

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Randi Bonica and Gordon Broz,
Petitioner

v.

Docket No. CR-21-0561 and CR-21-0578
Dated: September 13, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Paul K. Donohue, Esq.
M.O.S.E.S. Special Projects Attorney
98 North Washington Street, Suite 3
Boston, MA 02114

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston, MA 02108

Administrative Magistrate:

James P. Rooney

Summary of Decision

Engineers whose regular duties required them to dive to perform underwater bridge inspections are entitled to have their “dive pay” considered as regular compensation.

DECISION

Engineers Randi Bonica and Gordon Broz, who were underwater bridge inspectors, each appealed from the State Board of Retirement’s refusal to treat the dive pay they received for diving to inspect bridges as part of their regular compensation.

I held a hearing in these consolidated appeals on March 5, 2024 at the Division of Administrative Law Appeals, which I recorded digitally. I marked Mr. Bonica’s and Mr. Broz’s

joint prehearing memorandum as Pleading A and the State Board's memorandum as Pleading B. I admitted into evidence 20 documents the parties had submitted with their memoranda – 9 from the petitioners (Exs. 1-9)¹ and 11 from the Board (Exs. 10–20). I admitted an additional 2 exhibits at the hearing. Mr. Bonica and Mr. Broz were the only witnesses. The parties filed post-hearing memoranda thereby closing the record on April 24, 2024.

Findings of Fact

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

1. Randi Bonica and Gordon Broz were each employed as Civil Engineer Vs with the Massachusetts Department of Transportation (MassDOT) performing underwater bridge inspections. Underwater bridge inspections by Mass DOT engineers began in 1977. DOT has 5 full-time divers, like Mr. Bonica and Mr. Broz, and another 19 part-time divers who make at least 20 dives per year. Full time divers perform 200 or more bridge inspection per year. (Broz testimony.)
2. Mr. Broz began diving full time in 1991 and by 2008 was an Underwater Bridge Inspection Team Leader. Mr. Bonica started diving in 1989. In 2008, he became the Eastern Area Dive Coordinator. In 2011, he was promoted to Underwater Operations Engineer. To qualify as divers, each took a 19-hour scuba diving course and a 10-hour bridge inspection course. (Broz testimony; Exs. 6 and 7.)

¹ Petitioners' exhibits begin with the appeal of Mr. Bonica, but do not list it as an exhibit. I will treat it as part of Ex. 1.

3. Mr. Bonica and Mr. Broz worked as divers throughout the year. Typically, it takes 1.5 - 2 hours to prepare equipment for a bridge inspection and at least four hours to perform the inspection. Two engineer divers are assigned to inspect smaller bridges that take one day to inspect. With large bridges, at least 3 divers are assigned, and as many as 5 or 6 on sizeable bridges. These largest bridges may take a few days to inspect. One of the divers, who is the “dive master” for the day, suits up and decides who dives that day, but stays on shore as a “safety diver” to monitor the work. The dive master also takes notes related to the dive and prepares a report referencing any differences from prior inspections. (Broz testimony.)

4. The work Mr. Broz and Mr. Bonica performed was specialized. The classification specifications for Engineers I -VI mention that engineers “perform engineering work in such areas as highways, bridges, buildings and facilities all in accordance with sound engineering principles.” The specification does not mention underwater bridge inspections. (Ex. 2.)

5. All engineers performing bridge inspection dives, including safety divers, were paid an extra \$10/hour “dive pay” throughout the day when diving during the period relevant to these matters.² (Ex. 20.) Section 12.10 of the pertinent collective bargaining agreement covering engineers provided that:

An employee who provides SCUBA services not classified in his/her job specification shall receive \$10.00 per hour in addition to his/her regular rate while preparing for, performing, and disengaging from SCUBA diving services.

² Mr. Bonica and Mr. Broz sometimes also trained engineers how to perform bridge inspections. They were not paid dive pay on those days. (Broz testimony.)

(Ex. 9.) This section was titled “Supplemental Duty.” *Id.* The language put in the collective bargaining agreement was meant to allow engineer/bridge inspection divers to receive this extra pay but exclude aquatic biologists who dive as part of their work. (Broz testimony.)

6. The Form 30 for Mr. Bonica from 2017 provides in its detailed description of his duties that he:

- a) Supervises and coordinates the activities of subordinates engaged in underwater bridge inspection activities to ensure effective operations
- b) Provides training for employees by teaching proper diving and underwater techniques and Department rules and regulations
- c) Schedules, reviews and records all underwater inspections performed by the Underwater Operations Team

(Ex. 7.)

7. The Form 30 for Mr. Broz from the same year lists his duties as:

- A) Plans and organizes Underwater Bridge Inspections
- B) Supervises all diving operations to ensure the safety of Dive Team Member(s)
- C) Coordinates all activities at the dive site to ensure an orderly, thorough, well documented Underwater Inspection

(Ex. 15.)

8. Although neither Form 30 for Mr. Bonica and Mr. Broz explicitly lists diving as one of their duties, Mr. Broz testified that supervising dives inherently means that you must dive yourself. (Broz testimony.)

9. Mr. Bonica and Mr. Broz retired for superannuation in 2020 and 2021 respectively. (Exs. 10 and 11.) The State Board of Retirement excluded their dive pay from the computation of

their regular compensation. In its denial letter to Mr. Bonica, the Board noted that diving was not listed as a duty in his Form 30, the collective bargaining agreement treated dive pay as supplemental pay, and he was paid only when he actually dove. The Board explained that dive pay did not count as regular compensation because the public employee retirement statute “does not include . . . pay for ‘additional services’ except in some cases for teachers” and “since the pay is paid only when you actually dive and presumably varies depending on how frequent the dives are and how long the dives and the preparation for them take, the pay is also not ‘regular’ within the meaning of G.L. c. 32, § 1.” (Ex. 1.)

10. Mr. Bonica and Mr Broz each appealed. In the appeal letter for Mr. Bonica, his counsel rejected the notion that dive pay was for additional services: “Rather it is enhanced pay for SCUBA inspections required by Randi Bonica and many other engineers to carry out functions as Underwater [B]ridge Inspectors. It is for wages received when employees dive during their 40-hour week. . . . It is similar in every aspect to extra wages paid for ‘weekend’ or ‘shift differential’ that are considered ‘regular compensation.’” (Ex. 1.)

Discussion

“‘Regular compensation’ during any period subsequent to June 30, 2009, shall be compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.” M.G.L. c. 32, § 1. Wages, in turn, are “the base salary or other base compensation of an employee paid to that employee for employment by an employer.” *Id.* The only public employees eligible to be paid for “additional services” are teachers “employed in a public day school who [are] member[s] of the teachers’ retirement

system, [with] salary payable under the terms of an annual contract for additional services in such school.” *Id.* But there are certain types of pay that are not base salary that count as regular compensation such as shift differential,³ weekend pay,⁴ and hazard pay.⁵

Although the State Board was skeptical that SCUBA diving was part of Mr. Bonica’s and Mr. Broz’s regular duties, the evidence presented at the hearing showed that diving to inspect bridges was the day-to-day responsibility of the two men throughout the year. The extra pay each received for diving is hazard pay based on the character of the work. Underwater diving to inspect bridges, oftentimes in moving water, is inherently dangerous. Even if that were not immediately obvious, the fact that one of the dive team stayed on shore to monitor the safety of the other divers makes that abundantly clear.

The State Board argues that the engineering specifications and the Form 30s for the two men undercut the claim that diving was their regular duty. The specifications describe dive pay as pay for “supplemental duty.” The explanation the petitioners offered for this is that diving is not part of the regular duties of most engineers, and was referred to as supplemental to

³ *Bower v. Contributory Retirement Appeal Bd.*, 393 Mass. 427, 428 (1984) (holding that a night shift differential was regular compensation because it was “regular,” “ordinary,” and “normal” and the employee “was regularly assigned to work two nighttime shifts on a recurrent eight-day cycle.”)

⁴ *Bowles v. Boston Retirement Bd.*, CR-06-389, Decision at 9 (DALA, Sept. 14, 2007) (weekend and other differentials were regular compensation because “[a]ll were within the CBA, and all were regular, recurrent and automatically given out.”)

⁵ *Dudley v. Leominster Bd. of Retirement*, CR-16-39, Decision at 8 (DALA, October 15, 2018) (per PERAC regulation 840 CMR 15.03(3)(b) a differential based on the character of the work is regular compensation, such as “a hazard pay differential which is based on the dangerous character of the work.”)

distinguish diving for bridge inspections from the diving performed by aquatic biologists who would not be eligible to receive this extra pay for the diving they perform. This explanation is convoluted; it is also hard to understand how a specification for engineers has any impact on the pay of aquatic biologists. Nonetheless, just as it is true that public employers and employees cannot bind retirement boards to their conception that a particular type of pay is regular compensation, so too the wording of the engineering specifications agreed to by the state and the union representing engineers cannot exclude from regular compensation work that is in fact compensation for regular work performed by underwater bridge inspectors.

As for the Form 30s, it is worth noting that both Mr. Bonica and Mr. Broz held what amounted to management positions, and thus some of their duties would involve management tasks, not diving *per se*. While divers like Mr. Broz and Mr. Bonica might understand that supervising diving implied that one had to dive to perform supervision, that is not the way non-divers, i.e. most people, would read that. The only explanation offered as to why diving was not explicitly listed was because to list diving would make it normal work and thus not eligible for supplemental dive pay. That is not necessarily so. Police officers who are eligible for hazard pay doubtless have Form 30s that list the various hazards of police work. It would behoove those who draft the Form 30s of underwater bridge inspectors to list diving as a duty, and not confuse the State Board in the future. But what is more important here is that the evidence shows that in fact diving was the regular work of Mr. Bonica and Mr. Broz, and thus the dive pay they received was part of their regular compensation.

Accordingly, the State Board's decision is reversed and consequently the regular compensation of Mr. Bonica and Mr. Broz should be recalculated to include their dive pay.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney
First Administrative Magistrate

Dated: September 13, 2024