Lynn S. Weltler,
Petitioner,

v.

Somerset Hills School District
Board of Education,
Respondent.

OAL DKT. NO. LID 14911-13
LWD DKT. NO. D72-03-028

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND
WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

Issued: June 3, 2015

The Division of Public Safety and Occupational Safety and Health (the Division), within the Department of Labor and Workforce Development, issued a determination dismissing the discrimination complaint of Lynn S. Weltler (petitioner) on the basis that she had failed to establish a prima facie case of discrimination as required under N.J.A.C. 12:110-7.5. In her complaint, petitioner alleged that her employer, the Somerset Hills School District Board of Education (respondent), through its agent, Principal Scott Neigel, had discriminated against her on the basis of her having expressed concerns regarding the safety of opening the orchestra pit at the High School Performing Arts Center (PAC) during a school musical production and, subsequently, having filed a complaint with the Division against respondent under the Public Employees Occupational Safety and Health Act (PEOSH Act) on the basis of the same safety concerns regarding use of the open orchestra pit during productions at the PAC. Specifically, petitioner alleged that the afore-mentioned discrimination had motivated respondent's decisions, through its agent, Principal Scott Neigel, not to rehire her for the yearly stipend positions of Fall Play Director, Spring Musical Director and PAC Manager and to "co-seat" her Theater Arts II and Acting Troupe courses for the 2013-2014 school year. Following the dismissal of her complaint by the Division, petitioner requested a hearing, at which time the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case.

Following a hearing, Administrative Law Judge (ALJ) Evelyn J. Marose found that respondent had proved by a preponderance of the credible evidence that it had legitimate business reasons for each of its actions and, in effect, that no credible evidence had been presented from which she could find or conclude that the reasons given by respondent for its actions were pre-textual. That is, the ALJ found that Principal Neigel had testified credibly that the decision not to rehire petitioner for the Fall Play Director and Spring Musical Director

positions had been based not on discriminatory animus, but rather, on the manner in which petitioner had resigned the prior year as Spring Musical Director (with no advance notice, three days before auditions for the spring musical were to commence) and on a desire to acknowledge the individual who had served successfully as the replacement Spring Musical Director on short notice when petitioner had abruptly resigned from that position by hiring him to serve in the subject stipend positions for the succeeding school year. Regarding the decision not to assign petitioner to the position of PAC Manager, the ALJ found that respondent had proved by a preponderance of the credible evidence that this decision too had not been motivated by discriminatory animus, but rather, had been due to respondent's business decision to discontinue rental of the PAC, which thereby eliminated the need for someone to serve in the position of PAC Manager. Finally, regarding the co-seating of petitioner's courses, the ALJ found that respondent had proved by a preponderance of the credible evidence that this decision had been based on the level of enrollment in the particular elective course offerings, adding that teachers other than petitioner had been assigned to co-teach electives so that subjects with limited enrollment could be offered and that those other teachers had not raised any safety concerns, nor had they filed complaints with the Division. Consequently, the ALJ issued an initial decision recommending that petitioner's discrimination complaint be dismissed. Petitioner filed exceptions to the ALJ's initial decision. Respondent filed a reply in opposition to respondent's exceptions.

In her exceptions, petitioner opens by taking issue with the issuance of multiple orders of extension for the ALJ to file her initial decision, asserting that in this case "justice delayed is justice denied." Petitioner explains that because of the time which had transpired between the hearing, the filing of post hearing briefs, and the issuance of an initial decision, "clearly the Judge, due to the delay, simply forgot what she had heard in the hearing." Petitioner adds, "[a]s there was a transcript, the Judge's failure to refer to the transcript is inexplicable, almost as inexplicable as her unsupported findings of fact." In addition, petitioner takes issue with the ALJ not having made reference within her initial decision to petitioner's assertion during the hearing that Principal Neigel had informed her that placement of the orchestra in the orchestra pit for the spring musical had been a "mandate that was handed down from the Superintendent." Petitioner asserts that although Principal Neigel denied ever having said that use of the orchestra pit for the spring musical had been a mandate handed down by the Superintendent, petitioner's letter of resignation which indicates that Principal Neigel did say this, "strongly supports" her testimony before the ALJ that he said it. Petitioner then goes on at some length about what she characterizes as "the 'smoking gun' in this case," the importance of which, she maintains, "cannot be overstated." Specifically, petitioner is referring to Exhibit P-11, which contains the following email exchange between petitioner and Principal Neigel from February 2013 (months after petitioner had resigned from the position of Spring Musical Director):

> Petitioner: Hi Scott, Last night I happened to be out with some professional theater colleagues and we were talking about theater spaces. When I mentioned that our pit was going to be opened and a net installed for our upcoming production, they informed me of some OSHA requirements that I did not know. I just wanted to let you know about this to ensure that the school's liability is not impacted in any way. Once the pit cover is removed, either a railing, person to secure the area (in the space at all times), or netting must be in place before

> anyone may be in the vicinity. OSHA requires that any safety net be tested and inspected upon installation, periods of stagnancy, or reinstallation. This can be done by the company that manufactured the netting (in our case I believe it is InCord). Nets must be certified before anyone can be on stage. More information about this can be found at the OSHA website. Just thought you might want to know. Lynn
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> Principal Neigel: Hi Lynn – I wanted to let you know that Dan Beam reached out to OSHA to inquire about the process for testing and inspecting the safety net. The person he spoke to explained to him that OSHA only extends to employees of an organization and does not cover students. They provided him with the attached letter regarding students and OSHA. You may want to share it with your professional colleagues whom might have received misinformation along the way. Please be assured that we will take every precaution to make sure that the stage is safe with the pit cover removed. If you have any concerns as the PAC Manager, please do not hesitate to let me know and I will follow up. Regards, Scott.

Regarding this exchange, petitioner asserts the following:

> One would have hoped, or perhaps even expected, that Mr. Neigel would be at least as interested in the safety of students as he was required by law to be in the safety of staff. Rather than disputing that it was an unsafe condition (in fact, if the Commissioner reviews Mr. Neigel's response, this basically is an admission that there was an unsafe condition but that he was not concerned with it), Mr. Neigel stated that, if it is an unsafe condition covered by P.E.O.S.H.A., then it did not affect him in his role as building Principal because P.E.O.S.H.A. only applies to employees and not to students.
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> . . .
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> The person who determined not to renew Ms. Weltler for the play and the musical is the same person who was audacious enough to put in writing that P.E.O.S.H.A. only applied to staff and not to students. How the significance of this document escaped the Administrative Law Judge is most disheartening. It certainly was put into evidence and discussed at great length in the brief submitted to the Administrative Law Judge after the conclusion of the hearing.
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> Properly parsed, the sentence in question means that the Principal of the high school, who should have been concerned with the safety of the students was stating, even if it is an unsafe condition (and Mr. Neigel throughout his testimony admitted that he knew nothing about theater or safety in a theater), that the unsafe condition was because P.E.O.S.H.A. governed. And P.E.O.S.H.A. has no application to students, only staff.

Finally, in conclusion, petitioner states the following:

> As stated at the outset, justice delayed is justice denied. Whether because of the delay, the Administrative Law Judge subconsciously felt that she was required to rule for the Board of Education, because if she ruled for Ms. Weltler it would have cost the District an additional year's stipends for the two positions in question, or whether this was merely subliminal, that she did not want the District to look at her and say, you put Ms. Weltler back, you ordered us to pay back-pay, but the delay was yours and not ours, is beside the point. Due to the delay, either on a conscious or unconscious basis, the Administrative Law Judge did not review the evidence in question, makes no comment on any of the documents and testimony supporting Ms. Weltler and, in a very cursory (in fact embarrassingly cursory) decision, considering the two full days of hearing and the 32 documents put into evidence, offered no analysis but merely determined to rule against Ms. Weltler.

In its reply to petitioner's exceptions, respondent asserts that (1) petitioner's exceptions fail to satisfy the requirements of N.J.A.C. 1:1-18.4, (2) the Commissioner cannot reject or modify the ALJ's initial decision concerning the credibility of the witnesses as the ALJ's initial decision was not arbitrary, capricious or unreasonable and it was supported by sufficient, competent and credible evidence, and (3) the ALJ's initial decision was timely filed "as per the extensions granted by the [Director and Chief Administrative Law Judge and the] Commissioner." Relative to its first point, respondent states the following:

> Petitioner has failed to specify any findings of fact, conclusions of law, or dispositions to which exception is taken but instead in a conclusory manner generally dismisses Judge Marose's findings of fact and conclusions of law on the grounds that Judge Marose did not find in favor of petitioner. Moreover, petitioner has failed to propose any specific findings of fact, conclusions of law, or dispositions in lieu of or in addition to those reached by Judge Marose. Instead, petitioner merely referenced portions of her rebutted testimony and certain documents in evidence that were not explicitly identified in the initial decision. This is insufficient.

Relative to its second point, respondent states the following:

> It is clear that petitioner merely disagrees with Judge Marose's credibility determination concerning the testimony of the witnesses in this case. Petitioner essentially argues that Judge Marose did not provide due weight to petitioner's testimony concerning: (1) the issue of whether use of the orchestra pit was a 'mandate'; and (2) the significance of the emails exchanged about the OSHA Act's applicability to students.
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> . . .

Judge Marose clearly made a credibility determination concerning the two witnesses' testimony and accepted Neigel's version of events; namely, that he never told petitioner that use of the orchestra pit was a mandate from the Superintendent. Even if Judge Marose found that Neigel did in fact tell petitioner that the Superintendent mandated the use of the orchestra pit, that finding would have no bearing on the decision ultimately reached. Moreover, there was no testimony offered at the hearing that petitioner was presented with a "non-negotiable issue," thus resulting in her resignation. The evidence shows that petitioner voluntarily resigned from her position as director of the spring musical and was resistant to Neigel's efforts to reach a compromise and have her remain in her position as director. It is clear that petitioner merely disagrees with Judge Marose's credibility determination because it was not favorable to her.

Additionally, petitioner's exceptions allude to a 'smoking gun' email exchange between petitioner and Neigel, which was not explicitly addressed in Judge Marose's opinion because it was not a smoking gun at all. Petitioner sent an email to Neigel to inform him of certain OSHA safety regulations that she became aware of with regard to nets covering orchestra pits. In response to petitioner's concerns, Neighel asked the custodial supervisor to reach out to OSHA for clarification, who in turn was informed that OSHA only extends to employees of an organization and does not cover students. Neigel's subsequent response to petitioner that OSHA does not apply to students, but rather to employees, is an accurate characterization of the statute.

What petitioner fails to acknowledge in her exceptions is that when Neigel informed petitioner that OSHA does not apply to students, he also set forth in the same email: 'Please be assured that we will take every precaution to make sure that the stage is safe with the pit cover removed. Neigel credibly testi9fied that he included this statement in the email to let petitioner know that he 'would take every precaution to make sure that it was safe and that was always my goal and my concern, is I would never, ever intentionally put anyone in a dangerous situation.' Neigel testified at length about how the safety of all individuals within his school building is a top priority. Petitioner's exceptions completely mischaracterize Neighel's testimony, while simultaneously failing to raise any evidence that Judge Marose's credibility determination was arbitrary, capricious, or unreasonable. The fact that petitioner was troubled upon being informed that, pursuant to New Jersey and federal law, OSHA does not apply to students is of no significance to Judge Marose's findings.

Regarding its third point, respondent states the following:

Petitioner boldly asserts that the initial decision reflects that Judge Marose 'forgot what she had heard in the hearing' because of the passage of time between the close of the record on July 21, 2014 and the issuance of a decision on March 6, 2015. This is pure conjecture and belied by the initial decision rendered by Judge Marose. It must be noted that both Laura Sanders, Acting Director and Chief

Administrative Law Judge, and Commissioner Wirths issued orders providing for the extension of time on November 19, 2014, December 5, 2014, and January 28, 2015. The most recent extension permitting Judge Marose to file her initial decision on March 6, 2015, which is the date of the initial decision. The fact that Judge Marose was granted an extension to complete her initial decision by both the Office of Administrative law and the Department of Labor and Workforce Development should have no bearing on the Commissioner's review of the initial decision.

CONCLUSION

An agency head need not defer to the findings of an ALJ. In re Kallen, 92 N.J. 14, 20 (1983). Indeed, he need not adopt any of the findings reached by an ALJ in her initial decision. Application of the County of Bergen, 268 N.J. Super. 403, 414 (App. Div. 1993). However, the agency head may not ignore an ALJ's abundantly supported conclusions. P.F. v. New Jersey Division of Disability, 139 N.J. 522, 530 (1995); Department of Health v. Tegnaxzian, 194 N.J. Super. 435, 450 (App. Div. 1984). Rather, where there is substantial evidence on all sides of the issues addressed, no findings made or conclusions reached that are based on that evidence and are otherwise within the ALJ's discretionary authority will be seen to be arbitrary, capricious or unreasonable. Application of the County of Bergen, supra, at 411; Application of N.J. Bell Telephone Co., 219 N.J. Super. 77, 89 (App. Div. 1996).

In the present case, the ALJ has produced a thorough and convincing decision wherein the credibility of each witness and the nature and quality of the evidence presented at the OAL hearing was carefully weighed. I will, therefore, accord to the ALJ the deference due her as the trier of fact and the person who directly observed the witnesses, their demeanor and deportment, as well as the quality of their individual testimony and evidence produced in support of their testimony. In addition, having considered the entire case record and the ALJ's initial decision, as well as having considered the exceptions filed by petitioner to the ALJ's initial decision and respondent's reply to petitioner's exceptions, and having conducted an independent evaluation of the record, I have accepted and adopted the findings of fact, conclusions and recommendation of the ALJ. Furthermore, regarding certain assertions made by petitioner within her exceptions about which she appears to be particularly vehement, I agree with respondent's reply to petitioner's exceptions in several important respects:

(1) I agree that the ALJ made a credibility determination concerning the two witnesses' testimony regarding the issue of whether use of the orchestra pit had been a "mandate" and accepted Principal Neigel's version of events.

(2) I agree that even if the ALJ had found that Principal Neigel, in fact, told petitioner that the Superintendent had mandated the use of the orchestra pit, that finding would have no bearing on the decision ultimately reached by the ALJ; which is to say, whether Principal Neigel told or did not tell petitioner that the Superintendent had mandated use of the orchestra pit is not material to a determination as to whether the decisions not to rehire petitioner in the stipend positions of Fall Play Director, Spring Musical Director, and PAC Manager and to "co-seat" her Theater Arts II and Acting Troupe courses for the 2013-2014 school

year, were in retaliation for her voicing of safety concerns and filing of a PEOSH complaint against respondent, or instead, were based on the legitimate business reasons to which Princpal Neigel and Business Manager, Nancy Lee Hunter, testified during the OAL hearing.

(3) I agree that petitioner's characterization of the February 2013 email exchange between Principal Neigel and petitioner regarding OSHA regulations (Exhibit P-11) as a "smoking gun" is inaccurate; which is to say, as indicated by respondent, it is "not a smoking gun at all." That is, as observed by respondent in its reply to petitioner's exceptions, (1) to state that the OSHA Act applies only to employees and not to students is an accurate characterization of the law, and (2) petitioner fails to acknowledge in her exceptions that Principal Neigel ended the email exchange by stating that, "we [the School District] will take every precaution to make sure that the stage is safe with the pit cover removed," adding, "[i]f you have any concerns as the PAC manager, please do not hesitate to let me know and I will follow up."

(4) I agree that the fact that the ALJ was granted extensions to complete her initial decision should have no bearing whatsoever on the outcome in this case and, I believe, as indicated earlier, that the initial decision of the ALJ is a thorough and convincing decision wherein the credibility of each witness and the nature and quality of the evidence presented at the OAL hearing was carefully weighed. Let me add that it is both well-written and well-reasoned.

ORDER

Therefore, it is ordered that the discrimination complaint of Lynn S. Weltler be dismissed.

This is the final administrative decision in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
COMMISSIONER, DEPARTMENT OF
LABOR AND WORKFORCE DEVELOPMENT

Harold J. Wirths, Commissioner
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