

No. A04-2407

STATE OF MINNESOTA
IN COURT OF APPEALS

Stephen Brittain,

Relator,

vs.

Public Employees Retirement Association of Minnesota,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Did the PERA Board of Trustees properly deny “line-of-duty” disability benefits, when the sole factual basis for the claim was Relator’s “perception” of the cause of his disability?

The PERA Board denied Relator line-of-duty disability benefits finding, *inter alia*, that the evidence reflected only his “perception” of a hostile work environment.

Apposite statutes and cases:

Minn. Stat. §§ 353.64 - 353.663 (2004)

In the Matter of Disability Benefits Application of Craig Wallin, 199 WL 507601 (Minn. Ct. App. (unpublished) July 20, 1999)

Burgess v. Bergstrom, 2004 WL 77766 (Minn. Ct. App. (unpublished) January 20, 2004)

- II. Does disability allegedly caused by a hostile work environment created by a supervisor occur from or arise out of an act of duty under the provisions of Minn. Stat. § 353.656, subd. 1 (2004)?

The PERA Board of Trustees found that disability based upon a claim to a hostile work environment did not constitute disability incurred in, or arising out of, any act of duty.

Apposite statutes and cases:

Minn. Stat. §§ 353.64 - 353.663 (2004)

In the Matter of Disability Benefits Application of Craig Wallin, 199 WL 507601 (Minn. Ct. App. (unpublished) July 20, 1999)

STATEMENT OF THE CASE AND FACTS

Relator, Steven Brittain ("Brittain"), worked as a Sheriff's Deputy in the Ramsey County Sheriff's Office ("Sheriff's Office") for approximately seventeen years. During that time he was a member of the Public Employees Retirement Association's Police and Fire Fund ("PERA" and "P&F Fund"). His last day of work in the Sheriff's Office was October 20, 2003. Brittain is currently receiving P&F "non-duty" disability benefits of \$2,254.47 per month. He seeks qualification for "line-of-duty" disability benefits that would increase the monthly payment to \$2,655.38 per month.¹

Brittain claims he had no work performance issues until 2002. That year he was working in the Transportation Unit ("Unit") of the Sheriff's Office when Sgt. Joanne Springer became the Acting Sergeant and his supervisor. Brittain claims Sgt. Springer's actions as his supervisor and the hostile work environment she created are "at the heart of his disability claim." Relator's Brief ("Rel.B.") at 1.

Brittain believed that Springer did not have a high regard for him or for the other male deputies in the Unit. He felt that Springer intended to get rid of the male deputies and claimed that he had been told by another deputy that Springer had referred to him to

¹ At the time of Brittain's fact-finding conference, his non-duty benefits were \$2,197.00 per month and his line-of-duty benefits would have been \$2,610.00 per month. Administrative Law Judge Report dated August 26, 2004, Finding No. 8; Rel. App. 007.

as “one of the male slugs” and also as “brain dead.” Administrative Law Judge Report dated August 26, 2004, Findings of Fact (“A.L.J. Finding”) No. 2; Rel. App 005.²

Brittain’s professional relationship with Sgt. Springer deteriorated during the summer of 2002. A.L.J. Finding No 4; Rel. App 006. He believed Sgt. Springer was showing preferential treatment towards female deputies and her brother by assigning them positions that provided them with substantial overtime compensation. *Id.* On August 9, 2002, Brittain got into a shouting match with Sgt. Springer. As a result, she filed a formal complaint against him, accusing him of threatening her and of conduct unbecoming of an officer. *Id.* Brittain filed a union grievance over this incident and Springer was moved out of the Transportation Unit in December, 2002. *Id.*

In August, 2002, Brittain sought treatment from Dr. Kenneth Hodges, a family practice physician, and from Brockman Schumacher, a master’s level psychologist. A.L.J. Finding No. 5; Rel. App. 006. At that time he was depressed, had tension headaches, was anxious about losing his job, and was on medical leave. *Id.* On

² Brittain sustained some hearing loss beginning in 1992. In 2002, his symptoms increased and on June 25, 2002, he requested that he be relieved of his duties as a firearms range instructor. A.L.J. Finding No. 3; Rel App. 005. On January 6, 2003, Relator had a hearing evaluation at Regions Hospital. Dr. Fozia Abrar calculated an 18.75% left ear hearing loss, which equaled a 1% permanent partial disability rating under the workers’ compensation permanent partial disability rules. On February 11, 2003, he was seen by Dr. Frank Ondrey who reported that Brittain’s hearing loss may affect his interpersonal communications but otherwise he had no other restrictions on his ability to work. A.L.J. Finding No 6; Rel. App. 006. On October 14, 2003, Dr. Craig Nystrom examined Brittain and evaluated a hearing loss of 15% in the left ear. This constitutes a 1% loss of the body as a whole under applicable workers’ compensation schedules. Several times Dr. Nystrom stated that Brittain would benefit from and could continue to be employable with the use of a hearing aid. A.L.J. Finding No 12; Rel. App. 007.

September 30, 2002, Schumacher recommended that his medical leave be continued. He recommended further continuations on November 26, 2002, and again on January 24, 2003. *Id.*; Ex. 9.

On July 16, 2003, Brittain made his first telephone inquiry to PERA. In response to the telephone intake representative's question, "Was the injury "in-line" or "not-in-line?" Brittain responded that it was, "in-line," based upon hearing loss and stress, as well as post traumatic stress disorder. Exh. 1; A.L.J. Finding No. 7; Rel. App. 006.³

On November 10, 2003, Brittain's attorney filed for both "line-of-duty" disability benefits and basic retirement benefits. On December 28, 2003, PERA staff approved Brittain for occupational disability (non-duty-related) under Minn. Stat. § 353.656, subd. 3 (2004). PERA staff informed Brittain that the question of whether his disability qualified as a "line-of-duty" disability was still under consideration and until that question could be resolved, his benefit payment would be based on a "non-duty" disability. A.L.J. Finding No. 17; Rel. App. at 008. On March 2, 2004, PERA staff denied his claim for line-of-duty benefits. A.L.J. Finding No. 18; Rel. App. at 008. Brittain requested a fact-finding conference before an Administrative Law Judge in order to challenge that decision.⁴

³ Relator's description of the telephone interview from which Exhibit 1 was completed infers that PERA's representative made a "judgment call" that Brittain's disability was "in-line." See Rel.B. at 2. The form shows that PERA's representative was simply asking questions of Brittain. Marking the "in-line" clause merely reflected Brittain's claim to disability, not the conclusion of PERA's representative.

⁴ Pursuant to Minn. Stat. § 353.03, subd. 3(c) (2004), the PERA Board of Trustees ("PERA Board") has established a fact-finding process to review staff denials of member (Footnote Continued on Next Page)

On July 15, 2004, a fact-finding conference was held, Administrative Law Judge Allan Klein presiding. In addition to the opinions of his treating physicians, Brittain submitted evidence of the discrimination charge he had filed with the Minnesota Department of Human Rights alleging gender and sex discrimination against the Sheriff's Office, A.L.J. Finding No. 10; Rel. App. at 007, together with copies of several "unsworn" written "declarations" that had been made by co-workers and submitted to the Department of Human rights in support of his discrimination claim.⁵ On August 26, 2004, Judge Klein issued his Findings, recommending to the PERA Board that Brittain be granted "in-line-of duty" benefits. On September 2, 2004, PERA staff filed Exceptions to the Judge's Report.

On October 14, 2004, a hearing was held before the PERA Board ("Board") at which the Board considered the record, including the A.L.J. Findings, the Exceptions filed by PERA staff, and the parties' oral arguments. The Board approved a motion to

(Footnote Continued From Previous Page)

applications for disability benefits. The fact-finding proceeding is not a contested case subject to Minn. Stat. ch. 14 (2004). Appeals from disability benefit denial decisions are referred to an Administrative Law Judge at the Office of Administration Hearings for a fact-finding conference. The conference allows the member to present evidence on the staff decision. The Administrative Law Judge issues findings of fact, conclusions of law, and a recommendation for the Board. The Administrative Law Judge's report, the record, and a staff developed Fact Sheet summarizing the case are then presented for the PERA Board's consideration at its monthly meeting. *See* Minn. Stat. § 353.03, subd. 3(c) (2004); PERA Policy Procedure 5.3, Record, Exhibit 32.

⁵ Some time after the fact-finding hearing but before the PERA Board hearing, the Department of Human Rights issued its Finding of No Probable Cause regarding his complaint. Transcript, "T." at 13; Record Exh. 49.

deny Brittain "line-of-duty" disability benefits and on October 21, 2004, issued its Order denying this benefit. The Order provided in part:

Specifically, the Board found that Mr. Brittain's depression resulted from his perception that his supervisor harassed him and that while Stephen Brittain experienced depression and a slight hearing loss, his inability to continue in his position did not result from an Act of Duty as the Board interprets Minn. Stats. §§ 353.63 and 353.656, subd. 1 (2004).

Order dated October 21, 2004; Rel App. at 013.

On December 17, 2004, Brittain filed and served a Petition for Writ of Certiorari, a signed Writ of Certiorari, and a Statement of the Case. On December 22, 2004, PERA filed its Supplemental Statement of the Case. On February 10, 2005, PERA filed and served upon the parties its Return of Record, including the transcript of the hearing before the PERA Board.

ARGUMENT

I. STANDARD OF REVIEW.

PERA administers a pension plan for police officers and fire fighters in accordance with Minn. Stat. §§ 353.63-353.663 (2004) and the fiduciary duties and standards imposed on it by Minn. Stat. ch. 356A (2004).

A public retirement fund is analogous to an administrative agency. *Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). Unlike many administrative agency proceedings, hearings before the PERA Board are not "contested cases" subject to the Administrative Procedures Act (Minn. Stat §§ 14.001-14.69 (2004)) and to its appeal process. Minn. Stat. § 353.03, subd. 3(c) (2004). The Board's quasi-judicial decisions are subject to review by writ of certiorari. Minn. Stat.

§ 606.01 (2002); Minn. R. Civ. A. 115 (2004). The scope of review is limited to determining whether a decision was arbitrary, oppressive, unreasonable, fraudulent, made under erroneous theory of law, or without any supporting evidence. *McDermott v. Minn. Teachers Ret. Fund*, 609 N.W.2d 926, 928 (Minn. Ct. App. 2000); *Stang v. Minn. Teachers Ret. Ass'n Bd. of Trustees*, 566 N.W.2d 345, 347 (Minn. Ct. App. 1997). In reviewing the PERA Board's decision, the Court should consider whether the PERA Board drew the correct legal conclusions from the facts in the record and whether there was a reasonable basis for its decision. *See Dietz v. Dodge County*, 487 N.W.2d 237, 241 (Minn. 1992). The PERA Board's decision should be reversed only if it is "fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within the jurisdiction or based upon an error of law." *Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d at 299 (quoting *Dokomo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 675 (Minn. 1990)).

Construction of Chapter 353 is, of course, a question of law and review by this Court on issues of statutory construction is *de novo*. *In re Twedt*, 598 N.W.2d 11, 13 (Minn. Ct. App. 1999). Thus, the Court is not bound by the PERA Board's construction of its statute. If, however, the meanings of the terms in the law are in doubt, the Court should give "great weight" to the construction given it by the PERA Board, as it is the body charged with the fiduciary responsibility to administer the plan. *See McDermott*, 609 N.W.2d at 928; *In re Twedt*, 598 N.W.2d 11, 13 (Minn. Ct. App. 1999); *Goodnature v. Pub. Employees Ret. Ass'n*, 558 N.W.2d 19 (Minn. Ct. App. 1997). When the meaning of a statute is doubtful, courts should give great weight to a construction placed upon it

by the department charged with its administration. *Harting v. Pub. Employees Retr. Ass'n of Minn.*, 2003 WL 22890079, (Minn. Ct. App. (unpublished) December 9, 2003) (a copy of this decision provided in Respondent's Appendix ("RA") at 3).

The PERA Board is exercising its fiduciary duty to its pension plan members when it makes disability benefit determinations. Minn. Stat. § 356A.02 (2002). The Board is uniquely suited for such decision making, being composed of the State Auditor; appointed public officials representing school boards, counties, cities, and the public; and elected public employees, including one who must be a member of the PERA P&F Fund. Minn. Stat. § 353.03, subd. 1 (2004). Therefore, if there is any doubt about the Board's construction and application of the "line-of-duty" disability provisions in Minn. Stat. § 353.656, subd. 1 (2004), the Court should defer to the PERA Board's judgment.

Because Brittain seeks review of an administrative agency decision, he must establish that the findings of the Board are either not supported by the evidence in the record, considered in its entirety, or are arbitrary and capricious. *In The Matter of the Application of John Allers and Konrad Stroh for Ret. Benefits*, 533 N.W.2d 646, 652 (Minn. Ct. App. 1995). Substantial evidence must support the Board's decision, i.e., "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than 'some evidence'; (4) more than 'any evidence'; and (5) evidence considered in its entirety." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

This case presents a factual issue and a legal issue: (1) whether the Board correctly found that Brittain's perception was not sufficient proof of the causation of his disability

and (2) whether the Board correctly found that a disability caused by a perceived hostile work environment does not constitute a disability incurred in or arising out of an act of duty under Minn. Stat. § 353.65, subd. 1 (2004).

II. THE PERA BOARD CORRECTLY FOUND THAT A DISABILITY ALLEGEDLY RESULTING FROM A HOSTILE WORK ENVIRONMENT IS NOT A DISABILITY INCURRED IN OR ARISING OUT OF ANY ACT OF DUTY.

Public safety personnel who become disabled “as a direct result of an injury, sickness, or other disability incurred in or arising out of any act of duty” are eligible for “line-of-duty” disability benefits. Minn. Stat. § 353.656, subd. 1 (2004). The PERA Board found that Brittain’s inability to continue his position as Deputy Sheriff did not result from any act of duty. With respect to his claim that his emotional maladies were caused by the acts of his supervisor, the Board found that he had not presented sufficient evidence to support his claim. The Board could not award benefits based solely upon his “perception” of the cause of his disability. T. at 17-18. The Board further found that: “Disabilities resulting from factors such as supervisory harassment or hostile work environment do not constitute a disability arising out of an Act of Duty.” Order and Memorandum dated October 21, 2004; Rel. App. at 013. In challenging the Board’s decision, Brittain makes two claims: (1) the Board made an improper distinction between physical and mental injuries and (2) the Board limited “line-of-duty” disability to acts of duty that are hazardous, *per se*. The first claim incorrectly interprets the Board’s concern over Brittain’s “perception.” The second ignores the expressed legislative intent to provide public safety personnel special benefits “based upon the particular dangers

inherent in these occupations” and thereby misreads the scope of the term, “act of duty” in Minn. Stat. § 353.63 (2004).

A. The PERA Board Found That Brittain’s “Perception” Did Not Provide A Sufficient Factual Basis Upon Which To Establish The Cause Of His Disability.

This case does not involve a dispute regarding Brittain’s physical and mental status. He is occupationally disabled from working as a deputy sheriff due to depression and other mental anomalies. He qualifies for occupational disability benefits under Minn. Stat. § 353.656, subd. 3 (2004) since, “by reason of that sickness or injury,” he is unable to perform the duties of deputy sheriff. Minn. Stat. § 353.356, subd. 3 (2004). Causation is not at issue for purposes of determining this type of disability.

Consequently, causation was not at issue or the focus of attention when PERA determined that Brittain was occupationally disabled. Under Minn. Stat. § 353.656, subd. 3 (2004), proof that the disability was caused by an act of duty is not necessary since all that is needed is a showing of disability, regardless of cause. The opposite is true in proving entitlement to “line-of-duty” disability benefits. This type of disability must be the “direct result of an injury, sickness, or other disability incurred in or arising out of any act of duty.” Minn. Stat. § 353.656, subd. 1 (2004). Causation is at issue for this type of disability and must be proved. *See Renz v. Hibbing Firemen’s Relief Ass’n*, 186 Minn. 370, 377, 243 N.W. 713, 715 (1932) (there must be a causal relationship between disability and service as a fireman.)

Since “line-of-duty disability was not the main focus of the application process, Brittain contends that the Board does not dispute that the hostile work environment led to

his disability while he was on duty. Rel.B. at 10. This argument misinterprets the Board's decision. The Board determined that Brittain's claim to "line-of-duty" disability benefits could not be based solely on his perception of the cause of his disability. The Board, in effect, determined that more substantial evidence was necessary to prove a claim to "line-of-duty" causation.⁶

The transcript of the Board's discussion and decision demonstrates that the Board was aware of the elements of proof needed to show causation. Brittain had the burden of proving that his disability was *caused* (incurred in or arising out of) by any act of duty. *See Burgess v. Bergstrom*, 2004 WL 77766 (Minn. Ct. App. (unpublished) January 20, 2004).⁷ The Board knew that Brittain had to show that his disability was the direct result of an act of duty. The Board recognized that Brittain had not made such a showing. Brittain's self-serving statements regarding causation were not sufficient, competent evidence. His perception was essentially the only proof presented regarding the cause of his disability.⁸ As such, Brittain could not meet the required standard of proof regarding the causation of his disability.

⁶ By misinterpreting the Board's decision, Brittain erroneously concludes that the Board attempts to distinguish between mental and physical disabilities. Rel.B. at 10-11. There is no basis for claiming that the Board attempts to make this distinction. The standard for "line-of-duty" disability is, "injury, sickness, or other disability, . . . expected to render the member *physically or mentally* unable to perform the duties . . ." Minn. Stat. § 353.656, subd. 3 (2004). The standard for "non-duty" disability does not specifically include mental disability. *See* Minn. Stat. § 353.656, subd. 3. PERA has not attempted to exclude mental disability from either standard.

⁷ A copy of this unpublished decision is included as Respondent's Appendix.

⁸ PERA's medical advisor did not find that Brittain was disabled as a result of an act of duty, only that he was occupationally disabled. Record, Exhibit 27. Absent from the (Footnote Continued on Next Page)

Administrative Law Judge Allan W. Klein made no factual finding that an act of duty caused Brittain's disability, only that Brittain perceived his depression was caused by his hostile work environment. In discussing Brittain's testimony regarding his work environment, Judge Klein qualified his findings as follows:

The Administrative Law Judge believes that this is what Brittain thought was true. He has not heard Springer's side of this report. The Administrative Law Judge expresses no opinion on what really happened. What matters here is that Brittain did believe it was true. He felt he was being harassed and that Springer was "out to get him."

A.L.J. Finding No 2, n.1; Rel. App. 005. Judge Klein concluded that the primary cause for Brittain's depression was the hostility that he *perceived* in his working environment. *Id.* No 4; Rel. App. 009. In his Memorandum, Judge Klein states, "The primary cause of the depression was the hostile work environment (as he perceived it) resulting from his poor relationship with his supervisor, Sergeant Joanne Springer." A.L.J. Memorandum; Rel. App. 010.

While the ALJ found that Brittain's perception was a sufficient factual basis upon which to prove causation, the Board was not so convinced. Trustee Gray's motion to deny benefits was premised in part on the following:

And two, in the conclusions of Judge Klein's decision here. In the last sentence it says, excuse me, second to the last sentence, is that instead the primary cause for his depression was the hostility which he perceived in his

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other medical reports submitted by Brittain was any discussion of Brittain's overall health, background, life experiences, and other vicissitudes of life which may have contributed to his disability. The opinions he did submit provided only "snapshots" of his current situation based upon his own statements of what he was feeling and his perception of what was happening as a result of work relationships.

working environment. And he repeats this again in the first paragraph of his memorandum, the third sentence where it starts, the primary cause of the depression was the hostile work environment, then parenthetically, as he perceived it, resulting from his poor relationship with his supervisor. And, I guess we cannot give benefits on a perception of something. We've determined he's disabled. He's receiving a benefit and I move that we reject the line of duty benefit.

Transcript at 17-18. In announcing the motion, President Hulmer stated:

Hulmer: Ok, so it's been moved by Walter and seconded by Terry to deny the recommendation by ALJ Judge Klein, and accept the staff's recommendation to deny Mr. Brittain a duty in the line of duty disability. Based on the fact that he hasn't provided enough evidence to support that and am I saying it wrong?

Trustee Gray: That's right.

Transcript at 18. Then, in response to a question from counsel, Trustee Gray stated that he was distinguishing between an actual or factually supportable situation versus merely a perception. Gray concluded by stating, "but the perception doesn't even meet a test of something being real and factual." T. 19-22.

The Board's conclusion that Brittain's perception was not a sufficient factual basis to establish causation is quite similar to the situation in *Burgess v. Bergstrom*, supra. In that case a Minnesota State Retirement System correctional employee claimed "job-related" disability based upon supervisor harassment and racial discrimination.⁹ There the court found that Burgess' allegations lacked corroboration and detail, her grievances were determined to be unsubstantial, the medical reports merely recited what Burgess told her doctors, and the medical conclusion that the disability was job related lacked any

⁹ Minn. Stat. § 352.95 (2004) though captioned "job-related" applies essentially the same standard as does Minn. Stat. § 363.656 (2004): "incurred in or arose out of any act of duty."

description of what job-related conditions the doctor believed caused the disability. *Id.* at. 2.

The Board had similar concerns regarding the evidence presented by Brittain. First, its Medical Examiner, whose duty is to review all medical reports submitted and to advise PERA accordingly, Minn. Stat. § 353.656, subd. 11 (2004), did not render an opinion regarding causation: only that Brittain was occupationally disabled. Record, Exhibit 18.¹⁰ Second, the records of Brittain's treating physician, Kenneth Hodges, M.D., lacked any assessment or discussion of Brittain's medical history. His report and opinion was premised principally on what Brittain told him. Although PERA's reporting form asked for details as to why Dr. Hodges believed Brittain's disability was not related to a previous illness or injury, Dr. Hodges did not respond to this question. Record, Exhibit 8. Similarly, Brockman Schumacher did not begin seeing Brittain until August, 2002. His reports did not relate anything regarding Brittain's past medical history or experiences. *See* Record, Exhibit 27. The reports merely mimic Brittain's perceptions. In response to the question asking why he did not believe Brittain's disability was the result of past illness or injury, Schumacher simply responded, "disability occurred as result of work injury." Record Exhibit 9. Third, absent from the record was a well-documented report by a certified psychiatrist that eliminated any pre-existing organic

¹⁰ The Medical Advisor, James C. Mankey, M.D., rejected the report of Brittain's psychologist, Brockman Schumacher, since prior to the amendment in 2004, psychologist reports were not considered to be allowable medical evidence under Chapter 353. *See* Act of May 29, 2004, c. 267, art. 8, sections 15 and 20, 2004 Minn. Laws 1019 and 1022.

basis for Brittain's disability.¹¹ The medical evidence in the record did not include any discussion of Brittain's overall health, background, life experiences, and other vicissitudes of life that may have contributed to his disability. The opinions he did submit provided only "snapshots" of his current situation based upon his own statements of what he was feeling and his perception of what was currently happening as a result of work relationships.

The Board reasonably expected something more by way of proof of the causation of Brittain's disability. Without such proof, the Board properly refused to base causation solely upon Brittain's perception. Underlying the PERA Board's decision was its correct belief that this perception without additional evidence did not satisfy Brittain's burden of proof

Brittain's claim that the PERA Board is making a distinction between physical and mental illnesses should be rejected. The Board's decision should be affirmed.

B. The PERA Board Correctly Found That The Legislature Did Not Intend Disability Arising From A Hostile Work Environment To Be Considered A Disability Incurred In Or Arising Out Of Any Act Of Duty.

The PERA Board determined that disability allegedly arising from a hostile work environment did not constitute disability arising as a "direct result of an injury, sickness, or other disability incurred in or arising out of any act of duty." Minn. Stat. § 353.656, subd. 1, (2004). In the Memorandum which accompanied its Order, the Board reasoned

¹¹ Such a report should be based upon a complete psychiatric examination, including consideration of Brittain's full medical and personal histories. It should contain findings regarding his predisposition for depression.

that “line-of-duty” disability should be limited to those hazardous situations envisioned by Minn. Stat. § 353.63 (2004). PERA Board Memorandum; Rel. App. 014.

The Board’s decision is consistent with the expressed policy of the legislature. The PERA Police and Fire Pension Plan was created to provide police officers and firefighters with benefits that are more generous than the benefits provided other public employees. The reason for this difference was the recognition that public safety work was “hazardous” and therefore different from other public sector work:

353.63 Policy. It is the recognized policy of the state that special consideration should be given to employees of governmental subdivisions who devote their time and skills to protecting the property and personal safety of others. **Since this work is hazardous, special provisions are hereby made for retirement pensions, disability benefits and survivors benefits based on the particular dangers inherent in these occupations.** The benefits provided in sections 353.63 to 353.68 are more costly than similar benefits for other public employees since they are computed on the basis of a shorter working lifetime taking into account experience which has been universally recognized. This extra cost should be borne by the employee and employer alike at the ratio of 40 percent employee contributions and 60 percent employer contributions.

Minn. Stat. § 353.63 (2004) (emphasis supplied).¹² Public safety personnel have substantially greater benefits than other public employees based upon and because of the “particular dangers inherent in these occupations.” *Id.*

One of the enhanced benefits is an occupational disability benefit, both for “line-of-duty” disability and for “non-duty” disability. Benefits are paid if a member is no

¹² The Policy for public safety personnel was first adopted in 1959 along with benefits for total and permanent disability in the line of duty. Act of April 24, 1959, c. 650, sec. 31-36, 1959 Minn. Laws 1056, 1059. In 1971 disability was changed from total and permanent to occupational, and bifurcated to the line-of-duty and non-duty benefits existing under current law. Act of May 14, 1971, ch. 297, sec 3, 1971 Minn. Laws 532.

longer able to perform his or her job as a police officer, firefighter or paramedic due to the disability.¹³ Accordingly, a disabled public safety employee can receive a P&F disability benefit and seek employment opportunities in other professions.

“Line-of-duty” disability is governed by Minn. Stat. § 353.656, subd. 1 (2004):

In line of duty; computation of benefits. A member of the police and fire plan who becomes disabled and physically unfit to perform duties as a police officer, firefighter, or paramedic as defined under section 353.64, subdivision 10, as a **direct result of an injury, sickness, or other disability incurred in or arising out of any act of duty**, which has or is expected to render the member physically or mentally unable to perform the duties as a police officer, firefighter, or paramedic as defined under section 353.64, subdivision 10, for a period of at least one year, shall receive disability benefits during the period of such disability. The benefits must be in an amount equal to 60 percent of the "average salary" as defined in section 353.651, subdivision 2, plus an additional percent specified in section 356.315, subdivision 6, of that average salary for each year of service in excess of 20 years. If the disability under this subdivision occurs before the member has at least five years of allowable service credit in the police and fire plan, the disability benefit must be computed on the "average salary" from which deductions were made for contribution to the police and fire fund.

(Emphasis supplied).¹⁴

¹³ In contrast, other public employees qualify for disability benefits only upon a showing of total and permanent disability, defined as the “inability to perform any substantial, gainful activity.” *Compare* Minn. Stat. §§ 353.01, subd. 19 and 353.33, subd. 1 (2004) *with* Minn. Stat. § 353.656, subs. 1 and 3 (2004).

¹⁴ Total and permanent disability benefits for most public employees are based upon a formula using actual years of service and salary levels. *See* Minn. Stat. § 353.33, subd. 3 (2004). In contrast, a “non-duty” disability benefit for public safety personnel provides a minimum benefit of 45% of average salary regardless of years of service. This is the equivalent of a normal retirement benefit based upon 15 years of service. If the member has more than 15 years of service, then each additional year raises benefits by 3%. *See* Minn. Stat. § 353.656, subd. 3 (2004). For “line-of-duty” disability, public safety personnel receive a minimum benefit equal to 60% of average salary (the equivalent to a benefit based upon 20 years of service) with an additional 3% for each year of service in (Footnote Continued on Next Page)

The PERA Board correctly found that “line of duty” benefits follow from the legislative policy to provide substantially greater benefits based upon the “particular dangers” inherent in public safety work.

Brittain claims the statute is clear and unambiguous. Rel.B. at 14. Nevertheless, he spends the majority of his argument parsing various canons of statutory interpretation and arguing that the legislature intended to enact an open-ended “line-of-duty” benefit, applicable to all work situations encountered by peace officers and fire fighters in the course of their nine-to-five duties. Rel.B. at 16. If that definition of “line-of-duty” was as evident as Brittain argues, he had no need to undertake this lengthy exercise with the canons of construction. Rel.B. at 17-18.

To the extent the Court finds the term “incurred in or arising out of any act of duty” to be ambiguous, it should defer to the Board’s interpretation since that application is consistent with legislative intent. The primary object in construing and applying the term, “incurred in or arising out of any act of duty,” is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (2004). If the term’s language presents two or more interpretations, the Court’s role is to ascertain probable legislative intent and

(Footnote Continued From Previous Page)

excess of 20 years. Minn. Stat. § 353.656, subd. 1 (2004). In addition, an automatic survivor benefit, without actuarial deduction is payable to the spouse of a disabled member who dies before reaching age 65. “Line-of-duty” disabilitants also receive employer paid health insurance until age 65. Minn. Stat. § 299A.465 (2004). At any time after age 50, it is more beneficial for public safety personnel to seek disability benefits rather than retirement benefits since disability provides an unreduced benefit as opposed to a reduced early retirement benefit and, automatic survivor coverage at no cost until age 65.

to give the statute a construction consistent with that intent. *Beck v. City of St. Paul*, 304 Minn. 438, 445, 231 N.W.2d 919, 923 (1975). In this case, there is no need to pursue extraneous evidence of legislative intent since the legislative purpose and intent in providing “line-of-duty” disability benefits is explicitly set forth, yet principally ignored by Brittain, within the four corners of the statute at issue.

Brittain argues that the language of this section should be construed as applying to any conceivable disability that arises from the workplace. He claims his “act of duty” was simply being at work:

I was required to be at work. I had a supervisor that told other deputies she was out to get me. So the fact that I had to go to work, be supervised by this supervisor, is my act of duty.

T. at 12. In effect, Brittain is claiming that the term “incurred in or arising out of any act of duty” means the same as the workers’ compensation standard, “arising out of and in the course of employment.” *See* Minn. Stat. § 176.021, subd. 1 (2004). Had the legislature intended to apply the same standard for “line-of-duty” disability decisions, it could have easily adopted that standard. The legislature did not do so, but rather chose a more limited standard and based benefits upon an “act of duty.” In applying that standard, it is perfectly reasonable for the PERA Board to limit its application to those duties or activities inherently unique to public safety duties.

Unlike workers’ compensation benefits, the legislature based “line-of-duty” disability benefits on something more than simply being at work. A “line-of-duty” injury must be caused by performance of a duty that arises from the unique nature and

requirements of public safety work. By excluding supervisor harassment from its parameters, the PERA Board is applying the term consistent with legislative intent.

Although it need have done so for purposes of this case, the Board reasoned that “line-of-duty” disability should be limited to those hazardous situations envisioned by Minn. Stat. § 353.63 (2004). Board Memorandum, Rel. App. at 014. Brittain claims that the Board has thus limited “line-of-duty” disability to those activities that can be considered “hazardous” *per se*. Rel.B. at 14-15.¹⁵ The Board’s decision in this case does not lead to, much less require, such results.

The distinction made by the Board is between acts of duty performed by the firefighter versus acts on the part of the employer which the firefighter perceives as being hostile. See Board Order and Memorandum, App. at 013-014. The PERA Board’s decision does not exclude all those acts Brittain claims it would.

The heightened dangers associated with the nature of fire fighting certainly justify higher benefits for disabilities which result from an act of duty. In this case, however, Brittain does not claim that his maladies were caused by the specific duties of his job. He claims they resulted from the acts of his supervisor. If the standard set forth in Minn.

¹⁵ The hypotheticals on page 14 of Brittain’s Brief do not so much represent “absurd results” but rather, instances when a determination of “duty-related” will be left to difficult fact-finding and application of the statute. Equally absurd would be to reward higher benefits to public safety personnel where the hazard is not restricted to only public safety work. For example, if the police station is in the same building as other city offices and a furnace malfunction results in injury to both police and civil employees, is it reasonable that police officers would receive higher benefits than the other city employees simply by being there?

Stat. § 353.656 adopted the workers' compensation standard or if it spoke only in terms of "work-related" disability, Relator's claim might have merit. The standard that must be met, however, is "incurred in or arising out of any act of duty." Minn. Stat. § 353.656, subd. 1 (2004). This standard does not extend to any activity that, in a broader sense, might be considered to be work-related.

The 'line-of-duty' standard should not be extended to cover the activities Brittain claims caused his disability. Enduring an unruly supervisor was not in Brittain's job description. "Line-of-duty" disability benefits should not substitute for alternative remedies that were available for Brittain to confront such behavior. *E.g.*, Minn. Stat. § 363A.03, subd. 13 (2002) (charge of sexual harassment); (employee grievance under the applicable collective bargaining agreement or County civil service personnel rules.). In this case, "line-of-duty" disability benefits should be awarded only for disabilities arising out of the specific duties or tasks required of him as a Deputy Sheriff.

Brittain is wrong in claiming (Rel.B. at 11) that this Court impliedly rejected the PERA Board's application of the statute in *In the Matter of Disability Benefits Application of Craig Wallin*, 199 WL 507601 (unpublished, Minn. Ct. App. July 20, 1999); copy submitted in RA7. Quite to the contrary, the *Wallin* decision supports the PERA Board's position. In *Wallin*, this Court declined to broadly interpret the line-of-duty benefit statute applicable to state correctional facility employees, Minn. Stat. § 352.95, subd.1 (1996) and found it only applied to injuries directly resulting from work. *Id.*, 1999 WL at. 2, RA7.

Wallin was a State Correctional Plan employee. He was disabled by depression and alcoholism. The Minnesota State Retirement System Board of Directors (“MSRS”) found he was eligible for disability benefits but not for “act-of-duty” disability benefits. The Court affirmed, finding that the board, “correctly interpreted the statute to limit the greater benefits to corrections employees whose disability originates from the *performance of their work.*” *Id.* The Court further found that the “direct result” clause of the statute indicated the legislature intended the statute to apply to “disabilities that originate in work performed by corrections employees.” *Id. See also Renz v. Hibbing Firemen’s Relief Ass’n*, 186 Minn. 370, 243 N.W. 713 (Minn. 1932) (statutory language “in the performance of duties as such fireman” and rule language “in service” meant the “labors, duties, and things to be done by a fireman as such”).

Wallin did not distinguish between “act-of-duty” disability and disability that might otherwise be considered “work-related.” Cases from other jurisdictions that the Court cited to and relied upon in this decision are, however, instructive. These cases do indeed make that distinction.

The *Allen* case cited in *Wallin* involved a police officer who had sustained several off-duty injuries but subsequently returned to the police force and was reassigned to the patrol division.¹⁶ He then sustained an on-duty automobile accident and was placed on performance of duty leave for two years. Although he continued to complain that he was in pain and unable to work, the examining physicians concluded he was fit for limited

¹⁶ *Allen v. District of Columbia Police & Firefighters’ Ret. & Relief Bd.*, 528 A.2d 1225 (D.C. 1987).

duty. He later developed a “depressive reaction” to his pain and physical condition. An examining psychiatrist for the Police Board recommended his approval for a disability retirement. Another Police Board psychiatrist opined that his psychological difficulties stemmed from his problems in returning to work. Following a hearing, the Board granted him a non-duty disability pension. On appeal, the court sustained the Board, holding that substantial evidence supported the determination that his “disabling depression was predominately caused by his inability to cope with the Department’s handling of his case rather than his service as such.” *Allen*, 528 A.2d at 1231.

The second case cited in *Wallin, Woldrich v. Vancouver Police Pension Board*, involved a claim to a line-of-duty psychological disability.¹⁷ The court held that the police officer “failed to meet his burden of showing that his mental disability arose as a natural consequence or incident of the distinct conditions of police work.” Instead, the court found that Woldrich’s disability was caused by his demotion, which was caused in turn by supervisors’ dissatisfaction with his job performance. *Woldrich*, 928 P.2d at 426-427. The *Woldrich* case is particularly helpful. Woldrich’s problem, like Brittain’s, grew out of employment relationships which are not unique to public safety personnel but are borne by the majority of workers. Demotion and depression can occur in most jobs, they are not unique to public safety personnel.

Finally, in a long line of cases, the Illinois courts have denied duty-related disability benefits arising out of stressful relationships with co-workers. Most recent are:

¹⁷ *Woldrich v. Vancouver Police Pension Bd.*, 84 Wash. App. 387, 928 P.2d 423, 426 (Wash. Ct. App. 1996).

White v. City of Aurora, 323 Ill. App. 3d 733, 753 N.E.2d 1244 (2001) (line of duty only if injured while performing an act involving a special risk not shared by ordinary citizens); *Trettenero v. Police Pension Fund*, 268 Ill. App. 3d 58, 643 N.E.2d 1338, (1994) (depression, anxiety and stress disorder related to relations with department supervisors and did not result from act of duty); *Olson v. City of Wheaton Police Pension Bd.*, 153 Ill. App. 3d 595, 505 N.E.2d 1387 (1987) (migraine headaches and stress from differences with superiors' management style are not the result of an act of duty entitling member to line-of-duty disability pension); *Graves v. Pontiac Firefighters' Pension Bd.*, 281 Ill. App. 3d 667, 667 N.E.2d 136 (1996) (job stress due to inability to perform certain duties, i.e., emergency medical, not duty related); *Robbins v. Bd. of Trustees of Carbondale Police Pension Fund*, 177 Ill. 2d 533 687 N.E.2d 39, 44 (1997) (police officer's stress based claim must result from a "specific, identifiable act of duty unique to police work" in order to be line-of-duty disability; psychological stress disability not related to duties if based on anxiety over job performance).¹⁸

¹⁸ See also *Bray v. Klein*, 697 S.W.2d 266 (Mo. App. E.D. 1985) (disability was not work related and not related to a traumatic injury to his hand but resulted from a "long-present condition of psychological abnormality" which affected his assessment of his physical condition and his ability to perform duties); *Cheslock v. Bd. of Admin., City of Memphis Retirement System*, 2001 WL 1078263 (Tenn. Ct. App. Sept. 13, 2001) (stress and strains of ordinary life or undesirable experiences in carrying out the terms of employment are not an injury for purposes of a line-of-duty disability.); "Determination Whether Peace Officer's Disability Is Service-Connected For Disability Pension Purposes: Psychiatric or psychological disorder-allegedly incurred in performance of duty," 12 ALR 4th 1158, 1185 (1982).

Limiting “line-of-duty” benefits to specific acts of duty is consistent with the *Wallin* court’s refusal to give the term a broad interpretation. It is consistent with the decisions of other jurisdictions, particularly those relied upon in *Wallin*. It is consistent with the public purpose of providing higher benefits to an employee injured while performing duties required by a distinctively hazardous occupation. The statute should not be construed to provide benefits not intended by the legislature. *Axelson v. Mpls. Teachers Ret. Fund Ass’n*, 554 N.W.2d 297, 301 (Minn. 1996).

Brittain’s disability was not caused by an act of duty, but rather by the acts of his supervisor. He should continue to receive only those disability benefits afforded under the broader standards of Minn. Stat. § 353. 656, subd. 3 (2004).

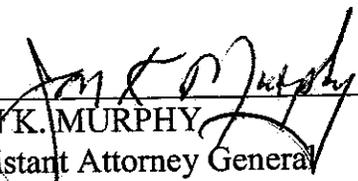
CONCLUSION

The Court should affirm the PERA Board's decision finding that Brittain is not entitled to "line-of-duty" disability benefits.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).