COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Lorenzo Internicola,
Petitioner,

v.

Saugus Retirement Board,
Respondent.

No. CR-20-385

Dated: November 10, 2022

Appearance for Petitioner:
Daniel Fogarty, Esq.
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Appearance for Respondent:
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Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner, a police officer, applied to retire for accidental disability based on a diagnosis of PTSD. The respondent retirement board denied the application without convening a medical panel. The board reasoned that the petitioner committed "serious and willful misconduct," G.L. c. 32, § 7(1), by failing to disclose important medical facts in preemployment examinations. But the petitioner's entitlement to a medical panel must be analyzed based on his own evidence, unrebutted and believed. From that perspective, it is impossible to conclude that the petitioner committed disqualifying misconduct within the meaning of § 7(1). The case is therefore remanded to the board with instructions to arrange for a medical panel to be convened.

DECISION

The Saugus Retirement Board denied the accidental disability retirement application of Police Officer Lorenzo Internicola without convening a medical panel. Officer Internicola appeals. An evidentiary hearing took place on July 25, 2022. Officer Internicola was the only witness. I admitted into evidence exhibits marked 1-15. The record closed upon the submission of hearing briefs. The briefs rely on stipulations marked 1-33, which I hereby admit as well.

Findings of Fact

The evidence presented by Officer Internicola, unrebutted and believed,[1] supports the following findings of fact:

1. Officer Internicola served in the United States Navy from March 2009 until December 2012. He was detailed to the Army, where he worked as a prison guard in Guantanamo Bay, Cuba. (Exhibit 12; Stipulations 3, 4, 6; Transcript 22-23.)

2. After returning from Cuba, Officer Internicola was treated for mental health issues at Portsmouth Naval Hospital in Virginia.[2] He was diagnosed with anxiety, PTSD (posttraumatic stress disorder), and alcohol dependence. Treatment was effective, and Officer Internicola felt better. (Exhibit 15; Stipulation 5; Transcript 23-28.)

3. Thereafter, Officer Internicola applied for a position with the Saugus Police Department. In June 2013, he underwent physical and psychological preemployment examinations. Among the forms he completed was a medical history questionnaire. The questionnaire listed a series of conditions under the heading, "Do you now have or have you ever had any of the following . . . ." Officer Internicola selected "No" checkboxes to indicate that he had no history of any "[m]ental or emotional disorder," "[m]ental health treatment," or "alcohol or drug abuse." (Exhibit 1; Stipulation 7; Transcript 28, 32-35.)

4. The preemployment process also included an interview with a psychologist, Dr. Samuel Migdole. Officer Internicola told Dr. Migdole that his history of psychological or psychiatric treatment involved a "group meeting with a mental health person after his return from

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[1] The standard by which the evidence is evaluated in this proceeding is discussed *infra*.

[2] The parties agreed at the hearing that the inclusion of mental health information in this decision would not unwarrantedly invade Officer Internicola's personal privacy. *See* G.L. c. 4, § 7, 26th para., (c).

deployment." Dr. Migdole administered a personality test and found no psychological issues. He recommended Officer Internicola for employment, which Officer Internicola commenced in September 2013. (Exhibit 2; Stipulations 8, 9; Transcript 28-29, 45-47.)

5. Officer Internicola knew at the time of his preemployment process that he was providing incorrect information on his medical history questionnaire and in his interview with Dr. Migdole. On the other hand, at that time, Officer Internicola was in good mental health. He did not believe that his previous issues would impair his ability to serve as a police officer. His mental health providers were supportive of his plan to work for the police. (Exhibit 15; Transcript 23-48.)

6. In October 2016, Officer Internicola responded to a violent car accident involving injuries to a nine-year-old child. He was badly upset, and he filed a report documenting the incident. (Exhibits 2-5; Stipulations 12-19.)

7. In March 2019, Officer Internicola was admitted to McLean Hospital after a suicide attempt. He was diagnosed with PTSD, which providers connected to his work as a police officer. He has been on injury leave ever since. (Exhibits 6, 7; Stipulations 22-28.)

8. In November 2019, Officer Internicola applied for accidental disability retirement, citing PTSD "from traumatic events during [his] career." Dr. Dennis O'Neal executed a treating physician's statement. He described Officer Internicola's PTSD as the result of the October 2016 car accident. He added that Officer Internicola's earlier PTSD, relating to his military service, was immaterial to his performance as a police officer. (Exhibits 8, 9; Stipulations 29-30.)

9. In July 2020, the board denied Officer Internicola's application without convening a medical panel. The board explained that Officer Internicola "did not accurately

disclose his medical history during the pre-employment examination stage, which he was obligated to do." Officer Internicola timely appealed. (Exhibits 13, 14; Stipulations 31-33.)

Analysis

A retirement board may deny a member's retirement application at any time if the member "cannot be retired as a matter of law." 840 C.M.R. § 10.09(2). By extension, a board is not required to convene a medical panel if an applicant for disability retirement fails to present a prima facie case. *See Duquet v. Malden Ret. Bd.*, No. CR-18-297, at 8 (DALA Aug. 28, 2020). A prima facie case is made out by "sufficient evidence 'that, if unrebutted and believed, would allow a factfinder to conclude that [the member] is entitled to . . . benefits.'" *Hickey v. Medford Ret. Bd.*, No. CR-08-380, at 4 (CRAB Feb. 16, 2012) (quoting *Lowell v. Worcester Ret. Bd.*, No. CR-06-296, at 2-3 (DALA Dec. 4, 2009)).

In the usual case, a member's entitlement to accidental disability retirement hinges on three requirements: that the member is "unable to perform the essential duties of his job," that the incapacity is "likely to be permanent," and that the incapacity was caused by "a personal injury sustained or hazard undergone as a result of, and while in the performance of, [the member's] duties." G.L. c. 32, § 7(1). The board agrees that Officer Internicola makes a prima facie case as to these three requirements.

A provision implicated more infrequently makes accidental disability retirement unavailable in cases of "serious and willful misconduct on [the member's] part." *Id.* Serious and willful misconduct is "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." *Jones v. Weymouth Ret. Bd.*, No. CR-04-181, at 6 (CRAB Sept. 30, 2005). The board's position is that serious and willful misconduct defeats Officer Internicola's retirement application.

The behavior on which the board relies occurred during Officer Internicola's preemployment screening. The parties disagree about whether that chronological juncture is relevant to § 7(1). Their respective positions are rooted in two separate strands of precedent.

Officer Internicola cites two DALA decisions stating that misconduct matters for purposes of § 7(1) only if it was contemporaneous with the accident that caused the member's disability. *Carrier v. Fall River Ret. Bd.*, No. CR-18-0274 (DALA July 24, 2020); *Beamud v. Cambridge Ret. Bd*., No. CR-09-355 (DALA June 21, 2013). The magistrate in *Beamud* emphasized that the retirement law features no parallel to G.L. c. 152, § 27A, which denies workers' compensation to certain employees who misrepresented their physical conditions at the time of hiring.[3] The magistrate in *Carrier*, closely reading § 7(1)'s syntax, concluded that the phrase "without serious and willful misconduct" relates specifically to the event of the member sustaining an injury or undergoing a hazard. Under these two decisions, "the sole question is whether [the member] was engaging in misconduct when he was injured." *Carrier*, *supra*, at 12. If these decisions are correct, then Officer Internicola's preemployment behavior is not misconduct for purposes of § 7(1), and he is entitled to an examination by a medical panel.

The board's position is grounded in an older CRAB decision, *Kallas v. Quincy Ret. Bd.*, No. CR-00-1165 (CRAB Jan. 18, 2002). A medical panel in that case declined to certify that the

[3] "In any claim for compensation where it is found that at the time of hire the employee knowingly and willfully made a false representation as to his physical condition and the employer relied upon the false representation in hiring such employee, when such employee knew or should have known that it was unlikely he could fulfill the duties of the job without incurring a serious injury, then the employee shall, if an injury related to the condition misrepresented occurs, not be entitled to benefits under this chapter. Retention of an employee who rectifies any misrepresentation made to his employer regarding his physical condition subsequent to the hire but prior to the injury shall restore any right to compensation under this chapter." G.L. c. 152, § 27A.

member was disabled. CRAB saw no error in the panel's analysis, but added: "We also agree with the Magistrate that . . . [the member] would not be eligible due to his serious and willful misconduct in making misstatements as to his physical condition at the time of his hiring." *Id.* at 2. CRAB has not since reaffirmed or disavowed that remark.

For present purposes, it is prudent to assume that *Kallas* is good law. The implication of this assumption is that it is *possible* for a preemployment misrepresentation to count as serious, willful misconduct within the meaning of § 7(1).

What *Kallas* does *not* say is that *every* preemployment misrepresentation is disqualifying under § 7(1). Nor would such a holding make sense. No authority suggests that a retiree for accidental disability must possess a career-long disciplinary record free of serious, willful misconduct. *Some* connection or nexus between the member's misconduct and his disability is necessary, even if simultaneity is not. The misconduct must in *some* way make the member's "serious injury" a "probable consequence[]." *Jones*, *supra*, at 6.

These points draw clarity and shape from *Kallas*'s facts, as told in the underlying DALA decision. *Kallas v. Quincy Ret. Bd.*, No. CR-00-1165 (DALA Aug. 3, 2001). The member there, after a car crash, suffered from two years of chronic back pain. *Id.* at 2-5. During July 1997, his back was imaged multiple times and he was prescribed Percocet. *Id.* at 4, 11. In August 1997, he applied for a job as a school custodian, certifying that he had never endured an accident, a serious injury, or any back problems. *Id.* at 4-5, 11-12. The employer relied on these statements in choosing the member over other candidates. *Id.* at 10. The custodian position required "enormous amounts of lifting, bending, climbing stairs, carrying heavy objects, [and] shoveling snow." *Id.* The member worked for one week before leaving with back pain. *Id.* at 5-6.

In this sequence of events, it is possible to discern a connection between the member's preemployment misconduct and his ensuing disability. The member was suffering from an ongoing medical condition that made his new job duties perilous. He concealed fresh medical information that would have scared off his new employer. In essence, he deceitfully obtained a job tailor-made to disable him, and the job promptly delivered. As *Jones*, *supra*, requires, the member's misrepresentations made serious injury a probable consequence.

It is not difficult to understand why the board views Officer Internicola's case as a potential descendant of the *Kallas* paradigm. But the difference in procedural posture is pivotal. *Kallas* reached CRAB after a medical panel's examination. Officer Internicola has not yet been afforded such an examination. To obtain one, he is only required to present a prima facie case. His evidence must now be taken as unrebutted and believed. *Hickey*, *supra*, at 4.

This perspective generates the following, interrelated assumptions: (a) that Officer Internicola's mental health issues upon leaving the military were fully resolved by the time of his application to join the police; (b) that his trauma as a police officer was entirely independent of his trauma at Guantanamo; and (c) that his disabling symptoms were caused specifically by his trauma as a police officer. These propositions are supported by Dr. O'Neal's treating physician's statement. Their implication is that Officer Internicola's preemployment omissions were not connected to his eventual disability. His prima facie case thus stands on a different footing from *Kallas*; it presents the more common scenario of a blot on a member's disciplinary record that remains irrelevant to his retirement application.

The procedural posture also means that the various findings and assumptions stated in the instant decision are provisional. They will be open to reexamination in light of the medical panel's certificate and additional information. *See Ferreira v. Boston Ret. Bd.*, No. CR-12-665,

at 4 & n.8 (CRAB Apr. 15, 2015); *Lowell*, *supra*, at 4. In particular, the panelists' analyses may shed light on the connections or divides between Officer Internicola's preemployment medical condition and his current symptoms. In turn, such input may inform the ultimate determination of whether Officer Internicola's behavior amounted to disqualifying misconduct within the meaning of § 7(1), *Kallas*, and *Jones*.[4]

Conclusion and Order

The board's decision is VACATED. The case is remanded to the board with instructions to arrange for a medical panel to be convened.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

[4] The board asserts that standards promulgated by the Human Resources Division are pertinent to the analysis of whether Officer Internicola would have been hired if he had accurately disclosed his medical history. This point may prove important at a later date, but it need not be dissected in the current procedural posture.