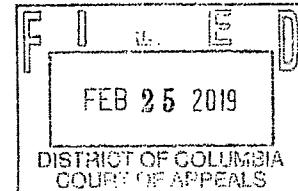


**District of Columbia
Court of Appeals**



No. 15-AA-597

NICOLE R. MCCREA,

Petitioner,

v.

FD2038-14

POLICE & FIREFIGHTERS'
RETIREMENT AND RELIEF BOARD,

Respondent.

BEFORE: Blackburne-Rigsby,* Chief Judge; Glickman, Fisher, Thompson,
Beckwith, Easterly, and McLeese,* Associate Judges, and Nebeker,*
Senior Judge.

O R D E R

On consideration of petitioner's petition for rehearing or rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*. It is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copy to:

Nicole R. McCrea
5205 East Capitol Street, SE
Washington, DC 20019

Copy e-served to:

Loren L. AliKhan, Attorney
Solicitor General for DC

bep

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-597

1/3/2019
FILED

District of Columbia
Court of Appeals

Julio Castillo
Julio Castillo
Clerk of Court

NICOLE R. McCREA, PETITIONER,

v.

DISTRICT OF COLUMBIA POLICE AND
FIREFIGHTERS' RETIREMENT AND RELIEF BOARD, RESPONDENT.

Petition for Review of an Order of the
District of Columbia Police and
Firefighters' Retirement and Relief Board
(FD-2038-14)

(Submitted September 28, 2017)

Decided January 3, 2019)

Nicole R. McCrea, pro se.

Karl A. Racine, Attorney General for the District of Columbia, *Todd S. Kim*, Solicitor General at the time the brief was filed, *Loren L. AliKhan*, Deputy Solicitor General at the time the brief was filed, and *James C. McKay, Jr.*, Senior Assistant Attorney General, were on the brief, for respondent.

Before BLACKBURNE-RIGSBY, *Chief Judge*, MCLEESE, *Associate Judge*, and NEBEKER, *Senior Judge*.

Opinion for the court by *Chief Judge* BLACKBURNE-RIGSBY.

Dissenting opinion by *Senior Judge* NEBEKER, at page 18.

BLACKBURNE-RIGSBY, *Chief Judge*: *Pro se* petitioner Nicole R. McCrea, a fifteen-year veteran of the District of Columbia Fire and Emergency Medical

Services Department ("Department"), was involuntarily retired on April 30, 2015, by respondent District of Columbia Police and Firefighters' Retirement and Relief Board ("Board") upon its determination that she was mentally disabled and incapacitated due to a diagnosis of Adjustment Disorder with Anxiety and Depression ("ADAD"). The Board concluded that her disability was not incurred in the "performance of duty" ("POD") and was therefore compensable under the provision of the statute governing retirement disability for injuries not incurred in the POD, instead of the provision for disabilities incurred during the POD, which provides benefits at a higher annuity rate.

Ms. McCrea challenges her involuntary retirement on the grounds that the Board's conclusion "lacks competent, objective, probative and reliable evidence." In the alternative, she seeks a reversal of the Board's determination that her disability was not incurred in the POD, claiming that she is entitled to receive retirement benefits at the POD annuity rate. Ms. McCrea claims that her ADAD condition stems from a sexual assault by her co-workers while she was on duty, which she contends constitutes a disability incurred in the POD.

We affirm and conclude that substantial evidence in the record supports the Board's decision to involuntarily retire Ms. McCrea for a disability not incurred in

the POD. The alleged incident of sexual assault on Ms. McCrea cannot form the basis of relief pursuant to D.C. Code § 5-710 (a) (2012 Repl.), which dictates relief for a disability incurred in the POD. Our conclusion is controlled by our decisions in *In re Underwood v. National Credit Union Administration*, 665 A.2d 621 (D.C. 1995), and *Nunnally v. District of Columbia Police & Firefighters' Retirement & Relief Board*, 184 A.3d 855 (D.C. 2018), wherein we held that mental and emotional injuries resulting from sexual harassment in the workplace could not be classified as "injuries" arising out of employment, since sexual harassment does not concern any task the employee was called upon to perform. *Underwood, supra*, 665 A.2d at 632-33. We hold that, likewise, mental and emotional injuries resulting from sexual assault in the workplace are not compensable as injuries incurred in the POD.

I. Factual and Procedural Background

Ms. McCrea began working as a firefighter with the Department on January 3, 2000. Her claim arose from an incident that she contends occurred at around midnight on the evening of May 30, 2013. She asserts that she was sleeping on her stomach at the firehouse, when three male co-workers "fondl[ed] [her] between [her] legs." Following the May 30th incident, Ms. McCrea contends that she

experienced “difficulty concentrating, difficulty falling asleep and/or staying asleep, headaches, loss of appetite, nausea, upset stomach and diarrhea.” On June 25, 2013, Ms. McCrea reported the incident to the District of Columbia Police and Fire Clinic (“Clinic”) and requested that her ensuing mental health injury be classified as a POD injury. After filling out the Clinic’s incident report, Ms. McCrea was referred to the Clinic’s Behavioral Health Services section where she was interviewed by a psychologist, Mary Kenel, Ph.D., who evaluated her and placed her on sick leave on June 25, 2013. Ms. McCrea remained on sick leave until the Board made its decision to retire her on April 30, 2015, which became effective on May 15, 2015.

In March 2014, the Clinic referred Ms. McCrea to clinical psychologist and neuropsychologist, Dr. Gloria Morote, who specializes in psychological evaluations. Dr. Morote recommended Ms. McCrea for disability retirement. D.C. Code § 5-633 (2012 Repl.) mandates that uniformed employees who have been on leave for a significant period of time due to injury or illness be recommended for disability retirement. Dr. Morote based her recommendation on the fact that Ms. McCrea had been on sick leave for an extended period of time and her diagnosis of an anxiety disorder, which affected her “ability to . . . express her feelings, work under stress, make judgments, and deal with people in general,” and prevented her

from performing her duties as a firefighter. The Board subsequently held a three-day retirement hearing on November 6, 2014, and January 22 and February 12, 2015.

At the hearing, Ms. McCrea appeared *pro se* and testified that she did not wish to be retired. She urged the Board to adopt the conclusions of her treating psychologist, Dr. Beverli Mormile, that Ms. McCrea suffered from Post-Traumatic Stress Disorder (“PTSD”), was fit to return to work on a limited-duty status, and should be reinstated. The Board determined that Ms. McCrea suffered from an ADAD, “which prevents her from performing useful and efficient service with her Department,” and did not find the record evidence sufficient to support the finding that she suffered from PTSD. The Board subsequently retired Ms. McCrea “by reason of a disability not incurred in the performance of duty.” The Board based its decision on Ms. McCrea’s demeanor during the three days of hearings, where she was “visibly and extremely mistrustful and paranoid;” her refusal to comply with the Clinic’s requests for treatment information from her treating psychologist; her failure to submit any documentation, including diagnostic test results or clinical notes that would support Dr. Mormile’s diagnosis and treatment recommendations; and the record evidence as a whole. The Board weighed this evidence against the Department’s evidence, which included testimony, reports,

standardized tests, and the diagnosis of the Clinic's psychologist, Dr. Morote, and found that the Board's interaction with Ms. McCrea "strongly supports Dr. Morote's opinion that [Ms. McCrea]'s paranoia and distrust is so pervasive that it would prevent [her] from performing the full duties of a firefighter because she could no longer work effectively with a team." Further, the Board concluded, Ms. McCrea's inability to work as a team, which is central to the functions of a firefighter, is evidence that she is unable to perform the functions of a firefighter safely in life-or-death situations and she poses a risk to herself and to the public.

The Board was unable to assign Dr. Mormile's conclusion and recommendation much weight because Dr. Mormile did not submit any corroborative evidence like testing reports or clinical notes. Further, Dr. Mormile's recommendation was contradictory as she stated that Ms. McCrea could return to full duty and then listed "a number of limitations which prevented less-than-full duty status."

II. Analysis

To be considered a member of the Department performing the member's "full range of duties," the member must have the "ability" "to perform *all of the*

essential functions of police work or fire suppression as determined by the established policies and procedures of the Metropolitan Police Department or the Fire and Emergency Medical Services Department.” D.C. Code § 5-701 (19) (2012 Repl.) (emphasis added). According to the District of Columbia Fire and Emergency Medical Service Useful and Efficient Service Statement, to be considered a full duty uniformed member, a firefighter must be able to perform an extensive list of “essential duty functions.” “While not exclusive,” the list includes:

Perform firefighting tasks . . . , rescue operations, and other emergency response actions under stressful conditions . . . for prolonged time periods . . .

Perform in unpredictable emergency requirements for prolonged periods . . .

Critical, time-sensitive, complex problem solving during physical exertion in stressful, hazardous environments

....

Ability to communicate (give and comprehend verbal orders) . . .

Functioning as an integral component of a team, where sudden incapacitation of a member can result in mission failure or in risk of injury or death to civilians or other team members.

(emphasis added).

A. Substantial evidence supports the Board's determination that Ms. McCrea is disabled from useful and efficient service as a firefighter.

Under the Police and Firefighters' Retirement and Disability Act ("PFRDA"), D.C. Code §§ 5-701 to -724 (2017 Supp.), "[t]he terms 'disabled' and 'disability' mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or injury, not due to . . . willful misconduct on his part." § 5-701 (2).

In its analysis, the Board made the following findings. Dr. Morote opined that Ms. McCrea suffers from ADAD, which makes her paranoid and mistrustful; as a result, her symptoms are so pervasive that they would prevent her "from performing the full duties of a firefighter because she could no longer work effectively with a team" and "follow orders." In accepting Dr. Morote's opinion, the Board opined that this point is evidenced by Ms. McCrea's inability to meet the "essential duty functions" of a firefighter—namely, to "communicate (give and comprehend verbal orders)" with her co-workers and working "as an integral component of a team, where sudden incapacitation of a member can result in mission failure or in risk of injury or death to civilians or other team members." The Board credited Dr. Morote's opinion and concluded that a member who is

unable to complete the “essential duty functions” of her job is not a member performing her “full range of duties” pursuant to the PFRDA, § 5-701 (19), and is considered “disabled for useful and efficient service” in that member’s capacity. § 5-701 (2).

Dr. Mormile did not testify but the Board relied on three of Dr. Mormile’s treatment updates. In August 2014, Dr. Mormile noted that “Ms. McCrea continues to experience severe psychological symptoms that impede her ability to complete many of her job duties.” She recommended Ms. McCrea could “return to work in a restricted capacity” and then “some time” thereafter, “be able to return to full duty.” In September 2014, Dr. Mormile noted that Ms. McCrea “still experiences a significant level of distress” but that nonetheless, Dr. Mormile “recommended that Ms. McCrea be allowed to return to work” that month, on a limited duty basis initially, and then within 120 days, be returned to full duty status. In her third and final treatment update dated January 2015, Dr. Mormile recommended that Ms. McCrea be returned to full duty status “as soon as possible,” beginning with a part-time work schedule and “Gradual Exposure Therapy”—“sleeping in a secured area; limited/gradual exposure to male co[-]workers in the firehouse where the alleged assault occurred.”

While the Board acknowledged Dr. Mormile's assessments and recommendation, it noted that Dr. Mormile's assessment that Ms. McCrea could return to duty, with various limitations including to limit Ms. McCrea's anxiety, stress, and interactions with her co-workers, is incompatible with the essential duties of a firefighter who must work safely and effectively with a team. We conclude the Board did not err in concluding that the work limitations recommended by Dr. Mormile contradict her overall recommendation that Ms. McCrea be returned to full duty status. The Board did not err in crediting Dr. Morote's assessment over that of Dr. Mormile.

B. The Board did not err in classifying Ms. McCrea's mental illness as non-POD.

The PFRDA, which is recognized as the workers' compensation plan for uniformed members of the District, provides compensation for disabling injuries.¹ *O'Rourke v. District of Columbia Police & Firefighters' Ret. & Relief Bd.*, 46 A.3d 378, 389 (D.C. 2012). In doing so, PFRDA precludes other civil remedies that may otherwise be available, such as remedies resulting from suits for common law

¹ Although the language regarding coverage of injuries in the PFRDA and the Workers' Compensation Act differs, the two are "conceptually close" and have been construed as the same standard. *Nunnally, supra*, 184 A.3d at 862 (citation omitted).

torts. *Nunnally, supra*, 184 A.3d at 859. “This reflects the public policy trade-off implicit in workers’ compensation statutes”—“swift and certain compensation” for the loss of one’s “right to sue in court.” *Id.* (citation and quotation marks omitted).

The PFRDA defines a compensable injury as a disabling injury incurred “in the performance of duty.” § 5-710 (a). We have previously held that mental illness claims that are the result of workplace sexual harassment are “unrelated to any work task,” and cannot be an injury “arising out of . . . employment” and therefore are not compensable as injuries incurred in the POD. *See Underwood, supra*, 665 A.2d at 634, 637. “[S]exual harassment is not ‘a risk involved in or incidental to’ employment,” is “altogether unrelated to any work task,” and therefore cannot statutorily be an injury “arising out of” employment. *Id.* at 634 (citation omitted).

In our recent decision *Nunnally*, we agreed with the Board that *Underwood* was controlling in Lt. Nunnally’s case for the same “significant policy consideration[s]” discussed in *Underwood*.² *Nunnally, supra*, 184 A.3d at 859

² In *Nunnally*, Lt. Nunnally of the Metropolitan Police Department filed an internal complaint against her supervisor for sexual harassment. *Nunnally, supra*, 184 A.3d at 857. After an investigation, MPD fired the supervisor. *Id.* Three years later, Lt. Nunnally reported to the Clinic that she had suffered several years (continued . . .)

(quoting *Underwood, supra*, 665 A.2d at 637). The PFRDA provides an exclusive remedy for injuries within the employer's scope, and therefore preempts claims based on the same alleged injuries. *Id.* at 861. The concern of this court has been the ability of sexual harassment "victims to obtain full and appropriate relief, particularly under tort theories—assault, infliction of emotional distress, defamation, battery, invasion of privacy, and the tort of 'outrage' among others—that typically accompany a plaintiff's" sexual assault claim. *Id.* at 860. We have explained that if a uniformed member victim of sexual harassment was to be compensated under § 5-710 for injuries incurred in the POD, then the victim "would be forced to," *id.* at 861 (citing *Underwood, supra*, 665 A.2d at 637-38), settle for a wholly administrative remedy for a personal injury, which is not aligned with "the kind of injury involved," *Underwood, supra*, 665 A.2d at 630, 637-38. In *Nunnally*, we held that workers' compensation for injuries from workplace sexual harassment "would frustrate implementation of the Human

(...continued)

of workplace abuse and stress related to the sexual harassment and to retaliation for reporting it. *Id.* The Clinic recommended, and the Board accepted the Clinic's recommendation, that Lt. Nunnally be retired as disabled, as Lt. Nunnally was incapacitated from further duty. *Id.* The Board reasoned that, even viewing Lt. Nunnally's allegations in the light most favorable to her, it was foreclosed by *Underwood, supra*, 665 A.2d 621, from classifying Lt. Nunnally's injuries as incurred in the POD. *Nunnally, supra*, 184 A.3d at 858. We ultimately agreed with the Board that *Underwood* is controlling in Lt. Nunnally's case and discussed the public policy implications behind declining to compensate an emotional or mental injury as a result of workplace sexual harassment. *Id.* at 857.

Rights Act, the local human rights law,” and would preclude sexual harassment victims from obtaining full and appropriate relief, particularly under tort theories. *Nunnally, supra*, 184 A.3d at 860 (citation and internal quotation marks omitted). Compensating a uniformed member victim, like Lt. Nunnally, under the PFRDA would not only frustrate implementation of other forms of relief but would not allow for just compensation to a victim due to the “severe cap on allowable recovery” and preclude further recovery, “even for punitive damages.” *Underwood, supra*, 665 A.2d at 637-38. For the same reasons, Ms. McCrea’s injury is not compensable as an injury incurred in the POD.

Further, the Board possesses expertise on a set of “usual impairments that lead to” disability retirement that are typically based on physical injuries incurred in the line of duty. *Id.* at 637. That is not to say the Board does not also address claims attributable to mental illness,³ but claims attributable to mental illness are not typically based on sexual harassment, but rather, may be based on PTSD or depression claims following trauma in the line of duty—e.g., the attacks on September 11, 2001. Regardless, there is no justification for limiting disability

³ See e.g., *Pierce v. District of Columbia Police & Firefighters' Ret. & Relief Bd.*, 882 A.2d 199, 201-02 (D.C. 2005) (discussing a police officer's disability retirement based on a diagnosis of major depressive disorder).

claims for sexual harassment to the Board when other like claims “can proceed directly to court, and when [the Board] cannot offer special expertise making it a more suitable forum.” *Id.*

Sexual assault by a co-worker, like sexual harassment, where it occurs on the job, has nothing to do with “and cannot be justified by reference to, any task an employee is called upon to perform, even if the persons involved work together and have a supervisor-supervisee relationship.” *Id.* at 634. Mental illness resulting from an alleged incident of workplace sexual assault by co-workers cannot be classified as an injury that arose from employment because it is not related to any foreseeable task that an employee is called up to perform.⁴ *See id.* The concern that we had in *Nunnally* regarding a victim’s ability to obtain the appropriate relief also applies in the context of sexual assault. Therefore, compensating a uniformed member victim of sexual assault by classifying his or her injury as an injury incurred in the POD and awarding disability compensation in lieu of typical

⁴ Our analysis is premised on the factual context of workplace sexual assault, wherein a member is assaulted by a co-worker, a supervisor, or another individual employed by the Department that may interact with the member on a professional basis. Our holding does not extend to incidents of sexual assault perpetrated during the course of employment as a member of the Department by any individual not employed by the Department, or for example, during the course of an emergency response mission.

remedies obtained following tort claims for the same or similar conduct would be forcing the member to settle for a remedy that was not intended to compensate the type of injury incurred. *See Nunnally, supra*, 184 A.3d at 861 (citing *Underwood, supra*, 665 A.2d at 637-38). Although the Board is well-equipped to assess more common impairments that lead to disability based on injuries in the line of duty, it does not possess the expertise to address claims of mental illness that result from an incident outside of the member's essential duty functions.⁵ *See Underwood, supra*, 665 A.2d at 637.

We conclude that sexual assault by a co-worker is analogous to sexual harassment for the reasons set forth in *Nunnally*. We hold that the rationales set forth in *Nunnally* and *Underwood* extend to claims of workplace sexual assault.⁶

⁵ See, e.g., *Newell-Brinkley v. Walton*, 84 A.3d 53, 57-59 (D.C. 2014) (discussing a police officer's disability retirement based on high blood pressure and an on-the-job back injury); *Sandula v. District of Columbia Police & Firefighters' Ret. & Relief Bd.*, 979 A.2d 32, 33 (D.C. 2009) (determining a police officer's disability retirement based on an asthma diagnosis); *Bausch v. District of Columbia Police & Firefighters' Ret. & Relief Bd.*, 926 A.2d 125, 126-27 (D.C. 2007) (deciding a firefighter's disability retirement for back and knee injuries).

⁶ To the extent our dissenting colleague finds the sexual harassment that occurred in *Nunnally* distinguishable from the sexual assault that allegedly occurred in this case because of the severity and seemingly criminal nature of the act in this case, we respectfully disagree. Sexual harassment can take various forms, many of which may be criminally punishable. There are several examples of behaviors that "could lead to unlawful sexual harassment if found to be (continued . . .)

Therefore, mental illness claims that are the result of workplace sexual assault are not compensable under the PFRDA as injuries incurred in the POD.

III. Conclusion

Substantial evidence in the record supports the Board's conclusion that Ms. McCrea's mental illness, which was the result of an alleged sexual assault, prevents her from performing the essential tasks of a firefighter. Therefore, she is disabled within the meaning of the statute. The Board did not err in determining that Ms. McCrea's injury was not incurred in the POD.

Contrary to our dissenting colleague's position, declining to classify Ms. McCrea's injury as POD, is not a "punish[ment]" but rather, an opportunity for her

(...continued)

pervasive," including "[a]sking repeatedly for a date" or "[w]riting unwanted letters or poems," which may constitute stalking; "[o]ffering threats if sexual favors are not provided," which may constitute threatening; and "[g]rabbing, kissing, or fondling in a forcible manner; and/or [i]nitiating sexual assault and rape," which may constitute sexual assault and/or rape. ROBERT J. NOBILE, GUIDE TO EMPLOYEE HANDBOOKS § 5:20 (2018). The Equal Employment Opportunity Commission has also defined harassment as "[o]ffensive conduct" including "physical assaults" and "[t]he harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee." U.S. EQUAL EMP'T OPPORTUNITY COMM'N, HARASSMENT, available at <https://www.eeoc.gov/laws/types/harassment.cfm>.

to seek a more appropriate remedy for her injuries. Ms. McCrea can bring a suit for her injuries under common law tort theories or any other remedy that she may be entitled to. Moreover, the record reflects complaints by Ms. McCrea "that she had been subject to racial and sexual harassment at the Department in the past." Classifying Ms. McCrea's mental illness as an injury not incurred in the POD will also allow her to pursue relief for her discrimination and harassment claims with the appropriate agencies including the D.C. Office of Human Rights and the Equal Employment Opportunity Commission. *See Nunnally, supra*, 184 A.3d at 860-61; *Underwood, supra*, 665 A.2d at 637.

Affirmed.

NEBEKER, *Senior Judge*, dissenting: I am unable to convince my colleagues that the precedents they rely on should not apply to the facts of this case because the assault on petitioner, a criminal offence, is vastly different from what is known as sexual harassment. That difference also lies not only in that, but that she is punished by a reduction in an annuity for the rest of her life, as distinguished from workman's compensation in lieu of a common law remedy.

"For private sector workers, injuries from sexual harassment are not compensable in workers' compensation and the courts remain open to common law claims, *Underwood*, 665 A.2d at 638, and a similar rule applies for most public sector workers, *King*, 640 A.2d at 664. Only police officers and firefighters alleging sexual harassment would be relegated to the exclusive and limited remedies of workers' compensation. In the absence of any legislative intent or apparent rationale supporting this distinction, our decision in *Underwood* precludes us from causing this arbitrary and anomalous result. We therefore hold that injuries from sexual harassment are not injuries incurred 'in the performance of duty' under D.C. Code §§ 5-709 (b) and -710 (e)." *Nunnally*, 184 A.3d at 863.

Although the majority has some concerns about police officers and firefighters being treated differently, we also should recognize that the PFDRA

serves as the worker's compensation plan for the District's police officers and firefighters. In light of their differing work environment and experiences, could we not make the argument that a different scheme would be appropriate? Many other jobs do not demand the close quarters and long hours where one is expected to eat and sleep on the job on a regular basis.

While the majority expresses concern that McCrea would be forced to settle for compensation that inadequately addresses her injury, why is the court complacent with McCrea receiving a reduction in an annuity for the remainder of her life because of its characterization of her injury?

Additionally, I continue to struggle with the majority's comparison of sexual harassment and sexual assault. While both types of behavior cause harm to the victim, I believe the resulting trauma can be very different. In looking at the D.C. Human Rights Law, Council's intent is specified as follows, "It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities,

matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.” (D.C. Code § 2-1401.01). While the Human Rights Law may be equipped to handle sexual harassment that occurs in the workplace, a sexual assault committed in the workplace while an employee is in performance of her duties seems altogether different.

What if we alter the facts slightly: What if McCrea was stabbed with a knife instead of being sexually assaulted. This stabbing would constitute assault with the intent to kill. Where would we require her to seek her relief? I am not saying that a stabbing is related to any work task, but I question what remedy would be available to her in light of this holding.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

★ ★ ★

[REDACTED]

**BEFORE
THE POLICE AND FIREFIGHTERS' RETIREMENT
AND RELIEF BOARD**

In the Matter of:

Nicole McCrea, Firefighter

**D.C. Fire and Emergency Medical
Services Department
Case No.: FD14-2038
Disability Retirement**

ORDER

The Police and Firefighters' Retirement and Relief Board has determined that Nicole McCrea, Member, who was appointed to the District of Columbia Fire and Emergency Medical Services Department on January 3, 2000, is incapacitated from further duty by reason of a disability not incurred in the performance of duty after more than five years of creditable service. It is therefore

ORDERED: The Member shall be retired on a percentage of disability, pursuant to D.C. Code §§ 5-709(b) and 5-710 (e)(2)(A-D) (2012 Repl.), in the amount of 54% of 70% of the Member's basic salary, or 30% of her basic salary, whichever is higher, effective close of business **May 15, 2015**, pursuant to the provisions of the Police and Firefighters' Retirement and Disability Act, as amended by Public Law 96-122. The amount of the disability retirement annuity shall be determined by the District of Columbia Retirement Board (DCRB) upon receipt of this Order based on the Member's certified individual retirement record and related information.¹

ORDERED: The Member shall appear before the Police and Fire Clinic (PFC) for an annual medical and/or psychological examination beginning the calendar year 2016 and every year thereafter, during the month of her date of birth, until such time as the Member has reached the age of 50, pursuant to D.C. Code § 5-721 (2012 Repl.). The Member shall contact the Clinic at least 30 days prior to the month of her date of birth to schedule an appointment for such annual examination.

¹ Any dispute in the amount of the Member's disability retirement is reviewed by DCRB pursuant to D.C. Code §1-751 (2012 Repl.).

ORDERED: The Member shall file a notarized Annual Earned Income Report with the District of Columbia Retirement Board ("DCRB") beginning for calendar year 2016 in 2017, and every year thereafter until the date of her 50th birthday, pursuant to D.C. Code § 5-714 (2012 Repl.), to determine the Member's continued eligibility for the disability retirement annuity. The notarized report shall be documented on the forms provided, or in a format suggested by DCRB, and must be filed by May 15th whether or not the Member earns any earned income. Finally, the Member may be required to submit additional notarized statements and information as required by DCRB.

This Order serves as notification to the Member regarding the current requirements as stated above. The Member is cautioned, however, that these requirements are subject to change.

By **ORDER** of the Police and Firefighters' Retirement and Relief Board.

Dated: 4/30/15
AGC/jg



Andrea G. Comentale, Acting Chairperson

CERTIFICATE OF SERVICE

I, Alicia D. Cooper, hereby certify that on April 30, 2015, I sent a copy of the foregoing Order to each of the individuals listed below at the email addresses provided with the exception of the copy sent to Nicole McCrea, which was sent by first class mail, postage prepaid, at the address listed below. I also sent a copy of the decision to William Sarvis, Jr. and Nicole McCrea, by first class mail, postage prepaid, at the addresses listed below.

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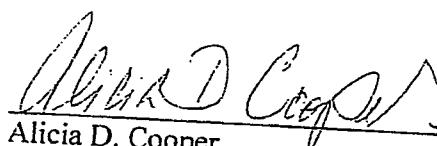
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D.C. Department of Human Resources

GOVERNMENT OF THE DISTRICT OF COLUMBIA



**BEFORE
THE POLICE AND FIREFIGHTERS' RETIREMENT
AND RELIEF BOARD**

In the Matter of:

Nicole McCrea, Firefighter

**D.C. Fire and Emergency Medical
Services Department
Case No.: FD14-2038
Disability Retirement**

DECISION¹

**Andrea G. Comentale, Esq., Acting Chairperson
D.C. Office of the Attorney General**

**Aubrey Mongal, Captain
D.C. Metropolitan Police Department**

**Mark Wynn, Deputy Chief
D. C. Fire and Emergency Medical Services Department**

**Charles Epps, M.D.
Public Member**

**Henry Wyatt, M.D.
Public Member**

¹ Pursuant to D.C. Code §5-721(a)(2012 Repl.), the District of Columbia Retirement Board completed its review on April 29, 2015.

INTRODUCTION

The proceedings in this case took place on November 6, 2014, January 22, 2015, and February 12, 2015, before the Police and Firefighters' Retirement and Relief Board regarding Nicole McCrea, Member,² who was appointed to the District of Columbia Fire and Emergency Medical Services Department ("Department") on January 3, 2000.³ The hearing was initiated by the Police and Fire Clinic ("PFC")⁴, which on May 1, 2014, recommended that the Member be considered for disability retirement having concluded that she was permanently disabled based on a diagnosis of Unspecified Anxiety Disorder (DSM-V 300.00). At the hearing, witnesses testified under oath. The Member, who appeared *pro se*, had the opportunity to, and did in fact, present testimonial and documentary evidence as well as argument. The record was entered into evidence and the record was closed at the end of the February 12, 2015, hearing.

ISSUES

1. Is the Member disabled from performing useful and efficient service?
2. Was the Member's disability incurred in the performance of duty?
3. Has the Member completed five years of creditable service with the Department?
4. What is the Member's percentage of disability, and what jobs, if any, can the Member perform?

SUMMARY OF EVIDENCE

The Member was appointed to the Department on January 3, 2000. At the time, her case was referred to the Board for disability retirement consideration, the Member was a Firefighter Grade 01, Step 09, with an annual base salary of \$65,568.00.⁵ (R. at 2).⁶

On June 25, 2013, the Member reported to the PFC and informed Taunya Brownlee, M.D., that she suffered a "specific event" which she said occurred at her firehouse on May 30, 2013. Dr. Brownlee noted that the Member did not elaborate, but she told Dr. Brownlee that since the incident she had been suffering headaches, diarrhea

² Member's social security number is xxx-xx-7176.

³ This information was obtained from FEMSD's creditable service verification form.

⁴ The PFC is the entity authorized by the City Council of the District of Columbia to treat work-related injuries and make fitness-for-duty assessments for Metropolitan Police Department Officers, D. C. Fire and Emergency Medical Services Firefighters and Paramedics, United States Secret Service Agents and uniformed White House Police Officers, and for United States Park Police Officers.

⁵ Board staff members reviewed the Member's salary in the District's PeopleSoft computer system and found it increased to \$75,962, effective October 5, 2014.

⁶ The documentary evidence is contained in the Official Hearing Record, which is cited as "R." followed by the page number.

and an upset stomach. (R. at 580). While at the PFC, the Member prepared a Department FD-44 Report of Illness or Injury to Uniform Member reporting an illness due to "chronic symptoms of mental [and] physical stress due to hostile attack while on duty [on] [May 30, 2013]." (R. at 578-579).

Dr. Brownlee referred the Member to the PFC's Behavioral Health Services section ("BHS"), where she was interviewed by Mary Kenel, Ph.D., a licensed psychologist. Dr. Kenel noted that the Member told her that she was touched inappropriately while sleeping at her firehouse. The Member told Dr. Kenel that she had been subject to racial and sexual harassment at the Department in the past and was discriminated against due to her educational accomplishments. She noted that she did not have a high level of trust in the Department as she felt that there were past "cover-ups" at her expense and others were taking pleasure in her distress. She told Dr. Kenel that she was told not to discuss the incident, but both the D.C. Metropolitan Police Department ("MPD") and the Department's Equal Employment Opportunity officer, Joshua Henline, were investigating the matter. (R. at 71-72).

Dr. Kenel further noted that the Member was tearful throughout the interview, her behavior and affect were "inappropriate" and she was "very, very angry," depressed, and frustrated. At the end of the session, Dr. Kenel diagnosed the Member with Adjustment Disorder with Mixed Anxiety and Depressed Mood. Dr. Kenel then placed her on sick leave. *Id.*

On July 9, 2013, the Member again met with Dr. Kenel. She told Dr. Kenel that the incident was consuming her thoughts and she did not have confidence in her supervisors. She told Dr. Kenel that she felt everything would be pushed under the rug and she wanted the Department to start an investigation immediately. She felt that the incident was done to humiliate her. (R. at 69).

On July 16, 2013, Battalion Fire Chief Michael Donlon informed Dr. Kenel that the Member had called and complained that she felt worse after her previous session with Dr. Kenel. She did not state what had upset her but she told Chief Donlon that she "did not wish to injure [her]self by working with Dr. Kenel." After meeting with the Member again on July 17, 2013, the PFC agreed to have the Member meet with a different BHS psychologist, Raquel Gordon, Ph.D. (R. at 68).

On August 6, 2013, the Member addressed a memorandum to Assistant Fire Chief Larry Jackson. In that memorandum she wrote that her request to classify her medical leave as performance of duty was verbally denied. In addition, she denied receiving anything in writing from the Department to justify its decision or any documentation on how to appeal this ruling. (R. at 204).

On September 9, 2013, Mr. Henline sent a letter to the Member informing her that the MPD had suspended its investigation due to her lack of cooperation. Mr. Henline further wrote that he also made several attempts to contact her; however, she failed to respond. (R. at 505).

On January 16, 2014, Medical Compensation Specialist Frieda Cardwell reviewed the Member's appeal of the classification of her injury and denied her request. Ms. Cardwell found that the Member had not provided any evidence to establish a *prima facie* case that her injury or illness was incurred in the performance of duty. (R. at 216-220).

On May 1, 2014, Gloria Morote, Ph.D., a psychologist consultant with the PFC, recommended the Member to the Board for disability retirement with a diagnosis of Adjustment Disorder with Anxiety and Depression. (R. at 2- 9). Dr. Morote noted that the Member has been on sick leave since June 25, 2013, and had a past medical history of "adjustment Disorder with Anxiety and Depression." (R. at 5). Dr. Morote administered several standardized tests to the Member to assess whether she was suffering from any emotional or personality disorders. Those tests included the Personality Assessment Inventory; the Minnesota Multiphasic Personality Inventory -2 Restructured Form; the Beck Depression Inventory - II, the Beck Hopelessness Scale; and the Beck Anxiety Scale. (R. at 7).

Based on her testing, Dr. Morote diagnosed the Member with "Unspecified Anxiety Disorder" as defined by the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM-V"). Dr. Morote noted that her testing revealed evidence of anxiety, depression, hypervigilance, mistrust, and social and emotional withdrawal at clinically severe levels. She opined that the Member's illness prevents her from performing the full duties of a firefighter albeit the illness is not related to the performance of her duties. (R. at 8).

Based on her test results, Dr. Morote prepared temperament codes in which she expressed "significant concerns" regarding the Member's ability to influence people, express her feelings, work under stress, make judgments, and deal with people in general. (R. at 11).

On May 8, 2014, the Member was interviewed by rehabilitation experts at Rehabilitation Perspectives, Inc., ("RPI") with the goal of identifying skills the Member possessed which would be transferrable to employment if she was retired from the Department. The Member informed RPI that she has a high school diploma, a Bachelor of Science in Chemistry and Master of Science in Biotechnology. She is also working on a Master's Degree in Biomedical Engineering. The Member also informed RPI that she is generally proficient in the use of computers, Microsoft Windows and Microsoft Office applications. (R. at 15).

The Member also told RPI that prior to employment with the Department, she was a researcher at the National Eye Institute (a part of the National Institutes of Health) from 1991 to 1993. She also worked at a copy center, trained as a Firefighter I and II, and has been an EMT⁷-B for 13 years. *Id.*

⁷ EMT-B is the abbreviation for emergency medical technician – basic.

On May 19, 2014, based on the Temperament Codes prepared by Dr. Morote, and the interview it conducted with the Member, RPI prepared a Labor Market Survey ("LMS") listing five positions in the D.C. Metropolitan Area which it determined she has the skills and psychological temperament to perform. (R. at 18-20). Those positions are as follows:

1. Administrative Assistant II, a sedentary level, full-time position with an average annual salary of \$35,713.00. The incumbent provides general administrative support for the staff, including data entry, scheduling, front office management, records maintenance, office equipment management; supports various projects and provides assistance as needed; manages, tracks and maintains database and files; and performs data entry and analyzes, verifies, and generates reports for Advanced Life Support internship skills and protocols in support of the ALS internship program. *Id.*
2. Patient Service Representative, a sedentary level, full-time position with an annual salary of \$32,240.00. The incumbent serves patients by greeting them and helping them; scheduling appointments; and maintaining records and accounts. *Id.*
3. Supply Clerk, a medium to heavy work, full-time position with an annual salary of \$35,692.00. The incumbent is responsible for technical and administrative duties such as inventory and management; and distribution and control functions. Specific responsibilities include: Maintaining manual and automated inventory systems as materials are ordered, received and dispensed; conducting periodic inventories of office and police specific supplies; producing and analyzing usage reports to identify items that need ordering or need to be discarded; researching and responding to inquiries related to inventory levels; downloading reports and data to assist in monitoring the budget; developing written materials for inclusion in the inventory system; ensuring the efficient and safe storage of materials; researching availability of equipment, using catalogs, the internet, and existing vendor contracts; initiating the purchase approval process and ordering supplies and equipment using standard purchasing policy, procedures and the County's automated financial system; recommending equipment or office supply substitutions; tracking purchasing requests; following through with discrepancies on orders; assisting with stocking, inventory, and distribution of supplies; and overseeing the receipt process and/or receiving supplies and equipment delivered to the Police Department and placing the items in the proper location and/or notifying employees of their arrival. *Id.*
4. Research Laboratory Technician, a sedentary level, full-time position with an average annual salary of \$37,500.00. The incumbent provides technical knowledge and expertise in research laboratory analysis by assisting with bench top experiments, preparing and assisting with the experiments, collecting and analyzing data, assisting in the preparation and analysis of laboratory experiments as requested, and preparing reports. *Id.*

5. Communications Analyst, a sedentary level, full-time position, with an average annual salary of \$55,000.00. The incumbent supports directors and/or managers and lead program teams to deliver program milestones; assists with design and development of program processes; participates in team communication and collaboration during development and start-up; assists with training of employees for programs, as assigned; and assists with improvement of program processes. *Id.*

On August 3, 2014, the Member submitted a request to the Board to reschedule her August 28, 2014, hearing. The Member stated that she was in need of additional time to prepare for the proceeding. Since this was the Member's first request, the Board granted it and continued the matter to November 6, 2014. (R. at 468-470).

On November 6, 2014, the Board convened a disability retirement hearing on the Member's behalf. (R. at 1163 - 1314). The Member appeared *pro se* and testified that she did not want to be retired and had been attempting to convince the PFC to return her to full duty. She testified that her doctor had given the PFC two certifications to allow her to work in a limited-duty status and transition back to full duty and she felt the PFC should follow that recommendation. (R. at 1169). Member also argued that there is substantial evidence in the record proving that the incident at the fire station did occur as she described. (R. at 1181)

Dr. Morote testified at the November 6, 2014, hearing on behalf of the PFC. She testified that she is a clinical psychologist and neuropsychologist. She specializes in diagnostic assessments and psychological and neuropsychological evaluations and she consults with various agencies including the PFC. (R. 1182-1183).

Dr. Morote testified that she reviewed the Member's psychological records and evaluated the Member in March of 2014. She had not, however, seen any of the Member's psychological records after that date. (R. at 1184).

Dr. Morote testified that her clinical interview and evaluations were designed to identify an individual's symptoms and chief psychological complaint. As part of this process she observed the Member's mental status, communicative skills and demeanor, and she administered a battery of standardized psychological tests which measure emotional and personality functions. (R. at 1185-1186).

After administering her tests and conducting her clinical interview, Dr. Morote noted that the Member's paranoia level was extremely high. That meant that she was highly suspicious, distrustful, hypersensitive to feedback, and was prone to feeling that she was being treated unfairly or unjustly. Her scores also indicated the Member was exhibiting high levels of stress. (R. at 1187). In addition, the Member also exhibited "moderate to severe" symptoms of depression and anxiety which in turn are negatively impacting her concentration. (R. at 1188-1189). In Dr. Morote's opinion, the Member's symptoms were not indicative of post-traumatic stress disorder, but rather an unspecified anxiety disorder. (R. at 1189). Dr. Morote testified that the Member's symptoms were

"quite intense." She noted that the Member believed that they were related to the incident she reported which occurred while at work but Dr. Morote had no evidence that those events actually occurred. Dr. Morote opined there must be a link to an actual event in order to diagnose Post Traumatic Stress Disorder ("PTSD"), not just a belief that such an event occurred. (R. at 1190-1195).

Based on her testing and interview, Dr. Morote concluded that the Member could no longer perform the full duties of a firefighter because her degree of paranoia, anxiety, and distrust of others prevents her from working as a member of a team. The Member does not trust enough to maintain relationships with others and consequently, she would not be able to work with a team. (R. at 1196-1198, 1202-1203). Dr. Morote also wrote that the Member could not work effectively under stress (R. at 1202-1203). Dr. Morote concluded that the Member's impairment is moderate to severe in nature. (R. at 1200).

At the final hearing, Dr. Morote reviewed the jobs listed in the LMS and opined that the Member would not be able to perform the positions of Administrative Assistant 2 and Patient Service Representative, because they involve regular social interaction because her psychological impairment inhibits her ability to be flexible and interact with others. (R. at 1204). Dr. Morote also opined that the Member would not be able to perform the position of Communications Analyst because it would require her to interact extensively with others while administering training. (R. at 1207-1208). However, she determined the positions of Supply Clerk and Research Laboratory Technician would be suitable positions for the Member because they did not demand much teamwork. (R. at 1205-1206).

Dr. Morote testified that she did not diagnose the Member with PTSD because her interview of the Member and the Member's standardized test data did not support that diagnosis. They identified the Member's symptoms as anxiety, suspiciousness, distrust/paranoia, depression and somatic or bodily concerns. She also identified the data as "glaring." Of those symptoms, the most striking ones were the Member's paranoia and anxiety. (R. at 1215-1216).

Dr. Morote testified that the Member strongly believes that the event she described is causing her symptoms, but she reiterated that the Member's levels of distrust and paranoia were "very, very high" and at "clinically significant levels" and this was causing a "disturbance in [her] thinking." (R. at 1225). Dr. Morote also testified that she cannot say whether the incident the Member reported did or did not happen, she can only say that her interview with the Member and the Member's test data most strongly support a diagnosis related to anxiety and paranoia, which suggests a disturbance in thinking rather than PTSD. (R. at 1217). She testified that a psychologist cannot diagnose PTSD based on an alleged incident. There has to be a confirmed event. (R. at 1218).

The Member testified that when she was first appointed she requested that she be sent to an active station because she wanted a challenge. She was sent to Engine 11, which she described as an "all boys club." She testified that she was the first black female to be at that firehouse in ten to eleven years. When she arrived, she felt that the mentality

at Engine 11 was that she was taking away their fun. She felt they did not consider her to be part of the team. (R. at 1232). She testified that she was not trying to change the environment but she just wanted to do her job. She received glowing evaluations and high test scores, and she enjoyed her job, but no matter what she did, it was not good enough. (R. at 1233).

The Member testified that while at the Engine 11 she suffered through incidents of aggressive touching, having her bed soaked with water, tacks in her seat, other firefighters entering the bathroom while she was inside, and pouring water down the fire pole which caused her to fall and tear a tendon in her foot. (R. at 1234). The Member testified that she reported all of this to her commanding officer Chief Timothy Jefferies, but a lot of the information was "suppressed" because Engine 11 is the chief's firehouse and it was considered to be "elite." She testified that "demands" were made to her to "not let stuff get outside of the firehouse." *Id.*

The Member testified that after water was poured on the pole, she fell and tore a tendon and was off work for 7 months. She also testified that this injury was considered to be a performance of duty ("POD") injury, but that there is no mention of this injury in the medical records the Department provided to the Board because they did not provide complete records.⁸ (R. at 1236-1237). The Member then testified that in 2004, on New Year's Eve, she was threatened with bodily harm on a fire ground. (R. at 1237).

The Member alleged that much of this information was not in the Board's record and asked why the records were redacted. The Chairperson then informed her that to the Board's knowledge, the records provided were complete. The Board has no way of knowing if records are missing unless one of the parties identifies which records are missing.⁹ (R. at 1239).

The Member then testified that one day, when her company was responding to a fire, the driver from her shift had a problem with the amount of time it took for her to get on the truck, and he proceeded to call her names and threatened her. (R. at 1241). She ultimately went out on sick leave for stress in 2005, but she testified that was due to a culmination of a number of stressful events. (R. at 1239-1240).

The Member testified that after she came back she was detailed to Engine 1. On May 30th to 31st, while at that firehouse, she was awakened by fondling between her legs. She woke up and saw three firefighters coming toward her. (R. at 1251). She immediately reported the incident to her lieutenant but he did not take any other action. (R. at 1252). She eventually told the fire captain and he told her not to tell anyone. (R. at 1253). The Member then reported it to Chief Morris and Deputy Chief Pearson once she came off of her assignment. (R. at 1256-1257). The D.C. Metropolitan Police Department ("MPD")

⁸ Chairperson Hochhauser informed the Member that if she was alleging that the Department did not provide complete records she should identify the missing records so the Board could order the Department to produce them. (R. at 1236-1239). However, the Member did not comply with this request.

⁹ To date, the Member has not provided any records to support her allegation that she suffered a tendon tear caused by water placed on her fire pole.

began an investigation. *Id.* Afterwards, the Member testified that she tried to return to work in the firehouse but she woke up screaming. Since then she has not returned to full duty. (R. at 1257-1258).

The Member testified that she initially met with Dr. Roosevelt Martin Johnson, a psychologist, in 2005, but after her most recent incident she could not find another doctor she liked so she returned to Dr. Johnson. (R. at 1259). She said she eventually changed to Dr. Deanna Wall as her treating provider upon Dr. Johnson's recommendation because he was downgrading his practice. (R. at 1262). Carla Rhodes, Psy.D., however, is her current treating psychologist. (R. at 1263).

The Member testified that she filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Office of Human Rights, but she has not received a right to sue letter because they are still investigating. (R. at 1267).

The Member testified that she disagreed with Dr. Morote's assessment of her inability to continue to function as a firefighter. (R. at 1268-1269). The Member felt that she could return to full duty. *Id.* The Member also testified that she reviewed the LMS and she is able to perform all of the jobs recommended by RPI. (R. at 1278-1281).

The Member testified that MPD classified the incident as "misdemeanor sexual abuse" but she also testified that a grand jury "suspended it" and did not return an indictment. (R. at 1289). The Member also asserted that she did not want to be retired, but if she were retired, her injury was a Performance-Of-Duty ("POD") injury. (R. at 1292).

On November 7, 2014, the Member met with Marc Cottrell, Psy.D., a psychologist at the PFC. Dr. Cottrell presented the Member with a list of questions to give to her treating psychologist so that the PFC could determine whether she was fit to return to full duty. (R. at 1332).

On November 14, 2014, the Member reported to Behavioral Health Services ("BHS"), a division of the PFC, for a scheduled appointment. Dr. Cottrell noted that the Member would only meet him in the lobby. She asked Dr. Cottrell for paperwork returning her to light duty to which Dr. Cottrell responded that BHS needed her psychologist to answer questions before they could return her to light-duty status. Dr. Cottrell noted that the Member asserted this was a violation of the Health Insurance Portability and Accountability Act ("HIPAA") and the Americans with Disabilities Act ("ADA") and ethics codes prescribed to practicing psychologists. Dr. Cottrell noted that the Member insisted that BHS has enough information to return her to light duty status; however, she refused to cooperate and take a copy of the questions to her treating psychologist. (R. at 1330).

On November 25, 2014, the Member returned to BHS and met with Dr. Cottrell, Olusola Malomo, M.D., Medical Director of the PFC, Battalion Fire Chief Raymond Gretz, and MPD Lieutenant Randall Stroman. Dr. Cottrell noted that the Member

demanded to know who his supervisors were and who "ordered him to interfere with [her] employment." She continued to argue that requiring her to provide additional information from her psychologist was illegal and violated her "human rights." Dr. Cottrell told her he did not disagree with the course of treatment that her psychologists were following for her, but BHS needed the questions they provided to her to be answered by her psychologist so they could insure that she could safely return to the workplace in the event that any additional anxiety or distress should arise. Dr. Cottrell wrote that the Member again refused to accept the list of questions or take them to her psychologist. (R. at 1328).

On December 18, 2014, the Board issued an Order directing the Member to submit a report from her treating psychiatrist detailing: 1) her present diagnosis; 2) the provider's opinion as to whether that diagnosis resulted from a work-related incident; 3) the Member's current treatment plan; and 4) the provider's opinion as to whether the Member can return to full duty. (R. at 1315-1316).

On December 23, 2014, Dr. Cottrell, a psychologist at BHS, noted that the Member would not meet with them and was refusing to adhere to Department general orders requiring her to include the PFC in her health care decisions. (R. at 1326). The Department was unsure how to address the matter without antagonizing the Member further but it noted that she had not been seen there for the PFC to review her treatment for over 30 days. *Id.*

On January 12, 2015, Beverli Mormile, Psy.D., provided a treatment update. Dr. Mormile opined that the Member has "mild" symptoms of PTSD which was caused when she was "sexually violated" while performing her duties with the Department. (R. at 1321-1322). Dr. Mormile noted that the Member has difficulty sleeping, negative alterations in cognition, irritability, and anger, and those symptoms were affecting her ability to function outside of the workplace. *Id.*

Dr. Mormile reviewed the Member's treatment records and opined that she met the diagnostic criteria for Post-Traumatic Stress Disorder ("PTSD"), Adjustment Disorder with Mixed Anxiety and Depressed Mood. *Id.* She noted that the Member agreed to begin gradual exposure therapy by visiting firehouses in an off-duty capacity and learning strategies for handling peer-related psychosocial stressors. *Id.* Dr. Mormile felt that the Member's mild symptoms did not prevent her from performing any essential job tasks. *Id.* Dr. Mormile recommended that the Member return to work on a part-time schedule with a gradual increase to a full-time shift and that she sleep in a secured area which allows gradual exposure to male co-workers. *Id.*

On January 12, 2015, Dr. Cottrell reviewed Dr. Mormile's report and noted that the treatment update "does not present a differential diagnosis articulating and supporting the presence of both PTSD and Adjustment Disorder." (R. at 1325). He noted that the update does not clarify whether the disorders share the same etiology or whether they stem from different sets of circumstances. *Id.*

On January 22, 2015, the Board reconvened the disability retirement hearing on the Member's behalf. It was at that hearing that the Board became aware of the Member's refusal to comply with BHS's request to convey its list of question to her treating psychologist so they could assess whether she could be returned to full duty. The Board asked the Member why she had not provided the questions to her provider. The Member responded that she did not believe that she had to provide them to her doctor because she felt they were not "assessing" her but rather her doctor. (R. at 1342). She felt that because the Department ruled her injury or illness to be non-POD, they were not treating her and therefore any consent she signed to allow them to speak with her doctor was "null and void". The Member felt that she was experiencing additional retaliation. (R. at 1342-1343).

The Board attempted to explain to the Member that she is required to provide medical records and access to her doctor regardless of whether an injury is POD or non-POD pursuant to the Department's general orders. However, the Member insisted that was not true. (R. at 1343-1344). The Member further testified that she felt the treatment update provided by her doctor was sufficient for the PFC to return her to full duty. *Id.*

The Board again explained to the Member that the PFC makes the decision on whether a member is physically and psychologically fit to return to full duty and they need those questions answered in order to do so. The Member again responded that it was "a violation of her rights" and was "illegal." The Board then verbally ordered the Member to give her provider the list of questions to answer as the PFC requested and it continued the hearing. (R. at 1346-1349). The Board followed the verbal order with a written one issued later that day ordering the Member to provide her treating psychologists with the list of questions requested by the PFC and directing her to tell the provider to answer them to the best of her ability and return them to the PFC by February 5, 2015. (R. at 1254).

On January 19, 2015, Dr. Morote provided an addendum reporting that she had nothing further to add to her initial report. (R. at 1324).

On February 12, 2015, the Board reconvened the Member's disability retirement hearing. At the hearing Acting Chairperson Comentale inquired whether the Member had complied with the Board's January 22, 2015, order. The Member responded that she did not. She argued that the order was a violation of her rights "under the Americans with Disabilities Act, the Privacy Act, and the HIPAA Act." She argued that she cannot be compelled to violate her rights and provide health information not relating to the essential functions of her job. (Tr.¹⁰ 10).

The Member argued that she has demonstrated that she is not disabled and her referral for disability retirement was discrimination and harassment. She argued that the PFC has not provided evidence of "imminent, direct threat" or any evidence of permanent disability. (Tr. 13). The Member reiterated that her doctor believes she can resume duty on a limited basis and work up to full employment and argued that the concept of "full

¹⁰ "Tr." refers to the page of the February 12, 2015, transcript.

duties" is not covered by the ADA. She also argued that being referred for disability retirement was due to "malicious intent to defer due process." She further argued that she was being subjected to "disability discrimination" and "harassment." The Member then asked the Board to make a decision so she could "move to the next stage." (Tr. 15).

At that hearing, Dr. Morote testified that she reviewed the January 9, 2015, evidence from the Member's treating psychologist and it did not change her opinion that the Member should be retired. (Tr. 12). The Board then concluded the proceeding.

ANALYSIS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board has the authority to hear this matter pursuant to D.C. Code § 5-721(a) (2012 Repl.) which states in pertinent part:

The Mayor shall consider all cases for the retirement of members and all applications for annuities under this subchapter subject to review and final determination by the District of Columbia Retirement Board. In each case of retirement of a member the Mayor shall certify in writing the physical condition of the member for whom retirement is sought. The Mayor shall give written notice to any member under consideration by him for retirement to appear before him and to give evidence under oath. . . The Mayor is authorized to administer oaths and affirmations, and may require by subpoena or otherwise the attendance and testimony of witnesses and the production of documents at any designated place... In order to carry out his responsibilities under this subchapter with respect to retirement and disability determinations, and related functions, the Mayor of the District of Columbia shall establish a Police and Firemen's Retirement and Relief Board.

1. Is the Member disabled for useful and efficient service with the Department?

D.C. Code § 5-701(2) (2012 Repl.) states:

The terms "disabled" and "disability" mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or injury, not due to vicious habits or intemperance as determined by the Board of Police and Fire Surgeons, or willful misconduct on his part as determined by the Mayor.

The Department's *Limited Duty and Useful and Efficient Service Policy* requires that, "all firefighters, regardless of their current assignments, have to be capable of performing the full duties of a firefighter." (Emphasis added). See *District of Columbia Fire and Emergency Medical Service Useful and Efficient Service Statement* (as amended April 14, 2004), which specifically states:

Accordingly, "[w]hile not exclusive, to be considered full duty members regardless of rank or assignment must be able to perform all of the following essential duty functions:

- 1) Perform firefighting tasks (e.g., hose line operations, extensive crawling, lifting and carrying heavy objects, ventilating roofs or walls using power or hand tools, forcible entry, etc.), rescue operations, and other emergency response actions under stressful conditions while wearing PPE and SCBA, including working in extremely hot or cold environments for prolonged time periods...
- 2) Wear an SCBA, which includes a demand valve type positive pressure face piece or HEPA filter masks, which require the ability to tolerate increased respiratory workloads.
- 3) Endure exposure to toxic fumes, irritants, particulates, biological (infectious) and non-biological hazards, and/or heated gases, despite the use of PPE including SCBA.
- 4) Climb ten or more flights of stairs while wearing fire protective ensemble weighing at least 50 pounds or more and carrying equipment/tools weighing an additional 20 to 40 pounds.
- 5) Wearing fire-fighting ensemble that is encapsulating and insulated. Wearing this clothing will result in significant fluid loss that frequently progresses to clinical dehydration and can elevate core temperature to levels exceeding 102.2 degrees F.
- 6) Searching, finding, and rescue-dragging or carrying victims weighing over 200 lbs to safety despite hazardous conditions and low visibility.
- 7) Advancing water-filled hose lines up to 2.5 inches in diameter from fire apparatus to occupancy (approximately 150') can involve negotiating multiple flights of stairs, ladders and other obstacles.
- 8) Climbing ladders, operating from heights, walking or crawling in the dark long narrow and uneven surfaces, and operating in proximity to electrical power line and/or other hazards.
- 9) Perform in unpredictable emergency requirements for prolonged periods of extreme physical exertion without benefit of warm-up, scheduled rest periods, meals, access to medication (s) or hydration.
- 10) Operating fire apparatus or other vehicles in an emergency mode with emergency lights and sirens.
- 11) Critical, time-sensitive, complex problem solving during physical exertion in stressful, hazardous environments (including hot, dark, tightly enclosed spaces), further aggravated by fatigue, flashing lights, sirens, and other distractions.
- 12) Ability to communicate (give and comprehend verbal orders) while wearing PPE and SCBA under conditions of high background noise, poor visibility, drenching from hose-lines, and/or fixed protection systems (sprinklers).
- 13) Functioning as an integral component of a team, where sudden incapacitation of a member can result in mission failure or in risk of

injury or death to civilians or other team members." (Board Exhibit 1, pages 3EA-5EA).

D.C. Code § 5-701 (19) (2012 Repl.) describes the term "full range of duties" as:

[T]he ability of a sworn member of the Metropolitan Police Department or the Fire and Emergency Medical Services Department to perform all of the essential functions of police work or fire suppression as determined by the established policies and procedures of the Metropolitan Police Department or the Fire and Emergency Medical Services Department and to meet the physical examination and physical agility standards.

Following the events of September 11, 2001, the Council of the District of Columbia determined that the mandatory staffing levels at both the Metropolitan Police Department ("MPD") and D.C. Fire and Emergency Medical Services Department ("FEMSD") were negatively impacted by the large number of employees in each Department who were on extended medical leave or limited duty since those employees could not respond during this crisis. On June 24, 2004, the Council passed the Omnibus Public Safety Agency Reform Amendment Act of 2004 ("Omnibus Act"), which requires that uniformed members who have not worked in full duty status due to injury or illness for a specified time period to be recommended for disability retirement. FEMSD recommends a firefighter who has spent at least 64 cumulative work days in a less-than-full-duty status in any two year period due to an injury or illness, other than a pregnancy, for disability retirement. (Sept 30, 2004, D.C. Law 15-194).

The Board reviews each individual case on its own merits. The Board reviewed the record and the testimony presented at all three (3) of the Member's hearings. The Board took special note of the PFC's recommendation that the Member is suffering from an Unspecified Anxiety Disorder which prevents her from performing useful and efficient service with her Department. The Board also took note of Dr. Mormile's assessment that the Member has mild symptoms of PTSD and her opinion that those symptoms did not prevent the Member from performing any essential job task.

The Board also took note of the Member's refusal to comply with both the BHS request and the Board Order to provide additional information from her treating psychologist. The Member argued that it was a violation of her rights under the ADA, the Privacy Act, and HIPAA although she did not explain precisely what "rights" those statutes gave her that she felt were violated. The Member asserted that she could not be compelled to provide the information because she did not believe it was related to the essential functions of her job and she felt that BHS was actually evaluating her psychologist. The Member continued to refuse even after the Board explained that it has the statutory authority to make that determination and it needs BHS to review her doctor's reports and recommendation in order to assess whether the Member can perform the full duties of a firefighter.

Lastly, the Board took note of the Member's demeanor during her three (3) hearings. The Board noted that the Member was visibly and extremely mistrustful and paranoid of the requests made by BHS and the Board although reasonable and clearly within each respective entity's authority. The Board noted that Member's mistrust was so strong that she refused to follow any directive BHS or the Board gave to her to relay additional questions to her psychologist despite being advised that if the psychologist answered favorably, it may have resulted in BHS clearing her to return to full duty as she initially requested.

The Member's conduct, which the Board observed, strongly supports Dr. Morote's opinion that the Member's paranoia and distrust is so pervasive that it would prevent the Member from performing the full duties of a firefighter because she could no longer work effectively with a team. The Board's interaction with the Member strongly suggests that the Member's psychological condition impairs her ability to follow orders. The Board recognizes that the ability to work as a team and follow orders are essential functions of a firefighter. As a result, the Member must be able to perform those functions safely in life-or-death situations; otherwise, she poses an unacceptable risk to herself and to the public.

The Board reviewed Dr. Mormile's assessment that the Member can return to full duty but was unable to give it much weight. The Board found it to be contradictory because she recommended that the Member could return to full duty, but then listed a number of limitations which prevented less-than-full duty status. Specifically, Dr. Mormile recommended that the Member return to duty on a part-time schedule and sleep in a secured area with limited or gradual exposure to male co-workers. Based on this recommendation, a firefighter working a part-time schedule is not performing full duty. Additionally, if the Member needs a segregated sleeping area with limited exposure to her co-workers she cannot function as an effective member of the team.¹¹

The Board also noted that the Member did not provide any documentation in support of Dr. Mormile's diagnosis. She did not provide any diagnostic test result or clinic notes to enable the Board to better understand how Dr. Mormile arrived at a diagnosis of PTSD or to explain her recommendation that the Member could return to duty as a firefighter. Dr. Cottrell noted this is why he asked the Member to convey additional questions to Dr. Mormile. (R. at 1325). The Member's refusal to comply with Dr. Cottrell's request to convey additional questions to Dr. Mormile, and the Board's

¹¹ The Board recognizes that had the Member cooperated with BHS and relayed their additional questions to Dr. Mormile, it may have been possible to reconcile the inconsistencies in her recommendation.

The Board also reviewed Dr. Mormile's opinion that the Member is suffering from mild PTSD incurred in the performance of duty and compared it with Dr. Morote's conflicting opinion that she does not suffer from PTSD at all. Although, Dr. Mormile does not believe this condition disables the Member from performing the duties of a firefighter, Dr. Morote maintains that the Member's diagnosis of Unspecified Anxiety Disorder does disable her from performing the full duties of a firefighter. Consequently, the Board finds that the PTSD diagnosis cannot serve as the basis for the Member to be retired on disability.

subsequent order to do as Dr. Cottrell requested, prevents the Board from giving greater weight to Dr. Mormile's opinion.

In sum, the Board weighed the evidence from Dr. Morote and BHS, against the evidence from Dr. Mormile, and found the former to be significantly stronger and better supported both by the evidence in the record and the Board's observations of the Member's demeanor during the hearings. The Board, therefore, finds a preponderance of the evidence in the record supports the conclusion that the Member is suffering from Adjustment Disorder with Anxiety and Depression. The Board further finds that this illness results in the Member exhibiting high levels of anxiety and paranoia which prevents her from following orders and working effectively as a member of a team. A firefighter who cannot work as part of a team poses an unacceptable danger to herself and to the public; therefore, the Board finds the Member's illness disables her for useful and efficient service with the Department.

2. Was the Member's disability incurred in the performance of duty?

D.C. Code § 5-709(b) (2012 Repl.) provides, in pertinent part, that:

Whenever any member who is an officer or member of the Metropolitan Police force or the Fire Department of the District of Columbia and who first becomes such a member after the end of the 90-day period beginning on November 17, 1979, completes 5 years of police or fire service and is found by the Mayor to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity which shall be 70% of his basic salary at the time of retirement multiplied by the percentage of disability for such member as determined in accordance with § 5-710(e)(2)(B), except that such annuity shall not be less than 30% of his basic salary at the time of retirement...

D.C. Code § 5-710(e)(1) (2012 Repl.) provides, in pertinent part, that:

Whenever any Member who is an officer or Member of the Metropolitan Police force or the Fire Department of the District of Columbia and who first becomes such a Member after the end of the 90-day period beginning on November 17, 1979, is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables [him] for the performance of duty, [he] shall upon retirement for such disability, receive an annuity computed in accordance with paragraph (2) of this subsection.

The Member bears the initial *prima facie* burden of proof on the issue of whether an injury is POD. *Lamphier v. District of Columbia Police and Firefighters' Retirement and Relief Board*, 698 A.2d 1027, 1032. (D.C. 1997). To satisfy the *prima facie* burden,

the Member must establish a sufficient basis to permit a reasonable inference that the disabling injury was incurred in the performance of duty. If the Member makes such a showing the burden shifts to the Board to rebut, by substantial evidence, why the injury was not incurred in the performance of duty. *Pierce v. PFRRB*, 882 A.2d 199 (D.C. 2005). If the Board rebuts the *prima facie* evidence, it shifts the burden to the Member to show by a preponderance of the evidence that the disability was incurred in the performance of duty. *Pierce* at 205; *Upchurch v. District of Columbia Dept. of Employment Services*, 783 A.2d 623, 628 (D.C. 2001).

