

Dep't of Transportation v. S. N.

OATH Index No. 1233/14 (Feb. 14, 2014)

Evidence of engineer's inability to complete work assignments in a reasonable time frame, practice of accumulating so much clutter at his cubicle that it prevented him from using it as a work space, and his personal hygiene and appearance supported agency physician's medical opinion that he was unfit to perform the duties of his position. ALJ found employee unfit and recommended involuntary leave under section 72 of the Civil Service Law.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
S. N.¹
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disability proceeding was referred to the tribunal by the Department of Transportation ("Department") pursuant to section 72 of the Civil Service Law and alleges that respondent, a civil engineer, is mentally unfit to perform the duties of his position. Respondent denies the allegation.

The hearing was conducted before me on January 28, 2014. On November 18, 2013, respondent was directed by the Department to report for a medical examination the purpose of which was to determine his fitness for work; the letter notified him of an examination scheduled for November 21, 2013, and attached an Attachment A which described the basis for sending him for the examination (ALJ Ex. 1). On November 27, 2013, the Department served respondent with a Notice of Proposed Leave of Absence proposing to place him on a section 72

¹ Respondent's full name is being withheld for purposes of publication because this report discusses his medical condition. See *Laurido v. Simon*, 489 F. Supp. 1169, 1177 (S.D.N.Y. 1980) (placement of a civil servant on involuntary leave for mental unfitness pursuant to section 72 of the Civil Service Law implicates the employee's liberty interest in his or her reputation). This accommodation is being made despite respondent's objection to same at the hearing made on the basis of his desire not to be "anonymous" (Tr. 9-10), which objection I have overruled.

leave of absence on December 12, 2013, absent his request for a hearing (ALJ Ex. 1). By letter of the same date, respondent requested a hearing (ALJ Ex. 1), and the hearing was scheduled for January 28, 2014. Prior to trial, the parties engaged in discovery and conducted settlement discussions and agreed by stipulation, dated December 18, 2013, to waive the section 72 deadlines for conducting the hearing and for a post-hearing final determination.

On January 31, 2014, petitioner's counsel sent an e-mail to the tribunal seeking an expedited decision in the case due to conduct attributed to respondent at work subsequent to the hearing (E-mail of J. Weinstein to ALJ Richard, F. Zapata, B. Zapert, et al., dated Jan. 31, 2014). Respondent's counsel objected to subsequent conduct being made a part of the record in this case so as to form the basis for expediting a decision (E-mail of F. Zapata to ALJ Richard, J. Weinstein, B. Zapert, et al., dated Jan. 31, 2014). In reply, I agreed that it was not proper to put additional facts before me as the record of the case is closed. I also apprised the parties of the administrative process for seeking expedited hearing, which should not be forwarded to the hearing judge, and offered the assistance of the conference judge with whom to discuss their concerns (E-mail of ALJ Richard to J. Weinstein, F. Zapata, B. Zapert, et al., dated Jan. 31, 2014). While I have not taken these new allegations into account in my analysis of the case, I have entered the e-mail exchange into the record as ALJ Exhibit 2. A formal request for expedited decision was never filed.

Based upon the analysis that follows, I find that respondent is unfit to remain in his position and that he should therefore be placed on leave pursuant to section 72 of the Civil Service Law.

ANALYSIS

Respondent has been employed by the Department as a civil engineer for 20 years. He is alleged to be unfit to perform the duties of his position. Attachment A² alleges that respondent "accumulates inordinate amounts of paper, posters and plastic bags at his workspace," in addition to paper towels, cups, plates and bowls, and he keeps collecting them despite being told

² Attachment A is to contain a description of the behavior that concerns the employer. Civ. Serv. L. § 72(1) (Lexis 2013) ("Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of his or her position"). It also forms the basis for the mental status examination performed in this case by Dr. David Salvage. It is not a pleading and the fact that an employee committed the acts stated therein is not an element to be proven at the hearing. *Transit Auth. v. Smith*, OATH Index No. 1299/02 at 8 (Mar. 24, 2003) (Attachment A is merely the vehicle for having the employee medically examined).

by his supervisor to discard them (ALJ Ex. 1). It states that respondent dates each cup to indicate last usage “for future reference.” Attachment A also notes complaints about respondent’s appearance: that he “wears paper towels around his shirt collar and tucked inside the front of his shirt” to absorb perspiration, and that he uses safety pins on his shirt pocket to hold his personal items and on his pants “to hold the folds of his pant legs.” Attachment A does not refer to respondent’s ability to complete his assigned work projects, although that is also a basis for the Department seeking to place him on leave under section 72.

Respondent’s supervisor is Yassar Fawzy, Deputy Director of Roadway Bridges for Manhattan and Brooklyn, the division responsible for managing bridge rehabilitation and construction (Tr. 19-20). Mr. Fawzy has supervised respondent for six years.

Mr. Fawzy described respondent’s work area as cluttered and disorganized (Tr. 20). He testified that respondent keeps plastic bags, cups, papers, and boxes under his desk and in front of his work space, his files are unfiled, and he has many personal items in and around his work space (Tr. 21). For example, respondent keeps a shopping cart in the hallway (Tr. 44). Because respondent told Mr. Fawzy that he keeps food inside the plastic bags under his desk, Fawzy is concerned that this condition, unabated, will attract rodents and insects and cause a health hazard for the employees who work there (Tr. 52-53).

According to Mr. Fawzy, the state of respondent’s cubicle diminishes his ability to do the work he is assigned (Tr. 45). His computer is at his desk but he is unable to sit at the desk to use it because of the clutter. Because he cannot sit in his cubicle, respondent stands in the hallway to work, which Mr. Fawzy has repeatedly told him not to do (Tr. 21, 25, 45). None of respondent’s co-workers will sit near him because of these conditions and co-workers located near him in the past have asked to be moved to another location (Tr. 26, 46). Respondent’s clutter has started to spread to the cubicle next to his, where no one is currently assigned.

Mr. Fawzy identified several photographs taken of respondent’s cubicle in October 2013 (Pet. Ex. 1). From them, I observed the following. The cubicle has a long U-shaped desk area with three sides that can be used as work surfaces. All three sides are completely covered with papers, files, work binders and office supplies. The floor beneath the work surface is filled with boxes and plastic bags stuffed with materials, files, binders, and a cart with a large canvas bag filled with more materials, all of which are strapped to the cart. The items beneath the work surface fill the space below, so there is no room to place your legs to sit at the desk. In addition,

there is an island made of stacked boxes, bags and papers that juts out from the middle of the desk. At the time the photos were taken, respondent's work chair contained a large bag filled with materials. The disarray is substantial.

Mr. Fawzy said he gave respondent a directive in July 2013, to clean his cubicle of the clutter, and respondent failed to do so (Tr. 21). Mr. Fawzy said that Department counsel, Mr. Weinstein, issued respondent a directive in October 2013, to clean his work area, and respondent failed to do so (Tr. 21-22). Most recently, in January 2014, Mr. Fawzy instructed respondent to discard certain items in his work space, to file other work items, and to generally limit the items placed in his work area (Tr. 23-25). He also instructed respondent not to spread his things into adjoining cubicles (Tr. 25). His e-mail dated January 9, 2014, directed respondent to discard items in his cubicle, including "ASCE seminar materials and certificates, empty paper cubs [sic] and plastic bottles, plastic bags, boxes, personnel [sic] material laying around and hanging on the walls and project documents" (Pet. Ex. 2). It also directed respondent not to place items in adjoining cubicles and to limit his activities to his own (Pet. Ex. 2). Mr. Fawzy testified that, to date, there has been no improvement since his January directive (Tr. 26).

With respect to hygiene, Mr. Fawzy testified that he has noticed a strong body odor on respondent and he has received complaints about it from other workers (Tr. 26). He complained that respondent does not dress professionally for the office, that he sometimes wears slippers or boots without laces, that he wears paper towels around his neck under his collar and wears clothing with holes in it, and he uses paper clips to hold up his pants (Tr. 27). Respondent's appearance and behavior has caused his co-workers to avoid interacting with him (Tr. 43).

Petitioner entered respondent's timesheets in evidence (Pet. Ex. 10) and Mr. Fawzy testified about his repeated lateness. He cited 78 instances of lateness from January to June 2013 totaling 37 hours and 67 instances of lateness from July through December 2013 totaling 27 hours (Tr. 41). He said that, despite having discipline imposed for the lateness, respondent failed to improve his tardiness (Tr. 42). The latenesses were unexcused and charged to annual leave. Fawzy believes the lateness is related to respondent's mental condition because he asked respondent many times to get up earlier but he only gave excuses for his lateness (Tr. 51). However, he was unsure that it was a health issue or mental issue (Tr. 52). I did not find proof of a connection between respondent's lateness and his disability.

Last, Mr. Fawzy testified that respondent has very low productivity in his job, taking months to complete a project that should take only a few weeks. Mr. Fawzy assigns work to respondent. He said he gave respondent only one assignment in the last year, which took the entire year for him to turn in (Tr. 27). Respondent's position as a civil engineer requires him to review consultants' reports on bridge projects and to comment upon them, an assignment that should take approximately six weeks to complete, according to Fawzy. He said he assigned a consultant's report to respondent on the rehabilitation of the 25th Street Bridge in November 2012 (Tr. 27-28).

The evidence showed that Mr. Fawzy assigned respondent to work on a consultant's report for the 25th Street Bridge project in or around July 2013, and respondent turned it in on December 20, 2013.

On July 25, 2013, Mr. Fawzy sent respondent an e-mail asking when his comments on the project would be completed (Pet. Ex. 4). On July 26, he sent respondent an e-mail memorializing their conversation that day involving respondent's complaint that the comments he was compiling were lost in a corrupted electronic file, and his request for additional time to retype them and to complete comments not yet finished (Pet. Ex. 4). Although Mr. Fawzy confirmed that respondent sent him a corrupted file (Tr. 29), he did not believe it was caused by computer error, because he had difficulty opening every file respondent sent to him (Tr. 48). IT staff looked at the problem and performed repairs, but respondent continued to complain of a problem (Tr. 49). Mr. Fawzy gave respondent a deadline of August 12, 2013, to complete the project (Pet. Ex. 4).

On August 21, Mr. Fawzy sent respondent an e-mail asking for his comments on the project and stating that more than six weeks had passed since it was assigned to him (Pet. Ex. 5). On October 3, he e-mailed respondent again, indicating he had not submitted his work and asking that he submit his comments by October 11 (Pet. Ex. 6). On November 15, in an e-mail, respondent told Mr. Fawzy he was missing an Appendix (Pet. Ex. 7). Fawzy told respondent he would check on the Appendix and urged him to continue his review without it (Tr. 33). Fawzy said the Appendices were not relevant to the review (Tr. 33).

By e-mail dated December 17, Mr. Fawzy asked respondent to submit the review by the end of the week (Pet. Ex. 7). The next day, respondent said he would (Pet. Ex. 8). He further stated that he "could have submitted it earlier than you instructed" but the events concerning his

proposed section 72 leave, such as the medical exam, consultations with his attorney, preparation and appearances at OATH had “cost a lot of time” (Pet. Ex. 8). In the attachment to an e-mail dated December 20, respondent submitted his final comments on the project to Mr. Fawzy with a notation indicating “I have a few more pages of comments yet to type” (Pet. Ex. 9).

Mr. Fawzy said this final submission was “barely minimal” and unprofessional (Tr. 36-37). He said it reviewed certain chapters of the report and referenced discrepancies and formatting issues, but it failed to comment on seven technical chapters on habitation that were the “meat of the project” (Tr. 37). Fawzy did not find the work substantive enough. He said he completed the review himself in August 2013, because he could not wait for respondent to finish it, but he wanted to see how long it would take him to do so (Tr. 38). This kind of delay is significant, he said, because of the costs incurred on budgeted projects in which consulting fees are being charged to the City (Tr. 38). Respondent’s poor work performance causes Fawzy’s own work performance to suffer because he has to complete work that respondent fails to complete (Tr. 43).

Respondent contends that he was unable to complete his work timely because Fawzy denied him access to the copier and computer printer. Fawzy admitted he restricted respondent’s use of the copier and printer, he said, because the Deputy Director noticed that respondent was printing too many pages on the copier and printer (Tr. 40). The restriction requires respondent to ask Mr. Fawzy to print for him, not that he is forbidden all use of the equipment. Mr. Fawzy denied the restriction had any effect on respondent being able to complete his assignment on time because respondent knew to ask him to print for him, and respondent did not ask him to print the document any sooner (Tr. 50-51). Fawzy said he did not receive many requests from respondent for printing.

Respondent was examined on November 21, 2013, by Dr. David Salvage, a board certified psychiatrist selected by the agency (Tr. 55-56). Dr. Salvage, who was qualified at the hearing as an expert, testified that he performed a general mental status examination and a Folstein mini-mental status exam on respondent, tests that are designed to assess areas of cognition, abstraction, and general mental functioning (Tr. 57). He found respondent unfit to perform the duties of his position (Pet. Ex. 13).

Dr. Salvage testified that his initial impression of respondent was of someone that was “bizarre and psychiatrically troubled” (Tr. 57). Respondent was dressed “in a very bizarre

manner” in stripes and plaids and his pants were very long and cuffed on the outside with safety pins holding them up. His garments were wrinkled and were not properly buttoned. “He looked as if he were eccentric and possibly homeless” (Tr. 58).

Through questioning him, Dr. Salvage reported that respondent has a fixed illusion of a persecutory nature that people were blocking him, though respondent could not describe who or for what reasons they were blocking him. To some questions, he would respond that he could not answer because he did not “want this information to fall into the wrong hands” (Tr. 58). When the doctor noted to respondent that he had arrived late for the appointment, respondent stated “you’re in the wrong zone,” “I don’t understand the zone that you’re in” (Tr. 58).

Dr. Salvage said he asked respondent basic questions establishing his history and background: where he grew up, his country of origin, his education, etc. Respondent was unable to respond, not for lack of memory, but out of “an intense paranoia that seemed extremely unrealistic, that this was somehow dangerous information or it could be used against him” (Tr. 66). It was significant to Dr. Salvage that, even when asked to summon long ago information unconnected to his current job, respondent had no ability to be open or logical rather than conspiratorial.

When asked to spell the word “widower” forwards and backwards, respondent could spell it forwards but not backwards. Dr. Salvage said this skill would show cognitive organization. A patient’s failure to perform the skill at all suggests dementia. However, respondent’s ability to perform the task partially suggested a process of psychosis where the concentration is impaired by the ability to gauge reality, to decide what is important and to retain the simple task that is being given (Tr. 60).

The results of the Folstein seemed significant in that respondent had difficulty subtracting backwards from 100 by serial sevens but only after he got into the 70s (Tr. 61). This suggested to Dr. Salvage that his cognition was intact enough to perform the subtraction to a point, but he would eventually become preoccupied with plots and other bizarre ideas that prevented him from continuing to perform this simple task. Respondent was not mixed up about the math but was preoccupied with psychotic thinking that limited his concentration to 20 to 30 seconds at a time (Tr. 61). With respect to proverb interpretations, respondent’s responses were bizarre; when asked about people who live in glass houses (should not throw stones), his response was only,

“don’t be rash” (Tr. 59). When asked if there might be a more abstract response to it, respondent could not provide one, responding again, “don’t be rash” (Tr. 59).

With respect to the condition of respondent’s cubicle, Dr. Salvage showed him the photographs of his cubicle and desk area and asked him about it. Respondent alternated between not seeing a problem and saying “I just have containers of things here” reasoning there should be no problem with that (Tr. 61). He could not describe what was in the containers or why they were there or recognize that their presence could trouble or concern others in the work place (Tr. 62). When asked about this, his psychosis appeared and he remarked that “they” were blocking him, and he did not want the items “to fall into the wrong hands” (Tr. 62).

Considering his Tasks and Standards, Dr. Salvage noted that respondent’s job description was complex requiring many cognitive tasks (Pet. Ex. 3). Given his performance on the mental status exam, Dr. Salvage did not see how respondent could fulfill these duties even remotely (Tr. 62). With respect to the requirement in his Tasks and Standards requiring that respondent “[e]ngage[] in, or supervise[] the conduct of complex and important research, investigations, studies or examinations related to the engineering functions or activities of a department or agency,” Dr. Salvage testified that respondent was not capable of summoning the appropriate evaluative skills to perform this task, noting his inability to concentrate on the serial sevens for more than 30 seconds at a time (Tr. 63). Also, based upon his lack of reality testing – his belief that people are pursuing him, remarks about being in a different zone, the way he relates to the clutter and containers filled with unidentified fluids kept at his desk – any ability to realistically assess complex and important research would be “severely compromised” (Tr. 63). Dr. Salvage therefore concluded that respondent was unfit for duty. In his opinion, respondent suffers from a psychotic condition, specifically delusional disorder of a persecutory nature, that impedes his ability to make basic engagements with reality such as a civil engineer would need to do (Tr. 63).

Dr. Salvage also worried about respondent’s overall safety and physical health because of the containers filled with fluids and his psychotic response to basic questions; he questioned whether there might be a medical condition causing respondent to display such symptoms (Tr. 67). Dr. Salvage questioned respondent’s ability to care for his nutrition and other aspects of his wellbeing, such as taking necessary medication for his hypertension. A leave of absence, he believed, would enable respondent to be treated by a psychiatrist with appropriate medications, in this case, anti-psychotics which require some period of weeks to begin to work and may

involve more than one trial to determine the correct medication or medications (Tr. 68). He also recommended an extensive organic workup, in light of his 72 years of age, including blood work, neurodiagnostic imaging of his head, and possibly neuropsychological testing.

Respondent offered no medical evidence to support his claim of fitness.

Respondent described his work as reviewing the work of engineering and design consultants (Tr. 73). When a consultant submits a report, he reviews the engineering portions of it (Tr. 74). He said these assignments generally take two to three months to complete, depending on the length of the project. In the past year, he said, he handled “four bridges and the contracts were cancelled” (Tr. 74). There was a subsequent three month period when no projects were given out, so he and other engineers were told to just enter their time in the timesheets.

Respondent said that he received the project involving the East 25th Street Bridge from Mr. Fawzy in June of 2013; he disputed receiving the assignment in December of 2012, as Fawzy said (Tr. 75). Indeed, respondent’s testimony was consistent with the documentary evidence, which indicated he was given the assignment in July 2013, not the prior November. In the earliest e-mail submitted in evidence, dated July 25, 2013, Fawzy states to respondent, “You started compiling your comments a week ago on the 25th BRPR. Please advise when you will be done. Thanks.” (Pet. Ex. 4). Mr. Fawzy did not explain this discrepancy with his testimony. Respondent said that he received the assignment after another engineer became ill and there was some delay before it was reassigned to him as the agency waited to see if the other engineer would be able to return to work. Thus, respondent explained that the office may have received the consultant’s report in December 2012, but it was not assigned to him at that time (Tr. 76). I found his explanation logical and consistent with the documentary evidence.

Respondent’s further explanations were far less helpful to his case. He explained his difficulty on the job to be caused by his supervisor’s decision to deny him use of office copiers, printers and scanners, which he said hindered his productivity (Tr. 76-77). He admitted the restrictions were placed because he was making too many copies, though he denied printing or scanning in excess. He said he was denied the ability to call the Help desk when he had problems with his computer freezing (Tr. 79). Respondent conceded, however, that if he e-mailed his supervisor when he needed printing, his supervisor would print whatever he needed (Tr. 84). He also admitted wearing paper towels in the office “occasionally” (Tr. 84). He said he used them to wipe perspiration but denied wearing them inside of his shirt (Tr. 85). He said he

no longer wears deodorant because it interferes with his sweat glands; instead, he goes to the restroom and washes (Tr. 85). He said neither his co-workers nor his friends had ever made any objection to him on this basis. He denied the photos of his desk were accurate (Tr. 85). He said he is able to work at his cubicle (Tr. 88).

As for the time he spends in the hallway, respondent said he goes there to retrieve records from his storage cabinets (Tr. 87-88). He denied walking around the office or in the hallway, chatting with others, and said others do that. He said his supervisor sees him outside his cubicle and wonders what he is doing, but he is working (Tr. 89). He ascribed his lateness to the illness of his elderly mother-in-law, who he frequently took to the doctor during the period October 2012 to January 2013 (Tr. 89, 91). He said he took approved annual leave but another manager objected to his taking frequent annual leave for morning lateness and denied it (Tr. 90).

I find that the weight of the evidence established that respondent is unfit to perform the duties of his position, now and for the “reasonably foreseeable future.” *Admin. for Children’s Services v. J. M.*, OATH Index No. 3350/09 at 13 (Apr. 5, 2010).

In order to place an employee on an involuntary medical leave under section 72, the agency must prove by a preponderance of the evidence that respondent suffers from a disability, that he is unable to competently perform the duties of his position, and that his inability to perform is caused by the disability. *See* Civ. Serv. Law § 72(1) (Lexis 2013); *Housing Auth. v. Caballero*, OATH Index No. 699/96 at 17 (Mar. 13, 1996). The focus of the section 72 proceeding is on the employee’s current and future fitness and ability to perform his job duties, not on his past condition or work performance. *Housing Auth. v. Dave*, OATH Index No. 138/95 at 2-3 (Aug. 12, 1994), *aff’d*, NYC Civ. Serv. Comm’n Item No. C-95-72-4 (Oct. 11, 1995).

Petitioner established that respondent suffers from a mental disability. *See Human Resources Admin. v. Bartolo*, OATH Index No. 1211/94 (Nov. 3, 1994). Dr. Salvage offered convincing testimony of his conclusion that respondent suffers from a psychotic condition, specifically delusional disorder of a persecutory nature that impedes respondent’s ability to make basic engagements with reality, as is required of a civil engineer. Dr. Salvage explained that respondent’s psychosis so interrupts his thought process that he cannot concentrate for significant periods of time, or even for more than 20 to 30 seconds.

Petitioner also must prove that respondent is unable to perform his job duties at “a minimally acceptable level” “presently and for the reasonably foreseeable future.” *Human*

Resources Admin. v. Farber, OATH Index No. 944/02 at 23-24, 27 (Sept. 19, 2002) (finding that numerous unscheduled and unpredictable absences and late arrivals caused by respondent's migraine headaches made her unfit to perform the duties of her attorney level III position).

Petitioner's proof established respondent's current inability to perform the duties of his position. The evidence showed that respondent took six months, from July to December, to complete a single project that his supervisor said should have taken only six weeks. Respondent did not dispute the amount of time he took to complete the project. And he was vague about what, if anything, he spent his time doing besides that project. Rather, he claimed he was delayed in his work by the onset of these disability proceedings and by Mr. Fawzy's ban on his use of printers and copiers. There was no evidence to support these claims. Even putting aside the issue of time, in the end the work product that he completed failed to address the main substantive issues in the consultant's report.

His counsel argued that respondent is not unfit because, under our caselaw, his work production would have to be practically nil to justify putting him on an involuntary leave (Tr. 93-94). This is not a correct analysis of the standard for fitness. In *Law Department v. K. A.*, the case alluded to by counsel,³ the tribunal found a claims specialist unfit to perform her duties when, so overwhelmed by major depression, she regularly failed to complete her assignments which had to be reassigned to others, failed to regularly check her e-mail and voicemail, and turned on her computer so infrequently that it no longer recognized her log in. OATH Index No. 2100/06 at 2 (Jan. 5, 2007), *aff'd in part, rev'd in part*, Corp. Counsel determination (Jan. 22, 2007). The employee in that case was found unfit even though she acknowledged her lack of functioning at work and its connection to her mental state and in spite of the fact that she was receiving treatment, albeit ineffective at that time. OATH 2100/06 at 4. Respondent here offers a less compelling case for fitness than did K. A. He has not recognized his lack of functioning at work and he has made no concession that he needs treatment or is willing to engage the process of getting well – attributes that would weigh in favor of his fitness, even if not dispositive proof in every case. See *Dep't of Correction v. A. S.*, OATH Index No. 2448/09 at 13 (Sept. 30, 2009) (correction officer who acknowledged illness that made him unfit and embraced his treatment had less risk of recurrence); *Caballero*, OATH 699/96 at 23 (employee who “denies the

³ Counsel erroneously cited *Housing Authority v. Anonymous*, OATH Index No. 1055/10 (Mar. 24, 2010) as the case containing this factual scenario.

existence of the disability, or refuses to properly treat it or make efforts to bring it under control” is far more likely to be unfit within the meaning of the statute because such an employee is at far greater risk of recurrence.).

There also is credible evidence, in photographs and testimony, about respondent’s maintenance of a work space that is so cluttered that he cannot work there. The clutter not only prevents him from working but it disrupts the work environment by creating an eyesore and potential health hazard that other workers avoid being near. His personal habit of wearing paper towels inside his clothing, which is visible to others, similarly creates apprehension among his co-workers. The fact that he dressed consistent with the Attachment A description for his exam with Dr. Salvage provided corroboration of this bizarre aspect of his behavior. *See Admin. for Children’s Services v. Anonymous*, OATH Index No. 212/12 (Dec. 15, 2011) (employee’s “bizarre” conduct, such as making animal noises in the bathroom and talking to her computer, were disruptive to the work place and contributed to a finding that respondent was unfit).

The third element that petitioner must prove, that respondent’s mental disability has caused him to be unfit, is established by the evidence. The causal connection is generally found where acts of misconduct are “attributable to” or are the “direct results of” the disability. *See Dep’t of Finance v. Serra*, OATH Index No. 583/01 at 7 (Nov. 14, 2000); *Dep’t of Housing Preservation & Development v. Natal*, OATH Index No. 1185/90 (Mar. 22, 1991). In a disability proceeding, while the opinion of a medical specialist can be profoundly informative and can materially aid the fact-finder in reaching a proper conclusion, the fact-finder is not bound to accept an expert’s conclusions or opinions. *See Peabody Coal Co. v. Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977); *Felt v. Olson*, 51 N.Y.2d 977, 979 (1980). In this case, I found Dr. Salvage’s testimony extremely helpful to explaining the behaviors engaged in by respondent.

Thus, drawing my own inferences from the credible medical evidence, I find that respondent’s mental disability has caused his inability to perform the duties of his position.

FINDINGS AND CONCLUSIONS

1. Respondent has a mental disability, specifically delusional disorder of a persecutory nature.

2. Respondent's disability has caused him to be unfit to perform his duties as a civil engineer.

RECOMMENDATION

I find that respondent is unfit to perform the duties of his position and should be placed on involuntary leave pursuant to section 72 of the Civil Service Law.

Tynia D. Richard
Administrative Law Judge

February 14, 2014

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner

APPEARANCES:

JEREMY WEINSTEIN, ESQ.
Attorney for Petitioner

BRIAN ZAPERT, ESQ.
Attorney for Respondent
LAW OFFICES OF FAUSTO ZAPATA, JR., P.C.