STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
JAY GUSLER,	
Petitioner,	
	DOCKET NO. PES 10-002
To Review Under Section 101 of the New York State Labor Law: A finding issued on November 23, 2009 that there was no discrimination against the Petitioner under Section 27-a-10 of the Labor Law,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Jay Gusler, Petitioner *pro se.*

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry, Esq. of counsel) for respondent.

Robert M. Agostisi, Assistant Corporation Counsel for Intervenor City of Long Beach.

WHEREAS:

On January 19, 2010, Petitioner Jay Gusler ("Petitioner" or "Gusler") filed a Petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law Section 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of an Order of the New York State Department of Labor, dated November 23, 2009, dismissing Petitioner's complaint alleging discrimination against him in violation of the Public Employee Safety and Health Act (PESHA), Labor Law Section 27-a[10], by his employer, City of Long Beach, New York ("Employer" or "LBFD").

Respondent filed an Answer to the Petition on March 29, 2010. During the ensuing months, both parties requested adjournments of scheduled hearing dates and, on March 22, 2012, Respondent requested an adjournment of the hearing scheduled for April 19 & 20, 2012 in contemplation of moving to dismiss the Petition. Also on March 22, 2012, the City

of Long Beach made application to intervene in the instant proceeding. On May 22, 2012, Respondent filed its Motion to Dismiss.[1] On August 16, 2012, the City of Long Beach's motion to intervene was granted and on September 10, 2012, Intervenor joined in Respondent's Motion To Dismiss. Despite having been granted extensions of time to do so until December 7, 2012, Petitioner failed to oppose the motion. The Motion To Dismiss is granted.

I. STANDARD OF REVIEW

The PESHA, Labor Law Section 27-a[10][a], provides in pertinent part that no person shall discharge, discipline or in any manner discriminate against an employee for filing a public safety and health complaint. Labor Law Section 27-a[10][b] sets forth the statutory enforcement process:

> "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 Board's jurisdiction is not to determine whether the City of Long Beach violated the PESHA, but to review whether the Department of Labor's ("DOL's") Determination that there was no occasion to request the Attorney General to bring an action in Supreme Court was reasonable and valid. *See* Labor Law Section 27-a[6][c] and 101, *Matter of Nadolecki*, Docket No. PES 07-008 (May 20, 2009).

The civil prosecution of a PESHA retaliation case in Supreme Court requires evidence that: (1) Petitioner engaged in a protected activity; (2) the Employer was aware of the protected activity; (3) the Petitioner suffered an adverse employment action; and (4) there was a causal nexus between the protected activity and the adverse employment action. *See, e.g. Matter of Adam Crown*, Docket No. PES 10-009 [Oct. 11, 2011]; *Matter of Paul Danko*, Docket No. PES 09-002 [Mar. 24, 2010] (applying standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 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).

The Petitioner bears the burden of proof in proceedings before the Board. *See* Labor Law Section 101 and Board Rules, Section 65.30. If the Board finds that the Petitioner has met this burden, it shall revoke, amend or modify the Determination. Labor Law Section

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1 A motion more properly styled as a motion for summary judgment.

101[3]. In prior cases in which the Board found that it was not reasonable for the DOL to refuse to proceed further on an employee's PESHA retaliation complaint, it has either directed the Commissioner to request the attorney general to bring an action in Supreme Court, *See Matter of Crown, supra,* or remanded to the DOL for further investigation, *see Matter of Danko, supra,* and *Matter of Anthony La Placa,* Docket No. PES 08-006 [June 23, 2010].

II. FINDINGS OF FACT

Although Respondent's Motion To Dismiss was made prior to hearing, the factual history underlying said motion is set forth in the Board's Decision, dated July 12, 2012, resolving the Workplace Violence Protection Act ("WVPA") claim by Petitioner against Respondent (Docket No. PES 09-012) which arose out of the same incident giving rise to the instant motion. In the WVPA case, the Board determined that Gusler was a Lieutenant with the LBFD and that on February 11, 2009, he responded to a fire call with a fire truck and crew. LBFD Fire Chief Marco Passaro ("Passaro") arrived at the scene some time after Gusler. What occurred next, is disputed, but it is clear that there was at the very least a heated verbal exchange between Gusler and Passaro concerning fire department procedure. This exchange was witnessed by other firefighters, as well as two police officers and members of the public.

According to Gusler, he arrived at the fire call after Chief Gargan, who had indicated that there was no fire. Passaro then arrived and started yelling and cursing, criticizing the way the fire call was being handled. Gusler approached Passaro to tell him that his behavior in front of the public was unprofessional, at which time Passaro continued yelling and lunged at Gusler, threatening that he "would kick [Gusler's] ass," and would have physically assaulted Gusler but for the intervention of police officers who restrained Passaro. Gusler claimed that Passaro was intoxicated at the time and told that to the police officers. Gusler's claim that Passaro lunged at him and had to be physically restrained was supported in part by the testimony of three other firefighters, who all indicated that Passaro had to be physically restrained. One of the firefighters also testified that he personally had an incident with Passaro at an earlier date in which he felt that Passaro was "baiting" him.

The Safety and Health Officer investigating Petitioner's claims interviewed a number of witnesses and read a police report which indicated that there was no physical contact between Passaro and Gusler, that Passaro never had to be restrained, and that Passaro left the scene when requested to do so by the police. Although Passaro had a history of yelling and cursing and had been reprimanded in the past for unprofessional behavior and told to take anger management training, he had no prior history of violence or engaging in physical altercations.

III. PROCEDURAL HISTORY

Following the above-described incident on February 11, 2009, Gusler filed a complaint with the Long Beach Fire Commissioner requesting that Passaro be suspended, along with filing a complaint with the Long Beach police department; and, on February 17,

2009, Gusler filed a WVPA complaint with PESH - - all concerning the February 11, 2009 incident.

While Petitioner's WVPA complaint was still pending, the LBFD, on March 10, 2009, issued disciplinary charges against Petitioner, alleging insubordination and disrespectful behavior toward his supervisor arising out of the February 11th incident. In response thereto, on March 11, 2009, Petitioner filed a second PESHA complaint (the complaint herein), alleging that the disciplinary charges, as well as denial of his work leave requests, constituted unlawful retaliation against him for filing the WVPA complaint.

The Safety and Health Officer investigating the WVPA complaint concluded that it could not be sustained and a determination to that effect was issued on June 22, 2009. Gusler appealed said determination and, on July 16, 2012, the Board affirmed said determination and denied Gusler's WVPA Petition.

On November 23, 2009, the DOL issued its determination denying Petitioner's second PESHA complaint alleging unlawful retaliation and, on January 19, 2010, Petitioner filed the instant Petition with the Board appealing denial of his retaliation complaint. Respondent filed its Answer thereto on March 29, 2010. As previously indicated, Respondent and Intervenor have now moved to dismiss the Petition.

While the foregoing was taking place, the March 10th disciplinary charges filed against Petitioner by the LBFD proceeded to arbitration, a process that took some two years culminating in an Award by the Arbitrator, dated on or about March 17, 2012, finding Petitioner guilty of all charges preferred against him by the LBFD.

IV. CONCLUSIONS OF LAW

In the motion to dismiss the Petition, Respondent and Intervenor, relying on the so-called "Collins Presumption" established in Collins v. New York City Transit Authority 305 F3d 113, (2d Cir. 2002), involving an analogous situation, argue that Petitioner's pursuit of his retaliation claim is effectively barred by the arbitrator's decision finding Petitioner guilty of all the disciplinary charges, which charges Petitioner claims were preferred against him in retaliation for filing his WVPA complaint with PESH. They argue that because Petitioner will be unable to present strong evidence that the arbitrator's decision was wrong as a matter of fact - - either by presenting new evidence not before the arbitrator or by demonstrating that the impartiality of the arbitrator was compromised - - his Petition must be dismissed.

Collins v. New York City Transit Authority 305 F3d at 118-19 provides in material part that:

"A negative arbitration decision rendered under a [collective bargaining agreement] does not preclude a Title VII action by a discharged employee. However, [a] decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's

proof of the requisite causal link. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the [plaintiff alleging retaliation], to survive a motion for a summary judgment, must present strong evidence that the decision was wrong as a matter of fact – e.g. new evidence not before the tribunal – or that the impartiality of the proceeding was somehow compromised. (citing Alexander v. Gardner – Denver Co., 415 U.S. 36, 45-46 (1974)."[2]

Justifying their reliance on a presumption created under federal law, Respondent and Intervenor further argue that in order to evaluate employees' claims of unlawful discrimination and retaliation, New York courts and administrative agencies routinely borrow the procedures utilized by federal courts, citing Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, 316-17, 819 N.E. 2 d (2004) ("The [] New York State and New York City [anti-discrimination] laws are in accord with the federal standards under Title VII of the Civil Rights Act of 1964."). See also Brightman v. Prison Health Service, Inc., 33 Misc. 3d 1201 (A), 938 N.Y.S. 2d 225 (N.Y. Co. 2011) ("The standard of proof for retaliation claims brought pursuant to New York State Human Rights Law ("NYSHRL") is the same as for claims brought under Title VII. When analyzing claims for retaliation, courts apply the burden shifting test as set forth in McDonnell Douglas Corp. v. Green 411 U.S. 792, 802 [1973]" (citations omitted); CSEA, Inc. v. State of New York (SUNY Oswego), 34 PERB 3017 [p.3] (2001) (utilizing federal standards to evaluate claim discrimination and retaliation on basis of union activities); CSEA, Inc. v. Village of New Paltz, 24 PERB 4604 [p.2] (1991); Greenburgh UFA, Inc. Local 1586 v. Hartsdale Fire District, 37 PERB 4544 (2004).

Thus, they argue that the Collins Presumption is applicable to Gusler's Petition, just as it has been routinely relied upon by New York courts and administrative agencies in other cases. See, e.g., Hand v. NYCTA, 159 Fed. Appx. 282, 283 (2d Cir. 2005); Young v. Benjamin Development Co., 2009 WL 498933, at *9 (S.D.N.Y Feb. 17, 2009); Sanzo v. Uniondale Union Free Sch. Dist., 381 F. Supp. 2d 113, 118-120 (E.D.N.Y 2005).

For the following reasons, we agree with Respondent and Intervenor that the Collins Presumption is applicable to the Petition herein and that it warrants dismissal thereof.

The arbitration entitled In The Matter of the Disciplinary Hearing between the City of Long Beach, The Charging Party, against Lt. Jay Gusler and Uniformed Firefighters Association Local 286, Respondents, held pursuant to the collective bargaining agreement between the Employer and the Union, qualifies as a proceeding before an independent tribunal at which evidence was taken concerning the events of February 11, 2009. Petitioner's contention therein that "the Employer preferred Charges and Specifications against [him] as a pretext to retaliate against [him] for engaging in protected activity by seeking an investigation of the Fire Chief for being drunk at an emergency scene; for requesting that the police department prepare an event report; and for filing a complaint with the Department of Labor" appears to have been fully litigated during the eleven days of hearings held in the matter before being rejected in its entirety by the arbitrator. Presumably, Petitioner, having had the benefit of representation by his union and counsel, was given a full and fair opportunity to present his case.

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2 Although the Collins decision has been questioned by a Tenth Circuit case, it remains good law.

As Petitioner is in default in opposing the motion to dismiss, there is no basis for the Board to conclude otherwise, or even consider the possibility that the arbitration award was wrong as a matter of fact - - that there is any strong new evidence (or even any evidence) that was not before the arbitrator which should be taken into consideration or that the impartiality of the arbitration proceeding was somehow compromised.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Motion To Dismiss is granted.

2. The Petition is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
Of the industrial Board of Appeals
At New York, New York, on
February 6, 2013.

As Petitioner is in default in opposing the motion to dismiss, there is no basis for the Board to conclude otherwise, or even consider the possibility that the arbitration award was wrong as a matter of fact - - that there is any strong new evidence (or even any evidence) that was not before the arbitrator which should be taken into consideration or that the impartiality of the arbitration proceeding was somehow compromised.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Motion To Dismiss is granted.

2. The Petition is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
February 14, 2013.