

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

RICHARD SHAILOR,	:	Docket No. CR-20-0343
<i>Petitioner</i>	:	
	:	
v.	:	Date: March 10, 2023
	:	
BRISTOL COUNTY RETIREMENT	:	
BOARD and ESSEX REGIONAL	:	
RETIREMENT SYSTEM,	:	
<i>Respondents</i>	:	

Appearance for Petitioner:

Alan Shapiro, Esq.
Sandulli Grace, PC
Boston, MA 02108

Appearance for Respondents:

Michael Sacco, Esq.
Christopher Collins, Esq.
Joseph Kenyon, Esq.
Law Offices of Michael Sacco
Southampton, MA 01073

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, a current member of the Bristol County Retirement Board, is entitled to credit for his prior service as a reserve police officer in the Town of Rowley (in Essex County). Because his service was in a different system, he is eligible under G.L. c. 32 § 3(5) only if his service qualified as “a temporary, provisional, or substitute position.” Since a reserve police officer is a “substitute” police officer, he is entitled to purchase this service. Once purchased, he is entitled to the enhanced credit for reserve police officers under the measurement scheme of G.L. c. 32 § 4(2)(b).

DECISION

Pursuant to G.L. c. 32, § 16(4), Petitioner, Richard Shailor, appeals a decision by the Bristol County Retirement Board (“BCRB”) denying his application to purchase creditable service for his time as a reserve police officer with the Town of Rowley. When he first became a member of the BCRB, the Petitioner indicated he had previously worked as a police officer in Essex County. That began a series of communications between BCRB and the Essex Regional Retirement Board (“ERRB”)¹ about whether or not the Petitioner was owed, or was entitled to purchase, creditable service. ERRB initially indicated it would probably accept liability, pending the result of a relevant case working its way through the courts (the so-called “Gomes” decision). Ultimately, the Supreme Judicial Court decided the matter, which altered the Boards’ positions. *See Plymouth Ret. Bd. v. Contributory Ret. App. Bd.*, 483 Mass. 600 (2019). After *Plymouth Ret. Bd.*, ERRB decided it would not accept liability. In turn, on August 5, 2020, the BCRB issued an appealable decision denying the Petitioner’s request. On August 20, 2020, the Petitioner timely filed his appeal.

The parties each submitted a prehearing memorandum: the Respondents’ memorandum included 14 Exhibits; the Petitioner’s included one. On October 18, 2022, I issued an order asking the parties to respond whether they agreed the matter could be decided on the papers, and to submit any additional objections and/or arguments. On November 18, 2022, each party submitted an additional pleading; the Respondents’ pleading contained two additional exhibits. Thus, the parties collectively submitted 17 exhibits, which I now enter into the record. I held a

¹ The Essex Regional Retirement Board was previously called the Essex County Retirement Board. Some documents reflect the older name. For consistency, I will refer to it only by its current name and/or the abbreviation ERRB.

non-evidentiary hearing on January 20, 2023. Because all parties agree there are no relevant facts in dispute which would require a hearing, no hearing was held, and I decide this appeal on the written submissions under 801 Code Mass. Regs § 1.01(10)(c).

FINDINGS OF FACT

Based upon the Exhibits, I make the following findings of fact:²

1. The Petitioner is presently employed as a Sergeant with the Town of Rehoboth Police Department. (Joint Pre-Hearing memorandum.)
2. Rehoboth is in Bristol County. (Joint Pre-Hearing memorandum.)
3. He began his work as an auxiliary police officer in 1990, working for the Town of Wenham from December 1990 to October 1992. (Exhibits 1, 2 & 9.)
4. Wenham is a part of Essex County. (Joint Pre-Hearing memorandum.)
5. In e-mail correspondences from ERRB to Town of Rowley and Town of Wenham, the Wenham administrator noted that the Wenham position was unpaid, “used as a fill-in for a Reserve Officer.” (Exhibit 9.)³
6. On November 19, 1993,⁴ he began working as a reserve police officer for the Town of Rowley. (Exhibits 9 and 15.)

² There are some facts which are, at times, inconsistent in the documents. While I highlight the inconsistencies where they arise, their clarity is unnecessary in deciding the ultimate issue.

³ No party claimed that the Petitioner was entitled to credit for prior service as an “auxiliary officer” in Wenham. The only issue in this appeal is his time as a reserve officer in Rowley.

⁴ In his new member enrollment form with the BCRB, the Petitioner wrote he began working for the Town of Rowley in October 1992. An e-mail from the Town of Rowley treasurer indicates the Petitioner began working on September 28, 1992. However, according to the Town of Rowley’s Police Department records, his first day of work was November 19, 1993. Because the Police Department records appear complete, I rely on them for his work dates.

7. Rowley is also in Essex County. (Pre-Hearing Memorandum.)
8. The Petitioner worked as a reserve officer from November 19, 1993 until January 27, 1997; he then worked full-time, as a police officer, from January 31, 1997 until April 2, 1997, also for Rowley.⁵ (Exhibits 9 and 15.)
9. While working as a reserve police officer, the Petitioner was still ineligible to become a member of a retirement system. (Exhibit 11.)
10. However, when he began working full time, he became eligible. On January 28, 1997, the Petitioner became a member of the ERRB. (Exhibit 1.)
11. The Petitioner's tenure as a full-time police officer in Rowley was short-lived. A few months later, he began working as a full-time police officer for the Town of Rehoboth. (Exhibit 1.)
12. On April 7, 1997, the Petitioner enrolled as a member of the BCRB. He listed his prior employment with the Town of Wenham, from December 1990 – October 1992. He also listed his prior employment with the Town of Rowley from October 1992 to April 1997. (Exhibit 1.)
13. In September 2001, the BCRB contacted the ERRB to verify the Petitioner's "date and amount of their refund" along with the exact dates of service. (Exhibit 3.)
14. ERRB verified the Petitioner was employed by the Town of Rowley, and a member of its retirement system, from February 1, 1997 until April 3, 1997. It also indicated "he did not have retirement withheld for any other service (Town of Wenham)." (Exhibits 4-7.)

⁵ Records differ as to when the Petitioner's employment with Rowley ended. As noted, I rely on the Police Department's records for his work dates.

15. For some unspecified reason, there were no more communications about this until February 4, 2019, when the BCRB reached out again to the ERRB because the Petitioner indicated he worked in Wenham and Rowley between 1990 and 1997. BCRB asked if the Petitioner still had funds on account with ERRB, if he took a refund, and whether ERRB would accept liability under G.L. c. 32, § 3(8)(c). (Exhibit 8.)
16. Ultimately, in April 2019, ERRB agreed to accept liability for the Petitioner’s “four years and four months of reserve police service rendered from September 28, 1992⁶ to January 30, 1997 with the Town of Rowley.” It reserved the right to change its vote pending the outcome of the “Gomes” case. (Exhibit 10.)
17. Indeed, following the decision in *Plymouth Ret. Bd. v. Contributory Ret. App. Bd.*, 483 Mass. 600 (2019), ERRB rescinded its prior acceptance of liability on July 27, 2020. It explained that, during his employment with Rowley, the Petitioner “was not eligible for membership, did not remit contributions, and was not wrongfully excluded during the period.” (Exhibit 11.)
18. On August 5, 2020, the BCRB issued an appealable decision rescinding the previously granted creditable service by “3 years and 1 month.”⁷ (Exhibit 12.)
19. The Petitioner filed a timely appeal on August 20, 2020. (Respondent Exhibit 14.)

⁶ This is yet a third start date for the Petitioner’s service with the Town of Rowley. Again, because it is not relevant to the outcome of this appeal, I merely note the inconsistency.

⁷ Once again, the dates are inconsistent. ERRB initially voted to accept liability, and then reversed that vote, for “four years and four months of reserve service with the Town of Rowley.” BCRB’s decision only removed “3 years and 1 month” of service. The only issue before me is whether the Petitioner is entitled to credit for prior service under § 4(2)(b). Upon remand, the parties will have to recalculate his credit and any dispute can later be appealed.

CONCLUSIONS OF LAW

“The Petitioner has the burden of proving by a preponderance of the evidence that the [Retirement Board] has applied the law and[/]or its regulations incorrectly or has been culpable in perpetrating a correctible administrative mistake.” *Patterson v. State Bd. of Ret.*, CR-20-0324, 2023 WL 415581 (DALA Jan 20, 2023), quoting *Byrne v. Mass. Teachers' Ret. Sys.*, CR-15-609 (DALA Jan. 6, 2018). He has met his burden.

The dispute here comes from the interplay between a few statutory provisions: G.L. c. 32 §§ 3(5), 4(2)(b) and 4(2)(c). In the center is § 4(2)(b), which offers what is commonly referred to as an “enhanced” credit for prior service. The other two sections govern how someone purchases prior service either from the same system to which they presently belong (§ 4(2)(c)) or a different system to which they once belonged (§ 3(5)). Normally, members receive day-to-day credit for prior service. However, some jobs, like police officers, entitle members to more than day-to-day credit for prior service; thus, the term, “enhanced credit.”

Respondents argue that a police officer is entitled to the enhanced credit for prior service only if they first qualify to purchase it under § 4(2)(c); they further argue § 4(2)(c) applies only when a member is seeking credit for any kind of prior service from the same retirement system to which he currently belongs. They suggest that because the Petitioner is seeking credit for prior service from a different system, he can do so only under G.L. c. 32, § 3(5). And that section, they argue, excludes the Petitioner’s prior service.

This is a question of statutory interpretation: how does the enhanced credit under § 4(2)(b) fit within §§ 3(5) and 4(c)? In interpreting the meaning of a statute, “we look not only to the specific words at issue but also to other sections [of the statute], and ‘construe them together . . . so as to constitute an harmonious whole consistent with the legislative purpose.’” *Malloy v.*

Dept. of Correction, 487 Mass. 482, 496 (2021), quoting *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n*, 394 Mass. 233, 240 (1985). In enacting § 4(2)(b), the Legislature intended that certain public safety employees “receive[] more than actual service rendered in light of the hazardous nature of their work and the time during which they may be available for work but not actually called out.” *MaCaloney v. Worcester Reg. Ret. Sys., et al.*, CR-11-019 (CRAB, June 21, 2013).

“The drafting of § 4(2)(b) undoubtedly leaves room for improvement.” *Plymouth Ret. Bd.*, at 608. I do not read § 4(2)(b) to clearly and unambiguously dictate that the enhanced credit is available only when someone seeks credit for prior service from the same system presently employing them. Because the scheme is ambiguous, I must apply the interpretation that best effectuates the Legislature’s intent.

1. Purchase of credit for prior service from a different system runs through § 3(5)

Section 4(2) has several subsections, all of which perform a different task.

Subsection (a) demands that new members seeking to “claim credit as provided for in” subsection (c) file “a detailed statement of any other [past temporary or permanent] service,” and subsection (d) directs a local retirement board to “verify [the statement] as soon as practicable” after filing . . . Subsection (b) functions with the other provisions by providing a measurement criteria to local retirement boards.

See Plymouth Ret. Bd. at 606.

G.L. c. 32, § 4(2)(b) is thus a “measurement scheme.” *Id.* at 605. For certain types of prior service, a retirement board has some discretion as to how much creditable service it can provide. However, for reserve or intermittent-police officers, it has no discretion; in those cases, “the board shall credit as full-time service not to exceed a maximum of five years that period of time during which a reserve or permanent-intermittent police officer . . . was on his respective list and was eligible for assignment to duty subsequent to his appointment” G.L. c. 32, §

4(2)(b)⁸; *see Plymouth Ret. Bd., supra*. If entitled to this enhanced credit for prior service, “§ 4(2)(c) describes how to purchase” it. *Id.* at 605.

Sometimes, however, members of a retirement system seek credit for prior service from a system different than the one to which they presently belong. In those situations, G.L. c. 32, § 3(5) governs. It describes who may purchase prior service, how they pay for it, and the amount of creditable service they may receive. Among the persons eligible for credit under § 3(5) are “any member of any system who rendered service in any governmental unit other than that by which he is presently employed, in a temporary, provisional, or substitute position and who was excluded from membership by the rules of any board [.]” *See* G.L. c. 32, § 3(5).⁹

CRAB has interpreted “§ 4(2)(c) as applying only where a member wishes to purchase prior creditable service for part-time and similar work within the same retirement system.” *Jette v. Norfolk County Ret. Bd.*, CR-14-720 (CRAB, Oct. 23, 2017), *citing Santos v. Mass. Teachers’ Ret. Sys.*, CR-04-70 (CRAB Mar. 6, 2006) and *Tremblay v. Leominster Ret. Bd.*, CR-07-685 (CRAB May 19, 2011). On this, I am bound by CRAB precedent. *See Fahey v. Boston Ret. Bd.*, CR-15-630 (DALA, Nov. 2, 2016) (“DALA is bound by CRAB precedent until it is reversed by CRAB itself or the Court.”). “But § 4(2)(c) does not affect a member’s rights under § 3(5); the two sections pertain to purchasing different types of previous non-membership service.” *Tremblay, supra*. Because the Petitioner is seeking credit for service from a different system than his current one, CRAB precedent instructs he is not eligible under § 4(c); rather, CRAB

⁸ “[R]eserve, permanent-intermittent or call fire fighter[s]. . . later appointed as a permanent member of the fire department” are also eligible for this enhanced benefit. G.L. c. 32, § 4(2)(b). However, for simplicity, I only refer to “reserve or intermittent-police” officers in this decision.

