COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
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Donald Roy,
Petitioner

v. Docket No. CR-19-0543

State Board of Retirement,
Respondent

Appearance for Petitioner:[1]

Kathryn Waters, Esq.[2]
D.S. O'Connor & Associates
639 Granite Street, Suite 305
Braintree, MA 02184

Appearance for Respondent:

State Board of Retirement[3]
One Winter Street
Boston, MA 02108-4747

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Petitioner was not eligible for termination retirement allowance because his termination was not involuntary; he did not have 20 or more years of creditable service; and he did not prove that his termination was not brought about by collusion.

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[1] Matthew D. Jones, Esq., Massachusetts Teachers Association, Division of Legal Services, 2 Heritage Drive, 8th Floor, Quincy, MA 02171, filed the Joint Pre-Hearing Memorandum for Mr. Roy.

[2] Ms. Waters's last name was Doty when she conducted the hearing for Mr. Roy and that name appears in the transcript.

[3] Brendan McGough, Esq. appeared for SBR at the hearing. James H. Salvie, Esq. filed SBR's post-hearing brief before retiring.

DECISION

The petitioner, Donald Roy, appeals the denial of his application for a termination retirement allowance.

I held a hearing on September 13, 2022 by Webex, which I recorded and which was transcribed. Mr. Roy testified and called Joanne Martone, chief union steward of his union. I admitted six exhibits.

I granted the petitioner's continuances for filing a brief. Both parties submitted post-hearing briefs in April 2023.

Findings of Fact

1. Mr. Roy began working for the University of Massachusetts Amherst (UMass Amherst) on February 21, 1999. (Ex. 3, Tr. 6)

2. Around 2013 Mr. Roy became Information Technology (IT) compliance and risk manager. (Tr. 6)

3. Mr. Roy was IT compliance and risk manager until his last day at UMass Amherst. (Tr. 6)

4. Mr. Roy was also a union officer in his union, the Professional Staff Union (PSU), which is part of the Massachusetts Teachers Association. (Tr. 7, 11-12)

5. More specifically, Mr. Roy was an elected negotiating member of PSU. In that role, he attended bargaining sessions, among other things. (Tr. 8)

6. Mr. Roy volunteered for the union. (Tr. 41-42, 51)

7. When Mr. Roy filled in his time sheets for UMass Amherst, accounting for his time during workdays, the collective bargaining agreement (CBA) allowed him to put the time that he spent performing tasks for the union. (Tr. 29-30)

8. On November 30, 2017, at a bargaining session, UMass Amherst notified PSU that Mr. Roy would be laid off. (Tr. 8) The reason is unclear from the record. (Tr. 42-43) The timing – when Mr. Roy would be laid off – is absent from the record.

9. UMass Amherst did not notify PSU that any other employee would be laid off. (Tr. 21)

10. In December 2017, UMass Amherst provided Mr. Roy with a spreadsheet, listing employees whom Mr. Roy could "bump" under the CBA. (Tr. 8-9)

11. Bumping meant that if Mr. Roy were qualified for a job held by a less senior employee and successfully interviewed for the job, he could get the job held by the less senior employee. (Tr. 23)

12. The spreadsheet may have had 20 people on it. Mr. Roy knew them all. Only three or four people may have held positions related to IT. One of the people eventually married into his family and became his brother-in-law. (Tr. 9)

13. Because of the last two factors and because Mr. Roy did not want to put anyone in the position he was in – losing his job – Mr. Roy did not exercise his bumping right. (Tr. 9)

14. The record does not reveal when Mr. Roy decided not to exercise his right to bump and whether he informed UMass Amherst that he would not be exercising it.

15. Sometime around December 2017, negotiations began between UMass Amherst and PSU over a termination agreement for Mr. Roy. (Tr. 10)[4] The record does not reveal why

[4] Negotiations began sometime between November 30, 2017, when Mr. Roy learned that he would be laid off, and January 10, 2018, the earliest date that any of the four signatories to the resulting agreement signed it. (Ex. 6, p. 5) Mr. Roy was asked whether negotiations began "[a]fter December of 2017," and he answered, "Yes." (Tr. 10) I do not credit his answer that negotiations began after December 2017 because the question was leading; no document or other testimony verifies the information; and Mr. Roy, in his post-hearing brief, citing this transcript page, states that negotiations began *in* December 2017. (Pet Br. 3) Mr. Roy testified that negotiations began after he decided not to exercise his bumping right (Tr. 23), but the record does not reveal when that was.

negotiations began, such as whether Mr. Roy or PSU threatened to litigate or file a grievance under the CBA.

16. PSU representative Maura Sweeney and possibly Joanne Martone (who testified at the DALA hearing) negotiated with UMass Amherst. (Ex. 6, p. 5; Tr. 13, 45)[5]

17. During the negotiations, someone came up with the proposal that Mr. Roy should receive 19 months of paid administrative leave, one month for every year that he had been employed at UMass Amherst, a model that could be used for employees losing their jobs in the future. (Tr. 47)

18. On various dates in January 2018 (January 10, 24, and 25), Mr. Roy, Ms. Martone, Ms. Sweeney, and a representative of UMass Amherst signed an Agreement and General Settlement of Claims (which this decision will call "the agreement"). (Ex. 6)

A. The agreement referred to Mr. Roy's "separation from employment at the University." It also referred to his "termination" (Ex. 6, p. 1, §§2, 3) and "termination of that employment as of August 9, 2019." (Ex. 6, p. 3, §7)

B. The agreement required Mr. Roy to execute a letter of resignation effective August 9, 2019, irrevocably resigning from the position as IT Operations and Compliance Manager. (Ex. 6, p. 1)

C. The agreement did not preclude Mr. Roy from working for UMass Amherst in a different position after January 11, 2018. (Ex. 6, p. 1)

[5] While Ms. Martone testified that Ms. Sweeney "primarily" negotiated with UMass Amherst (Tr. 45, 46), she also testified that Ms. Sweeney was the "sole" negotiator, the one who actually spoke with UMass. (Tr. 46) Mr. Roy testified both that Ms. Sweeney was the individual who negotiated the agreement and that Ms. Sweeney and Ms. Martone negotiated it. (Tr. 10, 13)

D. In consideration for the agreement, PSU agreed not to file a grievance over Mr. Roy's termination. PSU and Mr. Roy agreed not to file a charge with the Massachusetts Department of Labor Relations. (Ex. 6, p. 1)

E. UMass Amherst would put Mr. Roy on administrative leave for 19 months. (Ex. 6, p. 2)

F. Mr. Roy's final day of work for the Administrative & Finance Information Technology Department would be January 10, 2018. (Ex. 6, p. 2)

G. On January 11, 2018 UMass Amherst would "have the authority to backfill all duties of this position." (Ex. 6, p. 2)[6]

H. The agreement included this statement under a heading "Acknowledgement of legal rights by the employee": "I acknowledge that I have agreed voluntarily to sign this Agreement sooner than the 21 days permitted." (Ex. 6, p. 4) (bold and italics omitted).

19. On January 12, 2018 Mr. Roy resigned effective August 9, 2019. (Ex. 6 (attachment labeled Ex. 1))

20. During Mr. Roy's 19 months of paid administrative leave, he performed no duties for UMass Amherst (Tr. 26-27), although he continued performing bargaining tasks for PSU. (Tr. 49)

21. Mr. Roy unsuccessfully interviewed for about 12 positions at UMass. (Tr. 18)

22. On August 6, 2019 UMass Amherst signed the Employer's Certification for a termination retirement allowance. (Ex. 4)

[6] It is unclear what this phrase means and how it relates to UMass Amherst's certification that it had abolished the position. (Ex. 4)

23. UMass Amherst filled in the box opposite "The employee's office or position has been abolished." (Ex. 4)

24. On August 8, 2019 Mr. Roy signed and submitted an application for superannuation retirement benefits to SBR. (Ex. 3)[7]

25. On October 28, 2019 SBR denied Mr. Roy's request for a termination retirement allowance under G.L. c. 32, §10(2) "based on the facts and circumstances of your separation from service." (Ex. 2)[8]

26. On November 7, 2019 Mr. Roy timely appealed the denial of his request for a termination retirement allowance under G.L. c. 32, §10(2). (Ex. 1)

Discussion

This is one of those cases with mysterious and murky facts that lead a finder of fact to suspect that the whole story has not been revealed, perhaps intentionally.

Because the facts are murky, the credibility of the witnesses is important. Did events happen as they testified? Did they appear to be telling the whole truth? Before I discuss the relevant law of this case and apply it to the facts, I review factual issues.

Mr. Roy's credibility

Mr. Roy diminished his credibility while testifying. He danced around the answer to various questions. For one example, Mr. Roy was asked if he performed his union duties daily. His purported answer follows:

> Depending on what bargaining sessions we were preparing for, some would require research and analysis and so there might be some times for regular

[7] The application for superannuation retirement benefits doubles as the application for a termination allowance. (Ex. 3, p. 2, question 6.a) Mr. Roy applied for both forms of benefits, but it is unclear when he did so. See "Discussion" below.

[8] This may have been a reference to what SBR suspected was collusion that brought about Mr. Roy's separation from UMass Amherst. G.L. c. 32, §10(3).

research and regular getting yourself up to speed to prepare – to present yourself in a bargaining session if they have it in the same time frame.

(Tr. 37)

When he testified about not negotiating his settlement agreement, he left the impression that he did not have anything to do with it other than signing it. (Tr. 12) On cross-examination, Mr. Roy confirmed that he received updates on the negotiations but said that his involvement was "[m]inimal." (Tr. 24) Mr. Roy had left the issue muddled enough that I posed questions as follows:

Q. [Y]ou were not involved in the negotiations?

A. No.

Q. Not directly involved, but were you in constant contact with the people who were negotiating this?

A. Yes, I would consult with my union representative.

Q. Okay. And this is about your future. So is it fair to say you were in constant touch with them about the negotiations?

A. Yeah, I – I don't know if "constant" is the right term, but, frequent, you know, or when there was a need to. It wasn't like every day all the time.

Q. Okay. I'm not saying every day, but every time there was a development, a significant development –

A. Yes.

Q. – you were in touch with them?

A. Yes.

Q. Okay. You were not directly involved in negotiating this, but you were not hands off?

A. No. I don't think it would work if…I wasn't inputting my expectations in talking to them and they explaining for me what was going on. I wouldn't know how this all happened.

(Tr. 34-36)

Ms. Martone's credibility

Ms. Martone also diminished her credibility by dancing around issues. When asked if UMass Amherst told her why it wanted to lay off Mr. Roy, she did not answer. (Tr. 42-43) Her testimony on whether Ms. Sweeney was the primary or sole negotiator with UMass Amherst was unclear or contradictory. (Tr. 45, 46)

The significance of Mr. Roy's not having directly negotiated with UMass Amherst

Mr. Roy argues that neither he "nor the union representative negotiating on his behalf" – he did not specify which one – colluded with UMass Amherst because he

> himself was not involved in the negotiation of his Termination Agreement, and only had periodic contact with Ms. Martone and Ms. Sweeney regarding the negotiations.

(Pet. Br. 12)

This argument has four flaws, some related. One, even though Mr. Roy was not directly involved in negotiations, he was still involved. Two, Mr. Roy's indirect involvement in negotiations does not mean that collusion did not occur. A relevant statute, as discussed below, refers to "collusion or conspiracy," G.L. c. 32, §10(3), but does not specify that the applicant for termination retirement benefits has engaged in the collusion or conspiracy. It is enough that collusion or conspiracy "brought about" an employee's "removal or discharge." G.L. c. 32, §10(3).

Three, Ms. Martone testified that Ms. Sweeney was the primary and, alternatively, the "sole" negotiator with UMass Amherst. (Tr. 45, 46) Ms. Sweeney did not testify. I am not asserting or implying that Ms. Sweeney colluded with UMass Amherst. I am stating that Mr.

Roy's testimony that he did not directly negotiate with UMass Amherst is not evidence that the non-testifying primary or sole negotiator did not collude with UMass Amherst.

Four, Mr. Roy's post-hearing brief did not summarize the evidence accurately. Contact between him and the union negotiators was "constant," – Mr. Roy agreed to that characterization even though he later backed away from it – "frequent," and "[s]ometimes a few times a day." (Tr. 35, 49) Contact was not "periodic." (Pet. Br. 12)

When did Mr. Roy apply for a termination retirement allowance and for superannuation benefits?

As stated above, Mr. Roy applied for both forms of benefits, but it is entirely unclear when he did so.

When asked when he applied for superannuation benefits, Mr. Roy was (1) not sure and (2) ambiguous. He answered, "I believe it was after the original application for retirement." (Tr. 14-15) It is entirely unclear what he meant by original application. It almost certainly did not mean his application for a termination retirement allowance, because Mr. Roy emphatically testified that he learned about a termination allowance only during the process of applying for superannuation benefits. (Tr. 14-15, 31)

When asked when he applied for a termination retirement allowance, Mr. Roy answered,

> I don't have that information in front of me, but I would assume it's sometime in August of 2019.

(Tr. 15) Later, he testified that he applied for superannuation retirement benefits on "the last day of whatever my contract was" (Tr. 31), presumably referring to August 9, 2019. (Tr. 49) So did he apply for both forms of benefits at the same time? It's not in the record.

UMass Amherst signed the Employer's Certification for a termination retirement allowance on August 6, 2019. (Ex. 4) For that reason, the application for superannuation benefits

that Mr. Roy signed on August 8, 2019 (Ex. 3) may have been his application for a termination allowance. However, when asked, "Are you applying for a termination allowance..?," Mr. Roy checked the "No" box. (Ex. 3) *See* Ex. 5 (SBR letter asking Mr. Roy to correct his answer to that question).

When SBR denied Mr. Roy's application for a termination retirement allowance, it asked Mr. Roy to contact a particular SBR staff person "if you wish to pursue a superannuation retirement." (Ex. 2) It is unclear whether SBR meant that Mr. Roy could apply for such a retirement benefit or whether he had already done so.

The facts are further muddied. Mr. Roy testified that *he* did not apply for a termination retirement allowance; UMass Amherst did it for him. He testified:

> Other than meeting with the HR person, they did all the rest. They were just informing they were doing this.

(Tr. 34)

What happened to Mr. Roy's application for superannuation retirement benefits?

Mr. Roy testified that SBR denied his application for superannuation benefits. (Tr. 15) In his post-hearing brief, Mr. Roy asserted that he "elected not to collect a superannuation retirement allowance pending his appeal." (Pet. Br. 6) (citing Tr. 16, lines 1-2) The transcript's page 16, lines 1 and 2, do not support that assertion. The assertion contradicts his testimony. I do not credit his assertion in his post-hearing brief.

The law of termination retirement allowances

A member of a retirement system is eligible for a termination retirement allowance under G.L. c. 32, §10(2) under certain circumstances, including if the employee has

> completed twenty or more years of creditable service and…whose office or position is abolished, or is removed or discharged from his office or position without moral turpitude on his part….

A member's termination must be involuntary. *Megiel-Rollo v. Contributory Retirement Appeal Board*, 81 Mass. App. Ct. 317, 325 (2012).

A member of a retirement system is not eligible for a termination retirement allowance if their "removal or discharge was brought about by collusion or conspiracy." G.L. c. 32, §10(3). In addition to *Megiel-Rollo*'s holding that a member's termination must be involuntary, the statutory bar on eligibility arising from collusion or conspiracy implies that a member's termination must be involuntary.

In this case, Mr. Roy must prove the following four elements (depending on how one parses the law of termination retirement allowances):

1.

A. His office or position was abolished *or*

B. he was involuntarily removed or discharged from his office or position without having committed moral turpitude.

2. His termination was involuntary.

3. He completed 20 or more years of creditable service.

4. His removal or discharge was not brought about by collusion or conspiracy.

Element 1: Discharge or abolition?

The only evidence that Mr. Roy's office or position was abolished is the Employer's Certification. UMass Amherst filled in the box opposite "The employee's office or position has been abolished." (Ex. 4) Did UMass Amherst really abolish Mr. Roy's "position of IT compliance and risk manager" (Tr. 6)? Did it abolish the office that he worked in? No further evidence exists.

Evidence that Mr. Roy was discharged is not as sparse as evidence that his office or

position was abolished, but it is not detailed. He testified that his "union was notified that I was going to be laid off." (Tr. 8) When Joanne Martone was asked if UMass Amherst told her why it wanted to lay off Mr. Roy, her answer was not elucidative:

> Well, that was part of the thing[9] because there was money and there was work and a layoff has to be because of lack of funds or lack of work.[10] And so, it was – it was a weird situation that they were – that's why they were coming to us[11] first instead of just to go in through the regular layoff process and issuing a notice.[12]

(Tr. 42-43)

Was Mr. Roy discharged? *Something* happened because there was a settlement and Mr. Roy was given the right to bump. But the settlement agreement is the only exhibit that Mr. Roy's job ended. Do other documents exist about Mr. Roy losing his job? I don't know.

It is possible that a member of a retirement system could be removed or discharged from their office or position *and* the office or position was abolished at the same time or a short time later. However, G.L. c. 32, §10(2) reads in the disjunctive, referring to a member "whose office or position is abolished, or is removed or discharged from his office or position." The scenarios are generally alternatives. Which one is Mr. Roy relying on? What is his theory of the case? He does not specify.

In the joint prehearing memorandum, Mr. Roy proposes as a fact that his position was abolished. (Memorandum 2) In his post-hearing brief, Mr. Roy refers in passing to his office or position having been abolished, once in the facts section and once in the argument section. (Pet. Br. 6, 8) However, Mr. Roy relies more on the argument that he was discharged. (Pet. Br. 5, 6, 7,

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[9] By "part of the thing," Ms. Martone presumably meant part of the mystery.

[10] Ms. Martone seemed to have been saying that enough funding and tasks existed to sustain Mr. Roy's position so that UMass Amherst's layoff of him was mysterious.

[11] Meaning the union representatives.

[12] Presumably, Ms. Martone meant issuing a notice of some sort to Mr. Roy.

8, 13)

I'm left with four facts and one suspicion. The facts: (1) The evidence that Mr. Roy's office or position was abolished is sparse. (2) The evidence about Mr. Roy's removal or discharge from his office or position is murky. (3) Mr. Roy relies both on being removed or discharged from his office or position *and* having had his office or position abolished, which are alternative and probably contradictory theories. (4) *Something* happened because there was a settlement and Mr. Roy was given the right to bump.

