WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NEGAR SABHARWAL, *Applicant*

vs.

COUNTY OF VENTURA, permissibly self-insured, adjusted by YORK RISK SERVICES GROUP, now known as SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ11337154
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 1, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

NEGAR SABHARWAL
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
GOLDMAN MAGDALIN KRIKES

JB/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. **Applicant's Occupation**: Deputy Public Defender III
2. **Applicant's age at dates of injury**: 53
3. **Date of injury**: 8/14/2020
4. **Parts of body injured**: aggravation of thyroid found industrial due to stress; psyche denied due to good faith personnel action
5. **Identity of petitioner**: Applicant
6. **Timeliness**: Yes
7. **Verified**: Yes
8. **Answer Filed**: Not at this time
9. **Date of Action**: 3/16/2023 Findings & Award
10. **The petitioner's contentions**: That the undersigned erred in finding the psyche injury nonindustrial and that the evidence does not justify the finding that applicant's performance reviews were lawful, non-discriminatory and in good faith; defendant failed to submit any evidence that the denial of applicant's desired duty assignment was lawful, non-discriminatory and in good faith; applicant's perception of gender discrimination was confirmed by defendant's own witness testified to the presence of gender discrimination within the employer's office for the first period of applicant's employment; and the evidence does not justify the finding that the denial of applicant's desired office space and email regarding her workout attire were lawful, non-discriminatory and in good faith.

II
FACTS

Applicant, Negar Sabharwal, has filed a timely and verified petition for reconsideration with respect to the psyche aspect of this case. The undersigned issued a Findings and Award wherein the thyroid aggravation was deemed industrial and not subject to the good faith action defense per *McCoy/Brooks* but the applicant did not meet their burden of proof with respect to a psyche injury per *Rolda*. In addition, *Verga* applied to bar some of the events as they were not actual events and due to applicant's behavior. To that end, a 5% award with future medical care issued. Defendant, County of Ventura, did not file a petition for reconsideration of the decision. Applicant's recitation of the facts do not provide a complete picture and as such they will be recapped here.

The applicant began her career with defendant in 2003 as Deputy Public Defender (PD) III and stopped working in August, 2017 as a PD III returning briefly to a modified position in 2020. Along with the testimony, the undersigned reviewed the numerous reports authored by the psyche PQME, Dr. West. (Court Exhibits X1 - X8). Dr. West's reports contained a review of the hundreds of pages contained in the applicant's personnel file and medicals. Dr. Mark Davidson (Exhibits Y and Y2) contained an analysis of the internal component of the applicant's claim.

The applicant initially testified that she was discriminated against as a PD. Defense' sole witness, Chief Deputy Public Defender, Claudia Bautista, denied that the applicant was treated unfairly due to her race or gender. Defense witness began working for defendant in 2001 and received many promotions along the way. She was also the applicant's supervisor from 2014 on.

At trial, the applicant mentioned all male trips when she began at the PD's office and that the male attorneys who went on these trips were promoted faster. On cross-examination, the applicant presented as a more difficult and nonresponsive witness e.g. when asked if she was discriminated against for gender and sexual harassment, she said she does not know the reason she was treated differently; she did not know of any female PD's that were promoted during her employment as the question was "vague" and she "did not keep track of it"; and, finally, defense witness appeared to be female but was unsure of their pronouns as the issue is more complex now and the same with Ms. Farley. The applicant ultimately stated that "it is always perception."

Defense witness indicated that written policies with respect to promoting to senior attorney positions were implemented in 2008. It was a given to go from a PD I to a PD III, but tenure did not guarantee promotion to a senior attorney position. Senior attorneys handled the more complex cases. At the time defense witness began in 2001, no such policies were in place and attorneys would walk in and ask to be promoted. The defense witness confirmed that after written policies were implemented in 2008, everyone was aware of it. Applicant's testimony that the policies were not in place until 2017 and her feigned response that she did not know if she met the standards when defense asked her about it appeared disingenuous based upon the evidence.

Defense witness was made aware in November 2016 that the applicant wanted to promote and said the applicant walked in and demanded it because of seniority stating, "I deserve it". The applicant was not promoted. Defense witness said that in order to be promoted, one had to do the "heavy lifting" by handling the complex cases and they had to submit a letter and state why they were qualified. Before the applicant went out on leave, they had a conversation about how to accomplish the goal of promotion and applicant never completed any of the necessary work to promote. Defense witness did not know before 2016 that the applicant wanted to promote or that there was an issue with not doing felony trials.

