COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Dale Young**,

 Petitioner

v. Docket No. CR-10-789

 Date Issued: April 1, 2016

**State Board of Retirement**,

 Respondent

**Appearance for Petitioner:**

*Pro se*

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Boxboro, MA 01719

**Appearance for Respondent:**

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State Board of Retirement

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**Administrative Magistrate:**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY OF DECISION**

The Petitioner is entitled to have the compensation she received during the periods of contract service she purchased pursuant to M.G.L. c. 32, § 4(1)(s) included in her regular compensation. While the inclusion of this compensation would otherwise be precluded by the Board’s Contract Service Buy Back Policy, this Policy is invalid because it exceeds the scope of M.G.L. c. 32. Additionally, this compensation qualifies as regular compensation under M.G.L. c. 32, § 1, because Ms. Young’s employment during this time was sufficiently “regular and permanent,” and she was not paid out of a 03 subsidiary account.

**DECISION**

 On November 12, 2010, the Petitioner, Dale Young, appealed timely under M.G.L. c. 32, § 16(4) the October 29, 2010 decision of the Respondent, the State Board of Retirement (the Board), which determined that the pay she received during her period of contract service does not qualify as “regular compensation.”

 An Order to Show Cause was issued on February 4, 2015; Ms. Young submitted her response to the Order to Show Cause, with ten proposed exhibits, on March 3, 2015, which she also attached to her pre-hearing memorandum as Pet. Ex. 6. A Notice of Hearing was issued on September 28, 2015 ordering the parties to submit pre-hearing memoranda. Ms. Young submitted her pre-hearing memorandum, with nine proposed exhibits (Pet. Exs. 1-9), on October 27, 2015; I have marked this memorandum “A” for identification. The Board submitted its memorandum, with ten proposed exhibits (Resp. Ex. 1-10), on October 29, 2015; I have marked this memorandum “B” for identification.

 I held an evidentiary hearing on October 29, 2015 at the Division of Administrative Law Appeals, One Congress Street, Boston, MA. The hearing was digitally recorded. At the hearing, I admitted twenty documents into evidence, including an additional document supplied by Ms. Young. (Pet. Exs. 1-10 and Resp. Exs. 1-10.) Ms. Young testified on her own behalf. The Board called no witnesses. The parties submitted post-hearing memoranda on December 30, 2015; I have marked Ms. Young’s memorandum as “C” for identification and the Board’s memorandum as “D” for identification. The record closed upon receipt of these memoranda.

**FINDINGS OF FACT**

Based on the evidence and testimony presented by the parties, I make the following findings of fact:

1. As of as early as February 27, 1998, contract employees with the Commonwealth of Massachusetts have been paid out of a subsidiary account labeled “CC.” Independent contractors and consultants are paid out of a subsidiary account labeled “HH.” (Pet. Ex. 6.)
2. Ms. Young was employed by the Massachusetts Department of Public Health (DPH) from January 2, 1979 to March 27, 1982. (Pet. Ex. 1; Resp. Ex. 5.)
3. Ms. Young was a member of the State Employees Retirement System (SERS) from 1979 to 1982 in connection with this employment. She took a refund of her retirement contributions in 1982, thereby ending her membership. (Resp. Ex. 9.)
4. Ms. Young was employed by the Massachusetts Department of Environmental Protection (DEP) from March 1, 1986 to February 21, 1998. (Pet. Ex. 1; Resp. Ex. 5.)
5. Ms. Young was a member of SERS in connection with this employment. She took a refund of her retirement contributions in 1998, thereby ending her membership. (Resp. Ex. 9.)
6. Ms. Young was employed as a contract employee from 1998 to June of 2008. (Pet. Testimony; Pet. Ex. 10; Resp. Exs. 3, 4.)
7. Ms. Young was employed by DEP as a contract employee from July 1, 2004 to June 30, 2005. (Resp. Ex. 3.)
8. Ms. Young was employed by the Executive Office of Energy and Environmental Affairs (EEA) from July 1, 2005 to July 10, 2010. She was employed as a contract employee from July 1, 2005 to June 30, 2008, and as a regular employee thereafter until her retirement on July 10, 2010. (Pet. Exs. 1, 6, 10; Resp. Exs. 4, 5.)
9. During her period of contract employment with the EEA from 2005 to 2008, Ms. Young’s employee ID was 154443. The “Payment Type” listed on her earnings statements was “HRCMS Employee Payroll.” The “Pay Group” listed on her earnings statements was “CW Normal FLSA 12.” (Pet. Ex. 6.)
10. During her period of regular employment with the EEA from 2008 until her retirement in 2010, Ms. Young’s employee ID was 154443: the same as during her period of contract employment. The “Payment Type” listed on her earnings statements was “HRCMS Employee Payroll”: the same as during her period of contract employment. The “Pay Group” listed on her earnings statements was “CW Normal FLSA 12”: the same as during her period of contract employment. (Pet. Ex. 6.)
11. On March 29, 2007, the Board adopted a Contract Service Buy Back Policy pursuant to M.G.L. c. 32, § 4(1)(s). (Pet. Ex. 2.)
12. Ms. Young enrolled with SERS in July of 2008. On her New Member Enrollment Form, Ms. Young indicated previous periods of membership with the SERS from 1979 to 1982 and from 1985 to 1998. (Resp. Ex. 9.)
13. On May 27, 2010, the Board amended its Contract Service Buy Back Policy by adding the following language:

Salary earned during any period of qualifying contract service that is purchased pursuant to § 4(1)(s) may not be utilized, or considered “regular compensation” in calculating a member’s retirement allowance.

(Pet. Ex. 2.)

1. On June 16, 2010, Ms. Young purchased prior contract service for the period of July 1, 2004 to June 30, 2008. (Resp. Exs. 3, 4.)
2. On Ms. Young’s Contract Service Buyback Form for her contract service with DEP from July 2004 to June 2005, the representative of DEP who completed page 2 of the Form indicated that Ms. Young was paid from the “State” subsidiary account. (Pet. Ex. 6; Res. Ex. 3.)
3. On Ms. Young’s Contract Service Buyback Form for her contract service with EEA from July 2005 to June 2008, the representative of EEA who completed page 2 of the Form indicated that Ms. Young was paid from the “Capital” subsidiary account. (Pet. Ex. 6; Res. Ex. 4.)
4. On June 27, 2010, Ms. Young submitted a Rollover/Transfer Request to purchase creditable service. (Pet. Ex. 9.)
5. On July 6, 2010, Ms. Young applied for a termination retirement allowance. (Resp. Ex. 6.)
6. On July 8, 2010, Ms. Young completed a retirement application for submission to the Board. (Resp. Ex. 5.)
7. Ms. Young retired on July 10, 2010 with 21 years, 2 months, and 11 days of creditable service. (Pet. Ex. 1; Resp. Ex. 5.)
8. The Board sent a Salary Request and Release Form to EEA to confirm Ms. Young’s compensation from July 2007 to July 2010. The form was completed by Kathleen Grant, who provided Ms. Young’s rate of compensation from June 29, 2008 to July 10, 2010, and who also indicated her belief that Ms. Young was a “03 contractor” prior to June 29, 2008. (Res. Ex. 7.)
9. The Board then sent the Salary Request and Release Form to DEP to confirm Ms. Young’s compensation from January 1, 1995 to February 28, 1998. The form was completed by a representative of DEP, who provided Ms. Young’s rate of compensation for the requested period. (Res. Ex. 8.)
10. On October 21, 2010, the Board mailed a pension data sheet to Ms. Young. The data sheet showed a calculated 3-year salary average of $71,985.40 based on regular compensation amounts Ms. Young received from May 4, 1997 to January 3, 1998, January 4, 1998 to February 21, 1998, and June 28, 2008 to July 10, 2010. It was not based on the compensation amounts she received as a contract employee from 2004 to 2008. (Pet. Ex. 1.)
11. On October 29, 2010, the Board notified Ms. Young that the regular compensation she received during her years of contract service could not be included in the calculation of her retirement benefits. (Pet. Ex. 2.)
12. On November 12, 2010, Ms. Young appealed the Board’s decision. (Pet. Ex. 3.)

**CONCLUSION AND ORDER**

After careful consideration of the evidence presented in this case, the Board’s decision not to include in Ms. Young’s regular compensation the pay she received as a contract employee is reversed.

When a member retires from public service, she is entitled to a superannuation retirement allowance that is based in part on “the average annual rate of regular compensation received by such member during any period of three consecutive years of creditable service for which such rate of compensation was the highest.” M.G.L. c. 32, § 5(2)(a). “Regular compensation” during the period of Ms. Young’s contract service is defined as:

salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus, overtime, severance pay for any and all unused sick leave, early retirement incentives, or any other payments made as a result of giving notice of retirement . . . .

M.G.L. c. 32, § 1.

“Employee” is defined as

any person whether employed or appointed for a stated term or otherwise, who is engaged in duties which require that his time be devoted to the service of either such governmental unit in each year during the ordinary working hours of regular and permanent employees, and who is regularly and permanently employed in such service . . . excluding any person whose compensation for service rendered to the commonwealth is derived from the subsidiary account 03 of the appropriation of any department, agency, board or commission of the commonwealth.

*Id.*

“‘[R]egular,’ as it modifies ‘compensation,’ imports the idea of ordinariness or normality as well as the idea of recurrence . . . [which] contrasts with ‘overtime’ and with the compendious ‘bonus’ which are to be excluded from the compensation that figures in computing retirement benefits.” *Boston Assoc. of School Admins. and Supervisors v. Boston Retirement Bd.*, 383 Mass. 336, 341 (1981).

M.G.L. c. 32, § 4(1)(s) governs the availability of creditable service for contract employment:

Any member in service of the state employees' retirement system who, immediately preceding the establishment of membership in that system or re-entry into active service in that system, was compensated for service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth may establish as creditable service up to 4 years of that service if the member has 10 years of creditable service with the state employees' retirement system, and if the job description of the member in the position which the member holds upon entry into service or re-entry into active service is substantially similar to the job description of the position for which the member was compensated as a contract employee . . . .

Upon completion of the payments [into the Annuity Savings Fund of the state employees' retirement system], the member shall receive the same credit for the period of previous service as a contract employee as would have been allowed if the service had been rendered by the member as a state employee.

 Neither party to this case contests Ms. Young’s eligibility to purchase creditable service pursuant to M.G.L. c. 32, § 4(1)(s). Ms. Young purchased 47 months and 10 days of contract service from July 2004 to June 2008. (Resp. Exs. 3, 4.) She was eligible to purchase this contract service because she had at least ten years of creditable service, and the position in which she was employed starting July 1, 2008 was identical to that in which she was employed as a contract employee immediately prior. (Resp. Ex. 5.)

 The issue in this case involves whether the compensation that Ms. Young received during her period of contract service can be included as regular compensation in the calculation of her retirement benefits. Both parties have put forth various arguments, and I will address each.

Application of the Board’s Contract Service Buy Back Policy

The Board maintains that its amended Contract Service Buy Back Policy precludes the use of Ms. Young’s contract compensation in the calculation of her retirement benefits:

Salary earned during any period of qualifying contract service that is purchased pursuant to § 4(1)(s) may not be utilized, or considered “regular compensation” in calculating a member’s retirement allowance.

(Ex. 1.) This Policy was later codified on August 19, 2011 at 941 CMR 2.09(5)(d)(1).

 Ms. Young argues that the retroactive application of the Policy to her periods of contract service that occurred before it was enacted is prohibited by M.G.L. c. 32, § 25(5) and *Madden v. Contributory Retirement Appeal Bd*, 431 Mass. 697 (2000). M.G.L. c. 32, § 25(5) provides members with a contractual expectation of their rights and benefits under Chapter 32:

*Effect of Amendments or Repeal*. The provisions of sections one to twenty-eight, inclusive, and of corresponding provisions of earlier laws shall be deemed to establish and to have established membership in the retirement system as a contractual relationship under which members who are or may be retired for superannuation are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits provided for thereunder, if such member or members have paid the stipulated contributions specified in said sections or corresponding provisions of earlier laws.

In *Madden*, the plaintiff challenged the Teachers’ Retirement Board’s retroactive application of its policy regarding the proration of part-time service to periods of her service that occurred before the policy was enacted. Ms. Madden worked part-time in the Arlington public school system from 1973 to 1980. *Madden*, 431 Mass. at 698. In 1980, she began working full-time in Arlington until 1982. *Id.* From 1982 to 1994, Ms. Madden worked part-time. *Id*. In 1990, the Teachers’ Retirement Board had enacted 807 CMR 3.04(2), which required part-time service to be prorated; prior to the enactment of this policy, members of the Teachers’ Retirement System would receive one full year of creditable service for each year of part-time service.

 The Supreme Judicial Court held that M.G.L. c. 32, § 25(5) provides Ms. Madden with a contractual expectation to the lawful interpretation of the retirement statute and associated regulations. Since the Board’s proration regulation at 807 CMR 3.04(2) did not exist until 1990, the Court held that the Board could prorate only her post-1990 part-time service, and that her pre-1990 part-time service would be subject to the regulation in effect before 1990; namely, that she would receive a full year of creditable service for each year of part-time service. *Id.* at 701-02.

Here, Ms. Young’s contract service in question occurred from July 1, 2004 to June 30, 2008. In July 2008, Ms. Young became a regular employee, and remained as such until her retirement on July 10, 2010. The Board adopted its Buyback Policy on May 27, 2010, a month and a half before Ms. Young’s retirement. Ms. Young argues that, like Ms. Madden, she had a contractual expectation when she enrolled in SERS in July 2008 that all policies and regulations in effect at that time would apply to her going forward, and that any subsequent amendments could only affect future periods of service. In particular, she argues that the Board’s Policy could not be applied retroactively to bar the inclusion of compensation she received for periods of contract service prior to May 27, 2010.

While I do credit Ms. Young’s use of M.G.L. c. 32, § 25(5) and *Madden*, her argument nonetheless fails for a simple timing issue. The Board’s Policy was first adopted on May 27, 2010; Ms. Young did not submit applications to purchase her periods of contract service until June 16, 2010. Therefore, at the time the Policy was adopted, Ms. Young had no “period of qualifying contract service . . . purchased pursuant to § 4(1)(s).” (Ex. 1.) Since the Policy was in effect when she purchased her contract service, the existence of the Policy affected her contractual expectation under M.G.L. c. 32, § 25(5), and therefore the Policy can be applied to those purchased periods of contract service, regardless of when the service actually occurred.

Validity of the Board’s Contract Service Buy Back Policy

 Since I have concluded that the Board’s Policy may be applied to Ms. Young’s compensation, I will consider whether it is consistent with Chapter 32.

Agency guidance that has not been formally promulgated is entitled to respect only to the extent it is persuasive. *See* *Rent Control Bd. v. Cambridge Tower Corp.*, 394 Mass. 809, 814 (1985) (internal agency notice flatly contradicting regulation did not have force of law and did not bind court). An agency’s policy is invalid and unenforceable when it is inconsistent with a statute or regulation. *See* *Haley v. Comm’r of Pub. Welfare*, 394 Mass. 446 (1985) (agency’s change in policy accorded no deference when it was unaccompanied by a similar change in statute or regulation).

Massachusetts retirement law allows Ms. Young to purchase creditable service for her contract employment from July 2004 to June 2008. G.L. c. 32, § 4(1)(s). However, Chapter 32 says nothing explicitly about whether compensation earned during contract employment qualifies as “regular compensation.” Thus, a determination of the Policy’s validity requires a comparison of the Policy with the definitions of “regular compensation” and “employee” included in Chapter 32.

“Regular compensation” during the relevant period is defined as “salary, wages or other compensation in whatever form, lawfully determined for the individual service of the *employee* by the employing authority. . . .” G.L. c. 32, § 1. The Board’s rationale for not including as regular compensation salary received during periods of contract service is that members do not qualify as “employees” during periods of contract service, either because they are paid out of the “subsidiary account 03,” or because they are not “regularly and permanently employed.”

“Employee” is defined in relevant part as:

[A]ny person whether employed or appointed *for a stated term or otherwise*, who is engaged in duties which require that his time be devoted to the service of either such governmental unit in each year during the ordinary working hours of regular and permanent employees, *and who is regularly and permanently employed in such service*, including employees of the general court, members of the judiciary, state officials, constitutional officers, member of the general court or other persons elected by popular vote, but excluding members of the judiciary appointed thereto prior to January second, nineteen hundred and seventy-five, and *excluding any person whose compensation for service rendered to the commonwealth is derived from the subsidiary account 03* of the appropriation of any department, agency, board or commission of the commonwealth. . . .

G.L. c. 32, § 1 (emphasis added).

 Clearly, members who are paid out of the “subsidiary account 03,” or are not “regularly and permanently employed” do not qualify as “employees,” and therefore any compensation they earn does not qualify as “regular compensation.” G.L. c. 32, § 1. What is less clear, however, is whether someone who provides service under a contract is also automatically paid out of the “subsidiary account 03” or not “regularly and permanently employed.” If either one is true, then it appears that the Policy is valid; however, if neither is always true, then the Policy would be invalid as overbroad, since it would capture certain contract employees who are not paid out of the “subsidiary account 03,” and are “regularly and permanently employed.” G.L. c. 32, § 1. These employees would be entitled to have their compensation included as “regular compensation” under the definitions in G.L. c. 32, § 1, but would be denied under the Board’s Policy. That compensation is received in exchange for contract service is not by itself sufficient to disqualify it from being “regular compensation”; the Board’s Policy that disqualifies such compensation must therefore stand on some other statutory basis.

 I will turn first to the issue of the subsidiary account 03. The language “excluding any person whose compensation for service rendered to the commonwealth is derived from the subsidiary account 03” was added to the definition of “employee” in G.L. c. 32, § 1 in 1973. Acts 1973, c. 324, § 1. Based on the documents submitted by Ms. Young in her response to the order to show cause (Pet. Ex. 6) it appears that the subsidiary account nomenclature for the Commonwealth has changed since 1973. Persons performing contract service for the Commonwealth are now paid either from subsidiary account CC or subsidiary account HH. (Pet. Ex. 6.) Account CC is reserved for contract employees, while account HH is used for independent contractors and consultants. *Id.* While it may have been true at one point that anyone rendering contract service was paid out of the 03 subsidiary account, that no longer seems to be the case. Therefore, the Board’s Policy barring the inclusion of compensation for periods of contract service purchased pursuant to G.L. c. 32, § 4(1)(s) will capture members who may have rendered contract service but were not paid out of the 03 subsidiary account. Therefore, the Board’s policy does not have its basis in preventing the use of compensation for periods where the member was paid out of the 03 subsidiary account, since we see that the Policy would be overbroad for this purpose.

 However, it may be that the Policy disqualifies this contract service compensation because it is derived from employment that is not sufficiently “regular and permanent.” An argument can be made that service rendered pursuant to a defined contract term is not “permanent,” but is rather “temporary.” According to this argument, contract service purchased pursuant to G.L. c. 32, § 4(1)(s) is not sufficiently “permanent” to create employment, and therefore provides a sufficient basis for the Board to enact the Contract Service Buyback Policy. However, this ignores the plain language of the definition of “employee,” which states that an employee is “any person whether employed or appointed *for a stated term or otherwise*. . . .” G.L. c. 32, § 1. A person employed pursuant to an annual contract would clearly fall under the category of a being “employed for a stated term.”

Additionally, a previous DALA decision established that contract service can be sufficiently “permanent” to satisfy the definition of “employee,” and thus the definition of “regular compensation.” *See Younis v. Boston Retirement Bd*, CR-07-743 \* 9 (2009) (finding that a member was permanently employed where his employment was subject to recurrent annual contracts, he was paid in regular, identical, weekly amounts, and he was not required to submit invoices for payment). In addition, the Appeals Court has previously held that being regularly employed according to its usual meaning connotes "continuous employment as distinguished from sporadic, intermittent, or temporary employment." *Concord v. Colleran*, 34 Mass. App. Ct. 486, 489 (1993). These decisions clearly indicate that contract employment is not automatically “temporary,” but rather can be considered “permanent” as that word is used in the definition of “employee” in G.L. c. 32, § 1. Therefore, a policy that disqualifies contract service compensation may capture contract service compensation that is derived from “regular and permanent” employment, and thus otherwise satisfies the definition for “regular compensation.” Accordingly, I conclude that the Board’s policy does not have its basis in the statutory requirement that regular compensation be derived from “regular and permanent” employment.

 Finding that the Board’s policy has no basis either in the “03 subsidiary account” exclusion or in the “regular and permanent” requirement, I conclude that the Board’s Policy is invalid as exceeding the scope of G.L. c. 32. The Policy is inconsistent with the statutory requirements for regular compensation, since it would disqualify contract service compensation entirely, even in cases where the member was not paid out of a 03 subsidiary account and her employment was subject to recurrent annual contracts. Therefore, the Policy cannot act to bar the inclusion of Ms. Young’s contract income in her three-year average salary for calculating her retirement benefits.

 The specific nature of Ms. Young’s contract service.

 Notwithstanding the invalidity of its policy, the Board maintains that the compensation Ms. Young received during her period of contract service nonetheless fails to satisfy the G.L. c. 32 definition of “regular compensation” because she was paid out of the “03 subsidiary account” and her employment was not “regular” or “permanent.”

 The only evidence that the Board has submitted to suggest that Ms. Young was paid out of a 03 subsidiary account is a hand-written notation on the Salary Request and Release Form completed by the EEA that reads “03 contractor prior to 6/29/08.” (Res. Ex. 7.) In contrast, Ms. Young submitted numerous documents with her response to the Show Cause Order that suggest that not only was she not paid out of a 03 subsidiary account, but that such accounts are no longer used by the Commonwealth. (Pet. Ex. 6.) Included in this submission are documents from the Commonwealth that explain how to classify contract employees and show that such employees are paid out of a subsidiary account labeled “CC.” *Id.* In addition, Ms. Young submitted certain earnings statements from her periods of contract and regular employment with EEA; these documents show that her Payment Type – “HRCMS Employee Payroll” – and Pay Group – “CW Normal FLSA 12” – did not change when she switched from contract employment to regular employment. *Id.* Furthermore, when DEP and EEA completed the employer portions of Ms. Young’s Contract Service Buy Back Forms, they indicated that she was paid out of the “State” and “Capital” subsidiary accounts, respectively. *Id.* Therefore, I find that Ms. Young has submitted sufficient evidence to rebut the Board’s assertion that she was paid out of a 03 subsidiary account.

 The Board also argues that the compensation Ms. Young received during her period of contract service does not qualify as “regular compensation” because she was not sufficiently “regularly and permanently” employed to qualify as an “employee” under G.L. c. 32, § 1. However, DALA has previously held that contract employment that is subject to annual contracts is sufficiently “regular and permanent.” *See Younis v. Boston Retirement Bd*, CR-07-743 \* 9 (2009). Ms. Young’s contract employment was subject to annual contracts from 2004 to 2008. Furthermore, her employment during this time was “continuous,” rather than “sporadic, intermittent, or temporary.” *Concord v. Colleran*, 34 Mass. App. Ct. 486, 489 (1993). She was employed by DEP as a contract employee from 1998 to 2005, and then by EEA as a contract employee from 2005 to 2008. (Resp. Exs. 3, 4, 5.) This employment history could hardly be described as “sporadic, intermittent, or temporary.” In addition, the definition of “employee” in M.G.L. c. 32, § 1 states that an employee is “any person whether employed or appointed *for a stated term* or otherwise.” This definition clearly contemplates employment with a defined term, such as contract employment like Ms. Young’s. For all of the foregoing reasons, I conclude that Ms. Young’s contract employment was sufficiently “regular and temporary” to qualify her as an “employee” pursuant to M.G.L. c. 32, § 1.

 Misclassification of Ms. Young’s employment.

 At the hearing and in her post-hearing memorandum, Ms. Young raised the issue of whether the duties she was required to perform during her period of contract service are such that she should have properly been classified as a regular employee rather than as a contract employee. She argues that she was given more authority than may properly be conferred upon a contract employee, and thus she should have been a regular employee. Ms. Young maintains that had she been properly classified as such, her compensation would qualify as regular compensation, and therefore I should reverse the Board’s decision.

 I decline to address the issue of whether Ms. Young’s duties and responsibilities during her period of contract service were such that she should have been classified as a regular employee rather than as a contract employee. Because this is an appeal of the Board’s decision to exclude certain portions of her compensation from the calculation of her retirement benefits, the issue of whether she was improperly classified is not properly before me. Had Ms. Young applied to purchase her contract service as regular prior service – alleging that she was improperly classified during this time – and the Board denied her request, she could have appealed that denial, and I would address that issue. However, Ms. Young purchased this service as contract service pursuant to M.G.L. c. 32, § 4(1)(s), and her appeal involves the issue of whether her compensation for this contract service qualifies as “regular compensation,” not whether she actually should have been able to purchase it as regular service.

 Conclusion

In conclusion, the Petitioner is entitled to have the compensation she received during the periods of contract service she purchased pursuant to M.G.L. c. 32, § 4(1)(s) included in her regular compensation. While the inclusion of this compensation would otherwise be precluded by the Board’s Contract Service Buy Back Policy, I conclude this Policy is invalid because it is inconsistent with M.G.L. c. 32. Additionally, this compensation qualifies as regular compensation under M.G.L. c. 32, § 1, because Ms. Young’s employment during this time was sufficiently “regular and permanent,” and she was not paid out of a 03 subsidiary account. The Board’s decision is therefore reversed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

DATED: April 1, 2016