

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

DM¹,
Petitioner

Docket No. CR-17-291

v.

Date: December 8, 2023

**Plymouth County Retirement
Association,**
Respondent
Town of MO,
Intervenor
**Public Employee Retirement
Administration Commission,**
Necessary Party

Appearance for Petitioner:

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Appearance for Respondent:

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Appearance for Necessary Party:

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PERAC
5 Middlesex Ave., Suite 304

¹ A pseudonym. See G.L. c. 4, § 7, 26th para., (c). I use pseudonyms for the Town employer and DM's co-workers and supervisors.

Somerville, MA 02145

Administrative Magistrate:

Bonney Cashin

Summary of Decision

The Petitioner's application for accidental disability retirement, which was based on a mental disability, is denied. The Town's training and supervision of the petitioner in the complete tax taking filing process was sorely lacking. The petitioner's inconsistent testimony and inability to recall whether and when she mailed or otherwise delivered the tax takings packages to the Registry in 2011 and 2012, however, lead me to conclude that the Town's personnel actions, including demotion, were bona fide. The Town's actions did not rise to the level of intentional infliction of emotional harm. Consequently, the petitioner suffered no cognizable personal injury while performing her duties.

DECISION

Introduction

On June 2, 2017, under G.L. c. 32, § 16(4), Petitioner DM appealed the decision of the Plymouth County Retirement Association (Board) to take no further action on her application for accidental disability retirement.² (Exs. 1-7.)

There is no dispute among the parties that DM became permanently disabled while in the performance of her duties. PERAC based its decision to deny the application on the argument presented by the Town—that its demotion of DM and its subsequent supervision of DM were bona fide personnel actions. (Exs. 1, 2.) Consequently, the Town argues, DM did not suffer a personal injury within the meaning of c. 32, § 7, as the Town's action did not amount to the intentional infliction of emotional harm. The parties agreed that the only issue to be decided at the hearing was whether the Town's personnel

² The Board's action followed three remands of this matter from PERAC to the Board, under its authority at c. 32, § 21(1)(d). (Exs. 33, 35, 36.) Following the first two remands, the Board held further hearings, considered additional evidence, made further findings, and again approved the application. (Exs. 1, 2.) PERAC's final remand instructed the Board to either deny the application or to take no action. (Ex. 37.) The Board took no further action.

actions were bona fide, and, if so, whether they amounted to the intentional infliction of emotional harm.

In February 2019, this matter was reassigned to me. I conducted a hearing on November 6, 2019, January 8 and 9, 2020, July 27 and 28, 2021, and September 29, 2021.³ DM testified on her own behalf and offered testimony from her husband. The Town offered testimony from JM, the Town's Treasurer/Collector, SP, a Senior Clerk in the Treasurer/Collector's Office, and JB, now Assistant Treasurer/Collector. SP was the only witness for the Town who had offered evidence at the Board's hearings.⁴ The Town's witnesses were sequestered during the hearing.

I admitted 55 exhibits. I marked 10 documents for identification. The hearing was digitally recorded. The parties prepared transcripts from a copy of the recordings. DM and the Town filed their closing arguments on February 9, 2022, and the record closed.

FINDINGS OF FACT

Based upon the testimony and other evidence in the record and the reasonable inferences from them, as well as my assessment of witness credibility, I make the following findings of fact:

1. DM was employed by the Town from February 14, 2005 through April 7, 2015. (Tr. I: 12, 43.)⁵
2. She is a high school graduate and is certified as a paralegal. (Tr. I: 11.)

³ The first three days of hearing occurred before DALA's offices closed because of the COVID-19 pandemic. I determined that the remainder of the hearing should proceed with live testimony, and the parties agreed. The hearing continued once DALA determined it was safe to do so.

⁴ Tr. V: 146-148.

⁵ References to the transcripts are Tr. Vol. No.: pg. no. The transcript volumes' pages were not consecutively numbered. Where the testimony was repetitious, I do not cite multiple references when not necessary to the decision.

3. DM worked initially in the Assessor's Office and then in the Town's Treasurer/Collector's Office from May 11, 2006 through October 14, 2014. (Tr. I: 12, 21; Tr. IV: 68.)

4. She was hired as a Clerk, an entry level position, and was promoted to Junior Clerk in October 2008. (Tr. I: 12, 13.)

5. JM is the Treasurer/Collector in Middleborough and has held that position since 1990. (Tr. IV: 19.)

6. When DM worked in the Treasurer/Collector's Office, VM was Assistant Treasurer-Collector. (Tr. I: 53; Tr. VI: 73.)

7. While JM and VM supervised the entire Office, employees whom they supervised worked on either the "Collector's side" or the "Treasurer's side" and had different work duties related to one of the two functions. (Tr. IV: 20-22.)

8. JM agreed she ultimately was responsible for the actions of her employees, but she had to rely on them to do their job. (Tr. V: 15, 34, 58.)

9. In 2011 and 2012, on the Collector's side, there were two Clerks, DM, a Junior Clerk, and JB, then a Senior Clerk/Supervisor. SK, a Senior Clerk/Supervisor who was out twice on medical leave in 2009 and 2010, returned to work for a time and then retired about February 2011. (Tr. IV: 101; Tr. VI: 7, 32.)

10. DM's job duties included opening and distributing mail, handling phones, assisting people at the counter with payments on tax and water bills and vehicle registration and balancing these accounts, data entry, and typing correspondence, usually using a form letter. She stated she would perform the work assigned to her each day. If

asked to prepare correspondence, her initials would appear on the letter or memo. (Tr. I: 15-16, 20-21; Tr. IV: 26-28.)

11. DM was unclear about when she was permitted to put items in the Office's mail slot. (Tr. II: 48-49, 51-52, 53.)

12. When real estate taxes remain unpaid, the Town undertakes a multi-step process to collect the debt. Eventually, if the taxes owed are not paid, the Town may file a tax taking to perfect a lien on the property. (Tr. I: 29; Tr. IV: 31-33.)

13. Although they require a separate filing, the process is the same for tax takings on property registered with the Land Court. (Tr. VI: 66, 67-68.)

14. Tax takings processed in a given year are for the previous year's unpaid taxes. For example, tax takings dated and filed in 2012 are for the 2011 tax year. (Tr. IV: 50.)

15. The Town uses a computerized tax title program to enter and manage data related to the tax takings. (Tr. I: 24; Tr. IV: 33-39; Exs. 39, 40.)

16. Those employees given access to the program record their initials for each entry made. DM's initials are DLM. (Tr. I: 25-26, 28, 106-107; Tr. IV: 39, 43; Exs. 39, 40.)

17. Tax taking instruments must be filed at the Registry of Deeds within 60 days of the taking. A check for the correct filing fee, based on the number of instruments to be recorded, must accompany the package of documents. If the check is for an incorrect amount, the Registry's usual practice is to return the unfiled instruments to the Town. (Tr. IV: 40; Tr. VI: 9, 15, 51-52.)

18. If the 60th day is a weekend or a holiday when the Registry is closed, then one must file the instruments no later than the last business day before the office is closed. In other words, the date by which the Registry must receive the takings package may be less than 60 days from the date of a taking. (Tr. IV: 56, 114; Tr. VI: 26.)

19. Once an account is opened in the tax taking program, the computer calculates and enters the tax taking date, which appears in each record and on each instrument when it is printed. (Tr. IV: 43, 44; Tr. VI: 10, 11, 15, 35; Exs. 23, 39, 40.)

20. To calculate the date by which the tax takings needed to be filed, JB's practice when she did tax takings was to count out 60 calendar days and adjust for any days the Registry was closed. The filing deadline is not computed by the tax taking program and does not appear in the program or on the instruments. (Tr. VI: 18, 19, 22.)

21. The Office must post notice in the local newspaper two weeks prior to the taking listing the properties on which taxes are owed. If the taxes remain unpaid following the two-week notice period, a tax taking account is opened for the property. (Tr. IV: 44-46; Tr. VI: 36-40; Ex. 44.)

22. The system is updated as payments are made. (Tr. VI: 17-18, 39.)

23. The next steps are the printing, signing, and notarizing of the instruments of taking. (Tr. IV: 49; Tr. VI 39-40; Ex. 41.)

24. When the instruments are ready, a voucher requesting a check for the Registry filing fee is sent to the Town Accountant. JM must sign the check. (Tr. IV: 56-59, 91-92; Tr. VI: 21.)

25. Both JM and JB say that whoever vouchered the check always was the person assigned to put the package together and submit it to the Registry. (Tr. IV: 58-59; Tr. V: 56-57, 280; Tr. VI: 48.)

26. The check is returned to whoever completed the voucher requesting it. (Tr. IV: 57; Tr. V: 279-281.)

27. According to JM, the person who requests the voucher is responsible for filing the tax taking package on time whether mailed by USPS, Fed Ex, or hand delivered. That person decides the method to use. (Tr. IV: 62-63; Tr. V: 56-57.)

28. Delivery from the Office to the Registry by regular mail takes 1-2 days. (Tr. VI: 54.)

29. When the instruments are filed, the Registry stamps them with the recording date and time and returns them to the Treasurer/Collector's Office. (Tr. IV: 52, 60-61.)

30. DM received no formal training in the tax taking process. The Office does not maintain a checklist, manual, video, or other memorialized training information. In general, Office training consisted of senior employees showing or explaining to junior employees how a task is done. Junior employees are expected to ask questions "if they don't know something or are unsure of something." (Tr. I: 43-44; Tr. IV: 67-70; Tr. V: 35.)

31. JB described her standard practice when supervising clerks as "I would always check in with them and just, you know, say, how's it going, do you need any help, do you have any questions, and that was pretty standard for me because I just...like to

know where they were at and just to make sure we were meeting deadlines and stuff.” To the ‘best of her recollection’ she followed this practice with DM. (Tr. VI: 42.)

32. DM testified “no” when asked whether she had any “reprimands, discipline, warnings, [or] corrective actions from the Town” during her employment prior to July 2014. (Tr. I: 22.)

33. On October 29, 2007, JM spoke to DM about the need for timely completion of her reconciliations work. JM also prepared a undated memo about the conversation. She conceded that DM tried to do better. (Tr. IV: 71-74; Ex. 52.)

34. The conversation and memo were not a “formal reprimand or anything”; it was corrective action. (Tr. V: 124, 151.)

35. JM also complained that DM continued to have difficulty timely completing her assignments up until she left work. There is no documentation of any corrective action or other discipline, and JM did not say whether she spoke to DM again about timely completion of her work. (Tr. V: 39-40; Tr. VI: 82.)

36. In October 2008, DM was promoted to Junior Clerk, a position that involved additional responsibilities. The Junior Clerk job description makes no reference to tax takings duties. JM stated it is one of the “other office duties as required or directed, which is a “catchall” category listed on the job description.” (Tr. I: 34; Tr. IV: 84; Tr. V: 122-123; Ex. 10.)

Tax takings prior to 2011 and 2012

37. JM recalls that DM prepared the submission to the Registry of Deeds in April 2010 because the cover letter has her initials on it, and it states the amount of the check, and the number of instruments of takings and of redemption. JM continued that

DM “had to have had” the takings documents and instruments of redemption in hand to figure out the amount for the check. Also, there is a sticky note on the voucher in DM’s handwriting showing a count of the documents. (Tr. I: 29-30, 31, 32; Tr. IV: 85-94; Exs. 38, 50.)

38. DM did not enter any accounts or other information into the tax takings program in 2010 or earlier because she lacked access to the program. (Tr. V: 51-52.)

39. During SK’s tenure, she was responsible for tax takings. When she was out on leave, SP (a Senior Clerk with prior tax taking experience who now worked on the Treasurer side of the Office) handled tax takings. (Tr. I: 14-15; Tr. IV: 24; Tr. VI: 7-8, 27-28.)

40. SP recalls that SK returned from medical leave in February 2010. SP had started tax title work to be filed that year, although she was assigned to handle payroll on the Treasurer’s side at the time. She has no direct knowledge whether SK or DM filed the package with the Registry in 2010. (Tr. V: 201-202, 241-245.)

41. JM does not know who mailed or otherwise delivered the 2010 package to the Registry. (Tr. V:42-43.)

42. JB recalls that SK filed the tax takings package in 2010. (Tr. VI:113; Tr. V: 243, 245.)

43. JB recalls that when she did tax title, she did “everything,” as did SK. This was the norm in the office. (Tr.VI: 147-148.)

44. In years just prior to 2011, the tax takings process was handled by either JB, SK, or SP, all Senior Clerks. In 2010, DM assisted SK with the voucher. (Tr. V: 51-52.)

Tax takings filed in 2011 (for the 2010 tax year)

45. When SK retired in February 2011, she had completed some of the work for the tax takings to be filed that year. JM initially asked JB to complete the tax taking process. JB completed some of the initial entries into the tax taking program, but soon became too busy with other work responsibilities. (Tr. VI: 27-28, 29-31, 33.)

46. JM then asked SP to train DM in data entry for the computerized tax taking program. (Tr. II: 80; Tr. IV: 102-103; Tr. V: 190-191, 193-196; Tr. VI: 29-31, 32-33.)

47. Prior to this point, DM had not received any training on the tax taking program and did not have a login for it. During training, SP signed in using her own login and password, so that many of the entries DM made appear on the screen shots as entered by SP. SP did not train DM in any other aspect of the tax taking process. (Tr. I: 19; Tr. II: 78-82; Tr. III: 157-158; Tr. V: 27-28; Ex. 23.)

48. JM saw them sitting together and assumed SP was training DM. She also assumed SP or JB told DM about placing the ad and sending the package to the Registry. (Tr. IV: 104; Tr. V: 32-33.)

49. JM had no firsthand knowledge about how and when the tax takings packages were prepared and delivered to the Registry in 2011 or 2012. (Tr. IV: 90-92, 106; Tr. V: 31, 32, 33, 34, 35-40.)

50. At some point, JM told SP not to train DM anymore and that JB would work with DM rather than SP. (Tr. V: 232, 233; Tr. VI: 40-41.)

51. JB was not involved in the data entry training. (Tr. VI: 34; Tr. IV: 106.)

52. In general, JB's training assistance was to "talk to them, show them what needed to be done." In her view, it is the trainee's responsibility to ask questions, including about something they did not understand. (Tr. VI: 117-118, 120.)

53. When JB was asked what she said to DM when she took over supervisory responsibility, she responded:

I don't recall exactly what I said but I worked on the Collector's side for 17 years and I always, if I assigned an assignment to somebody, I would always check in with them and ask them how they were doing with it and if they had any questions or needed any help. Because if, if they needed help, I needed to jump in and be able to help them so that was just what I always did." (Tr. VI: 45-46, 60.)

54. When asked if she remembered specifically whether she asked DM these types of questions, she replied: "I don't remember anything specifically." (Tr. VI: 46, 118.)

55. JB said DM's response would be that she was "all set;" she did not recall specifically, but her response was "in the nature of 'I'm good.'" JB had to "trust and believe that she's telling me she doesn't need my help and she doesn't have any questions." She could not recall specifically how many times she asked DM how the assignment was going, but it was more than one time. (Tr. VI: 46-47, 60.)

56. In 2011 and 2012, DM printed out the takings instruments, prepared the cover memos, and filled out the voucher. She recalled that she did not receive the filing fee check. (Tr. I: 31, 32; Tr. II: 23-29, 31, 32-33, 45.)⁶

57. JB showed DM how to print the takings documents and printed them with her. (Tr. VI: 120.)

⁶ When asked if she put together the 2011 package including the instruments and filing fee check, DM initially testified that she could not remember. She was confused about whether some events took place in 2011 or 2012. (Tr. I: 32-33, 36, 37-38, 44.)

58. JB did not go over the voucher process with DM because DM had prepared vouchers for other matters. DM had not previously completed a tax takings voucher on her own. JB did not know what SK had told or shown DM previously. (Tr. VI: 121, 122.)

59. In 2011, DM presented the documents to JM for signature and then to SP to be notarized, SP gave the takings instruments to DM after she notarized them. Although SP could see the date of taking on the instruments, she did not calculate the date the package was due at the Registry. (Tr. V: 209-211, 264; Ex. 54.)

60. In 2011, no one in the Office confirmed that the tax takings documents were filed with the Registry on time. JB did not calendar the 60-day deadline. She said: "Everybody in the office was aware of that." She said she talked to DM and "told her it had to be within 60 days." (Tr. VI: 123, 127-129, 132-133.)

61. JM agrees that everyone knew about the 60-day deadline for tax takings. The takings instrument states that it must be recorded in 60 days. (Tr. V: 59.)

62. DM was likely aware generally of a 60-day filing requirement. When questioned about it her responses conveyed lack of recall or uncertainty, or she qualified her response. (Tr. I: 151-152, 153, 158-159, 170.)

63. DM's testimony before the retirement board on February 28, 2017, however, is not inconsistent with her testimony at the DALA hearing as to her knowledge in 2011 or 2012. She was asked at the board's hearing when the filing occurred, not when she first learned of the 60-day requirement. (Tr. I: 162; Tr. III: 153; Ex. 33 at 26.)

64. When she signs a voucher, JM does not count the takings instruments to make sure the check amount requested is correct. She sees this as the responsibility of the Town Accountant before she cuts the check. (Tr. V: 64-65).

65. JB did not recall asking DM prior to the deadline whether the documents had been filed. (Tr. VI: 129, 131.)

66. Nothing on the voucher indicated that the filing fee check should be returned to DM. (Ex. 45.)

67. In 2011, the voucher package was prepared by DM, according to JB and SP, because DM's handwriting or initials were on various pages of the submission. (Tr. II: 142-143; Tr. V: 279-280; Tr. VI: 49-53.)

68. In 2011, JM concluded DM was responsible for preparing the submission and filing it on time because the cover letter has her initials on it and includes the amount of the check, shows the number of takings and instruments of redemption, her handwriting is on the voucher requesting a check in the amount that matches the number of instruments, and the check was returned to her. Consequently, she would have had all the necessary paperwork to accompany the check. (Tr. IV: 107-113, 115-116; Tr. V: 80-81; Exs. 38, 45.)

69. JM had some difficulty explaining how the 2011 voucher, which did not indicate in any way that it be returned to DM, nonetheless would be returned to her after being logged in on the Treasurer's side of the office. JM thought that as the check came back to the Collector's side of the Office for JM's signature, someone probably recognized DM's handwriting and left it for her. (Tr. V: 67-72, 77, 80-81.)

70. The package was ready to go to the Registry on Friday, April 15, 2011, based on the date on the check and on the cover memo. (Tr. VI: 53-54; Exs. 38, 45.)

71. JB and JM do not know how the documents were delivered to the Registry in 2011. (Tr. V: 40-41; Tr. VI: 136, 137.)

72. In 2011, the taking date was March 3, 2011, and the sixtieth day, May 1, was a Sunday. Thus, the documents had to be received and filed on or before Friday, April 29, 2011. The recording date was Tuesday, May 3, 2011. (Tr. V:54; Tr. VI: 113-114, 118-119; Ex. 38.)

73. Outgoing mail was placed in a slot in the office for pickup. (Tr. I: 40.)

74. The Office did not routinely retain a copy of Fed Ex tracking documents or certified mail receipts. (Tr. V: 45-46.)

75. In addition to the regular mailing process in the office, DM had access to Fed Ex forms, or could have asked to drive to the Registry. DM said she did not know how to use the Office's Fed Ex account. (Tr. I: 39; Tr. V: 41, 45-46; Tr. VI: 134, 136.)

76. There is no direct evidence establishing how or when the 2011 package was delivered to the Registry. Based on Registry stamp date, it is likely that DM left the package for regular mailing in the customary location in the office on Thursday, perhaps after the mail was picked up that day. (Findings 71-73.)

Tax takings filed in 2012 (for the 2011 tax year)

77. In 2012, SP and JB still entered data into the tax taking program. (Tr. VI: 140-141.)

78. According to JB, in 2012 DM was doing the tax taking process from "beginning to end." She opened accounts, entered data, arranged for and prepared the

newspaper advertisement, printed the documents, and prepared the voucher package. (Tr. VI: 59-60, 62, 64-66.)

79. Initially, DM minimized her involvement in the tax taking process, or claimed she had no clear memory of the events in 2012. Later, DM acknowledged she had done the tasks as JB testified to (in the previous finding). She did not acknowledge responsibility for the mailing. (Tr. I: 40-41, 42; Tr. II: 9, 12, 13-16, 16-22, 48; Exs. 40, 44, 46, 47.)

80. According to JB, DM was responsible for calendaring or otherwise tracking the filing deadline. The signing, notarizing, and voucher preparation were the same processes as in 2011. (Tr. VI: 144.)

81. JM signed the instruments on May 21, 2012, and SP notarized them. SP gave them back to DM to finish the process. (Tr. I: 43; Tr. V: 95, 212-213; Ex. 55).

82. The voucher and check were signed by JM on Tuesday, May 22, 2012. (Tr. V: 96; Tr. VI: 145-146; 151; Ex. 46.)

83. A cover letter dated May 22, 2012, addressed to the Registry and referencing two tax takings in the Land Court, had DM's initials on it. DM agrees she wrote the letter. (Tr. II: 132; Ex. 47.)

84. All elements of the tax taking package were ready to be delivered to the Registry as of Tuesday, May 22, 2012. (Findings 79-81.)

85. In 2012, the tax taking date was March 29, 2012. The 60th day, May 27, was a Sunday, and the Registry is closed on weekends. In addition, Monday, May 28 was Memorial Day that year, and the Registry is closed on holidays. Whatever delivery option

chosen would have had to ensure delivery no later than close of business on Friday, May 25, 2012. (Tr. VI: 69-70, 70-71; Ex. 41.)

86. DM took vacation days on May 25 and 29. (Tr. V:107.)

87. Delivery from the Town to the Registry would take 1-2 days assuming the regular course of the mail. If the package were mailed on Thursday, May 24, 2012, it could have arrived at the Registry on May 25. If the package were mailed on May 22 or 23, it most likely would have arrived at the Registry by May 25. (Findings 27-29.)

88. JM thought that once DM had the signed, notarized takings instruments and the check, mailing the documents was just "common sense." JM did not understand why you would wait. Her assumption or expectation was that you would "say something" if timely delivery by regular mail was uncertain, or use another option, like FedEx or hand delivery. (Tr. V: 39-40, 91.)

89. JB recalled that she followed her practice of checking in with DM, who said she did not need help. JB could not say when she checked in on DM's progress. (Tr. VI: 59-60.)

90. It is likely that DM left the package for mailing in the customary location in the Office on Thursday. There is no evidence establishing how or when the 2012 package was delivered to the Registry. Based on when the Registry stamped the instruments, it probably was delivered via regular mail on Saturday, May 26, 2012, or early on the following Tuesday, May 29. (Findings 83-85.)

91. About 4:00 pm on Tuesday, May 29, 2012, the Registry called the Collector's Office to report that the tax taking check was over by \$77.00 and needed to

be reissued.⁷ The Registry would accept another check if it were filed that afternoon or the following day. (Tr. III: 165-166; Tr. V: 45; Tr. VI: 74-80, 81-82; Exs. 41, 51.)

92. When she took the call, JB was not thinking about the date or that the tax filing might be late because it never had been before. In any case, delivering a corrected check on May 29 or 30 did not alter the fact that the filing was late. (Tr. VI: 77-78, 149, 148-149, 155-156.)

93. No one spoke directly to DM about the check amount being incorrect. DM was in the office on Wednesday, May 30 when VM received the call from JB asking her to deliver a corrected check to the Registry because JB fell ill. (Tr. V: 107; Tr. VI: 166; Ex. 51.)

94. According to JB, DM alone was responsible for the check issued for the incorrect amount. Others, including JM, were able to catch the error, but no system of checks and balances was in effect. (Tr. VI: 151-153.)

95. JB did not confirm with DM that the 2012 takings package was timely filed. DM had told her she was "all set." JB felt she had to trust that DM was doing what she was supposed to be doing, and that to inquire further or more specifically would look like she did not trust DM. (Tr. VI: 112.)

96. Based on DM's prior work history and the fact that there was never a problem before getting the documents filed on time, JM could not understand why DM failed to do so in 2011 and 2012. She thought DM did not pay attention to her work. JM

⁷ The Registry date-stamped the documents at 3:44 pm on May 29, 2012, before discovering that the check was for the incorrect amount. This probably is why it called the Treasurer/Collector's Office and allowed a corrected check to be delivered the following day, while leaving the documents stamped as received on May 29, 2012. See Ex. 41.

did not know who told DM how to get the package to the Registry, but it is “common sense” that you would mail it. (Tr. V: 39-40, 43, 45.)

2014 Email

97. JM received an email captioned “Middleborough Foreclosures” dated April 29, 2014, from David Coppola, Esq., an attorney who advised the Town concerning tax title matters. (Ex. 11.)

98. The email enumerated several matters Mr. Coppola was asking JM to investigate. After identifying the property, Number 3 stated: “The tax taking for this property [in 2012] was recorded 61 days after the date of taking making it invalid.” The taking would need to be disclaimed, and a new tax taking made before December 31, 2014, when the Town would lose its lien on the property. (Ex. 11.)

99. JM did not read the entire memo. She asked JB to give it to DM to research. JM recalls that she asked DM a couple of times about her progress, and DM replied she was working on it. That JM did not express any urgency to DM suggests that she did not read, or at the very least did not apprehend, the import of item no. 3. (Tr. I: 130; Tr. V: 111, 113, 161; Tr. VI: 215.)

100. That spring, JM was busy with the Town’s transfer of its employee health insurance coverage to state-managed coverage. (Tr. IV: 160; Tr. V: 111; Tr. VI: 173.)

101. JM read the Coppola memo completely on July 17, 2014, and acknowledged that she learned then of the late filing in 2012. (Tr. IV: 161.)

102. JM showed the email to JB and asked her to search the vouchers for the filing in 2012 as well as the filings for tax years 2009-2011, and 2013-2014. They learned that the filing made in 2011 was also untimely. (Tr. IV: 163; Tr. VI: 57, 58-59.)

103. On July 17, 2014, a Thursday, JM called DM into her office; VM was also present. JM told DM that the 2011 and 2012 tax takings were filed late, it was a \$17,000 error, and she had to take responsibility for it. JM sat behind her desk, DM and VM sat on the other side of the desk, approximately six feet away. (Tr. I: 52, 54, 55-56, 145-146; Tr. IV: 164-165, 170-172.)

104. DM recalls that JM was yelling and pointing her finger in DM's face. JM denies that she raised her voice, pointed at DM, or left her chair. (Tr. I: 52, 55; Tr. IV: 166, 168-169.)

105. VM said only, in response to a question from DM, that she did not recall why she went to the Registry in 2012. (Tr. I: 55.)

106. After the meeting, DM took her lunch break. She recalled that no one in the office spoke to her when she returned. (Tr. I: 57.)

107. At the meeting, DM was given a list of the properties for which the instruments of taking applied. Most likely the list was the same as that attached to the vouchers when the check for the Registry fee was requested in 2011 and 2012. DM was to find out if the taxes owed had been paid. This information is available on the tax taking program. DM stated that she worked on the list the rest of that afternoon and on the following days, however she was not scheduled to work the following day, a Friday, and Monday. (Tr. I: 58-9, Tr. II: 69; Tr. VI: 85, 86; Exs. 45, 46.)

108. Initially, DM confused the difference between what she was asked to do about the email in April versus in July 2014. (Tr. I: 44, 45, 47, 135-138.)

109. She appeared aware that the late filing referenced in the email affected more than one property, at least as to the Land Court filings. (Tr. I: 47, 51; Tr. II: 57; Ex. 11.)

110. Later in her testimony, she remembered writing next to each property listed whether it was “paid, not paid, and if it was in the proper name.” This would have been the information needed on the list given her in July. (Tr. I: 153-154.)

111. There was some urgency to determining those properties for which the taxes had not been paid because the Town risked losing its lien if the tax taking was not made by 3 1/2 years from the end of the fiscal year for which the taxes were unpaid. For unpaid taxes in FY 2011 (the subject of the tax taking filed in 2012) a new tax taking needed to be made before December 11, 2014. (Ex. 11.)⁸

112. At the end of the day, a Thursday, DM was to give the list to JB because DM had scheduled vacation days on Friday and Monday. (Tr. I: 59, 60; Tr. II: 70; Tr. IV: 174-175; Tr. VI: 85-86.)

113. According to DM, she put the file in JB’s work basket, and JB acknowledged her. (Tr. I: 59; Tr. II: 71-72, 74.)

114. JB stated that at 4:00 pm, DM left a folder with the list of properties on her desk and walked away. JB recalled she was on the phone and did not look up. JB thought it was not clear from the list where DM had left off, and she “had no way of knowing.” JB said DM did not tell her what she had done and what needed to still be addressed. JB did not try to contact DM after she left that day. (Tr. VI: 86-87, 194, 195-196.)

⁸ It would appear that the 3 1/2-year deadline had passed for preserving the lien on the tax takings filed in 2011. This was not addressed at the hearing.

115. JB did not recall what notations DM had made on the list. She recalled only that when she opened the folder, there was “no clear indication of where she was at.” JB did not ask DM about it on Tuesday when she returned to work. (Tr. VI: 192, 196.)

116. Instead, under instructions from JM, JB, with assistance from a Clerk in the office, started at the beginning of the list, apparently redoing what DM had done, to make sure everything was covered. (Tr. II: 148-150; Tr. IV: 87-88.)

117. JM questioned whether DM took the assignment seriously; “I was not happy.” (Tr. IV:177.)

118. JM called Town Manager CC on Friday July 18 or Monday, July 21, 2014, and they decided to have a disciplinary hearing. (Tr. IV: 177-178.)

119. JM was not in the office the afternoon this decision was made. JB called her to tell her about the list and to see if DM had permission to leave early. (Tr. IV: 176; Tr. VI: 193.)

120. While DM left at 4:00 pm and not 5:00 pm on Thursday, she likely had permission from VM. JB does not know whether VM gave DM permission to leave at 4:00 pm. DM did not work during her lunch period. (Tr. II: 73; Tr. VI: 193.)

121. According to DM, when she returned to work on Tuesday, July 22, 2014, she walked past VM and SP’s desks and neither said hello; usually they would greet her when she walked by. “From that point on, nobody talked to me.” (Tr. I: 60-61.)

122. On July 29, 2014, by letter signed by JM, the Town notified DM of a disciplinary hearing scheduled for August 4, 2014, before CC. (Tr. I: 61; Ex. 12.)

123. The reasons alleged for imposing discipline were “inexcusable error that invalidated the 2010 and 2011 tax takings...and...disobeying my directive to work with a senior clerk to determine which takings need to be redone.” The notice of hearing also stated that an “essential duty” of a Junior Clerk “is that you perform, independently, certain duties with respect to tax takings by the Town.” This language contradicts the Junior Clerk job description. (Ex. 12.)

124. DM was upset and crying about the letter’s allegations. (Tr. I: 63-64.)

125. On July 30, 2014, DM injured herself while trying to change an empty water bottle in the office breakroom. The 5 1/2-gallon replacement bottle fell and broke on the floor. Another employee helped her clean up the spilt water. DM pulled a muscle in her lower back and tore a ligament in her hip. (Tr. I: 64-66; Ex. 27.)

126. No one witnessed the accident. (Tr. IV: 210.)

127. DM told JM about the accident when she asked to go and get an ice pack. When she returned, JM had called CC. She informed DM that she needed to file a workers’ compensation claim, and she asked DM to write down what happened. Someone gave DM some band aids for her cut fingers. DM left at 3:45 pm to see a doctor. (Tr. I: 67-69; Tr. IV: 180-183.)

128. DM received treatment for her injuries and remained out of work on doctor’s orders. (Tr. I: 70-71.)

129. DM thought people in the office were calling her a liar about the incident. (Ex. 19.)

130. On August 12, 2014, CC sent DM a letter in which he questioned the basis for her absence from work and her injury. Nonetheless, he informed her that her

leave time was exhausted and, without conceding eligibility, her absence since July 30 and continuing would be counted toward her FMLA leave. (Ex. 13.)

131. DM viewed the letter as an accusation that she was faking the incident and as an attack on her self-esteem. (Tr. I: 88.)

132. The Town reissued the hearing letter and rescheduled it for September 9, 2014. (Tr. I: 88-89; Ex. 14.)

133. At the hearing, DM and JM testified, and CC presided. JM said that when DM was asked why, when she had everything needed, she did not file the documents, she responded that she did not know why, or she could not remember. (Tr.: IV: 184-186; Ex. 15.)

134. A decision was issued on September 15, 2014. CC found discipline to be warranted based on the tax taking allegation, but not on the disobedience allegation. He found just cause to demote DM to the Clerk position, effective September 22, 2014. (Tr. IV: 184; Ex. 15.)⁹

135. In JM's view, DM's demotion had sufficient basis because she had adequate training to perform the Junior Clerk role but had failed to do so. JM thought DM just did not pay attention to her work. (Tr. IV: 188; Tr. V: 38-39.)

136. DM felt demeaned, ashamed, attacked, bullied, and singled out because of the charges against her and the resulting demotion. (Tr. I: 91, 109.)

⁹ There is scant information in the record about the substance of or procedural protections provided in the disciplinary hearing. Based on what is available, I see no basis for issue preclusion to attach. *Christopher C. v Boston Retirement Bd.*, CR-19-342, -343 (DALA, May 5, 2023.)

137. No one else in the office was disciplined in any way because of the late filed tax takings in 2011 and 2012. (Tr. I: 107-108; Tr. V: 116, 118-119; Tr. VI: 133, 138-139.)

138. Neither JM nor JB accept any responsibility for the late filings. (Tr. V: 15, 22; Tr. VI: 125.)

Treatment upon return to work.

139. DM returned to work on a light duty, part time basis on September 23, 2014. She worked 1:00-5:00 pm. (Tr. I: 73, 90; Tr. IV: 183; Tr. VI: 89.)

140. When DM arrived that day, JM met with her. According to DM, JM raised her voice and yelled during the meeting. (Tr. I: 90-92; Tr. IV: 190-196.)

141. A memo intended to review the information provided at the meeting relates that DM was instructed not to pick up anything heavy while on light duty, to type all deposit slips, to write in her notebook on her own time unless it pertained to her job tasks, to follow a designated break time, and to start retraining on tax title. Her first task was to redo the ad for those properties that still had not paid taxes. She was to give the ad to JM to review. (Ex. 16.)

142. DM felt attacked and violated during the meeting. (Tr. I: 91-92.)

143. According to DM, once she returned to work, she was harassed, bullied, and treated differently than other employees. She felt scapegoated. She relayed the following examples: her supervisors left many sticky notes on her assignments with deadlines and obvious instructions; they complained about her handwriting, so she now was required to type out receipts and deposit slips rather than handwrite them; she could use the restroom only during her afternoon break; co-workers would not speak with her

and whispered behind her back; and they would not help her at the counter when it was busy. (Tr. I: 60-61, 74, 75, 78, 79, 93, 94; Tr. II: 96-97.)

144. JM denied that DM was bullied, demeaned, threatened, defamed, or called a liar or faker by anyone. (Tr. IV: 208-209.)

145. At one point, JM, in DM's view, mocked her accident with the water bottle. JM denies mocking her but acknowledges that she was not sure DM was really injured and thought the timing of the accident was too coincidental. (Tr. I: 61, 82; Tr. IV: 207-210; Tr. V: 130-131.)

146. According to JB and JM, DM did not want to talk to others when she returned to work. JM did not want to "force the issue" and so said nothing about it. (Tr. IV: 198, 199; Tr. VI: 215.)

147. SP recalled that DM stopped saying good morning or good night to SP and VM as she passed by their desks coming into and leaving the office. SP thought DM's demeanor had changed and SP stopped being friendly toward her. SP acknowledged that she may have avoided conversation with DM. (Tr. V: 225-227, 277.)

148. According to JB, DM continued to pick up heavy items after being told to ask others to help her with items like her cash drawer and the commitment books. (Tr. VI: 89.)

149. At times, according to JB, DM would not be at her desk for a long while. Sometimes JB found her at the Veteran's Office, other times, she could not find her. DM denies this. (Tr. II: 97-98; Tr. VI: 91-92.)

150. JB and JM were bothered by seeing DM writing in a notebook during this period, instead of working. DM apparently wrote in a notebook during the workday

before she was injured and on leave, and there is no evidence that either one spoke to DM about it then. DM wrote about how she was treated at work. (Tr. II:101-102; Tr. V: 143, Tr. VI: 92-93, 187.)

151. Before the memo was issued, DM and other employees had designated times for lunch breaks. DM did not previously have a set break time in writing. (Tr. V: 141-142.)

152. JB and JM stated they used sticky notes all the time for relaying in writing assignments to all supervisees. (Tr. IV: 200; Tr. VI: 94.)

153. A memo dated September 19, 2014, from JB to DM and two other Clerks in part required deposit slips to be printed and not handwritten. The change was ostensibly because someone in another office could not read the slips, although there had been no recent change in personnel. (Tr. III: 121-122; Tr. IV: 191-192; Tr. V: 140; VI: 95-96; Ex. 49.)

154. JB did not agree that DM needed more supervision or more training. (IV: 188.)

155. JB observed a conversation between DM and a regular customer at the front counter. She described the customer as rolling her eyes and making weird faces. JB, who knew the customer socially, later asked her about the conversation. She said the customer told her that DM was making derogatory comments about JM and JB. (Tr. IV: 201-203; Tr. VI: 96-97, 99-100.)

156. On October 14, 2014, while office staff were at lunch, JM admonished DM about her conversation with the customer. According to JB, who was present as a

witness, JM did so firmly yet quietly.¹⁰ (Tr. V: 134-135, 137-138; Tr. VI: 99-101, 180-181.)

157. According to DM, JM said: “if you do it again, you will be fired.” DM considered the conversation to be work-related. DM denied JM and JB’s description of the conversation but felt it did not matter what she said.¹¹ (Tr. I: 80, 83-84, 85; Tr. III: 145-148.)

158. DM could no longer tolerate what she believed was a hostile work environment. When she arrived home from work, she had a “breakdown.” She did not return to work. (Tr. I: 92, 94, 96.)

159. DM experienced high blood pressure and vomiting when at work, and she treated with medical doctors. (Tr. I: 94; Ex. 8.)

160. After October 14, 2014, DM’s primary care physician gave her a note to excuse her from work. (Tr. I: 95.)

161. DM saw a therapist beginning on October 24, 2014, and was prescribed medication for depression, anxiety, and sleeplessness. She was diagnosed with PTSD. (Tr. I: 96-97; Ex. 8.)

162. DM continues to suffer from depression. (Tr. I: 97.)

163. DM rarely leaves her home. She experiences panic attacks when she travels to or through the Town. She is less active than before; she does not drive or attend social events. (Tr. I: 96, 98.)

¹⁰ The customer later was hired at the Tax Collector’s office and may have taken DM’s position. (Tr.: VI: 179-180.)

¹¹ DM’s first attempts to explain what happened are difficult to understand. She was vague and referred to two unrelated incidents. (Tr. I: 79-80, 80-81.)

164. On March 27, 2015, DM's employment with the Town was terminated.
(Ex. 17.)¹²

165. On August 18, 2015, DM and her husband ran into SP at the supermarket. During their brief conversation, DM and her husband recall SP saying that it was "vile" at the Office and that JM asked her to write a letter saying she trained DM in tax title but "we both know that's not true." (Tr. I: 111-112; Tr. III: 129-133.)

166. SP denies she said this. She recalls DM became teary and said SP was a "lousy friend" who did not stand by her. SP felt badly about what had happened with DM. (Tr. V: 229-230, 232.)

167. SP does not use the word vile. DM used the term during her testimony. DM may have substituted the word in relating her sense of the conversation. (Tr. I: 95; Tr. III: 135; Tr. V: 111.)

168. Before their falling-out, DM saw SP as a coworker and friend. SP viewed them as very friendly in the office, often talking about their families. (Tr. V: 215-216; Tr. VI: 225-226.)

169. SP believed DM's attitude toward work changed in April 2014, when another Junior Clerk on the Collector's side was promoted to Senior Clerk. SP recalled that DM believed she should have been promoted. During a phone conversation with SP about the promotion, she recalls DM was very upset, irate, and loud. They were no longer friendly after that; SP did not appreciate the phone call because friends do not treat each other in that manner. (Tr. V: 216, 218-221, 235.)

¹² The Town's references to the termination hearing process at Tr. IV: 207-209 and Exhibits 18 and 19 are not determinative of any issues in this *de novo* hearing.

170. DM disputed SP's recollection their conversation, saying "I would never do that." DM thought she was qualified to be promoted to Senior Clerk. (Tr. I: 157.)

171. DM described her relationship with her coworkers before April and May 2014 as cordial. She spoke with them about work; she was not the type to stand around and talk socially. Her relationship with SP was more social, however in DM's view that "stopped" after the discovery of the late tax taking filing when no one was talking to her. (Tr. VI: 227-228.)

172. DM filed her accidental disability application on December 28, 2015, under both the injury and "hazard undergone" theories. (Ex. 4.)

173. DM's appeal filed on June 2, 2017, is timely. (Ex. 3.)

DISCUSSION

Applicable Law

Accidental disability retirement is granted to a retirement system member who is unable to perform her essential job duties, when such inability is likely to remain permanent until retirement age, and when the disability is by reason of an injury or series of injuries or of a hazard undergone as a result of, and while in the performance of, her job duties. G.L. c. 32, §7(1). An applicant must demonstrate either that a disability "stemmed from a single work-related event or series of events" or, "if the disability was the product of gradual deterioration, that the employment [had] exposed [the employee] to an identifiable condition...that is not common or necessary to all or a great many occupations." *Blanchette v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 479, 485 (1985) (internal citations and quotations omitted). The applicant has the burden of proving, by a preponderance of the evidence, *Pomeroy v. Plymouth Ret. Bd.*, CR-15-258,

Decision at *11 (CRAB, Sept. 27, 2019), the causal nexus between the claimed injury and the disability sustained. *Id.*

A mental or emotional disability resulting from a single injury or a series of work-related injuries has been recognized as a “personal injury” under c. 32, §7(1). *Id.* at 482. The term “personal injury” is to be “interpreted in harmony with c. 152,” the worker’s compensation statute. *Sugrue v. Contributory Ret. Appeal Bd.*, 45 Mass. App. Ct. 1, n.4 (1998). Under c. 152, personal injuries “include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within employment.” G.L. c. 152, § 1(7A). For the purposes of this decision, I assume this prong has been satisfied. Emotional disabilities caused by events at work are assessed using a subjective standard. *See Robinson’s Case*, 416 Mass. 454, 460 (1993).

Even then, if the emotional or mental disability arises principally from a “bona fide, personnel action” taken at work, including (but not limited to) transfers, promotions, demotions, or terminations, the disability is not deemed to be a personal injury unless the employer’s action amounted to the intentional infliction of emotional harm. G.L. c. 152, § 1. A case for intentional infliction of emotional harm can be made out only if the evidence shows that 1) the perpetrator intended or knew (or should have known) that emotional distress would likely result from her conduct, 2) the conduct was “extreme and outrageous” and “beyond all possible bounds of decency,” 3) the actions complained of caused the distress, and 4) the emotional distress sustained was “severe and of a nature that no reasonable [person] could be expected to endure it.” *Agis v. Howard Johnson Comp.*, 371 Mass. 140, 144-145 (1976). A claim of intentional infliction of emotional

distress “cannot be predicated upon ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’” *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987). It is not enough “that the [individual] has acted with an intent which is tortuous or even criminal, or has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice.’” *Id.* ¹³ These stringent requirements are aimed at preventing litigation featuring only bad manners and hurt feelings. *Agis* at 145.

Although c. 152, § 1 provides examples of actions that may be bona fide personnel actions, the term itself is not defined.¹⁴ As no word in a statute can be assumed to be superfluous, *Boston Police Patrolmen's Assoc. v. City of Boston*, 435 Mass. 718, 719-720 (2002), the words "bona fide" must add meaning to the words "personnel action." Bona fide means genuine or sincere and, in law, good faith. *See* [https://www.merriam-webster.com/dictionary/bona%20fide](https://www.merriam-webster.com/dictionary/bona%20fide;); https://www.law.cornelledu/wex/bona_fide. *See also Khramova v. Boston Ret. Bd.*, CR-11-522 (CRAB, July 25, 2016); *Madonna v. Fall River Ret. Bd.*, CR-10-175 (CRAB, Nov. 1, 2013). Through inclusion of the bona fide personnel action exception in the worker's compensation law, the legislature intended that employers should be allowed to make legitimate efforts towards regulating the competence and integrity of their employees through good faith supervision without risking liability for worker's compensation claims. *See Upton's Case*, 84 Mass. App. Ct. at 417. Shielding a retirement board from claims for accidental disability following acts of good faith supervision is

¹³ However, “[t] humiliating [an]- employee is not a BFPA [bona fide personnel action] as a matter of law.” *Donatelli v. State Bd. of Ret.*, CR-13-496 *23 (DALA, May 23, 2018) quoting *Agosto v. Mass. Bay Transit Auth.*, Board No. 015020-00 (Mass. Dept. of Indus. Acct., Dec. 14, 2007.)

¹⁴ Personnel actions are not limited to employer conduct that alters a person’s status or employment relationship. They include employer conduct such as supervisory criticism or questioning, which may lead to status-altering events. *Upton's Case*, 84 Mass. App. Ct. 411, 414.

also consistent with this legislative purpose. The legislature does not shield every personnel action, just those that are bona fide. Thus, it follows that mental or emotional disabilities resulting from non-bona fide personnel actions are compensable without a showing that an employer intended to inflict emotional harm. *Wicklow v. Fresenius Medical Care Holdings, Inc., et al*, Board No. 035561-09 (Dept. of Indus. Acct., Apr. 9, 2014).

“Production of evidence that a bona fide personnel action is the principal cause of the employee’s emotional disability is in the nature of an affirmative defense.” Once some such evidence is produced, it is the applicant’s burden to produce further evidence to substantiate her claim. *Id.* at 8, *citations omitted*.

Ill will in the workplace is an unfortunate but common occurrence. Many employees experience feelings of persecution and victimization at work, and their claims often fail. *See, e.g., T.A. v. Mass. Teacher’s Ret. Sys.*, CR-17-427 (DALA, Dec 20, 2019.)

An applicant’s claim is limited to injuries resulting from injuries or hazards undergone within two years of the date of his application, with some exceptions that do not apply to DM. G.L. c. 32, § 7(1), (3). DM’s last day of work was October 14, 2014. She filed her application on December 28, 2015. The events complained of occurred between July 17 and October 14, 2014, well within the two-year period. While DM applied under both the injury and hazard theories, her claim is best understood as a series of actions taken by her employer that have led to her mental and emotional disability.

Evaluation of the Evidence

I conclude that DM has not carried her burden to prove, by a preponderance of the evidence, that her application for accidental disability retirement should be granted. She

has failed to come forward with sufficient evidence to show that her employer's personnel actions were not bona fide or, alternatively, to show her employer intentionally inflicted emotional harm on her. Consequently, there is no personal injury cognizable under c. 32.

Witness Credibility

Given the passage of time, the memories of all witnesses can be unclear, uncertain or absent. Every witness, with perhaps the exception of SP, also had strong reasons for wanting her view of the facts to prevail. Issues with recall and bias affected the evaluation of all witness testimony to varying degrees.

The Town's witnesses and DM contradicted each other on numerous occasions, including occasions when no other evidence can resolve the dispute. Ultimately, though, many of these disputes do not shed much light on the question of whether DM was responsible for the late filing. They do, however, factor into my overall assessment of the witnesses' credibility.

I conclude that the different recollections of DM and JM concerning the 2014 email and related events, particularly the meeting on July 17, 2014, the disciplinary hearing, and DM's treatment in the Office are most likely the result of different perceptions of their interactions when viewed through the prism of their own biases, particularly when JM was critical of DM. There is some truth in both versions. While JM tended to recall her demeanor as calm and neutral, DM tended to recall her as angry and threatening.

JM's testimony was overshadowed by the fact that she lacked personal knowledge of day-to-day tax takings operations in the Office. I give her testimony about those operations less weight.

Town's Argument

The Town relied principally on its argument that whoever processed the voucher to request the check in 2011 and 2012 was the person responsible for timely filing with the Registry. That person had the check and all documents needed for the filing. The Town also relied on voluminous documents with DM's signature or initials and the like intended to show that DM had a larger, more responsible, and independent role in the tax takings process than she would acknowledge. I am not persuaded by the Town's latter argument. The evidence on that theory shows insufficient independence and responsibility on DM's part. I give little weight to evidence of DM's involvement in the tax taking process prior to 2011 because before then she was carrying out instructions given by other, more senior employees.

Work Performance

There are several indications that JM and JB were less than satisfied with DM's work performance and conduct. Her promotion to Junior Clerk in 2008 may not have been based on merit, but on union seniority rules. (Tr. 1: 156.) She had been spoken to about the timeliness of her work in 2007 and according to JM, her work continued to be unsatisfactory at times because she did not pay attention to it. She was not the first person selected to handle tax takings after SK retired in 2011. These factors would seem to point to a need for greater supervision, not less.

JM, JB, and the Town Manager portrayed DM as dishonest, disobedient, and as one who shirked work. To the extent it did not concern the tax filings, I found much of the testimony about the water bottle incident, writing in her notebook, visiting the Veterans Office, for example, to be distracting and unnecessary.

Supervision and Training

DM did not receive adequate supervision when she was asked to finish the tax takings process in 2011 and take over the process in 2012. Merely “checking in” and expecting a supervisee to ask questions is not supervision.¹⁵ Particularly when the various steps and a timeline were not in writing, more hands-on oversight was needed. Expecting an employee to always ask questions does not account for circumstances where missing information can lead to an incorrect understanding of what needs to be done.

JM and JB made assumptions about what DM would do, but neither acted to assure that the filing would be delivered on time. JM did not see supervision as part of her job. JB had a very “hands off” approach. She did not ask specific questions about the status of DM’s progress on the tax filing project. I was left with the impression that JB was hesitant to assert her supervisory authority and did not want to risk a possible confrontation with DM. Other than printing the documents, JB could not recall the specifics of her instructions to, or supervision of, DM. Instead, she relied on her general experience and what she would usually do.

It may be that DM was not aware in 2011 and 2012 that the last day of the 60-day period had to be adjusted to account for days on which the Registry was closed. All the

¹⁵ Supervision is defined as “the action, process, or occupation of supervising *especially* : a critical watching and directing (as of activities or a course of action).” <https://www.merriam-webster.com/dictionary/supervision>

Town's witnesses spoke of the 60-day deadline as common knowledge. JB explained how she calculated the filing date, but she did not testify that she explained the calculation to DM. Nor did anyone else. It is likely that DM thought 60 days meant just that. This would explain why the filings were recorded one or two days late. There is not enough evidence to make this finding, however.

Failure to Show Non-Bona Fide Personnel Action

The personnel actions at issue here include these events: assignment of tax takings work and JB's limited instruction in 2011 and 2012 (Findings of Fact 47, 57, 78, 79); assignment of tasks in April and July 2014 related to the April email (Findings of Fact 99, 103, 104, 107, 113, 114); the disciplinary hearing and decision finding a basis for discipline based on the late tax takings filings only (Findings of Fact 122, 123, 130, 134); the meeting and memo she received upon returning to work in September 2014 and use of "sticky notes" (Findings of Fact 140, 141, 143, 152); and the admonishment she received on October 14, 2014 (Findings of Fact 156, 157). To the extent DM's testimony about the "silent treatment" she received from others in the office was from co-workers and not supervisors, it is not a personnel action.

Whether the Town acted in good faith is analyzed subjectively. The Town's supervision was lax and inadequate. When it learned of the late filings, it behaved poorly and accepted no responsibility. JM told DM she would have to take responsibility for the late filing without first asking her what happened.

Still, I remain unconvinced that DM demonstrated the Town's personnel actions lacked good faith. Suggestions that the Town made DM a scapegoat are not evidence it acted in bad faith. DM's testimony showed a pattern in which she admitted more

involvement and knowledge about the 2011 and 2012 filings as the hearing progressed. She admitted to doing the tasks up to and including the voucher. Yet, she could not recall what happened with the tax takings filings once she prepared the packages to be delivered. She apparently could not or would not explain at the Town's disciplinary hearing nor during the hearing at DALA whether she gave them to someone else, left them on a desk or counter, mailed them or did something else. Her failure to recall anything seems improbable. In any case, it means she has not shown that she was not responsible for the late filings, which is necessary to show an absence of good faith by her employer.

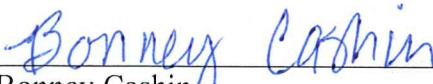
Intentional Infliction of Emotional Distress

I further conclude that DM has not shown that the Town's actions amounted to the intentional infliction of emotional harm. However petty, insensitive, or thoughtless the behavior of JM and JB, no intentionality was shown, and their actions do not rise to "extreme and outrageous" behavior that is "beyond all possible bounds of decency." *Agis*, 371 Mass. at 144-145. Tribunals have set a high bar for finding behavior that rises to this level. *Foley v. Polaroid Corp.*, 400 Mass. at 97-99; *B.G. v. State Board of Ret.*, CR-20-0207 (DALA, Oct. 8, 2021); *Giammalvo v. Mass. Teachers' Ret. Sys.*, CR-12-195 (DALA, Jun. 19, 2015).

CONCLUSION

The petitioner failed to show that her disability resulted from a personal injury. Following the decision of the Plymouth County Board of Retirement to take no further action, the petitioner's application for accidental disability retirement is denied.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Bonney Cashin
Administrative Magistrate

DATED: December 8, 2023