STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAUL DANKO, Petitioner, To Review Under Sections 27-a and 101 of the Labor Law: a Determination dated March 29, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 11-010 RESOLUTION OF DECISION

APPEARANCES

Corbally, Gartland and Rappleyea, LLP (William Frame of counsel), for petitioner.

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

WITNESSES

Douglas Dubner, Industrial Hygienist Trainee for the Department of Labor.

WHEREAS:

On January 15, 2009, Petitioner Paul Danko (Petitioner or Danko) filed a petition with the New York State Industrial Board of Appeals (Board) seeking review of a determination issued by the Commissioner of Labor (Commissioner or Respondent) on December 8, 2008 dismissing his complaint of discrimination under Section 27-a (10) of the New York State Labor Law against the New York City Department of Environmental Protection (DEP). The petition alleged that Danko was terminated from his employment in retaliation for giving testimony against his employer before a Federal Grand Jury in 1998. He also alleged that the Department of Labor (DOL) investigation into his alleged retaliation was unreasonable because the DOL Investigator failed to consider 70-80 pounds of documents produced by Danko in support of his complaint. By decision dated March 24, 2010, *In the Matter of the Petition of Paul Danko*, Docket No. PES 09-002, after hearing, the Board remanded the case back to Respondent for further investigation.

On March 29, 2011, after further investigation, DOL issued another determination concluding that the evidence submitted did not establish that there was discrimination against Danko in violation of the Public Employee Safety and Health Act (PESHA) because Danko could not establish a causal connection between his testimony and his discharge, and, even if he could, DEP had legitimate non-retaliatory reasons for discharging Danko. On May 27, 2011, Petitioner filed another petition with the Board challenging the March 29, 2011 determination and asking the Board to reverse DOL's decision, alleging that he had been the subject of a series of retaliatory acts by DEP, including multiple transfers and finally termination, which originated with his grand jury testimony in 1998.

Upon notice to the parties, a hearing was held on October 14, 2011 in New York, New York before Anne P. Stevason, Esq., Chairperson 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 and to make statements relevant to the issues. Petitioner Paul Danko was represented by counsel at the hearing but failed to appear in person.

I. SUMMARY OF EVIDENCE

Douglas Dubner, DOL Hygenist Trainee and former Safety and Health Inspector, was the sole witness at the hearing. Dubner testified that after the Board remanded the case for further investigation, he met with petitioner at his attorney's office on September 20, 2010 for approximately 2 ½ hours and reviewed and copied petitioner's paperwork and files regarding the complaint. Dubner estimated that he went through a couple hundred pages of materials and summarized all of the documents in a list, which he submitted into evidence at hearing.

Also in evidence, per stipulation of the parties, were the following documents:

1. Danko's complaint for retaliation filed with PESH on October 22, 2008;
2. Summary of materials supplied to PESH by Danko, written by Dubner;
3. DEP Notice of Determination dated August 6, 2007 after Informal Conference recommending termination of Danko's employment;
4. Report and Recommendation of the Administrative Law Judge after the Civil Service Law Section 75 Disciplinary Hearing dated April 11, 2008, recommending a 55 day suspension;
5. DEP letter to Danko dated September 25, 2008 informing him of his termination; and
6. DOL determination dated March 29, 2011 dismissing Danko's complaint.

Dubner admitted that he did not review Danko's grand jury testimony and only looked at the materials supplied by petitioner. Since petitioner never proved a prima facie case of retaliation, Dubner never contacted the employer for information. The materials revealed that Danko was employed by DEP from 1993 to 2008. After his testimony in 1998

which led to a guilty plea by DEP in 2001, Danko was transferred numerous times, given *inappropriate* work and his health and safety complaints were ignored. Although Danko alleged that all of his work performance reports were good prior to 1998 but poor afterward, Dubner found both good and bad reports after 1998. In fact, Danko submitted a good evaluation that he had received in 2003 as evidence at his disciplinary hearing.

Danko was transferred to a wastewater treatment plant far from his home on June 27. 2007. Danko was upset by the transfer. On July 17, 2007, Danko was brought up on disciplinary charges for misconduct related to various statements that he made to supervisors and coworkers which could be construed as threats. After a Civil Service Law Section 75 hearing on February 13, 2008 and continued to February 28, 2008 to give petitioner the opportunity to testify, the Report and Recommendation of the Administrative Law Judge found that discipline was warranted by (1) Danko's remarks which could be regarded as threats which "disrupt the functioning of agency operations and is deserving of a very severe penalty," (2) Danko's failure to notify the Agency of his arrest, etc. The Administrative Law Judge noted that Danko had previously been disciplined in 2005 for making a false time sheet entry and in 2007 for insubordinate remarks to a supervisor. The Administrative Law Judge recommended a 55 day suspension. However, when reviewed by the DEP Commissioner, it was determined that Danko should be terminated.

After reviewing Danko's materials, Dubner concluded that, Danko's testimony at the grand jury was protected activity, but his termination, almost 10 years later, was not causally related to the protected activity. Any retaliatory action that DEP may have taken against Danko happened much earlier than 30 days prior to the complaint being filed with DOL and therefore, his complaint as to any action other than his termination was untimely.

DOL finally determined that DEP was justified in terminating Danko based on his misconduct and there was no evidence, especially in light of the large amount of intervening time, that Danko was terminated in retaliation for his 1998 grand jury testimony.

II. GOVERNING LAW

The Board's role in this matter is not to determine whether the Department of Environmental Protection discriminated against the petitioner, but rather whether the Commissioner's determination that the petitioner was not discriminated against was reasonable (*see* Labor Law §§ 27-a [6] [c] and 101). Additionally, the petitioner bears the burden of proof in proceedings before the Board (Labor Law § 101; Board Rules 65.30). That the record contains some evidence which may give rise to another conclusion is not sufficient in this matter for us to find that the Commissioner's determination was unreasonable or that her investigation was not appropriate.

Labor Law § 27-a (10) (a) provides that no person shall discharge, discipline or in any manner discriminate against an employee who has filed a PESH complaint. Labor Law § 27-a (10) (b) sets forth the only statutory process available to an employee who believes that he or she has been discriminated against in retaliation for filing a PESH complaint:

> "Any employee who believes that he has been discharged, disciplined, or otherwise discriminated against by any person in violation of this subdivision may, within thirty days after such violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of such complaint, the commissioner shall cause such investigation to be made as he deems appropriate . . . . If upon such investigation, the commissioner determines that the provisions of this subdivision have been violated, he shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision. . . ."

The civil prosecution of a PESH retaliation case in supreme court requires evidence that (1) Danko engaged in a protected activity; (2) his employer was aware of the protected activity; (3) Danko suffered an adverse employment action; and (4) there was a nexus 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 followed in New York discrimination cases]). In addition, the complaint must be filed within 30 days of the adverse action.

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 his burden of proving that DOL's Determination that he was not discharged or discriminated against in violation of PESHA was unreasonable.

At hearing and during the investigation, Danko failed to prove a prima facie case of retaliation. While his 1998 Grand Jury testimony concerning the mercury contamination of the drinking water was (1) a protected activity, (2) which DEP was aware of, and (3) Danko was fired, which constituted an adverse employment action, (4) Danko failed to prove that there was a nexus between the protected activity and his termination. As stated by DOL, "the passage of ten years suggests no causal connection." In addition, there were instances of misconduct by Danko which were upheld after a disciplinary hearing, which reasonably could be determined to be sufficient non-retaliatory reasons for his discharge. Thus, even if DEP had considered the grand jury testimony when it terminated him, there is sufficient evidence in the record to suggest he would have been terminated anyway (*see Price Waterhouse v. Hopkins*, 490 U.S. 228 [1989]).

Therefore, we find that the Commissioner's determination was reasonable and valid.

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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
March 29, 2012.