

Dep't of Transportation v. Anonymous

OATH Index No. 1750/18 (Apr.16, 2018)

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

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
ANONYMOUS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

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

On February 20, 2018, DOT placed respondent on an involuntary medical leave pursuant to Civil Service Law section 72(5) based on a psychiatrist’s determination that respondent was unfit for duty. By letter dated February 15, 2018, respondent notified DOT that he objected to the leave and requested a trial.

A trial was held on March 16 and 29, 2018. Petitioner presented documentary evidence, the testimony of Dr. Robbins, who was qualified as an expert in psychiatry (Tr. 11), and three DOT employees who testified about respondent’s conduct that led to his fitness evaluation. Respondent testified on his own behalf and presented documentary evidence.

¹ Because this report contains sensitive medical information about respondent, his name is being withheld. *See* 48 RCNY § 1-49(d) (Lexis 2018). *See also Admin. for Children’s Services v. Anonymous*, OATH Index No. 212/12 at 1 (Dec. 15, 2011) (withholding respondent’s name because the report discussed sensitive medical issues).

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

BACKGROUND

Respondent has been a clerical associate in the Automated Enforcement Unit since September 2015. Respondent's duties include analyzing images from traffic cameras and processing Notices of Liability ("NOLs") for vehicle violations that fall within certain guidelines established by DOT. Employees in this unit work in shifts from 6:00 a.m. to 2:00 p.m. and 2:00 p.m. to 10:00 p.m. and share work stations and equipment. Due to overtime, shifts sometimes overlap. Mr. David was the unit supervisor at all times relevant.

According to Mr. David, respondent has a history of aberrant and disruptive behavior that commenced after his one-year probationary period ended (Tr. 198; Pet. Exs. 7, 8). Starting in October 2016 respondent, among other things, began wearing a dirty surgical mask, complaining that women in his unit were sexually harassing him, and engaging in verbal confrontations with co-workers. Respondent was referred for a fitness evaluation following a physical confrontation with a co-worker on January 9, 2018.

Ms. Jackie testified that when she got to her cubical shortly before her afternoon shift, she saw an old, dirty fan sitting on her desk. Respondent had placed his own fan on the partition that divided her cubical from respondent's cubical, where the old fan had been. Ms. Jackie testified that she asked respondent why he had placed the fan on her desk and he stated that it was dirty and did not want it blowing on him. She responded that she does not use the fan. As she was trying to unplug the fan and move it from her desk, respondent stated that if she put the fan back he would throw it at her. Ms. Jackie asked whether he was threatening her and respondent said "yes" (Tr. 42, 57-60).

Ms. Jackie testified that she called to Mr. David, whose office was behind her, saying respondent was threatening her with violence but he did not respond. She turned back to respondent saying that she did not want the fan on her desk. While they were going back and forth about the fan, respondent moved his fan, picked up the old fan off her desk, and threw it at her. The fan almost hit her hand. It landed on the desk and broke apart. Ms. Jackie testified that

Mr. David came out of his office and said not to touch anything. Respondent kept claiming that the fan had fallen out of his hands. Ms. Lee, who was also present, said that she saw respondent throw the fan. Mr. David got his supervisor, Mr. Susi, the director, and they called respondent into an office (Tr. 42-45, 61-64).

Ms. Jackie testified that she was surprised that respondent had thrown the fan at her and that she had not expected him to act on his threat (Tr. 46). Following the incident, she spoke to Mr. David and Mr. Susi and also prepared an e-mail documenting the incident (Pet. Ex. 5). Ms. Jackie's e-mail was consistent with her testimony. In the e-mail she also noted that before he threw the fan, respondent told her that she was being rude and that he did not like the way she was talking to him. She further wrote that this was not the first time she had been "accosted" by respondent and that a few weeks earlier he harassed her about sitting in another co-worker's chair while she was submitting her timesheet in CityTime (Pet. Ex. 5; Tr. 48).

Ms. Jackie also testified about an incident when she was riding the train with respondent after work and he was complaining about people in the office breathing on him. When Ms. Jackie said, "Come on man" respondent got irate and started yelling at her in front of a packed train of people. She also observed respondent initially being "neat and tidy" in his appearance but that at a certain point he started removing his shoes to clip his toenails and scrape his feet (Tr. 49-50). Ms. Jackie testified that she never spoke to respondent about his feet because he has an anger problem and was confrontational and defensive (Tr. 52-53).

Ms. Lee corroborated Ms. Jackie's account and testified that as she was approaching the area she heard respondent yelling and threatening Ms. Jackie about a fan. Ms. Jackie looked intimidated and Ms. Lee called to Mr. David to deal with the issue. Ms. Lee stated that she saw respondent pick up the fan and throw it at Ms. Jackie. It landed on the desk and broke into pieces. Ms. Lee testified that Ms. Jackie looked scared and startled. Mr. David came out of his office and asked what had happened. Respondent claimed that the fan had fallen. Ms. Lee told Mr. David that respondent was lying and that he had thrown it. Mr. David took respondent into an office. When respondent came out he gave Ms. Lee the "finger" by putting his hand on the back of his head and raising his middle finger at her (Tr. 69-72, 80-86). Ms. Lee documented her observations about the fan and respondent giving her the middle finger in two e-mails (Pet. Ex. 6). The e-mails were consistent with her testimony.

Ms. Lee testified that she was scared by the fan incident because this was not the first time that respondent had “blown up” in the office. For example, respondent got very angry when someone called him “Jeff” instead of “Jeffrey.” Because of the magnitude of the fan incident, Ms. Lee felt that something had to be done. Ms. Lee testified that she had previously observed respondent get into disagreements with women and that people could not be direct with him. She also testified that respondent wore a dirty face mask in the office, took off his shoes and picked his feet when he should have been working, and that he took pictures of people (Tr. 72-73, 86). Ms. Lee testified that she would never speak to respondent about these issues because he was unapproachable and would become combative and argumentative (Tr. 75). However, one time respondent was blocking the time clock so that no one could punch out and she said “excuse me” and he moved (Tr. 79).

Ms. Lee also testified that she stopped interacting with respondent completely after he accused her and other women of sexually harassing and intimidating him. She was dumbfounded by the allegations (Tr. 68-69, 78). Respondent’s complaint did not go anywhere because he refused to elaborate on the nature or extent of the sexual harassment (Tr. 75-76). Ms. Lee denied ever touching respondent (Tr. 79-80).

Mr. David testified that he was sitting in his office when Ms. Lee notified him that respondent was speaking to Ms. Jackie in an abusive manner. As he was getting out of his chair, he heard a loud noise. He walked towards the noise and saw a broken fan on Ms. Jackie’s desk, Ms. Jackie sitting at her desk, and respondent standing on the other side looking furiously at Ms. Jackie with his hands spread out. Mr. David immediately took pictures of the broken fan on Ms. Jackie’s desk (Tr. 181-184, 226-31; Pet. Ex. 11).

Mr. David testified that he sensed a violent scene, asked what happened, and called his supervisor Mr. Susi. Mr. Susi arrived and also asked what happened. Everyone was silent. According to Mr. David, Ms. Jackie was crying and she looked frightened and shocked. Ms. Lee stated that respondent had thrown the fan at Ms. Jackie (Tr. 164-86, 188, 190).

Mr. David and Mr. Susi spoke to respondent in Mr. Susi’s office. Respondent denied that he threw the fan. When asked to explain what had happened, respondent stated that Ms. Jackie was not treating him like a man and was not respecting him (Tr. 186-87, 231). Later Ms. Lee reported that respondent had shown her his middle finger (Tr. 189-90).

After the fan incident, Mr. David prepared a written summary of respondent's troubling and disruptive conduct over the past two years with supporting contemporaneous documentation (Tr. 197; Pet. Exs. 7, 8). Mr. David noted that during respondent's probationary period he kept to himself and was very calm but that after it ended respondent started having a variety of workplace issues including: wearing a dirty surgical mask because he was uncomfortable sitting with other people; complaining that women in his unit were sexually harassing him and that one woman was a "sexual predator;" issuing motorists improper NOLs because in respondent's "personal judgment" they deserved the tickets; changing database information against DOT policy so that certain motorists would not receive legitimate NOLs; refusing to train a new female employee; verbal altercations with various female employees; requesting a work station change in a threatening manner; removing his shoes and putting his bare feet on the desk to pick them or clip his toenails; claiming that Mr. David was targeting him when he pointed out respondent's errors; photographing and/or video-taping other employees; and hiding his keyboard so that no one else could use it (Tr. 114-22, 173-79, 199-225; Pet. Ex. 7).

By notice dated January 25, 2018, DOT directed respondent to report for a fitness for duty medical examination (Pet. Ex. 2). Included in the notice was an Attachment A that set forth the basis for the medical examination describing respondent: filming co-workers; hiding his keyboard; wearing a dirty surgical mask; grooming his bare feet; failing to wash his hands after using the restroom and then touching shared equipment; treating female co-workers in a disrespectful manner; throwing a fan at Ms. Jackie; and his unsubstantiated complaints of sexual harassment.

Also attached to the notice were two e-mails previously written by respondent on November 17 and 27, 2017. In the two-page, single spaced e-mail dated November 17, 2017, respondent claimed that he has been harassed by women at every job he has had. He complained at length about female "gender predators" in his unit sexually harassing him, invading his space, conspiring against him, touching him, and calling him "Jeff" instead of "Jeffrey." Respondent explained that he wears a surgical mask to keep these women from spreading their colds to him. He also alleged that: Mr. David is indifferent to his complaints and has a "hidden agenda"; the women in his unit are pushing him to a "breaking point"; he does not feel safe at work and has

had to “blow up” at one employee; he needs a shift change; and that no one should be allowed to share his work station (Pet. Ex. 2).

In the November 27, 2017 e-mail, respondent stated that he needs a shift change because he was being harassed, that no one was taking him seriously, that an employee was stepping on the backs of his shoes, that another employee was following him, and that he is “very angry,” is “being tortured by these people,” and that they are “provoking [him] to become aggressive” (Pet. Ex. 2).

On January 29, 2018, respondent was examined by Dr. Robbins who had reviewed the notice with the above-described attachments. Dr. Robbins also administered respondent a standardized personality test and had respondent fill-out a self-assessment questionnaire (Pet. Exs. 3, 9). According to Dr. Robbins, the personality test revealed substantive cognitive complaints and emotional, behavioral, and interpersonal dysfunction, depression, and anxiety. In the self-assessment questionnaire respondent stated that he was afraid people were trying to harm him, that he cannot have healthy relations with women, that he has a “messianic complex,” and he believes that J.K Rowling, who shares respondent’s birthday, based the Harry Potter series on his and Rowling’s lives (Tr. 143-44, 158-59; Pet. Ex. 9 at 2). Dr. Robbins testified that respondent spent several hours in his office and that he spent about an hour speaking to respondent about the various materials described above (Tr. 139).

In a written report dated January 29, 2018 (Pet. Ex. 4), Dr. Robbins described respondent’s responses to his questions about the listed Attachment A behaviors. Much of the interview focused on respondent’s physical and emotional discomfort with women, his “messianic complex,” his feelings of being a victim of women who can read his mind, and that he is possessed by spirits. Dr. Robbins diagnosed respondent with paranoid schizophrenia and found that he is beset by sexual preoccupation, has rigid and delusional thinking, and displays aggressive atypical behavior that interferes with his ability to work. Dr. Robbins concluded that respondent was unfit to return to work as a clerical associate and recommended that he get psychotherapy and medication to control his delusional and paranoid thinking.

By e-mail dated February 13, 2018, respondent sent Dr. Robbins a six-page rebuttal (Pet. Ex. 10). Respondent claimed that he grew up “religious” and that Dr. Robbins was biased against his religious beliefs about “gender roles and matters of the truth.” Respondent explained

that his “preoccupation with spirits and devils” is a product of his upbringing in the Seventh Day Adventist Church and his belief that he should abstain from relationships with non-Christian women, including all of the women in his workplace. Respondent also disputed a number of the allegations and explained why Dr. Robbins’ conclusions were wrong. For example, with regard to the filming of co-workers, respondent claimed that he showed Dr. Robbins that his cell phone “can not film.” Respondent also disputed Dr. Robbins’ diagnosis and suggested that the doctor watch certain reality television shows and a movie which show the “modern reality of women.” Respondent claimed that he was entitled to a second opinion, that he does not want to be placed on a leave, and that he is waiting to be hired for a different civil service position.

Based on Dr. Robbins’ report, DOT placed respondent on an involuntary medical leave pursuant to Civil Service Law section 72(5) on February 20, 2018.

At trial Dr. Robbins testified that he diagnosed respondent with paranoid schizophrenia, an illness characterized by mistrust of people and thought disorder. Typical behaviors associated with this diagnosis include a feeling that other people are interfering, talking about, and tormenting the person with the disorder. With regard to respondent these behaviors existed in the workplace and were observed by other workers such as respondent complaining that women were touching him, congregating at his desk and talking loudly to interfere with his concentration. Also, co-workers observed respondent grooming his bare feet on his desk, which respondent denied (Tr. 24-25).

Dr. Robbins reviewed respondent’s November 17 and 27, 2017 e-mails, and stated that respondent’s statements that women in his unit were “gender predators,” that he is being pushed to a breaking point, and does not want to be at work anymore indicates that respondent is having a great deal of difficulty in the workplace, is unsure how to respond, and is angry (Tr. 27-30).

Dr. Robbins also testified that respondent’s belief that he is invisible, that people can read his mind, and that he sees demons in people is unusual and demonstrates paranoid thinking. Also, respondent’s belief that co-workers are disrespecting him when they offer him food that he does not want is part of the psychiatric condition. Similarly, respondent’s belief that people are harassing him when they talk or accidentally brush up against him is a misinterpretation of other people’s actions. Likewise, respondent’s belief that when his supervisor checks his work he is being punished is a paranoid interpretation because it is a supervisor’s job to so. Dr. Robbins

testified that respondent's statements during the fitness exam about keeping a journal in college made little sense but they indicated that he believed he was being persecuted (Tr. 31-35, 162).

At trial respondent denied that he threw the fan at Ms. Jackie and claimed that it fell. He testified that he placed the fan on Ms. Jackie's desk with a note to please clean it. When she asked why the fan was on her desk, respondent tried to be nice and said he had tried to clean it. Ms. Jackie started bickering with him. Respondent stated that he was having a good day, he was going home soon, and he did not think he would see Ms. Jackie. Ms. Jackie called to Mr. David and accused respondent of threatening her because he had told her to stop bothering him. He continued working. If had seen Ms. Lee in the area he would have known that it was a set-up. In order not to argue with Ms. Jackie he agreed to move his fan but the cord fell between the desks. Ms. Jackie put the fan back where it was originally and he said "tsk, tsk." Respondent testified that he took the fan, put it back on Ms. Jackie's desk, and that it fell over. As soon as the fan made a noise he knew it was going to be a problem. Ms. Lee, who was about 50 to 60 feet away, said that he had thrown the fan and gestured with her hands over her head (Tr. 238-40).

Respondent testified that he spoke with Mr. David and Mr. Susi, who had been decorating the last week, and told them Ms. Lee was not supposed to be on that shift. He denied using any violence in the workplace and that he has no confrontations with Ms. Jackie. He had previously told Mr. David that the ducts in the office were full of dirt and that it was an unclean environment. He was afraid of catching colds from sick people so he wore a mask. Respondent denied having a problem with women and also said they started gossiping about him. Respondent denied that Ms. Jackie was crying about the fan and said that she treated him like an older sister (Tr. 240-42).

Respondent testified that he wrote the November 17 and 27, 2017 e-mails, to express his complaints about the various women in his office and to get moved to another station and shift (Tr. 246-49). It was undisputed that prior to January 9, 2018, respondent was granted a shift change, a work station change, and was given his own keyboard so that he did not have to share it with anyone else.

Respondent also testified about his visit to Dr. Robbins and explained that the part about Harry Potter had to do with his spiritual beliefs and that the books are an analogy to why he is being persecuted. Respondent acknowledged that he called women in his office gender predators

and explained that they are people of the opposite gender who come into an environment to make trouble, make you angry, and lure you out (Tr. 262). Respondent also stated that he has a professional driver's license and wants to be a motor vehicle operator. He thought that the fitness exam was to get him ready for his next job (Tr. 255-54).

In support of his fitness for duty, respondent submitted a brief one-page letter dated March 27, 2018, from Dr. Ellis (Resp. Ex. B). Dr. Ellis wrote that respondent was seen for a psychiatric examination and was found to "have strange beliefs regarding women who work with him." Dr. Ellis diagnosed respondent with "delusions of the Persecutory Type" that seem to be related to his spiritual beliefs as a member of the Seventh Day Adventist Church. Dr. Ellis also noted that at "this time [respondent] was able to understand the difference between female co-worker's behavior and his beliefs." Dr. Ellis concluded, without elaboration, that it was his "profession opinion that [respondent] is able to perform his job and is not a danger to self or others."

ANALYSIS

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

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

In disability proceedings the opinions of medical specialists can be profoundly informative and can materially aid the fact-finder in reaching a proper conclusion. The fact-finder is not bound to accept the conclusions or opinions of any given medical expert, but must

weigh the medical evidence and draw on reasonable inferences. *Peabody Coal Co. v. Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977); *Human Resources Admin. v. Romney*, OATH Index No. 319/82 at 38 (Dec. 20, 1982) (opinion evidence offered by medical experts is to be evaluated in conjunction with other evidence in the record).

Dr. Robbins' expert medical conclusions that respondent suffers from a disability that renders him unable to perform his job duties was persuasive and supported by: his three-page report as well as respondent's personality test and questionnaire; the credible testimony and written documentation of petitioner's witnesses; and respondent's own verbal and written statements. On the other hand Dr. Ellis's conclusion that respondent is fit for duty and is not a danger to himself or others was unsupported and unpersuasive. There was no evidence that Dr. Ellis reviewed the Attachment A with supporting documentation or that he performed a comprehensive examination of respondent. Dr. Ellis's conclusion that respondent is fit for duty seemed inconsistent with his findings that respondent has strange beliefs about the women he works with and suffers from "delusions of the Persecutory Type." Because Dr. Ellis did not testify and gave no written explanation for the basis for his finding, his conclusions are unreliable and will not be given any significant weight.

With regard to the first element of unfitness, Dr. Robbins offered cogent testimony that respondent suffers from a mental disability. Dr. Robbins, who was not personally selected by DOT, had no apparent reason to lie about respondent's mental condition. He was hired through Juris Solutions to provide an independent evaluation of respondent (Tr. 11-12, 129). Dr. Robbins diagnosed respondent with paranoid schizophrenia after reviewing the Attachment A and respondent's e-mails, the results of a personality test that he administered to respondent, respondent's answer's to a questionnaire, and meeting with respondent for more than an hour.

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

unpredictable absences and late arrivals caused by respondent's migraine headaches made her unfit to perform the duties of her attorney position).

“An essential part of fitness to work in any job assignment is an ability to work with and be supervised by others, without being disruptive or abusive.” *Housing Auth. v. Jones*, OATH Index No. 195/94 at 28 (Jan. 7, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 94-72-2 (Sept. 29, 1994). An employee has a duty not to interfere with the ability of co-workers to perform their tasks. *Health and Hospitals Corp. (Bellevue Hospital Ctr.) v. Samuel*, OATH Index No. 243/07 at 5 (Dec. 20, 2006); *Human Resources Admin. v. Anon.*, OATH Index No. 1781/12 at 30 (Aug. 9, 2012) (employee unfit based on evidence of his ongoing disruptive and frightening behavior); *Housing Auth. v. Caballero*, OATH Index No. 699/96 at 18 (Mar. 13, 1996) (employee unfit because her disability caused her “to have frequent violent or disruptive outbursts at work, or substantially interferes with [her] ability to interact appropriately with co-workers or supervisors.”); *see also Misesk-Falkoff v. IBM Corp.*, 854 F.Supp 215, 218 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995) (an employee with a neurological disorder was not otherwise qualified to perform her work under the federal Rehabilitation Act, 29 U.S.C. § 794, where there was evidence that she “exhibited fits of rage, emotional outbursts, crying episodes and similar behavior, making it difficult if not impossible for many co-workers and supervisors to get along with her”).

Dr. Robbins credibly testified that his conclusion that respondent was unfit was based on his finding that respondent is unable to work with others, not his job performance. In reaching his diagnosis, Robbins stated that he did not factor in respondent's religious beliefs or his fear of getting sick but instead focused on respondent's inability to get along with co-workers and his paranoid and delusional thinking (Tr. 134-44).

Dr. Robbins' conclusion was also corroborated by independent credible evidence. Examples included: respondent's sudden and unprovoked outbursts, engaging in verbal altercations with a number of women in his unit, repeatedly claiming that the women he works with are sexual predators who are verbally and physically harassing him, photographing or filming co-workers against their wishes and in violation of explicit orders not to do so, and hiding office equipment so that no one else can use it. Certainly, this conduct is disruptive and negatively impacts respondent's co-workers, to the point of putting some in fear of their safety.

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

[Respondent] is in a precarious position. He is beset by sexual preoccupation, rigid in his thinking and delusional with a great deal of difficulty understanding and adapting to women. He was referred because his aggressive atypical behavior distressed those with whom he worked and interfered with their capacity to work. His sexual preoccupation and self-protective behavior interfered with his concentration and reduced productivity.

(Pet. Ex. 4).

There was ample evidence that respondent's mental disability generates intense anger and aggression that disrupts the work environment, affects his judgment, and makes him currently unfit for his duties as a clerical associate. Respondent's paranoia, manifested in the false accusations and grudges he harbors against co-workers and his supervisor, prevents him from working cooperatively and has required that his work station and shift be changed and that he be given his own office equipment to avoid workplace conflict. Despite these accommodations, respondent continued to engage in aggressive, disruptive, and unpredictable conduct including the most recent episode of violence.

To the extent resolution of the January 9, 2018, fan incident requires a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

The testimony of Ms. Jackie and Ms. Lee that respondent threw the fan at Ms. Jackie was more credible than respondent's self-serving uncorroborated claim that the fan fell accidentally. Their testimony was consistent and was supported by contemporaneous e-mail documentation and Mr. David who stated that he heard a loud noise and quickly arrived to find the broken fan,

Ms. Jackie sitting in her chair frightened, and respondent standing looking furiously at Ms. Jackie with his hands spread out. Given respondent's admitted fear of these women and his own prior statements that he was at a "breaking point," that he had had to "blow up" at another employee and that the women in his office were provoking him to become aggressive, it seems more likely than not that respondent lost self-control when Ms. Jackie complained about the fan that he had placed on her desk.

Additionally, we have noted that a "finding of unfitness is supported where an employee denies the existence of a disability, or refuses to treat it, thereby creating a greater risk of future recurrence of the disability." *Papa*, OATH 1392/07 at 11 (citing *Caballero*, OATH 699/96 at 23); *Admin. for Children's Services v. E.D.*, OATH Index No. 202/03 at 6-7 (Oct. 18, 2002), *adopted in part*, Comm'r Dec. (Dec. 4, 2002) (respondent's lack of insight into her illness, refusal to acknowledge the need for treatment, refusal to take medication, and belief that she had no psychiatric problem weighed in favor of finding respondent unfit); *Admin. for Children's Services v. M.R.*, OATH Index No. 790/00 at 6 (Feb. 25, 2000) (respondent found unfit given lack of insight into condition and refusal to take medication).

It is clear that respondent is in denial about his disability and refuses to seek treatment, thereby creating a risk of future issues in the workplace. In his rebuttal e-mail to Dr. Robbins, respondent adamantly stated that the diagnosis of paranoid schizophrenia was incorrect and that he would never take any medication. Likewise at trial, respondent showed no interest in receiving any psychotherapy or other forms of treatment. Thus, it seems highly unlikely that respondent is willing to seek treatment in the form of psychotherapy and medication to control his delusional and paranoid thinking.

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

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

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

Civ. Serv. Law § 72(5) (Lexis 2018) (emphasis added). This tribunal has recognized that placing an employee on involuntary leave under section 72(5) without a hearing is an “extraordinary measure.” *Teachers’ Retirement System v. Barrett*, OATH Index No. 1210/99 at 3 (Sept. 22, 1999).

Overall, the record demonstrates that respondent’s anger and outburst have, over time, created significant disruption to office operations by causing his co-workers to fear what he might do. Respondent’s documented hostility and unprovoked anger towards co-workers, including the most recent episode of threatening and throwing a fan at Ms. Jackie, coupled with his recent statements that he does not feel safe at work and is angry further suggest that his actions severely interfere with operations and that he could harm others. This coupled with an independent psychiatrist’s determination, justified respondent’s immediate removal from the workplace. *See Papa*, OATH 1392/07 at 13-14 (pre-hearing leave was appropriate where employee engaged in bizarre and threatening behavior which caused fear in his co-workers); *Transit Auth. v. Smith*, OATH Index No. 1299/02 at 9(Mar. 24, 2003) (same).

Thus, petitioner had “probable cause” to believe that respondent’s continued presence on the job “represents a potential danger to persons” and “would severely interfere with operations.” Civ. Serv. Law § 72(5).

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent is currently unfit for the duties of his job pursuant to section 72 of the Civil Service Law.

2. Petitioner demonstrated that respondent was properly placed on an emergency leave pursuant to section 72 of the Civil Service Law.

RECOMMENDATION

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

Alessandra F. Zorghiotti
Administrative Law Judge

April 16, 2018

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner

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