

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

JAY SWEET,

Petitioner-Appellant

v.

STATE BOARD OF RETIREMENT,

Respondent-Appellee.

CR-14-719

DECISION AFTER REMAND

The petitioner-appellant Jay Sweet appeals from a July 2, 2021 decision of the Division of Administrative Law Appeals (DALA) concluding that an October 24, 2018 DALA decision's finding regarding his start date as Teacher E/Principal with the Department of Corrections is correct and that Mr. Sweet is, therefore, not entitled to Group 2 classification. The July 2, 2021 DALA decision was issued pursuant to a December 10, 2020 Decision and Remand Order by us. The magistrate held a hearing on May 5, 2021 and admitted an additional four exhibits into evidence.¹ Mr. Sweet testified on his own behalf, and the State Board of Retirement (Board) offered no witnesses. The DALA decision is dated July 2, 2021. Mr. Sweet filed a timely appeal to us.

¹ Exs. 7-10.

After reviewing the evidence in the record and the arguments presented by both parties, we adopt the Findings of Fact in the July 2, 2021 and October 24, 2018 DALA decisions as our own, with minor modifications,² and we incorporate both decisions by reference. For the reasons below, we affirm the July 2, 2021 DALA decision.³ **Affirm.**

Background. Mr. Sweet began working for the Department of Corrections (DOC) on July 10, 2011.⁴ Initially, Mr. Sweet worked as a Deputy Director/Program Manager VI (Deputy Director) in DOC's Division of Training and Education.⁵ Later, Mr. Sweet was appointed as Teacher E/Principal (Principal). The date on which Mr. Sweet began working as Principal was disputed by the parties and is the central issue before us.

The DOC terminated Mr. Sweet's employment in August 2014.⁶ Mr. Sweet retired in September 2014 and sought Group 2 classification for his work as

² We amend Finding of Fact #1 in the July 2, 2021 DALA decision to replace "June 25, 2011" with "June 23, 2011." We amend Finding of Fact #8 in the October 24, 2018 DALA decision to state: "In a letter dated October 30, 2014, the Board notified Mr. Sweet that it had voted to deny his request for Group 2 classification."

³ In our December 10, 2020 Decision and Remand Order, we affirmed the magistrate's October 24, 2018 decision to deny Mr. Sweet Group 2 classification for his position as Deputy Director.

⁴ 2021 FF #11; Exs. 3, 10. We use the prefix "2021 FF" for findings of fact from the July 2, 2021 DALA decision and the prefix "2018 FF" for findings of fact from the October 24, 2018 DALA decision.

⁵ 2021 FF #2; Exs., 3, 9.

⁶ 2021 FF #5-6; Ex. 7.

Principal.⁷ In a letter dated October 30, 2014, the Board informed Mr. Sweet that it had voted to deny his request.⁸ Mr. Sweet timely appealed to DALA.⁹

DALA held a hearing on June 19, 2018, and the magistrate admitted Mr. Sweet's Exhibits A-C and the Board's Exhibits 1-6. On October 24, 2018, DALA issued a decision affirming the Board's decision. DALA first concluded that Mr. Sweet was not entitled to Group 2 classification for his employment as Deputy Director because he did not meet his burden of proving that his regular and major duties as Deputy Director required him to have the care, custody, control, instruction or other supervision of inmate students in the programs he oversaw.¹⁰

The magistrate also concluded that Mr. Sweet was not entitled to Group 2 classification for his work as Principal because he did not show that he had performed the duties of Principal for at least 12 months, as is required by G.L. c. 32, § 3(2)(g).¹¹ The magistrate credited the Group Classification Questionnaire in the record, which reflected that Mr. Sweet was appointed to the Principal position on September 1, 2013 and performed those duties until August 30, 2014 (a period of 11 months and 29 days), over Mr. Sweet's testimony that he had performed the

⁷ 2018 FF #7; Ex. 3.

⁸ 2018 FF #8; Ex. 1.

⁹ 2018 FF #9; Ex. 2.

¹⁰ Oct. 24, 2018 DALA decision, p. 4-5. The record indicates that Mr. Sweet had not actually sought classification in Group 2 for the Deputy Director position. Rather, he requested Group 2 classification for the Principal position, and it was the Board's denial of that specific request that was appealed to DALA. Exs. 2 and 3. Regardless, as noted earlier, we affirmed DALA's decision to deny Mr. Sweet Group 2 classification for the Deputy Director position in our December 10, 2020 Decision and Remand Order, and we do not revisit that issue here.

¹¹ Oct. 24, 2018 DALA decision, p. 5.

Principal duties for two or more years prior to his retirement.¹² The magistrate stated that because Mr. Sweet had not held the position of Principal for 12 months, it was not necessary to analyze the position.¹³

Mr. Sweet timely appealed to CRAB and moved to expand the record to include two documents: (1) an August 25, 2014 termination letter from Veronica Madden, Esq. of the DOC (Madden letter), which stated that Mr. Sweet had been appointed principal at the school at MCI-Concord and North Eastern Correctional Center, Concord in September 2012; and (2) a June 9, 2015 decision by a hearing officer for the Department of Unemployment Assistance (DUA decision) that stated that Mr. Sweet had worked full time as a principal from July 10, 2011 until August 25, 2014. If either of these start dates (*i.e.*, September 2012 or July 10, 2011) were correct, Mr. Sweet might have performed the duties of Principal for more than one year and could possibly be entitled to Group 2 classification.

In a December 10, 2020 decision, we allowed Mr. Sweet's motion to expand the record, and we remanded the matter to DALA to consider whether the dates in the Madden letter and DUA decision were typographical or scrivener's errors on matters not central to the documents in question, or whether they called into question the original finding concerning the start date for Mr. Sweet's position as Principal. In the alternative that DALA finds Mr. Sweet failed to meet the durational requirement under § 3(2)(g) for the Principal position, we also affirmed

¹² Oct. 24, 2018 DALA decision, p. 5; 2018 FF #5; Ex. 3.

¹³ Oct. 24, 2018 DALA decision, p. 5.

the magistrate's decision to deny Mr. Sweet Group 2 classification for his Deputy Director position.

DALA held a hearing on May 5, 2021, and the magistrate admitted the Madden letter and DUA decision as Exhibits 7 and 8, respectively.¹⁴ On June 22, 2021, the magistrate issued an Order Regarding Two New Exhibits to the parties. The order stated that the magistrate had located two new documents in the file: (1) a letter dated March 25, 2013 from the DOC, appointing Mr. Sweet as Teacher E/Principal as of September 1, 2013; and (2) a letter dated June 23, 2011 from the DOC, appointing Mr. Sweet as Program Manager/Deputy Director as of July 10, 2011. The magistrate ordered the parties to send their positions on the admission of these documents as Exhibits 9 and 10 by June 29, 2021. Mr. Sweet objected to the admission of the two documents, and the Board had no comment. On June 29, 2021, the magistrate issued an order admitting the two new documents as Exhibits 9 and 10. In the June 29, 2021 order, the magistrate explicitly withdrew an order of the prior magistrate stating that only Exhibits 7 and 8 would be considered on remand.¹⁵

DALA issued a decision on July 2, 2021 in which it concluded that the start dates in the Madden letter and the DUA appeal were incorrect and did not call into question Mr. Sweet's start date as Principal in the Group Classification

¹⁴ The magistrate who presided over the May 5, 2021 hearing was not the same magistrate who presided over the June 19, 2018 hearing.

¹⁵ We do not have a copy of this order and rely on the magistrate's characterization of it.

Questionnaire (i.e., September 1, 2013) on which the October 24, 2018 DALA decision relied. DALA therefore concluded that Mr. Sweet was not entitled to Group 2 classification.¹⁶

Mr. Sweet timely appealed to CRAB and submitted a memorandum on December 15, 2021 with his objections.¹⁷ On January 1, 2023, Mr. Sweet moved to expand the record to include a December 26, 2022 letter to the Massachusetts State Board of Retirement from Veronica Madden in which she stated:

[I]n June 2012 I assigned Mr[.] Sweet to serve as Principal at MCI-Concord and the Northeast Correctional Center, to perform all the duties and responsibilities of that position. This was done as the Department of Correction was denied permission to post and hire for that Teacher E position. He continued in that position of Teacher E through the end of August, 2014 . . . In June, 2013, I appointed Mr. Sweet into the vacant Teacher E/Principal position at MCI-Concord and Northeast Correctional Center.

Ms. Madden also stated in the December 26, 2022 letter that she was writing at Mr. Sweet's request. The Board filed an opposition to Mr. Sweet's motion to expand the record on January 9, 2023.

Discussion. We address the following issues in turn: (1) Mr. Sweet's January 1, 2023 motion to expand the record; and (2) Mr. Sweet's objections to the July 2, 2021 DALA decision.

1. Expansion of the Record.

¹⁶ July 2, 2021 DALA decision, p. 12.

¹⁷ Mr. Sweet also raised objections about the magistrate who oversaw the June 19, 2018 hearing. We do not address those objections here because the focus of our review is exclusively the May 5, 2021 hearing and the July 2, 2021 DALA decision. Mr. Sweet had the opportunity to raise objections about the June 19, 2018 hearing and the resulting October 24, 2018 DALA decision in his previous appeal to CRAB.

We deny Mr. Sweet's motion to expand the record to include the December 26, 2022 letter from Ms. Madden. Under the Formal Rules of the Standard Rules of Adjudicatory Practice and Procedure (Formal Rules), which govern proceedings before CRAB and DALA, a party may move to reopen the record after the close of a hearing and prior to a decision being issued if there is "new evidence to be introduced." 801 CMR 1.01(7)(k). The Formal Rules in turn define "new evidence" as "newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it." 801 CMR 1.01(7)(k). In Mr. Sweet's prior proceeding before us, we made an exception to 801 CMR 1.01(7)(k) and allowed his motion to expand the record, observing that we had previously allowed post-hearing motions to expand the record when an exhibit was relevant to a material issue and to do so would be in the interests of justice.

Here, Mr. Sweet's January 1, 2023 motion to enlarge the record does not fall within the parameters of 801 CMR 1.01(7)(k). The motion was made after the October 24, 2018 and May 5, 2021 DALA hearings. Further, the motion does not appear to concern newly discovered evidence that could not have been discovered by Mr. Sweet by due diligence at the time of either hearing. Mr. Sweet has provided no reason why he could not have obtained the evidence in Ms. Madden's December 26, 2022 letter – which she stated she wrote at Mr. Sweet's request – before either DALA hearing. We have already given Mr. Sweet one opportunity to reopen the record, and the interests of justice do not compel us to do so again. We therefore deny Mr. Sweet's January 1, 2023 motion.

2. Mr. Sweet's Objections to the July 2, 2021 DALA Decision

Mr. Sweet made a number of objections to the July 2, 2021 Decision. We address these objections, none of which we find persuasive, below.

Crediting of Group Classification Questionnaire. Mr. Sweet objected to the magistrate's crediting of the Group Classification Questionnaire over the Madden letter, alleging that he testified that an imposter signed the questionnaire and that an HR employee changed his employment dates without his approval.¹⁸ Mr. Sweet also asserted in his objections that the Madden letter was accurate and reliable, stating that "Ms. Madden does not make mistakes" and "is trustworthy and honorable."¹⁹

We reject Mr. Sweet's objection to the magistrate's crediting of the Group Classification Questionnaire. Mr. Sweet's objection is, at root, an argument that the magistrate made incorrect factual findings based on the evidence presented at the hearing. However, the magistrate's factual findings are entitled to deference, and we must articulate our reasons for rejecting any findings. *Vinal v. CRAB*, 13 Mass.App.Ct. 85, 102 (1982). From the face of the July 2, 2021 DALA decision, it appears that the magistrate weighed contradictory documentary evidence and Mr. Sweet's testimony, assessed Mr. Sweet's credibility, and articulated a well-reasoned

¹⁸ Appellant's Dec. 15, 2021 Memorandum, p 4.

¹⁹ Appellant's Dec. 15, 2021 Memorandum, p. 5

conclusion. We see no reason for rejecting any of the magistrate's findings, and we decline to do so.²⁰

Disregard of Former Magistrate's Order and CRAB Remand Order.

Mr. Sweet objected to the July 2, 2021 DALA decision on the grounds that the magistrate at the May 5, 2021 hearing disregarded the CRAB remand order and an order by the former magistrate stating that only Exhibits 7 and 8 would be considered on remand.²¹ Although the precise nature of Mr. Sweet's objection is unclear, he appears to object to the magistrate's admission and consideration of the DOC appointment letters (Exhibits 9 and 10), as well as the magistrate's consideration of documents other than Exhibits 7 and 8.

We reject Mr. Sweet's objections. In the July 2, 2021 decision, the magistrate hewed closely to our remand order and focused on whether the Madden letter and the DUA decision called into question the original finding concerning Mr. Sweet's start date as Principal. We find that it was appropriate for the magistrate to admit Exhibits 9 and 10, which the magistrate said were in the file, because they corroborated the Group Classification Questionnaire and were therefore relevant to the question of whether the dates in the Madden letter and DUA decision were accurate.

²⁰ Further, Mr. Sweet did not object to the October 8, 2018 DALA decision on the grounds that the Group Classification Questionnaire was signed by an imposter and that an HR employee changed his employment dates without his approval. Since the October 8, 2018 DALA decision relied on the Group Classification Questionnaire, Mr. Sweet should have made these objections when he appealed that initial decision to us.

²¹ Appellant's Dec. 15, 2021 Memorandum, p. 6.

Denial of Opportunity to Call Witness. Mr. Sweet further objected to the July 2, 2021 DALA decision on the grounds that (1) the former magistrate did not reschedule the June 19, 2018 hearing after Mr. Sweet's witness was unable to attend the hearing because their car broke down; and (2) the magistrate denied a June 29, 2021 motion by Mr. Sweet requesting witnesses.²² Mr. Sweet did not provide a transcript, a motion, or any other document in support of the allegations in these objections. Nonetheless, we conclude that even if the allegations are true, Mr. Sweet's objections do not provide a basis for vacating the July 2, 2021 DALA decision.

First, we will not entertain Mr. Sweet's objection concerning his alleged inability to call a witness at the June 29, 2018 hearing because our review focuses solely on the May 5, 2021 hearing and July 2, 2021 DALA decision.²³ Second, assuming Mr. Sweet did in fact submit a motion on June 29, 2021 to call witnesses, the magistrate committed no error in denying such motion, given that the May 2, 2021 hearing had already occurred. Any such motion would have effectively been a motion to reopen the record under 801 CMR 1.01(7)(k), and Mr. Sweet did not allege in his objections that the hearing should have been reopened because he wished to

²² Appellant's Dec. 15, 2021 Memorandum, p. 1 and 5.

²³ Mr. Sweet stated in his January 31, 2019 memorandum in support of his appeal of the October 24, 2018 DALA decision that he planned to call a witness at the June 29, 2018 hearing, but the witness' car broke down on the way. Mr. Sweet did not state in the January 31, 2019 memorandum that the magistrate should have rescheduled the hearing.

introduce newly discovered evidence which by due diligence he could not have discovered at the time of the hearing, as 801 CMR 1.01(7)(k) requires.

Denial of Attorney. Mr. Sweet also objected to the July 2, 2021 DALA decision on the grounds that he was denied the opportunity to have a lawyer. Mr. Sweet wrote that on or about July 2, 2021, he requested additional time to find a lawyer and that the magistrate denied his request, stating that the May 5, 2021 hearing had already occurred and that Mr. Sweet should have filed a motion for time to locate a lawyer at a reasonable time before May 5, 2021.²⁴ Here too, Mr. Sweet did not provide documents in support of the allegations in his objection, but we conclude that even if his allegations are true, they do not provide a basis to vacate the July 2, 2021 DALA decision.

Under the Formal Rules, parties have the right to representation in adjudicatory proceedings. 801 CMR 1.01(3). However, Mr. Sweet stated that he made his request for additional time to find a lawyer on July 2, 2021, which was nearly two months after the May 5, 2021 hearing, more than three weeks after the magistrate's June 9, 2021 deadline for filing a post-hearing brief,²⁵ and more than three years after the initial June 19, 2018 hearing. Mr. Sweet did not provide any reason for waiting so long to try to find an attorney. Given this timing, we conclude that any denial of Mr. Sweet's July 2, 2021 request would not have been in error. Mr. Sweet had ample time to arrange representation, and, according to his own

²⁴ Appellant's Dec. 15, 2021 Memorandum, p. 7.

²⁵ July 2, 2021 DALA decision, p. 6.

objection, he did not do so. Administrative proceedings cannot be prolonged because of a party's unjustified delay; at a certain point, there needs to be finality. *See, e.g.*, *Ott v. Board of Medicine*, 276 Mass. 566, 573-74 (1931)(no abuse of discretion by the board in refusing to continue hearing or to reopen hearing several days after it had been concluded where petitioner did not attempt to retain counsel until the night before the hearing).²⁶

Bias. Finally, Mr. Sweet objects to the July 2, 2021 DALA decision on the grounds that the magistrate was biased. In support of his allegation of bias, Mr. Sweet states that the magistrate berated him for close to 12 minutes about *ex parte* communications, which, according to Mr. Sweet, showed that the magistrate was ready to rule against Mr. Sweet's position. Mr. Sweet also stated that the magistrate bullied him and asked questions that were aggressive, disrespectful, and confusing.²⁷ Mr. Sweet did not provide a transcript of the May 2, 2021 hearing, so we cannot evaluate what the magistrate said to Mr. Sweet.²⁸ However, we conclude that, assuming the facts undergirding Mr. Sweet's allegations of bias to be true, the magistrate did not exhibit bias such that the July 2, 2021 DALA decision should be

²⁶ We note that in the criminal context, where, unlike here, there is a constitutional right to counsel, Massachusetts Supreme Judicial Court has stated that “[a] court faced with a dilatory defendant has the power to take reasonable measures to keep proceedings forward, even if a defendant’s refusal to arrange representation leaves him without counsel.” *Com. v. Jackson*, 376 Mass. 790, 796 (Mass. 1978).

²⁷ Appellant’s Dec. 15, 2021 Memorandum, p. 3.

²⁸ Our longstanding Standing Order requires the appellant to provide us with the transcript of the relevant portion of the proceedings if our passing on an objection may require a review of the oral proceedings before DALA. Standing Order 2008-01, ¶ (4)(a)(3)(c).

vacated. The Supreme Judicial Court has said that bias requiring disqualification must ordinarily arise from an extrajudicial source and not from something learned from participation in the case. *Haddad v. Gonzalez*, 410 Mass. 855, 863-64 (1991), *citing Care and Protection of Martha*, 407 Mass. 319, 329-30 (1990)(citing cases). Applying the same general principle here, we note that Mr. Sweet has not alleged that the magistrate was biased against him because of conduct outside of the hearing process. Rather, Mr. Sweet appears to allege that the magistrate was biased against him because of his hearing-related conduct (e.g., *ex parte* communications). We therefore reject Mr. Sweet's objection based on the magistrate's alleged bias.

Conclusion. We affirm the magistrate's conclusion in the July 2, 2021 DALA decision that Mr. Sweet's start date as Principal was September 1, 2013. Based on that conclusion, we further affirm the magistrate's decision that Mr. Sweet was not entitled to Group 2 classification for his work as Principal because he was not actively performing the duties of Principal for at least 12 consecutive months before retirement or termination, as is required under G.L. c. 32, § 3(2)(g) for Group 2 classification for members entering service prior to April 2, 2012.²⁹ **Affirm.**

SO ORDERED.

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²⁹ We make no finding as to whether the duties of Principal actually warrant Group 2 classification. As with the October 24, 2018 DALA decision, such a finding is unnecessary here because we conclude that Mr. Sweet's tenure as Principal did not meet the durational requirement of G.L. c. 32, § 3(2)(g).

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