

Human Resources Admin. v. M.O.

OATH Index No. 173/15 (Nov. 21, 2014)

Petitioner established that respondent is mentally unfit to perform the duties of her position. ALJ recommended that she be placed on an involuntary leave of absence pursuant to section 72 of the Civil Service Law.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
- against -
M.O.
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Human Resources Administration (“HRA”), brought this proceeding pursuant to section 72 of the Civil Service Law. Petitioner alleged that respondent, a clerical associate II, is mentally unfit to perform her duties and should be placed on an involuntary medical leave of absence.

At a hearing conducted before me on October 15, 2014, petitioner presented the testimony of five witnesses, including Dr. David Salvage, who qualified as an expert witness, and also presented documentary evidence. Respondent, who was represented by counsel, offered documentary evidence and testified on her own behalf.

For the reasons below, I find that respondent is currently unfit to perform the duties of her position and should be placed on a disability leave pursuant to section 72 of the Civil Service Law. This report contains sensitive medical and personal information about respondent, who requested that her name be withheld from publication (Tr. 186). That request is granted pursuant to section 1-49(d) of OATH’s Rules of Practice. *See* 48 RCNY § 1-49(d) (Lexis 2014); *Dep’t of Environmental Protection v. Anonymous*, OATH Index No. 2443/14 at 1 n.1 (Aug. 20, 2014) (respondent’s name withheld because report contained sensitive medical information about

respondent); *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 1 n.1 (Apr. 5, 2010) (same).

ANALYSIS

Respondent has been employed by HRA Office of Child Support Enforcement ("OCSE") since 2003, where she works as a clerical associate II (Tr. 164). Respondent's duties involve answering telephones, taking messages, responding to client inquiries and electronic customer service referrals, and reviewing electronic images to make sure they were properly scanned (Tr. 49-50, 70; Pet. Exs. 1, 3). Petitioner alleges that respondent is unfit to perform the duties of her position. Petitioner submitted "Attachment A," which describes behavior that precipitated its concern about respondent's fitness for duty.¹ Attachment A alleges that respondent engaged in disruptive and often profane verbal outbursts at work, compulsively spat while seated at her desk, mumbled to herself, aimlessly wandered around the office, and destroyed an office telephone (Pet. Ex. 3).

Events Leading to the October 2013 Psychiatric Evaluation

Respondent was initially referred for psychiatric evaluation in October 2013 and was found fit to perform her duties. John Cnapich, Director of Paternity Outreach Services at OCSE, supervised respondent between 2009 and 2013 (Tr. 49, 70). He described the behavior and events that preceded respondent's initial psychiatric evaluation.

According to Cnapich, in May 2013, employees who worked near respondent complained that she was having conversations with herself, said "ow" and "ouch" repeatedly and loudly, cursed, cleared her throat loudly, and spat into her garbage can. Cnapich discussed the complaints with respondent and wrote a memorandum, dated May 9, 2013, memorializing their discussion (Tr. 50-52; Pet. Ex. 4). Cnapich testified that in July 2013, respondent's colleagues complained that she used their phones and when they hit the re-dial button, it appeared that respondent had dialed 9-1-1 (Tr. 53-55; Pet. Exs. 5, 6). According to Cnapich, respondent denied having called 9-1-1, but acknowledged that she used other employees' telephones

¹ As noted by this tribunal, Attachment A "is not a pleading and the fact that an employee committed the acts stated therein is not an element to be proven at the hearing." *Dep't of Transportation v. S.N.*, OATH Index No. 1233/14 at 2 n.2 (Feb. 14, 2014). Rather, Attachment A serves as written notice of the facts upon which the employer based its determination that the employee is not fit to perform her duties and forms the basis for having the employee evaluated. *Id.*

because she had problems with her own (Pet. Ex. 7). Cnapich further testified that he has had to ask respondent to stop engaging in loud, expletive-filled arguments with her ex-husband using the speakerphone because he and others in the office could hear their conversations (Tr. 60, 66).

On August 14, 2013, respondent's family advised Cnapich that they had arranged for emergency medical services personnel ("EMS") to go to respondent's workplace and remove her for psychiatric evaluation. According to Cnapich, respondent's ex-husband contacted him to express concern about respondent's mental state and her failure to regularly take her medication. They sought to have her evaluated in the hopes of getting a court order to compel her to take her medication (Tr. 60, 66).

Respondent returned to the workplace after a brief hospitalization, but continued to exhibit bizarre and disruptive behavior (Cnapich: Tr. 61-62; Charles: Tr. 95-96). On September 16, 2013, Stacey Charles, Executive Director of the Project Management Office at OCSE, whose office is located a few feet away from respondent's cubicle, observed respondent cursing, using profanity, and spitting into her garbage can (Tr. 91-93). Charles testified that respondent has said "fuck," "shit," "cunt," and "bitch" loud enough for other employees in the area to hear her (Tr. 93). Respondent curses to herself, to people on the telephone, to passersby, and to anyone who tries to engage her, even those trying to mollify her (Tr. 93-94; Pet. Ex. 14). Charles described respondent's comments as "offensive and at times scary," and testified that respondent "can be threatening . . . she can be loud and you just don't know where she's going to go with it" (Tr. 96; Pet. Ex. 14). According to Charles, respondent's behavior became so disturbing that she constantly kept her office door locked and sought intervention from the director of the OCSE human resources department (Tr. 97; Pet. Exs. 14, 15).

October 2013 Psychiatric Evaluation

On October 31, 2013, Dr. David Salvage, a board certified psychiatrist, examined respondent at petitioner's request (Tr. 13, 40-41). According to Dr. Salvage, his overall finding after the evaluation was that respondent had many symptoms of anxiety and met the criteria for anxiety disorder not otherwise specified (Tr. 13). He testified that his evaluation was limited because he had not received full documentation of respondent's problems at work and she did not disclose her full psychiatric history, meaning that respondent told him she only had one recent hospitalization for anxiety and denied having earlier hospitalizations, which her treatment

record later demonstrated (Tr. 14). He determined that she was fit to perform her duties (Pet. Ex. 3).

Events Preceding the June 2014 Psychiatric Evaluation

Petitioner alleges that respondent continued to exhibit disruptive and disturbing behavior after the October 2013 evaluation, which led to a second referral to Dr. Salvage for a psychiatric evaluation in June 2014.

On December 17, 2013, Charles observed respondent cursing out loud and described her as angry and upset (Tr. 98-99; Pet. Ex. 15). In an e-mail to human resources personnel, Charles reported that respondent's behavior was "extremely disruptive" and made the work environment "unsettling" (Pet. Ex. 15).

According to Charles, on April 21, 2014, when she arrived at work, respondent was talking to herself and on the telephone, saying things like, "you are evil" and "fuck you" (Tr. 99-100). When Charles attempted to speak to respondent, she asked Charles, "Who do you think you are?" and told Charles to leave her alone (Tr. 100). According to Charles, respondent's demeanor was angry, aggressive, and intimidating. Indeed, respondent was so loud during the incident that the entire area, which seats at least seven people, could hear her (Tr. 101).

Drewery-Parsons, Director of Family Court Support Services at HRA, has supervised respondent since December 2013 (Tr. 69-70). According to Drewery-Parsons, on April 30, 2014, she received a "frantic" telephone call from respondent, who reported that she had been attacked by a priest. Drewery-Parsons advised respondent to contact the police and respondent hung up the phone. Drewery-Parsons testified that respondent has made the same claim before (Tr. 70-71; Pet. Ex. 8).

On May 1, 2014, Drewery-Parsons, whose office is only a few feet away from respondent's cubicle, observed respondent at her desk, talking very loudly on the telephone so that her conversation could be heard by others (Tr. 72, 81). Drewery-Parsons asked her to keep her voice down because it was disruptive to the other people in the area. Drewery-Parsons testified that respondent "went off into a rant" and told her she should not treat an African-American that way (Tr. 72-73; Pet. Ex. 9).

Drewery-Parsons further testified that on May 27, 2014, she arrived at work to find that respondent's phone had been completely destroyed and switched with a phone from another

cubicle (Tr. 74). It appeared a liquid had been poured on respondent's telephone because "it was really destroyed, cracked, everything" and was inoperable (Tr. 75). When asked what happened to the telephone, respondent said that she dropped it (Tr. 74). Drewery-Parsons did not believe respondent's explanation because the floor is carpeted, so the phones were not easy to break and the phone "was really destroyed. I mean the screen was cracked, discolored, everything." (Tr. 76; Pet. Ex. 10). Drewery-Parsons did not see respondent destroy her phone, but testified that another employee reported having seen respondent do so (Tr. 87).

According to Drewery-Parsons, respondent's disruptive behavior persisted. For example, on June 3, 2014, when she arrived in the office, she heard respondent talking and cursing to herself (Tr. 77; Pet. Ex. 11). She approached respondent's cubicle, where she saw that respondent's desk was in disarray with papers "all over the place" and heard respondent curse as she moved papers from the desk into a garbage can (Tr. 77). Respondent saw Drewery-Parsons and toned down her behavior, but once Drewery-Parsons went to her office door, respondent started mumbling again. Drewery-Parsons testified that this was not the first time she had seen such behavior (Tr. 77; Pet. Ex. 11). Drewery-Parsons reported her observations to the OCSE human resources staff in an e-mail on June 3, 2014 (Pet. Ex. 11). In the e-mail, she noted that respondent was mumbling, talking under her breath, and had a hard time concentrating on her work. She reported that respondent was roaming around the office, meaning that respondent leaves her work area and walks back and forth or goes to the other side of the office (Tr. 78-79; Pet. Ex. 11). Drewery-Parsons testified that it is "typical" to hear from other employees that respondent, who is not required to be away from her desk as part of her job responsibilities, has wandered away from her work area and is cursing to herself (Tr. 79, 87). Drewery-Parsons asked respondent to remain in her work area, to no avail (Tr. 79).

On June 4, 2014, Drewery-Parsons heard respondent and another employee arguing about respondent's tendency to "hock," which she described as bringing up phlegm and spitting it out, in her garbage can (Tr. 80). Drewery-Parsons asked respondent, as she had done before, to go to the bathroom when she needed to cough up phlegm (Tr. 80). In response, respondent directed expletives at Drewery-Parsons and said, "you make me sick." When Drewery-Parsons asked respondent, "what did you say?" respondent told her to have a nice day, then called her stupid (Tr. 81, 87-88; Pet. Ex. 12).

Charles testified that on June 5, 2014, respondent spontaneously uttered phrases, directed at no one in particular, such as, “suck your cunt,” “you hurt me,” and “you’re a disgrace” (Tr. 102; Pet. Ex. 17). When approached by Charles, respondent replied that she was reading the newspaper. However, Charles testified that respondent was not reading a paper and that the kind of statements she was making would not be found in a newspaper (Tr. 103).

June 25, 2014, Psychiatric Evaluation

Respondent was re-evaluated for her fitness for duty by Dr. Salvage on June 25, 2014. Dr. Salvage testified that prior to his mental status examination of respondent, he reviewed the Attachment A, which summarized respondent’s behavior leading to the evaluation, and a description of respondent’s job duties (Tr. 28-29; Pet. Exs. 2, 3).

Dr. Salvage described respondent as “bizarre appearing female who kept her eyes closed throughout the majority of the interview” and who seemed “extremely disinhibited” at the examination (Tr. 17, 26; Pet. Ex. 2). According to Dr. Salvage, by way of a greeting, respondent “threw her arms around [him] and gave [him] a full body hug, pressing body to body.” She also told him he was “very sexy” and commented that he had lost weight since the last time she saw him (Tr. 17; Pet. Ex. 2). Dr. Salvage viewed this behavior as evidence of respondent’s “extremely poor judgment about negotiating social appropriateness” (Tr. 17). He explained that when considered in the context of his overall examination of respondent, her behavior indicated problems with the ability to distinguish what is real from what is an internal fantasy or what is socially appropriate in a particular situation (Tr. 17-18).

Dr. Salvage reported that respondent’s thought process during the examination was not consistently logical and exhibited mild flight of ideas, but was largely goal directed (Pet. Ex. 2). He said that although respondent was goal directed about wanting to remain in her job, when he asked her other questions about her life, respondent’s answers revealed a thought process that is “illogical, fragmented and psychotic” (Tr. 20). As an example, Dr. Salvage said respondent displayed “a classic example of flight of ideas” when they discussed her wishes (Tr. 19). She told him that she wanted go to England because her family is there, then said she meant she wanted to go to Paris because it is beautiful and has a lot of food, which is like her family (Tr. 19; Pet. Ex. 2). In his report, Dr. Salvage noted that respondent seemed to conflate concepts like

“travel,” “family,” and “foreign travel” and required “numerous clarifications throughout the interview” (Pet. Ex. 2).

When asked about the events described in the Attachment A, respondent became irritable and difficult. She denied the incidents and claimed they were fabricated by people who are out to get her (Tr. 29-30; Pet. Ex. 2). She also claimed that Drewery-Parsons is always reporting her for petty reasons because they have a personality conflict (Pet. Ex. 2). Dr. Salvage testified that when asked to explain why her colleagues and supervisor might be out to get her, respondent could not do so, but simply repeated her contention (Tr. 30-31). Given the rest of the evaluation, Dr. Salvage thought that this suggested that respondent has lost touch with reality and is unable to offer a coherent explanation (Tr. 31). Dr. Salvage testified that respondent’s use of expletives and cursing as described in Attachment A is consistent with a patient who has a psychotic disorder because her thought process is loosened (Tr. 31).

According to Dr. Salvage, respondent exhibited extremely limited insight into her own behavior. When asked about problems at work or whether her excessive hugging of Dr. Salvage might be a problem, she blamed others. When asked about her psychiatric hospitalization, respondent said it was irrelevant or denied that it ever happened (Tr. 20). Dr. Salvage testified that respondent’s limited insight is indicative of a psychotic disorder that is worsening (Tr. 20-21).

Dr. Salvage reported that respondent displayed “bizarre and illogical” responses when presented with abstract situations (Pet. Ex. 2). For example, when asked what she would do if presented with an unsupervised child playing in a dangerous situation, respondent said she would tell the child to go find his or her mother. After being told that the parents were not reachable, she responded parents can sometimes disappear. Dr. Salvage thought this consistent with psychotic thinking because the patient cannot logically process information and form a realistic plan; instead, he or she feels a kind of helplessness or inertia (Tr. 21-23; Pet. Ex 2).

According to Dr. Salvage, respondent informed him during the October 2013 evaluation that she had taken an antipsychotic medication during her hospitalization and that it had helped to reduce her anxiety (Tr. 26). However, during the June 2014 evaluation, when he asked her if she would be receptive to taking medication, she said she did not see the reason for doing so. Dr. Salvage strongly believes that respondent would benefit from taking antipsychotic medication (Tr. 26-27).

Dr. Salvage's assessment is that respondent's mental status "is significant for loosening of associations and an inability to display appropriate judgment consistently" (Pet. Ex. 2). He testified that respondent's thinking is illogical and shows signs of a thought disorder (Tr. 25). He further testified that respondent's disinhibited behavior during the exam was "suggestive of either a hypomanic disorder or a kind of more disorganized schizophrenia" (Tr. 26).

Dr. Salvage felt that respondent had "decompensated" between the October 2013 and June 2014 evaluations, and "was significantly worse" at the most recent examination (Tr. 14, 27). He testified that his diagnosis is that respondent has a psychotic disorder not otherwise specified (Tr. 27). He did not include a diagnosis in his report, however, because he thought it would be premature to do so without having reviewed records of her hospitalization in greater detail (Tr. 27).

Dr. Salvage testified that respondent has a "severe functional psychiatric disorder with a psychotic core" and that the behavior described in the Attachment A is not compatible with her ability to function in her job (Tr. 33). Further, Dr. Salvage testified that were he treating respondent, he would have sought to have her hospitalized based on her lack of inhibition and reality testing, as well as her verbally assaultive and threatening behavior (Tr. 35). He asserted that respondent's lack of insight and her inability to control her behavior presents a danger to her well-being and that of others (Tr. 35-36).

Reviewing respondent's Tasks and Standards, Dr. Salvage testified that respondent's ability to perform clerical and associated work with limited latitude for independent judgment would be severely compromised by her lack of appropriate judgment (Tr. 37; Pet. Ex, 1). Given respondent's lack of control and disinhibition, such as her remarks to Dr. Salvage that he was sexy and her use of profanity in the work place, Dr. Salvage believes it would be difficult for respondent to properly handle telephone calls, which is one of her tasks (Tr. 37, 39-40). Dr. Salvage testified that tasks which require respondent to search for materials that are difficult to locate and to file materials would also be difficult for her to complete because her thought process is disorganized (Tr. 38-39). In addition, if called upon to perform supervisory duties as described in the Tasks and Standards, respondent's behavior during the evaluation, including keeping her eyes closed, inappropriate contact and comments, and her illogical thinking, indicate that she would be incapable of the interpersonal interaction and logical thinking necessary to supervise others (Tr. 39).

Events of September and October 2014

Petitioner contends that as recently as September and October 2014, respondent continued to exhibit behavior that is disruptive and has caused her colleagues to express concern for their well-being. Petitioner called two witnesses, Victor McDade and Nadine Tibby, who testified as to respondent's recent conduct.

McDade is a temporary worker who was assigned to OCSE from September 2014 until a few days before the hearing (Tr. 110; Pet. Ex. 19). He has worked at HRA for over two years, but was only at respondent's location for a month or two (Tr. 111). McDade testified that the first week he began working at OCSE, he noted that respondent kept walking back and forth, mumbling and cursing. She eventually approached him and asked him who he was and how long he was going to work there (Tr. 111; Pet. Ex. 18). McDade testified that respondent would walk around the office in his area cursing, such as "motherfucker," "goddamnit," and "shit," in a rapid-fire speed and that she would also mumble (Tr. 113). He testified that he was unsure if she was talking to someone because at first she was not looking directly at him, but sometimes looked at him (Tr. 113).

McDade came to believe that respondent developed some form of infatuation with him. He testified that coworkers told him that respondent asked others about him and left food for McDade on his desk (Tr. 114-15). According to McDade, respondent went to his work area every day to look for him and if he is not present, she asked his colleagues his whereabouts (Pet. Ex. 19). One day, respondent entered his area while McDade was talking to Tibby, his supervisor, and stated that she thought she heard or saw God around, while looking at McDade (Tr. 115-16; Pet. Ex. 19). McDade's account is corroborated by Tibby, who testified that she observed respondent leaving food items on McDade's desk (Tr. 135-36). Tibby also witnessed the incident during which respondent told McDade that she thought she saw God (Tr. 138).

According to McDade, respondent's attention caused him to become "a little concerned" (Tr. 116). His disquiet intensified after he learned from Tibby that she overheard respondent call 9-1-1 to report that she had been sodomized in a church (Tr. 116-17). McDade testified because of her prior reference to God near him and the church reference in the 9-1-1 telephone call, he became uncomfortable and concerned for his safety and reputation, so he wrote a memorandum summarizing his interactions with respondent (Tr. 117; Pet. Ex. 19).

McDade's discomfort grew after someone made an anonymous call to 9-1-1 from the OCSE office on October 3, 2014, to report an assault and rape. Police officers came to investigate the complaint and met with Vladimir Vizner, OCSE's disciplinary coordinator (Tr. 153-54). The officers could not determine the telephone extension from which the emergency call originated and asked Vizner if he had any information about the 9-1-1 call. Vizner, who was familiar with respondent because he had received complaints about her erratic behavior since 2013, told them that she has a history of calling 9-1-1 (Tr. 155-57). Vizner and the officers went to respondent's cubicle, but she stated that she had nothing to report to the police. On further investigation, the police officers concluded that the call had been a nuisance call and left (Tr. 156-57). Subsequently, one of the officers called Vizner to report that the 9-1-1 caller had mentioned a name McDade used as an actor (Tr. 158; Pet. Ex. 21).

McDade testified that he had provided his stage name to very few people at OCSE, including respondent, and he came to believe that she called 9-1-1 to report an assault and rape and provided his name during the call (Tr. 112, 117). McDade was visibly distraught at the hearing as he recounted his alarm about being associated with any suggestion that a sexual assault had occurred. He testified that when he was told about the incident, he panicked and became so upset that he had to leave work early. He was subsequently assigned to a new work location to prevent further interaction with respondent (Tr. 117-18, 125-26; Pet. Ex. 21).

Tibby is a records manager who is employed by TriState Agency. Her employer assigned her to a project at OCSE, where she has been working since September 2, 2014 (Tr. 131). As part of her job duties, she supervises a team of 11 workers, including McDade (Tr. 132). Tibby is familiar with respondent because she sits on the same floor as respondent, but on the opposite side. She has to go to respondent's area of the floor twice daily to check e-mails (Tr. 132-33).

Tibby testified that during her first week at OCSE, as she rode the elevator alone with respondent, respondent looked at her and said, "Leave me the fuck alone" just before they exited the elevator on the floor on which they both worked (Tr. 133). Respondent has cursed Tibby on other occasions and has gone out of her way to walk by Tibby's desk, where she mumbles, bounces on the desk, and tells Tibby, "fuck you," (Tr. 134-35; Pet. Ex. 20). According to Tibby, she has tried to avoid encounters with respondent because she is afraid of what respondent will say (Tr. 133-34, 139, 147).

In early October 2014, Tibby passed respondent and they almost met in the corridor, and respondent said, “What the fuck you looking at, I’m going to call the police on all you motherfuckers” (Tr. 139). Tibby reported the incident to Vizner and told him that on an earlier occasion, while in the women’s bathroom, she overheard respondent using the speakerphone function to make a telephone call to 9-1-1 in which she reported that she was calling from a church and someone was being sodomized (Tr. 137, 140-42). Tibby testified that she mentioned the call to McDade because she was concerned about respondent’s interaction with him (Tr. 137-38, 142).

Respondent’s Testimony

Respondent denied having engaged in the behavior described by her colleagues. She testified that she was having personality conflicts with her supervisor, Drewery-Parsons, which caused her to request that her work station be changed (Tr. 171-72; Resp. Ex. B). She maintained that Drewery-Parsons, who she described as “confrontational,” is “in cahoots” with Charles and other employees to “put her in her place” (Tr. 169, 172). On cross-examination, respondent stated that Drewery-Parsons and Charles are part of a clique that seems to not want her to work at OCSE (Tr. 177-78).

Respondent believes that she and Cnapich, who supervised her before Drewery-Parsons, got along well. She maintained that he has never heard her curse (Tr. 177). Respondent maintained that it was Cnapich, not her ex-husband, who summoned EMS to remove her from the workplace in August 2013. According to respondent, Cnapich did so because he heard her screaming at her ex-husband while at work (Tr. 178-79).

When asked about the witnesses’ account of her behavior, respondent maintained that she had never met Tibby and that she would be “crazy to go and just say a dirty word to a person” she did not even know (Tr. 179). With respect to Charles, respondent asserted that Charles “doesn’t know how to say good morning. She comes into the office and goes straight into her . . . office and closes the door” (Tr. 179-80).

Respondent maintained that she does not need psychiatric treatment, including medication, because “I live, I pay my rent and I seem to be okay” (Tr. 181-82) Respondent believes that she is fine and if she is moved to a different work area she would “not have any personality problems” (Tr. 182).

However, respondent has seen a psychiatrist, Dr. David Szuster, three or four times since August 2014 (Tr. 173-74; Resp. Ex. C). Respondent testified that she consulted Dr. Szuster because of this action against her (Tr. 176). According to respondent, Dr. Szuster found her non-confrontational and able to handle her job duties. She last saw him in October 2014 and he has never prescribed her medication (Tr. 175-76). A letter from Dr. Szuster, dated September 17, 2014, which I am considering in its entirety over petitioner's objection,² states that he evaluated respondent on August 27, 2014, and saw her on September 3 and 17, 2014. He reported that respondent denied depressive, manic, or psychotic symptoms and concluded that "[a]t this time she is able to continue working and accepts responsibility for own [sic] behavior and keeps [sic] within acceptable limits of the rules of society" (Resp. Ex. C).

Respondent is Unfit Under Section 72

In a section 72 proceeding, petitioner bears the burden of establishing by a preponderance of the evidence that: (i) the employee suffers from a disability, (ii) she is unable to competently perform her job duties, and (iii) her inability to perform is caused by her disability. *Human Resources Admin. v. Anonymous*, OATH Index No. 1781/12 at 2 (Aug. 9, 2012); *Admin. for Children's Services v. Papa*, OATH Index No. 1392/07 at 10 (Mar. 30, 2007). The proceeding focuses on "the employee's current fitness and ability to perform his job duties, not on his past condition or work performance" and "[p]ast performance is relevant only to the extent that it is probative of respondent's present condition and future conduct." *Dep't of Environmental Protection v. Anonymous*, OATH 2443/14 at 10 (citing *Admin. for Children's Services v. J. M.*, OATH 3350/09 at 4; *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)).

Petitioner has established that respondent suffers from a mental disability. Dr. Salvage credibly testified that respondent has a psychotic disorder manifested by disorganized thinking, loosening of associations, and an inability to display appropriate judgment consistently. Although Dr. Salvage found respondent fit on his initial evaluation, he concluded that she had

² Petitioner objected on the grounds that Dr. Szuster was not available to authenticate the letter or to be subject to cross examination. The parties then stipulated that the letter would be admitted for the limited purpose of establishing that respondent has sought treatment (Tr. 175). Having reconsidered the parties' stipulation, I have determined that although hearsay, it is appropriate to consider the letter in its entirety and to determine what weight, if any, it should be given. See 48 RCNY § 1-46(a); *Fire Dep't v. Armbruster*, OATH Index No. 1350/12 at 6 (in administrative hearings, objection to hearsay goes primarily to weight rather than admissibility).

decompensated by the second evaluation and was no longer fit to perform her duties. He testified that respondent's thinking is illogical and shows signs of a thought disorder and that her disinhibited behavior during the exam is indicative of either a hypomanic disorder or a kind of more disorganized schizophrenia. Dr. Salvage opined that respondent's profane and seemingly uncontrollable outbursts are consistent with the behavior of a patient who has a psychotic disorder. He also testified that respondent's fixation with a male employee would be consistent with his diagnosis because people with a psychotic disorder develop fixed delusions that relate to one person or concept. He believes that respondent would benefit from hospitalization and anti-psychotic medication. Moreover, based on her lack of inhibition and reality testing, as well as her verbally assaultive and threatening behavior, and her lack of insight into and control of her behavior, he is concerned that she presents a danger to herself and others.

Respondent did not dispute that she suffers from a mental disability. Indeed, her counsel argued that after respondent's hospitalization in August 2013, "HRA has been on notice that she is indeed disabled under the rubric of the Americans with Disabilities Act, the state Human Rights Law as well as the City Human Rights Law" (Tr. 8-9, 186). Respondent contends that she requested to be moved to another part of the office as a reasonable accommodation of her disability, which request petitioner ignored (Tr. 9).

The Americans with Disability Act (ADA) prohibits employment discrimination "against a qualified individual on the basis of a disability." 42 U.S.C.A. § 12112(a) (Lexis 2014). The New York State and New York City Human Rights Laws use similar language, but provide more expansive protections. *See* Exec. Law § 296(1)(a) ("It shall be an unlawful discriminatory practice" for an employer because of an individual's disability "to discriminate against such individual in compensation or in terms, conditions or privileges of employment."); Admin. Code § 8-107(1)(a) ("It shall be an unlawful discriminatory practice" for an employer because of an individual's disability "to discriminate against such person in compensation or in terms, conditions or privileges of employment."); *Phillips v. City of New York*, 66 A.D.3d 170, 176 (1st Dep't 2009).

This tribunal has held that the employee bears the burden of asserting and proving a defense premised on the disability laws. *See Fire Dep't v. A.G.*, OATH Index No. 771/12 at 14-15 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013) (to prevail in this defense an employee bears the burden of showing that he or she suffers from a

disability, that he or she is otherwise qualified to perform the essential functions of his or her job without an accommodation, that the employee requested an accommodation prior to the date of the alleged misconduct, and that the employer failed to accommodate his or her request); *Human Resources Admin. v. Farber*, OATH Index No. 944/02 at 38 (Sept. 19, 2002) (noting, in a section 72 proceeding, that respondent “has the burden of asserting and proving a defense under the ADA”); *see also Housing Auth. v. Caballero*, OATH Index No. 699/96 at 23 n.9 (Mar. 13, 1996); *Human Resources Admin. v. Horne*, OATH Index No. 487/93 at 13 (Feb. 25, 1993).

Respondent contended that petitioner was on notice of respondent’s disability because of a 2013 hospitalization and submitted a memorandum, dated June 27, 2014, in support of her contention that she sought a reasonable accommodation of her disability but was ignored. In the memorandum she stated “I would like to have a different seating because I am having personality problems with my present supervisor who is confrontational. Therefore I am imploring you to please find me another seat” (Resp. Ex. B). This is insufficient to establish that respondent’s employer knew that she had a disability for which she was requesting an accommodation. *See Human Resources Admin. v. Anonymous*, OATH 1781/12 at 35 (finding no support for respondent’s contention “that employees are entitled to accommodations based solely upon a perceived disability or a history of a disability”); *see also Human Resources Admin. v. Griffin*, OATH Index No. 941/12 at 11 (May 10, 2012), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 12-52-SA (Oct. 26, 2012) (“[a]n employer’s obligation to provide a reasonable accommodation is triggered by a request from the employee which should include information regarding the nature of the disability and the requested accommodation”) (citing Admin. Code § 8-107(15)(a)); *Dep’t of Correction v. Astacio*, OATH Index No. 1715/99 at 5 (July 14, 1999), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 01-36-SA (Apr. 17, 2001). Moreover, even had respondent’s request for different seating been granted, it is not apparent how this would have addressed respondent’s conduct, such as roaming around the work area, cursing and saying vulgar things to herself and to colleagues other than her supervisor, and engaging in disruptive and disturbing conduct.

The second element that petitioner must establish in a fitness proceeding is that respondent is unable to competently perform her job. The evidence supports a finding that while respondent sometimes performs her assigned tasks, she is often unable to do so. Drewery-Parsons credibly testified on a good day respondent will perform her job duties, but on a bad day,

she has to remind her frequently to do her work, which she said is “very frustrating.” (Tr. 85). She explained that respondent sometimes appears to have difficulty concentrating on her work because “she just can’t get it together, she’s constantly talking to herself,” and referring to a black notebook in her personal possession, while cursing and mumbling (Tr. 79). She has been observed with her head down, tapping her feet and rocking back and forth, and with her eyes closed. During these episodes, she was not doing her assigned work (Tr. 83-84; Pet. Ex. 13). As respondent’s supervisor, Drewery-Parsons is “constantly going out to ensure that the work is being done,” which takes a lot out of her (Tr. 85). She described the impact of respondent’s behavior on the office as “extremely disruptive” especially when respondent walks back and forth and is away from her desk for long periods of time, which is often the case (Tr. 85-86). Drewery-Parsons further testified that she has had reports that some of respondent’s work-related telephone calls are “not very nice,” but failed to provide any details about the calls (Tr. 89).

The issue of fitness “is not limited to ‘how well an employee performs her tasks when she is present at work’ . . . [a]n employee may be unfit because a disability causes her ‘to have frequent violent or disruptive outbursts at work, or substantially interferes with [her] ability to interact appropriately with coworkers or supervisors.’” *Admin. for Children’s Services v. Papa*, OATH 1392/07 at 10-11 (quoting *Human Resources Admin. v. Farber*, OATH 994/02 at 32; *Housing Auth. v. Caballero*, OATH 699/96 at 18).

Here, there is ample credible evidence that respondent’s disability causes her to disrupt the workplace and negatively affects her supervisors and co-workers. Charles testified that she has found respondent to be scary and threatening. Although she prefers to leave her office door open, she feels compelled to close it to lessen the disturbance caused by respondent when she utters profanity, curses at passersby, or coughs and spits into her garbage can. Tibby testified that she is afraid of respondent and goes to significant lengths to avoid encounters with her. Tibby fears being subject to expletive-filled verbal attacks and is concerned that respondent’s behavior may escalate. McDade became so concerned about respondent’s seeming fixation on him that he sought and obtained a transfer. It is significant that although respondent believes that Charles and Drewery-Parsons have conspired against her, Tibby and McDade are temporary workers who were assigned to work at OCSE in September 2014. There is no reason to believe that they had any motive to fabricate evidence against respondent. Similarly, while respondent

testified that she has a good relationship with Cnapich, her former supervisor, he too credibly testified to having observed respondent engage in disruptive, abusive, and erratic behavior.

In contrast, respondent's testimony was evasive and insincere. When asked whether she had ever dialed 9-1-1 from "any office phone at the HRA," respondent denied having made calls to 9-1-1 from her own phone, stating "there is no documentation on my phone" (Tr. 168). When asked if she ever told any of her coworkers "fuck you," respondent responded that it is against policies and procedures to curse and it is disrespectful to do so (Tr. 168). When asked if she had ever given McDade food, she answered that he is a good actor and that she had only had one contact with him (Tr. 168). Respondent seemed unable or unwilling to provide direct answers to these questions.

Respondent's demeanor during the proceedings and while on the witness stand are worthy of note. She smiled inappropriately and made odd faces at several points in the proceeding and was manifestly perturbed by the testimony of several witnesses. For example, respondent glowered at Charles throughout Charles' testimony and turned her back on McDade during his entire testimony so that she did not have to look at him. At times, respondent seemed to struggle to restrain herself and during Tibby's testimony, she interrupted the proceedings to state "[e]xcuse me, judge, that's a lie" (Tr. 133).

Respondent offered no medical testimony to support her claim that she is mentally fit to perform her duties, but submitted a letter from her treating psychiatrist. While the opinions of medical experts can inform and aid the fact finder in reaching the proper conclusion, the fact finder is not required to accept the opinions or conclusion of any given expert, but must weigh the evidence in the record and draw his or her own inferences. *Admin. for Children's Services v. J.M.*, OATH 3350/09 at 5 (citing *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 of medical experts is to be evaluated in conjunction with other evidence in the record)). Here, I found the single paragraph letter from respondent's psychiatrist to be of little probative value in the face of Dr. Salvage's detailed report and testimony. Respondent offered no evidence as to the basis of Dr. Szuster's opinion, nor was he available to be cross-examined. Accordingly, I afforded Dr. Szuster's single-paragraph letter little weight.

Where an employee denies the existence of a disability or refuses to treat it, thus creating a risk of future recurrence of the disability, this further supports a finding of unfitness. *Dep't of Environmental Protection v. Anonymous*, OATH 2443/14 at 13 (finding that respondent is unfit supported where respondent was in denial about his disability and, although he claimed to be under psychiatric care, there was no evidence of ongoing treatment); *Admin. for Children's Services v. Papa*, OATH 1392/07 at 11 (respondent's denial that she was mentally ill supports a finding that she is unfit); *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). Here, while respondent has seen a psychiatrist of her own choosing, she maintains that she does not require psychiatric treatment.

The third element that petitioner must establish is that there is a causal nexus between respondent's mental illness and her unfitness. *Dep't of Environmental Protection v. Anonymous*, OATH 2443/14 at 12. The causal connection is generally found where the acts of misconduct are "attributable to" or are the "direct results of" the disability. *Id.* (quoting *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's expert testimony, coupled with testimony describing respondent's behavior in the workplace, demonstrate the requisite causal nexus between her mental illness and her inability to perform her duties.

Accordingly, I find that petitioner has proved by a preponderance of the evidence that respondent is unfit to perform the duties of her position.

FINDING AND CONCLUSION

1. Respondent has a mental disability that has caused her to be unfit to perform her duties as a clerical associate II.

RECOMMENDATION

I find that respondent is unfit to perform the duties of her position and recommend that she be placed on an involuntary leave of absence pursuant to section 72 of the Civil Service Law.

Astrid B. Gloade
Administrative Law Judge

November 21, 2014

SUBMITTED TO:

STEVEN BANKS
Commissioner

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