

# ***Human Resources Admin. v. Anonymous***

OATH Index No. 1781/12 (Aug. 9, 2012)

Respondent is unfit to perform the duties of his position, by reason of a disability, and thus should be placed on a post-hearing leave of absence pursuant to section 72 of the Civil Service Law.

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

*In the Matter of*  
**HUMAN RESOURCES ADMINISTRATION**  
*Petitioner*  
*-against-*  
**ANONYMOUS**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**FAYE LEWIS**, *Administrative Law Judge*

This is a disability proceeding referred by petitioner, the Human Resources Administration (“HRA”), pursuant to both sections 72 and 75 of the Civil Service Law. Respondent<sup>1</sup> is a job opportunity specialist (“JOS”) employed at the Waverly Model Center. The petition alleges that respondent committed various acts of misconduct in August, 2011, and alternatively, that respondent is unfit by reason of a disability to perform the duties of his position and should be placed on an involuntary leave of absence.

Over the course of a three-day hearing in June, 2012, petitioner presented Dr. Azariah Eshkenazi as an expert witness and introduced the testimony of 12 employees at the Waverly Center: Joseph Guilford, the floor manager; Zorita Hayes, the Center Director; Millicent Shepherd, the Deputy Center Director; Olivia-Ann Muriel, Channelle Williams, Abena Jaurey, all co-workers; Yolanda DeJesus, Calvin Quick, and Charlo White, supervisors; Security Sergeant Annette Thomas; Security Guard Yuniko Pridgeon; and Hiawatha Pendergrass, an

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<sup>1</sup> Because this report contains sensitive medical information about respondent, his name is being withheld pursuant to section 1-49(d) of OATH’s Rules of Practice. 48 RCNY § 1-49(d) (Lexis 2012). *See Admin. for Children’s Services v. Anonymous*, OATH Index No. 212/12 at 1 (Dec. 15, 2011) (withholding respondent’s name because the report discussed sensitive medical issues); *Admin. for Children’s Services v. J.M.*, OATH Index No. 3350/09 at n. 1 (Apr. 5, 2010) (withholding respondent’s name because the report discussed her medical condition); *see also Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing a right to confidentiality in one’s personal medical information).

assistant manager. Respondent testified on his own behalf. On rebuttal, petitioner also presented the testimony of Donald Lemons, the Deputy Director of the Office of Legal Employment Opportunity.

For the reasons set forth below, I find that respondent is presently unfit to work and recommend that he be placed on an involuntary leave of absence.

### ANALYSIS

Petitioner elected to proceed with this case under alternate theories: either respondent is liable and should be penalized under Section 75 of the Civil Service Law because he has committed volitional acts of misconduct, *see Reisig v. Kirby*, 62 Misc. 2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969), or respondent's conduct is instead attributable to a disability, and respondent, by virtue of that disability, is unable to fulfill the duties of his position. The theories are mutually exclusive. If respondent's acts were caused by a disability, no penalty for misconduct under Section 75 may be imposed. *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Bruce*, OATH Index No. 138/10 at 3-4 (Dec. 4, 2009) (dismissing AWOL charge where evidence demonstrated that the charged misconduct was most likely due to a mental disability and noting that petitioner's remedy was to pursue a disability proceeding); *Dep't of Housing Preservation and Development v. Chambart*, OATH Index No. 380/84 at 15 (Feb. 22, 1985) (section 72 "was not intended to offer appointing authorities the ability to elect disciplinary action over the more humane treatment afforded under section 72, where an employee's conduct is attributable to a mental or physical disability"); *Housing Auth. v. Cosentino*, OATH Index No. 535/88 at 11-12 (Mar. 31, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-72-1 (Feb. 21, 1990); *see also Cymbalsky v. Dilworth*, 97 A.D.2d 543 (2d Dep't 1983) (a finding of unfitness requires an employer to follow the procedures set forth in section 72 rather than section 75).

Because a finding that respondent is unfit to work due to a disability would lead to dismissal of the Section 75 charges, it is appropriate to first consider this issue.

In a disability proceeding, petitioner bears the burden of proving by a preponderance of the evidence that respondent suffers from a disability, that he is unable to competently perform his job duties, and that his inability to perform those duties is caused by his disability. *Admin. for Children's Services v. Cleveland*, OATH Index No. 116/08 (Feb. 20, 2008); *Police Dep't v.*

*Cornick*, OATH Index No. 536/08 at 13 (Dec. 7, 2007); *Housing Auth. v. Barone*, OATH Index No. 1122/04 at 14 (May 23, 2005).

Here, while the parties dispute respondent's fitness to work, there is no dispute that respondent suffers from several disabilities. Dr. Eshkenazi, a psychiatrist who evaluated respondent on May 29, 2012 at petitioner's request, concluded that he has attention deficit hyperactivity disorder ("ADHD") and generalized anxiety disorder-severe (Tr. 28: Pet. Ex. 2). In his evaluative report, Dr. Eshkenazi noted, as a "diagnostic impression," "rule out bipolar disorder," which meant he believed respondent might have bipolar disorder, but did not have enough information to make that diagnosis (Pet. Ex. 2).

Respondent produced a letter from his treating psychiatrist, Dr. Gray, dated March 27, 2012, which stated that respondent has been under his care for the past year and a half and has been diagnosed with anxiety, depression, and attention deficit disorder, and is currently receiving medicine and psychotherapy "to address symptoms related to those conditions" (Pet. Ex. 3).

Respondent also testified that he has been diagnosed with ADHD, attention deficit disorder with obsessive compulsive tendencies ("OCD"), depression, bi-polar disorder, suicidal ideation, anxiety issues, and sleep disorder (Tr. 474). He has been seeing a psychiatrist, Dr. Gray, for over a year for his depression, anxiety, and ADHD, and seeing a therapist, Ms. Moreno, for slightly longer, for his bipolar disorder (Tr. 477, 483).

The remaining issue is whether that respondent is incapable of performing his job duties due to his disability. The evidence demonstrated that respondent is unable to competently function in the workplace because of a persistent inability to interact with others, co-workers and supervisors alike, without engaging in disruptive, angry, and sometimes frightening behavior.

### **Dr. Eshkenazi's Evaluation**

After evaluating respondent, Dr. Eshkenazi concluded that he was not mentally fit to perform the duties of his position (Tr. 25; Pet. Ex. 2). He testified that respondent was extremely anxious during the interview and that he was shaking, "very, very badly" (Tr. 43). Dr. Eshkenazi allowed that while most people are nervous when going for a psychiatric evaluation, he believed respondent's anxiety was "far above and beyond the natural response," indeed, "overwhelming" and "paralyzing" (Tr. 42, 64). At one point, "for no apparent reason," respondent became "very emotional" and started to cry (Pet. Ex. 2).

Dr. Eshkenazi also believed that respondent had difficulty concentrating and answering his questions (Tr. 28). He testified that respondent was “rambling” when he talked and “going around and around” (Tr. 57, 65):

He was unable to answer questions. . . He was just losing it. He was circumstantial. He had looseness of association, jumping from subject to subject and totally made no sense

(Tr. 66). There were times when he could not follow “at all” what respondent was saying (Tr. 57, 65). Dr. Eshkenazi concluded that respondent’s difficulty in concentrating was a manifestation of his ADHD (Tr. 38). He noted that respondent said he was taking medication for ADHD (Adderall), anxiety (Xanax), and depression (Trazodone) (Tr. 28; Pet. Ex. 2).

According to Dr. Eshkenazi, respondent admitted most of the allegations in Attachment “A,” petitioner’s statement about his behavior in the workplace from August 2011 forward (Tr. 37, 42, 43; Pet. Ex. 1b). Dr. Eshkenazi testified that he asked respondent if Attachment A described what had happened and respondent said that it described what had occurred, “more or less” (Tr. 55, 63). However, despite allegations in Attachment A that he had told co-workers that he was feeling suicidal, respondent denied ever planning to kill himself and said his co-workers had misunderstood him (Tr. 37, 38). Dr. Eshkenazi acknowledged there is a distinction between actively planning suicide and having thoughts that one would be better off dead (Tr. 37, 38). He noted, however, that respondent was hospitalized for several days in 2004 for depression and suicidal ideation (Pet. Ex. 2).

Dr. Eshkenazi acknowledged that respondent’s condition could likely be treated (Tr. 64). However, he said that he would prescribe different medication for respondent if the bipolar diagnosis was confirmed (Tr. 35). He believed that respondent might need a tranquilizer to help him “calm down to be able to focus” (Tr. 36). He also testified that respondent was taking a lower dosage of Adderall than that typically prescribed for ADHD and that he would not use Trazodone to treat depression, as it is typically used as a sleep aid and there are many more effective antidepressants (Tr. 52).

### **Dr. Gray’s Letter and Respondent’s Testimony About his Disabilities and How They Could be Accommodated**

Respondent did not present an expert witness to rebut Dr. Eshkenazi’s conclusions that he is not mentally fit to perform the duties of his position. However, respondent did submit a letter

written by his treating psychiatrist, Dr. Gray. This letter, dated March 27, 2012, states that respondent suffers from anxiety, depression, and attention deficit disorder, and continues:

It should be noted that his symptoms may interfere with his abilities to function at work. Problems maintaining attention and focus, fidgetiness, and difficulties with verbal impulsivity, are consistent with attention deficit disorder. In addition his anxiety and depression may interfere with his ability [to] relate [to] others appropriately and to attend work on a regular basis.

(Pet. Ex. 3). Respondent noted this letter said that his anxiety and depression might “interfere” with his ability to relate to others, stressing, “Interfere. Not prevent” (Tr. 560).

Respondent further testified that he believes he is fit to work, even without reasonable accommodations (Tr. 495, 521). With such accommodations, he feels that he can improve (Tr. 495). He testified that both of his evaluations rate him as good, his clients thank him for helping them, and he probably interviews more clients than anyone else in his unit (Tr. 521, 525).

Respondent explained that his disabilities manifest themselves in the workplace in various ways. He said that symptoms of ADHD include his leg bouncing, as well as his pacing and walking in circles (Tr. 475). Additionally, sometimes he is inattentive, and then has to ask a client to repeat information so he understands it fully (Tr. 478). Many times, however, he is hyper-attentive, focusing almost entirely on one task and not noticing anything else (Tr. 558). He believes that this helps him during client interviews. He also takes Adderall as needed to manage his ADHD symptoms, often twice daily (Tr. 475).

Respondent testified that his depression sometimes makes him look sad, although he thinks this could also be a result of Xanax, which he takes to control his anxiety (Tr. 485). He said he is not currently taking any medication for his depression. He denied ever thinking about committing suicide, although he has sometimes thought that the world would be a better place without him, which is “suicidal ideation” (Tr. 483). Respondent acknowledged that his anxiety makes him apprehensive about approaching co-workers with whom he has had “past issues” (Tr. 487).

Respondent explained that he does not take any medication for his bipolar disorder. When he was first diagnosed as an adolescent, his parents thought he should not take medication but instead learn “some self-control,” because “when you take medication as a crutch, it reduces your own coping mechanisms” (Tr. 480). Also, once when he took medication, it made him feel

depressed, so he stopped. Instead, respondent testified, he treats his bipolar disorder through counseling (Tr. 482).

Respondent explained that his disabilities impact his interpersonal relationships with other JOS workers more than his interactions with his clients (Tr. 474). In particular, he testified that his bipolar disorder impacts his functioning at work when he shows his “anger,” so that he needs to “take a minute break” to clear his head and talk to someone in his “support network,” such as his father or his therapist (Tr. 482). He also believes that he should be able to take time off when he needs it, using sick time (Tr. 482).

Further, respondent maintained that a “self-paced workload,” which would mean taking as much time as needed with each client, could help accommodate his anxiety (Tr. 488). He believes that it would help him manage all of his disabilities if his managers talk to him with sensitivity, rather than yelling, as he said certain managers have done. Indeed, he has requested, and would like, management to conduct sensitivity training for his managers and supervisors (Tr. 479, 485, 487).

In addition, respondent suggested that he should be able to e-mail colleagues or supervisors when he does not feel like talking to them. He asserted that putting a mat under his desk or carpeting the floor would help colleagues deal with his distractibility because it would reduce the sound that his leg makes when it bounces (Tr. 492). He also suggested that perhaps his desk height could be adjusted or a divider put up, or the cubicle walls could be “strengthened,” so his leg bouncing is not so noticeable. Finally, he said that using a headset would help him block out distractions (Tr. 493).

Respondent testified that he has requested a reasonable accommodation from many of his supervisors. He has made requests by e-mail and also submitted a 766 form, request for reasonable accommodation, various times, including in December 2011, because he felt that an “interactive discussion” was not taking place (Tr. 490). Every time this happened, the form got sent back to him for his supervisor’s signature, and for him to submit medical documentation. Respondent acknowledged not providing medical documentation, as requested by EEO, until he submitted Dr. Gray’s letter, because he felt it was not required by the EEO policy. He testified that EEO has denied him the reasonable accommodations requested (Tr. 491).

## **Evidence about Performance and Conduct in the Workplace**

The twelve supervisors and co-workers presented by petitioner testified about respondent's job performance and interaction with other employees from August 2011 to the present. Their testimony presented respondent as an easily angered employee who has difficulty accepting supervision and interacting with colleagues and whose actions disrupted the workplace and were sometimes perceived as threatening. Respondent denied some, but not all of the conduct, and asserted that some of his comments had been misunderstood. Further, he contended that he should not be penalized for conduct which was attributable to his disability. Additionally, although he did not have anything negative to say about his current supervisors, he thought his previous supervisors treated him unfairly and tended to "scream and yell" at him (Tr. 531).

Respondent has worked at the Waverly Model Center since about 2009 (Guilford: Tr. 140). The Center has five case management units, which Mr. Guilford supervises as the floor manager (Tr. 71, 73). Until March or April of 2012, respondent worked in the Customer Management Unit ("CMU"), on the second floor of the Center. CMU staff is responsible for interviewing new and current clients to get information to determine their eligibility for public assistance (Guilford: Tr. 73-74). Interviews can last for over an hour (Hayes: Tr. 157). Ms. Hayes testified that respondent had three different supervisors in CMU. Through August 2011, he was supervised by Ms. King-Mervin. As of August 22, 2011, he was transferred from Ms. King-Mervin's group to Mr. Quick's group (Hayes: Tr. 159; Pet. Ex. 20). Then, in about September 2011, respondent was given his own "personal" supervisor, Ms. Gilda Francis (Hayes: Tr. 158).

Finally, in March or April 2012, respondent was transferred to the third floor, to a Customer Service Information Unit, under the supervision of Shirley Guerrant (Hayes: Tr. 156). This unit is also known as "quick service" unit (Hayes: Tr. 156; Pendergrass: Tr. 430), servicing clients with active public assistance cases who have specific issues, such as missing benefits or relocation out of state. A typical client meeting lasts only ten or fifteen minutes, according to Mr. Pendergrass, who runs the unit (Tr. 430). Respondent's supervisors testified that he was transferred so many times because of difficulties with supervisors and co-workers, which persisted even after the transfers.

Workplace incidents or events are discussed below, largely in chronological order.

**July 11, 2011 and August 9, 2011**

These dates involved two discrete and limited incidents.

Mr. Guilford testified that he received a phone complaint from a client complaining that on July 11, 2011, respondent closed her case even though she had never withdrawn her application (Tr. 74; Pet. Ex. 4). When he talked to respondent, respondent played him a voicemail from the client, indicating that she did not think that having an application open would serve her purpose (Tr. 76). Mr. Guilford did not recall whether the client said that she wanted her application withdrawn (Tr. 76), but he said he could “understand” that respondent would construe the voicemail as a request to close her case (Tr. 76-77). However, he testified that a client who wants his or her case closed must put that request in writing before it can be closed (Tr. 77).

Respondent testified that the applicant had left him a voicemail message asking him to withdraw her case because she could not find her documentation. A few days later, when the applicant located her paperwork and went to the Center, no one told respondent and the supervisor rejected her case. When Mr. Guilford asked him about this, respondent played the voicemail and Mr. Guilford said it was okay (Tr. 496, 497).

Regarding August 9, 2011, Mr. Guilford testified that respondent told him that a client said he was homeless, but wanted to file a request for additional assistance to pay rent arrears so he could return to his apartment. Mr. Guilford told respondent to have the client complete a form to specify what he needed. Respondent replied that the client was homeless and thus did not need to have his rent paid; Mr. Guilford reiterated that the client would not be homeless if he was permitted to move back in, that it was “not a big deal,” and that respondent should give the client the form and tell him to bring in other documentation, such as a letter from the landlord (Tr. 88). However, Mr. Guilford later saw respondent at the photocopy machine, with the client seated at his desk. Respondent said he still had not given the client the form, and Mr. Guilford reminded him to be sure to do that (Tr. 89). Subsequently, a security guard approached Mr. Guilford and said respondent wanted the client removed from his desk but was not providing any reason (Tr. 90).

When Mr. Guilford went to speak to respondent, respondent said he did not want the client at his desk and would not give the client the form unless the client was removed from his desk. Mr. Guilford then spoke with the client, gave him the form to complete, and told him to

provide documentation (Tr. 90). By that time the client had been in the office for over an hour (Tr. 91).

Mr. Guilford testified that it was inappropriate for respondent to ask security to remove the client, as the client was not being abusive or disruptive but simply wanted information about getting his rent paid (Tr. 91). Mr. Guilford memorialized the incident in a brief memorandum to respondent (Pet. Ex. 5).

Respondent testified that the client was homeless and wanted money to sleep on a friend's couch. He checked with his supervisor, Ms. King, who said that he could not give the client money for that purpose, and to instead give the client a form relating to homeless shelters. Respondent said he did as directed by Ms. King. He did not give the client the form for rent arrears (Tr. 498). Respondent did not address whether Mr. Guilford directed him to give the client the form.

### **August 2011**

Apart from the August 9, 2011 incident, which is discrete in nature, there were a series of negative interactions between respondent, his co-workers, and his supervisors during August 2011. Many of these involved respondent's attempts to involve co-workers and supervisors in his relationship with Ms. Burke-Evans, a supervisor who sat in the cubicle across from respondent (White: Tr. 455).

#### **Conflict with Ms. Jaurey**

Ms. Jaurey, a JOS worker and colleague of respondent's, testified that she had been friendly with respondent until their "falling out" in August 2011, which involved Ms. Burke-Evans. Respondent had written a letter to Ms. Burke-Evans, asking for her friendship, and had asked Ms. Jaurey to read the letter on August 22, 2011. Ms. Jaurey testified that she told respondent that she was busy and "maybe" would read it when she had time (Tr. 390). When respondent repeated his request the next day, she said that she could not read the letter, and that he could not leave it on her desk (Tr. 390). She also told respondent that Ms. Burke-Evans was her friend, respondent was bad mouthing her, she did not want to be a pawn, and respondent should talk to Ms. Burke-Evans himself. Ms. Jaurey testified that respondent became "very angry;" she told him that if he did not leave her desk she would have to tell management (Tr. 390). He got red and "stomped away" (Tr. 391). She testified that she could "see the rage in

him like kind of building” (Tr. 391). She notified Mr. Guilford and then e-mailed Ms. Shepherd on August 31, 2011 (Pet. Ex. 34).

Ms. Jaurey testified that respondent was so persistent in asking about the Burke-Evans letter that it was “overwhelming” (Tr. 400). “It was like every minute he would come over. . . It was constantly the same thing with him . . .” (Tr. 400). According to Ms. Jaurey, “literally every day,” respondent was upset or arguing with someone. Whenever “something would happen” involving respondent, he would say it was “part of his disability” (Tr. 399). Respondent had previously talked to her about his bipolar disorder and had said that as part of his disability he has trouble calming down and “can’t take no for an answer” (Tr. 398).

Respondent testified that he was confused when Ms. Jaurey refused to read the letter on August 23, 2011, since she had told him on August 22 to come back the next day. He felt she was dismissive and slightly angry but did not appear to feel threatened (Tr. 499). He confirmed that they had been friendly, that he had he talked to Ms. Jaurey about his ADD when he was having “a rough day,” and had even showed her a list of symptoms of ADD with OCD tendencies (Tr. 547-48).

#### **Conflict with Mr. White**

Mr. White, an administrative job opportunity specialist (“AJOS”) for ten years, supervised respondent when respondent’s direct supervisor was absent (Tr. 453-54). He, too, said that respondent often approached him, starting in about August, 2011, regarding Ms. Burke-Evans (Tr. 455). Respondent would ask why Ms. Burke-Evans was not speaking to him, and Mr. White would reply that he did not want to get involved (Tr. 455). Respondent nonetheless persisted in his inquiries. As time went on, Mr. White found his continued inquiries to be “weird and strange” (Tr. 455).

At one point respondent asked Mr. White to give Ms. Burke-Evans a gift for her daughter, which Ms. Burke-Evans did not want to accept. Respondent left the item on Mr. White’s desk and walked away. Mr. White moved it to Ms. Burke-Evans’s desk, but Ms. Burke-Evans removed it. When respondent returned to Mr. White’s desk, Mr. White told him that he needed to retrieve the item because Ms. Burke-Evans did not want it. Respondent was “a little frustrated” and turned red (Tr. 457). Mr. White thought this was “strange” but not “out-of-control” (Tr. 457).

Mr. White testified, however, that there were other incidents where respondent would “walk up and down the aisle . . . yelling and screaming at the top of his lungs . . . for no apparent

reason” (Tr. 458). If Mr. White was talking to one of the security officers, respondent would get up from his desk and yell that he could not hear because Mr. White was making too much noise (Tr. 458). Respondent also started going around the office, telling people that Mr. White was a bad guy, and was not on his side (Tr. 456, 467). Mr. White felt that he had become one of respondent’s “targets” as a result of refusing to intervene with Ms. Burke-Evans (Tr. 458).

Respondent testified that he asked Mr. White to try to get Ms. Burke-Evans to stop yelling at him and that he wanted to find out what the problem was. He denied that Mr. White ever told him to stop talking about Ms. Burke-Evans (Tr. 557).

**August 22, 2011 - Transfer to Mr. Quick’s unit**

Around the same time, Ms. Hayes, the Center Director, and Ms. Shepherd, the Deputy Director, decided to transfer respondent from Ms. King-Mervin’s supervision to Mr. Quick’s supervision. Ms. Hayes and Mr. Shepherd both testified that respondent had a problem accepting Ms. King-Mervin’s supervision (Hayes: Tr. 158; Shepherd: Tr. 250). There was “always this back and forth bantering” between them and at times respondent was “somewhat insubordinate” (Hayes: Tr. 158).

Ms. Shepherd went further: she said that respondent was having trouble with “interaction with his overall unit” and “wasn’t following the proper protocols” of his work. Instead, he would do what he thought was appropriate, and when his supervisor questioned him, “he would get angry” (Tr. 251). If she e-mailed him a directive, he would e-mail back, saying that he had a disability and she was violating “the disability codes” (Tr. 252-53). Although respondent never produced documentation of his disability, Ms. Shepherd decided to address his claim of a “hostile work environment” by moving him from one part of the floor to another, away from Ms. King-Mervin (Tr. 253, 254). By memorandum to respondent dated August 17, 2011, Ms. Shepherd said that, effective August 22, 2011, he was being relocated to the We-Care group 2, under Mr. Quick’s supervision, “to prevent a hostile working environment” (Pet. Ex. 20).

**August 29 and 30, 2011 – Departure and Absence**

There is no dispute that respondent left work early on August 29, 2011, without telling his covering supervisor, and did not return to work until August 31, 2011. Instead, respondent talked to his union representative, who relayed that information to the administrative assistant to Ms. Hayes and said that respondent would return with a medical note documenting his absence due to a medical emergency (Guilford: Tr. 104-05, 109-110; [REDACTED] Tr. 501, 567).

Mr. Guilford testified that because respondent did not tell a supervisor that he was leaving, the client whom he had been assigned to interview was left sitting in the waiting room for over an hour (Tr. 109). Mr. Guilford did believe that respondent called in sick on August 30 (Tr. 112). Respondent did not bring a doctor's note when he returned on August 31, and said that he had been unable to schedule an appointment with the doctor (Tr. 112). Respondent did not reply when Mr. Meacham asked why he had not gone to the emergency room. Mr. Guilford was unable to explain why respondent's leave was ultimately approved (Tr. 115-16).

Respondent testified that he was having a massive "anxiety attack" on August 29, 2011, which was a Monday, because on the previous Friday, August 26, Ms. Burke-Evans had "screamed" at him for going to a bar with her daughter and sending her daughter a Facebook friend request (Tr. 50, 567). His union representative suggested it would be best if he went home, so he did so. He did not tell his covering supervisor he was leaving because that was Ms. Burke-Evans, who was the cause of his anxiety attack (Tr. 567). However, on August 30, he contacted his supervisor, Mr. Quick, about his absence (Tr. 502). He was not able to get an appointment with his own doctor on August 29, but he contacted the Employee Assistance Program ("EAP") and eventually provided the location with a letter from EAP which indicated that he had left a message on the EAP voicemail on August 29 saying he was depressed due to a conflict with a supervisor, and that on August 30 he had told the EAP director that he called out sick from work (Tr. 501; Pet. Ex. 41).

#### **August 31, 2011 – Agitated and Disruptive Behavior**

Petitioner's witnesses testified that respondent was extremely upset and angry on August 31, 2011, beginning in the morning and continuing during and after a meeting with management in the afternoon.

Ms. Williams, a JOS worker for three years at the Waverly Center, testified that when she saw respondent on August 31, he looked "so upset" (Tr. 372). His clothes were "disheveled," his face was "red," he was "stomping," and he "slammed" the door very hard (Tr. 372). She did not really interact with him because he was too upset (Tr. 374-75). Ms. Williams told her supervisor, Ms. Shepherd, and, as directed, sent an e-mail documenting her concerns (Shepherd: Tr. 261; Williams: Tr. 373). In the e-mail, she said that respondent was "walking back and forth in circles, with a menacing look," making her feel "threatened" (Pet. Ex. 32).

Ms. Jaurey testified that on August 31, respondent came in to work looking extremely "frazzled" and walking so hard that "you could actually hear the ground shaking" (Tr. 394).

Further, although it is not clear what date this referred to, Ms. Jaurey testified that respondent once told someone in the fair hearing area that part of his disability is thinking about suicide and “HRA [was] pushing him over the edge and this is what might happen if they don’t leave him alone” (Tr. 388, 401).

Ms. Shepherd testified that, in addition to Ms. Williams, at least two of respondent’s other co-workers approached her on August 31, 2011 to assert concerns about respondent. Inna Federovskaya said that she was “shaking” and “nervous” and that respondent was “frightening” her. Ms. Federovskaya said respondent told her that he could not work, he was getting anxiety attacks, and he should have taken his medication (Tr. 258; Pet. Ex. 21). Ginnette Alexander told Ms. Shepherd that respondent had had approached her and was talking “negatively” about Ms. Burke-Evans (Pet. Ex. 22).

Having received these complaints, Ms. Shepherd called respondent in for a conference to discuss the complaints as well as other complaints she had received from staff regarding respondent (Tr. 95-96). Some of these complaints alleged that respondent repeatedly asked staff to intervene on his behalf with Ms. Burke-Evans and became upset when they declined (Hayes: Tr. 164-65). Other complaints included statements made to Mr. Guilford around the same time. According to Mr. Guilford, Ms. Federovskaya told him that respondent had said he wanted to commit suicide (Tr. 129), Ms. Williams said respondent had made disparaging comments about Ms. King-Mervin (Tr. 127), and another JOS worker, Richard Vecchioni, said respondent was very depressed (Tr. 129). Mr. Guilford testified that respondent was becoming a “topic of conversation,” that his co-workers were concerned, and that he had sometimes seen respondent look “enraged” (Tr. 149).

Along with respondent, Mr. Guilford and Mr. Meacham were present at the August 31 meeting. As documented in a lengthy memorandum by Ms. Shepherd (Pet. Ex. 23), she handed respondent a copy of a memorandum from Mr. Guilford. In the memorandum (Pet. Ex. 7), Mr. Guilford wrote that respondent had made disparaging statements against supervisors, as well as other disturbing statements, and that his activity was “disruptive to the work environment.” Mr. Guilford also wrote that although he knew respondent had requested a “reasonable accommodation,” this was for an “undocumented condition,” and he did not believe a “written request” had been made (Pet. Ex. 7). Respondent said this was a “lie” and that he had not made disparaging statements (Pet. Ex. 23).

Ms. Shepherd testified about the meeting in detail. She said that respondent was told that he had made statements that he was suicidal, which had frightened the staff. Respondent became angry. “He’s tapping, he’s banging, and . . . you could see in his face he’s just angry” (Tr. 264). Respondent then began “rambling” about how he had some type of social life outside the office with co-workers, but Ms. Shepherd interjected and said the meeting was not about that but about how his statements were frightening staff and how he had said disparaging things about a supervisor (Tr. 264). Respondent went on to explain that he was not actively contemplating suicide and that people should know the difference (Pet. Ex. 264; Resp. Ex. 23). The most striking thing for Ms. Shepherd was that respondent became “so angry” during the discussion (Tr. 264). His face was “beet red” and he kept “tapping” his foot (Tr. 267). Respondent’s union representative kept telling him to calm down, but respondent explained that when he is angry he does “the tapping” and “the hands” (Tr. 264). He also said that management was not acknowledging his disability. Ms. Shepherd told him that nobody at work had ever received documentation of his disability and respondent said she could call his EAP worker (Pet. Ex. 23). He also said that he would sue for “on the job mental injury” and that he would speak with his therapist, his psychiatrist, and his father (Tr. 269; Pet. Ex. 23).

Ms. Shepherd concluded her memorandum about the meeting by stressing how angry respondent had become and how she felt the “situation” needed to be investigated “to prevent possible endangerment of staff and/or others” (Pet. Ex. 23).

Ms. Shepherd further testified that respondent was “so upset” after the meeting that “he went from person to person,” “stomping” and “having a temper tantrum” (Tr. 265). Mr. Guilford testified that while he did not witness respondent’s behavior after the meeting, several staff members told him the next day, September 1, that respondent had been “really angry” and “really upset” (Tr. 132). Mr. Vecchione said that respondent spoke about “getting a gun and shooting someone” (Tr. 129). Mr. Vecchione was not concerned that respondent would actually follow through; he believed respondent was only expressing anger (Tr. 133). Additionally, Ms. Burke-Evans told Mr. Guilford that she was so afraid of respondent that she did not feel she could report to work the day after the meeting. Indeed, Ms. Burke-Evans stayed home the next day (Tr. 134, 136, 149). Mr. Guilford memorialized these concerns in a contemporaneous memorandum (Pet. Ex. 8).

Respondent’s testimony about August 31 was brief. He said that he did not recall speaking to anyone negatively about Ms. Burke-Evans on August 31, apart from telling Ms.

Alexander that he missed work the previous Friday because Ms. Burke-Evans had yelled at him for going to a bar with her daughter (Tr. 503-04). He did not recall mentioning to anyone that he felt suicidal, because he has never felt suicidal. However, he did tell Mr. Vecchione that the office was making him regress and making him feel worse about himself (Tr. 503). Respondent also testified that he participated in a meeting on August 31 in the director's office, where his supervisors were "verbally aggressive" because he had left early on August 29 and did not have a doctor's note when he returned (Tr. 504). He said that his supervisors "constantly kept on attacking" him, raising their voices, which made him upset (Tr. 505).

### **September 2011 – Transfer Offer**

Ms. Hayes testified that she spoke with respondent around this time, about whether he was threatening suicide and about his interactions with and about Ms. Burke-Evans. Respondent explained that he was not actively contemplating suicide. He did sometimes think the world might be a better place had he not been born (Tr. 169). Ms. Hayes took respondent at his word. She testified that she thought his situation could be improved, since he had always been "a good worker" (Tr. 169). She notified EEO and Ms. Burke-Evans in an attempt to resolve the situation (Tr. 170). She also notified her regional manager, Ms. Rabain, of these issues. Ms. Rabain suggested offering respondent a transfer to the Staten Island office. Respondent had once requested, and been approved for, a travel hardship transfer to Staten Island, although he had then rejected it (Pet. Ex. 11). However, respondent declined Ms. Hayes's transfer offer. Thus, he remained at the Waverly office, under Mr. Quick's supervision.

### **October 4, 2011 – Encounter With a Client**

Sergeant Thomas, who works with the HRA Police, testified to an encounter between respondent and a client, Mr. Y.,<sup>2</sup> on October 4, 2011 (Tr. 351). She said that respondent was talking to a client when he stood up and told the client that he was going to close the client's case. Although Sergeant Thomas told respondent that he was not permitted to say that to a client, respondent reiterated his statement while "walking up and down the aisles" (Tr. 352). Mr.

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<sup>2</sup> Names of public assistance clients are redacted to protect their confidentiality. See *Human Resources Admin. v. Green*, OATH Index No. 3347/09 at 4 n.3 (Nov. 18, 2009) ("Acronyms are used to protect the identities of these clients [i.e., clients of respondent, an HRA eligibility specialist], in accordance with section 136(1) of the New York Social Services Law").

Y. told Sergeant Thomas that he wanted to give respondent a document showing that he was exempt from a working program. Sergeant Thomas asked respondent to sit down and said that she would speak to the client, and repeated that respondent could not tell the client that he would close the client's case. However, respondent was very agitated, reiterated that he would close the case, and said that the client should be arrested. Ultimately, a supervisor had to assist the client (Tr. 351-52, 354; Pet. Ex. 31). It took about an hour to calm both the client and respondent down (Tr. 355).

Sergeant Thomas acknowledged that respondent is generally "fine" with clients and she had never seen him behave this way before (Tr. 354, 355). However, one or two clients have approached her and asked what is wrong with respondent (Tr. 355). She also testified that workers sometimes get "a little edgy" around respondent because he walks "back and forth" and "stomps" and carries a little book bag on his back. This detracts from the rest of her responsibilities (Tr. 341).

Mr. White testified that in October 2011, respondent had notified him that a client was using an alias. Mr. White testified that it was not an alias, just a misspelling, and that that respondent had become "unprofessional" with the client, Mr. White and Mr. White's supervisor (Tr. 462).

Respondent testified that Mr. Y. "flipped out" when respondent refused to use a name other than that shown on his social security card, but that Mr. White was not involved (Tr. 511, 513). After this it was determined that Mr. Y. would deal with a supervisor, rather than respondent (Tr. 511).

### **October, 2011 - assignment to Ms. Francis**

According to Ms. Hayes, although respondent had been transferred from Ms. King-Mervin's unit to Mr. Quick's unit in August 2011, he soon began to question Mr. Quick's authority and leadership. There was "always this constant challenge or this constant bantering thing" (Tr. 169). Ms. Hayes then realized that she had a "second level supervisor," Ms. Francis, who had supervised Mr. Quick and was "extremely knowledgeable," and who she thought would "make a good fit" with respondent (Tr. 169). She decided to make Ms. Quick respondent's "personal supervisor" (Tr. 170). Ms. Hayes wanted to reduce the "hostile environment" that was developing, because respondent was "constantly" having issues about Ms. Burke-Evans, as well as some other co-workers, entering his own "personal space" (Tr. 171). She testified that there

was no way to accommodate respondent's feelings about this because they all worked in the location and had to navigate the same floor (Tr. 171).

### **December 9 and 12, 2011 – Reaction to Being Served with Disciplinary Charges**

It was not disputed that, by Friday, December 9, 2011, respondent learned that disciplinary charges against him had been substantiated and he would be receiving a 15-day pay fine (██████████ Tr. 506). It is also undisputed that respondent became upset in the office and went home (Hayes: Tr. 172; Shepherd: Tr. 270; ██████████ Tr. 508).

Respondent acknowledged that he became upset on December 9 because he had learned about the penalty, he had no idea why one of the charges was substantiated, and he felt overworked (Tr. 507, 509). He believes that he talked to Ms. Francis and Mr. Vecchione about feeling upset. He also texted Ms. Williams with a sarcastic message because he felt that she had betrayed him, leading to one of the disciplinary charges (Tr. 506). In retrospect, he sees that he should have talked to Ms. Williams, rather than texted her (Tr. 507).

Ms. Hayes was not in the office on December 9, but recalled Ms. Francis telling her that respondent had been "in tears" and "very despondent," and that she had sent him home (Tr. 172). Similarly, Ms. Shepherd did not see respondent that day, but Ms. Francis told her he was very angry about the suspension (Tr. 270).<sup>3</sup> Ms. Williams testified that she was concerned when she got respondent's text message, referencing the charge, because she thought respondent had a bad temper and was afraid he thought her responsible for the disciplinary charges because of her August 31, 2011 e-mail about respondent walking in circles and looking "menacing" (Tr. 279; Pet. Ex. 32). However, apart from the text message, she did not testify that respondent communicated with her about the discipline, much less took any action against her.

On the next work day, Monday, December 12, 2011, Ms. Hayes met with respondent about the charges after Ms. Francis told her that respondent looked "disheveled," "sluggish," and "unsteady" (Hayes: Tr. 182). Ms. Hayes testified that respondent said he was still worried about the charges and also spoke about what had happened in August with Ms. Burke-Evans (Tr. 183).

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<sup>3</sup> Ms. Francis wrote Ms. Shepherd an e-mail dated December 14, 2011, stating that respondent had come to her desk, with tears "running down his face" and "not [breathing] right," saying he had gotten a letter indicating that he would not be paid for fifteen days, which he could not afford. She thought respondent could not function and asked if he wanted to go home. He "put his time in and went home" (Pet. Ex. 12). It is not clear why this e-mail references December 14, as both Ms. Hayes and Ms. Shepherd testified that Ms. Francis told them about respondent's emotional reaction on December 9, 2011.

He acknowledged having not taken his medication. He was “swaying” a little bit and “totally and completely unfocused,” so Ms. Hayes did not feel that he could work (Tr. 184). When asked if he wanted to go home, respondent said no. However, Ms. Hayes later spoke to respondent’s father, who suggested that respondent might be able to remain at work, rather than go home. Respondent stayed at work, but remained mostly in his cubicle with his head down (Tr. 183,184). Ms. Hayes memorialized this in an e-mail to her regional manager (Pet. Ex. 13).

Respondent testified that he met with Ms. Hayes after receiving the disciplinary documents, but he was not sure about the day (Tr. 528). He also said that he “always” takes his Adderall in the morning before he interviews clients; he can not take Xanax at the same time because the medications counteract each other (Tr. 530)

### **December 13, 2011 – Encounter with Mr. White**

Mr. White testified that on December 13, 2011, he was talking to one of the security guards in the lobby when respondent approached and stood in between himself and the security guard. Respondent “basically” had his knapsack in Mr. White’s face (Tr. 456). Mr. White said neither he nor respondent said anything to each other; by this time their relationship had deteriorated because of the dissension around Ms. Burke-Evans (Tr. 456).

Ms. Hayes testified that respondent came into her office to complain that Mr. White had “physically assaulted” him by the elevator (Tr. 185). She said respondent was “scared” and “really, really trembling” (Tr. 185). When asked why he was trembling, respondent said that he had not taken his medication (Tr. 185).

According to Mr. White, another incident ensued later that morning. Mr. White testified that he was walking past respondent’s cubicle on the way to his own office when respondent got up and placed himself in front of a metal ladder situated between his desk and the wall. Mr. White was afraid that he would have to touch respondent if he wanted to walk through (White: Tr. 460). He wanted to avoid respondent “at all cost,” so he squeezed himself between respondent and the ladder, scraping his back. (Tr. 460). Mr. White memorialized this in an e-mail to Ms. Hayes and Ms. Shepherd, where he wrote that respondent “bumped” into him when he was on his way to ask a worker about a case (Pet. Ex. 38). He testified that respondent had bumped into him by standing in front of the ladder (Tr. 466).

Sergeant Thomas testified that on December 13, 2011, respondent came to the security office and said he wanted to file a report against Mr. White, and that he was going to use

physical force against Mr. White (Tr. 335, 336). Sergeant Thomas told respondent they were in a meeting and that she would talk to him when the meeting was over (Tr. 335). When the meeting concluded, she asked Mr. White what was going on; he said he had no idea. She then advised Ms. Hayes of respondent's statements (Tr. 336).

Sergeant Thomas and Ms. Hayes testified that they met with respondent and the union representative (Thomas: Tr. 338, 341; Hayes: Tr. 10-91). Ms. Hayes testified that respondent was "agitated" and "upset." He refused to sit down and paced back and forth (Tr.191). Sergeant Thomas testified that respondent said that he felt Mr. White had attacked or "bumped" him and wanted Mr. White arrested for assault. Sergeant Thomas replied that an assault arrest requires a visible injury, and there was none. She wrote a security incident report indicating that respondent and Mr. White "allegedly engaged in a verbal altercation" (Pet. Ex. 28). She provided this description upon instruction by her inspector, because she did not witness the actual altercation and they needed "to label it as something" (Tr. 361). She also asked respondent if he needed police assistance, or wanted a report written, but respondent "just looked" at her and "didn't say anything" (Tr. 365).

Ms. Hayes memorialized these meetings in another e-mail to her regional manager, in which she requested that respondent be transferred because of safety concerns of staff as well as disciplinary charges (Pet. Ex. 14).

Respondent's version of events differed. He testified that he did not recall putting himself between Mr. White and a security guard on December 13 (Tr. 509). However, he did recall Mr. White bumping into him. He testified that he left his cubicle to call a client, saw Mr. White approaching, and decided to wait. Instead Mr. White "turned into" his cubicle row and "knocked" him back several feet, then continued on his way without stopping to look back (Tr. 510). According to respondent, the security office refused to take a report, saying they were doing paperwork; this put him into "a state of fear and shock" (Tr. 429). It is probable that his leg was bouncing and he was trembling (Tr. 529).

Respondent also testified that he told security personnel that if Mr. White repeated his behavior, he would "use some type of self-defense," because Mr. White's behavior was "an escalation" from a previous incident, where Mr. White began "screaming" at him about how he was dealing with a client, Mr. Y. (Tr. 511). After the client meeting ended, respondent was told to avoid Mr. White (Tr. 516). Respondent testified this was not the same incident that Mr. White testified about, but involved the same client (Tr. 511).

### **February and March 2012 – Conflicts with Ms. Muriel and Mr. Quick**

Ms. Muriel and Mr. Quick testified to a series of conflicts with respondent beginning in February 2012.

Ms. Muriel, a JOS worker, testified that in about November 2011, respondent joined her unit (the “We Care” unit), sitting in the cubicle next to her (Tr. 292). At first they were “just regular co-workers” who worked well together (Tr. 293), but problems began in February 2012, when respondent gave gifts of candles and ginger ale, which she liked to drink. Ms. Muriel would return the gifts and tell him she did not want them, only to find the gifts back in her cubicle minutes later (Tr. 313). Respondent had also been trying to persuade her to go out with him socially, which she had declined (Tr. 305). However, he was persistent and this was “beginning to be a constant thing” (Tr. 305).

On February 15, 2012, the day after Valentine’s Day, respondent commented that Ms. Muriel must have had a good Valentine’s Day because she came to work late. Ms. Muriel found this degrading and complained to Mr. Guilford (Tr. 305). Later that day, there was a meeting with Ms. Hayes, respondent and Ms. Muriel which lasted two hours. The meeting took so long because respondent did not understand when Ms. Hayes said he was harassing Ms. Muriel. Instead, respondent said that he could “always hope,” leading Ms. Hayes to repeat her comments (Tr. 306). The meeting ended with the understanding that respondent and Ms. Muriel were not to interact with each other (Tr. 306).

Mr. Quick testified that Ms. Muriel told him of the February 15 comment, but he told her not to pay attention and just to make a note of it (Tr. 438). After February 15, however, Ms. Muriel complained that respondent had told former clients of hers, since reassigned to him, that she had made mistakes on their cases (Tr. 438-39). Mr. Quick did not hear anything that respondent said, but upon hearing Ms. Muriel’s concerns, told respondent that he should complete his cases without commenting about Ms. Muriel to the clients (Tr. 439, 449).

Ms. Muriel testified that on March 5, 2012, about 12:15 pm., she was sitting in her cubicle, interviewing a client, when she overheard respondent arguing with Mr. Quick. Mr. Quick was in his own cubicle, about two cubicles away. Ms. Muriel heard respondent say that he could not talk to Mr. Quick or Ms. Muriel. She told respondent that she did not want him to say her name (Tr. 294; Pet. Ex. 25). Mr. Quick told her to “leave it alone” (Tr. 315). Respondent began “grunting” and banging on the cubicle, which made her client nervous. Additionally, about ten minutes later, while the interview was still continuing, one of her co-

workers approached her and said that respondent had told other co-workers on the floor that she had said the “f” word to him, which she denied (Tr. 294). As a result, the interview, which should have taken about half an hour, took an hour and a half (Tr. 295). Ms. Muriel had heard respondent grunt and tap his leg before, when he was upset (Tr. 317), but this incident was much more disturbing and she had trouble returning to her regular duties (Tr. 298; Pet. Ex. 25). As instructed by Mr. Quick, Ms. Muriel documented the incident in a memorandum (Tr. 294; Pet. Ex. 25).

In that memorandum, Ms. Muriel gave a slightly more detailed account of what transpired. She noted that respondent was quiet after she told him not to use her name, but moments later, went to a worker in another cubicle, complained that he was being treated unfairly, banged on black bins, then walked over to his cubicle, and started to bang on the cubicle wall between them, startling her client (Pet. Ex. 25). She also testified that after she finished her interview, several people, including a security officer, said that Mr. [REDACTED] had alleged that she had cursed at him (Pet. Ex. 25).

Mr. Quick corroborated much of Ms. Muriel’s testimony. He testified that on March 5, respondent kept asking him questions about Ms. Muriel’s previous work on a case. Respondent approached his cubicle several times to ask about this, and he told respondent, as he had before, to handle the case and not bring up Ms. Muriel. Respondent was persistent and at one point Mr. Quick had to address respondent from his cubicle. Ms. Muriel became upset as she was interviewing a client and respondent was speaking about her (Tr. 440). Later that day, Mr. Quick saw respondent walking around, saying that that Ms. Muriel had cursed at him (Tr. 442).

Sergeant Thomas provided additional corroboration. She testified that she heard a lot of banging from the third floor when she was on the second floor. Upon investigation, she saw respondent “just stomping back and forth.” When respondent saw her, he stopped and returned to his desk, saying, “[I]t’s not fair” (Tr. 342). She also testified that another security officer, Officer Reese, had reported that respondent had said something along the lines of, “They’re lucky I’m not younger or seeing red or I would hurt them” (Tr. 343). At Ms. Hayes’ request, both Sergeant Thomas and Officer Reese noted their observations in respective incident reports (Pet. Exs. 29, 30).

Later that same day, Ms. Muriel testified, she was doing another client interview and started to scan documents using one of the five scanners on the floor. Respondent approached her and started shouting that he was unable to use the scanner because Ms. Muriel was using it,

and that she was going to curse at him (Tr. 299). After she called security, a guard intervened and calmed respondent down. Mr. Quick and Ms. Monet also approached to see if Ms. Muriel was all right. She told Mr. Quick that she felt frustrated and was losing tolerance (Tr. 304). She noted the incident in another memorandum, writing that respondent had told security and Ms. Francis that he would press charges (Pet. Ex. 26). She felt respondent was “retaliating” against her, indeed “terrorizing” her, because she had reported his actions of February 15, 2012 to Ms. Hayes (Pet. Ex. 26).

Ms. Pridgeon, a security guard assigned to HRA who has worked at the Waverly Center for over a year, testified that on March 5, 2012, she saw Ms. Muriel “screaming for security” (Tr. 407). Ms. Muriel said that respondent had approached her at the scanner and told her to use another scanner, and that he was not supposed to be around her. When Ms. Muriel said she did not want to move, he “got upset,” “stormed off,” and went into Ms. Francis’s cubicle (Tr. 408). Ms. Pridgeon testified that respondent told her that he had asked Ms. Muriel to use another scanner. When Ms. Pridgeon asked him why, since there was more than one scanner, respondent replied that he wanted to see his psychiatrist because he did not feel safe around Ms. Muriel and wanted to file harassment charges against her (Tr. 409, 412). Ms. Pridgeon memorialized this in a security incident report (Pet. Ex. 35). She included in the report that respondent felt Ms. Muriel had over-reacted by calling security (Pet. Ex. 35).

Respondent presented a different version of these events. He testified that he was interviewing a client whose case Ms. Muriel had previously handled and mentioned Ms. Muriel’s name to the client. When respondent told the client that he and his wife were legally responsible for each other, the client got upset and asked why he had not been told that before. Respondent replied that it was his case now and he had to do things “the right way” (Tr. 516). Later on, the client again mentioned Ms. Muriel’s name in discussing his case (Tr. 516). According to respondent, Ms. Muriel reacted by cursing at respondent and telling him to keep her name “out of [his] mouth” (Tr. 517). Respondent testified that his leg began to shake more than usual because he had been cursed at, and it banged against the desk, which is attached to the wall. He said he never physically banged on the wall (Tr. 517).

Respondent also testified that later that day, while Ms. Muriel was using a scanner near his desk, he asked Ms. Francis to ask Ms. Muriel to use another scanner. He said he never approached Ms. Muriel directly about the scanner (Tr. 517-18).

### **March, 2012 - Relocation to the Second Floor**

Ms. Hayes testified that she was not in the office on March 5, 2012, but when she heard of the incident between respondent and Ms. Muriel, she was concerned. She was also surprised, because she thought their interpersonal issues had been resolved on February 15. She was troubled by respondent's language and behavior: "the rocking back and forth in the cubicle, the intimidation," as well as the use of profanity (Tr. 198). She had heard from security staff and other co-workers that respondent had walked through the aisles, using profanity and "flailing his arms" (Tr. 200). He was also reported to have said that Ms. Muriel used the "f" word toward him (Tr. 200). He felt he could not be in the same vicinity of Ms. Muriel, which was "a problem" (Tr. 200).

Additionally, by memorandum dated March 6, 2012, Ms. Muriel had requested that respondent be moved to a different cubicle, writing that she was "very uncomfortable" that he was still sitting in the adjacent cubicle, that she did not want "any confrontation," and that she did not want to be "disturbed" as she interviewed clients (Pet. Ex. 27). She also alleged that respondent, aware that she was sitting in the next cubicle, had made "unnecessary noises" that very day, including tapping his feet hard on the floor, shaking the cubicle and making "loud grunt sounds" (Pet. Ex. 27).

The decision was made to move respondent to the Customer Service Information Unit (or "Quick Service Unit") on the second floor, under the supervision of Ms. Guerrant. Ms. Hayes testified that respondent "couldn't let anything go," so she wanted to move him to a different floor, away from people whom he had had prior conflict (Tr. 199). Ms. Hayes met with respondent and his union representative and told respondent that he was being relocated to a new unit (Tr. 198, 199). Prior to moving to the new unit, he would be sitting next to Ms. Francis, waiting for training (Tr. 210). Ms. Hayes explained in her testimony that she felt she had to relocate respondent to prevent "a so-called hostile environment" (Tr. 199). She believed that she had to be "firm" with respondent and tell him on what date he would be moved and who his new supervisor would be, because respondent could be "relentless in terms of his tactics" (Tr. 200, 201). Instead of doing work, respondent would sit in his office and type a "diatribe" to his supervisors about issues in the office (Tr. 201).

Respondent testified that he was "a little bit nervous" about the transfer to the second floor and felt that he was "betraying" the clients on his caseload (Tr. 519). He tried to approach Ms. Hayes about this, but she did not want to discuss it (Tr. 520). He was also upset because he

was moving from interviews where he could control the interview speed to a unit dealing with “constant problems” that had to be dealt with quickly (Tr. 520).

### **March 16, 2012 – Incident with Client**

Ms. Hayes testified that on March 16, 2012, a supervisor informed her that a client had arrived who was HIV positive and supplied documentation which appeared to show that he had previously had active tuberculosis, but that it was no longer active (Tr. 210). She took the document to the AIDS unit, which confirmed that the dates on the form showed that the tuberculosis was no longer active (Tr. 210). She informed a supervisor, Ms. Goodwin, of this, and Ms. Goodwin gave the form to respondent, who interviewed the client. The next day, March 17, 2012, respondent complained to the health and safety unit that Ms. Hayes had personally forced him to interview a client with active tuberculosis (Tr. 211; Pet. Ex. 18). Respondent also e-mailed a copy of that person’s medical documentation to the health unit, along with his complaint that Ms. Hayes had forced him to interview the client (Tr. 211). Ms. Hayes had never spoken to respondent about the client (Tr. 211).

Respondent testified that on March 16, he was assigned a client with active tuberculosis. He told Ms. Goodwin that he was uncomfortable seeing the client; she expressed her own discomfort, but brought the client over after speaking to Ms. Hayes, who told her that respondent should interview the client (Tr. 518). Respondent acknowledged that he e-mailed the health and safety director about a possible exposure to tuberculosis, mistakenly saying that it was Ms. Hayes who brought the client to him. He said that when he realized his mistake, he promptly corrected it by e-mail. However, Ms. Hayes “screamed” at him “over 30 times” for this, an “honest mistake” (Tr. 519).

### **Work Performance on the Second Floor**

The evidence about respondent’s work on the second floor, following his transfer in March or April 2012, shows that respondent continues to have some difficulty following supervisory directives, and that his interactions with certain colleagues and supervisors remained problematic.

For example, Mr. Quick testified that in April 2012, after respondent had been moved to Ms. Guerrant’s unit, respondent e-mailed him regarding a client, saying that the client was complaining that Mr. Quick had failed to respond to phone messages. Mr. Quick testified that

respondent should have e-mailed his immediate supervisor, who would have contacted Mr. Quick. He forwarded respondent's e-mail to Ms. Guerrant, along with an e-mail asking her to stop respondent from e-mailing him as he should follow the "chain of command," and warning that failure to do so would result in disciplinary action. Mr. Quick also noted that his voicemail had already been changed to notify clients to contact him. He copied respondent on the e-mail (Tr. 443-44; Pet. Ex. 37). About half an hour later, respondent replied to everyone on the e-mail:

First let us have the disciplinary conference for when you got an inch away from my face to verbally assault me in front of Mrs. Francis and Mr. Meachem . . . so please cease your foolish threats and arrange [that] the participants that are needed under the caseload from your group are being properly serviced . . . Changing the voicemail does not mean it is checked, please service my former clients and stop taking your animosity on me onto them

(Pet. Ex. 37). One minute later, respondent sent another e-mail, stating, "Furthermore, open communication is mentioned in several suggestions as reasonable accommodations, so your threat is both preposterous and criminal" (Pet. Ex. 37). After this e-mail exchange, when Mr. Quick passed by respondent's cubicle to speak to a colleague, respondent gestured or moved back in his seat as if fearing that Mr. Quick would try to touch him (Tr. 447).

Similarly, Ms. Muriel testified that Ms. Shepherd suggested that she refrain from going to the second floor, to avoid seeing respondent. However, this is difficult and sometimes infeasible because some of her clients are disabled and it is inconvenient and time-consuming for them to go to and from the second floor (Tr. 311). When she would go to the second floor, and respondent saw her, he would stare at her "with a mean look" (Tr. 307). Ms. Muriel also testified that respondent still comes to the third floor to use the bathroom, even though there are bathrooms on every floor, and to socialize with co-workers, some of whom sit near her (Tr. 312). She feels forced to stay in her cubicle until he leaves, which makes her feel confined (Tr. 313).

Likewise, Ms. Jaurey testified that she has not had much interaction with respondent since he moved to another floor but when she has reason to go to his floor, he "gives her a look" (Tr. 397). Once, she went to speak to his direct supervisor about a case. Respondent was speaking to the supervisor so she waited until they were done. Later she learned that respondent sent an e-mail to the manager who was sitting across from the supervisor, asking why Ms. Jaurey and other people were coming to the floor to "harass" him (Tr. 397). She is frustrated because she can not totally avoid going to respondent's floor, even though she has no direct contact with him (Tr. 397).

Mr. Pendergrass, a 27-year HRA employee who runs the Quick Service Unit, testified that he once saw respondent showing some documents concerning EEO to a client. Mr. Pendergrass said respondent should not have done this because it was not part of his job description. Respondent then showed Mr. Pendergrass the information, and Mr. Pendergrass reiterated that he should not be showing this material to a client (Tr. 431, 432).

Similarly, Ms. DeJesus, an AJOS who has supervised respondent over the past three months in the Quick Service Unit, when his regular supervisor is absent, testified that there are times when respondent does not address the pertinent issue, such as whether a client has received food stamps. One time she saw him looking up information on the computer relating to a medical issue that he said pertained to his client (Tr. 325). On that occasion, she told him that that had nothing to do with his job, but he continued the research and gave the client the information (Tr. 325). The client had been there for at least 45 minutes, much longer than the 20 to 30 minutes that a typical client spends in the unit (DeJesus: Tr. 329), or the 10 to 15 minutes that Mr. Pendergrass estimated that an interview takes (Tr. 430). Ms. DeJesus acknowledged that part of respondent's duties involves whether or not a client is employable (Tr. 327). She spoke with respondent's supervisor, Ms. Guerrant, telling her that respondent was giving out information relating to a medical issue (Tr. 329).

Respondent testified that no one told him or gave him a written policy about how much time he was supposed to spend dealing with a client in the Quick Service Unit (Tr. 521).

### **The Issue of Unfitness**

As respondent himself testified, his disabilities tend to impact his relationships with colleagues more than his interactions with his clients. Indeed, although Dr. Eshkenazi testified that respondent's thinking was extremely circumstantial and both Dr. Eshkenazi and Dr. Gray opined that respondent might have difficulty concentrating, the evidence did not support a conclusion that respondent was unable to concentrate at work. Respondent testified without rebuttal that he tends to hyper-focus and that he takes Adderall twice a day to help him concentrate; this testimony seemed entirely plausible as respondent also took Adderall during the trial at two different instances (Tr. 476-77, 575-75). Moreover, even though respondent acknowledged displaying some restlessness in meetings and needing at times to take breaks and walk around (Tr. 533), his supervisors said that, in general, he was a good worker. Mr. Quick was pleased with respondent until their negative interactions involving Ms. Muriel: he testified

that respondent was “very conscientious” and “did very well interacting with clients,” and that his initial interactions with respondent were “very pleasant” (Tr. 436, 437). The only negative comment he had regarding respondent’s initial work was that, sometimes, he gave clients more information than agency protocol called for (Tr. 436). Ms. Hayes testified that respondent had always been a “good worker” (Tr. 169), although she was clearly perturbed by his negative interactions with staff and supervisors. Along these lines, the July 11, 2011 incident, involving respondent closing a client case based on a voicemail rather than written authorization, seemed to involve little more than an honest mistake, as Mr. Guilford himself acknowledged.

Yet, taken as a whole, the evidence shows that respondent has had consistent difficulty taking supervision and following instructions. In the past year, he has had no less than four different supervisors, three in one unit, and the last (and apparently current) supervisor in a different unit on a different floor. Ms. Hayes’s testimony about the difficulties that respondent had with Ms. King-Mervin and Mr. Quick was strikingly similar. As to each, she said that he questioned their authority and directives, such that there was constant “bantering” back and forth between respondent and each of them. When either criticized his behavior, respondent would say they were violating the disability laws, even though he never supplied written documentation of his disability.

The record showed some specific instances of respondent’s difficulty taking direction. For example, Mr. Guilford credibly testified that on August 9, 2011, respondent would not give a client a form so he could get money for rent, despite repeated instructions to do so. Instead, respondent argued with Mr. Guilford and ultimately went to security to ask that the client be removed from his desk, without providing any reason. Ms. DeJesus testified to a more recent occurrence, where respondent kept looking up information on a computer for a client even though she had told him that was not part of his job.

More strikingly, the record established that respondent becomes obsessive about certain people and issues, and gets angry with both colleagues and supervisors when they refuse to accede to his often repeated requests. This was a consistent pattern, over the course of a year, with many different people. Witness after credible witness testified as to respondent’s repeated attempts to have his co-workers intervene on his behalf with Ms. Burke-Evans, a supervisor with whom he wished to establish or reclaim a friendship. Ms. Jaurey testified that respondent was so “persistent” about this that it was “overwhelming” and that every day he was upset or arguing with someone. She also noted he had said that having trouble calming down and taking “no” for

an answer was part of bipolar disorder. Mr. White, who sometimes supervised respondent, said that after he refused to intervene with Ms. Burke-Evans, respondent would yell that he could not hear anything else when Mr. White talked to a security guard. Respondent also started badmouthing him in the office. Moreover, although they did not testify, a number of employees complained that respondent had made disparaging comments about Ms. Burke-Evans and that he had become upset with him when they refused to assist him. The August 31 meeting dealt with Ms. Burke-Evans, as well as respondent's comments about suicide, which respondent said were misunderstood. Respondent was visibly angry during the meeting, and after the meeting as well. Ms. Shepherd described him as "stomping" and "having a temper tantrum." And Ms. Burke-Evans did not report to work the next day because she was so taken aback by respondent's hostility toward her.

Indeed, one reason why Ms. Hayes assigned Ms. Francis as respondent's "personal supervisor" is that she hoped it would reduce the "hostile environment" that was developing because of respondent's "constant" issues with Ms. Burke-Evans. However, as Ms. Hayes aptly observed, respondent "does not give up" on an issue or concern of importance to him (Tr. 217). The conflict between respondent and Mr. White, continued, for instance, coming to a head on December 13, 2011, when respondent claimed that Mr. White had "bumped him" and told security that he would use physical force or "self-defense" against Mr. White if need be. I credited Mr. White's testimony that respondent had deliberately blocked his way, over respondent's testimony that Mr. White had bumped into him. The evidence established that respondent was prone to anger and distress during this period. It was not implausible that he would try to deliberately provoke a confrontation with Mr. White out of anger that Mr. White did not try to help him gain Ms. Burke-Evans's friendship.

Several months later, in February 2012, respondent began to obsessively focus on another female co-worker, Ms. Muriel. Respondent was persistent when Ms. Muriel returned gifts he had given her and said that she did not want to go out with him. Indeed, at a meeting on February 15, 2012, held because respondent had made an inappropriate comment to Ms. Muriel, respondent reiterated that he could "always hope," despite Ms. Muriel's clear statements otherwise. As with Ms. Burke-Evans, this situation escalated, to the point where Mr. Quick had to tell respondent not to make negative comments about Ms. Muriel to his clients. Ultimately, on March 5, 2012, respondent became so upset after Ms. Muriel told him not to mention her name that he banged on both the cubicle and bins outside the cubicle, startling Ms. Muriel's client and

as a result prolonging her interview. Respondent was later described as “just stomping back and forth,” and reportedly said it was good that he was not younger or he could hurt someone. Later that day, respondent became angry about Ms. Muriel using a scanner near his cubicle. At least four different witnesses testified to this event: Ms. Muriel, Mr. Quick, Sergeant Thomas, and Ms. Pridgeon, leaving little doubt that it occurred, despite respondent’s testimony that his leg shook only because he had been cursed at and that he never physically banged on the wall, just the desk.

Even after respondent’s move to the second floor, he continued to have difficulty when coming into contact with certain people, including Ms. Muriel, Ms. Jaurey, and Mr. Quick, evidenced most notably by his sending an e-mail to a manager asking why Ms. Jaurey and other people were coming to the floor to “harass” him. As Ms. Hayes testified, if he has had a negative interaction with a person, he no longer wants anything to do with that person and will complain or send an e-mail if he sees that person on his floor (Tr. 218). His managers have tried to accommodate him, for example, having Ms. Shepherd, rather than Ms. Burke-Evans, give him his paycheck, because he does not want any interaction with Ms. Burke-Evans (Tr. 218).

In addition to being angry with supervisors and co-workers, respondent has been very depressed. At one point he left work early and did not return for two days because of something that Ms. Burke-Evans said to him about her daughter. At another point he was extremely upset and crying in the office because he learned that disciplinary charges had been substantiated against him and he would be receiving a 15-day pay fine. Most alarmingly, respondent talked about suicide with his co-workers.

All of respondent’s supervisors testified about the amount of effort they have devoted to trying to manage respondent’s relationships with co-workers. Ms. Hayes testified that issues relating to respondent have detracted considerably from her management of the Center, because she spends so much time trying to accommodate his needs, talking with him, writing memoranda and e-mails to document his behavior, and mediating between him and his colleagues (Tr. 191, 216, 217). Ms. Shepherd, similarly, testified that she has spent a lot of time on issues involving respondent, disrupting her work flow, because workers often e-mail her or walk into her office to express concerns and ask her to intervene (Tr. 276, 278). At one point workers were concerned because respondent was constantly wearing a black knapsack; she told the workers that they were reading too much into that, but she understood, because when respondent gets angry, it can be “frightening” (Tr. 276).

As often noted by this tribunal, “[a]n essential part of fitness in any job assignment is an ability to work with and be supervised by others, without being disruptive or abusive.” *Housing Auth. v. Jones*, OATH Index No. 195/94 at 31-32 (Jan. 7, 1994) (finding employee unfit to work where, because of his disability, “he could not handle the interpersonal relationships and contact that are . . . a necessary part of his position”). An employee has a duty not to interfere with the ability of co-workers to perform their tasks. *Health and Hospitals Corp. v. Samuels*, OATH Index No. 243/07 at 5 (Dec. 20, 2006); *Human Resources Admin. v. Horne*, OATH Index No. 487/93 at 13 (Feb. 15, 1993).

Thus, an employee may be unfit because a disability causes him “to have frequent violent or disruptive outbursts at work, or substantially interferes with [his] ability to interact appropriately with co-workers or supervisors.” *Admin. for Children’s Services v. L. P.*, OATH Index No. 1392/07 at 10-11 (Mar. 30, 2007), citing *Housing Auth. v. Caballero*, OATH 699/96 at 18 (Mar. 13, 1996). See also *Misek-Falkoff v. IBM Corp.*, 854 F. Supp 215, 218, 227 (S.D.N.Y. 1994), *aff’d*, 60 F.3d 811 (2d Cir. 1995) (finding that an employee with a neurological disorder was not “otherwise qualified” to perform her work under section 504 of the federal Rehabilitation Act, 29 U.S.C. § 794, where there was evidence that she “exhibited fits of rage, emotional outbursts, crying episodes and similar behavior, making it difficult if not impossible for many co-workers and supervisors to get along with her”); *Schmidt v. Bell*, 1983 U.S. Dist. LEXIS 13961 at \*40-41 (Sept. 9, 1983) (employee is not an “otherwise qualified” handicapped person where he refused to follow policies and procedures, made criticism of his job performance impossible, resented any type of authority, and has a “volatile, explosive personality” which is “exacerbated under stress”).

Ultimately, respondent is unfit to perform the duties of his job because his behavior has repeatedly disrupted the workplace and negatively impacted his co-workers, frightening some co-workers and making it harder for many others, co-workers and supervisors alike, to perform their job duties. Although he has been assigned to four separate supervisors, his difficulties dealing with certain co-workers continue. See *L. P.*, OATH 1392/07 at 11 (finding employee unfit to perform her job duties based on testimony of examining psychiatrist as well as evidence of her ongoing disruptive behavior); *Admin. for Children’s Services, v. E.D.*, OATH Index No. 1644/01 at 18 (May 30, 2001) (finding employee’s delusional disorder rendered her unfit to perform duties of her position because it diminished her productivity and distracted her from work).

Additionally, we have noted that a “finding of unfitness is supported where an employee denies the existence of a disability, or refuses to treat it, thereby creating a greater risk of future recurrence of the disability.” *L.P.*, OATH 1392/07 at 11, *citing Caballero*, OATH 699/96, at 23; *Admin. for Children’s Services v. E.D.*, OATH Index No. 202/03 at 6 (Oct. 18, 2002), *aff’d in part*, Comm’r Dec. (Dec. 4, 2002) (respondent’s lack of insight into her illness, refusal to acknowledge the need for treatment, refusal to take medication, and belief that she had no psychiatric problem weighed in favor of finding respondent unfit); *Admin. for Children’s Services v. M.R.*, OATH Index No. 790/00 at 8 (Feb. 25, 2000) (respondent found unfit given lack of insight into condition and refusal to take medication).

Here, while respondent acknowledged having bipolar disorder, which Dr. Eshkenazi also suspected, he acknowledged not taking any medication to treat this condition. Instead, he chooses to address it through counseling. Without in any way suggesting that medication is always a panacea, it is striking that respondent has had ongoing difficulty modulating his behavior and controlling his anger. At times he has seemed enraged. At other times he has been so sad that he has been unable to work and has told colleagues that it might have been better if he had not been born. Respondent’s continuing inability to control his outbursts indicates that talk therapy alone is ineffective in treating his bipolar disorder.

Finally, respondent’s contentions that he would be fit to work if given a reasonable accommodation, and that the agency has violated his rights by failing to engage in an “interactive process,” are without merit.

The American with Disabilities Act (“ADA”) prohibits employment discrimination “against a qualified individual with a disability.” 42 U.S.C.S. § 12112(a) (Lexis 2012). A “qualified individual with a disability” is an individual who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C.S. § 12111(8) (Lexis 2012). The New York State and New York City Human Rights Laws use similar language, but with broader protections. *See* Exec. Law § 296(1)(a) (Lexis 2012) and Admin. Code § 8-107(1)(a) (Lexis 2012); *see Phillips v. City of New York*, 66 A.D.3d 170, 176 (1st Dep’t 2009). Respondent contended that he has sought, but been denied, various reasonable accommodations.

The evidence demonstrated that respondent made repeated requests for a reasonable accommodation, but did not provide written documentation of a disability, as requested many times by his supervisor, until he submitted Dr. Gray’s letter in March, 2012. Ms. Hayes testified

that around late July, 2011, respondent complained that he was not being respected because of his disability. She held a meeting with him, Ms. King-Mervin, and probably two other people, discussing EEO policy and trying to reduce the friction in the unit (Tr. 159). After the meeting, Ms. King-Mervin sent respondent a memorandum, dated July 15, 2011, asking that he submit medical documentation so that assistance could be made available for him, including an EAP appointment (Tr. 160-62; Pet. Ex. 9). On July 20, 2011, Ms. King-Mervin sent respondent a follow-up memorandum, noting that he had not submitted the documentation requested on July 15 (Tr. 162-63; Pet. Ex. 10).

Respondent then complained to Margaret Etkins of the EEO office that Ms. King-Mervin had made an “illegal medical inquiry” (██████: Tr. 535). Ms. Etkins asked respondent to provide EEO with medical documentation. Respondent told her he was anxious about submitting this documentation for “fear of persecution” and that he believed that HRA’s EEO policy did not require medical documentation, so long as the employee requesting documentation was perceived as having a disability or had a history of having a disability (Tr. 539, 565). Respondent contended that Ms. Etkins “recommended” but did not insist that he submit medical documentation (Tr. 541), and that she also suggested that he contact EAP, which he did (Tr. 540).

Donald Lemons, the Deputy Director of EEO, testified that respondent contacted him by telephone as early as April or May 2011, to make allegations of disability discrimination and request a reasonable accommodation. He said that he sat in on an interview of respondent conducted by an EEO investigator on June 7, 2011, during which both the investigator and Mr. Lemons told respondent that he needed to submit medical documentation so EEO could verify that a need existed for a reasonable accommodation (Tr. 608, 609, 622).

In December 2011, respondent submitted several requests for a reasonable accommodation to EEO, including requests for an air purification system, a scanner where his “inability to stand still due to [his] disability won’t be called bizarre,” and a “role-play scenario to demonstrate appropriate behavior when shoved in the workplace” (Pet. Ex. 45). Respondent testified that he also submitted requests for flexible time off and breaks when needed (Tr. 577).

By letter dated December 19, 2011, Mr. Lemons informed respondent that EEO could not take any action regarding his request for a reasonable accommodation until respondent had provided EEO with detailed medical documentation. He noted:

. . . A request for a reasonable accommodation must accompany a medical statement with specific information. A request for a reasonable accommodation should be accompanied by a medical statement that . . . [p]rovides the specific nature of your disability and its limitations . . . [i]dentifies, in detail, the limitations of what you are able to do and unable to do because of your condition, [i]ndicates what type of modifications or equipment is necessary . . . [and] . . . [i]ndicates the duration of your condition . . .

(Pet. Ex. 44). Respondent testified that he did not provide documentation because Mr. Gray's letter said "should," not "must," "meaning that they could discuss the reasonable accommodations without the medical documentation" (Tr. 579). Respondent also said that he "didn't understand why . . . all this was needed," and that he felt that Mr. Lemons's letter was not sufficiently clear about what should be in the medical statement (Tr. 580). Nonetheless, respondent testified that he submitted Dr. Gray's letter once he worked through his anxiety about submitting the letter (Tr. 541-42). He acknowledged that Dr. Gray's letter does not indicate what respondent might be seeking by way of reasonable accommodation, but said that this was the first time Dr. Gray wrote this type of letter and he did not know what to include (Tr. 590).

On May 12, 2012, after Dr. Gray's letter was submitted, respondent met with Mr. Lemons and Ms. Etkins to discuss his requests for a reasonable accommodation (Tr. 859; Pet. Ex. 48). He requested being able to wear headphones when not interviewing to block out distracting office noise, being able to contact EAP, and EEO training for managers and supervisors (Lemons: Tr. 616; Pet. Ex. 48). By letter dated May 17, 2012 to respondent, Stephanie Grant, the EEO Officer/Director, said that EEO had determined that permitting him to wear headphones would impose an undue hardship on staff because respondent needs to be able to interact with HRA clients and staff when necessary. EEO also concluded that respondent's request to contact EAP was so vague that it could not be addressed without clarification, and that his request for staff training could not be considered a reasonable accommodation because it would not enable him to perform the essential duties of his position (Pet. Ex. 48). Mr. Lemons testified that EEO had discussed respondent's request to wear headphones with Ms. Hayes, who thought it would be problematic (Tr. 617).

Ms. Hayes acknowledged telling EEO that if respondent wore headphones, it would be difficult for him to interview clients, or for a supervisor or other co-worker to get his attention (Tr. 240-41, 246). Respondent is currently in a unit where he is supposed to be constantly calling ticket numbers for client interviews. At the most, there are five or ten minutes between

clients (Tr. 247). “So how would he be able to sit with a headphone on and interview his clients at the same time? Or how is he supposed to wear a headphone and also respond to his supervisor or other co-workers?” (Tr. 246). She thought that with respondent wearing headphones, somebody might have to touch him to get his attention, which could be easily misconstrued and lead respondent to become upset or angry (Tr. 241).

As a legal matter, respondent is incorrect that the agency violated his rights by not engaging in an “interactive process” or requiring that he provide documentation. After an employer has received a request for an accommodation, the employer has a duty to engage in an interactive process with an employee to find an appropriate accommodation. 29 C.F.R. Part 1630 Appendix; *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 338 (2d Cir. 2000); *Jackan v. NYS Dep’t of Labor*, 205 F.3d 562, 566 (2d Cir. 2000); *Jernigan v. Dalton Management Co., LLC*, 819 F. Supp. 2d 282, 291 (S.D.N.Y. 2011); *see also Vinikoff v. NYS Division of Human Rights*, 83 A.D.3d 1159, 1162 (3d Dep’t 2011); *Phillips v. City of New York*, 66 A.D.3d 170, 176 (1st Dep’t 2009). However, an employee “who is responsible for the breakdown of that interactive process may not recover for a failure to accommodate.” *Vinikoff*, 83 A.D.3d at 1163 (citing *Nugent v. St. Lukes-Roosevelt Hospital Ctr.*, 303 Fed. Appx. 943, 946 (2d Cir. 2008)) (disability discrimination claim rejected where employee failed to provide timely response to employer’s request for information about connection between employee’s disabilities and requested accommodations); *see also Jackson v. Elmhurst Hospital Ctr.*, 2012 U.S. Dist. LEXIS 34508 at \*16 (E.D.N.Y. Mar. 14, 2012) (“where the employee causes the interactive process to collapse, an employer will not be liable for failing to make an accommodation under the ADA”).

This reasoning has been applied to address situations where employees refuse to provide medical documentation to support their reasonable accommodation request. As part of the interactive process, an employer may request medical documentation to establish that the employee has a disability requiring a reasonable accommodation. *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 656 (6th Cir. 2000) (citing 29 C.F.R. § 1630.14(c)); *EEOC v. Prevo’s Family Market*, 135 F.3d 1089, 1094 (6th Cir. 1998) (“the employer need not take the employee’s word for it that the employee has an illness that may require special accommodation. Instead, the employer has the ability to confirm or disprove the employee’s statement”). Thus, where an employee has not cooperated with such a request, the employee cannot establish discrimination as it is the employee who precipitated the failure of the interactive process. *Kennedy*, 215 F.3d at

656. In an unpublished decision, the Second Circuit has used the same analysis. *Delson v. Mineta*, 144 Fed. Appx. 136, 137-38 (2d Cir. 2005).

In two recent decisions, this tribunal has found that an employee who has failed to produce requested documentation of disability may not claim discrimination based upon a breakdown in the interactive process. *See Fire Dep't v. A.G.*, OATH Index No. 771/12 at 21-22 (July 5, 2012) (“Respondent may not maintain that the Department failed to meet the requirements of the ADA, when she did not properly comply with legitimate requests to supply specific medical documentation on why an accommodation was needed”); *Human Resources Admin. v. Griffin*, OATH Index No. 941/12 at 13 (May 10, 2012) (“It is not unreasonable for an employer to request some proof of disability. Because respondent failed to comply with that basic request, she cannot fault petitioner for failing to engage in the interactive process”). The Appellate Division has used a similar analysis to address claims brought under the New York City Human Rights Law. *See Jacobsen v. Health & Hospitals Corp.*, 2012 N.Y. Slip Op 05478 (1st Dep’t 2012) (rejecting assertion that hospital failed to engage in good faith interactive process when they sought clarification about employee’s medical condition); *Romanello v. Intesa Sanpaolo S.p.A.*, 2012 N.Y. App. Div. LEXIS 5517 at \*5 (1st Dep’t July 17, 2012) (finding that disability discrimination does not lie where employer engaged in “good faith interactive process” but plaintiff “abruptly cut off” the process”).

Respondent’s interpretation that HRA’s disability discrimination and reasonable accommodation policy (Resp. Ex. A) does not require him to provide documentation when asking for a reasonable accommodation is similarly mistaken. Although the policy prohibits discrimination based upon a person’s actual or perceived disability (subsection II), it provides that the agency will make reasonable accommodations for qualified employees “*with disabilities*” (subsection III) (emphasis added). Nothing in the policy supports respondent’s contention that employees are entitled to accommodations based solely upon a perceived disability or a history of disability, and are not required to supply documentation of their disability.

Additionally, even though respondent did not provide medical documentation of his disability until March 27, 2012, when he submitted Dr. Gray’s letter, and even though that letter failed to indicate what reasonable accommodations might be appropriate, the record established that petitioner’s supervisors tried as best they could to accommodate respondent’s needs. Ms. Hayes and Ms. Shepherd transferred respondent from one supervisor to another, including his

own “personal” supervisor, and finally assigned him to a unit on a different floor, in an effort to reduce or eliminate his negative interactions with co-workers and supervisors, and to address his concerns that these individuals were discriminating against him.<sup>4</sup> Ms. Hayes met with respondent and Ms. Muriel on February 15, 2012 in an attempt to mediate their dispute. She testified credibly that she met with respondent in the summer and fall of 2011 to discuss EEO policy (Tr. 204-05) and told respondent he could contact EAP whenever he wanted (Tr. 240). Ms. Hayes also took steps to make staff aware of EEO policy, holding meetings with upper-level staff in August 2011, and mandated EEO meetings with all staff in November 2011, and January 2012 (Pet. Ex. 17). And Ms. Shepherd testified that she had permitted respondent to take breaks and walk around when needed (Tr. 282-83).

Finally, even though respondent may disagree with EEO’s denial of his specific reasonable accommodation requests, Ms. Hayes’ testimony that his request to wear headphones was problematic seemed eminently reasonable. Similarly, while EEO declined to find that holding staff meetings was a reasonable accommodation, Ms. Hayes testified that she would have no objection to holding meetings with managers about supervising people with disabilities (Tr. 239).

Respondent testified as to other accommodations that he thinks would help him: taking breaks, taking time off when needed, a “self-paced” workload, adding carpeting or a mat or adjusting the desk to minimize the impact of his foot tapping. His counsel also suggested that a “white noise” machine might be useful to minimize distractions (Tr. 244-45). This might be true, and these accommodations might help respondent concentrate, or help others work around respondent when he is distracted. However, there is no reason to believe that they would address the central problem, which is respondent’s persistent inability to work with and be supervised by others, without being disruptive, abusive, or intimidating.

Accordingly, based upon the evidence presented, I find that respondent is unfit to perform the duties of his position and recommend that he be placed on a disability leave pursuant to Section 72 of the Civil Service Law. It should be understood that this is distinct from a termination of respondent’s employment pursuant to Section 75 of the Civil Service Law.

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<sup>4</sup> Respondent submitted three different discrimination complaints to EEO, dated May 12, 2011 (against Ms. Shepherd and Ms. King-Mervin), August 31, 2011 (against Ms. Burke-Evans), and December 13, 2011 (against Ms. Williams and Mr. Guilford). EEO found no probable cause as to the first two complaints, and closed the final complaint, noting that it had found similar complaints to be without probable cause (Pet. Exs. 42, 43, 46, 47, 59).

Rather, respondent will be on a leave of absence for a year. At the end of the year, he can be terminated pursuant to section 73 of the Civil Service Law. However, within that year, he can apply to be reinstated to his position at any time by requesting a medical examination pursuant to section 72(2) of the Civil Service Law.

Given the opportunity for reinstatement, respondent should consider Dr. Eshkenazi's opinion that a different medication could be more effective in treating his bi-polar disorder. It may be in respondent's best interest to obtain another opinion by a mental health professional, to determine whether different treatment options might help him better modulate his behavior, so that he is able to return to work.

Faye Lewis  
Administrative Law Judge

August 9, 2012

SUBMITTED TO:

**ROBERT DOAR**  
*Commissioner*

APPEARANCES:

**DANIEL KORENSTEIN, ESQ.**  
**YAJAIRA YEPEZ, ESQ.**  
*Attorneys for Petitioner*

**KREISBERG & MAITLAND, LLP**  
*Attorneys for Respondent*  
**By: JILL MENDELBERG, ESQ.**  
**JEAN O'HEARN, ESQ.**