

**Matter of Nasser v Department of Educ. of the City  
of N.Y.**

2017 NY Slip Op 32253(U)

October 24, 2017

Supreme Court, New York County

Docket Number: 150489/2017

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
Justice

PART 13

In the Matter of the Application of  
KARIMA NASSER,  
Petitioner,

INDEX NO. 150489/2017

For a Judgment Pursuant to Article 78  
of the Civil Practice Laws and Rules

MOTION DATE 10/18/2017

-against-

MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

THE DEPARTMENT OF EDUCATION OF THE CITY  
OF NEW YORK,  
Respondent.

The following papers, numbered 1 to 7 were read on this Article 78 Petition.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that this Petition for an Order granting Petitioner’s August 8, 2016 application for a Waiver of Return, pursuant to Article 78 of the CPLR, is granted . Respondent The Department of Education of the City of New York’s (“DOE”) cross-motion to dismiss the Petition is denied.

Petitioner was a special education teacher from September 5, 2000 to her retirement on January 31, 2017 at 80 I.S. 33, Mark Hopkins Intermediate School, Brooklyn, New York. On or about March 1, 2016 she applied for a Sabbatical for Restoration of Health (“Sabbatical”), pursuant to Respondent DOE Chancellor’s Regulation C-650. Approval of the school medical director, Dr. Anne Garner, is required for the Sabbatical. Petitioner’s initial Sabbatical application contained records from medical professionals detailing her chronic physical ailments, which include diabetes, peripheral vascular disease with chronic edema, hepatitis C and bilateral diffuse osteoarthritis (Opposition Papers Ex. 3). Her application was initially denied. On April 25, 2016 Petitioner submitted additional documentation of psychiatric conditions, which include suffering from Post Traumatic Stress Disorder, Major Depressive Disorder and Panic Disorder without Agoraphobia (*Id*). On May 2, 2016 Petitioner was granted

the Sabbatical retroactively for six (6) months from March 1, 2016 to July 31, 2016, based solely on her psychiatric diagnosis (*Id*, Affidavit of Dr. Anne Garner). Upon completion of the Sabbatical, Petitioner was required to return to employment within the DOE for at least a year.

Upon completion of her Sabbatical, on or about August 8, 2016 Petitioner requested a Waiver of Return (“Waiver”). Petitioner stated she was “unable to report back to work due to [her] current medical condition and wish[ed] to request a waiver of exemption from returning to teaching,” as well as seeking to apply for immediate retirement (*Id* at Ex. 2). Her Waiver application was denied (*Id* at Ex. 7). Although there is no appeal process after a denial of a Waiver determination, on or about October 7, 2016 Petitioner submitted an appeal. Dr. Garner nonetheless reviewed the appeal, accompanying documents and the United Federation of Teachers’ (“UFT”) Contract, and again determined Petitioner failed to show that she suffered from a newly developed medical condition, or that she has developed a catastrophic condition, which would prevent her from returning to her position for the required year of service following her Sabbatical (*Id*, Affidavit of Dr. Anne Garner). On or about October 19, 2016 Petitioner agreed by Stipulation of Settlement in another action to retire by February 1, 2017 (*Id* at Ex. 9).

Petitioner now brings this Article 78 Petition seeking a judgment declaring Respondent’s denial of her Waiver application was arbitrary and capricious, and directing Respondent to grant the Waiver, or in the alternative, direct a hearing to prove entitlement to a Waiver. Respondent opposes the Petition and cross-move to dismiss the Petition.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious (*Matter of Pell v Board of Education*, 34 NY2d 222, 356 NYS2d 833, 313 NE2d 321 [1974]). “It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion” (*Matter of Arrocha v Board of Education of the City of New York*, 93 NY2d 361, 690 NYS2d 503, 712 NE2d 669 [1999]). “Administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are better suited to make final decisions concerning wholly internal matters” (*Maas v Cornell Univ.*, 94 NY2d 87, 699 NYS2d 716, 721 NE2d 966 [1999]). When “challenging the disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious” (*Borenstein v N.Y.C. Empl. Ret. Sys.*, 88 NY2d 756, 650 NYS2d 614, 673 NE2d 899 [1996]). A Medical Board determination will be sustained if there is some credible evidence (*Id*).

Respondent DOE Chancellor’s Regulation C-650 defines a Sabbatical Leave as:

“A leave of absence granted with reduced salary to an eligible employee with the expectation that the employee will return to service strengthened by ... restoration of physical health accomplished during the leave” (Opposition Papers Ex. 4).

**Prior to granting a Sabbatical, the UFT Contract states:**

**“Sabbaticals of six months or less shall be conditional upon the employee remaining in the New York City school system for one (1) year after the employee’s return” (*Id*).**

**Pursuant to the UFT Contract, a request for a Waiver is “reviewed and approved by the Board’s Medical Bureau on a case-by-case basis” (*Id* at Ex. 5). When deciding whether to grant a Waiver, the UFT Contract states in Article 16(B)(10):**

**“If an employee is unable to return from a sabbatical or is unable to complete the applicable service requirement upon return from a sabbatical due to a medical incapacity which has developed since the commencement of the sabbatical, such employee shall receive a hardship exception to this return provision” (*Id*).**

**The DOE’s Division of Human Resources Personnel Memorandum uses broader language when determining to grant a Waiver. It states the “enumerated provisions and obligations covering returns from sabbatical leave may be waived provided there are significant, prolonged medical reasons preventing an individual from returning to work” (*Id* at Ex. 6).**

**This Petition is not moot. On October 19, 2016 the Parties agreed to a Stipulation of Settlement in a separate action where Petitioner agreed to retire by February 1, 2017 and the DOE agreed to withdraw disciplinary charges (*Id* at Ex. 9). The Stipulation of Settlement expressly states that the Petitioner could commence “any action, grievance and/or appeal related solely to her compensation as a DOE employee and as it relates to her request for a medical waiver” (*Id*). This Article 78 Petition directly relates to the exception carved out in the Stipulation of Settlement.**

**Respondent’s denial of Petitioner’s Waiver application was arbitrary and capricious as the determination made by Dr. Garner was without any “credible evidence” (Borenstein, *supra*). When reviewing an application for a Waiver of Return, the UFT Contract states that the medical bureau should grant a Hardship Exception if the employee is unable to return from a sabbatical due to a medical incapacity that developed after *the commencement* of the Sabbatical (Opposition Papers Ex. 5, *emphasis added*). Petitioner’s Sabbatical officially commenced on March 1, 2016, but her psychiatric condition developed in April 2016.**

**Petitioner’s application for a Waiver should have been examined from the commencement date of her Sabbatical, March 1, 2016. On March 2, 2016 Petitioner’s physician, Dr. George Liakeas, MD, recommended that she should avoid work from March 2, 2016 to June 30, 2016 due to continued work related stressors that would increase her risk for a cardiovascular event (Moving Papers Ex. C). On March 22, 2016 Petitioner was admitted as a patient at the Karen Horney Clinic to undergo psychiatric evaluation and medical consultation (*Id*). On April 14, 2016 she was first diagnosed with Post Traumatic Stress Disorder related to experiences at her job, as well as**

diagnosed with Major Depressive Disorder and Panic Disorder without Agoraphobia (*Id*). Dr. Henry A. Paul, MD, Petitioner's psychotherapist and clinic psychiatrist, recommended that Respondent grant Petitioner a medical waiver and allow her to retire immediately (*Id*). On August 8, 2016 Dr. Liakeas reiterated his March 2, 2016 recommendation stating that Petitioner should not return to work due to her medical conditions (*Id*).

Dr. Garner failed to adhere to the standards set forth in the UFT Contract when deciding Petitioner's Waiver application. Dr. Garner failed to take into consideration the recommendations given by Petitioner's physicians made *after* the commencement of Petitioner's Sabbatical. Even if Dr. Garner approved the Sabbatical on the basis of Petitioner's medical records available up to May 2, 2016, the Sabbatical began retroactively from March 1, 2016. When considering Petitioner's August 8, 2016 Waiver, Dr. Garner erred in using the May 2, 2016 date instead of the March 1, 2016 date to determine if Petitioner developed a new medical incapacity, which she unquestionably did. Therefore, the DOE's decision to deny Petitioner's Waiver lacks any credible evidence as they failed to adhere to their own standards in the UFT Contract, and Petitioner's Waiver should be granted.

Accordingly, it is ORDERED AND ADJUDGED, that the Petition seeking an Order granting Petitioner's August 8, 2016 Waiver of Return, pursuant to Article 78 of the CPLR, is granted, and it is further,


ORDERED AND ADJUDGED, that Petitioner is not responsible to pay back the six (6) months of pay she received while on her Sabbatical for Restoration of Health dated March 1, 2016 to July 31, 2016, and it is further,

ORDERED, that Respondent's cross-motion to dismiss the Petition is denied, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ  
J.S.C.



MANUEL J. MENDEZ  
J.S.C.

Dated: October 24, 2017

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST     REFERENCE