COMMONWEALTH OF MASSACHUSETTS

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

**Paul Poirier**,

 Petitioner

v. Docket No. CR-15-503

 Date Issued: Aug. 25, 2017

**New Bedford Retirement Board**,

 Respondent

**Appearance for Petitioner:**

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**Appearance for Respondent:**

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**Administrative Magistrate:**

Kenneth J. Forton, Esq.

**SUMMARY**

The Petitioner, a custodian for the New Bedford School District, is entitled to an evaluation by a medical panel. He has proven by a preponderance of the evidence that his injuries were sustained while performing the essential duties of his job and that he did not engage in serious and willful misconduct. The Respondent’s decision denying his application for accidental disability retirement is therefore reversed.

**DECISION**

 On August 31, 2015 the Petitioner, Paul Poirier, appealed timely under G.L. c. 32, § 16(4), the August 27, 2015 decision of the Respondent, New Bedford Retirement Board, denying his application for accidental disability retirement.

The Petitioner submitted a pre-hearing memorandum, with 34 proposed exhibits, on October 3, 2016; I have marked this memorandum “A” for identification. The Respondent submitted its pre-hearing memorandum, with 13 proposed exhibits on October 4, 2016; I have marked this memorandum “B” for identification. I have marked a list of the exhibits as “C” for identification.

I held an evidentiary hearing on October 20, 2016 at DALA, One Congress Street, Boston, Massachusetts. The hearing was digitally recorded. At the hearing I admitted 41 documents into evidence. (Exs. 1-41.) The Petitioner testified on his own behalf and also called his supervisor, James Stewart, to testify. The Respondent called no witnesses.

On February 22, 2017, the Petitioner submitted a post-hearing memorandum; I have marked this memorandum “D” for identification. On February 28, 2017, the Respondent submitted a post-hearing memorandum; I have marked this memorandum “E” for identification.

**FINDINGS OF FACT**

Based on the testimony and documents submitted by the parties, I make the following findings of fact:

1. Paul Poirier was born in 1957. He began working for the City of New Bedford School Department as a custodian at New Bedford High School on February 12, 2012. (Poirier Testimony; Exhibit 13.)
2. Mr. Poirier was employed by the New Bedford School District as a custodian for 21 years all together. (Poirier Testimony.)
3. As a custodian, Mr. Poirier was responsible for the care, maintenance and security of New Bedford High School. Some of his regular duties included opening the classrooms, emptying the trash, mopping the floors and closing the windows. (Poirier Testimony; Ex. 35.)
4. The responsibility of closing the windows was particularly important because there had been some recent vandalism inside the school building. First floor classrooms with ground level windows had been specific security concerns in the past. Failure to secure windows could result in disciplinary actions for custodians. (Poirier Testimony; Stewart Testimony; Ex. 41.)
5. On September 17, 2012, Mr. Poirier reported to New Bedford High School at 3:00 p.m. to begin his regular shift. His supervisor informed Mr. Poirier that he would have extra work that day because he was going to have to cover for a colleague who was out sick. (Poirier Testimony.)
6. While he was cleaning his second classroom, which was below ground level, Mr. Poirier noticed a window that had been left fully open. (Poirier Testimony.)
7. The windows in classrooms below ground level at New Bedford High School run along the top of the concrete walls of the classrooms. Under the windows against the walls are “univents” that heat the classroom and create a shelf approximately two feet wide. Just below the windows are sills that extend approximately four to six inches out to the windows. To pull the windows inward and lock them, Mr. Poirier had to stand on the univent and then reach past the sill to pull in the window. (Poirier Testimony; Stewart Testimony; Ex. 34.)
8. Mr. Poirier and other custodians at New Bedford High School use two different methods for reaching the windows. The first method, which the school administration advises, is to use a ladder to reach the window. The second method, used by almost all of the custodial staff at New Bedford High School, including the supervisor, is to use a chair from the classroom to climb onto the univent and pull the window in from there. Either method involves stepping on the univent for leverage. (Poirier Testimony; Stewart Testimony.)
9. When Mr. Poirier noticed the window was open, he went to close it in his usual manner. He brought a chair over next to the univent, stepped onto the chair, then stepped onto the univent, and reached up to close the window. The window was extended fully open. (Poirier Testimony.)
10. The teacher in this classroom had placed plants on the windowsill that partially obstructed Mr. Poirier as he attempted to close the window. He had informed his supervisor previously that these plants obstructed clear access to the windows. The supervisor replied that he would try to get them removed and for Mr. Poirier to do the best he could until this happened. (Poirier Testimony; Stewart Testimony.)
11. As Mr. Poirier attempted to pull in the window, one of the tracks that helped control the opening and closing of the window became stuck. That jolt caused Mr. Poirier to lose his grip on the small window handle and his hand slipped off. His elbow then hit one of the larger plants on the windowsill. The combination of these events caused Mr. Poirier to lose his balance and fall onto the univent and finally the floor. (Poirier Testimony.)
12. Mr. Poirier’s coworker, Tony Williams, was the first person to arrive in the classroom after hearing him fall. Mr. Williams immediately called their mutual supervisor, Mr. Stewart, and told him that Mr. Poirier had been hurt. (Poirier Testimony.)
13. Mr. Poirier was taken from the school to St. Luke’s Hospital in New Bedford by ambulance, where he was treated for left knee and low back injuries. X-rays were taken at the emergency room. (Ex. 33.)
14. Mr. Poirier had a prior history of arthritis in his knees and a cartilage tear in his right knee. He had been able to perform his job duties prior to the accident without pain or restriction. (Poirier Testimony.)
15. After the accident, Mr. Poirier sought medical treatment with Dr. Alves, Dr. Wortman, and Dr. Stern for left knee and low back injuries. His left knee injury required surgery. (Exs. 29, 30, 31, 32.)
16. Mr. Stewart completed an “Industrial Accident Report of Foreman or Supervisor” on the same day of the accident. Mr. Stewart’s understanding of the accident came from Mr. Poirier, who told him how he fell before leaving for the hospital. Mr. Stewart states in the report that Mr. Poirier “fell while trying to close windows from countertop.” (Poirier Testimony, Stewart Testimony; Ex. 15.)
17. Mr. Poirier completed an “Employee’s Report of Injury” the day following the accident, September 18, 2012. In this report he stated, “I was climbing onto chair to close window—there were potted plants in front of the window obstructing my view. The window was fully extended out. I had to pull hard on handle to close window. My elbow hit the plant and knocked me off balance causing me to fall off the chair.” (Ex. 17.)
18. Mr. Poirier had previously shut this window in the same manner at least 100 times without incident. He had never before moved the plants while closing the window and he was always able to close it successfully. Other custodians had also closed windows while they were obstructed with plants or other classroom objects. This incident was a rare occurrence. (Poirier Testimony; Stewart Testimony.)
19. Most custodians at New Bedford High School used chairs to reach the windows rather than ladders because it was faster and they did not have to carry the ladders from classroom to classroom. Additionally, using a ladder put them farther from the windows, allowing them less leverage, and thus making it more difficult to close. If windows were extended fully open, which they regularly were, they could not be closed by using only a ladder. Students would open the windows for teachers by stepping onto a chair and then onto the univent. (Poirier Testimony; Stewart Testimony.)
20. Opening windows or completing other responsibilities as quickly as possible was common for custodians at New Bedford High School due to their substantial work load. There were regular absences in custodial staff due to sickness, personal days off, and vacations. The school rarely had a full custodial staff on duty. When a custodian was absent from work, nobody replaced the absent custodian. Instead, other custodians were assigned extra work to cover the missing employee’s area. (Stewart Testimony.)
21. At the time of Mr. Poirier’s accident, there were eight or nine custodians per shift at New Bedford High School. The school had approximately 4,000 students and 1,000 staff members. Each custodian was assigned approximately 15-20 classrooms per shift. (Poirier Testimony; Stewart Testimony.)
22. Mr. Poirier’s supervisor, Mr. Stewart, had also used a chair to step onto the univent to close windows in the past without incident. He had never disciplined a custodian for not using a ladder to close a window. Further, he stated that if he had reprimanded every custodian who did not use a ladder to close a window “I would have no one to work in the building.” (Stewart Testimony.)
23. After Mr. Poirier’s accident, other custodians continued to close windows by stepping onto chairs and then the univent in the same manner. There have been no other accidents from custodians using this method to close windows since Mr. Poirier’s accident. (Stewart Testimony.)
24. Mr. Poirier has not returned to work since the date of the accident, September 17, 2012. (Poirier Testimony.)
25. Mr. Poirier filed for Workers’ Compensation and received benefits starting September 17, 2012. They were periodically discontinued before a Judge’s Conference Order and Settlement provided him with further benefits. (Exs. 26, 27, 28.)
26. On August 20, 2014, Mr. Poirier submitted an application for accidental disability retirement, citing left knee and low back injuries. (Ex. 1.)
27. On August 27, 2015, the New Bedford Retirement Board denied Mr. Poirier’s application without requesting a regional medical panel because he was “not in the performance of [his] job duties” and “medical records indicate injury is not permanent.” (Ex. 5.)
28. Mr. Poirier appealed the decision of the New Bedford Retirement Board on August 31, 2015. (Ex. 7.)

**CONCLUSION AND ORDER**

After consideration of the evidence presented in this case, the Board’s denial of Mr. Poirier’s application for disability retirement benefits is reversed. The Board shall request a regional medical panel to examine Mr. Poirier.

The Board denied Mr. Poirier a regional medical panel. To be entitled to a medical panel examination, an applicant must provide sufficient evidence that, if unrebutted and believed, would allow a fact finder to conclude that the applicant is entitled to accidental disability retirement. G.L. c. 32, § 7(1); *DeFelice v. Norfolk Cty. Ret. Bd*., CR-08-200, at \*7 (DALA 2012); *Lowell v. Worcester Reg. Ret. Bd.*, CR-06-296, at \*24 (DALA 2009). In other words, to reach the medical panel stage, an applicant for accidental disability retirement must make out a prima facie case. *Church v. Marblehead Ret. Bd.*, CR-10-38, at \*17 (DALA 2013); *Lowell*, CR-06-296, at \*22.

To qualify for accidental disability retirement, an applicant must prove total and permanent disability by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time. G.L. c. 32, § 7. This is to say that the claimed injury must be sustained “during the actual performance of the duties that the employee has undertaken to perform on behalf of the public.” *Damiano v. Contributory Retirement Appeal Board*, 72 Mass. App. Ct. 259, 263 (2008). If an employee’s injury is sustained due to serious and willful misconduct on his part, he is not considered to be in the performance of his duties. G.L. c. 32, § 7(1).

The Board maintains that Mr. Poirier has failed to meet his burden of proving that the 2012 accident occurred while he was in the performance of his duties and that his injury was not the result of serious and willful misconduct. *See* *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 255 (1996) (applicant bears burden of proving entitlement to accidental disability retirement by a preponderance of the evidence). The Board had originally contested whether Mr. Poirier’s injuries were permanent, but conceded that point at the beginning of the hearing.

When considering whether an employee has engaged in serious and willful misconduct, all of the immediately attending circumstances should be considered. *Tripp’s Case*, 335 Mass. 515, 518 (1969). “The word serious refers to the conduct itself and not to its consequences. Willful implies intent or such recklessness as is the equivalent of intent.” *Dillon’s Case*, 324 Mass. 102, 110 (1949). Serious and willful misconduct is “conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.” *Scaia’s Case*, 320 Mass. 432 (1946); *DiGloria v. Chief of Police*, 8 Mass. App. Ct. 506, 513 (1979). In a recent decision, the Appeals Court established that a violation of a law or regulation does not constitute serious and willful misconduct in the absence of an admonition or contrary instruction.  *Drumm’**s* *Case*, 74 Mass. App. Ct. 38, 903 N.E.2d 1127 (2009). Likewise, an assumed violation of a policy statement, standing alone, does not rise to the level of serious and willful misconduct. *Burek v. Montague Retirement Bd.*, CR-08-258 (DALA 2009).

To address the circumstances surrounding the fall, I must first settle how Mr. Poirier injured himself, as there is conflicting evidence in the record on this point. The Board asserts that Mr. Poirier fell from the chair that he used to reach the window. Mr. Poirier, on the other hand, testified that he fell when he had both feet on the univent. This is what Mr. Poirier told his supervisor, Mr. Stewart, soon after the accident. Mr. Stewart completed a Supervisor’s Injury Report on the day of the accident. In the report, he wrote that Mr. Poirier “fell while trying to close windows from [a] countertop.” (Ex. 15.) Mr. Poirier’s Employee Injury Report, completed the day after the accident, contains a slightly different version of events: “I was climbing onto chair to close window—there were potted plants in front of the window obstructing my view. The window was fully extended out. I had to pull hard on handle to close window. My elbow hit the plant and knocked me off balance causing me to fall off the chair.” (Ex. 17.) I conclude that it is more likely that he fell from the uninvent because he would have had to step off the chair and onto the uninvent to get the leverage required to pull the window inward. Also, the day after the accident, Mr. Poirier was in a great deal of pain and could easily have made an error in his injury report. In these circumstances, I place greater weight on what he told his supervisor immediately following the accident than I do on the report that he filed the day after the fall.

Mr. Poirier was performing one of his required job duties when he was injured. Closing and securing windows was an integral part of his responsibilities as a custodian at New Bedford High School. (Ex. 35.) His supervisor, Mr. Stewart, emphasized the security concerns when windows are left open and unlocked, as recent break-ins at New Bedford High School demonstrated. (Stewart Testimony.) A memo circulated to all custodial staff at New Bedford High School stated that custodians could face disciplinary action if they failed to secure classroom windows. (Ex. 35.) There is no dispute that when Mr. Poirier fell and was injured in September 2012, he was trying to close a classroom window. He was therefore in the performance of his duties, unless the way that he was trying to close the window is considered serious and willful misconduct.

The Board cites a laundry list of Mr. Poirier’s actions that it considers serious and willful misconduct. I consider them in turn.

*(1) Mr. Poirier should have used a ladder instead of a chair.* The Board maintains that Mr. Poirier should have used a ladder to close the classroom window, that this was the only authorized method of executing his job duty, and that his failure to use a ladder constitutes serious and willful misconduct. The Board references Mr. Stewart’s testimony that the New Bedford High School administration wants their custodians to use ladders when performing difficult job requirements. Mr. Stewart himself said that he tells his custodians to use ladders, although primarily for changing lightbulbs. Mr. Stewart admitted, however, that he himself often does not use a ladder to close windows and rather uses a chair to step onto the univent, just as Mr. Poirier did. Perhaps for this reason, Mr. Stewart has not, in his 32 years as a custodian and supervisor, disciplined a custodian for not using a ladder to close a window. Nearly all of his custodial staff use the chairs instead of ladders to access the windows. If he reprimanded every custodian who did not use a ladder to close a window, he testified, “I would have no one to work in the building.” Using a chair in these circumstances cannot be considered serious and willful misconduct.

*(2) Mr. Poirier should not have stepped onto the univent to close the window.* The Board maintains that Mr. Poirier’s stepping on the univent was serious and willful misconduct. Mr. Stewart explained that whether a custodian used a ladder or a chair to reach the height of the window, he would still have had to step on the univent. The univents in New Bedford High School ground floor classrooms are essentially long counters that run against the wall. They are approximately two feet wide, and the window sill that extends above them is approximately another four to six inches wide. A custodian trying to close one of these windows is at least two and a half feet from the front of the window without stepping on the univent. Because the window was extended fully outward, it was impossible to close it without stepping on the univent. Mr. Poirier’s decision to step on the univent to close the window was not serious or willful misconduct; it was a necessary step in completing one of his job duties.

*(3) Mr. Poirier should have moved the materials on the univent and the plants on the window sill.* The Board contends that Mr. Poirier should have moved some of the materials on the univent before standing on it, and some of the plants on the window sill. The materials on the univent were not obstructing him from closing the window. He had informed Mr. Stewart about the plants on the window sill, but Mr. Stewart directed Mr. Poirier to do the best he could to close the window until the plants were removed. Mr. Poirier had closed this particular classroom window nearly one hundred times previously without any issue. He could have removed the plants from the window sill, but he had no reason to suspect that they would contribute to his fall because he had worked around them so many times before. Failing to move the plants does not rise to the level of serious and willful misconduct.

*(4) Mr. Poirier should have closed the window from the outside.* The Board suggests that Mr. Poirier should have exited the building and closed the window from the outside. However, the classroom windows cannot be locked from the outside, so even if Mr. Poirier had first gone outside to close the window, he still would have had to come back inside and climb up to the window in order to lock it. The custodians were also under time pressure because of staff absences that required extra work for the other employees. The day of the accident, Mr. Poirier was assigned an extra area of classrooms to clean in the absence of one of his coworkers. No additional custodians were called in or asked to work overtime to compensate for custodian absences. This encouraged custodians to try to complete their classrooms in as efficient a manner as possible. Going outside to close the window first would not have eliminated his need to climb to the window and it would have added time to his already heavy workload that day. This cannot be considered serious and willful misconduct.

To sum up, taken together Mr. Poirier’s actions did not rise to the level of serious and willful misconduct. There is some risk of injury in almost all courses of conduct at work. His conduct could be construed as “risky, but it was a calculated, informed risk based on his knowledge.” *Burek v. Montague Retirement Bd.*, CR-08-258 (DALA 2009). Mr. Poirier assessed the risks and made a reasonable decision under the circumstances, based on external constraints and his years of experience. He had closed that particular classroom window in the same way many times in the past without incident. Nearly all custodians at New Bedford High School closed the windows the same way. Consequently, I conclude that Mr. Poirier was in the performance of his job duties when he was injured on September 17, 2012.

For the foregoing reasons, the Petitioner is entitled to be evaluated by a medical panel. The Board’s decision denying his application is therefore reversed and this matter is remanded for the appointment of a regional medical panel.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kenneth J. Forton

Administrative Magistrate

DATED: Aug. 25, 2017