COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala

John Sorrentino,
Petitioner

v. Docket No. CR-19-0118

State Board of Retirement,
Respondent

Appearance for Petitioner:

Richard D. Glovsky, Esq.
Locke Lord
111 Huntington Avenue
9th Floor
Boston, MA 02199-7613[1]

Appearance for Respondent:

James H. Salvie, Esq.
Associate Board Counsel
State Board of Retirement
One Winter Street
Boston, MA 02108-4747

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Denial of petitioner's application for superannuation retirement benefits is affirmed because petitioner had not re-entered state service for longer than two years, as statutorily required, and his other claims are unavailing.

[1] Mr. Sorrentino was also represented before, during, and after the hearing by M. Patrick Moore, Jr., Esq. On January 17, 2023 Mr. Moore withdrew his appearance because he was leaving the private practice of law to enter the Attorney General's Office.

DECISION

The petitioner, John Sorrentino, appeals the denial by the State Board of Retirement (SBR) of his application for superannuation retirement benefits. I held a hearing on June 14, 2022 by Webex, which I recorded.

Mr. Sorrentino testified and was the only witness. I admitted 41 exhibits. 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.

Both parties submitted post-hearing briefs on September 26, 2022.

Findings of Fact

Mr. Sorrentino worked for the Massachusetts Health Research Institute, Inc. (MHRI) from 1990 to 1997. (Stipulation) I will first make findings of fact about MHRI and then about Mr. Sorrentino.

MHRI

1. On May 14, 1959 the Massachusetts Health Research Institute, Inc. (MHRI) was incorporated as a nonprofit corporation. (Ex. 10)

2. Of MHRI's 12 initial directors, one was Governor Foster Furcolo and one was Alfred Frechette, Commissioner of Public Health. (Ex. 10; Ex. 25) Whether the other 10 directors were public officials or employees is not in evidence. (Resp. Br. 5)

3. MHRI's principal office was Room 546 of the State House. (Ex. 10) (What other entity may have been located in that room or suite is not in the record.)[2]

[2] The original location of MHRI in the State House does not demonstrate that the Commonwealth operated MHRI, as Mr. Sorrentino argues. (Pet. Br. 6, 8). A suite of rooms on the fifth floor of the State House is occupied by the Massachusetts headquarters of many veterans' groups, including the American Legion, Persian Gulf Era Veterans, Veterans of Foreign Wars, and Vietnam Veterans of America. https://en.wikipedia.org/wiki/

4. MHRI had three substantive purposes:

A. To help develop and increase the facilities of the Department of Public Health (DPH), "institutions or agencies" within DPH or associated with it,[3] other health departments,[4] and "other institutions and organizations"[5] in Massachusetts researching health; and "to provide more extensive conduct of… research"[6] into public health.

B. To receive and administer gifts and grants related to the objectives of DPH and the entities described in purpose A.

C. To conduct research and to finance research related to the objectives of DPH and the entities described in purpose A.

(Ex. 10)

5. On October 23, 1980 MHRI, in Restated Articles of Organization, restated the three substantive purposes of MHRI above. (Ex. 10)

6. On April 7, 1997 MHRI's Articles of Amendment added a fourth substantive purpose:

> To educate and assist *other non-profit organizations* in more effective internal management and delivery of services….

Massachusetts_State_House. No one would contend that the Commonwealth operates these veterans' groups or that the location of their offices in the State House indicates that Commonwealth operates them. In fact, the American Legion's location in the State House is – Room 546-2, http://www.masslegion.org/, which may indicate that Room 546, MHRI's original location, has historically been used by nonprofits.

[3] Note that institutions associated with DPH are not necessarily part of state government.

[4] These are presumably municipal health departments.

[5] Note that other institutions and organizations are not necessarily part of state government. Presumably, they are not.

[6] Some language of the Articles of Organization is awkward. For example, it is unclear what this phrase means. To increase research? It is unclear what it means to "increase[e] the facilities" of DPH and other entities. Increase the number of facilities? The lack of clarity of the language is not significant.

(Ex. 10) (emphasis added)[7]

7. On April 14, 2000 MHRI became Third Sector New England, Inc. (Ex. 10)

8. On April 12, 2002, Third Sector New England, in Restated Articles of Organization, restated the four substantive purposes of MHRI. (Ex. 10)

9. In December 1996, while Mr. Sorrentino worked at MHRI, the Inspector General of the Commonwealth of Massachusetts wrote in "A Report on Certain Activities and Practices of the Massachusetts Public Health Biologic Laboratories,"

> MHRI was not created by an act of the Legislature, nor is it in any way controlled by the Commonwealth.

(Ex. 23, p. 90)

10. The Inspector General also wrote:

> MHRI is a *private* nonprofit corporation[,] which for years has provided fiscal and administrative services to MDPH/MPHBL [Massachusetts Department of Public Health/Massachusetts Public Health Biologic Laboratories], under so-called memoranda of understanding…. The State Division of the Comptroller reserves the term "memorandum of understanding" for intergovernmental contracts between State agencies and/or between State and Federal agencies.

(Ex. 23, p. 40) (emphasis added; note deleted)

11. The Inspector General's report later wrote:

> 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….

(Ex. 23, p. 131) (emphasis added)

12. A page later, the Inspector General's report wrote:

> DPH used the term "memorandum of understanding" to describe its agreements with MHRI. This Office has been told[8] that this term is a misnomer.

[7] The word "other" implies that MHRI is a nonprofit organization, as opposed to a government entity.

[8] Presumably by the Comptroller. *See* Finding of Fact 10.

> An MOU is only applicable to intergovernmental agreements between State agencies or between State and Federal government agencies.[9] The agreement between DPH and MPHBL and MHRI is a consultant contract.

(Ex. 32, p. 132) *See* Finding of Fact 10 (Inspector General referred to "so-called memoranda of understanding").

13. The Inspector General considered the existence of documents called memoranda of understanding between DPH and MHRI to be misnamed consultant contracts that did not indicate that MHRI was a state government entity. (Ex. 32, pp. 23, 132)

14. In June 1990 and on July 1, 1993 DPH and MHRI signed memoranda of understanding.[10] (Ex. 14, p. 8; Ex. 15, p. 8) The two memoranda are very similar.

15. The first memorandum of understanding was to be in effect from May 1, 1990 until June 30, 1992; the second from July 1, 1993 until June 30, 1994. (Ex. 14, p. 6; Ex. 15, p. 6)

16. It is unknown whether a memorandum of understanding was in effect after June 30, 1994, during Mr. Sorrentino's next and last three years of employment at MHRI. (Tr. 29)

17. The memoranda of understanding concerned the Newborn Screening Project or Program (NSP). (Ex. 14, p. 2; Ex. 15, p. 2)

18. Under both memoranda, MHRI was to serve as the administrative and fiscal agent for DPH and NSP. (Ex. 14, p. 2; Ex. 15, p. 2)

19. Both memoranda called MHRI "a non-profit corporation." (Ex. 14, p. 1; Ex. 15, p. 1)

---

[9] To support his argument that the Commonwealth operated MHRI, Mr. Sorrentino invoked the Inspector General and quoted this sentence, starting with "only." (Pet. Br. 7) Mr. Sorrentino did not acknowledge that the Inspector General referred to "*so-called* memoranda of understanding" and suggested that the term as applied to these agreements was a "misnomer." (Ex. 23, pp. 40, 132) (emphasis added)

[10] The use of the term "memorandum of agreement" in the documents is not dispositive of whether MHRI was a government agency. My use of the term in this decision is not significant; I am referring to the documents by the name on them. In its brief SBR calls these documents "contracts." (Resp. Br. 7)

20. Both memoranda named Mr. Sorrentino as the administrative director. (Ex. 14, p. 3; Ex. 15, p. 2)

21. Both memoranda stated:

> In accordance with regulations of the Executive Office of Administration and Finance governing the use of State facilities by private organizations, MDPH… shall provide laboratory facilities, office space and use of existing office and laboratory equipment for the Project and the Project Staff.

(Ex. 14, p. 6; Ex. 15, p. 6)[11] Thus, the memoranda acknowledged that MHRI was a private organization using state facilities.[12]

22. Jonathan Spack signed the memoranda of agreement for MHRI as its executive director. (Ex. 14, p. 8; Ex. 15, p. 8)

23. Mr. Spack was not a state employee, or at least not a member of the Massachusetts State Employees' Retirement System. (Ex. 38)

24. Sometime in 1996 or 1997 DPH "terminated MHRI as its fiscal and administrative agent." (Ex. 35, p. 27)

Mr. Sorrentino

25. From January 6, 1980 until June 23, 1990, Mr. Sorrentino worked for and was paid by DPH. (Ex. 13; stipulation)

26. Mr. Sorrentino had approximately10 years and 5 months of creditable service from working for DPH. (Stipulation)

27. When Mr. Sorrentino worked for DPH, he was a member of the Massachusetts State

[11] In support of this argument that the Commonwealth operated MHRI, Mr. Sorrentino paraphrased the second part of this quotation following the ellipsis – but not the first part acknowledging that MHRI was a private organization. (Pet. Br. 7)

[12] 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." (Pet. Br.18)

Employees' Retirement System (MSERS). (Ex. 13; stipulation)

28. In or around June 1990, after Mr. Sorrentino left state service, he withdrew his deductions and interest from his MSERS retirement account, terminating his MSERS membership. (Ex. 13; stipulation)

29. From approximately June 1990 to June 1997 Mr. Sorrentino worked for MHRI. (Stipulation)

30. When Mr. Sorrentino left DPH to work for MHRI, he knew that he was leaving state service. At least three indications exist of Mr. Sorrentino's knowledge:

A. On May 25, 1990 Mr. Sorrentino sent an email referring to "my state termination date." The reference was in the context his using all of his vacation time at DPH before he left. (Ex. 9)

B. On June 4, 1990 Mr. Sorrentino sent an email referring to his leaving "my State position" on that date. (Ex. 7)

C. Sometime after June 8, 1990 Mr. Sorrentino signed a Withdrawal Notice for his deductions to MSERS and interest. Mr. Sorrentino did *not* fill out the part of the form asking that his retirement account be transferred to MHRI. Instead he signed the following statement:

> 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.

(Ex. 8)

Part of the Withdrawal Notice is a form called "Request for Return of Accumulated Total Deductions to Member." It includes this statement:

> You are eligible for a refund of your total accumulated deductions under the following conditions:

> 1. If you permanently leave the service of THE COMMONWEALTH OF MASSACHUSETTS and do not intend to take a position in the Commonwealth of Massachusetts subject to the provisions of sections 1 to 28 of Chapter 32 of the General Laws.
> ….

(Ex. 8)

31. When Mr. Sorrentino worked for MHRI, he was not a member of MSERS and did not make contributions to it. (Tr. 33)

32. Sometime in June 1997 Mr. Sorrentino left MHRI and returned to state service. (Ex. 13; stipulation)

33. From July 1, 1997 until June 20, 1998 Mr. Sorrentino worked for the University of Massachusetts Medical Center. (Ex. 13; stipulation)

34. When Mr. Sorrentino worked for the University of Massachusetts, he was a member of MSERS. (Stipulation)

35. When Mr. Sorrentino stopped working for the University of Massachusetts, he became an inactive member of MSERS. (Ex. 13, stipulation)

36. In 2000 Mr. Sorrentino completed a buyback of the deductions and interest he had previously withdrawn from MSERS for his employment at DPH. (Ex. 13; stipulation)

37. On December 15, 2006 Mr. Sorrentino sought to buy back service for the time when MHRI employed him, June 1990 to June 1997. (Ex. 39) He sought to do so under G.L. c. 32, §4(1)(s). (Ex. 39 (form mentioned statute), Tr. 37, 58)

38. On April 9, 2007 SBR denied Mr. Sorrentino's application because he was not a member in service of MSERS. (Ex. 39)

39. No evidence exists that Mr. Sorrentino appealed SBR's April 9, 2007 denial.

40. On October 20, 2018 Mr. Sorrentino signed an application for superannuation

retirement benefits. (Ex. 12)

41. When asked on his application to list all service with "state, city or county government," Mr. listed DPH from January 1980 to May 1990 and the University of Massachusetts Medical Center from July 1997 to July 1998. (Ex. 12)

42. On October 29, 2018 SBR received Mr. Sorrentino's application to retire on November 10 (Ex. 13) or November 12, 2019 as a deferred retiree. (Exs. 13, 37) (A deferred retiree is basically an inactive MSERS member. *See* G.L. c. 32, §10(3). Email of James Salvie, Feb. 7, 2023.)

43. On November 27, 2018 SBR wrote to Mr. Sorrentino, "Your first check *should* be deposited within 90 to 120 days of your retirement date." (Ex. 6) (emphasis added)[13]

44. On February 6, 2019 SBR denied Mr. Sorrentino's application for superannuation retirement because he had not returned to active service for at least two consecutive years, as G.L. 32, §3(6)(e) requires. (Ex. 13)

45. In a letter dated February 25, 2019 and mailed on February 26, 2019 Mr. Sorrentino stated that he had received SBR's denial on February 22, 2019. He timely appealed it. He wrote, "I am appealing this denial of my eligibility to receive a pension." (Ex. 37)

46. In his appeal letter, Mr. Sorrentino did not raise the possibility of buying back service for having worked at MHRI. (Ex. 37)

47. In his appeal letter, Mr. Sorrentino twice referred to MHRI (without naming it) as a "non-profit corporation." (Ex. 37)

48. On December 1, 2020 DALA ordered Mr. Sorrentino to show cause why his appeal

[13] When Mr. Sorrentino appealed SBR's later denial of his application for a superannuation retirement, he mischaracterized this letter as "indicating that I *would* receive my first retirement check within 90 to 120 days." (Ex. 37) (emphasis added)

should not be dismissed for failing to state a claim on which relief can be granted because he was not a state employee for two years after reentering state service, as G.L. c. 32, §3(6)(e) requires.

49. On January 11, 2021 Mr. Sorrentino responded to the order to show cause.

50. On January 19, 2021, DALA accepted Mr. Sorrentino's response and allowed his appeal to continue. (First Pre-Hearing Order)

51. In his hearing testimony, Mr. Sorrentino twice referred to MHRI as a non-profit. (Tr. 73)

Discussion

What is on appeal and what is not on appeal

I have authority to decide in an appeal only the issues that a petitioner has appealed. I cannot decide issues that are not on appeal. *See Michael Dufresne et al. v. State Board of Retirement*, CR-19-0572 (DALA 2022). By extension, I have no authority to decide issues that the parties agree are in front of me or do not object to my hearing but are not actually in front of me. (*See* Letter of M. Patrick Moore, Jr., Esq. to DALA, June 6, 2022 (expressing belief that SBR agreed to expansion of issues on appeal)). I have no authority to examine a general situation that has been brought to my attention through an appeal of a specific issue and issue orders to rectify the situation beyond the appealed issue. *See David Lynn v. Essex Regional Retirement Board*, CR-14-550 (DALA 2018) (DALA has "no equity powers"); *Jane Doe v. Massachusetts Teachers' Retirement System*, CR-19-0547 (DALA 2021) (an appeal cannot become a "moving target"); G.L. c. 32, § 16(4) ("action taken or decision of the retirement board" is appealable to DALA).

SBR's denial, under G.L. c. 32, §3(6)(e), of Mr. Sorrentino's application for a superannuation retirement benefit is the issue that Mr. Sorrentino appealed and is the issue that is

before me. (Ex. 37) Among the issues that Mr. Sorrentino did not appeal and that are not before me is his application in 2006 to buy back his service from 1990 to 1997, which SBR denied in 2007. (Ex. 39)

Mr. Sorrentino's theory of his employment at MHRI

Mr. Sorrentino contended that he was a state employee, specifically of DPH, while working at MHRI. (Response to Order to Show Cause 1, 4, 6, 7, 8; Pet. Br. 4, 5, 6, 7, 9; Tr. 33-35, 41, 61)

Mr. Sorrentino also contended, slightly differently, that he "should be *considered* to have been a public employee for *purposes* of the SERS" when he worked for MHRI. (Pet. Br. 1, 2) (emphasis added) He also contended, also slightly differently, that at MHRI he was "*functioning* as [a] state employee[]." (Pet. Br. 17) (emphasis added)

Mr. Sorrentino also conceded implicitly that he was not a state employee while working at MHRI. When asked on his application for superannuation retirement to list all service with "state, city or county government," Mr. Sorrentino did not list MHRI. (Ex. 12)

By invoking 941 C.M.R. 2.09(3)(c) (which I discuss below), Mr. Sorrentino contended that he was an employee of a "vendor." He also characterized the regulation as allowing "a contractor" to "render creditable service." (Pet. Br. 16)

"In general, legal parties are allowed to propound alternative…theories. However, it is difficult to do so convincingly." *Matthew Tinlin v. Weymouth Retirement Board*, CR-13-361 (DALA 2015). And Mr. Sorrentino, like the petitioner in *Tinlin*, does not acknowledge that he is arguing in the alternative.

Some alternative arguments are mutually exclusive. Mr. Sorrentino cannot prevail under G.L. c. 32, §3(6)(e) because he was, as he argues, an employee of the Commonwealth from 1990

to 1997, and also prevail under 941 C.M.R. 2.09(3)(c) because he was, as he also argues, a vendor of the Commonwealth for the same period. I discuss both provisions below.

G.L. c. 32, §3(6)(e)

Under this statute,

- a person who becomes an MSERS member under §3(6);
- a member who is reinstated or re-enters active service under §3(6)(b), (c), or (d); or
- a member who transfers or re-establishes membership under §3(8)

is eligible for a superannuation retirement allowance only if the person or member is "in active service for at least two consecutive years" after "commencement of his new employment." SBR's position is that Mr. Sorrentino re-entered active service under §3(6)(b) when he began working at the University of Massachusetts Medical Center. The purpose of the statute is unknown. (Email of James Salvie, Feb. 7, 2023) The purpose might be to

In his response to the order to show cause, Mr. Sorrentino argued:

> G.L. c. 32, §3(6)(e) does not apply to Mr. Sorrentino as he continuously was employed as a public employee from 1980 to 1998.

(Response to Order to Show Cause 1; *see also* Response 7) Mr. Sorrentino similarly argued about the statute in the joint prehearing memorandum. (Joint Pre-Hearing Memorandum 8-9) He implied this argument in his post-hearing brief, but did not discuss or even mention the statute.

DALA has already decided this issue: Working at MHRI did not constitute state employment. MHRI was "a private, non-profit entity, and not any agency, board or commission of the Commonwealth…." *Grant Carrow v. State Board of Retirement*, CR-13-569 (DALA 2018). "MHRI was not an instrumentality of the Commonwealth between October 13, 1992 to September 18, 1993" – a period when Mr. Sorrentino worked for MHRI – under 941 C.M.R.

2.09(3)(c). *Id*. (This decision discusses 941 C.M.R. 2.09(3)(c) below.)

In *Maria Bettencourt v. State Board of Retirement*, CR-11-219 (DALA 2015), Administrative Magistrate McConney Scheepers, who also authored *Carrow*, ruled against the petitioner, who had worked for MHRI, on the merits of her appeal and because she had missed the deadline to appeal. In 2015 she wrote in dictum:

> MHRI was not part of the DPH, but rather a vehicle for the funneling of federal funds into DPH programs. MHRI was an independent non-profit entity.

Because DALA has already decided that employment at MHRI was not state employment, I do not need to examine the definition of "employee" under Chapter 32, §1. I certainly do not need to leave state pension law and explore employment law, which is less relevant, as Mr. Sorrentino asks me to do. (Pet. Br. 6)

I'm not sure why Mr. Sorrentino did not address *Carrow* or *Bettencourt*, distinguish them, or argue why I should not follow them. Instead of discussing two clear adverse precedents about MHRI, Mr. Sorrentino, under a heading "Precedent supports Mr. Sorrentino's position" (Pet. Br. 2), discussed other DALA decisions involving nonprofits to try to prove that Mr. Sorrentino's work for MHRI was state employment. (Pet. Br. 2-6)

Mr. Sorrentino's argument that his work for MHRI was state employment is also flawed procedurally. When he applied for superannuation retirement, he listed his service with DPH from January 1980 to May 1990, and with the University of Massachusetts Medical Center from July 1997 to July 1998. He did not apply for superannuation based on employment with MHRI. (Ex. 12). When SBR denied his application, Mr. Sorrentino appealed. The basis of his appeal was that SBR had indicated that he was eligible for superannuation retirement. He *possibly alluded* to his argument about G.L. c. 32, §3(6)(e). (Ex. 13 ("During this entire period, I worked at the same state-owned facility")) However, that is not the most significant procedural flaw of

his appeal. The most significant procedural flaw is that Mr. Sorrentino applied for superannuation retirement based on his state employment from 1980 to 1990 and from 1997 to 1998, excluding MHRI; he was denied superannuation retirement benefits; and his appeal became based on his supposed state employment from 1980 to 1998, including MHRI. Mr. Sorrentino's argument on appeal is inconsistent with his application whose denial he appealed.

Furthermore, Mr. Sorrentino's appeal is flawed factually. In 1990 he acknowledged that he was leaving state employment. (Exs. 7-9) Thirty-one years later, in 2021, in his response to the order to show cause, Mr. Sorrentino contended that he did not leave state service in 1990. Mr. Sorrentino has not acknowledged or discussed the apparent discrepancy.

History of 941 C.M.R. 2.09(3)(c) and the statute it was issued under

Mr. Sorrentino contends that he is entitled to a state pension for his work at MHRI under 941 C.M.R. 2.09(3)(c). That regulation was issued under G.L. c. 32, §4(1)(s), which provides in part:

> 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….

The statute was added in 2006, St. 2006, c. 161, and became effective on October 17, 2006. M.G.L.A. c. 32, §4.

As for 941 CMR 2.09(3(c), I first review the three iterations of it. I then review some DALA decisions under the regulation. I finally assess whether the iterations of the regulation and the decisions affect this appeal.

SBR issued 941 C.M.R. 2.09 in 2011. Mass. Register Regulation Details, Secretary of the Commonwealth, Aug. 9, 2011. The provision was worded as follows:

> Service through a vendor or contractor. The contract service being purchased must have been service as a "contract employee" of the Commonwealth. Individuals 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.

Mass. Register Regulation Details, Secretary of the Commonwealth, Aug. 9, 2011; Regulation Filing by SBR to Secretary of the Commonwealth, Aug. 5, 2011, Mass. Register 1189.

On June 21, 2013, SBR amended 941 C.M.R. 2.09(3)(c). It was worded as follows:

> 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 941 CMR 2.09(3)(c) members who were employees of a vendor or contractor, which was selected and contracted to provides 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.[14] 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 on instrumentality of, the Commonwealth or a Commonwealth agency;[15] 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.[16]

[14] I call this the introduction clause of this part of the regulation for purposes of discussion two footnotes later.

[15] I call this clause 1 of this part of the regulation to make it easier to discuss.

[16] I call this clause 2 of this part of the regulation. I know that *Eva Yutkins-Kennedy v. State Board of Retirement*, CR-19-0171 (DALA 2021) referred to it as "941 CMR § 2.09 (3)(c)2,

> 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.

Regulation Filing by SBR to Secretary of the Commonwealth, June 7, 2013; Mass Register 1237.

On March 18, 2022, SBR amended 941 C.M.R. 2.09(3)(c) again. It is currently worded as follows:

> 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 941 CMR 2.09(3)(c) 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 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.[17]

Mass. Register Regulation Details, Secretary of the Commonwealth, March 8, 2022 (summary: "amend 941 CMR 2.09(3)(c) to narrow the definition of who qualifies as a 'contract employee' eligible for certain service purchases to align with recent administrative decisions"); Regulation Filing by SBR to Secretary of the Commonwealth, March 3, 2022, Mass. Register 1465.

---

commonly known as the 'supervisory exception,'" but it is easier to call it "clause 2" for my purposes.

Notice the structure of this part of the regulation, which explains an anomaly in the successor version. The introduction clause stated that SBR may consider eligible contract service in some circumstances. The regulation then amplified itself by repeating the introduction clause in clause 1 before adding clause 2. When SBR amended the regulation most recently, it eliminated clause 2. It retained the language of clause 1 – but eliminated the numeral "1" and the indent. Thus, the third and current version of the regulation (1) inherited from the second version the very similar language in both the introduction clause and clause 1; and (2) thereby has two successive sentences that contain very similar language.

[17] These are the two successive sentences that contain very similar language, as discussed in the previous footnote.

Susan Diamantopoulos v. State Board of Retirement, Docket No. CR-15-253 (DALA 2016) interpreted the second of the three iterations of the regulation. Administrative Magistrate Forton concluded that "941 CMR 2.09(3)(c) is inconsistent with G.L. c. 32, § 4(1)(s), and is therefore invalid." He was referring to clause 2. Soon afterward, he concluded the same thing in *Seshadri v. State Board of Retirement*, CR-15-62 (DALA 2016) ("the part of this regulation that allows employees of private contractors to purchase creditable service under § 4(1)(s) exceeds the scope of the statute"). He was referring to 941 CMR 2.09(3)(c) in general.

In *Jonathan J. Hogan v. State Board of Retirement*, CR-16-243 (DALA 2017) (interpreting second iteration of 941 CMR 2.09(3)(c)), Administrative Magistrate Silverstein recognized that

> the "instrumentality of the Commonwealth" exception is problematic to the extent that it expands the prior contract service that may be purchased under M.G.L. c. 32, § 4(1)(s).

Administrative Magistrate Silverstein referred to the regulation in general, not only clause 2 of part of it. He attempted to harmonize the statute and regulation.

> [T]he Contributory Retirement Appeal Board (CRAB) approved DALA Magistrate Silverstein's interpretation of the regulation in a way that harmonized it with c. 32, §4(1)(s).

Eva Yutkins-Kennedy v. State Board of Retirement, CR-19-0171 (DALA 2021).

CRAB concluded that the phrase a "vendor functioning as an instrumentality of the Commonwealth" means "a public entity created by the legislature and placed within state government." *Hogan v. State Board of Retirement*, CR-16-243 (CRAB 2021).[18]

The State Board of Retirement came to agree with Administrative Magistrate Forton's

[18] This decision by the Contributory Retirement Appeal Board is not in the Social Law Library database or on Westlaw. Nonetheless, DALA's *Yutkins-Kennedy* case, which is in both databases, quotes the CRAB decision.

reasoning in *Diamantopoulos* and *Seshadri*. In *Yutkins-Kennedy*, CR-19-0171 (DALA 2021), SBR asked Administrative Magistrate Palace to rule in *Yutkins-Kennedy* against the petitioner because clause 2 was *ultra vires*.

Administrative Magistrate Palace agreed that the provision was *ultra vires* but "respectfully disagree[d] that DALA has the authority to declare" it so. She assumed, as she believed that she must, that the provision of the regulation was valid, applied it, and ruled against the petitioner.

When SBR amended the regulation most recently, the summary of the amendment in the Massachusetts Register Regulation Details referred to "narrow[ing] the definition of who qualifies as a 'contract employee' eligible for certain service purchases to align with recent administrative decisions." The amendment eliminated clause 2 (the supervisory exception), which *Diamantopoulos v. State Board of Retirement* and *Eva Yutkins-Kennedy v. State Board of Retirement* had identified as inconsistent with the statute. However, *Hogan* had identified the entire 941 CMR 2.09(3)(c) (which it called the instrumentality of the Commonwealth exception) as "problematic." Similarly, Administrative Magistrate McConney-Scheepers identified the entire 941 CMR 2.09(3)(c) as "problematic." *Paul Swoboda v. State Board of Retirement*, CR-18-0094, CR-18-0276 (DALA 2022). *Seshadri* concluded that the entire 941 CMR 2.09(3)(c) "exceeds the scope of the statute." Nonetheless, the amendment retained much of 941 CMR 2.09(3)(c).

From approximately June 1990 to June 1997, when Mr. Sorrentino worked for MHRI, which iteration of the regulation was in effect? None.

On December 15, 2006, when Mr. Sorrentino sought to buy back service for the time when MHRI employed him, which iteration of the regulation was in effect? None.

On February 25, 2019, when Mr. Sorrentino appealed SBR's decision, which iteration of the regulation was in effect? The second.

On June 6, 2022, when Mr. Sorrentino first raised, as far as I can tell, the issue of 941 CMR 2.09(3)(c), which iteration was in effect? The third and current iteration.

Do the different iterations matter in this appeal? No. Each iteration contains this language that is relevant to this appeal:

> 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 appeal does not concern clause 2, which *Diamantopoulos* and *Yutkins-Kennedy* identified as inconsistent with the statute.

If the iterations don't matter to this appeal, and the appeal does not concern clause 2, why have I spent so much time discussing the iterations and clause 2? First, I needed to confirm that the iterations and clause 2 don't matter to this appeal. Second, I want to save time and effort for any subsequent tribunal that may review this decision.

Mr. Sorrentino's claim under 941 C.M.R. 2.09(3)(c)

As stated above, Mr. Sorrentino contends that he is entitled to a state pension for his work at MHRI under 941 C.M.R. 2.09(3)(c). His contention is flawed procedurally and legally.

Mr. Sorrentino's contention is flawed procedurally because as far as I can tell, Mr. Sorrentino first raised it in his letter of June 6, 2022, which added a legal issue to the parties' joint prehearing memorandum of June 25, 2021. The joint prehearing memorandum includes a discussion of legal issues arising from the existing appeal. If a party identifies another legal issue arising from the existing appeal, it should by all means bring the issue to DALA's attention so that DALA can conduct the hearing and rule on motions to illuminate the state action or inaction

that is on appeal and legal issues arising from the existing appeal. But the joint prehearing memorandum and any additions to it are not a mechanism to expand the underlying appeal itself.

Mr. Sorrentino contends that his work at MHRI was creditable service because MHRI, quoting the regulation, "was established and is operated by the Commonwealth" or "functions as an instrumentality of[] the Commonwealth or a Commonwealth agency." (Pet. Br. 10-11)

941 C.M.R. 2.09(3)(c) does not provide a *definition* of people eligible to contribute to MSERS, namely employees of entities established by, operated by, or functioning as an instrumentality of the Commonwealth, as Mr. Sorrentino treats the regulation. (Pet. Br. 10-16) One way to know that 941 C.M.R. 2.09(3)(c) does not provide a definition is that the previous provision, 941 C.M.R. 2.09(2), is a definition section. 941 C.M.R. 2.09(3)(c) does not create a definition of "employee," "member," or "creditable service" that is an alternative definition to those of in or implied by G.L. c. 32, §§1, 3, and 4 or 941 C.M.R. 2.09(2). Rather, the regulation creates a *procedure* for people to "purchase contract service."

On December 15, 2006 Mr. Sorrentino applied to purchase contract service for the time that he worked for MHRI. On April 9, 2007 SBR denied his application because he was not an MSERS member. (Ex. 39) Mr. Sorrentino did not appeal. This issue is not on appeal and is not before me. I cannot consider and rule on it simply because it might be related to the issue that is on appeal. As I stated above, I have no authority to rectify a general situation beyond an appealed issue.

Mr. Sorrentino's contention that he is entitled to a state pension for his work at MHRI under 941 C.M.R. 2.09(3)(c) is flawed legally for a few reasons. The major reason is that DALA has already decided that under 941 C.M.R. 2.09(3)(c), MHRI was not an entity or instrumentality of the Commonwealth. *Carrow*.

In addition, MHRI was not "a public entity" and it was not "created by the legislature and placed within state government." *Hogan* (CRAB June 1, 2021); *Keith Esthimer v. State Board of Retirement*, CR-18-0577 (DALA Jan. 21, 2021) (relying on DALA's *Hogan* case, but not CRAB's *Hogan* case, which CRAB had not yet issued).

Furthermore, under both G.L. c. 32, §4(1)(s) and 941 C.M.R. 2.09(3)(c), an applicant must be a member of MSERS at the time of application. When Mr. Sorrentino applied under the regulation in 2006, he was not an MSERS member. (Ex. 39) SBR properly denied his application. (Ex. 39)

Finally, Mr. Sorrentino has focused on language "established and operated by" and "functions as an instrumentality of[] the Commonwealth or a Commonwealth agency," but does not discuss the full wording of the relevant sentence in the regulation:

> 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.

941 C.M.R. 2.09(3)(c) (emphasis added)

Mr. Sorrentino argues that SBR cannot ignore its own regulation and is bound by it. (Pet. Br. 16) But if the regulation applied to Mr. Sorrentino and his work at MHRI, SBR would not be required to allow him to purchase contract service. SBR would not even be required to *consider* Mr. Sorrentino's application to purchase contract service. SBR would have *discretion* to consider his application – especially since 941 C.M.R. 2.09(3)(c) exceeds the scope of G.L. c. 32, §4(1)(s). *Hogan* (DALA 2017), *Seshadri*.

By invoking the regulation, Mr. Sorrentino implicitly invokes the statute under which the regulation issued, although he does not mention the statute in his post-hearing brief. Mr. Sorrentino does not acknowledge that if the law and the facts were in his favor, he could recover,

at most, "up to 4 years" of creditable service under G.L. c. 32, §4(1)(s), not the seven years that he seeks.

And which four years of creditable service would that be? 1990 to 1993? Mr. Sorrentino might still not meet the requirement in G.L. c. 32, §3(6)(e) that he work for two consecutive years after reentering service.

G.L. 32, §20(5)(c)(2)

Mr. Sorrentino alleges that when began working at MHRI, he called SBR to ask about making voluntary contributions to MSERS and an SBR employee told him that it did not recognize MHRI as a state agency. (Tr. 13, 23, 32-33, 47, 73) Mr. Sorrentino did not have the name of the person he talked to or notes from the conversation 32 years before. (Tr. 47) He alleges that based on that conversation, he withdrew his deductions and interest from his MSERS account. (Tr. 31-32, 74; *see also* Affidavit attached to Response to Order to Show Cause) He contends:

> Although Mr. Sorrentino withdrew his contributions to SERS in 1990, this withdrawal occurred only because the Board erred when it informed him that he could no longer contribute or obtain additional benefits. Had the DPH-MHRI Transition[19] been properly recognized[20] at the time as continuing Mr. Sorrentino's employment with the DPH, no withdrawal would have occurred.

(Petitioner John Sorrentino's Response to Order to Show Cause 7) The remedy, he argues, is G.L. 32, §20(5)(c)(2).

Mr. Sorrentino's contention is flawed procedurally and legally. The contention is flawed procedurally because as far as I can tell, Mr. Sorrentino first raised it in his response to the order to show cause.

---

[19] Presumably, Mr. Sorrentino means his transition from working at DPH to working at MHRI. *See* Tr. 43, 46, 73.

[20] Presumably, Mr. Sorrentino means recognized by SBR.

I wrote in *Joy Cedarquist v. Bristol County Retirement System*, CR-15-232 (DALA 2018):

> [T]hese claims are not on appeal and are not before me. A petitioner cannot expand her appeal by discussing issues in her final memorandum of law that were not in her initial appeal. If a party has not applied for something, she cannot appeal not receiving it to DALA.
>
> An administrative law case regarding pensions has three stages before the appeal arrives at DALA. 1. A member of a retirement system applies for a benefit. 2. The retirement system denies it or does not act on the application. 3. The member appeals the denial or inaction. Ms. Cedarquist skipped all three steps in arguing that she was entitled to benefits reaching back to before her application.

As in *Cedarquist*, Mr. Sorrentino's claim is not on appeal and is not before me. He cannot expand his appeal by discussing an issue in a response to an order to show cause. Mr. Sorrentino did not ask SBR to correct an alleged error; SBR did not decline to correct the alleged error; and Mr. Sorrentino did not appeal the declination. (Tr. 47) Mr. Sorrentino skipped all three stages in a pension case before it arrives at DALA.

Mr. Sorrentino's contention that SBR erred – in two ways – is flawed legally. He contends that SBR erred in 1990 when it allegedly told him that MHRI was not a state agency, whereas (1) he was a state employee (Pet. Br. 2-6); and (2) he was an employee of a state vendor under 941 C.M.R. 2.09(3)(c). (Pet. Br. 6-10) Aside from these two reasons being mutually exclusive, SBR did not err; it was correct that MHRI was not a state agency. *Carrow*. *See also Bettencourt*. In addition, neither SBR nor Mr. Sorrentino could have invoked 941 C.M.R. 2.09(3)(c) in 1990. SBR issued the regulation in 2011. Mass. Register Regulation Details August 9, 2011; Regulation Filing, Aug. 5, 2011. SBR did not err and could not have erred in 1990 by not applying 941 C.M.R. 2.09(3)(c), a provision that it issued 21 years later.

So many facts have been alleged, not all of them significant and some of whose significance has not been argued (*e.g.*, Exs. 24 and 36; memoranda of understanding lacked

transfer payments (Tr. 24, 25, 27)), and so many arguments have been presented, not all of which fit together and not all of which are strong (*e.g.*, DPH's mentions of MHRI in DPH's annual reports demonstrate that DPH "operated" MHRI (Pet. Br. 7)), that it is hard to address all facts and arguments in this decision. Nevertheless, I have considered all facts and arguments carefully, reading, rereading, and parsing the briefs, transcript, and other submissions multiple times.

Conclusion and Order

SBR correctly denied Mr. Sorrentino's application for superannuation retirement benefits. I affirm its decision.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

_____

Kenneth Bresler
Administrative Magistrate

Dated: February 24, 2023