STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MOLLY HASTINGS, Petitioner, To Review Under Section 101 of the Labor Law: a Determination dated February 4, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 11-005 RESOLUTION OF DECISION

APPEARANCES

Molly Hastings, petitioner pro se.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Michael Paglialonga of counsel), for respondent.

WITNESSES

Molly Hastings, for petitioner.

Douglas Dubner; Victor M. DeBonis, Esq.; Annie McIntyre; Joann Wright, for respondent.

WHEREAS:

On February 16, 2011, Molly Hastings (Petitioner) filed a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice, 12 NYCRR Part 66 (Board Rules), seeking review of a Determination issued February 4, 2011 on behalf of the Commissioner of Labor (Commissioner or Respondent). That Determination stated that the New York State Department of Labor (DOL) found that evidence did not establish that Petitioner was discriminated against in violation of the Public Employee Safety and Health Act (PESHA) Labor Law § 27-a, and DOL would accordingly take no further action concerning a complaint filed by Petitioner against the New York State Office of Parks, Recreation and Historical Preservation (Parks Department).

The Petition asserts that Petitioner was discriminated against by the Parks Department when she was terminated from employment due to a safety complaint she made. Respondent filed an Answer to the Petition on April 15, 2011. Upon notice to the parties, the Board held a hearing in Garden City, New York on October 19, 2011 before Board Member Jean Grumet, Esq., the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

I. SUMMARY OF EVIDENCE

Testimony of Molly Hastings

Petitioner was employed by the Parks Department from June 9, 2005 to July 1, 2010. At the time of her termination she was a Seasonal Assistant Park & Recreations Supervisor at Connetquot River State Park (Connetquot). Her duties when she was terminated included supervising other environmental educators, conducting environmental education, managing the Connetquot gift shop, and doing environmental field work.

On May 11, 2010,[1] Gary Lawton, the Regional Environmental Manager and Petitioner's supervisor, conducted a counseling session with Petitioner together with Annie McIntyre, a Parks Department environmental educator at Jones Beach State Park, who was slated to replace Lawton upon his upcoming planned retirement. Petitioner had never before been counseled or disciplined.

The session covered five topics. First, according to Lawton's May 14 Counseling Memo to Petitioner, "[w]e discussed an email that you sent out that appeared to implicate that Ms. Annie McIntyre was disloyal to State Parks because of her association with a non-profit organization." In the April 28 email referred to, Petitioner had suggested that the Parks Department schedule future years' "Heckscher Festivals" for the weekend before Earth Day (April 22) rather than Earth Day itself to avoid competing with a nearby organization's celebration, and had stated that "many participants... including the Nature Center of Jones Beach" could not attend the 2010 Heckscher Festival and that McIntyre was on the organization's board of directors. Petitioner testified that McIntyre interpreted this as criticism of her, and sent Petitioner an email stating that "[y]ou need to get the facts straight, especially when you are making statements that are less than flattering."

Second, Petitioner was counseled for having told a group it was too late for them to participate in the Hecksher Festival. Third, Petitioner was counseled because when asked to provide Lawton with parent evaluations showing concern about the proposed closing of a Tiny Tots program, for forwarding to the Parks Department regional director, she included unrelated positive evaluations of herself. Fourth, she was counseled for reprimanding a worker for taking unauthorized time off when the worker had actually obtained Petitioner's permission. Last, Lawton's memo reflects that while he was on vacation at the end of March, Petitioner telephoned the Regional Director about transition in the environmental office and did not "follow the chain of command." Petitioner testified that she called

[1] Except as specified, all other dates mentioned were also in 2010.

headquarters out of anxiety after McIntyre, slated to replace Lawton, told Petitioner that she, McIntyre, would take on Petitioner's responsibilities. Lawton's May 14 memo advised Petitioner that during the transition, McIntyre would work at Connetquot, initially observing, and "may make changes in the office operations that you may or may not agree with, but I expect you to give Annie the same respect that you have given me.... [E[veryone in the office will report directly to Annie until she is comfortable at which time she may choose to delegate responsibilities."

On June 30, Lawton and McIntyre called Petitioner in for a second counseling session. Petitioner testified that the counseling session took place in a small cluttered room in the Connetquot headquarters where other private or important meetings had been held in the past. At the beginning of the meeting, Lawton propped a heavy vacuum cleaner against the closed door, which Petitioner considered a fire hazard. Petitioner testified that there was no need to do this since the door stayed closed on its own and there was hardly anyone in the building. When Lawton refused three requests from Petitioner that he move the vacuum cleaner, Petitioner stated that she would not stay in the room to be counseled, became upset, stated that if she had to stay in an unsafe place she would have to quit, and left. She stated that she returned within ten minutes to request that the meeting resume in what she considered a safe environment. Lawton, however, left to make a phone call and when he returned, told Petitioner to leave and not to return until she received a phone call.

On July 2, Petitioner was called to meet with McIntyre and Joann Wright, the regional labor relations administrator, who told Petitioner she was being terminated. When Petitioner asked them if she would have been let go had she stayed in the room with the vacuum cleaner, she was told no.

Testimony of Douglas Dubner

Dubner, an Industrial Hygienist Trainee with the DOL, was assigned to investigate the complaint Petitioner filed with the DOL on July 12 alleging that she was fired as a result of refusing to meet in a room with unsafe conditions. During his investigation, Dubner was provided by the Parks Department with a document headed "DRAFT Molly Hastings Counseling Outline – June 30, 2010" which the Parks Department stated that Lawton had prepared, listing various issues to be discussed with Petitioner at the June 30 meeting. The issues listed include failure to complete certain assignments in a satisfactory way, "disrespect for supervisors," making a change in revenue procedures and leaving the office without consulting supervisors or informing staff, and "confront[ing]" McIntyre about suspected employee drug use in front of seasonal employees. Dubner also reviewed a July 1 memo from Lawton to Wright concerning Petitioner's departure from the counseling session and request to continue outside the building. According to the memo, Lawton propped a vacuum cleaner against the door for privacy since the door "does not shut securely." When Lawton began to counsel Petitioner she stopped him, said she was going to quit and would not be treated like a child trapped in a rodent-smelling room, and stated with intense anger that she was Lawton's best employee. After asking Petitioner to sit down and start the counseling session, Lawton "indicated to her that our conversation was over and she left the room." Petitioner returned "[a]bout 20 minutes later" and asked to continue the counseling at the outside picnic table; Lawton, on Wright's direction, instructed her to go home and not return until called.

In an August 25 letter to Dubner, Wright stated on behalf of the Parks Department that Petitioner had always had conflicts with both subordinates and supervisors; was counseled on May 11 concerning performance deficiencies including poor judgment and insubordination; was to be counseled on June 30 for additional performance deficiencies; and at the June 30 meeting, "became extremely angry and abruptly ended the meeting, stating, 'Stop this right now, I'm just going to quit,' and refused to continue." Her "failure to improve her performance coupled with her refusal to meet... were the sole reasons for her termination."

Dubner concluded that Petitioner's complaint about the unsafe blocked door was an important factor in her termination. Among the factors leading Dubner to this conclusion were that while McIntyre did not even mention the vacuum cleaner when describing the June 30 meeting to Dubner, Lawton's memo about the meeting began by explaining why he used the vacuum cleaner to close the door; that Parks Department employees stated to Dubner that they were "wavering" about terminating Petitioner until the June 30 session; that Lawton could simply have moved the vacuum cleaner and continued the meeting; and that Petitioner did not refuse counseling but asked to conduct it elsewhere.

Testimony of Victor DeBonis

DeBonis, a senior attorney with the DOL, reviewed the file and discussed it with Dubner. DeBonis concluded that Petitioner's safety complaint did not cause her termination. Among the factors leading DeBonis to this conclusion were that the Parks Department expressed dissatisfaction with Petitioner and intended adverse employment action of some sort, though not necessarily termination, prior to the June 30 session; and that most employers would regard walking out of a counseling session as "fairly egregious." The letter of determination from DeBonis, which the Department sent Petitioner on behalf of the Commissioner, concluded that if Petitioner's account of the June 30 meeting, including her description of her complaint about the vacuum cleaner, was correct, she engaged in protected activity when complaining that the vacuum cleaner propping the door closed was a fire hazard, but "[a] causal connection cannot be established between the alleged safety complaint and the decision to terminate your employment."

Testimony of Annie McIntyre

McIntyre, now the Parks Department's regional environmental manager stationed in Connetquot, occasionally worked with Petitioner before 2010, attended the May 11 counseling session, and saw the draft agenda prepared by Lawton for the June 30 session. No substantive discussion took place on June 30 because Petitioner refused. While Lawton indeed propped a vacuum cleaner against the door (which McIntyre assumed was to keep it closed for privacy), Petitioner did not mention that on June 30, and it was Petitioner herself who moved the vacuum cleaner when she left the room. Petitioner, who McIntyre believed had not been warned by Lawton that the meeting was for counseling, appeared to be upset because she expected a different kind of meeting:

> "She was really shocked. It should not have been handled that way, it was clear she was very surprised. Then she just kind of took a deep breath and said, 'You know what, I'm just going to stop this right here, and I'm just going to quit. I'm not going to sit here in this rodent-

> smelling room' – because there was a mouse cage with a mouse – 'being lectured to like a child.'"

With the possible exception of a comment about the building's leaky roof, Petitioner mentioned no safety concern during the session, nor was any complaint by her discussed or considered when a decision to terminate her employment was made. Rather, the major factor was Petitioner's unwillingness to accept that there was something that needed to be worked on, and the "lack of respect for the process and her supervisor" shown by her refusal to participate.

Testimony of Joann Wright

Wright, the Parks Department's regional labor relations administrator, had discussed the May 11 counseling session with Lawton, McIntyre, and the regional director before that session was held, and received a copy of the May 14 counseling memo. Before the June 30 session, Wright participated in a conference call about it with Lawton, McIntyre and the regional director in which options of termination or demotion for Petitioner were discussed.

On June 30, Lawton telephoned Wright and stated that Petitioner "wouldn't sit for the counseling" and he did not know how to proceed; nothing about a vacuum cleaner was mentioned in that phone call. After consulting a superior, Wright advised Lawton not to proceed with the meeting. In subsequent discussions concerning Petitioner's termination, including discussion by Wright with a Parks Department labor relations official, no safety complaint by Petitioner was referred to.

II. GOVERNING LAW

A. Standard of Review and Burden of Proof

Under Labor Law §§ 27-a (6) (c) and 101, the Board's role in this matter is to determine whether the Commissioner's determination that the Parks Department did not discriminate against the Petitioner is reasonable. Additionally, the petitioner bears the burden of proof in proceedings before the Board (Labor Law § 101; Board Rules 65.30).

B. Public Employee Safety and Health Act

The Public Employee Safety and Health Act (PESHA) requires public employers to furnish employees with workplaces free from recognized hazards likely to cause the employees death or serious physical harm, and to provide reasonable and adequate protection to employees' lives and safety. (Labor Law § 27-a[3][a]). PESHA required the State to promulgate a plan for occupational safety and health and standards with respect to public employers in accordance with the federal Occupational Safety and Health Act (OSHA), which authorizes States to assume responsibility for occupational safety or health issues pursuant to a program that, among other things, "will be at least as effective in providing safe and healthful employment" as standards promulgated under OSHA. *See* PESHA (Labor Law § 27-a[3][c] and [4][a]) and OSHA (29 U.S.C. § 667[b] and [c][2]). PESHA authorizes workers to request that the Department conduct a safety inspection by

notifying the Commissioner of a violation or imminent danger (Labor Law § 27-a[5][a]), and authorizes the Commissioner both to order employers to come into compliance, and to seek injunctive relief in court (Labor Law § 27-a[6] and [7]).

PESHA prohibits discharge, discipline or other discrimination against an employee because the employee filed any complaint "under or related" to PESHA. (Labor Law § 27-a[10][a]). Employees who believe they were illegally discharged or discriminated against are authorized to complain to the Commissioner, who "shall cause such investigation to be made as [s]he deems appropriate" and, if she determines that there has been prohibited discrimination, shall request the New York Attorney General to bring an action in supreme court for all appropriate relief. (Labor Law § 27-a[10][b]).

Although the statute does not expressly define what types of complaint are "under or related to" PESHA and thus protected against retaliation, the concept is not limited to complaints of unsafe conditions made to the Department pursuant to § 27-a[5], but encompasses complaints made to the employer itself. The Board so recognized, for example, in *Matter of Crown*, Docket No. PES 10-009 [Oct. 11, 2011] (reversing Department determination which failed to recognize that petitioner alleged retaliation for numerous internal safety complaints, not for a complaint to the Department of which the employer was as yet unaware). A regulation implementing OSHA – which prohibits retaliation for safety complaints in words nearly identical to those of § 27-a[10[a], *see* 29 U.S.C. § 660[c][1] – states that OSHA

> "would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers.... Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer."

See 29 CFR § 1977.9[c].

Similarly, PESHA does not expressly state whether, or in what circumstances, employees may refuse hazardous work, instead, authorizing workers confronting conditions likely to cause death or serious physical harm to seek rapid intervention from the Department and, if necessary, the courts.[2] But another regulation implementing OSHA – whose anti-retaliation provision, as stated above, closely resembles Labor Law § 27-a[10][a] – addresses the issue by stating that OSHA does not, in general, "entitle employees to walk off the job because of potential conditions at the workplace" and that since employees "normally have [the] opportunity to request inspection of the workplace" pursuant to OSHA, discipline "for refusing to perform normal job activities because of alleged safety or health hazards" is not normally a violation of the statute."

[2] PESHA requires the Department to give "highest priority" to and "immediately" act on requests for inspection "made in a situation where there is an allegation of an imminent danger such that an employee would be subjecting himself or herself to serious injury or death because of the hazardous condition." (Labor Law § 27-a[5-a]). If the Department fails to act within 48 hours of notification of an imminent danger, an employee who may be injured by reason of such failure is authorized to seek injunctive relief in the Commissioner's stead. (Labor Law § 27-a[7][c]).

> "However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

See 29 CFR § 1977.12. The U.S. Supreme Court sustained this interpretation in *Whirlpool Corp. v. Marshall*, 445 US 1 [1980].

To establish a prima facie case of retaliation, in the context of a safety and health complaint, the PESH discrimination complaints must include a nexus between the protected employee activity and the adverse action by the employer. The Petitioner has to establish: 1. That he engaged in protected behavior; 2. The employer was aware of the protected behavior; 3. That he suffered an adverse employment action; and 4. There is a causal connection 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 are followed in New York discrimination cases]).

III. FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing, testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39). As explained below, we find that Petitioner did not meet her burden of proving that DOL's Determination that she was discharged or discriminated against in violation of PESHA was unreasonable.

At the outset, we note that the Board's role is not to determine whether the Parks Department discriminated against Petitioner – or, even more clearly, whether its decision to terminate her was wise or just – but rather, whether the DOL's Determination was reasonable. *See* Labor Law §§ 27-a[6][c] and 101. Petitioner presented considerable evidence tending to show that she was a competent, well-respected employee with a good record and that her termination may have resulted from friction with a new supervisor who believed (erroneously, according to Petitioner) that Petitioner had criticized her, and/or a lack of need for two environmental educators with supervisory responsibilities at Connetquot following McIntyre's transfer. If the Parks Department had to establish just cause for Petitioner's discharge, such evidence would be highly relevant and would have to

be seriously considered,[3] but it does not prove that Petitioner was discharged in violation of PESHA, much less that the DOL's contrary determination was unreasonable, the issue for the Board.

Both Petitioner (in her July 12, 2010 complaint to DOL and later testimony at the hearing) and DOL (in its February 4, 2011 Determination and in DeBonis' testimony) discussed the events leading to Petitioner's discharge primarily in terms of a refusal to follow Lawton's direction at the June 30 counseling session. As discussed above, PESHA does not establish any general right to refuse all assignments which an employee deems unsafe, and 29 CFR § 1977.12, the OSHA regulation DOL reasonably accepted as correct,[4] protects such refusal only if the condition causing an employee's apprehension is "of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury." Even if Petitioner feared a fire hazard as she testified, it was not invalid or irrational for DOL to determine that a vacuum cleaner easily moveable by Lawton did not rise to this level.

Another and probably more appropriate way to analyze the events leading to the discharge is in terms of a complaint about safety and alleged retaliation, rather than refusal of dangerous work.[5] Unlike protection for refusal of work, statutory protection for a complaint does not require that a reasonable person would see an imminent risk of serious injury; rather, as DeBonis testified, protection exists "whether the complaint was a valid one or not." The Determination therefore properly found that if Petitioner's statement that she complained of a fire hazard created by the vacuum cleaner is accepted,[6] three of the four tests for a violation of Labor Law § 27-a[10] (that she engaged in a protected activity, the employer was aware of it, and she suffered an adverse employment action) were satisfied, with only the fourth (a nexus between the protected activity and the adverse action) at issue We nevertheless find that the Determination, which was based on that last element, absence of a "causal connection" between the complaint and Petitioner's termination, was reasonable.

The evidence strongly suggests that it was not the fact that Petitioner voiced a complaint about the vacuum cleaner at the June 30 meeting, but her indignation at how she was being treated, statements that she would quit, a prior counseling session, and leaving the room during a counseling session which directly led to the Parks Department's termination of her employment. As stated above, however, the issue decided by the Commissioner, reviewed under a rationality standard by the Board, was not whether it was right or wrong to terminate Petitioner's job, but whether she was discriminated against in violation of PESHA

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[3] The complaint which Petitioner filed with DOL states that she sought to file a union grievance about her discharge but was advised that as a seasonal employee, she could be fired without any need to show just cause

[4] Both the Determination and DeBonis in his testimony invoked the regulation. As discussed above, both PESHA and OSHA indicate that protection under PESHA should be "at least as effective" as under OSHA. *See* Labor Law § 27-a[3][c] and [4][a]; 29 U.S.C. § 667[b] and [c][2])

[5] As noted in the Determination, it is undisputed that within 10 to 20 minutes of leaving the meeting room Petitioner asked to resume the counseling session and it was the Parks Department that then refused.

[6] Although McIntyre denied that Petitioner mentioned the vacuum cleaner, the DOL made no such finding. As Dubner noted, it is hard to see why Lawton began his July 1 memo by discussing the vacuum cleaner if it had never been mentioned.

for making a safety complaint. Thus, that termination may have been a harsh or excessive response to Petitioner's behavior is not enough for the Board to sustain her petition. And even if one assumed that it was what she deemed a fire hazard, not other aspects of the situation, that inspired the ire that led to Petitioner's firing, precedent under OSHA would still support the idea that DOL could rationally conclude that the discharge did not violate PESHA. Under OSHA, a worker's

> "entitlement to some indulgence for the manner in which he engages in protected activity 'must be balanced against the employer's right to maintain order and respect.'.... Because one cannot easily demarcate the extent of the leeway to be granted an employee engaging in protected activity, each case must be evaluated on its own facts.... [B]ut the responsibility for deciding whether particular conduct falls within or without the leeway to which an employee is entitled belongs to the Board,[7] whose judgment in this regard we must uphold so long as it is not arbitrary or illogical."

Formella v. U.S. Dept. of Labor, 628 F3d 381, 391-393 [7th Cir 2010] (citations omitted).[8]

Petitioner also testified that even before her complaint about the vacuum cleaner on June 30, she had made other safety complaints about the 100-year-old Connetquot headquarters, indeed that "there was a constant flow of safety complaints made to me." However, and while McIntyre confirmed that Petitioner, on June 30, mentioned that she had tried to get Lawton "to fix the wiring or the leaky roof or something," there was no evidence that earlier safety complaints which she made played any role in Petitioner's termination. Not only is there no evidence that such complaints influenced her termination, her basic claim is that whatever earlier complaints she made, until the May 2010 meeting and the transition from Lawton to McIntyre, the Parks Department was very happy with her work. We therefore conclude that this, too, cannot be a basis to overturn the Determination.

Based upon the above, we find that the Determination is not unreasonable or invalid.

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[7] The "Board" here referred to was an Administrative Review Board of the U.S. Department of Labor; the same reasoning applies to the Respondent Commissioner, who is that board's counterpart in the present case.

[8] *Cf. Harrison v. Administrative Review Bd.*, 390 F3d 752, 758-759 [2d Cir 2004] ("entitlement to submit a complaint about a vehicle's safety would not mean that the employee was similarly entitled to attach the complaint to a rock and through his supervisor's window"). We are, of course, not equating Petitioner's conduct to rock-throwing. In addition to OSHA, precedent under other laws prohibiting employer retaliation similarly supports the idea that rational balancing of workers' rights against employers' right to respond to misconduct or even personal conflicts should not be second-guessed. *See generally, e.g., Trustees of Boston University v. NLRB*, 548 F2d 391 [1st Cir 1977].

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Petition for Review is hereby denied.

Anne P. Stevason, Chairperson

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
January 30, 2012.