COMMONWEALTH OF MASSACHUSETTS

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

Sharon Moran,
Petitioner,

v.

Brockton Retirement Board,
Respondent.

No. CR-20-332

Dated: June 18, 2021

Appearance for Petitioner:
Judith B. Gray, Esq.
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Appearance for Respondent:
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Appearance for the Public Employee Retirement Administration Commission:
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Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

A 911 dispatcher injured while retrieving labor-union-related documents from her car did not suffer her injury "in the performance of [her] duties," G.L. c. 32, § 7, and therefore was not entitled to accidental disability retirement benefits.

DECISION

Petitioner Sharon Moran appeals from a decision of the Brockton Retirement Board (board) denying her application for accidental disability retirement benefits. The board's decision followed a series of remand letters from the Public Employee Retirement

Administration Commission (PERAC). I allowed PERAC to intervene over opposition from Ms. Moran and the board.[1]

I held a recorded evidentiary hearing over the WebEx platform on June 15, 2021. I admitted sixteen agreed-upon exhibits into evidence, including four originally unnumbered "medical" exhibits that I marked as nos. 13-16. I heard oral summations and closed the administrative record.

Findings of Fact

Having considered the testimony and the exhibits, I find the following facts.

1. Sharon Moran began working for the City of Brockton in 2006. She served as a 911 dispatcher. Dispatchers performed their work in eight-hour shifts, with three or four dispatchers on duty in each shift. (Exhibit 1; Moran testimony.)

2. From 2011 to around 2016, Ms. Moran served formally as a steward of her labor union. In this role, Ms. Moran advised and represented union members in grievance proceedings, collective bargaining negotiations, and the like. In consideration of this work, Ms. Moran received an annual stipend. (Exhibit 5; Moran testimony.)

3. Ms. Moran's successor as union steward held that position for only six months. At the request of union officials, Ms. Moran then agreed to serve as a frequent union "representative," an informal role unaccompanied by a stipend. Ms. Moran did not return to her

[1] The board asserted staunchly that PERAC lacks standing and, in essence, that PERAC's involvement interferes with the board's autonomy. I allowed PERAC's motion to intervene on the basis that precedents of the Contributory Retirement Appeal Board (CRAB) deem PERAC "substantially and specifically affected" by significant matters within PERAC's supervisory purview. *See* 801 C.M.R. § 1.01(9)(d); *Patton v. Essex Reg'l Ret. Syst.*, No. CR-13-511 (CRAB Sept. 30, 2016); *Rotondi v. Stoneham Ret. Bd.*, No. CR-03-551 (CRAB Dec. 30, 2005). I note that PERAC's input may be especially helpful where a retirement board views a member's claim as presenting a close case.

post as a formal "steward," but she resumed most or all of the same duties she had performed in that capacity. (Exhibit 5; Moran testimony.)

4. The collective bargaining agreement applicable to Ms. Moran stated that "employees shall have the right to join the union, hold office, act as a Union representative and engage in lawful association activities for the purposes of collective bargaining." The agreement added that union representatives "shall be granted reasonable time off during working hours for the purpose of investigating and settling grievances." Throughout her tenures as both formal steward and informal representative, Ms. Moran performed union-related activities during her dispatcher shifts. (Exhibit 4, arts. XXIV, XXVI; Moran testimony.)

5. Ms. Moran believed that, as a formal union steward, she had no discretion to decline requests for help from the union or its members. As an informal representative, she also fielded all union-related requests, feeling compelled to do so by her conscience. But she understood that she would suffer no formal consequences if she were to decline such requests. (Moran testimony.)

6. Ms. Moran had a history of one or more surgeries on her left knee. These surgeries were successful, leaving Ms. Moran without symptoms. (Exhibit 13.)

7. On February 13, 2017, Ms. Moran worked the midnight-8:00 AM shift. At approximately 7:45 AM, she walked toward her car to retrieve documents pertinent to a grievance-related inquiry from a union member. Ms. Moran intended to bring the documents back to her desk for the last few minutes of her shift. (Exhibit 5; Moran testimony.)

8. The parking lot where Ms. Moran's car was parked was icy and snowy. She slipped, fell, and suffered an injury to her left knee. She was unable to return to her desk that night. (Exhibits 1, 2, 3, 13; Moran Testimony.)

9. In undetailed, handwritten forms she completed soon after the incident, Ms. Moran wrote that she "completed shift" at "8" and that she sustained her injury "[l]eaving work end of shift." (Exhibits 2, 3.) Having considered Ms. Moran's vivid and detailed testimony under oath, I credit her explanation that those forms reflect imprecise shorthand.[2]

10. Ms. Moran was treated with physical therapy. Subsequently she underwent three surgical procedures, including a total knee replacement. (Exhibit 13.)

11. On or about July 8, 2019, Ms. Moran submitted an application for accidental disability retirement. A panel of three physicians certified (a) that Ms. Moran was physically incapable of performing the essential duties of her job, namely to sit or stand for periods longer than 10-15 minutes; (b) that this incapacity was likely to be permanent; and (c) that—according to two of the three physicians—Ms. Moran's incapacity might be the natural and proximate result of her February 2017 injury. (Exhibits 14-16.)

12. Three times the board referred Ms. Moran's retirement application to PERAC. Each time PERAC remanded, opining that Ms. Moran had not been performing dispatcher duties at the time of her injury. On July 30, 2020, the board denied Ms. Moran's application, incorporating PERAC's reasoning. Ms. Moran timely appealed. (Exhibits 6, 7, 9-11.)

Analysis

A public employee applying for accidental disability retirement must establish three elements: (i) that the employee "is unable to perform the essential duties of his job"; (ii) that the disability "is likely to be permanent"; and (iii) that the disability arose "by reason of a personal

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[2] In a written witness statement accompanying Ms. Moran's application for workers' compensation, Brockton Police Officer Michael Livingston wrote that Ms. Moran's injury occurred "at 8:04 AM." (Exhibit 3.) This laconic notation does not alter my assessment of Ms. Moran's testimony.

injury sustained . . . as a result of, and while in the performance of, [the employee's] duties." G.L. c. 32, § 7. There is no dispute that Ms. Moran is unable to perform the essential duties of her job, and that her disability is likely to be permanent.

There also is no dispute that Ms. Moran's disability resulted from her July 2017 fall in the parking lot. The parties' disagreement centers on whether that accident occurred "as a result of, and while in the performance of, [Ms. Moran's] duties." § 7.

To satisfy this condition, it is not enough that Ms. Moran traveled to the parking lot directly from her desk. This fact could satisfy only the statutory requirement "that the applicant's injuries were sustained 'as a result' of her duties." *Boston Ret. Bd. v. Contributory Ret. App. Bd.* (*Palmeri*), 340 Mass. 109, 111 (1959). But the statute makes a "conjunctive" demand that the injury occurred "while in performance of" the employee's job duties. *Id.* This demand means that the injury must arise "*during the actual performance of* the [employee's] duties." *Damiano v. Contributory Ret. App. Bd.*, 72 Mass. App. Ct. 259, 263 (2008) (emphasis added). Accidental disability retirement thus is not available to an employee who is hurt—even during working hours—while performing a non-duty. *Id.*; *Palmeri*, 340 Mass. at 111; *Namvar v. Contributory Ret. App. Bd.*, 422 Mass. 1004 (1996).

The critical question is therefore whether, at the time of her injury, helping union members with labor grievances was one of Ms. Moran's "duties." A "duty" is an "obligation that is owed or due to another . . . which one is bound to do, and for which somebody else has a corresponding right." *Black's Law Dictionary* 615 (10th ed. 2014). It follows that a job-related activity is an employee's "duty" only if the job *obligated* the employee to perform the activity. Accordingly, when a building inspector was injured while replacing a water-cooler jug, the Appeals Court upheld CRAB's denial of accidental disability retirement, explaining: "While the

[employee] had, from time to time, replaced the water bottle *as a courtesy* to his fellow employees . . . *he was not required to do so*." *Connolly v. Contributory Ret. Appeal Bd.*, 73 Mass. App. Ct. 1127 (2009) (unpublished memorandum opinion) (emphasis added). Decisions determining whether an employee was duty-bound to perform the injuring activity have considered both the employee's job description and any supervisor's instructions. *See Gale v. Contributory Ret. App. Bd.*, No. 93-6003-G (Suffolk Super. Sept. 20, 2000); *Glynn v. Boston Ret. Bd.*, No. CR-14-295 (DALA Feb. 5, 2016); *McDonald v. Boston Ret. Bd.*, No. CR-11-623, slip op. at 9 (DALA Feb. 27, 2014).

It is questionable whether assisting other employees with union-related business was an employment "duty" of Ms. Moran even during her term as a union steward. But it is not necessary to resolve that question: her term as steward ended in around 2016, and it is clear that Ms. Moran's subsequent union-related activities were voluntary. After 2016, no union-related assistance from Ms. Moran was "owed or due" to anyone, and no one possessed a "right" to such work. *See Connolly*, 73 Mass. App. Ct. 1127; *Loan v. Boston Ret. Syst.*, No. CR-13-203, slip op. at 7 n.4 (DALA Nov. 9, 2018). The governing CBA established only that Ms. Moran was *permitted* to take on union-related assignments, and no supervisor required Ms. Moran to do so.

Because Ms. Moran was not injured while in performance of her job duties, the board was correct to deny her application for accidental disability retirement.

The line of cases that dictates this result dates back to *Palmeri* in 1959. Today the Supreme Judicial Court "might not draw [the line] in the same place." *Namvar*, 422 Mass. at 1005. Denying accidental disability retirement to an employee injured at work can appear "counterintuitive." *Damiano*, 72 Mass. App. Ct. at 264. Yet this result flows from the fact that "accidental disability retirement benefits are more generous than those available under ordinary

retirement." *Id.* at 262. "If the Legislature wants to make a change and devote more public funds to accidental disability retirement benefits, it can do so." *Namvar*, 422 Mass. at 1005.

Order

The decision of the Brockton Retirement Board is AFFIRMED.

SO ORDERED.

Division of Administrative Law Appeals

Yakov Malkiel
Administrative Magistrate