

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Janet S. Walsh and
PERAC,
Petitioners

v.

Docket No. CR-21-0135

Reading Retirement Board,
Respondent

Appearance for Petitioner:

Janet S. Walsh, *pro se*
18 Jewel Circle
Methuen, MA 01844

Appearance for Public Employee
Retirement Administration
Commission (PERAC):

Felicia McGinniss, Esq.
Associate General Counsel
PERAC
Five Middlesex Avenue, Suite 304
Somerville, MA 02145

Appearance for Respondent:

Michael Sacco, Esq.
Law Offices of Michael Sacco
P.O. Box 479
Southampton, MA 01073-0479

Administrative Magistrate:

James P. Rooney

Summary of Decision

Reinstated member appeals a decision by her current retirement board that her reinstatement date was December 20, 2019, the date the board determined was the day the retirement board of which she had previously been a member accepted her plan to repay in installments the retirement benefits she had already received. The board's determination is reversed. The member's date of reentry into membership was September 3, 2019, the date she waived her existing retirement benefits. *See* M.G.L. c. 21, § 105(a). That date is also her reinstatement date because the application for reinstatement she signed offered her the opportunity to accept reinstatement by signing the application. Her current board is therefore ordered to allow her to buy back the time she worked at her new job before deductions were taken from her pay.

DECISION

Janet S. Walsh, a formerly retired public employee, appeals the March 23, 2021 decision of the Reading Retirement Board to treat her reinstatement date as December 20, 2019, the date that board thought the Massachusetts Water Resources Authority Employees' Retirement Board voted to adopt the reinstatement agreement and the payment plan associated with it. She contends that her reinstatement date was September 3, 2019, the date she signed a reinstatement agreement.

The parties filed cross-motions for summary decision. I admit into evidence the twenty-one exhibits filed by the parties and admit as Exhibit 22 Ms. Walsh's appeal letter. A list of exhibits appears on the last page of this decision. I marked Ms. Walsh's prehearing memorandum "A," the Reading Retirement Board's prehearing memorandum "B," Ms. Walsh's motion to add the Public Employee Retirement Administration Commission (PERAC) as a party "C," the ruling on the motion "D," the Reading Retirement Board's motion for summary decision "E," and the joint motion for summary decision of Ms. Walsh and PERAC "F."

Findings of Fact

Based on the exhibits and reasonable inferences from them, I make the following findings of fact:

1. Janet S. Walsh retired from the Massachusetts Water Resources Authority (MWRA) in 2010 and received a retirement allowance from the MWRA Retirement System from her retirement in 2010 until 2019. (Ex. 1.)
2. On September 3, 2019, Ms. Walsh submitted an Application for Reinstatement to Service to the MWRA Employees' Retirement System in accordance with M.G.L. c. 32, § 105. (Ex. 1.)

3. PERAC's form Application for Reinstatement states in two places that the date of signing the Application is the date of reinstatement. On page 2, under "Conditions," the Application states: "After reviewing the above information and consulting with my retirement board, I apply to be reinstated into membership in the retirement system under the provisions of G.L. c. 32, § 105 as of the date that this form is signed (reinstatement date)." Next to the section "Member's Signature" the Application states "Date signed is reinstatement date." It also states that the member was to understand that "my rights to my superannuation/termination retirement allowance will cease as of my reinstatement date." (Ex. 1.)
4. An attachment to Ms. Walsh's reinstatement application shows the calculation of how much money she would have to pay back in retirement benefits received from the MWRA Employees' Retirement System plus interest. The attachment lists both the total amount that would need to be repaid as a lump sum (\$162,993.49) and the monthly payment if Ms. Walsh chose to repay over a five-year period (\$2,983.42).¹
5. On September 30, 2019, Ms. Walsh requested approval by the MWRA Employees' Retirement Board of a repayment agreement of five years to repay the total amount owed in equal monthly installments, unless PERAC determined that she could use funds rolled over from other retirement plans to repay her MWRA retirement

¹ The attachment notes without explanation her "Month of Reinstatement – December." However, the attachment was prepared on September 3, 2019, the day Ms. Walsh filed her application. It lists the total amount Ms. Walsh would have to repay of benefits received in 2018 as \$11,272. It lists the amount she would have to repay for benefits received in 2019 as \$5,958.80 or nearly one-third less, which would be consistent with a reinstatement date of September 3, 2019.

- benefits. As of that date, Ms. Walsh was awaiting a decision from PERAC on the rollover question. (Ex. 3.)
6. Ms. Walsh sought reinstatement because she had been offered full-time employment from the Reading Municipal Light Department by letter of September 9, 2019, to commence on September 26, 2019. (Ex. 2.)
 7. On September 26, 2019, Ms. Walsh began working at the Municipal Light Department. The Light Department initially processed her first paycheck to include withholding for retirement deductions from her regular compensation. The Reading Retirement Board Administrator informed the Light Department not to take any retirement deductions until her reinstatement had been confirmed. (Exs. 2, 4.)
 8. On October 31, 2019, the MWRA Employees' Retirement Board voted to "adopt Janet Walsh's Reinstatement Agreement."² (Ex. 5.)
 9. On November 15, 2019, PERAC's tax counsel opined "that a rollover was permissible" for Ms. Walsh to make a lump sum payment for reinstatement. (Exs. 6, 7.)
 10. Ms. Walsh was placed on the Town of Reading employee payroll effective December 20, 2019 based on Board counsel's advice that the installment plan for reinstatement became official on December 10, 2019 when counsel was provided sufficient documentation to establish that a binding repayment agreement existed. Retirement deductions began on December 23, 2019. (Exs. 7, 8,10, 13.)

² Later, PERAC's executive director described this action as "an unusual practice for the Board." (Ex. 14.)

11. Ms. Walsh had been told by MWRA Employees' Retirement System's executive director that the Reading Retirement Board was refusing to deduct retirement contributions from her pay until she repaid her retirement benefits in full.³ Thereafter, instead of paying in five years of installments, Ms. Walsh repaid her retirement benefits to the MWRA Employees' Retirement System with three checks totaling \$160,779.26: a check dated January 7, 2020 from Vanguard Fiduciary Trust Company in the amount of \$62,819.81 a check dated January 8, 2020 from ADP Retirement Services in the amount of \$74,270.08; and a check dated January 22, 2020 from ICMA-RC in the amount of \$23,689.37.⁴ (Exs. 7, 21.)
12. The MWRA Employees' Retirement System requested that PERAC issue an opinion as to the effective date of Ms. Walsh's reinstatement. By letter of June 30, 2020, PERAC's Executive Director opined "the effective date of reinstatement is when a member has entered into an installment plan or made a lump sum payment of any retirement allowance received" in accordance with M.G.L. c. 32, § 105. He concluded that Ms. Walsh's date of reinstatement was September 3, 2019 "when she signed an agreement." In reaching this latter conclusion, he noted that the application Ms. Walsh signed required that she have entered into a "signed and binding repayment agreement" by her reinstatement date, which the application referred to as the date she signed the application. The Executive Director also opined that

³ The email Ms. Walsh received was dated January 6, 2020. By then, retirement deductions from Ms. Walsh's pay had recently begun.

⁴ The total cost of Ms. Walsh's reinstatement was less than the initial figure given because of a change in the interest rate. (Ex. 7.)

deductions from Ms. Walsh's pay should have begun in Reading after that date. (Ex. 12.)

13. By letter of July 10, 2020, counsel for the Reading Retirement Board requested that PERAC reconsider its opinion that Ms. Walsh's date of reinstatement should be September 3, 2019 because the Reinstatement Application submitted on that date is not a "binding repayment agreement," and the Reading Retirement Board had not been notified that Ms. Walsh had begun or completed making payments to the MWRA Employees' Retirement System. (Ex. 13.)

14. By letter of October 23, 2020, PERAC's executive director reiterated PERAC's position that September 3, 2019 was the date of Ms. Walsh's reinstatement, citing PERAC Memorandum #34/2004⁵ as stating:

"[u]pon signing this [*Application for Reinstatement To Service* form], the members are transformed from retiree status to member in service status. In this case, Ms. Walsh signed the form on September 3, 2019 acknowledging the buyback procedure and requesting for it to be completed in installment payments.⁶ Therefore, September 3, 2019 is when her reinstatement occurred, as that is when Ms. Walsh entered into a binding repayment plan with MWRA. Ms. Walsh's required 5-year reinstatement service would begin on September 26, 2019 as that is the start date of her new position and when the RRB should have begun taking deductions. The repayment agreement is between the member and the retirement board from which they retired and is on such terms as that board determines, and the MWRA deemed the September 3, 2019 application and letter to be sufficient. The RRB (Reading Retirement Board) has no role in determining the terms or structure of the repayment plan.

(Ex. 14.)

⁵ The letter mistakenly refers to the memorandum as #32/2004.

⁶ The portion of the application in which Ms. Walsh asked to pay in installments is not in the record. I accept the representation by PERAC's executive director, particularly because there is other evidence in the record that Ms. Walsh sought to repay in installments. He may, however, have conflated the September 3, 2019 application with Ms. Walsh's September 30, 2019 letter requesting approval of a repayment plan or, alternatively, payment by rolling over other retirement funds.

15. By letter of March 23, 2021, Reading Retirement Board’s counsel informed Ms. Walsh that despite PERAC’s opinion, the Board was sticking with its belief that her reinstatement date was December 20, 2019. Counsel opined that because the MWRA Employees’ Retirement Board did not formally vote to adopt Ms. Walsh’s repayment “agreement” until December 20, 2019,⁷ the Reading Retirement Board determined that her reinstatement date was December 20, 2019. Counsel emphasized that this date was particularly important because it meant that Ms. Walsh must continue as a Reading Retirement System member-in-service “uninterrupted through and including December 19, 2024 for you to be eligible to retire” from the Reading Retirement System. (Ex. 20.)
16. Ms. Walsh filed a timely appeal requesting that her reinstatement date be changed from December 20, 2019 to September 26, 2019, the date she began working at Municipal Light Department. (Ex. 22.)

Discussion

The decision of the Reading Retirement Board to establish the date of the Petitioner’s reinstatement to service is reversed. Given the wording of the application she signed, Ms. Walsh’s date of reinstatement was September 3, 2019, which is also the date on which she waived her existing retirement benefits. Because by that date she had resumed her status as unretired member of a retirement system, when she began her full-time employment with the Reading Municipal Light Department on September 26, 2019,

⁷ No minutes from this meeting are in the record. I accept esteemed counsel’s representation of what happened at that meeting.

retirement deductions should have been taken from her pay from the start of this new public employment.

On July 1, 2004, M.G.L. c. 32, § 105 came into effect and allowed a retiree to unretire and be reinstated to membership in a contributory retirement system under certain conditions, as follows:

- (a) Any member retired under section 5 [superannuation retirement] or section 10 [resignation, etc.] shall be eligible to be reinstated in a retirement system established under this chapter, if the retired member repays to the system from which he retired an amount equal to the total amount of any retirement allowance received by the retired member, together with buyback interest. Such payment shall be paid in one lump sum or in installments as the board shall prescribe. Upon such reinstatement, regular deductions shall be made from regular compensation pursuant to paragraphs (b) and (b ½) of subdivision (1) of section 22, and for such purpose, the member's date of entry into service shall be the date such member waived his retirement allowance or the date of reinstatement, whichever occurs earlier. Upon completion of such payment, the member shall be entitled to creditable service for all periods of service for which deductions were made from the member's regular compensation. For purposes of this section, the term "reinstatement service" shall mean a member's period of full-time employment after reinstatement in a retirement system under this section.

The parties focus their arguments on the question of the correct date of Ms. Walsh's reinstatement. PERAC and Ms. Walsh argue that the date of her reinstatement was September 3, 2029, as that is the date Ms. Walsh signed her reinstatement application. This view is stated on the PERAC form that Ms. Walsh signed, in the two opinion letters issued by PERAC in connection with this matter, and more generally in PERAC Memorandum #34/2004.

The Reading Retirement Board maintains that the date of reinstatement should be December 20, 2019, the date the Board began taking retirement deductions from Ms. Walsh's compensation. The Board argues in the alternative that, in accordance with CRAB's decision in the case of *Andersen v. State Board of Retirement*, CR-10-736 (DALA, Apr. 5, 2013; CRAB

Oct. 9, 2014), the date of reinstatement is the date when a member has paid back her entire retirement allowance plus buy back interest, in this case January 22, 2020.

But the most important date for Ms. Walsh is the date she reentered into service and thus became eligible to resume full-time work in the public sector and to contribute toward her retirement once again. That is because the public employee retirement statute provides that a retired member may reenter public service and have this additional service count toward a future retirement benefit, but only if the member waives her existing retirement benefit, then works for five years at her renewed public employment, and before she retires again has repaid the retirement benefits she has already received. M.G.L. c. 32, § 105(a). Depending on which date is Ms. Walsh's date of reentry, she must work five years from September 26, 2019 [the date she started to work for Reading], December 20, 2019 [the date the installment plan to repay her retirement benefit became official, according to Reading], or January 22, 2020 [the date she paid back her former retirement benefit in full].

The reentry date is also important because it is then that a formerly retired member, like Ms. Walsh, could begin to earn "regular compensation" again and begin to contribute again toward her future retirement. This is particularly important because the retirement statute limits how much a retired member may earn from additional public employment, if she is not unretired. Limits on the hours and the pay a retired employee may receive for work in the public sector effectively mean that on an annual basis a retired employee can work only part-time in a public job. M.G.L. c. 32, § 91(b).⁸ A person who seeks to unretire and work full-time, such as Ms.

⁸ Section 91(b) provides in pertinent part that a retired employee who takes a job in the public sector may work for:

Walsh, needs to know from the start of her renewed employment whether she is allowed to work full time without running afoul of the limits otherwise imposed on work by retired public employees. If she is not considered unretired when she starts full-time public employment and does not become unretired until many months later, she would not only need to work longer to become eligible for her new period of public employment to count towards her retirement benefit, she might also lose some of her pay if she exceeded the hours or pay limits imposed on retired employees.

The retirement statute recognizes the need to clarify the date of reentry and preferably to have it precede or at least coincide with the day a retired employee begins full-time work in the public sector. The statute does this by providing that the date of reentry may be either the date the member has waived the retirement benefit she has been receiving or her date of reinstatement “whichever occurs earlier.” M.G.L. c. 32, § 105(a).

The retirement statute does not specifically define the date of waiver or the reinstatement date. The date of waiver would seem to be the date the member waived receipt of ongoing retirement benefits. Here, the reinstatement application form, which PERAC prepared and Ms. Walsh signed, stated that waiver would occur on the date of reinstatement, which the form recited would be the date the member signed the application form. The retirement statute conceived of the possibility that the waiver and reinstatement dates might be different dates. But

not more than 1,200 hours in the aggregate, in any calendar year; provided that the earnings therefrom when added to any pension or retirement allowance he is receiving do not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated plus \$15,000; provided however that in the first 12 months immediately following the effective date of retirement, the earnings received by any person when added to any pension or retirement allowance the person is receiving shall not exceed the salary that is being paid for the position from which the person was retired or in which the person's employment was terminated.

that does not preclude the two dates from being on the same date. However described, because waiver is an action taken by the member alone, the determination of the waiver date must involve an examination of the member's actions alone. Here, Ms. Walsh, by signing the reinstatement application on September 3, 2019 was waiving her retirement benefits as of that date. While the result is in part based on the representation by PERAC in the form that the waiver date and the reinstatement date would both occur on the date the form was signed, it is not absolutely dependent on it. That is because waiver is within the member's power to do by herself, which is what Ms. Walsh did on September 3, 2019.

On the other hand, reinstatement depends on both the member's request for reinstatement and her retirement board's agreement to the request. It is this date about which PERAC and the Reading Retirement Board disagree. Board counsel is correct that the signed application does not appear to be sufficient to be a contract. While an attachment to the application listed the total amount Ms. Walsh would have to pay back in retirement benefits and interest, it did not tie down whether she would pay it in a lump sum or over time. Counsel for PERAC is correct, however, that the statute requires only that the parties reach an agreement to reinstate, not that this agreement meets all the formalities of a contract.

An "application" signed by a member would be a reinstatement agreement if the so-called application was in reality an offer to reinstate with the member's signature on it an acceptance of reinstatement. Here, the "application" states that the member is applying "to be reinstated into membership in the retirement system . . . as of the date this form is signed." It then adds that the member's signature means that the "[d]ate signed is the reinstatement date." The wording of the application thus offers a member the opportunity to be reinstated on the date

the application is signed. While this is not the only possible way a reinstatement date could be determined, the use of the PERAC form makes the waiver and reinstatement dates the same date.

The October 31, 2019 action by the MWRA Employee's Retirement Board to "adopt" Janet Walsh's Reinstatement Agreement" was thus simply an acknowledgement that Ms. Walsh had been reinstated as a member of this retirement system, which according to PERAC's executive director was an unusual step by this board, one that presumably was not absolutely necessary.

Since reinstatement is simply reinstatement as a member of the retirement system from which the member had retired, later action by another retirement system for which the unretired member now works can have no bearing on the determination of the member's reinstatement date. Thus, the December 20, 2019 date on which the Reading Retirement System began to treat Ms. Walsh as a regular employee and take retirement deductions from her pay is irrelevant unless that date, on which the Board asserts the MWRA Employee's Retirement Board accepted her request to repay in installments, has some independent significance. As I have already stated, the Reinstatement Application was phrased in such a way that Ms. Walsh's signature on it was an acceptance of the MWRA Employees' Retirement System's offer of reinstatement. Although the exact manner of repayment was not specified in the signed document, the attachment listed the specific amounts Ms. Walsh would pay if she chose to pay as a lump sum or in installments. Thus, by signing the agreement she agreed to pay back her retirement benefits in one of these two ways, with either option being acceptable to the MWRA Employees' Retirement System. If PERAC's executive director is correct that Ms. Walsh asked to pay back in installments when she signed the reinstatement application that would be even clearer proof of the existence of a payment agreement. Since Ms. Walsh had been provided that day with what

installment payments would be over a five-year period, that would seem to be sufficient to the extent any sort of defined payment agreement was necessary at this stage. A ministerial action by her former retirement board three months later concerning the installment plan should have no impact on either her reinstatement date or her date of reentry into service.

To hold up a retired employee's reentry into membership over details of repayment of retirement benefits she has already agreed to repay would be inconsistent with the legislature's intent that an unretired member need work five years – and only five years – full time to be eligible for this new period of employment to count as creditable service that will be used to calculate the member's subsequent retirement benefit. Five years is a long time for an employee who has worked long enough to retire to then resume full-time work. Indeed, PERAC in Memorandum #34/2004 cautions that "interested individuals should carefully consider whether reinstatement is appropriate in their situations." There is a good chance that a member seeking to unretire and the member's retirement board will need to take some time to figure out the details of how prior retirement benefits are to be repaid. The amount can be substantial. In Ms. Walsh's case, it totaled over \$160,000. Although, at first, she decided to pay back this money in installments over five years, she also inquired if she could repay using money from other retirement accounts. This took some time to sort out. There were also a number of back-and-forth communications involving the two retirement systems and PERAC. Finally, when Ms. Walsh obtained approval to pay using her other retirement funds and, faced with the Reading Retirement Board's continued disagreement with PERAC as to her reinstatement date, she paid off the entire amount in January 2020.

I do not see any reason why any of these doings should bear on when Ms. Walsh began her five-year reemployment period. By early September 2019, she had waived her existing

retirement benefit. Later that month, she began full-time employment in Reading. Repayment is a key feature of the retirement statute's reinstatement provision, but the legislature's enforcement mechanism to ensure prior retirement benefits are repaid comes not at the start of the member's new job, but at the end, for the statute provides that an unretired member will not obtain creditable service or receive any retirement benefit associated with an additional five years of service if prior retirement benefits are not repaid.

Although the Reading Retirement Board's position is that a retired member is reinstated once she reaches a definite agreement to repay her prior retirement benefits in installments, it notes the *Andersen* decision previously mentioned that focuses on the actual repayment date as the date of reinstatement, and thus proposes, alternatively, that Ms. Walsh's reinstatement date should be July 22, 2020, the date she had repaid her prior retirement benefit in full. *Andersen v. State Board of Retirement*, CR-10-736 (DALA, Apr. 5, 2013; affirmed by CRAB, Oct. 9, 2014).

This decision is not controlling here. Mr. Andersen had been a city alderman for a number of years, then retired from the Chicopee Retirement System. A few years later, he began working for the Holyoke Soldiers' Home. In 2002, he waived his existing retirement benefits and that year and the next sought to become a member of the State Employees' Retirement System. He was told (correctly) that this was not permitted under existing law. Starting in 2003, he sought to have the legislature pass a private bill that would allow him to enter the State Employees' Retirement System. The bill was never adopted. When Section 105 came into effect in 2004, apparently unaware of this development, Mr. Andersen did not take advantage of it and apply for reinstatement in the Chicopee Retirement System, the system from which he had retired. Instead, in 2005, he again sought to join the State Employees' Retirement System. There are no indications in the decisions what response he received. The only effective action he

took was in 2007 when he repaid in full the retirement benefits he had received from the Chicopee Retirement System. Under these circumstances, in which Mr. Andersen's waiver of his prior benefit was ineffective and in the absence of any application for reinstatement, Magistrate Judithann Burke understandably determined that his reinstatement date coincided with the date he repaid his retirement benefits, a decision that CRAB affirmed. Because no proper application for reinstatement was filed, the decision does not discuss the impact of reinstatement applications, let alone the application form drafted by PERAC. Because Mr. Andersen's waiver was premature, the decision also has no discussion of the impact of the waiver on the date of reentry into service. The *Andersen* decision thus applied the law to the facts before it, but it offers no guidance on the very different facts and issues presented in this appeal.

Conclusion

Based on the previous analysis, Ms. Walsh's date of reentry into service and her reinstatement date both occurred on September 3, 2019. I therefore reverse the contrary determination by the Reading Retirement Board and direct it to allow Ms. Walsh to buy back her first few months of service in Reading when her employer was not deducting retirement contributions from her pay.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
Acting Chief Administrative Magistrate

Dated: July 14, 2023

Exhibits

- 1 Application for Reinstatement to Service, 9/3/19
- 2 Reading Municipal Light Dept. offer of employment to Ms. Walsh, 9/9/19
- 3 Ms. Walsh's request for approval of an installment plan, 9/30/19
- 4 Paystub corrected by Reading Retirement System's Administrator, email trail, 9/26 – 10/4/19
- 5 MWRA Employees' Retirement Board's minutes of retirement bd. meeting, 10/31/19
- 6 Attorney McDonough letter re: MWRA Employees' Retirement Board's meeting, 11/15/19
- 7 MWRA Employees' Retirement Board's Executive Director Russo re: PERAC permission to rollover 401k plans, 1/6/20
- 8 Email trail between Reading Retirement System Administrator and Reading Municipal Light Dept. payroll staff, 12/30/19 – 1/15/20
- 9 MWRA Employees' Retirement Board's Director's notification to Ms. Walsh of money owed, 1/15/20
- 10 Email from Reading Retirement Board's Administrator to Ms. Walsh re: reinstatement date, 2/10/20
- 11 Email trail Reading Retirement Board's Administrator and Reading Municipal Light Dept. payroll staff, 4/23/20 – 5/7/20
- 12 PERAC letter to MWRA Employees' Retirement Board's Executive Director, 6/30/20
- 13 Attorney Sacco letter to PERAC, 7/10/20
- 14 PERAC letter to Attorney Sacco, 10/23/20
- 15 Two rollover checks to MWRA Employees' Retirement System, 1/7/20, 1/8/20
- 16 PERAC Memo #2 2017 re binding effect of PERAC memoranda on retirement bds, 1/5/17
- 17 blank Application for Reinstatement to Service, 9/3/19
- 18 PERAC Memorandum #34/2004, Reinstatement to Service, 9/13/04
- 19 Email trail between Attorney Sacco and Attorney McDonough, 11/15 -12/20/20
- 20 Attorney Sacco to Ms. Walsh, 3/23/21
- 21 Three rollover checks to MWRA, 1/7/20, 1/8/20, 1/22/20
22. Ms. Walsh's appeal letter