

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 chawks.

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