

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Scott J. Szajna,
Petitioner

v.

Docket No.: CR-22-0072

Date Issued: Mar. 8, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Scott J. Szajna, *pro se*

Appearance for Respondent:

Sarah G. Kim, Esq.
State Board of Retirement
One Ashburton Place, 12th Floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The Petitioner is not entitled to purchase contract service for his employment with Mycroft Talisen, Inc. working at the University of Massachusetts President's Office because he was not a "contract employee" under G.L. c. 32, § 4(1)(s), but instead worked for a third-party for-profit private contractor that was not an instrumentality of the Commonwealth. *See* 941 CMR 2.09(3)(c) (2013). Additionally, he is barred from purchasing his Mycroft Talisen service because he was eligible to receive retirement benefits for his work. *Id.*

DECISION

Petitioner Scott Szajna timely appeals, under G.L. c. 32, § 16(4), the decision of Respondent State Board of Retirement to deny his application to purchase certain

contract service from October 22, 2007 through May 13, 2010 because he was paid by a third-party contractor and because he was eligible for retirement benefits.

On August 3, 2023 DALA issued a scheduling order and suggested that the appeal could be decided on written submissions under 801 CMR 1.01(10)(c). Neither party objected. On August 30, 2023, Mr. Szajna submitted a memorandum and two proposed exhibits. On October 24, 2023, the Board submitted a memorandum and seven proposed exhibits. I hereby admit the parties' proposed exhibits into evidence as marked. (Exs. 1-9.)

FINDINGS OF FACT

Based on the parties' written submissions, I make the following findings of fact:

1. Scott Szajna is employed at the University of Massachusetts. He began working there as a full-time employee on May 14, 2010. (Exs. 6, 9.)
2. Before he worked for the University of Massachusetts, Mr. Szajna worked for Mycroft Talisen, Inc., a for-profit corporation. Mycroft Talisen is incorporated in Delaware and has its principal office in St. Louis, Missouri. (Exs. 3-5.)
3. Mycroft Talisen had a contract with the University of Massachusetts President's Office from August 24, 2007 to October 1, 2008 to provide information technology (IT) services related to Base Identity Management Infrastructure, Oracle Virtual Directory, Oracle Access Management, and Oracle Identity Management. Under the contract, the University of Massachusetts was authorized to pay Mycroft Talisen a total amount of \$1,000,000, not to exceed \$1,200,000.¹ (Ex. 5.)

¹ The record does not contain the complete contract or complete Statement of Work between Mycroft Talisen and the University of Massachusetts.

4. From October 22, 2007 to May 13, 2010, Mr. Szajna worked for Mycroft Talisen as an at-will employee. His job title was Business Analyst. Mycroft Talisen provided Mr. Szajna's salary and paid him directly. Mr. Szajna reported to a Mycroft Talisen employee. (Ex. 5.)

5. When he worked for Mycroft Talisen, Mr. Szajna was eligible to receive healthcare benefits from the company and participate in a 401(k) retirement account. (Ex. 5.)

6. During his time at Mycroft Talisen, Mr. Szajna was assigned to work at the University of Massachusetts President's Office under the terms of the above-mentioned contract between the company and the University of Massachusetts. (Exs. 5, 8.)

7. The day after he concluded his employment with Mycroft Talisen, Mr. Szajna began working as a Senior Software Administrator at the University of Massachusetts President's Office on May 14, 2010. (Exs. 5, 6.)

8. On or about October 13, 2020, Mr. Szajna applied to purchase service credit under G.L. c. 32, § 4(1)(s) for his employment at Mycroft Talisen. (Ex. 5.)

9. In support of his application, Mr. Szajna submitted incomplete copies of the contract and Statement of Work between Mycroft Talisen and the University of Massachusetts. (Respondent's Mem. Oct. 24, 2023.)

10. By letter dated March 25, 2021, the Board denied Mr. Szajna's application. The Board instructed Mr. Szajna that he could file a formal letter of appeal and the request would be added to the agenda of an upcoming Board meeting. (Ex. 7.)

11. On or about June 30, 2021, Mr. Szajna sent a letter to the Board contesting its decision and asserting his eligibility to purchase his service. (Ex. 8.)

12. The Board denied Mr. Szajna's request to purchase service by letter dated February 2, 2022. This letter provided appeal rights to CRAB and DALA. (Exs. 8, 9.)

13. On February 14, 2022, Mr. Szajna timely appealed the Board's final decision. (Ex. 9.)

CONCLUSION AND ORDER

When a member retires from public service, he may be entitled to a superannuation retirement allowance that is based in part on his years of creditable service. G.L. c. 32, § 5(2)(a). "Creditable service" is defined as "all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive." G.L. c. 32, § 1. One form of "other service" that a member may purchase, under certain circumstances, is prior contract service to the Commonwealth. G.L. c. 32, § 4(1)(s) states:

Any member in service of the state employees' retirement system who, immediately preceding the establishment of membership in that system or re-entry into active service in that system, was compensated for service to the commonwealth *as a contract employee for any department, agency, board or commission of the commonwealth may establish* as creditable service up to 4 years of that service if the member has 10 years of creditable service with the state employees' retirement system, and if the job description of the member in the position which the member holds upon entry into service or re-entry into active service is substantially similar to the job description of the position for which the member was compensated as a contract employee.

(Emphasis added.)

As a general matter, G.L. c. 32, § 4(1)(s) provides a limited opportunity for members to purchase prior contract service when the service was rendered to a

department, agency, board, or commission of the Commonwealth. A series of CRAB and DALA decisions establish that it does not allow for the purchase of service based on work for a third-party vendor, even if that work was performed for the Commonwealth. See, e.g., *Hogan v. State Bd. of Retirement*, CR-16-243 (CRAB June 1, 2021); *Seshadri v. State Bd. of Retirement*, CR-15-62 (DALA Feb. 5, 2016); *Diamantopoulos v. State Bd. of Retirement*, CR-15-253 (DALA Jan. 22, 2016).

The State Board of Retirement attempted to clarify what constitutes “contract service” by issuing a regulation, 941 CMR 2.09(3)(c) (amended 2013), which provided:

Service Through a Vendor or Contractor. The contract service being purchased must have been service as a “contract employee” of the Commonwealth. Except only as otherwise set forth in this sub-section members who were employees of a vendor or contractor, which was selected and contracted to provide services to the Commonwealth, are specifically excluded from purchasing contract service as creditable service.

The Board may consider as eligible contract service such service provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency. The Board may consider as eligible contract service: (1) such service, as verified by the Board, provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency; or (2) such service, as verified by the Board, provided through a vendor by an individual (a) who was under the supervision and control of a Commonwealth agency or its employees and, (b) which service was performed in the standard and ongoing course of an agency’s regular business function, but not including, any such service provided as part of any specific or defined projects of that agency for which a vendor was selected.

No credit shall be allowed for any such service provided through a vendor for which the member shall be or is entitled to receive a retirement benefit, allowance, annuity, or pension from any other source.²

² Effective March 18, 2022, the Board amended its regulation again. It now limits eligibility for contract service purchases to services provided through a “vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency” (eliminating the provisions of former 941

As an initial matter, the regulation bars the purchase of service credit based on work for a vendor for which the member is entitled to a retirement benefit, annuity, or pension from any other source. Mr. Szajna was eligible to participate in a 401(k) retirement program when he worked for Mycroft Talisen. Based on this reason alone, Mr. Szajna is barred from purchasing his Mycroft Talisen, Inc. service. *See Philpot v. State Bd. of Retirement*, at *6-7 (third-party contractor disqualified from purchasing § 4(1)(s) service because he participated in 401(k) plan); *O'Connor v. MTRS*, CR-17-202, at *7-8 (Aug. 9, 2019) (DALA may affirm retirement board decision on different grounds than board cited).

Next, although the regulation begins with a general prohibition on the purchase of service credit based on work for a vendor or contractor that was selected to provide services to the state, it does provide two exceptions under which the Board may consider such work as “contract service.” The first exception applies if the member’s former employer functioned as an instrumentality of the state or one of its agencies. “Instrumentality of the Commonwealth” is not defined in § 4(1)(s) or the Board’s regulation. However, CRAB addressed this issue in *Hogan, supra*. There, CRAB ruled that the term means a “public agency” or “a public entity created by statute and placed within an existing agency or department of the Commonwealth.” *Id.* at *6.

CMR 2.09(3)(c)(2)). This amendment was adopted after Mr. Szajna submitted his application, so this decision applies the regulation as amended in 2013. The Scheduling Order for this appeal erroneously concluded that the 2022 regulation applies to Mr. Szajna’s appeal. However, the 2013 regulation is appropriate here because it was in effect at the time of Mr. Szajna’s application and the Board’s decision. *See Sullivan v. State Bd. of Retirement*, CR-19-0100, at *6 (DALA Sept. 15, 2023) (quoting *Kalu v. Boston Retirement Bd.*, 90 Mass. App. Ct. 501, 505 n.8 (2016)).

In the present matter, there is no evidence that Mycroft Talisen was created by the Legislature and placed within state government by a provision of the Session Laws or General Laws. In fact, Mycroft Talisen is no more than a garden variety for-profit business, registered with the Secretary of the Commonwealth as just that. Moreover, the company's financial arrangements with the Commonwealth support the conclusion that it was not an instrumentality: the University paid Mycroft Talisen a total amount of \$1,000,000, not to exceed \$1,200,000. Mycroft Talisen is not an instrumentality of the Commonwealth.

The second exception, which currently is no longer applicable (*see* footnote 2), is service through a vendor where the individual was under the supervision and control of the state and the service was performed in the standard and ongoing course of the agency, but not including service for specific or defined projects of the agency. Mr. Szajna argues that he should benefit from this exception because his job duties as a University of Massachusetts employee were consistent with the duties he performed at the University while employed by Mycroft Talisen. The only evidence that Mr. Szajna presented of his duties before and after becoming a full-time state employee is his own assertion. However, the contract that he worked under stated that Mr. Szajna's reported to a Mycroft Talisen employee, not the Commonwealth. Mr. Szajna has failed to prove by a preponderance of the evidence that he was under the "supervision and control" of the Commonwealth.³

³ Additionally, because the record evidence does not include a complete copy of the relevant contract, it is hard to say whether the work Mr. Szajna performed was on specific and defined projects for which his employer was selected or he was performing work in the standard and ongoing course of business. *See* 941 CMR 2.09(3)(c) (amended 2013).

For the above stated reasons, Mr. Szajna is not entitled to purchase service credit for his work for Mycroft Talisen. The Board's decision is therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: March 8, 2024