

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

May 24, 2017

Docket No. CR-13-147

MARILYN J. VOLPE, Petitioner

v.

MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM, Respondent

**DECISION AND ORDER ON MOTION TO
COMPEL PRODUCTION OF DOCUMENTS**

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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

A retired public school teacher's application to purchase retirement credit for prior nonpublic school teaching service in a Massachusetts publicly-funded school (the Boston School for the Deaf) between 1977 and 1992, was denied by the Massachusetts Teachers' Retirement System (MTRS) on the grounds that she was entitled to receive a retirement allowance from the Sisters of St. Joseph Retirement Plan while she taught at the School, and received a lump-sum distribution from the Plan upon leaving that position. *See* M.G.L. c. 32, § 4(1)(p). After appealing MTRS's decision to the Division of Administrative Law Appeals (DALA), the teacher moved to compel the production of documents by MTRS of documents she had requested previously.

The motion is denied. Two of the requests seek documents regarding other persons or their survivors whose applications to purchase retirement credit for teaching service at the Boston School for the Deaf or with the Sisters of St. Joseph, which operated the School, were granted by MTRS. Those requests seek information beyond the material factual issues identified in a previous discovery decision appeal regarding the teacher's proposed interrogatories to MTRS and recordkeeper subpoenas to the Sisters of St. Joseph Retirement Plan's successor administrator and actuary— whether, as a factual matter, the payment Ms. Volpe received from the Plan was, per section 4(1)(p), a "retirement allowance from any other source" to which she was entitled. *See Volpe v. Massachusetts Teachers' Retirement System*, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017). Because MTRS has no discretion in applying this statute or denying retirement credit for prior non-public school credit based upon eligibility for "a retirement benefit from any other source" (if that was indeed the case here), it is irrelevant whether, and, if so, why, MTRS may have allowed retirement credit in other instances for prior service at the Boston School for the Deaf or other schools operated by the Sisters of St. Joseph. An order to compel is unnecessary as to the remaining document requests, as MTRS has produced documents in response to them. MTRS remains under a continuing obligation to supplement those responses if it finds other relevant documents in its possession, custody or control in addition to those it has already produced.

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 non-public 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 on the grounds that 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, *citing* M.G.L. c. 32, § 4(1)(p). Section 4(1)(p) 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).

A hearing is presently scheduled for June 21, 2017 at the Division of Administrative Law Appeals and, preparatory to it, Ms. Volpe sought discovery from MTRS via document requests and interrogatories, and from the Sisters of St. Joseph Retirement Plan’s successor administrator and actuary via recordkeeper subpoenas. I denied Ms. Volpe’s previous motion for leave to serve written interrogatories upon MTRS as to those seeking information regarding other persons or their survivors whose applications to purchase retirement credit for teaching service at the Boston School for the Deaf or with the Sisters of St. Joseph were granted. That information was beyond the material factual issue raised here—whether, per M.G.L. c. 32, § 4(1)(p), the Sisters of St. Joseph Retirement Plan provided a retirement allowance for which Ms. Volpe was eligible, and whether the payment she received from the Plan administrator in late 1992 was indeed a retirement allowance. If the answer was “yes” as to both issues, MTRS was without discretion under the statute to allow credit for Ms. Volpe’s teaching, and what it may have decided as to other former Boston School for

the Deaf teachers was irrelevant. *See Volpe v. Massachusetts Teachers' Retirement System*, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017) (*the May 11, 2017 Discovery Decision*). The *May 11, 2017 Discovery Decision* also allowed Ms. Volpe to serve recordkeeper subpoenas upon the Sisters of St. Joseph Retirement Plan's successor administrator and actuary, as those sought information related to whether what Ms. Volpe received when she left teaching at the Boston School for the Deaf was, per M.G.L. c. 32, §4(1)(p), a "retirement allowance, annuity or pension from any other source."

