

Anne P. Stevason  
Chairman

State of New York  
Industrial Board of Appeals

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STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X  
In the Matter of the Petition of:

BRIAN COLELLA,

Petitioner,

To review under Section 101 of the Labor Law:  
Section 27-a (10) of the New York State Labor  
Law (the Act).

DOCKET NO. PES 05-004

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
-----X

RESOLUTION OF DECISION

WHEREAS:

1. The above proceeding was commenced by the filing of a Petition for Review pursuant to Labor Law Section 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66) on June 1, 2005 and later amended July 1, 2005; and
2. An Answer was served and filed by the Respondent on August 3, 2005; and
3. A hearing was held at the Board's offices in New York City on February 1, 2006, before John G. Binseel, Esq., former Deputy Counsel and designated Hearing Officer. Board Member Susan Sullivan-Bisceglia was also present. Petitioner Brian Colella appeared pro se. Respondent Commissioner of Labor (Commissioner) was represented by counsel, John D. Charles.

4. Both parties were present during the course of the hearing held herein, and were provided sufficient opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues raised in this proceeding; and
5. The Board having given due consideration to the pleadings, the testimony, the hearing exhibits, the documents and all of the papers file herein; and
6. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated by reference in its entirety in this Resolution of Decision; and
7. All motions and objections made on the record of this proceeding that are not consistent with this determination are deemed denied.

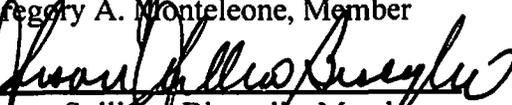
NOW, THEREFORE, IT IS HEREBY RESOLVED:

1. That the Petition for Review filed here, be and the same hereby is, granted.
2. That the matter is hereby remanded to the Department of Labor for further proceedings consistent with the above decision and to "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," as required by labor law § 27-a (10).

  
 Anne P. Stevason, Chairman

ABSENT  
 Mark S. Perla, Member

  
 Gregory A. Monteleone, Member

  
 Susan Sullivan-Bisceglia, Member

  
 J. Christopher Meagher, Member

Dated and Filed in the Office of  
 the Industrial Board of Appeals,  
 at Albany, New York,  
 on August 22, 2007

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MEMORANDUM OF DECISION

The Petition for Review in the above-captioned case was filed with the Industrial Board of Appeal (Board) on June 1, 2005. The Answer was filed on August 10, 2005. Upon notice to the parties, a hearing was held on February 1, 2006 at the Board's offices in New York City before John G. Binseel, former Deputy Counsel for the Board and designated Hearing Officer in this case. Also in attendance was Board Member Susan Sullivan-Bisceglia, Esq.

Petitioner, Brian Colella, appeared and represented himself, *pro se*. Respondent, Commissioner of Labor (Commissioner) was represented by Jerome A. Tracy, Counsel to the Department of Labor (DOL), John D. Charles of counsel. Each party was afforded full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues. In addition, post-hearing briefs were submitted.

The proceeding was brought by the Petitioner to challenge a determination by DOL under Labor Law § 27-a(10). DOL had determined, in a decision dated January 5, 2005 to administratively close the investigation into Petitioner's complaint that he was

discharged in retaliation for filing a complaint about safety and health at his workplace. The decision provided that the Act does not protect against insubordination or employee wrongdoing. In April 2005, Petitioner was informed of his right to appeal to the Board and this Petition followed.

The Board, having given due consideration to the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed here, makes the following findings of fact and law pursuant to the provisions of Board's Rules of Procedure and Practice (Rules) § 65.39 (12 NYCRR 65.39).

#### FINDINGS OF FACT

Petitioner is a public employee who was employed as a temporary, provisional electrician by North Brooklyn Health Network at the Woodhull Medical & Mental Health Center from August 2, 2004 to September 1, 2004. Petitioner was originally hired to work from August 2, 2004 to December 30, 2004. Petitioner, along with six other electricians, was hired to work on a renovation of the Maternity Ward at Woodhull.

Petitioner testified that while working on August 18, 2004, he noticed a lot of dust, smoke and the cutting of aluminum conduit in his work area. In addition, a jackhammer was being used to chop up the floor right next to him. On August 19, Petitioner noticed that the electricians were the only trade working in the area that day and again there was smoke and dust. The workers opened the windows to get some air and were reprimanded by the Supervisor of Mechanics, Jesse Crawford, to keep the windows shut. Later that day, the electricians were told to leave the floor and later informed that an asbestos abatement team was brought in. The workers were allowed to return to the work area in the afternoon of August 20, 2004. Petitioner testified that he thought that he and the other workers were exposed to asbestos and aluminum fumes.

From Monday, August 23, 2004 until Thursday, August 26, 2004 Petitioner participated in new employee orientation. During the orientation, the employees were informed that they were covered by the New York State Public Employee Safety and Health Act and that all employees were expected to promote safe and sanitary conditions throughout the facility and to report all hazardous conditions.

On August 24, 2004, Petitioner filed a complaint with the Assistant Personnel Director of the Hospital concerning the "deplorable working conditions in the hospital and that we had been exposed to Asbestos and Aluminum being disturbed while working..." Although Petitioner wanted to file the complaint anonymously due to a fear of retaliation, he was told that he needed to give his name and was assured that it would be illegal for them to retaliate against him for making a complaint of an unsafe condition. This concern was memorialized in a memo dated August 24, 2004 to the Assistant Personnel Director. Petitioner later found out that although his supervisor was under a duty to report any exposure to asbestos, no report had been made.

On August 27, 2004, Petitioner filed an "Exposure Occurrence" report with his supervisor who said that he would look it over and give it to Jesse Crawford, Supervisor of Mechanics. On August 31, 2004 Petitioner received a letter stating that his complaint about working conditions had no basis. On September 1, 2004, Petitioner's employment was terminated. When Petitioner asked why he was being discharged, he was told that the employer did not have to tell him.

DOL, after investigation, determined that Petitioner was not discharged in violation of Section 27-a(10) but was discharged for insubordination and wrongdoing. In support of this determination, DOL produced a memo from the supervisor of Mechanics, dated August 18, 2004 indicating that Mr. Colella admitted to Supervisor Bardes and Electrician Siderakis that he installed ductwork and that this work was done without authorization. The memo stated that Bardes discovered that "new ductwork had recently been cut into an existing fan coil unit and had been redirected to the storage room." In response, Colella testified that the duct into the storage room was done prior to August 10, 2004 and that his initial intent was to replace the 6" duct with a 10" duct but that he did not engage in self-help after he was told not to and that it would be taken care of.

#### JURISDICTION OF THE INDUSTRIAL BOARD OF APPEALS

Although DOL raises the issue of whether the Board has jurisdiction to review its determination in this case, this is not the first case in which the Board has reviewed a DOL determination under Labor Law § 27-a(10), and in fact, it was DOL who referred Petitioner to the Board. Most recently, the Board asserted jurisdiction in the case of *In the Matter of the Petition of Theresa J. Wilson v. Commissioner of Labor*, PES-06-002. Likewise, the Board decisions in *In the Matter of the Petition of Usher Z. Piller v. Commissioner of Labor*, PR-57-90 and *In the Matter of the Petition of Dr. Bejai Inder Sahai Srivastavav. Commissioner of Labor*, PES-00-009, reviewed DOL determinations pursuant to Labor Law § 27-a(10) and issued decisions. In keeping with Board precedent, the Board asserts jurisdiction in this case.

#### PROTECTIONS AFFORDED PUBLIC EMPLOYEES UNDER PESH

The Public Employee Safety and Health Act (PESH), Labor Law § 27-a, was enacted to ensure that public employees were provided with a safe work environment and grants to them the same protections afforded to employees in the private sector. L. 1980, c 729 § 1 provides:

"The legislature hereby finds and declares that it is a basic right of all employees to work in an environment that is as free from hazards and risks to their safety as is practicable, and it is the intent of the legislature to insure that this right is also afforded to employees of the state, its counties, cities, towns, villages and other public employers who serve the people of this state."

To that end, Labor Law § 27-a(10)(a) provides:

“No person shall discharge, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section...”

This anti-retaliation provision of PESH is designed to encourage employees to report workplace safety violations – an important aspect of ensuring a safe work environment.

Although there is no case law interpreting the retaliatory provision of PESH, in general, a prima facie case for retaliatory discharge is established upon a demonstration of three factors: (1) the employee engaged in a protected activity; (2) the employee suffered adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. 82 Am.Jur.2d Wrongful Discharge § 121. If these factors are proven, the burden shifts to the employer to prove a non-retaliatory reason for the discharge. The burden then shifts back to the employee to show that the employer’s reason is a pretext and that the employee would not have been fired but for the protected activity.

In the instant case, there is no dispute as to factors one and two. Colella engaged in a protected activity by filing a complaint regarding the safety of his working conditions i.e. that there was a lack of fresh air and there was exposure to asbestos. Colella suffered adverse employment action by being discharged. The issues concern whether Colella’s complaint was the reason for his discharge or whether he was discharged for the non-retaliatory reasons of insubordination or altering air conditioning duct material.

It is the opinion of the Board that the only reasonable conclusion based on the evidence presented is that Colella was discharged for filing the health and safety complaint. The timing of events as well as the employer’s failure to act on Colella’s alleged insubordination in a timely manner lead to only one reasonable conclusion. Although Colella was a provisional, temporary employee and could be discharged at will, he could not be discharged for an improper reason, i.e. in retaliation for his filing a health and safety complaint.

Colella was hired on August 2, 2004 for a four month period. He complained about the lack of fresh air in his work environment. He had a discussion with a supervisor concerning widening the air conditioning duct on or about August 10 or 12. The supervisor said that he would take care of it. Colella’s work area was evacuated on August 19 for possible asbestos exposure and an asbestos abatement team was brought in. Colella’s supervisors failed to report the possible exposure. Colella attended an employee orientation on August 23 through 27, where he was told to report any workplace safety concerns. He filed a safety complaint on August 24, 2004 with the Assistant Personnel Director about the possible asbestos exposure. On August 25, he spoke with Human Resources about possible asbestos exposure. On August 26, Colella spoke with a nurse who informed him that the supervisors should file a report. On August

27, 2004 Colella was given a satisfactory rating from his supervisor. Included in the rating was a "meet standards" in the category of "Respectful." No mention was made on the form concerning insubordination or doctoring any air conditioning ducts. On August 30, 2004, Supervisor Mark Bardes and Electrician Steve Siderakis signed identical affidavits that on August 13, 2004 Colella admitted "that he had modified the HVAC system." On August 31, 2004, Colella was sent a letter informing him that it was determined that there was no basis for his complaint. On September 1, 2004, Colella was discharged and given no reason for his discharge.

Colella did not discover the reason for his discharge until his Freedom of Information Act request was complied with. He denied altering any ducts and testified that no changes were made to the ducts, as far as he knew, between August 10 and 30. He credibly testified that he spoke with Bardes about the need for fresh air on August 10 and that at that time he admitted that he intended to change the duct to widen it but that after he was told not to and that Bardes would take care of it, he left it alone. Due to the lack of specificity in the affidavits of Bardes and Siderakis and their absence at the hearing, there is insufficient evidence to contradict Colella's statement that he did not engage in the activities he was accused of. In addition, the failure to discipline or even reprimand Colella immediately on August 12 or 13, for his alleged behavior, is suspect. When considered along with the fact that the affidavits were not signed until August 30, the only reasonable interpretation of the evidence before the Board, is that the reasons given for Colella's discharge was a pretext.

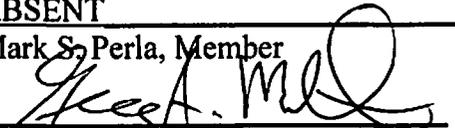
For all of the above reasons, the case is remanded to the DOL for further proceedings in accordance with this decision and to "request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision," as required by labor law § 27-a (10).

Let a Resolution of Decision issue accordingly.

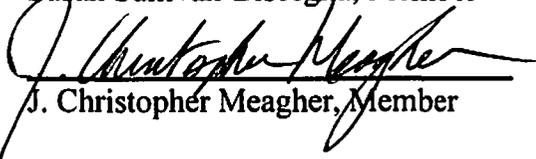
  
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