

***Dep't of Environmental
Protection v. Anonymous***
OATH Index No. 2443/14 (Aug. 20, 2014)

Petitioner demonstrated that machinist is currently unfit for the duties of his job and was properly placed on an emergency leave pursuant to section 72 of the Civil Service Law. Recommendation that leave be continued.

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

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
ANONYMOUS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This disability proceeding was referred by petitioner, the Department of Environmental Protection (“DEP”), pursuant to section 72 of the Civil Service Law. Petitioner alleges that respondent, a machinist, is unfit for duty (ALJ Ex. 1).¹

On February 7, 2014, DEP placed respondent on an involuntary medical leave pursuant to Civil Service Law section 72(5) based on a psychiatrist’s determination that respondent was unfit for duty. By letter dated February 10, 2014, respondent notified DEP that he objected to imposition of the leave and requested a hearing.

The matter was referred to the Office of Administrative Trials and Hearings (“OATH”) and a settlement conference was held on March 10, 2014. At the parties’ request, the case was taken off-calendar to give them an opportunity to resolve the matter. OATH was advised that the parties were unable to reach a resolution and the case was scheduled for trial.

¹ Because this report contains sensitive medical information about respondent, his name is being withheld. See 48 RCNY § 1-49(d) (Lexis 2014). See also *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).

On June 9, 2014, the parties' medical experts testified regarding respondent's current fitness. Petitioner also presented a witness from the Department of Citywide Administrative Service ("DCAS") who testified that DCAS cannot monitor an employee's treatment with a psychiatrist for DEP (Tr. 116-19). Petitioner also presented Mr. Nyarko from DEP's Office of Environmental Health and Safety ("OEHS") who investigated complaints involving respondent that led to his psychiatric evaluation. During cross-examination it became apparent that petitioner had not provided all of the underlying notes, interview statements, and other documents that were used by Mr. Nyarko to compile his report, as requested by respondent's counsel. Petitioner was directed to provide the documents. No further testimony was taken and the June 12 trial date was adjourned to July 8, 2014, to allow the parties to discuss settlement and for petitioner to provide the missing discovery.

The parties were unable to reach a resolution. At the July 8 hearing, respondent presented a witness from the Employees Assistance Program ("EAP") who testified that EAP has the capability to monitor an employee's psychiatric treatment for DEP (Tr. 194-200). During the continued cross-examination of Mr. Nyarko, respondent's counsel objected once more to petitioner's failure to provide the documents used to compile the report. Petitioner was again directed to provide Mr. Nyarko's entire file regarding his investigation of respondent except for privileged documents. The documents were subsequently produced and the hearing was completed on July 24, 2014. Respondent did not testify.

For the reasons below, petitioner demonstrated that respondent is currently unfit for the duties of his job and that he was properly placed on an emergency leave pursuant to section 72 of the Civil Service Law.

BACKGROUND

Respondent has been a machinist at DEP for 20 years. For the past nine years he has worked at the Hunts Point Plant (Pet. Ex. 8). As a machinist, respondent works under supervision setting up and operating machine shop equipment (Pet. Ex. 2). The genesis of this proceeding stems from a number of workplace violence complaints involving respondent.

In 2011, DEP created a workplace violence prevention program to be in compliance with New York State requirements. DEP employees who feel that they are being assaulted,

threatened, or bullied in the workplace may file a complaint with OEHS. An incident report is taken, witnesses are interviewed, a report is generated, and action, if deemed appropriate, is taken. DEP also provides training to its employees on the program and how to file a complaint (Tr. 130-32, 135).

According to a workplace violence incident report, interview notes, Mr. Nyarko's final report, and Mr. Nyarko's testimony on September 25, 2013, another machinist named Wilson reported that respondent approached him at a work sink and said he heard that Wilson had made a comment about him. Respondent started shouting, "F**k you, f**k you, f**k your wife. Do you know how many men are f**king your wife?" Wilson stated that he left the room to avoid a confrontation. Respondent followed him to the elevator screaming in a violent and threatening manner as if he wanted to attack him (Pet. Ex. 8 at 2-3; Resp. Exs. D, F; Tr. 137-38).

Another worker also reported that he was passing by the elevator and observed respondent following Wilson and shouting profanities. The worker stated that respondent generally behaves in a strange manner, never replies to greetings from anyone, and is "cold" to everyone but stated that he never heard respondent curse before (Pet. Ex. 8 at 3; Resp. Exs. D, H; Nyarko: Tr. 233-41).

During the Wilson interview, Wilson told Mr. Nyarko of prior incidents with respondent that he never reported. Nine months earlier, Wilson was working with respondent without any problems. All of a sudden respondent got up and said, "If you don't want to work with me, why don't you tell me? I would get a transfer." Respondent used profanity and challenged Wilson to a fight. Wilson stated that in the past two years respondent's mood would suddenly change and that respondent would get angry and curse at him. Wilson filed the workplace violence report because he did not feel safe working alone with respondent due to respondent's sudden outbursts of anger and rage. Wilson requested and subsequently received a transfer (Pet. Ex. 8 at 2-3; Resp. Exs. D, F, Q).

Respondent appeared for an OEHS interview with counsel on October 2, 2013. According to the interview notes (Resp. Ex. G), respondent alleged that the September 25 incident was precipitated by Wilson who called him a "fucking idiot" when he walked by. He further stated that Wilson called him a "cunt" the week before (Resp. Ex. G). Wilson told Mr. Nyarko that he did nothing to trigger the incident (Resp. Ex. H; Nyarko: Tr. 247-48).

In writing his report on Wilson's complaint, Mr. Nyarko investigated and included other incidents involving respondent (Tr. 138-41).

Mr. Nyarko spoke to a supervising machinist who stated that on October 31, 2013, as he was leaving the repair shop, respondent pointed to Wilson and blurted out, "That mother fucker" is "walking a thin line – he and his comments, he better be careful or he's gonna get wacked." The supervisor stated that respondent continued by saying, "I had to pay a lot of money to a fuckin lawyer and someone is gonna have to pay for it. I warn [sic] him about stirring up trouble." When questioned by the supervisor about the lawyer, respondent stated, "For that workplace violence shit" (Resp. Ex. 8 at 3).

OEHS also received an incident report from security officer Valdez (Resp. Ex. C) who stated that on October 25, 2013, he observed respondent drive into the plant and give the "middle finger" to another security officer who responded in kind. Respondent got out of his car and started cursing at the officer, who remained calm. Valdez asked respondent to calm down and go to work, which he did. Valdez advised Mr. Nyarko that respondent's hostility towards security officers had been on-going for months (Pet. Ex. 8 at 3). The incident report characterized the on-going interaction as "joking" between respondent and the other officer but noted that the latter had been advised it "needs to stop" (Resp. Ex. C).

Mr. Nyarko included in his report prior workplace violence complaints that had been filed by respondent but could not be substantiated (Tr. 141-42). For example, respondent filed a workplace violence report (Resp. Ex. J) with OEHS in November 2011, alleging that on September 1, 2011, his supervisor spat on him. In the incident report Mr. Nyarko observed there was nothing to verify respondent's claim that in the past other workers had spat at and kicked him, burped in his face, placed a dead fish on his car, opened his locker, and verbally harassed him because he was not married. Furthermore, respondent was often unwilling or unable to identify who some of the alleged perpetrators were or when and where the incidents happened. Instead, respondent would ignore Mr. Nyarko's questions and continue with his complaints. Mr. Nyarko told respondent that he was not giving OEHS anything to work with and that the complaints could not be addressed unless adequate information was provided. In reviewing respondent's complaints, Mr. Nyarko noted that the identified workers denied the allegations and complained that respondent was aggressive, screamed, and had a history of making fictitious

claims. In the 2011 incident report, Mr. Nyarko noted that he thought respondent was paranoid and had mental health issues (Pet. Ex. 8; Resp. Exs. I, J, K, M, O; Nyarko: Tr. 266-69).

Mr. Nyarko also spoke to an Assistant Commissioner who stated that on March 29, 2013, respondent called him in an agitated state saying that no one had gotten back to him about his workplace violence complaints. According to the Commissioner, respondent was yelling, was disrespectful, and was accusing OEHS of doing nothing. The Commissioner knew this was untrue because OEHS staff had spoken repeatedly to respondent and told him that he had not provided enough details for them to investigate. The Commissioner also told respondent to get himself in check, which he did. The Commissioner explained to respondent that his complaints had been unsubstantiated and his case closed. Respondent got angry and repeated that his “supervisor continues to spit at me when he is on the phone with me” and also said “you are dead.” Respondent hung up on the Commissioner and called his union to make the same complaint (Pet. Ex. 8 at 4-5; Resp. Ex. N; Tr. 143).

In December 2012, Mr. Nyarko was told by his supervisor to stop investigating respondent’s complaints until OEHS heard back from DEP’s disciplinary unit. Mr. Nyarko did not speak to some of the other complaining workers until 2013 when he was compiling his report (Resp. Ex. K; Nyarko: Tr. 277-78, 284).

Mr. Nyarko summarized his findings and conclusions in a report dated January 3, 2014 (Pet. Ex. 8). He determined that respondent had violated DEP’s Code of Conduct and the workplace violence policy. He recommended that DEP evaluate the appropriateness of disciplinary charges for the profanity incident with Wilson, consider sending respondent to stress management training, and also consider a psychiatric evaluation of respondent (Tr. 146-47).

Prior to the completion of Mr. Nyarko’s investigation and report, DEP prepared and served respondent with disciplinary charges (Resp. Exs. L, P; Tr. 284-91). Subsequently, DEP determined that a fitness evaluation was more appropriate. Based on Mr. Nyarko’s report, an “Attachment A” was prepared (Pet. Ex. 1) that summarized many of the above-stated facts and requested a determination be made as to respondent’s fitness for duty.

Dr. Salvage, a psychiatrist, testified that in January 2014 he was asked by a private agency, Juris Solutions, to evaluate respondent for his fitness for duty at DEP. Dr. Salvage testified that prior to the examination he reviewed the Attachment A that described respondent’s

pattern of behavior, complaints of being persecuted, and the fear instilled by respondent's erratic and threatening behavior (Tr. 13-14). Dr. Salvage also reviewed a copy of respondent's job duties as a machinist (Pet. Ex. 2).

Dr. Salvage testified that he met respondent on January 30, 2014, for an hour. According to Dr. Salvage, when he asked respondent about co-workers spitting on him, burping in his face, and placing a dead fish on his car, respondent was unable to provide any details about why this happened and was unable to entertain the notion that this might not be real. Instead, respondent maintained that everyone, including a taxi driver, was against him and could not be trusted. He said people were out to get him, he needed to protect himself, and that he was being ridiculed and tormented by his supervisors. Dr. Salvage testified that during the interview, respondent became more agitated, angry, and intense. Respondent wanted to know what the outcome would be. When Dr. Salvage explained that this was a legal process, respondent started making threatening statements to the effect that, "They better be careful, they may just have to call the police." When Dr. Salvage asked what he meant, respondent stated, "You'll just have to wait and see what happens." Respondent refused to cooperate further (Tr. 16-18; Pet. Ex. 3).

Dr. Salvage also testified that, when he asked respondent about some of the events described in the Attachment A, respondent tried to minimize them or said that people were trying to persecute him. He explained that people were throwing sewage at him from the roof of the building. Respondent appeared irritated that Dr. Salvage questioned him about these incidents (Tr. 20). In his report, Dr. Salvage noted that respondent did not view his actions to be problematic and that he would move from topic to topic and wanted to talk only about pleasant things (Pet. Ex. 3).

Dr. Salvage summarized his findings in a report (Pet. Ex. 3). He concluded that respondent has a delusional disorder with both persecutory and grandiose features and a paranoid personality disorder. In reaching his conclusion, Dr. Salvage consulted several texts on psychiatry. He also looked at the concept that a personality disorder usually affects cognition (the ability to think logically about events such as whether someone would really place a dead fish on his car) and mood (how someone relates to others). Dr. Salvage stated that both of these things were in play because respondent exhibited aggressive behavior in the workplace and became increasingly disturbed and threatening during the interview. Furthermore, respondent

had no insight into why he behaved the way he did or why others would be uncomfortable with or frightened of him. Dr. Salvage noted that respondent also demonstrated impulsive traits as evidenced by his desire for the process to be completed right away (Tr. 18-20; Pet. Ex. 3).

Dr. Salvage found that respondent was unfit for his duties and presented a heightened risk and danger in the workplace because his delusions and beliefs were completely fixed, meaning that he was unable to recognize that his actions were causing problems. Dr. Salvage took into consideration how respondent's diagnosis affected his ability to work with co-workers. Dr. Salvage also considered that respondent works with heavy tools. His paranoid ideation that he is working in a dangerous world coupled with his pattern of aggressive and abusive behavior towards his co-workers has a high correlation with potential violence (Tr. 21-22; Pet. Ex. 3). Dr. Salvage also testified that he himself felt personally threatened by respondent because respondent displayed a lot of rage in the interview. Dr. Salvage wondered if respondent would leave his office peacefully (Tr. 57).

Based on Dr. Salvage's report, respondent was placed on emergency leave on February 7, 2014, under Civil Service Law section 72(5). Respondent has been drawing on his leave balances since that time.

Dr. Goldsmith, a psychiatrist, testified for respondent and stated that he first evaluated respondent in early March 2014. He initially spent three hours with respondent. He also reviewed a letter that provided the various complaints about respondent from the Attachment A (Resp. Ex. B), as well as Dr. Salvage's report. Dr. Goldsmith testified that he spoke to respondent who described being mistreated at work. Dr. Goldsmith stated that respondent was inflexible about other interpretations of the Attachment A events which was consistent with Dr. Salvage's view that respondent has issues with paranoia (Tr. 69-71).

On March 7, 2014, Dr. Goldsmith wrote respondent's counsel a letter (Pet. Ex. 6) stating, "It is my opinion, to a reasonable degree of psychiatric certainty, that [respondent] demonstrates features of a paranoid personality disorder." However, he concluded that this did not interfere with respondent's ability to work as a machinist because respondent had been paranoid most of his life and it had not interfered with his work in the past (Tr. 69-71).

Dr. Goldsmith also testified there was no evidence of a delusional condition that suggested an increased risk of violence or a need to inflict some retribution because of some

break with reality. Respondent had no history of violence. Instead, he tried to cope with the conflict at work by making complaints through the administrative process. This led Dr. Goldsmith to conclude that respondent was not a risk to himself or others (Tr. 72). Dr. Goldsmith noted that Dr. Salvage used an outdated method to conclude respondent has a delusional disorder. There was no evidence that respondent had a break with reality; he merely had disagreements about the allegations that were made against him (Tr. 75-76, 80).

After March 7, Dr. Goldsmith saw respondent four more times for an additional four hours and reduced his evaluations to a report dated March 28, 2014 (Pet. Ex. 7). Dr. Goldsmith stated that after spending more time with respondent, it became clear that his initial diagnosis about respondent was misguided: while respondent has certain paranoid tendencies, his responses were based on cultural differences and his culturally influenced style of communication. According to Dr. Goldsmith, respondent's communication skills are colored by his thick accent, growing up in a Communist country, and what his family told him about the dangers that happen when you talk to people. Respondent is mistrustful based on his cultural experiences but is not a danger to himself or others. Dr. Goldsmith testified that respondent explained he had been trained not to take matters into his own hands and to notify the authorities, including calling the police. This is what respondent was attempting to communicate in the situations where he felt threatened. Dr. Goldsmith noted that Dr. Salvage failed to take into account any cultural differences when he evaluated respondent. Dr. Goldsmith opined that respondent is fit to return to work and that he does not need any psychiatric therapy to correct any psychiatric problem (Tr. 81-88; Pet. Ex. 7).

Dr. Salvage reevaluated respondent in April 2014, and met with him for an hour. Dr. Salvage knew respondent had not been at work and respondent advised that he had been to see another doctor. They spoke again about the behavior described in the Attachment A. Dr. Salvage testified that there was "a very mild degree of improvement" in that respondent's responses were more toned down and he was better able to present his ideas. During the interview respondent indicated that some of his behavior was based on a misunderstanding and that there were cultural differences at play. However, respondent's answers seemed rehearsed and he was unable to explain how his childhood in Croatia was contributing to his problems at

work. Respondent also indicated that he was open to remaining in treatment in order to return to work but that he wanted to change doctors for financial reasons (Tr. 25-27, 51; Pet. Ex. 4).

Dr. Salvage testified that people with personality disorders often do not see themselves as having a problem and seek treatment so that they can go back to their jobs or stay in their marriages. Here, respondent was unable to say that he understood the conflicts and was resolved to work them out. Dr. Salvage found that his diagnosis remained the same and that respondent was still unfit to return to work. Dr. Salvage felt that even though respondent seemed to be getting better he continued to show the same defensiveness and misattribution of blame, creating a strong possibility of relapse. Dr. Salvage noted that if respondent were to get the proper treatment and provisions were put in place so that DEP could monitor his treatment and condition, he could return to work as a machinist (Tr. 27-30, 33, 53, 59; Pet. Exs. 4, 5).

Dr. Salvage testified that he reviewed Dr. Goldsmith's March 7 letter and noted that initially Dr. Goldsmith concurred with his opinion that respondent suffers from a paranoid personality disorder. However, Dr. Salvage found that Dr. Goldsmith's conclusion that respondent's psychiatric condition did not affect his ability to be a machinist was illogical given that the behaviors recounted in the Attachment A demonstrated the opposite (Tr. 35).

Dr. Salvage also looked at Dr. Goldsmith's March 28 report and found it dubious that, having arrived at a firm diagnosis of a paranoid personality disorder, he would change completely and state that there was no psychiatric diagnosis. Dr. Salvage noted that Dr. Goldsmith failed to adequately explain why he changed his opinion, failed to address the previous existing behaviors documented in the Attachment A, and without any convincing analysis, concluded that respondent's behavior could be better explained by cultural differences. Specifically, Dr. Goldsmith failed to describe the Croatian culture and how it would predispose someone to be distrustful, paranoid, agitated, aggressive, or non-cooperative with other people. Dr. Salvage testified that research shows that people with respondent's type of personality disorder tend to get more paranoid as they age and less open to psychotherapy. Thus, Dr. Salvage found Dr. Goldsmith's second report unreliable (Tr. 38-42).

Dr. Goldsmith disagreed with Dr. Salvage's opinion that as a person ages their psychological disorders get worse. He testified that as people get older they become less problematic and their risk of violence lessens (Tr. 85-86).

ANALYSIS

In order to place an employee on an involuntary medical leave pursuant to section 72 of the Civil Service Law, petitioner must prove by a preponderance of the evidence that: (i) respondent suffers from a disability, (ii) he is unable to competently perform his job duties, and (iii) his inability to perform is caused by a disability. *See Admin. for Children's Services v. Papa*, OATH Index No. 1392/07 at 10 (Mar. 30, 2007); *Dep't of Parks & Recreation v. Matthews*, OATH Index No. 219/00 at 2-3 (Nov. 22, 1999).

The focus of the section 72 proceeding is on the employee's current fitness and ability to perform his job duties, not on his past condition or work performance. *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 4 (Apr. 5, 2010). Past performance is relevant only to the extent that it is probative of respondent's present condition and future conduct. *Housing Auth. v. Dave*, OATH Index No. 138/95 at 5 (Aug. 12, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 95-72-4 (Oct. 11, 1995).

In disability proceedings the opinions of medical specialists can be profoundly informative and can materially aid the fact-finder in reaching a proper conclusion. The fact-finder is not bound to accept the conclusions or opinions of any given medical expert, but must weigh the medical evidence and draw on reasonable inferences. *Peabody Coal Co. v. Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977); *Human Resources Admin. v. Romney*, OATH Index No. 319/82 at 38 (Dec. 20, 1982) (opinion evidence offered by medical experts is to be evaluated in conjunction with other evidence in the record).

With regard to the first element of unfitness, Dr. Salvage offered evidence that respondent suffers from a mental disability. Dr. Salvage, who was not personally selected by DEP (Tr. 350), had no apparent reason to lie about respondent's mental condition. He was hired through Juris Solutions to evaluate respondent and concluded that respondent has a delusional disorder as well as a paranoid personality disorder. He was called to testify after the parties were unable to reach a resolution.

Initially, Dr. Goldsmith corroborated Dr. Salvage's diagnosis by finding respondent has features of a paranoid personality disorder but later opined that respondent does not have a mental disability. Dr. Goldsmith's assertion that respondent's inappropriate actions were caused by cultural differences is highly questionable, given that it was made after the previous diagnosis

of a paranoid disorder and because he was hired to testify regarding respondent's fitness in this proceeding.

Dr. Goldsmith's opinion that respondent was mentally fit and that his problems at work related to cultural differences was conclusory. As noted by Dr. Salvage, Dr. Goldsmith failed to describe the Croatian culture and how it would cause someone to be paranoid and aggressive with other people. On the other hand, there were examples in the record that around 2011 respondent started to have sudden outbursts of profanity and unprovoked hostility towards his co-workers and supervisors. Moreover, respondent made numerous, incredible complaints that co-workers and supervisors had spit at and kicked him, burped in his face, placed a dead fish on his car, opened his locker, threw sewage at him from the roof, and verbally harassed and tormented him for no good reason. Notably, both doctors acknowledged that respondent spoke about these complaints and that he believed they occurred but could not provide any details or corroboration about them (Salvage: Tr. 16-18; Goldsmith: Tr. 91-94). Dr. Goldsmith failed to explain how these incidents related to cultural differences. It seems more likely than not that respondent's behavior is the result of a mental disability, not of cultural differences. For all these reasons, petitioner proved respondent has a disability.

The fact that an employee may have a psychiatric disorder does not prove that he is unable to do the job. *See, e.g., Comm'n on Human Rights v. Henderson*, OATH Index No. 704/01 (June 12, 2001). The second element petitioner must show is that respondent is unable to perform his job duties at "a minimally acceptable level" and that the disability "presently and for the reasonably foreseeable future" prevents him from doing so. *Human Resources Admin. v. Farber*, OATH Index No. 944/02 at 24, 27 (Sept. 19, 2002) (numerous unscheduled and unpredictable absences and late arrivals caused by respondent's migraine headaches made her unfit to perform the duties of her attorney position).

"An essential part of fitness to work 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 28 (Jan. 7, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 94-72-2 (Sept. 29, 1994). An employee has a duty not to interfere with the ability of co-workers to perform their tasks. *Health and Hospitals Corp. (Bellevue Hospital Ctr.) v. Samuel*, OATH Index No. 243/07 at 5 (Dec. 20, 2006); *Human Resources Admin. v. Anon.*, OATH Index No.

1781/12 at 30 (Aug. 9, 2012) (employee unfit based on evidence of his ongoing disruptive and frightening behavior); *Housing Auth. v. Caballero*, OATH Index No. 699/96 at 18 (Mar. 13, 1996) (employee unfit because her disability caused her “to have frequent violent or disruptive outbursts at work, or substantially interferes with [her] ability to interact appropriately with co-workers or supervisors.”); *see also Misek-Falkoff v. IBM Corp.*, 854 F.Supp 215 (S.D.N.Y. 1994), *aff’d*, 60 F.3d 811 (2d Cir. 1995) (an employee with a neurological disorder was not otherwise qualified to perform her work under 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”).

There was undisputed evidence that respondent is unable to work with or be supervised by others, without being disruptive or abusive. Examples of his sudden and unprovoked outbursts include: cursing at Wilson at the sink and following him to the elevator cursing; telling a supervisor that Wilson better be careful or “he’s gonna get wacked” for filing a workplace violent complaint; giving the middle finger to a security officer and engaging in a verbal confrontation with the officer; and making incredible allegations against co-workers that could not be verified. Certainly, this conduct is disruptive and negatively impacts respondent’s co-workers, to the point of putting some, like Wilson, in fear of their safety.

Finally, petitioner has shown a causal connection between respondent’s mental illness and his unfitness. A causal connection is generally found when acts of misconduct are “attributable to” or are the “direct results of” the disability. *Dep’t of Finance v. Serra*, OATH Index No. 583/01 at 7 (Nov. 14, 2000); *Dep’t of Housing Preservation and Development v. Natal*, OATH Index No. 1185/90 (Mar. 22, 1991). Dr. Salvage stated in his report:

[respondent] is unable to grasp that there are aspects of his behavior and style of relating that are causing problems. From his point of view, “the people at work are wrong and they need to change.” He did indicate that he would cooperate with counseling or further testing, but was also frank about stating, “I don’t think it would do anything because I don’t have any problems.”

(Pet. Ex. 3). Indeed, Dr. Goldsmith agreed that respondent was inflexible about other interpretations of his conduct.

There was ample evidence that respondent's mental disability generates intense anger and aggression that disrupts the work environment and makes him currently unfit for his duties as a machinist. In addition, respondent's paranoia, manifested in the false accusations and grudges he harbors against co-workers, prevents him from working cooperatively and has required that his supervisor transfer other staff who cannot cope with his behavior.

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." *Papa*, 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 (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 (Feb. 25, 2000) (respondent found unfit given lack of insight into condition and refusal to take medication).

Here, Dr. Salvage testified that he examined respondent twice and both times respondent was in denial about his disability. While respondent told Dr. Salvage he was in treatment and was willing to continue, except for being evaluated by Dr. Goldsmith, there was no evidence that respondent is currently under a psychiatrist's care. Dr. Salvage credibly explained that people in respondent's situation often say they will get treatment in order to return to work but that until they recognize they have a problem and find a way to work it out, there is a strong probability that the condition will get worse. Although Dr. Salvage believed that with the proper treatment respondent could go back to work, respondent is not currently fit to do so. Thus, whether there is a mechanism for DEP to monitor respondent's treatment, as claimed by respondent, is irrelevant.

It is notable that respondent did not dispute the allegations set forth in the Attachment A. Instead, respondent challenged the quality of Mr. Nyarko's report which formed the basis for the Attachment A and DEP's overall investigation. For example, respondent complained that Mr. Nyarko did not include in his report: respondent's assertion that Wilson provoked the September 25 incident by calling him a fucking idiot; that Officer Valdez characterized the on-going interaction between respondent and another officer as "joking"; that one of the people interviewed noted respondent had not demonstrated prior violent tendencies; or that during the

conversation with the Assistant Commissioner, respondent got himself in check when told to do so. Moreover, respondent argued that when he made uncorroborated complaints about other workers they were never properly investigated and that he was immediately branded as paranoid and having mental health problems. On the other hand, complaints made against him were taken seriously, even when there was no corroborating evidence. Finally, respondent questioned DEP's decision to bring him up on disciplinary charges for the incident with Wilson even though Mr. Nyarko had not completed his report and investigation.

None of respondent's arguments as to the alleged investigative flaws undermine petitioner's position that respondent is unfit for his duties as a machinist. Even though Mr. Nyarko left out some information from his report that was favorable to respondent and credited the complaints of other workers over respondent's complaints against them, respondent's conduct is not in dispute. Moreover, the record shows that DEP did not investigate respondent's complaints because he was unable to provide details, because the complaints were incredible and could not be independently verified, and because there was evidence that respondent routinely made up stories about his co-workers. There is also no prohibition against charging a respondent for misconduct under Civil Service Law section 75 and alternatively commencing a section 72 proceeding because there is evidence that the misconduct might be caused by a mental disability. Mr. Nyarko's report and DEP's investigation appears to have been done in good faith.

Accordingly, petitioner has proved by a preponderance of the evidence that respondent is currently unfit to perform the duties of his position due to a mental disability. Upon future proof of fitness, respondent may seek reinstatement pursuant to section 72(2) of the Civil Service Law.

The next issue is whether placement of respondent on an involuntary pre-hearing leave of absence was proper pursuant to section 72(5) of the Civil Service Law. *See Barrett v. Miller*, 179 Misc.2d 24 (Sup. Ct. N.Y. Co. 1998) (OATH has jurisdiction to determine propriety of placement of employee on pre-hearing involuntary leave). Section 72(5) states:

Notwithstanding any other provisions of this section, if the appointing authority determines that there is *probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations*, it may place such employee on involuntary leave of absence immediately; provided, however, that the employee shall be entitled to draw all accumulated unused sick

leave, vacation, overtime and other time allowances standing to his or her credit.

Civ. Serv. Law § 72(5) (Lexis 2014) (emphasis added). This tribunal has recognized that placing an employee on involuntary leave under section 72(5) without a hearing is an “extraordinary measure.” *Teachers’ Retirement System v. Barrett*, OATH Index No. 1210/99 at 3 (Sept. 22, 1999).

Even though respondent does not have a history of violence, petitioner has shown it had “probable cause” to believe that respondent’s continued presence on the job “represents a potential danger to persons” and “would severely interfere with operations.” Civ. Serv. Law § 72(5). Respondent’s documented hostility and unprovoked anger towards co-workers, coupled with his statements that Wilson “better be careful or he’s gonna get wacked,” suggests that his actions severely interfere with operations and that he could harm others. Indeed, Wilson described two hostile encounters with respondent that led him to get a transfer because he was afraid to be alone with respondent. Moreover, respondent’s delusional and paranoid behavior, which included falsely accusing his co-workers of misconduct, interfered with operations.

More importantly, Dr. Salvage made an independent evaluation of respondent and found that he presented a heightened risk and danger in the workplace because his delusions and beliefs were fixed and he lacked any insight into how his actions were causing problems. Dr. Salvage also felt personally threatened by respondent because he displayed such rage in the interview and made vague threats that, “They better be careful, they may just have to call the police.”

Overall, the record demonstrated that respondent’s angry outbursts have, over time, created significant disruption to office operations by causing his co-workers to fear what he might do. This coupled with an independent psychiatrist’s determination, justified respondent’s removal from the workplace. *See Papa*, OATH 1392/07 at 13 (pre-hearing leave was appropriate where employee engaged in bizarre and threatening behavior which caused fear in his co-workers); *Transit Auth. v. Smith*, OATH Index No. 1299/02 (Mar. 24, 2003) (same).

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent is currently unfit for the duties of his job pursuant to section 72 of the Civil Service Law.
2. Petitioner demonstrated that respondent was properly placed on an emergency leave pursuant to section 72 of the Civil Service Law.

RECOMMENDATION

Based upon the foregoing findings, respondent should remain on involuntary leave pursuant to section 72 of the Civil Service Law.

Alessandra F. Zorziotti
Administrative Law Judge

August 20, 2014

SUBMITTED TO:

EMILY LLOYD
Commissioner

APPEARANCES:

CARLA LOWENHEIM, ESQ.
Attorneys for Petitioner

GREENBERG, BURZICHELLI, GREENBERG, P.C.
Attorneys for Respondent

BY: ROBERT BURZICHELLI, ESQ.

BY: LINDA KELLER, ESQ.