

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and DONNALYN SULLIVAN,
Complainants

Docket No. 07 BEM 00453
14 BEM 00605

v.

MIDDLESEX SHERIFF'S OFFICE,
Respondent

Appearances: Julie Brady, Peter Noone, and Danielle Gifford, Esqs. for Complainant
Sullivan
Ann Margaret O'Neill, Kier Wachterhouser, and Kevin Freytag, Esqs. for
Respondent

DECISION OF THE HEARING OFFICER
ON REMAND IN 07 BEM 00453
AND IN 14 BEM 00605

I. PROCEDURAL HISTORY

This case has a long and checkered history. On February 26, 2007, Donnalyn Sullivan ("Complainant") filed a complaint (07 BEM 00453) with the Massachusetts Commission Against Discrimination ("MCAD") alleging disability discrimination based on Respondent's unwillingness to accommodate her asthmatic condition by giving her an indoor assignment in harsh, cold weather. She amended her complaint on July 31, 2009 to include a charge of retaliation based on being sent home from work on involuntary sick leave and being placed on involuntary disability retirement after she submitted a doctor's note supporting her request for an indoor assignment as an accommodation. A public hearing on these claims was held on December 6, 8, 9, and 12, 2011. In August

2012, the undersigned hearing officer issued a decision reinstating Complainant to her correction officer position upon the satisfaction of lawful and relevant eligibility criteria, awarding her \$75,000 in emotional distress damages, and determining that Complainant was entitled to lost seniority, retirement benefits, and back pay retroactive to January 2007. Respondent appealed to the Full Commission.

While the Full Commission appeal was pending, Complainant filed a second complaint (14 BEM 00605) alleging disability discrimination and retaliation based on her thwarted attempts to obtain reinstatement through the Public Employee Retirement Administration Commission ("PERAC"). Complainant charged that Respondent undermined the PERAC medical review process by submitting an inaccurate job description for her position which over-emphasized outdoor work in adverse weather as an essential element of her job.

The Full Commission issued a decision on Complainant's first case on May 2015, affirming the undersigned hearing officer's findings of fact, conclusions of law, emotional distress damages, and civil penalty but remanding the matter to determine if Complainant satisfied the lawful and relevant eligibility criteria for reinstatement and if not, to determine the amount of front pay to which she is entitled.

The matters on remand and the matters raised by the second complaint were consolidated for a second hearing. Per a "revised order" of this hearing officer dated November 14, 2016, the following issues were identified for the hearing: A) whether the MCAD has the authority to reinstate Complainant to the position she occupied prior to her involuntary disability retirement based on the MCAD's determination that her involuntary disability retirement was discriminatory and retaliatory; B) if not, whether

Complainant currently satisfies the lawful and relevant eligibility criteria for Correction Officer at the Middlesex Sheriff's Office if granted a reasonable accommodation; C) whether changes in the position description and/or other actions taken by the Sheriff's Office following Complainant's MCAD challenge to her involuntary disability retirement constitute disability discrimination and/or retaliation; D) whether Complainant is entitled to front pay if she is not reinstated as a Correction Officer and, if so, in what amount?

A second public hearing took place on October 30 and 31, 2017; November 13, 15, 16, 17, 20, 27, 28 30, 2017; December 1, 13, 2017; and January 18, 19, and 22, 2018. The parties introduced 113 joint exhibits and four chalks.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent that testimony and exhibits are not in accord with or are irrelevant to my findings, they are also rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant filed her initial complaint of disability discrimination and retaliation (07 BEM 00453) against the Middlesex Sheriff's Office on February 26, 2007. She did so after being sent home from work on January 24, 2007 pending a fitness-for-duty exam. Docket No. 07 BEM 00453, findings of fact ("FF") 53.
2. On March 15, 2007, the Middlesex Sheriff's Office signed a notice of intention to file an involuntary disability retirement application on behalf of Complainant. Docket No. 07

BEM 00453, FF 68. Complainant was placed on involuntary disability retirement pursuant to a majority decision of a three-physician panel. Tr. 1 at 89, 111; Tr. 7 at 55.¹

3. Complainant testified that prior to her removal from her position in 2007 at age thirty-eight, she didn't anticipate retiring until "closer to sixty or so." Tr. 11 at 9. Based on Complainant's testimony, I conclude that Complainant would have remained on the job until age fifty-nine.
4. In conjunction with its application for Complainant's involuntary disability retirement, the Middlesex Sheriff's Office provided the state retirement system with a job description for a correction officer transportation post. Tr. 9 at 119-120. According to Complainant, she first occupied a transportation officer assignment in 2001 on a permanent bid basis and continued to hold it at the time of her involuntary disability retirement even though she was temporarily assigned to "operations/utility" between 2005 and her removal on January 24, 2007. Tr. 9 at 121-123; Tr. 11 at 13; Tr. 12 at 175. Complainant maintains that she never lost her permanent bid as a transportation officer whereas Respondent takes the position that bids are held on an indefinite basis and can be lost for disciplinary reasons or by removal for cause. Tr. 12 at 175; BEM 00453 at FF 6.
5. In July 2009, Amoroso Cefalo was promoted to the position of Human Resources (HR) Director of the Middlesex Sheriff's Office.² Tr. 1 at 76. In that role he oversaw training, payroll, benefits, workers' compensation, job advertisements, postings, internal job bids,

¹ Transcript references are to the record in Complainant's second case, Docket No. 14 BEM 00605, which is the subject of this decision.

² He currently serves as chief legal counsel to the Middlesex Sheriff's Office, having been promoted from Assistant Superintendent on December 3, 2017. Tr. 17 at 37.

discipline, benefits, recruitment, and retirements. Tr. 1 at 151-152. He also consulted with Respondent's legal department about MCAD complaints brought against the Middlesex Sheriff, signed position statements in consultation with the legal department, and responded to questions from MCAD investigators. Tr. 1 at 154, 158-160. Prior to becoming HR Director, he was the Assistant HR Director and reported to then-HR Director Kevin O'Donnell. Tr. 1 at 79.

6. Sheriff Peter Koutoujian began his tenure as Middlesex Sheriff in January 2011. Tr. 1 at 130. One of his first initiatives was to provide academy training for approximately one hundred temporary correction officers who had not attended a basic training academy ("BTA") due to budget cuts necessitated by the 2008 recession. These officers were not considered full-time correction officers, could only work thirty-two hours a week, did not receive benefits, could not be forced to work overtime, and could not carry a firearm. Tr. 17 at 38-41.
7. Sean McAdam became the Superintendent of the Middlesex Sheriff's Billerica facility in June 2011. He replaced Patrick Murphy when the latter assumed the role of Special Sheriff in May 2011. Tr. 1 at 136; Tr. 6 at 14, 20. Prior to becoming Superintendent, he was Deputy Superintendent and Assistant Superintendent at the Billerica facility where Complainant worked. He testified that to his knowledge, Complainant's asthma never affected her excellent performance. Tr. 6 at 29. His testimony is consistent with that of former Assistant Deputy Superintendent Slattery at the first public hearing who stated that he never had a problem with Complainant's ability to perform her job or her ability to respond to emergencies. 07 BEM 00453, FF 15.

8. HR Director Cefalo signed an amended position statement in the first case under the pains and penalties of perjury, was listed as a potential witness in the first case, and attended the first day of hearing in the first case on December 6, 2011 which included opening statements presenting the claims and defenses of both sides. Tr. 1 at 174, 176-177, 189-190. His direct supervisor at the time through November 2012 was Special Sheriff Patrick Murphy who was a witness in the first case. Tr. 1 at 136.
9. HR Director Cefalo put up an internal job posting dated August 11, 2011 for a correction officer exam limited to internal candidates. Joint Exhibit 4; Tr. 2 at 95-96, 101-103, 121. A job description for correction officer was attached to the posting. Id. According to Mr. Cefalo, the job description was understood to be for entry-level, operations/utility pool correction officers. Tr. 17 at 43-46. Successful internal candidates attended a twelve-week basic training academy (the so-called "second 35th BTA") which took place in mid-2012. Tr. 2 at 92-97, 115; Tr. 17 at 46. The job posting did not contain any language about the possibility of correction officers having to work under adverse weather conditions.
10. On August 20, 2012, the undersigned hearing officer issued a decision in 07 BEM 00453. The decision concluded that Respondent discriminated against Complainant by failing to provide her with a reasonable accommodation for her asthma, that Complainant did not seek the elimination of an essential job function but only protection from a small subset of correction officer assignments which required prolonged exposure to outdoor elements during cold weather months, that most correction officer assignments are totally or primarily indoors, and that the Middlesex Sheriff's Office had

retaliated against Complainant for seeking such an accommodation. The decision was subsequently upheld by the Full Commission in May, 2015 (see FF 38).

11. Complainant was elated when she received the decision because she thought she was returning to work. Tr. 12 at 37. When she subsequently learned that Respondent was appealing the decision to the Full Commission, she was devastated, depleted, and disappointed. Tr. 12 at 37-38. She testified that after seeing light at the end of the tunnel, the appeal threw her into a tailspin. Tr. 12 at 38.
12. According to HR Director Cefalo, he "briefly glanced" at the decision which was circulated as an attachment to an August 22, 2012 email from Middlesex Sheriff Chief Legal Counsel Ladonna Hatton. Tr. 1 at 205-208; Complainant's Exhibit 3. Mr. Cefalo learned that there was a ruling against the Sheriff's Office. Tr. 1 at 208. He claims that he did not read the decision, but he acknowledges that he understood that pursuant to its terms, Complainant could seek to be reinstated to her position. Tr. 1 at 210, 215.
13. Middlesex Sheriff Peter Koutoujian also testified that he did not read the August 20, 2012 decision of the undersigned hearing officer in this matter and took no actions in regard to its contents, relying on his chief legal counsel to make decisions about Complainant's status. Tr. 19 at 46, 6381, 93.
14. In September 2012, Complainant filed a request with PERAC pursuant to M.G. L. c. 32, section 8 that it conduct a "restoration to service" review of her status as an involuntary disability retiree. Tr. 11 at 93-94; Joint Exhibit 5. It consisted of an in-house staff nurse at PERAC reviewing medical records followed by a physician conducting a comprehensive medical evaluation (a "CME"). A candidate deemed capable of returning to work would then be screened by a medical panel of three physicians. A

restoration to service review is more rigorous than an application for disability retirement because the restoration to service review focuses on a whole-body exam, not just a review of a specific disability and requires the unanimous approval of a three-physician panel, not just a majority vote of the panel. Tr. 7 at 7, 19-20, 27-29, 36-38; Tr. 9 at 27, 75-76.

15. In October 2012, two months after the first decision in this case, HR Director Cefalo revised the job posting for correction officer. Joint Exhibits 4, 9-11. He states that he did so in anticipation of an external correction officer exam in November 2012 and based on his opinion that the August 2011 internal posting for correction officer did not contain an adequate description of the job's working conditions. Tr. 2 at 80, 117, 123, 147, 152. Director Cefalo testified that he looked at the Massachusetts Department of Correction website which contained a job posting from February 2012. Tr. 17 at 52-54. Based on the Department of Correction job posting, he updated the Middlesex Sheriff's job description by adding a new section entitled "working conditions" which referred to the following: 1) "subject to being forced to work over 8 hours depending on operational needs;" 2) "required to interact with people who are under physical or emotional stress;" 3) "stand and walk for prolonged periods of time;" and 4) "may work under exposure to adverse weather conditions." Tr. 2 at 138, 144, 153-157; Tr. 17 at 54-55; Joint Exhibit 8. The new language became part of the job description for Respondent's correction officer position. Tr. 2 at 162. Mr. Cefalo testified that he added the language to let external applicants know about all of the working conditions that they would face on the job, including the possibility of having to work in extremely hot or cold weather. Tr. 17 at 89, 94-95. According to Mr. Cefalo, the working conditions listed on the updated job

description were essential job functions that all correction officers must be able to perform. Tr. 17 at 97. The working conditions language is not included in internal job postings for specific assignments such as transportation, records, or receiving, which are bid positions. Tr. 2 at 166, 176, 179; Joint Exhibits 15 & 16.

16. There are approximately 450 correction officers in three different types of positions at the Middlesex Sheriff's Office: utility posts, specific bid posts, and "superintendent pick" positions. Tr. 2 at 53. More than one officer can occupy the same post. Tr. at 63, 67. HR Director Cefalo testified that as of the date of his testimony on October 31, 2017, there were 200 to 220 officers assigned to 40 utility posts. Tr. 2 at 53. Officers assigned to utility posts select shifts and days-off based on seniority but otherwise are given various assignments on a daily basis. Tr. 2 at 53, 61; Tr. 4 at 108; Tr. 5 at 52. Officers holding specific bid posts are assigned to particular positions. Tr. 2 at 62, 65; Tr. 5 at 52. The third category consists of "superintendent pick" positions of which there are approximately 25-27 such assignments. Tr. 2 at 54, 66; Tr. 5 at 52.
17. According to HR Director Cefalo, some posts are primarily indoors, others are primarily outdoors, and some require that officers spend a majority of their day in a vehicle. Tr. 2 at 53; Tr. 5 at 52-53; Tr. 6 at 106. He testified that out of 40 utility posts, 30 are primarily indoors, 3 are primarily outdoors, 3 are primarily in a vehicle, and 4 are a mix. Tr. 2 at 58, 64-65. He testified that out of 23 bid posts, 15 are primarily indoors, 2 are primarily outdoors, 2 are primarily in a vehicle, and 4 are a mix. Tr. 2 at 65-66. Of the 25-27 "superintendent picks" positions, he testified that 18 are primarily indoors, 5 are primarily outdoors, none are primarily in a vehicle, and 4 are a mix. Tr. 2 at 66-67.

Examples of indoor positions include: key handler, second and third-tier officers, library positions, and dayroom positions. Tr. 6 at 64-69.

18. Scott Brazis replaced Patrick Murphy as Special Sheriff on December 1, 2012. Tr. 5 at 8, 16. He testified that during his tenure at the Middlesex Sheriff's Office, there were only two emergencies at the Cambridge Jail: one on "9/11" (September 11, 2001) and one in July 2008 or 2009. Tr. 5 at 55-56, 58. During those emergencies, some officers escorted inmates out of the facility, while other officers maintained security and operations inside the facility. Tr. 5 at 55-57, 59, 135-139, 141-142. He stated that Respondent has specialized units (e.g., the SWAT team, the tactical unit, and the K-9 unit) to respond to emergencies. Tr. 5 at 170, 172. Retired Special Sheriff Patrick Murphy concurred that not all correction officers leave their posts to respond to an emergency. Tr. 4 at 145. Retired Superintendent McAdam agreed that even during emergencies of the utmost urgency, some officers assigned to central control must remain inside to monitor cameras and doors. Tr. 4 at 145; Tr. 6 at 80-88. HR Director Cefalo also acknowledged that some correction officers must remain indoors to operate communications and monitor the fire alarms. Tr. 2 at 70, 75-77. Respondent's Superintendent of Operations Osvaldo Vidal likewise testified that not all correction officers work outside during inmate escapes, uprisings, and fights because some officers must secure indoor areas. Tr. 18 at 30-81.
19. According to Operations Superintendent Vidal, there are no in-service physical fitness requirements to ensure that individuals maintain the requisite fitness to perform essential job functions such as chasing an escaped inmate. Tr. 18 at 102-103. He cited one example where an overweight officer who chased an escaped inmate had a heart attack

and died and described another situation in which an overweight officer couldn't get through a door in order to respond to a hostage incident. Tr. 18 at 103-105.

20. Instances of individuals who leave work on a disability retirement basis and thereafter file a return-to-service request with PERAC are extremely rare according to Frank Valeri, Deputy Director of PERAC during the events at issue. Tr. 7 at 18, 34; Tr. 9 at 13. In such cases, PERAC's disability unit examines updated medical records in order to assess whether the retiree is able to perform the essential duties of his/her former job. Tr. 11 at 153. According to Mr. Parsons, PERAC relies on the employer to provide information as to whether or not a job has changed since the employee's retirement but does not seek information regarding possible reasonable accommodations. Tr. 11 at 159. PERAC does not permit the employer to provide documents directly to the physicians. Tr. 9 at 62, 65.
21. In the rare cases where an individual files a return-to service request, the following process takes place: a PERAC desk review is followed by a single physician review of the retiree's entire medical status (a comprehensive medical examination -- "CME") which, in turn, is followed by a review by a three-doctor medical panel. Tr. 7 at 19-20, 37-38; Re. 9 at 28-29. The medical panel must vote unanimously to approve the retiree's return to work. Tr. 7 at 29, 55. The return-to-service review process can take over a year. Tr. 7 at 245. If the determination is negative, a retiree must wait a year after

receiving notice of denial in order to file another return-to-service request.³ Tr. 7 at 30, 55, 245-246; Tr. 9 at 49.

22. Between the fall of 2012 and the summer of 2013, Complainant received a desk review by a PERAC nurse and CME by PERAC physician Dr. Thomas Gassert on April 22, 2013. Tr. 7 at 9. Both the nurse and Dr. Gassert determined that Complainant was capable of returning to work. Tr. 7 at 129, 131, 165, 191; Joint Exhibits 33 & 34.
23. Medical appointments were then arranged for Complainant to be screened by a three-physician panel. Nurse Case Manager Jane Carritte sent the following job description to the three physicians comprising the panel: "Correction Officer -- Transportation - Billerica/Cambridge." Tr. 7 at 193; Joint Exhibit 34.
24. On May 20, 2013, HR Director Cefalo received an email from PERAC General Counsel John Parsons looking for an up-to-date job description for correction officer. Tr. 2 at 193-196; Tr. 7 at 44-45, 107; Tr. 10 at 23; Tr. 17 at 99; Joint Exhibit 27. Several days later, PERAC Deputy Director Valeri emailed Mr. Cefalo to ask him to review a job description on file at PERAC with the following headings: "Title: Correction Officer; Assigned To: Transportation." Joint Exhibit 30; Tr. 2 at 199-200, Tr. 7 at 201, Tr. 17 at 102-103. The job description was part of Ms. Sullivan's original involuntary disability retirement application and had Donnalyn Sullivan's name in the upper left corner. Id. Mr. Valeri wanted to determine whether the job description had been updated. Tr. 2 at 201; Tr. 9 at 109-110. On June 3, 2013, Mr. Cefalo responded that it was an updated job

³ Voluntary disability retirees are also subject to reviews initiated by PERAC to determine if a retiree is capable of returning to work. Tr. 7 at 32.

description for Respondent's transportation post. Tr. 2 at 202; Tr. 17 at 104; Joint Exhibit 31. According to Mr. Cefalo, he had no understanding as to why Complainant's name appeared on the job description or why PERAC wanted him to look at the job description. Tr. 17 at 103-104. I do not credit this testimony.

25. On July 17, 2013, Mr. Cefalo received notices that Complainant was scheduled for medical appointments set up by PERAC between late-July and mid-August 2013 to evaluate her current disability status. Tr. 2 at 214-216; Tr. 7 at 136. The appointments were with the following physicians: Dr. Barry Levine, Dr. Sharmila Mudgal, and Dr. Inna Ketsler. Id. Mr. Cefalo forwarded the notices to outside counsel. Joint Exhibit 41; Tr. 2 at 216-217. Complainant's first medical appointment was scheduled for Monday, July 29, 2013 with Dr. Levine. Tr. 26. Mr. Cefalo claims that despite communications from PERAC from May to July 2013, it was not until July 26, 2013 that he, or anyone else at the Middlesex Sheriff's Office, was aware that Complainant had contacted PERAC for the purpose of attempting to return to work. Tr. 17 at 97-98. I do not credit this assertion.
26. On July 26, 2013, Mr. Cefalo received notification that the time of Complainant's first medical appointment was being changed. According to Mr. Cefalo, he thereafter sought and received clarification that Complainant was scheduled for a restoration to service evaluation. Tr. 2 at 235, Tr. 3 at 15, 36. Upon learning that it was a restoration to service review, he called Respondent's outside counsel about the PERAC information and sent them the new medical appointment notice. Tr. 2 at 190-192; 209-210, 223-228, Tr. 3 at 25-26; Tr. 17 at 116; Joint Exhibits 45 & 46.

27. On the evening of Friday, July 26, 2013, as Mr. Cefalo prepared to leave his office for a two-week vacation, he emailed Mr. Valeri, for forwarding to the three-physician panel, a statement that Ms. Sullivan held a correction officer utility position when separated rather than a transportation bid position. Joint Exhibit 54; Tr. 17 at 117-118. Mr. Cefalo testified that in light of his late May/early June 2013 communications with PERAC, he was concerned that PERAC was using the transportation correction officer job description. Tr. 17 at 118. In order to address this concern, Mr. Cefalo attached the job posting for utility correction officer that was created two months after Complainant's first MCAD decision. Joint Exhibit 54; Tr. 3 at 97, 139. The October 2012 job posting contains the following language: "May work under exposure to adverse weather conditions." Joint Exhibit 54. He also attached a December 6, 2007 letter from Kevin O'Donnell which stated that Complainant would "need to be outside in colder temperatures for a number of reasons" including going to different buildings to relieve fellow officers, transporting inmates, working in outside recreation areas, and quelling disturbances and which stated that "any correction officer is required to meet all of the duties of correction officer in every setting." Joint Exhibit 48; Tr. 3 at 30. Mr. Cefalo did not send a copy of his PERAC correspondence to Complainant or her attorneys. Joint Exhibit 54; Tr. 3 at 138.
28. The O'Donnell letter which Mr. Cefalo sent to PERAC contradicts the conclusions in 07 BEM 00453 (Complainant's first MCAD case) that it was not an essential function of a correction officer position to spend a majority of the day outside. The decision asserts that former Human Resource Director Kevin O'Donnell could not cite a single example of a workplace accommodation ever having been granted by the Middlesex Sheriff's

Office and characterizes O'Donnell as a witness who lacked credibility by falsely claiming that he was unaware that Complainant had filed a charge of discrimination with the MCAD and by denying that Complainant had requested an accommodation. 07 BEM 00453, FF's 68 & 78.

