

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Boston Public Health Commission
(Therese Shank),
Petitioner

v.

Docket No.: CR-22-0356
Date issued: November 28, 2025

Boston Retirement System,
Respondent

Appearance for Petitioner:

Andrea M. Milyko, Esq.

Appearance for Respondent:

Edward H. McKenna, Esq.

Administrative Magistrate:

James P. Rooney

SUMMARY OF DECISION

An EMT who was injured while working and could no longer perform CPR or lift patients was granted accidental disability retirement by the Boston Retirement System because those duties were essential to her position in the field. The appeal of her employer, the Boston Public Health Commission, is denied because her subsequent work as a dispatcher for the Commission was not an accommodation that met the standards set forth by the Supreme Judicial Court in *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669 (2009).

DECISION

Therese Shank worked as an emergency medical technician (EMT) for Boston Emergency Medical Services (EMS), which is a bureau of the Boston Public Health Commission. She suffered a neck injury while working in the field and, in 2022, the Boston Retirement System

approved her application for accidental disability retirement. The Boston Public Health Commission timely appealed the Retirement System's action.

I held a hearing on January 11, 2024 at the Division of Administrative Law Appeals, 14 Summer Street, 4th Floor, Malden, Massachusetts. I marked the parties' joint prehearing memorandum, which contained a statement of agreed facts, as Pleading A. I admitted the 47 exhibits accompanying the joint memorandum. The witnesses at the hearing were: Ms. Shank and John Gill, the Superintendent-in-Chief of Boston EMS. The administrative record closed on August 23, 2024 when the parties filed their post-hearing memoranda.

Findings of Fact

Based on the testimony, the exhibits presented by the parties, the statement of agreed facts and inferences drawn from them, I make the following findings of fact:

1. Therese Shank worked as a paramedic in Florida for ten years before moving to Massachusetts. She worked for a private ambulance company here before taking the test in 2014 to become an emergency medical technician with Boston EMS. Her objective was to continue to work in the field providing direct care. She would not have applied if she thought she would be assigned to dispatch. (Shank testimony.)

2. A posting from September 15, 2014 for a job as an EMT with Boston EMS stated that the duties of the position included providing "emergency medical care," operating "emergency response vehicles," responding to "emergency medical assistance [requests] from the public via 9-1-1," and assessing, treating and transporting patients with illnesses, injuries or undergoing a "behavioral emergency." The minimum qualifications included the ability to "carry more than 20 lbs. of equipment while walking, climbing and descending stairs, or

traversing difficult terrain,” “perform cardiopulmonary resuscitation for extended periods of time,” “lift an adult patient” with the aid of a partner, and maintain current valid EMT certification.” The posting added that an EMT “[m]ay be reassigned to the EMS Dispatch Operations Center if qualified.” (Ex. 49.) The posting did not include a job description for dispatch. (Shank testimony.)

3. Boston EMS is part of the Boston Public Health Commission. It has five divisions: field operations, special operations, support services, dispatch, and training. Boston EMS has long required those who work in dispatch to be certified EMTs. Superintendent-in-Chief Gill remembers that this was true when he started working for Boston EMS in 1986. (Gill testimony.)

4. The two divisions most relevant to this matter are field operations and dispatch. EMTs assigned to field operations are “generally assigned to ambulances and deliver on-scene medical responses to patients. They are responsible for treating, stabilizing, and transporting patients to hospitals.” (Agreed Fact 3.)

5. EMTs assigned to dispatch “receive calls made to ‘911,’ obtain relevant information about the medical emergency from the caller, provide initial medical instructions to callers, assess the emergency, determine what resources to call, provide instruction to the caller before EMTs arrive, and coordinate communication between all pre-hospital providers and receiving hospitals throughout the Boston area.” (Agreed Fact 4.) In practice, dispatchers perform three separate tasks: (1) taking 911 calls, triaging them to determine what response is called for, and walking callers through life-saving measures, (2) dispatching ambulances to the scene, and (3) C-Med, which involves communications between ambulances

and hospitals. Dispatchers rotate through these three tasks during each shift. (Gill testimony.)

6. Boston EMS trains all new recruits, including someone like Ms. Shank who was already a paramedic. The training takes 24 weeks and involves a mix of classroom training and field training. (Gill testimony.)

7. Once recruits have passed the training, they are assigned to the field or dispatch. The collective bargaining agreement gives Boston EMS the authority to assign EMTs to its various division as it chooses.¹ (Ex. 37.) In practice, once training is completed, those assigned to dispatch are individuals who struggled during the EMT training or who expressed a preference to work in dispatch. (Gill testimony.) As noted above, Ms. Shank wanted to provide direct patient care and would not have applied for the job if she knew she would be assigned to dispatch. (Shank testimony.)

8. The 24 weeks of training that all Boston EMT recruits undergo prepares them for work in the field, but not in dispatch. Those assigned to dispatch must receive another 88 hours of classroom training and 12 weeks of hands-on training. If successful, they receive a certification from the Association of Public-Safety Communications Officials. (Gill testimony.)

9. Ms. Shank began working as an EMT recruit with Boston EMS on November 14, 2014. (Agreed Fact 5; Ex. 11.) She completed the training and became a Boston EMT on May 15, 2015. (Agreed Fact 6; Ex. 12.)

1 This is also spelled out in the Boston Public Health Act of 1995, which provides that “[n]o collective bargaining agreement entered into by the commission . . . shall limit inherent management rights which shall include . . . employment, assignment and reassignment of employees.” M.G.L. c. 111 App. § 2-4(d).

10. Ms. Shank was assigned to the field. Some of the tasks she performed were physically taxing. Cardiopulmonary resuscitation (CPR) is so physically demanding that a firefighter is allowed to tap out after two minutes. (Shank testimony.)

11. On September 16, 2016, Ms. Shank experienced acute neck pain while she was performing CPR on a patient. The pain immediately radiated to her skull and her eye. She later developed weakness in her arms. Ms. Shank filed an injury report that day. She tried physical therapy and underwent an MRI that revealed severe spinal stenosis at C4-C5 and C5-C6. Andrew White, M.D., an orthopedic surgeon, recommended that she have surgery to decompress those two cervical discs and relieve the pressure on her spinal cord caused by the compressed discs. On October 21, 2016, Dr. White performed an anterior cervical discectomy and fusion at C4-C5 and C5-C6. (Shank testimony; Exs, 4, 5, 6, 7, 15, and 18.)

12. Ms. Shank was out of work for seven months. She applied for workers' compensation but was initially denied. She thus relied on sick time and a leave bank during this period. She was granted workers compensation in February 2017. (Shank testimony.)

13. Dr. White saw Ms. Shank on April 19, 2017 to evaluate how she had progressed since her surgery. He determined that "many of her neurological symptoms had resolved and many of her myelopathic symptoms improved, even better than expectations." He prescribed physical therapy and a work-hardening course to see if she could return to field work. Ms. Shank explained that one of the requirements to return to the field was the ability to dead lift a 150-pound mannequin, which Dr. White acknowledged "she certainly cannot perform currently." Dr. White cleared her for light duty, limited to work in dispatch with no lifting, bending or overhead work. (Exs. 31 and 32.)

14. Following Dr. White's April 19, 2017 report, Boston EMS accepted Dr. White's conclusion that Ms. Shank could perform light duty work. (Gill testimony.) Dispatch was light duty work. Ms. Shank understood that if she declined to go to dispatch, she would lose her workers' compensation benefits. She agreed to work in dispatch so she could continue to be paid while she healed. She was not alone in this regard. Ms. Shank estimated that 80% of the people working in dispatch were injured. She found the work distressing because there was only so much she could do over the phone to help someone. In one call, she listened to someone die. (Shank testimony.)

15. When Ms. Shank was assigned to dispatch, she received the same pay as before and the same health and vacation benefits. She received hazard pay while working in dispatch and was eligible for overtime in that unit. In 2021 and 2022, she worked 1,000 hours of overtime. She was not eligible for details. She could not transfer to another division because of her physical limitations. If a vacancy arose, she could have applied for promotion. But she would not have been eligible for promotion if she failed to be recertified annually as an EMT or failed to obtain a CPR card from the American Heart Association. Toward the end of her time with Boston EMS, Ms. Shank was unable to complete all the requirements for a full CPR card because she was unable to complete the chest compression portion. She received an advisor's card that was sufficient to allow her to explain to a 911 caller how to perform CPR. If she was somehow promoted, she would have been assigned to dispatch. (Gill testimony.)

16. When Ms. Shank finally realized that she would never recover enough to go back into the field, she decided to apply for accidental disability retirement. When COVID-19 hit

the United States, she decided to “take one for the team” and keep working a little longer.

(Shank testimony.)

17. Ms. Shank applied for accidental disability retirement on April 21, 2021, while she was still working full-time as an EMT Telecommunicator, which is the formal title for a 911 dispatcher. She stated that she was injured on September 16, 2016 “while performing cardiac chest compressions herniated cervical vertebrae resulting in surgical fusion of C4-C8.” She listed the cervical fusion as the medical condition that caused her disability and stated that she could not perform chest compression without pain. She also stated that since the surgery she had not done anything strenuous. She noted that she was currently working as dispatcher and that this was an accommodated position. (Ex. 1.)

18. The Boston Public Health Commission filed an Employer’s Statement in which it stated that Ms. Shank had “requested to be reassigned to Dispatch Operations after injuring herself as a field EMT.” It added that an “EMT-Telecommunicator position does not require and EMT to work in the field in an ambulance responding to 911 calls. The telecommunications position is strictly answering medical calls and dispatching ambulances to medical emergencies.” It noted that:

Emergency Medical Dispatch is an essential part of Boston EMS and the positions are regularly staffed by trained EMTs. These EMTs provide meaningful work by coordinating care with the caller and the dispatched ambulance, among other duties. The EMTs staffing these positions undergo extensive training.

(Ex. 2.)

19. Susan Inonog, M.D., filed a physician's statement in support of the application. Dr. Inonog stated that Ms. Shank was disabled by "cervical myelopathy s/p ACDF C4-C6" and that as an EMT she could not perform cervical compressions. (Ex. 3.)

20. Ms. Shank was examined by a medical panel made up of two orthopedic doctors, John Goldberg, M.D., and Wojciech Bulczynski, M.D., and a neurologist and neurosurgeons, Julian H. Fisher, M.D. (Exs. 5-7.)

21. Dr. Godberg diagnosed Ms. Shank with cervical strain, degenerative cervical disc disease, spinal stenosis of the cervical spine related to acute disc rupture C4-C5 and C5-C6. He noted that she was status "post anterior cervical discectomy and fusion C4-C5" and C5-C6" and "post intervertebral discectomy and fusion." He thought she was unable to perform the essential duties of her position and that her disability had "arisen as consequence of the work-related accident as described consisting of a major cause of her present incapacity." He concluded that she would be "at significant risk to herself or others if she were to attempt to return to the essential demands of her occupation." (Ex. 5.)

22. Dr. Bulczynski diagnosed her with a cervical sprain and underlying pre-existing severe congenital stenosis of her cervical spine. In his opinion, "the cervical sprain aggravated pre-existing spinal stenosis, which then required surgical treatment. He thought she was disabled form her "usual employment" and "would be at risk to herself if she tried to return to her work." (Ex. 6.)

23. Dr. Fisher concluded about Ms. Shank that:

Given the persistent marked pain, limitation of range of motion about the neck and the inability with the upper extremity mild weakness to perform active maneuvers such as chest compression for resuscitation, changes all of a permanent nature and related to

the work injury and the spinal cord compression with myelopathy, Therese Shank must be considered no longer able to perform the set of activities critical to her work. She must be considered as permanently disabled.

(Ex. 7.)

24. The Boston Retirement System held a hearing before Judith R. Cohen, Esq. to evaluate Ms. Shank's application. Hearing Officer Cohen determined that the dispatch position was not an appropriate accommodation under *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669 (2009) because it "result[ed] in a loss of benefits to which she would otherwise be entitled including promotional opportunities and salary increases." She therefore recommended that Ms. Shank's application be approved. (Ex. 10.)

25. Thereafter, the Boston Retirement System adopted Hearing Officer Cohen's decision and approved Ms. Shank's accidental disability retirement application. PERAC approved this decision. The Boston Public Health Commission filed a timely appeal. (Exs. 44, 46, and 47.)

Discussion

An applicant may receive accidental disability retirement when she can show that as of hers last day of work, she was a "member in service" and (1) was "unable to perform the essential duties of h[er] job," (2) "such inability is likely to be permanent," and (3) the disability was caused "by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, h[er] duties." M.G.L. c. 32, § 7(1). There is no dispute that Ms. Shank's 2017 on-the-job injury has left her permanently unable to perform some of the essential duties of a field EMT for Boston EMS because she can no longer perform CPR or lift

patients. The only issue is whether she is ineligible for accidental disability because she can still perform the duties of a dispatcher.

The resolution of that issue turns on whether her application should be evaluated based on the field EMT work she was performing when she was injured or on the dispatch position she held thereafter. The parties agree that DALA should look to *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669 (2009) for guidance in resolving this issue.

Samuel Foresta, Jr. worked as a safety inspector for the occupational safety department of the Massachusetts Turnpike Authority (MTA). His “job responsibilities included conducting MTA training sessions on cardiopulmonary resuscitation (CPR), first aid, fire extinguisher safety, and other aspects of safety awareness; internal safety audits; and industrial accident investigations. One of [his] primary responsibilities was to conduct weekly inspections of fire extinguishers along the Massachusetts Turnpike and MTA tunnels.”² 453 Mass.at 671. In March 2001, he “injured his lower back while attempting to lift a fire extinguisher onto an MTA transport van.” *Id.* In June 2002, his “orthopedic surgeon approved his return to work full time, provided that accommodations for certain medical restrictions could be made.” The MTA attempted to accommodate him by assigning the fire extinguisher inspections to another employee. *Id.* at 672. Mr. Foresta remained responsible for “classroom instruction, inspections, investigations, data entry, course development, and report writing.” He was also assigned administrative tasks that had “been piling up.” *Id.* at 683 n. 17.³ When Mr.

2 Although the SJC described Mr. Foresta’s inspection of fire extinguishers as one of his primary responsibilities, it was the fifth duty listed in his job description. *Foresta*, 453 Mass. at 673 n. 4.

3 The director of Mr. Foresta’s division thought highly of him, saying he was a “superb

Foresta's subsequent application for accidental disability was reviewed by a medical panel, the panel at first determined that he was unable to perform the essential duties of his job because he was "unable to perform the prolonged driving and lifting from floor level required of his work." *Id.* at 673. When told that such tasks were no longer part of Mr. Foresta's duties, the panel changed course, this time determining that he could perform the essential duties of his job. *Id.* at 674. This led to the rejection of Mr. Foresta's disability application.

The Supreme Judicial Court ultimately affirmed this conclusion, saying that the public employee retirement statute at M.G.L. c. 32, § 7:

permits an employer to modify an injured employee's work-related responsibilities in order to accommodate the injury, thereby revising the "essential duties of his job," and, as a result, limiting the retirement system's liability for accidental disability benefits. . . . [I]n this case, the essential duties of the job as modified are similar in responsibility and purpose to those performed by the employee at the time of injury, and result in no loss of pay or other benefits.

Id. at 671. However, the Court cautioned that:

there are limits to the extent to which a department head may alter a job description in order to compel an unwilling employee to continue working at a revised job rather than receive disability retirement benefits to which he otherwise would be entitled. The essential duties of the job as modified must be similar in responsibility and purpose to those performed by the employee at the time of injury, and must result in no loss of pay or other benefits. We draw no bright line to be followed in every case, nor can we, for the determination whether a job is similar in responsibility and purpose necessarily depends on the particular factual circumstances of the employment.

Id. at 680.

The net result of *Foresta* is that if an employer has modified an employee's job duties post-injury so that they are similar in responsibility and purpose to those performed by the

instructor." 453 Mass. at 683 n. 17.

employee at the time of injury, then the employee's eligibility for accidental disability retirement should focus on whether he can perform the duties of the job as modified. *Id.* at 684. That necessarily means that if a modified job is not similar in responsibility and purpose to those performed by the employee at the time of injury or would cause a loss of pay or other benefits, then the analysis should focus on the job the employee held when injured.

A fair reading of the medical panelists' reports is that the three doctors determined that Ms. Shank could no longer perform the duties of a field EMT but did not address whether she was capable of working as a dispatcher. The Boston Public Health Commission asserts that the evaluation should have been whether Ms. Shank could perform the duties of the dispatch position she last held. It contends that Ms. Shank's only real position was as an EMT and, as such, the Commission had the discretion to assign her to any of its units. It further contends that field EMT and dispatch EMT jobs have similar responsibilities because they function as first responders and both play a critical role in handling emergencies.

Before addressing these arguments, I note that, unlike the agency in *Foresta*, the Commission did not seek to modify Ms. Shank's essential duties so that she could be kept on the job. Instead, it initially denied her claim for workers' compensation benefits for months, so that Ms. Shank had to rely on sick time and leave bank time to continue to be compensated. Shortly after Ms. Shank started to receive workers' compensation, a doctor determined that Ms. Shank could perform light work. It was then that Ms. Shank agreed to work in dispatch because if she did not, she understood that she would lose her workers' compensation benefits. She took the dispatch job with the idea that she would stay there until she recovered from her neck injury and then she could return to the field. Thus, the Commission

did not reassign Ms. Shank to dispatch as an accommodation, and Ms. Shank did not agree to assume that position with the understanding that it was a long-term accommodation. Indeed, the Commission could not realistically offer Ms. Shank an accommodation that would allow her to continue working as a field EMT because her inability to perform CPR was not a task she could be excused from.

While I note these aspects of this case, it is not apparent that the SJC in *Foresta* was primarily concerned with the employer's or the employee's motivations, but rather whether the job available to the employee post-injury was similar to the job held at the time of injury.⁴ I therefore turn to examining whether the field EMT and the dispatch EMT are similar jobs.

I do not think the Commission's ability to transfer an EMT from a field position to dispatch (or to any of the other units – training, special operations, and support services) proves that the jobs are similar. It proves only that the Commission wants each of its units staffed by EMTs, not that the jobs in each unit are similar.

The Commission's main contention is that the two jobs are similar because both field EMTs and EMTs in dispatch directly communicate with persons needing emergency services, obtain such information from those needing such assistance or family members, assess the nature of the health emergency, and provide medical services either directly or by instructing a family member on how to assist the person in need of medical assistance. While these show the field EMTs and EMTs in dispatch are both part of a team working toward the goal of

⁴ But as noted earlier, the Court did say that an employee unwilling to accept a substantially revised job would still be eligible for accidental disability retirement. *Foresta*, 453 Mass. at 680.

providing health to a person experiencing a health emergency, their responsibilities are very different.

The actual duties of a field EMT and an EMT in dispatch are dissimilar, as demonstrated by the very different descriptions offered by the Commission of the duties of each position.

The job posting for a field EMT described the duties of that position as including:

- providing “emergency medical care,”
- operating “emergency response vehicles,”
- responding to “emergency medical assistance [requests] from the public via 9-1-1,” and
- assessing, treating and transporting patients with illnesses, injuries or undergoing a “behavioral emergency.”

(Ex. 29; Finding 2.) The minimum qualifications included the ability to:

- “carry more than 20 lbs. of equipment while walking, climbing and descending stairs, or traversing difficult terrain,”
- “perform cardiopulmonary resuscitation for extended periods of time,”
- “lift an adult patient,” with the aid of a partner, and
- maintain current valid EMT certification.

(*Id.*) Put another way, field EMTs “deliver on-scene medical responses to patients. They are responsible for treating, stabilizing, and transporting patients to hospitals.” (Agreed Fact 3; Finding 4.)

The description of the dispatch job did not include any direct care of patients or physical requirements. Rather, EMTs assigned to dispatch are in an office and:

receive calls made to 911, obtain relevant information about the medical emergency from the caller, provide initial medical instructions to callers, assess the emergency, determine what resources to call, provide instruction to the caller before EMTs arrive, and coordinate communication between all pre-hospital providers and receiving hospitals throughout the Boston area.

(Agreed Fact 4; Finding 5.)

In practice, the Commission does not treat the two positions as equivalent. The initial training it provides to all new recruits is meant to prepare them only for work in the field. Those who it assigns to dispatch must undergo months of additional training. And it assigns certain people to dispatch because they did not do well in field training, which strongly suggests that the Commission does not view the two jobs as fungible.⁵

The duties of a dispatch EMT are not a subset of the duties of a field EMT, as was acceptable in *Foresta*. Therefore, Ms. Shank's work in dispatch cannot be considered an accommodation under *Foresta* – or the assignment to a similar position – and thus the medical panel appropriately considered whether her injury disabled her from working in the field. It need not have considered whether her injury precluded her from working as a dispatcher.

The parties agree that Ms. Shank suffered a work-related injury that permanently precluded her from working as a field EMT. Thus, considering the positive medical panel and my rejection of the Commission's argument that her work in dispatch was an accommodation acceptable under *Foresta*, I conclude that Ms. Shank has demonstrated her eligibility for accidental disability retirement.

I do not rely on Ms. Shank's assertion that the move to dispatch caused her to lose pay and benefits and eliminate her opportunity for promotion. Her pay and benefits were literally

5 The Commission is the one municipal agency that I know of that requires its dispatchers be EMTs. The benefit of this decision seems obvious for a trained EMT is more likely to be able to better assess a medical condition than a person without the medical training received by EMTs. An EMT may also be better able to instruct a family member on how to take some action to help the person in need of aid before the field EMTs get there, such as how to perform CPR. But requiring EMTs to hold dispatch positions does not by itself demonstrate that the field and dispatch positions are similar.

the same. It is true that she was eligible for overtime only in dispatch and that, as a dispatcher, she could not work details. While this was a change in her work circumstances to a degree, it was not a change to her pay or benefits. Nothing in Chapter 32 or *Foresta* requires employers to provide the same opportunities to earn extra money (such as through overtime or paid details), particularly when the injury precluded that employee from doing certain tasks. Nor is the opinion clear on whether a change in promotional opportunities would matter to the analysis. It would seem from Superintendent-in Chief Gill's testimony that because Ms. Shank could not obtain a full CPR card from the American Heart Association, as she could not physically perform CPR, she was technically ineligible for promotion to lieutenant. (Finding 15.) Even if she somehow became eligible to be promoted to lieutenant, she could serve only in dispatch rather than in any of the other units, a factor that might influence a decision whether to promote her. This is a difference, but the SJC did not address whether retirement boards should take this into account when determining if an accommodation was adequate.

Finally, Ms. Shank's work for over four years after her injury as a dispatcher does not preclude her from seeking accidental disability retirement. As the SJC pointed out in *Foresta*, the retirement statute seeks to have injured employees try to heal and return to their old positions by requiring employers to develop plans that would encourage employees to undertake medical or vocational rehabilitation. *Foresta* at 677-678; M.G.L. c. 32, § 5B. Ms. Shank took the steps offered to her to try to heal, including physical therapy and surgery, and thought with time she would get better. When she realized that she would not recover sufficiently to return to the field, she applied for accidental disability retirement. That she

stayed longer than this to help the Commission during the Covid pandemic cannot be held against her.

Conclusion

The Boston Public Health Commission has failed to show that the Boston Retirement System erred in granting Ms. Shank accidental disability retirement. I therefore affirm the Retirement System's decision.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney

First Administrative Magistrate

Dated: November 28, 2025