COMMONWEALTH OF MASSACHUSETTS

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

Patrick Burke,
Petitioner,

v.

State Board of Retirement,
Respondent.

No. CR-19-394

Dated: August 18, 2023

Appearance for Petitioner:
Patrick Burke (pro se)
Plympton, MA 02367

Appearance for Respondent:
Yande Lombe, Esq.
Boston, MA 02108

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

A state employee spent less than half of his working hours providing "care . . . or other supervision" to "persons who are . . . mentally defective." He was therefore ineligible for group 2 under G.L. c. 32, § 3(2)(g).

DECISION

Petitioner Patrick Burke appeals from a decision of the State Board of Retirement declining to classify him in group 2 under G.L. c. 32, § 3(2)(g). I held a hearing by WebEx on July 13, 2023. Mr. Burke was the only witness. I admitted into evidence exhibits marked 1-10.

Findings of Fact

I find the following facts.

1. Mr. Burke worked for nearly thirty years as an employee of the Department of Developmental Services. His place of work was DDS's Brockton office, which provided services to individuals with an array of developmental disabilities. (Testimony; Exhibit 1.)

2. From 1989 until 1998, Mr. Burke's job title was "Human Service Coordinator A/B" (coordinator). In this role, Mr. Burke helped eligible adults to secure placement in various programs. His duties included client interviews, case administration, visits to program sites, and crisis management. He spent slightly more than half of his time caring for clients face-to-face. (Exhibits 1-3; Testimony.)

3. From 1998 until 2019, Mr. Burke's title was "Human Service Coordinator C/Supervisor" (coordinator/supervisor). In this more senior position, Mr. Burke oversaw and monitored the work of approximately seven supervisees. He filled in for them in their absence and assisted them in times of crisis. He participated in his office's planning and training work. He also shouldered a substantial caseload of clients he cared for personally. (Exhibits 1-3; Testimony.)

4. Mr. Burke's work as a coordinator/supervisor continued to involve face-to-face responsibility for his clients' wellbeing. However, given his new supervisory duties, Mr. Burke's in-person client work shrank somewhat as a percentage of his total working hours. I find by a preponderance of the evidence that, in his coordinator/supervisor role, Mr. Burke spent somewhat less than half of his time caring for his clients face-to-face. (Exhibit 2; Testimony.)

5. In anticipation of his retirement, Mr. Burke asked the board to classify him in group 2 under G.L. c. 32, § 3(2)(g). The board granted prorated group 2 status to Mr. Burke's nine years of work as a coordinator, but not to his twenty-one years of work as a coordinator/supervisor. He timely appealed the latter determination. He has been retired since November 2019. (Exhibits 1-8, 10.)

Analysis

A public employee's retirement benefits are shaped in part by the employee's assignment into one of four groups. G.L. c. 32, § 3(2)(g). Today, most employees may "elect to receive . . .

pro-rated benefits" that the retirement board calculates by assigning each of the employee's positions into the proper group. § 5(2)(a).

Membership in group 2 may yield favorable benefits as compared to group 1, the catch-all classification. The category of employees who qualify for group 2 includes those "whose regular and major duties require them to have the care, custody, instruction or other supervision of . . . persons who are mentally ill or mentally defective or defective delinquents or wayward children." § 3(2)(g).

The term "mentally defective" is obviously and badly archaic. In 1954, the Supreme Judicial Court wrote that these words "describe persons whose mentality is less than normal." *Ex parte Dubois*, 331 Mass. 575, 580 (1954). Over the years, administrative case law has come to interpret the "mentally defective" category as covering individuals with developmental disabilities. *See Desautel v. State Bd. of Ret.*, No. CR-18-80, at *4 (CRAB Aug. 2, 2023); *Blake-Pease v. State Bd. of Ret.*, No. CR-01-0575 (DALA Mar. 10, 2004). The parties agree that Mr. Burke's client population satisfied this element of the group 2 definition.

An employee's "regular and major" duties are those in which he was engaged during "more than half" of his working hours. *Desautel*, *supra*, at *4; *Forbes v. State Bd. of Ret.*, No. CR-13-146, at *7 & nn.21-22 (CRAB Jan. 8, 2020). In this context, the terms "care . . . or other supervision" do not include supervisory or administrative duties: they are limited to "*direct* patient care." *Sheehan v. State Bd. of Ret.*, No. CR-00-1014 (CRAB Feb. 4, 2002) (emphasis added). *See Morreale v. State Bd. of Ret.*, No. CR-15-332, 2017 WL 3440540, at *6 (DALA Mar. 10, 2017). This rule reflects the view that the overarching purpose of the quadripartite grouping system is to "[p]rovid[e] early retirement incentive to employees with hazardous duties

. . . [thus] making room for younger employees better able to perform that type of work." *Pysz v. Contributory Ret. Appeal Bd.*, 403 Mass. 514, 518 (1988).

This appeal therefore turns on the finding of fact that, as a coordinator/supervisor, Mr. Burke spent less than half of his employment hours caring directly for his clients. *See supra* p. 2.[1] There is no question that Mr. Burke's supervisory and administrative duties provided a valuable service to his constituents and to the Commonwealth. But the conditions that the retirement law imposes on eligibility for various benefits are inflexible. *See Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010). By a preponderance of the evidence, Mr. Burke does not qualify for group 2 as statutorily defined.[2]

Conclusion and Order

The board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

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[1] Given the limited scope of the board's arguments before and at the hearing, I assume in Mr. Burke's favor that his in-person work with DDS clients amounted to "care . . . or other supervision," § 3(2)(g), i.e., that that work involved "charge, oversight, watchful regard, and attention," *Rebell v. Contributory Ret. Appeal Bd.*, 30 Mass. App. Ct. 1108, slip op. at 4 (1991) (unpublished memorandum opinion), and a measure of "responsib[ility] for . . . the [clients'] physical or psychological needs," *Sutkus v. State Bd. of Ret.*, No. CR-09-837 (CRAB Feb. 17, 2011). *But see Albano v. State Bd. of Ret.*, No. CR-15-327, at *2 (CRAB July 23, 2018) (duties "primarily in the nature of planning, placement, and oversight of the supports provided to . . . clients" did not count as "direct care").

[2] Mr. Burke asserts that at least one other individual in a position similar to his has been assigned to group 2. It is certainly possible for individuals hired into similar positions to spend meaningfully different portions of their work schedules providing care directly to clients. In any event, a member's argument that he has been treated unequally vis-à-vis his or her peers is constitutional in substance, cannot be entertained by an administrative tribunal, and belongs in the Superior Court. *See Sarno v. MTRS*, No. CR-07-253, at *6-7 (DALA Oct. 29, 2010); *Racow v. Winthrop Ret. Bd.*, No. CR-20-492, at *3-4 (DALA Mar. 25, 2022).