29. Mr. Cefalo arranged to have outside counsel hand-deliver his email, the new job posting, and the O'Donnell letter to the medical panel. Tr. 17 at 125-127; Joint Exhibit 54.
30. According to Complainant, the October 2012 job posting was not applicable to internal candidates such as herself and listed requirements that she did not expect to have to comply with upon her return to work. Tr. 12 at 180-182. She expressed concern that the extraneous information would cloud the judgment of the medical panel. Tr. 12 at 182-183. She testified that the O'Donnell letter suggested that correction officers have more outdoor exposure in cold temperatures than they actually have, that it was designed to disqualify her from returning, and that none of the documents addressed the issue of reasonable accommodation. Tr. 12 at 187-189; Tr. 15 at 72. Complainant describes herself as devastated, dumbfounded, and distraught when she saw the October 2012 job posting during her medical evaluation with Dr. Barry Levine on July 29, 2013. Tr. 12 at 191.
31. According to PERAC Deputy Director Valeri, an employer is not supposed to send materials directly to a physician panel. Tr. 7 at 46-49, 202, 210-211. PERAC General Counsel Parsons testified that Mr. Cefalo's actions "raised concerns." Tr. 9 at 159-160. Mr. Parsons recalls that his office reached out to the doctors in order to tell them not to consider the information. Tr. 9 at 173, 184.

32. An email from PERAC nurse Jane Carritte states that Respondent's outside counsel became argumentative when Dr. Levine expressed reluctance to accept their job posting. Neither Mr. Valeri nor Mr. Parsons knew for certain what Dr. Levine received and reviewed. Tr. 7 at 211-214, 237-238, 244; Tr. 9 at 68-69; Tr. 10 at 128; Joint Exhibits 45 & 61.
33. In October 2013, HR Director Cefalo received notification from RN Patrice Looby, a PERAC case manager, that Complainant was determined to be unable to perform the essential duties of her job. Tr. 3 at 143, Tr. 7 at 215; Joint Exhibit 64. The only physician voting against Complainant was Dr. Levine, whose July 29, 2013 report states that in his opinion she is not able to perform the essential duties of the position from which she retired or a similar position within the same department because if she "does work under adverse conditions such as cold weather she may develop severe asthma as she did back in 2011 and 2012." Joint Exhibit 68 at 45-46; Tr. 10 at 136. Dr. Levine submitted a second report in response to a request from Mr. Valeri for an opinion as to whether Dr. Levine believed that Complainant should avoid extreme weather conditions at all times, even limited, transitional exposure, or only prolonged exposure and whether her condition would be exacerbated by indoor conditions. Joint Exhibit 68 at p. 48. Dr. Levine's second report states that Complainant should avoid extreme weather conditions at all times, including transitional exposure, and that, "[F]ollowing the principle of the Lung Law, I do not feel that she could perform the duties of a correction officer." Joint Exhibit 67 at pp. 49. Dr. Levine's reliance on the "Lung Law" is misplaced as the law establishes a presumption of job-related disability for firefighters who contract lung

- disease, but does not apply to correction officers. Tr. 10 at 153. According to Mr. Valeri, PERAC was nonetheless satisfied with Dr. Levine's report. Tr. 10 at 79
34. The other physicians on the medical panel, Dr. Sharmila Mudgal and Dr. Ina Ketsler, as well as Dr. Gassert, who performed the CME, all concluded that Complainant was capable of performing the essential functions of the job from which she retired or a similar position within the same department. Tr. 7 at 218-228.
35. As a result of Dr. Levine's dissenting vote, Complainant was denied restoration to her position as a Middlesex Sheriff's Office correction officer. Complainant could have re-applied for restoration after waiting twelve months from the date of her denial in late 2013, but she chose not to do so because she thought the process was unfair. Tr. 9 at 194; Tr. 10 at 80; Tr. 11 at 100; Tr. 14 at 27; Tr. 15 at 159.
36. On March 12, 2014, Complainant filed a second MCAD complaint. 14 BEM 00605.
37. Middlesex Sheriff HR Director Cefalo received a copy of the complaint at or around March 12, 2014. Tr. 1 at 201. He worked with outside counsel on filing a MCAD position statement in response to the complaint. Tr. 1 at 202.
38. In May 2015, the MCAD issued a "Full Commission" decision in 07 BEM 00453 upholding this Hearing Officer's 2012 decision.
39. As a disability retiree, Complainant is allowed to earn some additional income beyond what she receives as a disability pension. Complainant's pension started out at about \$18,000 a year in 2007-2008 and then increased to \$22,826 in 2009. Tr. 13 at 29; Tr. 15 at 135. Prior to 2014, she was permitted to retain without reimbursement to the state retirement system \$5,000 more than the difference between her pension and what her salary would have been (not including overtime) had she continued to work. Tr. 7 at 13.

For instance, in 2011, Complainant was allowed to earn and retain \$42,755 in addition to what she received as a disability pension. Tr.15 at 140. Her 2011 teaching income of \$51,767 resulted in "excess earnings of \$9,011. Tr. 15 at 141. After January 2014, the ceiling was increased to \$15,000. Excess earnings must be paid back to the State Retirement Board. Tr. 7 at 16. Complainant acknowledged that the disability pension rules permitted her to earn and retain income that combined with her pension was not less than her salary as correction officer. Tr. 15 at 144. The ceiling, however, did not take into consideration overtime earned by correction officers nor the fact that a non-disability pension places no ceiling on the earnings of retirees. Tr. 15 at 145.

40. After her involuntary retirement from the Sheriff's Office, Complainant continued to work at her family restaurant/bar until it closed in May 2017 but says she got "very little money to work there." Tr. 13 at 33. She attempted to locate positions in the criminal justice field by networking with various organizations such as the Irish American Police Officers Association. Tr. 13 at 99. She taught at Lincoln Tech, a proprietary technical training career school from June 2008 until she was laid off in June 2012. Tr. 11 at 74-75. She taught a variety of courses including criminal justice to students who received a non-degree certificate. Tr. 11 at 76. Complainant's salary of \$47,000 or \$48,000 at Lincoln Tech and her disability pension of approximately \$18,000 exceeded the cap of earnings allowed as a disability retiree (which, at the time, was the amount of her base earnings as a correction officer plus \$5,000), requiring that she refund the Commonwealth for three successive years in the amounts of \$4,000, \$9,000, and \$11,000. Tr. 13 at 152-153. Complainant received unemployment after being laid off from Lincoln Tech which extended from July 2008 until the end of the year. Tr. 13 at

34; Tr. 16 at 22. After her lay-off from Lincoln Tech, Complainant looked for jobs by reviewing newspaper ads, going online, and sending out resumes. Tr. 13 at 35. In mid-2013, Complainant applied, without success, to teach as an adjunct or professor at 33 criminal justice/sociology teaching jobs and/or four-year college positions. Tr. 13 at 55, 62-79; Tr. 15 at 166-172; Tr. 17 at 25. During the first half of 2013, Complainant continued to work as a substitute teacher in the Town of Saugus, as she had done previously. Tr. 13 at 56. In September 2013, Complainant applied for probation jobs with the trial court division of the Massachusetts courts. Tr. 13 at 80-81. Complainant updated her credentials and applied for licensure for massage therapy in 2013. She intended to use to use massage therapy to augment a superannuation pension from the Sheriff's Office which does not have an earning cap. Tr. 13 at 83-88, 159 At the end of the 2013 school year, Complainant filed for unemployment for a few weeks, substitute taught in Somerville, and then began working for the City of Boston in September 2013 as a substitute teacher in East Boston and Charlestown. Tr. 13 at 58-60, 88, 91; Tr. 16 at 22; Joint Exhibit 36. In January 2014, Complainant also began working on a grant as a tutor for the City of Somerville up to nineteen hours per week for the January-June 2014 school term. Tr. 13 at 93-97, 105-106; Tr. 16 at 10. She continued to work for the Boston and Somerville schools during the subsequent school year from September 2014 to June 2015. Tr. 13 at 107-110; Tr. 16 at 10. In June or July 2014, Complainant took exams for probation and court officer. Tr. 13 at 82, 115. Complainant passed both exams but declined court officer positions because they were entry level jobs with compensation commencing in the mid to high \$30,000's and did not offer retirement benefits comparable to the "group 4" pension available to correction officers. Tr. 13 at

131-132; Tr. 15 at 179-184; Tr. 17 at 11. Complainant again collected unemployment benefits in the summer of 2014. Tr. 16 at 22. In regard to probation officer positions, Complainant went through a screening process and participated in numerous district court interviews over a period of several years into 2016 but was never offered employment. Tr. 13 at 116-120, 135, 144-145; Tr. 15 at 176-177. Had she been offered such a position, she testified that she would have accepted it and waived her disability retirement annuity. Tr. 17 at 11. During the 2015-2016 and 2016-2017 school years, Complainant continued to substitute teach in the City of Boston but was not given a teaching position in the City of Somerville that year. Tr. 13 at 141, 143; Tr. 14 at 16; Tr. 16 at 13. Complainant applied for two Boston Schools "cluster-sub" positions in 2016 but didn't get either one. Tr. 13 at 139-140. In January 2017, she re-commenced teaching "a couple of classes" at Lincoln Tech. Tr. 13 at 18; Tr. 14 at 15. Complainant received no benefits for any of the aforesaid work. Tr. 13 at 194, 110. Complainant also applied for a security position at New England Baptist Hospital but heard nothing in response. Tr. 14 at 22-23. She collected unemployment benefits in the fall of 2017. Tr. 16 at 23.

41. Complainant described her earnings history after leaving the Sheriff's Office as "inconsistent" which caused her distress because it requires that she sometimes rely on her parents, forego socializing, miss vacation opportunities, not have personal days off, and work five days a week and four nights a week. Tr. 14 at 70-71. She testified that the process of applying for and receiving unemployment compensation is humiliating. Tr. 13 at 98. She states that she has a lot of nights where she can't sleep because she's worried about her ability to support herself. Tr. 15 at 16. She testified that she doesn't

have a personal relationship because she feels that she can't offer anything to anyone and since she doesn't have a husband or children, her career is all that she had. Tr. 15 at 17, 19. Complainant describes her family relationships as suffering because she is short-tempered and cranky with family members. Tr. 14 at 72; 15 at 17, 19. She doesn't see her friends as much as she did before she was involuntarily retired because she can no longer afford to socialize and travel. Tr. 15 at 17-18. Complainant describes herself as a totally changed person who used to be happy-go-lucky but now is "broken" and worries about everything. Tr. 15 at 17-18. She testified that she remains involved in numerous law enforcement-related volunteer organizations because that is the only time that she feels "whole" and because it allows her to network in the law enforcement community. Tr. 13 at 38-43; Tr. 15 at 18.

42. According to the Complainant's mother, Diane Sullivan, Complainant is heartbroken that the Middlesex Sheriff's Office did not reinstate her as a correction officer following the decisions of the Hearing Officer and the Full Commission. Tr. 3 at 214. She described her daughter's job as "everything" to her, testified that her daughter was thrilled to get it, and has been very unhappy since she lost it. Tr. 3 at 214, 224. According to Diane Sullivan, her daughter is not the same since she failed to regain reinstatement to her former position of correction officer and has experienced a loss of confidence and self-esteem. Tr. 3 at 215. She described her daughter as "wounded" and "a different girl." Tr. 3 at 216. She testified that her daughter struggles financially to earn an income commensurate with her former employment, that her financial struggles affect her relationships with others, that she has to work all the time at three part-time jobs, that she doesn't have money for a social life, that she has had to defer her dream to buy a

house and remain in a family-owned duplex apartment where she lives with her sister and her sister's family. Tr. 3 at 217-219, 224, 233-237. Complainant's mother stated since failing to regain her position, her daughter has become unpredictable in her reactions to people and events, that she cries all the time, has gained weight due to stress, and can't afford a gym membership. Tr. 3 at 217-223.

43. Complainant's sister Susan Sullivan testified it "broke" Complainant not to be able to return to her former position and that being a correction officer was extremely important to Complainant. Tr. 4 at 170-171. Susan Sullivan stated that Complainant's unsuccessful efforts to recover her former position devastated her and made her hopeless. Tr. 4 at 172. She testified that Complainant's negative emotions have gotten progressively worse as time has gone on because everything is out of her control. Tr. 4 at 173, 180. Susan Sullivan describes her sister as breaking down in tears about her life and experiencing a lot of sleepless nights. Tr. 4 at 173, 183. She testified that Complainant feels as if she doesn't have much to "offer" in regard to her relationships with others, that she struggles to obtain sufficient income, is humiliated at having to ask her parents for money, and doesn't socialize as often as she did formerly because of lack of funds. Tr. 4 at 174-177. Susan Sullivan described her sister as gaining weight, being less confident, being angry at her circumstances, and snapping at people due to the stress of her circumstances. Tr. 4 at 176-178, 181, 184.42

44. Complainant's treating pulmonologist, Dr. Lawrence Kenney, MD, FCCP, examined Complainant and drafted a letter dated February 23, 2017 updating his appraisal of her condition. Joint Exhibit 100. His letter notes that Complainant has not required hospitalization since 1996 for asthma or any other medical problem. He states that

Complainant has not experienced seasonal variability in asthma control for many years, has worked outdoors as well as indoors with children in all weather without suffering a limiting asthma episode, shows improvement in her pulmonary function data, and has demonstrated significant asthma symptom control for several years. Dr. Kenney states that he is confident, with a degree of medical certainty that she is medically ready to resume the full duties of her correction officer position as described to him by Complainant as long as consideration is given to allow her indoor access during prolonged periods of exposure to severe outdoor weather. Joint Exhibit 100; Tr. 16 at 244,274. Dr. Kenney testified that Complainant's asthma has improved a great deal, that her airways disease has quieted, that she is less sensitive to seasonal variations in weather than in the past, and that her improvement is consistent with the tendency of adults to have decreased asthma symptoms as they age. Tr. 16 at 233, 247, 268, 276.

45. Complainant testified that she is "fully capable of responding to emergencies," that she functioned as a correction officer during two emergencies (a riot in 1995 and 9/11), that she is physically capable of overseeing inmate recreation, that she can chase inmates, and that she can work outdoors except when "symptomatic" in severely cold weather in which case she would take a sick day off. Tr. 12 at 147-150, 173.13. At the time of her January 19, 2018 public hearing testimony, Complainant described her health as "great" and stated that her asthma was well under control. Tr. 14 at 29.

46. Sheriff Koutoujian is not aware of any reasonable accommodation requests being granted under his tenure. Tr. 19 at 152-153.

III CONCLUSIONS OF LAW

Despite the passage of more than a decade, multiple hearings, and thousands of pages of exhibits, Respondent continues to engage in disability discrimination at Complainant's expense by refusing to accommodate her occasional bouts of asthma and by retaliating against her for her dogged pursuit of reinstatement to a position she can perform with an accommodation. In 2007, Respondent involuntarily removed Complainant from her position as a Middlesex correction officer for reasons adjudicated to be discriminatory and retaliatory, first by this hearing officer in 2012 and subsequently by the full Commission in 2015 (07 BEM 00453). In both decisions, Complainant won relief designed to make her whole.

The discriminatory and retaliatory activities found to have occurred in 2007 should have been reversed *ab initio*, through reinstatement, back pay, and benefits as ordered by the Commission pursuant to G.L. c. 151B, section 5, yet such relief has not been forthcoming. Despite two rulings adverse to Respondent, it continues to treat Complainant as a disability retiree whose reinstatement is contingent upon the unanimous approval of a three-physician panel overseen by PERAC. Respondent argues that it is unable to reinstate Complainant to her former position because she failed to receive the endorsement of a three-physician panel pursuant to Chapter 32, section 8 ("evaluation and reexamination of members retired for disability"). However, a three-physician panel only comes into play for *lawful* disability retirements, not those adjudicated to be discriminatory and retaliatory as is the case here. In this regard it is noteworthy that Chapter 32, section 8(2)(d) provides that nothing pertaining to the evaluation and reexamination of members retired for disability shall excuse an employer from compliance with Chapter 151B, section 4(16).

Complainant's involuntary removal from her position as a correction officer and the determination in 07 BEM 00453 that her removal violated chapter 151B at the time it occurred sets this matter apart from situations where former employees who were subject to lawful disability retirements challenged PERAC's restoration to service requirements in their efforts to return to work. See McLaughlin v. City of Lowell, 84 Mass. App. 45 (2013) and Rodrigues v. Public Employee Retirement Administration Commission, 98 Mass. App. 514 (2020). In McLaughlin, a fire department captain applied for and received an accidental disability retirement, subsequently sought restoration to service, was denied restoration based on a rule prohibiting the use of an asthma inhaler at the scene of a fire, and was collaterally estopped from challenging an administrative decision upholding the inhaler rule. Under these circumstances as well as the absence of "allegations indicative of impropriety," the McLaughlin court concluded that a medical panel's determination of unqualified handicap status was entitled to preclusive effect. See McLaughlin, 84 Mass. App at 70. Here, however, Complainant did not initiate her disability retirement, should not have been retired, was adjudicated by the MCAD to be a qualified handicapped individual prior to PERAC's medical review, and presented evidence of Respondent's improper ex parte communications with PERAC relative to Complainant's quest for reinstatement.

Likewise, the present case is distinguishable from Rodrigues where a firefighter received a disability retirement due to a congenital heart defect and thereafter sought to return to work pursuant to G.L. c. 32, sec. 8. There is no indication in Rodrigues that the retirement was involuntary. Moreover, the Court noted that the firefighter did not challenge his medical disqualification under Chapter 151B sec. 4 in a timely manner and

therefore had no valid c. 151B claim, did not request a reasonable accommodation with respect to his cardiac condition, and challenged health and fitness standards that were "legislatively ratified." Rodrigues, 98 Mass. App. at n. 7. None of the circumstances which contributed to the dismissal of the Rodrigues case are at play here.

Based on the foregoing, Complainant deserves to be treated as an employee who was never lawfully separated from employment. She was denied a reasonable accommodation by the Middlesex Sheriff's Office, an omission found to constitute disability discrimination and retaliation. PERAC endorsed that denial during its medical review process by failing to consider whether an accommodation would permit her to perform her essential job functions. Thus, Complainant does not stand in the shoes of disability retirees such as those in McLaughlin and Rodrigues who seek to return to service after departing under legitimate circumstances. See Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass. 729, 236 (2003) (MCAD has authority under c. 151B sec. 5 to order the hiring/promotion of an employee who is victim of discrimination, despite an explicit statutory process for filling the positions). Unlike the situations in McLaughlin and Rodrigues, Complainant's involuntary removal as correction officer and her unsuccessful efforts to be reinstated were tainted, leading to the conclusion that they should not control the outcome in this case. Instead, the only lawful and relevant eligibility criteria should be those applicable to currently employed correction officers. Accordingly, the answer to Issue A in the Revised Order outlining the issues to be addressed at the public hearing is answered in the affirmative, to wit: The MCAD has the authority to order Complainant to be reinstated to the position she occupied prior to her involuntary disability retirement

based on the MCAD's determination that her involuntary disability retirement was discriminatory and retaliatory.

Turning to Issue B -- whether Complainant satisfies the lawful and relevant eligibility criteria for correction officers at the Middlesex Sheriffs Office if granted a reasonable accommodation -- the answer, again, is yes for the reasons discussed above. However, even if Complainant's return to service were subject to PERAC's medical review process under G.L. c. 32 section 8(2)(a), it is notable that Complainant passed each step in the process with the sole exception of approval from Dr. Levine who: 1) based his analysis on a job description doctored by Respondent to emphasize the very condition (working in adverse weather) which this Commission had already rejected as a valid basis for refusing to engage in an interactive process with Complainant and 2) applied the so-called "Lung Law" standard to Complainant's situation despite its inapplicability to correction officers. Given these defects, it is not surprising that all of PERAC's medical professionals aside from Dr. Levine concur that Complainant satisfied the lawful and relevant eligibility criteria for correction office if granted a reasonable accommodation.

Issue C focuses on whether changes in the position description and/or other actions taken by the Sheriff's Office following Complainant's MCAD challenge to her involuntary disability retirement constitute disability discrimination and/or retaliation. In regard to the claim of disability discrimination, Complainant bears the initial burden of showing that she was a qualified handicapped employee who unsuccessfully sought a reasonable accommodation, followed by the employer's obligation to show that it made a good faith, albeit unsuccessful, attempt, to accommodate Complainant's disability. See

Gannon v. City of Boston, 476 Mass. 786, 794 (2017); Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443 (2002); Mammone v. President & Fellows of Harvard College, 446 Mass. 657 (2006).

The 2012 decision in this case establishes that Complainant is a qualified handicapped individual capable of performing her correction officer position's essential job functions. Complainant only experienced difficulties when assigned to a post that involved prolonged exposure to outdoor elements in cold weather. Findings of fact from the first hearing establish that Complainant could perform most bid assignments because they are primarily indoors as well as numerous utility posts. Assistant Deputy Superintendent Slattery testified at the first hearing that he never had a problem with Complainant's ability to perform her job or her ability to respond to emergencies. She was -- and remains -- restricted only in regard to a small subset of correction officer assignments for limited periods of time. Despite Respondent's claim that correction officers must be able to perform each and every assignment, the record establishes that the needs and preferences of correction officers are often taken into consideration.

Rather than permit Complainant to return to work after the first MCAD decision, however, Respondent ignored the factual conclusions in 07-BEM-00453 by amending the correction officer job description to add the conclusory assertion that working in "adverse weather" was essential, engaged in ex parte communications with PERAC designed to undercut Complainant's chances of being restored to her former position, submitted to PERAC a discredited letter from Respondent's former HR director, and failed to acknowledge that most correction officers work primarily indoors. These

factors establish that Complainant fulfilled her prima facie burden in 14 BEM 00605 of establishing handicap discrimination and that Respondent failed to rebut this showing.

Respondent's conduct also fulfills the elements of retaliatory animus.

Complainant's protected activity, beginning with her quest for a reasonable accommodation in 2007 and continuing up to and beyond receiving a favorable decision in 2012, was met by the unrelenting efforts of Respondent to prevent her return to work. Respondent subjected Complainant to retaliatory adverse action just two months after she prevailed before this Commission in her first case by altering the job description for correction officer and ignoring PERAC's procedural rules in order to communicate with Complainant's physician review panel. These circumstances satisfy the elements of a prima facie case of retaliation. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003) (prima facie case of retaliation requires showing that complainant engaged in protected activity, respondent was aware of the activity, respondent subjected complainant to adverse employment action and a causal connection exists between the two).

Respondent makes much of the purported need for all correction officers to be able to work outdoors in freezing conditions, but this assertion stands in stark contrast to the numerous indoor assignments granted to other correction officers, the lack of in-service physical requirements for veteran officers who are incapable of chasing escaping inmates and performing other strenuous activities, and the credible evidence that Complainant is capable of working outdoors except on infrequent occasions when extreme weather occurs during a flare-up of her asthma symptoms. On the basis of the foregoing, Respondent has failed to rebut the causal connection between Complainant's

protected activity and Respondent's efforts to thwart her return to service. Thus, the credible evidence in this case compels an affirmative answer to Issue C.

While the above analysis makes clear that there should be no lawful impediments to Complainant's restoration to service, there have been myriad administrative impediments. These impediments have resulted in an eight-year stalemate over Complainant's restoration to Respondent's employ, with this Commission's orders being thwarted, first by Respondent, and then ignored by agencies overseeing the state's retirement system which are not party to this action. Such unrelenting bureaucratic intransigence bodes ill for Complainant's ultimate reinstatement. Thus, it is time to turn to Issue D and compensate Complainant for the losses she has sustained as a result of her non-reinstatement. In sum, in addition to the relief granted by my decision in 07 BEM 00453, Complainant is entitled to back and front pay and benefits under her union contract until age 59, followed by superannuation retirement benefits thereafter, less whatever amount Complainant should have paid into the retirement system had she not been removed from her position and offsets for the income and involuntary disability pension benefits she has received since 2007.

In computing the damages to which Complainant is entitled, I have reviewed the expert testimony submitted by Mr. Stone and Dr. Moore regarding lost income, pension benefits, and other matters. I am satisfied that both are sufficiently qualified in the

specific topic area on which they opine and that both of their reports should be considered.⁴ I have adopted recommendations from both experts as detailed below.

IV. REMEDIES

Although both experts are qualified to address matters of relief, Dr. Moore's analysis is preferable from a structural standpoint in that his analysis is comprehensive yet clear. Dr. Moore correctly grounds his analysis in the union contract between the Middlesex County Sheriff's Office and the New England Police Benevolent Association, Local 500. He accounts for projected increases in future contracts, in disability retirement income, and in Complainant's future earnings by assuming they will increase consistent with the cost of living and by adjusting for such increases through a present value calculation. Since future conditions are uncertain, such an assumption is valid. Dr. Moore calculates a discount rate to determine the present value of future lost earnings by using the yield of U.S. Treasury Inflation Protected Securities (TIPS). Reliance on TIPS appears to be the industry standard. Dr. Moore's framework will therefore be used as the starting point for computing back and front pay damages subject to the following adjustments.

A projected retirement age of 59, advocated by Mr. Stone, is more persuasive than Dr. Moore's assumption that Complainant would have only worked as a correction officer until age 55. This conclusion is based on Complainant's testimony that age 55

⁴ Respondent's claim that Mr. Stone should disclose the names of other individuals who may have performed calculations or contributed to his opinions is rejected as I am satisfied that Mr. Stone stands behind the calculations and opinions as the signatory of his report.

was the floor, not the ceiling, at which she contemplated retirement.⁵ It is fair to consider an age closer to the ceiling in light of the possibility, not accounted for by either expert, that Complainant would have achieved promotions in rank over the course of her career and that such promotions would have enhanced both the length of her career and her projected income. A later retirement age impacts the damages in multiple ways, including an increase in the projected average earnings upon which Complainant's pension is calculated.

Mr. Stone is likewise more persuasive than Dr. Moore in estimating that Complainant would have continued to earn overtime throughout her career commensurate with what she earned in 2004 and 2005, to wit: 15% of her regular hours. Respondent relies on Complainant's significantly diminished overtime in 2006 to argue for a lower benchmark, but the 2006 figure resulted from the fact that Complainant was consigned to an outdoor post that exacerbated her asthma and was denied a reasonable accommodation permitting her to fully function. Given these circumstances, 2006 was not an accurate picture of her potential earning. Complainant is therefore entitled to overtime for 15% more hours per year, at 1.5 of her base pay rates, for the years spanning 2007 and her retirement at age 59.

In regard to the tax consequences of the award, Mr. Stone correctly notes that Complainant will be taxed at a substantially higher rate than she would have been had she earned the same income in smaller increments over the course of a career. Such a

⁵ At the first hearing Complainant testified that she planned to continue working for Respondent until age fifty-five or older (Hearing Decision, p. 23) and at the second hearing Complainant testified that she thought she was going to retire "probably closer to sixty." Tr. 11 at 9.

discrepancy is compounded by the fact that superannuation retirement benefits are not subject to state tax unlike a damage award. Thus, had Complainant continued to work as a correction officer with an anticipated retirement in her late fifties per her stated intention, her superannuation pension benefits would not be subject to state income tax whereas a damage award designed to compensate Complainant for the loss of such a pension would be subject to state taxation. It is therefore equitable to account for tax consequences of a lump sum award.

Notwithstanding the meritorious points cited above, Mr. Stone goes too far in seeking additional damages -- in addition to back and front pay -- for the following benefits provided by the Sheriff's office: paid vacation days, paid personal time, paid sick days, paid holidays, paid jury duty, and paid leave bonus days for exemplary attendance. To award additional damages for such benefits would amount to double-reimbursement. A job with liberal paid leave is undeniably attractive, but may serve to compensate employees for the less attractive aspects of such a position such as physical danger or undesirable working conditions. In any event, such perks are embedded into the reimbursement given to correction officers and are not subject to compensation apart from lost income. Similarly, compensation for the loss of a clothing allowance is inappropriate since the allowance covers an expense which Complainant did not sustain.

Computations for out-of-pocket health insurance expenses are rejected because Complainant has provided only an estimate of such expenses, without supporting documentation. There is, moreover, no showing that such expenses would be included in the medical coverage of a correction officer as opposed to the medical coverage of a disability retiree. On the other hand, Complainant is entitled to compensation for any

yearly losses she may have sustained in regard to longevity pay, a training incentive, and a stipend for her master's degree, less any savings she achieved by not having to pay union dues.

Finally, computations for prejudgment interest are rejected as premature. Such interest is assessed by the Commission following the disposition of the case at a statutory rate of 12% per annum from the filing of the complaint until paid or until the order is reduced to a court judgment and post-judgment interest begins to accrue.

In consideration of the above parameters, the parties are instructed to revise the back and front pay estimates of Dr. Moore and to award compensation for back and front pay, retirement income, and benefits commensurate with those revisions.

Turning to emotional distress damages, as recognized in Complainant's previous decision, such an award must rest on substantial evidence that is causally-connected to the unlawful acts of discrimination and take into consideration the nature and character of the alleged harm, its severity, its length, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). In this case, Complainant's emotions have run the gamut from elation when she received notice of the 2012 decision in her favor to devastation when she learned that Respondent was appealing the decision. She testified that after seeing light at the end of the tunnel, the appeal threw her into a tailspin. Complainant described the process of applying for and receiving unemployment compensation as humiliating. She states that she has a lot of sleepless nights because of financial worries and doesn't have a personal relationship because she feels that she can't offer anything to anyone. She describes her career as all that she had. Complainant states that her family relationships have suffered because she

is short-tempered and cranky. Complainant's sadness is compounded because she can no longer afford to socialize and travel. Complainant describes herself as a totally changed person who used to be happy-go-lucky but now worries about everything. Complainant testified that she remains involved in numerous law enforcement-related volunteer organizations because that is the only time that she feels "whole" and because it allows her to network in the law enforcement community.

According to the Complainant's mother, Complainant is heartbroken that the Middlesex Sheriff's Office did not reinstate her as a correction officer. She described her daughter's job as "everything" to her, testified that her daughter was thrilled to get it, and has been very unhappy since she lost it. According to Mrs. Sullivan, her daughter is not the same since she failed to regain reinstatement. Mrs. Sullivan testified that her daughter experienced a loss of confidence and self-esteem. She described her daughter as "wounded" and "a different girl." She testified that her daughter struggles financially to earn an income commensurate with her former employment, that her financial struggles affect her relationships with others, that she has to work all the time at three part-time jobs, that she doesn't have money for a social life, that she has had to defer her dream to buy a house and remain in a family-owned duplex apartment where she lives with her sister and her sister's family. Complainant's mother stated since failing to regain her position, her daughter has become unpredictable in her reactions to people and events, that she cries all the time, that she gained weight due to stress, and that she can't afford a gym membership.

Complainant's sister Susan Sullivan testified it "broke" Complainant not to be able to return to her former position and that being a correction officer was extremely

important to Complainant. Susan Sullivan states that Complainant's lack of success in recovering her former position was devastating to her and rendered her hopeless. Susan Sullivan testified that Complainant's negative emotions have gotten progressively worse as time has gone on because everything is out of her control, that her sister cries about her life, that she experiences a lot of sleepless nights, that she feels as if she doesn't have much to "offer" in regard to her relationships with others, and that she doesn't socialize as often as she did formerly because of lack of funds. Susan Sullivan described her sister as snapping at people due to the stress of her circumstances and as less confident than she used to be

I credit all of the foregoing testimony about Complainant's emotional state over the last eight years. It is clear that she has been consumed with reclaiming a career that she believes was unlawfully stolen from her. The strains of ongoing litigation to reclaim her career, the isolation from colleagues who were former friends, and the financial stressors of looking constantly for a full-time job have been compounded by the length of time her claims have been pending and by disappointment over their lack of resolution. Complainant testified with great poignancy that she volunteers in law enforcement activities in order to feel connected to a community to which she formerly belonged. Based on the foregoing, Complainant is entitled to receive \$250,000 in emotional distress damages.

V. ORDER⁶

⁶ In light of Respondent's good faith, albeit unsuccessful, settlement efforts, I decline to impose a civil penalty.

In accordance with the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L. c. 151B, sec. 5, Respondent is order to:

- 1) Cease and desist from all acts of discrimination;
- 2) Pay Complainant the sum of \$250,000 in emotional distress damages with interest at the rate of twelve per cent per annum. Said interest shall commence upon the filing of the complaint (14 BEM 00605) and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- 3) Compensate Complainant for the back pay losses she has sustained as a result of her non-reinstatement. with interest at the rate of twelve per cent per annum and front pay losses and benefits under the Union contract until age 59 followed by superannuation retirement benefits thereafter, less what Complainant would have paid into the retirement system had she not been removed from her position and less offsets for income and involuntary disability pension benefits she has received since 2007. In order to compute the foregoing, Dr. Moore's analysis is adopted in regard to projected increases in future contracts, in regard to disability retirement income, in regard to Complainant's future earnings, and in regard to a present value discount rate based on the yield of U.S. Treasury Inflation Protected Securities (TIPS). However, Dr. Moore's projected retirement age of 55 will be extended to age 59 years old, with projected average earnings and retirement calculations adjusted accordingly. Complainant's income will also be calculated to reflect the likelihood that she would have continued to earn overtime throughout her career commensurate with what she earned in 2004 and 2005, to wit: overtime for 15% more hours per year, at 1.5 of her base pay rates, for the

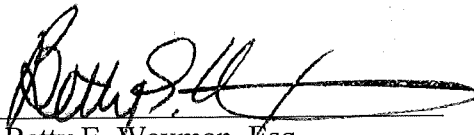
years spanning 2007 and her retirement at age 59. Damages for the following claims are rejected on the basis that compensation would amount to double reimbursement: paid vacation days, paid personal time, paid sick days, paid holidays, paid jury duty, and paid leave bonus days for exemplary attendance and a clothing allowance. Computations for out-of-pocket health insurance expenses are also rejected.

In regard to the tax consequences of the award, Mr. Stone correctly notes that Complainant will be taxed at a substantially higher rate than she would have been had she earned the same income in smaller increments over the course of a career. Such a discrepancy is compounded by the fact that superannuation retirement benefits are not subject to state tax unlike a damage award. The parties are therefore instructed to account for the tax consequences of a lump sum award and compensate Complainant accordingly.

- (4) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's senior managers and supervisors who make decisions related to assignments and promotions. Such training shall focus on discrimination based on disability and retaliation. Following the training session, Respondent shall provide to the Commission the names of persons who attended the training.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 13th day of November, 2020



Betty E. Waxman, Esq.,
Hearing Officer