COURT OF APPEALS
DECISION
DATED AND RELEASED

October 3, 1995

No. 94-2955

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

PEGGY A. PIKALEK,

Plaintiff-Respondent,

v.

CITY OF MILWAUKEE,

Defendant-Appellant,

MILWAUKEE EMPLOYES' RETIREMENT SYSTEM/ANNUITY AND PENSION BOARD,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. The City of Milwaukee appeals from a judgment granting summary judgment in favor of Peggy A. Pikalek, reversing the

findings of the Milwaukee Employes' Retirement System/ Annuity and Pension Board, which denied Pikalek's application for duty disability. The City claims the trial court erred in reversing the Board because Pikalek's ability to perform in a limited-duty capacity precludes an award of duty disability benefits. Because the current law governing duty disability applicable to Pikalek does not preclude her from receiving benefits if she is able to perform in a limited-duty capacity, we affirm the judgment of the trial court.

I. BACKGROUND

On February 20, 1978, Pikalek began employment with the City as a police officer. On that same date, she simultaneously became a member of the Milwaukee Employes' Retirement System. At the time of her hiring, a duty disability retirement pension system was in place for officers who became "totally and permanently incapacitated for duty" due to a work-related injury. Up until 1987, "totally and permanently incapacitated for duty" was consistently interpreted to mean "not fit for full-duty." During 1987, the chief of police issued a memorandum creating a formal limited-duty program and protocol for injured police officers. The program, in effect, changed the meaning of the "totally and permanently incapacitated for duty" requirement. An officer could no longer receive duty disability if the officer was able to perform in a "limited-duty" capacity even though the officer was not fit for "full duty."

Between November 1981, and September 1990, Pikalek sustained four work-related injuries as a police officer. As a result of these injuries, Pikalek filed for duty disability retirement with the Board in February 1991. She was examined by a three-member medical panel. One member concluded that she was totally and permanently disabled and should be retired on duty disability. The two other panel members found that she was capable of working in a limited-duty capacity. In November 1991, the Board denied Pikalek's application for duty disability on the grounds that she could still perform in a limited-duty capacity. The parties stipulated to the fact that Pikalek is not able to perform in a full-duty capacity, but is able to perform in a limited-duty capacity. Pikalek appealed the Board's decision to a reviewer, who affirmed the Board's decision. In December 1991, Pikalek filed a notice of appeal from the decision on review. A hearing was held before a hearing

examiner in July 1993. The hearing examiner issued a recommended decision denying benefits. The Board adopted the hearing examiner's decision.

In November 1993, Pikalek filed an action for certiorari review in the trial court pursuant to the Milwaukee City Charter, § 36-15-18, and § 68.13, STATS., seeking review of the Board's decision. In May 1994, she moved for summary judgment, asking the trial court to reverse the decision of the Board. The trial court granted the motion in August 1994, concluding that Pikalek was entitled to duty disability benefits. The trial court entered judgment reversing the findings of the Board. The City appeals from this judgment.

II. DISCUSSION

Although the City appeals from the judgment entered by the trial court, we review the decision of the Board. *See* ***Harris v. Annuity & Pension Bd.***, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). Our review is limited to consideration of whether the Board kept within its jurisdiction, acted according to law, or acted arbitrarily or in bad faith, and whether the evidence before the Board was such that it could not reasonably make the order or determination in question. *See* ***Ruthenberg v. Annuity & Pension Bd.***, 89 Wis.2d 463, 472-74, 278 N.W.2d 835, 839-40 (1979). We conclude that the Board did not act according to the law when it denied Pikalek duty disability benefits.

The issue in this case is whether the Board can change the definition of "totally and permanently incapacitated" to mean "incapable of performing in a *limited-duty* capacity" with respect to an officer who was hired when the term was defined to mean "incapable of performing in a *full-duty* capacity." Pikalek claims that § 36-13-2-e of the Milwaukee City Charter precludes the Board from unilaterally changing the definition. Section 36-13-2-e provides in pertinent part:

> No application nor interpretation of the provisions of this act or rule of the board shall be either effected, instituted or promulgated retroactively or applied in such a manner as to such member, retired member or beneficiary so that it results in any form, in the

> diminution, loss or partial loss or reduction of any credit, benefit or retirement allowance to which such person was or is entitled because of prior interpretation or application of the provisions of this act or rule whether general or specific.

The City counters that § 36-13-2-e does not apply to Pikalek because § 36-13-2-e is only triggered when an officer has an absolute right to the benefits referenced therein. It argues that duty disability benefits are not an absolute right, but are contingent upon an event that may or may not happen—an injury. The City does not cite any authority in support of this contention. Instead, it cites ***Smith v. Annuity & Pension Bd.***, 241 Wis. 625, 629, 6 N.W.2d 676, 678 (1942) for the proposition that the benefits and rights to which Pikalek is entitled are determined at the time of retirement and not at the time of hire. This case might control the instant case if § 36-13-2-e did not exist.

Section 36-13-2-e, however, explicitly precludes the Board from creating or changing the interpretation of a rule that results in a loss of *previously existing benefits*. It states that the Board *shall not re-interpret a provision to result in any loss of benefit that a person was entitled to under a past interpretation.* Clearly, the Board's new definition of "totally and permanently incapacitated" causes Pikalek to lose the previously established benefit of being able to receive duty disability if she is unable to perform in a *full-duty* capacity. We conclude that § 36-13-2-e is binding and prevents the Board from changing the duty disability retirement criteria applicable to Pikalek.[1] Accordingly, we affirm the decision of the trial court that Pikalek is entitled to receive duty disability benefits.[2]

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[1] In light of our conclusion that § 36-13-2-e governs, we do not address the City's argument that many foreign jurisdictions apply the limited-duty criteria. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

[2] The City also argues that public policy precludes awarding duty disability to an individual who is able to perform limited-duty work. In support of this argument, the City cites worker's compensation law and the Americans with Disabilities Act, 42 U.S.C § 12101 (1990). We are not persuaded. The authority the City cites is inapposite. The City's authority deals with the public policy of prohibiting employers from discriminating against disabled individuals *who want to work*. Pikalek is in a different category. She does not want to work in a limited-duty position. As noted

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
within this opinion, the law applicable to Pikalek provides her with that right. Accordingly, we reject the City's public policy argument.