STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAUL DANKO, Petitioner, To Review Under Section 101 of the Labor Law: A finding that there was no discrimination against the Petitioner under Section 27- a (10) of the Labor Law dated December 8, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 09-002 RESOLUTION OF DECISION

APPEARANCES

Paul Danko for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Paul Danko, and Douglas Dubner, Discrimination Investigator for PESH.

WHEREAS:

On January 15, 2009, Petitioner Paul Danko (Petitioner or Danko) filed a petition with the New York State Industrial Board of Appeals (Board) seeking review of a determination issued by the Commissioner of Labor (Commissioner or Respondent) on December 8, 2008 dismissing his complaint of discrimination under Section 27-a(10) of the New York State Labor Law. The determination stated:

> "As a result of the investigation, it appears that the burden of establishing that you were discriminated against in violation of the above-cited section of the Act cannot be sustained. The evidence developed during the investigation was not sufficient to support a finding of a violation. The information and documentation you

> provided were unable to establish a connection between the safety and health complaint and the employer's adverse actions. Accordingly, we are dismissing your complaint."

In his petition, Danko alleges that he was terminated from his employment in retaliation for giving testimony against his employer before a Federal Grand Jury. He also alleges that the investigation was unreasonable because the Department of Labor (DOL) Investigator failed to consider 70-80 pounds of documents produced by Danko in support of his complaint.

After requesting a ten day extension of time in which to file an answer, which was granted by the Board pursuant to Board Rules of Procedure and Practice (Rules) 65.1 and 65.5 (g) (12 NYCRR 65.1, 65.5[g]), Respondent filed her answer on March 16, 2009. The Commissioner denied the allegations of the petition and found: (1) Petitioner failed to present any evidence that "anyone in position to impact his working conditions was knowledgeable about the above referenced Grand Jury testimony. . .;" (2) the employer's reasons for terminating Danko's employment were unrelated to any protected activity; and (3) there was no nexus between Danko's Grand Jury testimony in 1998 and his termination in 2008 and the other alleged adverse actions occurred much earlier than 30 days prior to the filing of the complaint. In reply, Petitioner alleged that Respondent failed to conduct an investigation and evidence offered by Petitioner was not considered by Respondent.

Upon notice to the parties, a hearing was held on September 16, 2009 in White Plains, New York before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues. Petitioner filed a post-hearing statement on October 20, 2009 and Respondent did not file a brief.

SUMMARY OF EVIDENCE

Douglas Dubner, DOL Discrimination Investigator (Dubner) testified that Danko's discrimination complaint was referred to him for investigation on October 27, 2008. He contacted Danko right away and conducted an in-person interview with Danko on November 5, 2008. They spoke for approximately two hours and completed a DOL questionnaire.

Dubner testified that an investigator is required to determine whether the elements of a prima facie case are present prior to conducting an in-depth investigation. Although Danko came to the interview with a bag full of documents, Dubner did not look at the documents, other than the few shown to him by Danko, because Danko did not come up with a prima facie case. A prima facie case consists of four elements: (1) protected activity; (2) employer knowledge of the protected activity; (3) an adverse action; and (4) a nexus between the protected activity and the adverse action. In addition, the statute requires that the complaint be filed within 30 days of the adverse activity. Dubner testified that Danko's 1998 grand jury testimony concerning mercury in the water supply was protected activity; that the employer probably knew that Danko testified; that Danko's termination from

employment constituted adverse action and that it occurred within 30 days of his filing a complaint with DOL. However, there was no clear nexus between protected activity and the termination. Although Danko maintained that he was being discriminated against for being a whistleblower, and that his termination was a result of his 1998 testimony, Dubner testified that since the initial adverse actions took place more than 30 days prior to the complaint being filed, Danko failed to show a prima facie case and that Danko was required to file a claim after the first adverse action following his protected activity.

Since there was no prima facie case presented, Dubner did not conduct an in-depth investigation.

DISCUSSION

The Board's role in this matter is not to determine whether the Department of Environmental Protection discriminated against the petitioner, but rather whether the Commissioner's determination that the petitioner was not discriminated against was reasonable (*see* Labor Law §§ 27-a(6)(c) and 101). Additionally, the petitioner bears the burden of proof in proceedings before the Board (Labor Law § 101; Board Rules 65.30). That the record contains some evidence which may give rise to another conclusion is not sufficient in this matter for us to find that the Commissioner's determination was unreasonable or that her investigation was not appropriate.

Labor Law § 27-a (10) (a) provides that no person shall discharge, discipline or in any manner discriminate against an employee who has filed a PESH complaint. Labor Law § 27-a (10) (b) sets forth the only statutory process available to an employee who believes that he or she has been discriminated against in retaliation for filing a PESH complaint:

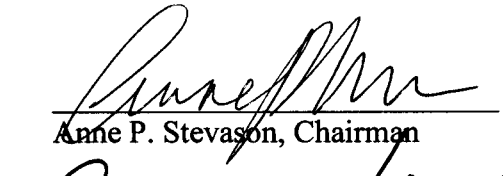
> "Any employee who believes that he has been discharged, disciplined, or otherwise discriminated against by any person in violation of this subdivision may, within thirty days after such violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of such complaint, the commissioner shall cause such investigation to be made as he deems appropriate . . . . If upon such investigation, the commissioner determines that the provisions of this subdivision have been violated, he shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision. . . ."

The civil prosecution of a PESH retaliation case in supreme court requires evidence that (1) Danko engaged in a protected activity; (2) his employer was aware of the protected activity; (3) Danko suffered an adverse employment action; and (4) there was a nexus between the protected activity and the adverse employment action (*see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [1972]; *Dept of Correctional Services v. Division of Human Rights*, 238 AD2d 704 [3d Dept. 1997] [federal standards followed in New York discrimination cases]). In addition, the complaint must be filed within 30 days of the adverse action.

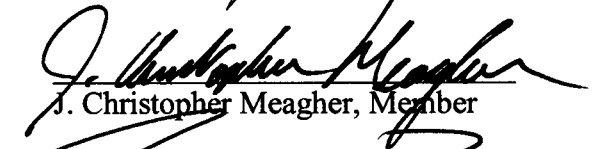
The evidence demonstrated, and the Commissioner does not appear to dispute, that Danko engaged in a protected activity when he testified before the Grand Jury; and that his termination was an adverse action which occurred within 30 days of the complaint. However, the Commissioner in reaching her determination that Danko's claim had no merit, found that the complaint was untimely because the first adverse action occurred prior to the 30 days. On this basis, the Commissioner refused to look at further evidence presented by Danko. We find this to be an unreasonable investigation. Although it may prove difficult to show that there is a nexus between the 1998 Grand Jury testimony and Danko's termination in 2008, Danko was a whistleblower and produced evidence which the Commissioner refused to look at to determine whether a nexus existed. DOL is incorrect in dismissing a complaint because the first of numerous adverse actions occurred prior to the 30 day time limit in which to file a complaint. We remand the case to the Commissioner to review Danko's documents to determine if his termination was due to his protected activity.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

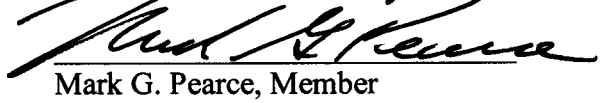
1. That the Determination under review herein is hereby revoked and that the underlying PESH complaint is remanded to Respondent for further investigation.



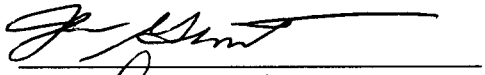
Anne P. Stevason, Chairman



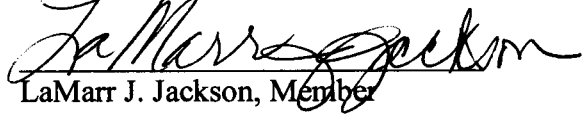
J. Christopher Meagher, Member



Mark G. Pearce, Member



Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 24, 2010.