BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

SUN MOSLEY, Appellant, vs. OFFICE OF SECRETARY OF STATE, Respondent.	CASE NO. R-DSEP-11-001 FINDINGS, CONCLUSIONS AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This matter came before the Personnel Resources Board, JOSEPH PINZONE, Vice Chair, and LAURA ANDERSON, Member. The hearing was held on March 8, 2012, in the Personnel Resources Board hearing room in Olympia, Washington.

1.2 **Appearances.** Appellant Sun Mosley was present and represented herself. Ms. Mosley was assisted by Steven Knight. Respondent Office of the Secretary of State was represented by Alicia Young, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal of a disability separation.

II. FINDINGS

2.1 Appellant Sun Mosley was a Fiscal Analyst 2 and a permanent employee for Respondent Office of the Secretary of State (OSOS). Appellant and Respondent are subject to Chapter 41.06 RCW and the rules promulgated thereunder, Title 357 WAC.

2.2 Appellant began her permanent employment as a Fiscal Analyst 1 with OSOS in 2003. She was subsequently promoted to a Fiscal Analyst 2. In summary, the essential functions of her position included reviewing and processing invoices and payments, managing accounts payable, reconciling accounts, maintaining tax records, and managing petty cash accounts for the agency. Approvals from staff to pay invoices and requests from staff for the creation of invoices were

submitted by email to Appellant's OSOS email. Predictable and reliable attendance was important to the successful performance of these duties.

2.3 In 2008, Appellant began suffering from medical conditions that required her to be absent from work and interfered with her ability to perform the essential functions of her job. Over a period of approximately three years, Appellant worked when she was medically able, but she also used a substantial amount of leave including sick leave and annual leave. In addition, she was granted the use of shared leave and unpaid leave. Much of Appellant's leave was covered by the Family Medical Leave Act.

2.4 From 2008 to November 2010, Appellant's condition was fairly well managed through therapy and the use of medication. However, she was subject to flare-ups which required her to be absent from work. During this timeframe, reasonable accommodation was explored for Appellant. For example, Appellant requested a quieter work place and asked that she be moved to cubical at the other end of the building. Terri Parker, Human Resource Consultant for OSOS, credibly testified that Respondent considered Appellant's request, but determined that there was no area within the office that was quieter than the area in which Appellant was currently working.

2.5 In November 2010, Appellant changed her medication, her condition worsened, and she again went out on leave. Before allowing Appellant to return to work, Respondent requested a medical clearance stating that she was fit to work. Jeffery Thurston, MN, ARNP, released Appellant to return to work. Mr. Thurston signed a release on November 30, 2010, indicating that Appellant could perform the essential functions of her position and suggesting ways to reduce the noise levels in the workplace.

2.6 Also in November 2010, Respondent received concerns from Appellant's coworkers about increasing incidents of Appellant's disturbing and disruptive behavior in the workplace. Respondent determined that an Independent Medical Examination (IME) was needed. The IME was conduct by Dr. Richard Schneider. He examined Appellant on January 13, 2011. His report

indicated that Appellant could perform the essential functions of her position and that no accommodation was necessary.

2.7 In June 2011, Appellant was again absent from work. By letter dated June 30, 2011, Respondent notified Appellant that her absence from work was approved for Family Medical Leave, asked that she notify them in writing of the date she intended to return to work, and told her that she must submit a medical certification that she was safe to be at work before she could return.

2.8 On July 12, 2011, Mr. Thurston signed a medical certification indicating that Appellant could perform the functions of her position. Mr. Thurston also indicated that Appellant might experience flare-ups that would require her to absent from work.

2.9 Before receiving Mr. Thurston's assessment, Respondent accessed Appellant's work email account to check for incoming work such as invoices to be paid and requests for the creation of new invoices. In Appellant's email, Respondent discovered numerous emails that Appellant had sent between her work email and her home email. The emails include Appellant's descriptions of events she believed were occurring in the workplace, her fears about what she perceived, what she felt was happening to her in the workplace, and the impact of these perceived events on her and her family. Mr. Thurston had not been provided these emails before submitting his July 12, 2011, medical certification.

2.10 Respondent found the contents of the emails alarming. In the emails, Appellant talked about officials and agency staff conspiring to kill her and her family and her desire that these individuals be killed for their actions. Appellant also indicated that she felt she was under surveillance and that her medical provider was in on the conspiracy with her employer.

2.11 Because of the information contained in the emails and concerns about Appellant's behavior in the workplace, Respondent placed Appellant on home assignment. By letter dated July

26, 2011, Respondent notified Appellant that she was on home assignment with pay so that the agency could confirm her fitness to return to work. Respondent sent the emails to Mr. Thurston. In addition, Mr. Thurston had a telephone discussion with Ms. Parker.

2.12 On August 8, 2011, Mr. Thurston signed an addendum to his July 12, 2011, medical certification. Mr. Thurston stated, in part:

> The content and nature of these emails *[dated between May 16, 2011, and July 23, 2011]* . . . are significantly different than the emails that your office provided to me November 22, 2010. . . The emails of May to July 2011 appear to be conversations or expressions of her thoughts with herself. . . .
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> . . . .
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> These current emails messages, I believe, raise a level of concern, in that they convey thoughts and emotions of Ms. Mosley of perceived threats to her well-being and her life, as well as those of her partner . . . and her daughter . . . In them, she refers to ongoing conspiracies, corruption, and cover-ups by state officials and employees, and collusion by the federal government. She alleges that coworkers, administrative staff, and elected officials have persisted in harassing and persecuting her in various ways, and even poisoning her, because she knows information that would implicate them in these alleged crimes. She also mentions her fear that members of her family in Korea may be at risk of adverse consequences as results of actions taken against her.
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> These thoughts expressed by Ms. Mosley are most likely of a delusional and paranoid nature, and unsupported by objective facts. . . . The concern is that, if the situation changes or she otherwise feels or believes that her life or the lives of her family are threatened or in danger, she may act against others whom she thinks are responsible or culpable. . . .
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> In her emails, she made many statements that God should punish or kill the alleged perpetrators, that they go to hell, and asking for and thanking God for protection of herself and her family. . . . Ms. Mosley's expressions of righteous indignation about these alleged crimes and her fearfulness about retaliation against her and her family raise concern further because, at some point, she may feel compelled to take action. Such action could include violent behavior toward others. She may even come to believe that she would be acting as an agent and on behalf of God. . . . .
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> . . . .

> *[In answer to the question: will the employee be incapacitated for a single continuous period of time due to her medical condition?]* . . . Yes, the period of incapacity beginning currently and I am unable to predict an ending date.
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> *[In answer to the question: will the employee need to attend follow-up appointments or work part-time or on a reduced schedule because of the employee's medical condition?]* . . . A work schedule of any kind would also depend on stabilization and improvement of her mental health condition and an affirmative assessment of her safety in the work environment.
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> *[In answer to the question: will the condition cause episodic flare-ups periodically preventing the employee from performing her job functions?* . . . Yes; again, a work schedule of any kind would depend on stabilization and improvement of her mental health condition and affirmative assessment of her safety in the work environment. At this time, I am unable to estimate the frequency of flare-ups or the duration of incapacity.
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> . . . .

2.13 In addition, Mr. Thurston testified that he has a professional obligation to Appellant and others to point out safety concerns and concerns of violence in the workplace. He provided persuasive and credible testimony that the Appellant's emails from May 16, 2011, through July 23, 2011, containing references to violence and people being killed, were alarming, delusional, paranoid, and unrealistic. He further testified that it is impossible to predict who might commit a violent act at any given time. Mr. Thurston confirmed that Appellant was incapacitated and that he was unable to predict the duration of her incapacity.

2.14 After receiving Mr. Thurston's addendum, Respondent determined that accommodation would not resolve Appellant's ability to be available to work regularly and perform the functions of her position. Respondent also determined that based on Mr. Thurston's assessment, Appellant was unable to return to work in any capacity. By letter dated August 10, 2011, Respondent notified Appellant of her separation effective August 17, 2011. The August 10, 2011, letter contained a typographical error. On August 11, 2011, the letter was reissued with the error corrected. All other provisions of the letter, including the effective date of the separation, remained unchanged.

2.15 Appellant filed a timely appeal with the Personnel Resources Board on August 31, 2011.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the agency was unable to provide any kind of accommodation to Appellant and further, she indicated that she did not want an accommodation. Respondent also argues that Mr. Thurston provided medical documentation of Appellant's inability to work in any capacity. Therefore, Respondent asserts that under the provisions of WAC 356-46-165, the agency had ample reason to separate Appellant from employment. Respondent contends that the agency allowed Appellant to use a substantial amount of leave, including shared leave, and that charging her leave as Family Medical Leave was appropriate given her serious medical condition and inability to work. Respondent explains that Appellant was separated because she was unable to safely perform the functions of her position with or without accommodation. Respondent asks that Appellant's separation be upheld.

3.2 Appellant alleges that the agency subjected her to harassment and discrimination which contributed to her medical condition. Appellant argues that Respondent incorrectly charged three weeks of her absences as Family Medical Leave when the leave was for blood pressure issues and not for her mental condition. Appellant further argues that the notice of separation was insufficient and because she received two letters, it was confusing. Appellant contends that she was not incapacitated and that she would have been able to perform the duties of her position if the agency had allowed her to return to work. Appellant asks that she be returned to her position with all back pay and benefits including leave, that she be awarded the direct costs of her appeal, and that she be awarded punitive damages of pain and suffering to her and her family.

IV. RELEVANT CIVIL SERVICE RULES

4.1 WAC 357-46-160 provides:

> A disability separation is an action taken to separate an employee from service when the employer determines that the employee is unable to perform the essential functions of the employee's position or class with or without reasonable accommodation due to mental, sensory, or physical incapacity. Disability separation is not a disciplinary action.

4.2 WAC 357-46-165 states:

An employer may separate an employee due to disability when any of the following circumstances exist:

(1) The employer is unable to reasonably accommodate the employee.

(2) The employer has medical documentation of the employee's inability to work in any capacity.

(3) The employee requests separation due to disability and the employer has medical information which documents that the employee cannot perform the essential functions of the employee's position or class.

4.3 WAC 357-46-170 provides:

Before separating an employee from employment under the provisions of WAC 357-46-160, the employer must provide at least seven calendar days' written notice to the employee. For permanent employees, the notice must include information on how to apply for reemployment as provided in WAC 357-19-475.

V. CONCLUSIONS

5.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.

5.2 In an appeal of a disability separation, the appointing authority has the burden of supporting both the basis for the action taken and compliance with the civil services law(s) or rule(s) governing the action. WAC 357-52-110.

5.3 Appellant argues that her disability was impacted by the alleged harassment and discrimination she received at work. However, as provided in RCW 49.60.120, such allegations are within the jurisdiction of the Washington State Human Rights Commission, not the Personnel Resources Board.

5.4 In addition, in her written closing argument, Appellant requests costs and punitive damages. The Personnel Resources Board is not a court and its authority is limited by chapter 41.06 RCW, the statute creating it. There is no express statutory provision for the Board to award damages beyond

back pay and benefits. See: Cohn v. Dept. of Corrections, D91-009 (1992), aff'd Thurston County Super. Ct. No. 92-2-01245-3 (1993); Farnes v. Liquor Control Board, D82-32 (1982).

5.5 Respondent has met its burden of proof. Respondent established that the agency was unable to provide a quieter workplace as requested by Appellant as an accommodation. In addition, based on Mr. Thurston's August 8, 2011, assessment and his testimony before the Board, Respondent clearly established that Appellant was incapacitated and unable to safely return to work.

5.6 Respondent also established that the agency complied with the applicable civil service rules governing disability separations. Respondent has proven that:

- As required by WAC 357-46-160, Appellant was unable to perform the essential functions of her position because she was incapacitated and unable to safely return to work.
- As required by WAC 357-46-165(2), Respondent assured that they had current medical documentation from Mr. Thurston of Appellant's inability to work.
- As required by WAC 357-46-170, by letters dated August 10 and 11, 2011, Respondent gave Appellant written notice of her separation and the effective date of the separation. While Appellant may have been confused by the corrected letter, the underlying action did not change and she was provided appropriate notice of the action, the reason for the action, and the effective date of the action. Further, the letters provided her information on how to apply for reemployment.

5.7 Respondent proved both the basis for the action taken and OSOS's compliance with the civil service rules governing the action. Respondent has met its burden of proof and the appeal should be denied.

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VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Sun Mosley is denied.

DATED this _____ day of _____, 2012.

WASHINGTON PERSONNEL RESOURCES BOARD

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JOSEPH PINZONE, Vice Chair

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LAURA ANDERSON, Member