COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

SCOTT PERRY *Petitioner*	:	Docket No. CR-20-0172
v.	:	Date: February 16, 2024
MIDDLESEX COUNTY RETIREMENT SYSTEM *Respondent*	:	

Appearance for Petitioner:

Gary Romagna, *Esq.*

Appearance for Respondent:

Thomas Gibson, *Esq.*

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

A member is not entitled to a termination retirement allowance if they were removed or discharged for violating a law, regulation, or rule applicable to their position. G.L. c. 32, § 10(2)(c). Here, one of the reasons for the Petitioner's termination was for violating the town's personnel policy: failing to fulfill his responsibilities as an employee through "incompetence or inefficiency in performing assigned duties." A town policy is a kind of "rule" under § 10(2)(c). As such, the Petitioner is not entitled to a termination retirement allowance.

INTRODUCTION

The Petitioner, Scott Perry, timely appeals a decision by the Respondent, the Middlesex County Retirement System ("MCRS" or "Board"), that he was ineligible for a termination allowance. I held an in-person hearing on November 13, 2023. There were two witnesses: the Petitioner and the town administrator, Paul Sagarino. I admitted Petitioner's exhibits P1-P20 and

Respondent's exhibits R1-R12 into evidence without objection. The parties submitted their closing briefs on January 31, 2024, at which point I closed the administrative record.

FINDINGS OF FACT

1. The Petitioner worked for the town of Burlington between 2001 and 2021. (Petitioner testimony.)

2. He began as a firefighter. In 2006 he became a civilian dispatcher after he was injured (and unable physically to work as a firefighter). (Petitioner testimony; Ex. P14.)

Dispatcher training and duties

3. A dispatcher is generally required to do three things in an emergency call. First, they must gather the relevant facts: who is calling, what is the emergency, where is the emergency, etc. Second, they must decide which responders to dispatch: should they dispatch a fire engine, a basic life support ("BLS") ambulance, an advanced life support ("ALS") ambulance, or something else?[1] Third, they must evaluate whether the caller requires "pre-arrival instructions." Based on the emergency, the dispatcher may have to tell the caller to do certain things while waiting for assistance. If a person is not breathing, for example, the dispatcher will explain to the caller how to perform CPR. (Petitioner testimony.)

4. When the Petitioner started as a dispatcher, he was already a certified emergency medical technician ("EMT"). However, the fire department also required the Petitioner be certified as an emergency medical dispatcher ("EMD"). (Petitioner testimony.)

[1] There is a difference between a BLS and ALS ambulance. For one, the BLS ambulance is managed by the fire department; an ALS ambulance is managed by a private company with which the town contracts. There are specific conditions that would warrant dispatching one over the other. (Petitioner testimony.)

5. There is no state agency that certifies EMDs. Rather, certification is through a private company. The Petitioner was first certified at a three-day course. After that, he had to be recertified as an EMD about every two years. (Petitioner testimony.)

6. The fire department eventually contracted with a private entity to provide EMD certification: the Association of Public Safety Communications Officials ("APCO"). This training was done in-house, usually by the training captain. (Petitioner testimony.)

7. Part of the training included review of emergency medical dispatch guide cards. These were cards that gave specific instructions for responding to specific calls. They provide specific questions to help determine the nature and severity of the incident and which units to send. They also provide guidance on pre-arrival instructions, if necessary. They are like flash cards for a particular emergency. The medical cards were available at the dispatch desk for reference whenever needed. (Petitioner testimony; Ex. P9.)

8. The Burlington fire department has rules and regulations, a copy of which the Petitioner received when he began working there. It includes a section on dispatchers. (Petitioner testimony; Ex. P15.)

9. Among other things, "[dispatchers] shall use established procedures, good judgment, and initiative in transmitting requests for service to the appropriate location with proper personnel." (Section 3:0.) (Ex. P15.)

10. The Town also has a personnel policy. Although the Petitioner claims he never saw it, it was in effect during his employment and applicable to him.[2] The policy sets forth various

[2] It is hard to believe a town employee was never directly provided, or given access to, the town personnel policy. It's especially hard to believe here, when the town policy was cited as grounds for disciplining the petitioner. *See, infra,* ¶¶ 19-21. In any case, even if he did not see the policy, he has not proffered, and I am not aware of, any support for the proposition that a town employee is not subject to a policy unless he has reviewed it.

grounds for discipline including "incompetence or inefficiency in performing assigned duties." (Ex. R12.)

11. With this background in mind, I turn to the two events that are at the heart of this appeal.

May 17, 2019

12. On this day, the Petitioner was working as a dispatcher. A call came in about someone who was unresponsive. (Ex. P9.)

13. The caller said her mother was *not* breathing. Though the Petitioner now acknowledges that is what the caller said, he has repeatedly explained that, at the time, he did not hear that. Rather, he believed the caller said her mother *was* breathing. (Petitioner testimony; Ex. P9.)

14. Because he thought the caller said her mother *was* breathing, he did not give the caller any pre-arrival instructions. Rather, he dispatched a paramedic response and hung up the call. (Petitioner testimony, Ex. P9.)[3]

15. The caller's mother eventually passed away. After the chief read her obituary in the newspaper, he went back and reviewed the incident. This triggered an investigation led by assistant chief, Michael Patterson. (Ex. P9.)

16. Ultimately, the assistant chief determined that the Petitioner was at fault. He explained that, even if the Petitioner heard the caller say her mother was breathing, he should have confirmed it through a series of questions. He had to determine the nature and severity of

[3] I credit the Petitioner's testimony that, at the time, he thought the caller said her mother *was* breathing. The Petitioner's testimony on this point was credible. He testified in some detail that he had answered numerous calls like this and knew which pre-arrival instructions to give in the scenario that someone was *not* breathing. He had given those pre-arrival instructions many times before. (Petitioner testimony.) Therefore, I do believe that if he had correctly heard the caller, he would have given her further instructions. The fact that he gave no instructions corroborates his testimony that he misheard her.

the call, which included asking questions about the patient's breathing. However, he did not ask a single question about the patient's breathing. (Ex. P9.)

17. Had he asked, he would have learned the caller was not breathing, instead of relying on what he misheard. That would have led to him providing pre-arrival instructions, which he failed to do in this case. (Ex. P9.)

18. Although the assistant chief did not believe the Petitioner's conduct was purposeful or with malicious intent, he did believe "that under similar circumstances, a reasonable, prudent emergency medical dispatcher would have determined the nature and severity of the [situation] through asking the caller a series of questions and would have provided the caller emergency medical pre-arrival instruction" (Ex. P9.)

19. He categorized the Petitioner's conduct as negligent. Citing section 4.9 of the Town's personnel rules, he explained that the town's rules and regulations allow for disciplinary action "for failure of an employee to fulfill responsibilities as an employee, including any standards set forth in these personnel policies." Examples include "incompetence or inefficiency in performing assigned duties." (Exs. P9 & P12.)

20. He concluded that the Petitioner "performed inefficiently in performing his assigned duty as an [EMD]." (Ex. P9.)

21. As a result of violating the Town's rules and regulations, the Petitioner was suspended for two, 10-hour shifts. (Ex. P9.)

October 28, 2019

22. On this date, the Petitioner was again working as a dispatcher. This time, a call came in on the fire department's regular land line (not through 911). (Petitioner testimony.)

23. The call was from an off-duty Burlington firefighter who the Petitioner knew. He called to report gunshots. According to the Petitioner, he reported "one, two, three gunshots." He then hung up the call. (Petitioner testimony.)

24. Based on a transcript of the call, his caller's full statement was "Hey this is Gerry Hanafin. Get an ambulance down to right across from my house for a gun shot, two gun shots, three gun shots. 20 year old. Hurry up." (Ex. R10.)

25. The Petitioner did not understand him to be saying anyone had been shot. He did not believe the caller reported any victims or injuries or anyone requiring assistance. Thus, the Petitioner dispatched a fire engine but no ALS ambulance. (Petitioner testimony.)

26. Eventually, over the radio, a lieutenant asked the Petitioner for an estimated time of arrival for the ALS ambulance. The Petitioner had not dispatched one yet. He understood the lieutenant's question to essentially be a request for one, so he dispatched one at that point. (Petitioner testimony; Ex. P10.)

27. In December 2019, the department began another investigation of the Petitioner's conduct. It sent the Petitioner two different letters asking him to respond to a series of questions about this incident. (Ex. P10.)

28. The department was generally investigating why the Petitioner did not immediately dispatch a paramedic response. (Ex. P10.)

29. The Petitioner spoke with his union representative who counseled him not to answer the questions. The Petitioner followed these instructions and informed the assistant chief of his position. (Petitioner testimony.)

Disciplinary process

30. After the department concluded its investigation of the May incident, the town issued a report. The Petitioner immediately filed a grievance. The grievance stayed his suspension. (Petitioner testimony; Ex. P6.)

31. The grievance process is set out in the Town personnel rules and regulations as the method to challenge the "improper application" of the disciplinary procedures. (Ex. P19).

32. The town did not issue a final report or issue any written conclusions about the October incident. Instead, after the Petitioner failed to answer the department's questions, on January 29, 2020, the town administrator, Paul Sagarino, issued the Petitioner a letter informing him he was being discharged "for cause" because "the Town has determined that on two occasions within a six month period, you failed to follow required Dispatcher procedures that you knew or should have known were required of your position." (Ex. P7.)

33. The "two occasions" referred to the May and October incidents. (Sagarino testimony.)

34. Administrator Sagarino had spoken with the chief, and it was the chief's assessment that the Petitioner had violated rules and policies on both occasions. Administrator Sagarino's understanding was that the Petitioner violated section 3.0 of the fire department rules and regulations regarding dispatchers. (Sagarino testimony.)

35. Administrator Sagarino had also read the May report citing the Petitioner for "incompetence and inefficiency." In his testimony, he was confused about whether that mandate came from the fire department rules or the town personnel policy. (Sagarino testimony.)

36. However, he knew the allegations were that the Petitioner failed to both determine the nature and severity of the call and give pre-arrival instructions. (Sagarino testimony.)

37. Administrator Sagarino also believed that use of dispatch guide cards was mandated by the state in the certification process and that formed the basis for the department's suggested discipline—that the Petitioner did not use the dispatch guide cards during the incidents. (Sagarino testimony.)

38. After receiving the termination letter, the Petitioner filed another grievance. (Ex. P13.)

39. About one week later, the Petitioner and the town entered into a settlement agreement. It covered compensation, withdrawal of the grievances, and expunging the suspension from the Petitioner's file. It was not to be construed as an admission by any party regarding any allegations, rights or obligations. (Ex. P8.)

40. It concluded that the Petitioner "retains the right to pursue retirement . . . based on the Town's termination of [his] employment, which the Town acknowledges was for a cause other than moral turpitude." (Ex. P8.)

41. That same day, the Petitioner filed his application for retirement, seeking a termination allowance. He attached the January 29, 2020 letter from the town. (Ex. P1.)

42. The Board initially provided him with an estimate for his termination allowance. However, on March 4, 2020, the Board issued an appealable letter explaining that was in error:

> While you have the years of service necessary to calculate a benefit under [the termination retirement] provision, you were discharged for cause which precludes you from receiving the enhanced benefit. Section 10(2)(c) states in pertinent part:
>
> > *(c) Any member who is removed or discharged for violation of the laws, rules and regulations applicable to his office or position . . . shall not be entitled to the termination retirement allowance . . .*

> You still are entitled to receive a regular retirement allowance and we will continue processing your superannuation retirement for a March 31, 2020 payment unless you rescind your application in writing.

(Ex. P2.)

DISCUSSION

In certain situations, a member who is discharged is entitled to an "enhanced" benefit upon retirement known as a "termination retirement allowance." G.L. c. 32, § 10(2)(a). However, the member is ineligible if they were removed or discharged for violating a law, regulation, or rule applicable to their position. G.L. c. 32, § 10(2)(c). What constitutes violation of a law or regulation is normally apparent. *See Brisson v. State Bd. of Ret*., CR-07-112, 2009 WL 5966862 (DALA Dec. 4, 2009) (probation officer pled guilty to driving to endanger); *Morse v. Dukes Cty. Ret. Sys.*, CR-19-0190, 2020 WL 13584381 (DALA Feb. 5, 2020) (violating a state regulation prohibiting unauthorized use of the CJIS system). It is less apparent what constitutes a rule; nevertheless, there is some guidance: "'rules' have been interpreted to include agency policies and procedures." *Kowalski v. State Bd. of Ret.*, CR-09-0450 (CRAB May 18, 2015), *citing Hansen v. State Bd. of Ret.*, CR-07-442, 2009 WL 5908183 (DALA Mar. 12, 2009). This includes a town's personnel policies, *Barnstable Cty. Ret. Bd. v. PERAC*, CR-12-572 (DALA Mar. 31, 2015) (CRAB July 25, 2016), or even just a program policy. *Kowalski, supra* (employee terminated for not complying with Asian Longhorn Beetle program policy). Moreover, § 10(2) "makes no distinction between minor and major violations of workplace rules." *Hansen*, at *5.

As a preliminary issue, at the hearing, I asked the parties to address the following question: what should happen if a town terminated someone based on a mistake of fact? I suggested it was possible the department did not believe the Petitioner's explanation of the May

incident even though his version could very well be true; indeed, I believe it. What recourse, if any, would an employee have in that situation?

However, upon further reflection, it is clear the department gave the Petitioner the benefit of the doubt in its investigation, but still concluded his explanation did not excuse his conduct. The department found that even if the Petitioner thought the caller said her mother was breathing, he was required to do more. The Petitioner still had to determine the severity of the call and should have confirmed what he heard through a series of questions. That is what a "reasonable, prudent" EMD would have done. Had he done so, he would have been able to provide the required pre-arrival instructions. Thus, in this case, the department's conclusions were not based on a mistake of fact.

And in any event, even if the town was mistaken in the reasons leading up to the termination, there is no basis for relitigating the termination with DALA. "Under § 10(2)(c), it is the reason for the town's termination of an employee that controls; we do not engage in an independent review of the termination itself." *Barnstable Cty. Ret. Bd. v. PERAC*, CR-12-572, n.9 (CRAB Jul. 25, 2016); *Kowalski*, at *2; *Belliveau v. SBR*, CR-13-456 (DALA Apr. 1, 2016) (CRAB Dec. 21, 2016) (DALA does not have "jurisdiction over the validity of the merits of the termination and/or the employer's action").[4]

Thus, the only question is whether the Petitioner's was terminated for violating a town rule, e.g., a policy or procedure. Here, the Petitioner's termination was based on a violation of a rule or policy. The basis for the rule violation in the May incident was clearly set out in the May

[4] The Petitioner had an opportunity to challenge the basis for his suspension and termination through the grievance process (and possibly the civil service process). That he voluntarily withdrew his grievances as part of a broader settlement agreement does not create a right to challenge the underlying basis for the termination in this forum.

report. And while there was no final report regarding the October incident, it was another basis for the Petitioner's termination. According to Administrator Sagarino, the chief believed the Petitioner's conduct in October also violated a rule or policy, even if Administrator Sagarino was less than clear about which rule or policy was violated.

The combination of his May rule violation and October misconduct (which was probably a rule violation) formed the basis of the Petitioner's termination. He would not have been terminated if he only violated the rules once in May, and he probably would not have been terminated if his only misconduct was from the October incident. But given both, he was terminated, which was clearly based on at least one rule or policy violation. *See Barnstable Cty. Ret. Bd. v. PERAC*, CR-12-572 (DALA Mar. 31, 2015), *affirmed by* CRAB (July 25, 2016) (affirming denial of termination allowance on one of two grounds listed in termination letter because the member only "may" have violated a town policy under the second ground).

The Petitioner argues that he was terminated because he failed to use the dispatch guide cards, even though not required by a rule or policy. These cards are, at most, an aid. I understand the Petitioner's confusion. The town's termination letter broadly stated the Petitioner was being terminated for failing "to follow required Dispatcher procedures." Administrator Sagarino also testified that he believed the Petitioner was specifically terminated for failing to refer to the dispatch guide cards. While administrator Sagarino may have been mistaken about the department's reasons for disciplining the Petitioner, nothing in the statute or case law suggests that, when reviewing why someone was terminated, DALA cannot rely on context and evidence beyond a termination letter. *Kowalski,* at *2, n. 8 (CRAB did not rely on reason stated in termination letter but, rather, Petitioner's performance review which indicated he violated a

department policy). The context and evidence beyond the termination letter here support the Board's position that the Petitioner was terminated for violating a rule or policy.

CONCLUSION AND ORDER

The Board's decision to deny the Petitioner's application for a termination retirement allowance is **affirmed**.[5]

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate

[5] The MCRS argues for the first time in its post-hearing memorandum that the Petitioner does not have the requisite amount of creditable service (20 years) to qualify for a termination allowance. This is inconsistent with the Board's denial letter stating that the Petitioner had the "years of service necessary to calculate a benefit under that provision." Moreover, the MCRS did not give the Petitioner timely notice that it would be raising this issue—indeed, it made no mention until its post-hearing memorandum, leaving the Petitioner with no opportunity to reply. Generally, I can "affirm a retirement system's denial on a ground other than the one it originally invoked as long as the petitioner had sufficient notice of the new ground." *Biundo v. MTRS*, CR-15-416 & 417 (DALA Dec. 14, 2018). Here, however, there was not sufficient notice and I decline to entertain this argument.