

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Christopher Tomeo,
Petitioner,

No. CR-22-0189

Dated: March 8, 2024

v.

State Board of Retirement,
Respondent.

Appearance for Petitioner:
Christopher Tomeo (pro se)

Appearance for Respondent:
Brendon McGough, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

Before he became a member of a public retirement system, the petitioner worked for two years in the service of a vendor to the Commonwealth. He did not prove that, during those years, his work was supervised and controlled by the Commonwealth or its agents. The petitioner therefore is not entitled to purchase retirement credit for his pre-membership service under G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c).

DECISION

Petitioner Christopher Tomeo appeals from a decision of the State Board of Retirement denying his application to purchase credit for a period of pre-membership service. Because neither party wished to present live testimony, the appeal was submitted on the papers. 801 C.M.R. § 1.01(10)(c). I admit into evidence an affidavit from Mr. Tomeo, his exhibits marked A-R, and the board's exhibits marked 1-6.

Findings of Fact

I find the following facts based on a preponderance of the record evidence.

1. Mr. Tomeo was hired by the Somerville Transition Shelter in October 2004. The shelter's purpose was to house and monitor youths committed to the custody of the Department of Youth Services (DYS). The shelter was run by the nonprofit corporation Community Resources for Justice (CRJ). (Exhibits A-D, 1, 6; Tomeo Aff. ¶¶ 1-8.)

2. The shelter's operations were governed by certain DYS-promulgated policies. The shelter's staff members underwent DYS-prescribed training sessions. They attended weekly and monthly meetings with state employees. They also reported information to state employees on other occasions, both in person and by telephone. (Tomeo Aff. ¶¶ 6, 9-12.)

3. Mr. Tomeo became a permanent DYS employee in September 2006. In 2018, he applied to purchase credit for his pre-membership service with the shelter. The board denied the application in May 2022, and Mr. Tomeo timely appealed. (Exhibits E-H, 2-5; Tomeo Aff. ¶¶ 13, 14.)

Analysis

The retirement benefits of a public employee depend in part on the duration of the employee's creditable service. Employees generally are credited with the periods during which they worked for governmental units while maintaining membership in public retirement systems. *See* G.L. c. 32, § 4(1)(a). But various statutory provisions allow employees to purchase credit for service that predated their system membership.

The provision at issue here is § 4(1)(s), which authorizes certain purchases of "service to the commonwealth as a contract employee." "Contract employees" in this context are workers who "enter into time-limited contracts to work for the Commonwealth." *Young v. Contributory Ret. Appeal Bd.*, 486 Mass. 1, 3-4 (2020). *Cf. Flynn v. State Bd. of Ret.*, No. CR-21-653, 2024 WL 664421, at *3 n.3 (DALA Feb. 9, 2024). Purchases under § 4(1)(s) are available only to

current members of the state retirement system and are subject to certain additional statutory terms.

A regulation promulgated by the respondent board specifies various circumstances under which an individual is considered to have been a “contract employee.” 941 C.M.R. § 2.09. The regulation underwent a significant amendment in March 2022. Recent decisions have taken the view that a purchase application under § 4(1) is governed by the version of § 2.09 that was in effect when the application was filed. *Sullivan v. State Bd. of Ret.*, No. CR-19-100, 2023 WL 6195150, at *6 (DALA Sept. 15, 2023); *Grant v. State Bd. of Ret.*, No. CR-22-542, 2023 WL 9022696, at *3 (DALA Dec. 22, 2023). The board’s stout disagreement with that analysis would not change the result here.¹ This decision therefore assumes that Mr. Tomeo’s case is governed by the pre-amendment version of § 2.09.

In certain circumstances, paragraph (3)(c) to the pre-amendment version of § 2.09 stretched the term “contract employee” to reach “employees of a vendor.” In pertinent part, the regulation said:

(c) *Service Through a Vendor or Contractor.* The contract service being purchased must have been service as a “contract employee” of the Commonwealth. . . . The Board may consider as eligible contract service: . . .

2. such service, as verified by the Board, provided through a vendor by an individual:

¹ The board asserts that it intended for the March 2022 amendment to apply retroactively. It explains that the purpose of the amendment was to “align [§ 2.09] with recent administrative decisions.” 1465 Mass. Reg. 55. Those decisions had described the pre-amendment version of § 2.09 as ultra vires. *See infra* note 2. Given these circumstances, the board invokes the rule that ascribes “retroactive effect to curative changes, i.e., changes designed to remedy mistakes and defects in the administration of government[,] where the remedy can be applied without injustice.” *Figueroa v. Director of Dep’t of Lab. & Workforce Dev.*, 54 Mass. App. Ct. 64, 70 (2002) (citations and quotation marks omitted).

- 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

The parties agree that CRJ was a “vendor” and that Mr. Tomeo worked “through” that entity. They agree that Mr. Tomeo performed his services in the “standard and ongoing course” of DYS’s regular operations. The dispute concentrates on whether Mr. Tomeo was subject to DYS’s “supervision and control.”

The case law has not spoken in detail about the meanings of “supervision” and “control” in this context. Appellate opinions from other areas of the law provide clues. The Supreme Judicial Court once wrote that “the words ‘supervision and control’ comprehend an exercise of restraint or direction, of authority over, of domination and command.” *Fluet v. McCabe*, 299 Mass. 173, 179 (1938). More recent opinions unpack each of the phrase’s two words. “[T]o supervise’ means to oversee, to have oversight of, to superintend the execution of . . . to inspect with authority.” *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549, 565 (2015). “‘Control’ means the authority to regulate, direct or dominate.” *Golubek v. Westfield Gas & Elec. Light Bd.*, 32 Mass. App. Ct. 954, 955 (1992). It may be fair to generalize that to supervise and control someone is to wield the authority to tell them what to do.

Even without elaborate conceptual analyses, administrative decisions have applied the supervision-and-control rule in instructive circumstances. The petitioner in *Yutkins-Kennedy* met the rule’s demands when agents of the Commonwealth defined her assignments, reviewed her work, established her schedule, and furnished her with a workspace. *Yutkins-Kennedy v. State Bd. of Ret.*, CR-19-0171, 2021 WL 9697064, at *2, *6 (DALA Oct. 8, 2021). The petitioner in *Sullivan* satisfied the rule by working out of a state hospital, participating in its workflow,

reporting to both state and private supervisors, and answering to state-promulgated policies.

Sullivan, 2023 WL 6195150, at *5. *See also Lak v. State Bd. of Ret.*, No. CR-21-384, 2023 WL 8122654, at *4 (DALA Nov. 17, 2023).

Last but not least, the statutory context offers direction. The “contract employees” whose purchases the Legislature intended to authorize in § 4(1)(s) are people who “work[ed] for the Commonwealth,” albeit impermanently. *See Young*, 486 Mass. at 3-4. The board’s implementing regulation must be interpreted in light of that statutory intent. *See Friends & Fishers of Edgartown Great Pond, Inc. v. Department of Env’tl. Prot.*, 446 Mass. 830, 837 (2006). In order for it to be possible to view a vendor’s employee as someone who worked for the Commonwealth, the Commonwealth’s agents would need to have exercised especially tight, vigorous, employer-style supervision and control over that employee.²

“[I]n all issues determining entitlement[,] and absent statutory presumptions, the Petitioner bears the burden of proof.” *Goldstein v. MTRS*, No. CR-03-176, at *4 (CRAB Feb. 4, 2005). Mr. Tomeo has not carried his burden of proving that he worked under the Commonwealth’s “supervision and control” during the pertinent period. It is true that certain

² Serial DALA decisions have concluded that the pertinent portion of § 2.09, pre-amendment, “exceed[ed] the scope of the governing statute.” *Sullivan*, 2023 WL 6195150, at *4 (collecting cases). The essential rationale of the decisions has been that: “Section 4(1)(s) requires the member to have rendered service to the Commonwealth as a contract employee. The regulation, in contrast, entitles employees of vendors and third-party contractors to creditable service.” *Diamantopoulos v. State Bd. of Ret.*, No. CR-15-253 (DALA Jan. 22, 2016). These juxtaposed statute and regulation are perhaps reconcilable in light of the labor law’s “concept of joint employment.” *Jinks v. Credico (USA) LLC*, 488 Mass. 691, 701 (2021). In some circumstances, that concept permits a worker to be viewed simultaneously as the employee of two entities who both control the employee’s work. *Id.* at 703. Accordingly, in an appropriate case—unlike those that DALA’s magistrates have seen to date—it may be possible to find that a particular “employee[] of a vendor” under 941 C.M.R. § 2.09(3)(c) was also a “contract employee” of the Commonwealth under G.L. c. 32, § 4(1)(s).

Commonwealth-promulgated policies and rules applied to Mr. Tomeo's work. But that is true of *all* workers of the Commonwealth's vendors. Mr. Tomeo has not shown that instructions and feedback from the Commonwealth actually dictated his activities on a real-life, routine basis. He has not shown that the Commonwealth's agents wielded the authority to tell him what to do. All in all, the record does not establish that the Commonwealth directed and dominated Mr. Tomeo's work in anything like the style of an ordinary employer. Contrast *Yutkins-Kennedy, supra*, and *Sullivan, supra*.

Conclusion and Order

In view of the foregoing, the board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate