COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

NANCY SULLIVAN *Petitioner*	:	Docket No. CR-19-0100
v.	:	Date: September 15, 2023
STATE BOARD OF RETIREMENT *Respondent*	:	

Appearance for Petitioner:

Nancy Sullivan, *pro se*
Campton, NH 03223

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
Boston, MA 02108

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, a registered nurse, was previously employed by a vendor for the Commonwealth. She was the Nursing Director for the adolescent unit at the Taunton State Hospital providing services through the Department of Mental Health. She then worked for the Commonwealth as a Health Facility Inspector for the Department of Public Health. The State Board of Retirement denied her application to purchase her prior service at the state hospital. The statute regarding purchases of service as a vendor, G.L. c. 32, § 4(1)(s), is seemingly limited to contract employees; however, the governing regulation, 941 Code of Mass. Regs. § 2.09, is more expansive. Because DALA is without power to declare a regulation invalid, the only issue in this case is whether the Petitioner's service falls under the regulation. I find that it does and reverse the Board's decision.

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Nancy Sullivan, appeals the February 6, 2019, decision by the Respondent, the State Board of Retirement ("SBR" or "Board") denying her request to purchase creditable service under G.L. c. 32, § 4(1)(s). The parties each submitted pre-hearing memoranda with proposed facts and exhibits. I held hearing, virtually, via the WebEx platform on August 10, 2023. The Petitioner was the only witness. I admitted exhibits R1-R9 into evidence without objection; I kept the record open so the Petitioner could submit exhibit P1, which I now enter into evidence. The parties submitted closing briefs by September 8, 2023, at which point I closed the administrative record.

FINDINGS OF FACT

Based on the exhibits and testimony, I find the following facts:

1. The Petitioner is a registered nurse. (Petitioner testimony.)
2. She worked as a Health Facility Inspector for the Department of Public Health ("DPH") from 2002 until she retired in 2019. (Petitioner testimony; stipulated facts.)
3. Before that, she was employed by Charles River Health Management, Inc. ("Charles River") and then the Home for Little Wanderers ("Little Wanderers"), from October 1993 through March 2002. (Ex. R2; stipulated facts.)
4. These companies ran the adolescent unit at the Taunton State Hospital. The Petitioner was the Nursing Director for that unit. She reported to the Nursing Director of the hospital. (Petitioner testimony; Ex. R2; stipulated facts.)
5. Her unit was created after an Executive Order mandated adolescents could not be placed together with adult inpatients. (Ex. R2; stipulated facts.)

6. Accordingly, the Department of Mental Health ("DMH") created a competitive procurement process to choose a company to provide these inpatient services. (Exs. R2-R3.)
7. Both Charles River, and then the Little Wanderers, were chosen. They were vendors of the Commonwealth and specifically DMH. (Exs. R2-R3; stipulated facts.)
8. While working at Taunton, the Petitioner had no contract with the Commonwealth. She also contributed to Social Security. (Ex. R4; stipulated facts.)
9. These services were covered by all the state hospital policies and the Petitioner's department was integrated into the state hospital departments. (Ex. R2.)
10. The Petitioner served essentially "two masters," DMH and her employers. (Ex. R2.)
11. A job description explained she "assumes overall authority for the organization and direction of al nursing services provided at TAFPT and is responsible for goals, objectives, standards, operating policies, and procedures specific to the adolescent unit." (Ex. P1.)
12. In her testimony, the Petitioner elaborated on her duties. She explained that she oversaw approximately 50 nurses. (Petitioner testimony.)
13. Through her supervision of the staff, she was responsible for the treatment, health, and safety of all the individuals in the program. She oversaw all aspects of their care. She sat in on treatment and planning meetings, reviewed all use of restraints (medical or physical), and monitored medication compliance. She also hired and terminated employees. (Petitioner testimony.)

14. She served on numerous hospital-wide committees which dealt with restraints, infection control, human rights, and more. These committees were not limited to issues in the adolescent unit. (Petitioner testimony.)

15. She assured that the facility was compliant with state and federal regulations. (Petitioner testimony.)

16. She was also responsible for professional development, *i.e.*, training. (Petitioner testimony.)

17. Although she was a registered nurse, her primary function was not direct patient care; rather, it was overseeing the nurses who provided direct patient care. That did not mean she never provided this care herself. She did, sometimes, as she oversaw her staff. But it was not a primary component of her job. (Petitioner testimony.)

18. When she left that role, she went to work as a Health Facility Inspector for DPH. (Petitioner testimony.)

19. The job description for this position was more detailed:

    1. Inspects hospitals, nursing homes, state schools, clinics, home health agencies, facilities for the care and well-being of sick or elderly patients, city, town and school infirmaries, nurse aid training programs or other medical or nursing facilities statewide for compliance with applicable laws and the rules and regulations of the Department of Public health or related agencies necessary before issuance of renewal of license to operate or certification for Title 18 and Title 19.

    2. Performs patient centered reviews of Medicaid-eligible patients to assess the quality of care and appropriateness of placement.

    3. Makes reports concerning conditions found and recommendations for licensing, certification or the correction of any inadequacies encountered.

    4. Acts as consultant to licensee in interpreting federal and state laws and departmental rules and regulations for the care of patients.

5. Organizes and assists in in-service training programs to improve standards and quality nursing care.

6. Investigates complaints and prepares reports on findings for presentation at hearings regarding suspension of license or decertification.

7. Assists in planning new facilities or in the remodeling of existing facilities and advises on new equipment for improved care of patients.

8. Provides administrators of facilities with material pertaining to new techniques in patient care and equipment.

9. Acts as a consultant in assisting facilities to coordinate their activities with available local health services.

10. Conducts after hours on-site monitoring of problem facilities/services to assure the health and safety of patients in the event of emergencies (e.g. fires, power failure, labor action or other jeopardizing situations (e.g. poor facility management and/or poor patient care.)).

(Ex. P1.)

20. In her testimony, the Petitioner better explained what she did. Her responsibilities at DPH were substantially similar to her work at Taunton, though with DPH she oversaw facilities state-wide and not just at one hospital. For example, she monitored nursing homes, state schools, mental health facilities and department of developmental service homes. (Petitioner testimony.)

21. There was significant overlap between what she did with DMH and what she did at DPH. She was responsible for the treatment, health, and safety of all the individuals in the various facilities. She would inspect about one facility a week. But while there, she performed the same tasks she performed at the state hospital. (Petitioner testimony.)

22. For example, she would sit in on treatment and planning meetings. She would monitor restraint use and medication compliance. She assured that the facilities were compliant with state and federal regulations. (Petitioner testimony.)

23. She also served on DPH-wide committees just like the ones she served on at Taunton. (Petitioner testimony.)

24. There were two differences between the two jobs. At DPH, she was not responsible for hiring or terminating employees. And the scale of her work at DPH was bigger: at the state hospital, she oversaw one unit whereas at DPH, she oversaw numerous facilities.

25. In 2018, the Petitioner applied to purchase her prior service with Charles River and the Little Wanderers. (Ex. R1.)

26. The SBR ultimately denied her request on February 6, 2019, without explanation. (Ex. R7.)

27. The Petitioner filed a timely appeal. (Ex. R9.)

CONCLUSION AND ORDER

1. *Overview of the statutory and regulatory scheme governing purchases for prior service as a vendor.*

Pursuant to G.L. c. 32, § 4(1)(s), a member can purchase creditable service for certain prior work as a state contractor. *See Yutkins-Kennedy v. State Bd. of Ret.*, CR-19-0171, 2021 WL 9697064 (DALA Oct. 8, 2021). Based on this statute, the SBR enacted a regulation outlining the parameters of these buyback requests. *See* 941 Code of Mass. Regs. § 2.09. However, when the Petitioner performed the service in question, the regulation in place at that time arguably allowed credit for service beyond what § 4(1)(s) authorized.

Specifically, § 4(1)(s) allows credit to a member who "was compensated for service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth[.]" The regulation appeared to go further by authorizing credit, not just for contract employees, but for employees of vendors. One section allowed credit if a member worked through a vendor "established and operated by, or that functions as an instrumentality of,

the Commonwealth of a Commonwealth agency." 941 Code of Mass. Regs. § 2.09(3)(c)(1) (in effect until 2022). This is referred to as the "instrumentality clause." A second section alternatively allowed credit if a member provided service through a vendor "who was under the supervision and control of a Commonwealth agency or its employees." *Id*. at § 2.09(3)(c)(2). This is referred to as the "supervision clause." Both the statute and regulation additionally required the contract position to have been "substantially similar to the job description of the position for which the member was compensated as a contract employee." *See Id*. at § 2.09(3)(d); G.L. c. 32, § 4(1)(s).

DALA has struggled to harmonize the regulation with the governing statute because the statute does not address credit for vendors (or third-party contractors). Accordingly, the "instrumentality" clause was narrowed by CRAB, which explained it applies to members who worked for "another type of public entity, rather than a private vendor." *See Hogan v. State Bd. of Ret.*, CR-16-0243 (CRAB Jun. 1, 2021). "Instrumentality of the Commonwealth" thus refers to "a public body created by statute and placed within an existing agency or department of the Commonwealth." *Ibid*. However, the Petitioner does not rely on the "instrumentality clause" but, rather, on the "supervision clause."

Every magistrate who has evaluated the "supervision clause" agrees it exceeds the scope of the governing statute. *See Sorrentino v. State Bd. of Ret.*, CR-19-0118, 2023 WL 2351357, (DALA Feb. 24, 2023) (Mag. Bresler); *Camacho v. State Bd. of Ret.*, CR-20-0273 (DALA Dec. 23, 2022) (Mag. Wheatley); *Swoboda v. State Bd. of Ret.*, CR-18-0094 and 0276 (DALA Mar. 18, 2022) (Mag. McConney-Scheepers); *Yutkins-Kennedy*, *supra* (Mag. Palace); *Hogan v. State Bd. of Ret.*, CR-16-0243, 201 WL 3440536, (DALA Jun. 16, 2017) (Mag. Silverstein); *Diamantopoulos v. State Bd. of Ret.*, CR-15-253 (DALA Jan. 22, 2016) and *Seshadri v. State Bd.*

of Ret., CR-15-0062 (DALA Feb. 6, 2016) (Mag. Forton). One magistrate found this inconsistency meant the regulation was *ultra vires*. *See Diamantopoulos, supra*; *Seshadri, supra*. Yet, when the SBR later conceded, and argued the regulation was invalid, a different magistrate explained DALA "is without jurisdiction to declare a regulation void for exceeding the agency's statutory authority." *Yutkins-Kennedy, supra, citing Salisbury Nursing Rehabilitation Center, Inc.* v. *DALA*, 448 Mass. 365, 374-76 (2007).

In 2022, while this appeal was pending, the SBR amended the regulation to exclude the "supervisory clause" and limit the "instrumentality clause" (as defined in *Hogan*). *See* 941 Code Mass. Regs. § 2.09(3)(c) (2022). It did so to "narrow the definition of who qualifies as a 'contract employee' eligible for certain service purchases to align with recent administrative decisions." *Sorrentino, supra*, citing the summary of the amendment in the Massachusetts Register. The relevance of this amendment will be discussed below.

2. *As a factual matter, the Petitioner's service falls under the definitions in the pre-2022 regulation.*

The first question is whether the Petitioner even qualifies to purchase her prior service under the parameters of the pre-2022 regulation. If not, then no further analysis is necessary. As a factual matter, I find that the Petitioner's is entitled to purchase her prior service under the pre-2022 regulation because she was under the supervision and control of a Commonwealth agency (or its employees) and her position was substantially similar to the position she held when she became a member.[1]

[1] The regulation also requires the service to have been "performed in the standard and ongoing course of an agency's regular business function" but excludes "any such service provided as part of any specific or defined projects of that agency for which a vendor was selected." 941 Code. Mass. Regs. § 2.09(3)(c)(2). Further, "[n]o credit shall be allowed for any such service provided through a vendor for which the member shall be or is entitled to receive a

The Petitioner's service was clearly under the supervision and control of a Commonwealth agency: DMH. She worked at the Taunton State Hospital, which was run by DMH. She reported to both DMH and her employer. Her unit was covered by all state hospital policies and integrated into the state hospital departments. In short, her job would not have existed if DMH did not run an inpatient facility for adolescents.

Also, the Petitioner's position as a Health Facility Inspector was substantially similar to her position as the Nursing Director of the adolescent unit. The Petitioner explained that the duties she had at both jobs were extremely similar. The Petitioner was a credible witness; she had a good memory, she did not overstate her duties, and thoughtfully responded to questions. I therefore credit her testimony on this point.

The Board argues her duties are dissimilar because there are things she did not do for DPH which she did do for DMH, and *vice versa*. "Substantially similar" is not a precise term, but it does not mean identical. I find that the Petitioner's duties nevertheless were almost identical. The difference between the two jobs was in scale: at the state hospital she oversaw one unit; at DPH, she oversaw care across numerous facilities. But she provided the same kind of oversight in both roles. Because the Petitioner was a licensed nurse, the Board interprets that to mean the Petitioner provided direct care at Taunton but not while working for DPH. This is incorrect. The Petitioner did not provide direct care at either job, at least not as part of her core duties.

The Board analogizes this case to the facts in *Nagles v. State Bd. of Ret.,* CR-10-307 (DALA Nov. 15, 2013) and distinguishes it from *Gearan v. State Bd. of Ret.*, CR-17-115 (DALA Jan. 4, 2019). But I see it in reverse. This case is more like *Gearan* where the Petitioner's "core

retirement benefit, allowance, annuity, or pension from any other source." *Ibid*. Nothing in the record or the Board's arguments suggest these exclusions are present in this case.

duties" were the same at both jobs, even though she had additional duties at the new job. The Petitioner in *Nagles* had totally different duties at both his jobs, at least when he first started—which is when the comparison must be made. *See also Bucuzzo v. State Bd. of Ret.*, CR-14-406 (DALA Feb. 9, 2018).

3. *I do not have the power to invalidate the regulation as ultra vires*.

Because the Petitioner's service is covered under the pre-2022 regulation, that requires me to determine whether I am bound by a possibly invalid regulation. The answer is simple: I am. DALA lacks the authority to declare a regulation invalid. *See Yutkins-Kennedy*, *supra*. A party challenging a regulation has other recourses. It can file a declaratory judgment action in Superior Court. *See Greater Boston Real Estate Bd. v. Dept. of Tel. & Energy*, 438 Mass. 197 (2002). If an agency believes its own regulation is *ultra vires*, it can simply amend its regulation—like the SBR did here. But what a party cannot do is seek to invalidate a regulation at an administrative hearing. *See Salisbury*, *supra,* and cases cited. More importantly, an agency cannot enact a regulation and then argue that same regulation is invalid.[2] *See Larrabee v. MCAD*, 96 Mass. App. Ct. 516, 524 ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation."); *Salaam v. Commissioner of the Dept. of Transactional Assistance*, 43 Mass. App. Ct., 38, 43 (1997).

4. *The post-2022 regulation is not retroactive.*

A court might one day declare the pre-2022 amendment *ultra vires*, maybe even a court reviewing this decision. But because I cannot invalidate the regulation, I have two versions of the

[2] I understand this case was filed and briefed before some of the decisions upon which I rely were decided. Nevertheless, one of the Board's positions is that § 2.09(3)(c) is *ultra vires*. As explained, I cannot entertain that argument.

regulation before me: the pre-2022 version or the 2022 version. The Petitioner's service falls under the pre-2022 version but not the newer one. Generally, "[t]he applicable regulations are those in effect at the time of [a Petitioner's] application and the [Board's] decision." *Kalu v. Boston Ret. Bd.*, 90 Mass. App. Ct. 501, 505 n. 8 (2016). "[R]egulatory changes of substance apply only to events that occur after the change's effective date." *Figueroa v. Director of Dept. of Labor & Workforce Development*, 54 Mass. App. Ct. 64, 70 (2002).

One exception to the prospective application of a regulation is if it is merely curative, "i.e., changes 'designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice.'" *Id*., *quoting Canton v. Bruno,* 361 Mass. 598, 609 (1972), *in turn quoting Graham & Foster v. Goodcell,* 282 U.S. 409, 429 (1931). Applying the regulation retroactively in this case would create an injustice. The only reason this issue is even relevant is because the matter has unfortunately lingered in DALA for over four years. Had it been decided sooner, the prior regulation would be the only one in place. Applying the 2022 regulation prospectively thus avoids arbitrarily penalizing the Petitioner for the delay.

A regulation, like a statute, may also be applied retroactively if there is an "'unequivocally clear' showing of contrary legislative intent." *Smith v. Mass. Bay Transp. Authority*, 462 Mass. 370, 373 (2012). The 2022 regulation makes no mention as to whether it should, or should not be, applied retroactively. The only evidence of what it intended to accomplish is that it was passed to narrow the definition of contract employee and conform with administrative decisions. *See Sorrentino, supra*. That, however, sheds no light on the question of retroactivity. The Board could have intended to apply it prospectively to avoid any potential conflicts retroactive application would have. For example, retroactive application could require the Board take back credit it as already given which, in turn, could spur more litigation about

whether the process "deprives members of the 'core of . . . reasonable expectations.'" *Madden v. CRAB*, 431 Mass. 697, 701 (2000). On the other hand, it is *possible* the Board intended the regulation to apply retroactively. But that is not "unequivocally clear" and, absent more, I apply the presumption the regulation looks to the future.

Therefore, the Board's decision denying the Petitioner's application to purchase this prior service is **reversed**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate