

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and DONNALYN SULLIVAN,  
Complainants

v.

Docket No. 07 BEM 00453

MIDDLESEX SHERIFF'S OFFICE,  
Respondent

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For Complainant Sullivan: Peter Noone, Esq. and Julie Brady, Esq.  
For Respondent: Arthur Murphy, Esq. and Michael Maccaro, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 26, 2007, Donnalyn Sullivan ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") against the Respondent Middlesex Sheriff's Office alleging handicap discrimination. Complainant asserts that she was subjected to discrimination when denied a reasonable accommodation for an asthma-related disability. The complaint was amended on July 13, 2009 to include a charge of retaliation.

On April 4, 2010, the Commission issued a Probable Cause Finding and subsequently certified the case to public hearing. A public hearing was held on December 6, 8, 9, 10 and 11, 2011.

At the hearing, the following individuals testified: Complainant, Joseph Cleary, Susan Sullivan, Diane Sullivan, Kevin O'Donnell, Patrick Murphy, Richard Hopkinson,

Kevin Slattery, Richard Looney, and Dr. Lawrence Kenney, MD. The parties submitted fifty-one (51) joint exhibits. Complainant submitted eight (8) additional exhibits plus a chalk and Respondent submitted five (5) additional exhibits plus a chalk.

Based on all the relevant, credible evidence cited below and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant was hired by the Respondent Middlesex Sheriff's Office in 1990 as a correction officer. She has a degree in criminal justice from Salem State College and a master's degree in criminal justice administration from Curry College. Transcript I at 35-36. After her hire, Complainant attended a training academy for four weeks at which she was elected president of her class. Transcript I at 40-41. During the 2006-2007 time frame, Complainant was a grade 15 utility correction officer. Transcript VIII at 130-131.
2. The Middlesex Sheriff's Office has facilities in Billerica and Cambridge which house approximately 1,200 inmates and employ approximately 500 correction officers. Each facility is administered by a Superintendent. Beneath the position of Superintendent there are several Deputy Superintendents and several Assistant Deputy Superintendents. Transcript II at 152-153. The Billerica facility is larger than the Cambridge facility, with a number of free-standing structures and more correction officers. Transcript II at 8; VII at 9 & 24. Transcript V at 116-117; 138.
3. During late 2006/early 2007, the Middlesex Sheriff was James DiPaola and his second in command -- the "Special Sheriff" -- was Paul Norton.
4. Correction officers are charged with the care, custody and control of inmates. Transcript II at 59-60. The job description states that correction officers provide custodial care of

inmates, patrol, take head counts, observe behavior, quell disturbances, investigate suspicious behavior, make referrals, prepare reports, ensure cleanliness and safety, enforce regulations, assist in training and perform other work as needed. Joint Exhibit 33.

5. Correction officer positions are classified into three categories: 1) "bid" positions; 2) utility positions; and 3) "Superintendent pick" positions. Joint Exhibit 6C, Art. IX; Transcript V at 142; VIII at 98. Within the three categories there are multiple assignments ("posts"). Transcript VII at 219; VIII at 58. When an emergency occurs at the Sheriff's Office, some, but not all, correction officers leave their assigned posts to attend to the emergency. Transcript VI at 44. Other officers remain at their assigned posts in order to avoid additional security risks. Transcript VI at 43-45; VII at 223-225.
6. "Bid" positions are occupied by correction officers of grade 15 or higher who apply for and are selected to fill specific jobs such as the canteen, kitchen, transportation, gym, tower, patrol, indoor recreation, laundry, mattress shop, infirmary, medical transportation, K-9, work release van, training center, clerical/mail, platform, and inner perimeter security. Transcript IV at 136, 144; V at 142; VIII at 153, IX at 14-15. There was contradictory testimony about the length of bid position assignments. Former Human Resource Director Kevin O'Donnell testified at one point that the longest duration of a bid assignment is three years and generally is one year, but at another point he testified that bid positions last indefinitely with the bid process only coming into play if someone leaves, retires, or loses a bid position for disciplinary reasons. Transcript V at 149-150; IX at 82, 89. Patrick Murphy, former-Human Resource Manager/current-Special Sheriff, testified that some bid positions last one year, some two years, and others last indefinitely

until an employee bids on something else or is removed for cause. Transcript VII at 43. According to Complainant, correction officers are allowed to remain in bid positions for the duration of their employment. Transcript III at 163. Based on the foregoing testimony, I find that there is variability in the length of bid assignments.

7. When a vacancy occurs in a bid position, selections are made from a pool of six candidates who are determined by seniority. Joint Exhibit 6C, Art. 9 (1); Transcript II at 12, 23; V at 147. Complainant testified that bid positions are primarily indoors and that she was capable of performing all of them. Transcript II at 42, 44, 50, 52. I credit this testimony.
8. “Utility” posts<sup>1</sup> are filled by approximately half of Billerica’s uniformed correction officers. Transcript VII at 42. They are placed in a general job pool of employees who perform a variety of assignments including checkpoints, tiers, the front office, outside security (i.e., traps), the “movement response team,” and central control. Transcript I at 62 & VIII at 191-193; IX at 15; Joint Exhibit 6C, Art. 9(2). The correction officers perform these assignments annually at a facility (Billerica versus Cambridge) and on a schedule (shifts and days off) but not on a particular post. Transcript V at 133, 138; V at 157; VII at 31; Joint Exhibit 6C (Art. IX of the CBA). Utility posts are assigned daily at roll, approximately fifteen minutes prior to the start of a shift. Transcript II at 150; III at 236-237; V at 130; VII at 33-34. The length of time that a correction officer remains in the same post is discretionary. Transcript V at 74. Deputy Superintendent Richard Hopkinson testified that while he was a Captain from 2001 to 2008, he kept correction officers in the same utility assignment on average for four to six months. Transcript VIII at 57, 133. Kevin Slattery, a Shift Commander in 2006-2007, testified that the average

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<sup>1</sup> Utility posts are also referred to as “operational” posts.

duration of a utility assignment during that period was from three to eight months.

Slattery and then-Human Resource Manager Patrick Murphy stated that correction officers' utility assignments are changed in order to promote versatility and to permit officers to cover for those who are sick, on vacation, or receiving training. Transcript VII at 46, 51; VIII at 145-147.

9. "Superintendent-pick" positions, which comprise ten percent or less of the positions covered by the parties' collective bargaining agreement, are filled directly by each facility's Superintendent without regard to seniority or qualifications and typically last one year. Transcript V at 160-161; VII at 48, 229; IX at 81; Joint Exhibit 6C, sec. 4A. The Superintendent-pick process takes place in the fall for the following calendar year. Transcript VII at 174.
10. In the 2006-2007, the Billerica facility had multiple buildings that were, for the most part, not connected and not air-conditioned. Transcript V at 117, 119, 127. The main building had a courtyard with doors that were usually kept open during recreation periods. Officers assigned to oversee inmate recreation were permitted to stand at the threshold of the open doors. Transcript V at 122; VI at 47.
11. Numerous bid and utility posts at the Billerica facility are exclusively or primarily indoors such as the gym, the infirmary, the "lower report seg," the central control post, and those staffed by officers on the movement response team, on patrols, making deliveries, accompanying inmates around the prison campus, going to the post office, and operating vans. Transcript I at 66-71, 75-76; IV at 191; VII at 62-66; IX at 68. Most bid and utility posts at the Cambridge facility are exclusively or primarily indoors. Transcript VII at 230; IX at 90-91.

12. After attending academy training in 1991, Complainant bid on and became a caseworker at the Billerica facility until 2001. Complainant described the position as primarily indoors except for when she had to walk from one building to another, cover lunch, or oversee a recreation period in the yard. Transcript I at 44-45. As a dormitory caseworker, Complainant dealt with child support issues, visitation, furloughs, and substance abuse meetings. Transcript I at 42-43.
13. Complainant was first diagnosed with asthma in 1991. Complainant's asthma, when uncontrolled, causes chest tightness, wheezing, and difficulty breathing. Transcript II at 116. Complainant was hospitalized in 1994, 1995, and 1996 for difficulty breathing, tightness of the chest, and wheezing. On at least one occasion in the 1990s, Complainant was placed on a ventilator. In 1996, Complainant was hospitalized for eleven days, was out of work for a couple of months, and returned to work on a light-duty basis working a couple of days a week in four-hour increments. Transcript II at 111-112.
14. During the years that Complainant worked at the Middlesex Sheriff's Office, she could perform all work-related activities when her asthma was under control, including outdoor work for up to a full day. Transcript IV at 209, 214. Complainant experienced difficulties only with prolonged exposure to the outdoor elements in cold weather. Id. She did not go to work when her asthma was not stable. Transcript IV at 114. Complainant's asthma gets worse when she has prolonged exposure to exertion, wintry/damp weather, hot/humid conditions, and changes in temperatures, but she is not affected by pollen and does not have allergies. Transcript II at 111, 115-116; IV at 33-34, 60, 115-117, 209.
15. Assistant Deputy Superintendent Slattery testified that he never had a problem with

Complainant's ability to perform her job or her ability to respond to emergencies.

Transcript VIII at 181.

16. Complainant has been a patient of Dr. Lawrence Kenney, a pulmonary specialist, since 1994. Transcript II at 104. Under his supervision, Complainant has avoided serious incidents of asthma since 1996 through the use of inhaler medication, avoidance of cold weather as much as possible, and by bundling up to keep herself warm. Transcript II at 114, 117-118. Dr. Kenney testified that Complainant is the person best equipped to describe her asthma triggers. Transcript XI at 157.
17. Complainant testified that she notified Respondent about her asthma in 1994 when she brought in a medical note to excuse an asthma-related absence. Transcript II at 103-104. According to Complainant, she carried an inhaler everywhere she went and used the inhaler in the presence of co-workers. Transcript III at 8-9; IV at 125.
18. In 2001, Complainant bid on and was awarded a transportation post. In the transportation position Complainant had to carry a gun and transport inmates from the Billerica and Cambridge facilities to courts and other locations. Complainant describes the post as "primarily indoors" to the extent she spent most of her time in environmentally-controlled vans, courthouses, and other buildings. Transcript I at 56-57; IV at 114-115, 129. She testified that the assignment involved some exposure to exhaust fumes but such exposure was not a concern unless "prolonged." Transcript IV at 59-60. According to Complainant, she had no problem performing transportation duties even on days that were below freezing. Transcript IV at 130. Respondent witness Richard Looney, who currently works as a transportation officer, testified that he spends approximately one-quarter of each shift outdoors. Transcript IX at 7-8. I credit testimony that the

transportation assignment is a primarily-indoor post which did not trigger Complainant's asthma. Transcript IV at 115.

19. In 2003, during the time that Complainant occupied the transportation post, she expressed her unhappiness about the Sheriff removing her brother from a Sheriff's Department position as a result of her brother's failure to satisfy a physical requirement. Transcript III at 99-100, 104-105; IV at 54.
20. On March 29, 2005, after serving as a transportation officer for over four years, Complainant mistakenly left her gun in a bagel shop after she removed her utility belt to use the bathroom. Then-Cambridge Superintendent Martin Gabriella<sup>2</sup> imposed upon Complainant a five-day suspension with an additional twenty-five days held in abeyance, and he required that she attend eight hours of training. Complainant's gun permit was indefinitely suspended. Transcript II at 130; III at 158. Complainant was removed from her transportation position because it required her to carry a gun. She was assigned to the Billerica facility under then-Superintendent Paul Norton. Joint Exhibit 36; Transcript II at 131; III at 159.
21. Following the gun incident, Complainant was placed in the utility pool and assigned a variety of posts such as the front office, patrol, traps, work release, and pods. Transcript II at 134. Complainant was allowed to keep her schedule of Mondays through Fridays, 8:00 a.m. to 4:00 p.m. Transcript II at 132; V at 158.
22. Complainant testified that she was informed by her union attorney that she would be returned to her transportation post within three to six months. Transcript II at 135. That did not happen. Some three months later, Complainant mentioned to Superintendent

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<sup>2</sup> Gabriella became Superintendent of the Billerica facility in or around 2006 after its prior Superintendent, Paul Norton was promoted to Special Sheriff. Transcript II at 139, 152.



Norton that she wanted to return to her transportation position. Transcript II at 136.

Complainant continued to speak to Superintendent Norton approximately every three months. Transcript II at 137.

23. On November 4, 2005, Complainant wrote to Sheriff DePaola asking to return to her transportation bid assignment. Joint Exhibit 37A. On December 28, 2005, Norton, who by then had become Special Sheriff, denied her request, stating that her firearms permit remained suspended indefinitely. Id.<sup>3</sup>
24. Complainant did not bid on other specialty positions or apply for Superintendent-pick positions in or after December of 2005 because she didn't want to relinquish what she considered to be her permanent bid in the transportation position. Transcript III at 173-174; IV at 112; VII at 173. She credibly denied ever being told that she had lost her transportation bid because of the gun incident or that she should bid on a different position. Transcript IV at 112. Complainant sincerely believed that she retained her transportation bid after she was removed from the post but according to then-Human Resource Director Kevin O'Donnell and Human Resource Manager Patrick Murphy, Complainant lost her transportation bid when she was assigned to the utility pool in 2005. Id.; Transcript V at 155; VII at 172.
25. In February of 2006, Complainant moved into a second floor apartment in her parent's home because her removal from the transportation post reduced her ability to earn overtime income. Transcript III at 171-173.
26. Complainant testified that in mid-year 2006, Union President Rick Looney "insisted" on

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<sup>3</sup> Respondent introduced hearsay testimony relative to the firearm permit suspension of an Officer Thomas Sickles for leaving his gun unattended but did not establish the length of time his permit was suspended, the factual circumstances leading to the suspension, or his pre-suspension record as a correction officer. Transcript IV at 57; VIII at 24-26, IX at 45, 94-95. Accordingly, I decline to consider Officer Sickles as a comparator.

talking to Superintendent Gabriella about the refusal to restore Complainant to her transportation bid. Complainant testified that she was reluctant for him to do so.

Transcript III at 95-96. According to Complainant, Looney reported back to her that Superintendent Gabriella said the Sheriff's Office did not want Complainant to pursue the re-issuance of her gun permit and if she did, she "wouldn't find [herself] in a cushy little position like work release and ... could easily find [herself] back in the job pool."

Transcript III at 96. At the time, Complainant considered herself to be on temporary assignment until her firearm permit was restored and anticipated going back to what she considered to be her permanent bid on transportation. Transcript III at 96. Officer Looney denied ever speaking to Superintendent Gabriella about the return of Complainant's gun permit. Transcript IX at 32-33. I credit Complainant's testimony that Officer Looney spoke to Superintendent Gabriella and that Gabriella did not want her to pursue the return of her gun permit but I find that Officer Looney did so at Complainant's request.

27. Complainant subsequently talked to Human Resource Manager Murphy who agreed to talk to Human Resources Director O'Donnell about the possibility of returning Complainant to her transportation bid. Murphy reported that O'Donnell was not willing to change Complainant's status at that time. Transcript III at 97.
28. Complainant produced a chalk of various bid and utility assignments between August of 2006 and January of 2007. Complainant's Chalk 1. Complainant's analysis indicates that during this period there were 144 correction officers who were assigned to indoor posts, 18 correction officers assigned to part-indoor/part-outside posts, and 71 assigned to outside posts. Transcript II at 84-88. Complainant classifies the following posts as

indoor assignments: tiers, front office, inner perimeter security, tower, training center, canteen, gym, infirmary, central control, movement response team, pod visits, community work program, laundry, mail, platform, work release van, jail, segregation units, pods, and hospital. Chalk 1 at p. 7. Complainant testified that she could function in all of the indoor and partially-indoor posts regardless of the temperatures. Transcript II at 102.

29. Complainant attempted, unsuccessfully, to arrange for an in-person meeting with the Sheriff in September of 2006. Transcript II at 142; III at 101; IV at 53.
30. Complainant was assigned to the outdoor post of Trap 1 commencing on October 10, 2006 by then-Captain Hopkinson who was her direct supervisor at the time. Transcript II at 164. Hopkinson testified that he did not have a particular reason for assigning Complainant to Trap 1. According to Complainant, the Trap 1 post is a utility assignment in which an officer verifies the credentials of vehicle operators as they seek to enter the secure area of the Billerica facility, logs them in, radios ahead, and inspects vehicles as they enter and leave the facility. Transcript II at 32-33, 35-36. Complainant estimates that approximately 30 vehicles go in and out of the facility each day and that a full examination of a vehicle takes between 5 and 10 minutes. Transcript II at 36, 38. Complainant testified that her assignment to the Trap I post required her to be outside most of the day. Transcript II at 41. During the 2006 time frame, the Trap I post had an inadequately-heated wooden shack with no insulation. Transcript II at 34; Joint Exhibit 34. According to Complainant, the temperature inside the shack was almost the same as outside. Transcript II at 41. Complainant asserted that she could work any assignment at Billerica except for Trap I. Transcript II at 63.
31. In contradiction to Complainant's testimony, Union President Richard Looney described

the Trap 1 assignment as only twenty-five percent outdoors. Transcript IX at 19. I do not credit Looney's estimation. I find Complainant's estimate of the outside time involved in manning the Trap I post to be more accurate than Looney's because Complainant's estimation is based on daytime activity whereas Looney's is based on his experience manning the trap during a 4:00 p.m. to midnight shift when fewer vehicles enter and leave the facility. Transcript IX at 68.

32. Deputy Superintendent Hopkinson testified that while he was a Captain in 2006-2007, he would make changes in utility post assignments in order to address conflicts between inmates and officers but that he did not take officer preferences into consideration nor did he move utility officers for health-related reasons. Transcript VIII at 63-63, 113-115. In contrast to Hopkinson's testimony, Former Captain/ current Assistant Deputy Superintendent Joseph Cleary testified that utility correction officers regularly ask for changes in assignments and that when he served as a Shift Commander, he accommodated such requests. Transcript II at 19-20. Assistant Deputy Superintendent Kevin Slattery testified that he would also take into consideration an officer's preferences regarding assignments. Transcript VIII at 161. Complainant described the practice of officers requesting assignment changes as "happen[ing] all the time" for reasons such as coaching activities, a second job, marital problems, and child care. Transcript II at 148-149. I credit the testimony of Clearly, Slattery, and Complainant over that of Hopkinson.
33. Hopkinson estimated that between October 10, 2006 and January 23, 2007, he assigned Complainant to Trap 1 approximately 50-60% of the time, but Departmental records for that period show that he actually assigned Complainant to Trap 1 96% of the time. Transcript VIII at 67, 111; Respondent's Exhibit 3. He testified that he assigned

Complainant to Trap I for “no specific reason” other than she was doing a good job there and there was no reason to move her. Transcript VIII at 85. Hopkinson acknowledged that any correction officer could have filled the Trap I post. Transcript VIII at 111.

34. Complainant testified credibly that during the fall of 2006, she informed then-Captain Hopkinson that she would need an indoor post when the weather became cold because of her asthma. Transcript II at 144. Complainant asserts that she spoke to Captain Hopkinson about her asthma on five to six occasions and that each time he gave her a noncommittal response such as he would deal with her request “when the time comes” or he would “look into it.” Transcript II at 144-145; 162, 165-166; II at 10. I credit Complainant’s testimony.

35. In December of 2006, Complainant began to experience problems with her asthma due to her exposure to the cold. Transcript II at 154. Complainant testified credibly that she repeatedly asked then-Captain Hopkinson if she could be reassigned indoors on days of “extreme” cold as an accommodation to her asthma, but that her request was not granted. Transcript II at 162. According to Complainant, she requested to work inside on specific days rather than to work indoors indefinitely. Transcript IV at 212. Hopkinson was not credible when he denied that Complainant ever asked him to move inside from the Trap I post during cold weather. Transcript VIII at 71-72-73.

36. On December 12, 2006, Complainant took funeral leave in the morning. Respondent’s Exhibit 3. When Complainant returned to the Billerica facility in the afternoon, she was assigned to a visiting section of the facility. Transcript II at 146-147. According to Complainant, Captain Sheehan asked if she would be interested in working there in the future and she replied that she would, but she was not subsequently assigned to that

location. Transcript II at 148; Respondent's Exhibit 3.

37. At the public hearing, Deputy Superintendent Hopkinson and Assistant Deputy Superintendent Slattery testified that prior to January 14, 2007, they did not have any discussions with Complainant about her asthma, did not receive any notes about Complainant's asthma, did not receive any requests that her Trap I assignment be changed in cold weather, did not see her carry an inhaler, and were not aware that Complainant suffered from asthma. Transcript VIII at 69-72, 158-159. I do not credit their testimony.
38. Assistant Deputy Superintendent Cleary was subpoenaed to the public hearing by Complainant. At the time of the events at issue, he had a good rapport with Complainant and considered her to be a very good correction officer. Transcript II at 20-21. Assistant Deputy Cleary testified that as a Captain at the end of 2006, he agreed to ask Deputy Superintendent Gabriella whether Complainant could be removed from her outdoor Trap I assignment. Transcript II at 18. Cleary testified that he received the following response from Deputy Superintendent Gabriella: "[The Trap] is where the Shift Deputy wants her. That's where she is." Transcript II at 19.
39. According to Director of Human Resources Kevin O'Donnell, any number of correction officers could have worked at the Trap 1 assignment and Complainant could have been assigned to any of the posts. Transcript V. at 74.
40. On December 21, 2006, Complainant wrote to Sheriff DiPaola to ask for the re-issuance of her gun permit and reinstatement to her transportation bid. Joint Exhibit 37B. That request was not granted.
41. A chalk of temperature data from the Northeast Regional Climate Center at Cornell

University indicates that during the first week of January, 2007, Fahrenheit temperatures in Bedford, MA were between the 40s and the high 60s; during the second week of January they were between the high 20's and the high 40's; and during the third they dropped to the low teens to low 30s. Respondent's Chalk 1.

42. The fluctuating weather conditions in January of 2007 caused Complainant's asthma symptoms to destabilize and she experienced wheezing and tightness of the chest. Joint Exhibit 41P.
43. Complainant took four sick days and a pre-planned vacation day between Friday, January 12, 2007 and Friday, January 19, 2007. Respondent's Exhibit 3; Transcript III at 188, 190. Complainant went to see Dr. Kenney on Tuesday, January 16<sup>th</sup> because she wasn't feeling well after exposure to "extreme cold temperatures" at the trap post. Transcript II at 169; III at 186; IC at 99. Complainant turned in a note from Dr. Kenney dated January 16, 2007 stating that due to being placed on an outdoor detail and due to unstable, variable weather, her asthma had become unstable. Joint Exhibit 41P; Transcript III at 180, 182.
44. Complainant testified credibly that when she returned to work on Monday, January 22, 2007, she asked Captain Hopkinson for a temporary indoor position in order to recuperate, but he assigned her to the outdoor trap post on Monday and Tuesday, January 22-23, 2007. Respondent's Exhibit 3; Transcript III at 193.
45. Complainant called Dr. Kenney on January 23, 2007 about being posted outside on January 22 and 23 in temperatures of 23 and 27 degrees, respectively. Respondent's Chalk 1; Transcript III at 201. Dr. Kenney wrote a note dated January 23, 2007 which Complainant submitted late in the afternoon of the same day. Transcript III at 205. The

note stated that Complainant had moderate to severe asthma and that working outside with “the variability of weather conditions, the allergen exposure, the wind and the cold air” adversely affected her asthma. Joint Exhibit 5; Transcript II at 174. Dr. Kenney opined that Complainant should not work outside, and he cautioned that an outdoor environment “may trigger a severe or life-threatening episode of Asthma” and he urged that Complainant’s working environment be changed quickly. Id.

46. Captain Hopkinson testified that he first saw Dr. Kenney’s note on January 24, 2007. Transcript VIII at 77. He claims that prior to seeing the note, he had never received a request from Complainant to be shifted to a different post and was unaware that she had asthma. Transcript VIII at 69, 75-77. I do not credit this testimony given Complainant’s history of asthma-related emergencies on the job and her use of inhaler medication at work.
47. Human Resource Manager Patrick Murphy testified that he was not “acutely” aware that Complainant had asthma prior to January 24, 2007. Transcript VII at 71, 201. I do not credit this testimony because Murphy had worked at the Middlesex Sheriff’s Office with Complainant for many years, was her direct supervisor at one point, and was aware that she had been carried out of the facility on a stretcher in 1995. Transcript VII at 70-72. These circumstances support a finding that Murphy was aware of Complainant’s asthma.
48. Complainant testified that she obtained the note from Dr. Kenney because she had repeatedly requested an accommodation and was being “ignored.” Transcript II at 171.
49. Respondent’s Equal Opportunity and Affirmative Action Policy and Procedure (revised 5/1/06) states that it “shall provide mechanisms to process requests for reasonable accommodation to the known physical and/or mental impairments of such otherwise



qualified persons [but that] [a]ccommodations which would impose undue hardships need not be granted. These include excessive financial cost, substantial disruption to organization structure, direct threats or unreasonable compromises to operational safety, security and health of the public, staff and inmates or accommodations which are inconsistent with the established bona fide job qualifications which apply to all security personnel.” Joint Exhibit 9C at 203.03(2) & (3).

50. Assistant Deputy Superintendent Slattery testified that he never had training on how to deal with disabled employees. Transcript VIII at 183.
51. On January 24, 2007, Complainant was assigned to an indoor post involving the escort of prisoners. Transcript IX at 96. Immediately after roll call, she was contacted by then-Shift Commander Kevin Slattery. He said that he had never seen such an extreme letter as Dr. Kenney’s note and was going to forward it to the Personnel Office. Transcript II at 179. Later that morning, Slattery and Captain Hopkinson met with Complainant. Slattery informed her that the Human Resource Department was concerned about Dr. Kenney’s note because her inability to work outside at the Trap 1 location meant that she couldn’t perform her job as a correction officer. Transcript II at 183-184. Captain Hopkinson and Shift Commander Slattery asked Complainant if she wanted to rip up her note because of the drastic language but she refused. Transcript VIII at 80, 107, 163. Slattery ordered Complainant to go home on sick leave per instructions from Human Resources. Id.; VIII at 79, 81. Complainant objected to going home, stating that she was capable of working an indoor post, that she could work outdoors except in bad weather, that she could perform any post except for exclusively-outdoor assignments, and that she could be outside during emergencies. Transcript II at 52, 183-184; IV at 221; VIII at 79,

81.

52. Complainant testified that she attempted to page Dr. Kenney in order for him to speak to her supervisors, but was told by then-Captain Hopkinson that the decision had already been made.<sup>4</sup> Transcript II at 185; IV at 219. Hopkinson does not recall making such a statement and he testified that he would have spoken to Dr. Kenney on the phone but that Complainant could not reach her physician. Transcript VIII at 82, 105. I find Complainant's version to be the more credible of the two versions.

53. Complainant spoke with the Middlesex Sheriff's Human Resource Director O'Donnell before she left for the day. O'Donnell had the sole responsibility to deal with medical notes. Transcript V at 13. It was O'Donnell who decided that, due to the restrictions set forth in Dr. Kenney's note, Complainant should be sent home pending a fitness for duty exam. Transcript V at 14-15; IX at 103, 105. O'Donnell didn't attempt to contact Dr. Kenney before sending Complainant home. Transcript V at 14-15. O'Donnell testified that Complainant was very upset about being sent home and expressed her opinion that she could still do the job. Transcript IX at 104. According to O'Donnell, the Middlesex Sheriff's Office does not allow employees to return to work unless they can produce a medical note with no restrictions. Transcript V at 24; IX at 121. O'Donnell referred to this policy as the "no-restrictions ideology." Transcript V at 79.

54. Deputy O'Donnell interpreted Dr. Kenney's note as seeking a permanent indoor assignment which he deemed to constitute an undue hardship on Respondent because such an assignment would lack the flexibility necessary to deal with absenteeism, inmate

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<sup>4</sup> Human Resource Manager Murphy testified that Complainant never gave him permission to reach out to her medical providers after submitting the January 24, 2007 note to the Sheriff's Office. Transcript VIII at 20. I do not credit this assertion in light of Complainant's credible testimony that she attempted to arrange for Dr. Kenney to speak to her supervisors.

escapes and other unanticipated circumstances. Joint Exhibit 5. Transcript V at 21; IX at 134-138, 141- 143. He interpreted the parties' Collective Bargaining Agreement to preclude accommodations. Joint Exhibits 6C and 6E.

55. Middlesex Sheriff's Office Policy 203 states that if an accommodation cannot be made due to an undue hardship or any other reason, "the request shall be brought to the attention of the Special Sheriff for review." Joint Exhibit 9C (Policy 203(5)(3)(e)).

Neither O'Donnell nor Murphy brought Complainant's note to the attention of Special Sheriff Norton and Norton did not respond when Complainant attempted to see him.

Transcript III at 11-12; VI at 97-98.

56. During his six-year tenure as Respondent's Human Resource Director, O'Donnell did not grant any accommodations to correction officers. Transcript V at 30, 50. O'Donnell testified that he did not consider The Americans with Disabilities Act to apply to correctional officers, he deemed accommodations to involve situations in which officers "couldn't perform correctional functions," and he interpreted the collective bargaining agreement between the Middlesex County Sheriff and the union representing correction officers, sergeants and lieutenants<sup>5</sup> to preclude light-duty assignments and accommodations even though Articles IX and XX do not address these matters.

Transcript V at 31, 33, 35, 40, 51; Joint Exhibits 6C; 6E.

57. Patrick Murphy testified that he, too, had never implemented a request for a reasonable accommodation despite reviewing hundreds of doctors' notes during his tenure with Human Resources and that he had never received training about how to handle a

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<sup>5</sup> The National Association of Government Employees (NAGE) represented correction officers employed by the Middlesex Sheriff's Office from 2003-2006. Joint Exhibit 6D. From July 1, 2006 through June 30, 2008, the union was the New England Police Officers Benevolent Association – Local 500. Joint Exhibit 6E.

reasonable accommodation request as a Human Resource Manager. Transcript VI at 80-82, 88; VII at 78, 201-203. Murphy confirmed that if a correction officer had a medical restriction, the officer could not remain at work. Transcript VI at 80; VII at 87.

58. Both Human Resource Manager Murphy and Human Resource Director O'Donnell interpreted Dr. Kenney's note as preventing Complainant from working outdoors at all and as seeking a permanent indoor post. Transcript VI at 95. Deputy O'Donnell concluded that granting such an accommodation would have caused an undue hardship because of the need for correction officers to function interchangeably. Transcript V at 35-37, 46-49, 68.
59. As Superintendent of the Billerica facility on January 24, 2007, Martin Gabriella had the authority to assign Complainant to any position provided that he did not violate the parties' collective bargaining agreement. Transcript VI at 31-32.
60. Complainant never returned to work at the Middlesex Sheriff's Office after January 24, 2007. As she departed the Billerica facility on January 24<sup>th</sup>, she left a handwritten note for Special Sheriff Norton. Complainant's Exhibit 1. Complainant did not receive any response. Transcript III at 12. Neither Special Sheriff Norton nor any other supervisor from the Middlesex Sheriff's Office ever dialogued with Complainant or her doctor about her medical condition, the extent to which it restricted her, what jobs she could perform, or the possibility of working inside on cold days or on other occasions when conditions required that she do so. Transcript III at 17-18; VI at 90-101; VII at 245-246.
61. O'Donnell arranged for Complainant to have a fitness-for-duty evaluation by Dr. Reid Boswell two days after she was sent home. Joint Exhibit 28. On January 26, 2007, Dr. Boswell examined Complainant and asked various questions about her asthma.