

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

KIM WRIGHT,

Petitioner-Appellant AND

**PUBLIC EMPLOYEE RETIREMENT
ADMINISTRATION COMMISSION,**

Intervenor

v.

STATE BOARD OF RETIREMENT

Respondent-Appellee.

CR-16-68

DECISION

Petitioner Kim Wright appeals from the decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), affirming the decision of the respondent State Board of Retirement (SBR) to require payment of buyback interest on the petitioner's purchase of creditable service at a rate of 3.75% pursuant to G.L. c. 32 §§ 1 and 3(5). The DALA magistrate admitted twelve exhibits into evidence, labeled 1 – 12. The DALA decision is dated May 10, 2019. Ms. Wright filed a timely appeal to us.

After a careful review of the record and consideration of the arguments presented by the parties, we reverse. Ms. Wright was erroneously excluded from membership during her period of employment with the Salem Area Employment and Training Administration (SAETA) funded through the Comprehensive Employment and Training Act (CETA) program. The Public Employee Retirement Administration Commission (PERAC) issued Memorandum #32 of 2013 subsequent to *Herrick v. Essex Regional Retirement Bd.*, 465 Mass. 801 (2013), instructing retirement boards to adopt a rate of interest to be used when a payment effects a benefit being received and is based on a board error, also known as the "correction of errors" rate. PERAC also issued Memorandum #14 2018 indicating that when

members are erroneously excluded from membership, application of the “correction of errors” interest rate was appropriate. Given that PERAC has broad authority in its oversight of retirement systems, the memoranda issued by PERAC are binding on the boards and are given “Skidmore” deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Accordingly, the “correction of errors” interest rate applies to the purchase of Ms. Wright’s creditable service with SAETA.

Background. From April 1980 until June 1984, Ms. Wright was a full-time employee of SAETA.¹ SAETA was a division of the federally funded CETA program, administered by the City of Salem.² During this period of employment, Ms. Wight was not a member of the Salem Retirement System, and contends that she “was never permitted to become a member-in-service.”³ In June 1985, Ms. Wright was subsequently hired by the Massachusetts Trial Court, where she then became a member-in-service of the Massachusetts State Employees’ Retirement System (MSERS) until her retirement effective September 7, 2018.⁴

On June 4, 2013, Ms. Wright submitted an application to SBR to purchase creditable service for her term of employment with SAETA.⁵ Though she was unable to provide official documentation of her payroll records from the City of Salem due to their destruction in a flood, her buyback request was eventually approved upon receipt of additional records documenting her period of employment and salary for the four years of service.⁶ Her request was approved by letter dated February 28, 2018, which included a calculation as to the amount owed.⁷ SBR determined that based on her salary for the four years of service, she owed \$4,384.57 in retroactive contributions, as well as interest in the amount of \$9,048.60 for a total of \$13,433.17.⁸ G.L. c. 32 § 1 defines “buyback interest” as “one-half of the actuarial assumed interest,” which SBR assessed at a rate of 3.75% charged through her date of application.⁹

¹ Exhibit 10; Finding of Fact 1.

² Ex. 2.

³ Ex. 3, 5, 10; FF 2.

⁴ Ex. 1, 10; FF 3.

⁵ Ex. 10; FF 4.

⁶ Ex. 3, 5; FF 7.

⁷ Ex. 5, 6; FF 7.

⁸ *Id.*

⁹ Ex. 6.

On March 19, 2018, Ms. Wright remitted to SBR the total sum to purchase her creditable service and reserved the right to appeal the amount owed, as well as the calculation of interest.¹⁰ On June 14, 2018, Ms. Wright submitted an affidavit in support of her appeal regarding the calculation of interest on her purchase.¹¹ On appeal, Ms. Wright argued that as a wrongfully-excluded member, she should not have been required to pay interest on her buyback purchase, or alternatively, that the appropriate rate of interest was the “correction of errors” rate rather than the rate assessed by SBR. PERAC was permitted to intervene and submitted a memorandum in support of the application of the “correction of errors” interest rate, in accordance with its guidance that members who were erroneously excluded from membership to a public retirement system pay such a rate. On May 10, 2019, the DALA magistrate determined that SBR had properly required payment of interest on Ms. Wright’s purchase and affirmed the 3.75% rate of interest. Ms. Wright appealed the DALA decision to us.

I. Membership status.

Ms. Wright’s eligibility to purchase creditable service for the period she was employed by SAETA and funded by CETA is not in dispute. The issue on appeal is which, if any, rate of interest is applied to her purchase of creditable service. The magistrate concluded that regardless of whether Ms. Wright was erroneously excluded from membership in the Salem Retirement System while she was employed by SAETA, SBR appropriately applied the buyback interest rate of 3.75% to her purchase. While we agree with the magistrate that interest must apply to her purchase, her status as a wrongfully-excluded member requires some discussion.

It is well settled that members are eligible to purchase creditable service from employment under a CETA-funded program administered by a city or town in Massachusetts. *See Gomes v. Contributory Retirement Appeal Bd.*, Middlesex Superior Court Civil Action No. 94-5927-B, Welch, J., (10/11/95) (establishing that an employee who worked for a CETA-funded program was eligible for membership in the retirement system corresponding to the town that administered the program). *See also Leonard v. Salem Retirement Bd.*, CR-87-1201 (DALA 1989) (explaining that the source of funding was not determinative of the

¹⁰ Ex. 9; FF 9.

¹¹ Ex. 10.

employee's eligibility for membership in a public retirement system, but rather the nature of the relationship between the employee and the employer.); *Sennott v. Teachers' Retirement Bd.*, CR-03-688 (DALA Dec. 5, 2003) (member entitled to purchase creditable service for service rendered that was funded by a JPTA grant which replaced CETA); *Boyle v. Pittsfield Retirement Bd.*, CR-02-587 (DALA 2007) (determining that an employee who was employed by a city and received CETA funded training was eligible to buy back creditable service); *Benedetti v. New Bedford Retirement Bd.*, CR-04-192 (DALA 2005, *aff'd* CRAB 2008)(employee may purchase creditable service for CETA employment but not for employment after her agency was reorganized and restructured into a distinct entity, separate and apart from the city).

The issues pertaining to Ms. Wright's appeal is similar to *Ronan-Jacobson v. State Board of Retirement and Salem Retirement Board*, where the petitioner was employed full time by SAETA from 1982 until 1985 and not made a member of the Salem Retirement System. *See Ronan-Jacobson v. State Board of Retirement and Salem Retirement Board*, CR-00-987 (DALA 2001)(*aff'd* CRAB 2002). The magistrate determined that the Salem Retirement Board had an unwritten policy permitting membership in the retirement system to anyone working more than twenty hours per week for the city of Salem. *See Id.* at 3. Given this policy, DALA determined, and CRAB affirmed, that it was an error for the petitioner to have been excluded from membership. *See Id.* Ms. Wright's period of employment with SAETA (from 1980 – 1984) overlaps with that of the petitioner's in *Ronan-Jacobson* in the same program, and Ms. Wright was similarly excluded from membership in the same retirement system. Comparatively, it is consistent with both DALA's and CRAB's position to consider Ms. Wright wrongfully excluded from membership in the Salem Retirement System. However, there is no provision in Chapter 32 allowing members to purchase creditable service for periods in which they were erroneously excluded from membership. Consequently, there is no corresponding interest rate to this situation.

II. Rate of interest.

DALA and CRAB have long held that a person wrongfully excluded from membership should not be required to pay interest on the purchase of service. However, the Appeals Court has since held that neither CRAB nor DALA have the power to grant equitable remedies without explicit statutory authority. *See Bristol County Retirement Board v. CRAB*,

65 Mass. App. Ct. 443, 446 (2006) (declaring that “[w]hile we understand CRAB's motivation to decide the case on essentially equitable principles on behalf of a sympathetic retiree, we conclude that its decision is inconsistent with the public employee retirement law[.]”). Following *Bristol*, DALA determined in *Knightly v. State Bd. of Retirement* that decisions rendered to remedy erroneous exclusions without the requirement of buyback interest were premised on equitable powers that were in neither DALA nor CRAB’s jurisdiction. See *Knightly v. State Bd. of Retirement*, CR-10-15 (DALA 2011; no CRAB decision). DALA affirmed this conclusion again in *McDonough v. Quincy Retirement Bd.*, where the magistrate opined that it was the intent of the legislature to require wrongfully-excluded members pay interest on purchases of creditable service in reference to the “time value of money.” *McDonough v. Quincy Retirement Board*, CR-13-357 (DALA 2016; no CRAB decision). Accordingly, pursuant to the above and the lack of equitable powers within DALA and CRAB, we too conclude that interest payments may not be waived on purchases of creditable service, even where a member has been erroneously excluded.

As the DALA magistrate acknowledged, Chapter 32 does not directly address members who were erroneously excluded from membership and sets no particular rate of interest for purchase of creditable service in such circumstances. Considering the statute’s silence, the magistrate looked to those instances explicitly covered by the statute and analogized Ms. Wright’s situation to a member purchasing creditable service pursuant to the Buyback provisions of Chapter 32, rather than a member who has underpaid, concluding that interest payments are required. The magistrate agreed with SBR that the buyback interest rate would apply under the circumstances. PERAC, as intervenor, however, argues that while it believes its earlier position that no interest should apply, the “corrections of error” interest rate is most appropriate in these situations.

Historically, CRAB determined that where members were employed by a governmental unit funded through the CETA program, the members were erroneously excluded from membership and were allowed to purchase creditable service for that period of employment without interest. Subsequently, in the case of *Herrick v. Essex Regional Retirement Bd.* 465 Mass. 801 (2013), the Supreme Judicial Court determined that in situations where an error was made by the board or where an error was being corrected by a court, interest would apply. This ruling in *Herrick* prompted PERAC to issue Memorandum

#32 of 2013, instructing the retirement boards to adopt a rate of interest to be used when a payment effects a benefit being received and is based on a board error.¹² Later, PERAC issued Memorandum #14 of 2018, which explicitly instructs a rate of interest for erroneously excluded members – the “correction of errors” interest rate.¹³

We disagree with the magistrate that where members were erroneously excluded from membership, the circumstances are analogous to members buying back creditable service, thereby applying the buyback interest rate in the purchase of creditable service. In these instances, we defer to PERAC and incorporate its discussion in its Memorandum at 4-8. As a state agency charged with providing oversight and guidance to state retirement boards, PERAC may issue memoranda to “clear up an ambiguity and fill in the gaps” where reasonable. In *Grimes*, CRAB articulated that PERAC memoranda are considered “interpretive rules,” and are entitled to deference according to their persuasive weight under the *Skidmore v. Swift* standard of agency review.¹⁴ *Grimes v. Malden Retirement Board & PERAC*, CR-15-5 (CRAB 2016). Such “*Skidmore* deference” does not give PERAC’s memoranda the full force of law but entitles them to deference if “reasonable.” *Id.*

In 2013, PERAC issued Memorandum #32 in response to the Supreme Judicial Court’s holding in *Herrick*, which interpreted G.L. c. 32 § 20(5)(c)(2) to supply a remedy for any error on part of a retirement board that affects the amount of benefits a retiree receives. *See Herrick*, 465 Mass. at 809. The Court determined that members should “receive the actuarial equivalent of the benefits they would have received had the board not erred,” and left the appropriate rate of interest to be assessed by the individual retirement boards. *Id.* Consequently, Memorandum #32 instructed state retirement boards to adopt what it referred to as a “correction of errors” interest rate. Following PERAC’s guidance, SBR assessed its rate to that of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W).

¹² Ex. 12.

¹³ Ex. 11.

¹⁴ In *Skidmore v. Swift*, the Supreme Court held that an administrative agency’s rulings, interpretations, and opinions are afforded weight according to their “power to persuade.” *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

With the various interest rate questions confronted by the retirement boards, PERAC issued Memorandum #14 of 2018 “Interest Payments in Certain Situations.” This included specific instructions for erroneously excluded members. Considering the decisions in *Bristol*, *Knightly*, and *McDonough*, discussed *supra*, PERAC revised its previously held position that erroneously excluded members should not be charged interest. With *Herrick* in mind, PERAC determined that a member who has been wrongfully excluded from membership due to an error on part of the retirement board should pay “the correction of errors” interest rate.¹⁵ PERAC grounded this decision in the fact that neither statutory provision generally governing purchases of creditable service are appropriate where a member has been excluded by error, as such a member was neither excluded by prior rule nor by election.¹⁶ Given the silence of G.L. c. 32 on the matter of interest for wrongfully-excluded members and PERAC’s regulatory role in filling in statutory gaps, it logically flows that absent any authority to the contrary, PERAC’s guidance is reasonable and due deference. CRAB has held that such memoranda as binding upon retirement boards. *See George Grimes v. Malden Retirement Board & PERAC*, CR-15-5 (CRAB 2016) (stating that “[r]etirement boards must follow PERAC’s directives because of the statutory grant of power to PERAC to issue such directives in order to ensure that the more than one hundred retirement systems in the Commonwealth operate efficiently and apply uniform rules and policies.”). Pursuant to the holding in *Herrick* concluding that interest applies when correcting a board error and our determination that PERAC’s Memoranda #32 of 2013 and #14 of 2018 to be reasonable and given *Skidmore* deference, the “correction of errors” interest rate applies to Ms. Wright’s purchase of creditable service under these circumstances.

Conclusion. The DALA decision affirming SBR’s decision to require Ms. Wright to pay buyback interest on her purchase of creditable service for her employment with SAETA is reversed. Pursuant to the holding in *Herrick* requiring interest in instances where there was an error made by the board or a correction made by a court and where PERAC’s

¹⁵ PERAC Memorandum #14 states that “[i]t is PERAC’s position that since these members have been excluded by error, it is more logical for the ‘correction of errors’ interest rate to attach to payments of those erroneously excluded.”

¹⁶ G.L. c. 32 § 3(5) governs circumstances where members have been previously excluded by rules of a retirement board. G.L. 32 § 3(2)(c) and 3(3) provide for those who previously “elected not to become a member in service.”

Memorandum is reasonable in filling in a gap under its broad authority, the correction of errors interest rate applies to Ms. Wright's purchase of creditable service for her employment with SAETA.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



Uyen M. Tran
Assistant Attorney General
Chair
Attorney General's Appointee



Nicolle M. Allen, Esq.
Governor's Appointee

Patrick M. Charles, Esq.
Public Employee Retirement Administration
Commission Appointee

Date: October 18, 2022

Memorandum is reasonable in filling in a gap under its broad authority, the correction of errors interest rate applies to Ms. Wright's purchase of creditable service for her employment with SAETA.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Uyen M. Tran
Assistant Attorney General
Chair
Attorney General's Appointee

Nicolle M. Allen, Esq.
Governor's Appointee

Did not participate
Patrick M. Charles, Esq.
Public Employee Retirement Administration
Commission Appointee

Date: October 18, 2022