THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Thomas Sharp,

 **Petitioner**

v. Docket No. CR-16-4

 DATED: March 30, 2018

Franklin Regional

Retirement Board,

 **Respondent**

**Appearance for Petitioner:**

Thomas Sharp

53 Simmons Brook Drive

Westfield, MA 01085

**Appearance for Respondent:**

Michael Sacco, Esquire

P.O. Box 479

Southampton, MA 01073-0479

**Administrative Magistrate:**

Judithann Burke

 **Case Summary**

The Petitioner, who sought to purchase his substitute teaching service in the Westfield Public Schools, is not entitled to purchase this service, as, he submitted his request subsequent to July 10, 2015, the day he last received regular compensation from the Town of Erving and left Town Hall for the final time.

 **DECISION**

The Petitioner, Thomas E. Sharp, is appealing from the December 22, 2015 decision of the Respondent, Franklin Regional Retirement Board (FRRB), denying his request to purchase substitute teaching service rendered in the Westfield Public Schools from October 3, 2002 to December 31, 2003. (Exhibit 9.) The Petitioner’s timely appeal was received on January 6, 2016. (Exhibit 10.)

 I held a hearing on August 1, 2017 in Room 305 at 436 Dwight Street, Springfield, MA. I marked Exhibits 1-14. The Petitioner testified in his own behalf. The FRRB presented no witnesses. The hearing was digitally recorded. The parties submitted pre-hearing memoranda of law. (Respondent-Attachment A; Petitioner- Attachment B.) The Respondent’s post-hearing memorandum was received on September 1, 2017, thereby closing the record. (Attachment C.)

 **FINDINGS OF FACT**

 Based upon the documents submitted by the parties, I hereby render the following findings of fact:

1. The Petitioner, Thomas Sharp, born in 1951, was employed as the Erving Town Administrative Coordinator from June 30, 2003 through July 1, 2015, when he was placed on what has been characterized as “administrative leave” after the terms of his Employment Agreement expired. He was enrolled in the FRRS effective June 30, 2003. (Exhibits 1, 2 and 4.)
2. On May 19, 2014, the Petitioner and the Town of Erving executed an Employment Agreement to extend his term as Administrative Coordinator for one additional year, commencing on July 1, 2014 and ending on June 30, 2015. (Exhibit 2.)
3. The May 2014 Employment Agreement provided, in paragraph 2, that the Town of Erving would notify him at least sixty (60) days prior to the June 30, 2015 expiration date that his employment would not be renewed. (Exhibit 2 and Petitioner Testimony.)
4. On June 4, 2015, Erving Town Treasurer Margaret Sullivan sent an electronic mail communication to FRRS Executive Director Dale Kowacki indicating that the Petitioner “may want to leave town soon. He has asked the Board of selectmen (*sic*) for an executive session for an exit strategy.” (Exhibit 3.)
5. On June 22, 2015, following a discussion between the Petitioner and the Erving Board of Selectmen, the Petitioner and the Town of Erving entered into an Administrative Leave Agreement and General Release (Leave Agreement) that noted therein *inter alia*, “Employer wished to offer Mr. Sharp certain consideration in connection with his intentions to retire effective 1-13-16”, and, “Mr. Sharp intends to retire from his employment with employer effective January 13, 2016 (retirement date).” The Leave Agreement characterized the Petitioner’s compensation as “Administrative Leave Compensation” and that “Fifty percent (50%) of the Administrative Leave Compensation will be designated as compensation in connection with Mr. Sharp’s intended retirement” and “Fifty percent (50%) of the Administrative Leave Compensation will be designated as consideration of waiver and release as set forth in Section 10, below.” The Leave Agreement’s Section 10 is a *pro forma* waiver and release whereby, “in consideration of the payments and benefits provided to him, Sharp releases and forever discharges the employer from any cognizable claim he may have or ever have through the date of the execution of the Leave Agreement.” (Exhibit 4.)
6. Nothing in the Leave Agreement addressed any actual employment duties that the Petitioner would be required to perform. In fact, he performed no employment duties after July 1, 2015. He was required to turn in his keys and all proprietary information. He received regular compensation through July 10, 2015. From and after that date, compensation per the Leave Agreement took effect. (*Id.* and Petitioner Testimony.)
7. On June 25, 2015, the Petitioner sent a copy of the Leave Agreement to Director Kowacki via electronic mail noting, “Do you or your staff see any problems with it? It is getting me to my 65th birthday…for retirement purposes.” In an electronic mail reply the following day, Director Kowacki informed the Petitioner that FBBS counsel “cast a pall on the entire agreement.” (Exhibit 5.)
8. On July 29, 2015, the Westfield Public Schools Director of Human Resources, Jennifer Willard, confirmed that the Petitioner had worked as a substitute teacher in the Westfield Public Schools from October 3, 2002 to December 31, 2003. This was the first time that any information was provided to the FRRB regarding the Petitioner’s Westfield employment. The July 29, 2015 letter did not provide the exact number of days that the Petitioner worked as a substitute teacher or the compensation he received per day for this work. (Exhibit 6 and Petitioner Testimony.)
9. On September 3, 2015, Director Kowacki sent the Petitioner an electronic communication noting that only a member actively employed could purchase past non-membership service, and, that since the Petitioner’s active employment ended on July 10, 2015, he was ineligible to purchase his Westfield Public School substitute teacher service. Director Kowacki also noted that the Westfield Public Schools had not provided sufficient information pertaining to the number of days the Petitioner had actually worked as a substitute teacher and his actual earnings. (Exhibit 7.)
10. On November 11, 2015, the Petitioner sent a letter to the FRRB and requested to appear before the board to discuss “the denial of some benefits that I believe I should be eligible to receive.” In this letter, the Petitioner acknowledged that his employment effectively ended on July 10, 2015 (“my last day at Town Hall”), but the Town of Erving “offered” to keep him on the payroll through January 12, 2016, his 65th birthday. The Petitioner also contested some additional compensation he received in previous years, as well as the purchase of the Westfield substitute teaching service. (Exhibit 8.)
11. Following the Petitioner’s appearance and discussion with the FRRB at its November 15, 2015 meeting, Director Kowacki sent the Petitioner a letter dated December 22, 2015 therein indicating that the board’s position with respect to the purchase of his substitute teaching service and the compensation paid to him during the Leave Agreement period remained unchanged, but two separate line item payments had been included in the calculation of his retirement benefit. The Petitioner was apprised of his right to appeal to the Contributory Retirement Appeal Board. (Exhibit 9.)
12. The Petitioner filed a timely appeal on January 6, 2016. (Exhibit 10.)
13. On January 9, 2016, the FRRB received the Petitioner’s application for Voluntary Superannuation Retirement in which the Petitioner requested a January 12, 2016 retirement date and elected to receive his retirement allowance pursuant to G.L. c. 32, § 12(2)(c), or, “Option C.” (Exhibit 11.)
14. On February 26, 2016, the Public Employee Retirement Administration Commission (PERAC) approved the Petitioner’s superannuation retirement allowance pursuant to Option C, effective January 12, 2016. The calculation of his retirement allowance did not include any of the compensation he was paid pursuant to the Leave Agreement, and the Petitioner was not afforded any credit with respect to the Westfield substitute teaching service. (Exhibit 12.)

**CONCLUSION**

The Petitioner, who is required to prove his case by a preponderance of the evidence, has failed to meet that burden. While he strenuously asseverates that he was not a “member inactive” of the FRRS after his employment ended on June 30, 2015, and, he last received regular compensation and left the Erving Town Hall for the last time on July 10, 2015, he was indeed a “member inactive” from and after July 10, 2015. He has not shown that he was actively employed, collecting Workers’ Compensation benefits, on sick leave, or on authorized leave of absence with pay following his final day of active employment and the day in late July 2015 when the FRRB received information from the Westfield Public Schools regarding his substitute teaching service, as required by G.L. c. 32, § 3(1)(a)(i). *See also James Zavaglia v.Gloucester Retirement Board and Salem Retirement Board*, CR-09-459 (Division of Administrative Law Appeals January 10, 2014; Contributory Retirement Appeal Board April 15, 2015). It should also be noted that when the Westfield Human Resources Director supplied preliminary information to the FRRB regarding the Petitioner’s Westfield service in late July 2015, the information was not complete. An application that included the correct dates and hours of his teaching service and the amounts he was paid was still necessary to begin any processing of the purchase request. Thus, any service purchase application would be received even further into his administrative leave.

The date provided by the Town of Erving in the Leave Agreement as the last day he would receive monies from the Town, January 12, 2016, is not controlling or dispositive on this point. The employer cannot bind the retirement board to regard the Petitioner as an active employee between July 10, 2015 and January 12, 2016. “The public entity that negotiates [an agreement] is not the one that will have to find funds to pay the continuing retirement benefits.” *See Boston Association of School Administrators & Supervisors,* 383 Mass. 336 at p. 341 (1981).

Further, the FRRB duly notes that, in this case, the compensation contemplated in the Leave Agreement is clearly not regular compensation paid to an employee who is performing a service to the governmental entity. On the contrary, the Agreement’s paragraph 2 sets forth that 50% of the compensation to be paid was intended to compensate the Petitioner in connection with his intended retirement, and, 50% was intended as consideration for his releasing the Town from any further liability it has related to his employment. These payments were not “remuneration geared to work or services performed” and are not regular compensation per G.L. c. 32, § 1.

 In conclusion, as a “Member Inactive” as that term is defined in G.L. c. 32, 3(1)(i), the Petitioner was not eligible to purchase his prior service. The decision of the FRRS denying the Petitioner’s applications to purchase his non-member substitute teaching service is affirmed.

 So ordered

 Division of Administrative Law Appeals,

 BY:

Judithann Burke,

 Administrative Magistrate

DATED: March 30, 2018