

Dep't. of Transportation v. M.S.

OATH Index No. 2524/17 (Feb. 2, 2018)

Respondent's singing, an isolated outburst in a meeting, and an unsubstantiated complaint of unsafe operation of a city vehicle, were insufficient to find him unfit to perform the duties of his position under section 72. Petition is dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
M.S.¹
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

This is an employee disability proceeding referred to the tribunal by petitioner, Department of Transportation ("DOT" or "the Department"), pursuant to section 72 of the Civil Service Law alleging that respondent, a Highway Transportation Specialist, is unfit to perform the duties of his position due to disruptive singing in the workplace and disruptive behavior. On May 16, 2017, respondent underwent a psychological examination at the direction of DOT. Following the examination, DOT notified respondent that, based on the doctor's conclusions, the agency intended to place respondent on an involuntary leave of absence. Respondent contends that he is fit to perform his job duties and requested a trial.

A three-day trial was conducted at this tribunal on October 14, October 24 and November 24, 2017. Petitioner relied on documentary evidence, the testimony of three DOT employees, A. Friedman, S. Shapiro, and S. Barkho, in addition to the examining psychiatrist Dr. David Salvage. Respondent testified on his own behalf, presented documentary evidence from his

¹ Respondent holds a commercial driver's license and is subject to Department and federal regulations that require random drug testing. Pursuant to such federal regulations, respondent's name has been withheld from publication. See 49 CFR §§ 40.321(b), 40.323(a), (b), 382.405(g), (h); *Dep't of Sanitation v. Anonymous*, OATH Index No. 1853/15 at 1 n.1 (Aug. 7, 2015), *modified on penalty*, Comm'r Dec. (Oct. 6, 2015); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 1 n.1 (July 31, 2009).

treating psychiatrist, Dr. Waqar Siddiqui, the testimony of his current supervisor, E. Manglos and two additional DOT employees, C. Howard and A. Kagan.

For reasons discussed below, I find that petitioner's proof was insufficient to establish that respondent was unfit to perform the duties of his job and recommend that the petition be dismissed.

BACKGROUND

Respondent has worked for DOT for 33 years and has been singing on the job since he was hired (Tr. 488). He began his career as a traffic control inspector ("TCI"). As a TCI, he was responsible for inspecting thermoplastic markings on highways. He was promoted to highway transportation specialist ("HTS") assistant in the Design and Construction Unit, where he continued to perform field inspections and also supervised the work of TCIs. Respondent was promoted to HTS1 in 1997 where he was in charge of the installation of thermoplastic marking on highways in all five boroughs and supervised four employees. In the early 2000s, respondent was promoted to HTS2 where he supervised six employees. He also assisted his current supervisor Mr. Manglos with refurbishment of thermoplastic markings over non-resurfaced roadways (Tr. 469-71). Respondent received meritorious pay raises in each title that he held (Tr. 472). Over the course of his employment at DOT, respondent's performance evaluations have been very good and excellent (Tr. 517).

Respondent has been married for 25 years and has three sons; his two youngest sons, P.S. and F.S., are autistic. P.S. lives in Pennsylvania at a school for children with special needs. His youngest son, F.S., is autistic and does not speak. Respondent drives with his family every weekend to visit P.S. Respondent's mother-in-law, who has Alzheimer's disease, also lives with respondent. Respondent testified that he began seeing a psychiatrist over 11 years ago for depression around the time that his children were diagnosed with autism and his mother-in-law was diagnosed with Alzheimer's (Tr. 479-82, 484). Respondent was prescribed medication to treat depression. He advised Mr. Barkho, Mr. Weld and his other supervisors that he was seeing a psychiatrist and was taking medications for depression (Tr. 483-85). He testified that he has been singing at work since he started working at DOT three decades ago and that singing makes him feel better (Tr. 488, 513).

Respondent's current supervisor, Mr. Manglos, has worked at DOT for 35 years. He has heard respondent singing in the office but it was not loud or disruptive and he has never received any complaints from any of respondent's co-workers. He has never had to issue respondent any written counseling or to give verbal counseling regarding his conduct in the office or his work performance (Tr. 433-35). According to Mr. Manglos, respondent is a productive worker, producing a high number of inspections and work orders. Respondent is also able to complete all paperwork related to his job. Mr. Manglos has never received any complaints about respondent's work performance from supervisors or colleagues (Tr. 456-57). Mr. Manglos testified that he was aware that respondent was seeing a psychiatrist but did not observe any unusual behavior in the office (Tr. 442).

Respondent currently supervises two employees and to date he has not heard of any problems with respondent's supervision of them. Mr. Manglos related that respondent is well-liked and likes to have fun. Mr. Manglos further testified that respondent is "nice... he's good. He knows his stuff, he's productive. He's knowledgeable" (Tr. 427-31, 433-34).

Another supervisor, Mr. Barkho, has worked at DOT for 29 years and has known respondent since 1996 (Tr. 315-316). He characterized respondent as a very good worker and approved previous merit increases for respondent. Mr. Barkho never received any complaints about respondent's job performance (Tr. 336-37, 339). In 2013, he advised respondent that based on his performance, he was going to nominate respondent for another merit raise (Tr. 336-37, 475).

In 2013, Mr. Weld was appointed Chief Engineer in the Transportation Planning and Management Division with Mr. Barkho reporting directly to him. Mr. Weld reorganized the unit and assigned the HTS positions to specific boroughs rather than city-wide assignments. Respondent was assigned to Staten Island as the borough lead and his supervisory responsibilities were reduced to two employees (Tr. 334-36, 473). Respondent asked Mr. Weld about the merit increase discussed with Mr. Barkho but Mr. Weld said that he did not know anything about it (Tr. 476). Mr. Weld asked respondent to assist the Brooklyn unit in addition to Staten Island because Brooklyn was falling behind with inspections and installations. Respondent assisted with Brooklyn and was highly productive. After working with the Brooklyn unit for a year, respondent asked Mr. Weld for a raise and Mr. Weld declined because respondent "[made] too much money" (Tr. 473). Respondent told Mr. Manglos that he was upset that he did

not get the merit increase and that he was denied promotions. However, respondent's frustration did not affect his performance at work (Tr. 446-47).

Management's concern with respondent's behavior apparently began in January 2017, when Mr. Weld hired A. Friedman to be his Chief of Staff. Shortly after assuming this role, Ms. Friedman met with employees in the unit to see if there were any issues that they wanted to share with management (Tr. 50; 91-92). Ms. Friedman testified that in those meetings, a number of people complained that respondent sang loudly in the office. On March 8, 2017, Ms. Friedman sent respondent an e-mail stating that she "genuinely appreciate[d] [his] exuberance," and complimented respondent's singing voice. In the e-mail, Ms. Friedman asked respondent to keep his singing at a professional level (Pet. Ex. 1; Tr. 16-17, 53). Ms. Friedman testified that she did not ask respondent to stop singing and did not advise him of any specific complaints about his singing (Tr. 89-90). Ms. Friedman stated that she had not received any complaints from respondent's supervisors about respondent's singing, nor had respondent's supervisors brought any complaints about respondent's singing to her attention (Tr. 92-93). Mr. Manglos was copied on the March 8 e-mail from Ms. Friedman advising respondent that there were complaints about respondent's singing in the office. Prior to receiving the e-mail, Ms. Friedman had not informed Mr. Manglos of any complaints about respondent's singing (Tr. 440-41).

Ms. Friedman could not recall who complained about respondent's singing but testified that she "could offer some guesses" (Tr. 95). Ms. Friedman testified that she received complaints about respondent's singing frequently but did not put anything in writing until the March 8 e-mail (Tr. 96-97). She could not recall if the complaints were before or after the March 8 e-mail (Tr. 98). Prior to March 2017, respondent had never been advised of any complaints about his singing. Respondent testified that Mr. Weld heard him singing on several occasions and tried to guess the song respondent was singing. Mr. Weld never told him that his singing was disruptive or inappropriate (Tr. 488).

Shortly after sending the March 8 e-mail to respondent, Ms. Friedman received a complaint about respondent's driving (Pet. Ex. 2; Tr. 57). The complaint stated that respondent was driving a DOT vehicle in an unsafe manner and that the complainant had recorded a video of the alleged unsafe driving. Ms. Friedman testified that she began investigating this complaint but did not view the complainant's video. She met with respondent's supervisor, Mr. Manglos, and respondent to discuss the complaint. Respondent denied the allegations (Tr. 61-62; 65-66).

Ms. Friedman did not recall whether respondent was written up for this incident. She testified that “someone wrote something up” and that she “may or may not have helped with that draft” and that she did not recall exactly (Tr. 63). According to Ms. Friedman, if respondent were found to have done something wrong with the DOT vehicle, they would have written him up (Tr. 66). Mr. Manglos was not shown the driving video but confirmed that there was no counseling memo issued and respondent was not disciplined as a result of this complaint (Tr. 436-37). Mr. Manglos testified that he was aware that there were prior driving complaints involving respondent (Tr. 466). The complaint indicated that the matter was resolved and closed on March 8, 2017 (Pet. Ex. 2).

Mr. Barkho was advised of the March 2017 driving complaint against respondent but did not know much about it and never spoke to respondent about it. He testified that there were complaints about respondent’s driving in past years and respondent’s previous supervisor had written memos to the Advocate’s Office to document the complaints. According to Mr. Barkho, these complaints had been discussed with respondent but he was not sure if respondent was disciplined in any of these instances (Tr. 344-45, 348).

On March 9, 2017, while attending a meeting in Mr. Barkho’s office, S. Shapiro heard respondent speaking or singing loudly outside of the office (Tr. 289-291). She testified that she “quietly glanced” at her co-worker, A. Kagan who was also in attendance. She looked at the door and rolled her eyes and according to Ms. Shapiro, based on this non-verbal communication, Mr. Kagan understood that he should say something to respondent. According to Ms. Shapiro, “this [her ocular directive] was clear” (Tr. 291-92). Ms. Shapiro testified that Mr. Kagan left the meeting and although she could not see where Mr. Kagan went, she could hear him, but she was not sure what she heard. Ms. Shapiro heard respondent singing again and decided that she “should address [respondent] about the disruption and that maybe Mr. Kagan wasn’t clear enough” (Tr. 292-94). Ms. Shapiro testified that in a “curt and professional” tone, she told respondent that there was a meeting in progress and asked respondent to “[be] quiet please.” Ms. Shapiro stated that respondent responded in an “unfriendly tone” that she could say “please” (Tr. 295-96, 311-12).

On cross examination, Ms. Shapiro stated that she might have exchanged that glance with Mr. Kagan after he entered the room and that she was not certain of the order of events (Tr. 304-05). She further testified that she was not sure if Mr. Kagan told her that he spoke with

respondent outside of the meeting or if she heard something outside of the meeting. She later admitted that she did not know if she was talking with Mr. Kagan with her mouth or with her eyes or not talking at all (Tr. 306). Ms. Shapiro testified that this was not the first time that she had ever heard respondent singing in the office and that after she told him to stop singing, respondent stopped singing (Tr. 309-10).

Mr. Kagan attended the March 9 meeting but his account of the events differed from than Ms. Shapiro's recollection. Mr. Kagan, HTS 3, has worked at DOT for 20 years and has known respondent during that time (Tr. 395-96). He testified that he had taken a chair from respondent's office for the meeting while respondent was out. Mr. Kagan later heard respondent's voice but could not tell if respondent was singing or talking, so he left the meeting to tell respondent that he had taken his chair then returned (Tr. 397, 398-9). After Mr. Kagan's project was discussed, he returned the chair to respondent's office. Mr. Kagan said that he never complained to Ms. Shapiro about respondent's singing and never spoke to respondent about singing during the meeting (Tr. 399-400).

Mr. Barkho, who hosted the March 9 meeting, testified that he heard respondent singing and asked either Ms. Shapiro or Mr. Kagan to speak to respondent about his volume (Tr. 319). Mr. Barkho testified that they both left the office during the meeting but he did not see either person speak to respondent. After Ms. Shapiro returned, Mr. Barkho did not hear respondent singing anymore (Tr. 322).

C. Howard is an Administrative Manager and has been employed with DOT for 32 years. In March 2017, she worked in that capacity for Mr. Barkho (Tr. 406-07). She has known respondent for 32 years and she testified that respondent sings all of the time (Tr. 409). Ms. Howard testified that as Mr. Barkho's office manager she would know about any complaints made to Mr. Barkho about respondent and that Mr. Barkho never received any complaint about respondent's singing. Ms. Howard was not aware of any reprimands or counseling memos that Mr. Barkho might have given to respondent about his singing (Tr. 415-17).

Ms. Howard testified that she was at work on March 9 and saw Ms. Shapiro come out of Mr. Barkho's office to speak to respondent. She heard Ms. Shapiro tell respondent in a "stern voice" to stop singing and to stop the noise. Ms. Howard recalled that Ms. Shapiro's tone of voice was so harsh that it caused her to look up from her work. According to Ms. Howard, Ms. Shapiro spoke to respondent as though she was disciplining a child. She heard respondent

respond to Ms. Shapiro that she could have said it nicer. She did not hear Ms. Shapiro say please when speaking to respondent. After the exchange between respondent and Ms. Shapiro, Ms. Howard saw Ms. Shapiro return to the meeting (Tr. 413-14).

After hearing about respondent's singing during the March 9 meeting, a meeting was convened in Mr. Barkho's office on March 13, 2017 with Mr. Weld, Mr. Manglos, and respondent to discuss respondent's singing and to instruct him to stop (Tr. 370-72). Ms. Friedman had not advised Mr. Manglos about respondent's singing on March 9. Mr. Manglos learned about these complaints at the March 13 meeting (Tr. 440-442). When Mr. Weld brought up respondent's singing, respondent said he would stop singing (Tr. 445). Respondent became frustrated, and banged his hands on the table. He then took some medications from his pocket, cursed, and told the supervisors that they caused him to take those medications. Respondent was angry and left the meeting (Tr. 326-28, 444-45, 454-455). Mr. Weld then called the Advocate's Office. Mr. Barkho stated that he was concerned about respondent and that was the first time he had ever seen respondent behave in that way (Resp. Ex. C. at 13-14; Tr. 327-29). Mr. Barkho testified that following the March 13 meeting, the Department decided that respondent should no longer drive a city vehicle (Tr. 340-41).

Following the meeting, Mr. Barkho and Mr. Manglos received an e-mail from Ms. Friedman asking them to provide any documentation of conversations they had with respondent in the past regarding his behavior in the office. Mr. Manglos replied that he did not have any documentation. Mr. Weld then copied Mr. Barkho on an e-mail stating that Mr. Barkho document what had occurred in the meeting (Resp. Ex. D, Tr. 362). Pursuant to Mr. Weld's direction, Mr. Barkho sent an e-mail characterizing respondent's behavior as loud and unethical and stated that his singing disturbed other colleagues. Mr. Barkho also wrote that based on respondent's behavior he was not sure if respondent should drive a city vehicle and that based on the "strange actions and behaviors from [respondent], I recommend that he needs help" (Resp. Ex. E). Mr. Barkho stated that since that meeting, there have been no other instances and that respondent has been very quiet (Resp. Ex. C at 23).

Although Ms. Friedman requested that Mr. Barkho draft a longer version of this e-mail and send it to respondent to "make this official," Mr. Barkho did not draft another version and did not forward the e-mail to respondent (Resp. Ex. E; Tr 365-66). Mr. Barkho testified that after the March 13 meeting, respondent stopped singing in the office (Tr. 372).

Later on March 13, Mr. Manglos was copied on an e-mail from Mr. Weld where Mr. Weld referenced respondent's behavior during the meeting as well as respondent's singing during the March 9 meeting, and the e-mail from Ms. Friedman (Resp. Ex. F, Tr. 450-52). Mr. Manglos testified that he was never advised that people in the office reported to Ms. Friedman that they were "extremely uncomfortable and felt threatened" by respondent as Mr. Weld wrote in the e-mail. Mr. Manglos testified that he did not hear respondent singing in the office in unacceptable volumes in a manner disrespectful to [his] coworkers and that there was no discussion of unprofessional behavior that occurred on the morning of the meeting. Mr. Manglos testified that he did not hear respondent singing on the morning of March 13 prior to their meeting (Resp. Ex. F, Tr. 450-54).

Respondent testified that he has been singing at work since the day he got there. Neither Mr. Barkho nor Mr. Manglos complained or informed respondent that there were complaints about his singing. Respondent was first notified of complaints on March 8 when he received the e-mail from Ms. Friedman. Prior to receiving the e-mail, respondent had not ever been informed by anyone that it was not appropriate to sing in the office (Tr. 488-89). Respondent testified that he was singing at work on March 9, but was not aware that there was a meeting in progress in Mr. Barkho's office. He testified that Mr. Kagan came to his office to return a chair that he had taken when respondent was away from his office. Mr. Kagan did not ask respondent to be quiet nor did he say anything about respondent's behavior or his singing. Respondent continued singing. Later, Ms. Shapiro approached respondent and told respondent to be quiet in a "nasty tone of voice." Respondent advised Ms. Shapiro that she could have asked him more nicely but that he stopped singing right away. Other than Ms. Shapiro, no one spoke to respondent regarding his singing during the meeting. Respondent testified that had he known there was a meeting in progress, he would not have been singing. When he was informed about the meeting, respondent stopped singing right away (Tr. 490-91).

Respondent testified that on the morning of March 13, 2017, he was on a field assignment out of the office. When he returned to the office, Mr. Manglos asked respondent to come to Mr. Weld's office for a meeting with Mr. Barkho and Mr. Weld. At the meeting, Mr. Weld discussed the e-mail from Ms. Friedman and the complaints about his singing. Respondent told Mr. Weld that he was not previously aware of any complaints about his singing but if Mr. Weld wanted him to stop singing, he would stop singing (Tr. 493). Respondent testified that he

was trying to tell Mr. Weld that Ms. Shapiro had been rude to him but that Mr. Weld repeatedly interrupted him. Respondent also attempted to tell Mr. Weld that he felt that the extra work he performed was not acknowledged and that he had been denied promotions or merit raises but that Mr. Weld continued to interrupt him. Respondent testified that he became frustrated and lost his temper. Respondent took several medications out of his pocket and said that he was taking more medication “because of you” referring to Mr. Weld (Tr. 492-94). Respondent denied singing in the office at any time on March 13 and testified that he has not sung in the office since that meeting. Sometime after that meeting, Mr. Manglos advised respondent that he could no longer drive a city vehicle (Tr. 496).

M. Smith and E. Caraway investigated Mr. Weld’s complaint on behalf of the Advocate’s Office and interviewed respondent and several of his supervisors and colleagues including Mr. Barkho, Mr. Manglos, Mr. Kagan, and Ms. Howard. The summary of their investigation (“Attachment A”) was issued along with a letter to respondent directing him to report for a medical examination to determine if he was fit to perform the duties of his position (ALJ Ex. 1; Pet. Ex. 4). The Attachment A referenced three proposed bases for finding respondent unfit to perform his job duties: his singing; his conduct at the March 13 meeting; and the complaint about respondent’s driving of a DOT vehicle.

On May 16, 2017, respondent met with Dr. David Salvage, the Medical Officer selected by the Commissioner of the Department of Citywide Administrative Services (Pet. Ex. 4). During their meeting, Dr. Salvage, who was deemed an expert in psychiatry, performed a full general psychological examination and the Folstein mini mental status examination (Tr. 121). Dr. Salvage testified that they completed these “very rigorous” exams in 50 minutes (Tr. 268). Dr. Salvage diagnosed respondent with unspecified schizophrenia spectrum and other psychotic disorder (Tr. 140-41). In making this diagnosis, Dr. Salvage testified that he relied on petitioner’s Attachment A, his observations, results from the exam he administered, and correspondence from respondent’s treating psychiatrist (Tr. 118, 151). Dr. Salvage issued a written report concluding that respondent was not psychiatrically fit to resume his role as a HTS (Pet. Ex. 5).

Dr. Salvage stated that he had problems with respondent’s thought process and concluded that respondent was psychotic (Tr. 136). He testified that he reviewed respondent’s “troubling history” included in the Attachment A and that everything described about respondent’s behavior

in Attachment A, “was largely congruent with this “belligerent, uncooperative, easily upset, attacking, condescending” person that he examined (Tr. 169, 194).

Respondent is currently under the care of Dr. Waqar Siddiqui, a board-certified psychiatrist who has been treating respondent since 2006 for depression. Although Dr. Siddiqui did not testify at the hearing, Dr. Siddiqui’s written evaluations of respondent were offered into evidence. According to the evaluations, respondent is fairly stable and is compliant with his medical routine. Dr. Siddiqui also reported that the prescribed medications did not impair respondent’s ability to drive (Pet. Ex. 4). Dr. Siddiqui reported that respondent has never presented with any thought disorder and there is no evidence of psychotic thinking, no memory problems and no disturbances in thought process. On May 30, 2017, respondent presented with an anxious mood because of his job situation but that respondent was still stable. Dr. Siddiqui cited respondent’s job situation as a major stressor. In Dr. Siddiqui’s opinion, respondent is psychiatrically stable and has been for the past 10 years and is capable of performing his work duties without restriction (Pet. Exs. 4, 6; Resp. Ex. B).

ANALYSIS

To place an employee on an involuntary leave of absence under section 72, the Department must prove by a preponderance of the evidence that (1) respondent suffers from a disability, (2) respondent is currently unable to perform his job duties, and (3) his inability to perform those duties is caused by his disability. *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); *Housing Auth. v. Caballero*, OATH Index No. 699/96 at 17 (Mar. 13, 1996).

The Attachment A

Under the provisions of New York Civil Service Law section 72, the employer must provide employee written notice of the facts giving rise to the judgment that the employee is not fit for duty. This notice, commonly referred to as Attachment A, also requires the employee to undergo a medical examination conducted by a DCAS medical officer. The Attachment A is provided to the DCAS medical officer that will examine the employee to apprise the medical officer of the behavior that concerned the employer. Petitioner does not have to prove at trial

that respondent committed the acts contained in the Attachment A. This document is the vehicle for having the employee medically examined. *Transit Auth. v. Smith*, OATH Index No. 1299/02 at 7-8 (Mar. 2003). Nonetheless the accuracy of the information reported in this document is important as it is reviewed by the examining psychiatrist and therefore may offer perspective into or influence his or her testimony and conclusions.

The Attachment A in this matter was drafted at the conclusion of the interviews conducted by Marcia Sampson and Erica Caraway on behalf of the Advocate's Office and was forwarded to Dr. Salvage for review in advance of his meeting with respondent (Pet. Ex. 4). Although the allegations do not have to be proved at trial, there should be some evidence offered that supports the behavior described. Significant aspects of the Attachment A in this matter reported information that was not corroborated by any witness testimony or was rebutted by credible eyewitness testimony.

The Attachment A stated that on March 7, 2017, respondent "disrupted the office by singing" and "Chief of Staff Alice Friedman sent an e-mail to [respondent] advising him of his disruptive behavior" (Pet. Ex. 4). This is not accurate. There was no testimony that respondent was singing in the office on March 7 or testimony that he disrupted the office by singing on that date. Furthermore, Ms. Friedman's March 8 e-mail to respondent did not address that his singing might have been disruptive. In fact, Ms. Friedman complimented him on his voice and only asked him to sing at a lower volume (Pet. Ex. 1).

The Attachment A continues that on March 9, 2017, respondent was overheard "singing and cursing in the office in a loud and disruptive manner." Respondent admits and witness testimony corroborates that respondent was singing. However, there was no testimony from any witness that respondent was "cursing" during the March 9 meeting. The March 9 entry continues that Ms. Shapiro and Mr. Kagan each left the meeting to ask respondent to stop singing and that respondent refused, then shouted that they could say "please" and continued singing (Pet. Ex. 4). According to Mr. Kagan, he did not speak to respondent about singing when he left the meeting. Mr. Kagan also testified that he gave this account to the Advocate's Office during his interview (Tr. 399-401). Only Ms. Shapiro left the meeting to tell respondent to stop singing. The Attachment A reported that respondent continued to sing after being asked to stop. However, the testimony of Ms. Shapiro, Mr. Kagan, Mr. Barkho and respondent each related that when Ms. Shapiro returned to the meeting after speaking to respondent, he stopped singing.

The Attachment A also states that respondent admitted that Ms. Friedman issued written and verbal notifications to him and requested that he stop singing. Yet both Ms. Friedman and respondent testified that she never asked respondent to stop singing. This testimony is consistent with respondent's interview with the Advocate's Office where he told the interviewers that Ms. Friedman did not ask him to stop singing (Pet. Ex. 4; Resp. Ex. H at 15-20; Tr. 89-90, 488).

The Attachment A also stated that respondent admitted to recklessly driving his agency assigned vehicle. This assertion is a direct contradiction to the respondent's testimony at trial, respondent's statement to his supervisor and to Ms. Friedman regarding this incident and to the statements respondent made to Advocate's Office during his interview. Respondent did not make this admission (Pet. Ex. 4; Resp. Ex. H at 43-48; Tr. 499-500).

The Attachment A goes on to state that respondent became angered, easily agitated, and raised his voice continuously during the interview with the Advocate's Office. This characterization is not correct. This tribunal reviewed the transcript as well as the audio recording of respondent's interview that was provided by petitioner. Respondent did not raise his voice continuously as reported, nor did he sound angry on the recording. Given that respondent was interviewed by two people, at times subjected to simultaneous questioning and frequent interruptions, respondent generally remained cooperative, although at times flustered, under these conditions (Resp. Ex. H).

Medical Evidence

The first element petitioner must establish is that respondent suffers from a mental disability. See *Human Resources Admin. v. Bartolo*, OATH Index No. 1211/94 at 3 (Nov. 3, 1994). Dr. Salvage submitted his report and testified on petitioner's behalf. His diagnosis was disputed by Dr. Siddiqui, who did not testify but submitted reports on behalf of respondent.

The finder of fact must weigh the medical evidence and draw on all reasonable inferences. *Peabody Coal Co. v. Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977) (“[T]he trier [of fact] is not bound to accept the opinion or theory of any given medical officer, but may weigh the medical evidence and draw his own inferences.”). “Resolution of questions of credibility and the weight of evidence is primarily the province of the finder of fact, who has had the opportunity to see and hear the witnesses.” *Bennett v. Phillips*, 175 A.D.2d 934 (2d Dep’t 1991); see also *Chua v. Chassin*, 215 A.D.2d 953, 955 (3d Dep’t 1995) (issues of credibility or

weight given to expert testimony “are solely within the province of the administrative factfinder”). In administrative proceedings, the opinions of medical and other specialists can aid the factfinder in reaching a proper conclusion, but the finder of fact is not bound to accept those conclusions or opinions. *Human Resources Admin. v. Romney*, OATH Index No. 319/82 (Dec. 20, 1982) (opinion evidence offered by medical experts is to be evaluated in conjunction with other evidence in the record). Significantly, “[t]he court may reject an expert’s opinion if it finds the facts to be different from those which formed the basis for the opinion . . . [and] if after careful consideration of all the evidence in the case, expert and other, it disagrees with the opinion.” *Heller v. Murray*, 112 Misc. 2d 745, 750 (N.Y. Civ. Ct. 1981).

I credit the report and evaluation of Dr. Siddiqui over that of Dr. Salvage. Dr. Siddiqui has treated respondent and seen him regularly since 2006. Respondent sought treatment initially because of the stress of having two autistic children and a mother-in-law with a recent diagnosis of Alzheimer’s (Tr. 484). Having treated respondent during this time, Dr. Siddiqui was aware of, identified, and gave significance to stressors in respondent’s life including respondent’s job situation and the pending section 72 proceeding. In contrast, Dr. Salvage examined respondent for less than one hour rendering his very serious diagnosis with limited or discounted information. According to Dr. Siddiqui’s June 2017 report, respondent has never presented with any thought disorders or psychosis. Dr. Siddiqui reported that respondent suffered from “major depression - moderate,” and is stable on medication and adjustment disorder with anxiety. Dr. Siddiqui expressed the opinion that respondent is “psychologically stable [and is] completely capable of doing his work activities without restriction” (Pet. Ex. 6). I fully credit Dr. Siddiqui contemporary assessment in October 2017 that respondent is psychologically stable on his current regimen of medications and is not displaying any signs of thought disorder or evidence of psychotic symptoms (Resp. Ex. B).

I do not credit Dr. Salvage’s report and testimony for the following reasons. First, Dr. Salvage’s testimony about respondent’s behavior was more elaborate than the descriptions related in his report. Dr. Salvage’s description of respondent’s mental state, particularly on cross-examination, was more expansive and largely inconsistent with his submitted report. In his report to the petitioner regarding his examination with respondent, Dr. Salvage described respondent as “friendly and cooperative” noting that respondent became “somewhat” defensive and irritable when confronted about the allegations about his behavior at work. He also stated

that respondent became challenging and unpleasant when respondent noted that Dr. Salvage did not remember a telephone number. Dr. Salvage stated that the flow of respondent's thinking was organized, noting that there was significant lack of acknowledgment of any problems in the report about him. Dr. Salvage also reported that respondent was "apologetic about his behavior" and that respondent noted that during his 33 year career at DOT this is "the only time that it's ever happened." In the report, Dr. Salvage described respondent's mood as a little nervous and stated that respondent's affect was congruent with his mood, that respondent appeared anxious and pressured but not angry (Pet. Ex. 5).

During his testimony Dr. Salvage stated that respondent did not display "the usual, regular, appropriate level of a degree of anxiety" during the exam and that this led Dr. Salvage to conclude that respondent had some degree of pathological disinhibition (Tr. 181). In his testimony, Dr. Salvage also described respondent as annoyed, irritated, frustrated, abrasive, unpleasant, psychotic, attacking, arrogant, and having a sense of extreme narcissistic entitlement (Tr. 137-39, 182-83, 191, 270). Dr. Salvage stated that respondent could not answer questions without becoming arrogant, defensive, or uncooperative (Tr. 183). Dr. Salvage described respondent as labile, combative, irritable, volatile, and hostile (Tr. 193). He stated that respondent was dysregulated and could not follow regulative norms. Dr. Salvage also stated that respondent's answers to questions during the examination were often idiosyncratic, bizarre, unrelated to logic and revealed derailed thinking (Tr. 204). None of these descriptions were included in his written report.

I conclude that Dr. Salvage embellished his descriptions to enhance the persuasiveness of his report. Based on the escalation of Dr. Salvage's language, it appears that Dr. Salvage attempted to address challenges on cross-examination with bolstered descriptions of respondent's conduct to defend his diagnosis and conclusions. If respondent's conduct and responses were as negative and disturbing as Dr. Salvage depicted, he should have reported this with the same exigency in his written report several months ago.

Second, Dr. Salvage testified that he relied on the Attachment A (with the previously discussed inaccuracies), in addition to his observations and the exams administered in assessing respondent's fitness. During his testimony, Dr. Salvage stated he observed a pathology that was 100% congruent with the information in the Attachment A, stating he "seemed such a mirror of what's written about him" (Tr. 270-71). He further referenced the "congruence" between his

observations and the Attachment A several times in his testimony (Tr. 194, 255-56). Dr. Salvage speculated that although his conclusions were congruent with the Attachment A, as he emphasized, if the Attachment A were incorrect, his conclusions would not change (Tr. 190-91, 193, 194).

Dr. Salvage relied on the Attachment A description of the March 13 meeting concluding that respondent's conduct was inappropriate especially around "other coworkers who are now afraid of him and not easily able to work with him" and concluding that respondent, who had worked at DOT for over 33 years without incident, was not an individual who could function adequately in a workplace even with very, very simple job requirements (Tr. 191). Dr. Salvage also acknowledged that other than the events characterized in the Attachment A, he has no knowledge of any problems respondent has had with co-workers (Tr. 250).

Dr. Salvage described the events from March 7 to March 13, 2017, referenced in the Attachment A as a "troubling history" (Tr. 169). However, as discussed earlier, portions of the Attachment A were inaccurate. Thus Dr. Salvage's conclusion that respondent's history is troubling is based in part on inaccurate information.

Dr. Salvage testified further that he was troubled by respondent's denial during the examination that he was driving recklessly (Tr. 149). Dr. Salvage clearly assumed that respondent had admitted this conduct because it was stated in the Attachment A. Dr. Salvage concluded that this denial was problematic and was "a rather aggressive externalization" of denying responsibility for his actions (Tr. 149). Dr. Salvage had no basis to conclude that respondent drove recklessly other than reliance on the information provided in the Attachment A.

Third, Dr. Salvage's omission of information and his explanations for these omissions call into question the thoroughness of the examination and the reliability of Dr. Salvage's findings. Respondent testified that he told Dr. Salvage that two of his sons were autistic but this information was not included in the report. Dr. Salvage instead incorrectly reported that respondent himself had autism (Pet. 5; Tr. 511-12). When this error was brought to Dr. Salvage attention on cross-examination, Dr. Salvage at first insisted that respondent told him that he had autism. He noted that a patient's autism might be a relevant fact in examining a patient for fitness. Dr. Salvage explained that notwithstanding his belief that respondent was autistic, he "chose to position the discussion, which is in a larger context of a blocked disorder, combative behavior and then more direct difficulties in the work place" (Tr. 217). This response made little

sense and failed to address the omission of a serious condition that could affect the examination and diagnosis. Later, Dr. Salvage testified that respondent did, in fact, tell him that his sons were autistic and that respondent was upset about his sons' conditions and that this led him to see a psychiatrist (Tr. 236-37). This information, however, is not in Dr. Salvage's report.

Dr. Salvage conducted his examination of respondent in his office in his home that he shares with three cats. Respondent testified that during his examination, the cats wandered into Dr. Salvage's office, one laid on the chair where respondent was sitting, one jumped in respondent's lap, and the other rubbed against his legs (Tr. 509-10). Dr. Salvage asked respondent whether he was allergic to cats and respondent told him that he was. Dr. Salvage, however, denied that the cats entered the office and testified that he asked about respondent's allergies only because some people are hyper allergic. Although respondent testified that there were three cats and Dr. Salvage stated that he has three cats, Dr. Salvage denied that respondent saw the cats or that they entered his office (Tr. 179-81). Notwithstanding this dispute, the anxiety, irritability or other behaviors that Dr. Salvage noted might be attributable to respondent's cat allergy, in addition to being accused of lacking the mental fitness to work. At the very least, information that the examination took place under conditions that might have triggered respondent's allergies, thereby affecting his presentation and affect, should have been included in the report rather than summarily discounted and excluded.

I was struck by the subjectivity and illogic expressed in Dr. Salvage's evaluation of respondent's responses. Most troubling was his evaluation and critique of the response that respondent gave when asked what he would wish for if he could have three wishes granted. Respondent said that he would wish that he could hear his non-verbal autistic son speak. It seems more than reasonable that a parent might want to hear his child's voice. Dr. Salvage testified that he thought the response was poignant but also questioned its appropriateness. Dr. Salvage testified that wishes should be realistic "like, I really wish I made a billion dollars" (Tr. 240- 243). He continued that if the wish is not realistic, "and there's nothing they can do, which usually bodes in looking at psychodynamic efficacy how the person can function in the world as they're not going to be that functional if the wish is (a) super unrealistic, or (b) they're not capable of seeing a realistic plan of how to get what they want" (Tr. 243). Dr. Salvage then testified that this response was not significant in terms of his ability to perform his job (Tr. 236).

In accordance with the reports of Dr. Siddiqui, based on his observations and treatment of respondent over the last 11 years, I find that respondent has the following mental conditions: major depression that is stable with medication; and adjustment disorder with anxiety. Dr. Salvage's report and testimony were insufficient to prove that respondent's mental conditions rendered him unfit to work.

Fitness to Work

The fact that an employee may have a psychiatric disorder does not prove that he is unable to do the job, and it is not the end of the inquiry. *See, e.g., Comm'n on Human Rights v. Henderson*, OATH Index No. 704/01 (June 12, 2001). Petitioner next must prove that respondent is unable to perform his job duties at "a minimally acceptable level" and that his disability "presently and for the reasonably foreseeable future" prevents him from doing so. *Human Resources Admin. v. Farber*, OATH Index No. 944/02 at 4, 27 (Sept. 19, 2002) (finding that numerous unscheduled and unpredictable absences and late arrivals caused by respondent's migraine headaches made her unfit to perform the duties of her attorney level III position). The question of fitness is not limited to "how well an employee performs her tasks when she is present at work." *Farber*, OATH 944/02 at 34.

An employee may be unfit because a disability causes him "to have frequent violent or disruptive outbursts at work, or substantially interferes with [his] ability to interact appropriately with coworkers or supervisors." *Caballero*, OATH 699/96 at 18. An employee has a duty not to interfere with the ability of co-workers to perform their tasks. *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); *Health and Hospitals Corp. (Bellevue Hospital Ctr.) v. Samuel*, OATH Index No. 243/07 at 5 (Dec. 20, 2006).

As stated previously, the Attachment A referenced three proposed bases for finding respondent unfit to perform his job duties: a complaint about respondent's driving of a DOT vehicle; his singing in the office; and his conduct at the March 13 meeting. None established a basis for finding respondent unable to perform his job duties.

On March 2, 2017 petitioner received a complaint from a civilian reporting that a city vehicle was being driven recklessly on the Belt Parkway. Ms. Friedman and Mr. Manglos met with respondent to discuss the allegations. Neither Mr. Manglos nor Ms. Friedman had viewed

the recording referenced in the complaint. Respondent denied that he was driving recklessly. The complaint investigation was closed on March 8, 2017 and respondent was not counseled or disciplined in connection with this complaint.

Petitioner provided a copy of this cell phone video recording to respondent in preparation for this hearing (Resp. Ex. I). The recording showed flashing yellow lights on top of the car and it also showed the driver changing lanes, and he appeared to use the signal light when doing so. This recording is remarkable for what it does not show. This recording does not show the vehicle weaving in and out of traffic and car being driven an unsafe manner as described in the complaint.

It is not disputed that respondent sings at work. According to respondent's testimony, he has been singing at work since the day he started at DOT 33 years ago. It is now petitioner's position that respondent's singing is disruptive. Ms. Friedman e-mailed respondent about complaints that she had received about respondent's singing but testified that she did not advise respondent that his singing was disruptive (Pet Ex. 1). Ms. Friedman stated in her e-mail that she received complaints but did not recall who complained or when the complaints were made. Neither respondent nor his supervisors were notified about any complaints that respondent's singing was disruptive.

On March 9, 2017, petitioner alleges that respondent disrupted a meeting with loud singing and refused to stop singing after being asked to do so. Respondent testified that he was singing on March 9 but that he was not aware that there was a meeting in progress. He stated that had he known there was a meeting, he would not have been singing. Respondent testified that when he was told to stop singing by Ms. Shapiro, he stopped. This unrebutted testimony was corroborated by petitioner's witnesses and respondent's direct supervisor, Mr. Manglos. Most notably, respondent has not sung in the office since March 13, 2017 after being directed by Mr. Weld to stop singing.

On March 13, 2017, respondent was called to a meeting with his supervisor Mr. Manglos, Mr. Barkho, and Mr. Weld to discuss his singing in the office. It is not disputed that during the meeting, respondent got upset, cursed, pulled some pill bottles from his pocket and stated that [the supervisors] were driving him to this. Respondent explained that his outburst was a result of frustration that he felt about being passed over for a raise and a promotion. He acknowledged that he lost his temper (Tr. 494). Respondent's supervisor, Mr. Manglos, who has worked with

respondent for over 30 years, testified that this behavior was unusual for respondent (Tr. 455-56). Similarly, Mr. Barkho who has also worked with respondent for 21 years testified that respondent's outburst in the meeting was the first time that he had ever seen respondent act that way (Tr. 327). This uncharacteristic outburst appears to be an isolated episode and would not support a finding of current unfitness to support involuntary leave.

As stated previously, the focus of a section 72 proceeding is the employee's current and future fitness and ability to perform his job duties, not his past condition or work. *See Farber*, OATH 944/02 at 23; *Housing Auth. v. Dave*, OATH Index No. 138/95 at 2-3 (Aug. 12, 1994). The allegedly disruptive behavior occurred in March 2017 and the fitness evaluation was conducted in May 2017. Respondent was not placed on pre-hearing suspension but remained at work in his current capacity as Borough Lead for Staten Island, supervising two employees. It was undisputed that respondent stopped singing in the office as of March 13, 2017 at Mr. Weld's direction and according to un rebutted witness testimony, respondent has not sung in the office since. Furthermore, petitioner has offered no evidence to support a finding that the observed behaviors that gave rise to this proceeding currently persist. Moreover, respondent's current supervisor testified that respondent is currently working and has had no issues with his performance to date. Petitioner has offered no evidence that respondent is currently unfit to perform the job duties that he has continued to perform since these proceedings began.

Petitioner must prove that respondent's mental disability caused lack of fitness. The causal connection is generally found where acts of misconduct were "attributable to" or were 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 & Development v. Natal*, OATH Index No. 1185/90 (Mar. 22, 1990). Inasmuch as I have found respondent fit for work, petitioner cannot prove this element.

FINDINGS AND CONCLUSIONS

1. Respondent has a mental condition which is major depression and adjustment disorder with anxiety.
2. Respondent's condition has not made him unfit to perform his duties as a Highway Transportation Specialist Level II.

RECOMMENDATION

Based upon the foregoing findings, the petition should be dismissed and respondent returned to performing all duties and responsibilities of Highway Transportation Specialist.

Joycelyn McGeachy-Kuls
Administrative Law Judge

February 2, 2018

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner

APPEARANCES:

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