# *Admin. for Children's Services v. Anonymous*

OATH Index No. 1546/12 (Sept. 6, 2012)

Fitness proceeding brought against motor vehicle driver. ALJ found evidence sufficient to establish that employee had a disability, but insufficient to establish that she was unable to perform her job and therefore unfit. ALJ recommends that petition be dismissed.

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**NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*
**ADMINISTRATION FOR CHILDREN'S SERVICES**
*Petitioner*
*- against -*
**ANONYMOUS**
*Respondent*

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## REPORT AND RECOMMENDATION

**JOHN B. SPOONER,** *Administrative Law Judge*

This is a disability proceeding referred by the petitioner, the Administration for Children's Services, pursuant to section 72 of the New York State Civil Service Law. The petitioner alleges that respondent, a motor vehicle driver, is mentally unfit to perform the duties of her position and should be placed upon an involuntary leave of absence.

At the hearing held on June 21 and July 20, 2012, petitioner presented the testimony of a supervisor, a child protection specialist, a police officer, and a psychiatrist, who examined respondent and concluded she was unfit. Respondent testified on her own behalf. Both parties submitted written closings on August 8, 2012.

For the reasons provided below, I find that petitioner's proof was insufficient to establish that respondent was unfit and recommend that the petition be dismissed. Due to the possible detrimental effect to respondent by publication of this report, I find that withholding respondent's name is appropriate. *See Taxi & Limousine Comm'n v. Anonymous*, OATH Index No. 1053/09 (Jan. 12, 2009) (employee's name withheld where decision discusses personal issues contained in medical records); OATH Rules of Practice, 48 RCNY § 1-49(d) (Lexis 2012).

## ANALYSIS

Respondent has been employed by the Administration since 2003 as a motor vehicle driver. The primary responsibilities of an Administration driver include using Administration vehicles to transport clients, children, and staff for various purposes, including removal and placement of children, medical appointments, and other outings for the children. The Administration fleet includes sedans, minivans, and vans.

The instant proceeding was commenced in March 2012 pursuant to section 72 of the Civil Service Law, which provides that a public employer may place a civil service employee out on involuntary leave of up to one year where the employee is found, after a hearing, to be unfit to perform her work duties. Respondent's supervisor, Mr. Goldstein, provided general background information about the duties of drivers and respondent's work history. He testified that he has supervised respondent since 2006 (Tr. 56). He indicated that there were unspecified "problems" with respondent's driving which resulted in a conference and some retraining, but no formal disciplinary charges (Tr. 73). In addition, supervisors and other drivers were assigned to accompany respondent on her driving assignments and observed that her driving was "fine" (Tr. 73).

As part of the section 72 proceeding, petitioner prepared an Attachment A, listing 11 incidents which prompted the Administration to send respondent for a psychiatric evaluation. The earliest incidents occurred in 2008, when respondent was observed "weaving in and out of traffic" and talking to herself and arguing with a security guard about displaying her identification. In 2009, respondent submitted a medical note indicating she was on medication which might cause drowsiness and in 2010 respondent was observed "speeding" in a residential area, braking frequently, and cutting off cars on a freeway as she yelled and sounded the horn. In January 2011, staff members again reported a number of incidents: that respondent was weaving in and out of traffic, slamming her hands on the steering wheel, and screaming profanity; that she got lost, suggested that her passengers get out in an isolated area, and also drove into a snow drift; and that she argued with a co-worker about using the microwave. In August 2011, several caseworkers refused to ride with respondent because they felt her driving was unsafe. Finally, the Attachment A described a December 2011 incident involving

respondent's car hitting another car's bumper and a February 2012 police visit which resulted in respondent's forced hospitalization, and an expert opinion that respondent was unfit to drive.

Through the testimony of its four witnesses, petitioner presented proof regarding only the last two of the Attachment A incidents, a December 2011 driving incident concerning contact with another vehicle's bumper and the circumstances surrounding respondent being involuntarily hospitalized in February 2012. As to the driving incident, Child Protection Specialist Talarico testified that, on December 16, 2011, she determined that a two-year-old child needed to be removed from a home and taken to the child's aunt elsewhere in the City. Respondent was the driver of a mini van, which picked up Ms. Talarico, the child, and the child's grandmother. According to Ms. Talarico, for 10 to 15 minutes respondent drove "erratic," stopping and starting "very abruptly" so the passengers were "thrown against our seatbelts" (Tr. 46). As the van was stopped at Cypress Avenue in Brooklyn, respondent backed up and began to pull into the right lane. The grandmother yelled that a car was coming and respondent stopped to let the car pass (Tr. 46).

Ms. Talarico stated that, as respondent was stopped, a man came over to the car, identified himself as an undercover officer, said that respondent hit his bumper, and asked if everyone was all right. Respondent said that she was on "official ACS business," would have to take the car "out of service," and need to "call her base" (Tr. 47). She said that the baby had been crying and that it was not "a big deal" that she had struck his bumper. The man walked to the other side of the van and asked the passengers if they were all right. He looked at Ms. Talarico and told her she should tell someone about the incident and left (Tr. 47).

Ms. Talarico testified that, at this point, respondent said that she needed to call her base to "get permission to move the vehicle." Ms. Talarico told respondent that they needed to get the child to her foster placement. Respondent pulled the van into a gas station and said that Ms. Talarico and the grandmother "could just get out and walk" because they were "close enough to the location" (Tr. 48). Ultimately respondent drove the three passengers to the placement location, as indicated by a January 18 e-mail from Ms. Talarico to her supervisor (Pet. Ex. 2). In her testimony, Ms. Talarico indicated that she was "embarrassed" by respondent's behavior. She stated that she did not feel safe during the ride with respondent due to respondent's "erratic" driving and respondent's "aggressive" and "out of control" attitude (Tr. 51).

Sergeant Kocher described the encounter with respondent on February 1, 2012, which led to her being hospitalized. He indicated that, at around 7:00 a.m., he and his partner responded to a 911 call concerning an emotionally disturbed person in an apartment in Brooklyn threatening other tenants. After knocking numerous times and having respondent refuse to open the door, they contacted building security staff and had them unlock the door. Inside they saw that the floor of the small apartment was strewn with clothes, utensils, and cups. Respondent had no clothes on. As they stood in the doorway and explained why they were there, respondent said that they had no right to be there, that she was "fine," and that she did not do anything wrong (Tr. 83-85). Respondent was also cursing and screaming, repeatedly throwing objects across the room (Tr. 85-86). Respondent said that she needed to get ready to leave for work. In Sergeant Kocher's opinion, respondent exhibited symptoms of being emotionally disturbed and he determined that she should be transported to a hospital for evaluation (Tr. 86-87).

The sergeant explained to respondent that she could go to the hospital voluntarily or, if she refused, the officers would handcuff her and escort her there. Respondent insisted she wanted "no part of" the hospital and refused to cooperate. She became more upset when the police asked her about any history of mental illness. The officers waited for respondent to get dressed, handcuffed her, and strapped her to a ambulance chair. Emergency medical service workers placed her in the back of an ambulance and she was driven to Long Island College Hospital (Tr. 87-88). Sergeant Kocher conceded that respondent was not violent toward the officers (Tr. 91).

Petitioner's expert proof as to respondent's current unfitness was provided by the March 8 report (Pet. Ex. 1) and testimony from Dr. Eshkenazi, the psychiatrist retained to evaluate respondent. In his report, Dr. Eshkenazi indicated that during his March 6 interview respondent declined to answer a number of questions about her psychiatric history, saying it was because of the lack of confidentiality. In discussing the February 1 incident, she first acknowledged that the police were called because she was "acting out" in her room and then stated she had no idea why the police were called. Respondent admitted that, at the hospital, she was prescribed Risperdal, an antipsychotic medication. Respondent indicated that she could not remember most of the incidents mentioned in the Attachment A. She stated that she must be a good driver because she had never been issued a ticket. In his evaluation, Dr. Eshkenazi diagnosed respondent as "I. Rule out psychotic episode" and "II. Personality disorder, paranoid type." Following receipt of

Dr. Eshkenazi's written report, Mr. Goldstein ceased using respondent as a driver and reassigned her to clerical duties (Tr. 70).

In his testimony, Dr. Eshkenazi elaborated that he found respondent's refusal to answer questions about her history to be paranoid. He found her thought process to be "concrete," meaning that she gave literal answers to questions without providing the information being asked for (Tr. 19). He regretted that respondent did not provide any of the records from her February hospitalization and treatment. He indicated that the most likely reason for prescribing Risperdal would have been to treat psychosis (Tr. 16-17) and suggested that she should probably still be taking it (Tr. 18). He indicated that one of the side effects of Risperdal is that it can have a "sedating effect." He stated that "it certainly is not recommended that bus drivers be permitted to drive on this medication" (Tr. 17).

In her testimony, respondent indicated that she was in the Army for eight years and received an honorable discharge (Tr. 128). She stated that she had an associate degree from a community college in North Carolina and, in 2009, received a bachelor of arts degree in anthropology from New York University (Tr. 103). Respondent believed that she was thought of "highly" at the Administration (Tr. 103).

Respondent acknowledged that she has been treated by a Veterans Administration psychiatrist for depression and anxiety. She took some medication for her depression in 2011. She consulted a psychiatrist at her college for her learning disability and he gave her Risperdal because she was "a little anxious" before her final exams in 2008 (Tr. 127).

Respondent offered explanations for the driving incident with Ms. Talarico and for the incident which led to her hospitalization. As to the driving incident, respondent indicated that she did not drive "erratically" as reported by Ms. Talarico (Tr. 107). She admitted that she was "guarded" with Ms. Talarico because she did not want to provoke her to complain to her supervisors (Tr. 108). Instead, she tried to keep her "head down" and focus on her job (Tr. 137).

Respondent recounted that, while driving Ms. Talarico and the clients, traffic stopped. Respondent honked her horn to signal to the driver in front of her to move forward to give her space to switch to the right lane. The driver did not respond, so respondent tried to maneuver into the right lane with the space she had. In the process, she "merged into" or "brushed" the other car's rear bumper (Tr. 105). This prompted the driver to get out, tap on respondent's

window, and say, "Miss, you just hit my car." Respondent said "sarcastically" that there was no damage and apologized. She told him she had "very important" City business to attend to and started to pull away (Tr. 105).

When respondent started to drive forward, the other driver told her she was "not going anywhere" because she just hit his car. Ms. Talarico and the child's grandmother started "complaining." Respondent tried to get the man to move away and let her leave because there was no damage. When he did not, she called her dispatcher and said she needed a replacement driver. The man then relented and said that respondent could leave. Before she did he looked inside the car and asked whether anyone got hurt. The passengers indicated no one was injured and the man left (Tr. 107).

As to the February 1 incident, respondent stated that, at around 7:10 or 7:15 a.m., she was getting ready to put on her clothes when she became "angry" about her student loans from the Veteran's Administration, where the staff had encouraged her to go to school but did not help her find a job after she finished (Tr. 110). Respondent admitted that she started getting "madder and madder" and started "yelling . . . too loud" (Tr. 111) about the VA and about her bills (Tr. 117). She heard a knock on the door and when she answered a man said that he was a police officer. Respondent said she was not dressed and did not have time to talk to him. The man knocked again and respondent refused to open the door. Next she saw her lock move and the door opened (Tr. 112).

Respondent was dressed only in a sleeveless T shirt and underwear. The officer asked her to get dressed, which she did. The officer asked how respondent was and said that some people were worried about her. He said he wanted to take her for a ride and that she should not get upset. Respondent replied that she did not have time for this because she needed to get to work. Respondent then used her walkie-talkie to call her office and tell them she would not be into work. The officer stopped respondent from taking her purse and handcuffed her hands behind her back. As he did this, respondent told him she did not want to go (Tr. 112-13).

Respondent denied throwing anything and insisted that she was only picking up things and trying to put them inside her bag to take to the hospital (Tr. 115-16). She denied threatening anyone (Tr. 116). She admitted that she had her clothes in duffle bags and books in plastic bags sitting on the floor of the room. She admitted that the room was "not neat" but that she did not expect company (Tr. 118).

Respondent walked to the elevator with the officer. Downstairs another officer placed her into the ambulance (Tr. 114). At the hospital, a doctor gave her a shot and told her she had to stay there for seven days (Tr. 121). She was also told to take a pill or she would be there longer than seven days (Tr. 122).

Respondent acknowledged that she was given a prescription for Risperdal while at the hospital. After respondent returned to work, she was referred to a psychiatrist by the hospital. Respondent went to see this psychiatrist, who told respondent that she did not need to continue taking any medication and that she did not need to return for any further treatment (Tr. 123-24).

Respondent indicated that she was guarded with Dr. Eshkenazi because "nobody briefed me on him" (Tr. 128). She said that she did not mail any of her hospital records to Dr. Eshkenazi because she was unable to obtain the records by the date that he requested them (Tr. 129). She did not want Dr. Eshkenazi to see all of her medications because some were for "a woman's reproductive system" (Tr. 131).

To place an employee on an involuntary medical leave pursuant to section 72 of the Civil Service Law, the employer must prove by a preponderance of the evidence (i) that respondent suffers from a disability, (ii) that she is unable to competently perform her job duties, and (iii) that her inability to perform is caused by her disability. *See Dep't of Parks & Recreation v. Matthews*, OATH Index No. 219/00 (Nov. 22, 1999); *Housing Auth. v. Caballero*, OATH Index No. 699/96 at 17 (Mar. 13, 1996). The determinative issue in a section 72 proceeding is the employee's current fitness and ability to perform her job duties, not her past condition or work performance. *Human Resources Admin. v. Bizaliele*, OATH Index No. 305/96 at 12 (Dec. 18, 1995).

The proof that respondent had a mental disability rested upon the report and testimony of Dr. Eshkenazi as well as respondent's own summary of psychological problems. In her own testimony, respondent candidly admitted a history of psychological treatment for anxiety and depression, both in the past and within the last few months. She also offered a largely consistent account of becoming inappropriately angry and loud prior to her seizure by the police officers and her hospitalization. As the February 1 incident made clear, respondent's emotional life can be turbulent, even unstable. Respondent acknowledged as much in her testimony. She indicated that she had voluntarily sought treatment recently when she recognized that her emotions were

getting out of control. In testifying at the hearing, respondent appeared subdued and somewhat disengaged. While still responding to most questions directly and lucidly, she did smile inappropriately and look away at times. Her descriptions of her attitude toward her work were instructive. While, on the one hand, she indicated she was dedicated to performing her assignments as efficiently as possible, she was, on the other hand, fearful of having co-workers complain about her behavior. This resulted in her appearing sullen and unfriendly, as suggested in the testimony of Ms. Talarico.

The precise nature of respondent's admitted psychological problems was not entirely clear. There was only limited support offered for Dr. Eshkenazi's conclusion that respondent had a "personality disorder, paranoid type." Dr. Eshkenazi's conclusion that respondent had a paranoid disorder was based primarily upon respondent's defensiveness during the interview and her refusal to discuss her psychiatric history. In this regard, respondent admitted to being apprehensive during the interview because she knew anything that she said might be used to place her upon indefinite sick leave, hardly an unreasonable fear. Given the severe consequences of a finding of unfitness and subsequent involuntary leave without pay might have upon respondent's ability to support herself, respondent's anxiety about the interview seemed rational.

It was notable that the attachment A provided to Dr. Eshkenazi described a number of incidents from 2008 through 2011, as summarized above. The Attachment A incidents seemed to show anger and irritability, but did not identify behaviors indicative of unusual or delusional fears.

Even while some of Dr. Eshkenazi's specific conclusions were not entirely convincing, it was clear that his analysis was hampered by respondent's refusal to provide the full records from her recent hospitalization or other medical proof, with the exception of the two conclusory doctor's notes. I found that Dr. Eshkenazi's evaluation, combined with the uncontroverted facts surrounding the February hospitalization and respondent's own testimony, established that respondent has a mental disability.

For a number of reasons, however, the evidence did not establish the second necessary element that respondent was currently unable to perform the duties of a driver. In this regard, it was notable that, despite the numerous incidents recounted in the Attachment A, petitioner presented proof upon only one job-related incident: the December 2011 work incident described by Ms. Talarico. No evidence at all was offered as to the earlier incidents, the most recent of

which was January 2011. Even fully credited, Ms. Talarico's testimony established that she had a poor opinion of respondent's driving skills, without offering much substantive evidence that respondent was an unsafe driver. Ms. Talarico's opinion that respondent's driving was "erratic" was exemplified only by her statement that the passengers were pressed forward against their seat restraints. Given the traffic to be found throughout an urban area such as New York City, particularly during business hours on a week day, abrupt stops did not establish that respondent was an unsafe driver. Ms. Talarico's description of the incident with the other vehicle also did not establish that respondent was an unsafe driver. Ms. Talarico was not even aware of contact with another vehicle until the other driver approached, indicating that any contact between two vehicles must have been gentle and minor. Rather than demonstrating unfitness, Ms. Talarico's rendition of respondent's conversation with the other driver indicated that respondent was performing her driving duties competently. Respondent indicated she needed to report the incident to her base and to request another vehicle to transport the passengers, a reasonable response to the situation. The fact that respondent may have raised her voice in dealing with the incident did not establish unfitness, where she said nothing profane or otherwise inappropriate.

This single incident fell far short of establishing a "pattern of dangerous and erratic driving," as argued by petitioner's counsel in her closing (Petitioner's Closing at 3). In fact, the testimony from Mr. Goldstein that respondent was spoken to about the 2009 through 2011 complaints, was retrained, and given favorable supervisory assessments of her driving performance in 2011, suggested that the earlier problems with respondent's driving had disappeared or at least improved. Certainly petitioner's failure to offer any proof as to earlier incidents foreclosed relying upon these earlier complaints to establish that, as of the time of the hearing, respondent was not a safe driver.

The only statement by respondent which was arguably inappropriate was Ms. Talarico's assertion that respondent stopped and ordered her passengers to "just get out and walk." However, there were indications that this remark, assuming it was made, was not an order but was rather part of an exchange in which one of the passengers was complaining about respondent's general attitude. In Ms. Talarico's e-mail, written about a month after the incident, Ms. Talarico described respondent's remark slightly differently. She indicated that, after the child's grandmother accused respondent of being rude, respondent stated that "if we didn't like it

we could all get out and walk." Taken in this context, respondent's actions and statements, while certainly discourteous and probably disciplinable as misconduct, did not amount to abandoning the passengers or refusing to complete her work assignment, as suggested by Ms. Talarico's hearing testimony. In fact, respondent properly notified her dispatcher of the delay, sought a replacement car, and then proceeded to deliver her passengers to their destination as quickly as was feasible.

The facts surrounding the police officer's removal of respondent from her home and her involuntary hospitalization in February 2012, while confirming that respondent has a mental disability, did not demonstrate that respondent is or has ever been unable to perform her job of driving a vehicle. Although petitioner repeatedly asserted that respondent was "naked," the fact that respondent was unclothed when the police officers used the superintendent's key to enter her apartment at 7:00 a.m. was hardly surprising and indicative of little. The suggestion that respondent was potentially dangerous was largely refuted by the officer's testimony which indicated that the only harm caused by respondent's actions was loud shouting which disturbed her neighbors. The police officer emphasized that, apart from throwing objects around, respondent was never violent. Nothing in the police officer's testimony as to his interaction indicated that respondent was unable to drive a vehicle or was otherwise unfit either in February or, more importantly, as of the date of the hearing.

Dr. Eshkenazi's conclusions that, based upon the length of her hospital stay and the prescription for Risperdal, respondent may have had a psychotic episode and was severely ill had some logical basis. Other portions of Dr. Eshkenazi's analysis as to her fitness to drive, however, seemed speculative. His assumption that she needed to continue to take Risperdal indefinitely was entirely unsupported. Respondent's testimony that she took Risperdal only during the time of her hospital stay and was not directed to continue any medication after she left the hospital was consistent with the letter from her treating therapist (Resp. Ex. A), indicating that respondent was "stable" and "fit to return to her daily activities." It was also consistent with a letter from a treating psychiatrist at the Department of Veterans Affairs (Resp. Ex. B) that, in June 2012, respondent was treated for depression and anxiety "mostly with psychotherapy" and that respondent had shown "no evidence of delusions or hallucinations."

In short, the hearing evidence showed that co-workers had complained about respondent's driving in 2009, 2010, and early 2011, but that, other than the incident with Ms.

Talarico, there had been no complaints since January 2011. There were no other incidents in 2011 or early 2012. When supervisors and other drivers accompanied respondent and evaluated her driving in 2011, they found her to be driving safely and competently. Respondent did not offer, and petitioner did not seek to obtain discovery of, respondent's February 2012 hospital records, which might have been probative of her current mental state. There was thus no evidence that, at the time of the hearing in June and July 2012, respondent was unable to perform the duties of a driver or was otherwise unfit.

I am sensitive to the fact that, as a driver who regularly transports children, some extra degree of scrutiny must be given to respondent's driving. Petitioner's attorney, in her closing, gave much emphasis to respondent's comment that respondent did not know how to care for children as an indication that she must be unfit to be a driver for the Administration, whose central mission is to protect children. Discomfort with caring for children did not, however, establish unfitness to drive generally. Care of children is not included in respondent's tasks and standards (ALJ Ex. 1). And, while Mr. Goldstein properly pointed out that Administration drivers are expected to see to children's comfort by adjusting the air conditioning or heat in the vehicle or perhaps turning on or off the radio, the caseworkers, not the drivers, are charged with the direct care of any children being transported (Tr. 59-60). The fact that respondent may have expressed reluctance to perform child care duties did not mean that she could not operate a vehicle with a child as a passenger, which is all her job assignment required. There was no evidence offered at the hearing to show that respondent's driving has ever imperiled the safety of a child or any other passenger.

It is true that respondent did not offer an expert witness on the issue of her fitness to work as a driver. In her closing, petitioner's attorney requested a negative inference of unfitness based upon this failure of proof, relying upon *Dep't of Environmental Protection v. Trezza*, OATH Index No. 544/99 at 9 (Feb. 8, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 99-72-1 (June 3, 1999). *Trezza*, however, does not stand for the proposition that section 72 leave must be automatically granted if an employee fails to offer expert evidence, as suggested by petitioner. Rather, OATH cases indicate that, where an employee fails to offer expert evidence opposing the testimony of the employer's expert, this must be considered in ascribing appropriate weight to employer's expert evidence, *see Admin. for Children's Services v. Papa*, OATH Index No.

1392/07 (Mar. 30, 2007), but does not always result in a finding of unfitness. *Comm'n on Human Rights v. Henderson*, OATH Index No. 704/01 (June 12, 2001). In this case, the weight to be given Dr. Eshkenazi's expert conclusion of unfitness was limited due to the issues noted above, even while it was enhanced somewhat by the absence of expert proof from respondent.

Past cases involving employees placed upon involuntary leave, particularly three recent cases brought by petitioner, involved far more serious work incidents which involved failure to complete assignments or significant workplace disruptions. *See Admin. for Children's Services v. Anonymous,* OATH Index No. 416/12 (Dec. 14, 2011); *Admin. for Children's Services v. Anonymous,* OATH Index No. 212/12 (Dec. 15, 2011); *Admin. for Children's Services v. Anonymous,* OATH Index No. 2619/11 (Dec. 30, 2011). In particular, in *Housing Authority v. John Doe,* OATH Index No. 1226/03 (Apr. 9, 2003), the principal case relied upon by petitioner, a driver was found unfit based upon proof of two incidents, in which he abandoned a vehicle without notifying his supervisor and stranded a passenger without waiting to drive him back as instructed. Dr. Eshkenazi concluded that the employee had paranoid schizophrenia. The judge found that anti-psychotic medication which had been prescribed for the driver to deal with his schizophrenia had side effects, including drowsiness, which would prevent his driving. In that case, the incidents proven established that the employee had twice abandoned assignments without explanation and without notifying supervisors. Although the employee's expert disputed the conclusions of the employer's expert, the diagnosis of paranoid schizophrenia was confirmed by the employee's treating psychiatrist.

None of the *John Doe* factors exist in the instant case. At most, petitioner's hearing evidence established that respondent was an excitable driver who was sometimes discourteous. Neither respondent's emotional nature nor her occasionally rude remarks establish that she is unfit to be a driver. *Comptroller v. Wang*, OATH Index No. 665/98 (Dec. 11, 1997). Certainly, if respondent continues to make inappropriate remarks or to exhibit unsafe driving practices, she can and should be brought up on disciplinary charges for misconduct. The fact that she has apparently not been subjected to discipline despite past complaints about her behavior was not explained by petitioner, although one possible reason might be that the incidents were extremely minor and better dealt with by counseling. The fact that the number of complaints has declined since January 2011 suggests that these conferences may have been effective.

I therefore find that, while the proof established that respondent has a mental disability, the evidence of her job performance was insufficient to prove that, at the time of the hearing, respondent was unable to perform the duties of a vehicle driver.

## FINDING AND CONCLUSION

The petition should be dismissed in that the evidence at the hearing failed to establish that respondent is unfit to perform the duties of her position as a driver.

I therefore recommend that the petition to place respondent on disability leave pursuant to Civil Service Law section 72 be dismissed.

John B. Spooner
Administrative Law Judge

September 6, 2012

SUBMITTED TO:

**RONALD E. RICHTER**
*Commissioner*

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