

MUNICIPAL FIRE AND POLICE RETIREMENT
SYSTEM OF IOWA
7155 Lake Drive, Suite 201
West Des Moines, IA 50266

IN THE MATTER OF:

AARON TYLER GUTIERREZ,

Applicant.

DECISION

Iowa Code § 411.6(3) (2015) and
Iowa Code § 411.6(5) (2015)

STATEMENT OF THE CASE

Aaron Tyler Gutierrez ("Gutierrez") filed his application for a disability pension on or about July 1, 2015. The Medical Board of the University of Iowa Hospitals and Clinics reported its findings to the System regarding Gutierrez' disability on October 2, 2015. An initial decision awarding an ordinary disability pension was made by the System on October 2, 2015. Gutierrez filed a timely appeal challenging the award of an ordinary disability pension and requesting an accidental disability pension. A hearing was held before the Disability Appeals Committee of the Board (comprised of Mary Bilden, Eric Court, and Duane Pitcher, chair) on February 24, 2016 at the offices of the System. Gutierrez appeared, and was represented by attorney Melissa Schilling. Assistant City Attorney Graham Jura appeared for the City of Council Bluffs. Daniel Cassady, Deputy Director, appeared on behalf of the System. Alice Helle was present as counsel to the Committee. Testimony was received from Aaron Gutierrez. Omaha Police Officer Sergio Gutierrez, Council Bluffs Police Officer Joshua Horner and Council Bluffs Police Chief Tim Carmody were called as witnesses by Gutierrez and testified by telephone. The City called no witnesses. Both parties waived post-hearing briefs.

FINDINGS OF FACT

The Committee, having reviewed the evidence of record, finds as follows:

1. Aaron Gutierrez was born on November 22, 1988 and commenced service as a police officer for the City of Council Bluffs on or about April 18, 2011.
2. Gutierrez last working day on the job was June 24, 2015.
3. On October 2, 2015, the System's Medical Board opined that Gutierrez is mentally incapacitated from the performance of his duties as a police officer as a result of his post-traumatic stress disorder ("PTSD"), and that his incapacity is likely to be

permanent (of at least one year's duration). A "staff physician comment" in the Medical Board's report noted that Gutierrez' PTSD is "related to shooting incidents that occurred while performing his duties as a police officer."

4. Gutierrez testified that the first such incident occurred in August of 2013. The incident was also described in detail in the April 17, 2015 "Psychiatric Diagnostic Evaluation of Aaron Gutierrez" by psychiatrist Bruce D. Gutnik, M.D. (MFPRSI Ex. 4). Gutierrez and another officer responded to report of an intoxicated man with blood on his hands. They found the man in a construction site, holding a knife. The other officer deployed his tazer, but it failed, and the suspect then charged Officer Gutierrez, who fired 4 shots. Two of the shots hit the suspect, who survived. Gutierrez testified that he "felt numb" after the incident and was on paid administrative leave for 9 days after the shooting.
5. The second incident occurred in March, 2014. Gutierrez spotted a pick-up with no license plates that he (correctly) suspected was stolen. He followed the vehicle, which eventually back-tracked toward Gutierrez. When it blew a tire, the driver got out and a foot pursuit ensued. Gutierrez testified that the man jumped out from behind a building and yelled, "I'm going to f___ing kill you," while raising his hand and holding a silver object. Gutierrez fired one round. The man fell, as if hit, but it was later determined that he had not been shot. Instead he had a seizure. Gutierrez testified that he was on administrative leave for 6 weeks after this incident, that he had nightmares and found it difficult to socialize, and that his wife said he was punching and kicking her at night.
6. After returning to duty, Gutierrez began experiencing difficulties at work and was eventually referred by the department to Dr. Gutnik for the above-referenced April, 2015 psychiatric evaluation. The stated purpose of the evaluation was "to determine if Mr. Gutierrez has any psychiatric problems that may have contributed to his impaired performance as a police officer." As a result of his examination, Dr. Gutnik concluded that Gutierrez suffers from Post-Traumatic Stress Disorder, an Adjustment Disorder with Depressed Mood and Obsessive-Compulsive Personality Traits. He further opined that "it is likely, with a reasonable degree of medical certainty, that Officer Gutierrez' impaired performance was a result of his PTSD."
7. Officer Sergio Gutierrez (Aaron's older brother) testified by telephone. He has been a patrol officer in Omaha since August of 2012. He testified that he works uniformed patrol in one of the most violent areas of the city. He testified that he had never had to discharge his gun in the line of duty and had not had a suspect pull a gun or knife on him, although a suspect once reached for a knife but was subdued. He testified that he was aware of the 2 shooting incidents at issue and offered his opinion that officer-involved shootings are rare – particularly multiple incidents within a 7-month period. He agreed that police work is stressful, and on cross-examination, confirmed that he was trained on the use of deadly force and the use of firearms. On re-direct he agreed that having to use deadly force is different than being trained to use it.

8. Joshua Horner, a patrol officer with the Council Bluffs Police Department since September of 2009, also testified by telephone. He testified that he is dispatched to "whatever comes into the 911 center" and that he was a 911 dispatcher for Pottawattamie County from 2003 – August, 2009. In that position he received calls for the county, Council Bluffs police and fire and several smaller departments. He testified that a suspect once pulled a knife on himself in his presence, but a suspect had not pulled a weapon on him during his career. He testified that he has never fired his weapon in the line of duty. He testified that he was familiar with the 2 incidents in question, and that he considered them unusually stressful.
9. Chief Tim Carmody of the Council Bluffs Police Department also testified by telephone, in addition to his deposition testimony that was admitted as City Exhibit 2. He testified that he is a 32-year veteran of law enforcement, including 22½ years with the Omaha PD. He testified that he had been at the scene during an officer-involved shooting only once during his career, but had 4 officer friends who were killed in the line of duty. He testified that he has never fired at a suspect, but had "come close." He estimated when asked that Omaha has approximately 10 officer-involved shootings per year. He agreed that officer-involved shootings can involve greater than the usual day-to-day stress, but also commented that officers are exposed every day to the unknown. "That's why we wear ballistic vests, carry weapons and train." He equated the stress of shooting to other stressful incidents such as pursuits. He testified in his affidavit that during one high-risk search warrant operation, he was shot at "and as feet from an officer who was shot." He helped coordinate investigations into critical incidents, including shootings where officers were injured, sometimes critically, and where the suspect was shot, sometimes fatally. He also had taken command of an "active shooter" incident at a mall in Omaha that lasted several hours. He agreed that Officer Aaron Gutierrez had been involved "critical" incidents but did not agree that the cited incidents were unusually stressful for police work.
10. As noted above, Gutierrez filed his disability application with the System on or about July 1, 2015. In the "Employer's Statement" portion of the application, the City reported a last working day on the job of June 24, 2015.
11. On page 2 of Gutierrez' application, in response to the question about the type of disability being applied for, the box for "Ordinary Disability" was checked. An ordinary disability pension was awarded by the System, and Gutierrez now appeals for an accidental disability pension, arguing that his former attorney completed that portion of the application in error.
12. MFPRSI Exhibits 1 – 8 were received into evidence automatically, pursuant to the System's administrative rules.
13. Gutierrez offered Member's Exhibit 1 (Tab 14), which is Dr. Gudnik's response to certain questions from Gutierrez' attorney regarding his April 17, 2015 Diagnostic Evaluation. Member's Exhibit 1 was received into evidence, subject to the City's objection that Dr. Gudnik's response to question number 4, regarding whether the

incidents in question were unusually stressful for police work, was not relevant as a medical record and instead was a response to a leading question.

14. The City offered City Exhibits 1-3. City Exhibit 1 (Tab 10) is captioned Position Statement of City of Council Bluffs & Council Bluffs Police Department.” It was received into evidence without objection. City Exhibit 2 (Tab 2) is titled “Affidavit of Chief Tim Carmody, Chief of Police, Council Bluffs Police Department. It was also received into evidence without objection. City Exhibit 3 (Tab 15) is a “Memorandum of Understanding” between the City of Council Bluffs, the Council Bluffs Police Department and Gutierrez. It was received into evidence, subject to the City’s objection that it is irrelevant to this proceeding.

CONCLUSIONS OF LAW

1. As a preliminary matter, we must consider the objections to certain exhibits offered into evidence.

Member’s Ex. 1: The City objected to question and answer #4 in this exhibit, in which Dr. Gudnik opined that Gutierrez’ involvement in the two shootings at issue “involve stress of a greater magnitude” than the day to day mental stresses experienced by other police officers. The Committee finds that Member’s Exhibit 1 is admissible. While the response in question is not on a medical issue and thus does not constitute medical evidence, the weight to be accorded the statement is in the discretion of the Committee.

City Ex. 3: The Member objected to this exhibit, the Memorandum of Understanding based on relevance. The Committee finds that it is admissible for the limited purpose stated by the City – as evidence that the City was supportive of an ordinary disability pension for Gutierrez.

2. Iowa Code § 411.6(3) states:

3. Ordinary disability retirement benefit. Upon application to the system, of a member in good standing or of the chief of the police or fire departments, respectively, any member shall be retired by the system, not less than thirty and not more than ninety days next following the date of filing the application, on an ordinary disability retirement allowance, if the medical board after a medical examination of the member certifies that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be

entitled to be restored to active service in the same position held immediately prior to the application for disability benefits. The member-in-good-standing requirement of this subsection may be waived for good cause as determined by the board. The burden of establishing good cause is on the member.

3. Iowa Code section 411.6(5) states (in relevant part) as follows:

5. *Accidental disability benefit.*

a. Upon application to the system, of a member in good standing or of the chief of the police or fire departments, respectively, any member in good standing who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, or while acting pursuant to order, outside of the city by which the member is regularly employed, shall be retired by the system if the medical board certifies that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A medical condition shall be deemed to have been known to exist on the date that membership commenced if the medical condition is reflected in any record or document completed or obtained in accordance with the system's medical protocols pursuant to section 400.8, or in any other record or document obtained pursuant to an application for disability benefits from the system, if such record or document existed prior to the date membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits.

* * * * *

c. (1) Disease under this subsection shall mean heart disease or any disease of the lungs or respiratory tract and shall be presumed to have been contracted while on active duty as a result of strain or the inhalation of noxious fumes, poison, or gases.

(2) Disease under this subsection shall also mean cancer or infectious disease and shall be presumed to have been contracted while on active duty as a result of that duty.

(3) However, if a person's membership in the system first commenced on or after July 1, 1992, and the heart disease, disease of the lungs or respiratory tract, cancer, or infectious disease would not exist, but for a

medical condition that was known to exist on the date that membership commenced, the presumption established in this paragraph "c" shall not apply.

d. The requirement that a member be in good standing to apply for and receive a benefit under this subsection may be waived for good cause as determined by the board. The burden of establishing good cause is on the member.

4. An accidental disability pension is payable under chapter 411 for a mental injury only if the traumatic incident that caused the injury constitutes workplace stress of greater magnitude than the day-to-day stresses experienced by other police officers (or firefighters). See *Moon v. MFPRSI*, 548 N.W.2d 565 (Iowa 1996) and *City of Cedar Rapids v. MFPRSI*, 572 N.W.2d 919 (Iowa 1998).
5. There was much discussion and argument regarding the "ordinary disability" box being checked on Gutierrez' disability application. As correctly noted by the Member, however, Rule 9.2(2)(f) of the System's Administrative Rules provides that the designation of "accidental" or "ordinary" on the disability application is not controlling, and that determination is for the System. Furthermore, the application form itself notes that the final determination concerning whether "ordinary" or "accidental" is appropriate will be made by the System. The fact that "ordinary disability" was checked on Gutierrez' application was not a factor in the award of that benefit and does not preclude him from appealing for an accidental disability pension.
6. It is undisputed that Gutierrez is incapacitated from the performance of his duties as a police officer as a result of his Post-Traumatic Stress Disorder and that his incapacity is likely to be permanent. It is also undisputed that his PTSD was caused by the two shooting incidents he described.
7. The issue in this the cited incidents constitute workplace stress of greater magnitude than the day-to-day (not daily) stresses experienced by other police officers.
8. The 2 shooting incidents cited by Officer Gutierrez were clearly stressful and would constitute workplace stress of greater magnitude than the day-to-day stresses experienced by workers in most professions. Police work is inherently dangerous and stressful, however. The issue is not whether police-involved shootings are rare, but whether the cited incidents constitute workplace stress of greater magnitude than the day-to-day stresses experienced by other police officers. The Committee finds that the 2 incidents in question were not unusually stressful for police work.

DECISION

The appeal for an accidental disability pension on behalf of Aaron Tyler Gutierrez under chapter 411 is hereby denied. The award of an ordinary disability pension is affirmed.

Dated this 25th day of February, 2016.


_____, Chair
Disability Appeals Committee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 26 day of February, 2016.

By: ☒ U.S. Mail ☐ Facsimile
 ☐ Hand Delivered ☐ Overnight Courier
 ☐ Federal Express ☐ Other

Signature

