COMMONWEALTH OF MASSACHUSETTS

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

Amy Johnson,
Petitioner,

v.

State Board of Retirement,
Respondent.

No. CR-18-586

Dated: April 8, 2022

Appearance for Petitioner:
Amy Johnson (pro se)
551 Elm Street
Hanson, MA 02341

Appearance for Respondent:
Melinda E. Troy, Esq.
One Winter Street
Boston, MA 02108

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner worked as a registered nurse in a facility for women involuntarily committed under G.L. c. 123, § 35. Each woman was detained based on a judicial finding that she had an "an alcohol or substance use disorder" involving a "likelihood of serious harm." Those detainees were "mentally ill" within the meaning of G.L. c. 32, § 3(2)(g), and the petitioner is entitled to Group 2 classification for retirement purposes.

DECISION

Petitioner Amy Johnson appeals from a decision of the State Board of Retirement denying her request for Group 2 classification under G.L. c. 32, § 3(2)(g). An evidentiary hearing took place by WebEx on March 28, 2022. Ms. Johnson was the only witness. I admitted into evidence exhibits marked 1-15.

Findings of Fact

I find the following facts.

1. Ms. Johnson is a registered nurse. She began working for the Commonwealth in 2003. For approximately ten years, she was employed by UMass Correctional Health, working at the Bridgewater Correctional Complex. Her patients there included both minimum-security prisoners and individuals involuntarily committed by the courts under G.L. c. 123, § 35. (Johnson testimony; Exhibit 5.)

2. In late 2016, Ms. Johnson began working for the Department of Mental Health. Her position was located at the Taunton State Hospital, a psychiatric institution. She was assigned to the Women's Recovery from Addictions Program (WRAP). (Johnson testimony; Exhibits 4-5.)

3. WRAP is a locked facility for women committed under § 35. Its patients generally suffer both from substance use disorders and from additional mental health disorders, such as post-traumatic stress disorder, bipolar disorder, and borderline personality disorder. Patients arrive at WRAP while still detoxing from addictive substances. Many have also stopped taking their prescribed psychiatric medications. (Johnson testimony; Exhibits 4, 7, 8.)

4. Ms. Johnson spent the majority of her working hours at WRAP in an acute unit. Her responsibilities included assessing, medicating, and monitoring patients, and responding to medical and psychiatric emergencies. Her patients were sometimes psychotic, and often angry, agitated, and violent. Physical confrontations among the patients and the staff were not unusual. (Johnson testimony; Exhibits 4-6.)

5. In anticipation of her retirement, Ms. Johnson asked the board to classify her in group 2 under G.L. c. 32, § 3(2)(g). The board declined in a letter dated October 5, 2018, which Ms. Johnson timely appealed. She retired effective December 7, 2018. (Exhibits 1, 2, 4-6.)

Analysis

The retirement benefits of a Massachusetts public employee are shaped in part by the employee's classification into one of four "groups." G.L. c. 32, § 3(2)(g). Classification in Group 2 may yield favorable benefits as compared to Group 1, the catch-all group. Group 2 covers, among other employees, those "whose regular and major duties require them to have the care . . . of prisoners . . . or persons who are mentally ill." § 3(2)(g).

An employee's group classification is based on his or her position at the time of retirement. *Maddocks v. Contributory Ret. Appeal Bd.*, 369 Mass. 488, 493-94 (1976). There is no dispute that, as the case law requires, Ms. Johnson provided hands-on care to her patients, *Morreale v. State Bd. of Ret.*, No. CR-15-332 (DALA Mar. 10, 2017), and shouldered responsibility for patient well-being, *Sutkus v. State Bd. of Ret.*, No. CR-09-837 (CRAB Feb. 17, 2011). The disagreement centers on whether WRAP's patient population consisted of either "prisoners"[1] or "persons who are mentally ill."

Involuntary commitment to WRAP is governed by G.L. c. 123, § 35. Upon receipt of a § 35 petition, the court is required to schedule an "immediate" hearing. The person whose commitment is at stake is brought to court by a summons or an arrest warrant. He or she is then entitled to a court-appointed attorney. § 35; *In the Matter of a Minor*, 484 Mass. 295, 296-97 (2020); *In the Matter of G.P.*, 473 Mass. 112, 116-17 (2015).

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[1] Ms. Johnson initially waived the argument that her patients were "prisoners." After certain additional proceedings, she moved to withdraw that waiver. The motion is allowed, essentially because the waiver's enforcement would not advance the interests of justice and administrative economy. *See Cardoze v. Swift*, 113 Mass. 250, 252 (1873); *Turners Falls Ltd. P'ship v. Bd. of Assessors of Montague*, 54 Mass. App. Ct. 732, 737 (2002); *Doe v. Sex Offender Registry Bd.*, 86 Mass. App. Ct. 1119, slip op. at 2 n.1 (2014). The board, having received notice that Ms. Johnson's waiver might not be enforced, did not substantially rely on the waiver at the hearing.

The judge may issue an order of commitment upon finding that the person has "an alcohol or substance use disorder," *and* that the disorder creates a "likelihood of serious harm." G.L. c. 123, § 35. The latter element may involve either self-harm or harm to others, *id.* § 1, and must be "imminent." *In the Matter of a Minor*, 484 Mass. at 297. The judge's findings are required to rest on clear and convincing evidence. *Id.* at 296. The involuntary commitment may be up to 90 days long. § 35.

The question whether individuals committed under § 35 count as "prisoners" is a close one.[2] The retirement law does not define this term. As a matter of plain meaning, the term "prisoners" is not necessarily limited to criminals serving terms of incarceration. It is elastic enough to cover other people who are "taken by force and kept somewhere," *Black's Law Dictionary* 1388 (10th ed. 2014), or who are "deprived of liberty and kept under involuntary restraint, confinement, or custody," *Merriam Webster's Collegiate Dictionary* 927 (10th ed. 1993). To advance applicable legislative purposes, courts have interpreted statutory categories of "prisoners" to reach a variety of classes of individuals involuntarily confined by the legal system. *See, e.g.*, *Commonwealth v. Geary*, 31 Mass. App. Ct. 930 (1991) (a convict in a treatment center was a "prisoner" for purposes of a statute punishing prisoner assaults); *Commonwealth v. Faulkner*, 8 Mass. App. Ct. 936 (1979) (a detainee awaiting trial was a "prisoner" for purposes of a statute punishing prisoner escapes); *Defalco v. Office of Ct. Mgmt.*, 90 Mass. App. Ct. 1104 (2016) (unpublished memorandum opinion) (a person who injured a

[2] *Martin v. State Bd. of Ret.*, No. CR-09-1065 (DALA Nov. 2, 2016), addressed this question only in dicta, given that the petitioner there "did not engage in hands-on care." *Id.* at 3-4.

court officer while violently resisting arrest was a "prisoner" for purposes of a statute compensating "injuries . . . caused by . . . prisoners").

The central legislative purpose of the retirement law's grouping system is to "provid[e] early retirement incentive to employees with hazardous duties." *Pysz v. Contributory Ret. Appeal Bd.*, 403 Mass. 514, 518 (1988). *See Spencer v. Civ. Serv. Comm'n*, 479 Mass. 210, 220 (2018); *Pub. Emp. Ret. Admin. Comm'n v. Madden*, 86 Mass. App. Ct. 1107 (2014) (unpublished memorandum opinion). It may well be that this purpose would be best served by an interpretation of the term "prisoners" to include § 35 detainees.[3]

In any event, it is easy to determine that Ms. Johnson's charges at WRAP were "mentally ill" for purposes of Group 2. The term "mentally ill" also is not defined in the retirement statute. But the case law identifies three key factors that must be considered in deciding whether a certain population counts as "mentally ill" in this context.

One factor is whether the population suffers from a mental disorder[4] recognized by the American Psychological Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *See Neergheen v. State Bd. of Retirement*, No. CR-07-439, at 2-3 (CRAB Nov. 3, 2009); *Richard v. State Bd. of Ret.*, No. CR-16-72, at 8 (DALA Feb. 7, 2020). The DSM as currently updated does indeed view substance use disorder as a mental disorder. *See Diagnostic and Statistical Manual of Mental Disorders* 483-84 (5th ed. 2013); *In re Christopher R.*, 171 Cal.

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[3] Legislative purpose shapes the construction of statutory categories; it does not offer its own freestanding bucket. It is therefore clear that "[t]he hazardous nature of . . . work is not a criterion on which membership in Group 2 is based." *Woodward v. State Bd. of Ret.*, No. CR-20-359, at 10 (DALA Dec. 17, 2021).

[4] The APA does not apparently use the term "illness" in a sense distinct from diagnosable disorders. *See Diagnostic and Statistical Manual of Mental Disorders*, *supra*, at 20-21; U.S. Dep't of Health and Human Servs., *Facing Addiction in America* 2-1 (2016) ("severe substance use disorders . . . are now understood to be chronic illnesses").

Rptr. 3d 14, 21 n.6 (Cal. App. 2014); *Colby v. Assurant Emp. Benefits*, 603 F. Supp. 2d 223, 240-41 (D. Mass. 2009). All of Ms. Johnson's patients at WRAP were found by judges to suffer from severe substance use disorders. Each patient's addiction was so serious that it "substantially injure[d] the person's health," "substantially interfere[d] with the person's social or economic functioning," or involved a loss of "the power of self-control." G.L. c. 123, § 35. Collectively, the WRAP patient population obviously tended to suffer from substance use disorders of the severity contemplated by the DSM.

Pertinent precedents also consult a standard drawn from a DMH regulation, 104 C.M.R. § 27.05(1). This standard views people as mentally ill when they suffer from a "substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life." *Id. See Pulik v. State Bd. of Ret.*, No. CR-10-605, at 5-6 (CRAB July 10, 2012); *Popp v. State Bd. of Ret.*, No. CR-17-848, at 8 (DALA Oct. 22, 2021).[5] Ms. Johnson's patients surely tended to satisfy this test. At a minimum, a disorder of "orientation" grossly impaired their "ability to meet the ordinary demands of life." *Id.* This conclusion is compelled by the fact that a judge found each WRAP participant to have a disorder so severe as to require her temporary removal from her community. *See* G.L. c. 123, §§ 1, 35; *In the Matter of a Minor*, 484 Mass. at 302-03.

A third key consideration grows out of two cases concerning patients with serious dementia. *Pulik*, *supra*; *Nowill v. State Bd. of Ret.*, No. CR-08-558 (CRAB July 10, 2012). In

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[5] 104 C.M.R. § 27.05(1) contains a proviso excluding individuals with substance use disorders. But that proviso serves specifically to remove such individuals from the ambit of involuntary commitment under statutes *other than* § 35. *Id.* An exception carved out of the proviso ensures that substance use disorders *do* "qualify as a category of mental illness for the purpose of involuntary commitment under [§ 35]." 104 C.M.R. § 27.18(2) (cross-referenced at 104 C.M.R. § 27.05(1)).

both cases, the petitioner-members were assigned to Group 2; but CRAB emphasized that their particular patient populations suffered from symptoms so severe as to create a "likelihood of serious harm" absent involuntary hospitalization. Observing that Group 2's use of the term "mentally ill" dates back to 1972, CRAB reasoned that people "housed on a locked ward . . . who have demonstrated a risk of harm to their caregivers . . . are likely to have been confined as 'mentally ill' persons in the 1970s." *Nowill*, *supra*, at 8-9. *See also Popp*, supra, at 7-8. This third factor is again easily established by the judicial findings that presaged each WRAP patient's commitment. Every woman committed to WRAP necessarily suffered from a substance use disorder so bad that no intervention short of involuntary commitment would have adequately protected her or others against imminent and serious harm. *In the Matter of a Minor*, 484 Mass. at 310.

With these three datapoints in mind, it is hard to conjure a reason why the WRAP patient population would *not* be considered mentally ill for Group 2 purposes. Certainly, as a matter of legislative purpose, people suffering from severe addictions are not inherently safer than other categories of mentally ill individuals, such as dementia patients. *See Pysz*, 403 Mass. at 518.[6]

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[6] It is not necessary to decide the impact of the additional mental illnesses that most of Ms. Johnson's patients suffered alongside their substance use disorders. Remarks in *Pulik* and *Nowill* appear to suggest that "secondary" diagnoses do not count for purposes of the Group 2 calculus. But a rigid, formal reading of those remarks would diverge from "the plain language of the statute," contradict "common-sense notions of who is mentally ill," and yield "inequitable" results. *Richard*, supra, at 9-11; *Flynn v. State Bd. of Ret.*, No. CR-18-423, at 17-19 (DALA June 11, 2021). Indeed, in the context of individuals suffering dually from substance use disorders and other mental illnesses, efforts to disentangle "primary" and "secondary" diagnoses are hopelessly arbitrary. An easier reading of *Pulik* and *Nowill* may be that mental illnesses count for Group 2 purposes only when they are "primary" in the informal sense of truly driving patient care, not "secondary" in the informal sense of being merely incidental or derivative. *See Nowill*, *supra*, at 9 (discussing Group 2's exclusion of patients admitted specifically for treatment of neuromuscular disorders); *Pulik*, *supra*, at 7 (discussing the unimportance to the Group 2 analysis of symptoms that tend to correlate with severe dementia).

Conclusion and Order

For the foregoing reasons, Ms. Johnson is entitled to Group 2 classification under G.L. c. 32, § 3(2)(g). The board's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate