Dep't of Environmental Protection v. J.B.

OATH Index No. 321/15 (Dec. 19, 2014), *rejected and remanded*, Comm'r Dec. (Feb. 13, 2015), **appended**

DEP police officer was accused of being unfit to perform the duties of his position and placed on involuntary leave pursuant to Section 72 of the Civil Service Law. ALJ granted officer's motion to dismiss the proceeding due to petitioner's failure to comply with Section 72 due process and notice requirements. ALJ also found that petitioner failed to establish probable cause to impose emergency leave under 72(5).

Commissioner rejected ALJ's recommendation that petition be dismissed on procedural grounds and remands for ALJ to make a determination regarding respondent's fitness under Section 72.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
J.B.
Respondent

REPORT & RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disability proceeding was referred to the tribunal by petitioner, the Department of Environmental Protection ("DEP" and "Department"), pursuant to section 72 of the Civil Service Law (Civ. Serv. Law § 72 (Lexis 2014)) alleging that J.B.,[1] an environmental police officer, is mentally unfit to perform the duties of his position. Respondent denies the allegation.

On February 10, 2014, petitioner served respondent with notice of a formal hearing to be held at OATH on March 21, 2014. At a pre-trial conference held on March 10, 2014, the parties

[1] Respondent's full name is being withheld for purposes of publication because this report discusses his medical condition. *See Laurido v. Simon*, 489 F. Supp. 1189 (S.D.N.Y. 1980) (placement of a civil servant on involuntary leave for mental unfitness pursuant to section 72 of the Civil Service Law implicates the employee's liberty interest in his or her reputation). This accommodation is being made *sua sponte* as the parties have not requested it. *See Dep't of Citywide Admin. Services v. H. M.*, OATH Index No. 1670/04 at 1 n.1 (July 26, 2004).

agreed to re-evaluate respondent's mental condition, waiving pending Section 72 deadlines, and petitioner agreed to restore all his leave balances and place him in full pay status. A new examination was conducted, but settlement discussions were unsuccessful. The case was restored to the trial calendar; however, scheduling the trial was delayed due to the illness of respondent's counsel.

The hearing was conducted before me on September 9 and 16, and October 15 and 23, 2014. The record was closed on November 7, 2014, after the submission of written summations.

ANALYSIS

Background

The conduct that is the subject of this proceeding pursuant to Section 72 of the Civil Service Law ("CSL") occurred at a DEP work location on August 9, 2013. According to a memo written by Sergeant Anthony Garcia, he approached respondent after being summoned by other officers and asked if he was okay.

> [Respondent] stated that he was speaking for God and that he needed to spiritually cleanse Officer Zarentis from demons and evil. He began speaking in tongues and told Officer Zarentis to get on his knees to rid him of the evil spell inside of him. . . . [Respondent] was calm and non-combative during his exchange of words. [Respondent] continued to instruct Officer Zarentis to get on his knees to cleanse him and to pray. Officer Zarentis replied by saying "no".

(Pet. Ex. 3 at 1). Sergeant Garcia told Officer Zarentis to comply with respondent's request and asked both men to remove their duty belts, which contained their weapons. Both men complied. "A prayer was then said in the presence of all members of service listed above" and the incident ended (*id.*). Officer Zarentis reported in a written memorandum that respondent was in a trance-like state and claimed to be God or Jesus Christ (Resp. Ex. D). Supervisors decided to have respondent transported to Westchester Medical Center for a psychiatric evaluation and his firearm was taken from him. DEP wanted an assessment of his mental condition before returning him to full duty and releasing his firearm (Tr. 101).

After eight hours of observation, respondent was discharged (Resp. Ex. B at 4) upon a finding that there was "no risk of harm to self or others" (Resp. Ex. C at 4). The psychiatrist who evaluated him reported that family members who met with him stated that the conduct

described by co-workers involved "speaking in tongues," a common practice of the family's Apostolic Pentacostal faith that was not an unusual occurrence at church or home, though family members agreed it was not usual for respondent to engage in this practice at work (Resp. Ex. B at 14). Co-workers reported to the doctor that the conduct they witnessed was the first such episode by respondent in the workplace (*id.*). Upon examination, the doctor noted respondent's affect ("normal range with appropriate reactivity, congruent, normal mobility and intensity"), thought process ("logical, formed appropriate and linear"), thought content ("appropriate, has adequate knowledge of self with no evidence of inappropriate or odd belief. The religious options are not exaggerated and no evidence of any overvalued ideation or psychosis"), insight ("has full and intact insight"), and judgment ("is logical and has full range intact judgment") (Resp. Ex. C at 3-4). The doctor also noted "good eye contact," "in control manner and composed conduct," "bright and normal intelligence," "polite and well spoken," and "reliable historian and good rapport developed" (*id.* at 3). The doctor found no evidence of current psychiatric disorder (*id.* at 4).

On August 10, 2013, respondent was put out on paid sick leave until he could be cleared to return to work by his private physician (Tr. 99). Respondent remained on sick leave from August 10 to September 15, 2013 (Tr. 68-69). On September 3, respondent's private physician wrote a note indicating that he was not ready to return to work and needed to see a "psych specialist" (Pet. Ex. 7). On September 16, respondent returned to work with a doctor's note that stated he could work full duty (Tr. 72-73, 100). He was placed on modified duty and assigned to the communications center at a DEP precinct where he remained until January 14, 2014 (Tr. 73, 85). Modified duty is assigned when an officer, for a host of reasons, is not allowed to carry a firearm (Tr. 103).

After his release from the hospital, respondent was directed by the Department to report to the Psychological Evaluation Section ("PES") of the New York Police Department ("NYPD") on August 15, 2013, for a determination of his psychological fitness for duty (Opposition at 2). DEP recently entered into a Memorandum of Understanding with the NYPD (Pet. Ex. 5) [2] to use

[2] DEP has used the NYPD's medical, psychological, and background unit to evaluate new hire employees since 2001. In 2013, DEP expanded its use of PES to all fit-for-duty exams for current employees (Tr. 77, 80). Deputy Chief Frank Milazzo described PES as "the only people qualified [since] they do the initial screening and clearing of our employees" (Tr. 77). The Memorandum of Understanding ("MOU") has an effective date of July 1, 2013, although the agreement was not executed by the parties until April 2, 2014, a delay occasioned by leadership changes at both agencies (Tr. 79). DEP asserts the MOU was in force in August 2013, at the time of the incident.

PES doctors to conduct EPO fit-for-duty examinations. The Department conceded that respondent was provided with no written notice at the time; he was given only verbal notice, as was customary (Tr. 111: "Sometimes they're sent an email. It's usually a conversation.").

DEP directed respondent to report to PES on September 17 for a second evaluation. The doctor's report summarizing the August and September evaluations was completed three months later, on December 27, 2013 (Pet. Ex. 6). When that report found respondent unfit, he was disqualified from carrying a firearm and put on an immediate leave of absence (Tr. 75-76).

By letter dated January 14, 2014 ("January 14 notice"), DEP notified respondent that, effective January 15, he would be placed on a leave of absence "based upon the determination in the psychological evaluation conducted by the Psychological Evaluation Section of the NYPD finding you 'unfit for duty'" (Resp. Ex. A). The letter is styled a "Notice of Leave of Absence pursuant to Section 72 of the NYS Civil Service Law," and it attached the psychological report prepared by PES. It is the first written notice provided to respondent in connection with this proceeding. Respondent could no longer work at the communications center (Tr. 84). He was allowed to exhaust accrued leave balances through April 28, 2014. However, DEP indicates he has been kept on full pay status since that date (Tr. 40, 76).

Notice and due process required under Section 72

CSL § 72 (1) provides that when an employer determines that "an employee is unable to perform the duties of his or her position by reason of a disability," the employer may require the employee to undergo a medical examination. If, after such examination, the employee is found unfit to perform the duties of the job, the employee may be placed on an involuntary leave of absence (CSL § 72(1)). The statute requires the employer provide the employee with written notice and allows the employee to object to the proposed leave and request a hearing, within a specified period of time (*id.*). If the employee requests a hearing, imposition of the proposed leave of absence is held in abeyance pending a final determination, unless the employee's continued presence on the job is likely to create a potential danger (*see* CSL §§ 72(1), (5); *Sheeran v. NYS Dep't of Transportation*, 18 N.Y.3d 61, 64 (2011)).

On the first day of trial, respondent moved to dismiss the proceeding on the grounds that petitioner failed to serve respondent with statutory notice (Affirm. of Nadira Stewart, dated

September 9, 2014, "Motion").[3] The Department submitted its opposition to the motion on September 19, 2014 ("Opposition").

Courts have held that "[b]ecause of the significant due process implications of the statute, strict compliance with its procedures is required." *Breen v. Gunn*, 137 A.D.2d 685 (2d Dep't 1988); *McShane v. State of New York*, 43 Misc. 3d 320, 329 (S. Ct. N.Y. Co. 2014). Because DEP failed to comply with statutory notice and other requirements set forth in Section 72, respondent's motion to dismiss is granted.

Specifically, I find that the Department violated several statutory requirements, which failures are sufficient to find that respondent was not accorded the requisite due process. First, notice was untimely, submitted five months after respondent was first sent for a medical examination; in addition, the notice failed to contain a description of the facts that gave rise to the employer's belief that respondent was unfit. Second, DEP failed to require that respondent's medical examinations be conducted by a medical officer selected by the Department of Citywide Administrative Services ("DCAS"). Third, DEP imposed the leave of absence prior to a hearing and final determination, without probable cause to impose an emergency leave. *See* CSL §§ 72(1), (5). The facts of these matters are essentially undisputed, although their legal significance is in dispute.

I.

Under Section 72, the employer notice must notify the employee *in writing* (i) that it believes the employee is unfit to perform the duties of his or her position by reason of disability, (ii) the facts that led the employer to such a belief, and (iii) that the employee must undergo a medical examination. CSL § 72(1) (emphasis added). Such notice must be provided "prior to the conduct of the medical examination." CSL § 72(1).[4] No prior written notice was given to respondent. The January 14 notice is the first written communication sent to respondent notifying him of his rights under Section 72; it was sent five months after respondent's first

[3] The motion asserts, erroneously, that respondent was served in January 2014 with "a letter of involuntary leave and termination" (Motion at ¶¶4, 5). The notice served on respondent on January 14, 2014, does not seek termination.

[4] Section 72 states:

> *Written notice of the facts* providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of his or her position shall be provided to the employee and the civil service department or commission having jurisdiction *prior to the conduct of the medical examination.*

CSL § 72(1) (emphasis added).

compelled psychological examination on August 15, 2013. According to a Department witness, other EPOs were evaluated pursuant to the same process, receiving no notices until after their evaluations were completed (Tr. 106-08). DEP asserts the "NYS Mental Health [sic] Law" provides the authority for requiring mental fitness examinations (Summation at 2), but it cited no provision of the state Mental Hygiene Law as a basis for its procedures.

Primarily, the Department contends it was not acting pursuant to Section 72 in August 2013, when it commenced this process by sending respondent for a psychological evaluation at PES (Opposition at 1; Tr. 101). DEP says it was acting pursuant to its right to ensure the psychological fitness of an environmental police officer ("EPO") as it is entitled to do pursuant to the EPO Notice of Examination (Summation at 2). Notice of Examination states that EPOs are subject to periodic medical and psychological fitness testing throughout their careers (ALJ Ex. 1 at 3).[5] That the Department must have the ability periodically to evaluate the fitness of its EPOs is not in dispute. The issue is the notice that must be given in the case of psychological examinations such as the ones to which respondent was subjected.

The Department asserts their fit-for-duty exams require no notice, and notice was not due under Section 72 until DEP became aware of a finding that respondent was unfit. DEP asserts in its brief that it "was not until the[] [psychologist's] report was issued" in December 2013 that Section 72 "came into the picture" (Summation at 2). Deputy Chief Frank Milazzo, Bureau Administrator for the Department's Bureau of Police and Security, said he believed Section 72 was not invoked so long as the employee was still allowed to work (Tr. 102), and notice was not required so long as DEP was "not looking to" put someone out on a Section 72 leave or terminate them (Tr. 107). It seems unreasonable to believe that respondent's examinations in August and September 2013 should not be subject to Section 72 notice requirements when the results of those examinations are the grounds upon which the Department now asserts that he is unfit in this Section 72 proceeding. Any notion, that the legal standard could be dependent upon DEP's subjective intent, must be rejected as unworkable.

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[5] The Notice of Examination states as follows:

> Medical and psychological guidelines have been established for the position of [EPO]. You will be examined to determine whether you can perform the essential functions of the position of [EPO]. Additionally, you will be expected to continue to perform the essential functions of the position of [EPO] throughout your career, and *may, therefore, be medically and psychologically tested periodically throughout your career*.

ALJ Ex. 1 at 3 (emphasis added).

I find the psychological examinations conducted by PES doctors directly implicate respondent's "'property right in continued civil service employment,'" *Rivera v. Beekman*, 86 A.D.2d 1, 9 (1st Dep't 1982), quoting *Snead v. Dep't of Social Services of NYC*, 355 F.Supp. 764, 771 (S.D.N.Y. 1973), and therefore must be subject to review under Section 72, which requires pre-examination notice.[6] Providing notice only after a doctor has rendered a determination of non-fitness upturns the due process protections put in place by statute. "Because of the significant due process implications of the statute, strict compliance with its procedures is required." *Breen v. Gunn*, 137 A.D.2d 685; *McShane*, 43 Misc. 3d at 329.

Requiring pre-examination notice is not unreasonable. The Department did not send respondent for a mere periodic assessment of his fitness. The Department felt it had reasonable cause to commence extensive psychological testing of respondent, even after respondent was found fit for release from Westchester Medical Center, because of concerns raised by his conduct on August 9. The facts that created the Department's concern, as expressed by the Department's witnesses, should have been conveyed in the proper notices required by Section 72.

In light of the foregoing, the January 14 notice was untimely.

Moreover, DEP failed to provide respondent with written notice of the facts that led the agency to believe that respondent was unfit, as required under the statute. Notice of such facts is commonly provided to the employee in an attachment to the notice, referred to as the "Attachment A." *See Dep't of Environmental Protection v. Anonymous*, OATH Index No. 2443/14 at 5 (Aug. 20, 2014) (noting the preparation of Attachment A based upon facts summarized from prior interviews). The Department prepared no Attachment A in this case.

Instead, petitioner attached to the January 14 notice a copy of the December 27, 2013, psychological report prepared by the PES doctor which, among other things, contained the doctor's description of the facts (Resp. Ex. A), apparently obtained from memoranda written by respondent's co-workers and given to the doctor. The co-worker memoranda provided to the doctor were not provided to respondent with the notice. Even if the doctor's own description of the facts alleged in the memoranda is accurate, providing a recitation of the facts via the examining physician is not in compliance with the statute. Use of the doctor's report as written

[6] It must be noted that, in addition to retrieving his firearms, DEP did avail itself of section 9.41 of the state Mental Hygiene Law to satisfy any immediate need for an evaluation of respondent's mental condition by sending him to a psychiatric facility. Mental Hyg. Law § 9.41 (Lexis 2014). The question currently posed is not whether this action triggered Section 72 notice requirements.

notice of the facts giving rise to the agency's fitness inquiry appears to be an issue of first impression for this tribunal.

Written notice of the facts is an obligation of the employer-agency under Section 72, not of the medical officer. *McShane*, 43 Misc. 3d at 329 ("the employer must provide written notice of the facts providing the basis for the proposed leave and judgment that the employee is not fit to perform the duties of his position"). Providing notice of the facts giving rise to the agency's fitness inquiry through the medical officer's report is improper, as an initial matter, because Section 72 requires that written notice of the facts be given "prior to conduct of the medical examination." That is, the examination should not have been conducted before a set of facts was formulated by the employer-agency and given to the employee as a basis for requiring an examination. Thus, by the time of the examination, the written notice of facts would have been provided to the employee and the medical officer conducting the exam.

The Department failed to provide written notice of the facts that gave rise to its fitness inquiry prior to respondent's psychological examination. Its submission of the doctor's report for this purpose was in violation of the statute.

II.

Section 72 requires the examination be conducted by "a medical officer selected by the civil service department or municipal commission having jurisdiction" (CSL § 72(1)),[7] which in New York City is the Department of Citywide Administrative Services ("DCAS"). City Charter § 814. Thus, only DCAS is authorized to designate who may conduct Section 72 examinations. Here, petitioner sent respondent to be examined by doctors who are employees of the NYPD. There is no authority cited on this record for doing so.

DCAS has a contract with JurisSolutions to provide doctors to conduct independent medical examinations for purposes of City compliance with section 72. According to the director of operations for DCAS's bureau of examinations, JurisSolutions is a vendor that

[7] In pertinent part, the section states:

> When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reasons of a disability, other than a disability resulting from occupational injury or disease as defined in the workers' compensation law, *the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction.*

CSL § 72(1) (emphasis added).

provides medical officers in designated specialties to conduct fit-for-duty examinations. *Financial Information Services Agency v. N.P.*, OATH Index No. 866/14 at 3, 4 (Aug. 22, 2014). In *Financial Information Services Agency v. N.P.*, this tribunal found that DCAS lawfully delegated its authority to appoint a medical officer under section 72 of the Civil Service Law by contracting with JurisSolutions to provide qualified, independent doctors to perform fit-for-duty examinations. *Id*. at 4; City Charter § 311(b)(4)(c). Contracting with a private entity like JurisSolutions furthers the goal of ensuring the independence of the examining physicians, *N.P.*, OATH 866/14 at 3, 4 (finding that JurisSolutions doctors were "independent and well-qualified"), whereas contracting with another city law enforcement agency may not.

DEP's contract with the NYPD to perform fitness examinations does not vitiate a Section 72 analysis. At least one court has held that the procedural requirements of Section 72 cannot be circumvented by collective bargaining agreements or other employer rules. *See Robinson v. Hall*, 119 Misc. 2d 90, 91-92 (S. Ct. Albany Co. 1983) (finding that Section 72 – not a provision of state civil service department rules providing for medical examination upon to return to work from sick leave – was in fact being invoked where employee's absence constituted an involuntary leave focused on mental unfitness).

Petitioner failed to ensure that respondent's medical examinations were conducted by a medical officer selected by DCAS, in violation of the statute.

III.

The January 14 notice placed respondent on an immediate involuntary leave, which is only permissible under emergency circumstances, as set forth in Section 72(5) of the Civil Service Law.[8] The January 14 notice reads as follows:

> Please be advised that as of January 15, 2014, you are hereby placed on a leave of absence based upon the determination in the psychological evaluation conducted by the [PES] of the NYPD finding you "unfit for duty."
>
> You are not to report to work until further notice from this agency.

[8] Section 72(5) provides for an immediate emergency leave "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." CSL § 72(5).

> Upon being placed on this leave of absence, you will be entitled to draw all accumulated, unused sick and annual leave, overtime and other time allowances standing to your credit.
>
> You may object to this leave of absence by submitting a written request for a hearing . . .

(Resp. Ex. A). There is nothing in the notice that distinguishes it to the employee as a notice of emergency leave pursuant to 72(5). The notice does not cite Section 72(5). There is no reference to any determination that respondent's presence on the job would either present a "potential danger to persons or property" or would "severely interfere" with DEP operations.[9]

In *McShane v. State of New York*, the Supreme Court invalidated a notice that contained these and other deficiencies. 43 Misc. 3d at 329-30. Because of the defects in notice, the court held the leave of absence was a "nullity." *McShane,* 43 Misc. 3d at 331, quoting *Briggs v. Scoralick*, 147 A.D.2d 694, 695 (2d Dep't 1989) ("Due to the respondents' failure to comply with the notice requirements of the statute, petitioner's purported placement on a leave of absence is a nullity."). The court would not consider in respondents' defense any "rational basis in fact for taking the [actions] they took" (*McShane*, 43 Misc. 3d at 331). The procedures set forth in Section 72 are "mandated" according to the statutory scheme, and respondents' failure to follow those procedures to the letter invalidated the leave of absence (*id*.).

Nevertheless, by putting respondent out prior to a hearing, DEP's actions necessitate a review of the appropriate standard for doing so. *See Barrett v. Miller*, 179 Misc.2d 24 (Sup. Ct. N.Y. Co. 1998) (OATH has jurisdiction to determine the propriety of an employee's placement on pre-hearing involuntary leave).

Section 72 "is a discrete statute, with a specifically articulated standard governing the imposition of emergency pre-hearing leaves, which are temporary and subject to a full hearing on fitness. Absent case law to the contrary, that standard is applicable here." *Dep't of Citywide Admin. Services v. H.M.*, OATH Index No. 1670/04 at 11 (July 26, 2004). This tribunal has often noted that placing an employee on emergency leave is an "extraordinary measure," since there is no statutory limitation or automatic ending to the length of such leaves. *Teachers' Retirement System v. Barrett*, OATH Index No. 1210/99 at 3 (Sept. 22, 1999), cited in *Dep't of Environmental Protection v. Anonymous*, OATH 2443/14; *Admin. for Children's Services v.*

[9] Indeed, since neither petitioner's opposition to the motion to dismiss, nor its written summation, makes an argument for applying Section 72(5), it is unclear whether DEP intended to invoke the provision.

J.M., OATH Index No. 3350/09 at 20 (Apr. 5, 2010); *Housing Auth. v. V.M.*, OATH Index No. 1014/07 at 3 (Mar. 23, 2007).

Section 72 requires a hearing prior to instituting leave except in emergency situations:

> 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.

CSL § 72(5) (emphasis added). The issue is whether petitioner had probable cause to believe that respondent's continued presence on the job presented "a potential danger to persons or property or would severely interfere with operations." CSL § 72(5). I find the proof insufficient to impose emergency leave.

The cases in which emergency pre-hearing leaves have been sustained under Section 72 demonstrate the standard of proof. These cases typically include a pattern of out-of-control conduct, threats or hostility toward co-workers, or persistent creation of a chaotic work environment. *See, e.g., Dep't of Environmental Protection v. Anonymous*, OATH 2443/14 (emergency leave appropriate where employee showed hostility and unprovoked anger towards co-workers and stated that a co-worker had "better be careful or he's gonna get wacked"; ALJ found employee's actions severely interfered with operations and he was capable of harming others); *Admin. for Children's Services v. Papa*, OATH Index No. 1392/07 at 13 (Mar. 30, 2007) (Section 72(5) leave proper where the record showed frequent and intense angry outbursts that, over time, "caused [respondent's] co-workers to be upset and to fear what she might do."). In *Dep't of Environmental Protection v. Anonymous*, Judge Casey found that respondent was "unable to work with or be supervised by others, without being disruptive or abusive." OATH 2443/14 at 12. The tribunal concluded that respondent interfered with operations upon finding several occasions where he falsely accused co-workers of misconduct and engaged in hostile encounters with them, and that one colleague was granted a work transfer because he was afraid to be alone with respondent. OATH 2443/14 at 15. In sustaining pre-hearing emergency leave in *Papa*, the tribunal noted that respondent's volatility was "recurring and unpredictable" and

created "significant disruption to office operations" which included her office-wide distribution of an e-mail on the date of the Black History Month lunch stating she could not afford to attend because she was denied a promotion that was given to a black male colleague, along with other racially-tinged messages. The e-mail suggested the political correctness of her white colleagues be recognized by regurgitating (*i.e.*, having a "puking party"). *Papa*, OATH 1392/07 at 8-9, 13. Supervisors testified about the numerous complaints of outrage they received in response to the missive.

Here, the conduct at issue occurred on one occasion only -- there is no pattern of conduct. There were no threats or hostility toward co-workers or lack of control alleged here. Eyewitness accounts consistently describe respondent as "calm and non-combative" (Pet. Ex. 3 at 1, 2, 3), "not confrontational or combative" (Pet. Ex. 11 at 1, 3), and "seated and relaxed" (Resp. Ex. D). Deputy Chief Milazzo admittedly found no mention of respondent being threatening or a danger to himself or others in his review of the memoranda written by respondent's sergeants and co-workers shortly after the August 9 incident (Pet. Ex. 3; Tr. 87-91). Deputy Chief Milazzo acknowledged that the conduct of concern to the Department was respondent "asking another officer to kneel down and to have his spiritual cleansing" (Tr. 91). He did not characterize it as a threat but stated that the actions were "outside the norm of a police officer on duty at work" (Tr. 92). There is no showing that respondent is unable or unwilling to conform his conduct to the requirements of his position. Respondent was put back to work after the August 9 incident, on modified duty, from September 16, 2013, to January 14, 2014, with no further incident occurring during that time. Petitioner suggests, disparagingly, that respondent was well-behaved only because of the jeopardy created by the Section 72 proceeding. However, the same is proof of his capacity to conform his conduct to the expectations of his position.

The fact that on August 9, 2013, respondent was placed in handcuffs and removed involuntarily to Westchester Medical Center for a psychiatric evaluation pursuant to section 9.41 of the NYS Mental Hygiene Law (Tr. 85) is not evidence that he was a potential danger. Deputy Chief Milazzo stated that section 9.41 was invoked due to a concern for respondent's safety, but he articulated no specific concern (Tr. 86). There is no allegation that respondent sought to or spoke of harming himself or anyone else. His co-workers described him as calm and non-threatening during the August 9 incident (Pet. Ex. 3). Significantly, he was evaluated at Westchester Medical Center and released after being found not to be a threat to himself or others.

Most significantly, there was no basis to put respondent on an emergency leave at the time it was imposed, in January 2014, after he had been working for months without further incident. *Fire Dep't v. Berardi*, OATH Index No. 350/04 at 40 (Sept. 7, 2004), *adopted*, Comm'r Dec. (Sept. 24, 2004) (decision to place employee on pre-hearing leave was "premature and taken without sufficient objective, articulable evidence to demonstrate that respondent was a clear danger to himself or others in the workplace.").

I find no probable cause to believe that respondent's continued presence on the job on January 14, 2014, presented "a potential danger to persons or property or would severely interfere with operations."

Moreover, as a result of the foregoing deficiencies in statutorily mandated notice, respondent's motion to dismiss is granted.[10]

Petitioner is free to recommence the Section 72 process anew if presented with cause to believe that respondent is presently unfit to perform the duties of his position. *McShane,* 43 Misc. 3d at 332. Petitioner should be advised, however, that respondent has not been to work since January 2014. *Admin. for Children's Services v. Anonymous*, OATH Index No. 2617/11 at 2 (Dec. 30, 2011) (in disability proceeding, the focus is not on past performance but on respondent's current fitness to do her job); *Fire Dep't v. Ceglia*, OATH Index No. 204/08 at 2 (Feb. 6, 2008) (in disability proceeding, issue is respondent's current fitness to do her job, not past attendance).

FINDINGS AND CONCLUSIONS

1. Petitioner failed to serve timely statutory notice under Section 72.

2. Petitioner failed to provide respondent with a written notice of the facts that gave rise to its belief that respondent was unfit, as required by statute.

3. Petitioner failed to require that respondent's medical examinations be conducted by a medical officer selected by DCAS, in accordance with Section 72.

[10] DEP was first put on notice of respondent's objections to its failure to follow Section 72 notice procedures by letter dated January 31, 2014, submitted by his counsel (Exh. A to the Motion).

4. Petitioner imposed an involuntary leave of absence prior to a hearing and final determination, without probable cause to impose an emergency leave under Section 72(5).

RECOMMENDATION

I recommend that respondent be reinstated forthwith to his position as an environmental police officer with the Department and that he be restored any lost wages and leave balances as a result of being improperly placed on a pre-hearing leave as of January 15, 2014, to date.

Tynia D. Richard
Administrative Law Judge

December 19, 2014

SUBMITTED TO:

EMILY LLOYD
Commissioner

APPEARANCES:

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Commissioner Decision (Feb. 13, 2015)

I have reviewed and carefully considered the record of respondent's Civil Service Law §72 hearing held at OATH regarding his fitness for duty as an Environmental Police Officer. Administrative Law Judge Tynia D. Richard, having heard the case, issued a Report and Recommendation. In that Report and Recommendation, ALJ Richard concluded that there had been deficiencies in statutorily mandated notices, granted respondent's motion to dismiss the proceedings and did not address the merits of the Department's case.

For the reasons set forth below, I reject the findings of the Administrative Law Judge and remand this matter to ALJ Richard to issue a supplemental Report and Recommendation.

Our Counsel advises that ALJ Richard made an error of law when she incorrectly assumed that the only purpose for subjecting respondent to a psychological exam would be to place him on a leave of absence pursuant to §72. As a police officer, empowered under law to make arrests and carry firearms, fitness to do so must be periodically examined, as it was in August, 2013. Such periodic evaluations fall outside the scope of §72.

Because the purpose of the exam was not to evaluate respondent for a leave of absence, there is no legal basis for the conclusion that the exam must be conducted by a doctor designated by DCAS.

Having determined that the motion to dismiss lacks merit, I would ordinarily proceed to determine whether respondent was unfit for duty such that a leave of absence was warranted. However, the ALJ, despite holding a full hearing, failed to provide any analysis on the underlying merits of whether respondent was fit for duty in her Report and Recommendation. It would not be appropriate for me to proceed further without the benefit of the ALJ's findings of fact and analysis in this regard. Accordingly, before making a final determination concerning respondent's fitness for duty, I will remand this matter to ALJ Richard to provide a supplemental Report and Recommendation with findings and analysis addressing respondent's fitness for duty.

Therefore, IT IS HEREBY DETERMINED AND ORDERED that the motion to dismiss brought by respondent is DENIED, and the matter is remanded to ALJ Tynia D. Richard who, having heard all of the evidence during the full hearing that was conducted on the substantive issue, to wit, respondent's fitness for duty, is requested to issue a supplemental Report & Recommendation with findings of fact and analysis thereon.

Emily Lloyd, Commissioner

Feb. 13, 2015