Based upon that decision, I now deny Ms. Volpe's motion to compel the production of documents by MTRS regarding other persons or their survivors whose applications to purchase retirement credit for teaching service at the Boston School for the Deaf, or for prior employment by the Sisters of St. Joseph of Boston, that MTRS has allowed. I also deny the motion regarding requests to which MTRS has responded by producing documents, although MTRS remains under a continuing obligation to supplement those responses if it finds other relevant documents in its possession, custody or control in addition to those it has already produced.

Background

I begin by reviewing the *May 11, 2017 Discovery Decision* briefly. On April 10, 2017, Ms. Volpe moved 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, which MTRS opposed; and (2) recordkeeper subpoenas to the Sisters of St. Joseph Retirement Plan's successor administrator (Bank

of America) and actuary (Willis Towers Watson) seeking 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.

In the *May 11, 2017 Discovery Decision*, I denied 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, allowed 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, and also allowed her to serve the recordkeeper subpoenas she proposed. I did so because:

- (1) 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;
- (2) If it was, the statute's exclusion clause applied, and MTRS was without discretion to waive its applicability;
- (3) It was therefore irrelevant whether, and, if so, why, MTRS may have allowed other members, or their survivors, to purchase retirement credit for prior service at the Boston School for the Deaf, and therefore interrogatories related to those matters were unlikely to lead to the discovery of relevant evidence;
- (4) Ms. Volpe could contest, however, whether, as a factual matter, the Sisters of St. Joseph Retirement Plan and the payment she received from it comprised a "retirement allowance from any other source" under the statute, and the May 11, 2017 discovery order allowed her to pursue discovery related to those factual issues.

I turn next to Ms. Volpe's request for production of documents, which Ms. Volpe served on April 11, 2017, a month before I issued the *May 11, 2017 Discovery Decision*. As had her proposed

interrogatories, Ms. Volpe's document request sought information regarding the retirement system's action on other public school teachers's requests to purchase prior service at the Boston School for the Deaf for retirement credit.¹ The documents she requested were:

1. Retirement applications, service purchase applications, supporting documentation and service purchase invoices of those individuals (or survivors) whose teaching service from Boston School for the Deaf was allowed as creditable service by the Respondent (MTRS).
2. Retirement applications, service purchase applications, supporting documentation and service purchase invoices of those individuals (or survivors) whose teaching service in the employ of the Sisters of Saint Joseph of Boston was allowed as creditable service by the Respondent.
3. Documents submitted by or on behalf of the Petitioner to the Respondent.
4. Documents on which you rely or intend to rely in contending that the Petitioner received a retirement allowance, annuity or pension within the meaning of M.G.L. c. 32, Section 4(1)(p) for all of her years of teaching service at the Boston School for the Deaf.
5. Documents on which you rely or intend to rely in contending that the tuition of all of the pupils taught by the Petitioner at Boston School for the Deaf was not financed in full or in part by the Commonwealth.
6. All correspondence between the petitioner and the Respondent.
7. All correspondence between the Respondent and any other person or entity regarding the Petitioner.

¹/ The Standard Rules of Adjudicatory Practice and Procedure that govern appeals such as this one allow the service of a document request after an appeal has been without prior leave of the presiding officer. *See* 801 C.M.R. § 1.01(8)(b). The request need not be filed with DALA, and was not in this case. The scope of allowable discovery via document requests may come before the presiding officer subsequently, either upon a motion for an order to compel discovery (as it did here), *see* 801 C.M.R. § 1.01(8)(i), or upon a motion for a protective order by the party from whom documents were requested, *see* 801 C.M.R. § 1.01(7)(a)1 (general rule allowing motion requesting that the presiding officer "issue any order or take any action not inconsistent with law or with the Standard Rules).

MTRS served a response to Ms. Volpe's document request on May 8, 2017. It objected to producing documents regarding 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, on the ground that, per the *May 11, 2017 Discovery Decision*, they sought information beyond the bounds of relevant discovery. However, in response to document requests 1 and 2, MTRS produced two documents regarding another MTRS member (name and identifying information redacted) who was allowed to purchase retirement credit for prior non-public school service at the Boston School for the Deaf between September 1974 and June 1980 because that person was not eligible for any retirement benefit from the school's pension plan. One of these documents was a letter from the Sisters of St. Joseph, dated September 21, 2001, which explained that the person in question worked at the School for fewer than the ten years of service that the Plan then required for retirement benefits eligibility. The other document, also redacted, was an MTRS invoice to the person in question for the purchase, for retirement purposes, of 5.23 years of creditable service at the Boston School for the Deaf. MTRS stated that it produced these documents:

because the MTRS will rely on the September 11, 2001 letter from Sisters of St. Joseph's [retirement plan] to show that there was a retirement plan in place with a vesting period of 10 years.

(MTRS opposition to petitioner's request for production of documents, May 8, 2017 at 1-2, paras. 1 and 2.)²

²/ By "in place," MTRS presumably meant when Ms. Volpe started teaching at the Boston School for the Deaf in 1979, or at least shortly afterward. The letter does not state when the Retirement Plan was implemented; however, it states that the individual in question was employed at the School between September 1, 1974 and June 30, 1980, and that when she left employment at the School with

MTRS produced Ms. Volpe's "member file" in response to document requests 3, 6 and 7. As to document requests 4 and 5, MTRS stated that it intended to rely upon the exhibits it had included in its December 29, 2016 prehearing memorandum,³ as well as upon the documents it had produced regarding retirement credit to another MTRS member for service at the Boston School for the Deaf.

On May 12, 2017, Ms. Volpe moved for an order compelling production of all of the documents she had requested from MTRS. MTRS opposed the motion for the same reasons it had given in objecting to the document requests, adding, as well, the *May 11, 2017 Discovery Decision*, and because it had already included the documents on which it intended to rely in her prehearing memorandum and her response to the document request. MTRS also stated that it had produced the documents regarding the other MTRS member:

for the sole purpose of showing that one member was allowed to purchase their

approximately five years of service, vesting in the Plan required 10 years of service.

³/ MTRS's proposed hearing exhibits were:

(1) A letter from the former Shawmut Bank to Ms. Volpe enclosing a bank check for \$6,441, representing her "lump sum distribution" from the Sisters of St. Joseph Retirement Plan, dated Dec. 22, 1992 ;

(2) Part I of Ms. Volpe's application to purchase retirement credit for nonpublic school teaching in a Massachusetts publicly-funded school (the Boston School for the Deaf);

(3) Part II of Ms. Volpe's application to purchase retirement credit for nonpublic school teaching in a Massachusetts publicly-funded school (the Boston School for the Deaf), received by MTRS on Feb. 17, 2012; and

(4) MTRS's letter denying Ms. Volpe's application to purchase prior service at the Boston School for the Deaf for retirement purposes, dated Mar. 4, 2013.

service at Boston School for the Deaf under G.L. c. 32, § 4(1)(p) because this member had less than ten years of service [at the School], and had therefore not yet vested in the [Sisters of St. Joseph] retirement plan, which had a ten year vesting period.

(MTRS opposition to petitioner's request for production of documents, May 11, 2017, at 1-2.)

Ms. Volpe replied that MTRS had selectively disclosed documents regarding its action on other requests for retirement credit for prior service at Boston School for the Deaf, and should not be allowed to disclose selectively only those documents that suited its advantage.

Discussion

1. Applicable Standards

Ms. Volpe's motion for leave to serve interrogatories and record-keeper subpoenas did not address her document request, and no motion to compel document production or for a protective order regarding document production was before me when I issued the *May 11, 2017 Discovery Decision*. That decision determined, nevertheless, what factual issues were raised here regarding the denial of Ms. Volpe's application to purchase retirement credit for her prior service at the Boston School for the Deaf and, thus, the scope of relevant discovery in this appeal. MTRS had denied Ms. Volpe's application to purchase retirement credit for her service at the School pursuant to M.G.L. c. 32, § 4(1)(p) because she was eligible to receive a "retirement allowance ... from any other source" —specifically, a retirement allowance from the Sisters of St. Joseph Retirement Plan that she allegedly received in the form of a lump-sum payment from the Plan administrator in late 1992 after her employment at the Boston School for the Deaf ended. As a result, there were material factual

issues here as to whether the Plan provided a retirement allowance for which Ms. Volpe was eligible, and whether the payment she received from the Plan administrator in late 1992 was indeed a retirement allowance. Resolving those factual issues “would determine whether Ms. Volpe was or was not eligible for a retirement allowance from ‘any other source,’ per M.G.L. c. 32, § 4(1)(p).”

May 11 2017 Discovery Decision at 15.

I allowed Ms. Volpe’s proposed discovery via recordkeeper subpoenas because it probed these material factual issues. *Id.* at 15, 117-18. However, the statute was not ambiguous as to whether “retirement allowance from any other source” included one from a private retirement system, and did not leave the application of section 4(1)(p) to the discretion of a contributory pension system such as MTRS. *Id.* at 15. For that reason, discovery of the statute’s application in other instances (for example, where public school teachers other than Ms. Volpe applied for retirement credit for teaching service at the Boston School for the Deaf, and MTRS granted the application) was not relevant to the application of section 4(1)(p) in this appeal. For that reason, I denied Ms. Volpe’s proposed interrogatories 5-8, which sought the discovery of information showing whether MTRS has allowed retirement credit to other teachers for prior teaching service at the Boston School for the Deaf—information that was not relevant to the factual issues raised here. *Id.* at 16.

The scope of permissible discovery via Ms. Volpe’s document requests has now come before me as a result of her May 12, 2017 motion for an order compelling discovery, which MTRS opposes. I apply the *May 11, 2016 Discovery Decision* in determining the scope of allowable discovery via the document requests in question.

2. *Determination of Motion to Compel Production of Documents*

a. *Document Requests 1 and 2*

The motion is denied as to requests 1 and 2, which requested documents regarding other MTRS members who were allowed retirement credit for prior service at the Boston School for the Deaf. The requests seek information beyond the scope of the material factual issues identified by the *May 11, 2017 Discovery Decision*. This outcome is not affected by MTRS's production of limited, redacted documents regarding the member who taught previously at the School between 1974 and 1980 but had not worked there ten years and therefore did not qualify for a retirement benefit from the Sisters of St. Joseph Retirement Plan. I accept MTRS's explanation (in its response to Ms. Volpe's document request) of the limited purpose for which it disclosed these documents—as evidence, upon which it intends to rely, that the Plan was “in place” when Ms. Volpe worked at the school and required ten years of service to qualify for a retirement benefit under the Plan. The use of the produced documents for this purpose relates to whether the Plan provided a retirement allowance for which Ms. Volpe was eligible, and whether the payment she received from the Plan administrator in late 1992 was indeed a retirement allowance. As the *May 11, 2017 Discovery Decision* stated, resolving those factual issues “would determine whether Ms. Volpe was or was not eligible for a retirement allowance from ‘any other source,’ per M.G.L. c. 32, § 4(1)(p).”

MTRS also asserts that the documents in question were produced to show that the other member in question had not worked at the Boston School for the Deaf for the ten years needed to

qualify for a retirement benefit from the Sisters of St. Joseph Retirement Plan. This appears to relate to issues I have determined to be beyond the scope of this proceeding, including how MTRS decided other applications to credit prior service at the Boston School for the Deaf, and whether its decisions have been consistent or, at least, consistent with how it decided Ms. Volpe's creditable service application.

If section 4(1)(p) left MTRS with discretion to allow retirement credit for prior service at a non-public school even if the member was eligible for a retirement allowance from any other source, the result here would be different. If that were the case, MTRS would indeed have to produce documents it had showing how, and why, it determined other applications to credit prior service at the School for retirement purposes under M.G.L. c. 32, § 4(1)(p), and could not "pick and choose" which of these documents it chose to produce.

However, I have already determined that section 4(1)(p)'s language regarding a retirement allowance "from any source" is not ambiguous, and leaves MTRS with no discretion in applying it. It is of no legal consequence here, therefore, whether MTRS granted the other member's application to credit prior service at the Boston School for the Deaf for retirement purposes because that member had not qualified for a retirement benefit under the Sisters of St. Joseph Retirement Plan. MTRS is therefore precluded from using the documents in question to show how it decided the other member's application (or the application of any other member other than Ms. Volpe) to credit prior service at the Boston School for the Deaf for retirement purposes, or why it did so. Based upon the limited evidentiary use to which MTRS may put the documents it produced—showing the existence of the Sisters of St. Joseph Retirement Plan when Ms. Volpe worked at the Boston School for the

Deaf, and the ten year vesting period Ms. Volpe needed (and appears to have met) to qualify for a retirement benefit under that Plan—there has been no selective production of documents as to material issues to be decided here, and the allowed use of those documents will work no prejudice to Ms. Volpe.⁴

b. Document Requests 3-7

MTRS produced Ms. Volpe's "member file" in response to document requests 3, 6 and 7, which requested correspondence between these parties or between MTRS and other parties regarding Ms. Volpe. This production is, implicitly, a representation that MTRS has no other documents that respond to requests 3, 6 or 7. There is no showing (or assertion) that MTRS has withheld any documents that these requests sought. There is, as a result, no further discovery to compel as to these three document requests, and as to these requests the motion is denied. There remains a continuing obligation on MTRS's part to timely supplement its responses to requests 3, 6 and 7 if it finds other relevant documents in its possession, custody or control that relates to those requests other than the "member file" it has already produced.

As to document requests 4 and 5, MTRS stated that it intended to rely upon the exhibits it had included in its December 29, 2016 prehearing memorandum, as well as upon the documents it

⁴/ I note, in this regard, that the *May 11, 2017 Discovery Decision* allowed Ms. Volpe to serve record-keeper subpoenas seeking information regarding the Sisters of St. Joseph Retirement Plan and the nature of its payment to Ms. Volpe after she left employment at the Boston School for the Deaf in 1992. This gives her an opportunity to discover information regarding these material facts beyond the September 21, 2001 letter from the Sisters of St. Joseph on which MTRS intends to rely.

had produced regarding retirement credit to another MTRS member for service at the Boston School for the Deaf, regarding the contentions to which these two document requests refer—“whether Ms. Volpe received a retirement allowance, annuity or pension within the meaning of M.G.L. Chapter 31, Section 4(1)(p) for all of her years of teaching service at the Boston School for the Deaf” (document request 4), and whether “the tuition of pupils Ms. Volpe taught at the Boston School for the Deaf were paid for in full or in part by the Commonwealth” (document request 5).⁵ This response is, implicitly, a representation that MTRS has already produced all of the documents relating to document requests 4 and 5 that it has. There is no showing (or assertion) that MTRS has withheld any documents that these requests sought. There is, as a result, no further discovery to compel as to these three document requests, and as to these requests the motion is therefore denied. There remains a continuing obligation on MTRS’s part to timely supplement its responses to requests 4 or 5 if it finds other relevant documents in its possession, custody or control in addition to those it has already produced.

Order

For the reasons set forth above, Ms. Volpe’s May 12, 2017 motion to compel production of the documents it requested of MTRS is denied. MTRS has a continuing obligation to timely

⁵/ As I noted in the *May 11, 2017 Discovery Decision*, Ms. Volpe asserts that MTRS declined to stipulate to public funding of her Boston School for the Deaf pupils’s tuition. However, it is unclear whether MTRS actually disputes that, as to those pupils or in general as to deaf pupils from public schools who attended the Boston School for the Deaf when Ms. Volpe taught there, that the School qualifies as a Massachusetts publicly-funded school for purposes of retirement credit for prior nonpublic school teaching service.

supplement its May 8, 2017 response to Ms. Volpe's document requests 3-7 if it finds other relevant documents in its possession, custody or control in addition to those it has already produced.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: May 24, 2017