

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

ROBERT LONG	:	Docket No. CR-21-0616
<i>Petitioner</i>	:	
	:	
	:	Date: March 29, 2024
v.	:	
	:	
STATE BOARD OF RETIREMENT	:	
<i>Respondent</i>	:	

Appearances:

For Petitioner: Robert Long, *pro se*
For Respondent: Yande Lombe, Esq.

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

Petitioner, Robert Long, works at the Department of Youth Services (“DYS”) at a residential treatment program known as DYS Brewster. Since 1996, he has worked as the Program Coordinator III, Facility Director. DYS Brewster is known as a “staff secure” facility. It is not a locked facility and employs no institutional security officers. Rather, the Petitioner and his staff are entirely responsible for the custody of the committed youths. Because he has custody of the youth committed to his facility, he is entitled to Group 2 status.

INTRODUCTION

The Petitioner, Robert Long, timely appeals a decision by the State Board of Retirement (“Board” or “SBR”), denying his application for reclassification to Group 2. On January 31, 2024, I conducted a hearing in person at the Division of Administrative Law Appeal (“DALA”). The Petitioner testified on his behalf; the Board did not present any witnesses. I also admitted Respondent’s Exhibits R1–R6 and Petitioner’s Exhibits P1-P3 into evidence. The parties submitted closing briefs, the last of which was filed on March 22, 2024, at which point I closed the administrative record.

FINDINGS OF FACT

1. The Petitioner began working for the Department of Youth Services (“DYS”) in 1988. (Ex. R1; Testimony)
2. DHS “serves as the Commonwealth’s juvenile justice correctional agency.” *Forbes v. SBR*, CR-13-146, *1 (CRAB Jan 8, 2020.)
3. When a youth is committed to DHS, it creates “a custodial relationship between the [youth] and the department.” *Com. v. Carrion*, 431 Mass. 44, 198 (2000).
4. The Petitioner has always worked at the Stephen L French Youth Forestry Camp in Brewster (“DYS Brewster”). (Testimony.)
5. When the Petitioner began working there, DHS Brewster was home to three different programs: the homeward bound program, a secure detention unit (that housed about 12 offenders), and a residential treatment program. The homeward bound program closed down around 2007. The secure detention unit operated from 2001 until 2014. After it closed, all that remained was the residential program. (Ex. R1a; Testimony.)
6. DHS Brewster is not locked down. There are no additional security guards or prison walls. Rather, it is what is known as a “staff secure” facility. The Petitioner also referred to it as a “congregate” care facility. (Testimony.)
7. A staff secure facility is “characterized by unlocked entrances and exits where staff personnel provide the primary security to prevent a youth from physically leaving the program without the approval of the Department.” 109 Code Mass. Regs. § 2.02. (Testimony.)¹

¹ A “staff secure” facility is considered a residential facility. The other kind of DHS residential facility is a “hardware secure” facility which is “characterized by locked entrances and exits and other physically restrictive construction and procedures designed to prevent a youth from physically leaving the program without the Department’s approval.” 109 Code Mass. Regs. § 2.02 (defining terms); *Commonwealth v. Terrell*, 486 Mass. 596, 598 n. 6 (2021) (the

8. When the Petitioner began in 1988, he was the Program Coordinator for the homeward bound program. It was a “highly structured 27-day outdoor experiential education program for court-acquainted male adolescents[.]” Basic activities included “pullboating, obstacles, hiking, camping, rock climbing, canoeing and cross-country skiing.” (Ex. P1, pg. L16).

9. In this capacity, the Petitioner was in charge of the entire program, which required him to live, and participate in activities, with the youth. As he explained, he camped and hiked with the youth, and also taught them things like rock climbing and canoeing. If something like a disciplinary issue came up, he had to deal with it by directly counseling and/or interacting with the youth. (Testimony.)

10. In 1996, he was promoted to Assistant Facility Director for DYS Brewster. One year later, he was promoted to Program Coordinator III, Facility Director of DYS Brewster. The major difference between the two jobs was the scope of his oversight; as Assistant Facility Director, it was over a few discreet programs whereas as the Facility Director it was over every aspect of DYS Brewster. In any event, he was only the Assistant Facility Director for about a year, so I will instead focus on his role as the Facility Director. (Ex. 1a; Testimony.)

11. According to the job description, a Facility Director is the “primary custodian” of the DYS Brewster camp which, by 2014, included only the residential program. The Facility Director “provide[s] direct care, custody, instruction, and supervision of program youth when necessary and is responsible for the safety and orderly operations of the assigned facility. Overall care maintenance and oversight of the facility[.]” (Ex R1b)

Department may place committed juveniles fourteen years of age or older in residential facilities that are either “hardware secure” or “staff secure”). It resembles a jail or prison, but for youth committed to DYS. If not placed in a residential facility, a juvenile may be placed in a community-based setting, like their home. *Id.* at 599-600.

12. Specific duties and responsibilities include:

- Coordinate training for the SE Region ...Organizes and maintains regional training grids[.]
- Serves as a part of the DYS threat alert team.
- Facility oversight; employee will coordinate the completion of maintenance and other major construction/repair projects as deemed necessary[.]
- Provides direct supervision for the three state employees and one provider maintenance staff.
- Employee works collaboratively with on-site provider administration and staff in support of the mission and goals of the residential treatment program[.]

(Ex. R1b.)

13. That is far from the only duties he undertakes. He wears many different hats providing daily supervision, care, instruction, and custody of the committed youth in varying capacities. The youth are intertwined with everything that takes place at the facility and he interacts with them often. (Testimony.)

14. There are often staff shortages. Because he has round-the-clock, daily responsibility for monitoring and securing the youth, that means the Petitioner must step up and fill that void or as he put it, “if there is a need, you fill it.” Thus, if a kitchen worker is out, the Petitioner steps in to cook and serve meals to the rest of the camp with the youths working in the kitchen. During the height of the COVID-19 pandemic, he was one of a handful of staff always on site, filling in for teachers and counselors allowed to work remotely. (Ex. P1; Testimony.)

15. There is no standard workday because his duties are dynamic, changing with the needs of the facility at any time. There are, however, some duties he undertakes regularly.

16. He teaches. He created the Angler Education program where he directly teaches the youth to fish in ponds around the campus. He also works with youth directly on release planning,

putting together a booklet of certificates and contacts they can take with them when they leave.

(Ex. P1; Testimony.)

17. He supervises. He supervises youth in their classes, when they are working in their apprenticeship positions in the kitchen or doing maintenance around the facility, and in any other situation where he is needed. (Testimony.)

18. He provides security and custody. Unlike a hardware secure facility, there are no institutional security officers on site.² He and his staff provide that service. They provide proximity and visual supervision at all times and escort the youth when they move from point to point. He always carries a two-way radio to stay apprised of any security issues or to simply know a youth is on the move. He conducts and/or oversees daily searches. He enforces the Prison Rape Elimination Act (“PREA”). If a youth runs away, he and his staff are responsible for tracking them down. If a youth misbehaves, he and his staff are responsible for restraining and disciplining them. (Exs. P2 & P3; Testimony.)

19. The Petitioner obviously has administrative duties that require him to be in his office answering e-mails or on the phone. He is responsible for certain administrative decisions such as ordering food or approving maintenance projects. He has oversight over everyone at the facility, though he does not supervise them all. For example, as of six months ago, he does not directly supervise the head maintenance worker but continues to supervise the kitchen staff. He estimates he performs about two to three hours of office work a day. (Testimony.)

20. Overall, the Petitioner estimated that he spends approximately six hours a day on administrative tasks (which includes the two to three hours of office work) and the rest of the day

² When the facility had a detention unit, it had institutional security officers. But the facility has not had any security officers for years. (Testimony.)

directly interacting with youths. He emphasized, however, that those six hours include activities directly relating to, or impacting, the youth such as writing disciplinary reports. (Testimony.)

21. The Petitioner’s job is undoubtedly dangerous. The Petitioner, and his staff, are subject to threats, disrespect, and physical altercations. (Exs. P2-P3; Testimony.)

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, *inter alia*, employees “whose regular and major duties require them to have the care, custody, instruction or other supervision of . . .wayward children.” *Forbes v. SBR*, CR-13-146, *1 (CRAB Jan 8, 2020.). Children committed to DYS are considered “wayward children.” *Id.* The Petitioner “has the burden to establish that ‘the care, custody, instruction or other supervision’ of youth committed to DYS were his ‘regular and major duties’ and not a secondary or ancillary part of his position.” *Id.* at *6.³

To determine an individual’s regular and major job duties, we account for evidence of an individual’s actual job responsibilities in addition to official job descriptions outlined in documents such as the Position Description (Form 30) and the [Employee Performance Review Form]. The responsibilities listed in an [Employee Performance Review Form] or Position Description serve as helpful evidence of actual duties but are not dispositive factors. We have held that individuals who serve in a supervisory capacity but are required to provide direct care on a regular basis for more than half of their working hours are eligible for Group 2 classification even though their job also involved supervision and administration.

Desautel v. SBR, CR-18-0080, *3 (CRAB Aug. 2, 2023) (footnotes omitted).

³ I credit the Petitioner’s testimony that his job was dangerous. However, “dangerousness is not, itself, a statutory criterion for inclusion in Group 2.” *Saffie v. SBR*, CR-21-0020, 2023 WL 4548408 (DALA Jul. 7, 2023).

Like many group classification cases, the Petitioner’s job description does not entirely capture his actual, day-to-day duties. The Petitioner’s job description makes it seem as if his job is purely administrative; and he certainly has administrative duties he must perform daily. But the Petitioner does spend some of his time dealing directly with the youth committed to his camp—supervising them, caring for them, instructing them, and sometimes disciplining them. The tasks he undertakes directly with the youth are tasks traditionally considered to be care, supervision or instruction, including when he has to fill in for absent staff. *See e.g. Koch v. SBR*, CR-09-449 (DALA Oct. 9, 2014). The problem for the Petitioner is that, even by his own estimate, this does not take up over 50% of his time.

That said, the Petitioner is nevertheless entitled to Group 2 status. Even if he does not provide care, instruction or other supervision over 50% of the time he is working, he has custody of the youth every minute of the day. “Custody in the correctional context has been interpreted to involve the exercise of physical control over prisoners and control over the doors and gates of secure areas.” *McKinney v. SBR*, CR-17-230, 2023 WL 6537982 (DALA Sep. 29, 2023). DYS Brewster is not a secure facility where the youth live in cells and are monitored by institutional security officers. The Petitioner, and his staff, are the security officers—thus the term “staff secure” facility. DYS has a custodial relationship with the committed youth, but the people who run the individual facilities maintain actual custody of the youths. It is no different than saying that state prisoners are in the Commonwealth’s custody but understanding that the Superintendents and their subordinate correctional officers have actual custody of the prisoners in the individual facilities. *See Sheehan v. SBR*, CR-92-187 (DALA Jan. 17, 1996) (analogizing much of what a DYS Hearing Officer did to the work performed by a correction officer or prison guard).

Moreover, custody is not limited to when a person is immediately and directly exercising physical control, e.g., handcuffing someone or watching them while they are in a cell. Our cases have acknowledged that certain persons can have “constructive” custody, meaning, they retain custody of someone even if they are not with that person at the time. *Cf. Commonwealth v. Hughes*, 364 Mass. 426, 429 (1973) (explaining concept of “constructive custody” and further noting that for purposes of the escape statute, a “prisoner is as much in the custody of the correctional facility when he is on furlough as when he is physically within its walls”). To be sure, these observations have been made in cases where a member who is not a correctional officer, but works at a jail or prison, seeks Group 2 classification. DALA decisions have observed that those members do not have “custody” of prisoners simply because they are alone with them; rather, the prisoners remain in the custody of correctional officers who are close by. *See, e.g., McLaughlin v SBR*, CR-19-0515, *11, 2022 WL 16921450 (DALA Dec. 23, 2022) (petitioner conducting investigatory interviews did not have care or custody of prisoners because correctional officers were nearby maintaining custody and control); *Colon v. SBR*, CR-12-622, *5-6 (DALA Apr. 7, 2012) (The Petitioner “meeting alone with inmates did not mean that he had custody of them. The corrections officers, not Mr. Colon, had custody of inmates within the secured areas, even if a corrections officer was not in the same office with an inmate or immediately outside it.”); *Kalinowski v. SBR*, CR-12-506 (DALA Apr. 7, 2017); *Kelley v. Boston Ret. Bd.*, CR-03-034 (DALA Feb. 13, 2004); *Curley v. Plymouth Cty. Ret. Bd.*, CR-02- 1422 (DALA Jan. 12, 2004).

References to correctional officers having custody of inmates in those cases provide a helpful analogy to the Petitioner’s relationship with the committed youth in this case. The Petitioner and his staff are solely responsible for maintaining custody of the committed youth

around the clock, whether they are physically with them or sitting in a different building. The youth are not free to go and come as they please, and the only reason they do not is because of the Petitioner's oversight. The Petitioner has custody of these "wayward children" well over 50% of the time; in fact, he maintains custody of them 100% of the time he is working.

CONCLUSION AND ORDER

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

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate