

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Rebecca Donatelli,
Petitioner

v.

Docket No. CR-13-496

State Board of Retirement,
Respondent

Appearance for Petitioner:

James T. Morris, Esq.
Quinn and Morris PC
141 Tremont Street
Boston, MA 02111

Appearance for Respondent:

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State Board of Retirement
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Boston, MA 02108

Administrative Magistrate:

James P. Rooney

Summary of Decision

Denial of application for accidental disability retirement based on long-term job stress associated with treatment by the applicant's boss's boss is affirmed. No written notice of injury was filed by applicant, and thus review is limited to the two years preceding the accidental disability retirement application. Although there is evidence that the boss's boss spoke harshly to the applicant, most of the incidents to which she testified occurred before the two year period. Within those two years, there is evidence that her boss and her boss's boss were genuinely dissatisfied with applicant's work performance and that she was afraid of being fired. In the face of what appear to be bona fide personnel actions by her employer within the two year period, applicant failed to prove that her underlying depression was aggravated to the point of disability by specific injuries or an uncommon job hazard.

DECISION

Rebecca Donatelli appeals the September 24, 2013 decision of the State Board of Retirement denying her application for accidental disability retirement in which she claimed that a supervisor in her office had treated her so poorly as to make her psychologically unfit to perform her job. I held a hearing in the appeal on September 8, 2016 at the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts, which I recorded digitally. Ms. Donatelli was the only witness who testified. I gave the parties additional time to present further testimony concerning Ms. Donatelli's interactions with the supervisor, but no further testimony was presented. The record closed when the parties filed closing briefs by October 31, 2016.

FINDINGS OF FACT

Based on the testimony and evidence presented, and the reasonable inferences drawn from them, I make the following findings of fact:

1. Rebecca Donatelli, who was born in 1955, was employed by the Massachusetts Executive Office of Public Safety and Security Office of Grants and Research - Highway Safety Division from 1993 to 2010. She worked as an administrative assistant (Program Coordinator II) whose responsibilities were to "check expenditure reports, work with databases, prepare letters and memos, set up meetings, check a hotline and record information in [the] database" all while meeting deadlines and handling special projects. (Ex. 4.) Her job description stated that she was:

responsible for creating, administering, analyzing, and evaluating grants, and grant programs. Responsibilities include the ability to write grant proposals, federal reports, and detailed subject matter report breakdowns for the Executive Office [of Public Safety and Security], Federal Agencies, and partners. Program Coordinator II's will be responsible to making award recommendations,

administering grants, analyzing highway safety research and provide technical assistance for the Highway Safety Division, Office of Grants and Research, Executive Office of Public Safety and Security, Federal Agencies, as well as other safety Partners. This position also requires the ability to coordinate Conferences, and meetings, develop and present to large and small groups of people.

(Ex. 6.)

2. Ms. Donatelli began to experience depression around 2001. She later told Edward Silberman, M.D., one of the medical panelists examining her in connection with her application for accidental disability retirement, that around then:

she began to have low mood and frequent tearfulness. This lasted for “several years” and was relieved when she was prescribed Zoloft, an antidepressant, by her primary care physician. A possible contributor to the depressive syndrome was dealing with one of her brothers as his representative payee for disability benefits and being the brunt of verbally abusive behavior in that role. She states that she did well until 2005 when she noted a return of low mood along with intense anxiety.

(Ex. 9.)

3. Prior to 2007, Ms. Donatelli recalled receiving satisfactory performance reviews, and receiving raises and commendations. Her depression did not cause her to miss work. (Donatelli testimony.) She did lose some time in 2005 from a gastrointestinal illness. Her supervisor wrote in the evaluation of Ms. Donatelli’s performance that year that she “had made many improvements this year. She has been working hard to catch up from her absence. She has shown initiative and energy towards new projects and is doing very well.” (Ex. 7, p. 77.)

4. In 2007, Ms. Donatelli’s immediate supervisor was Caroline Hymoff, with whom she got along. In July 2007, Sheila Burgess-Hill was appointed director of the Office of Grants and Research.¹ (Donatelli testimony.)

¹ Ms. Burgess-Hill is no longer employed by the Office of Grants and Research. She applied for accidental disability retirement following a car accident. After Ms. Donatelli’s hearing, I

5. Ms. Donatelli's office was outside Ms. Burgess-Hill's. She heard her yell at her children on the phone. (Donatelli testimony.) She also thought that Ms. Burgess-Hill "seemed to single out employees whom she did not like and harass them in an attempt to get them to leave or to establish grounds to dismiss them." (Ex. 9.) Ms. Donatelli heard her yell at another supervisor; that supervisor and his subordinate transferred out of the division. Although Ms. Burgess-Hill's actions were not initially directed at Ms. Donatelli, they made her anxious. (Donatelli testimony; Ex. 9.) At some point, Ms. Donatelli thought Ms. Burgess-Hill was laughing at everything she said, including when her immediate supervisor was present. (Donatelli testimony.)

6. Ms. Donatelli's performance review for 2007 was completed on July 19, 2007. Ms. Hymoff wrote that Ms. Donatelli "continued to have personal issues which took her out of the office for extended periods of time. [She] has met with supervisors and HR to formulate steps to address her attendance and put a plan in place." Ms. Burgess-Hill wrote, "I have had discussions with [Ms. Donatelli] in regards to her attendance concerns and being off payroll. We have instituted a procedure to address this and have initiated a meeting with HR. We discussed the difficulty of assigning new programs [to her] until we have a resolution or plan in place." (Ex. 7, pp.79-80.)

7. Ms. Donatelli told Ms. Burgess-Hill that she suffered from depression. Ms. Burgess-Hill had her with the agency's Human Resources Department, which recommended that

realized that I had decided Ms. Burgess-Hill's accidental disability retirement appeal. No issue was raised in that appeal concerning Ms. Burgess-Hill's in-office behavior; the issue decided was whether she was in the performance of her job duties when she had the car accident. *See Burgess-Hill v. State Bd. of Retirement*, Docket No. No. CR-15-665 (Mass. Div. of Admin. Law App., Mar. 24, 2017). I have not relied on any information learned in Ms. Burgess-Hill's appeal in deciding this appeal.

she take advantage of the Family and Medical Leave Act (FMLA) to address her depression.

(Donatelli testimony; Ex. 9.) Ms. Burgess-Hill agreed “to accommodate her request for somewhat more flexible arrival and departure times at work.” (Ex. 9.)

8. On July 26, 2007, Ms. Donatelli applied for intermittent FMLA leave from July 19, 2007 to June 30, 2008. Alexandra Rolde, M.D., supported the application, stating that Ms. Donatelli has “episodes of depression, usually triggered by [a] difficult family situation. [These] occur every 4-6 months and last about 1 month.” She also stated that Ms. Donatelli had been “under my care since 1/06. [She e]xhibits crying spells, incapacity to sleep, get out of bed in a.m., attend her daily duties and became exceedingly panicked for a period of a month.” She recommended that Ms. Donatelli “may need not to go to work for 1-3 days on a periodic basis every few months.” (Ex. 7, p. 83.) On August 22, 2007, Dr. Rolde followed up with a letter confirming that she had been “treating Ms. Donateilli for moderate to severe Anxiety and Adjustment Reaction to her difficulties in her family situation.” She commented that Ms. Donatelli has had “a somewhat rocky course in that her anxiety has caused daily functioning to be compromised on occasion.” (Ex. 7, p. 67.)

9. Ms. Donatelli also submitted with her FMLA application a note from her niece describing abuse Ms. Donatelli had been suffering. The niece wrote that Ms. Donatelli had been handling the finances of her alcoholic uncle, Ms. Donatelli’s brother, which “has caused nothing but problems” for years. The brother had accused Ms. Donatelli of stealing from him and “had threatened her life and . . . called her a number of horrible names I am too embarrassed to write.” Ms. Donatelli told her once that her brother had threatened to stab her and her dog when she went to his apartment to give him money. This sent her into a deep depression. (Ex. 7, p. 81.)

10. Ms. Donatelli did not report for work the week of July 30 - August 3, 2007. She had a meeting with Ms. Hymoff to address her recent absences and giving proper notification of her supervisor. Ms. Donatelli agreed that she would speak to a supervisor or leave a message with the reason for her absence. Ms. Hymoff pointed out that Ms. Donatelli's unplanned absences were placing additional burdens on other staff. Ms. Donatelli "responded that she [was] trying to address these issues, wants to take on a larger workload and report to work in a timely manner." (Ex. 7, p. 84.)

11. On August 10 and August 27, 2007, Ms. Hymoff wrote memos to Ms. Donatelli notifying her that she had violated policy by not calling in sick prior to the start of her work day. Each time, she was informed that "[v]iolations of this policy may result in disciplinary actions up to and including termination." (Ex. 7, pp. 85 and 87.)

12. On October 11, 2007, Ms. Burgess-Hill wrote to Human Resources and asked for some guidance regarding time and attendance issues with Ms. Donatelli. She noted that Ms. Donatelli had not always been clear about the reason she was taking time off. Ms. Burgess-Hill wanted to know who should make the determination if the time Ms. Donatelli was taking off qualified for FMLA leave. She closed by stating that Ms. Donatelli "has several written warnings for issues that I believe fall outside the FMLA issue, and her supervisor and myself have been working closely with Rebecca to resolve these issues, all the while attempting to be accommodating as possible to her health needs." (Ex. 7, p. 88..)

13. On November 16, 2007, Human Resources approved Ms. Donatelli's request for intermittent FMLA leave. The letter informing her of this decision stated that she could take up to twelve weeks of leave in a twelve month period, i.e., 450 hours. It also stated that her request

was granted “based on your provider’s estimation of your need to use one to three days of leave on a periodic basis every few months.” (Ex. 7, pp. 91-92.)

14. On March 25, 2008, Ms. Donatelli submitted another application for FMLA leave. This time, Dr. Rolde asked that she be permitted to take one to two days off per month or come to work late. (Ex. 7, pp. 54-55.)

15. Between July 17, 2007 and May 25, 2008, Ms. Donatelli took 849.25 hours of medical leave. (Ex. 7, pp. 15-17 and 52-53.)

16. Ms. Donatelli’s performance review for 2008 was completed on June 23, 2008. Ms. Hymoff wrote that “[i]n working to evaluate your performance, there are concerns relative to timeliness. You are receiving a meets [expectations rating] because we are judging you on the time you are in the office, and know you are working to address these issues. Specific expectations will be outlined in upcoming EPRS [Employee Performance Review] and RDPH to help Rebecca improve on this rating.” Ms. Burgess-Hill wrote “I feel the work that has fallen through the cracks during the time Rebecca has been here is of great concern [and] the items outlined in the memos she’s received . . . raise concerns that must be addressed during the next several months.” (Ex. 7, p. 94.)

17. Ms. Hymoff also prepared a memo to memorialize some of the issues discussed during the performance review. In it, she stated that management’s main concern was Ms. Donatelli’s failure to meet agreed-upon deadlines for completion of paperwork associated with the program areas for which Ms. Donatelli had responsibility. She added that Ms. Donatelli had acknowledged in the meeting that “failure to improve on [management’s] concerns can result in disciplinary action leading to termination.” Ms. Hymoff concluded that “I appreciate your ability to work as a team player on the new initiatives on the grammar school program and the

reference notebooks, while working on individual assignments for the underage drinking program.” (Ex. 7, p. 101.) Ms. Donatelli was given the opportunity to comment, which she did in a memo dated June 27, 2008. In the memo, she described her progress on various work assignments and stated “I want to assure you that I will continue to be a team player.” (Ex. 7, p. 103.)

18. Ms. Donatelli also prepared a memo responding to Ms. Burgess-Hill’s comments in the evaluation. In the memo, Ms. Donatelli stated that “I appreciate the attention given to me through my leave. I do not feel work had fallen though the cracks. The sub grantees I work with have told me personally, through emails and letters stating their appreciating my support during the grant period.” After describing her opinion on how well she performed various work tasks, she concluded, “I am nervous sending this memo, I feel if I don’t address these issues and let this go what is going to happened next.”² She added “I appreciate Sheila and Caroline’s attention and consideration of my work and leave situation.” (Ex. 7, p. 106.)

19. On July 1, 2008, Ms. Donatelli once again reapplied for intermittent FMLA leave. She asked to be allowed to come to work late. Dr. Rolde supported this application, stating that Ms. Donatelli had “occasional panic/depressive episodes environmentally induced - approximately 1 to 2 episodes/month, ongoing duration unpredictable -- few days to a couple of weeks.” She stated further that this condition commenced on February 1, 2006 and that Ms.

² The portion of Ms. Donatelli’s performance evaluating for 2008 in the record reflects that she been given an overall “meets” rating. Her response notes that she had been rated “below,” presumably on one of the elements on which she was evaluated. On this she commented, “I also feel this below rating stems back to the internal policy memo. I have not and do not tell anyone outside the agency internal information.” (Ex. 7.) This policy memo is not in the record and there is no explanation as to what element of Ms. Donatelli’s performance was rated as “below” standards.

Donatelli “suffers from [a] chronic high state of anxiety with occasional panic depression, related to her high expectations of herself and very dysfunctional original family.” She recommended that Ms. Donatelli be allowed one or two absences per month or be allowed to come in to work late. (Ex. 7, pp. 49-50.)

20. On December 4, 2008, Ms. Donatelli went to the emergency room of Massachusetts General Hospital to be treated for an episode of severe anxiety she experienced at work. (Ex. 7, pp. 46-48.) The hospital completed a form on which it checked a box that the admission was for an injury that was not work related. (Ex. 7, p. 47.) Ms. Donatelli returned to Massachusetts General on May 14, 2009 and reported that her abusive brother was no longer in her life. (Ex. 9., p. 168.)

21. Ms. Donatelli’s performance review for 2009 was completed on June 30, 2009. This time she was rated as being below expectations. Ms. Hymoff wrote that Ms. Donatelli “has made strides to improve timeliness and accuracy, but still [is] below standards. Writing skills improved. Timeliness, accuracy, and attendance impacted ability to perform as a PC II.” Ms. Burgess-Hill wrote, “I am concerned after numerous opportunities to improve Rebecca continues to work below the expected level of a PC II.” Ms. Donatelli indicated on the form that she intended to file responsive comments, but those are not in the record. (Ex. 7, p. 107.)

22. On August 24, 2009, Ms. Burgess-Hill sent the following letter to Ms. Donatelli:

I would like to express my sincere appreciation for your time and effort over the past 18 months in improving the operations of the Highway Safety Division. As you know, recently the National Highway Safety Traffic Administration conducted a Special Management Review of our Occupant Protection program because of the insufficient progress in meeting seat belt use goals. I am happy to report that the team found no “findings” during the review.

I am convinced that this is largely due to the outstanding manner in which you have performed your usual and additional duties during these recent months. I

know this result has taken a good deal of effort that has led directly to improved programming.

I am sincerely grateful for your contribution of time and talent and I am looking forward to the good things to come out of this office in the future. Please accept this letter as a slightly tangible expression of the esteem and gratitude with which I view your work here at the Highway Safety Division. I will be sending a copy of this letter to Human Resources to be added to your personnel record.

(Ex. 7, p. 113.)

23. On September 23, 2009, Ms. Hymoff conducted a progress review of Ms. Donatelli's performance. She again rated her as below expectations. She noted that Ms. Donatelli "continues to require scheduled meetings to provide clear direction and timelines. Recommendations were made to review training, public speaking, time management courses." Ms. Donatelli again checked that she intended to provide comments, but these are not in the record. (Ex. 7, p. 114.) On October 5, 2009, a "Remedial Development Plan" was prepared that required Ms. Donatelli to perform specific tasks by deadlines set forth in the plan, with a review of her progress every thirty days. (Ex. 7, p. 118.). Another such plan was prepared on November 6, 2009. It noted that Ms. Donatelli continued to rate at below expectations. (Ex. 7, p. 120.)

24. By October 2009, according to what Ms. Donatelli told Dr. Silberman:

she had developed a reputation in her office for taking off a great deal of time, as evidence[d] by her complaint that several coworkers were taking bets on when she would return to work from one of her leaves. These absences also began to attract the notice of her boss, whom she viewed as increasingly hypercritical of her, including accusing her of mistakes she had not actually made, exaggerating the importance of minor mistakes, and rebuking her in very harsh language. . . . Ms. Donatelli viewed these things as comprising a pattern of harassment designed to get rid of her, similar to what she had seen in relation to others. Her response to these supervisory actions was to become increasingly dysfunctional and unable to sustain a work effort. She estimates that in the last year of her work, she was out on leave one week for every month, and often more. Her symptom profile during this period included low mood, somatic symptoms, poor sleep, poor

appetite, intense anxiety and obsessive thoughts about her relationship with her boss and the possibility that she would lose her job.

(Ex. 9.)

25. On November 20, 2009, Ms. Donatelli was issued a notice of verbal warning by Ms. Hymoff. The warning read:

Since October 5, 2009, you have been on a Remedial Development Plan. During the 30 day period in which you were given to complete the goals outlined in that plan, you were unsuccessful. As result we instituted a continuation of that plan on November 5 giving you a second chance to improve your performance. In the second plan, we were more specific in outlining expectations. As of November 18, based on deadlines specified in the second RDP, you are not on track to successfully meet the overall goals.

. . . .

The cumulative pattern of poor performance causes undue stress on co-workers who must fill in the gap of work that you have failed to complete or is so late your co-workers must rush to meet deadlines you have missed. Failure to meet pertinent deadlines also jeopardizes our responsibilities of meeting state and federal reporting deadlines, contracting responsibilities and reimbursements. It also requires a level of micromanagement that should not be required [of] a person in your position as a Program Coordinator II.

As a result of this initial stage in progressive discipline, I have attached the Corrective Action Plan (CAP) in an effort to guide you in improving your work performance.

This warning is being given so that you may have another opportunity to correct your work performance. If you fail to perform the essential functions of your job at the expected satisfactory level by ensuring that the duties and tasks listed in your job description are performed in a timely manner and in accordance with the attached CAP, further disciplinary action will be taken in the form of suspension and/or termination.

(Ex. 7, pp. 122-123.) The Corrective Action Plan mentioned in the warning listed 20 tasks Ms. Donatelli was to have completed by December 4, 2009. (Ex. 7., p. 124.)

26. Thereafter, a person from Human Resources with the initials MG added to Ms. Donatelli's personnel file the following information:

11/30/2009 @ 9:35 I received a call from Rebecca Donatelli (OGR) Ms. Donatelli told me she was calling because she received a verbal warning and some of the things in this warning were not true and so bad that it was making her sick, Rebecca said she was told [a] co-worker was going around the office making bets how long she would be out and when she would return to work.

Ms. Donatelli said she feels intimidated by Sheila and the only reason she sign[ed] the warning is because of intimidation she gets from Sheila; and wanted to know what she should do about the warning, I told her I can't tell her what she need[ed] to do about the warning I would need to review what she received and speak with Irma [another Human Resources staff member] concerning this issue.

She wanted to know if she should call the union; again I can't tell you what to do that is a decision you would have to make concerning the union; Ms. Donatelli said this is her notice to HR that she will be calling the union.

(Ex. 7, p. 126.)

27. On December 16, 2009, Ms. Hymoff issued Ms. Donatelli a written warning. In its, she stated that "[e]ven with increased supervision that you have been provided, I am seriously concerned that you are not making significant progress. You continue to demonstrate poor work performance and continue to miss deadlines." She added that [w]e are committed to continuing to work with you to improve your work performance and meet the expectations of a Program Coordinator II," but warned that she had "grave concerns that failure to make significant improvements may results in further disciplinary actions and/or termination." (Ex. 7, p. 128.) Ms. Donatelli responded with a memo to Ms. Hymoff the following day in which she reviewed the tasks listed in the November Corrective Action Plan and declared that she had met all pertinent deadlines. (Ex. 7, pp. 129-30.)

28. Another Remedial Development/Corrective Action Plan was prepared by Ms. Hymoff for January 2010. (Ex. 7, pp. 131-132.)

29. On January 21, 2010, Ms. Hymoff and Ms. Burgess-Hill sent a memo to Ms. Donatelli informing her that she was being briefly suspended. The memo stated that Ms.

Donatelli had failed to meet the goals set forth in the November Corrective Action Plan and that she had been rated as below expectations in a fiscal year 2010 progress review. The memo continued:

Despite all the assistance provided to you and the numerous opportunities you have been given to improve, you continue to not perform the essential functions of your job. As a result, you are hereby notified that you are suspended without pay for the following period: one day. The suspension will be served January 26, 2010.

Your continued failure to provide timely and accurate reporting of data as required by HSD [Highway Safety Division] and our federal funding sources has resulted in underreporting to federal agencies. The data reported to the federal agencies has been the basis for research studies and increased program oversight by our federal funders. Your continued failure to enter and verify correct data into the FFY2009 Traffic Enforcement Mobilization Grant database calls into question the integrity of the data for the effectiveness of our grant program and the research conducted by federal agencies. This has resulted in inaccurate reporting of data that has affected the credibility of the office and has impacted the ability of state decision makers to make informed fact-based decisions on program initiatives and funding levels.

The intent of this suspension is to define for you the seriousness of the situation so that you may take immediate corrective action. Continued failure to perform the essential functions of your job will result in further disciplinary action up to and including termination.

(Ex. 7, pp. 133-134) Ms. Donatelli was told she could challenge the suspension by requesting a hearing. (Ex. 7, p. 134.) She later complained that she had not been told she was in charge of the database and instead was told only to spot check it occasionally. (Ex. 3.)

30. That day, Ms. Donatelli filed a grievance contesting the suspension and disputing that she had poor work performance. (Ex. 7, p. 136.) She ultimately served the one day suspension on April 12, 2010. (Ex. 7, p. 142.))

31. Sometime in January 2010, various accommodation were given to Ms. Donatelli to help her complete her work. She was allowed flexibility to set her own deadlines and allowed

to stay after 5:00 p.m. to make up her hours, so long as a supervisor was there. Thirteen of her tasks were also reassigned. (Ex. 7, pp. 139-140.)

32. Human Resources sent Ms. Donatelli a letter on April 14, 2010 informing her that “[b]ecause of the frequency and duration of your absences due to your intermittent leave is unclear, you will have to provide additional documentation from your health care provider that certifies that the absences are due to your current FMLA leave.” (Ex. 7, pp. 33-35.) In an undated memo, Ms. Donatelli complained that the rules about when she could work late were changed constantly. (Ex. 3.) During this period, she feared she would be fired. (Donatelli testimony.)

33. Ms. Donatelli injured her neck on August 12, 2010 while mailing large, heavy posters. (Ex. 7, pp. 4-6.) She filed a notice of injury with Human Resources. (Ex. 7, pp. 7-9.)

34. On August 31, 2010, Ms. Donatelli filed another grievance regarding a performance evaluation. (Ex. 7, p. 151.) She withdrew one of her grievances on October 19, 2010.³ (Ex. 7, p. 153.)

35. Ms. Donatelli was hospitalized from September 9 - 14, 2010 at Massachusetts General Hospital. (Ex. 7.) At the hospital, she was diagnosed with anxiety disorder, mood disorder and adjustment disorder. The discharge notes observe that:

Patient has worked for 20 years in a state regulatory office, and describes being “harassed” by her direct supervisor who is trying to get her fired. Patient states this situation started three years ago, immediately after this individual assumed this position. She believes the reason why she is being harassed is because “my boss is evil.” Per her report there was no specific trigger for this situation, but she believes it is due to the fact that she used to be friends with the prior supervisor. Patient describes that her supervisor has also tried to get fired and harassed other individuals at work. She is currently unable to challenge these claims, and

³ The record does not show clearly which grievance she withdrew.

explore different explanations. She is currently on a three-day suspension for a “small mistake,” and worries that she will ultimately lose her job.

(Ex. 10.)

36. Regarding Ms. Donatelli’s’ psychiatric symptoms, the hospital noted:

The patient was complaining of symptoms of depression and anxiety, including “meltdowns” that led to her staying in bed for days at a time. She was perseverative on her boss at work who she felt was treating her unfairly and had much anger about this. The team had some suspicion for a delusional process underlying these strong and preoccupying feelings toward her boss. However, collateral information from the patient’s boyfriend and another friend showed these thoughts were generally reality based.

(Ex. 10.)

37. When Ms. Donatelli was discharged, Massachusetts General Hospital reported that she would be in an outpatient program for the rest to the month and would return to work on October 4, 2010. (Ex. 7, p. 30.)

38. On October 5, 2010, Ms. Hymoff sent a memo to Ms. Donatelli informing her that she was expected to work 37.5 hours per week, and if she intends to use any portion of her sick leave balance, she had to call 15 minutes before the start of her work day at 9:00 a.m. and speak to a designated supervisor. (Ex. 7, p. 152.)

39. Ms. Donatelli appears to have worked only two days in late September 2010 and, after that, spent all of October and November on FMLA leave. (Ex. 7, p. 21.) Dr. Jonathan Worth wrote “to whom it may concern” letters on September 23, October 18, November 16, and December 6, 2010, and January 4, 2011 saying that Ms. Donatelli was under his care and need to be on medical leave during which she would be meet with a social worker once per week at Massachusetts General Hospital. (Ex. 7, pp. 23-27.)

40. On December 2, 2010, Ms. Donatelli filed an application for superannuation retirement. (Ex. 3.)

41. On October 31, 2011, Ms. Donatelli applied for accidental disability retirement.⁴ She stated that “I suffer with major depression and panic disorder which is severe and disabling due to the unusual behavior of the Director on various dates and times. I can no longer perform [my] duties.” (Ex. 4.) Dr. Worth filed a physicians’s statement in support of the application. He wrote that Ms. Donatelli suffers from severe recurrent major depression and a panic disorder with “relapses triggered by stressful incidents at work, and during [the] time period of these events the depression and panic attacks have become more severe and treatment/medication resistant.” (Ex. 5.)

42. Ms. Donatelli attached to her application a number of memos she had written, some of which are undated, and some email exchanges. In the first undated memo, she described how she had been “challenged and intimidated” by Ms. Burgess-Hill for three years. She detailed a number of “harassment incidents” beginning in July 2007 when she was conducting an underage drinking program and overheard Ms. Burgess-Hill yell to her direct manager, “what the f__k is she doing? I don’t trust her.” Then, on her 2008 performance review she reported that she was given a below rating because Ms. Burgess-Hill and Ms. Hymoff had received calls from police departments looking for payments for a program that was Ms. Donatelli’s responsibility. When Ms. Donatelli asked which police departments called, she overheard Ms. Burgess-Hill tell Ms. Hymoff, “you make her think she is wrong, because of course no departments called looking for payment.” In an April 2009 meeting with Ms.

⁴ The record does not reflect whether Ms. Donatelli had been retired for superannuation by then.

Burgess-Hill about Ms. Donatelli missing work for a few days in April, she recalled Ms. Burgess-Hill saying “the next time you are off payroll I am going to give you a sunny two day vacation.” In May 2009, Ms. Donatelli requested a meeting with Ms. Burgess-Hill about sick time issue and then, once the meeting began, invoked her “Weingarten rights” to have a union official present. Ms. Burgess-Hill then left her office. Later that day, they met in Ms. Burgess-Hill’s office and Ms. Donatelli started to explain that some of her absences in May were because she was upset by what Ms. Burgess-Hill said in their April 2009 conversation. Ms. Burgess-Hill became upset and yelled, “this meeting is over I never said that.” In December 2009, Ms. Donatelli met with Ms. Burgess-Hill to go over a rebuttal memo Ms. Donatelli had prepared to show that she had met the goals of a corrective action plan and had completed her tasks on time. Ms. Burgess-Hill disagreed with this conclusion and stated, “you are killing me.” In a February 2010 meeting concerning another corrective action plan, Ms. Burgess-Hill said to Ms. Donatelli, “what have you been doing for 37.5 hours? . . . Are you worthy of a paycheck?” That month, Ms. Donatelli sent a memo to Katy Kelly, whose position is not in the record, in which she stated:

For the past two years I feel like I have been receiving mixed messages for my supervisor and Director. I perform my work to what I believe is satisfactory and am told you are doing a good job and other times I am told my work is not satisfactory through written memos and written warnings and now a one day suspension.

(Ex. 3.)

43. A medical panel made up of three psychiatrists, Edward K. Silberman, M.D., Helenita Hamer, M.D., and Rafael Ornstein, M.D., was convened to examine Ms. Donatelli in connection with her accidental disability retirement application. Each panelist concluded that she was disabled, the disability was likely to be permanent and that her disability might be the

natural and proximate result of a personal injury sustained or hazard undergone on account of which retirement is claimed. Ms. Donatelli told all three panelists that her current troubles began when Ms. Burgess-Hill became the Department head in 2007. (Ex. 9.)

44. Dr. Silberman diagnosed Ms. Donatelli with a major depressive disorder with anxious features. Dr. Silberman commented as to her disability that:

Her record of attendance at work since 2009 has been very spotty, despite criticism for her boss and coworkers about her time on medical leave. She has demonstrated poor ability to concentrate on her work, or to cope with the stress of a harsh or unreasonably demanding boss. While it is hard to determine to what extent her supervisors' criticism have been exaggerated, it is likely that they reflect some degree of diminished work performance over and above her many absences.

(Ex. 9.)

45. Regarding causation, Dr. Silberman concluded that Ms. Donatelli's mistreatment at work aggravated her underlying psychological condition. He explained:

One would not expect an otherwise healthy person to be thrown into a state of severe anxiety and dysfunction by hearing her boss shout and curse over the telephone. However, it is clear that Ms. Donatelli had a prior history of depression and anxiety. There is also evidence that she demonstrated a high level of interpersonal sensitivity - i.e. vulnerability to perceived rejection or criticism from others. Despite these vulnerabilities, she had been doing well at work over a long period of time before the arrival of the new supervisor, but started to become much more symptomatic and dysfunctional after working under her for several months. It is reasonable to conclude, therefore, that her illness would have remained under adequate control had she not had to deal with her boss and the boss' personal style.

(Ex. 9.)

46. Dr. Hamer diagnosed Ms. Donatelli with bipolar disorder, not otherwise specified. In summary, Dr. Hamer concluded:

Although the member first sought psychiatric treatment before her problems with a supervisor at work started, there seems to be substantial evidence that her problems after 2007 were at least in part precipitated by her difficulties doing her

job and the alleged difficulties with an insensitive and harsh supervisor. As such, it is fair to presume that her condition and the problems she was treated for were at least in part precipitated or aggravated by the work environment. And these problems apparently have persisted until the present time.

(Ex. 9.)

47. Dr. Ornstein diagnosed Ms. Donatelli with a major depressive disorder and a panic disorder. He opined that “[a]lthough Ms. Donatelli clearly has an underlying psychiatric vulnerability to depression and anxiety, the hostile work conditions appeared to be a major factor in Ms. Donatelli becoming overtly psychiatrically ill and ultimately disabled.” (Ex. 9.)

48. On September 23, 2013, the Board denied Ms. Donatelli’s application for accidental disability retirement. The vote was “based in part on [the Board’s] determination that Ms. Donatelli had failed to meet her burden of proof with respect to causation.” (Ex. 1.) Ms. Donatelli filed a timely appeal. (Ex. 2.)

DISCUSSION

The State Board of Retirement’s denial of Rebecca Donatelli’s application for accidental disability retirement is affirmed.

An applicant may receive accidental disability retirement when she can show permanent and disabling injuries that were sustained during the performance of essential job duties by “a specific incident or series of incidents” or as a product of “hazards undergone” that are not common to other professions. M.G.L. c. 32, § 7(1). Psychological disabilities in which causation is alleged to relate to numerous job-related events over a period of years have been analyzed by looking at both specific injurious events and general job hazards. *See Fender v. Contributory Ret. Appeal Bd.*, 72 Mass. App. Ct. 755, 894 N.E.2d 295 (2008) (applicant’s claim

that job-related events caused him to be suicidal was evaluated both in terms of the hazards of his job and the particular events that led to his suicide attempt).

A. *Notice of Injury*

The first hurdle Ms. Donatelli must overcome is one of timing. The public employee retirement statute generally limits accidental disability retirement applications to those disabling injuries caused by events or hazards that occurred within two years of the filing of the retirement application, unless notice of an earlier event or hazard was given to the retirement board or some other exception applies. M.G.L. c. 32, § 7(1). Ms. Donatelli never submitted a notice of injury regarding any of the incidents at work that caused her to take time off from work due to psychological injuries.⁵ She has not asserted, or even addressed, whether any exception applies. She filed her application for accidental disability retirement on October 31, 2011. Therefore, she is limited to incidents that occurred on or after October 31, 2009. That does not make all prior incidents entirely irrelevant, however. Aggravation of an underlying condition to the point of disability can be the basis for accidental disability retirement. *See Baruffaldi v. Contributory Ret. Appeal Bd.*, 337 Mass. 495, 501, 150 N.E.2d 269, 272 (1958)(aggravation of pre-existing disease is compensable under workers' compensation and is also an injury for accidental disability retirement purposes).

Ms. Donatelli suffered from depression before she began experiencing psychological problems from her treatment in the workplace. Thus, her application was based on aggravation

⁵ The chances that an employee who is suffering psychological harm from mistreatment by a supervisor will file a notice of injury are undoubtedly vanishingly small. There is a much greater chance that such a person will do what Ms. Donatelli did and complain to Human Resources. The retirement statute's notice of injury requirement at M.G.L. c. 32, § 7(1) makes no distinction, however, between physical and psychological injury and does not provide an alternative for employees who are injured in some way by their boss. I must follow the law as it is written. Any exceptions must be made by the legislature.

of an underlying condition – and was so understood by the medical panel. The difference that the two year limit makes is that any harm Ms Donatelli suffered before October 31, 2009 must be treated as part of her underlying condition. Therefore, the issue is whether anything that occurred at work on or after October 31, 2009 has been shown to have aggravated her underlying condition to the point of permanent disability.

B. *Causation*

Ms. Donatelli claims that her boss's boss, Ms. Burgess-Hill, treated her so cruelly that her psychological condition deteriorated to the point that she became permanently disabled.⁶ The evidence that this happened on or after October 31, 2009 is sparse and equivocal. In November 2009, Ms. Donatelli received a verbal warning for failing to meet goals set forth in a Remedial Development Plan that had been adopted the prior month to direct her work. (Finding 25.) Ms.

⁶ There does not seem to be a dispute that Ms. Donatelli is permanently disabled. That is what the medical panel found. The retirement board did not address this finding, but instead denied her application solely because, in its view, she had not demonstrated work-related causation. The panelists all thought that her work environment was the cause of her disability. This conclusion on causation is only "some evidence" that was to have originally been considered by the retirement board and now by the Division of Administrative Law Appeals. The ultimate conclusion is to be based on all the medical and non-medical evidence. *See Blanchette v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 479, 483, 481 N.E.2d 216, 219 (1985). I accept that, in all likelihood, workplace conditions ultimately caused Ms. Donatelli's permanent disability. Her underlying depression began with family issues, but by May 2009, the brother who had been abusive towards her was no longer in her life. (Finding 20.) Thus, any further deterioration was likely related to her work environment. I do not rely to any extent on the opinions of the panelists on this issue, however, because they had only Ms. Donatelli's version of workplace events. They were aware that Ms. Donatelli's boss's boss was critical of her performance; had they had her personnel file, they would have known that Ms. Donatelli's immediate boss was also critical of her performance. They would also have learned both the details of the criticisms made and of the efforts of her bosses to accommodate Ms. Donatelli's psychological condition – information that presents a more complicated view than just that a particular boss was out to get Ms. Donatelli. Thus, the medical panel was not in possession of sufficient information to sort out whether what undermined Ms. Donatelli's mental state was impermissible harassment or genuinely held criticism of her job performance. The panel also did not limit its consideration to events that occurred within two years of the filing by Ms. Donatelli for accidental disability retirement.

Donatelli responded by telling Human Resources that some of the items discussed in the warning were untrue. (Finding 26.) In December 2009, Ms. Donatelli was issued a written warning because of poor work performance and missed deadlines. Ms. Donatelli responded with a memo in which she stated that she had met all applicable deadlines. (Finding 27.) In January 2010, she was placed under another Remedial Development Plan and told she would be suspended for one day for poor work performance. (Findings 28 and 29.) She filed a grievance regarding this suspension, apparently on the basis that she was not assigned the data-updating task that was mentioned in the suspension notice, but she ultimately served the suspension. (Finding 30.) That same month, Ms. Donatelli was given various accommodations to ease the burden on her. She was allowed to stay after 5:00 p.m. to finish her work (so long as a supervisor was present), allowed to set her own deadlines, and thirteen of her tasks were reassigned to other employees. (Finding 31.) It is not clear whether after that she remained on a Remedial Action plan; none from this period were in her personnel file. In August, she filed a grievance over a performance evaluation; that performance evaluation is not in the record. (Finding 34.) In September, 2010, she had what appears to be a breakdown and spent six days in the hospital. The record does not reflect any particular incident that led to the hospitalization. The medical records say only that Ms. Donatelli complained about being harassed by Ms. Burgess-Hill, but provide no specifics as to what caused her to end up in the hospital. (Findings 35 and 36.) She does not appear to have worked for more than a few days after that. (Finding 39.)

Most of these events seem to relate to personnel actions taken by Ms. Donatelli's employer. To the extent mental or emotional injuries are caused by "bona fide personnel actions," they are not considered personal injuries sufficient to establish eligibility for accidental disability retirement, unless the actions amounted to intentional infliction of emotional harm.

Khramova v. Boston Ret. Bd., Docket No. CR-11-522, Decision at 19 (Mass. Div. of Admin. Law App., Jan 2, 2015.) In order for conduct to rise to the level of intentional infliction of emotional distress, it must be “extreme and outrageous, beyond all possible bounds of decency and...utterly intolerable in a civilized community.” *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145, 355 N.E.2d 315, 319 (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, 508 N.E.2d 72, 82 (1987) (citations and internal quotations omitted). However, “[t]he deliberate act of humiliating [an] employee is not a BFPA [bona fide personnel action] as a matter of law.” *Agosto v. Mass. Bay Transit Auth.*, Board No. 015020-00 (Mass. Dept. of Indus. Accid., Dec. 14, 2007.)

Ms. Donatelli had the burden to prove that psychological damage she suffered at work was the “natural and proximate cause” of any mental or emotional disability she suffers. *Campbell v. Contributory Ret. Appeal Bd.*, 17 Mass. App. Ct. 1018, 460 N.E.2d 213 (1984). She had to show that her psychological injuries were not caused by the apparently bona fide personnel actions she experienced in her last year or so on the job. This she could have done by showing that the personnel actions were not bona fide and the treatment she received at work was worse than the commonplace annoyances of dealing with a difficult boss. Alternatively, even if the personnel actions were to some extent bona fide, she could have shown that they were undertaken as part of an intentional effort to cause her emotional distress.

Ms. Donatelli has not made the necessary showing. From November 2009 through January 2010, Ms. Donatelli’s supervisor, Ms. Hymoff, and Ms. Hymoff’s boss, Ms. Burgess-Hill, issued Ms. Donatelli warnings about her work performance and suspended her for one day. On their face, these actions appear to be bona fide personnel actions. Ms. Donatelli has claimed that some

of the supposed performance issues were not true, and in one instance were known by Ms. Burgess-Hill to be untrue (although the incident involving the allegations that police departments were complaining about awaiting payments that were Ms. Donatelli's responsibility occurred in 2008, and thus before the October 31, 2009 cutoff). (Finding 42.) If this were proven, then at least some of the personnel actions would not be bona fide, and if the personnel actions were based on knowingly false charges, then this would amount to intentional infliction of emotional distress (although she would not necessarily have to show this if the actions were not bona fide). But this is not clear. The November 2009 verbal warning was for failure to meet certain job performance goals. Ms. Donatelli responded that some of the items in the warning were untrue. But the record does not reflect which items Ms. Donatelli thought were untrue or provide any evidence one way or the other as to whether the items were true. Similarly, with the written warning issued the following month, there are two bare bones versions of Ms. Donatelli's performance. Both Ms. Hymoff and Ms. Burgess-Hill warned her for poor performance and missed deadlines; she responded that she had not missed deadlines. The warning and the response do not provide enough information for me to tell whether the performance criticisms were true or not, and thus Ms. Donatelli has failed to show that this warning was not bona fide. Moreover, her claim that she had met deadlines does not, by itself, show that her superiors used knowingly false bases for issuing a warning. The suspension imposed in January 2010 has also not been shown to lack a bona fide basis. Ms. Donatelli grieved it, claiming that one aspect of her allegedly poor performance involved a data entry task that she was unaware was principally her responsibility. However, the memo setting forth the reasons for the suspension discusses describes Ms. Donatelli's "continued failure to provide timely and accurate reporting of data,"

which suggests that this matter had been raised with her before, and so the extent of her responsibility should not have come as a surprise.

It is unclear whether anything happened at work after January 2010 that caused Ms. Donatelli to be hospitalized in September 2010 and to effectively stop working after that. Her personnel file contains numerous corrective action plans entered into before that in which her supervisors attempt to address what they perceive as failures on Ms. Donatelli's part to live up to job performance expectations. Her personnel file lacks any subsequent corrective action plans, although there is a suggestion in a memo Ms. Donatelli wrote that a corrective action plan was implemented for February 2010. (Finding 42.) Rather, her personnel file documents that, around this time, Ms. Donatelli was given some accommodations to help her improve her performance. Some of her tasks were reassigned to others, and she was given more flexibility about staying later to finish her work (although it is not entirely clear how flexible management was on this). Thus, her job stress should have been eased somewhat. The only other likely event that might have put Ms. Donatelli over the edge was a performance evaluation in August 2010. (Finding 34.) Presumably, the evaluation was negative, but it is not in the record, and Ms. Donatelli did not testify about it or attribute her September 2010 hospitalization to it. All that remains is the hospitalization itself, and Ms. Donatelli's explanation to hospital staff that she had a breakdown because of an evil boss who was trying to get her fired.

That appears to be the crux of Ms. Donatelli's case. In her version of events, Ms. Burgess-Hill had long treated her poorly and she finally reached a point where she could take no more of it. But the record on this is decidedly mixed. If Ms. Donatelli is credited, Ms. Burgess-Hill said a number of things to her that were cruel – loudly telling Ms. Donatelli's immediate supervisor that she did not trust Ms. Donatelli, questioning her in a discussion of her performance

whether she was really putting in a week's work for a week's pay. Ms. Burgess-Hill also stormed out of a meeting in her own office and pestered Ms. Donatelli about minor mistakes for no good reason. But the personnel records also show that Ms. Burgess-Hill complimented Ms. Donatelli for jobs done well, sought the advice of Human Resources on how to properly handle Ms. Donatelli's frequent absences, and was the one who suggested she consider FMLA leave to deal with her mental health issues. And though Ms. Donatelli thought it was Ms. Burgess-Hill who was behind the criticisms of her job performance, the record reflects that the performance evaluations were signed as well by Ms. Donatelli's immediate supervisor, Ms. Hymoff, and some of the memos criticizing Ms. Donatelli's performance were written by Ms. Hymoff alone, including the verbal and written warnings. (Findings 23, 25, and 27.) Yet, Ms. Donatelli does not attribute any ill will to Ms. Hymoff. Probably the most accurate description of Ms. Donatelli's relationship with Ms. Burgess-Hill comes from the memo Ms. Donatelli wrote in February 2010 in which she complained that she was receiving "mixed messages" from Ms. Burgess-Hill, who was sometimes critical and sometimes complimentary. (Finding 42.)

Thus, at most, there appears to have been some criticism of Ms. Donatelli's work that was genuine (at least in the minds of her supervisors) coupled with some unprofessional treatment of her by one of her bosses, who at other times could be complimentary – and no particular event or events in her last year or so of employment that pushed her underlying depression into a state in which she could no longer perform her job. Not only is this a muddled picture, but the specific instances of cruel treatment that Ms. Donatelli placed at a particular time all occurred before October 31, 2009, while the criticism of her performance, which appears to have been genuinely held by at least her immediate boss, was a culmination of three years of complaints of poor performance. The evidence strongly suggests that Ms. Donatelli was eventually worn down by

the longstanding criticism of her job performance (and her fear of losing her job) more than by anything else. This would make her claim one based on her reaction to bona fide personnel actions. It is not an adequate basis to support an application for accidental disability retirement.

This case has not been easy to resolve. I note that it would have helped if one or both parties had presented witnesses other than Ms. Donatelli who could have testified to the treatment she had received from Ms. Burgess-Hill. While there is no requirement that an applicant's claim of mental health disability caused by poor treatment by a supervisor be corroborated, the likelihood that there is more than one possible perspective on an employer-employee dispute makes testimony from additional witnesses potentially helpful to either side. *Compare Khramova v. Boston Ret. Bd.*, Docket No. CR-11-522 (Mass. Div. of Admin. Law App., Jan. 2, 2015) (teacher granted accidental disability retirement introduced evidence of motivation for harassment by her supervisor) with *Brewer v. New Bedford Ret. Bd.*, Docket No. CR-15-432 (Mass. Div. of Admin. Law App., Nov. 17, 2017) (dispatcher denied accidental disability retirement when she and her fellow employees presented diametrically opposing testimony about whether she had been harassed).

In sum, because the evidence fails to show that Ms. Donatelli's underlying depression was aggravated to the point of disability by harassment by a supervisor that was not part of a bona fide criticism of her work, I conclude that she has not demonstrated eligibility for accidental disability retirement. I therefore affirm the decision of the State Board of Retirement denying Rebecca Donatelli's accidental disability retirement application.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: March 23, 2018