Commonwealth of Massachusetts
Contributory Retirement Appeal Board

John Sorrentino,

Petitioner-Appellant

v.

State Board of Retirement,

Respondent-Appellee.

CR-19-0118

DECISION

Petitioner John Sorrentino appeals from a decision of the Division of Administrative Law Appeals (DALA) affirming the State Board of Retirement's denial of benefits to him given that he did not re-enter state service for at least two years after terminating his Massachusetts State Employees' Retirement System (MSERS) membership by withdrawing deductions and interest from his MSERS retirement account. Magistrate Bresler held an evidentiary hearing on June 14, 2022 and admitted 41 exhibits into evidence. Magistrate Bresler's decision is dated September 26, 2022. Mr. Sorrentino filed a timely appeal to us.

After considering the arguments by the parties and after a review of the record, we incorporate the DALA decision by reference and adopt its Findings of Fact 1–51 as our own. We affirm DALA's decision that Mr. Sorrentino is ineligible for retirement benefits. We add the following comments to address the issues raised by the parties.

Background

After serving in the Massachusetts Department of Public Health (DPH) for ten and a half years, John Sorrentino worked for Massachusetts Health Research Institute Inc. (a private

nonprofit that worked closely with DPH) from 1990-97.[1] After leaving DPH, Mr. Sorrentino chose to withdraw his deductions and interest from his MSERS retirement account, signing a form declaring, "It is not my present intention to accept a position in the service of the Commonwealth of Massachusetts or a political subdivision thereof which would entitle me to become a member of any other similar contributory retirement system maintained within the commonwealth by public funds."[2] He also cashed out all his vacation time.[3] In 1997, Mr. Sorrentino again became a member of MSERS after leaving MHRI and becoming employed by the University of Massachusetts Medical Center—a position he held for just under a year.[4] In 2006, Mr. Sorrentino attempted to buy back his MHRI service under M.G.L 32, s.4(1)(s)[5]—which enables certain "contract employee[s]" to buy back some of their service—but SBR denied his application given that he was not an MSERS member at the time of his application.[6] Mr. Sorrentino did not appeal this determination.[7] When Mr. Sorrentino applied for superannuation retirement benefits in 2018 (listing, notably, only DPH and UMass Medical Center, and not MHRI, as the state service he had performed), the State Board of Retirement (SBR) denied his application given that he had not returned to active state service for at least two consecutive years after having terminated his MSERS membership, prompting Mr. Sorrentino's appeal.[8] During the DALA proceedings, Mr. Sorrentino requested that Magistrate Bresler recuse himself, believing the Magistrate to have shown bias against him—a request Magistrate Bresler rejected as groundless.

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[1] For Mr. Sorrentino's work history, see Finding of Fact 25, 29. For MHRI's status, see FFs 1, 9-19.
[2] FF 30C.
[3] FF 30A.
[4] FF 33.
[5] M.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."

[6] FF 37.
[7] FF 38.
[8] FFs 41, 44.

Discussion

1. Application of G.L. c. 32, § 3(6)(e)

DALA correctly upheld SBR's determination that Mr. Sorrentino was not entitled to superannuation retirement because he did not meet the statutory requirements of G.L. c. 32, § 3(6)(e). This statute provides that a member, who is reinstated or who re-enters active service, will not be eligible for a superannuation retirement allowance unless the member has been in active service for at least two consecutive years. G.L. c. 32, § 3(6)(e).

The record establishes that Mr. Sorrentino worked for the DPH from 1980 to 1990. He left the DPH to work for MHRI from 1990 to 1997 and then worked for UMass Medical Center from 1997 to 1998. When he left his employment with the DPH, Mr. Sorrentino cashed out all of his vacation time[9] and withdrew all his accumulated total deductions and interest.[10] In his retirement application dated October 20, 2018, Mr. Sorrentino sought to retire as a deferred retiree,[11] reporting his state service to consist of his service with the DPH from January 1980 to June 1990 and with UMass Medical Center from July 1997 to July 1998. Because he left state service in 1990 to work for MHRI, a private non-profit organization, G.L. c. 32, § 3(6)(e) requires that upon re-entering state service or his reinstatement to state service, he must work for at least two consecutive years to be eligible for superannuation retirement. He did not meet this criteria. Upon returning to state service in 1997 with UMass Medical Center, Mr. Sorrentino worked there just shy of a year, falling short of the two consecutive year minimum requirement. Accordingly, Mr. Sorrentino is not entitled to a superannuation retirement as concluded by DALA.

2. Mr. Sorrentino's Employment at MHRI

Mr. Sorrentino, however, contends that he is entitled to a superannuation retirement allowance since he had not left state service. He argues that he did not have a break in service but that his employment with MHRI constituted state service. Alternatively, he asserts that he is

[9] FF 30A; Exhibit 9.
[10] FF 28; Exhibit 13.
[11] FF 42; Exhibit 13.

entitled to the purchase of creditable service since his employment with MHRI was contract work performed for the DPH.

We turn first to resolving whether Mr. Sorrentino's employment at MHRI was state employment, resulting in a continuous period of state service making him eligible for retirement benefits. Here, we determine that DALA correctly concluded it was not for the following reasons. First, the actions taken by Mr. Sorrentino in anticipation of his departure from DPH were inconsistent with his contention that he did not have a break in his state service. In April 1990, Mr. Sorrentino emailed about using all his vacation time at DPH before leaving. He used the phrase, "my state termination date" as his departure date.[12] Further, he cashed out all his remaining vacation time after his departure. Additionally, Mr. Sorrentino sent an email on June 4, 1990 with the subject line – Resignation – giving notice of his resignation from his "State Position" on June 5, 1990.[13] Around the same time, he also withdrew all his accumulated total deductions and interest from his retirement account. Most telling is that Mr. Sorrentino omitted his employment with MHRI in his retirement application when he was requested to list all his service with the Commonwealth. As Magistrate Bresler noted, the fact that Mr. Sorrentino did not include MHRI as part of his government service on his superannuation retirement application is a significant procedural flaw in his appeal given that he is arguably appealing the denial of a claim he did not originally make.

With respect to Mr. Sorrentino's claim that MHRI was a "governmental unit" or a "quasi-public enterprise, controlled and operated by a political subdivision of the commonwealth,"[14] we conclude that MHRI met neither of these classifications and was instead a private non-profit that contracted with DPH. Importantly, MHRI was not created by any act of legislation and was never publicly or officially recognized as a part of the Massachusetts government, nor were its employees paid directly by the Commonwealth.[15] Further, MHRI's Articles of Organization (which were in effect from its founding to beyond the end of Mr. Sorrentino's employment there) emphasize that the Institute was a private entity. The Articles declare that the Institute's fundamental purposes were:

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[12] FF 30A.
[13] FF 30; Ex. 7.
[14] M.G.L., c.32 s.4(1)(a) and M.G.L., c.32 s.4(1)(d).
[15] Exhibit 23, p.131.

"A. To help develop and increase the facilities of the Department of Public Health (DPH), institutions or agencies within DPH or associated with it, other health departments, and other institutions and organizations in Massachusetts researching health; and to provide more extensive conduct of studies and research into the causes and treatment of disease, disorders and defects of particular importance to the public health by encouraging gifts, grants, bequests, devises, contributions and donations—real and personal property—to the corporation for such purposes.

B. To receive, hold and administer gifts or grants for the purposes of the corporation and in keeping with the research, prevention and treatment purposes and objectives of the Massachusetts Department of Public Health, the Institutions and agencies within such Department of associated therewith, other health departments and other institutions and organizations engaged in health research within the Commonwealth of Massachusetts, including the Executive Office of Human Services and the Departments and agencies within such Office and associated therewith.

C. To conduct and finance the conduct of studies, research, demonstrations, evaluations, and training in any and all fields of public health, medicine, and health services and in keeping with the purposes and objectives of the Massachusetts Department of Public Health, other health departments and other institutions and organizations engaged in health research in Massachusetts, including the Executive Office of Human Services and the Departments and agencies within such Office and associated therewith."

D. To acquire, take and hold, by bequest, devise, grant, gift, purchase exchange, lease, transfer, judicial order or decree or otherwise, any property, real, personal or mixed, without limitations as to amount of value, except such limitation, if any, as may be now or hereafter specifically prescribed by law; to borrow money, sell, mortgage, exchange, reconvey, transfer or otherwise dispose of any such property; to administer, invest and reinvest its property and deal with and expend the income and principal of the corporation as will in the judgement of the directors best promote the objects and purposes of the corporation; to make, sign and execute any agreements or instruments and do and perform any acts that may be in the judgement of the directors necessary, desirable or proper to carry out the purposes and objectives of the corporation; to engage the services of such expert, administrative and clerical personnel as the directors deem necessary and fix their compensation within the amounts made available for such purpose by the directors."[16]

Notably, these Articles emphasize that MHRI had numerous objectives unrelated to DPH or other parts of the Massachusetts government, including "develop[ing] and increas[ing] the facilities of…institutions and organizations in Massachusetts researching health," "provid[ing] more extensive conduct of studies and research into the causes and treatment of disease, disorders and defects of particular importance to the public health," and "conduct[ing] and financ[ing] the

[16] Exhibit 10.

conduct of studies, research, demonstrations, evaluations, and training in any and all fields of public health, medicine, and health services."[17] Further, in April of 1997 (a few months before Mr. Sorrentino left MHRI), the Institute added a fifth Article of Organization, stating that it would "educate and assist *other non-profit organizations* in more effective internal management and delivery of services by engaging in, among other activities, publication of a journal of educational value to non-profit managers and employees" (emphasis added).[18] The phrase "other non-profit organizations" demonstrates that MHRI was itself a non-profit. Additionally, as Article (II)D demonstrates, MHRI was under the sole control of its Directors and Officers and there exists no reference to DPH or any other part of the Commonwealth having the capacity to control it.

Other MHRI documents in the record—such as the Institute's contracts with other state governments, the 'Memoranda of Understanding' (MOUs) MHRI signed with DPH, and a settlement agreement MHRI and the Commonwealth signed in 1997—similarly emphasize that the Institute was a distinct and separate entity from the state government and frequently explicitly refer to MHRI as a private non-profit.[19] As a 1996 report by the state's Inspector General notes, for example, MHRI reorganized its Board of Directors in 1980 to exclude state employees given that they created a conflict of interest when the Institute sought contracts from the Massachusetts government—a clear indicator that MHRI and the Commonwealth were well aware that one was not part of the other.[20] Even more explicitly, the MOUs DPH and MHRI signed in 1990 and 1993 explicitly referred to MHRI as a "private organization," noting that, though MHRI would be able to use state lab spaces for the Newborn Screening Program, such use would occur "In accordance with regulations…governing the use of State facilities by private organizations."[21] Additional

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[17] The record shows that MHRI implemented these principles by working with a variety of entities outside of the Commonwealth. For example, MHRI contracted with the Connecticut, Rhode Island, Vermont, New Hampshire, and Maine Departments of Health to provide the states with a variety of different health services. See Exhibit 22.

[18] Exhibit 10.

[19] Exhibits 14, 15, 17. Note that, as will be explained below, the Inspector General's report states that the term MOU applies only to intergovernmental agreements, and that these agreements were in fact mislabeled 'contracts.' Exhibit 23, p.132.

[20] Exhibit 23, p.131.

[21] Exhibit 14, p.6. Notably, the MOUs' preambles also explicitly state "Whereas Chapter 111, Section 4E, Massachusetts General Laws authorizes the Department of Public Health to conduct a mental retardation program in conjunction with any foundation, scientific organization or medical school" and "Whereas federal or state support for this program is not presently available"—clauses that would be irrelevant and illogical unless MHRI was a private entity.

facts—such as that the Commonwealth assigned MHRI a vendor number and paid it through a vendor account, that its lawyer refused to speak with the Inspector General in 1996 given that MHRI was a "private organization," and that MHRI was able to retain the assets it earned in separate accounts not subject to the financial regulations that govern state agencies—further demonstrate that MHRI was unequivocally not part of the Commonwealth.[22]

Mr. Sorrentino's main argument that he was a state employee while at MHRI between 1990 and 1997 is that DPH exercised such a significant amount of control over MHRI's affairs during this period that the Institute became a "quasi-public enterprise, controlled and operated by a political subdivision of the commonwealth."[23] This argument is unpersuasive to us for two reasons. First, the 1990 and 1993 MOUs between DPH and MHRI that Mr. Sorrentino cites appear to be contracts that, while granting some employees of the latter some supervisory power over some employees of the former, do not rise to the level of turning MHRI into a "quasi-public enterprise." The MOUs in question covered only three years and only gave a few DPH employees authority to supervise specific aspects of MHRI's work "in connection with the" Newborn Screening Program (such as personnel actions) while generally enabling the two entities to divvy up the work of administering and implementing the Program and, as noted above, explicitly referred to MHRI as a private organization.[24] As the record demonstrates, MHRI worked on a number of other projects besides the Newborn Screening Program during the period of Mr. Sorrentino's employment and neither its core functioning nor decision making capacity appeared to have been generally usurped by DPH.[25]

Second, and perhaps more importantly, as the Inspector General's 1996 Report showed, to the extent DPH employees exercised significant control over MHRI during the period of Mr. Sorrentino's employment, much of this relationship appears to have been unlawful and unauthorized by DPH itself. The Report states that, when DPH dealt with significant budget

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[22] Exhibit 23 (e.g. p. 131, 133, 27). For example, the Inspector General's report notes that MHRI retained funds for assisting in the production and distribution of anti-infectious agents like CMVIG-IV and RSVIG-IV and was generally not subject to the budgetary regulations governing Massachusetts state agencies. Note also that even Mr. Sorrentino's initial appeal memo appears to recognize that MHRI was not part of the state government, referring to DPH having "outsourced the services I was providing to a non-profit corporation." Exhibit 37.

[23] Appellant's brief, p.4-5.

[24] Exhibit 14, p.2-6. See similarly Exhibit 15.

[25] See, for example, the contracting with other New England governments discussed above.

constraints, certain agency officials began to use MHRI as an "illegal fiscal conduit to receive and expend funds required by law to be paid to the General Fund of the Commonwealth," often in ways that personally benefited these officials.[26] According to the Report, DPH officials such as the Director and Deputy Director of the Massachusetts Public Health Biologic Laboratories unlawfully, and often without the knowledge of the DPH Commissioner, took actions such as assigning no-bid contracts to MHRI, performing creative accounting to keep money intended to be returned to the Commonwealth in MHRI accounts, and enabling (through MHRI) private entities to inappropriately mark up Commonwealth-created products.[27] Indeed, Mr. Sorrentino appears to concede this point in his appeal brief, arguing that the illicitly close nature of certain facets of the relationship between DPH and MHRI (such as the 'off budget accounts' the former kept with the latter) proves that MHRI was part of the Commonwealth.[28] We refuse, however, to classify instances in which agency officials exercised illegal, opaque, or otherwise unauthorized shadow powers over private contractors as falling within the ambit of the "controlled and operated by a political subdivision of the commonwealth" provision, given that, by its plain language and the principles of statutory construction by which we are bound, such a provision obviously refers only to instances where such "control[] and operat[ion]" was lawful and authorized by the "political subdivision" itself, as opposed to by individual employees that engaged in unlawful

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[26] Specifically, doing so allowed some agency officials to receive royalty proceeds they were prohibited from earning. Exhibit 23, e.g. p. 7, 9, 10.

[27] Exhibit 23, e.g. p.6, 7, 126, 130.

[28] Appellant's brief, p.11-12. See e.g. Mr. Sorrentino's statements that "The DPH Commissioner told the inspector general "that [the Massachusetts Public Health Biologics Lab] had used MHRI to 'preserve its workforce' in the face of State budget reductions" (which, the Inspector General noted, would violate state finance law were MHRI a truly independent private entity)" and "The DPH's Commissioner was even more direct: MHRI's assets were just an 'off budget account' to benefit the DPH's state laboratory. Id. at 127. On these facts, the Inspector General concluded that DPH has used the 'MHRI as an illegal fiscal conduit in order to keep these funds off the books of the Commonwealth and to evade legislative oversight.' Id. at 132 (the 'MHRI retains overhead for its services from grants and contract money that otherwise would go to the Commonwealth's General Fund according to [] G.L. c. 29, § 2 for appropriations pursuant to [] G.L. c. 29, §6D'. These practices were a 'pattern of behavior that had persisted for many years,' to wit: purported 'privatiz[ation] [of the] activities of [the] Massachusetts Public Health Biologics Lab which had commercial potential,' and using the resulting revenue as an "off budget source of funds to subsidize" DPH operations. Id. at 129."

activities.[29]

We are similarly unpersuaded by the other arguments Mr. Sorrentino makes for why MHRI should be considered a part of the Massachusetts government. The fact that the Institute was originally located in the Massachusetts State House, for example, does not prove that it was in the state government, given that, as Magistrate Bresler noted, many nonprofit veterans' groups such as the American Legion are located on the State House's fifth floor and newsrooms for reporters covering the State House and the Massachusetts State House Press Association have occupied suites in the building for over a century.[30] Nor do the facts that DPH mentioned MHRI in some of their early reports or allowed MHRI to use state lab space convince us that the Institute was actually part of the state government. As a private organization, MHRI performed a significant amount of work for DPH, making them relevant to DPH's reports, and MHRI's use of state lab space was expressly provided for in the contracts it signed.[31] Similarly, the fact that the Attorney General (AG) apparently represented Mr. Sorrentino in litigation in a case where the Commonwealth was also a defendant and where DPH's "official acts and doings" had been "called in question" does not appear to us to be clear evidence that the AG viewed Mr. Sorrentino as a state employee, nor could such a belief (even if true) override the abundant evidence in numerous documents, including MHRI's own Articles of Organization, that the Institute was a private nonprofit. Finally, and in contradiction with his earlier arguments, Mr. Sorrentino contends that MHRI must have been part of the state government because otherwise, actions DPH and MHRI took, such as the distribution and accepting of no-bid licenses, would have been illegal. As

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[29] An interpretation of Chapter 32 that would allow unauthorized state takeovers of private entities to enable those entities' employees to gain pensions would obviously go contrary to the Legislature's intent to oppose and deter such conduct and to generally incentivize the government to behave lawfully. "It is, of course, true that statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme…[when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.' *United Say. Assn. of Tex. v Timbers of Inwood Forest Associates, Ltd.,* 484 US 365, 371, 98 L Ed 2d 740, 1085 Ct 626 (1988)." *U.S. v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 220 (2001). Note also that, given that, per the Inspector General's report, several DPH officials appear to have committed serious misconduct involving MHRI, we do not give evidentiary weight to such officials' statements that they did not make a distinction between funds that should have been distributed to the Commonwealth's General Fund and funds given to MHRI. See Exhibit 23, p.127-8, Appellant's brief, p.5.

[30] See e.g. https://mastatehousepress.wixsite.com/mastatehousepress/about and https://www.masslegion.org/about.

[31] Exhibits 13, 14.

explained above, however, the Inspector General's findings lead us to believe that (many of) these actions were in violation of the Commonwealth's laws and regulations, and Mr. Sorrentino's claim thus cannot stand on this ground.[32]

Our findings on this question are consistent with past DALA interpretations of the "controlled and operated by a political subdivision" provision. In both *Carrow v. State Board of Retirement*, CR-13-569 (DALA 2018), and *Bettencourt v. State Board of Retirement*, CR-11- 2019 (DALA 2015), DALA Magistrate McConney Scheepers concluded (as we do) that MHRI was not merely an apparatus to implement the will of DPH and hence that MHRI employees are not employees of the Commonwealth.[33] Magistrate Scheepers emphasized the fact that "there was no oversight [of MHRI] by DPH, and no accountability from the MHRI to DPH" meant that the Institute was not fundamentally a 'governmental unit,' even though particular DPH employees supervised the Petitioner—a conclusion with which we concur. In contrast, we find the cases Mr. Sorrentino cites to be distinct and inapplicable. In *Roy v. Springfield Retirement System*, DALA ruled that a teacher's work for the Massachusetts Career Development Institute Alternative School—a school founded through a partnership between the nonprofit MCDI, Inc. and the City of Springfield—was for a "quasi-public enterprise, controlled and operated by a political subdivision of the commonwealth."[34] The Magistrate found that MCDI, Inc. "had no mission distinct from being part of the MCDI Alternative School," that its director was (and had always been) a City of Springfield employee appointed by the mayor, that the Alternative School was overseen and managed by the City, and that the school was "consider[ed]" by the state Department of Education "to be a public school of the Commonwealth" that it "exercised its oversight jurisdiction over" the same as other public schools.[35] In contrast to the circumstances in *Roy*, here,

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[32] Mr. Sorrentino also appears to suggest that he meets the statutory definition of the term 'employee' in Chapter 32 since he performed work "in the service of the Commonwealth." Appellant's brief, p.8, M.G.L. c. 32, § 1. First, this work was "in the service of" MHRI, not the Commonwealth, since MHRI was—undisputedly—Mr. Sorrentino's employer from 1990-97. Additionally, the term 'employee' is explicitly defined as "appl[ying]" only to those "whose regular compensation…is paid by any political subdivision of the commonwealth." Since MHRI was not a political subdivision of the Commonwealth, Mr. Sorrentino cannot be considered an 'employee' (per the Chapter 32 definition) for the period he worked at MHRI.

[33] CR-13-569 and CR-11-219.

[34] CR-06-590 (DALA 2008).

[35] For example, the Magistrate noted, all Alternative School students were public school students and none paid tuition. Alternative School graduates also received identical diplomas and took identical standardized tests to other Springfield public school students.

the 'joint' projects MHRI worked on with DPH were not entirely controlled by the latter, MHRI's Executive Director was not a state employee personally appointed by a high-ranking political figure, and MHRI undoubtedly had a "mission distinct from being part of" DPH programs. Similarly, in *Sennott v. Teachers' Retirement Board* and *Boyle v. Pittsfield Retirement Board*, DALA Magistrates held that petitioners who worked for training programs that were created and administered by their cities were working for political units of the Commonwealth, despite the fact that these programs relied on federal funds.[36] In *Sennott*, the training program for which the Petitioner worked was explicitly called "component unit" of the city of Gardner in official documents and relied on the Massachusetts Division of Employment and Training to carry out a number of its core administrative functions, while in *Boyle*, the Mayor of Pittsfield (who hired the Petitioner and generally had power over him and other program employees) signed an Agreement that the training program at issue was "an unclassified department of the City of Pittsfield."[37] Here, on the other hand, both the Commonwealth of Massachusetts and MHRI itself classified the Institute as a private vendor and MHRI operated under its own direction, working with the Commonwealth contingently and at its discretion.

3. Creditable Service Purchase Pursuant to § 4(l)(s) and 941 C.M.R 2.09(3)

Mr. Sorrentino also argues that he is entitled to purchase for credit his work with MHRI pursuant to § 4(l)(2). Because DALA addressed this issue, we too address it here.

