

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS**

**May 11, 2017**

**Docket No. CR-13-147**

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**MARILYN J. VOLPE, Petitioner**

**v.**

**MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM, Respondent**

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**DECISION AND ORDER ON MOTION TO  
CONDUCT PREHEARING DISCOVERY**

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**Appearance for Petitioner:**

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**Appearance for Respondent:**

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**Administrative Magistrate:**

Mark L. Silverstein, Esq.

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*Summary of Decision*

A retired public school teacher appealing the denial of retirement credit for prior teaching at a nonpublic school between 1977 and 1992 (the Boston School for the Deaf) because she was entitled to receive a retirement allowance from the school's private retirement fund and received a lump-sum distribution from it upon leaving that position, *see* M.G.L. c. 32, § 4(1)(p), may subpoena records regarding contributions to, and her distribution from, the private pension plan's successor administrator and actuary, and may also serve interrogatories upon the Massachusetts Teachers' Retirement System (MTRS) that relate to the ground MTRS cited in denying her creditable service application. However, the teacher may not serve interrogatories asking MTRS to state whether the tuition of students she taught at the Boston School for the Deaf was paid by the Commonwealth and the reasons for its position, because that was not a ground for denying her creditable service application and therefore does not relate to her claims on appeal or to MTRS's defenses. In addition, she may not serve interrogatories upon MTRS that seek information about other persons or their survivors whose applications to purchase retirement credit for teaching service at the Boston School for the Deaf were granted by MTRS (if any), because they are not likely to lead to the discovery of relevant evidence. M.G.L. c. 32, § 4(1)(p) precludes retirement credit for prior nonpublic school teaching based upon eligibility for a retirement allowance from "any other source," a broad, and unambiguous, category that includes a private retirement plan from which Ms. Volpe was entitled to receive a retirement allowance while she was employed at the Boston School for the Deaf, if indeed that was the case. Extrinsic evidence regarding the meaning of section 4(1)(p)'s exclusion clause, including how MTRS applied it in other instances, is not relevant to its applicability. The teacher may contest whether, as a factual matter, the school's retirement plan and the payment she received from it comprised a "retirement allowance from any other source" under the statute, and the discovery she is allowed to pursue relates to that issue.

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*Introduction*

In this appeal, petitioner Marilyn J. Volpe, a retired public school physical education teacher who currently receives a retirement allowance, appeals the denial by respondent Massachusetts Teachers' Retirement System (MTRS) of her request to purchase retirement credit for her prior nonpublic school service between 1979 and 1992 at the Boston School for the Deaf, which was operated by the Sisters of St. Joseph of Boston. MTRS denied the request pursuant to M.G.L. c. 32, § 4(1)(p), because Ms. Volpe qualified for a retirement allowance from another source (the Sisters of St. Joseph Retirement Plan) while she was employed at the school, and received a lump-sum distribution

from that plan after she left. The statute provides in pertinent part that a Massachusetts public school teacher who is a member of a contributory retirement system (such as MTRS), and who previously taught pupils in a nonpublic publicly-funded school, may be eligible to purchase up to ten years of that prior nonpublic school service for retirement credit, “provided, that no credit shall be allowed and no payment shall be accepted for any service for which the member shall be entitled to receive a retirement allowance, annuity or pension *from any other source.*” M.G.L. c. 32, § 4(1)(p) (emphasis added).

Ms. Volpe moves for an order allowing her to conduct prehearing discovery comprising (1) written interrogatories to MTRS, for the most part as to whether it has allowed other teachers to purchase retirement credit for prior service at the Boston School for the Deaf; and (2) recordkeeper subpoenas to the Sisters of St. Joseph Retirement Plan’s successor administrator (Bank of America) and actuary (Willis Towers Watson) that seek the production of records regarding contributions to the Retirement Plan and the payment that Ms. Volpe received in late 1992 from the Plan’s administrator. For the reasons set forth below, the motion is denied in part (as to the proposed interrogatories concerning MTRS’s action on other public school teachers’s requests to purchase prior service at the Boston School for the Deaf, and whether the tuition of students Ms. Volpe taught at the school was publicly funded) and allowed in part (as to the recordkeeper subpoenas, and as to two proposed interrogatories regarding Ms. Volpe’s eligibility to receive a retirement allowance from a source other than MTRS for her teaching service at the Boston School for the Deaf).

*Background*

Petitioner Marilyn J. Volpe is a former Newton (Massachusetts) Public Schools physical education teacher who taught from 2001 until 2015, when she retired at the age of 63. She currently receives a pension from the Massachusetts Teachers' Retirement System (MTRS) at the rate of 30.36 percent of salary based on 13.2 years of service as a public school teacher. (See Volpe prehearing memorandum, Nov. 10, 2016, at Exh. 1.)

Between 1977 and June 1992, Ms. Volpe was employed full-time by the Boston School for the Deaf, initially as a dormitory supervisor (between September 1977 and June 1979), and during the 13 years that followed as a health and physical education teacher. The school was operated by the Sisters of St. Joseph of Boston. It provided specialized education, including physical education for deaf and aphasic students, that the public schools did not then offer. (MTRS Prehearing Mem., Dec. 29, 2016, Exh. 2: Ms. Volpe's service credit purchase application dated Feb. 17, 2010.) Several months after she left her employment at the Boston School for the Deaf, Shawmut Bank, the administrator of the Sisters of St. Joseph Retirement Plan, mailed Ms. Volpe a \$6,441 check that its cover letter described as her "lump sum distribution" from the Plan, together with a Form 1099R "for this distribution." (MTRS Prehearing Mem., Exh. 1: Letter from Shawmut Bank to Ms. Volpe, dated Dec. 22, 1992, without a copy of the Form 1099 to which the letter refers.)

On or about February 17, 2012, before she retired from the Newton Public Schools, Ms. Volpe applied to MTRS to purchase creditable service for her prior nonpublic school teaching service at the Boston School for the Deaf. (MTRS Prehearing Mem., Exh. 2.) MTRS denied Ms.

Volpe's creditable service application, on March 4, 2013, for two different reasons: (1) for the period 1977-June 1979, because during that time Ms. Volpe was a "dorm supervisor" at the Boston School for the Deaf and was not engaged in teaching pupils; and (2) for the period September 1979 to June 1992, when she taught at the school, because she received a retirement benefit from the Sisters of St. Joseph Retirement Plan that was entirely funded by the employer and that covered all of her service at BSD, *citing* M.G.L. c. 32, § 4(1)(p). (MTRS Prehearing Mem., Dec. 29, 2016, Exh. 4.)

A hearing is currently scheduled for June 21, 2017. Ms. Volpe moves for an order allowing her to conduct pre-hearing discovery via interrogatories to MTRS, pursuant to 801 C.M.R. § 1.01(8)(g), and via recordkeeper subpoenas to Bank of America and Willis Towers Watson, pursuant to 801 C.M.R. § 1.01(10)(g). The motion includes the proposed interrogatories and subpoenas.

The proposed interrogatories request that MTRS:

- (a) State its position as to whether the tuition of students Ms. Volpe taught at the Boston School for the Deaf was financed fully, or in part, by the Commonwealth, and the facts and documents upon which MTRS bases its position (proposed interrogatories 1 and 2). Ms. Volpe asserts that MTRS declined to stipulate as to this public financing;
- (b) State whether it contends that Ms. Volpe "was or is eligible to receive a retirement allowance, annuity or pension from a source other than MTRS with respect to all her years of teaching service at Boston School for the Deaf from 1978-1992" (proposed interrogatory 3) and the facts and documents upon which MTRS relies in answering that interrogatory (proposed interrogatory 4); and
- (c) Identify other persons, or their survivors, whose applications to purchase retirement credit for prior employment by the Sisters of St. Joseph were granted by MTRS (proposed interrogatories 5-8). Ms. Volpe asserts, on information and belief, that MTRS has allowed other retirement system members to purchase retirement credit for prior service at the Boston School for the Deaf.

One of the proposed subpoenas is addressed to Bank of America, in Boston, which “took over operations for Shawmut Bank, which handled retirement pension funds for the Sisters of Saint Joseph” when Ms. Volpe was employed at the Boston School for the Deaf.”<sup>1</sup> The subpoena requests documents created, maintained, sent or received by Shawmut Bank, Shawmut Bank of Boston, Fleet National Bank of Boston, Fleet Financial group, Bank of Boston, BankBoston or Bank of America with respect to Ms. Volpe, including:

documents with respect to contribution, deposit, maintenance, distribution, receipt, calculation or determination of retirement benefits contributed or distributed by the Sisters of St. Joseph of Boston or Boston School for the Deaf to or on behalf of Marilyn J. Volpe.

Ms. Volpe states in her motion that she seeks “records reflecting the dates and amounts of retirement plan contributions and distributions made on [her] behalf from 1978 to 1992,” because Shawmut Bank ceased operating, she does not have such records, and she believes that “would be entitled to purchase credit for any years of service between 1978 and 1992 for which no retirement contributions within the meaning of [M.G.L.] Section 4(1)(p) were made.”

The other proposed subpoena is addressed to Willis Towers Watson, in Boston, which “took over operations for the company that provided actuary services for the Sisters of Saint Joseph Retirement Plan at the time of [Ms. Volpe’s] separation from [the Boston School for the Deaf] in 1992,” for the purpose of obtaining information pertinent to her lump sum distribution amount.” It

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<sup>1/</sup> Shawmut National Corp. and its largest affiliate, Shawmut Bank, merged with Fleet/Norstar Financial Group in 1995. The entity created as a result, Fleet Financial Group, merged with BankBoston in 1999 to create FleetBoston Financial, which, in turn, merged with Bank of America in 2004. *See* [https://en.wikipedia.org/wiki/FleetBoston\\_Financial](https://en.wikipedia.org/wiki/FleetBoston_Financial)

requests documents created, maintained, sent or received by the Wyatt Company, Watson Wyatt, the Willis Group, Towers Watson, or Willis Towers Watson (apparently, the Retirement Plan's prior actuaries) with respect to Ms. Volpe, including the same types of documents she requests in the subpoena to Bank of America.

Each proposed subpoena is a *subpoena duces tecum* that requires the recordkeeper to appear for a deposition at the offices of Ms. Vole's counsel on May 18, 2017, and produce the documents requested by the subpoena at the deposition. Each subpoena states Ms. Vole's willingness to accept the records in advance of the scheduled hearing and dispense with the recordkeeper's testimony.

MTRS does not object to the proposed subpoenas.<sup>2</sup> It objects strenuously, however, to the proposed interrogatories. In its view, interrogatories 1 and 2 (regarding the public financing of Ms. Vole's Boston School for the Deaf students] were addressed by MARS's December 29, 2016 prehearing memorandum, and interrogatories 5-8 (regarding teachers who were allegedly allowed to purchase prior service at the school) are overboard, require a burdensome information search of an unlimited number of service purchases over an unlimited period of time, invade the privacy of other persons who are not parties to this appeal, and seek irrelevant information to the extent they do not concern Ms. Vole's own creditable service application and her burden of proof.

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<sup>2</sup>/ The positions of Bank of America and Willis Towers Watson with respect to the proposed subpoenas are not yet known. Ms. Volpe was not required to serve her motion allowing the subpoenas upon either entity. Each of them will have the right to file a motion with DALA to vacate or modify the subpoena after being served with it. *See* M.G.L. c. 30A, § 12(4).

*Discussion**1. Proposed Interrogatories**a. Applicable Standards*

The Standard Rules of Adjudicatory Practice and procedure that govern appeals such as this one provide in pertinent part that:

With the approval of the Agency or Presiding Officer, after a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve written interrogatories upon any other Party for the purpose of discovering *relevant information* not privileged and not previously supplied through voluntary discovery.

801 C.M.R. § 1.01(8)(g) (emphasis added).

The Rules do not define “relevant information,” and the parties have not directed my attention to any decisions defining “relevant information” as Rule 8(g) of the Standard Rules employs this phrase. In other circumstances where the Standard Rules do not supply procedural detail, DALA has applied standards used by the courts to resolve issues under analogous provisions of the Massachusetts, and Federal, Rules of Civil Procedure. *See, e.g., In re Taunton Public Schools*, BSEA No. 1601127, Ruling on Taunton Public Schools’ Motion to Dismiss, 21 Mass. Spec. Educ. Rper (MASER) 244, 245 (Mass. Div. of Admin. L. App., Bureau of Spec. Ed. App., Oct. 27, 2015) (standards used by courts to decide motions to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. Rule 12(b)(6), and by the Massachusetts courts to decide such motions under Mass. R. Civ. P. Rule 12(b)6, including taking the allegations of the complaint to be true and drawing

inferences from those allegations in the plaintiff's favor, were applied in granting the public schools' motion to dismiss a hearing request filed by the parent of a special needs student pursuant to 801 C.M.R. § 1.01(7)(g)(3) and Rule 17B of the SEA Hearing Rules for Special Education Appeals).

In following that approach here as to the permissible scope of discovery via interrogatories, I turn to the Massachusetts civil practice rules governing discovery generally, Mass. R. Civ. P. Rule 26(b), and the rule governing the use of interrogatories specifically, Mass. R. Civ. P. Rule 33.

Mass. R. Civ. P. Rule 26(b)(1) provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Mass. R. Civ. P. Rule 33(a) allows any party to serve upon any other party a limited number of interrogatories, without leave of court, and these may be served upon the plaintiff after the action is commenced, and upon any other party after it is served with the summons and complaint. Mass. R. Civ. P. Rule 33(b) provides that “[i]nterrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.”

Rule 8(g) differs materially from Mass. R. Civ. P. Rule 33 because it requires prior approval of proposed interrogatories by the presiding officer, while Mass. R. Civ. P. and Fed. R. Civ. P. Rule 33(a) allow interrogatories to be served without leave of court after an action is commenced. Beyond that distinction, the scope of discovery via interrogatories under Mass. R. Civ. P. Rules 26(b) and

33(b) is neither at odds with the plain wording of Standard Rule 8(g) nor contrary to the instruction of 801 C.M.R. § 1.01(2)(b) that the Standard Rules be “construed to secure a just and speedy determination of every proceeding.” They provide a standard of relevance—whether the information Ms. Volpe’s proposed interrogatories seek is relevant to the subject matter of this appeal, or relates to her claims or MTRS’s defenses—that is helpful in deciding her motion.

*b. Proposed Interrogatories 1 and 2 Denied*

Without question, the proposed interrogatories relate to the factors that make prior service in a “non-public publicly funded school” eligible or ineligible for retirement credit under M.G.L. c. 32, § 4(1)(p). Proposed interrogatories 1 and 2, for example, ask whether or not the Commonwealth funded Ms. Volpe’s pupils’ tuition at the Boston School for the Deaf when she taught there, which relates arguably to whether she taught in a publicly-funded non-public school, the type of prior service that M.G.L. c. 32, § 4(1)(p) addresses.

However, even if MTRS declined to stipulate that she did, of greater consequence to relevance here is that MTRS did not deny Ms. Volpe’s creditable service application on the ground that the Boston School for the Deaf was not a publicly funded school, and Ms. Volpe does not claim that it did. At this point, public funding (and, thus, the eligibility of Ms. Volpe’s prior teaching service at the school for retirement credit but for section 4(1)(b)’s exclusion clause) is not in dispute. MTRS does not argue in its prehearing memorandum that the Boston School for the Deaf was not a “non-public publicly funded school,” which may or may not be the explanation to which MTRS referred in opposing Ms. Volpe’s motion as to proposed interrogatories 1 and 2 as unnecessary. (*See*

above at 7.) More to the point here, it underscores that MTRS has not attempted to add this as a ground for denying Ms. Volpe's creditable service application.

In short, proposed interrogatories 1 and 2 do not relate to any ground on which MTRS denied the application or any ground on which Ms. Vole appealed the denial. Therefore, allowing these proposed interrogatories would not lead to evidence related to the ground on which MTRS denied the application—Ms. Volpe's entitlement to receive a retirement allowance from "any other source," meaning, here, the Sisters of St. Joseph Retirement Plan— or to Ms. Volpe's grounds for appealing—what amounts to a financial hardship claim in her appeal, and presumptively as well (if her claim is read expansively to encompass disagreement with MTRS's conclusion about her lump sum distribution after she left her employment at the Boston School for the Deaf), a claim that the St. Joseph Retirement Plan was not a retirement allowance "source" from which she was entitled to receive, or from which she received, an "allowance," for purposes of M.G.L. c. 32. § 4(1)(p). I am denying, therefore, Ms. Volpe's motion as to proposed interrogatories 1 and 2.

*c. Proposed Interrogatories 3 and 4 Allowed*

Proposed interrogatory 3 asks whether MTRS contends that Ms. Vole "was or is eligible to receive a retirement allowance, annuity or pension from a source other than MARS with respect to all her years of teaching service at Boston School for the Deaf from 1978-1992, and proposed interrogatory 4 asks MARS to identify the facts and documents upon which it relies in answering proposed interrogatory 3.

In contrast with proposed interrogatories 1 and 2, proposed interrogatories 3 and 4 relate to

Ms. Volpe's claims and to the ground that MTRS cited in denying her creditable service application—her eligibility to receive, and her receipt of, a retirement allowance from “any other source,” specifically the Sisters of St. Joseph Retirement Plan. For this reason, I am allowing MTRS's motion as to these two proposed interrogatories.

*d. Proposed Interrogatories 5-8 Denied*

Proposed interrogatories 5-8 seek information regarding other persons or their survivors whose applications to purchase teaching service for employment by the Sisters of St. Joseph were granted by MTRS. This information has nothing to do with Ms. Volpe's claims or to the ground on which MTRS denied her creditable service application, except in one respect that is not legally material here—the suggestion that in denying her application, MTRS applied or interpreted M.G.L. c. 32, § 4(1)(p), or a policy related to it, in a manner that was inconsistent with its allowance of retirement credit to other teachers who performed similar prior service at the Boston School for the Deaf.

Ms. Volpe's position might have merit for discovery purposes if the plain language of M.G.L. c. 32, § 4(1)(p) excluding creditable service for “any service for which the member shall be entitled to receive a retirement allowance, annuity or pension from any other source” was ambiguous, or left its application to the discretion of a contributory retirement system such as MTRS. If this were the case, resort could be had to extrinsic sources to determine whether it should apply here, among them how the agency responsible for implementing the statute (here, MTRS) has interpreted it in other instances. In that circumstance, discovery to show different, or inconsistent, applications

of the statute to public school teachers in similar, prior nonpublic teaching circumstances would relate, arguably, to the exceptions one might wish to read into the statute as a matter of preferable public policy and statutory construction intended to effect it, or to the interpretation of M.G.L. c. 32, § 4(1)(p)'s exclusion clause that the retirement system member urges.<sup>3</sup>

It is far from certain, however, that section 4(1)(p)'s exclusion clause is ambiguous as to whether benefits from a private retirement plan fall within the ambit of a "retirement allowance ... from any other source." By including the word "any" in this clause, the legislature intended that the exclusion be interpreted broadly, provided that the benefits in question indeed qualified as a "retirement allowance, annuity or pension."

The breadth of section 4(1)(p)'s exclusion clause is not unlimited—per *Rosing v. Teachers' Retirement System*, 458 Mass. 283, 291, 936 N.E.2d 875, 881 (2010), it does not encompass Social Security benefits, but that exception extends no further. In *Rosing*, MARS denied applications by public school teachers to purchase creditable service toward retirement for their prior nonpublic school work with special needs students at institutions funded, entirely or in part, by the Commonwealth because they had earned Social Security benefits for this work. DALA, the Contributory Retirement Appeal Board and the Superior Court affirmed the denial based upon an

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<sup>3</sup>/ Here, for example, Ms. Vole appears to assert that a public school teacher applying for retirement credit for prior nonpublic school teaching should be exempted from the statute's exclusion on the ground of personal economic hardship, which, as she describes it, results from receiving a modest lump-sum distribution from her prior employer's retirement plan upon leaving her employment at the Boston School for the Deaf, and a modest public pension reflecting approximately 13 years of service as a public school teacher, reflecting her later-in-life entry into this service, and age-related limitations upon her ability to perform the essential duties of a physical education teacher that caused her to retire at age 63. (See Ms. Volpe's filing dated Nov. 10, 2016, which has been treated as her prehearing memorandum, at 1-2.)

interpretation of M.G.L. c. 32, § 4(1)(p)'s exclusion clause as sufficiently broad to encompass Social Security benefits within the ambit of "retirement allowance . . . from any source," so that entitlement to those benefits as a result of prior nonpublic school employment precluded retirement credit for such service under section 4(1)(p).

Having transferred these cases from the Appeals Court, the Supreme Judicial Court held that Social Security benefits did not qualify as a "retirement allowance, annuity or pension . . . from any other source" for purposes of M.G.L. c. 32, § 4(1)(p)—not because Social Security did not provide a "retirement" allowance, but because the legislature clearly knew how to say so specifically if it intended to include entitlement to Social Security benefits within the phrase "any other source." It had done so in a similar exclusion clause included in M.G.L. c. 32, § 3(4A), which governs the purchase of up to ten years of retirement credit for prior teaching service in a nonpublic school prior to 1973.<sup>4</sup> Section 3(4A) provides that no credit for prior nonpublic school teaching service prior to 1973 would be allowed, or payment accepted, "for any service on account of which the [contributory retirement system] member shall be entitled to receive a retirement allowance or other similar payment from the nonpublic school system, *the federal government* or any other source . . . ." (emphasis added). However, the legislature "did not amend section 4(1)(p) to mirror § 3(4A)" at the time, and the phrase "the federal government" was not added to section 4(1)(p)'s exclusion clause afterward. *Rosing*; 458 Mass. at 287, 936 N.E.2d at 878. Neither the specific inclusion of this phrase in section 3(4A)'s exclusion clause, nor its omission from section 4(1)(p)'s exclusion clause,

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<sup>4</sup>/ Section 3(4A) was added to Chapter 32 in 1992, 20 years after section 4(1)(p) had been added. See St. 1992, c. 333.

was superfluous, and, accordingly, the courts could not imply that entitlement to Social Security benefits as a result of prior nonpublic school teaching service precluded retirement credit for that service under M.G.L. c. 32, § 4(1)(p). *See id.*; 458 Mass. at 292, 936 N.E.2d at 881. Social security benefits were therefore not covered by the exclusion clause of section 4(1)(p), and any different interpretation was for the legislature to address. *Id.*; 458 Mass. at 293-94, 936 N.E.2d at 883.

*Rosing* resolved, based upon the legislative history, that entitlement to Social Security benefits did not preclude retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p). It did not extend the exception of Social Security benefits from the ambit of section 4(1)(p)'s exclusion clause to any other source of retirement allowance, and nor did it hold that the phrase "retirement allowance . . . from any other source" was ambiguous as to any other type of retirement allowance, including an allowance available under, or a distribution made pursuant to, a private retirement plan.

As to sources of retirement allowances other than Social Security, the phrase "retirement allowance . . . from any other source" is sufficiently broad to encompass a retirement allowance from the Sisters of St. Joseph Retirement Plan if, in fact, it was a plan providing a retirement allowance for which Ms. Vole was eligible, and this is what Ms. Vole received from the plan administrator in late 1992. These are factual issues whose resolution would determine whether Ms. Vole was or was not eligible for a retirement allowance from "any other source," per M.G.L. c. 32, § 4(1)(p). However, these factual issues do not show that the plain language of M.G.L. c. 32, § 4(1)(p) is ambiguous as to what "retirement allowance from any other source" includes, or that the application of section 4(1)(p) is left to the discretion of a contributory pension system such as MARS.

Discovery of the statute's application in other instances is not relevant, therefore, to the application of section 4(1)(p) here.

To sum up—it is relevant to the applicability of section 4(1)(p)'s exclusion clause whether Ms. Vole was entitled to receive a retirement allowance from “any other source” (specifically, the Sisters of St. Joseph Retirement Plan) and whether she received it. Her proposed discovery via recordkeeper subpoenas probes these factual issues. However, discovery of information showing whether MTRS has allowed retirement credit to other teachers for prior teaching service at the Boston School for the Deaf would not do so. The applicability or inapplicability of M.G.L. c. 32, § 4(1)(p)'s exclusion clause is not a matter of discretion on MTRS's part, and does not depend upon MTRS practice and determinations in other cases. For this reason, I deny proposed interrogatories 5-8 as seeking information beyond the subject matter of this appeal.

## *2. Proposed Subpoenas*

Ms. Volpe's proposed subpoena to the Bank of America seeks “records reflecting the dates and amounts of retirement plan contributions and distributions made on [her] behalf from 1978 to 1992.” Her proposed subpoena to Willis Towers Watson seeks records containing “information pertinent to her lump sum distribution amount” after she left her employment at the Boston School for the Deaf. Both are *subpoenas duces tecum* that require the recordkeeper to appear for a deposition at the offices of Ms. Volpe's counsel on May 18, 2017, and produce the documents requested by the subpoena at the deposition. Each subpoena states Ms. Volpe's willingness to accept the records in advance of the scheduled hearing and dispense with the recordkeeper's testimony.

801 C.M.R. § 10(g) provides that “[t]he Agency or Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12,” which, in turn, provides in pertinent part that:

(1) Agencies shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, *relating to any matter in question in the proceeding*. Agencies may administer oaths and affirmations, examine witnesses, and receive evidence . . .

(3) Any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding . . . .

(Emphasis added.)

The italicized language of M.G.L. c. 30A, § 12(1) requires that the testimony and evidence required by a subpoena be related to “any matter in question” in the adjudicatory appeal. That is the case here. Ms. Volpe seeks to issue recordkeeper subpoenas to Bank of America, the successor to Shawmut Bank, the former administrator of the Sisters of St. Joseph Retirement Plan, and to the successor to the retirement plan’s actuary through at least 1992, when she left her employment at the school. The subpoenas seek records that (if they exist) may clarify who made contributions on Ms. Volpe’s behalf to the retirement plan, whether she was entitled to a retirement benefit under it, and whether she received a retirement benefit from the plan after she left her employment at the school. The subpoenas fall within the ambit, therefore, of “evidence . . . relating to any matter in question” in this proceeding, as required by M.G.L. c. 30A, § 12, in particular whether Ms. Volpe was entitled to a “retirement allowance” from the Sisters of St. Joseph retirement plan that would preclude retirement credit for her prior teaching service at the Boston School for the Deaf pursuant to M.G.L.

c. 32, § 4(1)(p).

*Order*

Ms. Volpe's motion is granted with respect to her proposed interrogatories 3 and 4, and denied as to her proposed interrogatories 1-2 and 5-8.

Because the proposed interrogatories were included with the motion, MTRS has already received them. MTRS's 30-day time to respond to the two allowed interrogatories, *see* 801 C.M.R. § 1.01(8)(h), shall run, therefore, from its receipt of this Decision and Order. Per 801 C.M.R. § 1.01(8)(h), MTRS shall file a copy of its answers to the allowed interrogatories with DALA.

Ms. Volpe's motion is also granted with respect to the proposed subpoenas to the keepers of records at Bank of America and Willis Towers Watson. Because the date that each subpoena specifies for the witness to appear with the requested records is close at hand, counsel will need to change that date before serving the subpoenas. With that change made, Ms. Volpe's counsel may now issue the subpoenas in accordance with the requirements of M.G.L. c. 30A, § 12.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Mark L. Silverstein  
Administrative Magistrate

Dated: May 11, 2017