STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
JANICE RAZZANO,	
Petitioner,	DOCKET NO. PES 11-009
To Review Under Section 101 of the Labor Law: A Finding Dated March 29, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Wolin & Wolin (Alan F. Wolin, Esq. of counsel), for Petitioner.

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

WITNESSES

For Petitioner: Janice Razzano.

For Respondent: Katherine Salomone, Douglas Dubner.

WHEREAS:

On May 27, 2011 Janice Razzano (Petitioner) filed a Petition and on May 28, 2011 an Amended 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 (Board Rules) (12 NYCRR Part 66), seeking review of a March 29, 2011 letter (Determination) from the New York State Department of Labor (DOL). The Determination states that the Commissioner of Labor (Commissioner or Respondent) will take no further action concerning Petitioner's complaint alleging discrimination against her in violation of the Public Employee Safety and Health Act (PESHA), Labor Law § 27-a[10], by her employer, Remsenburg-Speonk Union Free School District (Employer, School District or District).

Respondent filed an Answer to the Petition and Amended Petition on August 1, 2011. Upon notice to the parties, hearings were held on December 5, 2011 and April 27, 2012 in Old Westbury and Garden City, New York respectively before Jean Grumet, Esq., Member 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, to make statements relevant to the issues, and to make closing arguments.

By letter to the Board dated October 12, 2012, the DOL requested that in light of the Second Department's remand of Petitioner's Article 78 case under the New York State Public Sector Whistleblower Law (Civil Service Law § 75-b) in *Matter of Razzano v Remsenburg-Speonk UFSD*, 95 AD3d 1335 [2d Dep't 2012], the present matter be held in abeyance during the pendency of proceedings in Supreme Court, Suffolk County. The Petitioner, by letter dated October 17, 2012, opposed the motion. We deny the DOL's motion and remand this matter to the DOL for further investigation.

I. SUMMARY OF EVIDENCE

Petitioner's Testimony

Petitioner has been employed by the School District as a school psychologist in the District's elementary school since 1993, full-time since 1994, and with tenure since 1997. The District has employed no other tenured psychologist since then. Her duties include consulting with teachers, parents, staff, and administrators; counseling children (either as a provider of special education services, or for non-identified children in times of crisis or need); testing and evaluating children and reviewing the results of evaluations with staff, administrators and parents; performing classroom observations; attending Committee on Special Education (CSE) meetings to develop, review and revise plans for each student who requires special education support pursuant to the Individuals with Disabilities Education Act; attending weekly team meetings involving the Instructional Support Team, the Child Study Team, Section 504 of the Rehabilitation Act, and Response to Intervention to consider the needs of children who are not classified as special education students but may require additional support; mediation and conflict resolution; program development for students and faculty; and obtaining social histories of students.

By law, CSE meetings are required to include a psychologist, and are also typically attended by the District's director of special education and Petitioner's immediate supervisor Jan Achilich, speech and reading teachers, and whoever else is needed to discuss a particular child. According to Petitioner, during the 2009-10 school year she had a counseling caseload of eleven students with a total of twelve weekly sessions, and during the 2010-11 school year she had a caseload of ten students with a total of twelve weekly sessions. In the 2007-2008 school year Petitioner had an exceptionally large counseling caseload; in other past years the caseload had been as low as five students. Petitioner's last full-time salary was about $119,000 per year.

The school in which Petitioner works has extensive water damage and mold from long-term ceiling leaks. In January 2009 Petitioner began to experience severe coughing,

chest pressure, pain and other respiratory symptoms, which dissipated when she left the building and returned when she reentered. Over the next year she consulted numerous doctors and provided the District with their reports. On three occasions, including on March 10, 2009, she went or was taken to a hospital emergency room because of her symptoms.

Doctors diagnosed acute bronchitis, building-related illness, asthma, allergic asthma and other conditions, and recommended using a respirator and a HEPA air purifier, which Petitioner began using in March. They also recommended that she be allowed to take short breaks outside the building, and given an office with a window. Although the air purifier was installed and helped at first, the School District did not maintain and clean it consistently, and Petitioner was not given a window office. She was, however, allowed to take short outside breaks. Thereafter, Petitioner voiced her continuing concerns about building conditions including water damage, toxic mold, asbestos and cleaning of the HVAC system to District officials including superintendent Katherine Salomone, both orally and in writing, on numerous occasions.

Petitioner's attendance record from the District shows that at the beginning of the 2008-9 school year she had 28 sick/personal leave days available, including days carried over from previous years. According to the record, she was out sick 4 ½ days from September to December 2008, and a total of 14 ½ days (including half a personal day) from January 6, 2009 to April 2, 2009. These absences included all or part of all eight work days from Wednesday March 4 to Friday March 13, three days the week beginning March 16, and four the week of March 23.[1]

Prior to March 16, 2009, the District had not replaced Petitioner with a substitute if she was out; instead she made up work on her return. For the days when Petitioner was out between March 16 and April 2, 2009, the District used a substitute, David Strauss, to cover for her. In February 2009, the District hired an independent contractor, John Suozzi, as the replacement for Melissa Paladino, an autism consultant who had worked only with the few autistic students in the District. Following Suozzi's arrival, the District increasingly assigned him to work with non-autistic children as well, doing work including evaluating students and attending CSE and other meetings that had been central to Petitioner's job.

Prior to complaining about the water damage, toxic mold and asbestos in the school, Razzano had attended all meetings to plan for children covered by Section 504 of the Rehabilitation Act; after her complaints the District instructed her to attend such meetings only in case of special need. The District also removed her from meetings of instructional support teams; for functional behavior assessment and formulation of behavior intervention plans; and of the child study team – comprised of her as school psychologist, the director of special education, classroom teachers and relevant specialists – which considered students referred for but not yet determined to be in need of special education. In the past, Petitioner testified, she attended such meetings weekly; after her complaints, she was rarely invited to attend.

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[1] Petitioner testified that the attendance record does not necessarily reflect exact days or times when she was absent, because absences were recorded in "units" corresponding to a full work day, so that if she missed only part of a day a "unit" absence might not be recorded until the absences added up to the equivalent of a full day. For present purposes, exactly which days or times Petitioner was absent is not material.

District records which Petitioner obtained through a Freedom of Information Law (FOIL) request show that the District had had successive contracts with Paladino's agency, the Institute for Children with Autism from September 2006 to June 30, 2009. In her three years as the District's autism consultant, Paladino's duties were limited to home visits, observations, and consultations; she attended only three team meetings during this three year period. The last contract for Paladino's agency, for the term July 1, 2008-June 30, 2009, terminable on ten days' notice, shows that Paladino earned a $125 per hour fee, and the agency was paid a total of $2437.50 for 19.5 hours work by her through February 2009. Records concerning Suozzi, which Petitioner also obtained through a FOIL request, show that for the contract periods February 6-June 30, 2009 and July 1, 2009-June 30, 2010, Suozzi was to be paid on as "As Needed" basis, at rates of $110 per hour for Behavioral and Learning Consultation for Students with Disabilities, $150 per hour for Psychoeducational Evaluations, $1,200 per full-day session for Staff Training and Development, and $1,600 per Diagnostic Evaluation. For work between February and June 2009, the District paid Suozzi a total of $12,235 for about 112 ½ hours work, all at $110 per hour. For the 2009-2010 school year, Suozzi was paid a total of $25,844.70 for about 224 hours, most at $110 per hour, some at $150 per hour.

In the fall of 2009, Petitioner remained assigned to her old office and experienced the same symptoms as before. On October 12, 2009 she complained to the DOL's Public Employee Safety and Health (PESH) Bureau (Bureau), requesting an unannounced inspection of the school building to address hazards caused by water damage including an ongoing mold problem in ceilings, a girls' bathroom, a storage room and elsewhere, and increased friability of asbestos-containing materials in pipe insulation and elsewhere, including the boiler room which adjoined Petitioner's office. Petitioner stated that the School District had simply replaced or painted tiles with visible mold, which was not a solution to the mold problem, and had resisted union requests to have the building tested. She stated that in addition to immediate and serious danger to her own health, conditions posed a serious danger to public health and safety including that of the building's employees and students. She stated that prior testing conducted on behalf of the School District had been performed in the wrong locations and using inadequate procedures, and requested an in-depth, extensive evaluation of the entire school by an industrial hygienist.

In response to Petitioner's complaint, the PESH Bureau conducted an industrial hygiene inspection on November 16, 2009 and February 9, 2010. The inspection did not find asbestos-containing material, visible mold or wet surfaces, but did find a level of carbon dioxide in Petitioner's office of double the 600 parts per million which is recommended to avoid air quality complaints. The Bureau hygienist's May 12, 2010 Investigation Narrative stated that the level measured, although below the OSHA Permissible exposure level of 10,000 parts per million, "often results in complaints of fatigue, eye and throat irritation" and "reflects a lack of adequate fresh air." The Investigation Narrative did not sustain Petitioner's complaints, but noted other violations including the absence of adequate planning and training for exposure to blood-borne pathogens and inadequate information provided to the nurse and other employees. Petitioner's appeal of the DOL's determination in this matter is presently before the Board in *Matter of Janice Razzano,* Board Docket No. 10-014. The Bureau issued a Notice of Violation and Order to Comply on May 18, 2010, which ordered the District to correct five "serious" PESH violations by the summer of 2010.

In October 2009, Petitioner also sent three letters to Salomone complaining of (1) asbestos and mold in the building, (2) excessive heat in Petitioner's office, and (3) an evaluation she believed to be retaliatory for her complaints of mold. On November 17, 2009 she again wrote to the Bureau complaining that while the District had removed and replaced tile containing visible mold, leaks remained and testing for mold and asbestos needed to be conducted. She also identified a number of additional concerns, again requested testing, and invoked the "Whistle-blowers Law," Civil Service Law § 75-b, which, under circumstances defined in that statute, protects public employees who disclose information regarding legal violations that endanger the public health and safety to government bodies from retaliation.

In December 2009, Petitioner requested that the District supply, for the period since June 1996, records of air quality testing, HVAC cleaning, asbestos abatement, repairs, water damage and/or mold records or reports, and her employee exposure and medical records and complaints. In a January 3, 2010 letter to Salomone, Petitioner reiterated this request and objected to having been moved from her excessively hot office not to an office with a window, but instead to a significantly smaller, untested office on the same HVAC system, and in which a moldy tile had recently been replaced. On April 4, 2010 Petitioner wrote to Salomone concerning a severe coughing episode she had experienced in March, which had been followed by a meeting at which Salomone suggested that Petitioner move her computer to the computer lab but continue to meet with students in her office. Petitioner suggested testing the air quality of another office. On April 21, 2010, Petitioner was called into Salomone's office and informed that her position was being reduced to half-time, with two other positions also to be eliminated. On May 4, 2010 Petitioner submitted a grievance to the District.

On June 14, 2010 the District's Board of Education formally resolved to eliminate the positions of a special education teacher, a general education teacher, and a teaching assistant, and to reduce Petitioner's position and that of a speech teacher from full-time to half-time. The next day, Petitioner was formally notified "that due to fiscal constraints," the District was reducing her position to half-time and that pursuant to the Education Law she "may be entitled to reinstatement to the same or similar position if it becomes available within seven years." On May 7, 2010 Petitioner complained to the DOL's PESH Bureau that she had been retaliated against for her safety complaints, specifically referring to her complaints the previous October. This is the retaliation complaint which the DOL ultimately dismissed in the Determination presently under review.

Petitioner testified, and all other evidence confirms, that she was the only tenured staff member who lost work as a result of the resolutions reported in the District's June 14, 2010 minutes. The special education teacher whose position was eliminated continued to work in the 2010-11 school year, filling the spot of a teacher who was on leave in 2009-2010 and had asked to remain on leave that spring. A general education teacher was known to be retiring. A teaching assistant had resigned. And a new probationary speech teacher had been hired in February 2010 on a half-time basis to replace a teacher who retired at the end of 2009. In addition, Petitioner noted that the District continued to employ full-time substitute teachers, an art teacher, a music teacher, a computer teacher, a computer technology director, a library teacher, a second language teacher, three reading teachers and two physical education teachers. She further testified that even after the transfer of much of her work to Suozzi, she continued to have more work than could reasonably be done on a

half-time basis. In September 2010, Petitioner wrote to Salomone and Achilich concerning her difficulty scheduling counseling for ten students; Salomone responded by suggesting that Petitioner could fit in students during the time outside the building which Petitioner continued to need for health reasons.

Testimony of Katherine Salomone

Salomone became superintendent of the School District in 2003, and retired at the end of 2010.

When Petitioner began to cough and wheeze on entering the building in 2009, the School District removed the carpet from her office, used non-allergenic paint to paint it, cleaned the office and replaced the furniture, replaced ceiling tiles, and installed a HEPA filter. In addition, Salomone wrote to Petitioner on March 25, 2009 agreeing that "to help you with your apparent issues," Petitioner could wear a face respirator in school "in the short term" despite "concerns... due to its potential of frightening the young children... and... the difficulty to understand you when you speak;" could monitor two recess periods outside school instead of one inside and one outside the building; could take additional short outside breaks to drink water; and could wear eye goggles. Thereafter, Petitioner continued to complain about conditions in the school and stated that she was dissatisfied with the accommodations offered.

In 2010, economic conditions made it difficult for the District to get community support for its budget, and every employee's schedule was reviewed with a view towards possible financial savings. The District determined that Petitioner's caseload had declined and it could no longer afford a full-time school psychologist. Salomone testified that after the graduation of a sixth-grade class with an unusually large group of special education students, "I believe" in 2009, there had been a reduction in the number of mandated counseling sessions, although she did not know the exact numbers. District decisions to reduce or eliminate Petitioner's and other positions were reviewed by Achilich, the board of education and a community budgetary committee, as well as Salomone. At the meetings Salomone attended, the only factors considered were employee schedules, student needs, legal mandates with respect to CSEs and the school psychologist, and the District's financial situation.

Testimony of Douglas Dubner

Dubner is a safety inspector for the PESH Bureau, trained as an industrial hygienist. He also investigates retaliation complaints. He assisted Petitioner in filling out her May 7, 2010 complaint. Dubner's role as an investigator consists of gathering information for transmittal to the DOL's Albany office where a decision is made: in the present case, to Victor DeBonis, the DOL Senior Attorney who made and signed the Determination under review. Dubner did not personally reach any conclusion as to whether or not the reduction in Petitioner's hours was retaliatory.

When Dubner advised the District of Petitioner's complaint, it responded with an August 12, 2010 letter from its law firm stating that the complaint of retaliation was without merit since "the reduction in her hours is based upon economic need of the District with

reference to budgetary concerns. Also her work load has decreased based upon the number of students that need her services." Enclosed were copies of affidavits from Salomone and Achilich, apparently filed in a proceeding brought by Petitioner before the New York State Education Department.

Salomone's affidavit stated that Petitioner's hours were reduced based on fiscal constraints as part of "an ongoing program of cost savings" that included "abolishing or reducing several positions," that the PESH Bureau's investigation had not found visible mold or airborne asbestos, and that the reduction of Petitioner's position was not in any way retaliatory and she "is in no way being 'singled out.'" Achilich's affidavit, dated May 25, 2010, stated that Petitioner's "case load is so small that continuation of the full-time position as school psychologist would be fiscally irresponsible," and that her counseling caseload "for the upcoming 2010-2011 school year" would only include "approximately eight children" held over from 2009-10; in addition, only three triennial CSE evaluations were expected.[2] Achilich's affidavit stated that the District has retained an autism consultant for many years, that the "current autism consultant possesses a highly specialized set of skills," and that his "duties are limited and highly specialized and do not conflict with those of Petitioner." Finally, Achilich's affidavit stated that in 2009-10 "the District was constrained to hire a substitute counselor because Petitioner missed 22.5 days of work."

Dubner testified that he discussed this response with Petitioner, but did not show it to her. He did not recall the substance of the discussion. During his investigation Dubner also spoke with Salomone, Achilich, a school custodian, a cook, a general teacher and an art teacher, but he did not testify as to what any of them, except for Achilich, said. Achilich, Dubner testified, "basically told me... that they needed to be able to take care of the students and that's why they needed to get additional people and stuff like that. In other words, they weren't retaliating against her because she made complaints, they just needed to be able to do what they had to do." Achilich also told Dubner "when they did excise her at that time they had less students and she just didn't have as much workload as she had before." Dubner did not recall asking the District for actual time or attendance records, budget numbers, or information concerning Suozzi, whose name he did not recall hearing.

The Determination Under Review

The Determination under review states (and at the hearing the DOL agreed) that Petitioner established a prima facie case of prohibited retaliation pursuant to the PESHA, Labor Law § 27-a[10]: that is, (1) she engaged in behavior protected by the statute when she complained to the District and Bureau concerning health and safety issues, (2) the Employer was aware of the complaints, (3) she suffered an adverse employment action when her position was reduced to half-time, and (4) the timing was sufficiently close to indicate a causal connection for purposes of establishing a prima facie case.

The Determination found, however, that "Although a prima facie case is established, the complaint must be dismissed because the District had legitimate non-discriminatory

[2] Petitioner explained that in addition to a mandatory annual review meeting to discuss his or her progress and individual education plan, each special education student also has a triennial CSE meeting.

reasons to reduce your employment," reasons which did not appear to be "a mere pretext for retaliatory discrimination." Specifically:

> "Information provided by the District shows that your counseling caseload for the 2010-2011 school year is eight students for ten counseling sessions per week. This compares to your caseload during the 2007-2008 school year when your caseload was fifteen students and twenty-two counseling sessions per week. In addition, only three students are scheduled for evaluations during the 2010-2011 school year....
>
> "The District concluded that your caseload is too small to justify the expense of a full-time position. Your position was reduced to half-time as a cost-saving measure. The District also eliminated two teaching positions, one teaching assistant position, and reduced a speech teacher position to halftime...."

Discussing the possibility of pretext, the Determination added:

> "The volume of work which your position is handling does not justify a full time position and it is outside the control of the employer. It is unlikely that the District would deprive its students of the needed services of a counselor in order to retaliate against you. Moreover, the fact that the District also eliminated an additional 3.5 positions at the time it reduced your position indicates the seriousness of the financial difficulty faced by the District."

II. STANDARD OF REVIEW

The PESHA, Labor Law § 27-a[10][a], provides that no person shall discharge, discipline or in any manner discriminate against an employee for filing a public safety and health complaint. Labor Law § 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 School District violated the PESHA, but to review whether the DOL's Determination that it did not and that there was

no occasion to request the Attorney General to bring an action in Supreme Court was reasonable and valid. *See* Labor Law §§ 27-a[6][c] and 101, *Matter of Nadolecki,* Docket No. PES 07-008 (May 20, 2009).

The civil prosecution of a PESH retaliation case in Supreme Court would require evidence that: (1) Petitioner engaged in a protected activity; (2) the Employer was aware of the protected activity; (3) she 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). In the present case, the Determination itself states, and the DOL has stipulated, that a prima facie case of retaliation is established and the only issue is whether, as the School District asserts and the Determination agreed, the District established that it had legitimate non-discriminatory, non-pretextual reasons for its action.

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

We find that Petitioner met her burden to establish that it was not reasonable or valid for the DOL to conclude upon the existing record that her complaint of retaliation had been refuted and must be dismissed. In light of the record available to the DOL during its investigation and more fully developed at the Board hearing, the response of the School District claiming that Petitioner's position was reduced from full-time to half-time solely for budgetary reasons, because her caseload had become too small to support a full-time psychologist, was not adequately supported, and left too many unanswered questions which the DOL, during its investigation, apparently never considered.

"Information provided by the District" cited in the Determination, purportedly showing that Petitioner's caseload had declined and "does not justify a full time position," a matter "outside the control of the employer," actually was, and remains, in sharp dispute. For example, the District stated to the DOL that Petitioner's counseling caseload declined from 15 students and 22 weekly sessions in 2007-08 to eight students and ten sessions in 2010-11; it appears that the DOL accepted that statement at face value. Yet Petitioner testified that even after the District chose to out-source much of her work to Suozzi, her counseling caseload for 2010-11 continued to be ten students with 12 weekly sessions, an insignificant change from 2009-2010 when she had 11 students with 12 sessions. She also testified that 2007-08 had been an exceptional year, cherry-picked by the District to present

a misleading picture,[3] and that in other past years she had as few as five students in her counseling caseload.

On the limited record the DOL compiled, it is also highly questionable whether the reduction in Petitioner's workload prior to April 2010 was "outside the control of the employer" as stated in the Determination, or instead resulted from a District decision to transfer much of Petitioner's work to Suozzi thereby making possible the ultimate, retaliatory decision to reduce her position to half-time. Achilich's affidavit, the sole evidence supplied by the District which referred to Suozzi, implied that his role was similar to that of the autism consultant retained by the District for many years and stated that his duties were "limited and highly specialized and do not conflict with those of Petitioner." Yet information obtained by Petitioner through FOIL requests strongly suggests that Suozzi's role went far beyond that of Paladino, the autism consultant, and included much of the work historically performed by the Petitioner.

As noted earlier, Suozzi worked far more hours than Paladino had. For example, while Paladino was paid for 19 ½ hours from August 2008 to February 2009, Suozzi was paid for 146 hours 40 minutes from August 2009 to February 2010. Initially, Suozzi's invoices to the District – although already for significantly more work than Paladino had billed for – listed seven particular students for whom he provided "behavior and learning consultation" and/or "parent training/counseling." Beginning in April 2009, however, Suozzi's invoices no longer listed particular students, and included bills not only for "behavior and learning consultation" but also for other work including psychological testing and evaluation, scoring and reporting on tests, "presentation superintendent's conference," "initial assessment" and attendance at a CSE meeting.

For her part, Petitioner testified that while her initial understanding was that Suozzi would replace Paladino in working with autistic children, in actuality, he took over much of Petitioner's work with the effect of limiting the number of students she evaluated, her meetings with parents and school personnel, and her counseling case load and behavioral interventions. Petitioner testified that Suozzi's testing included students who were not autistic, approximately five in the year before the District cut Petitioner's hours,[4] and that Suozzi attended "mandated" meetings, i.e., meetings requiring the presence of the school psychologist, in addition to performing psychological evaluations. Suozzi's invoices appear far more consistent with Petitioner's version than with the Achilich affidavit's implication, which the DOL Determination accepted without question, that Suozzi's duties were no greater than that of Paladino and did not overlap Petitioner's.

The Determination's finding "that the District also eliminated an additional 3.5 positions at the time it reduced your position" is less compelling once it is realized that, as the District did not dispute, Petitioner was the only person whose work was actually affected. This does not, of course, prove that financial considerations did not influence the District's decision, or that in better economic times the District would not have replaced

[3] Salomone's testimony that Petitioner's caseload declined after an unusually large number of special education students graduated and that "I believe" the year that occurred was 2009 suggests the possibility that Petitioner's recollection was correct.

[4] Petitioner testified that an evaluation takes between three and four hours on average, "plus report writing time, plus committee meetings to discuss the results, as well as meetings with the parents."

teachers who retired instead of eliminating their positions. It does mean that Salomone's statement that Petitioner "is in no way being 'singled out'" should not simply have been accepted by DOL without requesting and considering actual numbers and records.

Likewise, there is little doubt that the District saved money by cutting Petitioner's position to half-time, even taking into account the over $25,000 (less than half the reduction in her compensation) paid to Suozzi during the 2010-11 year. Suozzi's availability to pick up the slack may address the Determination's objection that "It is unlikely that the District would deprive its students of the needed services of a counselor in order to retaliate against you." Regardless, the DOL in making its Determination certainly did not rely on such considerations; the sole mention of Suozzi during the investigation appears to have been in Acilich's affidavit implying – very misleadingly, according to Petitioner's testimony – that he was just an "autism consultant," performing "limited and highly specialized" duties that did not overlap with Petitioner's. The point is not that it is clear that the District acted to retaliate, but that the DOL appears never even to have considered actual savings, budget conditions or specific facts, instead simply accepting the District's unsupported explanation.

Requesting and considering actual evidence, and affording Petitioner an opportunity to rebut such evidence, was a particular necessity in the present case because the record contains strong suggestions that reasons given by the District might, indeed, have been pretextual. For example, Salomone's reference in correspondence with Petitioner to "your apparent issues," and in her affidavit to the fact that the PESH Bureau hygienist did not find mold or asbestos, may imply impatience with Petitioner's ongoing illness. Acilich's statements about Petitioner's frequent absence from work – both in her affidavit, and in comments to Dubner during the investigation – may imply desire to curtail her employment for that reason. While such motivation would not necessarily be retaliatory within the meaning of the PESHA, it is quite different from the reasons stated by the School District and accepted without adequate investigation in the Determination. In short, the DOL appears to have essentially simply accepted the School District's own account of the reasons for its actions, without either considering Petitioner's submissions indicating that her work load had not declined or affording her an opportunity to rebut the District's explanation. For these reasons, we find that the DOL's Determination was not valid and reasonable, and we remand the case to the Commissioner to further investigate whether Razzano's hours were reduced due to her protected activity.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Determination under review herein is revoked, and the underlying PESH complaint is remanded to Respondent for further investigation; and

2. The Petition is granted.

Absent
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
December 14, 2012.