The regulation applicable to Mr. Sorrentino's service purchase when SBR denied his application in 2019, 941 C.M.R. 2.09(3), allowed individuals to potentially be eligible for up to four years of creditable service if they, in addition to meeting other criteria, a) worked for an "instrumentality of the Commonwealth or a Commonwealth agency" or b) were "under the supervision and control of a Commonwealth agency or its employees" and performed "service…in the standard and ongoing course of an agency's regular business function…not including, any such service provided as part of any specific or defined projects of that agency for which a vendor was selected."[38] Even if Mr. Sorrentino's service satisfied the latter criterion (which is not evident, given that projects like the Newborn Screening Program, which were "specific or defined

[36] CR-03-688 (DALA Dec. 2003) and CR-02-587 (DALA May 2007).
[37] Ibid.
[38] DALA Decision, p.15.

project[s]…for which a vendor was selected," cannot count towards his service), it is abundantly clear that he has not met two of the other requirements necessary for the regulation to apply to him.[39] First, 941 C.M.R. 2.09(3)(a) requires that, to be eligible for a 'Vendor or Contractor Service Buyback,' "the individual seeking to purchase contract service must *currently* be a member in service of the MSERS with at least ten years of creditable service with the MSERS *at the time of the application to purchase*" (emphasis added).[40] Because Mr. Sorrentino did not seek to buy back his MHRI service when he was a member of MSERS, the regulation does not apply to him, and we cannot rule for him based on it.[41] Second, 491 C.M.R. 2.09(3)(c) states that SBR "may consider" service conducted according to the above criteria to be "eligible"—not that it must do so.[42] SBR is thus not required to give Mr. Sorrentino creditable service under this regulation, meaning that its decision to consider such purchase is permissive in nature, not mandatory.

4. Mr. Sorrentino's Request for Corrections Pursuant to § 20(5)(c)(2)

In response to an Order to Show Cause, Mr. Sorrentino argues that he only withdrew his deductions and interest from his MSERS account because an SBR employee told him that the Board did not recognize MHRI as a state agency—a statement he argues was false and provides him basis to receive pension benefits under M.G.L. c. 32, § 20(5)(c)(2), which requires corrections to erroneous determinations. Such a contention fails even if this claim for relief was timely asserted before DALA. No corrections are warranted as we have determined above that MHRI is not, and was never, a part of the state government, a state entity, or political subdivision. Accordingly, § 20(5)(c)(2) is not implicated in this matter.

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[39] Our above discussion of why MHRI was a private nonprofit that the state did not lawfully control also shows that it was not an "instrumentality" of the Commonwealth. As the rest of this paragraph shows, however, even if it were, the regulation in question still would not apply to Mr. Sorrentino. We note also that this version of 941 C.M.R. 2.09(3)(c), which was in place from 2013-2022, arguably exceeds the scope of the law it supposedly interprets. The law in question, M.G.L. c.32, § 4(1)(s), applies only to certain "contract employee[s] for" parts of the Commonwealth—a seemingly stricter standard than the one enabled by this version of the regulation. While CRAB does not have jurisdiction to declare a (part of a) regulation invalid (see e.g. *Salisbury Nursing Rehabilitation Center Inc. v. DALA*, 448 Mass. 365 (2007)), we thought it important to flag this issue for any Court that might review this decision.

[40] 941 C.M.R. 2.09(3)(c).

[41] Mr. Sorrentino also attempted to buy back his MHRI service in 2006, but was rejected because, then as now, he was not currently a member in service of MSERS. See FFs 37-38.

[42] 941 C.M.R. 2.09(3)(c).

5. Contentions of Bias and Recusal Argument

Mr. Sorrentino also argues that Magistrate Bresler demonstrated bias towards him and should have recused himself. There is not, however, evidence to support this contention. To begin, we note that a petitioner must meet a relatively high burden of proof to show that a judge or magistrate should recuse themselves. As the Supreme Judicial Court (SJC) wrote in *Haddad v. Gonzalez*, "The matter of recusal is generally left to the discretion of the trial judge,...and an abuse of that discretion must be shown to reverse a decision not to allow recusal."[43] Indeed, "[T]o sustain an appellate claim that a judge committed an abuse of discretion, it must be demonstrated that 'no conscientious judge, acting intelligently, could honestly have taken the view expressed by him.'"[44] The SJC has also specifically determined that "impatience, discourtesy, or bad manners...do not invalidate a trial or require the setting aside of a decision provided the essentials of sound judicial conduct are not violated" and that judges' expressions of disapproval of particular parties' conduct, even when phrased harshly, do not merit their recusal when these expressions "rise from…something *learned from participation in the case*" (emphasis in original) rather than "from an extrajudicial source."[45] Here, there is no evidence that any of the (little) criticism Magistrate Bresler expressed—which, as will be shown below, was directed only at the argumentative strategies Mr. Sorrentino's counsel deployed—came "from an extrajudicial source," nor that such criticism in any way impaired "the essentials of sound judicial conduct." Even were a lower standard of proof required, though, we are unconvinced that Magistrate Bresler exhibited any meaningful bias towards Mr. Sorrentino. In his appeal brief, Mr. Sorrentino lists nine statements and/or actions by Magistrate Bresler he believes demonstrate the Magistrate's prejudice against him. We will consider each in turn.

First, Mr. Sorrentino notes that Magistrate Bresler wrote in his decision that "At the hearing Mr. Sorrentino committed to look for various documents related to his income and taxes from 1990 to 1997 and reporting to me (tr. 68, 82, 84), but I did not hear further from him," when the transcript showed that these documents were requested by SBR's counsel and was left to be discussed

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[43] *Haddad v. Gonzalez*, 410 Mass. 855 (1991)—also quoted in *Masingill v. EMC Corp*. 449 Mass. 532 (2007).
[44] *Commonwealth v. Goodreau*, 442 Mass. 341 (2004), quoting *Commonwealth v. Ira I.*, 439 Mass. 805 (2003), and *Commonwealth v. Bys*, 370 Mass. 350 (1976).
[45] *Ott v. Board of Registration in Medicine* 276 Mass. 566 (1931) and *Haddad v. Gonzalez*, quoting *Care and Protection of Martha and others* 407 Mass. 319 (1990).

between the parties. Magistrate Bresler's decision, however, in no way contradicts the idea that SBR was the party originally interested in these documents. After SBR's counsel asked for these documents, Magistrate Bresler stated that his "understanding" was that Mr. Sorrentino would "look for" the documents in question and "confer" about them with SBR's counsel, after which Mr. Sorrentino's counsel would "let [Magistrate Bresler] know what's going on"—to which Mr. Sorrentino's attorney responded "Yes….We can do that, Magistrate Bresler."[46] Thus, the sentence of Magistrate Bresler's decision to which Mr. Sorrentino objects was correct and, in any case, is in no way evidence of bias.

Second, Mr. Sorrentino states that "Magistrate Bresler allowed into evidence after the hearing items in an exhibit that Mr. Sorrentino did not have an opportunity to address"—specifically, Mr. Sorrentino's appeal letter to DALA.[47] As Magistrate Bresler noted, however, a petitioner's appeal letter is obviously necessary to the adjudication of an appeal as it establishes that the petitioner has, in fact, appealed and sets out briefly the basis on which they did so. Hence, such appeal letters cannot be considered 'new' to the record and Magistrate Bresler's decision does not appear to us to be inappropriate, let alone a reflection of bias.

Third, Mr. Sorrentino states that Magistrate Bresler accepted an email from SBR's counsel, and cited it in his decision, even though he denied Mr. Sorrentino the opportunity to respond. To begin with, Magistrate Bresler did give Mr. Sorrentino an opportunity to respond to the email in question. On February 7, 2023, Magistrate Bresler asked SBR's counsel three factual questions and stated that "Three days after SBR answers, Mr. Sorrentino may comment narrowly on these questions and SBR's answers."[48] SBR's counsel responded the same day. After missing this deadline, on February 15, 2023, Mr. Sorrentino's counsel asked for an additional three days, stating that he had missed the email. Magistrate Bresler denied this request—a decision that appears to us eminently reasonable, given that Mr. Sorrentino's counsel had in fact missed the necessary deadline.[49] Independently, though, as the Magistrate stated, Mr. Sorrentino did not need the opportunity to respond to the email given that it contained purely factual content and did not involve advocacy. Magistrate Bresler asked SBR's counsel three questions—the definition of the term 'deferred retiree,' the statute and facts under which SBR believed Mr. Sorrentino became an

[46] DALA Transcript, p.82-4.
[47] Appellant's brief, p.17.
[48] Appellant's brief, cited Exhibit C-1.
[49] Appellant's brief, cited Exhibit C-2.

MSERS member, and whether there existed a known legislative rationale for M.G.L c. 32 s. 3(6)(e).[50] SBR's counsel answered all of these questions directly, and the email to which Mr. Sorrentino objects does not appear to contain any attempt to persuade the Magistrate to rule for SBR. Further, Magistrate Bresler's decision only cites the email for factual matters: that there is no articulated legislative rationale for s.3(6)(e) and that a deferred retiree is "an inactive MSERS member."[51]

Fourth, Mr. Sorrentino alleges that "Magistrate Bresler stretched to include, if not conjured, aspects of his decision which were inappropriate."[52] To support this claim, Mr. Sorrentino notes that Magistrate Bresler cited a Wikipedia article showing that many nonprofit veterans' organizations are currently located in the Massachusetts State House and suggested that this "may indicate" that "MHRI's original location has historically been used for nonprofits" to respond to his contention that MHRI's original location in the State House helped prove it was part of the state government. Such a citation, however, is not inappropriate, given that it demonstrates that being located in the State House does not inherently make an organization part of the state government. Whether or not MHRI's original location was generally used for nonprofits, the fact that it could have been demonstrates that an entity's location is not (typically) important to determining whether that entity was part of the Commonwealth.

Fifth, Mr. Sorrentino notes that Magistrate Bresler suggested that a statement in the Inspector General's report that "MHRI is a private organization… MHRI's Board of Directors was reorganized in 1980 to exclude State employees on the Board because such presence created a conflict of interest when MHRI sought State contracts" was made "[p]resumably by the Comptroller," when such a claim is hearsay.[53] However, Magistrate Bresler did not make this statement about the part of the Inspector General's report Mr. Sorrentino quotes. Rather, he noted this in reference to the Inspector General's statement that "This Office has been told that the 'MOUs' between DPH and MHRI were 'misnomer[s],' given that these terms only apply to "intergovernmental agreements."[54] Regardless, such a remark in no way amounts to a judicial

[50] Appellant's brief, cited Exhibit C-1.
[51] DALA Decision, p. 9, 12.
[52] Appellant's brief, p.18.
[53] Ibid.
[54] DALA Decision, p.4-5.

permission of hearsay (given that the legal conclusions in question were based solely off an Exhibit in the record) nor is evidence of bias.

Sixth, Mr. Sorrentino critiques Magistrate Bresler for finding that "When Mr. Sorrentino left the DPH to work for the MHRI, he knew that he was leaving state service," which he states contradicts his testimony and "disadvantages [him] for being a layman."[55] Magistrate Bresler cited for this proposition, though, two emails Mr. Sorrentino sent, respectively referencing his "state termination date" and his leaving his "State position."[56] It is deeply unclear to us how quoting Mr. Sorrentino's own contemporaneous statements that he was leaving his "State position" as evidence that he knew he was doing this unfairly "disadvantages" him.

Seventh, Mr. Sorrentino alleges the fact that Magistrate Bresler "took numerous unnecessary and unwarranted swipes" at him and his counsel, including by noting that his DALA brief used a quote from the DPH-MHRI MOUs but excluded the part of it that explicitly declared MHRI to be a private organization.[57] Noting this absence, however, is eminently reasonable, given that it demonstrates that even the sources Mr. Sorrentino cites do not support his position. Mr. Sorrentino's response in his appeal brief—that "just because the MOUs make that statement does not make it true"—does not ring true when a) the MOUs affirm the views of both the entity that is supposedly part of a state agency and the view of the state agency itself and b) Mr. Sorrentino himself cites the parts of the MOUs he believes support his position. In any case, there is no logical reason why noting this absence shows that Magistrate Bresler was biased against Mr. Sorrentino.

Eighth, Mr. Sorrentino asserts that Magistrate Bresler's statement that "Mr. Sorrentino incorrectly cites MHRI's use of state facilities as support for his argument that MHRI was not a 'private and independent non-profit'" is false.[58] Again, it is unclear why, even if Magistrate Bresler was wrong here, such an inaccuracy would constitute evidence of bias, but, also again, Magistrate Bresler's statement was correct. MHRI's use of state facilities does not show it was part of the state government, given that it was explicitly only able to do so under a vendor contract that specified that the Institute was a private entity.

Ninth, and finally, Mr. Sorrentino states that Magistrate Bresler critiqued him for arguing in the alternative without noting he was doing so, referencing the Magistrate's use of a quote that

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[55] Appellant's brief, p.19, FF 30.
[56] FF 30.
[57] Appellant's brief, p.19.
[58] Ibid.

"In general, legal parties are allowed to propound alternative…theories. However, it is difficult to do so convincingly" and his statement that "Mr. Sorrentino, like the Petitioner in *Tinlin*, does not acknowledge that he is arguing in the alternative."[59] Magistrate Bresler's statement, though, appears to us to be more than fair, given that presenting mutually exclusive arguments (here, that MHRI was part of the state government and that it was merely a vendor) is often unpersuasive and/or confusing to a judge, especially when these arguments are not explicitly tagged as being conditional contentions.

We thus find no evidence of Magistrate Bresler displaying bias towards Mr. Sorrentino and conclude his decision not to recuse himself to be reasonable.

Conclusion

For the above reasons, we affirm the DALA decision that Mr. Sorrentino is not entitled to retirement benefits.

SO ORDERED.

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Date: August 30, 2024

[59] DALA Decision, p.11.