The applicant has asserted that her exit out of felonies in 2006 was because she was targeted due to an email she wrote about an investigator. The email was not in the applicant's personnel file and no additional information was provided to substantiate it. The applicant asserted that an unfavorable review appeared out of the blue thereafter. The applicant felt that she was criticized on a personal level and also that she had not gone to trial. That review remained in her personnel file and was reviewed by Dr. West. Further, the review contained applicant's responses about childcare issues in relation to the applicant's inability to get to court. Dr. West allowed the applicant to lodge responses to the reviews contained in her personnel file and applicant's responses to the original 2006 review were written in years after the fact by Dr. West and not contemporaneously.

The applicant complained about the comments in her personnel file as improper yet she testified that in 2008 she told the former Chief PD, Duane Danmeyer, that once her kids were older she would take on more serious cases. The applicant testified that his response was to laugh and she was determined to stay away from him and the main office. To that end, the applicant took the position handling juvenile cases. Danmeyer worked through 2010 and the applicant alleged that she did not return to felonies until 2017. However, emails and the applicant's personnel file that were reviewed by Dr. West indicated that applicant was reluctant to leave juvenile. Defense witness indicated that juvenile handled both felonies and misdemeanors and the applicant's handling of a juvenile felony gang case was noted in her personnel file.

In 2011, the applicant was sent back to the main office to a new office. The applicant thought the shared office that was offered was too small. She was also offered a solo office but said the surrounding area was too loud. Applicant got a doctor's note and asked her supervisor at the time, Steve Lipson, if she could have another specific office and he said "yes" until an incident regarding a conference and the use of her time took place in November, 2011. The applicant referred to this as the "Yosemite incident" as she was heading to a training seminar in Yosemite and wrote "travel" instead of "in". (In their petition the applicant indicates it was a "nomenclature"). The end result was that PD Farley had to deal with applicant's client who needed to get released. Farley indicated in a memo that the incident was a liability issue for the department. The department took a negative view of applicant's actions and PD, Farley, said it was the false use of travel time. An email in applicant's personnel file in Dr. West's report showed that the applicant was told to make sure she signed herself "in" on that day. The applicant did not get the office she coveted and did not receive the attorney of the year award as a result. PQME West's reports (Exhibits X1 and X2) contained the emails and memos regarding this incident and it appeared that the applicant was distressed by it as management changed their minds about giving her an office that was hidden and out of the way. PD Farley thought the applicant liked not to be around the office and only appeared when alerted by support staff. The applicant complained that the loud noise around the solo office that she was offered was not congruent with her work. The

applicant interpreted a comment she overheard was that a "dark cloud" was at the end of the hallway referred to her and was borderline racist.

The applicant also had difficult relations with two different judges and felt that she was treated unfairly in court. To that end, defense witness gathered the transcripts for the encounters to review, interviewed other PD's and even went to the courtroom to observe the applicant and gather "intel". The witness commended the applicant for her zealous advocacy but thought the applicant's conduct of speaking over the judges and acting like "this is how it's to be done" could also be viewed as "overstepping" with the judicial officers. Later the applicant had another incident with a different judge and she was upset that the judge made a comment about her looks. Defense witness agreed that this would be upsetting.

In 2015, the applicant worked in PROS (Post Relief Offenders) which was a realignment assignment. Another PD had her also covering arraignments in the morning at the time. The applicant stated she was overworked and could not leave the building for lunch. Another PD had retired from parole cases and that assignment was added to the realignment assignment too. Defense witness eventually helped out one day a week. Clients were calling the applicant that had never gone to court and others were admitting to violations. She told the writs and appeals people and they started to work on writs. The applicant was the only PD that had to have the Writs and Appeals unit help out. This was the only event that was deemed actual as it was about the work and the stress of dealing with indigent clients who needed to have their crimes reclassified as quickly as possible due to a change in the law and it was coupled with other assignments at the time.

The applicant was off work in October 2015 and complained to her supervisors about her perception of systemic bias. The applicant returned to work in 2016 with work restrictions and was placed in arraignment court and she felt that was consistent with the restrictions. The applicant felt that she did not hear back quickly enough with respect to attending a non-CPDA education conference. Defense witness indicated that non-CPDA conferences are not encouraged because of budget issues and she only knew of one that was approved because the person who attended came back and trained others with their knowledge of DNA.

Although defense witness did not know why the applicant was not reassigned to felony cases until later, she said that the juvenile department handled both felonies and misdemeanors. The reports of Dr. West support this as stated above. The applicant was assigned a felony trial by defense witness after she was taken off the modified job of arraignment court which the applicant testified was congruent with her work restrictions in 2016. It was during that assignment that the applicant was greatly offended by the judge's comment. She was also assigned traffic court and domestic violence court after her three month leave. There were comments in the personnel file that the applicant appeared to avoid felonies and wanted to stay with the juvenile crimes division.

Defense witness testified that the assignment of a money laundering felony case to the applicant was a typical entry level assignment and the applicant was assigned the case from inception. Per defense witness, that was not "dumped" on the applicant. It requires the same skill set as a child molestation, strike or life case and the kind of case one must handle to be promoted. The applicant was not given a caseload on her return from leave - it was the applicant's only assignment. The defense witness stated that when the applicant applied for a promotion she basically thought she should get it due to seniority. Defense witness testified that in order to get promoted, once has to do the "heavy lifting".

In 2017, the applicant was greatly distressed about an email from her supervisor when she claimed she was seen coming back from lunch wearing workout attire. Defense witness confirmed that it would not bother her if someone did that. A review of Dr. West's report indicated that the email criticized her for wearing workout attire during work hours. Proper court attire is mentioned in the reviews as part of the applicant's job. The applicant never returned to work and felt she had to "flee". The applicant treated for a "thyroid storm". The applicant briefly returned in 2020 with restrictions. The applicant could only communicate with her supervisors in writing in 2020. Her employer could not accommodate this although she believed they could have done so. After a month she went off work and her last date of work was 5/21/2020.

The psyche PQME issued several different mathematical equations and ultimately issued the following percentages as 11 different causative factors for the psyche injury:

1. 20% Performance evaluations
2. 10% Denial of desired duty assignments
3. 08% Denial of desirable/requested office space
4. 02% Email from manager
5. 15% Alleged excessive workload
6. 10% Alleged gender and ethnic/race discrimination in the workplace
7. 08% Alleged hostile work environment
8. 07% Marital discord
9. 10% Thyroid condition and infection
10. 07% Orthopedic Pain
11. 03% Headaches

Due to the fact that some of the actual events were deemed personnel actions per *Larch*, a *Rolda* analysis applied. In addition, it was found that applicant's own behavior and perceptions invoked a *Verga* scenario as well. In calculating whether the injury is compensable, 55% were deemed actual events of employment (1-5). Dr. West indicated that the applicant's injury was substantially caused by personnel actions (40%). Four of the five factors were deemed personnel actions by the undersigned (1-4). They were lawful, non-discriminatory and in good faith based

upon the evidence. Dr. West attributed 15% to the excessive workload (#5) which is an actual event but did not meet the statutory threshold of compensability. The allegations of bias were entirely subjective and not viewed as objectively reasonable based upon the evidence (6&7). Applicant's personality as described by defense witness was reminiscent of *Verga*. Therefore, the applicant did not meet their burden of proof as to psyche.

III
DISCUSSION

a. Applicant contends - the evidence does not justify the finding that applicant's performance reviews were lawful, non-discriminatory and in good faith

Applicant cites the fact that the language regarding her childcare issues was removed from a subsequent evaluation proves that the review was in bad faith. However, applicant fails to acknowledge that these were applicant's own excuses for her failure to appear in court on a regular basis. Moreover, it is conjecture to assume that the removal of that language in a follow up review shows it was in bad faith nor was the review ever removed from her personnel file. The applicant complained about these comments to PQME Dr. West and Dr. West allowed the applicant to lodge complaints to what was reviewed therein.

In addition, applicant asserts that this must be viewed within the context of the male dominated 2006 world, however, defense witness stated there were also female only events at the same time. Applicant assumes she was never assigned felony cases again due to this and ignores her testimony wherein she stated to the Chief Public Defender at the time, Danmeyer, that the applicant would handle the more complicated cases when her children were older.

In addition, Dr. West's report showed that the applicant did not have the requisite experience to handle felony trials in 2006 and they needed her elsewhere. The reports demonstrated a repeated disinterest in taking cases to trial and that the applicant wanted to stay in juvenile and did not want to do felonies (court Exhibits Y1 and Y2). Defense witness testified that written policies were implemented in 2008 which clarified the road to promotion and rid the department of the view of walking in and asking to be promoted. Thus, despite the compliment that defense witness conveyed that the applicant was an excellent PD, she also stated that in order to promote, the applicant had to do the "heavy lifting" and applicant was disinclined to do so based upon her own conduct. Applicant's complaint about the 2006 personnel review and lack of felony trial experience were self-inflicted due to the statements to her supervisors. The applicant denied a lot of these allegations on cross-examination and her testimony could only be described as difficult at times. No bad faith was demonstrated and it appeared that defense witness tried to assist the applicant to get a promotion.

b. Applicant contends - defendant failed to submit any evidence that the denial of applicant's desired duty assignment was lawful, non-discriminatory and in good. Faith

Applicant's assertions are a rehash of the earlier assertion about the email she sent about an investigator that she believed led to her removal from felonies in 2006. There is no proof of that other than applicant's own self-serving statement. Applicant also ignores the fact the statement she made to former Chief PD Danmeyer regarding handing more complicated cases when her children were older showed that she wanted to be treated differently. The applicant changed the trajectory of her career and purposefully moved away from the main office so she could accomplish that.

PQME West's reports and voluminous record review show that the applicant was removed from felonies in 2006 because she never went to trial and the personnel needs at the time required moving her to another courtroom that needed help and put someone more experienced in her place. The reports also showed that the applicant wanted to go to juvenile and stay there. At juvenile, the applicant handled both felonies and misdemeanors.

In addition, applicant was on leave in 2015 and returned to an arraignment court assignment that she said was congruent with her restrictions. In 2016 the applicant expressed interest for the first time to promote to the senior level. Defense witness assigned a typical starter felony trial to the applicant and without a caseload. Applicant failed to complete that task and found it overwhelming. Defense witness testified that written procedures were implemented in 2008 that delineated the road to promotion and applicant failed to acknowledge their existence.

The alleged 10 year gap of lack of felony trial assignment is inaccurate based upon the evidence presented. Defendant did not deny anything to this applicant as she was in control of her career from the beginning. The numerous complaints that applicant made throughout the years e.g. one office was too small and another too loud; the PROS assignment was too much work and she was the only PD to have had help from the Writs and Appeals Unit; and the fact that she talked over judges in court does not appear congruous with someone who would sit back idly if they truly felt they were deprived of felony assignments. The applicant had a false belief that promotions were due to seniority alone. *Verga* was cited as applicable to this case due to the applicant's conduct and the defendant was not found at fault.

c. Applicant contends - applicant's perception of gender discrimination was confirmed by defendant's own witness testified to the presence of gender discrimination within the employer's office for the first period of applicant's employment

Defense witness did state that she felt she was not promoted as quickly. However, she was promoted to the Chief PD position. Defense witness stated that written policies were implemented in 2008 and as such guidelines for promoting were in place for years. The witness denied that the

applicant was the victim of gender discrimination. Further, the applicant denied she was the victim of gender discrimination. This is a non-issue.

d. Applicant contends - the evidence does not justify the finding that the denial of applicant's desired office space and email regarding her workout attire were lawful, non-discriminatory and in good faith

As far as the office space, again the applicant was not satisfied with either office that was provided to her when she went back to the main office. One was too small and the other was too loud and she provided a doctor's note. The applicant would have gotten the office she wanted but she signed herself out when she was not out and it appeared dishonest. They told her they were not happy with what she did and they did not give her the desired office space as a result. The voluminous records reviewed by PQME West indicated that PD Farley felt that applicant's conduct of not being available created a liability issue. The applicant also was not selected as attorney of the year and it was obviously viewed as more than a minor misstep and not as a "nomenclature" as applicant asserted. There was nothing unlawful regarding the decision to not reward the applicant with an out of the way office.

As far as the email about workout attire, the applicant said she was coming back from lunch, but the email review contained in the PQME report indicated that she was wearing workout clothes during working hours. Proper court attire is mentioned throughout the reviews as an essential function of the PD's job. There was nothing unlawful about the employer's email regarding not wearing workout attire during work hours.

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Dated: 4/19/2023

/s/ Diane Bancroft

DIANE BANCROFT
Workers' Compensation Administrative Law Judge