Police Dep't v. J.W.

OATH Index No. 1168/21 (May 28, 2021), *adopted*, Comm'r Dec. (June 7, 2021), **appended**

Respondent's motion to dismiss based on procedural challenges is denied. Petitioner proved that respondent is presently unfit to perform the duties of a traffic enforcement agent. Leave of absence under section 72 of the Civil Service Law recommended.

NYPD Commissioner adopted ALJ's recommendation to place respondent on a leave of absence but indicated that the imposition of this leave of absence would be held in abeyance pending respondent's application for a change in title to the position of Clerical Associate.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND TRIALS

In the Matter of
POLICE DEPARTMENT
Petitioner
- against -
J.W.
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

Petitioner, the Police Department, brought this proceeding under section 72 of the Civil Service Law, alleging that respondent is unfit to perform the duties of her job as a traffic enforcement agent. As a result, petitioner seeks to place respondent on an involuntary leave of absence. Respondent objects to being placed on an involuntary leave of absence and seeks to remain in the temporary administrative job to which she has been assigned (ALJ Ex. 1).

The matter was scheduled for a pre-trial conference on January 7, 2021, which was adjourned at respondent's request. Conferences were held on January 22 and February 8. On each occasion, respondent waived her right to a trial within 30 days. After the second conference, a trial was scheduled before me on April 22, 2021.

At the trial, petitioner relied on documentary evidence and the testimony of the Department's doctor, Dr. David Lichtenstein and Associate Traffic Enforcement Agent Jennifer

Latty. Respondent declined to testify, but instead, challenged the petition on procedural grounds and sought its dismissal. Following the receipt of post-trial submissions, the record closed on May 21, 2021. Respondent's name is being withheld from publication to protect her privacy because this report discusses her medical condition. *See* 48 RCNY § 1-49(d) (Lexis 2021); *Police Dep't v. A.A.*, OATH Index No. 2183/14 at 1 (June 30, 2015); *Admin. for Children's Services v. Anonymous*, OATH Index No. 212/12 at 1 (Dec. 15, 2011).

For the following reasons, respondent's motion to dismiss is denied. I find that respondent is presently unfit to perform the duties of her position and recommend that she be placed on an involuntary leave of absence pursuant to section 72 of the New York State Civil Service Law ("CSL").

ANALYSIS

Respondent is a level II Traffic Enforcement Agent ("TEA") whose job entails patrolling an assigned area to enforce traffic laws, rules and regulations, directing and controlling traffic, and maintaining the efficient and safe flow of vehicles and pedestrians (Pet. Ex. 1).

Pursuant to section 72 of the CSL, petitioner seeks to place respondent on an involuntary medical leave of absence on the basis of a physical disability, in this case, the inability to walk or stand for long periods of time. The statute provides that when an employer determines that "an employee is unable to perform the duties of his or her position by reason of a disability," the employer "may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction." In addition:

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

CSL § 72(1) (Lexis 2021). This "written notice of the facts providing the basis" for the employer's judgment is commonly referred to as Attachment A, and discloses to the employee, what is particularly concerning about the employee to the employer, that supports the employer's need to have the employee medically examined. It must also apprise the employee of his or her rights, which include objecting to the proposed leave and requesting a hearing. *Id.* Attachment

A is not an element to be proven at trial. *See Transit Auth. v. Smith*, OATH Index No. 1299/02 at 7 (Mar. 24, 2003). Following the examination, if the employee is found to be unfit to perform the duties of the job, the employee may be placed on an involuntary leave of absence. CSL § 72(1).

On November 9, 2020, petitioner's Medical Division performed a medical evaluation of respondent to determine her fitness for duty. On the same day, it deemed her unfit and proposed, by letter dated November 9, 2020, to place her on leave effective November 23, 2020. Respondent objected by letter dated November 10, 2020. Following her objection, petitioner, by referral dated November 24, 2020, sought a second medical evaluation of respondent's fitness for duty, which evaluation was performed on December 14, 2020 (Attachment A, Exs. 7-9).

On December 14, 2020, petitioner notified respondent that its Medical Division had determined that she was unfit to perform her duties as a level II TEA and proposed to place her on a leave of absence effective December 28, 2020, pursuant to section 72 of the CSL (Pet. Ex. 12). Respondent timely objected to the proposed leave and requested a hearing before this tribunal (Pet. Ex. 13). In her letter of objection, respondent stated that she is "willing to consider the change of title to continue working [her] current assignment."

Jennifer Latty is a level II TEA and has been with the Police Department for on or around 22 years. Ms. Latty has supervised as many as 60 TEAs during her career but has never supervised respondent. She testified generally that level II agents must be able to go into the field and issue summonses at least once per week, even if they are placed on administrative assignments. The only exception is if the agent has been granted a reasonable accommodation, which she understood to be the case with respondent (Tr. 14-18, 20).

It is uncontested that in 2016, respondent had soft tissue sarcoma surgery on her left and right calves. Letters from respondent's doctor in 2017 and 2018, support respondent's medical condition and allude to a reasonable accommodation (Pet. Exs. 5, 6).

Dr. David Lichtenstein has been the executive officer in charge of all the medical doctors in petitioner's Medical Division from November 2019. Among other things, he oversees fitness for duty evaluations for all civilian titles and has evaluated well over one thousand NYPD employees (Tr. 24-25). Employees may be referred for such evaluations in a number of ways. A member may disclose that he/she has a medical condition. An employee may also be referred by a supervisor inquiring into whether or not the employee is qualified medically for the position

and title held. Finally, a referral may come as a result of someone being out on leave pursuant to the Family Medical Leave Act ("FMLA"), where, because of the FMLA application, the worker appears not to be fit for his/her title (Tr. 26).

If a worker is deemed medically unfit and a second opinion is sought of Dr. Lichtenstein, he would conduct a "truncated" interview of the worker by asking if he/she is medically able to perform the full and unrestricted title requirements or if there is a reasonable expectation that the worker will be able to do so. If the answer is in the affirmative, the interview concludes, and the worker is returned to duty. If the worker answers otherwise and provides medical documentation, Dr. Lichtenstein would commemorate the worker's statement, review any medical data, and deem the worker to be medically unfit (Tr. 27-28).

According to Dr. Lichtenstein, at some point respondent had requested and been granted a reasonable accommodation. After a certain amount of time had elapsed, the police surgeon by whom respondent had been interviewed felt that she was no longer medically fit for her title and referred respondent to Dr. Lichtenstein for a second opinion (Tr. 26-27, 40-41). Petitioner provided documentation to show that on January 17, 2019, Dr. Reilly, one of petitioner's surgeons, conducted a Fitness for Duty evaluation of respondent[1] (Tr. 29-30). Under the section marked, "Reason for Request," was written "Request made duty (sic) due to pain, numbness, swelling – side effects from May 2016 cancer surgery. She cannot stand or walk for long periods of time. May not be able to go back into the field." Under "Clinical History and Findings," Dr. Reilly noted that respondent had soft tissue sarcoma surgery, right and left calf edema and left lower leg pain with standing. He further noted that respondent was not fit for her job title duties in her current condition (Tr. 29-30; Pet. Ex. 2).

Almost two years later, on or around November 9, 2020,[2] petitioner's doctors conducted another Fitness for Duty evaluation of respondent, which was made at the request of "Director Wanda Garcia" (Pet. Ex. 3). The evaluation was done on the same day that the request was made. Dr. Lichtenstein, who was identified on the form as the evaluating doctor, wrote that respondent's medical condition was unchanged and that she was not medically fit for her title

[1] Dr. Lichtenstein was unsure whether respondent had applied for a reasonable accommodation through petitioner's Equal Employment Opportunity office, which is the prelude for the worker being sent to a Department surgeon for a medical examination, but he assumed that she had done so (Tr. 42).

[2] Petitioner explained in its brief that even though respondent was initially evaluated by the Medical Division and found to be unfit, the Covid-19 Pandemic caused petitioner to cease follow-up medical evaluations and respondent's file was temporarily placed on hold. Pet. Brief at 2.

(Tr. 31-32, 44-45; Pet. Ex. 3). He testified that respondent provided documentation from her treating physician to support that she was being treated for a chronic condition and she told him that she did not feel that she was able to do full and unrestricted duty (Tr. 32-33, 46). Dr. Lichtenstein admitted that in reaching his conclusion that respondent was medically unfit, he spent less than three minutes with her, but disclosed that he had had access to the documentation from respondent's doctor regarding a reasonable accommodation for respondent (Tr. 38-40, 45). Petitioner presented a November 17, 2017 letter from respondent's doctor which described that respondent "has a history of lower extremity sarcoma, had resection and radiation . . ." and stated that "[s]he is cleared to return to work 4/1/17[3] with reasonable accommodations including starting with sedentary work that allows her to have sitting breaks from standing/walking" (Pet. Ex. 6). Petitioner also presented a January 2, 2018 letter from respondent's doctor in which she wrote that respondent "continues under my care for lower extremity swelling and pain resulting from a soft tissue sarcoma. She remains limited in being [able] to stand and walk for long periods (Pet. Ex. 5).

On December 14, 2020, Dr. Joseph Cioffo, the deputy chief of the Medical Division, conducted a Fitness for Duty evaluation of respondent and found her medically unfit for her title. Dr. Cioffo noted that respondent had a history of soft tissue sarcoma surgery and bilateral lower edema, as a result of which, she could not stand for long periods of time because of weakness in her legs" (Tr. 34-35; Pet. Ex. 4).

Standard

In a section 72 disability proceeding, petitioner must prove by a preponderance of the credible evidence that the employee suffers from a disability, that she is currently unable to competently perform her job duties, and that her inability to perform those duties is caused by her disability. *See* CSL § 72(1) (Lexis 2021); *Human Resources Admin. v. Anonymous*, OATH Index No. 1613/10 at 1 (Mar. 15, 2010); *Admin. for Children's Services v. Cleveland*, OATH Index No. 1116/08 at 1-2 (Feb. 20, 2008); *Police Dep't v. Cornick*, OATH Index No. 536/08 (Dec. 7, 2007); *Housing Auth. v. Barone*, OATH Index No. 1122/04 (May 23, 2005).

Respondent's Motion to Dismiss

[3] Given the date of the letter, it appears that the intended date of return was inaccurate and should have been 4/1/18.

Respondent advances two arguments for dismissal. First, it claims that petitioner failed to establish respondent's unfitness because its determination that she is unfit is not supported by substantial evidence. Resp. Brief at 2-3. The gravamen of respondent's second argument is that petitioner did not comply with statutory safeguards in that it did not provide respondent, DCAS or the Civil Service Commission ("CSC") with an Attachment A or any written notice of the basis on which it was proposing to place her on leave, prior to being examined by Dr. Reilly and Dr. Cioffo. Resp. Brief at 7-8. Respondent's second argument will be addressed first.

Compliance with Procedural Safeguards

As previously stated, section 72(1) provides that when an employer determines that an employee is unable to perform the duties of his or her position by reason of a disability, the employer must provide the employee with written notice of the facts, referred to as Attachment A, underlying its determination of unfitness before requiring "such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction." Respondent mistakenly mentions the CSC as a relevant body. However, in the City of New York, the "civil service department or commission having jurisdiction" which shall be provided with the Attachment A is the Department of Citywide Administrative Services ("DCAS"). Charter § 814 (Lexis 2021).

Notice to respondent

Petitioner posits that contrary to respondent's claim, it provided her with an Attachment A prior to a final medical evaluation which was conducted on December 14, 2020. It cites to its letter to respondent on November 9, 2020, in which petitioner advised, *inter alia*, that:

> On November 9, 2020, a determination was made by the Medical Division that you are unable to perform your duties as a Traffic Enforcement Agent II. This decision is further detailed in attachment "A." You are, therefore, advised that this Department has proposed to place you on a leave of absence as of November 23, 2020, pursuant to New York Civil Service Law Section 72.

Pet. Brief at 10. The document which was attached to the November 9, 2020 letter and which was captioned as "Attachment A," displayed the date, respondent's name and title and a partial social security number. It also contained three numbered paragraphs, the second of which stated as follows:

> 2. On November 9, 2020, an evaluation was conducted by the Medical Division. It was determined that TEA II [J.W.] was unfit to perform the duties of a Traffic Enforcement Agent II, at this time.

Petitioner's "Attachment A" document indicates that it was completed after respondent was evaluated on November 9, 2020 and not before, as the statute requires. However, petitioner took no action on that examination. Instead, it conducted a follow-up examination of respondent on December 14, 2020. On the same day, following respondent's second meeting with petitioner's doctor, petitioner advised respondent that it intended to place her on a leave of absence effective December 28, 2020. Its letter cited to "facts described in the enclosed 'Attachment A' and the report of the Deputy Chief, Medical Division." In seeking to establish that it complied with procedural safeguards by providing respondent with the Attachment A in advance of the December 14, 2020 examination, petitioner related back to the first Attachment A which it had prepared and served upon respondent one month earlier. Pet. Brief at 10. I found that while the Attachment A which respondent received in November 2020, would not have sufficed for the November evaluation, it sufficiently put respondent on advance notice of the need for the December 14, 2020 evaluation. Typically, the Attachment A includes the reason why the employer is directing the employee to a medical examination. The Attachment A here did not provide that information. However, I did not find that fatal to petitioner because its need to evaluate respondent was precipitated, in the first place, by respondent's application for continued reasonable accommodation.

Notice to DCAS

As to the claim that petitioner did not provide DCAS with a copy of the Attachment A, respondent relies heavily on *Department of Environmental Protection v. J.B.*, OATH Index No. 321/15 (Dec. 19, 2014). Petitioner argued that DCAS "delegated its responsibility to appoint a medical officer to conduct medical examinations of civilian and uniform members of the NYPD in Section 72 proceedings to the NYPD." Pet. Brief at 8. Petitioner also provided proof of such delegation by DCAS in the form of a letter dated October 3, 2011, issued by the existing DCAS Commissioner in response to a request from the NYPD Commissioner, who set forth the qualifications of the NYPD's medical doctors and psychologists assigned to its Medical Division and noted their familiarity with specific job requirements of Police Department employees. Pet. Brief at Appendix A.

In *Police Department v. A.A.*, OATH Index No. 2183/14 at 4 (June 30, 2015), a case that post-dated *J.B.*, Administrative Law Judge Kevin Casey clarified that even though DCAS has jurisdiction to select medical officers for section 72 examinations, nothing in the statute prevents DCAS from delegating said task, and in fact, "section 815(a)(18) of the New York City's Charter expressly authorizes DCAS to delegate personnel management functions to agency heads, such as the Police Commissioner." *Id.* Where, as here, such delegation was effectuated by virtue of the October 2011 letter from the DCAS Commissioner, I find that petitioner complied with the procedural safeguards of section 72, in that respondent was given written notice of petitioner's basis for believing that she was unfit for duty, she was examined by a qualified and duly-appointed expert, she was given the documentation that the expert relied upon (including documentation that she provided), and she was given ample time and opportunity to challenge the expert's findings and to present her own evidence.

Respondent Fitness/Unfitness for Duty as a Level II TEA

The focus of the section 72 proceeding is on the employee's current and future fitness and ability to perform her current duties, not on past conditions or performance. *Admin. For Children's Services v. Papa,* OATH Index No. 1392/07 at 10 (Mar. 30, 2007); *Dep't of Probation v. Kornheiser*, OATH Index No. 361/06 at 5 (Oct. 13, 2005), *adopted in part, rejected in part,* Comm'r Dec. (Oct. 17, 2005); *Housing Auth. v. Dave*, OATH Index No. 138/95 at 2-3 (Aug. 12, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. C-95-72-4 (Oct. 11, 1995).

To support her claim that petitioner's determination of her unfitness is not supported by substantial evidence, respondent cites to *Williams v. Troiano*, 129 A.D.3d 1601 (4th Dep't 2015), in which a firefighter was removed from duty in August 2011, because of an on-the-job hypoglycemic accident stemming from his diabetes, but was not informed that he had been placed on involuntary leave pursuant to section 72 until April 2012. The court found that respondents, the City's Fire Department did not strictly comply with the requirements of the Civil Service Law when it placed the petitioner on leave well in advance of providing him with notice, and that strict compliance is required given the significant due process implications attached to the statute. The court concluded that the determination of Mr. Troiano's unfitness was supported by substantial evidence. It added that, based on the evidence introduced at the fact-finding hearing, the "'inference [was] reasonable and plausible' that the petitioner was

rendered unfit to serve as an active duty firefighter because of his inability to manage his diabetic symptoms." *Id* at 1603. The court further noted that the substantial evidence standard does not permit courts to "weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists." *Id* at 1603-04.

Here, respondent did not contest the timeliness of petitioner's notice, as was the case in *Troiano.* Rather, respondent took issue with the less than three minutes that Dr. Lichtenstein spent with respondent, which was deemed a Fitness for Duty examination of respondent. Also, respondent's counsel argued that Dr. Lichtenstein's testimony was incredible on grounds that his replies regarding his interview of respondent was not in accordance with "people's diction, speech patterns, syntax and vocabulary" Resp. Brief at 4. I disagree. I found Dr. Lichtenstein's testimony to be straightforward and credible. It was clear to me that his purpose was solely to determine whether or not the original examiner's findings were sustainable. As the doctor stated, he first inquires whether the employee is able to perform the full and unrestricted requirements of the job. If the answer is in the affirmative, the interview is discontinued and the employee is returned to duty. If the employee answers otherwise, Dr. Lichtenstein would note the employee's response, review the medical data and deem the worker unfit.

Even though Dr. Lichtenstein did not conduct the most recent evaluation of respondent, he briefly interviewed her one month before that last evaluation and credibly testified that based on his interview and his review of her medical documentation, respondent was not fit for duty in her title. At the time, the most recent documentation that petitioner had from respondent's doctor was the January 2, 2018 letter, which supported a request for a reasonable accommodation because of respondent's inability to stand and walk for long periods (Pet. Ex. 5). This was a follow-up request to an earlier one from respondent's doctor on November 17, 2017 (Pet. Ex. 6).

In its brief, petitioner stated that in December 2018, respondent again requested a reasonable accommodation of the Equal Employment Opportunity Division. Pet. Brief at 6. Petitioner did not provide a copy of respondent's latest request for an accommodation. But a reasonable inference may be drawn that respondent did indeed make such a request, given her letter of objection on December 14, 2020, to petitioner's notification that it intended to place her out on leave, following Dr. Cioffo's medical evaluation of respondent on the same date and his conclusion that respondent remained unfit for her title (Pet. Ex. 4). To reiterate, respondent wrote that she was "willing to consider the change of title to be able to continue working [her]

current assignment" (Attachment A at Ex. 13). This suggested that she was either unable or unwilling to return to her titled position of TEA II. As Judge Casey further noted in *A.A.*, OATH 2183/14 at 13, "Light duty, performing clerical tasks, is not a reasonable accommodation because those are not essential duties of a traffic enforcement agent," which is what respondent has been doing for well over four years. *See* Mayoral Directive 78-14 (Sept. 8, 1978) (limited duty assignments for temporarily disabled employees should not exceed one year, except "under the most unusual circumstances," and such assignments should be considered a transition where the employee either returns to full-duty or leaves City Service); *Dep't of Correction v. Montero*, OATH Index No. 858/94 at 7 (July 7, 1994) (essential function of a correction officer, "the care, custody, and control of inmates," cannot be performed while on light-duty); *see also Coles v. NYS Div. of Human Rights*, 122 A.D.3d 1256, 1258 (4th Dep't 2014) (county not required to create a light-duty position for deputy sheriff who did not dispute that her epilepsy prevented her from escorting inmates).

In sum, I find that petitioner's evaluations of respondent, especially, Dr. Cioffo's evaluation on December 14, 2020, in which he deemed her unfit for her title, plus respondent's undisputed willingness to remain in her reassigned position (which was made at her request for a reasonable accommodation), constitute substantial evidence that respondent suffers from a medical disability that prevents her from performing the essential duties of her job as a Level II TEA. Thus, respondent should be placed on a leave of absence pursuant to section 72 of the Civil Service Law.

FINDINGS AND CONCLUSIONS

1. Petitioner complied with the procedural safeguards of section 72 of the Civil Service Law, when it provided respondent with an Attachment A in November 2020, well in advance of her medical evaluation in December 2020.

2. Petitioner presented substantial evidence that respondent is presently unfit to perform the duties of her position due to a medical/physical disability.

RECOMMENDATION

I recommend that respondent's motion to dismiss be denied and that respondent be placed on a leave of absence pursuant to section 72 of the Civil Service Law.

Ingrid M. Addison
Administrative Law Judge

May 28, 2021

SUBMITTED TO:

DERMOT SHEA
Commissioner

APPEARANCES:

MAX B. WINTER, ESQ.
Attorney for Petitioner

LICHTEN & BRIGHT, P.C.
Attorneys for Respondent
BY: STUART LICHTEN, ESQ.

THE POLICE COMMISSIONER
CITY OF NEW YORK

June 7, 2021

VIA EMAIL
Ingrid M. Addison
Administrative Law Judge
Office of Administrative Trials and Hearings
100 Church Street, 12th Floor
New York, New York 10007
[redacted]

Re: Police Dep't v. J.W.
OATH Index No. 1168/21

Dear Judge Addison:

A copy of your May 28, 2021, Report and Recommendation was forwarded to this office following the leave for ordinary disability proceeding pursuant to Section 72 of the New York Civil Service Law.

After reviewing the Report and Recommendation, I agree with the finding that J.W. is presently unfit to perform the duties of her current position of Traffic Enforcement Agent and the recommendation to place her on a leave of absence. However, the imposition of this leave of absence will be held in abeyance pending resolution of an application to title change J.W. to the position of Clerical Associate. Presently, this application is pending with the New York City Department of Citywide Administrative Services.

Sincerely,

[redacted]

Dermot Shea

1 Police Plaza, New York, NY 10038 • 646-610-5410 • Fax: 646-610-5865
Website: http://nyc.gov/nypd