

NO. 47166-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FRANK SHAW,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
STATE OF WASHINGTON

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF RETIREMENT SYSTEMS**

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I. INTRODUCTION

In this proceeding, Mr. Shaw asks the Court to award him a duty disability retirement from the Law Enforcement Officers' and Firefighters' Retirement System Plan 2, based on a newly asserted claim of a preexisting posttraumatic stress disorder (PTSD) aggravated by events at work. The Department of Retirement Systems' (DRS) Final Order concluded that he was not eligible for a duty disability retirement as a matter of law, because aggravation of a preexisting condition could not form the basis of a LEOFF Plan 2 duty disability retirement. Put differently, DRS held that unless a member applying for duty disability retirement claimed that authorized work duties were the sole cause of a disabling condition, the claim would fail as a matter of law.

Although the remainder of his arguments are incorrect, DRS agrees with Mr. Shaw in one regard—the Final Order should not have dismissed his claim as a matter of law because DRS agrees that a member's work duties need not be the sole cause of his disability. Consistent with DRS's longstanding practice, the Order correctly held that to qualify for a duty disability retirement, a member's mental disability must be incurred in the line of duty. And, the Order correctly held that for a disability to be incurred in the line of duty, the disability must arise "naturally and proximately" out of the member's employment. That is, the work activity

giving rise to the disability (i) must be sufficiently work-related to be deemed to have “arisen naturally;” and (ii) must be the proximate cause of the disability. Rather than dismiss, the Final Order should have applied this standard.

Because the Final Order did dismiss Mr. Shaw’s claim as a matter of law, it did not reach any of the factual issues necessary for the resolution of his claim. Contrary to Mr. Shaw’s suggestion, this Court has no authority on judicial review under the Administrative Procedure Act (APA) to make de novo findings of fact involving the credibility of medical experts and decide his eligibility for a duty disability retirement. Rather, pursuant to RCW 34.05.574, this Court should remand to the administrative tribunal to complete the review it has begun, applying the “naturally and proximately test” to Mr. Shaw’s unique facts.

II. COUNTERSTATEMENT OF THE ISSUES

Issue 1 (threshold legal issue). Under the error of law standard governing APA judicial review, did DRS (and the superior court) correctly conclude that a LEOFF Plan 2 disability must be “incurred in the line of duty” (as opposed to simply arising during the period of the member’s employment)? (Shaw’s Assignment of Error 1.)

Issue 2 (remedies). Under RCW 34.05.574, in light of DRS’s agreement that a member’s work need *not* be the sole cause of a member’s disability, is the only appropriate remedy a remand to DRS?

Issue 3 (application of law to fact). [The Court should not reach this Issue 3: it will arise only if this Court does not remand to DRS.] Should Mr. Shaw’s application for a duty disability retirement be denied because (i) his only disability was his inability to manage his anger; (ii) his

disability arose from a deep-seated personality disorder (not PTSD); and (iii) none of the events or conditions of his work environment (*alleged* to have caused his disability) did in fact *cause* his disability or bear a sufficient relationship to the job activities of a firefighter?

Issue 4 (attorneys' fees). Under RCW 49.48.030 or RCW 4.84.340-.360, should this Court deny attorneys' fees? (Shaw's Assignment of Error 3.)

III. STATEMENT OF THE CASE

A. **LEOFF Plan 2 Provides Duty Disability Retirements to Members Incapacitated for Service Due to Medical Conditions Incurred in the Line of Duty**

DRS administers eight retirement systems for the benefit of public employees. Among these is the Law Enforcement Officers' and Firefighters' Retirement System (LEOFF), which covers full-time law enforcement officers and firefighters. RCW 41.26. In general, LEOFF members qualify for "service retirement" based on age and years of service, and receive a monthly allowance based on a formula that considers the member's years of service and compensation at the time of retirement. RCW 41.26.420. If a member becomes totally incapacitated before qualifying for a "service retirement," [s]he may be eligible for a "disability retirement"—either a "non-duty disability retirement" or a "duty disability retirement." RCW 41.26.470. To qualify for a non-duty disability retirement, the member must prove three elements, set forth in DRS's administrative regulations. WAC 415-104-485. To qualify for the more advantageous duty disability

retirement,¹ WAC 415-104-480 requires the member to prove the same three elements *and* to prove that the incapacitating condition (physical or mental) was “incurred in the line of duty.” WAC 415-104-480.

B. DRS Denied Mr. Shaw’s Application for a LEOFF Duty Disability Retirement

1. The LEOFF Plan Administrator Denied Mr. Shaw’s Application

All applications for disability retirement begin with an application to the LEOFF Plan Administrator. WAC 415-104-480(7), -485(7). Upon review of Mr. Shaw’s application, the LEOFF Plan Administrator found that Mr. Shaw had met the first three elements and was eligible for a non-duty disability retirement. However, the Plan Administrator found that his disability (anger management) had not been incurred in the line of duty. Accordingly, Mr. Shaw was granted a non-duty disability retirement, but his application for duty disability retirement was denied. CAR 0002.

2. DRS’s Petitions Examiner Again Denied Mr. Shaw’s Application

When a member’s application is denied by the Plan Administrator, the member may seek further review by DRS’s Petitions Examiner. WAC 415-104-480(8), -485(8). In the course of this review, the Petitions Examiner collects additional information from as many sources as

¹ With a duty disability retirement, Mr. Shaw would not be taxed on the first ten percent (10%) of his monthly allowance. In addition, the actuarial reduction on his monthly benefit may be removed. RCW 41.26.470.

possible, and performs a de novo analysis. Mr. Shaw sought such review, and the Petitions Examiner again found that he was not entitled to a duty disability retirement. CAR 0003.

Mr. Shaw's petition was initially denied in August 2009. He sought reconsideration and was denied again in January 2011. Until his motion for reconsideration, Mr. Shaw had made no mention of a childhood posttraumatic stress disorder (PTSD) that is now the centerpiece of his claim. CAR 0598.

3. In an Administrative Appeal, DRS's Presiding Officer Denied Mr. Shaw's Application Based on a Threshold Legal Issue

Mr. Shaw appealed DRS's decision, and an adjudicative proceeding was conducted pursuant to the Administrative Procedure Act (APA). After a pre-hearing conference, the issue was set out as follows:

In granting Mr. Frank Shaw non-duty disability benefits under WAC 415-104-485, the Department determined that Mr. Shaw had

- (i) incurred a mental disability;
- (ii) become totally incapacitated for continued employment in a LEOFF eligible position; and
- (iii) separated from his LEOFF-eligible position due to the disability.

The only issue raised in this appeal is whether the foregoing mental disability was "incurred in the line of duty," such that Mr. Shaw is eligible for duty disability benefits under RCW 41.26.470 and WAC 415-104-480.

CAR 0005-6 (Final Order, COL 9) (emphasis added).

In the administrative proceeding, Mr. Shaw, who had the burden of

proof, argued that he was entitled to a duty disability because (1) he developed PTSD as a child; (2) his PTSD was aggravated by four specific encounters at work; and (3) as a result of the aggravation of his preexisting PTSD, he was totally incapacitated for continued employment as a firefighter. CAR 0003, 0009-10 (Final Order, COL 21). *See* WAC 415-08-420 (establishing burden of proof). DRS denied that Mr. Shaw had PTSD in the first instance and, ipso facto, that PTSD had caused his problems at work.

The tribunal took two full days of testimony (from Mr. Shaw, his employer, and medical experts) and considered a detailed evidentiary record (182 exhibits, 1176 pages) related to the foregoing issues. However, upon motion in limine from Mr. Shaw, the tribunal excluded the testimony of the LEOFF Plan Administrator, the person uniquely qualified to explain LEOFF's interpretation of the disability statute. CAR 0015.

Notwithstanding this extensive factual record, DRS decided the case on a threshold legal issue, i.e., the requisite nature of the causal link between the alleged triggering event and the disability. Specifically, the Presiding Officer concluded that if the work event simply served to aggravate a preexisting condition, the causal link was not sufficient to support a LEOFF Plan 2 duty disability retirement. Because Mr. Shaw's disability claim was based solely on his claim of a preexisting condition,

aggravated at work, the Final Order concluded that his claim must be denied as a matter of law. CAR 0011 (Final Order, COL 25) (because his claim was premised “exclusively on application of the aggravation rule, [it] cannot be approved”). Accordingly, his “claim for retirement for disability in the line of duty [was] denied.” CAR 0012.

As a result of this decision on the threshold legal issue (the requisite nature of the causal link), the Presiding Officer made no factual findings regarding Mr. Shaw’s mental condition, the events at work, or the causal relationship between the two. CAR 0006 (Final Order, COL 10) (“For the following dispositive analysis it is not necessary to address or determine how his disabling condition(s) came about, or what his disabling condition(s) may have been.”).

C. In Light of the Scope of This Court’s Authority on Judicial Review, the Counterstatement of the Substantive Facts Is Brief

Because this Court has no authority to make de novo factual findings regarding Mr. Shaw’s mental condition or the conditions of his employment, this counterstatement of the facts is brief. The record shows that Mr. Shaw did not have PTSD and that no event at work aggravated his alleged PTSD.² The only aspect of his job that he could not perform

² App. 32-34 (citing CAR 0598-99, 0814-15, 1066-67, 1098-1100, 1101-04). The Appendix is a demonstrative exhibit—DRS’s closing brief before the agency (CAR 0160-203). For the Court’s convenience, each cite in the brief to an exhibit or the

was working cooperatively within established department protocols.³ His inability to do so was grounded in a longstanding personality disorder, developed in his childhood years.⁴ His acknowledged desire to “make waves” to rock the establishment and his violent reactions when he did not get his way are summarized in the DRS’s closing brief to the administrative tribunal with detailed citations to the record. *See, e.g.*, CAR 0283-89 (intention to “make waves”); CAR 0437 (angrily throwing the phone across the room in the station living quarters to make a point); CAR 0387-89 (angrily kicking the emergency room door off its hinges); CAR 0511-12 (angrily throwing contents of ambulance about the station); CAR 0364-5 (behavior threatening the fire chief). Nothing in his work environment caused the foregoing problems; Mr. Shaw would have had these problems with anger management in any situation. CAR 1085.

IV. ARGUMENT

A. This Court Must Affirm Most Portions of DRS’s Final Order Unless Mr. Shaw Can Establish Their Invalidity

On judicial review, the reviewing court must affirm an agency's final order unless the petitioner can demonstrate its invalidity.

transcript is supplemented with a parallel cite to the CAR. In the brief, the Court will find a complete summary of the relevant substantive facts.

³ App. 8-10 (citing CAR 0256, 0266-69, 0337-38, 0352, 0354, 0411, 0424, 0432, 0532-33, 0549, 0562, 0580, 0586, 0589, 0656, 0933, 1142-43, 1145, 1151-52).

⁴ App. 24-27 (citing CAR 0313, 0389, 0418, 0465, 0538-39, 0543, 0573-74, 0584, 0658, 0664, 0736, 0751, 0756, 0763, 0804-09, 1067-68, 1070-71, 1073-77, 1082, 1084, 1156).

RCW 34.05.570(1)(a). “The validity of agency action shall be determined in accordance with the standards of review provided in [the APA]” RCW 34.05.570(1)(b). In reviewing an agency order arising out of an adjudicative proceeding, the court shall grant relief only if it determines that one or more of the statutory bases for relief are established. *Heidgerken v. Dep’t of Nat. Res.*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000). As it pertains here, this Court should grant relief only if it determines that “[t]he agency has erroneously interpreted or applied the law[.]” RCW 34.05.570(3)(d). Under this error-of-law standard, the Court reviews the agency’s interpretation of the law de novo. However, the Court may substitute its judgment for that of the agency only if the agency’s interpretation or statement of the law is incorrect. *Franklin Cnty. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

Although issues of law are within the reviewing court’s province to decide, courts accord great weight to an agency’s interpretation when an agency is interpreting the law it administers. *Woldrich v. Vancouver Police Pension Bd.*, 84 Wn. App. 387, 393, 928 P.2d 423 (1996) (deferring to Board’s interpretation of RCW 41.40.125 that a stress reaction to a disciplinary demotion was not a disability incurred in the line of duty). This is especially true, where, as here, the agency has expertise in a special field of law. *Grabicki v. Dep’t of Ret. Sys.*, 81 Wn. App. 745,

752, 916 P.2d 452 (1996) (acknowledging DRS's special expertise in administering pension law).

To the extent that Mr. Shaw claims that DRS erroneously interpreted or applied the law (RCW 41.26.470) by requiring that a duty disability be "incurred in the line of duty," he did not carry his burden to demonstrate invalidity by proving that DRS's interpretation was incorrect.

B. DRS's Final Order Correctly Concluded That a LEOFF Plan 2 Duty Disability Must Be Incurred in the Line of Duty

Mr. Shaw asks this tribunal to conclude that a member can become eligible for LEOFF Plan 2 duty disability retirement even if his disability was not "incurred in the line of duty." Citing the history of various disability statutes for firefighters, he argues that the change in language from those statutes (requiring that a disability be "incurred in the line of duty") to the language of the language of RCW 41.26.470(7) (providing that a member must "become disabled in the line of duty" to receive a duty disability) reflects the Legislature's intent to relax the requisite nature of the causal connection between work duties and the disabling condition. Shaw Br. at 10-12. He argues that if a disabling disease simply arises during the term of a member's employment, it can support a duty disability retirement even if there is no causal connection between the duties of the member's employment and the disabling disease.

1. The Change in Statutory Language Does Not Reflect Legislative Intent to Liberalize the LEOFF Plan 2 Standard

Provisions for duty disability retirement had previously existed in LEOFF Plan 1, the predecessor of LEOFF Plan 2: RCW 41.26.120 provided a “[r]etirement for disability incurred in the line of duty.” Although the Plan 2 duty disability statute contains language somewhat different from Plan 1—becoming disabled in the line of duty (Plan 2) as opposed to incurring a disability in the line of duty (Plan 1)—nothing in the legislative history indicates that the Legislature intended a different interpretation of the two provisions. 2004 Final Legislative Report on H.B. 2418, 58th Leg., at 31 (CAR 0208).

In the original LEOFF Plan 2 enactment in 1977, the Legislature provided a general “earned disability retirement” for all members “who become[] totally incapacitated for continued employment by an employer” RCW 41.26.470(1). The benefit was actuarially reduced for those who retired before age 53. Regardless whether the cause of the member’s disabling condition was work-related or not work-related, the member received the same benefit; in essence, all that was required was a “temporal connection” between the disability and the term of employment.

In 2004, the Legislature, enacted a new benefit specifically for “all LEOFF 2 members disabled in the line of duty” 2004 Final

Legislative Report on H.B. 2418, 58th Leg., at 31 (CAR 0208). This benefit had lesser actuarial reductions and a more favorable tax status. In order to provide more favorable tax status, the pension statute was required by federal tax law to be “in the nature of a workmen’s compensation act,” which in turn required that the disability be service-connected. *See* IRC § 104(a); Treas. Reg. § 1.104-1(b). By adding the statutory requirement that the member “become[] disabled in the line of duty,” the Legislature intended to ensure that the disability was “service-connected,” i.e., that it had more than a “temporal connection” with the term of the member’s employment and was in fact caused by that employment. RCW 41.26.470(7). Mr. Shaw’s interpretation would eliminate the intended distinction between duty and non-duty disability retirement and should be rejected.

2. Mr. Shaw’s Argument Ignores Express Statutory Language and Leads to Absurd Results

Mr. Shaw’s interpretation ignores multiple principles of statutory construction. A statute must be construed by reading it in its entirety and considering its relation with the statutory scheme as a whole. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). All statutory language should be given effect, and no portion should be rendered meaningless or superfluous. *Kilian v. Atkinson*, 147 Wn.2d 16,

21, 50 P.3d 638 (2002). Courts should avoid constructions that yield unlikely, absurd or strained results. *Id.*

Mr. Shaw's proposed interpretation fails to give meaning to the statutory distinction between duty and non-duty disabilities. To receive either benefit, a member would merely have to incur a disabling condition during the period [s]he was employed. Such an interpretation fails to read RCW 41.26.470 in its entirety, ignoring its separate provisions for duty and non-duty disabilities, and fails to give meaning to the express statutory language that a duty disability must arise "in the line of duty." This would be an absurd result indeed and should be rejected.

Although Mr. Shaw argues that the Court should liberally construe the statute, the courts apply the principle of liberal construction only to resolve ambiguity, after full consideration of legislative purpose, the entire statutory scheme, and other rules of statutory construction. *Shurtliff v. Dep't of Ret. Sys.*, 103 Wn. App. 815, 825, 15 P.3d 164 (2000). Because the legislative intent and statutory scheme are clear, this court need not reach the principle of liberal construction.

3. The Court Should Reject Mr. Shaw's Argument That WAC 415-104-480 Should Be Ignored

Pursuant to its rulemaking authority to implement the Plan 2 statutory requirements, RCW 41.50.055, DRS adopted a LEOFF Plan 2

duty disability rule incorporating the LEOFF Plan 1 language:

Who is entitled to duty disability benefits? Any member of LEOFF Plan 2 who the department determines has:

- (a) *Incurred a physical or mental disability in the line of duty;*
- (b) Become totally incapacitated for continued employment in a LEOFF eligible position; and
- (c) Separated from a LEOFF eligible position due to the disability.

WAC 415-104-480(1) (emphasis added).

How is “line of duty” defined? Line of duty means any action or activity occurring in conjunction with your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or service.

WAC 415-104-480(2). By arguing that a LEOFF Plan 2 duty disability need not be “incurred in the line of duty,” Mr. Shaw in effect is arguing that the LEOFF Plan 2 duty disability rule, WAC 415-104-480, should be ignored. Any such challenge to WAC 415-104-480 should be rejected for both procedural and substantive reasons.

First, the APA limits the procedures available for challenging agency rules. The substance of a rule may be challenged only “upon petition for declaratory judgment” or “in the context of any other review proceeding under [RCW 34.05.570].” RCW 34.05.570(2)(a). At no phase of this proceeding has Mr. Shaw challenged WAC 415-104-480; his Petition for Review contains no reference, express or implied, to a rule challenge. Accordingly, the rulemaking file is not in evidence. To the

extent Mr. Shaw is challenging the rule in this proceeding, this Court should refuse to review his claim. *See* RAP 2.5 (regarding errors raised for the first time on review).

In any case, the DRS's interpretation of RCW 41.26.470(7) in WAC 415-104-480—adopted pursuant to its rulemaking authority; set forth in a properly promulgated rule; and interpreting the law it administers—is entitled to great weight. *See* RCW 41.50.055. *See also* *Woldrich*, 84 Wn. App. at 393. DRS's interpretation is grounded in its special expertise in administering pension law and is entitled to deference. *See Grabicki*, 81 Wn. App. at 752. In short, DRS did not err in concluding that a LEOFF Plan 2 duty disability must be incurred in the line of duty.

C. To Be “Incurred in the Line of Duty,” a Mental Condition Must Arise “Naturally” and “Proximately” Out of Employment

The question whether a disability has been “incurred in the line of duty” raises two threshold legal issues. First, what is the requisite nature of the triggering work event(s)—i.e., what standard should be used to determine whether the alleged triggering event(s) is/are sufficiently work-related to be deemed “in the line of duty”? And second, what is the requisite nature of the causal link between the alleged triggering event(s) and the disability? Legal determinations regarding these two threshold questions must then be applied to the claimant's unique factual situation.

In holding that the performance of duties particular to LEOFF employment must be the sole cause of a member's disabling condition, DRS's Final Order centered on the second question, the requisite nature of the causal link. As elaborated below, DRS agrees with Mr. Shaw: consistent with its longstanding practice, the performance of LEOFF duties must be the proximate cause, but need not be the sole cause, of a member's disabling condition.

1. Courts Have Interpreted the “Incurred in the Line of Duty” to Require That a Mental Condition Arise “Naturally and Proximately” Out of Employment

To determine whether a disability was incurred in the line of duty for LEOFF purposes, Washington courts have required that a work-related disease arise “naturally and proximately” from the employee's work. *See generally Dillon v. Seattle Police Pension Bd.*, 82 Wn. App. 168, 916 P.2d 956 (1996); *Woldrich v. Vancouver Police Pension Bd.*, 84 Wn. App. 387, 928 P.2d 423 (1996). Relying on court interpretations of workers' compensation cases, these courts have adopted one test to determine whether an injury is compensable and another to determine whether a work-related disease is compensable. In the case of injury, the claimant must simply show that the injury occurred “in the course of employment,” in essence, while the employee was “on the clock.” *Dillon*, 82 Wn. App. at 171. However, for a work-related disease, which often develops

incrementally over time, the test requires more than a showing that the disease developed and/or was diagnosed during the period in which the employee was employed. Rather, in the case of an alleged disease, including a mental disease or condition, the claimant is “required to prove that his . . . disease arose ‘naturally and proximately’ out of his employment.” *Id.*

The “naturally and proximately” test addresses the two threshold legal issues regarding the requisite nature of the triggering event. If the alleged triggering event meets the “proximately” prong of the test, the causal link between the alleged event and the disease is sufficient. “A[n employee] shows his disease was proximately caused by his work if he establishes he would not have contracted the disease, but for the aggravating condition of his job.” *Id.* And, if the alleged triggering event meets the “naturally” prong of the test, it is sufficiently work-related. To establish that a disease arose naturally out of employment, “a[n employee] must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his . . . particular employment.” *Id.* at 172.

Both *Dillon* and *Woldrich* turned on whether the LEOFF member’s disease had “arisen naturally” from his employment, i.e., whether it was sufficiently work-related to warrant a LEOFF duty disability retirement. In

both, the issue of proximate cause was undisputed—“but for” the triggering event, the disease would not have arisen at all. Neither case involved the aggravation of a preexisting condition. CAR 0011 (Final Order, COL 24).

2. The Presiding Officer Believed It Was Beyond Her Authority to Incorporate the “Aggravation Rule” Into the “Naturally and Proximately Test”

In the administrative proceeding, Mr. Shaw argued that RCW 41.26.470 required DRS to incorporate the so-called “aggravation rule” from workers’ compensation law, i.e., the principle that a worker is entitled to workers’ compensation benefits if the employment either causes a disabling disease or aggravates a preexisting non-work-related disease so as to result in a new disability. CAR 0010 (Final Order, COL 22). “In an aggravation case, the employment does not cause the disease, but it *causes the disability* because the employment conditions accelerate the preexisting disease to result in the disability. In this sense, it is proper to speak of the *disability* [as opposed to the disease] being *caused* by the employment in an aggravation case.” CAR 0010 (citing *Ruse v. Dep’t of Labor and Indus.*, 138 Wn.2d 1, 6-7, 977 P.2d 570 (1999)).

Although the Presiding Officer correctly held that the *Dillon-Woldrich* “naturally and proximately test” should be used to interpret RCW 41.26.470(7), it viewed the “aggravation rule” as a separate

construct from workers' compensation and held RCW 41.26.470 did not require DRS to incorporate the aggravation rule in applying the "naturally and proximately test." CAR 0011 (Final Order, COL 24). Equating her rejection of the aggravation rule with the adoption of a "sole cause rule," the Presiding Officer concluded that the "performance of duties particular to LEOFF employment . . . [must be] the sole cause of [the member's] disabling condition." CAR 0011 (Final Order, COL 25). Because she equated the two rules, the Presiding Officer never evaluated whether any of the work events alleged by Mr. Shaw proximately caused his disabling condition.

3. The Court Should Remand to Allow DRS to Apply the Naturally and Proximately Test to Mr. Shaw's Factual Situation

DRS agrees with Mr. Shaw that his claim should be analyzed under the proximate cause test set forth in *Dillon*, i.e., is it the case that "but for" one or more of his alleged work events or activities, he would have not have become totally incapacitated? Such an analysis would include an evaluation of whether any of his alleged work events aggravated a preexisting mental condition and, if so, whether, "but for" such aggravation, his disability would not have occurred.

Historically, DRS has used such a proximate cause test to evaluate LEOFF Plan 2 disabilities; it has considered the effect of work events on a

member's preexisting condition (if any); it has not required that a work event be the sole cause of a member's disability. DRS has recently filed a CR-101 to amend WAC 415-104-480 to clarify this position, stating:

This rule-making activity will codify the department's existing practice of granting a LEOFF Plan 2 duty disability benefit. The rule will clarify that the work actions and activities defined in WAC 415-104-480(2) must be the proximate cause of the member's disability (but need not be the sole cause of the member's disability).

CR-101 (Attach. A).

To the extent that the Presiding Officer believed that she had no authority to adopt an aggravation rule where DRS staff had not already expressly done so (and was therefore required to adopt a "sole cause rule"), this Court should remand to allow the Presiding Officer to apply the proximate cause test articulated in *Dillon* as reinforced by the pending rule.

D. Because Mr. Shaw's Disability Claim Should Not Be Dismissed As a Matter of Law, This Court Should Remand to Allow the Analysis to Proceed

Mr. Shaw asks this Court, on judicial review, to make the factual findings and legal conclusions requisite to a determination that he is entitled to a duty disability retirement. Shaw Br. at 41; CP 6-7. His request should be rejected. Relief in this proceeding can only be granted pursuant to RCW 34.05.574. And, under that statute, remand to the agency is the only appropriate form of relief.

1. Additional Factual and Legal Issues Require Resolution

The Final Order denied Mr. Shaw's claim strictly as a matter of law:

This order denies . . . Appellant's claim . . . because [it] . . . is not sufficiently supported by law that can be applied in this forum. For the following dispositive analysis it is not necessary to address or determine *how* his disabling condition(s) came about, or *what* his disabling condition(s) may have been.

COL 10 (emphasis added). Accordingly, the order contained no factual findings regarding Mr. Shaw's mental condition or employment experiences.

Because DRS agrees with Mr. Shaw that this case should not have been dismissed as a matter of law, it is now necessary to apply the LEOFF disability statute and rules to facts regarding Mr. Shaw's mental condition and employment experiences in order to determine his eligibility. Before a tribunal can determine whether Mr. Shaw's "mental disability" was "incurred in the line of duty," the tribunal will have to know what mental disability is in question. And, before the tribunal can determine what mental disability is in question, the tribunal will need to know exactly what job functions Mr. Shaw could not do. Only when it knows exactly what he was unable to do, can the tribunal determine which of the various

mental conditions suggested in the record caused his inability to perform.⁵ In turn, only when the tribunal knows which of the various mental conditions caused his inability, can it determine whether that particular mental condition was incurred in the line of duty.

Although the tribunal developed a detailed administrative record related to these issues, it made no factual findings or legal conclusions regarding these questions. Mr. Shaw's eligibility for a duty disability cannot be resolved without such findings and conclusions.

2. Resolution of the Remaining Factual and Legal Issues Is Beyond the Scope of Judicial Review

Judicial review invokes the appellate jurisdiction of the court, not its general or original jurisdiction. *Reeves v. Dep't of Gen. Admin.*, 35 Wn. App. 533, 537, 667 P.2d 1133 (1983). The function of the Court on judicial review is to review the decisions of the agency, not to try the case de novo. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). DRS's Final Order contains only one "agency decision": the refusal to adopt the workers' compensation aggravation rule (or, the implementation of a sole cause rule). Although review of this one decision is within the scope of this Court's appellate jurisdiction on judicial review, DRS has made no other final "agency decision" that is susceptible of

⁵ Mr. Shaw argues that his mental disability is either Posttraumatic Stress Disorder or depression NOS 311. The Department's forensic psychiatrist found that the mental disability that caused Mr. Shaw's difficulties at work was a personality disorder.

appellate review by this Court.

In order to resolve the remaining factual issues, this Court would be required to review a lengthy administrative record, including a transcript containing two days of testimony. The Court would be required to make credibility findings regarding the testimony of medical experts, including Dr. Vlahakis (Mr. Shaw's treating doctor who had never reviewed his employment file); Dr. Dougherty (the doctor who briefly interviewed Mr. Shaw when he applied for social security disability); and Dr. Fischer (the forensic psychiatrist retained by DRS, who reviewed the entire documentary record). Such credibility findings are beyond the scope of judicial review. *See Nghiem v. State*, 73 Wn. App. 405, 869 P.2d 1086 (1994); *Callecod v. Wash. St. Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *rev. denied*, 132 Wn.2d 1004 (1997); *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 847, 894 P.2d 1352 (1995).

3. Remand to DRS Is the Only Appropriate Relief in This APA Proceeding

It is well settled that the APA establishes the exclusive means of judicial review of agency orders. RCW 34.05.510; *Judd v. AT&T*, 116 Wn. App. 761, 66 P.3d 1102 (2003). Specifically with regard to the relief available on judicial review, RCW 34.05.574 provides,

- (1) In a review under RCW 34.05.570, the court may
 - (a) affirm the agency action or

- (b) order an agency to take action required by law[;] order an agency to exercise discretion required by law[;] set aside agency action[;] enjoin or stay the agency action[;] remand the matter for further proceedings[;] or enter a declaratory judgment order. . . .

In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

Given the current posture of the case, the appropriate relief under

RCW 34.05.574 would be

- (i) to set aside the denial of a LEOFF Plan 2 duty disability benefit in the Final Order as premature; and
- (ii) to remand to the administrative tribunal to apply the statute and rule to Mr. Shaw's unique factual situation, using the naturally and proximately test and WAC 415-104-480, as appropriate.

But RCW 34.05.574 does not authorize this Court to make de novo findings or conclusions regarding Mr. Shaw's mental condition—this Court can only remand to DRS to resolve the remaining factual and legal issues. Indeed, when modification of an agency order is necessary, the court “*shall remand* to the agency for [such] modification”

RCW 34.05.574(1) (emphasis added).

E. Mr. Shaw Is Not Entitled to a LEOFF Plan 2 Duty Disability Retirement

For reasons explained above, this Court should remand for a determination of the remaining factual and legal issues: it need not and should not reach the issue of whether Mr. Shaw is in fact entitled to a duty disability retirement. Nonetheless, Mr. Shaw has asked this Court to perform DRS's discretionary function of analyzing and determining his eligibility. To make this determination, this Court would be required to resolve each of three sub-issues: (i) the job functions that Mr. Shaw was unable to perform; (ii) the mental disease or condition that rendered him unable to perform these functions; and (iii) whether that disease or condition was "incurred in the line of duty." This Court should not reach any of these sub-issues. Nonetheless, DRS will address the three sub-issues in the logically necessary order.

1. The Only Aspects of His Job That Mr. Shaw Could Not Perform Were the "Affective Domain Skills"

Only when a tribunal knows exactly what job functions Mr. Shaw was unable to perform, can it determine which of the various mental conditions suggested in the administrative record rendered him unable to do those specific functions. Mr. Shaw had no difficulties with the technical aspects of his job. Throughout his career as a firefighter-paramedic, he was acknowledged not only by peers and supervisors, but

by the entire emergency services community, for his technical excellence and ability to handle crisis situations.⁶ Even after his abrupt resignation, he received the VFW's Emergency Medical Provider of the Year Award. CAR 0933.

Although Mr. Shaw was technically competent, he had great difficulty with "affective domain skills," also essential to successful performance as a firefighter-paramedic. CAR 1139. Mr. Shaw's Job Description required (i) the "[a]bility to establish and maintain effective working relations with other employees, supervisors and the public," and (ii) the ability to work within the chain of command to "[f]ollow and implement administrative direction" CAR 0562. The record amply demonstrates his difficulties in both these areas. App. 8-20.

Mr. Shaw's inability either to work in a team environment or to accept the authority of his commanding officers began almost immediately upon hire and continued through the days preceding his resignation. His need to challenge authority and always be "right" led to acts of insubordination, explosive bouts of anger, and ongoing conflict with peers and supervisors. Employees, supervisors, and other medical personnel were all acutely aware of these problems; they were consistently documented in his performance evaluations and personnel file. App. 10-

⁶ App. 8-9 (citing CAR 0256, 0266, 0337-38, 0352, 0354, 0411, 0424, 0432, 0549, 0562, 0574, 0580, 0586, 0589, 0933, 1145, 1151-52, 1162).

21. Because Mr. Shaw's problems with these affective domain skills jeopardized his safety and the safety of his colleagues and the community, his employer ultimately referred him for a fitness for duty exam. CAR 0460.

2. Neither Depression nor PTSD Affected Mr. Shaw's Ability to Perform His Job Functions

In order to establish eligibility for duty disability retirement, Mr. Shaw must show that his inability to perform the job functions described above was affected by the disabling conditions he alleges—PTSD or depression. On this record, Mr. Shaw has not carried his burden to prove either.

a. Mr. Shaw's Depression Was Not Disabling

It is unclear whether Mr. Shaw continues to base his claim for a LEOFF duty disability retirement on depression. Although his initial application to DRS was based entirely on depression, the Presiding Officer understood that he had abandoned depression and that his claim was based solely on PTSD. CAR 0010 (Final Order, COL 21). Because Mr. Shaw has made at least passing reference to depression in his brief to this Court, DRS will address it here. Shaw Br. at 41.

Based on the analysis of forensic psychiatrist, Dr. Fischer, DRS

does not dispute the diagnosis of depression.⁷ However, DRS does dispute that depression is the mental disease that rendered Mr. Shaw unable to perform his job duties, i.e., that created the conflicts with colleagues and those in authority and led to his explosive anger and acts of insubordination.⁸ CAR 1091.

Throughout his firefighting career, Mr. Shaw's depression remained under reasonably good control, excepting occasional periods of transition when his doctors were working to find a medication and dosage that would eliminate certain undesired side effects. CAR 1092. As Dr. Fischer explained, the symptoms of depression are sadness, emptiness, diminished interest or pleasure in life; a depressed person exhibits a certain flatness or lack of energy, an indecisiveness. CAR 1087. However, the record consistently reflects Mr. Shaw as passionate, fiery, explosive, impulsive, and highly decisive in emergency situations. Dr. Fischer concluded that although Mr. Shaw experienced some depression, depression neither caused his work problems nor rendered him disabled.

As explained more fully below, Mr. Shaw would have had all the

⁷ App. 29 (citing CAR 0465, 0508-10, 0633-729, 1069, 1087).

⁸ During the last two years of his career, Mr. Shaw submitted at least four applications for one form of disability or another, based on a mild depression. All were denied. *See* CAR 0487 (2005 denial of L&I application alleging depression NOS 311); CAR 0567 (2007 denial of second L&I application alleging depression NOS 311); CAR 0679 (2008 denial of application for long-term disability from a private disability carrier alleging depression); CAR 0576-77 (2008 denial of LEOFF disability retirement alleging depression "related to work stress").

same problems with anger management—dealing with peers and supervisors, and functioning within the chain of command—whether or not he was periodically depressed. He failed to carry the burden to prove that his depression was disabling.

b. PTSD Was Not the Source of Mr. Shaw's Difficulties With the Affective Domain Skills Required by His Job

When DRS denied his initial application for a LEOFF Plan 2 duty disability based on depression, Mr. Shaw changed his claim, asserting that his difficulties at work arose from PTSD. CAR 0003 (Final Order, FOF 10). The Presiding Officer understood that his claim on appeal was based exclusively on his newly asserted claim of PTSD. CAR 0009 (Final Order, COL 21).

Mr. Shaw has not carried his burden to show that he had PTSD. Ipso facto, PTSD cannot be the mental condition that caused his problems at work. After an extensive review of the entire documentary record, forensic psychiatrist Dr. Fischer concluded that Mr. Shaw did not meet the diagnostic criteria for PTSD.⁹ She saw no indication in the record of the intense level of anxiety and avoidance associated with PTSD. Nothing in Dr. Vlahakis' notes (or elsewhere in the record) indicated that Mr. Shaw was completely overwhelmed by his alleged sexual abuse; that he re-

⁹ App. 32, 33-34 (citing CAR 0814-15, 1066-67, 1098-1104).

experienced any traumatic event associated with the alleged abuse (through nightmares, flashbacks, and the like); or that he tried to block out or avoid reminders of the alleged childhood abuse. CAR 1100.

Dr. Fischer further concluded that the circumstances under which Dr. Vlahakis, Mr. Shaw's psychiatrist, began to assert that he had PTSD simply belied the doctor's credibility.¹⁰ Dr. Vlahakis had treated Mr. Shaw for almost five years and made no mention at all of PTSD in Mr. Shaw's clinical records. As a seasoned psychiatrist, with particular expertise with issues arising in paramilitary organizations, Dr. Vlahakis would be presumed to have considered whether Mr. Shaw had PTSD. Under these circumstances, the fact that no mention of PTSD appeared in Dr. Vlahakis' clinical notes was telling. CAR 1101. Indeed, Dr. Vlahakis' late assertion that Mr. Shaw had PTSD appeared a concession to a suggestion from Mr. Shaw himself.¹¹

Mr. Shaw asks this Court to find Dr. Vlahakis and Dr. Dougherty to be more credible than Dr. Fischer. Even if this Court could make credibility findings on judicial review, his argument would fail for various reasons. Dr. Vlahakis' inherent bias as Mr. Shaw's treating physician, the

¹⁰ App. 32-33 (citing CAR 0598-99, 1100).

¹¹ When Mr. Shaw's application for a LEOFF Plan 2 duty disability based on depression was denied, his prior attorney (and other backers from the LEOFF Plan 2 governing board) suggested that he "ask his doctor to diagnose [PTSD]." Although his doctor had previously refused to diagnose PTSD, after this suggestion Dr. Vlahakis changed his analysis to PTSD. CAR 0582, 0590.

limited source of his information, and the shifting nature of his diagnosis all undermine the credibility of his testimony. Dr. Dougherty simply did a brief interview with Mr. Shaw as part of his application for social security disability. Even if the “attending physician rule” were applicable in LEOFF cases (which DRS does not concede), at most the rule requires the tribunal to give “special consideration” to the opinion of a treating doctor. *See Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988) (“special consideration does not require the [tribunal] to give more weight or credibility to the attending physician’s testimony”). In short, Mr. Shaw did not carry his burden to prove that he had PTSD—much less that PTSD negatively affected his work performance.

c. The Only Condition That Affected Mr. Shaw’s Ability to Perform His Job Functions Was a Longstanding Personality Disorder

The record shows that Mr. Shaw’s difficulties with the affective domain skills required by his job were caused by a longstanding personality disorder. Although DRS has no burden to prove that Mr. Shaw had a personality disorder, the conclusions of Dr. Fischer in this regard are useful to assist the trier of fact in understanding why Mr. Shaw’s own assertions—regarding PTSD and/or depression as the source(s) of his disability—should be rejected.

After an extensive forensic review of all exhibits admitted in this

proceeding, Dr. Fischer concluded that Mr. Shaw met the diagnostic criteria for a lifelong personality disorder,¹² a disorder that affects a person's perception of the world; emotional experience of the world; and interaction with the world, causing "distress or impairment" in many areas of the person's life, including work.¹³

Mr. Shaw's disorder was centered in his narcissistic world view that his way was the best way and in his propensity toward frustration, anger, and rebellion at those who did not agree with his views.¹⁴ Dr. Fischer noted innumerable instances in which Mr. Shaw's attitudes and behaviors, arising out of his personality disorder, created conflict within the fire department; made it difficult for him to interact with supervisors, co-workers, and the administration; and made it difficult for him to follow orders and implement administrative direction.¹⁵ These problems are exactly the problems that hampered his ability to demonstrate the affective skills necessary for the successful performance of his job.

To summarize, on judicial review, this Court should not make de

¹² Similarly, Dr. Decker, who performed an extensive three-part fitness for duty examination of Mr. Shaw in 2005, noted a personality disorder. CAR 0465, 0538. And, in denying his application for social security disability, both Dr. Dougherty and Dr. Kerster noted the existence of a personality disorder. CAR 0736, 0756, 0763.

¹³ App. 24-25 (citing CAR 0313, 0465, 0573-74, 0538-39, 0543, 0584, 0658, 0664, 0736, 0751, 0756, 0763, 0805, 0809, 1067-68, 1071, 1074-77, 1084, 1156).

¹⁴ App. 26 (citing CAR 0465, 0532, 0539, 0573-74, 0658, 0663, 1075-80).

¹⁵ App. 27 (citing CAR 0543, 0562, 1073, 1081, 1086-87).

novo factual determinations (including those involving the credibility of medical experts) regarding the nature of Mr. Shaw's mental condition. To the extent it nonetheless does, the Court should find that Mr. Shaw has not carried his burden to prove that he was disabled by either depression or PTSD.

3. Mr. Shaw's Disability Was Not "Incurred in the Line of Duty"

In addition to showing that a mental condition affected his ability to work, Mr. Shaw must show that his disability was incurred in the line of duty. To analyze his claim, the Court must examine each work event that Mr. Shaw claims aggravated his mental condition and ask two questions:

- (i) *Is the causal link sufficient?* Is it the case that "but for" the alleged triggering work event, Mr. Shaw would not have developed his disabling problem with anger management (proximately prong of test)?
- (ii) *Is the triggering event sufficiently "work-related"?* Was the alleged triggering event a "distinctive condition of his particular employment" (naturally prong of test)?

Dillon, 82 Wn. App. at 171; WAC 415-104-480(2). Only if both questions are answered in the affirmative will Mr. Shaw be eligible for a LEOFF Plan 2 duty disability.

Mr. Shaw's claim regarding the "triggering work events" that led to his disability is difficult to pin down. In his application to DRS, he listed four "specific 'duty-related' incidents" that allegedly aggravated his

preexisting condition of PTSD “arising from abuse suffered as a child.”¹⁶ CAR 0003 (Final Order, FOF 12). Now, in his brief to this Court, he has modified his focus, citing primarily the amorphous stresses of “being a first responder” and working in a “negative culture.” As set forth below, none of these alleged events or conditions of the work environment support his claim.

a. Mr. Shaw’s Experiences as a First Responder Did Not Aggravate His Alleged PTSD to Cause Problems With Anger Management

Mr. Shaw now appears to claim that dealing with victims as a paramedic and first responder somehow aggravated his preexisting PTSD to the point that it became disabling. However, he has made no attempt to explain how his work as a first responder could have aggravated his alleged PTSD, or how such aggravation could have resulted in an inability to control his anger.

In fact, there is no causal connection between Mr. Shaw’s experiences as a first responder; the aggravation of a PTSD due to childhood sexual abuse; and his problems with anger management. First, his work as a first responder did not aggravate his alleged preexisting PTSD. To the contrary, the record clearly shows that Mr. Shaw thrived on

¹⁶ Mr. Shaw characterized these events as follows: (i) an occasion in which he was accused of inappropriate contact with teenage girls; (ii) an occasion in which he was accused of improprieties with a female news reporter; (iii) an occasion in which he was accused of making inappropriate remarks regarding a nurse’s pregnancy.

his work as a paramedic and excelled as a first responder through to the end of his career. Nor would experiencing horrific injuries as a first responder be expected to aggravate a PTSD caused by sexual abuse. Only events that had some sort of sexual overtone could conceivably aggravate such PTSD (by causing him to re-experience the abuse). CAR 1101. Second, even if his work as a first responder did aggravate his alleged PTSD, testimony establishes that any aggravation would simply have caused him to withdraw and avoid situations involving sexual innuendo involved—not lead to explosive anger.¹⁷

It simply cannot be said that “but for” his work as a first responder, Mr. Shaw would not have had disabling problems with anger management. Because the causal link is insufficient, Mr. Shaw’s experiences as a first responder provide no basis on which to conclude that his disability was “incurred in the line of duty.”

b. Negative Interactions with Supervisors and Peers Did Not Aggravate Mr. Shaw’s Depression to Cause Problems With Anger Management

In addition, Mr. Shaw now appears to claim that working within a negative work environment somehow aggravated his depression to the point that it became disabling. Again, he has made no attempt to explain how an alleged aggravation of his depression caused his difficulties with

¹⁷ App. 34 (citing CAR 1102-04).

anger management or why a negative work environment is sufficiently work-related to support a duty disability.

DRS does not disagree that Mr. Shaw experienced negativity at the fire station, largely of his own making.¹⁸ He found it difficult to deal not only with fellow fire-fighters and paramedics, but also with other administrative staff and medical professionals with whom he was required to interact. When people did not conform to his expectations, he reacted with frustration and anger. When rules did not make sense to him, he flouted them; when called on such insubordination, he complained that his supervisors were treating him unfairly.

Even if this self-created negativity contributed to Mr. Shaw's depression, it cannot be said that "but for" the negativity, Mr. Shaw would not have had his problems with anger management. Forensic psychiatrist Dr. Fischer concluded that there was no causal connection between Mr. Shaw's depression and his difficulties with anger management, that his explosive outbursts, arising from his personality order, would have occurred with or without the overlay of depression. The causal prong of the incurred-in-the line-of-duty test is not met.

Moreover, even if Mr. Shaw's work environment was the "but for" cause of his difficulties with anger management, a negative work

¹⁸ Chief Sinclair testified that Mr. Shaw "was kind of like a little dark cloud" walking around the fire station creating negativity wherever he went. CAR 1154.

environment is not sufficiently “work-related” to support a duty disability. Under the “naturally prong” of the incurred-in-the line-of-duty test and WAC 415-104-480, the conditions alleged to have caused the disability must be “distinctive of the worker’s particular employment” in the sense that they are not “conditions [of] everyday life or [conditions of] all employments in general” that have simply “happened to occur” in the worker’s own employment situation. *Dillon*, 82 Wn. App. at 172. Further, the “distinctive conditions” causing the disability “must be conditions of employment, that is, conditions of the worker’s particular occupation as opposed to conditions coincidentally occurring in his or her workplace.” *Id.* The disability must arise out of an “action or activity occurring in conjunction with . . . employment . . . as a . . . firefighter *and* required or authorized by law, rule, regulations, or condition of employment or service.” WAC 415-104-480(2) (emphasis added).

Even if Mr. Shaw experienced a negative work environment that contributed to his depression, a negative work environment is not sufficiently “work-related” to meet the “naturally prong” of the incurred-in-the-line-of-duty test. For example, in *Woldrich*, the court found that (i) a disciplinary demotion could not be considered to be an act taken in pursuance of police work; and, therefore, (ii) any disease caused by such demotion was not sufficiently work-related to be deemed to have been

incurred in the line of duty. *Woldrich*, 84 Wn. App at 390 (duties of a police officer do not include being demoted). Moreso here, Mr. Shaw's heated disagreements with colleagues and defiance of authority within the fire department cannot be deemed to be actions taken in pursuance of firefighting or emergency medical services. They are not incidents of Mr. Shaw's *employment per se*, but rather incidents that occurred "coincidentally in the workplace." The negativity at work is simply not sufficiently "work-related" to support the "naturally prong" of the test.

c. Events Involving Innuendo Did Not Aggravate His Alleged PTSD to Cause Problems With Anger Management

In his revised application for duty disability benefits, Mr. Shaw claimed that various events at work, involving sexual overtone, aggravated his preexisting PTSD to the point that it became disabling. He made no attempt to explain how such aggravation could have resulted in an inability to control his anger, or why these events were sufficiently work-related to support a duty disability.

One event involved a DUI presentation to the local high school, in which Mr. Shaw tried to "shock and awe" his audience in a fashion that some thought was overly graphic. Ultimately, Mr. Shaw characterized complaints about his presentation as "accusations of inappropriate contact with teenage females." CAR 0606. Another event involved Mr. Shaw's

jumping to the conclusion that the Assistant Chief was spreading rumors falsely accusing him of improprieties with a female reporter. CAR 0607. After an exhaustive investigation, the City concluded that there had been no rumors at all. CAR 0345-46.

First, there is no causal connection between the alleged events and Mr. Shaw's difficulties with anger management. Dr. Fischer saw no indication in the record that any of the alleged incidents had "aggravated" Mr. Shaw's alleged PTSD in the first instance:

if something was so traumatic that one got overwhelmed when they were reminded about it or they had constant nightmares or flashbacks, you would expect to see that . . . they had the avoidance symptoms [associated with PTSD.] [T]hey would pull back, they would not talk about it. It would be so overwhelming to them that . . . they wouldn't be able to function in situations that reminded them of it.

CAR 1103. Neither the DUI incident nor the affair incident overwhelmed Mr. Shaw to the degree that would be expected in PTSD. He certainly did not "pull back" in avoidance. Rather, he actively pursued both events in an attempt to "clear his name," talking to numerous people, threatening to sue, and generally "stirring the pot." CAR 1103-04. The anger Mr. Shaw exhibited in response to these events simply reflected his personality disorder, not a typical response to a PTSD caused by sexual abuse. It cannot be said that "but for" these incidents Mr. Shaw would not have had disabling problems with anger management: the events establish no causal

basis on which to conclude that his disability was incurred in the line of duty.

Second, even if the foregoing events aggravated Mr. Shaw's (alleged) PTSD and had a causal connection to his disabling anger, they are not sufficiently "work-related" to satisfy the incurred-in-the-line-of-duty test. Neither an overly graphic presentation at the local high school nor an overreaction to a perceived (but nonexistent) rumor can be deemed to be actions taken in pursuance of firefighting or emergency medical services. Once again, they are not incidents of Mr. Shaw's employment per se, but rather incidents that occurred "coincidentally in the workplace."

F. Mr. Shaw Is Not Entitled to Fees Under Either RCW 49.48.030 or RCW 4.84.340-.360

If this Court rules in favor of Mr. Shaw, he nonetheless will not be entitled to attorneys' fees under either RCW 49.48.030 or RCW 4.84.340-.360. RCW 49.48.030 is a Department of Labor and Industries statute, governing the award of attorneys' fees in actions in which employees seek additional wages from their employers. RCW 49.48.030 provides no authority for the assessment of fees against a defendant who is not the person's employer or former employer. *City of Kennewick v. Bd. for Volunteer Firefighters*, 85 Wn. App. 366, 370, 933 P.2d 423 (1997). DRS

was not Mr. Shaw's employer. Thus, his reliance on *Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (2002), and *Merino v. State*, 179 Wn. App. 889, 320 P.3d 153 (2014), is misplaced. In both cases, fees were awarded against the employer, *not* DRS.

Nor is he entitled to fees under the Washington Equal Access to Justice Act (EAJA, RCW 4.84.340-.360). RCW 4.84.350 provides,

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified

RCW 4.84.350(1).

Mr. Shaw is not entitled to fees under the EAJA because the Final Order was "substantially justified." To show that its action was "substantially justified," an agency must demonstrate that its action had a reasonable basis in law and fact. *Constr. Indus. Training Coun. v. Wash. St. Apprenticeship & Training Coun. of Dep't of Labor & Indus.*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). The fact that an agency did not prevail on judicial review does not create a presumption that its position was unreasonable or not substantially justified. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988); *see also Constr. Indus. Training Coun.*, 96 Wn. App. 59. Indeed, when a case involves a close question of statutory interpretation, courts have regularly found an agency's carefully

considered action to be reasonable and “substantially justified”—even if ultimately found by the court to be incorrect. See *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 535-36, 979 P.2d 864 (1999).

If this Court affirms DRS’s adoption of the incurred-in-the-line-of-duty standard and remands for the agency to apply the naturally and proximately test, the Final Order will have been substantially justified. Because the Presiding Officer had no authority to exercise DRS’s discretionary authority to interpret the statute, by adopting an aggravation rule or applying the proximate cause test before the agency itself articulated its causal standard, its conclusion—that *Dillon* and *Woldrich* “mark[ed] the limit” of her authority to incorporate workers’ compensation law into LEOFF—substantially justified. Accordingly the EAJA provides no authority for fees.

V. CONCLUSION

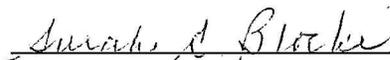
DRS’s Final Order correctly held that the incurred-in-the-line-of-duty standard, set forth in WAC 415-104-480 and interpreted by the “naturally and proximately test” in *Dillon*, should be applied to determine eligibility for LEOFF Plan 2 duty disability retirement. Because this standard does not require that an event at work be the sole cause of a member’s disability (nor, in practice, does DRS require it to be), the Final

Order should not have dismissed Mr. Shaw's claim on this basis.

At this stage in the proceeding, the only relief available under RCW 34.05.574 is for this Court (i) to set aside the denial of a LEOFF Plan 2 duty disability as premature; and (ii) to remand to the administrative tribunal to apply RCW 41.26.470 and WAC 415-104-480 to Mr. Shaw's unique factual situation and determine his eligibility for a LEOFF Plan 2 duty disability.

RESPECTFULLY SUBMITTED this 24 day of July, 2015.

ROBERT W. FERGUSON
Attorney General


SARAH E. BLOCKI
WSBA No. 25273
Assistant Attorney General

Attorneys for Respondent
Department of Retirement Systems

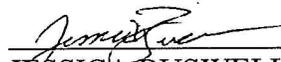
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on July 24, 2015, I caused true and correct copies of the foregoing *BRIEF OF RESPONDENT DEPARTMENT OF RETIREMENT SYSTEMS* to be filed with the Washington State Court of Appeals, Division II and be served as follows:

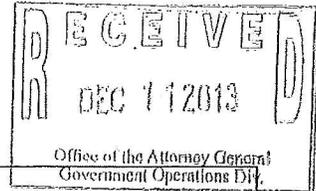
U.S. Mail Postage Prepaid via Consolidated Mail Service:

Wayne Williams
Williams, Wyckoff & Ostrander, PLLC
P.O. Box 316
Olympia, WA 98507

DATED this 24th day of July, 2015, at Olympia, Washington.



JESSICA BUSWELL
Legal Assistant



CERTIFICATION OF MAILING

I hereby certify that I have this day served a copy of this document upon the parties of record in this proceeding by mailing each of them a copy thereof, properly addressed and postage prepaid. Dated at Olympia, Washington, this 9th day of December, 2013.

Jessie Jackson
Jessie Jackson, Appeals Coordinator
Department of Retirement Systems
Olympia, Washington

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS
BEFORE THE PRESIDING OFFICER

<i>In re the Appeal of</i>)	Docket No. 11-L-002
)	
FRANK SHAW)	
)	FINAL ORDER
<i>for LEOFF Plan 2 line-of-duty</i>)	
<i>disability retirement</i>)	

STATEMENT OF THE CASE

Appellant Frank Shaw, formerly a member of the Washington Law Enforcement Officers' and Firefighters' Retirement System, Plan 2, now retired for disability (non-duty), requested a hearing before the Department of Retirement Systems (DRS or the Department) to contest its failure to grant him a retirement for disability incurred in the line of duty.

A hearing was held in Ellensburg on August 2, 2012, at which Mr. Shaw appeared and testified, and in Yakima, Washington, on August 3, 2012. Attorney Wayne Williams represented Mr. Shaw. Assistant Attorney General Sarah Blocki represented the Department.

ISSUE

Whether Mr. Shaw, retired from LEOFF Plan 2 for disability (non-duty), is eligible for duty disability benefits under RCW 41.26.470 and WAC 415-104-480.

RESULT

Mr. Shaw has not shown that he is eligible for duty disability benefits under RCW 41.26.470 and WAC 415-104-480.

FINDINGS OF FACT

DRS and LEOFF Plan 2

1. The Washington State Department of Retirement Systems (the Department or DRS) is the agency responsible for administering the statewide Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF).¹
2. State statutes set all significant terms for participation in, and benefits payable from, LEOFF. Using statutory formulas, LEOFF pays defined retirement benefits to members who become eligible to retire for disability before they are eligible to retire for service.
3. This appeal concerns benefits in Plan 2, the plan covering those who became members of LEOFF on or after October 1, 1977.²

Claim for Benefits and Pre-Appeal Procedure

4. Mr. Shaw became a member of LEOFF in or about September 1989, when he was first employed as a fire fighter/paramedic with the City of Ellensburg Fire Department. He remained an active contributing member of LEOFF, in Plan 2, until he resigned his employment as a fire fighter/paramedic with Kittitas Valley Fire and Rescue (KVFR) in October 2007.
CAR 0001
5. In or about late November 2007 Mr. Shaw applied to the Department for LEOFF Plan 2 disability retirement.
6. By letter of April 17, 2008, the Department's LEOFF plan administrator denied the application, citing a lack of supporting documentation to show that Mr. Shaw was unable to perform the duties of his position at the time of his separation from employment.
7. On September 6, 2008, after additional internal review, a successor plan administrator approved Mr. Shaw's claim for disability retirement (non-duty or "earned" disability), citing medical opinion that Mr. Shaw was incapacitated for continued employment as a fire fighter/paramedic due to depression and anger management issues.
8. On March 5, 2009, Mr. Shaw notified the Department that he did not agree with its ruling that he was not eligible for duty-related disability benefits; this notification was treated as a petition for internal review of a denied claim for benefits, under the Department's procedure in chapter 415-04 WAC.

¹ RCW 41.50.030(1)(c), .050, .055, .060.

² The Washington State Legislature created LEOFF in 1969, to take effect March 1, 1970. This original plan became known as LEOFF Plan 1, while the substantially revised plan that took effect on October 1, 1977 became known as LEOFF Plan 2.

9. In a decision issued August 17, 2009, The Department's petitions examiner denied Mr. Shaw's claim for retirement for duty-related disability, concluding that he had not established that his disability was work-related.
10. In September 2009, through counsel, Mr. Shaw asked the Department to reconsider its decision, and on April 2, 2010, submitted a formal motion to that effect with additional documentation. With this motion, Mr. Shaw asked the Department to consider him mentally disabled on the basis of previously-undiagnosed post-traumatic stress disorder (PTSD), as first described in February 2010 by his treating psychiatrist.
11. In a second petition decision issued January 31, 2011, the Department's petitions examiner again denied Mr. Shaw's claim, affirming that his mental disability was not incurred in the line of duty. This decision rejected the newly-asserted PTSD claim in view of the history of FS's work performance and the course of his psychiatric treatment.
12. On March 31, 2011, Mr. Shaw filed a Notice of Appeal with the Department, requesting a hearing to challenge the Department's January 31 denial decision.

In support of his claim that "he qualifies for a duty related disability benefit provided by RCW 41.26.470(7) retroactive to his date of separation from service", he stated, in Part III,

Specific duty-related incidents aggravated Mr. Shaw's pre-existing condition of post-traumatic stress disorder (PTSD) arising from abuse suffered as a child. The resulting disability was incurred in the line of duty. Those incidents include: a) a May 19, 2000, accusation of inappropriate contact with a teenaged girl while on duty at the fire department. That accusation was later shown to be groundless; b) A January 2001 false accusation of an affair with a married female reporter while on duty at the fire department; c) August 2005 verbal altercation with medical staff at Harborview Hospital in Seattle during transit of an injured patient; and d) an August 10, 2005, incident while on duty at the fire station which ultimately led to him leaving his job . . . The August 10, 2005 incident and resulting inability to perform his job were a direct result of incidents occurring in the line of duty.

CONCLUSIONS OF LAW

Jurisdiction, Burden of Proof

1. The Department of Retirement Systems has jurisdiction over the parties and the subject matter of this appeal.³
2. The Department administers the Law Enforcement Officers' and Firefighters' (LEOFF) Retirement System, implementing the provisions of chapter 41.26 RCW,⁴ which provides for an actuarial reserve system for the payment of death, disability and retirement benefits to law enforcement officers and firefighters, and to their beneficiaries.⁵ As part of the Department's implementation of chapter 41.26 RCW, the Director has adopted administrative rules governing unique aspects of LEOFF administration.⁶
3. This proceeding is conducted under the Washington Administrative Procedure Act (WAPA). The Presiding Officer enters this Final Order for DRS, as the Director's designee.⁷
4. Mr. Shaw has the burden of proof in this appeal.⁸

Applicable Provisions and Scope of Issue

5. *Statute* The LEOFF retirement system authorizes retirement benefits for members who become totally incapacitated for continued LEOFF-eligible employment. In LEOFF Plan 2, RCW 41.26.470(1) states, in part,

A member of the retirement system who becomes totally incapacitated for continued employment by an employer as determined by the director shall be eligible to receive an allowance under the provisions of RCW 41.26.410 through 41.26.550. . . .⁹
6. *Duty Disability Amendment* Before 2004, RCW 41.26.470(1) applied to all incapacitated LEOFF members, without distinction as to how an incapacity arose. In its 2004 session the Washington State Legislature (Legislature) added two subsections affecting contributions and benefits when a member retires for disability "in the line of duty," as follows:

(6) A member who becomes disabled in the line of duty, and who ceases to be an employee of an employer except by service or disability retirement, may

³ Chapters 41.50 RCW and 41.26 RCW; WAC 415-04-050(1), 415-08-020(1).

⁴ RCW 41.50.055.

⁵ RCW 41.26.020.

⁶ WAC 415-104-005, 415-104-015.

⁷ RCW 41.50.060; RCW 34.05.425(1)(b), 34.05.461(1)(b); WAC 415-08-025.

⁸ WAC 415-08-420(2).

⁹ The referenced statute sections do not affect *eligibility* for a disability retirement allowance under RCW 41.26.470(1).

request a refund of one hundred fifty percent of the member's accumulated contributions. Any accumulated contributions attributable to restorations made under RCW 41.50.165(2) shall be refunded at one hundred percent. A person in receipt of this benefit is a retiree.

(7) A member who becomes disabled in the line of duty shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five.¹⁰

7. *Department Rules* In December 2004 the Department adopted rules implementing the subsections newly added to RCW 41.26.470. WAC 415-104-485 (non-duty disability retirement) and WAC 415-104-480 (duty disability retirement) guide the Department's application of RCW 41.26.470(1),(6) and (7), and provide some detailed information for applicants for both types of disability retirement. Both rules were in substantially their present form by May 2007.¹¹

8. *Duty Disability Rule*

WAC 415-104-480(1) and (2) state,

This section applies to you if you are a LEOFF Plan 2 member who incurs a disability in the line of duty per RCW 41.26.470 (6) and (7) and this section.

(1) **Who is entitled to duty disability benefits?** Any member of LEOFF Plan 2 who the department determines has:

- (a) Incurred a physical or mental disability in the line of duty;
- (b) Become totally incapacitated for continued employment in a LEOFF eligible position; and
- (c) Separated from a LEOFF eligible position due to the disability.

(2) **How is "line of duty" defined?** Line of duty means any action or activity occurring in conjunction with your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or service.

9. *Scope of Issue* The parties agreed to the following statement of issue for the purpose of preparing and presenting their cases:

In granting Mr. Frank Shaw non-duty disability benefits under WAC 415-104-485, the

¹⁰ Law of 2004, ch. 4 § 1 (as amended, Laws of 2005, ch. 451, § 1 (subsection (7))).

¹¹ Amendments effective October 1, 2013, did not affect the subsections at issue here.

Department determined that Mr. Shaw had

- (i) incurred a mental disability;
- (ii) become totally incapacitated for continued employment in a LEOFF eligible position; and
- (iii) separated from his LEOFF-eligible position due to the disability.

The only issue raised in this appeal is whether the foregoing mental disability was "incurred in the line of duty," such that Mr. Shaw is eligible for duty disability benefits under RCW 41.26.470 and WAC 415-104-480.

Analysis

10. This order denies the Appellant's claim for LEOFF disability retirement in the line of duty because the claim as presented is not sufficiently supported by law that can be applied in this forum. For the following dispositive analysis it is not necessary to address or determine how his disabling condition(s) came about, or what his disabling condition(s) may have been.
11. The Department denied Mr. Shaw's application for duty disability retirement benefits quoting the terms of WAC 415-104-480(1)(a). This subsection remains the focus of the parties' arguments, and the central provision for resolution of this case. As interpreted by our state appellate courts, "incurred in the line of duty" in that subsection means that performance of duties as a law enforcement officer or firefighter must have caused a condition that disabled an applicant for further performance of duty in those roles.
12. Both the rule and the statute section it implements apply to members of LEOFF Plan 2. When the Legislature enacted LEOFF Plan 2 in 1977, it amended the existing LEOFF statute, placing the new Plan 2 provisions alongside the original provisions, and specifying that the new provisions applied only to new members.¹² It later designated in more detail those provisions that apply to only members of Plan 1, to only members of Plan 2, and to members of both plans.¹³ Because the Legislature expressly designated which LEOFF provisions apply to members of the two LEOFF plans, Plan 2-specific provisions would not normally be interpreted or applied by reference to Plan 1-specific provisions.
13. The benefits at issue here are authorized under Plan 2, but since the rest of this discussion includes reference to some terms of LEOFF Plan 1, two points of difference between the plans are briefly noted. (1) Members of LEOFF Plan 2 are covered by this state's workers' compensation scheme, but Plan 1 members

¹² Laws 1977 ex.s. ch. 294 § 25.

¹³ "RCW 41.26.080 through 41.26.3903 shall apply only to members of plan 1." RCW 41.26.075; "RCW 41.26.420 through 41.26.550 shall apply only to plan 2 members." RCW 41.26.410; "RCW 41.26.010 through 41.26.062 shall apply to members of plan 1 and plan 2." RCW 41.26.005.

are not.¹⁴ (2) In Plan 2, the Department determines whether a member is eligible for disability retirement, and its final agency orders are appealable by petitions for judicial review under the state Administrative Procedure Act, chapter 34.05 RWC. In Plan 1, disability retirement applications are decided by local police and fire service disability boards, whose orders are subject to only limited review by the Department director; courts review those boards' orders by means of statutory writs of certiorari, so standards of judicial review may differ slightly as a result of the differing appeal procedures.

14. The LEOFF Plan 1 duty disability statute section states,

Any member, regardless of age or years of service may be retired by the disability board, subject to approval by the director as hereinafter provided, for any disability incurred in the line of duty which has been continuous since his or her discontinuance of service and which renders the member unable to continue service.

RCW 41.26.120 (emphasis added).

The corresponding LEOFF Plan 2 subsection uses different phrasing,

A member who becomes disabled in the line of duty shall be entitled to receive a minimum retirement allowance . . .

RCW 41.26.470(7) (emphasis added).

Observing the express statutory separation between provisions governing LEOFF Plans 1 and 2, the phrase "becomes disabled in the line of duty" in RCW 41.26.470(7) would not normally be read together with, or assumed to be related to, "incurred in the line of duty" in RCW 41.26.120. In the particular case of retirement for disability in the line of duty in Plan 2, however, the language of the governing rule somewhat moderates the otherwise strict separation between Plan 1 and Plan 2 statute sections.

15. The Department initially adopted WAC 415-104-480 more than 25 years after the enactment of Plan 2. WAC 415-104-480 expressly acknowledges RCW 41.26.470(7) in its introductory sentence, yet does not mirror its language. Instead, in subsection (1) (a), the rule uses the phrase "incurred in the line of duty", incorporating the crucial language in RCW 41.26.120 for duty disability retirement in Plan 1.
16. Our state appellate courts interpreted the phrase "incurred in the line of duty" as it appears in RCW 41.26.120 in two 1996 cases, *Dillon v. Seattle Police Pension Board*, 82 Wn. App. 168 (1996), and *Woldrich v. Vancouver Police Pension Board*, 84 Wn. App. 387 (1996), outlined here.

¹⁴ RCW 41.26.480; 41.26.270.

17. Dillon Dillon was a police officer with the Seattle Police Department. The Seattle Police Pension Board (board) approved his retirement for disability (non-duty) as a result of an accidental off-duty gunshot injury to one of his hands. However, within three years, the board ordered him to return to work as a patrol officer. Mr. Dillon did not agree with the board's order, sharing the view of his physician and other city police officers that he was not capable of performing certain critical protective functions of police work because of residual pain and dysfunction in his injured hand. He returned to work, but his concerns about his performance caused anxiety and depression, for which he received psychiatric treatment. Dillon took a period of disability leave, but the board canceled his leave after five months and ordered him to return to work on a trial basis. The Department reviewed this second board order, reversed it because it determined that Dillon was mentally disabled, then remanded to the board to decide whether his disability was incurred in the line of duty. On remand, the board decided that Dillon's mental disability was not incurred in the line of duty.

Division One of the Court of Appeals reversed the Board's decision, deciding that Dillon did incur his mental disability in the line of duty. The court observed, "the [LEOFF] statute does not define what constitutes an injury in the line of duty," nor did any published cases. Noting that in 1985 the Legislature had designated RCW 41.26.120 as "a statute in the nature of a workers' compensation act", the court turned to workers' compensation law, and analyzed Dillon's claim using the causation formula for an occupational disease compensable under the workers' compensation statute: "such disease or infection as arises naturally and proximately out of employment . . ." RCW 51.08.140. Citing *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467 (1987), the court decided that Dillon had presented evidence satisfying both prongs of the formula. For the "proximately" prong, Dillon had to "establish, by competent medical testimony, that his job probably (as opposed to possibly) caused his disease", to establish "that he would not have contracted the disease but for the aggravating condition of his job". This element was satisfied in Dillon's case, where "the clear import of the medical [providers'] testimony is that Dillon's disabling condition was caused by his job." 82 Wn. App. at 172, n. 3. Regarding the "naturally" prong, again quoting *Dennis*, the court concluded that Dillon's mental disability arose naturally out of his distinctive employment because the particular demands of police work were at the root of his disabling concerns about his performance. "The conditions causing his disability were conditions of his particular employment, rather than conditions coincidentally occurring in his workplace, or conditions in everyday life or employment in general". 82 Wn. App. at 173.

18. Woldrich Woldrich was a police officer for the city of Vancouver, Washington. When he was notified that he would be demoted for disciplinary reasons, he experienced a stress reaction that evolved into a "disabling psychological disorder", and he never returned to work. The Vancouver Police Pension Board granted him retirement for mental disability, but denied his claim for line-of-duty disability benefits. The superior court and the Court of Appeals Division Two

upheld the denial. Following Division One's analysis in *Dillon*, the court looked to the *Dennis* formulation for causation of occupational disease in workers' compensation. The court concluded that Woldrich's mental disability was not incurred in the line of duty. His disabling symptoms appeared only after notification of the demotion, so were easily traceable to that event, consistent with the opinion of three mental health professionals (a social worker and two psychiatrists) who saw him in the months following. Even so, the court deferred to the board's interpretation that Woldrich's disability could be in the line of duty only where it arose from something he did or that happened to him while performing the duties of police work. The court adopted the board's view that a psychological reaction to a demotion resulting from his supervisors' dissatisfaction with his job performance (possibly including conduct of personal business using police department equipment and facilities) was not a natural consequence or incident of the distinctive conditions of police work.

19. WAC 415-104-480 became effective in 2004; eight years after *Dillon* and *Woldrich* were published¹⁵ in 1996. In subsection (1), defining eligibility for line of duty disability retirement for LEOFF Plan 2, the Department chose to use the phrase "incurred in the line of duty" from LEOFF Plan 1. Since it could have chosen otherwise, the Department must have intended to align the standard for duty disability in LEOFF Plan 2 with the standard in LEOFF Plan 1, as interpreted and applied in the *Dillon* and *Woldrich* opinions.¹⁶
20. This conclusion means that the Appellant cannot succeed here with his arguments from the difference in wording between RCW 41.26.120 and RCW 41.26.470(7). The WAPA indicates that a presiding officer in an adjudicative proceeding is expected to follow the directives of the acting agency's rules.¹⁷ WAC 415-104-480(1)(a) shows that the Department does not see RCW 41.26.470(7) as creating causation criteria for duty disability retirement in Plan 2 that are less restrictive than those in Plan 1. It is beyond the authority of this forum to examine the validity or wisdom of an applicable agency rule based on perceived differences between a rule and its authorizing statute.
21. Nor can the Appellant succeed in his primary proposal that the Department's rule should incorporate other case law guiding application of workers' compensation provisions. The Appellant's Notice of Appeal asserts, "Specific duty-related incidents aggravated Mr. Shaw's pre-existing condition of post-traumatic stress disorder (PTSD) arising from abuse suffered as a child. The resulting disability was incurred in the line of duty." In his pre-hearing brief, he says, "Mr. Shaw's early life experiences set him up to develop a disabling psychological condition

¹⁵ In 2001, Court of Appeals Division Three also cited and applied these opinions in an unpublished decision, *Olson v. Spokane County Disability Board*, No. 19929-1-III.

¹⁶ To the undersigned's knowledge, the Department has not issued any interpretive statements regarding the phrase "incurred in the line of duty", or interpreted it in appeals of LEOFF disability retirement applications. Since 1981, the Department has not had the authority to review determinations by disability boards that any disability was incurred in the line of duty. RCW 41.26.120(3); RCW 41.26.125(3).

¹⁷ RCW 34.05.570(3)(h).

as a result of the work activities and environment he experienced with the Fire Department.” Again, in his reply brief, he states, “Mr. Shaw’s PTSD became symptomatically evident due to the experiences he had as a result of his employment. The law does not require [that] work experiences be the sole cause of his disabling condition, only a cause.” The Appellant supports these statements with cases applying only the law of workers’ compensation; for this discussion the principle in these cases will be referred to as the aggravation rule.

22. One statement of the aggravation rule was given by our state’s Supreme Court, as follows:

While the Industrial Insurance Act should be liberally construed in favor of injured workers, *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987), a worker claiming entitlement to disability benefits for an occupational disease carries the burden of proving the disabling condition arose naturally and proximately out of employment. *Dennis*, 109 Wn.2d at 481; *Dillon v. Seattle Police Pension Bd.*, 82 Wn. App. 168, 171, 916 P.2d 956 (1996). A worker is entitled to benefits if the employment either *causes* a disabling disease, or *aggravates* a preexisting disease so as to result in a new disability. *Dennis*, 109 Wn.2d at 474 (“[C]ompensation may be due where disability results from work-related aggravation of a preexisting non-work-related disease.”). In an aggravation case, the employment does not cause the disease, but it *causes the disability* because the employment conditions accelerate the preexisting disease to result in the disability. In this sense, it is proper to speak of the *disability* being *caused* by the employment in an aggravation case.

Ruse v. Department of Labor and Industries, 138 Wn.2d 1, 6-7 (1999) (emphasis in original).

23. The Appellant’s claim assumes that the aggravation rule described in *Ruse*, well-established in workers’ compensation, has a role in the application of WAC 415-104-480. However, his arguments do not demonstrate that this is so.

The Legislature did state its intent that the LEOFF statute be considered “in the nature of workers’ compensation act”, as the *Dillon* court noted. In RCW 41.26.270, the Legislature also analogized certain aspects of disability retirement under LEOFF Plan 1 to certain aspects of workers’ compensation in this state, as a basis for “continuance [in LEOFF] of sure and certain relief for personal injuries in the course of employment or occupational disease . . . and . . . protection for the governmental employer from actions at law”.¹⁸ It has already been noted that the *Dillon* and *Woldrich* courts both turned to workers’ compensation law on causation of occupational disease when they considered how to apply “incurred in the line of duty” in RCW 41.26.120.¹⁹

¹⁸ RCW 41.26.270 as amended by Laws 1985, ch.102 §.4. See also note 14.

¹⁹ As noted in the Appellant’s post-hearing brief, these opinions were published some eight years after the legislature changed the workers’ compensation definition of “occupational disease” to exclude “claims based on mental conditions or mental disabilities caused by stress”. The implementing rule of the Department of Labor and Industries lists a number of as examples of mental conditions or disabilities

24. Despite these connections, the workers' compensation scheme and the scheme for law enforcement officers' and firefighters' retirement benefits are set out in separate, independent state statutes. The LEOFF statute does not direct the Department to determine disability retirement claims by reference to any provisions of Title 51, or their related case law. The Department's rules governing disability retirement in LEOFF also give no indication that LEOFF disability benefits should be awarded or denied based on workers' compensation law in general, or the aggravation rule in particular.²⁰ No court decisions have been cited for extending the aggravation rule in workers' compensation to retirement for disability in LEOFF. The *Dillon* and *Woldrich* cases did not involve the aggravation rule; those courts were not addressing claims that the officers' LEOFF employment merely aggravated pre-existing disease conditions to produce their mental disabilities. The Department did not separately address this question when it adopted WAC 415-104-480 after *Dillon* and *Woldrich* were decided. Thus, regarding the criteria for LEOFF line-of-duty disability retirement, *Dillon* and *Woldrich* mark the limit of reference to state workers' compensation law.
25. The definition of "line of duty" in WAC 415-104-480(2), and the holding in *Woldrich*, together dictate that LEOFF retirement for mental disability in the line of duty be granted only upon a persuasive showing that a member's disabling condition arose naturally and proximately from performance of duties particular to LEOFF employment, that is, that performance of those required or particularly authorized duties was the sole cause of a particular disabling condition.

The Appellant does not supply clear countervailing authority by which the workers' compensation aggravation rule could be read into the Department's duty disability retirement rule. Since he bases his claim for duty disability retirement exclusively on application of the aggravation rule, his claim cannot be approved.

caused by stress and so excluded under the statute, such as conflicts with supervisors, relationships with supervisors, coworkers or the public, and actual or perceived loss of a job, demotion or disciplinary action. RCW 51.08.142; WAC 296-14-300(1).

²⁰ Three Department rules address retirement for disability in LEOFF Plan 2, all of which say that DRS may consider determinations by the Department of Labor and Industries (DLI) in deciding a claim for disability retirement. WAC 415-104-480(5)(a) (non-duty); 415-104-485(5)(a) (line of duty); 415-104-482(4)(b) (line of duty – catastrophic). These provisions do not direct or authorize the Department to rely on DLI determinations, or even describe what effect those determinations may have if considered. The statements appear to be informational only, especially by comparison with the statement in WAC 415-104-482(5) that the program administrator "will substantially rely on determinations . . . by the [federal] Social Security Administration . . ." when deciding claims for catastrophic line-of-duty retirement benefits. These types of provisions do not appear in the rules for disability retirement in LEOFF Plan 1.

ORDER

The Appellant's claim for retirement for disability in the line of duty is denied.

Done this 9th day of December, 2013.



ELLEN G. ANDERSON
Presiding Officer
Department of Retirement Systems

Notice of Further Appeal Rights

Reconsideration: Any party to this appeal may ask the DRS Presiding Officer to reconsider this Final Order, but must do so promptly. The party must file a petition for reconsideration within ten days of the mailing date in the certification at the top of this Order. The ten-day time limit is strictly observed; DRS must **receive** the petition within that time. RCW 34.05.470, 34.05.010(6).

A petition for reconsideration must state specific reasons why the Final Order should be changed, and must be addressed to the Presiding Officer at the Department of Retirement Systems, PO Box 48380, Olympia, WA 98504-8380.

Judicial Review: A party may request judicial (Superior Court) review of this Final Order. A petition for judicial review must be filed within 30 days of the Final Order mailing date. **Any party seeking Superior Court review should carefully read and comply with the requirements for judicial review in the state Administrative Procedure Act (chapter 34.05 RCW).** Petitions for judicial review go directly to the Superior Court; it is not necessary to request DRS reconsideration. RCW 34.05.470(5), 34.05.542.

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**WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS
BEFORE THE PRESIDING OFFICER**

In re the Appeal of
FRANK L. SHAW,
For LEOFF Plan 2 Duty Disability

No. 11-L-002
DEPARTMENT'S CLOSING BRIEF

I. INTRODUCTION¹

Mr. Shaw has a lifelong Axis II personality disorder. Since 2001, his doctors have indicated that he also suffers from some degree of depression. After being denied duty disability benefits at least five times based on claims of depression, he has more recently begun to assert that he has post traumatic stress disorder (PTSD). To prevail in his request for a LEOFF Plan 2 duty disability from the Department of Retirement Systems (the Department), he must prove (i) that he has one (or more) of these mental conditions; (ii) that the identified condition rendered him unable to perform his duties as a firefighter-paramedic, and (iii) that the identified condition was "incurred in the line of duty."

Regardless which condition he identifies, his claim must fail. Although he has a personality disorder, that disorder was not incurred in the line of duty. Although he suffered from depression at various points in his career, depression *neither* rendered him unable to perform his duties *nor* was incurred in the line of duty. And, although he claims he has PTSD, the record does not support his claim.

¹ A complete Table of Contents is found at the end of this brief.

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1 authority,² the Department adopted rules implementing the LEOFF Plan 2 statutory requirements that
2 incorporate the Plan 1 language.³ Thus, WAC 415-104-485 (Plan 2 non-duty disability benefits)
3 provides (emphasis added),

4 (1) *Who is entitled to nonduty disability benefits?* Any member of LEOFF Plan 2 who
5 the department determines has:

- 6 (a) *Incurred a physical or mental disability while not in the line of duty;*
7 (b) Become totally incapacitated for continued employment in a LEOFF eligible
8 position; and
9 (c) Separated from a LEOFF-eligible position due to the disability.

8 Analogously, WAC 415-104-480 (Plan 2 duty disability benefits) provides (emphasis added),

9 (1) *Who is entitled to duty disability benefits?* Any member of LEOFF Plan 2 who the
10 department determines has:

- 11 (a) *Incurred a physical or mental disability in the line of duty;*
12 (b) Become totally incapacitated for continued employment in a LEOFF eligible
13 position; and
14 (c) Separated from a LEOFF eligible position due to the disability.

13 Both rules define “line of duty” as follows:

14 *How is "line of duty" defined?* Line of duty means any action or activity occurring in
15 conjunction with your employment or your status as a law enforcement officer or
16 firefighter and required or authorized by law, rule, regulations, or condition of
17 employment or service.

16 WAC 415-104-480(2); WAC 415-104-485(2).

17 To date, no published decision has interpreted the LEOFF Plan 2 disability statutes or
18 regulations per se. However, a handful of cases have interpreted the meaning of the language “incurred
19 in the line of duty,” in relation to LEOFF Plan 1 duty disability retirement.⁴

21 ² See RCW 41.50.055 (LEOFF rulemaking authority).

22 ³ Between 1977 and 2004, LEOFF Plan 2 did not distinguish between non-duty and duty disabilities.
23 RCW 41.26.470(1) simply provided a disability for members who “be[came] totally incapacitated for continued
24 employment.” In 2004, desiring to provide a tax-favored duty disability benefit to members who left service “as a
25 result of a line of duty disability,” the legislature simply promulgated language analogous to the language in
26 subsection (1) to provide a duty disability benefit to members who “be[came] disabled in the line of duty.” Final
Legislative Report, 58th Leg., at 31 (Wash. 2004) (attached).

⁴ The two cases the Department has found that interpret the term “incurred in the line of duty” as used in
the LEOFF statute are *Dillon v. Seattle Police Pension Board*, 82 Wn. App. 168, 916 P.2d 956 (1996), and
Woldrich v. Vancouver Police Pension Board, 84 Wn. App. 387, 928 P.2d 423 (1997).

1 **A. To Be “Incurred in the Line of Duty,” a Mental Condition Must Arise “Naturally” and**
2 **“Proximately” Out of Employment in LEOFF Plan 1**

3 In LEOFF Plan 1, “any member . . . may be retired . . . for any disability incurred in the line of
4 duty, which has been continuous since his or her discontinuance of service and which renders the
5 member unable to continue to serve.” RCW 41.26.120. “The statute does not define what constitutes an
6 injury *incurred in the line of duty*, and no cases [have been] found defining the phrase.” *Dillon v.*
7 *Seattle Police Pension Bd.*, 82 Wn. App. 168, 171, 916 P.2d 956 (1996) (emphasis added). However,
8 because RCW 41.26.120 is “a statute in the nature of a workers’ compensation act,”⁵ the Washington
9 courts have looked to caselaw interpreting the State’s workers’ compensation laws for guidance in
10 interpreting the term in LEOFF. *Id.*

11 Consistent with RCW 51, the courts have adopted one test to determine whether an *injury* is
12 “incurred in the line of duty,” and a somewhat different test to determine whether a *disease* is “incurred
13 in the line of duty” for purposes of LEOFF. In the case of injury, the claimant must simply show that
14 the injury occurred “in the course of employment,” in essence, while the employee was “on the clock.”
15 *Id.* However, for an occupational disease, which often develops incrementally over time, the LEOFF
16 test requires more than a showing that the disease developed and/or was diagnosed during the period in
17 which the employee was employed. Rather, in the case of an alleged occupational disease, including a
18 mental disease, the LEOFF claimant is “required to prove that his mental disease arose ‘*naturally and*
19 *proximately*’ out of his employment.”⁶ *Id.* (Emphasis added.) “The worker must establish, by competent
20 medical testimony, that his job probably (as opposed to possibly) caused his disease.” *Id.* (citing *Dennis*
21 *v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987)).

22 “A [LEOFF employee] shows his disease was *proximately* caused by his work if he
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25 ⁵ RCW 41.26.120 Purpose—1985 c. 102. See *infra* Part II.B., pp. 6-7.

26 ⁶ Correspondingly, RCW 51.08.140 (emphasis added) defines “occupational disease” as “such disease or
infection as arises *naturally and proximately* out of employment.”

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1 establishes he would not have contracted the disease, but for the aggravating condition of his job.” *Id.*
2 (Emphasis added.) To establish that a disease arose naturally out of employment, “a [LEOFF
3 employee] must establish that his or her occupational disease came about as a matter of course as a
4 natural consequence or incident of distinctive conditions of his particular employment.” *Id.* at 172.
5 These conditions do not have to be “unique” to the worker’s particular line of employment. However,
6 they must at least be “distinctive” of the worker’s particular employment, in the sense that they are not
7 “conditions of everyday life or [conditions of] all employments in general” that have simply “happened
8 to occur” in the worker’s own employment situation. Further, the “distinctive conditions” causing the
9 disease “must be conditions of *employment*, that is, conditions of the worker’s particular occupation as
10 opposed to conditions coincidentally occurring in his or her workplace.” *Id.*

11 Two examples will assist in understanding what it means for a disease to “arise naturally” out
12 of LEOFF employment. In *Woldrich v. Vancouver Police Pension Board*, 84 Wn. App. 387, 928 P.2d
13 423 (1997), a police officer received a disciplinary demotion. Upon learning of the demotion, the
14 officer did not return to work; slowly developed “a persecution complex which rendered him
15 psychologically unfit for duty”; and was granted a LEOFF non-duty disability. *Id.* at 389. Seeking a
16 duty disability, the officer argued that “the phrase ‘in the line of duty’ equates to ‘in the scope of
17 employment,’ ” and that “*any* disability by a law enforcement officer which results from his
18 employment, including a disciplinary demotion, is incurred in the line of duty.” *Id.* at 390 (emphasis
19 added).

20 Even though no “*off-the-job stressors*” had been noted, the court declined to find that the
21 officer’s disability had been incurred “in the line of duty” because it had not “*arisen naturally*” out of
22 his employment. Nothing about a disciplinary demotion was distinctive to police work; disciplinary
23 demotions occur generally in all employment situations. Further, the officer’s demotion had not resulted
24 from the officer’s employment per se, i.e., from an act
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1 taken in pursuance of police work. As the disability board had pointed out, “[d]uties of a police officer
2 do not include being demoted . . .” *Id.* at 390.⁷

3 By contrast, in *Dillon*, an off-duty police officer shot himself in the hand while cleaning his
4 gun. After he had received a non-duty disability allowance for approximately three years, the disability
5 board determined that the officer was capable of working as a patrolman and ordered his return to duty,
6 despite a statement from his physician that, because of the hand injury, he still “did not have the
7 function, control and ability” to protect himself or others. Almost immediately, Dillon’s ability to
8 perform his duties was questioned by fellow officers. Dillon himself, greatly concerned about his ability
9 to perform in threatening situations, became anxious and depressed, and developed “psychological
10 problems.”

11 The court found that Mr. Dillon’s psychological problems (and resulting disability) *had* “arisen
12 naturally out of his employment.” Unlike Mr. Woldrich, the performance of actual police duties
13 (handling combative suspects, prisoner alarms, and other threatening situations) with an injured hand
14 gave rise to legitimate anxiety and understandable depression. Nothing in everyday life or in
15 employment generally would have exposed him to such threatening conditions. Because the proximate
16 cause prong was also met, Mr. Dillon was granted a LEOFF duty disability. *Dillon*, 82 Wn. App. at
17 174.

18 **B. The LEOFF Provisions for Disability Retirement Were Created to Allow for Special Tax**
19 **Treatment for Duty Disability Retirements**

20 The legislature has drafted both LEOFF Plan 1 and 2 to allow members to avail themselves of
21 special tax treatment in the case of duty disability retirements. This special tax treatment derives from
22 IRC § 104 and the treasury regulations interpreting it. IRC § 104(a) provides that “[taxable] gross
23 income does not include—(1) amounts received under workmen’s compensation acts as compensation
24 for personal injuries or sickness.” Treasury

25 ⁷ The court noted that because it “give[s] great weight to an agency’s interpretation of the statutes it
26 administers,” it would “defer to the pension board’s interpretation that a stress reaction to a disciplinary
demotion . . . [was] not a disability incurred in the line of duty.” *Id.* at 393.

1 Regulation § 1.104-1(b) (emphasis added) elaborates on this exclusion as follows:

2 Section 104(a)(1) excludes from gross income amounts which are received by an
3 employee under a workmen’s compensation act . . . *or under a statute in the nature of a*
4 *workmen’s compensation act* which provides compensation to employees for personal
injuries or sickness incurred in the course of employment.

5 Disability retirement pensions are considered to meet these requirements if they are (i) provided
6 pursuant to a statute; (ii) available only for service-connected disabilities; (iii) not based on employee
7 contributions; and (iv) not based on years of service or age. Treas. Reg. § 1.104-1(b).

8 “[T]he intent of the [Washington] legislature . . . was to provide in RCW 41.26.120 a statute *in*
9 *the nature of* a workers’ compensation act which provides compensation to employees for personal
10 injuries or sickness incurred in the course of employment.” Laws of 1985, ch. 102, § 1 (emphasis
11 added). By closely tracking the Washington workers’ compensation act (RCW 51) in the interpretation
12 of the LEOFF Plan 1 duty disability statute, the Washington courts have effectively ensured that the
13 LEOFF disability statute will be “in the nature of a workers’ compensation act.”

14 Similarly, the duty disability benefit in LEOFF Plan 2 is intended to “be in the nature of a
15 workers’ compensation act” to achieve tax-favored status. *See* Final Legislative Report, 58th Leg., at 31
16 (Wash. 2004). By adopting WAC 415-104-480, incorporating the LEOFF Plan 1 language “incurred in
17 the line of duty” and interpreting that provision consistent with the LEOFF Plan 1 caselaw, the
18 Department has taken steps that reinforce the legislature’s intent.

19 **III. ISSUE**

20 The issue in this proceeding was set out in this tribunal’s Notice of Hearing and Pre-Hearing
21 Order, dated June 21, 2011, as follows:

22 In granting Mr. Frank Shaw non-duty disability benefits under WAC 415-104-485, the
Department determined that Mr. Shaw had
23 (i) incurred a mental disability;
24 (ii) become totally incapacitated for continued employment in a LEOFF
25 eligible position; and
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(iii) separated from his LEOFF-eligible position due to the disability. The only issue raised in this appeal is whether the foregoing mental disability was “incurred in the line of duty,” such that Mr. Shaw is eligible for duty disability benefits under RCW 41.26.470 and WAC 415-104-480.

Resolution of the stated issue requires further analysis of some of the prongs of non-duty disability retirement. Before this tribunal can determine whether Mr. Shaw’s “mental disability” was “incurred in the line of duty,” the tribunal will have to know *what* mental disability is in question. And, before the tribunal can determine what mental disability is in question, the tribunal will need to know exactly what job functions Mr. Shaw could not do. Only when we know exactly what he was unable to do, can we determine *which* of the various mental conditions suggested in this record caused his inability to perform. In turn, only when we know which of the various mental conditions caused his inability, can we determine whether that particular mental condition was incurred in the line of duty.

Thus, the following sub-issues must be considered, in the following order:

- (A) Which of his job functions was Mr. Shaw unable to perform?
- (B) Did Mr. Shaw have a diagnosable mental condition that rendered him unable to perform the job functions identified in (A)?
- (C) Was the mental condition identified in (B) “incurred in the line of duty,” i.e., did it arise “naturally and proximately” out of his employment with the Ellensburg Fire Department and/or Kittitas Valley Fire and Rescue?

IV. STATEMENT OF FACTS

A. Although Mr. Shaw Remained Technically Proficient Throughout His Career, He Had Great Difficulty Working Cooperatively Within Established Department Protocols

Very good paramedics are hard to come by. And Frank Shaw was a very good paramedic. As I have said to many many people, if I was ever sick and needed medical attention . . . I would have been relieved to look up and see Frank Shaw as the paramedic attending me.

John Sinclair, Fire Chief, Kittitas Valley Fire and Rescue. Tr. 305 (CAR 1145), 311 (CAR 1151).

Indeed, Mr. Shaw was an “excellent firefighter and paramedic,” “one of the most multi-

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1 talented employees” at the Ellensburg Fire Department. *See, e.g.*, Exs. 71-3 (CAR 0411); 82-3 (CAR
2 0432).⁸ He was “outstanding at getting the job done in the emergency setting.” Ex. 79-5 (CAR 0424).
3 “He worked well in a crisis”—proficient in complex extrications, able to multi-task at the scene when
4 resources were low, displaying “an uncommon attention to detail.” Ex. 162 (CAR 0580). And he was
5 passionate about his work—in particular, his patient care. Ex. 162 (CAR 0580).

6 Mr. Shaw’s technical excellence was acknowledged not only by his peers and supervisors, but
7 by the entire area emergency services community. “Area emergency medical providers wouldn’t
8 hesitate to call on Frank to treat the sickest or most seriously injured patient.” Ex. 162 (CAR 0580).
9 Throughout his career, he received many letters of commendation.⁹ In fact, two years after his
10 termination, Mr. Shaw received the VFW’s Emergency Medical Provider of the Year Award. Tr. 93
11 (CAR 0933).

12 In Mr. Shaw’s own words, he was “damn good” at his job; there was “never a time when I
13 couldn’t perform.” Ex. 164-5,8 (CAR 0586,0589). And he remained good until the day he resigned.
14 Asked whether Mr. Shaw’s patient care had deteriorated during the years immediately preceding his
15 resignation, Chief Sinclair responded, “I don’t believe so. I never saw any evidence of that. Up until the
16 day he resigned, I would have let Mr. Shaw work on a member of my family or me.” Tr. 312 (CAR
17 1152).

18 However, Mr. Shaw’s job description required more than technical proficiency. Among the “Necessary
19 Knowledge, Skills, and Abilities” listed on his job description were (i) the “ability to establish and maintain
20 effective working relations with other employees, supervisors, and the public,” and (ii) the ability to “[f]ollow and
21 implement administrative direction.” Ex. 147-3 (CAR 0562). Difficulties in these areas plagued Mr. Shaw’s entire
22 career in firefighting and emergency medical services. From his days in paramedic training (prior to 1989) to his
23 resignation in 2007, Mr. Shaw’s attitudes and behaviors led to regular friction with

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25 ⁸ Throughout this brief, the convention “Ex. x-y” will refer to “page y” in “exhibit x.”

26 ⁹ *See, e.g.*, Exs. 4 (CAR 0256); 8 (CAR 0266); 37 (CAR 0337); 38 (CAR 0338); 45 (CAR 0352); 47
(CAR 0354); 141 (CAR 0549).

1 colleagues and supervisors, and a “pattern of misconduct” involving repeated challenges to the rules of
2 the organization and the authority of his supervisors. Indeed, his career was summarized by “repeated
3 acts of unprofessional conduct, insubordination, [and] angry outbursts,” “a pattern of lashing out at
4 others.” Ex. 130-2,3 (CAR 0532,0533).

5 **1. Even in Paramedic Training, Mr. Shaw Had a Self-Righteous Attitude That**
6 **Colored His Relationships with Instructors and Peers**

7 Mr. Shaw completed his paramedic training at Central Washington University. Even at that
8 early stage in his career, Mr. Shaw was self-assured to the point of being perceived as cocky, if not
9 arrogant. He often projected an attitude that he was right—and that those who disagreed with him were
10 wrong. This attitude led him to confront and challenge instructors and students alike, at times angrily.
11 *See, e.g.,* Ex. 172-2 (CAR 0656) (angrily left university class). As one of his field mentors noted,
12 Mr. Shaw was not intimidated by authority; he would “get in your face” and argue with you. *See*
13 *generally* Tr. 302-03 (CAR 1142-43).

14 **2. Upon Hire and for the First Ten Years of His Career, Mr. Shaw’s Attitude and**
15 **Behaviors Led to Difficulties in His Working Relationships and His Willingness to**
16 **Follow Administrative Direction**

17 Mr. Shaw was hired as a firefighter and paramedic with the Ellensburg Fire Department (EFD)
18 in late 1989. Almost immediately, his superiors noticed the same self-important attitude he had
19 projected as a paramedic student. Summarizing his first couple years on the job, Lieutenant Davis rather
20 diplomatically noted,

21 Frank does seem to present some attitude problems He seems to be very critical of
22 Department policies. It appears he feels that he could make better decisions. He also
23 sometimes makes his own decisions in certain situations where either Department policy
24 or the Officer should dictate what takes place.

25 Ex. 9 (CAR 0267). Indeed, during the early months of his employment, Mr. Shaw had “left the scene
26 [of a fire] and returned to the station without permission [and without] notifying anyone on the fire
27 grounds of his actions.” Ex. 11 (CAR 0269) (February 1990). Another time, Mr. Shaw had been found
28 sleeping in the ambulance during an emergency response. Exs. 10 (CAR 0268); 11 (CAR 0269)
29 (October 1991). Again,

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1 after an emergency call, he had gone to bed, leaving others on his shift to restock the vehicles and put
2 them back into service. Ex. 9 (CAR 0267).¹⁰

3 In the eyes of his superiors, these were “serious violations of the Fire Department rules and
4 regulations,” reflective of a generalized “pattern of misconduct,” and Mr. Shaw was disciplined
5 accordingly. Exs. 11 to 15 (CAR 0269-73). Through this discipline, EFD made clear to Mr. Shaw that
6 his willingness to flout the established protocols and put himself “above the system” was not
7 acceptable.

8 Mr. Shaw demonstrated this same self-righteous attitude in his early interactions with his peers.
9 Rather than work cooperatively as a co-equal team member, he tended to be critical of his peers,
10 treating them abruptly if not rudely.¹¹ Approximately three months after he began employment, Captain
11 Caspar ranked his “attitude toward others” as somewhere between “difficult to work with” and “surly,
12 touchy, quarrelsome, and not cooperative.” Ex. 3-2 (CAR 0254). Shift members noticed—and
13 complained. Ex. 11 (CAR 0269). Indeed, from the beginning of his employment, Mr. Shaw’s abrasive
14 attitude had a dampening effect on the entire workplace.

15 A 1992 event, during the third year of his employment, is further illustrative. After due
16 notification, Mr. Shaw did not appear to take a key promotional exam¹² because it had been scheduled
17 on his day off. He did not inform the examiner of the scheduling conflict; he did not request an alternate
18 sitting for the exam; he simply did not appear at the scheduled time. When asked to explain his apparent
19 contempt for department protocols at a civil service hearing to deal with the matter, Mr. Shaw,
20 apparently without compunction, stated that he had “just wanted to see what would happen. . . . If no
21 one ever makes waves, then the beach never gets

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23 ¹⁰ On an earlier performance evaluation, Captain Pangrazi had stated, “[Mr. Shaw] sometimes doesn’t
realize why things are done in a certain way.” Ex. 6-3 (CAR 0262) (Probationary Evaluation Form, September
1990).

24 ¹¹ In the September 1990 performance evaluation, Captain Pangrazi also noted, “It also appears at this
time that Frank could be . . . weak in his team interaction with his peers.” Ex. 6-3 (CAR 0262).

25 ¹² A firefighter has only two chances to take the exam to promote to first class firefighter. If s/he does not
26 pass after two attempts, s/he will be dismissed. Ex. 23-3 (CAR 0285). If s/he does not promote within five years
of hire, s/he will also be dismissed. Ex. 23-1,2 (CAR 0283,0284).

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1 cleaned.” Mr. Shaw’s dismissive attitude caused considerable disruption within the fire service and he
2 was disciplined for his actions. Ex. 23-4,5,6 (CAR 0286,0287,0288). *See generally* Exs. 17 to 23 (CAR
3 0275-0289); 98-1 (CAR 0464).

4 Similar attitudes and behaviors continued throughout Mr. Shaw’s early career. Despite regular
5 notations in his performance evaluations, Mr. Shaw continued to challenge the system and create
6 barriers to communication and cooperation with his colleagues (from fellow employees to dispatchers
7 to hospital personnel).¹³ With Frank around, the atmosphere was unpleasant and strained. When Rich
8 Elliott joined the organization in 1997 and became Mr. Shaw’s captain, he recognized the same
9 problems as the line of captains before him:¹⁴ a “superioristic attitude”; a need to focus on teamwork
10 and interpersonal skills through a constructive (as opposed to a terse and confrontational) approach; and
11 a strained atmosphere within the department. Ex. 26-1,2,5 (CAR 0294,0295,0298).

12 Although Captain Elliott counseled Mr. Shaw to “expect that [his] view will not be the only one
13 that is viable and deserving of consideration,” Mr. Shaw refused to internalize this feedback or
14 acknowledge that either his attitude or behaviors were problematic. Ex. 26-3 (CAR 0296). In the
15 employee’s section of his 1998 performance evaluation, he wrote,

16 I far exceed my immediate peer group in skills and working knowledge on EMS and Fire
17 response, protocols, and care plans. . . . [The q]uality of [my] work is far more superior
18 than my immediate peers. . . . In my opinion the department has become dumbed down to
accommodate people of questionadle abilities and conviction. . . . I must admit [that] I
cannot adapt to [this] incompetence or unprofessionalism.

19 Ex. 27-5,6 (CAR 0304,0305) (sic). He was always right; to the extent they disagreed, others were
20 wrong.¹⁵

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22 ¹³ Examples include abrupt or rude interactions with administrative staff, colleagues, and dispatchers.
Exs. 25 (CAR 0293); 26 (CAR 0294-99).

23 ¹⁴ Between 1989 and 1997, Captains Caspar, Pangrazi, Young, and Davis had all reported problems in
Mr. Shaw’s attitudes and behaviors to Chief Alder.

24 ¹⁵ Mr. Shaw even framed his Accident Reports to shift responsibility away from himself. During the first
25 month of his employment, Mr. Shaw caused damage to a fire vehicle. He blamed the configuration of the station’s
26 driveway; EFD concluded the problem was “driver error.” Ex. 2-2 (CAR 0251),3 (CAR 0252). The following
year, Mr. Shaw prematurely instructed his colleague to close the station door, causing the door to come down on
the engine. His proposed solution was to “discontinue 2 engine fire rescues.” Ex. 7-3 (CAR 0265). Later,

1 **3. Mr. Shaw's Next Six Years Were Marked By Continued Difficulty Establishing**
2 **Effective Working Relationships and Following Administrative Direction**

3 **a. In 2000, Mr. Shaw's DUI Presentation at Ellensburg High School Created**
4 **a Disturbance Within the Fire Department**

5 After two years as Mr. Shaw's captain, Mr. Elliott was promoted to Assistant Chief of the Fire
6 Department. Looking for extra opportunities to challenge Mr. Shaw and allow him to excel, Assistant
7 Chief Elliott asked him to represent EFD at a joint WSP-EFD¹⁶ DUI presentation at Ellensburg High
8 School in April 1998 and again in April 1999. Exs. 32-1 (CAR 0320); 34-1,5 (CAR 0325,0329).
9 Shortly after the 1999 presentation, Mr. Elliott heard first from a parent and teenager, and then from
10 two of the driver's education teachers, that Mr. Shaw's portion of the presentation had been "overly
11 graphic" and unnecessarily "morbid."¹⁷

12 Nine months later (in February 2000), as EFD was preparing to choose a representative for the
13 April 2000 DUI presentation, the WSP representative from the 1999 presentation (John Sager)
14 approached Assistant Chief Elliott, indicating that Mr. Shaw's presentation had been "unprofessional"
15 and "flirtatious," and suggested that EFD send a different presenter to the April 2000 presentation.
16 Rather than unnecessarily stir the waters by investigating these statements further, Mr. Elliott and the
17 EFD Chief simply decided to pass the opportunity to make the presentation to someone else. Ex. 34-5
18 (CAR 0329). Mr. Elliott asked Mr. Shaw's captain to inform him that another paramedic had been
19 chosen. Ex. 34-5 (CAR 0329).

20 Had Mr. Shaw simply accepted that the opportunity had passed to another department member,
21 these events would have passed quietly away. However, as in other situations in which his actions were
22 questioned, Mr. Shaw reacted defensively, and the matter escalated. In Mr. Shaw's mind, he had been
23 "accused" of "inappropriate contact with teenage girls and

24 Mr. Shaw's foot was bruised when a nozzle fell from an engine. He blamed the engine set-up; the Safety
25 Committee found the accident was an inherent hazard and not preventable. Ex. 24-1 (CAR 0290),2 (CAR 0291).

26 ¹⁶ WSP is the Washington State Patrol.

¹⁷ In 2009, Mr. Shaw told the Department's Petitions Examiner that he had tried to "put a face of reality
on drunk driving" with a "shock and awe portion of the presentation." Ex. 164-3 (CAR 0584).

1 flirting”; the administration had sat on a serious accusation for “thirteen months”; and he was entitled to
2 “clear his name.” In his mind, the Department’s choosing an alternate presenter was amplified to an act
3 of “harassment.” He complained to the City’s Human Resources (HR) Director and to the Fire Chief
4 and discussed legal action. Exs. 29 (CAR 0312-0313); 32 (CAR 0320-0321). However, after much
5 verbal agitation, Mr. Shaw did not pursue his complaints, and, after a thorough investigation, the City
6 Manager wrote a memo in 2001 laying the matter to rest. Ex. 43 (CAR 0348-0349). *See generally*
7 Exs. 29 to 36 (CAR 0312-0336).

8 **b. In 2001, Mr. Shaw’s Response to Events Again Created Disruption Within**
9 **the Department and City**

10 In December 2000, the City of Ellensburg held its holiday “Shop with a Cop” event for under-
11 privileged children. For whatever reason, the local reporter put a disproportionate number of pictures of
12 firefighters (as opposed to “cops”) in her newspaper report of the event; a significant number of those
13 pictures contained Mr. Shaw. A few folks noticed, and there were a few off-hand remarks at EFD that
14 “maybe [the reporter] ‘had something’ for Mr. Shaw.”¹⁸ *See generally* Ex. 41 (CAR 0345-0346).

15 A couple days later, John Sager from the WSP approached the reporter and told her that there
16 was a “rumor in the community” that she and Mr. Shaw were having an affair. The reporter went to
17 Mr. Shaw, demanding that the “rumor” stop. After an eventual investigation, the City Manager
18 concluded that there was not (and never had been) such a “rumor in the community.” Ex. 41 (CAR
19 0345-46).

20 However, on the basis of the reporter’s remarks, Mr. Shaw jumped to the conclusion that
21 Mr. Sager and Assistant Chief Elliott were spreading rumors falsely accusing him of improprieties and
22 again set out to vindicate his name. Ex. 39 (CAR 0339). However, the more people he asked about “the
23 big rumor,” the more he recognized that there was *no* rumor in the Fire
24

25 _____
26 ¹⁸ Although these remarks may not have reflected good judgment in the workplace, they didn’t amount to spreading rumors.

1 Department or elsewhere in the community—other than whatever gossip had been generated by his
2 own inquiry. Ex. 40-4 (CAR 0343). Nonetheless, on Mr. Shaw's insistence, the City did a thorough
3 investigation, concluding that no EFD employees "were aware of any affair rumor circulating in the
4 Fire Department until you raised the matter with some of them yourself." Ex. 44 (0350-0351). The City
5 Manager brought the matter to closure by circulating a generic memo regarding the inappropriateness
6 of workplace rumors. Ex. 42 (CAR 0347). When all was said and done, Mr. Shaw's captain remarked
7 that all the flap certainly "had not hurt Mr. Shaw" and in fact, he had seemed pleased to press his
8 inquiry. Ex. 40-2,4 (CAR 0341,0343). *See generally* Exs. 39 to 44 (CAR 0339-51).

9
10 **c. In 2001 and 2002, Mr. Shaw's Disagreement About His Performance
11 Evaluation Led to an Altercation With the Chief and Discipline for
12 Insubordination**

11 During 1999, 2000, and 2001, Mr. Shaw's self-important attitude and confrontational behavior
12 continued. When Kittcom dispatchers registered a formal complaint regarding his rudeness toward
13 them, without hesitation Mr. Shaw justified his actions to the HR Director saying, "You know me,
14 Judy. I'm rude to people who are incompetent or not doing their job." Ex. 29 (CAR 0312-13). In his
15 mind, he was right; the dispatchers were wrong—he accused Kittcom of "harassment" for having
16 registered the complaint at all. Ex. 29 (CAR 0312-13).

17 In Mr. Shaw's 2001 performance evaluation, Captain Seemiller detailed various recent
18 situations in which Mr. Shaw had disregarded department's rules and undermined the department's
19 ability to work as a team. Of particular concern was Mr. Shaw's "potentially hazardous" willingness to
20 "freelance" at the emergency scene and his condescending, confrontational, and negative comments to
21 his colleagues that were "contrary to the teams [sic] effort." Ex. 49-1,2 (CAR 0356,0357). *See also*
22 Ex. 62 (CAR 0386). The evaluation noted that many were intimidated and withdrew from the give-and-
23 take of ideas when Mr. Shaw was present. Ex. 49-2 (CAR 0357). Again, rather than accept
24 responsibility for his actions, Mr. Shaw reacted—appealing the evaluation, criticizing Captain
25 Seemiller with two pages of invective, requesting a shift change, and calling for the captain's
26 resignation. Exs. 49 (CAR 0356-61); 50 (CAR 0362).

1 After continued friction with Captain Seemiller, acting outside the chain of command, Mr. Shaw took his
2 complaints about the captain directly to the Chief. Ex. 52 (CAR 0364-65). His demeanor was sufficiently
3 threatening that the Chief refused to meet with him alone, and ultimately disciplined him for insubordination.
4 Exs. 52 (CAR 0364-65); 60 (CAR 0384). *See generally* Exs. 48 to 60 (CAR 0355-84).

5 **d. In 2003, Interim Chief Elliott Became So Concerned About Mr. Shaw's Negativity**
6 **and Anger That He Questioned His Fitness for Duty**

7 Spring 2003, brought an avalanche of behavioral problems, large and small, related both to working
8 within the system and to maintaining effective working relationships. To name a few:

- 9 (1) Mr. Shaw refused to complete a simple leave request correctly and lied about the instructions he had
10 received regarding its completion (exs. 63 (CAR 0387-91); 67 (CAR 0396-97); 68 (CAR 0398-99);
11 71 (CAR 0409-11); 79(CAR 0420-26));¹⁹
- 12 (2) Mr. Shaw refused to participate in a patient transport to Harborview Hospital because he disagreed
13 with "how the transport was being handled," upsetting the pilot in the process (exs. 63 (CAR 0387-
14 91); 66 (CAR 0394-95); 67 (CAR 0396-97); 79 (CAR 0420-26));
- 15 (3) Mr. Shaw sat in the emergency vehicle talking to a member of the police department while his
16 colleagues extinguished a dumpster fire (and later rationalized that the police had kept him from his
17 duties) (exs. 66 (CAR 0394-95); 67 (CAR 0396-97); 79 (CAR 0420-26));
- 18 (4) Upset that a door at the local hospital was not working correctly, Mr. Shaw kicked it off its hinges
19 and indicated that his actions were justified (exs. 63 (CAR 0387-91); 9-4);
- 20 (5) Despite repeated requests, Mr. Shaw consistently neglected to complete EMS reports with the level
21 of detail necessary to support patient care and the medical billing process (exs. 71-1 (CAR 0409);
22 79-6 (CAR 0425); 104-4 (CAR 0477); and
- 23 (6) Mr. Shaw challenged EFD's policies, from cell phones to earrings to meals (exs. 63 (CAR 0387-91);
24 79-1,6 (CAR 0420,0425)).

25 In many cases, Mr. Shaw appeared to be "bucking policies [simply] to make a point." Exs. 67-2 (CAR 0397); 79-
26 1 (CAR 0420).

Even Jon Fowler, his captain, union member, and reasonably consistent advocate, indicated that
Mr. Shaw's negative attitude and propensity to anger had rendered him unapproachable, causing a drain on peers
and supervisors alike. Exs. 67 (CAR 0396-97); 71-3 (CAR 0411); 79 (CAR 0420-26). Although Mr. Shaw
realized that "there was apprehension by a lot of members to discuss things with

¹⁹ His captain later regretted that he had not insisted that Mr. Shaw complete the form correctly. Like
others, he acknowledged that he had "not tak[en] a firm stance" with Mr. Shaw in order "to placate him." Ex. 68
(CAR 0398-99).

1 him,” he believed the apprehension was their problem, not his. Ex. 82-2 (CAR 0431).

2 Following an investigatory hearing into the foregoing issues, Mr. Shaw was referred to the
3 City’s Employee Assistance Program to “formulate a plan to deal with” them. Ex. 71 (CAR 0409-11).
4 And, concerned whether the organization could continue to deal with Mr. Shaw’s pervasive negativity,
5 Interim Chief Elliott wrote to Mr. Shaw, “any [future] performance issues which occur that are related
6 to anger management may result in a departmental referral to a ‘Fitness for Duty’ examination.” Ex. 71-
7 2 (CAR 0410). *See generally* Exs. 63 to 79 (CAR 0387-426).

8 **e. In 2004, Mr. Shaw Threw a Phone in the Living Quarters to Provide a**
9 **“Visual Display of His Frustration With Co-Workers”**

10 Mr. Shaw’s next “major explosion” was in 2004 when he threw a phone across the room in the
11 station living quarters. On investigation, Chief Elliott learned that Mr. Shaw had chosen to throw the
12 phone “out of frustration over a perceived lack of attention to maintenance by other shift personnel.”
13 Ex. 87-2 (CAR 0441). *See also* Exs. 84 (CAR 0437); 86 (CAR 0439); 88 (CAR 0442-43). In
14 Mr. Shaw’s words, he had been seeking “to provide a ‘visual display’ of his frustration to [his] co-
15 workers.” Ex. 87-2 (CAR 0441). Co-workers expressed their discomfort about the incident, and Frank’s
16 performance evaluation read, “Frank can portray a very dominant personality trait which can at times
17 intimidate those with weaker resolve.” Ex. 82-3 (CAR 0432), 88-1 (CAR 0442). Although Chief Elliott
18 was very aware of his 2003 warning regarding future difficulties with anger management, he did not
19 require a fitness for duty exam at this time. Ex. 87-2 (CAR 0441). *See generally* Exs. 83 to 89 (CAR
20 0436-44).

21 **f. In 2005, a Series of Events Culminated in Mr. Shaw’s Storming Off the Job in**
22 **Anger and Remaining Absent for Almost Five Months**

23 Little changed. Mr. Shaw’s 2005 performance evaluation (summarizing his work between September
24 2004 and September 2005) by his erstwhile advocate, read,

25 Frank, more than any other member, will challenge his supervisors through non-verbal and even
26 verbal communication. His lack of trust and respect for many co-workers is routinely made
apparent through comments and actions. Virtually all department members would describe Frank
as being moody and difficult to approach although some have developed a method to do so.
Personal demeanor creates barriers for co-workers and causes significant disruption almost on a daily

1 basis. This is an area that has been a challenge for Frank throughout his employment and
2 needs to be addressed.

3 Ex. 104-3 (CAR 0476). In July 2005, an “abrupt and disconcerting” encounter with the new
4 superintendent of schools began what was later described as a two-week lead in to Mr. Shaw’s sudden
5 walking off the job. Exs. 97 (CAR 0463); 112 (CAR 0489-90).

6 On the morning of August 8, Mr. Shaw argued with his supervisor regarding engine
7 assignments. Exs. 92-1 (CAR 0449); 95-1 (CAR 0458). When the need for a patient transport arose,
8 Mr. Shaw’s supervisor assigned him to the transport to alleviate the tension his presence was causing at
9 the station. Ex. 91-1 (CAR 0446). On the transport, Mr. Shaw determined that hospital personnel had
10 “underestimated the patient’s condition,” and that he could and would make up for the hospital’s
11 failings by “giv[ing] the patient a good experience.” Ex. 127-2 (CAR 0520). When he was not treated
12 with the deference he expected by Harborview emergency room staff, Mr. Shaw treated a triage nurse
13 disrespectfully (commenting on her pregnancy) and “engaged Dr. Copass, the Emergency Room
14 Director . . . in a conversation challenging the . . . care [his] patient had received.”²⁰ Exs. 127 (CAR
15 0519-21); 129 (CAR 0530); 136 (CAR 0541-43); 164-8 (CAR 0589). The next morning (before going
16 off shift), he failed to report vital signs requested by a physician. Ex. 91-1 (CAR 0446).

17 When he returned to work the following morning, one of his first tasks was to ready the medic unit for
18 use. Perceiving the unit “to be a mess” and complaining that the kits “looked like they were put together
19 backwards,” Mr. Shaw began throwing linens from the unit, calling his co-workers “idiots,” and using expletives
20 at anyone who attempted to reason with him. Exs. 91-1 (CAR 0446); 95-2 (CAR 0459); 96-1 (CAR 0460); 98-1
21 (CAR 0464); 123 (CAR 0511-13); 127 (CAR 0519-21); 136 (CAR 0541-43). Then, just as abruptly, Mr. Shaw
22 stormed out of the parking lot at high speed in his truck without permission. Ex. 91-1 (CAR 0446).

23 The City could only characterize this behavior as insubordination, coupled with a serious
24 violation of City policies requiring employees to treat co-workers, supervisors, and the

25 ²⁰ As described by the City’s outside counsel after an interview with Mr. Shaw, he “took up some issues
26 with the Medical Director and that conversation went poorly enough,” so poorly that Mr. Shaw was concerned
that Dr. Copass would contact EFD. Ex. 130 (CAR 0531-33).

1 public with respect. Ex. 96 (CAR 0460-62). At a subsequent pre-disciplinary hearing, Mr. Shaw opined
2 that his conduct had been justified—even if he had made his points inartfully, they were points that
3 “needed to be said.” Exs. 127-3 (CAR 0521); 129 (CAR 0530); 136-2 (CAR 0542). The City Manager
4 Elliott wrote,

5 I disagree. Your conduct and behavior is unacceptable in the workplace. You have
6 demonstrated a willingness to put yourself above your co-workers, be insubordinate,
7 leave work or emergency scenes to the detriment of the department, your co-workers, and
8 the community at large, and generally treat people with a lack of respect or courtesy.

9 Ex. 136-2 (CAR 0542). However, Mr. Shaw remained oblivious to “how his behavior impacted others
10 and undermined the goals of the organization.” Ex. 136-2 (CAR 0542).

11 Ultimately, the City found that Mr. Shaw’s August 2005 behavior was “consistent with an
12 escalatory pattern of behavior that [he] ha[d] repeated throughout [his] career.” Ex. 136-2 (CAR 0542).

13 Accordingly, the Chief wrote to Mr. Shaw,

14 Your work history contains numerous references to a high level of frustration,
15 communications that you feel that you have been treated unfairly, and anger management
16 issues that have necessitated intervention and caused significant disruption in the
17 workplace. These references date back to your probation over 15 years ago.²¹

18 Ex. 96-2 (CAR 0461). The criteria outlined in 2003 (regarding future anger management issues at
19 work) were met, and EFD referred Mr. Shaw for a fitness for duty examination (FFDE) with
20 Dr. Decker. Ex. 96-2 (CAR 0461). *See also* Ex. 71-2 (CAR 0410).

21 **4. After a Five-Month Absence, Mr. Shaw Returned to Work and Continued in
22 Service Until His Abrupt Resignation**

23 Following a three-part FFDE, outside counsel advised the City that the results of the FFDE had
24 not been conclusive, but that the City may have sufficient disciplinary grounds to pursue termination if
25 it so chose. Exs. 98-2 (CAR 0465); 130-2 (CAR 0532); 134-3 (CAR 0539). Although the City
26 personnel who had dealt with Mr. Shaw over the past sixteen years were inclined to terminate him for
cause, the incoming Fire Chief (Chief Sinclair) convinced them that the timing of the contemplated
termination would be detrimental to the pending merger of EFD with Kittitas Valley Fire and

²¹ This appears to be a reference to Mr. Shaw’s probation in 1991, early in his career. Ex. 14 (CAR 0272).

1 Rescue (KVFR) and that Mr. Shaw was “salvageable.”²² Tr. 309-310 (CAR 1149-50). In January 2006,
2 Mr. Shaw was disciplined for his August 2005 behavior and returned to work for the next
3 approximately twenty-one (21) months. Ex. 136 (CAR 0541-43).

4 Again, little changed. His patient care was good; he was “still excited and stimulated by the
5 calls”; but, after a short time, his confrontational style reappeared. Ex. 172-16 (CAR 0670). In the
6 words of the new Chief,

7 he was kind of like a little dark cloud walking around the fire station. His fellow
8 firefighters avoided him. He was somebody that challenged authority . . . never to the
9 point of getting in trouble, per se . . . [M]any people . . . were happy when he was . . . on
vacation because they thought that it would be a good day in the fire station. . . . [W]e
had people that . . . when Frank was on [shift] . . . didn’t want to really work on his shift.

10 Tr. 314-15 (CAR 1154-55).

11 Conflicts with department administration and hospital personnel resumed, leading to his final
12 confrontation with two volunteer EMTs at the Ellensburg rodeo. Exs. 137 (CAR 0544); 138 (CAR
13 0545). Acting outside his authority, Mr. Shaw severely demeaned the two EMTs in front of “the
14 patient, the guardian,” and an “entire crowd of people,” causing one of the two to write to Chief
15 Sinclair, describing the event as the worst call he had ever been on. Exs. 139 (CAR 0546-47); 140
16 (CAR 0548). With an investigation into this behavior pending, Mr. Shaw tendered his resignation,
17 claiming that the rodeo had been improperly staffed, and he could no longer work under Chief
18 Sinclair’s direction. Tr. 317-318 (CAR 1157-58); Ex. 142-2 (CAR 0551).

19 **B. During the Latter Portion of His Career, Mr. Shaw Was Treated for Depression**

20 As the pattern of interpersonal difficulties continued to color his early career, Mr. Shaw became
21 depressed. In 2001, his general physician noted depression and prescribed medication. Ex. 171-5 (CAR
22 0637). In mid-2005, just prior to the events of August 2005, Mr. Shaw began psychotherapy with
23 Dr. George Vlahakis, in conjunction with his continued use of

24
25 _____
26 ²² City personnel were concerned that “there [would] be a period of calm and then [past] pattern[s would]
re-emerge.” Ex. 129 (CAR 0530).

APPENDIX 21

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1 antidepressants. Ex. 172-1,2 (CAR 0655,0656). On August 11, the day after Mr. Shaw stormed off the
2 job, Dr. Vlahakis informed EFD that Mr. Shaw was in his care and would need to be away from work
3 for at least two weeks. Ex. 93 (CAR 0451). During the ensuing four-plus months, Dr. Vlahakis was
4 extremely guarded in the information he provided regarding Mr. Shaw. Despite EFD's bona fide need
5 for information regarding Mr. Shaw's medical condition in order to make decisions regarding sick
6 leave, sick pay, family leave, and staffing, Dr. Vlahakis remained noncommittal. *See* Exs. 120-2 (CAR
7 0501),³ (CAR 0502); 157 (CAR 0573-74).

8 Notwithstanding repeated requests from EFD, during the first two months of Mr. Shaw's leave,
9 Dr. Vlahakis declined to provide any reasons for his absence, simply indicating that he needed to be off
10 work for a couple months. Exs. 100 (CAR 0469); 103 (CAR 0473); 107 (CAR 0483). On October 11,
11 2005, he indicated that Mr. Shaw would *not* return to work, but would apply for medical disability
12 (based on an unspecified condition exacerbated by work-related "stress"). Ex. 108 (CAR 0484-85). On
13 October 31, Dr. Vlahakis finally made a formal diagnosis of Mr. Shaw's condition on an L&I disability
14 application—" [*d*]epression NOS 311 [not otherwise specified]," related to "stress of [the] work
15 situation." Ex. 110 (CAR 0487). In response to EFD's request for additional information supporting the
16 L&I application, on December 6, Dr. Vlahakis indicated that Mr. Shaw had "*major depression*" and
17 was not "released for work." Exs. 111 (CAR 0488); 113 (CAR 0491); 121 (CAR 0507).²³ On December
18 20, two weeks later, the doctor suddenly indicated that Mr. Shaw's condition had improved, and he was
19 cleared to "return to work." Ex. 124 (CAR 0514-16). No further detail or explanation was provided.

20 After his return to work in January 2006, Mr. Shaw continued to meet with Dr. Vlahakis
21 regularly, though somewhat less frequently. Experimentation with various antidepressants continued.
22 Ex. 172-1 (CAR 0655). After Mr. Shaw's sudden resignation in October 2007, Dr. Vlahakis wrote in
23 support of a series of benefit applications. On December 22, 2007,

24
25 ²³ At just about the same time, Mr. Shaw completed a "Personal Injury Accident Report" for the City of
26 Ellensburg, simply claiming that he had a "*stress reaction* rendering me unable to continue to work." Ex. 115-1
(CAR 0493).

1 Dr. Vlahakis completed a second L&I application claiming "depression NOS 311."²⁴ The application
2 was denied. Ex. 151 (CAR 0567).²⁵ Mr. Shaw also sought long-term disability from a "private disability
3 carrier"; the application was denied in early 2008. Ex. 172-25 (CAR 0679).

4 In December 2007, Dr. Vlahakis completed Part 3 of Mr. Shaw's application to the Department
5 of Retirement Systems for a LEOFF disability retirement, claiming "depression NOS 311" "related to
6 work stress."²⁶ Exs. 148-1,2 (CAR 0563,0564); 155 (CAR 0571). It was denied in April 2008. Exs. 157
7 (CAR 0573-74); 158 (CAR 0575). However, after a phone call in which Dr. Vlahakis once again
8 referenced Mr. Shaw's depression and problems with anger management, the Department granted him a
9 non-duty disability LEOFF retirement. Exs. 159 (CAR 0576-77); 160 (CAR 0578). In March 2009,
10 Mr. Shaw petitioned for Department review. In August 2009, the petition was denied. Exs. 163 (CAR
11 0581); 165 (CAR 0592-96).

12 After various rejections,²⁷ Mr. Shaw began talking to legislators and other State officials, including Steve
13 Nelsen, Executive Director of the LEOFF Plan 2 Board,²⁸ to determine how he might strengthen his application.
14 Ex. 172-26,28,29 (CAR 0680,0682,0683). As Mr. Shaw later described these conversations to the Department's
15 Petitions Examiner, Ceil Buddeke, "Steve Nelsen said I had PTSD and should ask my doctor to diagnose that."
16 But, he continued to Ms. Buddeke, the "doctor wouldn't do it." Ex. 164-9 (CAR 0590).

17 Shortly thereafter, Mr. Shaw applied for social security disability, claiming both depression and
18 PTSD and telling the social security examiner, Dr. Dougherty, about "an
19

20 ²⁴ Mr. Shaw simply claimed "depression/stress." Ex. 150-1 (CAR 0566).

21 ²⁵ With reference to RCW 41.08.142, L&I's Notice of Decision contains the following explanation: "Claims based
22 on mental conditions or mental disabilities caused by stress are specifically excluded from coverage by law." Exs. 151 (CAR
23 0567), 154 (CAR 0570). This rule applies to stress-based conditions resulting from (1) conflicts with a supervisor; (2) threat of
loss of a job, demotion, or disciplinary action; (3) relationships with supervisors, coworkers, or the public; (4) specific or
general job dissatisfaction; (5) work load pressures; (6) subjective perceptions of employment conditions or environment;
and/or (7) objective or subjective stresses of employment. WAC 296-14-300. The Department uses the same analysis. Ex.
165-3 (CAR 0594).

24 ²⁶ In Part 1 of the application, Mr. Shaw described his disability as "depression/stress that leads to physical and
mental inability to perform job duties within acceptable industry standards." Ex. 146 (CAR 0558-0559).

25 ²⁷ During this time, Mr. Shaw briefly worked in an automobile mechanics shop, but was fired in April 2009. Tr. 239
(CAR 1079); Ex. 172-30 (CAR 0684).

26 ²⁸ This tribunal may take judicial notice of the fact that Steve Nelsen is the Executive Director of the LEOFF Plan 2
Board. See <http://www.leoff.wa.gov/about/index.htm>.

1 ambulance accident in which he thought he would be killed.” Ex. 173-4,11 (CAR 0733,0740). In
2 December 2009, his application for social security disability was denied. Ex. 173-24 (CAR 0753).
3 Finally, on February 10, 2010 (after receiving selected documents from Mr. Shaw’s former attorney),²⁹
4 Dr. Vlahakis wrote in support of Mr. Shaw’s request for reconsideration of the Department’s 2009
5 Petition Decision, “I feel . . . that Frank’s situation can be explained by a PTSD that began with . . .
6 early sexual abuse.” Ex. 167-2 (CAR 0599). At no time between 2005 and February 2010 had
7 Dr. Vlahakis’ clinical notes or his comments in support of Mr. Shaw’s various disability applications
8 made any reference to PTSD.

9 **C. Mr. Shaw’s Difficulties Working Within the System Arose from a Deep-Seated**
10 **Personality Disorder**

11 **1. A Personality Disorder is a Maladaptive Way of Functioning in the World That**
12 **Arises and Becomes Entrenched in Childhood or Early Adulthood**

13 A personality disorder is an Axis II psychological condition.³⁰ Tr. 229 (CAR 1069). Persons
14 with personality disorders have inflexible ways of thinking in many areas of their lives. Their disorders
15 affect how they perceive the world; their emotional experience of the world; and how they interact with
16 the world. Tr. 230 (CAR 1070). If a person has a personality disorder, the ways s/he (a) perceives and
17 thinks about things; (b) experiences emotions, deals with them internally, and expresses them to others;
18 and (c) behaves and gets along with others are significantly “out of the norm,” significantly different
19 from “what you would expect.” Tr. 232 (CAR 1072).

20 A personality disorder is deep-seated and “pervasive.” Its symptoms surface in multiple
21 personal and social situations—not “just at work” or “just at home.” Symptoms of the disorder come
22 out with almost all the people with whom the affected person interacts and in almost all the situations in
23 which that person finds him/herself. Tr. 232 (CAR 1072). The symptoms lead to real distress or
24 impairment in many areas of the person’s functioning, e.g., fights with the person’s

25 ²⁹ At no point has Dr. Vlahakis reviewed Mr. Shaw’s entire employment record. Tr. 195 (CAR 1035).

26 ³⁰ A person’s psychological condition is characterized over various “axes.” Axis I reflects short-term, episodic conditions, often best treated through medication or brief psychotherapy. Axis II reflects life-long conditions, usually treatable only through ongoing psychotherapy. Tr. 229 (CAR 1069).

1 spouse or children; problems in the work environment, etc.

2 A personality disorder is a “life-long pattern of maladaptive behavior.” It develops early
3 (childhood, adolescence, or early adulthood) and persists throughout life. Tr. 230 (CAR 1070), 233
4 (CAR 1073). It can only be treated through long-term psychotherapy. Tr. 233 (CAR 1073), 242 (CAR
5 1082). *See also* Exs. 63-3 (CAR 0389); 77 (CAR 0418); 134-3 (CAR 0539). Although intensive
6 psychotherapy may lessen the symptoms of the disorder, “a cure would be extremely rare.” Tr. 233
7 (CAR 1073). *See generally*, Ex. 177-1 to 6 (CAR 0804-09).

8 **2. Three of the Four Psychiatrists Who Evaluated Mr. Shaw Concluded That He**
9 **Had a Personality Disorder**

10 After an extensive forensic review, conducted pursuant to the standards of the American Academy of
11 Psychiatry and the Law, Dr. Rebecca Fischer determined unequivocally that Mr. Shaw suffered from a personality
12 disorder.³¹ Tr. 227-28 (CAR 1067-68). Dr. Fischer’s conclusions are consistent with Dr. Decker’s 2005 diagnosis
13 of an Axis II personality disorder (after performing a three-part fitness for duty test on Mr. Shaw), and the 2009
14 conclusions of Dr. Kerster, reviewing Mr. Shaw’s application for social security disability.³²

15 World view. A person with a personality order perceives and thinks about things inflexibly, in a way that
16 is significantly “out of the norm,” significantly different from “what you would expect.” Mr. Shaw’s “world
17 view” was profoundly self-centered, colored by the perception that he was always right. Tr. 234 (CAR 1074). To
18 the extent that others disagreed with him, they were wrong. His beliefs were rigid and inflexible. In Mr. Shaw’s
19 mind, everything had to be done to the highest standard; he was a perfectionist. *See generally* Tr. 234 to
20 237 (CAR 1074-77). Ex. 177-6 (CAR 0809).

21 ³¹ Dr. Fischer indicated that because Mr. Shaw’s disorder included traits from several different specific personality
22 disorders, she diagnosed him to have a “Personality Disorder Not Otherwise Specified.” Tr. 231 (CAR 1071). Ex. 177-2 (CAR
0805).

23 ³² Citing compulsive traits (rigidity and perfectionism), concrete thinking, a tendency to escape responsibility, and
24 externalization for his problems, Dr. Decker first diagnosed an Axis II personality disorder in August 2005. Ex. 98-2 (CAR
0465). In December 2005, Dr. Decker confirmed this diagnosis after administering a personality screening tool which noted
25 that Mr. Shaw’s “narcissistic tendencies” were “more elevated than in the original test.” Ex. 134-2,3 (CAR 0538,0539). She
26 noted a deep-seated “assumption [that] he is right and all others are wrong.” Ex. 134-2 (CAR 0538). *See also* Ex. 173-7,27,34
(CAR 0736,0756,0763) (social security diagnosis of personality disorder).

Dr. Vlahakis’ clinical interaction with Mr. Shaw focused on treating his Axis I depression, to the exclusion of
potential Axis II problems. Tr. 244 (CAR 1084). As Dr. Fischer pointed out, a treating doctor often plays a dual role—
providing treatment for the patient and also serving as advocate.

1 Interaction with world. These traits profoundly affected Mr. Shaw's ability to function in the
2 world. As he reported to Dr. Vlahakis, he preferred to work alone, according to his own high standards
3 and beliefs. *See also* Ex. 173-22 (CAR 0751)(Mr. Shaw "would do best with superficial contact with
4 the public"). Working alone, he did not have to accommodate varying perspectives of his colleagues or
5 compromise his high expectations and rigid standards. He did not have to deal with challenges to his
6 own preferred approaches, either from peers or from those in authority. Ex. 173-22 (CAR 0751). He did
7 not have to deal with external "changes in the game plan." Tr. 235 (CAR 1075). Exs. 157 (CAR 0573-
8 74); 172-4 (CAR 0658). In his own words, "I'm OK when I'm the boss of me." Ex. 164-3 (CAR 0584).

9 Conversely, when required to work and interact with others, Mr. Shaw had numerous problems.
10 When his colleagues did not meet his perfectionist standards, he was frustrated and critical of their
11 performance; he became impatient, brusque, or even rude with them. Tr. 236 to 237 (CAR 1076-77);
12 Exs. 29-2 (CAR 0313); 134-3 (CAR 0539). At times, he reacted with impulsive anger and negativity to
13 what he deemed to be their substandard performance. Exs. 134-2 (CAR 0538) (Dr. Decker citing
14 "recurrent tantrums and outbursts . . . over the assumption he is right and . . . others are wrong"); 172-
15 4,10 (CAR 0658,0664). When colleagues expressed views that diverged from his own, he had little
16 inclination to engage in the give-and-take needed to work cooperatively as a team. He offered his
17 solution, expecting it to be adopted, and withdrew from the dialectic of a group resolution.³³ When
18 others disagreed with his point of view, he construed the disagreement as a challenge to "his authority."

19 He disliked all authority (except his own).³⁴ When he disagreed with the rules of the
20 organization, he either challenged them or simply ignored them. When his superiors questioned
21

22
23 ³³ In 2006, the City Manager wrote to Mr. Shaw, "It appears your conduct in the workplace is primarily
24 impacted by your attitude and your assumptions that you are right when there may be two relevant opinions or
25 approaches to a situation." Ex. 136-3 (CAR 0543).

26 ³⁴ Chief Sinclair noted that before he was in a position of "authority" with respect to Mr. Shaw,
Mr. Shaw was much freer coming to him to discuss "issues." However, once Chief Sinclair was in Mr. Shaw's
chain of command, Mr. Shaw reverted to interacting with him as an "authority figure," with the assumption that
he could not work within authority. Tr. 316 (CAR 1156).

1 or criticized his actions, he refused to accept personal responsibility: externalizing the fault, placing
 2 blame on others, and claiming himself to be the victim of “unreasonable authority.”³⁵ Tr. 235-239
 3 (CAR 1075-79). Exs. 130-2 (CAR 0532); 134-3 (CAR 0539); 157 (CAR 0573-74); 172-4,9 (CAR
 4 0658,0663).³⁶

5 Mr. Shaw’s difficulties with interpersonal functioning were not limited to people at the Ellensburg Fire
 6 Department. After her forensic analysis, Dr. Fisher concluded that

7 it was evident from the record that he had difficulty in his interactions with multiple persons in his
 8 life . . . his coworkers, his bosses, administration, [and] his father-in-law,
 9 not to mention his mother, wife, and children. Tr. 239 (CAR 1079). Exs. 157 (CAR 0573-74) (Mr. Shaw disliked
 10 having “his authority” questioned by his wife); 98-2 (CAR 0465) (Mr. Shaw’s children pushed his buttons “in
 11 four seconds.” This initially “got him into treatment.”). “[I]t wasn’t . . . just circumscribed to one person or one
 12 event.” Tr. 239 (CAR 1079)(also fired as auto mechanic). *See generally* Tr. 238 to 240 (CAR 1078-80).³⁷

13 **3. Mr. Shaw’s Pattern of Maladaptive Behavior Significantly Impaired His Ability to**
 14 **Function at Work and at Home**

15 To rise to the level of a personality disorder, a person’s maladaptive patterns of behavior must lead to
 16 “distress or impairment” in many areas of functioning: social, occupational, or within the family. Tr. 233 (CAR
 17 1073). And, Mr. Shaw’s maladaptive attitudes and behaviors, i.e., his difficulties with interpersonal
 18 relationships and with authority, did cause

19 ³⁵ Mr. Shaw told Dr. Decker that he had been “‘abused’ by prior administrations.” Dr. Decker indicated her belief
 20 that he would continue to use this excuse for his behavior. Ex. 134-1 (CAR 0537) Mr. Shaw told Dr. Vlahakis that he “had
 21 issues with unreasonable authority.” Ex. 172-4,9 (CAR 0658,0663). Dr. Kerster noted the same tendency in his social security
 22 evaluation when he noted that for Mr. Shaw to work successfully within an organization, the lines of authority would need to
 23 be clear “to avoid power struggles.” Ex. 173-22 (CAR 0751).

24 ³⁶ When Interim Chief Elliott expressed concerns about his DUI presentation, he accused the Chief of harassing him.
 25 Ex. 29 (CAR 0312-13). When he received a negative performance evaluation from Captain Seemiller, he responded with two
 26 pages of vitriol against the captain. Ex. 50 (CAR 0362). When called on kicking the door off its hinges at the hospital, he
 believed he was “justified” because the equipment had not functioned properly and accused Elliott of harassment. Exs. 63
 (CAR 0387-91); 69-4 (CAR 0403); 72 (CAR 0412). When he was called on his inappropriate off-duty behavior at the
 Ellensburg rodeo, he complained to the Board of Fire Commissioners about Chief Sinclair’s leadership and resigned. Indeed,
 Dr. Vlahakis noted that Mr. Shaw had filed and dropped four harassment charges against his chiefs. Ex. 172-9 (CAR 0663).
 Dr. Fischer opined that this tendency to externalize blame was consistent with the type of personality disorder she had
 diagnosed. Tr. 245 (CAR 1085).

³⁷ Based on the conclusions set forth in Parts IV.C.1. and IV.C.2., Dr. Fischer concluded that Mr. Shaw had met
 Diagnostic Criteria A and B for a personality disorder, as set forth in the DSM IV. Tr. 233-41 (CAR 1073-81). *See* Ex. 177-6
 (CAR 0809).

1 considerable “distress” both at work and at home.

2 After more than sixteen years; numerous performance evaluations indicating to him that
3 improvement was needed; and at least two referrals to the City’s Employee Assistance Program, two
4 investigative hearings, three disciplinary hearings, five disciplinary actions, and an inordinate amount
5 of energy expended by City officials in dealing with him, the Ellensburg City Manager issued an
6 ultimatum to Mr. Shaw upon his return to work in January 2006:

7 You . . . show a clear lack of insight into how your behavior impacts others, the
8 department, and undermines the goals of our organization. . . . Due to your failure to
9 correct your conduct in the workplace and the harmful nature of your behavior, this [your
10 return to work] shall serve as an opportunity to correct this pattern of behavior that has
11 resulted in a series of corrective efforts . . . [which] have proven ineffective. Your
12 conduct has proven to be a liability for the City and will not be tolerated in the future.

13 Ex. 136-3 (CAR 0543).

14 In short, although his personality disorder did not impair his technical ability to respond to
15 emergency situations and provide good patient care, it did impair his ability to accomplish other aspects
16 of his job as set out in his job description: the “ability to establish and maintain effective working
17 relations with other employees, supervisors, and the public,” and the ability “to follow and implement
18 administrative direction.” Tr. 246-47 (CAR 1086-87). Ex. 147-3 (CAR 0562). In psychological terms,
19 Mr. Shaw’s maladaptive behaviors caused him significant impairment and distress, both at work and at
20 home, sufficient to meet DSM-IV Criteria C. Tr. 241 (CAR 1081).

21 **4. Nothing in Mr. Shaw’s Work Environment Caused Him To Have a Personality
22 Disorder**

23 **a. Mr. Shaw’s Personality Disorder Developed Early in his Life and Was
24 Evident by the Time He Commenced Work at EFD**

25 The causes of a personality disorder are “multifactorial.” Tr. 233 (CAR 1073). Current
26 psychological thinking is that a personality disorder is caused by a combination of biological and
environmental factors. A person may have a genetic predisposition to develop a disorder. If the person’s
upbringing during childhood and early adulthood is nonresponsive to his needs,

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1 a personality disorder may then develop. Tr. 233 (CAR 1073).

2 Mr. Shaw's family history and upbringing reflect the key factors that lead to personality
3 disorder. Tr. 241 (CAR 1081), 250 (CAR 1090). His mother herself had a personality disorder: she was
4 highly critical with many outbursts of her own.³⁸ Exs. 98-2 (CAR 0465), 134-3 (CAR 0539). At home,
5 "negativity and criticism were the norm." Ex. 98-2 (CAR 0465). Indeed, during his fitness for duty
6 exam, Mr. Shaw told Dr. Decker that "he knew he was warped because of this [i.e., this mother's
7 treatment of him, attributable to her own mental problems]." Ex. 134-3 (CAR 0539). When, at a young
8 age, he told her about some sort of "sexual abuse" from a man living in their home, his mother blamed
9 him and failed to take him seriously. Ex. 167 (CAR 0598-99). Tr. 250 (CAR 1090).

10 Raised amidst such "negativity and criticism," Mr. Shaw developed his own rigid standards and
11 expectations. As a child, he was moody and irritable; as a teenager, he was angry and prone to temper
12 outbursts. Exs. 98-1 (CAR 0464); 171-5 (CAR 0637); 172-2 (CAR 0656). Throughout college,
13 paramedic training, and immediately upon hire at the Ellensburg Fire Department (at age 28), the record
14 contains instances of his moodiness, verbal outbursts, and difficulties with anger management. Exs. 172
15 (CAR 0655-729) (history of verbal fights with wife and verbal confrontations at school); 16 (CAR
16 0274) (unhappiness and moodiness noted shortly after hire).

17 In short, Mr. Shaw's personality disorder was firmly entrenched *before* he began work at EFD;
18 *before* the events of 2000 and 2001; and *before* he ever complained of depression to Dr. Feng in 2001
19 or Dr. Vlahakis in 2005. In the opinion of Dr. Fischer, nothing about his work at the EFD either caused
20 or exacerbated his disorder.

21 He would have had these symptoms, the anger and the inflexibility, no matter where he
22 was . . . in any situation. It wasn't anything that occurred at his workplace as a paramedic
23 that led to it. It would have occurred in any situation that he was in.

24 Tr. 245 (CAR 1085).

25 ³⁸ The record indicates that Mr. Shaw's mother may also have had a bi-polar disorder. Tr. 250 (CAR
26 1090); Ex. 98-2 (CAR 0465).

1 **b. Events That Trigger Symptoms of a Personality Disorder Are Not the**
2 **Cause of the Disorder**

3 The *symptoms* of a personality disorder “wax and wane based on stressors.” Tr. 230 (CAR
4 1070). Without question, certain stressors at the EFD elicited frustrated and angry responses from
5 Mr. Shaw. This does not mean that the triggering events *caused* Mr. Shaw’s personality disorder. In lay
6 terms, if a person has hives, eats strawberries, and has an intense allergic reaction, the strawberries
7 cannot be deemed to have *caused* the underlying disorder (hives). Rather, they elicited symptoms of the
8 disorder. Analogously, if Mr. Shaw had a personality disorder, experienced particular events, and
9 reacted, the events cannot be deemed to have *caused* his underlying disorder.³⁹

10 **D. Mr. Shaw’s Depression Did Not Cause the Difficulties He Experienced at Work**

11 **1. Without Dispute, Mr. Shaw Experienced Depression, an Axis I Disorder**
12 **Associated With Sadness**

13 Depression is an Axis I condition; as such, it is treatable. The primary indication of depression
14 is a deep sadness or emptiness, a heaviness that there is no enjoyment or fun in life anymore. A
15 depressed person may cry at things that others may take in stride; may have little energy or interest to
16 engage with life and other people; may experience feelings of worthlessness, guilt, or indecisiveness.
17 Tr. 247 (CAR 1087).

18 Drs. Vlahakis, Decker, and Fischer agree that Mr. Shaw experienced depression to a greater or
19 lesser degree. *See supra* Part IV.B., p. 21. Ex. 98-2 (CAR 0465). Tr. 229 (CAR 1069). Since 2001,
20 Mr. Shaw has been treated for his depression through a regime of antidepressants and psychotherapy.
21 Exs. 171 (CAR 0633-54); 172 (CAR 0655-729). Throughout this period, his depression has remained
22 under reasonably good control, excepting occasional periods of transition when his doctors were
23 working to find a medication and dosage that would eliminate certain undesired side effects.

24
25 ³⁹ Correspondingly, although Dr. Decker found that the *symptoms* of his personality disorder decreased
26 somewhat during his 2005 leave, this does *not* mean that the underlying personality disorder itself improved
during that period. Ex. 122 (CAR 0508-10).

1 **2. Although Depression May Periodically Have Rendered Mr. Shaw Less Able to**
2 **Control His Personality Disorder, Depression Itself Did Not Impair His Ability to**
3 **Perform His Job Functions**

4 Although Dr. Vlahakis consistently indicated that Mr. Shaw's problems at work were caused by
5 depression, Dr. Fischer disagreed. As Dr. Fischer explained, if depression had been interfering with
6 Mr. Shaw's ability to function, "I would have expected . . . that . . . he would [have] appear[ed] down or
7 depressed"; that he would have been making self-critical comments; that he would have been "down on
8 himself." None of these symptoms were "there in the records." Tr. 251 (CAR 1091).

9 Indeed, Mr. Shaw's problems were quite the opposite. Rather than *self*-critical, he was critical
10 of other people and policies with whom he disagreed; he himself was "in the right." Rather than
11 indecisive, he was decisive if not impulsive, both at the accident scene and around the station. The
12 explosive anger and volatility he exhibited when he clashed with others were not signs of the "down
13 mood" associated with depression. And, it was his criticality of others, his impulsivity, and his volatility
14 that led to his difficulties establishing effective working relationships and his difficulties operating
15 within the lines of authority.

16 After the third segment of Mr. Shaw's fitness for duty exam, Dr. Decker indicated that
17 "[d]epression magnifies flaws in personality." Ex. 134-3 (CAR 0539). With reference to this statement,
18 Dr. Fischer explained, "If a person has both an Axis I and an Axis II disorder, it may require all their
19 energy to deal with the Axis I disorder. This can make them less able to control their Axis II
20 symptoms." Tr. 252 (CAR 1092). Thus, at times that Mr. Shaw's Axis I depression was worse (e.g.,
21 during periods of medication adjustments or changes), he was less able to control the impulsivity and
22 anger associated with his underlying Axis II personality disorder. Indeed, Dr. Fischer found that periods
23 during which Mr. Shaw was having difficulty managing his depression correlated closely with periods
24 during which symptoms of his personality disorder were more extreme—e.g., the phone-throwing
25 incident in 2004; the linen-throwing incident in 2005; the rodeo incident in 2007. "You would not have
26 expected these [extreme] reactions, if

1 he only had depression.” Tr. 252 (CAR 1092).

2 Notwithstanding this relationship between Axis I and Axis II disorders, Mr. Shaw’s depression
3 was neither necessary nor sufficient to cause his problems at work. Tr. 252 (CAR 1092). That is, his
4 difficulties would have arisen out of his personality disorder (whether or not he was also depressed);
5 and without his personality disorder, they would not have arisen.

6 **3. Nothing in Mr. Shaw’s Work Environment Caused His Depression**

7 As with a personality disorder, the causes of depression are “multifactorial.” Tr. 247 (CAR
8 1087). A person may have a biologic or genetic predisposition to depression, reflected in a family
9 history of mental illness; the environment in which s/he was raised may contribute to its development.
10 As previously indicated, Mr. Shaw’s family history and upbringing rendered him susceptible to
11 psychological problems. *See supra* Part IV.C.4., p. 28.

12 Ultimately, however, depression develops in response to events in one’s own life—“life
13 stressors,” “events that are stressful or difficult to deal with.” Tr. 247 (CAR 1087). The stress of not
14 being able to develop satisfying personal relationships is one type of “life stressor” that can lead to
15 depression. Tr. 248 (CAR 1088). At least as early as his college years, Mr. Shaw demonstrated signs of
16 a personality disorder that created significant disruption in many of his personal relationships. After
17 years of difficulty managing the effects of his personality disorder at work and at home, Mr. Shaw
18 gradually reported signs that his general practitioner first interpreted to be depression in 2001; in 2005,
19 his children “pushed his buttons” to the point he began psychotherapy to deal with depression. Ex. 98-2
20 (CAR 0465).

21 It simply cannot be said that Mr. Shaw would not have become depressed if he had worked in
22 an environment other than the fire department. He would have had difficulties with colleagues “in *any*
23 job that he was in or really *any* environment that he was in.” There was nothing “special or note-worthy
24 about being employed as a paramedic”; the job did not present unique stressors that other work
25 environments would not have presented. In the words of Dr. Fischer, “I don’t feel that Mr. Shaw’s work
26 environment caused his depression.” Tr. 251 (CAR 1091).

1 **E. The Record Does Not Support Mr. Shaw's Claims of Post Traumatic Stress Disorder**

2 Post traumatic stress disorder (PTSD) is a set of characteristic symptoms developed after
3 exposure to an extreme traumatic stress. To develop PTSD,

4 [y]ou have to be exposed to a traumatic event along the lines . . . of fighting in a war,
5 being in a car crash, something very traumatic, and to feel that your life is in danger, or to
6 witness this with another person to observe them being hit by a car and dying or
7 something along those lines.

8 Tr. 258 (CAR 1098). The person must respond with *intense* fear or horror—the “feeling of being
9 overwhelmed and helpless after [the] event.” Tr. 258 (CAR 1098) (summarizing Ex. 177-11 (CAR
10 0814)). The traumatic event continues to play out in a person’s life in a variety of ways. First, the
11 person will re-experience the event in very graphic ways. For example, if the original traumatic event
12 occurred in combat in the Vietnam War, the person would “have repeated nightmares and flashbacks of
13 [his] combat there.” If something reminded him of the war, e.g., hearing a helicopter overhead, “[he]
14 would get overwhelmed, [his] heart would start to beat, [he’d] feel sick to [his] stomach,” re-
15 experiencing *the event itself*. Tr. 258 (CAR 1098) (summarizing Ex. 177-12 (CAR 0815), criterion B).
16 Second, the person will go to great lengths to avoid stimuli associated with the traumatic event. For
17 example, the illustrative Vietnam veteran “would not watch anything having to do with war on the TV,
18 . . . would avoid places where [he] might hear a helicopter, [would avoid] contact with the persons [he
19 had] served with . . .” Tr. 258-259 (CAR 1098-99). His avoidance may be so extreme that he
20 withdraws from life altogether. The “re-experiencing symptoms” and the “avoidance symptoms” are
21 essential diagnostic criteria: if these symptoms are not present, the person does not have PTSD.
22 Ex. 177-11,12 (CAR 0814,0815).⁴⁰

21 **1. The Evolution of Mr. Shaw's PTSD Claim Undermines Its Credibility**

22 In February 2010, Dr. Vlahakis first suggested that Mr. Shaw had PTSD-like symptoms to support his
23 application for LEOFF duty disability. Ex. 167 (CAR 0598-99).⁴¹ From her more disinterested

24 _____
25 ⁴⁰ A third essential diagnostic criterion is persistent symptoms of hyperarousal. Tr. 259 (CAR 1099); Ex. 177-12
(CAR 0815).

26 ⁴¹ In his letter, Dr. Vlahakis hedged his opinion saying, “Frank’s symptoms . . . *very closely mirror* those listed for
. . . PTSD . . .” Ex. 167-2 (CAR 0599).

1 position,⁴² however, Dr. Fischer did not believe that Mr. Shaw was experiencing PTSD when he
2 terminated from employment in 2007. Tr. 260 (CAR 1100). As a preliminary matter, Dr. Fischer found
3 the absence of references to PTSD in the record to be significant. In her forensic review, she had
4 carefully read not only Dr. Vlahakis' clinical notes summarizing his appointments with Mr. Shaw, but
5 also the entire administrative record. "[T]here was no mention in the record of anything that was
6 consistent with [PTSD]." Tr. 260 (CAR 1100). Given Mr. Shaw's profession as a firefighter and
7 paramedic, an experienced psychiatrist would have been expected to ask questions designed either to
8 diagnose or rule out PTSD, early on in the therapeutic relationship. If Dr. Vlahakis had detected signs
9 of PTSD in that process, he would have been expected to note the same in his clinical notes. Under
10 these circumstances, the absence of any reference to PTSD between 2005 and 2010, either in the
11 clinical notes or on any of Mr. Shaw's applications for disability benefits, is telling. Tr. 260 (CAR
12 1100).

13 2. Mr. Shaw Does Not Meet the Diagnostic Criteria for PTSD

14 Beyond the foregoing circumstantial evidence, Dr. Fischer saw no indication in the record of
15 the intense level of anxiety and avoidance associated with PTSD. Nothing in Dr. Vlahakis' notes (or
16 elsewhere in the record) indicated that Mr. Shaw was completely overwhelmed; that he re-experienced
17 any traumatic event through nightmares, flashbacks, and the like; or that he tried to block out or avoid
18 reminders of the original event. Tr. 260 (CAR 1100).

19 In particular, the narrative constructed by Dr. Vlahakis simply did not ring true. First, the
20 February 2010 letter does not clearly identify the traumatic and horrific event underlying the claimed
21 condition. From Dr. Vlahakis' attempts to draw analogies to the "1999-2000 DUI event" or "2000-2001
22 affair event," it could appear that that he is claiming that Mr. Shaw's

23 _____
24 ⁴² As Dr. Fischer indicated, certain factors may lead to inaccuracies in the opinion of a treating doctor.
25 First, the treating doctor's information is filtered through what the patient tells him/her; the patient may not
26 disclose relevant information for many reasons. Second, the treating doctor may not elicit important information
relevant to the diagnosis of an Axis II disorder, if that disorder is not the subject of treatment. Finally, a
professionally acknowledged role of a treating doctor is to develop a therapeutic relationship with a patient. To do
so, the doctor frequently tries to see things from the patient's point of view. Tr. 226-27 (CAR 1066-67).

1 mother's *handling* of his early abuse is asserted to be the original horrific event. However, how his
2 mother handled the event does not rise to the level of the horrific, life-and-death type of occurrence that
3 forms the basis for PTSD. Tr. 262 (CAR 1102).

4 Even if the horrific event was the sexual abuse itself,⁴³ the record gives no indication that
5 Mr. Shaw had either "re-experiencing symptoms" or "avoidance symptoms" sufficient to meet the
6 diagnostic criteria for PTSD. Tr. 262-64 (CAR 1102-04). In the words of Dr. Fischer,

7 [if] something was so traumatic that one got overwhelmed when they were reminded
8 about it or they had constant nightmares or flashbacks, you would expect to see that . . .
9 they had the avoidance symptoms. They would pull back, they would not talk about it.
It would be so overwhelming to them that . . . they wouldn't be able to function in
situations that reminded them of it.

10 Tr. 261 (CAR 1101). Neither the DUI incident nor the affair incident overwhelmed Mr. Shaw to the
11 degree that would be expected in PTSD. He certainly did not back off. Rather, he actively pursued both
12 events in an attempt to "clear his name," talking to people, threatening to sue, and generally "raising the
13 stakes" surrounding each incident. Tr. 263-64 (CAR 1103-04).

14 V. ARGUMENT

15 As previously indicated, determination of Mr. Shaw's eligibility for a LEOFF duty disability
16 retirement requires resolution of the following sub-issues:

17 (A) Which of his job functions was Mr. Shaw unable to perform?

18 (B) Did Mr. Shaw have a diagnosable mental condition that rendered him unable to perform the
19 job functions in (A)?

20 (C) Was the mental condition identified in (B) "incurred in the line of duty," i.e., did it arise
"naturally and proximately" out of his employment with the fire service?

21 These questions are addressed in order here.

22 A. The Aspects of His Job That Mr. Shaw Could Not Perform Were the "Affective Domain 23 Skills"

24 Only when this tribunal knows exactly what job functions Mr. Shaw was unable to

25 ⁴³ "Sexually traumatic events [including] developmentally inappropriate sexual experiences" can form
26 the basis of PTSD in children. Ex. 177-7,8 (CAR 0810,0811). Even before the upcoming changes, the DSM-IV
makes this clear.

1 perform, can it determine *which* of the various mental conditions suggested in this record caused him to
2 be unable to do those specific functions. There is some disagreement in this record as to whether there
3 was *any* aspect of his job as a firefighter-paramedic that Mr. Shaw was unable to perform at the time he
4 terminated his employment in October 2007.⁴⁴

5 When Mr. Shaw's employer was asked to "state the nature of [his] disability" on Part 2 of his
6 application for a LEOFF disability retirement, Kittitas Valley Fire and Rescue (KVFR) simply
7 responded, "Unknown." Ex. 147 (CAR 0560-62). Asked what KVFR intended to reflect through that
8 response, Chief Sinclair responded,

9 When he left the organization, when he resigned, he was still a competent firefighter and
10 competent medic. He was being reviewed for some behavioral issues, but we weren't
11 aware of any disability that he had.

12 Tr. 322 (CAR 1162). Similarly, Ms. Hawley, HR Director for the City of Ellensburg, told Plan
13 Administrator Hardesty that after Mr. Shaw's return to work in January 2006, "he performed all of his
14 duties up until his abrupt resignation." Ex. 157-2 (CAR 0574). *See supra* Part IV., pp. 8-10.

15 However, firefighting and emergency medical work require more than technical proficiency. As
16 Chief Sinclair noted,

17 You have to have . . . affective domain skills [as well]. They are value-based skills. [The
18 department has] to have people that are willing to work in a team-based environment . . .
19 They have to work cooperatively. They absolutely have to understand that . . . we're a
20 paramilitary organization, and they have to be willing to work inside the chain of
21 command. You have to accept the authority of your company officer all the way up to the
22 chief

23 Tr. 299 (CAR 1139). These skills were set out in Mr. Shaw's Job Description as (i) the "ability to
24 establish and maintain effective working relations with other employees, supervisors, and the public,"
25 and (ii) the ability to "[f]ollow and implement administrative direction." Ex. 147-3 (CAR 0562).

26 The record amply demonstrates that Mr. Shaw had difficulties in both these areas, beginning
almost immediately upon hire (ex. 11 (CAR 0269), February 1990, leaving scene of fire) and

⁴⁴ In April 2008, Plan Administrator Michelle Hardesty denied Mr. Shaw a non-duty disability, saying, "There is no evidence supporting that Mr. Shaw was unable to perform the functions and duties of his position due to depression." Ex. 157-2 (CAR 0574). Dr. Fischer concurs. *See supra* Part IV.D.2., p. 30.

1 continuing through the days preceding his resignation (ex. 139 (CAR 0546-47), October 2007,
2 unprofessional encounter at rodeo). Employees, supervisors, and other medical personnel were acutely
3 aware of these problems; they were consistently documented in his performance evaluations and
4 personnel file. *See supra* Part IV.A., pp. 10-21. As the City Manager wrote to Mr. Shaw, “your conduct
5 and behavior are unacceptable in the workplace”:

6 [y]ou have demonstrated a willingness to put yourself above your co-workers, be
7 insubordinate, leave work or emergency scenes to the detriment of the department, your
8 co-workers, and the community at large and generally treat people with a lack of respect
or courtesy.

9 The behavior that you displayed in August of 2005 is consistent with [a] pattern of
10 behavior that you have repeated throughout your career. This behavior . . . makes you a
liability for the City.

11 Ex. 136 (CAR 0541-43). He was disciplined in 2006 for conduct “unbecoming to an officer or
12 employee of the City.” His conduct had “offended[ed] the public,” was “detrimental to the efficiency or
13 morale of the service,” and reflected “willful or repeated negligence in performing [his] duties,” all in
14 violation of EFD policy. Ex. 136-3 (CAR 0543).

15 In light of its concerns as to whether Mr. Shaw could work as a team member, with his
16 colleagues, inside the chain of command, without jeopardizing “[his own] safety, the safety of [his] co-
17 workers and to the health and well-being of the citizens we serve,” EFD ultimately referred him for a
18 fitness for duty exam. Ex. 96-1 (CAR 0460). In short, although Mr. Shaw was technically competent,
19 he had great difficulty with “affective domain skills,” also essential to successful performance as a
20 firefighter-paramedic.

21 **B. The Only Condition That Affected Mr. Shaw’s Ability to Perform His Job Functions Was
His Personality Disorder**

22 As indicated, before this tribunal can determine whether “Mr. Shaw’s mental disability” was
23 “incurred in the line of duty,” the tribunal will have to know *what* mental disability is in question.
24 Knowing the job functions with which Mr. Shaw had difficulty, this tribunal has the necessary
25 information to pursue this question: did Mr. Shaw have a diagnosable mental disease or condition that
26 rendered him unable to demonstrate the “affective

1 domain skills” necessary in his work as a firefighter-paramedic?

2 Between 2005 and 2007, in at least four applications, Dr. Vlahakis indicated that Mr. Shaw had
3 a mild depression (depression NOS) that likely caused difficulties in his work performance. Dr. Fischer,
4 pursuant to an extensive forensic examination, concluded that Mr. Shaw had a long-standing
5 personality disorder that caused the difficulties. After failing to be awarded disability based on claims
6 of depression, Mr. Shaw has recently claimed that his difficulties at work arose from PTSD. Each of
7 these alternatives is discussed below.

8 **1. Mr. Shaw’s Difficulties with the Affective Domain Skills Required in His Job**
9 **Description Were Caused by a Personality Disorder**

10 After an extensive forensic review of all the exhibits admitted in this proceeding, Dr. Fischer
11 concluded that Mr. Shaw met all the diagnostic criteria for a (lifelong) personality disorder, centered in
12 his narcissistic world view that his way was the best way and his propensity toward frustration, anger,
13 and rebellion at those who did not agree with his views. Likewise, Dr. Decker, who performed an
14 extensive three-part fitness for duty examination of Mr. Shaw in 2005, noted a personality disorder.
15 Exs. 98-2 (CAR 0465); 134-2 (CAR 0538). And, even after a brief interview (in the context of an
16 examination for social security disability in which Mr. Shaw had *claimed* depression and PTSD),
17 Dr. Dougherty noted features associated with an obsessive-compulsive personality disorder.⁴⁵ Ex. 173-7
18 (CAR 0736). *See supra* Part IV.C.2., p. 24 (existence of personality disorder).

19 One of the diagnostic criteria for a personality disorder is that symptoms of the disorder cause
20 “distress or impairment” in many areas of the individual’s life, including work. After noting
21 innumerable instances in which Mr. Shaw’s attitudes and behaviors (arising out of his personality
22 disorder) created conflict with peers and supervisors within the fire department, Dr. Fischer concluded
23 that this criteria was met: it was Mr. Shaw’s personality disorder that

24
25 _____
26 ⁴⁵ In his final report denying Mr. Shaw’s application for social security disability in 2009, Dr. Kerster
also noted the existence of a personality disorder. Ex. 173-27,34 (CAR 0756,0763).

1 made it difficult for him to interact with supervisors, co-workers, and the administration, and made it
2 difficult for him to follow orders and implement administrative direction. Tr. 246-247 (CAR 1086-87).
3 *See supra* Part IV.C.3., p. 27 (effect of disorder on ability to perform job functions). Conversely,
4 Dr. Fischer concluded, Mr. Shaw's difficulties with these "affective domain skills" were *not* caused
5 either by depression or PTSD.

6 **2. Mr. Shaw's Depression Did Not Cause His Difficulties with Teamwork and**
7 **Working Within the Chain of Command**

8 The second alternative suggested on this record is that depression is the mental disease that
9 caused Mr. Shaw's difficulties at work. Based on Dr. Fischer's corroborating analysis, the Department
10 does not dispute Dr. Vlahakis' diagnosis of depression *per se*. *See supra* Part IV.D.1., p. 29. However,
11 the Department *does* dispute that depression is the mental disease that rendered Mr. Shaw unable to
12 perform his job duties, i.e., that caused the conflicts with colleagues and those in authority that led to
13 explosive anger and acts of insubordination. Tr. 251 (CAR 1091).⁴⁶ As Dr. Fischer explained, the
14 symptoms of depression are sadness, emptiness, diminished interest or pleasure in life—a certain
15 flatness or lack of energy—indecisiveness. These simply are not the descriptors used throughout the
16 record to describe Mr. Shaw's difficulties relating to his colleagues and supervisors and functioning
17 within the system. To the contrary, the record consistently reflects him as passionate, fiery, explosive,
18 impulsive, and highly decisive in emergency situations.

19 As indicated by both Dr. Fischer and Dr. Decker, at those times that Mr. Shaw's Axis I
20 depression was worse, he was perhaps less able to control the impulsivity and anger associated with his
21 Axis II personality disorder. This does not mean that his depression was either necessary or sufficient to
22 cause these outbreaks of anger and the associated work-related difficulties. That is, his difficulties
23 would have arisen out of his personality disorder (whether

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25 ⁴⁶ The Department is not certain whether Mr. Shaw continues to base his claim for a LEOFF duty
26 disability retirement on depression. Although his initial claim was based entirely on depression, he may have
supplanted this claim with his new-found claim of PTSD.

1 or not he was also depressed); and without his personality disorder, they would not have arisen. *See*
2 *supra* Part IV.D.3., p. 31. In the language of “but-for” causation, it can *not* be said that Mr. Shaw’s
3 difficulties would not have occurred “but-for” his depression. Rather, the personality disorder was an
4 “intervening cause,” and without such “intervening cause” the work-related difficulties would not have
5 occurred.

6 In short, Mr. Shaw had both an Axis II personality disorder and Axis I depression; but, of the
7 two, only the personality disorder negatively affected his attitudes, behaviors, and work performance.

8 **3. Mr. Shaw Has Not Established That He Suffered From a Post Traumatic Stress**
9 **Disorder (PTSD)**

10 The third alternative suggested on this record is that PTSD is the mental disease that caused
11 Mr. Shaw’s difficulties at work. Subsequent to discussions with the Executive Director of the LEOFF
12 Plan 2 Board and with his prior attorney, Mr. Shaw has recently claimed that he suffered from PTSD
13 and that his PTSD rendered him totally incapacitated. Mr. Shaw has not proved on a “more likely than
14 not” basis either (i) that he had PTSD or (ii) that PTSD negatively affected his work performance. Upon
15 review of the entire documentary record before this tribunal, Dr. Fischer found the assertions of PTSD
16 less than credible. Most significantly, Dr. Vlahakis treated Mr. Shaw for almost five years and made no
17 mention at all of PTSD in Mr. Shaw’s clinical records. As a seasoned psychiatrist, with particular
18 expertise with issues arising in paramilitary organizations, Dr. Vlahakis must be assumed to have
19 considered and ruled out the existence of PTSD during his years of treatment. Tr. 261 (CAR 1101). As
20 Mr. Shaw himself acknowledged to the Department’s Petitions Examiner, for some time “his doctor
21 had refused to diagnose PTSD.” Ex. 164-9 (CAR 0590). The circumstances under which Dr. Vlahakis
22 and Dr. Dougherty have begun to assert that Mr. Shaw had PTSD simply belie their credibility.

1 **C. Whatever Mr. Shaw's Mental Condition, It Was Not Incurred in the Line of Duty**

2 The third and ultimate question before this tribunal is whether Mr. Shaw's disabling condition
3 was "incurred in the line of duty." Under WAC 415-104-480(2),

4 [l]ine of duty means any action or activity occurring in conjunction with your
5 employment or your status as a law enforcement officer or firefighter and required or
6 authorized by law, rule, regulations, or condition of employment or service.

7 Cases from LEOFF Plan 1 provide a useful test to determine whether Mr. Shaw's mental
8 condition/disease was incurred "in the line of duty": did it arise "naturally and proximately" out of his
9 employment with EFD or KVFR? *See supra* Part II.A., p. 4 (test for LEOFF duty disability).

10 **1. Mr. Shaw's Personality Disorder Was Not Incurred in the Line of Duty**

11 **a. Mr. Shaw's Personality Disorder Was Not "Proximately Caused" By His
12 Employment**

13 "A [LEOFF employee] shows his disease was proximately caused by his work if he establishes
14 he would not have contracted the disease [or his disease would not have worsened], but for the
15 aggravating condition of his job." *Dillon*, 82 Wn.2d at 171. A personality disorder is a lifelong
16 condition: it develops early (childhood, adolescence, or early adulthood) and persists throughout life.
17 Tr. 230, 233 (CAR 1070,1073). The symptoms—the *outward* expression of the disorder—may wax and
18 wane with external events. Tr. 230 (CAR 1070). However, the fact that *symptoms* wax and wane does
19 not mean that the *disease itself* cyclically becomes better and worse. The disease itself is there for the
20 duration—from the beginning to end, and cure is rare. Tr. 230 (CAR 1070).

21 Mr. Shaw's personality disorder was firmly entrenched *before* he began work at EFD and
22 *before* the events of 2000 and 2001. Other than a handful of appointments with Ellensburg's Employee
23 Assistance Program, the record contains no indication that Mr. Shaw ever engaged in the level of
24 intensive psychotherapy needed to control the symptoms of, much less cure, the disease. Tr. 233 (CAR
25 1073). Thus, the disorder itself did not become better or worse during Mr. Shaw's 18 years with the fire
26 service. Rather, his work in the fire service simply presented

1 him with situations that he found difficult to handle *because of* his underlying disorder. In short,
2 nothing about his work at the EFD either caused or exacerbated his disorder. Tr. 245 (CAR 1085).

3 Under the “but-for” analysis required to prove proximate cause, it simply cannot be said that
4 Mr. Shaw would not have developed a personality disorder if he hadn’t come to work at EFD.

5 He would have had these symptoms, the anger and the inflexibility, no matter where he
6 was . . . in any situation. It wasn’t anything that occurred at his workplace as a paramedic
that led to it. It would have occurred in any situation that he was in.

7 Tr. 245 (CAR 1085). His personality disorder was not “proximately caused” by his employment.

8 Because it was not “proximately caused” by his employment, it was not “incurred in the line of duty.”

9 No further analysis is required.

10 **b. Mr. Shaw’s Personality Disorder Did Not “Arise Naturally” Out of His**
11 **Employment**

12 If this tribunal finds that Mr. Shaw’s personality disorder *was* proximately caused by his
employment (not conceded), this tribunal must proceed to the second prong of the analysis—whether
13 Mr. Shaw’s personality disorder “arose naturally out of his employment.” To establish that a disease
14 *arose naturally* out of employment, “a [LEOFF employee] must establish that his or her occupational
15 disease came about as a matter of course as a natural consequence or incident of distinctive conditions
16 of his particular employment.” *Id.* at 172. These conditions do not have to be “unique” to the worker’s
17 particular line of employment. However, they must at least be “distinctive” of the worker’s particular
18 employment, in the sense that they are not “conditions of everyday life or [conditions of] all
19 employments in general” that have simply “happened to occur” in the worker’s own employment
20 situation. Further, the “distinctive conditions” causing the disease “must be conditions of *employment*,
21 that is, conditions of the worker’s particular occupation as opposed to conditions coincidentally
22 occurring in his or her workplace.” *Id.*

23 As indicated, Mr. Shaw’s work in the fire service presented him with various situations
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1 that he found difficult to handle. He found it difficult to deal not only with fellow fire-fighters and
2 paramedics, but also with other administrative staff and medical professionals with whom he was
3 required to interact, including dispatchers, transport personnel, hospital personnel, and city officials. He
4 expected them to do things “his way”; he refused to dialogue with them; and when they did not
5 conform to his expectations, he accused them of being incompetent and reacted with frustration and
6 anger. Similarly, he found it difficult to work within the established rules, regulations, and lines of
7 authority within the fire service. If a rule did not make sense to him, he challenged it: if he saw no
8 reason to complete his leave request according to the rules (on two forms rather than one), he
9 completed it on one; if he thought it was wrong that a critical promotional test would be scheduled on
10 his day off, he skipped the test; if he disagreed with a pilot’s decisions regarding transport, he refused to
11 help. When called on such insubordination, he complained that his supervisors were treating him
12 unfairly.

13 If this tribunal concludes that Mr. Shaw’s disease itself, i.e., his personality disorder, “came
14 about as a natural consequence of” expectations that he interact with peers as a team player and work
15 within the chain of authority in the organization, then the tribunal must analyze whether these
16 expectations (conditions) are *distinctive conditions of employment*. They are not.

17 An expectation that an employee develop effective working relationships is not an expectation
18 that is “distinctive” to the fire service. Nor are expectations that an employee follow and implement
19 administrative direction (by following the rules and regulations of the organization and the orders of
20 superiors) “distinctive” to the fire service. Rather, they are “conditions of all employment generally.”
21 Only as such were they present in Mr. Shaw’s own employment.

22 Further, under the “arose naturally” test, the “distinctive conditions” causing the disease “must
23 be conditions of *employment*, that is, conditions of the worker’s particular occupation as opposed to
24 conditions coincidentally occurring in his or her workplace.” *Id.* at

1 172. Put differently, to be incurred in the line of duty, a condition must arise out of an “action or
2 activity occurring in conjunction with . . . employment . . . as a . . . firefighter *and* required or
3 authorized by law, rule, regulations, or condition of employment or service.” WAC 415-104-480(2).

4 Analysis of this requirement is very similar to the analysis in *Woldrich v. Vancouver Police*
5 *Pension Board*, 84 Wn. App. 387, 928 P.2d 423 (1997). There, a police officer sought a LEOFF duty
6 disability based on a mental condition that developed as a result of a disciplinary demotion. The court
7 found that a disciplinary demotion could not be considered to be an act taken in pursuance of police
8 work. *Id.* at 390 (duties of a police officer do not include being demoted). Similarly here, Mr. Shaw’s
9 heated disagreements with colleagues and defiance of authority within the organization cannot be
10 deemed to be actions taken in pursuance of firefighting or emergency medical services. They are not
11 incidents of Mr. Shaw’s *employment* per se, but rather incidents that occurred “coincidentally in the
12 workplace.” Because Mr. Shaw’s disease did not arise out of distinctive conditions of employment, they
13 cannot be found to have “arisen naturally out of employment” or “incurred in the line of duty.”⁴⁷

14 **2. Even if This Tribunal Determines That Either Depression or PTSD Rendered**
15 **Mr. Shaw Unable to Perform His Job Functions, These Mental Conditions Did**
16 **Not Arise in the Line of Duty**

17 Because depression did not render Mr. Shaw unable to perform his job functions (sub-issue
18 (B)) and because Mr. Shaw did not have PTSD in the first instance (sub-issue A), in this brief, the
19 Department will not address whether either of the conditions was “incurred in the line of duty.” The
20 Department may address this sub-issue further in its response brief.

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24 ⁴⁷ At various points in his career, Mr. Shaw complained that his supervisors had harassed him. He never
25 filed a formal complaint, and no supervisor was ever formally found to have harassed him. However, even
26 assuming that he had been harassed, harassment may occur in any employment situation. It is not “distinctive” to
the fire services. Nor does it have a sufficient nexus to activities related to the duties of fire fighting to be deemed
to have arisen out of Mr. Shaw’s employment.

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VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests this tribunal to find that Mr. Shaw is not eligible for a duty disability from LEOFF Plan 1.

DATED this 19th of October, 2012.

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PROOF OF SERVICE

I, Becky Mitchell, certify that I caused to be served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of July, 2015, at Olympia, Washington.

BECKY MITCHELL
Legal Assistant



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (June 2004)

(Implements RCW 34.05.310)
Do NOT use for expedited rule making

Agency: Department of Retirement Systems

Subject of possible rule making: Law Enforcement Officers' and Fire Fighters' (LEOFF) Plan 2 Duty Disability: To clarify how the department administers duty disability benefits, including clarification of the requisite causal connection between the member's employment and disability.

Statutes authorizing the agency to adopt rules on this subject: RCW 41.50.050

Reasons why rules on this subject may be needed and what they might accomplish: This rule-making activity will codify the department's existing practice of granting a LEOFF Plan 2 duty disability benefit. The rule will clarify that the work actions and activities defined in WAC 415-104-480 (2) must be the proximate cause of the member's disability (but need not be the sole cause of the member's disability). The rule may be further amended to clarify the department's interpretation of the statutes, and ensure conformance with existing practices.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:

Process for developing new rule (check all that apply):

- Negotiated rule making
 Pilot rule making
 Agency study
 Other (describe)

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:
 (List names, addresses, telephone, fax numbers, and e-mail of persons to contact; describe meetings, other exchanges of information, etc.)

Jilene Siegel, Rules Coordinator
 Department of Retirement Systems, PO Box 48380, Olympia, WA 98504-8380
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DATE
July 20, 2015

NAME (TYPE OR PRINT)
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TITLE
Rules Coordinator

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