

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

SUSAN BURNES	:	Docket No. CR-21-0084
<i>Petitioner</i>	:	
	:	
v.	:	Date: October 20, 2023
	:	
STATE BOARD OF RETIREMENT	:	
<i>Respondent</i>	:	

Appearance for Petitioner:

Susan Burnes, *pro se*

Appearance for Respondent:

Yande Lombe, *Esq.*

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

Petitioner, Susan Burnes, worked at the Lemuel Shattuck Hospital for over 31 years as a Licensed Practical Nurse. Up until her last year of employment, over 50% of her work involved direct care of prisoners. Due to the Covid-19 pandemic, during her last year, she worked in different units. Less than 50% of her work that last year involved direct care of prisoners (or “mentally ill” patients). She is not entitled to Group 2 status for her last year of work. However, because G.L. c. 32, § 5(2)(a) allows someone employed before April 2012 to pro-rate their service, she is entitled to Group 2 status for every year before then.

DECISION

The Petitioner, Susan Burnes, timely appeals a decision by the State Board of Retirement (“Board” or “SBR”), denying her application for reclassification to Group 2. On July 31, 2023, I conducted a hearing in person at the Division of Administrative Law Appeal (“DALA”). The Petitioner testified on her behalf; the Board did not present any witnesses. I also admitted

Respondent's Exhibits 1 – 8 and Petitioner's Exhibit 1 into evidence. The parties submitted closing briefs, the last of which was filed on October 6, 2023, at which point I closed the administrative record.

FINDINGS OF FACT

Based on the exhibits and testimony¹ presented by the parties, I make the following findings of fact:

1. The Petitioner began working for the Lemuel Shattuck Hospital (“the Shattuck”) in 1990. She was a Licensed Practical Nurse II her entire career. (“LPN II”). (Res. Ex. 1; Testimony.)
2. The Shattuck provides care to patients who are economically and socially disadvantaged. Patients come from prisons and jails, Department of Mental Health (“DMH”) facilities, and sometimes from the community. (Testimony.)
3. The Petitioner had various duties over the years and worked in different units. (Testimony.)
4. The Petitioner’s job was undoubtedly dangerous. During her career, she was hit, spit on, stabbed with a needle, verbally abused, and seriously threatened. (Testimony.)
5. When she began, she was a general nurse practitioner in 8-North, which was a unit that housed prisoners exclusively. From there, she became certified as an intravenous infusion specialist and began working in the operating room (“OR”), post-anesthesia care unit (“PACU”), and the gastroenterology (“GI”) department. (Testimony.)

¹ I find the Petitioner’s testimony credible. She was knowledgeable, thoughtful and did not overstate facts. She acknowledged when she could not remember, or did not know, something. But she reliably recalled the more important aspects about her duties and responsibilities throughout her career.

6. Her duties required her to provide direct care to her patients almost every minute of the day. (Res. Ex. 3; Testimony.)

7. When she worked in 8-North, she worked mainly with patients who were post-operative, caring for their needs. Her duties expanded when she moved to the OR and GI departments. She would receive a patient and do a pre-procedure interview. Then she would prepare them for their procedure, which often included putting in an IV. She would accompany them to the operating/medical room, where the doctor would receive them. Once there, she had additional tasks supporting the doctor and patient. When the procedure was over, she helped the patient transition to their next stop. OR patients typically stayed at the hospital, so she would care for them in the PACU; GI patients would typically go back the same day, so she would prepare them to be discharged. (Testimony.)

8. Most of the patients she worked with were prisoners. When she worked in 8-north, she treated prisoners exclusively. When she moved to the OR and GI departments, prisoners still accounted for approximately 80% of her workload. (Testimony.)

9. Her other patients were comprised mostly of DMH clients, though they were not at the Shattuck for treatment of their mental illness. Instead, like the prisoners, they were there for medical procedures. (Testimony.)

10. A very small percentage of her patients were off the street—usually homeless or economically burdened individuals in need of care. (Testimony.)

11. Therefore, up until March 2020, the Petitioner spent easily more than 50% of her working hours directly caring for prisoners.

12. Then the COVID-19 pandemic hit. The OR shut down. Other services slowed. From March 2020, until she retired in March 2021, the Petitioner “floated” around to different units depending on where she was needed most. (Testimony.)

13. She worked in different departments and different floors. She estimated a majority of her work during this year was treating patients in the psychiatric ward and/or DMH patients. But, again, she did not treat them for mental illness. She treated them for the medical conditions that brought them to Shattuck. (Testimony.)

14. She also worked a lot in the geriatric unit. (Testimony.)

15. She continued to work with prisoners, but not as much as she did before. (Testimony.)

16. The evidence does not support a finding that she provided care to prisoners more than 50% of the time during her last year of employment. Rather, most of her time that year was spent caring for other, non-prisoner patients for conditions other than mental illness..

CONCLUSION AND ORDER

A member’s retirement compensation is based, in part, on their group classification. Members are classified into four groups. G.L. c. 32, § 3(2)(g). Group 2 includes employees “whose regular and major duties require them to have the care, custody, instruction or other supervision of prisoners ... or persons who are mentally ill.” *Bethel v. State Bd. of Ret.*, CR-19-0347, 2022 WL 16921448 (DALA Aug. 19, 2022), *quoting* G.L. c. 32, § 3(2)(g). It is the member’s burden to establish that “her regular and major job duties - *i.e.*, those that she spent more than 50% of her working hours performing - involved the care of mentally ill persons or

prisoners.” *Id*; see *Dyer v. State Bd. of Ret.*, CR-19-0414, 2023 WL 345937 (DALA Jan. 13, 2023).²

Determining a member’s job duties “is based on an evaluation of what her job responsibilities were in the twelve months preceding her retirement.” *Bethel; Maddocks v. CRAB*, 369 Mass. 488, 494 (1975). “The strictness of this new test, however, is mitigated by another provision in the 2011 amendments to the retirement law. Members who were employed prior to April 2, 2012 and who retire thereafter may now elect to pro-rate their retirement allowance based on the number of years they worked in positions within different classification groups.” *Lorrey v. State Bd. of Ret.*, CR-09-553, *5 (CRAB Dec. 19, 2014), citing G.L. c. 32, § 5(2)(a).³

There is no dispute the patients the Petitioner treated from jails and prisons are considered “prisoners.” *Johnson v. State Bd. of Ret.*, CR-18-586, *3, 2022 WL 16921457 (DALA Apr. 8, 2022). Whether someone is “mentally ill” is more involved. “‘Mentally ill’ individuals in the group 2 context are only those with ‘primary diagnoses of mental illness.’ Although the ‘primary diagnosis’ requirement has made little sense to DALA’s magistrates, we are constrained to enforce it.” *Larose v. State Bd. of Ret.*, CR-20-357, *3-4, 2023 WL 4548411 (DALA Jan. 27, 2023). The “primary diagnosis” criteria essentially require a member to show, not only that they cared for patients diagnosed with mental illnesses, but that

² The Petitioner’s job was surely dangerous. However, “dangerousness is not, itself, a statutory criterion for inclusion in Group 2.” *Saffie v. State Bd. of Ret.*, CR-21-0020, 2023 WL 4548408 (DALA Jul. 7, 2023).

³ G.L. c. 32, § 5(2)(a) provides in pertinent part:

Any active member as of April 2, 2012, who has served in more than 1 group may elect to receive a retirement allowance consisting of pro-rated benefits based upon the percentage of total years of service that the member rendered in each group . . .

the care they provided was for that mental illness. *See Hong v. State Bd. of Ret.*, CR-17-843, 2022 WL 16921455 (DALA May 6, 2022). Thus, DALA, and CRAB, have denied Group 2 status to members whose primary duties involved caring for a mentally ill individual's medical condition. *Micle v. State Bd. of Ret.*, CR-18-0657 (DALA Dec. 23, 2022); *Hong, supra*; *Richard v. State Bd. of Ret.*, CR-16-72 and CR-16-226 (DALA Feb. 7, 2020); *Miers v. State Bd. of Ret.*, CR-06-411 (CRAB Aug. 17, 2007). On the other hand, DALA, and CRAB, have granted Group 2 status when members cared for a mentally diagnosed individual's mental illness. *Larose, supra*; *O'Connor v State Bd. of Ret.*, CR-11-698 (CRAB May 20, 2019); *Pulik v. State Bd. of Ret.*, CR-10-605 (CRAB Jul. 10, 2012); *Nowill v. State Bd. of Ret.*, CR-08-558 (CRAB May 17, 2012).⁴

As noted, group classification first looks at a member's duties in the year preceding their retirement. Because the OR shut down during COVID, and because of her willingness to go where needed, the Petitioner spent her last year working less than 50% of her time with prisoners. Her work with DMH clients does not count towards Group 2 status because she did not care for their mental health needs but, rather, their medical needs. There is precedent for this result. *See, e.g., Maddocks*, at 490 n. 3, 491 (nurse spent "more than fifty percent of her time" in direct care in prior position; Group 2 denied where position in year prior to retirement was supervisory); *Bethel, supra* ("Had Ms. Bethel spent more than 50 percent of her time caring for

⁴ Given these constraints, it is no surprise a variety of employees of the Shattuck have been denied group 2 status. *See, e.g., Dyer, supra* (registered nurse); *Bethel, supra* (Wound Care Nurse/RN II); *Jean-Clouse v. State Bd. of Ret.*, CR-16-605 (CRAB Jul. 23, 2021) (phlebotomist); *Flynn v. State Bd. of Ret.*, CR-18-0423 (DALA Jun. 11, 2021) (LPN I and II); *Uthman-Olukokun v. State Bd. of Ret.*, CR-10-729 (DALA Feb. 7, 2014) (Rehabilitation counselor); *D'Urso v. State Bd. of Ret.*, CR-08-167 (DALA Feb. 10, 2012) (PACU RN).

patients on 8 North in the last year of her employment, she would qualify for Group 2 classification.”).

However, the Petitioner’s job duties prior to 2020 no doubt place her within Group 2. To be sure, a member must have more than just “technical or circumscribed responsibilities, such as collecting blood or urine samples.” *McKinney v. State Bd. of Ret.*, CR-17-230 & 868, 2023 WL 6537982 (DALA Sep. 29, 2023). Rather, “[t]he member must shoulder a measure of ‘responsib[ility] for ... the physical or psychological needs of the patients.’” *Hong, supra*. I credit the Petitioner’s testimony that she provided hands-on, direct care to her patients and was thoroughly responsible for their well-being. *See Johnson, supra; D’Urso, supra* (PACU RN provided “direct care” to patients). I also credit her testimony that she provided this care to prisoners well over 50% of the time. Because the Petitioner provided Group 2 service prior to 2020, she should be entitled to pro-rated credit for every year but her last. *Bethel, supra*, n.6; *Chikere v. State Bd. of Ret.*, CR-19-0006, *8, n.3 (DALA May 14, 2021).

The Board disputes that any of the Petitioner’s time would qualify for Group 2 status because the only evidence she presented was her uncorroborated testimony. However, I find the Petitioner’s testimony credible and reject this argument. The Board also argues that the Petitioner would nevertheless need to prove the prisoner patients she treated were not in the custody of correction officers when she cared for them. But the statute requires care “or” custody, not care “and” custody. “Whether correctional officers were present, nearby or absent is entirely irrelevant in this case.” *McKinney, supra; Jameson v. State Bd. of Ret.*, CR-17-960, at *17 (DALA Jun. 3, 2022) (when duties of physician at Shattuck involved care of prisoners it was irrelevant that the prisoners were within the custody of correctional personnel).

CONCLUSION AND ORDER

The Board's decision denying the Petitioner's request for reclassification is **reversed**.

The matter is remanded so it may recalculate her benefits consistent with this decision.

SO, ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate