SJC-12809

DALE YOUNG vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & another.[1]

Middlesex. February 11, 2020. - October 9, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[2]

Retirement. Public Employment, Retirement. State Board of Retirement. Contributory Retirement Appeal Board. Contract, Employment. Words, "Employee," "Regular compensation."

Civil action commenced in the Superior Court Department on April 30, 2018.

The case was heard by Susan E. Sullivan, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Dale Young, pro se.
Stefan L. Jouret for Michael McHugh & others.
Melinda E. Troy for State Board of Retirement.

[1] State Board of Retirement.

[2] Chief Justice Gants participated in the deliberation on this case prior to his death.

GAZIANO, J. Dale Young served as the coordinator, and then the director, of the State's natural resource damages program. During her first ten years at the program, she worked as a contract employee. After becoming a regular State employee and a member of the State retirement system, she purchased retirement credit for four years of her contract service, pursuant to G. L. c. 32, § 4 (1) (s). She later retired and requested that her benefit amount be based on her compensation during the purchased years of creditable contract employment, instead of her lower-paid years as a regular State employee. The Contributory Retirement Appeal Board (CRAB) concluded that compensation received during service for which credit is purchased pursuant to G. L. c. 32, § 4 (1) (s), cannot be used to calculate retirement benefits because it is not "regular compensation"; CRAB therefore ruled against Young's request. A Superior Court judge affirmed CRAB's decision, and Young appealed; we transferred the matter to this court on our own motion. We conclude that Young did not meet the statutory definition of "employee" for purposes of the retirement system in the years that she worked as a contract employee. Thus, there was no abuse of discretion in the Superior Court judge's decision, affirming CRAB, that Young was not entitled to

retirement benefits calculated based on her salary for those years.[3]

Because an understanding of the factual background requires some knowledge of the statutory definitions, we first present a statutory overview before discussing the facts of this case.

1. Statutory structure. The pension scheme is a "contributory retirement system." Plymouth Retirement Bd. v. Contributory Retirement Appeals Bd., 483 Mass. 600, 601 (2019), quoting Retirement Bd. of Stoneham v. Contributory Retirement Appeal Bd., 476 Mass. 130, 132 (2016). Employees of the Commonwealth generally are eligible for membership, and are required to contribute to the system via payroll deductions. See G. L. c. 32, §§ 1, 3 (2) (a) (x), 22 (1) (b); Massachusetts Teachers' Retirement Sys. v. Contributory Retirement Appeal Bd., 466 Mass. 292, 294 (2013). "Creditable service ordinarily is based on the duration of a member's employment in public service in the Commonwealth while a member of a public retirement system." Massachusetts Teachers' Retirement Sys., supra, citing G. L. c. 32, § 4 (1) (a).

Upon retirement, if a member has accrued sufficient creditable service, the member will receive a monthly retirement allowance. See G. L. c. 32, §§ 5, 10. This allowance often is

[3] We acknowledge the amicus brief submitted by Michael McHugh, Mark Stinson, Alice Smith, and James O. Brown, Jr.

based in part on the highest rates of regular compensation received by the member during his or her career of public service. See id. Regular compensation is "the 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. Therefore, one may receive regular compensation only during service as an employee. An employee, in relevant part, is "any person whether employed or appointed for a stated term or otherwise, who is engaged in duties which require that his [or her] time be devoted to the service of [the Commonwealth] 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 [C]ommonwealth is derived from the subsidiary account 03." Id.

The Commonwealth also hires some workers, not as regular State employees, but, rather, as contract employees. These workers enter into time-limited contracts to work for the Commonwealth. See Office of the Comptroller, Expenditure Classification Handbook 27 (Nov. 2014) (2014 Expenditure Handbook). Unlike regular State employees, they are not appointed to legislatively authorized positions, and do not receive retirement benefits, insurance, sick time, vacation, or personal leave. See id. Contract employees do, however, have

an employment relationship with the State, making them distinguishable from independent contractors and consultants. See id. See also G. L. c. 149, § 148B (setting forth test for independent contractor status).

In certain circumstances, an individual who was a contract employee and subsequently became a regular State employee may purchase credit for up to four years of that prior contract employment. See G. L. c. 32, § 4 (1) (s). To do so, the member must pay, with interest, the amounts that would have been withheld as payroll contributions had the service been rendered as a State employee. See id. "Upon completion of the payments, 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 [S]tate employee." Id.

2. Factual background. Young worked for the Department of Health from 1979 to 1982, and for the Department of Environmental Protection from 1986 to 1998. During those years, she was a State employee and a member of the State retirement system. From 1998 until 2008, she was a contract employee for the Department of Environmental Protection, the Executive Office of Environmental Affairs, and the Executive Office of Energy and Environmental Affairs. Working under one-year contracts, she served as the coordinator, and then the director, of the natural

resource damages program. She was not a member of the retirement system, but she was required to contribute a portion of her income to an alternative retirement plan. As a contract employee, she did not receive health insurance, life insurance, vacation time, sick time, or any other paid time off. She was entitled to receive unemployment insurance coverage, coverage under the Massachusetts Tort Claims Act, and a year-end W-2 tax form.

In 2008, Young's position was converted to regular employment, and she once again became an active member of the State retirement system. She subsequently purchased credit for four of her previous years of contract employment, paying over $40,000 to the annuity savings fund of the retirement system. Her position was eliminated in 2010. Because she had more than twenty years of creditable service, Young received a termination retirement allowance. See G. L. c. 32, § 10 (2). This type of allowance is based in part on the highest rates of regular compensation received during the member's years of service. See id. The State Board of Retirement (board) based her pension benefit on her final two years of regular employment, from 2008 to 2010, and her last year of regular employment prior to becoming a contract employee, from 1997 to 1998.

3. Prior proceedings. Young appealed from the board's determination to the Division of Administrative Law Appeals

(DALA). She argued that her retirement benefit should have been based on her salary during the purchased years of contract employment, which was higher than her salary during her time as a regular State employee. An administrative magistrate in DALA held an evidentiary hearing and ruled in Young's favor, and the board appealed to CRAB. CRAB concluded that Young was not an employee during the years in question, so her salary during those years was not regular compensation and could not be the basis for her retirement allowance. Accordingly, CRAB reversed the DALA administrative magistrate's determination.

Young then challenged CRAB's decision in the Superior Court under G. L. c. 30A. A Superior Court judge denied Young's motion for judgment on the pleadings and allowed CRAB's cross motion. Young appealed, and we transferred the case from the Appeals Court on our own motion.

4. Discussion. a. Standard of review. While we review questions of law de novo, we nonetheless "typically defer[] to CRAB's expertise and accord[] great weight to its interpretation and application of the statutory provisions it administers" (quotation and citation omitted). Plymouth Retirement Bd., 483 Mass. at 604. We will reverse or amend CRAB's decision only if it is arbitrary or capricious, based upon an error of law or unlawful procedure, unwarranted by the facts found by the agency

or the Superior Court, or unsupported by substantial evidence. See G. L. c. 30A, § 14 (7).

b. Statutory interpretation. The sole question in this case is whether compensation earned during periods of contract employment, for which creditable service subsequently is purchased, is "regular" compensation for purposes of calculating the retirement allowance. Regulation compensation is the "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. Based on this language, compensation can be regular compensation only if received by an "employee." Contract employees are treated as employees, as opposed to independent contractors, for the purposes of relevant labor laws. See 2014 Expenditure Handbook, supra at 27. See also Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013) (discussing purposes of independent contractor statute, G. L. c. 149, § 148B). Our inquiry, however, is whether contract employees are "employees" within the meaning of the retirement scheme, which contains a separate and explicit statutory definition.

To be deemed an employee under G. L. c. 32, § 1, an individual must meet three requirements. First, the individual must be "engaged in duties which require that his [or her] time be devoted to the service of [the Commonwealth] in each year

during the ordinary working hours of regular and permanent employees." G. L. c. 32, § 1. Second, an employee must be "regularly and permanently employed." G. L. c. 32, § 1. Third, the individual's compensation cannot be "derived from the subsidiary account 03." G. L. c. 32, § 1.

Young's work clearly met the first two of these requirements. She worked full time for the Commonwealth during the years in question. The board argued before DALA and CRAB that Young's contract employment was not permanent because she was hired for one-year terms.[4] As Young correctly noted at these administrative proceedings, however, this argument disregards the language in G. L. c. 32, § 1, that an employee can be "any person whether employed or appointed for a stated term or otherwise." Young, like other contract employees, served for a stated term; indeed, she completed ten consecutive one-year terms. Therefore, the mere fact that her contract employment throughout this ten-year period had multiple end dates did not preclude her from being an employee within the meaning of the statue. We conclude that her contract employment was regular and permanent. See Retirement Bd. of Concord v. Colleran, 34 Mass. App. Ct. 486, 489 (1993).

[4] The State board of retirement did not pursue this argument in its brief, but did again argue the point at oral argument before us.

The third requirement, which is the focus of the parties' briefs, presents a different question. As stated, this requirement precludes any individual whose compensation was "derived from the subsidiary account 03." See G. L. c. 32, § 1. Thus, if Young had been paid directly out of the 03 account, she would not have been an employee under the plain language of the statute. See Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019) ("plain and unambiguous" statutory language "is conclusive" [citation omitted]). The record indicates, however, that the 03 account was eliminated prior to the time of Young's contract employment.

Young argues that she is not excluded from the definition of "employee" because she was paid from an account labeled "CC," which is used for contract employees, and not from the "03 account." See 2014 Expenditure Handbook, supra at 27. CRAB concluded that the CC account was derived from the 03 account and should be considered to be equivalent. See Haskell vs. State Bd. of Retirement, CR-99-528 (DALA June 23, 2000; CRAB Mar. 13, 2001) ("03 subsidiary account was broken down into four separate subsidiary accounts": "CC, HH, JJ and NN"). CRAB found that there was insufficient evidence to establish that Young was paid specifically from the CC account, but that the evidence established that Young had been paid from one of the CC, HH, JJ, or NN accounts, discussed infra. CRAB determined

that it was not relevant for the purposes of this case which account was the source of Young's salary, as all of them were derivative of the 03 account. CRAB therefore determined that Young did not meet the statutory definition of an employee.

CRAB's conclusion implicitly contains the factual finding that the executive branch intended the CC account to be a derivative of the 03 account, as well as the legal conclusion that the statutory scheme allows the executive branch to establish such derivative accounts. For the reasons to be discussed, we agree that the identity of the specific derivative account is not relevant, as all of them fall under the 03 account designation, and that the Legislature intended the executive branch to have the authority to create such derivative accounts. For simplicity, we will assume that Young was paid from the CC account.

In 1947, the Legislature decreed that "[a]ppropriations by the general court, and any allotments by the governor, shall be expended only in the amounts prescribed in the subsidiary accounts . . . established by . . . the joint committee on ways and means." See St. 1947, c. 636, § 2 (amending G. L. c. 29, § 27). The joint committee subsequently promulgated an expenditure code handbook establishing the accounts titled 01, 02 and 03. See Object Code Numbers and Subsidiary Accounts for Budgetary Control, approved by the House Committee on Ways and

Means 3 (rev. June 1, 1949) (Object Code Numbers). The 03 account was delineated as the proper source of payment for "[a]ll services . . . rendered by non-employees except contractual services classified under other subsidiary accounts." Id.

In 1990, the comptroller issued a new expenditure classification handbook. See Office of the Comptroller, Expenditure Classification Handbook (Feb. 1990) (1990 Expenditure Handbook). Instead of the previous numerical accounts, the new handbook used a series of subsidiary accounts designated by letters. Compare id. at 1, with Commonwealth of Massachusetts, Subsidiary Accounts and Expenditure Code Numbers for Budgetary Control (1978). The board argues that the comptroller considered four of these new categories -- CC, HH, JJ, and NN -- to be part of the old 03 account. The board supports this contention by pointing to a 1990 memorandum from the comptroller that indicates that workers who previously had been paid from the 03 account were being divided into those four new groups. In addition, the comptroller's publications consistently have stated that contract employees are not eligible for membership in the retirement system. See 2014 Expenditure Handbook, supra at 27; 1990 Expenditure Handbook, supra at 4 ("individuals who are employed on a temporary basis through contracts . . . are not eligible for benefits").

The board's argument is bolstered by Young's "Salary Request and Release" form, which was completed by the Department of Environmental Protection. The form contained a notation describing her as a "03 contractor" during the period in question. We conclude that there is substantial evidence to support CRAB's factual finding that the executive branch derived the CC account from the 03 account and intended the newer CC account to be treated equivalently. See Retirement Bd. of Stoneham, 476 Mass. at 134.

This conclusion, however, does not end our inquiry. The legal question remains: did the Legislature intend to give the executive branch the discretion to treat contract employees as 03 workers, and thereby exclude them from the definition of "employee" in G. L. c. 32, § 1? To answer this question, we examine the process of enacting the statutory exclusion for those paid from the 03 account.

In 1973, a legislative committee reported that "the intent and purpose of the '03' subsidiary account, as set forth in the Code Manual, has been violated. It is no longer just the account out of which true consultants are compensated, but . . . has become another subsidiary account to be used for hiring [S]tate employees." See Joint Committee on Post Audit and Oversight, Report Relative to Use of Consultants by State Agencies 43 (Jan. 15, 1973) (1973 Report). The report noted

that many workers had been hired in contravention of the requirement in the expenditure classification handbook that any services paid for under the 03 account "be for a limited specified period of time"; these workers included those who had been paid from the 03 account for more than three years. See id. at 18. Hiring agencies also had flouted the requirement in the classification handbook that 03 account funds be used only for services that State employees generally do not or are not available to provide. See id.[5]

To rectify these problems, the Legislature enacted St. 1973, c. 1230, § 8, which mandates a number of procedures to be followed prior to hiring consultants and prohibits consultants from supervising others. See 1973 report, supra at 52 (Appendix C) (recommending legislation which subsequently was enacted). In essence, the new legislation delineated which workers could be considered consultants and which could not. See St. 1973, c. 1230, § 8. It did not dictate how those hired as consultants should be treated. See id.

If Young had brought a claim of misclassification based on the contention that she should have been considered a regular

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[5] These issues have been discussed repeatedly by the State Auditor. See Auditor of the Commonwealth, Report on the Use of Contract Employees by Certain State Agencies (Feb. 12, 2010); Auditor of the Commonwealth, Report on the Use of "03" Consultants in the Departments of Mental Health, Public Welfare, and Social Services (July 8, 1987).

State employee instead of a contract employee, and therefore her service during those years was regular membership service, the enactment might have been relevant. See, e.g., Rotondi v. Contributory Retirement Appeal Bd., 463 Mass. 644, 646 (2012) (plaintiff challenged CRAB's determination that previous service was not membership service). But Young did not claim that her previous service was regular membership service. Rather, she purchased credit for her contract service and then sought to base her retirement benefit on compensation received during that contract service. We thus must decide the narrow question whether compensation received during periods of contract employment, for which credit has been purchased pursuant to G. L. c. 32, § 4 (1) (s), is regular compensation.

The 1973 report also identified another issue with respect to the 03 accounts; the report indicated that some workers who were being paid out of the 03 account had been given membership in the retirement system. See 1973 report, supra at 38. To prevent this practice, the report recommended adding the following language to the definition of "employee" in G. L. c. 32, § 1: "no consultant, as defined in [G. L. c. 29, § 29A,] shall be deemed to be an employee for the purposes of this chapter unless his [or her] agreement for employment as a consultant specifically provides therefor." See 1973 report, supra at 53 (Appendix D).

Rather than excluding consultants, as the report recommended, the Legislature instead amended the definition of "employee" to "exclud[e] any person whose compensation for service rendered to the [C]ommonwealth is derived from the subsidiary account 03." See St. 1973, c. 324, § 1. Therefore, the question becomes whether the Legislature intended this exclusion to apply only to consultants, or if the exclusion was intended to give the executive branch the discretion to include some or all contract employees in the excluded class of workers. See G. L. c. 29, § 29A (giving Secretary of Administration and Finance discretion regarding use of 03 account).

On the one hand, the language that the Legislature chose gives the executive branch more latitude than would have been afforded by the language suggested in the 1973 report. On the other hand, the act was entitled "An Act providing that certain consultants shall not be considered employees of the [C]ommonwealth for the purposes of retirement under the contributory retirement system for public employees" (emphasis added); this would seem to indicate that the exclusion was intended to encompass only consultants. See St. 1973, c. 324, § 1; Olmstead v. Department of Telecomm. & Cable, 466 Mass. 582, 589 & n.12 (2013) (title of act is relevant to statutory interpretation).

This ambiguity likely arises because the term "contract employee" was not in common use in 1973. At that time, the expenditure classification handbook provided the 01 account for regular State employees and the 03 account for nonemployees. See Object Code Numbers, supra at 3. There was no category for contract employees, who seem to occupy a hybrid category. The first Massachusetts statute containing either the term "contract employee" or "contracted employee" was enacted in 1997. See St. 1997, c. 163, § 3. Similarly, neither term appeared in a published decision of this court or the Appeals Court until 2005. See Scott v. Boston Hous. Auth., 64 Mass. App. Ct. 693, 694 (2005).

Without a clear answer as to whether the Legislature intended to allow contract workers to be excluded from the definition of "employee," we look to G. L. c. 32, § 4 (1) (s), the provision under which Young purchased credit for her contract employment. That statute provides that purchasers of creditable service for contract work "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 [S]tate employee." Id. The statute does not state explicitly whether compensation received during purchased contract employment is regular compensation. See Leary v. Contributory Retirement Appeal Bd., 421 Mass. 344, 347 (1995)

(compensation received for out-of-State service for which credit was purchased was not regular compensation).

General Laws c. 32, § 4 (1) (s), is not the only provision to allow the purchase of credit for past service. General Laws c. 32, § 20 (5) (c) (2), permits the purchase of previous service if the individual was not a member of the State retirement system due to an error in the records. See Worcester Regional Retirement Bd. v. Contributory Retirement Appeal Bd., 92 Mass. App. Ct. 497, 500 (2017). General Laws c. 32, § 3 (3), allows makeup payments in cases of late entry into membership.

"[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 339 (2015), quoting Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514 (1975). "[W]e do not interpret a statute so as to render it or any portion of it meaningless." City Elec. Supply Co. v. Arch Ins. Co., 481 Mass. 784, 790 (2019), quoting Volin v. Board of Pub. Accountancy, 422 Mass. 175, 179 (1996). See A. Scalia & B.A. Garner, Reading Law: The Interpretation of Legal Texts 174-179 (2012).

The interactions between the provisions permitting the purchase of credit for previous service resolves our inquiry. "[I]ndividuals who are 'employees[]' . . . are generally

eligible for membership." Retirement Bd. of Stoneham, 476 Mass. at 132 & n.5, citing G. L. c. 32, §§ 1, 3 (2) (a) (x). Therefore, if contract employees met the definition of "employee," as Young argues, all of their contract service would qualify as membership service. Young would have been able to purchase credit for her previous contract service under one of the provisions permitting the purchase of previous membership service. See Worcester Regional Retirement Bd., 92 Mass. App. Ct. at 500, citing G. L. c. 32, §§ 3 (3), 20 (5) (c) (2). There would be no need for a special provision only for contract employees, and G. L. c. 32, § 4 (1) (s), would be mere surplusage.

The Legislature could not have intended such a result. See Plymouth Retirement Bd., 483 Mass. at 607, quoting City Elec. Supply Co., 481 Mass. at 790 ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme"). We therefore conclude that the Legislature necessarily implicitly granted the executive branch the authority to pay at least some contract employees from the 03 account or its derivatives, and thereby to exclude those contract employees from the definition of "employee" under G. L. c. 32, § 1.

This interpretation is bolstered by the fact that Young's salary during her final years of contract employment was higher

than during her subsequent years as a regular State employee. The Superior Court judge found that Young's contract salary "included an additional amount to compensate her for lack of . . . benefits," such as paid time off, a finding that Young does not dispute. With this type of arrangement in mind, the Legislature reasonably could have intended to authorize the executive branch to exclude contract workers from the definition of "employee" within the meaning of the retirement scheme. See Commonwealth v. Morgan, 476 Mass. 768, 777 (2017), quoting Seideman v. Newton, 452 Mass. 472, 477 (2008) (we "must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense").

The motion judge properly affirmed CRAB's determination that compensation received during years for which credit in the State retirement system is purchased pursuant to G. L. c. 32, § 4 (1) (s), is not regular compensation, and may not be used to calculate a member's pension benefit.

Judgment affirmed.