Human Resources Admin. v. S.J.

OATH Index No. 0074/19 (Feb. 13, 2019)

Petitioner failed to establish that a caseworker is mentally unfit to perform the duties of her position. Further, petitioner failed to establish probable cause to place the caseworker on an emergency pre-trial leave of absence. Dismissal of petition recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
- against -
S.J.[1]
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

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

At the trial conducted on November 2 and 5, and December 10, 2018, petitioner relied on documentary evidence and the testimony of four witnesses, including Dr. Brass, who qualified as an expert witness. Respondent, who was represented by counsel, testified in her own behalf. Prior to the trial, the parties engaged in settlement discussions and respondent waived the Section 72 deadlines for conducting the trial and for a post-hearing final determination (Tr. 386).

[1] This report contains sensitive medical and personal information about respondent, who requested that her name be withheld from publication (Tr. 22-23). That request is granted pursuant to section 1-49(d) of OATH's Rules of Practice. *See* 48 RCNY § 1-49(d) (Lexis 2019)*; Human Resources Admin. v. M.O.*, OATH Index No. 173/15 at 1 (Nov. 21, 2014) (respondent's name withheld because report contained sensitive medical and personal information about respondent); *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 1 n.1 (Apr. 5, 2010) (same).

For the reasons below, I find petitioner's evidence insufficient to establish that respondent is currently unfit to perform the duties of her position and recommend that the petition be dismissed. I further find that petitioner failed to establish that it had probable cause to place respondent on a pre-trial emergency leave of absence.

ANALYSIS

Factual Background

Respondent has been employed by HRA as a caseworker in the Office of Child Support Services ("OCSS") since 1995 (Tr. 85, 285). She presently works in the Employer Compliance Unit, where her duties involve processing court-issued income withholding orders issued against noncustodial parents in child support cases that are referred to HRA by New York State. Such orders typically require garnishment of the noncustodial parents' wages and caseworkers are responsible for ensuring that income is withheld consistent with the orders (Tr. 13-14). The unit receives about 3,000 employer compliance cases each month from the state and caseworkers have various deadlines to complete work on the cases, depending on what has to be done (Tr. 127).

As part of their duties, caseworkers access HRA and New York State databases to obtain, enter, or change information; speak to the parties involved in child support cases; and contact employers to resolve issues regarding garnishment of wages (Tr. 13-14, 84-88). Caseworkers must investigate and analyze issues and exercise independent judgment as to the appropriate action to take in a case (Tr. 196-97). They must be very careful in performing their duties because errors could result in insufficient or excessive garnishment of wages, which could have dire repercussions on the families involved in the child support cases (Tr. 187).

Events Leading to the May 21, 2018 Psychiatric Evaluation

Petitioner submitted "Attachment A," which describes behavior that precipitated its concern about respondent's fitness for duty (ALJ Ex. 1). Attachment A alleges that since January 2018, respondent has refused to complete assigned work and engaged in disruptive and offensive behavior, such as spraying a chemical substance in the air, playing loud music, and singing in her cubicle (ALJ Ex. 1). As this tribunal has noted, Attachment A "is not a pleading and the fact that an employee committed the acts stated therein is not an element to be proven at the hearing." *Dep't of Transportation v. S.N.*, OATH Index No. 1233/14 at 2 n.2 (Feb. 14,

2014). Rather, Attachment A serves as written notice of the facts upon which the employer based its determination that the employee is not fit to perform her duties and forms the basis for having the employee medically evaluated. *Id.* Petitioner's witnesses testified about the conduct described in the Attachment A.

Respondent's direct supervisor is Jean-Louis, who reports to Shmayenik, the Director of Administrative Enforcement. Pocchia, Executive Director of Enforcement Operations, oversees and manages day-to-day operations for several units, including respondent's unit (Tr. 11-12, 51, 84-85, 171). Jean-Louis, Pocchia, and Shmayenik testified that they began to notice significant deterioration in respondent's behavior and job performance starting in January 2018 (Pocchia: Tr. 15; Shmayenik: Tr. 85; Jean-Louis: Tr. 172).

OCSS staff, including respondent, work in cubicles in an open environment (Tr. 22). Jean-Louis testified that on January 3, 2018, someone who worked in the same area as respondent complained that respondent had been spraying a noxious substance. Respondent's coworker said she suffered from severe allergies that were being affected by the spray and asked to be relocated (Tr. 172-73). When Jean-Louis met with respondent in a conference room that day about the complaint, respondent said she did not know what Jean-Louis was talking about and walked out of the meeting (Tr. 173). Jean-Louis testified that she did not notice an unusual smell during the meeting (Tr. 223).

Jean-Louis reported the complaint to Shmayenik, who testified that she received complaints about respondent spraying an unknown substance from four or five staff members who sat near respondent. One staff member asked to be moved because the odor was making her ill, and that request was granted (Shmayenik: Tr. 90-91, 151; Jean-Louis: Tr. 173). In addition to receiving complaints, Shmayenik testified that in January 2018, she saw respondent spray her head with a liquid in a glass bottle. She approached respondent, who had previously denied spraying anything on herself, told respondent that she saw her spraying the substance, and asked her what it was. Respondent, who was seated at her desk when Shmayenik approached her, got up and walked away without replying. Shmayenik reported the complaints to her supervisor, Pocchia, and they went to respondent's desk along with respondent's direct supervisor, Jean-Louis (Tr. 90-93).

Pocchia testified that on January 3, Shmayenik and Jean-Louis told him that respondent was spraying herself with a noxious substance from a small, orange bottle that she kept in her hands at all times (Tr. 16, 39-41). They said that staff members seated near respondent said that the smell was "noxious" and "toxic" and asked to be relocated (Tr. 16, 38-39). Pocchia, whose cubicle was about 20 to 30 feet away from respondent's, did not notice the odor they complained about until he went to respondent's cubicle to assess the situation (Tr. 16-17, 36-37, 39-42). He detected a strong, unfamiliar odor "when [he] was about two or three feet away, when [he] was talking to her" (Tr. 40). He described the smell as "overwhelming" and said that it made his eyes tear up (Tr. 17). Pocchia testified that when he asked respondent what she was spraying, she asked him "what are you talking about?" (Tr. 16-17, 41). Pocchia said that he and the staff were concerned because they did not know what substance respondent was spraying and were worried about their safety (Tr. 17, 80). However, on cross-examination, Pocchia identified only one staff member who asked to move because of the spray and was relocated (Tr. 47-49).

According to Shmayenik and Pocchia, in addition to spraying herself with a noxious substance, beginning in January 2018, respondent started to leave her desk every eight to 10 minutes. She walked around the floor on which they worked "all day long," although her duties do not require that she get up from her seat so often (Pocchia: Tr. 15-16, 37-39; Shmayenik: Tr. 90). Pocchia testified that respondent sometimes left her desk for only a few seconds, but other times she walks around the entire floor before returning to her cubicle, which could take four to five minutes (Tr. 44-45). Although Pocchia acknowledged that "[s]ometimes she may legitimately go into the ladies restroom" during her walks, he testified that she gets up from her desk every eight to 10 minutes and leaves her work area (Tr. 45).

In addition to spraying herself with an unknown substance and frequently leaving her cubicle, respondent's supervisors maintain that her work performance markedly deteriorated beginning in January 2018.

Shmayenik and Jean-Louis testified that even before January 2018, respondent's supervisors assigned her cases that did not require her to call employers even though it is part of her tasks and standards to complete such calls (Shmayenik: Tr. 96; Jean-Louis: Tr. 224). According to Jean-Louis, this practice had been in place before she started working at HRA in 2001 (Tr. 172, 224). Jean-Louis had been manually selecting and assigning cases to respondent, which involved printing the case documents and giving them to respondent. Respondent was

only assigned cases that needed to be closed because they were the easiest cases to process (Tr. 185-86, 187). According to Jean-Louis, respondent did not work on the time-sensitive cases referred by New York State, which had to be reassigned (Tr. 183-84).

After she was apprised of issues with respondent's job performance, Shmayenik reviewed respondent's work on her assigned cases (Tr. 99, 184). Shmayenik testified that caseworkers are required to use several computer programs in the course of performing their duties (Tr. 85-88). New York State refers cases to OCSS via a database called ASSETS and through the state's electronic communication system ("ECS") (Tr. 88-89, 124-25). In January 2018 cases were assigned to caseworkers using ECS and caseworkers were to use the ASSETS system to enter notations about actions they took on their assigned cases (Tr. 102, 186). Shmayenik checked the remarks entered into the ASSETS database to see what work respondent actually performed on the cases listed on her activity sheet (Tr. 103, 184).

Respondent's supervisors determined that when respondent arrived at work, she did not start working for two hours, during which she walked around the floor and went to different pantries (Shmayenik: Tr. 100-01; Jean-Louis: Tr. 184-85). Although respondent indicated that she had completed three or four cases daily on her activity sheets, Shmayenik concluded that there were gaps in respondent's productivity because the work she completed could have been completed in less than seven hours (Tr. 100-01). Shmayenik also noted that respondent's work was done incorrectly and her supervisor had to correct cases after respondent worked on them (Tr. 99, 100, 103).

On January 18, 2018, Shmayenik convened a meeting with respondent, Jean-Louis, and another staff member to discuss respondent's work performance (Tr. 182; Pet. Ex. 4). Shmayenik and Jean-Louis also wanted to address complaints that respondent was leaving her work area every 10 minutes to walk around the office and was going to pantries in different units on the floor where they worked, where she sat and ate snacks (Shmayenik: Tr. 99; Jean-Louis: Tr. 183). When the issue of respondent's performance was raised, respondent became loud and emotional, stated that she did a good job to the best of her abilities, and abruptly left the conference room a few minutes after the meeting started (Tr. 184-85; Pet. Ex. 4). Shmayenik tried to refer respondent to the employee assistance program by providing her with a booklet about the program, but respondent refused to accept the booklet and told Shmayenik to keep it for herself (Tr. 93).

Jean-Louis testified that caseworkers must be adept in the use of computers to perform their duties. However, respondent was not proficient in using different databases to conduct searches relating to the cases (Tr. 188). She also failed to undergo trainings regarding the various computer systems and databases that caseworkers are required to use. For example, Jean-Louis signed respondent up for computer training on February 2, 2018, because HRA was going to change the way work was assigned and she wanted respondent to be familiar with the new process. However, respondent arrived late for the training and was not allowed to participate (Tr. 192; Pet. Ex. 10).

In April 2018, supervisors started to use a new case management tracking system ("CMTS") to assign cases to caseworkers, instead of the prior system of manual case assignment. Under CMTS, cases were assigned to caseworkers electronically and they had to access the cases using an icon on their computer. Once caseworkers complete work on the assigned case, they must close the case referral in three different systems: CMTS, ECS, and ASSETS (Pocchia: Tr. 70; Jean-Louis: Tr. 116-18, 195). Before the CMTS system was launched on April 9, 2018, everyone received training on how to use the database. In addition, a second training session was held a few weeks after they started using the database (Tr. 154-55). According to Jean-Louis, she sat behind respondent during one of the sessions and observed that respondent did not open her computer or participate in the training (Tr. 196). When cases were assigned to respondent using CMTS, respondent did not understand that she had to access her assigned cases using an icon on her computer (Tr. 116-18). Since the training, respondent has "barely" adapted to using CMTS (Tr. 196).

Further, respondent has failed to complete mandatory annual security training, despite efforts to assist her. Pocchia testified that each year OCSS staff members are required to undergo a security training in order to access New York State computer databases that contain confidential information (Tr. 25-26, 76-78). Access to those databases is necessary for caseworkers to work on their assigned cases and enter case notes into the ASSETS database (Tr. 193). The training entails watching a video online and signing acknowledgements that certain records used by the unit are confidential. The acknowledgement forms are generated by the computer at the end of the video. To complete the training, the trainee must sign printed copies of the acknowledgement forms, which must then be scanned and uploaded to the entity that

administers the training (Tr. 25-26, 76-78). If a staff member fails to complete the training, he or she may lose access to the New York State databases (Tr. 26).

In February 2018, the unit was notified of the training by e-mail. However, respondent refused to complete the training because she had done so the prior year (Tr. 193-94). In March 2018, after respondent failed to complete her training, Shmayenik reminded her of the need to do so. Respondent refused to complete the training and sign the required documents (Tr. 112-13). On April 2, 2018, Shmayenik went to respondent's desk and asked her to complete the training. Respondent, who was reading a book when Shmayenik approached her, again refused to do so (Tr. 114).

Petitioner also referenced respondent's time and leave record in support of its contention that she is unfit to perform her duties. Jean-Louis testified that starting in April 2017, respondent often arrived for work late, which she attributed to transit delay. In addition, she took time off so often that she exhausted accrued leave time, resulting in the need for her to take leave without pay. When Jean-Louis issued a memorandum to respondent dated February 8, 2018, regarding her late return from lunch on three occasions, respondent refused to sign it. Respondent's time and leave issues persisted into 2018 (Tr. 173-81; Pet. Exs. 8, 9).

Involuntary Leave of Absence

According to Pocchia, on April 23, 2018, respondent started to play loud music at her workstation and "would just sit there and sing" (Tr. 21). Her radio playing had not been an issue before that date (Tr. 60). He described respondent as having a small, portable cassette player device at her desk that she used to play music (Tr. 55-56). When he approached her and asked about the music, she asked him "what are you talking about" (Tr. 21). According to Pocchia, this was consistent with other instances when, in response to his questions about her behavior, respondent asked "what are you talking about" and contended that people were against her and were not treating her fairly (Tr. 17, 21, 47, 55).

Similarly, Shmayenik testified that on April 23, 2018, she went to respondent's cubicle to speak to her after receiving complaints from several caseworkers that respondent was playing music and singing along so loudly that it interfered with their work. Respondent told Shmayenik that she did not know what Shmayenik was talking about (Tr. 115-16). Shmayenik further testified that respondent said that it is not her problem if others do not like her singing and she got up and left her cubicle (Tr. 116).

On April 25, 2018, Shmayenik observed respondent seated near her desk with neither of the computer monitors on her desk in use. According to Shmayenik, respondent sang along to music that was playing on a personal music player, refused to follow Shmayenik's instructions, and continued to play her music (Tr. 119-20). Pocchia again approached respondent to discuss her playing music, but she got up and left her workstation. Pocchia followed respondent, who had taken her radio with her, as she walked to a pantry and "sat there with the music blasting . . . looking forward with a blank face" (Tr. 21-22, 58).

That day, Pocchia requested that respondent undergo an evaluation pursuant to Section 72 of the Civil Service Law (Tr. 18-19; Pet. Ex. 1). He testified that at the time of his request, respondent was not "functioning at all" in her job: she was being assigned one case to complete each day, yet she failed to resolve the case correctly (Tr. 19-20). In addition, respondent continued to spray a noxious substance that caused Pocchia to experience a "burning sensation" whenever he went near her (Tr. 22-23). She also walked around the floor, ignored her supervisors' instructions, and hoarded garbage on her desk (Tr. 21). Pocchia testified that he did not view respondent's actions as intentional misconduct, which is why he requested the evaluation pursuant to Section 72 (Tr. 23).

Along with his request for an evaluation on April 25, Pocchia asked that respondent be placed on a leave immediately because staff members were "very concerned" about respondent's behavior, which he described as "sitting there with a glazed look, playing music . . . singing in a loud voice . . . ignoring [him]" (Tr. 23, Pet. Ex. 1). Respondent was placed on an involuntary leave of absence under Section 72 on April 26, 2018 (ALJ Ex. 1).

May 21, 2018 Psychiatric Evaluation

On May 21, 2018, Dr. Brass, a board certified psychiatrist, examined respondent at petitioner's request and issued a report summarizing her findings. She concluded that respondent was unfit to return to work (Tr. 247; Pet. Ex. 12).

Dr. Brass testified that she has been working as a practicing psychiatrist since 2001 (Tr. 235). She specializes in the treatment of eating disorders, specifically the mood and anxiety components that accompany the illness (Tr. 237-38). On cross-examination, Dr. Brass acknowledged that she is unfamiliar with the term "Section 72" and that she primarily performs independent medical evaluations in workers' compensation matters (Tr. 257-58). Dr. Brass was

qualified at the hearing as an expert in the field of psychiatry over respondent's objection (Tr. 235-38).

Dr. Brass testified that before meeting with respondent, she reviewed records provided by petitioner (Tr. 241). While she did not recall how long her examination of respondent lasted, she spends an average of about 20 minutes conducting an independent medical examination (Tr. 259).

In her written report, Dr. Brass described respondent as "cooperative and polite" with "good eye contact" and noted that "she relates well to the examiner's questions" (Pet. Ex. 12). Further, she described respondent as "oriented to person, place, time and situation" and noted "[t]here is no evidence of delusions, hallucinations, or a thought disorder" (Pet. Ex. 12). Dr. Brass wrote that respondent displayed a "labile affect (she will be tearful one moment then animated the next talking about Jesus)" during the examination (Pet. Ex. 12). In her testimony, Dr. Brass explained that mood lability means a wide variation in mood from one moment to the next (Tr. 244, 267). Her mood was described as "euthymic," which Dr. Brass testified means average or neutral (Tr. 267-68). Dr. Brass noted respondent's "unimpaired" attention and her "good" concentration, computational ability, general fund of knowledge, and abstract ability (Pet. Ex. 12).

Dr. Brass concluded, however, that respondent's "judgment and insight are poor" and that she "seems to have no understanding of the current situation" (Pet. Ex. 12). She testified that this conclusion was based on respondent's inability to engage in any meaningful conversation with Dr. Brass about why respondent's supervisors felt that she was unfit. Dr. Brass explained "insight" as one's "understanding about a situation you're in" and maintained that respondent did not seem to understand what was going on or why she was at the examination (Tr. 243). As a basis for her conclusion that respondent displayed poor judgment, Dr. Brass testified that people who are fighting for their jobs are "really wanting to present their case . . . give their side of the story and that didn't seem to be happening here" (Tr. 243-44).

Furthermore, Dr. Brass testified that respondent had a "lack of awareness" as to the severity of the situation. Specifically, Dr. Brass described respondent as

> being tearful and then otherwise being, you know, relatively calm, not like, oh my god, it – my – they're trying to get me to not have my job anymore. That's what I would typically expect from, from somebody who's maybe gonna lose their job.

(Tr. 246).

Dr. Brass described respondent as not appearing "to really have an understanding of what [they] were talking about" during the examination (Tr. 241). She noted that respondent said she just wanted to do her job, but others were not permitting her to do so and that her supervisors or people she was working with were against her and making it hard for her to do her job (Tr. 241-42).

According to Dr. Brass, respondent made several references throughout the examination "about her religious beliefs and just wanting to, you know, pray to God and read the Bible" that were not relevant to their discussion (Tr. 242). Dr. Brass testified that respondent's statements about prayer and God came "out of nowhere" and were not in response to the questions Dr. Brass asked. As an example, Dr. Brass testified that when she asked respondent why she thought her supervisors made certain statements, respondent stated that she just wanted to pray or she believed in Jesus (Tr. 245).

Under "DSM-V Diagnosis/Impression," Dr. Brass wrote "Rule Out Delusional Disorder, Persecutory Type" (Pet. Ex. 12). According to Dr. Brass, delusions are a fixed belief, and delusions of persecution are thoughts that people are out to get you. These beliefs of persecution are described as fixed because they are not fleeting thoughts, but persist (Tr. 248). Dr. Brass testified that she did not make a conclusive diagnosis because she had only seen respondent once and therefore had not seen a pattern of behaviors and thoughts for a period of time (Tr. 247-48).

Even without a diagnosis, however, Dr. Brass concluded that respondent was unfit to return to work. She concluded that respondent was unable to perform the essential functions of her job and recommended a "comprehensive medical work up to rule out organic causes of bizarre behavior and lack of insight into current situation" (Pet. Ex. 12). Those organic causes could include dementia and Alzheimer's disease. Dr. Brass testified that she characterized respondent's behavior as "bizarre" because of how respondent related to her during the examination and how she responded to questions (Pet. Ex. 12; Tr. 247, 262, 271).

After the Emergency Leave of Absence

It is unclear from the record the circumstances under which respondent returned to work from the emergency leave of absence. Nonetheless, she returned on May 29, 2018, following a 30-day absence.[2]

[2] In an e-mail to this tribunal, dated January 29, 2019, petitioner's counsel represented that respondent returned to work on May 29, 2018, after being placed on a 30-day involuntary leave of absence pursuant to Section 72. Respondent's e-mail is incorporated into the record as ALJ Exhibit 2.

After respondent returned from the involuntary leave, Jean-Louis only assigned one case to respondent because she had to correct errors respondent made on her assigned cases. Other caseworkers handle about 20 cases per day. Yet, even with such a minimal case load, respondent's performance has been "marginal" and Jean-Louis has had to review and correct respondent's work "almost all the time" (Tr. 196-97, 218, 226). As an example, Jean-Louis stated that respondent was assigned a case where a noncustodial parent with two employers requested that wages no longer be garnished from one of the employers. Instead of terminating the income withholding from one employer, respondent terminated the entire case, which would have resulted in no income being withheld from either employer. Jean-Louis had to correct the error (Tr. 197-99; Pet. Ex. 5).

After respondent returned from the involuntary leave of absence, she continued to refuse to undergo the mandatory security training. In July 2018, when respondent remained the only employee out of a 35-person unit who had not completed the training, an employee from the unit's information technology department attempted to help her do so (Tr. 32). Jean-Louis printed out the forms that respondent was required to sign after she completed the training, but respondent refused to sign them. According to Jean-Louis, respondent is familiar with the documents because she has had to undergo the same process for the security training since 2010 (Tr. 194).

Similarly, Pocchia testified that in August 2018, he showed respondent the required forms, explained the importance of signing them, and told her that they must be signed every year. However, respondent refused to sign the forms, telling Pocchia that she had already done so (Tr. 32-33). As of the trial, respondent had not signed the required forms; however, New York State, which controls the databases, has not yet denied respondent access to the database. Were that to happen, respondent would be unable to work as a caseworker in the unit (Pocchia: Tr. 33, 81; Jean-Louis: Tr. 195).

Respondent has also persisted in using handwritten activity sheets despite being told to use the computerized spreadsheet. Caseworkers enter notes about their work on cases in both the ASSETS and CMTS databases (Tr. 199). They must also complete a daily activity sheet, in the form of an Excel spreadsheet that reflects their work on a particular case (Tr. 184, 200, 203, 210). Although handwritten activity sheets exist, Jean-Louis has never used them and since she has been in the unit, none of her staff have used them (Tr. 201). Respondent, however, has been

using hand-written activity sheets, despite Jean-Louis sending her the Excel spreadsheet and telling her she must complete the activity sheet on her computer (Tr. 203). Jean-Louis testified that although respondent is capable of making notes in the ASSETS database, she handwrites much of her case notes, which the unit cannot use (Tr. 188).

Petitioner produced handwritten and computer-generated activity sheets that respondent submitted to Jean-Louis between July 2018 and October 2018 (Pet. Ex. 11). Jean-Louis testified that the documents show that respondent entered information on an activity sheet as handwritten notes instead of making her entries on the computerized spreadsheet (Tr. 205-06). Jean-Louis described respondent's handwritten notes as "jumbled" and unrelated to the columns on the spreadsheet, which respondent submits with the handwritten sheets (Tr. 206). Furthermore, although respondent entered the list of cases on her handwritten sheets, she did not indicate what action she took on each case (Tr. 213).

October 3, 2018, Psychiatric Evaluation

Dr. Brass re-evaluated respondent for her fitness for duty on October 3, 2018, and issued a second report finding respondent unfit (Pet. Ex. 13).

During this examination, which lasted about 35 minutes, respondent provided Dr. Brass with "a stack of papers" with writing that Dr. Brass described as "rambling" and "disorganized" that seemed to concern "grievances" that respondent had with issues at her workplace (Tr. 250, 259-60).

In her report, Dr. Brass described respondent's affect as "labile" and her mood as "irritable" (Pet. Ex. 13). She acknowledged that someone who is sent for a medical examination might be irritable (Tr. 269). Dr. Brass described respondent's thoughts as "circumstantial and tangential" during the October examination (Pet. Ex. 13). She testified that "tangential" referred going "off on a tangent" and not answering a question, while "circumstantial" referred to going through "a lot of different statements and conversations" before coming back and answering the question asked (Tr. 270).

Dr. Brass noted that respondent "reported persecutory delusions" and included in the "History" section of the report is a notation that respondent stated "her supervisor and director 'are in cahoots with one another and have not been giving [her] work.'" She noted that respondent stated "I serve God, go to church, read my Bible" (Pet. Ex. 13). Dr. Brass testified that respondent told her "supervisors at work [were] out to get her, in terms of not giving her

work" (Tr. 252, 278). Dr. Brass diagnosed respondent as suffering from delusional disorder (Pet. Ex. 13). She noted that respondent has "an unclear psychiatric diagnosis" and recommended that she undergo a full neurological workup and that "[s]he should not return to work until this has been done" because respondent's symptoms could be caused by a neurological condition (Pet. Ex. 13; Tr. 261).

Behavior since the October 2018 Evaluation

According to respondent's supervisors, she continued to engage in odd and disruptive behavior in October 2018. Shmayenik testified that on October 12, 2018, after receiving reports that respondent was asleep at her desk, she went to respondent's cubicle and saw respondent asleep. Staff members also reported that respondent had been doing so periodically over the prior months (Tr. 136). Shmayenik took a photograph of respondent, then knocked on the cubicle and asked her why she was sleeping on duty. Respondent started "yelling" at Shmayenik and said that she did not know what Shmayenik was talking about (Tr. 135-37; Pet. Ex. 6).

That same day, Shmayenik observed that respondent's cubicle was "a real mess," with empty food containers, used napkins, old newspapers, and magazines (Tr. 137). She took a photograph of respondent's cubicle. That photograph shows a partially cluttered desk area with what appears to be three food containers, two bottles in front of what looks like a pile of newspapers, as well as papers pinned to the wall of the cubicle. There are several plastic bags that appear full on the desk area. The area on the desk directly in front of the computer monitor and keyboard are free of clutter (Tr. 137-39; Pet. Ex. 7).

In an e-mail, dated October 17, 2018, Shmayenik wrote that after a floor meeting the prior day, she had received numerous complaints about a "suspicious odor" emanating from respondent that made it almost impossible to be near her (Pet. Ex. 3). Shmayenik testified that respondent attended a monthly staff meeting and sat on the floor even though there were available chairs in the room and Shmayenik asked her to sit in a chair. According to Shmayenik, some staff members who sat near respondent during the meeting reported to Shmayenik that a strong odor of chemicals came from respondent, making it almost impossible to sit near her in the meeting as they could not breathe and were coughing (Tr. 94-96, 164; Pet. Ex. 3).

Respondent's Testimony

Respondent did not submit any medical evidence in support of her claim of fitness, relying solely on her own testimony.

Regarding the claim that she sprayed a noxious substance at the work place in January 2018, respondent was initially reluctant to answer questions concerning her actions. However, she eventually testified that she sprayed perfume on herself in January 2018. She described the perfume as "a baby powdered scent" that was "not loud" (Tr. 300-06).

As for her work performance in January 2018, respondent maintained that she was working on eight or nine cases per day and "was doing a fine job" (Tr. 314, 318).

Respondent took issue with how Shmayenik treated her during their meeting on January 18, 2018. According to respondent, Shmayenik was "hostile" and "condescending" towards her throughout the meeting, while Jean-Louis "talked professionally" (Tr. 315, 321). Respondent testified that she felt uncomfortable and "devalue[d]" during the meeting, and probably raised her voice at Shmayenik as a result (Tr. 321-22). When asked about Shmayenik's effort to give her information about the employee assistance program in January 2018, respondent stated that she did not understand why she was being singled out and labeled by her supervisors (Tr. 313).

Respondent maintained that from February to April 2018, her supervisors did not assign work to her, nor did they give her any written indication that her work was unsatisfactory (Tr. 288-89). She described her supervisors as unresponsive to her requests for help (Tr. 342). For example, she testified that when she asked Shmayenik for help in finding her assigned work on CMTS on April 23, 2018, Shmayenik refused to do so, telling respondent that she had already been trained (Tr. 294-95, 343-44, 347-48).

After respondent returned from the involuntary leave of absence in May 2018, her supervisor started assigning work to her. Respondent believes that she has performed the assigned work to the best of her ability, noting that when she asked for guidance, her supervisors ignored her requests. Moreover, respondent testified that in July 2018, someone in the unit agreed to help her, but later said that Shmayenik told him not to do so (Tr. 289-90, 295-96). Respondent described Shmayenik as "hostile," "unkind," and "rude" towards her (Tr. 290, 315).

Respondent did not deny engaging in much of the behavior set forth in the Attachment A and described by her supervisors in their testimony, but offered explanations for much of her conduct. For example, respondent acknowledged that she left her cubicle throughout the day, but claimed that she did so to use the bathroom, get water or tea, and make copies (Tr. 323). With regard to the claim that she left her desk every eight to 10 minutes, respondent stated that

she did not time herself (Tr. 325). She explained that the floor on which she works is "huge" and that it takes a while to get to the pantry and bathroom from her cubicle (Tr. 325-26).

Respondent did not dispute that she read materials unrelated to her duties during the work day, including magazines, books, and the Bible. She explained that because she was assigned only one case per day, she had nothing else to do when she completed work on that case. She also admitted that she slept at her desk during work hours, but maintained that it was because she was sick and the cold air from the air conditioner sedates her (Tr. 327-29).

As for the assertion that she collects used food containers at her workstation, respondent testified that she washes out used containers and keeps them at her desk, along with "recycled stuff." Respondent maintained that she cleans her desk every day (Tr. 330).

Respondent admitted that she sang at her cubicle and, with obvious reluctance, also admitted that she brought a small music player to work in April 2018. However, she maintained that she used headphones and kept the volume low so others would not hear (Tr. 335-39). Respondent acknowledged that she was singing at her desk on April 23, 2018, when Shmayenik told her to stop doing so (Tr. 339-40). As for her conduct on April 25, the day before she was placed on an involuntary leave of absence, respondent testified that she may have been singing, but did not believe that she was disturbing anyone because nobody complained to her (Tr. 346).

There are aspects of respondent's testimony that were not believable or made little sense. For instance, she insisted that she completed the online security training that is required for her to access confidential databases in 2018, as well as in prior years (Tr. 331-35). She said she gave the signed certificate to Jean-Louis sometime this year, but could not recall when (Tr. 333). However, Pocchia and Jean-Louis credibly testified that respondent has failed to submit the forms for 2018, despite repeatedly being urged to do so (Pocchia: Tr. 33, 81; Jean-Louis: Tr. 195). With respect to her failure to turn on her computer during the training, respondent testified that something could have been wrong with her computer. However, she acknowledged that she did not report any malfunction during the training (Tr. 342).

Similarly, respondent testified that she has continued to use the handwritten activity sheet because that is what she used in the past. She is the only one in her unit who continues to use the handwritten activity sheet instead of the computerized spreadsheet (Tr. 355). She testified that although her supervisor asked her to use the spreadsheet, there were sometimes problems with the computer that prevented her from accessing the spreadsheet (Tr. 355-57). Respondent tried

to explain why she did not use the spreadsheet exclusively, but was unable to offer a coherent reason (Tr. 357-61).

Respondent acknowledged that with the introduction of CMTS, "it's been a challenge" for her to do her work (Tr. 363-64). She explained that her supervisors have become more exacting in their expectations as to how they want her to do the work (Tr. 364). However, she maintains that she has been doing the work assigned to her to the best of her ability (Tr. 289). Respondent acknowledged that her supervisor has corrected her work, but disputed that all her work required correction (Tr. 365).

Fitness Under Section 72

Pursuant to Section 72 of the Civil Service Law, "the burden of proving mental or physical unfitness shall be upon the person alleging it." N.Y. Civ. Serv. Law § 72(1) (Lexis 2019). To satisfy its burden, petitioner must prove, by a preponderance of the evidence that: (i) the employee suffers from a disability, (ii) she is unable to competently perform her job duties, and (iii) her inability to perform is caused by her disability. *Human Resources Admin. v. M.O.*, OATH Index No. 173/15 at 12 (Nov. 21, 2014); *Admin. for Children's Services v. Papa*, OATH Index No. 1392/07 at 10 (Mar. 30, 2007).

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" and "[p]ast performance is relevant only to the extent that it is probative of respondent's present condition and future conduct." *Dep't of Environmental Protection v. Anonymous*, OATH Index No. 2443/14 at 10 (Aug. 20, 2014) (citing *Admin. for Children's Services v. J. M.*, OATH 3350/09 at 4; *Housing Auth. v. Dave*, OATH Index No. 138/95 at 5 (Aug. 12, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 95-72-4 (Oct. 11, 1995)).

In a disability proceeding, while the opinions of medical experts can inform and aid the fact finder in reaching the proper conclusion, the fact finder is not required to accept the opinions or conclusions of any given expert, but must weigh the evidence in the record and draw his or her own 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). Weighing the evidence and resolving issues of credibility "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"). An expert's testimony is "merely part of the proof to be considered by the trier of fact" and "[t]he court may reject an expert's opinion it if finds the facts to be different from those which form the basis for the opinion . . . [and] if after careful consideration of all the evidence in the case, expert or other, it disagrees with the opinion." *Heller v. Murray*, 112 Misc. 2d 745, 749-50 (N.Y. Civ. Ct. Queens Co. 1981).

Here, petitioner's medical evidence was unrebutted. Nonetheless, on its face, petitioner's evidence suffers from notable weaknesses. Most important, it lacks detailed articulation of the facts that form the basis for Dr. Brass's conclusion that respondent suffers from a mental illness, delusional disorder, that renders her unfit to perform her duties.

The May 2018 report fails to provide a diagnosis; instead, it recommends that delusional disorder be ruled out as a diagnosis. The report consists of three pages, one of which is Dr. Brass's attestation and signature. It includes few facts about the behavior observed in the examination that gave rise to the impression that respondent was unfit to perform her duties. The brevity of the report is consistent with Dr. Brass's testimony that the examination itself probably lasted about 20 minutes. Given the potentially grave consequences of finding an employee unfit to perform his or her duties pursuant to Section 72, it is critical that the medical professional conducting the examination undertake a thorough examination of the employee or explain why such an examination was not conducted. It is also critical that the report provide a basis from which to conclude that the employee suffers from a disability and that the disability makes her unfit to work. This report does not.

Oddly, the October 2018 report includes under patient history an almost verbatim recitation of what was contained in the May 2018 report, including quoted material attributed to respondent (Tr. 263-64; Pet. Exs. 12, 13). There is no detailed description to any specific assessment tools used to evaluate respondent that led to the diagnosis of delusional disorder. Instead, Dr. Brass summarized her examination of respondent as follows:

> The claimant is a 56-year old well-groomed female of average build, who appears well-rested and her stated age. She ambulates without assistance in no obvious pain discomfort or distress and is dressed neatly in casual clothing. The claimant is indifferent/apathetic with average social skills, poor eye contact,

> and appears to be of average intellect. Her thoughts are circumstantial and tangential and her speech flow is normal.
>
> The claimant is oriented to person, place, time and situation. There is no evidence of hallucinations or a thought disorder, but the claimant reports persecutory delusions. Recent and remote memories are good. She displays a labile affect and her mood is irritable. Concentration is good and attention is unimpaired. Computational ability is good. General fund of knowledge and abstract ability are good. There is no evidence of suicidal or homicidal ideation. Her judgment and insight are poor.

(Pet. Ex. 13). Under the heading "DSM-V Diagnosis/Impression" Dr. Brass wrote "Delusional Disorder" (Pet. Ex. 13). Interestingly, in her testimony Dr. Brass defined "delusions" without reference to the falsity of the beliefs and their failure to respond to logic or contradictory facts (Tr. 248, 265). By contrast, lay and expert definitions include such references. *See. e.g. Housing Auth. v. Anonymous*, OATH Index No. 1865/18 at 7 (May 3, 2018), *rejected*, Auth. Dec. (May 16, 2018) (testifying expert defined "delusional disorder" as a "fixed false belief that does not respond to logic"); *Dep't of Parks & Recreation v. Anonymous*, OATH Index No. 858/16 at 7 (Apr. 12, 2016) ("delusions place a patient in a fixed false belief that does not respond to logic"); Psychology Today (Online ed. Feb. 5, 2019) ("Delusions are fixed beliefs that do not change, even when a person is presented with conflicting evidence"); Merriam-Webster Dictionary (Online ed. Feb. 8, 2019) (defining delusion as "something that is falsely or delusively believed or propagated; psychology: a persistent false psychotic belief regarding the self or persons or objects outside the self that is maintained despite indisputable evidence to the contrary").

When asked to identify the "persecutory delusions" that she attributed to respondent, Dr. Brass identified "delusions with regard to feeling like the supervisors were trying to get her," complaints they were "out to get her, in terms of not giving her work," and statements that they were "in cahoots with one another . . . not giving [her] work" (Tr. 252, 278; Pet. Ex. 13). Yet, petitioner's evidence establishes that respondent's supervisors had in fact reduced or eliminated her workload during much of 2018. It would appear that respondent's belief that her supervisors were acting together to deprive her of work is based in fact. It is unclear whether Dr. Brass was privy to this information when she evaluated respondent and whether it would have influenced her assessment.

Thus, although Dr. Brass diagnosed respondent as suffering from a delusional disorder because respondent believed that her supervisors were targeting her by withholding work, the lack of a clearly articulated basis for that diagnosis, coupled with evidence that respondent's supervisors were in fact not giving her work, makes that diagnosis unreliable.

Even if petitioner's evidence satisfies the first prong of its burden, however, it failed to establish a causal connection between the diagnosed delusional disorder and respondent's inability to perform her job.

The fact that an employee may have a psychiatric disorder does not establish that she is unable to perform the duties of her position. *See Dep't of Transportation v. Anonymous*, OATH Index No. 1750/18 at 10 (Apr. 16, 2018); *Comm'n on Human Rights v. Henderson*, OATH Index No. 704/01 at 22-23 (June 12, 2001) (although petitioner established that the employee suffered from a mental disability, delusional disorder, persecutory type, it failed to establish a causal connection between the disability and respondent's inability to perform her job). In that regard, it is significant that Dr. Brass acknowledged that people with a delusional disorder can function in daily life without the delusion impacting their day-to-day interactions (Tr. 271). Given such a possibility, Dr. Brass's failure to set forth the reasons for her conclusion that respondent suffers from a delusional disorder that renders her unfit to perform her duties is all the more puzzling.

Petitioner bears the burden of proving that respondent is unable to perform her duties at "a minimally acceptable level" because she suffers from a disability that prevents her from doing so "presently and for the reasonably foreseeable future." *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). Thus, petitioner must show nexus between respondent's mental illness and her unfitness. *Dep't of Environmental Protection v. Anonymous*, OATH 2443/14 at 12. 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) *citing Dep't of Housing Preservation and Development v. Natal*, OATH Index No. 1185/90 at 11 (Mar. 22, 1991).

Although Dr. Brass was provided with a copy of respondent's job description (Tr. 256; Pet. Exs. 12, 13), neither her testimony nor her reports make reference to specific aspects of respondent's duties that she is unable to perform because of the diagnosed delusional disorder.

This is unlike *Department of Transportation v. Anonymous*, where Judge Casey concluded that petitioner demonstrated a nexus between the employee's delusional disorder and job performance. *Dep't of Transportation v. Anonymous*, OATH Index No. 480/17 at 7-8 (Dec. 27, 2016). In that case, the evidence established that the employee's delusions, which interfered with his cognitive ability, made it difficult for him to complete assignments due to petty quibbling and questionable ability to exercise independent judgment, which is a requirement of his job as a city planner.

On the record here, although there is compelling evidence that respondent is presently unable or unwilling to perform her job, petitioner failed to establish that her poor performance is a result of the diagnosed delusional disorder.

Shmayenik testified that respondent's current functioning at her job is "absolutely not acceptable" (Tr. 130). She explained that respondent continues to leave her cubicle every eight to 10 minutes and goes to different areas on the floor and that respondent is not performing the work of a caseworker because every case she does has to be checked and corrected (Tr. 139-41). According to Jean-Louis, given the "meticulous" nature of the respondent's duties as a caseworker, which requires that the caseworkers exercise great care to investigate and analyze issues, she does not believe that respondent is capable of performing her duties (Tr. 207-08). Similarly, Pocchia testified that respondent is not presently functioning in her job (Tr. 234).

Respondent, on the other hand, testified that she is currently working on a project where she closes out cases where there is no need to withhold income from an employee, that she uses the computer to access her assigned work, that she works independently then meets with her supervisor to review her work, and that her supervisor has been satisfied with her work. According to respondent, during the workday preceding her testimony, she reviewed two cases and did a good job (Tr. 286-88, 291-93, 362-63).

The supervisors' assessment is more believable. Jean-Louis, respondent's direct supervisor, was especially persuasive. Jean-Louis gave respondent a "good" rating on her last performance evaluation in 2017 (Tr. 221-22). She seemed to harbor no animosity towards respondent and appears sympathetic to respondent's plight. She credibly described having tried to help respondent by reviewing her work and giving her feedback. Yet, even though she is assigned fewer and simpler cases, respondent continues to make mistakes and Jean-Louis has to

correct respondent's work "almost all the time" (Tr. 197). Respondent's habit of frequently leaving her cubicle to walk around the floor has undoubtedly affected her ability to do her work.

Nonetheless, petitioner's evidence did not establish that respondent's errors in handling cases, minimal work output, and walking around the floor are the direct result of the diagnosed delusional disorder. Indeed, respondent's inability to perform her duties could be attributed to misconduct or incompetence, rather than unfitness due to a mental disability. *See Dep't of Consumer Affairs v. Yampolsky*, OATH Index No. 2269/10 at 30 (Aug. 12, 2010) (to establish misconduct the employer must show fault on the part of the employee through willful or intentional conduct; to establish incompetence, the employer must to prove that respondent is unable to meet the minimally acceptable threshold requirements of the duties of her title). There is ample evidence, for example, that respondent struggled to adapt to computerized systems and that she has found her work challenging with the advent of CMTS (Tr. 363-64), which may account for her inability to do her job.

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

Petitioner also highlights several incidents where it asserts that respondent caused disruption in the workplace as a basis for finding her unfit. Respondent sprayed a substance she identified as perfume at work in January and April 2018. Additionally, in October 2018 some of her coworkers detected a strong, unpleasant odor emanating from respondent. Petitioner offered no evidence to dispute respondent's explanation that the odor is her perfume. That others found respondent's choice of fragrance less than appealing is no reason to conclude that respondent is unfit. It is noteworthy that when asked about the clinical significance of respondent spraying a substance in the workplace, Dr. Brass stated that such behavior did not indicate delusion or persecutory delusion (Tr. 255-56). She noted that respondent's failure to acknowledge her conduct when asked about it shows a lack of insight and poor judgment. However, Dr. Brass did not testify, nor was there any evidence, that lack of insight and judgment in and of itself constitutes a disability.

Similarly, the evidence shows that on two dates April 2018, respondent sang and played her radio loud in the workplace. These limited episodes do not establish that respondent has disrupted the workplace to a degree that renders her unfit. *See Dep't of Transportation v. M.S.*, OATH Index No. 2524/17 at 17 (Feb. 2, 2018) (respondent's singing in the office, along with an isolated outburst at a meeting and a complaint about how he drove a vehicle did not establish a basis for finding him unfit).

Moreover, petitioner did not demonstrate that much of the behavior complained about, spraying a substance at the work place and loudly playing music and singing, have continued to be a feature of respondent's workday. According to Pocchia, respondent's radio playing has not been an issue since she returned to work in May 2018 after she had been placed on an involuntary emergency leave (Tr. 60-61).

As for allegations regarding respondent's lateness and absences, petitioner offered no evidence to connect them to a mental illness. *Comm'n on Human Rights v. Henderson*, OATH 704/01 at 23 (respondent's latenesses, while serious and disciplinable under Section 75 of the Civil Service Law, do not form the basis for leave under Section 72 where petitioner did not establish that they are related to respondent's disability). Finally, although petitioner established that respondent's desk is cluttered and unsightly, it failed to offer any evidence that the condition of her desk is due to a medical disability that prevents her from doing her work.

As for her demeanor at the three-day trial, respondent appeared engaged in the proceeding and remained calm throughout her testimony. She was largely responsive to the questions, although she appeared flustered on cross-examination and was reluctant to answer questions about the substance she sprayed on herself at the office and about playing music at her desk. Overall, respondent appeared alert, attentive, and even-tempered throughout the proceeding.

In sum, petitioner has failed to satisfy its burden of proving by a preponderance of the credible evidence that respondent is unfit to perform the duties of her position because of a mental disability.

Pre-Hearing Suspension

Having placed respondent on emergency leave prior to the trial, petitioner must further establish that the standard for such leave under Section 72 was met. *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). Here, the emergency leave standard was not met.

Section 72 permits involuntary leave prior to a hearing only in emergency situations where the agency has "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." Civ. Serv. Law § 72(5). Emergency leave is an "extraordinary measure," due in part to the financial hardship to the employee because there is no limit to the length of such leave. *Teachers' Retirement System v. Barrett*, OATH Index No. 1210/99 at 3 (Sept. 22, 1999); *see also Admin. for Children's Services v. 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).

Petitioner did not demonstrate that the agency had probable cause to believe that respondent was dangerous or that her presence in the workplace would "severely interfere with operations." In the two days preceding imposition of the involuntary leave, respondent was observed playing her radio loudly at her desk, singing aloud, having a glazed look on her face, spraying herself with a substance that some coworkers found to be noxious, and leaving her cubicle every eight to 10 minutes. Pocchia testified that the staff became "very concerned" about respondent's behavior (Tr. 23; Pet. Ex. 1). Also given as justification for the emergency leave were claims that respondent refused to review assigned cases, ignored her supervisor's instructions, and kept clutter at her desk (Pet. Ex. 1). However, such behavior is insufficient to establish that respondent posed a danger. *See Housing Auth. v. V.M.*, OATH 1014/07 at 7 ("Odd behavior and attendance problems . . . do not prove that an employee poses a 'danger' or would 'substantially interfere' with an agency's operations"); *Admin. for Children's Services v. Ogunka*, OATH Index No. 147/07 at 11-12 (Oct. 30, 2006) (bizarre, strange, and loud remarks did not establish that "extraordinary" pre-hearing suspension was necessary).

The evidence also did not demonstrate that respondent's behavior would "severely interfere" with the unit's operations. Petitioner presented no evidence that her conduct in April 2018 caused any significant disruption to the unit's functioning sufficient to warrant that she be placed on an involuntary leave.

In sum, petitioner lacked probable cause to believe that an emergency leave was warranted between April 26, 2018, and May 29, 2018, and respondent is entitled to restoration of any salary lost or leave balances used during that period.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to meet its burden of proving that respondent has a disability that has renders her unfit to perform her duties as a caseworker.

2. Petitioner failed to establish that there was probable cause to place respondent on an emergency pre-hearing involuntary leave of absence.

RECOMMENDATION

I find that petitioner has failed to establish that respondent is presently unfit to perform the duties of her position and that the emergency pre-hearing involuntary leave of absence was warranted. I recommend that the petition be dismissed, and that respondent be restored any salary lost or leave balances used during the period of her pre-trial emergency leave.

Astrid B. Gloade
Administrative Law Judge

February 13, 2019

SUBMITTED TO:

STEVEN BANKS
Commissioner

APPEARANCES:

EMILY TONE HILL, ESQ.
Attorney for Petitioner

KREISBERG & MAITLAND, LLP
Attorney for the Respondent
BY: JEAN O'HEARN, ESQ.