

Thereafter, respondent referred the matter to the New York State Attorney General for action pursuant to Labor Law § 27-a (10) (b).

The petition alleges the determination is invalid or unreasonable because complainants were terminated for legitimate, non-discriminatory reasons unrelated to their engagement in protected activities under PESHA.

Upon notice to the parties, a hearing was held on May 20, 2015 in Albany, New York, before then Counsel to the Board and the designated Hearing Officer in this matter, Wendell P. Russell, Jr., at which, the parties were given a full and fair opportunity to be heard.

COMPLAINT HISTORY

In April 2011, complainants filed PESHA complaints with respondent in which they alleged various possible unsafe conditions at petitioner's fire stations. In August and September 2012, complainants filed complaints of retaliation with respondent in which they alleged that they were shunned, ridiculed and demoted by petitioner. In October 2012, complainants filed a second round of PESHA complaints with respondent in which they alleged additional unsafe conditions at petitioner's fire stations.

Respondent investigated all of these complaints, and found violations of safety and health standards after a May 2011 inspection of petitioner's facilities and again after a November 2012 inspection of said facilities. Respondent also found that petitioner had impermissibly retaliated against complainants, as set out above.

Complainants also reported inappropriate activity on the part of petitioner and its firefighters and officers to other agencies. Respondent did not investigate these reports, but was aware of them.

SUMMARY OF EVIDENCE

A. Complainants

Testimony of Gordon S. Hadsell, Jr.

Gordon Hadsell testified that he was a member of the South Glens Falls Fire Company from 1988 to 2001, and rejoined in 2006 or 2007 until his termination in 2013. He was disciplined in August 2001 and February 2010, but was a member in good standing in April 2011, serving on the Board of Directors or as an officer. Prior to complainants' April 2011 PESHA complaints, the atmosphere at the fire company was "upbeat;" Hadsell socialized with various members of the fire company and their families outside of work. As an officer and director, Hadsell did not consider his relationship with the fire company to be adversarial.

Hadsell testified that his professional relationship with other members changed "very drastically" after he filed the April 2011 PESHA complaint; he was ostracized and subjected to hostility, name-calling, and mocking, which treatment he had not previously suffered. At a 2012 meeting, a fire company official confronted him and told him the fire company knew he had reported petitioner because a Village trustee had told one of the firefighters about complainants' filing against petitioner. Hadsell also testified he, Robbins and Bovey had gone to meet with a fire coordinator; they could not find his office and happened to go into the office

of petitioner's insurer to ask for directions. While there, the insurer's representative informed them that she had been trying for a year and a half to contact the then fire chief and there had been no response. She asked for Hadsell's help obtaining a current list of fire company members and Hadsell agreed because keeping an insurer informed of a company's roster is one of a fire chief's most important duties. Hadsell told then fire chief about his interaction with the insurer's representative and "next thing, I was being brought up on charges," because he had supposedly tried to make himself the insurance contact person.

Hadsell testified that he received adverse treatment from the fire company as a result of having filed a PESHHA complaint with respondent. He believed this was the case after two fire company officials said at a June 2011 meeting that "we need to do something with these people that keep on turning us in on the OSHA complaints." Hadsell also testified that a former fire company president told him the company knew "[Hadsell] and the two others wrote the OSHA complaints," and that Quinn's June 2011 reference in meeting minutes to the "three crybabies" referred to Bovey, Robbins and Hadsell as "the three that filed a OSHA complaint."

Testimony of Edwin Robbins

Edwin Robbins joined the South Glens Falls Fire Company in 1969 and was a member until his 2013 expulsion, with the exception of several years when he was a member of another company. During more than 20 years of membership, he was suspended once in 2009 and reinstated in 2010. Until 2009, Robbins relationship with other members of the fire company was "good." This changed when Robbins observed some safety and health violations, and after the PESHHA complaints were filed, his relationship with the fire company changed "drastically" until he was expelled in 2013. Robbins was friends, professionally and personally, with Bovey and Hadsell and had been for many years. In April 2011, the three filed PESHHA complaints. Thereafter, it came out at a Board of Directors meeting at which Bovey and Hadsell were present that the Board of Directors knew the identity of the three complainants. Further, after the PESHHA complaints were filed, an officer and Director brought charges against him, but he was later cleared of any wrongdoing.

In 2012, Robbins wrote the Office of the Attorney General, the Division of Criminal Justice Services and the mayor of the Village about the fire company. He contacted officials because of his concerns about unsafe actions by a fire police officer who was the chief's son.

Also in 2012, the fire company wrote Robbins directing him to return a binder of information maintained by the fire police captain. Robbins, then a fire police captain, had a copy of the binder, as did the Chief and the Company Secretary. Robbins testified that according to "one of the meetings' records," Quinn had suggested using the binder as "one of the ways [the fire company] could get rid of [Robbins]," as "retaliation." Robbins was demoted from fire police captain in July 2012 for failing to return the binder.

Robbins testified that Hadsell was expelled from the fire company after an insurance company representative had been unable, for a year and a half, to reach the company chief, despite having sent him letters and emails, and Bovey was expelled from the fire company because he is a friend of Robbins. Robbins further testified that the fire company mockingly called him, Hadsell, Bovey the "three *amigos*." He added that the main reason he was expelled was for having filed the April 2011 PESHHA complaint.

Testimony of Joseph Bovey

Joseph Bovey was a firefighter and fire police officer with petitioner since 2005. Prior to filing the April 2011 PESHHA complaint, Bovey “was in the clique” and got along with everyone— “members of the Board, the President, the Vice President, Secretary, Treasurer, the whole group.” With his friends Hadsell and Robbins, he filed the April 2011 PESHHA complaint because, as a member of the fire police, he had taken an oath to uphold the law; his “main concern” was the health and safety of firefighters and fire police. He testified that together Robbins, Hadsell and he were known as the “three *amigos*.” In addition to the April 2011 PESHHA complaint, Bovey filed the discrimination complaint at issue here, a federal safety and health complaint and a federal discrimination/retaliation complaint.

Bovey testified that “everyone” knew about respondent’s investigation, and that Village Trustee LaFave notified the members of the fire company of complainants’ identity. After Bovey filed the April 2011 complaint, “things just turned right around,” his working environment changed; specifically, he was called a “whistleblower,” people talked about him, whistled in his presence, ignored him and shunned him. Bovey “figured somewhere down the line that [petitioner] would try whatever [it] had to do to get rid of [complainants].” In 2013, he received a certified letter notifying him that he had been expelled from the fire company; no reason was provided.

B. Petitioner***Testimony of Fire Company President Wayne Palmer***

Wayne Palmer testified that he has been president of the South Glens Falls Fire Company since March 2, 2015, although he was previously a member from 1994 until 1999 when he moved out of the district. Palmer met Robbins and Hadsell at the fire company when all were members “back in the ‘90s” and recalled that Hadsell had been suspended at some point. Palmer did not know Bovey who has not a member during the times Palmer has been part of the fire company. Palmer never met Bovey who was not a member when Palmer first joined the fire company. Palmer testified that the “conduct of the complainants” had an impact on the fire company and some members had been lost “through the years of all this,” although he was not a member “at any time involving issues with the PESH complaints.”

Testimony of Firefighter Ronald C. Quinn, Sr.

Ronald Quinn testified that he has been a firefighter with petitioner for 34 years, including the time of respondent’s PESHHA investigations, and that he has held various leadership positions in the company. Quinn recalled the PESHHA investigations resulted in “no serious infractions” and caused “no real problems.” He recalled Robbins had been disciplined, but did not remember the reason. Other than having filed a PESHHA complaint, Quinn could not recall “anything specific” by Hadsell that would be considered adversarial to the fire company. Quinn also did not recall anyone complaining about Robbins, Hadsell, or Bovey filing PESHHA complaint in 2011, 2012 and 2013, “because we were not aware of who made the complaints;” he also could not recall when he himself became aware of the PESHHA complaints.

C. Respondent

Testimony of Kwo Lam, Senior Safety and Health Inspector

Kwo Lam testified that he is a Senior Safety and Health Inspector for respondent whose job duties include investigation of cases of discrimination and retaliation. Together with other investigators, he investigated complainants' allegations of retaliation. Lam reviewed the claim forms to confirm they contained the information needed for an investigation to go forward, including Hadsell's statement that he learned from a fire company officer he was going to be removed from office, Bovey's and Robbins's statements that a Village trustee revealed that complainants had filed PESHHA complaints and, as a result, had determined to demote Robbins and expel Bovey, and that petitioner members had started whistling at Robbins as a form of retaliation. The complaints showed the "protected activity and an adverse action" of which petitioner was aware.

In October 2012, Lam notified petitioner and the Village of the allegations made by complainants, whose names were included in the notice letters. Petitioner responded by sending respondent many documents, including minutes from fire company Board of Directors and member meetings, all of which were incorporated into respondent's investigation file. Lam also interviewed more than 15 members of the fire company, and all witness statements were included in the investigation file.

Lam explained that after the May 2011 site inspection of its firehouses, respondent cited petitioner in July 2011 for various violations of PESHHA. Petitioner was aware of the identity of those who had made the complaints, and the work environment at the fire company changed after the April 2011 complaints were filed, morale was "very bad," and several witnesses whom Lam interviewed "took it really personal" and "really were upset with the complainants." Lam read from the June 2011 minutes for a monthly fire company meeting that Quinn "asked about the crybabies that we have in our company that are cowards. Stated that we have been through OSHA and the police investigation, what are they planning next? He stated that if they are so unhappy with the fire company why don't—don't they just get out." Lam also read from the July 2011 Board of Directors meeting minutes, that a member "would like to get rid of the three troublemakers" and that the same member made a motion, which was seconded, "to get rid of Edward Robbins." The motion specified that Robbins should be expelled because he was "guilty of conduct that would bring disgrace on, or create disunion in, the fire company." Lam testified that petitioner also filed charges against Robbins that were found to have no merit.

Lam testified that the fire company wrote Robbins in July 2012 regarding a fire police binder containing member information; the binder was the subject of a "special company meeting" at which a motion was made to demote Robbins for not returning the binder, and a motion was made to remove Hadsell from the Board of Directors for having improperly made himself the contact person for an insurer of the fire company. Both motions passed unanimously. Lam testified those reasons were pretext and based on incorrect information.

Lam further testified that petitioner's allegation that Hadsell had made himself the insurance contact prompted Lam to contact the insurer. The insurer's representative reported that the president's version of events was false. The insurance representative had asked for Hadsell's contact information to facilitate communication with the fire company president, who had been unresponsive for more than a year. Lam also testified that Robbins had a copy of the binder of confidential information because, as fire police captain, he was required to have that information.

Lam testified that petitioner's bylaws were repeatedly changed, and cited to the July 2012 Board of Directors meeting setting out a bylaw amendment to a "vote of seventy-five percent to be able to get, you know, rid of certain people." Lam explained that because petitioner kept changing its bylaws, respondent began to question "what was going on with the three complainants." Lam read from the minutes of the November 2012 fire company meeting that Quinn and others "expressed their frustrations" and wanted "to move forward with the petitions" to expel complainants. At this meeting, respondent's letter to petitioner "regarding the complaints by Joe Bovey, Ed Robbins, and Gordon Hadsell against the South Glens Falls Fire Department" was read and members "spoke about the fact that they made the bylaw change petition so that the problems with these three people could be taken care of."

Upon completion of its investigation, respondent concluded that complainants had been discriminated against for filing PESHAs. Lam concluded that petitioner's purported justification for removing Robbins from his position and expelling him (his failure to return a binder of fire police information), as well as the purported justification for demoting and expelling Hadsell (making himself an insurance company contact) lacked merit. Regarding the expulsion of Bovey, Lam testified that no one knew "why he was involved—there was nothing to be able to address with Mr. Bovey."

Lam explained that filing a PESHAs complaint is a protected activity, and there are many acts taken by an employer that indicate retaliation or discrimination, including, "removal from specific positions and ultimately expulsion from a volunteer fire company."

Finally, Lam testified that he was aware that two complainants had been disciplined by petitioner before filing their original PESHAs, and that complainants had made complaints to other authorities, which complaints were not a factor in his investigation. Lam also knew that respondent's industrial hygienist found no serious violations by petitioner, and that no fines or sanctions had been sought, although for the purposes of retaliation, it did not matter whether a violation is "serious" or not.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule (12 NYCRR) § 65.39.

Standard of Review and Burden of Proof

Petitioner is considered a public employer, and its volunteer members are public employees covered by PESHAs (Labor Law § 27-a; *Hartnett v. Village of Ballston Spa*, 152 AD2d 83 [3d Dept 1989], appeal dismissed 75 NY2d 863 [1990]). 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 public health-and-safety complaint. Labor Law § 27-a (10) (b) sets forth the statutory process available to a public employee who believes that he has been discriminated against in retaliation for filing such a 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 subdivisions.”

The Board’s role in this matter is to review whether it was reasonable or valid for respondent to have determined that petitioner retaliated against complainants in violation of Labor Law § 27-a (6) (c) (*see e.g. Matter of Razzano*, PES 11-009 at 8-9 [Dec. 14, 2012]). The burden of proof is petitioner’s (State Administrative Procedure Act § 306 [1]; Board Rule (12 NYCRR) § 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). That the record might contain evidence that might give rise to a different conclusion is “not sufficient to find that [respondent]’s determination was unreasonable or that [its] investigation was not appropriate” (*Matter of Shapiro*, PES 09-001 at 7 [May 30, 2012]).

Petitioner Failed to Meet Its Burden

To establish a prima facie case of retaliation, in the context of filing a health-and-safety complaint, respondent must find that (1) complainants engaged in a protected activity; (2) petitioner was aware of that activity; (3) complainants suffered an adverse employment action; and (4) a nexus—or causal connection—existed between the filing of the complaints and the adverse actions (*see e.g. Matter of Danko*, PES 11-010 at 4 [March 29, 2012] [applying standards of *McDonnell Douglas Corp. v Green*, 411 US 792 [1972]; *Dept of Correctional Services v Div. of Human Rights*, 238 AD2d 704 [3d Dept 1997] [applying federal standards to New York discrimination cases]). Respondent’s determination found that petitioner behaved in a discriminatory or retaliatory manner in taking adverse employment actions against complainants for their having engaged in protected activities under PESHHA, in violation of Labor Law § 27-a (10). We find petitioner failed to show this determination was unreasonable or invalid.

Petitioner does not dispute that complainants engaged in a protected activity or that they suffered adverse employment actions. Petitioner failed to show that it was unaware of complainants’ identity or that there was no nexus between the protected activity and the adverse actions. Quinn’s vague testimony was contradicted by complainants’ and Lam’s specific and credible testimony and petitioner’s own meeting minutes. Petitioner also failed to show it was unreasonable for respondent to have concluded that the evidence supported the existence of a nexus between the protected activity and the adverse actions. Petitioner’s retaliatory animus toward complainants could not be explained but for their filing PESHHA complaints, and petitioner presented no credible evidence to show it had a legitimate, non-discriminatory reason for demoting and expelling complainants.

Petitioner did not overcome respondent’s credible and detailed evidence showing that petitioner knew complainants had filed PESHHA complaints. Lam testified credibly that respondent’s interviews of several fire company members indicated that company members were upset about the PESHHA complaints and that morale had dropped because of them. Lam testified credibly that respondent notified petitioner and the Village of the identities of the complainants. Bovey credibly testified that petitioner learned that he, Robbins and Hadsell had filed the complaints from a Village Trustee not long after respondent’s May 2011 site inspection. Additionally, the investigation report notes that the Village deputy mayor was responsible for overseeing the fire company and that the president of the fire company served as a Village Trustee during the time the complaints were filed.

As to the required nexus or causal connection, it may be established by showing that protected activity was followed by an adverse employment action and by showing retaliatory animus (*see e.g. Matter of Crown*, PES 10-009 at 9 [October 11, 2011]). Here, we find it was reasonable for respondent to conclude that the requisite causal connection was present: within weeks of complainants filing their April 2011 PESHAs, petitioner openly began to look for ways to expel them, and petitioner's retaliatory animus was on display at many member and Board of Directors meetings.

There was no contradiction that petitioner moved quickly, specifically and with animosity to expel complainants after they had filed PESHAs. As in *Matter of Crown, supra*, where complainant was suspended in March, two months after his protected activity in January, here it was shown that petitioner's retaliation began within weeks of the April 2011 complaints and within days of respondent's May 2011 site inspection. Petitioner's meeting minutes show that petitioner knew the identity of the complainants soon after the PESHAs were filed. Quinn's vague testimony that he was not aware of complainants' identity was not credible and was countered by Lam's credible testimony that respondent's notice letter to petitioner included complainants' names. Hadsell, Bovey and Robbins testified credibly that they were called derogatory names and shunned by the fire company, were demoted, and then expelled from the fire company after they had filed the PESHAs. Petitioner's hostility also was evident in the words of a fire company official who opined, in 2011, that petitioner needed "to do something with these people that keep on turning us in on the OSHA complaints." Meeting minutes also reveal that within weeks of the complaints, complainants were labelled "crybabies," "troublemakers" and "cowards" within the fire company.

Quinn and Palmer testified vaguely and inconsistently. Palmer testified that he was not a member or officer during critical periods when complainants were harassed, demoted and expelled. Quinn, a long-time member and officer of the fire company whom the investigative report identified as one who began deriding complainants shortly after they filed the complaints, testified he did not recall who filed the PESHAs because "[members] weren't aware of who made the complaints." This testimony is not credible. It is contradicted by the record, including meeting minutes from June 2011 in which Quinn himself is reported to have asked about the three "crybabies that we have in our company that are cowards," and to have stated that the fire company "[has] been through OSHA and the police investigation" and then suggested that complainants should leave the fire company. Meeting minutes from June and July 2011 and the credible testimony of complainants and Lam confirm petitioner's declared intent, articulated shortly after the complaints were filed, to "get rid of" complainants. At the June 2011 monthly company meeting, Quinn, one of the men who led the effort to get rid of complainants, replaced Hadsell as a member of the Board of Directors. At its July 2011 meeting, the Board of Directors voted to expel Robbins.

Petitioner's animosity toward complainants was documented in various meeting minutes. At a January 2012 meeting, although Hadsell was returned to the Board of Directors, the Board's president told him that he knew that complainants filed April 2011 safety and health complaints. July 2012 minutes and credible testimony from Lam reflect that Hadsell and Robbins were demoted after a "special company meeting." At that same meeting, charges against the two were considered and a few days later, a member asked the fire company to bring charges against Robbins for insubordination. Also at the July 2012 Board meeting, petitioner's then president proposed a bylaw change to permit the expulsion of any member who "creates disunion or brings disgrace" to petitioner. These minutes also record that the fire company chief reported that Bovey, Hadsell and Robbins had gone to the company's insurers office "asking questions about insurance," and that "the [Company's] contact person was

changed to Hadsell.” The record before us reflects this to be untrue. Lam and complainants credibly testified that Hadsell, at the request of the insurance representative, whom he had encountered accidentally, agreed to help because the insurance representative had tried unsuccessfully for more than a year to contact the chief to obtain information essential to coverage. Lam credibly testified that he investigated the chief’s allegation specifically and determined it to be false. Meeting notes for the August 2012 Board of Directors meeting reflect that the Investigation Committee “found Hadsell guilty of charges.”

Petitioner’s monthly company meeting minutes from November 2012 reveal that bylaw changes were made “so that the problems with these three people would be taken care of.” At that meeting, letters from the respondent “regarding the complaints filed by Joe Bovey, Ed Robbins and Gordon Hadsell against the South Glens Falls Fire Department” were read aloud, and Quinn and another officer indicated their continuing desire to expel complainants from the fire company. Quinn moved that the fire company should “move forward” and the motion passed. Another motion was made to “have the Board meet with the Village Fire Commissioners to discuss the [Department of] Labor complaints and see what they recommend.” This motion also passed.

In February 2013, respondent conducted a follow-up site visit in relation to PESHA violations; within days, a petition to expel complainants was presented at a special fire company meeting. In the same month, the fire company president informed Bovey and Hadsell that he would “take care of [them] once and for all.” On May 4, 2013, petitioner members held a hearing, and those present voted unanimously to expel complainants. On May 15, 2013, complainants were expelled.

On the record before us, we find reasonable respondent’s determination that there was the requisite nexus between petitioner’s adverse actions against complainants and the filing of the health-and-safety complaints.

Petitioner Failed to Prove Legitimate, Non-discriminatory Reason for Adverse Actions

When a prima facie case of retaliation is established, petitioner must demonstrate a legitimate, non-discriminatory reason for its adverse action (*See e.g. Matter of Crown*, PES 10-009 at 9; *see also McDonnell Douglass*, 411 US at 802; *Lavarack v. Human Rights Div.* 88 NY2d 734, 738 [1996]). Petitioner did not do so.

Petitioner alleged that complainants’ history was the reason they were expelled. While “instances of adverse employment actions before the protected activity” may interrupt the required causal connection (*Matter of Shapiro*, PES 09-001 at 9), this is not the case on the record before us. Petitioner offered vague or dated evidence of complainants’ disciplinary history. Palmer was chief for mere weeks at the time of the hearing and was not a member of the fire company when some of complainants’ purported transgressions occurred. Quinn testified that he did not recall much before the April 2011 complaints about “difficulty” with one complainant and could not “recall anything specific” about another.

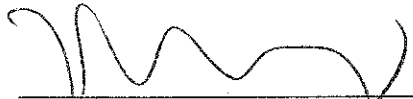
Petitioner made much of Robbins having a binder of confidential information; yet credible testimony showed that he was required to maintain the information, and that both the Chief and the company secretary had copies of the binder as well. Petitioner suggested Hadsell acted outside of his authority when dealing with an insurance representative; Hadsell testified this was not the case. Lam contacted the insurance representative directly and confirmed Hadsell’s version of events. Lam’s, Hadsell’s and Robbins’ credible testimony showed that petitioner’s reason for removing Hadsell (that he made himself the contact for an insurer) and

for removing Robbins (his refusal to return a binder) were fallacious. Petitioners presented no evidence to challenge respondent's determination as to Bovey.

Petitioners failed to establish any legitimate non-discriminatory reasons for the adverse actions taken against complainants. We find respondent's determination that petitioner acted in an unlawfully retaliatory manner reasonable.

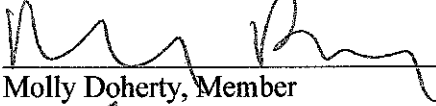
NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

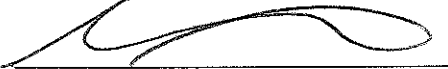
1. The petition be, and the same hereby is, dismissed.


Vilda Vera Mayuga, Chairperson


J. Christopher Meagher, Member


Michael A. Arcuri, Member


Molly Doherty, Member


Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on March 1, 2017.