COMMONWEALTH OF MASSACHUSETTS

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

**David Lynn,**

Petitioner

v. Docket Nos. CR-14-550

**Essex Regional Retirement Board**, Date: May 4, 2018

Respondent

**Appearance for Petitioner**:

David Lynn, *pro se*

33 Linebrook Road

Ipswich, MA 01938

**Appearance for Respondent**:

Michael Sacco, Esq.

Law Offices of Michael Sacco, P.C.

P.O. Box 479

Southampton, MA 01073-0479

**Administrative Magistrate**:

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY OF DECISION**

The Petitioner failed to prove that he purchased the service at issue while he was a member in service and, therefore, I affirm the decision of the Essex Regional Retirement System denying the purchase. *Zavaglia v Gloucester Ret. Bd*., CR-09-459 at \*2 (CRAB Amended Dec., Apr. 13, 2015).

**DECISION**

On October 9, 2014, the Essex Regional Retirement System (“ERRS”) wrote the Petitioner, David Lynn, informing him that it had denied his request to purchase Reserve Police Officer Service rendered from July 1, 1987 through March 21, 1988. On October 17, 2014, Mr. Lynn timely appealed that decision, pursuant M.G.L. c. 32, § 16(4).

The Respondent filed a pre-hearing memorandum that I marked “A” for identification. Mr. Lynn also filed a Pre-hearing memorandum and I marked it “B.” I held a hearing on August 2, 2016, which was digitally recorded. The Respondent called Mr. Lynn as a witness to testify at the hearing. In addition, the Respondent called Kristen Wallace as a witness. Ms. Wallace, at all times material to this matter, was the ERRS Retirement Coordinator.

A letter from the Respondent’s attorney to the Essex County Sheriff concerning a subpoena duces tecum was marked “C” for identification at the hearing. In addition, at the hearing, I entered 19 documents into evidence without objection (Exs. 1-19). At the end of the hearing, I left the record open so the parties could obtain additional documentation, file additional exhibits and post-hearing briefs. I received the parties’ post-hearing submissions. I marked Exhibits 20-27 by agreement and marked the Respondent’s post-hearing brief “D” and the Petitioner’s “E.” I closed the administrative record on December 2, 2016.

**Findings of Fact**

Based on the evidence presented by the parties, and reasonable inferences drawn from it, I make the following findings of fact:

1. Mr. Lynn became a member of ERRS on March 22, 1988 as a permanent, full time member of the Manchester Police Department. (Stip.)
2. Mr. Lynn was placed on paid administrative leave on June 28, 2014. (Ex. 20.)
3. The Chief of Police ordered Mr. Lynn not to perform any law enforcement functions or report to the police station. In addition, the Chief secured Mr. Lynn’s firearm at the police station. (*Id.*)
4. Mr. Lynn told the Chief that he planned to retire and the Chief wrote: “For now, your resignation/intention to retire has not been accepted by the town.” (*Id.*)
5. On July 8, 2014, the Town Administrator suspended Mr. Lynn without pay for 5 days “effective immediately.” (Ex. 21.)
6. On that same day, Mr. Lynn submitted an application for voluntary superannuation retirement. The application listed an effective retirement date of July 26, 2014. (Ex. 2.)
7. He submitted this form during a meeting with Kristen Wallace, ERRS Senior Retirement Coordinator. (Lynn and Wallace Test.)
8. During their meeting, Mr. Lynn told Ms. Wallace that he wanted to retire and do so before the disciplinary hearing scheduled for July 14, 2014. (Lynn and Wallace Test.)
9. Ms. Wallace understood Mr. Lynn to say that he had tried to resign his position the day before, but his resignation had not been accepted. (Wallace Test.)
10. During the meeting, Ms. Wallace raised the issue of Mr. Lynn’s purchasing reserve time and said that she knew someone who could provide the numbers needed to calculate the cost of the purchase. (Lynn Test.)
11. Ms. Wallace understood that she had to confirm the dates and amounts of service Mr. Lynn could purchase and determine the cost of the purchase. (Wallace Test.)
12. Mr. Lynn submitted his written resignation on July 8, 2014. The resignation provided that it was “effective today as I have submitted my paperwork to retire with the Essex Regional Retirement Board this morning.” (Lynn Test., Ex. 4.)
13. On July 10, 2014, Mr. Lynn forwarded a copy of the resignation letter dated July 8, 2014 to Ms. Wallace at ERRS. (Stip.)
14. On July 14, 2014, Ms. Wallace forwarded the information she gathered from Mr. Lynn for his service purchase to Scott Provencal to do the necessary calculations. (Ex. 27.)
15. On July 21, 2014, Mr. Lynn signed an agreement stating that he offered his “irrevocable resignation effective July 7, 2014.” His union representative signed it the same day. The Town Administrator signed it on July 24, 2014. The Agreement provided it became effective “when signed by the parties.” (Ex. 23.)
16. On July 22, 2014, Scott Provensal, ERRS Member Services Analyst, sent Mr. Lynn an invoice reflecting the cost to purchase the service and stating “this must be purchased by your retirement date.” (Ex. 5.)
17. On July 25, 2014, Mr. Lynn hand delivered a check in the amount of $937 to ERRS to purchase the service. (Ex. 14, Lynn Test.)
18. The check was returned to Mr. Lynn by ERRS with a letter dated August 25, 2014. (Stip., Ex. 6.)
19. On August 27, 2014, the Manchester Treasurer/Collector wrote to Ms. Wallace and indicated that Manchester received and accepted Mr. Lynn’s irrevocable resignation effective July 7, 2014. (Stip.)
20. The Respondent notified Mr. Lynn of its decision to deny his service purchase and provided him with his appeal rights, on October 9, 2014. (Ex. 11.)
21. Mr. Lynn filed a timely appeal of that decision, on October 13, 2014. (Stip., Ex. 12.)

**Discussion**

When a member of a public retirement system retires from public service, he is entitled to a superannuation retirement allowance that is based on several factors including years of creditable service. G.L. c. 32, § 1 defines creditable service as “all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive.” Under certain circumstances, the retirement law allows members to purchase creditable service. One such provision allows police officers, like Mr. Lynn, to purchase their past reserve service. *See Antonio Gomez v. Plymouth Ret. Sys. & PERAC,* CR-14-127, at \*9 (DALA Feb. 5, 2016), *aff’d* (CRAB Nov. 18, 2016). G.L. c. 32, § 4(2)(b) provides that retirement boards:

shall credit as full-time service not to exceed a maximum of five years that period of time during which a reserve or permanent-intermittent police officer or a reserve, permanent-intermittent or call fire fighter was on his respective list and was eligible for assignment to duty subsequent to his appointment; and provided, further, that such service as a permanent-intermittent or call fire fighter shall be credited only if such permanent-intermittent or call fire fighter was later appointed as a permanent member of the fire department.

But Mr. Lynn failed to accomplish his service purchase while he was a member in service and, therefore, his claim must fail. “There can be no question that, in the usual case, purchases of prior service may only be made at a time when the purchaser is an active member of a retirement system — i.e., at a time when he is still working for a governmental entity that participates in a retirement system.”[[1]](#footnote-1) *Zavaglia v Gloucester Ret. Bd*., CR-09-459 at \* 2 (CRAB Amended Dec. Apr. 13, 2015). “The purchase or transfer of creditable service must be accomplished while a government employee is a member in service.” *Zavaglia v Gloucester Ret. Bd*., CR-09-459 at \* 6 (DALA Dec. Jan 10, 2014), *aff’d* (CRAB Jul. 3, 2014 and Amended Dec. Apr. 13, 2015).

I now address whether Mr. Lynn was an active member in service when he attempted to complete the purchase of his service. The Legislature has defined the phrase Member in Service*,* providing that:

Any member who is regularly employed in the performance of his duties... Any member in service shall continue as such during any period of authorized leave of absence with pay or during any period of authorized leave of absence without pay if such leave is due to his mental or physical incapacity for duty or if such authorized leave of absence without pay is for not more than one year or is to permit such member to perform his duties as a member of a retirement board…

G.L. c. 32, § 3(1)(i).

On July 8, 2014, Mr. Lynn was on paid administrative leave, but on July 10 he was suspended without pay. Based upon the credible evidence, his status remained the same, until July 24, 2014, when the Town Administrator signed the Agreement making Mr. Lynn’s resignation effective July 7, 2017. While Mr. Lynn testified that he thought he was paid until he retired, I was not persuaded by that testimony. He was uncertain when he testified on that point and the letter from the Town Administrator dated July 8, 2014 (Ex. 21) was clear that Mr. Lynn was suspended without pay on July 8, 2014. Based upon the credible evidence, Mr. Lynn was suspended without pay as of July 8, 2014 and, therefore, he was not a member in service after July 8, 2014.

In the final analysis, however, it does not matter. Mr. Lynn did not pay for the service until July 25, 2014, the day after the Agreement making his resignation effective July 7, 2014 was completely signed. Accomplish means to “bring about a result by effort, to bring to completion, fulfill.” *Merriam-Webster Dictionary* <https://www.merriam-webster.com/dictionary/accomplish>. So, even if Mr. Lynn was a member in service until July 24, 2014, he failed to accomplish his purchase of service before he retired.

Mr. Lynn contends that equity requires that he be allowed to purchase the service at issue. I note that I have no equity powers and, while the Legislature has the authority to draft statutes, my obligation is to follow the statutes as written by the Legislature. *Bristol County Ret. Bd. v. Contributory Ret. Appeal Bd*., [65 Mass. App. Ct. 443](http://sll.gvpi.net/document.php?id=sjcapp:65_mass_app_ct_443), 446 (2006); *see Petrillo v. Public Emp. Ret. Admin.,* No. CR-92-731 (CRAB 1993) (CRAB does not have “authority to employ equitable remedy in the face of specific statutory language [to the] contrary.”). But, even if I had the authority to grant an equitable remedy, I would not in this case. Mr. Lynn’s service purchase was not completed because he was accused of improper conduct, suspended without pay and decided to retire with a retroactive retirement date all within the space of a couple of weeks. The situation surrounding the purchase of reserve police service was confusing, and it is not surprising that it took time for the Respondent to calculate the amount of the buyback and send an invoice.

Mr. Lynn notes that in the Pre-hearing Order dated November 5, 2015 a magistrate indicated that, based upon the material then available, it appeared to the magistrate that Mr. Lynn might be entitled to prevail as a matter of law. Mr. Lynn, however, does not acknowledge that both the Respondent and he provided responses to the Pre-hearing Order and based upon the additional information it was decided further proceedings were required. A hearing was scheduled, testimony taken, and evidence submitted.

**CONCLUSION AND ORDER**

For the reasons outlined above, the Respondent’s decision denying Mr. Lynn’s service purchase request is **AFFIRMED** and the Petitioner’s appeal is **DISMISSED**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

Dated: May 4, 2018

1. While the Legislature has provided for the purchase of some types of service for which a member need not be a member in service, none of those provisions are applicable to Mr. Lynn’s situation. [↑](#footnote-ref-1)