

EMILY DIAZ, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF : DECISION
THE TOWNSHIP OF MAHWAH,
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner, a tenured teacher of world languages, challenged respondent Board’s action in placing her on an unpaid medical leave of absence. Respondent contended that its action was a proper exercise of its authority under *N.J.S.A. 18A:16-4*, as a psychiatric examination of petitioner revealed that Diaz was medically unfit to continue her teaching duties. The respondent further contended that it was not obligated to return petitioner to her teaching position, as Diaz had not furnished proof of recovery satisfactory to the Board.

The ALJ identified two issues to be determined in this case: 1) whether the Board properly placed petitioner on a psychiatric leave of absence pursuant to its authority under *N.J.S.A. 18A:16-4*, and 2) if so, whether the Board’s determination that petitioner had not demonstrated satisfactory proof of recovery was arbitrary, capricious or unreasonable. The ALJ found, *inter alia*, that: petitioner’s request to be transferred from the high school to a middle school teaching assignment was accompanied by a letter from her personal physician which supported Diaz’s claims that she was under “extreme duress” and required a transfer as a matter of “medical necessity”, therefore, the Board properly directed Diaz to undergo a psychiatric examination in accordance with the requirements of *N.J.S.A. 18A:16-2*; a mutually agreed-upon psychiatrist, Dr. Gallina, diagnosed petitioner with an adjustment disorder and concluded that Diaz was not fit to remain in the classroom – whether at the high school or middle school level – until she pursued therapy; subsequently, the Board properly placed Diaz on a psychiatric leave of absence; to demonstrate proof of recovery, Diaz later engaged other doctors – a psychiatrist and a psychologist – to evaluate her, resulting in two reports which found petitioner fit for duty. The ALJ concluded that the Board had a reasonable basis for its decision not to accept the reports of Diaz’s personal psychiatrist and psychologist, as they do not speak in terms of recovery or address the concerns raised by Diaz’s initial medical evaluations. Accordingly, the ALJ ordered the petition dismissed.

Upon a thorough and independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, and recommended that the parties agree upon an expert to perform a fitness-for-work evaluation to advise regarding Diaz’s present emotional ability to return to the classroom.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 27, 2010

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The petitioning tenured teacher, Emily Diaz, challenges respondent’s action in requiring that she take an unpaid leave of absence for psychological reasons. She asks that she be returned to her position teaching Spanish in respondent’s district and that she be made whole for lost pay and benefits. After consultation with counsel for the parties, the Administrative Law Judge (ALJ) assigned to this case identified the following issues to be adjudicated:

1. Did the Board properly place Diaz on a psychiatric leave of absence pursuant to its authority under *N.J.S.A. 18A:16-4*, and
2. Is the Board’s determination that Diaz has not demonstrated satisfactory proof of recovery arbitrary, capricious or unreasonable?
Initial Decision at 3.¹

The leave of absence challenged by petitioner commenced in consequence of a psychological evaluation performed in September of 2008, which found petitioner medically unfit to continue her teaching duties. (Respondent’s Exhibit R-2 at 12) The evaluation, in turn, had been precipitated by a letter from petitioner asking for a change in teaching assignment for “medical” reasons. (Joint Exhibit J-1)

Respondent contends that it is not obligated to reinstate petitioner, because she has not provided proof of recovery. Petitioner argues that she has provided proof of recovery by

¹ These two issues were also set forth in the Prehearing Order.

means of the reports and testimony of two mental health professionals that she hired subsequent to the evaluation, both of whom opined that she was fit for work. (Petitioner's Exhibits P-9 and P-12) The Commissioner adopts the Initial Decision of the Administrative Law Judge (ALJ) dismissing the petition and recommending that petitioner demonstrate, by way of evaluation by an expert acceptable to both parties, her fitness to return to work.

It is undisputed that in 2002 petitioner began her employment in respondent's district. While her first year of teaching was at the middle school, her assignment in subsequent years was at the high school. It is further undisputed that she experienced significant medical problems during her period of employment at the high school and that her relationship with her supervisor became antagonistic.

On July 24, 2008 petitioner sent to respondent's superintendent, Charles Montesano, the above referenced note (Joint Exhibit J-1) asserting that she had a "medical need" for reassignment from the high school to the middle school. Attached was a letter from her personal physician, Paul Ostergaard, M.D., which maintained that petitioner was:

suffering from the effect of extreme duress at her present job description. She currently has to take medication for gastritis to prevent an ulcer in addition to irritable bowel syndrome and insomnia.
(Respondent's Exhibit 5)

Ostergaard further wrote:

On the basis of my findings and in the interest of preserving her health, I must recommend a change of job venue. Please consider her request to work in a lower grade as a matter of medical necessity.
(*Ibid.*)

Montesano testified – and the ALJ found – that because petitioner's request cited medical need, he directed that Diaz be examined by the school physician, Everett Schlam, M.D. (3T38-39; Joint Exhibit 2) It is undisputed that the meeting between Dr. Schlam and petitioner occurred on August 19, 2008 in the presence of petitioner's husband and young son, 3T8, and

Schlam testified that it lasted at least a half hour. (3T15) Schlam had been able to review Ostergaard's medical file concerning petitioner prior to the meeting. (3T8) After examining petitioner and speaking to Dr. Ostergaard, Schlam issued a report dated August 22, 2008 recommending that – based upon his examination of Diaz – “psychiatric clearance prior to the 2008/2009 school year [was] requested.” (Respondent's Exhibit 7)

In the report, Schlam explained that petitioner had presented as “tearful and upset,” and that she had spoken of both the medical and psychological stressors that had prompted her transfer request. (*Ibid.*) More specifically, she believed that job stress had contributed to gastric issues and a feeling of being overwhelmed. (*Ibid.*) In petitioner's view, the job stress flowed from unfair treatment by the high school administration, leading her to the conclusion that it would be less stressful to teach at the middle school. (*Ibid.*) Schlam testified in the OAL that petitioner had appeared distraught, and that he was concerned about her. (3T34)

He concluded that petitioner:

has a chronic stress disorder which is interfering with her ability to function at work. A psychiatric evaluation is required to help her manage acute stress so she can function effectively.
(Respondent's Exhibit 7)

He further advised that he had discussed petitioner's condition with Ostergaard, and both doctors had agreed that petitioner would benefit from a psychiatric evaluation and counseling. (*Ibid.*)

The ALJ found, and it appears undisputed, that in consequence of petitioner's request for a transfer to the middle school “as a matter of medical necessity,”² and Dr. Schlam's recommendation that a psychological evaluation be undertaken, respondent asked petitioner to undergo a psychological examination and she agreed. (Initial Decision at 4 and 8; 3T40) Accordingly, effective September 1, 2008, respondent placed petitioner on paid administrative leave pending the results of the evaluation. (Initial Decision at 4)

² This phraseology was used in the above referenced June 24, 2008 letter from petitioner's personal physician, Paul Ostergaard, to Montesano.

Petitioner conceded that the forensic psychiatrist who performed the evaluation, *i.e.*, David Gallina, M.D., was selected not by respondent, but by petitioner on advice from her union. (2T138-39; 3T41) Further, petitioner testified that Gallina was paid by both the NJEA and respondent. (2T176)

It is undisputed that Gallina met with petitioner on September 24, 2008. His evaluation – memorialized in a written report, incorrectly dated September 27, 2008 but issued subsequent to that date³ – included an extensive interview with petitioner, a patient questionnaire, the review of correspondence from petitioner and Dr. Schlam, and the administration of various psychological tests.⁴ (Respondent’s Exhibit R-2) The patient questionnaire invited petitioner to describe the nature of her main problem, and her response was “stress acute disorder.” (Respondent’s Exhibit R-3) Petitioner also checked off several physical and psychological issues on the questionnaire – including anxiety, tenseness, panic, insomnia and fatigue. (*Ibid.*) As the ALJ observed, “It was noteworthy that [petitioner’s] job-related stress was still apparent in September, when she had not been in the classroom since June.” (Initial Decision at 11)

Gallina noted that in the course of his interview with petitioner she acknowledged the significant emotional stress that her medical problems had caused her and the burdens they had imposed upon her job performance. (Respondent’s Exhibit R-2 at 5) She also, according to Gallina, identified – as a stressor – difficulties with her world language supervisor. Petitioner alleged, for example, that the supervisor issued a disciplinary write-up when physical discomfort precipitated her failure to go to a workshop required by the supervisor. (*Ibid.*) Petitioner related

³ Gallina explained that the September 27, 2009 date set forth on his written report reflected the date of the first section of the report. He finished the report after receiving the results of the tests that he had administered, but the typist failed to change the date. (1T109)

⁴ In his report, Gallina advised that the only documents which he felt were relevant to the evaluation were petitioner’s request for a transfer to the middle school, and Schlam’s letter/report about his interview with petitioner.

to Gallina that she had filed grievances and affirmative action complaints against the supervisor but had apparently not prevailed. (*Ibid.*)

Petitioner's explanation to Gallina for her request for a transfer to the middle school was that she had hoped 1) that there would be less pressure from the middle school administration, and 2) that she would be less under the world language supervisor's scrutiny in the middle school building, because the supervisor's office was located in the high school.⁵ As an example of how she felt about her supervisor, petitioner told Gallina:

I'm going white-knuckled. . . . I'm driving and I'm not even going to the school. I'm just driving by and my husband is sitting with me in the car, and he says your knuckles are turning white. (Respondent's Exhibit R-13 at 47)⁶

Gallina's own observations of petitioner found no evidence of psychoses, cognitive impairment or depression. (Respondent's Exhibit 2 at 9) He did identify "free-floating anxiety," *Ibid.*, occupational problems and "Adjustment Disorder With Mixed Emotions." (Respondent's Exhibit 2 at 10) Underlying these findings were the results of the mental status examination:

Increased levels of generalized anxiety and stress, mostly related to health problems and to occupational conflicts on her job. Ms. Diaz is clearly dissatisfied with the administration of the high school where she works, has had multiple conflicts with authority figures in her school, and she tends to blame others for her difficulties. (Respondent's Exhibit 2 at 11)

At the hearing in the OAL, Gallina explained that the term "adjustment disorder" signifies a greater difficulty than the average person in adjusting to one or more external stressors in an individual's life. (1T112) It could flow from a heightened sensitivity to a certain stressor or the accumulation of stress from multiple sources. (*Ibid.*) It is usually "reflected by a

⁵ During her testimony at the hearing in the Office of Administrative Law (OAL), Diaz conceded that her supervisor would be her supervisor no matter where she was located. (2T151-52)

⁶ This quotation is from the transcript of an audio tape which petitioner surreptitiously recorded when she appeared for the evaluation. She initially withheld it from discovery. (2T140)

mixed emotional response,” *e.g.* anxiety, depression, anger, irritability. (*Ibid.*) In petitioner’s case, Gallina felt that her extensive medical problems, her difficulties on the job and the normal stresses of parenthood were all significant contributors to her adjustment disorder. (1T113-14)

Gallina recommended cognitive therapy to assist petitioner in gaining insight into the nature of her occupational issues, noting that throughout her health related problems, petitioner had not sought or received any psychiatric or psychological treatment or medications.⁷ (Respondent’s Exhibit R-2 at 11-12) At the hearing he testified that the kind of illness and chronic pain that petitioner had experienced often wears a person down, necessitating new coping strategies. (1T119) Treatment, in his view, was essential. (1T120)

In Gallina’s opinion, petitioner’s belief that a transfer to the middle school would solve her problems was speculative:

Based on today’s evaluation, it is anticipated that Ms. Diaz may continue to have authority conflicts, to feel victimized, and to project most of the blame for these difficulties on others if she returns to her teaching job. Her level of insight into her own contribution to these difficulties is limited.
(Respondent’s Exhibit R-2 at 12)

Thus, as a result of the evaluation, Gallina concluded that petitioner was not fit to return to work. (*Ibid.*) While he understood that transfer to the middle school was petitioner’s preference, it was not medically necessary and he saw no basis to believe that it would resolve her problems. (*Ibid.*)

Gallina also explained that the nature of petitioner’s individual circumstances must be considered. There are people with adjustment disorders who go to work. However, the evaluation was intended to assess petitioner’s unique situation, including her medical stressors and the fact that her job involved being responsible for children. (1T125-26) Putting petitioner’s status in the context of a school district, Gallina observed:

⁷ Petitioner apparently did indicate to Gallina that she thought cognitive therapy might be helpful to her, especially in adjusting to the effects of her medical problems. (Respondent’s Exhibits R-2 at 11; R-13 at 43)

Like any bureaucracy, the school system's ability to adjust to all the individuals who are working for them is certainly limited. . . . so it is pretty much up to the individual to try to cope with the environment that any of us are working in. I think Ms. Diaz' ability to do that without some treatment and without some help would be fairly limited.
(1T131-32)

Ultimately, Gallina felt that treatment was "absolutely the right recommendation" for petitioner.
(1T126) It is undisputed that petitioner's administrative leave was extended based upon the results of Gallina's evaluation.

The ALJ found that Gallina's is a "highly accomplished physician and expert in the field of psychiatry," and that his testimony was presented "in a professional and credible manner." (Initial Decision at 8) She found significant the fact that he had been selected not by respondent but by petitioner's union. (*Ibid.*) She further found that Gallina's conclusion – that petitioner's high level of stress and anxiety called for a leave of absence and counseling in coping skills – was convincing, and was corroborated both by petitioner's own questionnaire answers and by petitioner's own statements in her taped and transcribed meeting with Gallina.
(Initial Decision at 8-9)

In discussing the content of the taped meeting, the ALJ noted that "[a] transfer from the high school was [petitioner's] clear agenda," Initial Decision at 9, but that Gallina spoke to her about the feasibility of that agenda:

Gallina: If I clear you to go back to work, in all probability, from what you're telling me, initially you're going to go back to the high school. Can you handle that?

Petitioner: No.

Gallina: So what is the alternative?

Petitioner: I don't know.

(Respondent's Exhibit at 45–46. [Emphasis added.]

Subsequent to Gallina's evaluation – on October 13, 2008, petitioner wrote to Montesano stating that she was prepared to return to work. (*See, e.g.* Joint Exhibit 3)⁸ This was in contrast to what she had just told Gallina in their September 24, 2008 meeting, *i.e.*, that she would not be able to handle going back to her position at the high school. (Respondent's Exhibit R-13 at 45-46) Montesano advised petitioner, by letter dated October 14, 2008, that as a result of Gallina's determination that she was not medically able to perform teaching duties, she would need written clearance from Gallina if she wished to return to work. In the meanwhile, her days of absence would be charged to her bank of 25 sick days. (Respondent's Exhibit R-8)

Rather than following through on seeking cognitive therapy, petitioner asked her chiropractor to submit a note saying she was fit to return to full time teaching, which he did on November 10, 2008. (Petitioner's Exhibit P-8) She also arranged – at her own expense – for a second evaluation, *i.e.* by Diana Riccioli, M.D. Dr. Riccioli's examination of petitioner took place on November 4, 2008, and the report was dated November 20, 2008. (Petitioner's Exhibit P-9) Respondent's Superintendent Montesano testified that he was given no prior notice that petitioner had arranged for a second evaluation. (3T44)

Riccioli's short recitation of the facts leading to petitioner's request for a second forensic evaluation, Petitioner's Exhibit 9 at 1-2, did not differ materially from the background presented in Gallina's report. The mental status assessment by Riccioli did not appear to differ in any significant degree from Gallina's. (Petitioner's Exhibit P-9 at 3) Nor did her diagnosis of "Adjustment disorder – unspecified occupational problems." (*Ibid.*) Riccioli's interpretation of the MMPI-2 test which she had petitioner take was that petitioner's judgment was "fair." (Petitioner's Exhibit P-9 at 4)

⁸ She repeated this assertion via letters dated November 24, 2008 and January 19, 2009.

Nonetheless, Riccioli opined that petitioner was “able to return to work as a teacher without psychological restrictions.” (*Ibid.*) Having found petitioner fit to return to work, Riccioli paradoxically wrote:

perhaps [petitioner] should work in a less conflicted environment to decrease some stress, which can worsen her physical illness (fibromyalgia). Mrs. Diaz explained some of her stress related to feeling subject to conflicting demands and working for what she perceives to be an unhelpful supervisor.
I recommend if possible a transfer to another school in order to decrease stress.
(*Ibid.* [Emphasis added.])

At the hearing Riccioli confirmed that her conclusion that petitioner was fit for work was conditioned upon whether petitioner could work in a less conflicted environment. (3T108) She stated in her rebuttal testimony on the third hearing date, however, that she believed that petitioner would be able to go back to work in the high school if need be, because she had had time off, because they had discussed – during the evaluation interview – solutions to some of the problems that petitioner had experienced, and because petitioner wanted to go back to work. (3T114-15)

Montesano received Riccioli’s report in November but did not allow petitioner to return to work because 1) Riccioli’s evaluation contradicted Gallina’s, 3T44, 2) he noticed “inaccuracies” in Riccioli’s report, *Ibid.*, 3) his priority was avoiding the risk of an unfit teacher in the classroom, and 4) he did not wish for petitioner’s stress to be exacerbated. (3T45)⁹

When asked to describe some of the inaccuracies in Riccioli’s report Montesano testified that, contrary to what was set forth in Riccioli’s report, petitioner was not “written up” for failing to attend a third day of teacher workshops, or for the content or greetings of her emails. She was written up for failing to sign Individual Education Plans (IEPs). He explained

⁹ At this point in time, petitioner’s sick days had been exhausted and her leave was to be continued through March 4, 2009, under the federal Family and Medical Leave Act. *See*, Respondent’s Exhibit R-12.

that teacher signatures on IEP documents are essential to verifying that special education students are receiving the required accommodations. The district needs to be able to produce such signed IEPs in the event that complaints are brought against it. (3T46-48)

Further, in contrast to the complaints that petitioner communicated to Riccioli about her supervisor, Ms. Lezansky, Montesano explained that a confidential investigation performed by the district affirmative action officer had unearthed no basis for a finding of discrimination or harassment. Statements from petitioner's departmental colleagues suggested that if there was a hostile work environment, it was more attributable to petitioner than to Lezansky. (3T53) In addition, Montesano testified that petitioner had also "had issues" with the supervisor who preceded Lezansky. (3T54)

Ultimately, Montesano testified that he had been keeping petitioner's position open and that he would accept her return to work provided that she:

Hopefully [would] receive the therapy that was recommended but most importantly [would] receive clearance from a doctor who has the full picture of what's going on. (3T55)

However, he could not support a transfer of petitioner to the middle school. Consultation with the middle school principal and a former supervisor revealed that petitioner had been transferred to the high school because her demeanor had been considered better suited to older children. (3T56) With regard to the interpersonal frictions, petitioner's supervisor would be the same at both schools. (3T55)

After petitioner filed her appeal to the Commissioner, she hired a third forensic professional – psychologist George Tierney. His first interview with petitioner took place on January 30, 2009, and his primary report was dated February 6, 2009. (2T39) On March 24, 2009, he met with petitioner again and penned a letter "To Whom It May Concern" that stated:

Based on my clinical evaluation, I believe that Mrs. Diaz is capable, from a psychological point of view, to resume her employment as a

teacher. Her mental health status is not impaired. Her mood and affect are normal, her thought procession in tact, and her cognitive functions for judgment, insight and abstractions is [sic] not impaired. (Petitioner's Exhibit P-12)

The February 6, 2009 report reiterated the history – provided by petitioner – that had already been articulated in Gallina's and Riccioli's reports. (Petitioner's Exhibit P-12 at 1-2) Similarly to Gallina and Riccioli, Tierney found in petitioner no psychoses, cognitive impairment or significant depression. (Petitioner's Exhibit P-12 at 3) He regarded petitioner's anxiety as natural – given petitioner's "occupational concerns." (*Ibid.*) His diagnosis was the same as those of Gallina and Riccioli, *i.e.* adjustment disorder and occupational problems. (Petitioner's Exhibit P-12 at 4)

Notwithstanding the foregoing, Tierney concluded that petitioner was "capable, from a psychological point of view, of resuming a position of teacher in the Mahwah Board of Education." (*Ibid.*) His impression of petitioner was that she was a "competent teacher in search of a cooperative arrangement between the Mahwah Board of Education and herself." (*Ibid.*) He suggested that if petitioner's "conflict with her supervisor . . . cannot be mediated successfully within the high school itself, perhaps a less conflicted environment could be available in the middle school, as requested by Ms. Diaz." (Petitioner's Exhibit P-12 at 5) In his view, such an alternative "could result in less stressful anxiety and also be beneficial to her physical well-being." (*Ibid.*)

In sum, Tierney's conclusion that petitioner was fit for work appeared to be conditioned upon whether she could resolve her issues with her supervisor. His suggestion about a transfer to the middle school implies that he was uncertain about whether petitioner was capable of succeeding at the high school. In fact, he testified that putting her back into the high school with the people against whom she had litigation pending could generate conflict which would move her back to the state she was in when she had asked for a "medically necessary"

transfer. (2T53) Further, he agreed that his interactions with Diaz had been after she had been away from work for seven months, which could have accounted for the level of function which he observed. (*Ibid.*)

Tierney's report appears to have engendered in Montesano the same kind of concerns that Riccioli's report had raised. Montesano testified that he thought Tierney's conclusions about petitioner's fitness to work might have been based in some part upon petitioner's assertions that she had not had issues with prior authority figures and that her relationships with her peers were positive. (3T57) Montesano did not believe that to be the case. (*Ibid.*) Tierney's report did not persuade Montesano that petitioner should be returned to work without medical clearance and without any therapy or counseling.¹⁰

At the hearing Gallina was asked for his perspective concerning Riccioli's and Tierney's evaluations. As regards Riccioli's conclusions he testified:

First, I think [petitioner] needed some time off to regroup herself, she was really overwhelmed. And secondly, I think she needed some treatment. And if she was in treatment and then made a transition to a different school for example whether it be the middle school or it was [sic] somewhere else then perhaps that would be helpful. But I didn't think that just switching the external environment was really directing itself to the heart of this problem. So in that case, at the end Dr. Riccioli and I simply disagreed.
(1T124)

In addressing Tierney's report he stated:

Basically it reviews the same history, essentially gives the same diagnosis and then makes a recommendation to go back to work as if nothing has happened. And I just don't think that's appropriate and I don't think it makes much sense. The history that Ms. Diaz gives cries out for her to get some help and to get some treatment. . . . And that's on her behalf as well as the children that she's teaching. So, the end result of the report which again implies that changing the . . . teaching environment is the answer to the problem, I just don't think is appropriate and I disagree with it.

¹⁰ Diaz testified that as of the hearing date she had not availed herself of therapeutic interventions, even though she conceded that Gallina, Riccioli and Tierney had all testified that she could benefit from same. (2T152-54) She remarked: "I think if we're going to talk about therapy, the entire Mahwah Board of Education needs to go into therapy with me." (2T153)

(1T126-27)

When Riccioli's and Tierney's reports did not result in a return to work, petitioner instituted this controversy – on or about December 5, 2008 – by way of a petition and application for emergent relief. The application for emergent relief was unsuccessful and proceedings on the underlying petition continued in the Office of Administrative Law in January 2009 (before Tierney met with petitioner and issued his report). The first hearing date was May 19, 2009¹¹ and two more hearing days followed: August 5, 2009¹² and October 5, 2009.¹³

The ALJ's overall assessment of petitioner's testimony was that it was lacking in credibility. She pointed out, for example, that in her hearing testimony petitioner had denied telling Gallina that she did not want to return to the high school. This position was inconsistent both with Gallina's recollections and with the content of the audiotape (referenced above) that petitioner had surreptitiously made of her interview with Gallina. (Initial Decision at 11) Similarly, the ALJ recounted that at the hearing petitioner denied telling Gallina that she suffered from acute stress, which contention was belied by petitioner's own words in the questionnaire that she had filled out for Gallina. (Initial Decision at 11-12)

The ALJ also noted the significant disparity in the presentations that petitioner made to Gallina and Riccioli, in meetings that occurred only six weeks apart. This rather abrupt change from a tearful, anxious demeanor to a calm and "stable" presentation flowed, in the ALJ's view, from a change in petitioner's agenda. (Initial Decision at 12) She concluded that petitioner, having been put on leave – instead of transferred to the middle school – as a result of

¹¹ Citation designation 1T.

¹² Citation designation 2T.

¹³ Citation designation 3T.

her tearful presentation to Gallina, changed her department with Riccioli, in the hope of obtaining a back-to-work recommendation. (Initial Decision at 12-13)¹⁴

The Commissioner cannot help but observe that petitioner had sought no treatment between her meetings with Gallina and Riccioli, nor did she offer – at the hearing or subsequently – any other persuasive explanation for the remarkable change in her affect in the six weeks between the two psychological evaluations. It does not appear from the record that passage of time alone can be regarded as an explanation for the change since, as the ALJ pointed out, petitioner presented to Gallina as stressed at the end of September 2008, after she had been away from the high school environment for three months. (Initial Decision at 11)

At the conclusion of her discussion of the material facts of this case, the ALJ offered her analysis of why the three mental health professionals who met with petitioner all agreed on a diagnosis of adjustment disorder, and all assigned petitioner similar GAF scores (levels of functionality), but disagreed upon the appropriateness of a return to work by petitioner.

She stated:

[E]ach doctor approached Diaz in precisely the same way, with a view toward responding to Diaz's concerns as she presented them, and with the intention of giving her the assistance she herself claimed to need. She wished to convince Gallina that she was not fit to return to the high school, and convince him she did. She and Dr. Gallina only parted company on the issue of a transfer. Dr. Gallina did not agree that the extreme stress that Diaz described would diminish simply by a transfer to the middle school, and without therapy and a respite from her teaching duties. I find that for this reason, and out of concern for her best interest, Dr. Gallina determined that Diaz was not psychiatrically fit for an immediate return to work.

Conversely, Diaz wished to convince Drs. Riccioli and Tierney that she was fit to teach and, again, she successfully did so. . . . I find that Riccioli and Tierney unwaveringly sought to support Diaz's goals. Not only did they find her to be fully functional and fit for duty, they further agreed that a transfer to the middle school would be in the best interest of her mental health. Indeed, Dr. Tierney wrote in his report, "my impression

¹⁴ Similarly, in considering Tierney's description of petitioner's department during her sessions with him, the ALJ concluded that petitioner tailored her behavior to further her goal of obtaining a back-to-work recommendation.

of Ms. Diaz is that of a competent teacher in search of a cooperative arrangement between the Mahwah Board of Education and herself.” But Tierney is not an educator, and is not equipped to assess Diaz’s competency as a teacher of world languages. Thus, this statement by him serves to emphasize that his report was written exclusively to promote Diaz’s objectives of a return to teaching, but in a middle-school classroom. Indeed, there could not be a more literal expression of Diaz’s purpose in seeking further psychological evaluation.
(Initial Decision at 14-15)

In light of the foregoing, the ALJ found that Gallina “provided the most credible report and testimony, precisely because, in the end, he was able to deviate from Diaz’s agenda and focus instead on what he truly felt was in her psychological best interest.” (Initial Decision at 15) The Commissioner concurs, and adds that Gallina appears to have taken into consideration the fact that the evaluation had a dual purpose. On the one hand it was meant to assess petitioner’s needs, but on the other hand it was meant to ascertain whether petitioner’s return to work would be harmonious with the needs of the students and the district’s operational requirements.

After citing to the statutes and case law which address the obligation of school districts to ensure that their teachers are fit for duty, and the measures which districts are entitled to take in furtherance of this obligation, the ALJ found that respondent’s decision to place petitioner on leave was proper. More specifically, the ALJ stated:

I conclude that the Board properly directed Diaz to undergo a psychiatric examination in accordance with the requirements of *N.J.S.A. 18A:16-2*. In requesting a transfer from the high school, Diaz cited “extreme duress,” requested the transfer as a matter of “medical necessity,” and supported her request with a letter from her personal physician. School-district administration comported itself in a prudent and professional manner when, rather than simply acceding to her request, it demanded first that she be examined by the school physician and in turn by a psychiatrist.
(Initial Decision at 16)

The ALJ further concluded:

that the Board properly placed Diaz on a psychiatric leave of absence in accordance with *N.J.S.A. 18A:16-4*. Its reliance on the opinion of Dr. Gallina was reasonable. He is a highly regarded psychiatrist, chosen by Diaz herself, who supplied the Board with a comprehensive and

articulate report. A highly stressed Diaz presented herself for evaluation by Gallina, and she made it very plain that she felt emotionally unable to return to her teaching position at the high school. Gallina understandably concluded that simply transferring Diaz to another workplace was tantamount to permitting her to run away from her problems, and afforded her no opportunity to resolve them. Gallina's determination that Diaz was not fit to return to teaching was grounded in his belief that Diaz's description of her stress was sincere. His report first and foremost considered Diaz and her best interests.
(Initial Decision at 17)

Thus, the first of the two above identified issues to be adjudicated in this matter – did the Board properly place Diaz on a psychiatric leave of absence pursuant to its authority under *N.J.S.A. 18A:16-4*? – was decided in favor of respondent.

As to the second issue – Is the Board's determination that Diaz has not demonstrated satisfactory proof of recovery arbitrary, capricious or unreasonable? – the ALJ applied *N.J.S.A. 18A:16-4* to the salient facts. *N.J.S.A. 18A:16-4* instructs that if it has been determined that an employee manifests a mental abnormality, he or she “shall be ineligible for further service until proof of recovery, satisfactory to the board is furnished.” (Initial Decision at 18, emphasis added)

The ALJ concluded that respondent had had a reasonable basis for its decision not to grant petitioner's request that it accept the Riccioli and Tierney reports as “proof of recovery.” (*Ibid.*) Those reports had failed to address petitioner's acutely stressed and highly anxious presentation to her personal physician, to Dr. Schlam and to Dr. Gallina, or to explain reasons – other than the possible decompression petitioner's absence from the workplace might have allowed – why they believed that a return to work would not trigger a recurrence of petitioner's stress and anxiety. (Initial Decision at 18-19) They found petitioner fit for work without identifying the means by which she had allegedly recuperated or, in the case of Tierney, why he felt that petitioner was prepared to successfully handle the same stressors in the same work environment. (*Ibid.*) The Commissioner notes, also, that both Riccioli and Tierney

recommended the transfer requested by petitioner, undermining somewhat their contentions that she was unconditionally fit for duty.

Having found in favor of respondent on both of the issues that the parties had agreed were presented by the pleadings, *see*, Initial Decision at 3, the ALJ recommended dismissal of the petition. (Initial Decision at 20) She suggested that the parties agree on a psychiatrist whose task it would be to “advise regarding [petitioner’s] present emotional ability to return to the classroom.”¹⁵ (*Ibid.*) Montesano testified that he would cooperate in choosing a mutually acceptable psychiatrist to evaluate petitioner’s recovery/fitness to return to work. (3T84)

The Commissioner agrees with the ALJ’s analysis and conclusions and is unpersuaded by petitioner’s exceptions. First, the Commissioner rejects the contention in petitioner’s first exception that the ultimate inquiry before the Commissioner is whether petitioner is now fit to teach. The issues before the Commissioner – which were agreed upon by the parties, set forth in the prehearing order, and correctly articulated and analyzed by the ALJ – are the reasonableness, *vel non*, of respondent’s actions in 1) requiring petitioner to undergo a psychological evaluation and placing petitioner on leave and 2) in declining to accept the Riccioli and Tierney reports as proof of recovery.

In her second exception, petitioner asserts that the ALJ disregarded the evidence presented by petitioner’s experts and accepted the analysis of Gallina, which – petitioner urges – was ‘questionable.’ At the outset, the Commissioner’s review of the thorough Initial Decision mitigates against a conclusion that the ALJ failed to consider the substance of Riccioli’s and Tierney’s reports and testimony. Rather, as stated above, the ALJ found that their reports reflected the presentation offered by petitioner during her meetings with them. That presentation

¹⁵ The ALJ referenced the two-year limit set forth in *N.J.S.A.* 18A:16-4, and opined that sufficient time remained for an evaluation to take place.

was noticeably different from the demeanor manifested during the meetings between petitioner and both Schlam and Gallina. The ALJ appropriately wondered why the later evaluators – despite agreeing with Gallina that petitioner had an adjustment disorder – glossed over the information set forth not only in Gallina’s report but also in the letters from Drs. Schlam and Ostergaard concerning petitioner’s intense anxiety,¹⁶ and gave no explanation as to how they believed petitioner had achieved recovery from her self-diagnosed “acute stress disorder” in six weeks. (Initial Decision at 18-19)

In criticizing Gallina’s report and analysis, petitioner appears to suggest that Gallina was biased in favor of respondent. To support this contention she points to interactions between Gallina and respondent’s superintendent, Charles Montesano. For example petitioner states that Gallina’s report was directed to Montesano, who “paid him and to whom he owed his allegiance” (Petitioner’s Exceptions at 11); Gallina received oral and written materials from Montesano but his report did not refer to same; Gallina gave an oral report to Montesano before writing the conclusion to the written report; and, when petitioner asked Gallina how she did on her testing, he indicated that the results would be sent to Montesano.¹⁷

The Commissioner does not agree with petitioner’s analysis on this point. First, it is undisputed that the petitioner chose Gallina at the recommendation of her union, and that petitioner’s union shared with respondent the cost of Gallina’s services. (2T138; 2T176; 3T41) More importantly, since the ultimate purpose of the evaluation in this matter was not therapy, but rather a determination as to petitioner’s fitness to teach in respondent’s schools, it was

¹⁶ Gallina’s conclusion that Diaz was experiencing “increased levels of general anxiety and stress,” Respondent’s Exhibit R-2, was corroborated by Ostergaard’s letter, Respondent’s Exhibit R-5, Schlam’s letter, Respondent’s Exhibit R-7, petitioner’s own statements on Gallina’s questionnaires, Respondent’s Exhibit R-3, and the transcript of petitioner’s surreptitiously taped session with Gallina, Respondent’s Exhibit R-13.

¹⁷ Petitioner maintains that Gallina’s failure to provide her with immediate feedback not only indicated that he was not an independent evaluator but also prevented her from presenting the test results to a physician of her own choice for a second opinion. It would appear, however, that she received the test results in discovery, and hired two other forensic experts, both of whom were qualified to test her.

unremarkable that Gallina addressed his report to the school administrator, or that Gallina updated Montesano during the evaluation process. In any event, no action was taken regarding petitioner until all aspects of the evaluation were completed.

That Montesano may have sent Gallina documents has little significance, since Gallina clearly identified – in his report – which documents he relied upon. Documents about petitioner’s work history did not appear to be among them. Rather, Gallina appeared to rely primarily upon petitioner’s information and testing, and his own observations. A review of the transcript of petitioner’s interview with Gallina reveals, ironically, that petitioner herself spoke extensively to Gallina about her work history, her difficulties with her supervisors, and the extreme stress that her work situation caused her. (Respondent’s Exhibit R-13 at 16-35)

The Commissioner also rejects petitioner’s assertion that Gallina’s recommendations were discrepant with the content of Gallina’s report – which petitioner characterizes simply as the description of a well-adjusted individual. At the outset the Commissioner notes with disapproval that the “excerpts” from Gallina’s report which petitioner presents in her second exception leave out inconvenient facts. For example, petitioner does not include, in her discussion of the section of Gallina’s report entitled “Language, Speech and Thinking,” Gallina’s observation that petitioner cried during the interview on several occasions “particularly when describing the various stressors in her life, including¹⁸ the multiple medical procedures that she has had done.” (Respondent’s Exhibit R-2 at 8, emphasis added) Nor does petitioner include, in her comment on the report section entitled “Mood and Affect,” Gallina’s statement that petitioner manifested “free-floating anxiety.” (Respondent’s Exhibit R-2 at 9)

In point of fact, while Gallina found that petitioner manifested no psychoses or profound personality disorders, and determined that her cognitive functioning was sound, his report as a whole finds that she has an adjustment disorder with mixed emotions and an

¹⁸ Common usage of the word “including” implies “but not limited to.”

occupational problem.¹⁹ (Respondent's Exhibit R-2 at 10) As stated above, he agreed that some persons diagnosed with adjustment disorder can function satisfactorily at work. However, he opined that it was necessary to assess petitioner's case on its individual merits. Accordingly, he expressed concern about petitioner's level of anxiety and stress, the adequacy of her repertoire of coping skills, her limited insight into her own contribution to the frictions in the workplace, and the likelihood that placing her into the same environment would result in the same problems for her.²⁰ Such concerns belie the petitioner's contention that Gallina's recommendations were inconsistent with his findings.

Petitioner's third and last exception alleges that the ALJ failed to make appropriate findings of fact and conclusions of law. In light of the foregoing discussion, the Commissioner rejects the third exception in its entirety. The ALJ's numerous findings, including her credibility findings were reasonable and supported by the record. Thus, the Commissioner is obliged to defer to them and, in this case, is wholly in accord with them. *N.J.S.A. 52:14B-10(c); D.L. and Z.L. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 *N.J. Super.* 269, 273 (App. Div. 2004).

Finally, in considering the facts and credibility issues in this case, the Commissioner notes the following. Petitioner's arguments completely ignore the content of the recording that petitioner herself made of her meeting with Gallina, which recording offers a first-hand corroboration of the state of mind and demeanor that Gallina observed and reported, and stands in stark contrast to Riccioli's and Tierney's portrayal of petitioner. Further, petitioner

¹⁹ A diagnosis of adjustment disorder has previously been held to constitute sufficient reason to render an employee unfit for duty and place that employee on leave pursuant to *N.J.S.A. 18A:16-4. Chambers v. Pleasantville Board of Education*, Commissioner Decision No. 263-98 (June 18, 1998).

²⁰ For example, he stated that Diaz "has had multiple conflicts with authority figures in her school, and she tends to blame others for her difficulties." (Respondent's Exhibit R-2 at 11)

initially failed to disclose the recording, suggesting that she knew that it would be unhelpful to her. These factors weaken petitioner's position.

In addition, without a professional evaluation the Commissioner, a lay person who has not had the opportunity to observe petitioner, cannot conclude that the more stable department which Riccioli and Tierney described and which the ALJ observed at the hearing is evidence of recovery and resolution of petitioner's problems. As noted by the ALJ, by the time petitioner had met with Riccioli, her priorities and agenda appeared to have changed. By the time petitioner met with Tierney she had been away from the workplace stressors for many months, and by the time the ALJ was able to observe petitioner, over a year had passed from the last day that petitioner had been at work.

Accordingly, the petition is dismissed for the reasons set forth in the Initial Decision, and it is recommended that the parties agree upon an expert to perform a fitness-for-work evaluation.

IT IS SO ORDERED.²¹

COMMISSIONER OF EDUCATION

Date of Decision: August 27, 2010

Date of Mailing: August 27, 2010

²¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.