

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Emerson E.,¹
Petitioner

v.

Docket No. CR-22-0312

**State Board of Retirement and Public Employee
Retirement Administration Commission,**
Respondents

Appearance for Petitioner:

Christine G. Narcisse, Esq.
McGuire & McGuire, P.C.
14 Harvard St.
Worcester MA 01609

Appearances for Respondents:

Brendan McGough, Esq.
Associate General Counsel
State Board of Retirement
One Winter Street, 8th Floor
Boston MA 02108

Felicia McGinniss, Esq.
Associate General Counsel
PERAC
5 Middlesex Ave., Suite 304
Somerville MA 02145

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The petitioner, a former correction officer, has applied for accidental disability retirement following an inmate assault that resulted in PTSD and depression. There is no

¹ A pseudonym. See G.L. c. 4, § 7, 26th para., (c).

dispute that the petitioner suffers from these conditions, that they are likely to be permanent, and that they arose as a result of and in performance of his job duties. The sole issue in dispute is whether the petitioner was incapable of performing his essential job duties when he separated from service. His employer stated that, notwithstanding the availability of light duty work, the petitioner was working “full duty.” Notwithstanding his employer’s statement, the petitioner was not, in fact, working full duty, but rather worked in a temporary status in which his contact with inmates was limited or precluded altogether. Moreover, notwithstanding this temporary status, the petitioner’s job duties had never been amended. Inmate contact was an essential component of the petitioner’s duties as a correction officer, but the petitioner was incapable of performing this critical function by reason of his PTSD. The application should be allowed.

DECISION

The petitioner appeals the decision of the State Board of Retirement (“the Board”) to take no action on his application for accidental disability retirement.² This appeal turns on whether the petitioner was able to perform the essential duties of a correction officer at the time of his separation from employment, notwithstanding a statement by his employer, the Worcester County Sherriff’s Department (“Sheriff’s Department”), that he was “working full duty.”

I held a hearing on June 26, 2023 at the Division of Administrative Law Appeals, 14 Summer Street, Fourth Floor, Malden, MA, 02148. The hearing was recorded. The petitioner testified, as did Kevin Carlo, the president of the union for Sheriff’s Department correction officers. I admitted into evidence the jointly proposed exhibits identified as Exhibits A-EE.

Findings of Fact

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. The petitioner was a correction officer for the Worcester County Jail and

² The Public Employee Retirement Administration Commission (“PERAC”) was added as a necessary party on December 14, 2022.

House of Correction, employed by the Sheriff's Department. He started on March 15, 2015. (Exhibit A).

2. The Sheriff's Department's job description for this position recites twenty-four essential functions for a correction officer. Many of these clearly require direct interactions with inmates in some form or other (for example, No. 9 "Maintains discipline in prison cell blocks and prison areas"). (Exhibit A).
3. The Worcester County Jail and House of Correction, like other correctional institutions, operates all day, every day. It must maintain a minimum amount of staffing at all times to ensure the safety of the public, staff, and inmates. Accordingly, to accommodate circumstances that may impact staffing --- such as sick days, vacation time, off-site duties, and institutional emergencies --- a certain flexibility is required of correction officers. Under the union contract, they may be required to participate in forced overtime and stay beyond the end of their regularly scheduled shift and work through the succeeding shift. (Carlo Test.; Petitioner Test.).
4. Sheriff's Department correction officers occasionally perform work that requires them to be armed, such as patrolling the perimeter of the jail or escorting inmates to off-site locations, such as court. (Petitioner Test.). Accordingly, correction officers must be able to carry firearms. (Petitioner Test.; Exhibit A).
5. On November 15, 2015, the petitioner heard yelling from an inmate's cell and banging on the cell's observation window. Through the observation window, the petitioner observed the occupant and heard him threaten him. The inmate

punched his fist through the observation window, shattering the window and striking the petitioner in the face. (Petitioner Test.).³

6. The petitioner was taken to the Saint Vincent Hospital Emergency Room where he was found to have sustained multiple lacerations and contusions about the face and right eye orbit, as well as a nasal bone fracture. (Exhibit I).
7. Since November 15, 2015 onward, the petitioner has treated with various providers to address the physical trauma associated with the attack. This trauma included headaches, blurred vision, and eye pain. (Exhibits I-K, O, Q, and N).⁴
8. The petitioner was out of work until the middle of December 2015 and collected worker's compensation benefits. (Exhibits L and M; Petitioner Test.). In December 2015, he returned to his regular job duties. (Petitioner Test.).
9. On March 15, 2018, the petitioner saw Lyndsey Digiorgio, NP. In addition to her assessment of ongoing issues the petitioner was experiencing with his right eye, Ms. Digiorgio noted PTSD-like symptoms that she would continue to monitor. She considered a mental health referral. The petitioner was allowed to continue to work without restrictions. (Exhibits J and K).

³ The petitioner filed an incident report, as did a nurse who reported to the scene of the attack immediately after it had occurred. (Exhibit A). There is no dispute that the petitioner fulfilled the statutory notice requirements.

⁴ Although the petitioner's injuries were serious (and have not fully abated) and involved an extensive course of treatment, this decision will not discuss the details of his physical injuries, or their treatment, because, as will be seen in what follows, this appeal centers on his emotional trauma.

10. On March 23, 2018, Ms. Digiorgio noted that the petitioner “may benefit from restricted duty for short time while symptoms are treated. PTSD likely contributing.” She restricted the petitioner to light duty status, including a limitation of no direct inmate contact. (Exhibits J and K).
11. The Sheriff’s Department accommodated this limitation under the union contract light duty provision. (Petitioner Test.).
12. The union contract did not permit light duty status to be continued indefinitely. Instead, it could be authorized for an initial ninety-day period and, if warranted, extended for an additional ninety days. The Sheriff’s Department could, if it so chose, extend light duty status beyond that time, but it had no obligation to do so under the contract. (Carlo Test.; Exhibit T).
13. On April 13, 2018, Ms. Digiorgio determined that the petitioner was “to perform no work activities” and again indicated she was considering a mental health referral and would continue to monitor his "PTSD like symptoms.” (Exhibits J and K).
14. The petitioner did not work from approximately April 13, 2018 through August 1, 2018. (Petitioner Test.).
15. The petitioner applied for worker’s compensation benefits and, on July 17, 2018, an order of payment issued for benefits as of July 16, 2018, as well as for payment for a neurological evaluation. (Exhibit P).⁵

⁵ The neurological evaluation was performed by Kate Williams, NP on July 20, 2018. Ms. Williams stated in her note that the petitioner "has increased anxiety, he also seems to have some PTSD and [is] having nightmares/flashbacks" and she recommended he see a CBT [cognitive behavioral therapy] therapist or a psychiatrist. (Exhibit Q).

16. On July 25, 2018, Ms. Digiorgio placed a referral for mental health support. (Exhibit K).
17. On August 1, 2018, Ms. Digiorgio permitted the petitioner to return to work, subject to a restriction that he have no direct inmate contact. (Exhibits J and K). Ms. Digiorgio noted that it was “OK [for the petitioner] to work control 3 and tower.” (Exhibit K).
18. That day, the petitioner returned to work in a light duty capacity with the restriction that he have no inmate contact. (Exhibit A; Petitioner Test.).
19. During his light duty status, the petitioner worked the 3 pm to 11 pm shift, in either the control room or the tower. In the control room, the petitioner would perform tasks such as directing telephone calls and e-mails. In the tower, the petitioner monitored the jail grounds below. Neither work location involves inmate contact. (Petitioner Test.).
20. The petitioner struggled performing even his light duty assignment. He viewed his work with anxiety and dread, describing coming to work as “going into hell.” He nevertheless persisted because he was the sole source of income for his family. (Petitioner Test.).
21. The petitioner met with Leo Polizoti, PhD, a PTSD expert, on August 7, 2018. Dr. Polizoti formed an initial diagnosis of PTSD, and they began regular counseling. (Exhibit R).
22. On September 20, 2018, Dr. Manoj Moholkar issued a Medical Status Report diagnosing the petitioner with PTSD and post-concussion headache. He continued to impose the limitation of no inmate contact. (Exhibit K). Dr.

Moholkar later included a diagnosis of post-concussion syndrome. (Exhibits J and K).

23. On October 2, 2018, the petitioner saw Dr. Babafemi Onabanjo and stated he was having nightmares of the assault. He was having headaches, had trouble focusing at work, and his sleep was poor. The petitioner stated he "feels like someone is coming after him." His affect appeared flat, and his mood appeared sad. Dr. Onabanjo's assessments included PTSD and depression. He prescribed fluoxetine and prazosin. (Exhibit N).
24. The petitioner came under the care of Dr. Amjad Bahnassi, a psychiatrist, on January 16, 2019. He diagnosed the petitioner as suffering from PTSD and depression. (Exhibit S).
25. On November 25, 2019, the petitioner applied for accidental disability retirement, claiming post-concussion syndrome, occipital neuralgia, post-traumatic stress disorder, and depression. His application states that he ceased to be able to perform all the essential duties of his position on April 13, 2018, noting, however, that "I have been back to work since August 1, 2018 to a temporary modified position with no inmate contact." (Exhibit A).
26. The application attaches Physician's Statement forms from Ms. Digiorgio and Dr. Bahnassi stating that the petitioner suffers from post-concussion syndrome, occipital neuralgia, PTSD, and depression. (Exhibit A).
27. In a letter dated January 3, 2020, Assistant Superintendent Jason Rives informed the petitioner that he had exceeded the 180 days of light duty status allowable under the "Light Duty Agreement" executed by the union and the

Sheriff's Department and that his light duty status would end on January 31, 2020. (Exhibit T).

28. On January 17, 2020, in reaction to this information, the petitioner met with Dr. Onabanjo, who wrote a letter stating that the petitioner continues to experience right eye pain, blurry vision, and intermittent headaches. Dr. Onabanjo advised that the petitioner "is to remain on light duty" and recommended that "he still not be engaged with inmates at this time to avoid possible further injury to [his] head or eye." (Exhibit N).
29. On January 20, 2020, the petitioner met with Ms. Digiorgio, who noted his PTSD, headaches, and eye problems and ordered "No direct inmate contact." (Exhibit K).
30. On January 22, 2020, the petitioner attended a meeting with Sheriff's Department staff and Mr. Carlo in an effort to arrange some way for him to stay employed during the pendency of his accidental disability retirement application. (Carlo Test.; Petitioner Test.). The Sheriff's Department expressed a willingness to assist the petitioner in retaining his employment during the pendency of the accidental disability retirement process. (Petitioner Test.).
31. Later that day, Assistant Superintendent Rives sent a letter advising that the petitioner's January 17, 2020 documentation would "would not be sufficient to indefinitely extend" his light duty status.⁶ Assistant Superintendent Rives

⁶ I do not infer from this language that an "indefinite extension" of light duty status would have necessarily been provided, even if otherwise impeccable medical documentation had been proffered. Based on the contractual time limits on light duty

also advised that inmate contact is “an essential job function of a Corrections Officer.” He also advised the petitioner to inform the Human Resources Director if there was an accommodation that could be extended to the petitioner that would enable him to have inmate contact. (Exhibit V).

32. The petitioner saw Dr. Onabanjo on January 27, 2020 "for follow up with concerns that he was not able to continue his light duty." Dr. Onabanjo drafted a letter stating that because light duty could not be continued, he was “willing for [the petitioner] to resume full duty if accommodations could be made.” These accommodations would be assignment to the 11pm to 7am shift so as to limit his interactions with inmates, eye protection as needed, “limited interactions [with inmates] and also to have support if needed to limit altercations.” This was a provisional recommendation, subject to whether this proposed arrangement resulted in exacerbation of the petitioner’s conditions. (Exhibit N).

33. On January 27, 2020, Ms. Digiorgio issued a Medical Status Report in which she opined that the petitioner could return to full duties if he received the following accommodations: assignment to the 11pm to 7am shift, eye protection as needed, and access to the Crisis Negotiation Team as needed (Exhibit K).

34. The petitioner provided Dr. Onabanjo’s note and Ms. Digiorgio’s report to the

service and the Sheriff’s Department’s reluctance to reduce some subsequently granted accommodations to writing (discussed below), it appears that the Sheriff’s Department, while amenable to working with the petitioner, was wary of agreeing to “light duty” service as opposed to a less contractually-fraught accommodations.

Sheriff's Department. (Petitioner Test.).

35. After the petitioner's light duty assignment expired as of February 1, 2020, the Sheriff's Department provided him with accommodations. First, he was restricted to the 11pm to 7am shift. (Petitioner Test.). The 11pm to 7am shift is a time during which inmates are locked in their cells and expected to be sleeping. (Petitioner Test.; Carlo Test.). Although he was assigned to either the control room or the tower, which was outside the secure inner perimeter of the jail itself (and thus would not involve inmate contact), he would occasionally be asked to enter the building for a brief period of time to cover an unanticipated staffing need. Second, the petitioner could not be required to remain on duty after the conclusion of his shift to provide coverage for the next shift. Third, the petitioner was allowed to request breaks, which he would take in his car. (Petitioner Test.).
36. In addition to these accommodations, the Sheriff's Department precluded him from attending roll call, which took place inside the secure perimeter. This was to minimize the chance of inmate contact. Moreover, the petitioner was not allowed to carry a firearm. (Petitioner Test.).
37. The Sheriff's Department did not reduce these limitations to writing. On one occasion, a superior officer was not aware of one of these limitations and confirmed its existence by placing a call to the Human Resources Department. (Petitioner Test.).
38. The petitioner worked under these conditions for approximately one year. (Petitioner Test.).

39. The Employer's Statement Pertaining to Member's Application for Disability

Retirement was signed on February 2, 2020 by Dianne Jordan, the Sheriff's Department's Director of Human Resources. The Statement included the following:

- In response to the question concerning the last date the petitioner was able to perform the essential duties of his position, the Sheriff's Department states: "N/A."
- In response to the question asking if there are any physical requirements the petitioner cannot perform because of the claimed disability, the Sheriff's Department states: "Please see the attached job description."
- In response to the questions regarding whether the petitioner could perform the essential duties of his current position if he was reasonably accommodated, the Sheriff's Department says: "Currently working full duty."
- In response to the question whether the petitioner's medical condition affected his job attendance or performance, the Sheriff's Department says: "Employee went out on 11/15/2015 and returned to work on 12/20/2015. Employee filed for resumption on 07/16/2018 and returned to work on 08/01/2018. Worker's comp claim was denied."⁷
- In response to the question whether the petitioner requested a modification of his job duties in order to accommodate his medical condition, the Sheriff's Department states: "N/A."
- In response to the question whether the petitioner had been offered any modification of job duties or other reasonable accommodation because of his medical condition, the Sheriff's Department says: "Light duty is available. Currently working full duty."

(Exhibit A).

40. In March 2020, the petitioner was examined by three separate Regional

Medical Panel physicians. All three physicians opined that the petitioner is

⁷ This appears to be an error. The record does not reflect a denied worker's compensation claim.

unable to perform the essential duties of his position, that his condition is permanent, and is such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed. (Exhibits B-D).

41. The examining physicians' conclusions include the following:

- Dr. Melvyn Lurie: The petitioner is unable to perform the essential duties of his position because "his intractable anxiety, a feature of his PTSD, is such that he would not react properly to stress nor to directives of his superiors. Moreover, his depression, especially with its symptoms and sign of psychomotor retardation, in itself would impair him from his job. These would put him, his coworkers, and the public in danger." (Exhibit B).
- Dr. M. Rachid Och: The petitioner is "disabled from his occupation due to a diagnosis of PTSD with continued symptoms of depression, anxiety, lack of enjoyment, poor attention and concentration, and suicidal thoughts. He suffers from flashbacks and nightmares as well and has only made minor progress in treatment both with the therapy and medication." (Exhibit D).⁸

42. On September 24, 2020, the Board approved the petitioner's application.

(Exhibit E).

43. On November 16, 2020, PERAC remanded the petitioner's application to the

Board pursuant to G.L. c. 32, § 21(1)(d), citing the February 3, 2020

Employer's Statement, which said that the petitioner was working "full duty."

(Exhibit F).

44. On January 14, 2021, Dr. Polizoti authored a note that the petitioner "must

avoid direct inmate contact" and that "this restriction is permanent." (Exhibit

⁸ Dr. Mark Cutler's discussion is relatively brief. He diagnosed the petitioner with a major depressive disorder and PTSD and opined that the petitioner is "mentally incapable" of performing the essential duties of his job. (Exhibit C).

R).

45. On February 2, 2021, Ms. Digiorgio reported that according to the petitioner, the “new assignment at work [is] causing increased anxiety symptoms.” She stated that the petitioner was to be restricted to the 11pm to 7am shift and that there was to be no direct inmate contact. (Exhibit K).
46. On or about February 1, 2021, the petitioner returned to light duty status. (Petitioner Test.). This was precipitated, at least in part, by the way the petitioner was “behaving,” which included errors and inconsistencies in his job performance in the control room. (Petitioner Test.).
47. In a letter dated February 9, 2021, Dianne Jordan, the Director of Human Resources, stated: “Per your updated medical documentation dated February 2, 2021, you have been placed on light duty status. As stated in the Light Duty Agreement, you are approved for light duty for ninety (90) days which will expire on May 3, 2021. If you require an extension for additional ninety (90) days, you will need to provide updated medical documentation prior to the May 3rd expiration.” (Exhibit Y).
48. On May 14, 2021, the petitioner was assigned to the tower for his 11pm to 7am shift when he experienced a strong urge to jump. He advised his supervisor of this and was relieved from duty. He was driven home by Sheriff’s Department staff. He has not worked since that time. (Petitioner Test.; Exhibit Z).
49. On July 28, 2022, the Board voted to take no further action on the petitioner’s application. (Exhibit G).

50. On July 29, 2022, the petitioner filed a timely notice of appeal with DALA.
(Exhibit H).

Analysis

An applicant for accidental disability retirement must establish (1) “that he is unable to perform the essential duties of his job”; (2) that the incapacity “is likely to be permanent”; and (3) that the incapacity arose “by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, [the member’s] duties. G.L. c. 32, § 7(1). The relevant “medical problem is required to have ‘matured,’ i.e., to have become disabling, while the applicant was still a member in service.” *Walsh v. Malden Ret. Bd.*, CR-19-517, 2024 WL 215930, at *2 (DALA Jan. 12, 2024) (citing *Hollup v. Worcester Ret. Bd.*, 103 Mass. App. Ct. 157, 164-65 (2023)) (internal quotation marks omitted).

In this case, there is no dispute that the petitioner is suffering from profound emotional trauma, that this trauma is likely to be permanent, and that it arose as a result of a personal injury received while in the performance of his duties. The only dispute is whether the petitioner is unable to perform the essential duties of his job. PERAC’s remand to the Board and the Board’s declination to act on the petitioner’s application is grounded entirely on the responses in the Sheriff’s Department’s Employer’s Statement.

To cut to the chase: If the Sheriff’s Department’s statement that the petitioner was “currently working full duty” is meant to suggest the petitioner was performing the essential duties of his position, the statement is inaccurate. From August 2018 through his final day of work, the petitioner was either on light duty status or on an *ad hoc* accommodated status subject to unwritten restrictions. In both cases, the petitioner’s

contact with inmates was either minimal or non-existent. As both the position description and Deputy Superintendent Rives's January 22, 2020 letter make plain, inmate contact is an essential requirement for the petitioner's position as a correctional officer. (Exhibit A; Exhibit V). The petitioner did not, and could not, fulfill this critical function, or the several essential work duties (such as the maintenance of order in the facility) that require this contact.

The fact that the Sheriff's Department accorded the petitioner light duty status and informal accommodations, which minimized inmate contact, does not vitiate the centrality of inmate contact to the petitioner's position. There is no evidence that light duty status could be assigned on a permanent basis. Instead, the evidence is that the Sheriff's Department was not contractually obligated to provide permanent light duty status and was disinclined to do so. As for the informal accommodations provided from February 2020 to February 2021, the evidence is that those accommodations were intended to serve as a bridge while the petitioner awaited the outcome of his accidental disability retirement application.⁹ Such temporary assignments cannot overwrite the essential duties of the petitioner's actual position. *See Ret. Bd. of Brookline v. Contributory Ret. Appeal Bd.*, 33 Mass. App. Ct. 478, 483 (1992) (holding that even if injured police officer could perform light duty as a dispatcher, he was nevertheless disabled from performing his job duties because the record did not indicate a department

⁹ In some circumstances, the provision of accommodations may work at cross purposes with an application for accidental disability retirement: if the accommodations modify the employee's responsibilities such that the employee can perform his or her job, the employee is not disabled. Those circumstances are not present here because, as discussed below, the Sheriff's Department did not actually modify the essential duties of the petitioner's job and, in any case, the petitioner struggled to perform his work even with accommodations.

practice of permanently assigning officers as dispatchers and because evidence suggested that permanent light duty assignments were not permitted).

Moreover, although an employer may modify an employee's job responsibilities to accommodate his or her limitations, *Foresta v. CRAB*, 453 Mass. 669, 680 n.11 (2009), the Sheriff's Department never modified the petitioner's job description, it only excused performance of his duties on a temporary basis in compliance with the union contract and/or in a commendable effort to allow the petitioner to keep working while his accidental disability retirement application was pending.¹⁰ To put it another way, the petitioner's "full complement of responsibilities was [] never diminished, only honored in the breach." *Kelley v. Norwood Ret. Bd.*, CR-19-500, 2021 WL 9697053, at *4 (Nov. 19, 2021).

Finally, the evidence suggests that the petitioner struggled to perform even the modified duties. There were errors and inconsistencies in his work in the control room (which I infer from the context were the product of the petitioner's mental state rather than his innate aptitude for the work). And the incident precipitating the petitioner's separation from employment, coupled with the conclusions of medical panelists Dr. Lurie and Dr. Ochs, indicates that, whether or not the petitioner had contact with inmates, he was suffering from anxiety that could impair his responses in the event of a non-inmate emergency (for example, a disturbance on prison grounds spotted from the tower, a fire, etc.).¹¹

¹⁰ The Sheriff's Department did not, for example, submit a revised job description to the Board in response to the petitioner's accidental disability retirement application.

¹¹ In light of the petitioner's anxiety, PTSD, and depression, although the panelists did not expressly state that the petitioner should not carry a firearm in connection with his work, it requires little clinical acumen or correctional insight to conclude that it might not

CONCLUSION AND ORDER

The petitioner is entitled to retire for accidental disability. The Board is directed to act on the petitioner's application and grant it.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: January 29, 2024

be advisable for the petitioner to carry a firearm in a stressful correctional setting. Although less central than inmate contact, being able to carry a firearm was listed as an essential duty of the correction officer position.