The *prima facie* standard requires the Member to provide a "sufficient basis to permit a reasonable inference that the disabling injury was incurred in the performance of duty." *Pierce* at 205. In further defining *prima facie*, the Court clarified that the Member does not have to provide dispositive proof, but "it must at least have some substance" and it isn't enough merely to allege that an event occurred. *In re Public Defender Service*, 831 A.2d 890 (D.C. 2003) quoting *Crane v. Crane*, 614 A.2d 935, 941 (D.C. 1992), and *In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377 (9th Cir. 1996).

The Board has no independent investigative power and is therefore reliant on the Member and the Department (through the PFC) to provide it with evidence drawing a causal link between a particular incident and a particular injury. The Member alleged (both in writing, and verbally at the November 6, 2014, hearing) that her illness was caused by an incident of sexual harassment or assault which occurred while she was on duty in her firehouse. After reviewing the record, the Board finds that the Member has not provided any evidence to make a *prima facie* showing of a causal link between any POD event and the illness which is disabling her, Adjustment Disorder with Anxiety and Depression.¹²

The Member testified that the Department conducted an investigation and convened a trial board but she did not present the Board with any of the evidence the trial board relied upon or the results from any of the proceedings. She also testified that a grand jury was convened to investigate the matter but the investigation was "suspended". (See R. at 1289). The Member also presented evidence that MPD initiated its own investigation of the incident, but then suspended it when she did not cooperate. (See R. at 505). Finally, the Member also alleged that EEOC and the Office of Human Rights were investigating the incident, but again she did not provide any information on the status of those investigations or their conclusions.

The only evidence the Member provided which purports to support her allegation is the FD-44 which she filled out on June 25, 2013, and Dr. Mormile's report. Neither document, however, offers any corroboration to the Member's argument that her illness is related to any performance of duty incident. The FD-44 and Dr. Mormile's report are

¹² The Board only has jurisdiction to determine whether disabling injuries were incurred in the performance of duty. Since none of the Member's psychologists are relating the Member's PTSD to a specific incident or are recommending that the illness is disabling, the Board has no jurisdiction to make a ruling as to whether it is related to a POD incident.

both merely written versions of the Member's verbal allegations, not corroborating evidence.

In sum, the Board finds that the Member only offered her own unsubstantiated allegation to support her argument of a causal link between an on-duty incident and the illness for which she is being retired.¹³ The Board further finds that these allegations do not satisfy the Member's *prima facie* burden. Therefore, the Board concludes the Member has not provided a sufficient basis to permit a reasonable inference that the illness for which she is being retired was incurred in the performance of duty.¹⁴

3. Has the Member completed five years of service with the Department?

D.C. Code § 5-709(b) (2012 Repl.) provides, in pertinent part, that:

Whenever any member who is an officer or member of the Metropolitan Police force or the Fire Department of the District of Columbia and who first becomes such a member after the end of the 90-day period beginning on November 17, 1979, completes 5 years of police or fire service and is found by the Mayor to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity which shall be 70% of his basic salary at the time of retirement multiplied by the percentage of disability for such member as determined in accordance with § 5-710(e)(2)(B), except that such annuity shall not be less than 30% of his basic salary at the time of retirement...

Based on a review of the record, the Board finds that the Member was appointed to the Department on January 3, 2000. At the time of this hearing, the Member had accumulated more than five years of creditable service with the Department. Accordingly, the Board concludes that there is sufficient evidence in record that the Member has more than five years of creditable service with the Department consistent with D.C. Code § 5-709(b).

4. What is the Member's percentage of disability and what jobs, if any, can the Member perform?

D.C. Code § 5-709(b) (2012 Repl.) provides, in pertinent part, that:

¹³ The preponderance of the evidence in the record (MPD's suspension of its investigation, the grand jury's suspension of its investigation, and Dr. Morote's opinion) actually refutes the Member's allegation of a causal link. Furthermore, even if the Member had provided *prima facie* evidence, and there was a preponderance of evidence in the record that her injury was caused by a POD incident, under *Estate of Underwood v. National Credit Union Administration*, 665 A.2d 621 (D.C. 1995), the Board, as a workers' compensation tribunal, is precluded from finding that an illness caused by sexual harassment or sexual assault was incurred in the performance of duty.

¹⁴ The Board also noted that Medical Compensation Claims Specialist Cardwell reviewed the Member's allegation that her injury was related to her duty and denied it for the same reason. (R. at 216-220)

Whenever any member who is an officer or member of the Metropolitan Police force or the Fire Department of the District of Columbia and who first becomes such a member after the end of the 90-day period beginning on November 17, 1979, completes 5 years of police or fire service and is found by the Mayor to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity which shall be 70% of his basic salary at the time of retirement multiplied by the percentage of disability for such member as determined in accordance with § 5-710(e)(2)(B), except that such annuity shall not be less than 30% of his basic salary at the time of retirement...

D.C. Code § 5-710(e)(2)(B) (2012 Repl.) then directs that the Board calculate the percentage of disability for members appointed after February 15, 1980, based on the following criteria:

- i. The nature of the injury or disease;
The percentage of impairment reported pursuant to subparagraph (A) of this paragraph;
- ii. The position in the Metropolitan Police force or the Fire Department of the District of Columbia held by the member immediately prior to his retirement;
- iii. The age and years of service of the Member; and
- iv. Any other factors or circumstances which may affect the capacity of the Member to earn wages or engage in gainful activity in his disabled condition, including the effect of the disability as it may naturally extend into the future.

The Board reviewed the evidence in the record regarding the Member's physical abilities and qualifications to determine if any of the positions recommended in the LMS is appropriate, in accordance with *Breen v. D.C. Police & Firefighters' Retirement and Relief Bd.*, 659 A.2d 1257 (D.C. 1995).

The Member argues that she has the psychological ability and skills to perform all of the positions listed in the LMS. Dr. Morote opined that the Member does not have the temperament to perform the positions of Administrative Assistant II, Patient Service Representative and Communications Analyst because she cannot reliably work with others as a team given her current psychological condition. However, Dr. Morote opined the Member has the temperament to perform the positions of Supply Clerk and Research Laboratory Technician because those positions do not require extensive interaction with others.

The Board has already found that a preponderance of the evidence in the record supports Dr. Morote's opinion that the Member cannot perform tasks which require extensive teamwork. Since the positions of Administrative Assistant II, Patient Service Representative, and Communications Analyst all appear to require the ability to work

well with others, the Board concludes that the Member does not have the psychological temperament to perform those positions.

Dr. Morote and the Member both believe she has the psychological temperament to perform the positions of Supply Clerk and Research Laboratory Technician. The Board also noted that RPI has reviewed the Member's skills and qualifications and has determined that she has the skills to perform those two positions. The Member reviewed the skill requirements of those positions as well and concurred that she has the skills to perform them. The Board, therefore, concludes that there is substantial evidence in the record to support the conclusion that the Member has the skills and psychological capability to occupy the positions of Supply Clerk and Research Laboratory Technician.

The following table contains the two (2) salaried positions recommended by the LMS that the Board found the Member has the capacity to perform. Positions listed with a salary range were calculated using the entry-level salary:

Position	Salary
Supply Clerk	\$35,692
Research Laboratory Technician	\$35,000

The Board utilized the formula provided in 7 DCMR §2515.3 to calculate the Member's percentage of disability and annuity:

Formula: A minus B divided by A equals C multiplied by D equals E

$$\text{or } \frac{(A - B)}{A} = C \times D = E$$

The actual figures used in the formula to determine the Member's annuity are as follows:

Symbol	Definition	Amount
A	Current salary of the position last held by Member.	\$75,962 ¹⁵
B	Average salary of positions Member has the capacity to occupy.	\$35,346
C	Percentage of disability.	54%
D	70 percent of Member's basic salary.	\$53,174
E	Amount of annuity using the formula.	\$28,714
F	Amount of annuity using 30 percent of the current salary for the position last held by Member.	\$22,789

¹⁵ See footnote 5.

The annuity is calculated at \$28,714, the higher figure, which represents 54% of her basic salary at the time of retirement rather than \$22,789, the annuity used in subsection "E" in the table above.¹⁶

DECISION

In sum, based on the foregoing Findings of Fact and Conclusions of Law, it is the decision of the Police and Firefighters' Retirement and Relief Board that Nicole McCrea, who has been found to be incapacitated from further duty with the Department by reason of a disability not incurred in the performance of duty, shall be retired under the provisions of D.C. Code § 5-701 (2) and (19), § 5-709(b) and § 5-710 (e)(2)(A-D) (2012 Repl.).

The Board's Final Order is issued separately on this day.

Dated: 4/30/15
AGC/jg


Andrea G. Comentale, Acting Chairperson

Certificate of Service Attached

¹⁶ This annuity is a preliminary calculation. The District of Columbia Retirement Board determines the actual amount of the annuity awarded to the Member pursuant to D.C. Code § 1-716 (2008).