ATTACHMENT E
THE PROPOSED DECISION
This matter was heard before Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings, State of California, in Sacramento, California, on May 8 and May 24, 2017.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Rosailda Perez and Robert Sandoval, Deputy Attorneys General, represented the Department of Consumer Affairs (DCA).

Eric Lambdin, Attorney at Law, represented Aaron Hanson (respondent), who was present.

Evidence was received on May 8, and May 24, 2017. The record was closed and the matter was submitted for decision on May 24, 2017.
ISSUE

Is respondent permanently and substantially incapacitated from performing his duties as an Associate Governmental Program Analyst (AGPA) for DCA based on a psychological (stress and anxiety) condition?

FACTUAL FINDINGS

Disability Retirement Applications

1. Respondent was employed as an AGPA by DCA. On January 22, 2016, Leslie Gladden, a Staff Services Manager for DCA, filed a disability retirement application on respondent’s behalf. DCA’s stated reason for respondent’s disability was:

   Per Dr. Jessica Ferranti’s reports dated 9-14-15, 10-20-15, and 1-6-16, Mr. Hanson is deemed to have a medical disorder and is unable to perform the essential duties of his current position or any position within the state.

   On May 3, 2016, respondent also filed a disability retirement application, but he checked the box stating that the application was “employer generated.” On his application, he described his disability as: “stress, but my doctor’s not diagnosed me as having a disability.”

2. By letter dated September 26, 2016, CalPERS informed respondent that his medical reports from Bernard Bauer, Ph.D. and Laura Davies, M.D. had been reviewed and that his employer’s disability retirement application had been denied. Respondent was informed of his right to appeal. On October 25, 2016, DCA appealed CalPERS’s determination. Respondent did not appeal.

Respondent’s Employment History

3. Respondent began working for the Board of Registered Nursing under DCA in 2011, as a Staff Service Analyst. He was promoted to AGPA in 2012. He remains employed with DCA, but has been on medical leave since September of 2015. Respondent is 39 years old.

Duties of an AGPA

4. As set forth in DCA’s Position Duty Statement, an AGPA for the Board of Registered Nursing works under the direction of the Discipline Program Manager and is responsible for case management in the Enforcement Division. The AGPA reports directly to a Staff Services Manager I, and ensures accurate, timely, and effective legal action is taken
on critical enforcement cases in which a registered nurse licensee poses a threat to the public health and safety.

5. About 25 percent of the AGPA's essential functions constitute analyzing, evaluating, and prioritizing cases for transmittal to the Attorney General's office. The AGPA also assists in developing a plan of action for complex cases, follows the case from filing to resolution, and manages closure. After receiving pleadings from the deputy attorney general assigned, the AGPA reviews the pleadings to ensure all violations of the Nursing Practices Act are accurately depicted. The AGPA also reviews any mitigation evidence that a respondent may produce to assess whether settlement is appropriate, negotiates settlement agreements, and participates in settlement conferences.

6. The AGPA must consult with Staff Services Managers, the Deputy Chief of Discipline and Probation, the Enforcement Division Chief, Assistance Executive Officer, District Attorneys, and Deputy Attorneys General. The AGPA must have excellent written and verbal communication skills, work independently, take initiative, and exercise flexibility. He must exhibit courteous behavior toward coworkers and the public and exercise good judgment.

Independent Medical Evaluation

7. CalPERS retained Laura Davies, M.D. to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Davies has been licensed in California since 1998. She is an American Board of Psychiatry and Neurology diplomate, and is Board Certified in Child and Adolescent Psychiatry as well as Adult Psychiatry. Dr. Davies has operated a private practice in Child, Adolescent, and Adult Psychiatry since 2002.

8. As part of the IME process, Dr. Davies reviewed respondent's duty statement and medical records. On September 7, 2016, she reviewed respondent's medical records from respondent's primary care physician, a report regarding a worker's compensation industrial injury claim related to stress, a report by Dr. Jessica Ferranti, and a report by Dr. Bernard Bauer. She did not review respondent's personnel records or complaints from his co-workers. Dr. Davies interviewed respondent and performed psychological testing. Dr. Davies found no acute Axis I disorder. Based on her psychological testing, she concluded.

1 Dr. Bauer's Qualified Medical Examination report was admitted as administrative hearsay under Government Code section 11513, subdivision (d). Dr. Bauer evaluated respondent for purposes of a workers' compensation claim. In making findings, he applied the standards of a workers' compensation case, and not a disability retirement proceeding. The standards in these two types of proceedings are different. (Bianchi v. City of San Diego (1989) 214 Cal.App.3d 563, 567.) The findings and conclusions in the workers' compensation proceeding are not binding in this proceeding. (Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].)
that respondent has no significant anxiety or depression. She further found that respondent has difficulty in social relationships, feels misunderstood, and that he "is somewhat aloof, cold, nongiving, and uncompromising."

9. At hearing, Dr. Davies testified that respondent showed moderate elevation on paranoid and anxiety scales. The tests she used, the Hamilton Anxiety Scale and the Hamilton Depression Scale, are reliable tests because they are not based on a patient's self-reporting, and have internal accuracy checks to ensure the user is not attempting to skew his results. Dr. Davies also determined that respondent did not have compromised cognition, did not suffer from ideas of reference (believing that general messaging is tailored to the person, specifically), thought broadcasting (believing one's thoughts are broadcasted generally without one speaking aloud), or thought blocking (an inability to think or process, despite attempting to). Dr. Davies acknowledged that respondent experienced anxiety, but determined that his symptoms do not meet the threshold for diagnosable anxiety attacks or anxiety disorder.

10. Dr. Davies also explained at hearing that she was aware of respondent's difficulties at work, reported conflicts with co-workers, stress and anxiety issues, and that he had exhibited "bizarre behavior" at work. None of these, however, are evidence of a psychiatric condition, nor do they indicate that respondent is substantially incapacitated from performing the usual duties of his job. She added that respondent is "not normal," "unusual," and "difficult to get along with," but these traits are not substantially incapacitating. She stressed that respondent had difficulty at work, but he was never hospitalized, was never diagnosed with depression by a psychiatrist, and, though he was referred to a psychologist for stress, there was never an associated diagnosis. Dr. Davies opined that respondent did not have mental disorder or a diagnosable condition at the time of her examination in September of 2016.

**Fitness for Duty Evaluation**

11. Dr. Ferranti is a board certified adult psychiatrist and forensic psychiatrist. She is the Director of the Workplace Safety and Psychiatric Clinic at the University of California, Davis Medical Center. She conducts workplace assessments, threat assessments for workplaces, schools, and colleges, fitness for duty (FFD) evaluations and Americans with Disabilities Act (ADA) evaluations. Dr. Ferranti does not conduct IMEs for CalPERS. She explained at hearing that, unlike an IME, an FFD determines whether an individual can perform his job safely. In this context, "safely" refers to physical and psychological safety of respondent and his coworkers.

12. Dr. Ferranti assessed respondent on September 2, 2015 for an employer-requested FFD evaluation. She provided DCA with a report on September 14, 2015. DCA
asked Dr. Ferranti to answer 11 questions to determine whether respondent was fit for duty as an AGPA. The primary questions posed were:

a. In your opinion, is [respondent] fit for duty?

b. Do you perceive or can you safely predict if Mr. Hanson may be a potential threat to himself or others in the workplace?

c. In your opinion, is there an existing medical condition(s) that currently affects [respondent’s] performance of his duties as an AGPA?

d. Given respondent’s condition(s), is he able to perform the essential functions of his job with or without accommodations...?

[ ]

k. Is/are [respondent’s] condition(s) temporary or permanent?

Other questions posed to Dr. Ferranti included whether respondent’s behavior adversely affects the health and safety of others, whether he could benefit from a reasonable accommodation, and whether his behavior could lead to workplace discrimination, harassment, hostility, and bullying.

13. At hearing, Dr. Ferranti explained that she is legally bound to confidentiality rules that do not allow her to reveal a diagnosis to respondent’s employer following an FFD. Her report detailed the results of her examination, which included a review of records that DCA submitted, records that respondent submitted, a four hour and fifteen minute interview with respondent, and her review of respondent’s position duty statement. She concluded that respondent was not fit for duty as an AGPA at the time of her examination based on a diagnosable mental illness.

14. Dr. Ferranti opined that respondent had “current psychiatric symptoms” that contributed to his occupational impairment and many of his behaviors were “volitional,” meaning they were within respondent’s ability to change. She further found that respondent demonstrated “a prominent pattern of some behavioral and interpersonal difficulties in the workplace that are not due to the symptoms of his mental disability.” Respondent had the

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2 Dr. Ferranti’s report stated that she evaluated respondent to determine his fitness for duty as a Staff Services Analyst. Credible evidence conflicts with this statement. Respondent was an AGPA at the time of Dr. Ferranti’s assessment.

3 While Dr. Ferranti did disclose respondent’s diagnosis at hearing, the parties stipulated that the portion of the record that refers to the diagnosis would be sealed. The diagnosis is therefore not named here, and not dispositive in this decision.
ability to behave more collaboratively and cooperatively and to improve his communication with supervisors and co-workers, and he chose not to do so.

15. Dr. Ferranti reviewed respondent’s expected job duties and found that due to the combination of a mental disability and respondent’s volitional behaviors, he was not able to attend meetings and cooperate collaboratively, participate, provide presentations, and act professional. He was unable to take direction from supervisors, have “excellent organizational, written, and verbal communication skills,” be dependable, flexible, tactful, and courteous. In her report and testimony, Dr. Ferranti stated that she concluded that, although respondent’s risk of violence in the workplace was low, his negative impact on his co-workers’ psychological safety should be strongly weighed.

16. DCA did not ask Dr. Ferranti to opine whether respondent was permanently and substantially incapacitated from performing his usual job duties. DCA did ask, however, whether respondent’s disability was temporary or permanent. At hearing, Dr. Ferranti emphasized that a FFD evaluation is limited in that she was not a treating doctor, she only saw respondent one time, and her conclusion was based solely on the period in time she evaluated respondent. She stated that, at the time of her evaluation, respondent’s condition would likely respond to pharmacological treatment under the direction of a treating psychiatrist. Dr. Ferranti opined that because his condition was likely to respond to medication, and his behaviors were within his power to change and control, she could not say that it was a permanent condition. Nor could Dr. Ferranti estimate the duration of the condition, but she did note that several months later when Dr. Davies evaluated respondent for an IME, she did not find a diagnosable condition, which could suggest a change in his status since Dr. Ferranti performed the FFD evaluation. Should respondent undergo treatment, Dr. Ferranti suggested he could be reevaluated in six months for his fitness for duty.

17. Dr. Ferranti submitted two supplemental reports in response to DCA’s requests. DCA requested that Dr. Ferranti offer her opinion regarding respondent’s fitness to perform other state positions. The supplemental reports, on October 20, 2015 and January 6, 2016, found that respondent is not fit for duty for any positions about which the DCA requested her opinion because of his inability to be supervised, cooperate and collaborate with coworkers, and communicate adequately, whether verbally or in writing.

Testimony of Former DCA Employee Beth Scott

18. Beth Scott is the Chief of Enforcement at the Bureau of Private Post-Secondary Education. She worked at the Board of Registered Nursing from 2009 to 2016, in several capacities, culminating in her role as Chief of Enforcement. She supervised respondent indirectly, but was aware of his behavioral and other work-related issues. Ms. Scott explained the expectations of an AGPA and that respondent was not meeting expectations. She described him as being unwilling to participate in meetings or trainings, unwilling to take criticism or direction, argumentative, accusatory, and inappropriate in his communications. Respondent’s behaviors included hiding and “slinking down” in his
cubicle, stating on a phone call that he was going to “go Norman Bates,” pacing in front of his supervisor’s cubicle, dramatically jumping into an empty cubicle when someone was to pass him in the hallway, and covering his face with a book during staff meetings and trainings.

19. Respondent had several memoranda in his employee file that describe concerns with his performance and directives to correct his behavior and professionalism. He was denied a merit salary adjustment for at least two years in a row. He made people, including Ms. Scott, uncomfortable, and, caused several employees to request medical leave due to the stress he had caused them. Even after working for DCA for two years, respondent demonstrated a poor understanding of how to do his job. Ms. Scott testified that when discussing a course of action, she determined that “progressive discipline” would not be effective for respondent, though it was an option she could have taken. Her superiors instead opted to order respondent to undergo a fitness for duty evaluation, followed by applying for disability retirement on respondent’s behalf.

Discussion

20. Dr. Davies’ opinion that respondent is not substantially incapacitated from performing his usual duties as an AGFA based on a psychological condition was persuasive. Her IME report and testimony provided clear and supported medical opinion that respondent does not have a diagnosable psychological condition that prevents him from performing his job functions. Dr. Davies formed her opinion by applying CalPERS’s disability retirement standards to the competent medical evidence obtained through her thorough examination and evaluation. Her evaluation of respondent was also the closest in time to DCA’s filing the disability retirement application on respondent’s behalf. Dr. Ferranti’s contrary opinion was not based on the CalPERS’s disability retirement standards. She was not familiar with those standards, nor had she ever conducted an IME. She determined that he was not “fit for duty,” not that respondent was substantially incapacitated from performing his usual job duties. Fitness for duty evaluations do not apply to CalPERS’s disability retirement standards.

21. DCA did not submit respondent’s medical records or send respondent to a doctor to perform an IME under CalPERS’s standards. The questions posed to Dr. Ferranti were directed to determine whether respondent was fit for duty, whether DCA could provide a reasonable accommodation, and whether respondent posed a threat to himself or others in the workplace. Additionally, it was Dr. Ferranti’s assertion, both in her report and at hearing, that respondent’s condition could be treated with medication, and was not permanent in nature. She suggested that, with proper medication and psychiatric treatment, respondent could be reevaluated after six months to determine his fitness for duty. DCA presented substantial evidence to support the assertion that respondent was ineffective at his job as an AGPA, made people feel uncomfortable and unsafe, and displayed problematic, unprofessional behaviors. This evidence did not support a permanent and substantial incapacity on respondent’s part to perform his usual job duties.
22. When all the evidence is considered, DCA did not present sufficient evidence to establish that respondent was rendered permanently and substantially incapacitated from performing the usual duties of an AGPA based on a psychological condition. Consequently, DCA's appeal of CalPERS's denial of the retirement application that DCA filed on respondent's behalf must be denied.

LEGAL CONCLUSIONS

1. By reason of respondent's employment, he is a state miscellaneous member of CalPERS and eligible for disability retirement under Government Code section 21151.

2. An applicant for an industrial disability retirement has the burden of establishing his or her eligibility by a preponderance of the evidence. (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.) DCA applied for disability retirement on respondent's behalf and appealed CalPERS's denial. DCA, therefore, must prove by a preponderance of the evidence that respondent qualifies for disability retirement. (Evid. Code § 115.)

3. An employee qualifies for disability retirement if it is proved that, at the time of the application for disability retirement, he was "incapacitated physically or mentally for the performance of . . . his duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

Government Code section 21156, subdivision (a)(2) further states that a determination regarding whether a member is eligible for disability retirement must be made on the basis of competent medical opinion, and the employer "shall not use disability retirement as a substitute for the disciplinary process."

4. In Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the substantial inability of the applicant to perform his usual duties." (Italics in original.) In Mansperger, the court found that a fish and game warden who had applied for disability retirement was not incapacitated for the performance of his duties, because the work activities that he was unable to perform were not common occurrences, and he could otherwise "substantially carry out the normal duties of a fish and game warden." (Mansperger, supra, 6 Cal.App.3d at p. 876.)
5. The burden was on DCA to present competent medical evidence to show that respondent was permanently and substantially unable to perform his usual duties as an AGPA due to a psychological condition. The evidence established that although respondent had been separated from employment due to Dr. Ferranti's opinion that he was unfit for duty, the claim of a psychological condition that rendered respondent substantially incapacitated from performing his usual job duties was not supported by the evidence. Dr. Ferranti's conclusion was not based on CalPERS's standards for disability retirement, which is the only standard that applies here. Rather, pursuant to Factual Findings 21 and 22, based on Dr. Davies's competent medical opinion, respondent does not meet CalPERS's standard of permanent and substantial incapacity to perform his usual job duties. DCA's application for disability retirement on respondent's behalf must therefore be denied.

ORDER

The Department of Consumer Affair's application for disability retirement on behalf of Aaron Hanson is DENIED.

DATED: June 7, 2017

HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings