

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Elizabeth Sydney,
Petitioner,

No. CR-20-268

Dated: October 27, 2023

v.

Marlborough Retirement Board,
Respondent.

Appearance for Petitioner:
Elizabeth Sydney (pro se)

Appearance for Respondent:
Michael Sacco, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner is not entitled to purchase retirement credit for a period of part-time pre-membership service. The purchase in question does not satisfy the respondent board's "appropriate rules and regulations." G.L. c. 32, § 4(2)(c).

DECISION

Petitioner Elizabeth Sydney appeals from a decision of the Marlborough Retirement Board denying her application to purchase retirement credit for a period of pre-membership service. The appeal was submitted on the papers. 801 C.M.R. § 1.01(10)(c). I admit into evidence exhibits marked 1-5 in DALA's case file.¹

Findings of Fact

The following facts are not in dispute.

¹ Exhibits 1-4 are listed in and attached to the board's prehearing memorandum. Exhibit 5 is an email attached to Ms. Sydney's prehearing memorandum.

1. Ms. Sydney is an employee of the Marlborough public schools. During the years 2009-2016, she worked part-time as a substitute teacher. Her workload then ranged broadly, from 93 hours to 960 hours per year. She was not a member of a public retirement system at that time. (Exhibits 1, 2, 5.)

2. In late 2016 or early 2017, Ms. Sydney transitioned into a full-time position, apparently not as a teacher. She then became a member of the retirement system administered by the board. (Exhibits 1, 2, 5.)

3. Subsequently, Ms. Sydney applied to purchase credit for her 2009-2016 pre-membership service. The board denied the application, and Ms. Sydney timely appealed. (Exhibits 3, 4.)

Analysis

The retirement allowance of a Massachusetts public employee is based in part on the duration of the employee's "creditable service." G.L. c. 32, § 5(2). Ordinarily, employees are credited with service they performed for Massachusetts governmental units while maintaining membership in Massachusetts public retirement systems. § 4(1)(a).

In certain circumstances, members may purchase credit for work that otherwise would not be creditable. Such purchases may be made only on the authority of specific statutory provisions. *See Mello v. MTRS*, No. CR-19-3, 2023 WL 4548406, at *2 (DALA July 7, 2023). CRAB has identified G.L. c. 32, §§ 3(5) and 4(2)(c) as "two provisions that potentially apply to the issue of prior non-member part-time service." *Santos v. MTRS*, No. CR-04-70, at *2 (CRAB Mar. 6, 2006).

Section 3(5) consists of multiple alternative clauses. The pertinent clause relates to members "who rendered service in any governmental unit other than that by which [they are] presently employed, in a temporary, provisional, or substitute position." This clause is

inapplicable to Ms. Sydney, whose pre-membership employer was the same “governmental unit” in which she serves today. *See generally* G.L. c. 32, § 1 (“governmental unit”).

Section 4(2)(c) does not present this problem, because it addresses “previous periods of . . . service[] in the same governmental unit.” *Tremblay v. Leominster Ret. Bd.*, No. CR-07-685 (CRAB May 19, 2011). The rule stated in § 4(2)(c) is that “the board may allow credit . . . under appropriate rules and regulations . . . for any previous period of part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service rendered by [the member] . . . while [she] was not eligible for membership.” *See generally Plymouth Ret. Bd. v. Contributory Ret. Appeal Bd.*, 483 Mass. 600, 604 (2019).

The board observes that the catalogue of types of prior service appearing in § 4(2)(c) does not include “substitute” service, a category mentioned in § 3(5). The board extrapolates from this observation that work as a substitute teacher is not eligible for purchase under § 4(2)(c). But CRAB has stated that § 4(2)(c) is the *broader* of the two provisions, in the sense that it covers “part time” service. *Santos, supra*, at *2-3. Likewise, it is only § 4(2)(c) that discusses “intermittent” work. It seems improbable that the Legislature, while stretching § 4(2)(c) to cover less-than-full-scale work, intended to exclude “substitute” positions in particular. *Cf. Bank of Am., N.A. v. Rosa*, 466 Mass. 613, 619-20 (2013). It is more likely that the Legislature viewed substitute employees as covered implicitly by § 4(2)(c)’s broad categories; an explicit reference to “substitute” employees was warranted in § 3(5) only to clarify that even that narrower provision may be satisfied by substitute work (when performed on a full-time schedule). *Cf. Pelletier v. MTRS*, No. CR-19-301, 2023 WL 3434952, at *3 n.5 (DALA May 8, 2023).

In any event, any purchase under § 4(2)(c) depends on compliance with the pertinent board’s “appropriate rules and regulations.” The Legislature thus grants each board substantial authority to determine—through properly promulgated, generally applicable rules—the types of part-time service that may and may not be purchased. *See Plymouth*, 483 Mass. at 604.

A regulation of the Marlborough board states that “[c]redit will not be granted for non-contributory service unless that service would qualify the individual for membership.” Under another of the board’s regulations, “employees who work less than 1040 hours per year are ineligible for . . . membership.” *See* PERAC, Marlborough Retirement Board Supplemental Regulations, <https://www.mass.gov/info-details/marlborough-retirement-board-supplemental-regulations> (last visited Oct. 23, 2023). Ms. Sydney offers no challenge to the validity of these provisions. *See Massachusetts Teachers’ Ret. Sys. v. Contributory Ret. Appeal Bd.*, 466 Mass. 292, 296-97 (2013).² Their effect is to make her ineligible for the purchase she seeks, because throughout her pre-membership, non-contributory service, Ms. Sydney worked less than 1040 hours per year.

Ms. Sydney emphasizes that, as a substitute teacher, she performed many hours of work. She describes herself as a reliable, dependable, professional, competent employee. The board does not demur. But entitlements under the retirement law are defined by rigid statutory and regulatory rules. Administrative agencies lack the authority to diverge from those rules on the basis of fairness or sympathy. *See Clothier v. Teachers’ Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010); *Bristol Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 446, 450-51 (2006); *Reed v. Essex Reg’l Ret. Bd.*, No. CR-20-124, at *11 (DALA July 2, 2021).

² It does appear that the board’s regulations make the universe of members who can purchase prior part-time service vanishingly small.

Conclusion and Order

The board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate