

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Leona Bombaci,
Petitioner

v.

Docket No. CR-11-324
Dated: June 24, 2016

State Board of Retirement,
Respondent

Appearance for Petitioner:

pro se
P.O. Box 570
Pocasset, MA 02559

Appearance for Respondent:

Melinda E. Troy, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston, MA 02108

Administrative Magistrate:

James P. Rooney, Esq.

Summary of Decision

Former social worker employed by the Department of Children and Families is not entitled to Group 2 classification under 2012 amendment of M.G.L. c. 32, § 2(g) granting such classification to DCF social workers because she retired before the amendment went into effect. She is also not entitled to Group 2 classification as a member whose regular and major duties involved the care, custody or instruction of the mentally ill. While she demonstrated that most of the foster children who were her responsibility were mentally ill, she did not show that her regular and major duty was providing direct care to them.

DECISION

Leona Bombaci, a retired social worker formerly employed by the Department of Children and Families (DCF), appeals, under M.G. L. c. 32, §16(4), from the State Board of

Retirement's May 31, 2011 decision denying her request to have her position reclassified to Group 2. I held a hearing on March 9, 2016 that I recorded digitally. I admitted 18 exhibits into evidence -- 11 from Ms. Bombaci and 7 from the Board. Ms. Bombaci testified on her own behalf and presented testimony from Andrea Lamb, a licensed clinical social worker who worked with DCF caseworkers, and Theresa Davies, who was a DCF social worker until 1995. I marked Ms. Bombaci's prehearing memorandum and supplemental memorandum as Pleadings A and B, and the Board's prehearing memorandum as Pleading C. Ms. Bombaci made an oral closing argument, while the Board filed a written closing brief on April 14, 2016.

Findings of Fact

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

1. Leona Bombaci, who was born in 1952, has a master's degree in education and is a licensed social worker associate. She went to work for DCF in 1982, and was granted a superannuation retirement in 2011. (Pleadings A and C; Pet. Ex. 2a.)
2. DCF employs many different types of social workers. It categorizes them by the tasks they performed, such as adoption, assessment, child welfare investigation, child welfare screening, child welfare, foster care, medical, and mental health and retardation social workers. (Pet. Ex. 3a.) Ms. Bombaci worked out of DCF's Cape Cod and Islands area office as a foster care social worker. In 1990, she was promoted to Social Worker D. (Pleading A.)
3. When a child is removed from a home by DCF and placed in foster care, the child frequently undergoes a mental health evaluation. (Lamb testimony.) A foster care social worker is assigned to handle the placement of the child with a foster family. (Bombaci testimony.) A

different social worker is assigned to develop a “service plan” with the child’s biological family, as part of an effort to work toward family reunification. (Davies testimony.)

4. As a foster care social worker, Ms. Bombaci’s initial responsibility was to ensure that a child was placed in a safe environment with a foster family. She helped recruit foster families, and prepared behavioral charts that she used to instruct foster parents on how to care for particular children. Ms. Bombaci was typically responsible for 30-40 foster children in any given month, and met with each of these children at least twice per month to discuss their progress. She coached the children in behavior management and counseled them and their foster families on how to handle any of the child’s medical needs. She drove children to their foster homes, drove older children to appointments, instructed children who were about to age out of DCF care on skills of independent living, and attended court hearings for children in need of services (CHINS). In a typical week, she spent three days on the road visiting foster parents and children, one day in meetings, and another day handling non-emergency phone calls about foster care. (Bombaci testimony; Pet. Ex. 2.) At least once per year, she conducted a 30-hour training for foster parents called M.A.P.P. (Massachusetts Approach to Partnership and Parenting). (Pet. Ex. 2.)

5. The performance evaluation form for Ms. Bombaci listed six duties:

-Recruit Foster and/or Adoptive Parents, through community outreach, to meet area needs.

-Conduct MAPP training session for prospective foster and/or adoptive parents in order to provide these prospective parents with information to prepare them for their responsibilities.

-Conduct home studies on new applicants in accordance with the MAPP Training Assessment Process and compete annual re-evaluation on existing foster parents so that

appropriate determinations can be made.

-Monitor and support placement activities to ensure effective placement of children.

-Complete required written documentation and statistical reports ensuring that information is complete and accurate.

-Provide a critical supportive role to the family resource (foster and/or adoptive families).

(Pet. Ex. 3b; Bd. Ex. 6.)

6. Although not every child who ends up in foster care has mental health issues, Ms. Bombaci, Ms. Lamb, and Ms. Davies estimated that at least 80% of foster children have some type of mental health problem as described in the Diagnostic and Statistical Manual of Mental Disorders. These problems include attention deficit disorder, attention deficit hyperactivity disorder, impulse control, bipolar disorder, intermittent explosive disorder, fetal alcohol syndrome, fire setting, depression, post-traumatic stress disorder, and suicidal thoughts.

(Bombaci, Lamb, and Davies testimony; see also Ex. 11, an affidavit of DCF social worker Linda Damon .) The trauma of being removed from a home and placed in foster care could itself cause mental health problems. (Davies testimony.)

7. Ms. Bombaci intended to work until 2017, but suffered an occupational injury, and consequently applied for and was granted a superannuation retirement on April 30, 2011. (Pet. Ex. 7; Pleading B.) She also filed an application for accidental disability retirement, which is still pending. (Pet. Ex. 8, Pleading B.)

8. Before she retired, Ms. Bombaci requested that her position be reclassified from Group 1 to Group 2. (Pet. Ex. 3; Bd. Ex. 3.) The Board denied her request on May 31, 2011 and she appealed a few days later. (Pets. Ex. 4; Bd. Exs. 1 and 2.)

Discussion

This appeal is governed by the provision of the public employee retirement law that classifies all public employees into four groups for retirement purposes, and of most interest to Ms. Bombaci, treats Group 2 employees more favorably than Group 1 employees. At present, this law provides that Group 2 includes:

employees of the department of children and families holding the title of social worker A/B, C or D or successive titles who have been employed in such titles for 10 years or more . . .

M.G.L. c. 32, § 2(g). Ms. Bombaci, who worked as a DCF social worker for more than ten years, would qualify to have her position treated as a Group 2 position if this provision had been in effect when she retired. Her retirement date is significant because classification is "properly based on the sole consideration of [the applicant's] duties at the time of retirement." *Maddocks v. Contributory Retirement Appeal Bd.*, 369 Mass. 488, 494, 340 N.E.2d 503, 507 (1975).

Unfortunately for Ms. Bombaci, this provision was not in effect when she retired. She retired in April 2011; the amendment adding DCF social workers to Group 2 did not take effect until July 1, 2012.¹

Statutes generally apply prospectively, unless the legislature specifies otherwise. *See Fleet National Bank v. Commissioner of Revenue*, 448 Mass. 441, 448-449, 862 N.E.2d 22, 28-29 (2007). Here, the legislature did not specify that employees who retired before the effective date of the amendment could be treated as Group 2 employees and, as a consequence, the Contributory Retirement Appeal Board has held that the amendment was not retroactive.

¹ St. 2012, c. 139, 62 was approved on July 8, 2012 and by § 229 made effective as of July 1, 2012.

Dellagustina v. State Board of Retirement, Docket No. CR-11-699 (CRAB, Dec. 2, 2015).

Even though the amendment is not retroactive, it could still be relevant if it demonstrated a legislative intent that the statute as it existed prior to the amendment should have been interpreted to treat DCF social workers as Group 2 employees. There is no legislative history in the record, but, as DALA Magistrate Judithann Burke has noted, “the statutory change reflects the notion that the General Court had begun to view all Social Worker positions as those involving the direct care, custody, instruction, or other supervision over the DCF children in their caseloads.” *Dellagustina* (Div. of Admin. Law App. Nov. 21, 2014.)

Magistrate Burke was referring to a category of Group 2 employees that was listed in the statute prior to the amendment – and, of relevance to the present appeal, this provision of M.G.L. c. 32, § 2(g) was in effect when Ms. Bombaci retired. It treated, as Group 2 employees, those:

whose regular and major duties require them to have the care, custody, instruction or other supervision of parolees or persons who are mentally ill or mentally defective or defective delinquents or wayward children . . .

M.G.L. c. 32, § 2(g). On its face, the amendment differs from this earlier provision in one key respect. The amendment requires that DCF social workers have been employed in those positions for at least ten years before they qualify to be treated as Group 2 employees, while those whose jobs involve the care and custody of parolees, the mentally ill, or wayward children are not so limited. Thus, it would appear that the amendment reflected a change in the legislature’s judgment as to who should be classified as a Group 2 employee, and was not simply a clarification of the existing statute.

Hence, the amendment’s blanket grant of Group 2 status to all types of DCF social workers who have been DCF socials workers for ten years does not help Ms. Bombaci, but she

still had the opportunity to show that the type of social work she performed for DCF met the earlier established standard. Thus, she would still qualify to be treated as a Group 2 employee if she could show that her regular and major duties as a DCF foster care social worker required her to have the care, custody, instruction or other supervision of persons who were “mentally ill or mentally defective or defective delinquents or wayward children.”

Ms. Bombaci asserts that her position should be treated as a Group 2 position because DCF had the custody of the foster children she worked with and the overwhelming majority of them suffered from one or more form of mental illness.

DCF has the “responsibility, including financial responsibility, for providing foster care for [foster] children.” M.G.L. c. 119, § 23(a). While this is a relevant factor, it is not dispositive. The relevant question, for retirement purposes, is not whether an agency has custody of mentally ill persons, but whether an individual employee of the agency provided direct care to mentally ill persons. Thus, an employee of the Department of Mental Retardation, who worked at regional office that provided direct care to mentally ill persons, did not qualify for Group 2 because he supervised employees who provided the direct care, but did not provide direct care himself. *Barry v. State Bd. Of Retirement*, Docket No.. CR-07-1125 (Div. of Admin. Law App., Aug. 6, 2009). Accordingly, Ms. Bombaci had to show not simply that DCF had custody of the foster children who were her responsibility, but that her regular and major duties involved direct care of foster children who were mentally ill or wayward.

Mental illness is not a criterion for placing a child in foster care. Rather, a child can be placed into foster care if it can be demonstrated to the juvenile court that the child:

(a) is without necessary and proper physical or educational care and discipline; (b) is

growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention.

M.G.L. c. 119, § 24.

An employee seeking Group 2 classification could still prevail if she could show that, in practice, the foster children she provided direct care tended to be mentally ill. In *Dellaguistina*, a DCF Social Worker D failed to make this proof, and ultimately failed to convince the Contributory Retirement Appeal Board that the majority of children in DCF custody were mentally ill. *Dellaguistina*, CRAB decision at 2. This decision did not prevent Ms. Bombaci from coming forward with evidence that most of the foster children she worked with were mentally ill. She has done so adequately through her testimony, the testimony of her two witnesses, and an affidavit of a co-worker, which in sum demonstrate that around 80% of foster children tend to have a form of mental illness.

However, she also had to demonstrate that providing direct care or instruction to mentally ill foster children were her regular and major duties, and on this score her evidence fell short. She has shown that she provided direct care to foster children when she drove them to their foster placements or appointments or instructed them on living independently when they were about to age out of DCF care. But these tasks do not appear to have been her major responsibilities. Although her ultimate responsibility was the welfare of the foster children, as much, if not more, of her time was spent recruiting and counseling foster parents. She did meet twice per month with the 30 to 40 foster children for whom she was responsible. Doubtless, this took up much of the three days per week she spent on the road, but it would be hard to describe these interactions with the foster children as mainly care and custody. Rather, the focus of these meetings was on

obtaining information about how the children were progressing in foster care, rather than providing care itself. Some of these interactions, such as training the children to manage their behavior and to take care of their medical needs, involved instruction, which is a statutory factor, but there is no evidence in the record to show how frequently this occurred. Ultimately, the evidence shows that Ms. Bombaci spent two days in the office each week, days during which she did not provide direct care to mentally ill foster children, and three days on the road, with only some of that time (and likely not a majority of that time) providing direct care to mentally ill foster children. She has not demonstrated therefore that her regular and major duties involved providing direct care to mentally ill foster children.

DALA has previously rejected a request for Group 2 classification by a DCF social worker who had responsibilities similar to Ms. Bombaci's. Leonard Goldstein was a DCF social worker whose duties included:

providing clients with direct social services, including casework, group work, or other therapeutic models. He provided assessment, intake and referral services. . . . [He] interviewed clients to determine eligibility for agency services; developed preliminary treatment plans; arranged for the provision of services and/or placement of clients in foster, adoptive or group homes; testified in court; made home visits; and screened emergency calls and responded to social service emergencies.

Goldstein v. State Bd. of Retirement, Docket No. CR-01-1264 (Jun. 12, 2003). Magistrate Maria Imperato held that his job:

did not require him to have the "care, custody, instruction or other supervision" of delinquent or wayward children. His job duties required him to provide social services to clients who were not in his care and custody.

Id. Similarly, I now hold that, despite solid proof that Ms. Bombaci's responsibility ultimately was to mentally ill foster children, she did not show that direct care of mentally ill foster children

was her regular and major duty.

I therefore affirm the State Board of Retirement's decision to classify Leona Bombaci in Group 1 rather than in Group 2.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: June 24, 2016