I'll go with fact 4. Mr. Roy has barely met the first element, although without enunciating which prong of the element he relies on.

The suspicion: Facts 1, 2, and 3 lead me to suspect that the something that happened in Fact 4, the termination of Mr. Roy's job, was brought about by collusion or conspiracy. I discuss this suspicion later under Element 4: No collusion or conspiracy.

Element 2: Involuntariness

On November 30, 2017 Mr. Roy learned that UMass Amherst was going to lay him off (Tr. 8), and January 10, 2018 was the last day that he performed duties for UMass Amherst. (Ex. 6, p. 2) Was Mr. Roy's termination on January 11, 2018 involuntary? It may or may not have been. If the termination of Mr. Roy's job was brought about by collusion or conspiracy, as I suspect and as I just discussed above and will discuss below, it was not involuntary.

However, Mr. Roy does not argue that he was removed or discharged on January 11, 2018.[13] Nor could he easily so argue if he wished to prevail. On January 11, 2018 Mr. Roy was

[13] At least, Mr. Roy does not explicitly so argue. However, at one point in his post-hearing brief, he acknowledged that he was terminated in January 2018. (Pet. Br. 13) ("Mr. Roy had approximately 18 years and 10 months of creditable service at the time his employment was *involuntarily terminated*") (emphasis added).

about six weeks short of having worked 19 years for UMass Amherst. If he argued that he was involuntarily terminated on January 11, 2018, he would lose on Element 3: Twenty or more years of creditable service (which I discuss later).

Instead, Mr. Roy argues that the end of his administrative leave on August 9, 2019, pursuant to the resignation letter that he signed on January 12, 2018 (Ex. 6 (attachment labeled Ex. 1)) constituted his involuntary termination.

Mr. Roy's separation from UMass Amherst after his administrative leave and severance pay ended was not involuntary from a legal or factual perspective. His separation was not involuntary legally under *Janet Barnett-Boucher v. Massachusetts Teachers' Retirement System*, CR-16-313 (DALA 2018). In that case, the petitioner was

> disqualified from receiving a termination retirement allowance under G.L. c. 32, § 10(2)(a) because her termination was not involuntary. Rather, it was the result of a bargained-for settlement agreement where she was allowed to stay on the payroll for an additional year and a half.…

See also Megiel-Rollo, 81 Mass. App. Ct. at 324 (disfavoring "retirement allowance for terminations negotiated in the context of such a settlement agreement").

Mr. Roy acknowledges the *Barnett-Boucher* case but attempts to distinguish it on the ground that Mr. Roy's position, unlike Ms. Barnett-Boucher's, was abolished. This is a distinction without a difference. In addition, the evidence that Mr. Roy's position was abolished is sparse and Mr. Roy is proceeding on two alternative and possibly contradictory theories of how he came to be separated from UMass Amherst, as I discussed above, without so acknowledging.

Nor was Mr. Roy's separation from UMass Amherst involuntary from a factual perspective. It came according to a settlement agreement that he signed on January 12, 2018, which included this provision: "I acknowledge that that I have agreed voluntarily to sign this

Agreement sooner than the 21 days permitted." (Ex. 6, p. 4)[14] What does Mr. Roy say about this language that he voluntarily signed the agreement? Nothing.

What does Mr. Roy say instead about why the end of his administrative leave was involuntary? Mr. Roy has a few arguments.

One, Mr. Roy argues that the resignation letter was not voluntary because he did not draft it. (Pet. Br. 7, 8) Had Mr. Roy drafted the resignation letter, it would tend to indicate that he had resigned voluntarily. However, the opposite is not necessarily true: Because Mr. Roy did not draft the resignation letter, it does not necessarily tend to indicate that he resigned involuntarily. Every day, thousands, if not millions, of people sign agreements that they did not draft, and they do so voluntarily.

Two, Mr. Roy argues that the resignation letter was not voluntary because UMass Amherst forced him to sign it. (Pet. Br. 7) That is not exactly the case. Mr. Roy had the option of being involuntarily terminated shortly after November 30, 2017 or receiving severance pay to perform no duties for UMass Amherst until August 9, 2019. (Tr. 25) He chose the latter. That was not involuntary under *Barnett-Boucher* or *Megiel-Rollo*.

Three, Mr. Roy argues that the resignation letter was not voluntary because he did not have a choice to bump any coworker. (Pet. Br. 7, 8) Three things are unclear about this argument. One, the connection between Mr. Roy's supposed lack of choice to bump a coworker and the voluntariness of his resignation. Two, how Mr. Roy can argue that he had no choice to bump a coworker when he decided not to exercise that right. And three, the timing of his supposed lack of choice to bump a coworker. The record does not reveal when Mr. Roy decided

[14] It is *possible* that Mr. Roy voluntarily signed the agreement sooner than the 21 days allowed but did not voluntarily sign the agreement in general. But such a possibility parses the language too finely. Nor does Mr. Roy invoke the possibility.

not to exercise his right. Is he arguing that between November 30, 2017 (when UMass Amherst told PSU that it was going to lay off Mr. Roy) and January 12, 2018 (when he signed the resignation letter) his supposed lack of choice to bump a coworker made his signature involuntary? Or is he arguing that between January 12, 2018 (when he signed the resignation letter) and August 9, 2019 (when his administrative leave and severance pay ended) his supposed lack of choice to bump a coworker made his termination from UMass Amherst involuntary?

Four, Mr. Roy argues that the resignation letter was not voluntary because "Mr. Roy wanted to remain an employee at UMass but was not given an opportunity to do so." (Pet. Br. 8) The issue is not whether Mr. Roy wanted to remain a UMass employee when UMass Amherst told PSU in November 2017 that it would lay off Mr. Roy. The issue is not whether Mr. Roy wanted to remain a UMass employee in August 2019. The issue is whether Mr. Roy voluntarily agreed to separate from UMass Amherst in August 2019. As I wrote above, Mr. Roy chose not to be involuntarily terminated shortly after November 30, 2017. Instead, he chose to receive severance pay to perform no duties for UMass Amherst until August 9, 2019. (Tr. 25)

In addition, it is not true that Mr. Roy was not given an opportunity to remain a UMass employee. He chose not to exercise his bumping right. The agreement did not preclude Mr. Roy from working for UMass Amherst in a different position. (Ex. 6, p. 1; Tr. 12) He interviewed for about 12 positions at UMass. (Tr. 18) His lack of success in landing another job at UMass Amherst does not mean that he was not given an opportunity to work at UMass Amherst. Nor did his lack of success in landing another job at UMass Amherst after January 12, 2018, when he signed the agreement, mean that his signature was not voluntary at the time.

Element 3: Twenty or more years of creditable service

Imagine this scenario. A member of a retirement system works for UMass Amherst. As

part of his employment, he gets four weeks of paid vacation. Year after year, he vacations in the Berkshires for four weeks. After working for UMass Amherst for almost 19 years, he is placed on paid administrative leave for 19 months. During those 19 months, he goes on vacation in the Berkshires for four weeks. He argues that the 19 months of administrative leave were creditable service, because UMass Amherst paid him money during those 19 months and he used part of the time to vacation in the Berkshires, something that UMass Amherst paid him to do when he was an employee before the administrative leave.

The member's argument would be unavailing for two reasons. He was not performing work for UMass Amherst while vacationing in the Berkshires. *See Russell Kleber v. Worcester Regional Retirement Board*, CR-19-0192 (DALA 2021). And his argument would account for only some of his time, not full-time work for 19 months.

Mr. Roy's argument is comparable and also unavailing. As an employee for UMass Amherst before January 2018, he was an elected negotiating member of PSU and he put "paid union time" on his timesheets for union tasks. (Tr. 8, 29-30) But that does not mean that UMass paid him *for* his union tasks any more than UMass Amherst "pays" employees to take vacations. Rather, when Mr. Roy was IT Compliance and Risk Manager, UMass Amherst paid him to provide IT services. Although the CBA is not in evidence, testimony reveals that under the CBA, UMass Amherst allowed Mr. Roy to get paid some hours for performing union tasks. (Tr. 29-30) That was in *lieu* of Mr. Roy's providing services. Mr. Roy's performance of union tasks – before and during his administrative leave – did not constitute his providing services to UMass Amherst.

Before his administrative leave, Mr. Roy was among the "bunch of volunteer people" for the union. (Tr. 41-42) (Martone testimony) During his administrative leave, Mr. Roy's union

"duties" were on "a volunteer basis." (Tr. 51) (Martone testimony) UMass Amherst was not *paying* Mr. Roy to be a union official during either period. Nor does the agreement mention that UMass Amherst would pay Mr. Roy for performing union tasks during his administrative leave. All it states is that "the University will place Donald A. Roy on paid administrative leave for nineteen (19) months." (Ex. 6, p. 2, § 4) Mr. Roy chose to volunteer for PSU during his administrative leave.

Mr. Roy's final day of working for UMass Amherst, specifically the Administrative & Finance Information Technology Department, was January 10, 2018 at the latest. (Ex. 6, p. 2) During the 19 months of his administrative leave, Mr. Roy performed no duties related to his previous role as IT Compliance and Risk Manager. (Tr. 26-27)

Thus, Mr. Roy's statement in his post-hearing brief that "[h]is day-to-day job duties were unchanged from his time of active employment to his time of paid administrative leave" (Pet. Br. 10) is untrue. His statement that

> while on paid administrative leave, he continued to perform his job duties as an elected member of the Bargaining Committee for PSU

(Pet. Br. 10) is also untrue. Performing tasks for PSU were not his "job duties." Again, he volunteered for union tasks.[15]

During his administrative leave, how many hours per month was Mr. Roy performing union tasks? He testified, "So it's really hard to say, but…probably like 20 hours a month." (Tr.

[15] Mr. Roy argues that during his administrative leave, he was on campus and UMass Amherst knew that he was performing union tasks. (Pet. Br. 10) I'm not sure how these factual allegations advance his argument that performing union tasks constituted performing job duties for UMass Amherst and that therefore his administrative leave was creditable service. UMass Amherst as an entity may have known that he was performing union tasks. But who were the UMass Amherst personnel who knew that Mr. Roy was performing union tasks, did they know that he was on administrative leave, and how, again, does that demonstrate that his administrative leave was creditable service? Mr. Roy does not say.

27) Later, Mr. Roy called the number of hours a "guesstimate." (Tr. 28) Despite these hedges – "probably," "like," and "guesstimate" – during his testimony, in his post-hearing brief, Mr. Roy asserts that he spent 20 hours per month on union tasks, both before and after his administrative leave started. (Pet. Br. 5) (citing Tr. 29). He so asserts in his post-hearing brief, even though he testified that he did not know whether that was the case. (Tr. 30) But put aside Mr. Roy's hedged testimony. Assume that his post-hearing brief is correct that he spent 20 hours per month on union tasks during his administrative leave. Where is Mr. Roy's acknowledgment that he was performing union tasks only about an eighth of the time? Nowhere. How does he argue that performing union tasks for roughly 12.5% of the time during his 19-month administrative leave entitles him to 100% of creditable service for those 19 months? He has no explicit argument on this point.

> UMass Amherst paid Mr. Roy
>
> for resigning, not for performing his duties. Thus, any compensation he received pursuant to the separation agreement was a severance payment, which is not regular compensation.

Charles Dodge III v. Montague Retirement Board & Public Employee Retirement Administration Commission, CR-18-288 (DALA 2018).

> The bottom line is Mr. Roy's administrative leave payments
>
> were not regular compensation for two reasons. First, the payments under the agreement were made for termination, severance or dismissal. G.L. c. 32, § 1; 840 CMR 15.03(3)(f); see *Dodge v. Montague Retirement Bd.*, CR-18-288, at *5 (DALA, Dec. 7, 2018) (payments that police chief on administrative leave received pursuant to a termination agreement not regular compensation because they were "for termination, severance, [or] dismissal"). Second, the payments were not for services performed. Therefore, they are not regular compensation

– and here is the major point –

> and *consequently not creditable service*. See G.L. c. 32, § 1; *Dodge*, *supra*; *Burke v. Hampshire County Retirement Sys.*, CR-10-35, at *5 (CRAB, Aug. 14, 2015).

Jean Scalese v. Framingham Retirement System, CR-20-0200, (DALA 2022) (emphasis added). *See also Kleber*; *Peter Nassiff v. Massachusetts Teachers' Retirement System*, CR-18-0500 (DALA 2022) ("Pay received for any period following the execution of a settlement agreement …does not form the basis for service credit").

Mr. Roy's compensation during 19 months of administrative leave constituted severance pay. Therefore, it was not creditable service. Therefore, Mr. Roy had under 19 years of creditable service. Therefore, he did not meet the 20-year minimum for a termination retirement allowance and is not eligible for one.

Element 4: No collusion or conspiracy

Two different approaches to proving collusion seem to have emerged. One is that a petitioner will not prevail under G.L. c. 32, §10(3) if "sufficient indicia of collusion" exist. *Barnett-Boucher*. The other is that a petitioner may overcome G.L. c. 32, §10(3) if "he has presented creditable evidence…that he did not collude" with his employer. *Anthony McDermott v. State Board of Retirement v. Public Employees Administration Retirement Commission*, CR-19-0071 (DALA 2020). "[S]uspicion is not enough to deny" an applicant a termination retirement allowance. *Id*.

I wish to clarify and harmonize these approaches, although the harmonization will not be complete; a partial abandonment of the second approach is called for.

"The Petitioner has the burden of proof on each element necessary to establish entitlement to a benefit under Chapter 32." *Deborah Herst Hill v. State Board of Retirement*, CR-07-605 (DALA 2009). That means that if a retirement board raises collusion or conspiracy, such as in a denial of a petitioner's application for a termination retirement allowance, the petitioner must prove the absence of collusion or conspiracy. The petitioner must do so by a preponderance

of the evidence. *Campbell v. Contributory Retirement Appeal Board*, 17 Mass. App. Ct. 1018 (1984); *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 255 (1996). That is, if the issue of collusion or conspiracy has been raised, a petitioner must prove that it was more likely than not, *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, 250 (1940), that there was no collusion or conspiracy (or less likely than not that there was collusion or conspiracy).

If a petitioner does not prove by a preponderance of the evidence that there was no collusion or conspiracy, then an indication of collusion or conspiracy, or suspicion of either of them, will suffice to deny an applicant a termination retirement allowance.

Collusion or conspiracy can occur at two separate times. Before discussing those two times, I note that G.L. c. 32, §10(2), the general provision about termination retirement allowances, applies to an employer's abolition of an office or position, or removal or discharge of an employee from an office or position. However, G.L. c. 32, §10(3), which bars collusion or conspiracy, applies as written only to removal or discharge of an employee from an office or position.

The first time that collusion or conspiracy can occur is when an employee is removed or discharged from an office or position. That could occur if an employee has 20 or more years of creditable service, but that is not a requirement. The second time is when

> an employee and an employer cooperate to extend a termination date to allow the employee to accrue twenty years of service and receive a termination allowance for which he would otherwise not have qualified.

Rita Burke v. Hampshire County Retirement System, CR-10-35 (CRAB 2015) (citation omitted).

The circumstances of the removal or discharge of Mr. Roy from his position are, as I have stated, suspicious and murky. When Ms. Martone testified about it, she called it a "weird

situation" and not "the regular layoff process." She mentioned "part of the thing," presumably referring to the mystery of UMass Amherst's action. (Tr. 42-43)

As for the negotiation to give Mr. Roy administrative leave for 19 months, Ms. Martone was asked whether qualifying Mr. Roy for a termination retirement allowance was ever part of her thought process. She answered, "I think we want everyone to do that." (Tr. 57) When asked whether a termination retirement allowance was on her mind during negotiations, she answered, "It's always a consideration." (Tr. 60) When she described the initial process when a union member was facing termination, she twice mentioned collecting information about the member's length of service.

> [W]e wanted to know *how much service*, how old everyone is, *how many years of service*, did they have service outside of the university and stuff like that so that we can make an assessment of, you know, what's best and help [to] advise.

(Tr. 62-63) (emphasis added) She also testified that "we always ask whenever somebody's getting laid off about their length of service and their age and stuff." (Tr. 57) (Why would the union collect information about a terminated employee's length of service except to use it?) When asked whether the union would try to get a member who had worked fewer than 20 years past the 20-year mark, Ms. Martone answered, "Probably." (Tr. 61) (Why was her answer not "Yes" when she had already testified that the union wanted to qualify everyone possible for a termination retirement allowance?)

This issue was one that Ms. Martone danced around. *See* Tr. 63. In light of her dancing around answers, her other testimony, and her diminished credibility, Ms. Martone's testimony that qualifying Mr. Roy for a retirement termination allowance was never a consideration (Tr. 48) is not believable.

Ms. Martone also tried to have it both ways: She testified that qualifying Mr. Roy for a retirement termination allowance was never a consideration (Tr. 48) but denied knowing whether Ms. Sweeney was motivated, at least in part, to so qualify Mr. Roy. (Tr. 61) It is unclear how qualifying Mr. Roy for an allowance was never a consideration without taking into account the motivation of Ms. Sweeney, the sole or principal negotiator. It is also unclear how Ms. Martone could testify that she did not know Ms. Sweeney's *motivation* during the negotiation, when she also testified about Ms. Sweeney's *knowledge* during the negotiation. (Tr. 63)

Another indication of collusion is that Mr. Roy testified that he did not apply for a termination retirement allowance; UMass Amherst did it for him. (Tr. 34)

If Mr. Roy wanted to prove the absence of collusion, he could have and should have called Ms. Sweeney and a representative from UMass Amherst to testify. He did neither. His testimony that he did not negotiate directly with UMass Amherst and that he was unaware of G.L. c. 32, §10(2) until an HR representative at UMass Amherst told him about it (Pet. Br. 12) does not prove that collusion did not occur. He did not prove that, more likely than not, collusion did not occur.

Conclusion and Order

Most importantly, Mr. Roy's severance pay was not regular compensation. Therefore, his administrative leave was not creditable service. Therefore, he did not have 20 or more years of creditable service. In addition, Mr. Roy's termination was not involuntary and he did not prove the absence of collusion in bringing about his termination. He lacked key elements of eligibility for a termination retirement allowance. The State Board of Retirement's denial of his application for an allowance is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Kenneth Bresler

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Kenneth Bresler
Administrative Magistrate

Dated: July 21, 2023