⁹ Section 3(5) also governs credit for prior service in other situations not relevant to this appeal, *e.g.* prior service before any system was in place.

precedent requires me to determine whether the Petitioner is entitled to creditable service under § 3(5). I find that he is.

The only avenue for the Petitioner under § 3(5) is if his work as a reserve police officer was a temporary, provisional, or substitute position. Respondents begin by arguing this matter is controlled by a different CRAB case, *Santos v. Massachusetts Teachers' Ret. Sys.*, CR-04-70 (CRAB, March 6, 2006). In *Santos*, a teacher sought to purchase creditable service based on prior part-time employment in a different system. *Santos* noted that § 4(2)(c) refers to cases “involving *part-time*, provisional, temporary, temporary provisional, seasonal or intermittent employment or service”; meanwhile, § 3(5) refers to “any member of any system who rendered service in . . . a temporary, provisional, or substitute position[.]” CRAB interpreted the absence of “part-time” in § 3(5) to preclude the ability to receive credit for prior “part-time” service in a different system even though “the wisdom of excluding such prior non-membership part-time service in another governmental unit when service is granted for prior non-membership temporary, provisional, or substitute service is not readily apparent.” *Santos v. Massachusetts Teachers' Ret. Sys.*, CR-04-70 (CRAB, March 6, 2006).

Santos has limited application here for a few reasons. First, *Santos* was about a teacher, not a reserve police officer. There was no question in *Santos* that his prior employment was not “temporary, provisional, or substitute.” See *Santos v. Massachusetts Teachers' Ret. Sys.*, CR-04-70 (DALA July 25, 2005) (as a student, Petitioner worked part-time at the school farm during the school year). Thus *Santos*, at most, stands for the proposition that part-time teachers are not eligible to purchase prior service from a different system. See also *Jette, supra* (absent a regulation, part-time librarian would be excluded from credit for prior service in a different

system). Second, *Santos* did not have occasion to consider the enhanced credit for reserve police officers under § 4(2)(b) and how that plays a role in understanding the entire statutory scheme.

Instead, in *Soojian v. Worcester Ret. Bd.*, CR-95-876 (DALA Nov. 5, 1996) DALA held that a reserve, or permanent intermittent, police officer qualified under § 3(5) to purchase prior service from a different system. *Soojian* reasoned that a “permanent-intermittent police officer [] is a ‘substitute’ position; permanent-intermittent police officers substitute for permanent police officer[s] who are unavailable due to sickness, vacation, or other leave.” *Soojian, supra*.

Compare and contrast *Peoples v. Reading Ret. Bd.*, CR-97-653 (DALA May 28, 1998) (reserve police officer eligible to purchase prior service under § 3(5) because it was a “temporary, provisional or substitute” position) with *Correia v. Fairhaven Ret. Bd.*, CR-17-062 (DALA Aug. 27, 2021) (call firefighter is not a “temporary, provisional, or substitute” position under § 3(5)).

I agree with *Soojian* that what the Petitioner did here was work in a substitute capacity for the Town of Rowley. Substitute employment is when an employee fills in for another. A substitute has the same responsibilities as the person for whom they are filling in; they have no set hours or schedule and may never work if no one requires substitution. *See e.g. Nester v. School Comm. of Fall River*, 318 Mass. 538, 541-542 (1945) (substitute teacher provided “intermittent and irregular service.”); *Demeris v. Town of Foxborough*, 99 Mass. App. Ct. 603 (2021) (reserve police officer is generally someone who “never had a set schedule. Instead, the department would call him as needed, and he then had the option of either accepting or rejecting the particular assignment”). As a reserve police officer, the Petitioner was a substitute employee.

Therefore, under our precedents, while the Petitioner is not eligible to purchase his prior service with the Town or Rowley under § 4(2)(c), he is entitled to purchase it under § 3(5).

2. *A reserve police officer purchasing prior service under § 3(5) is still entitled to the enhanced credit under § 4(2)(b).*

Once a system member pays for their prior service pursuant to the provisions of § 3(5), he is entitled to “receive the same credit for such period of his previous intrastate service or portion thereof elected as would have been allowed if such service had been rendered by him in the governmental unit by which he is presently employed.” G.L. c. 32, § 3(5). Had the Petitioner’s prior service been with Rehoboth, the amount of credit is determined by § 4(2)(b), which, as noted, requires the enhanced five-year credit. Therefore, he is entitled to that here.

I again rely to the Legislative intent that § 4(2)(b) was intended to provide an enhanced credit to certain public safety workers. The Respondents’ interpretation runs counter to this purpose because it creates a scenario where the Petitioner, and other similarly situated individuals, have no avenue for creditable service for this prior, hazardous work. It would be odd that the Legislature gave reserve police officers an enhanced credit only when they purchased prior service from the same system for which they presently work, but denied them any credit when they delayed seeking to purchase that prior service until after they begin working in a different system. The Legislature knows how to effectuate that result if it wants—like it did by limiting the enhanced credit to call firefighters *only* when they are later appointed to the same department where their prior service took place. Under the Respondents’ rule, the Petitioner could have received the enhanced credit for his prior service while employed at Rowley if he sought to purchase it then but, as soon as he began working in Rehoboth, lost all right to it. Given the two choices, the better interpretation is that the enhanced credit applies to any prior, reserve police service regardless of where it took place.

As noted, there is precedent for this interpretation. In *Soojian*, not only did DALA find that the Petitioner’s prior work as a reserve police officer in a different system was substitute

employment under § 3(5), DALA also found that he was entitled to the enhanced benefit under § 4(2)(b). *See also Peoples v Reading Ret. Bd.*, CR-97-0653 (DALA May 28, 1998).¹⁰ There is also some more recent precedent supporting this position. *See e.g. Ryan v. Woburn Ret. Bd., et al.*, CR-14-394 (DALA Nov. 25, 2016), *affirmed by* CRAB on July 23, 2018. In *Ryan*, DALA held the petitioner there was entitled to the enhanced credit under § 4(2)(b) for his time as a reserve police officer in a different town. Ryan was initially denied the enhanced credit because the town of Woburn argued that, like call firefighters, he had to be appointed to the same police department where he served as a reserve police officer. DALA, and then CRAB, disagreed. CRAB affirmed the decision but remanded the matter for reasons unrelated to that ruling.¹¹ At no moment did CRAB indicate Ryan was ineligible for the enhanced credit even though his prior service was not with the same system.¹²

Respondents complain that the Petitioner never put the ERRB on notice with respect to his Town of Rowley time. ERRB therefore did not have the benefits of the contributions remitted while he was an ERRB member, and it can now refuse liability. It is not clear why this matters legally. Whenever someone seeks to purchase prior service from a different system, the system

¹⁰ *In Peoples*, DALA again held that the Petitioner's prior work as a reserve police officer in a different system was substitute employment under § 3(5). *Peoples* also held that he would be entitled to the enhanced credit under § 4(2)(b) only if he had been appointed a full-time officer in the same department. That interpretation has since been overturned by *Ryan, infra*. But the finding that a reserve officer would receive the enhanced credit if he qualified to purchase his prior service under § 3(5) is consistent with *Soojian*.

¹¹ The remand was to determine which system should process Ryan's application to purchase his reserve police service. CRAB implicitly ruled that he was entitled to the enhanced credit no matter which system he applied to.

¹² The Petitioners suggest *Ryan* was wrongly decided and I should not follow it. To be fair, *Ryan* had no need to discuss the interplay or relevance of §§ 3(5) and 4(c). *Ryan* also pre-dated *Plymouth Ret. Bd*. Thus, the parties here put forward arguments not squarely addressed in *Ryan*. Nevertheless, to the extent *Ryan* held the Petitioner there was entitled to the enhanced credit under § 4(2)(b) for prior service as a reserve officer in a different system, I agree with it.

where that prior service took place did not have the benefit of prior contributions to invest (because the individual was never a member). Nevertheless, it is of no moment that the ERRB refuses liability. “The fact that the [prior system] will not accept liability does not affect Petitioner’s entitlement to purchase the service from the System of which he is currently a member.” *Jacques v. Mass. Turnpike Auth. Employees’ Ret. Bd.*, CR-01-1094 (CRAB, Jul. 7, 2003); *Ryan, supra*.

Finally, Respondents ask that if I find the Petitioner is entitled to purchase his prior creditable service, I address which board is liable under G.L. c. 32, § 3(8). However, that request is premature. See *Tremblay v. Leominster Ret. Bd.*, CR-07-685 (CRAB May 19, 2011), *citing Barnstable County Ret. Bd. v. Falmouth Ret. Sys.*, CR-08-494 (DALA Dec. 18, 2009 (absent a determination by the Public Employee Retirement Administration Commission as to liability, “[n]othing in G. L. c. 32, § 3(8)(c) or the case law applying it vests CRAB or DALA with the authority to make determinations under § 3(8)(c),” because no party can show harm from another party’s refusal to accept liability).

Accordingly, BCRB’s decision denying the Petitioner credit for his prior service as a reserve police officer in the Town of Rowley is **reversed**. The Petitioner is entitled to purchase this prior service and receive credit pursuant to § 4(2)(b)’s measurement scheme.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate