STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: GATES CHILI CENTRAL SCHOOL DISTRICT, Petitioner, To Review Under Section 101 of the New York Labor Law a Determination made under Article 2 of the Labor Law, dated April 21, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 15-007 RESOLUTION OF DECISION

APPEARANCES

Harris Beach PLLC, Pittsford, (*Laura M. Purcell* of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven Pepe*, of counsel), for respondent.

WITNESSES

Michael Joseph Mamo, Allan Richard Berry, John Pete Saltzberg, John Brondon and John Eaton for petitioners.

Senior Industrial Hygienist Charles Franklin Riley, Associate Safety and Health Inspector Bret Schmidt, claimant Lucy Van Orden-Johnson, Judy Garcia, Susan Lindsey for respondent.

WHEREAS:

The petition filed with the Industrial Board of Appeals on June 24, 2015 seeks review of a determination by the Commissioner of Labor against Gates Chili Central School District in Rochester, New York. Respondent filed an answer on July 30, 2015.

Upon notice to the parties, a hearing was held before Michael A. Arcuri, Board member and designated hearing officer in this matter on March 3, 2016, April 20, 2016, April 21, 2016, May 23, 2016, May 24, 2016, June 23, 2016, July 20, 2016, July 21, 2016, August 17, 2016 and September 16, 2016. 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 file post-hearing legal briefs.

SUMMARY OF EVIDENCE

On or about February 2, 2012, Lucy Van Orden-Johnson filed a complaint with the Department of Labor alleging that she was brought up on disciplinary charges and suspended as a school bus driver by the Gates Chili Central School District in retaliation for complaining about health and safety violations. Van Orden-Johnson complained to her employer in January 2011 that student behavior on the bus was impacting safety and she asked for some assistance with the problem. On March 1, 2011, Van Orden-Johnson was suspended with pay from work after having an accident while driving a bus. On March 11, 2011, Van Orden-Johnson was told to return to work on March 14, 2011 for retraining. On March 12, 2011, Van Orden-Johnson complained to her employer that other employees were harassing her. On March 14, 2011, after completing a retraining, she was suspended with pay again. Disciplinary charges seeking her termination were filed against Van Orden-Johnson on or about October 17, 2011 alleging misconduct and incompetency.

Civil Service Law § 75 Hearing

A hearing regarding the disciplinary charges was held pursuant to Civil Service Law § 75 over the course of five days between December 2011 and May 2012. A hearing officer, Allan Berry, was appointed by the petitioner to conduct that hearing. Evidence regarding numerous allegations of misconduct and/or incompetency during the 2010-2011 school year was introduced by the school district. In addition to offering evidence to defend her against those allegations, Van Orden-Johnson also raised a "whistleblower defense" and alleged that the hearing officer was biased. Van Orden-Johnson's "whistleblower defense" asserted that the school district brought the disciplinary charges against her and was seeking her termination because she complained to the school district superintendent about student behavior. By a report and recommendation dated September 30, 2012, Berry recommended that Van Orden-Johnson be terminated as he found her guilty of all the misconduct charges filed against her by petitioner. Berry dismissed Van Orden-Johnson's "whistleblower defense." He found that the school district conducted a thorough internal investigation of her complaint about student behavior and subsequently hired an outside consultant to conduct an investigation but neither investigation substantiated her complaint. Berry found the testimonial and documentary evidence of those investigations to be credible. Berry further determined that the school district repeatedly elected to offer counseling and retraining for some of Van Orden-Johnson's misconduct rather than immediately take disciplinary action against her and, thus, credibly demonstrated its efforts to work with Van Orden-Johnson. He found that she did not prove that the decision to seek her termination would not have been made but for her protected activity. Van Orden-Johnson also asked that Berry recuse himself in her post-hearing brief alleging that he was biased. Berry determined that he remained objective throughout the entire hearing as well as with the writing of his report and recommendations and, thus, did not need to recuse himself.

Article 78 Appeal of Civil Service Law § 75 Hearing Decision

Van Orden-Johnson appealed the decision to terminate her employment in an Article 78 proceeding and she was represented by counsel in that proceeding. Her appeal was dismissed (*Lucy Van Orden v Gates Chili Central School District*, Index No. 13-1508 [Sup Ct, Monroe County 2013]). The court, noting that Van Orden-Johnson was represented by counsel during the entire hearing, found that the hearing officer was not biased nor did he have a conflict of interest because

of his prior business dealings with the school district, the school district's lawyer and one of the school district's employees and witnesses at the termination hearing (*Id.*)

The PESHA Retaliation Determination

By letter dated April 21, 2015, the Department of Labor determined that petitioner had "behaved in a discriminatory and/or retaliatory manner" against Van Orden-Johnson for engaging in Public Employee Safety and Health Act (PESHA) protected activities in violation of Labor Law § 27-a (10).

On the first full day of hearing,[1] petitioner requested that, as a matter of law, the Board revoke the Commissioner's order pursuant to *Collins v New York City Transit Authority*, 305 F3d 113 (2d Cir 2002). Decision was reserved and petitioner renewed its request on the final day of hearing. The hearing officer requested that the parties submit post-hearing briefs to address the questions of (1) whether petitioner plead the "*Collins* Presumption" in the petition; (2) if not, whether petitioner properly amended their petition to include the "*Collins* Presumption" and (3) whether the "*Collins* Presumption" applies to the instant matter. Both parties submitted post-hearing briefs addressing these questions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board Rules of Procedure and Practice (12 NYCRR) § 65.39.

The Labor Law provides that an order of the Commissioner shall be presumed valid (Labor Law § 103 [1]). In this matter, the Board's review is limited to determining whether the Commissioner's determination that petitioner unlawfully discriminated against complainant is valid and reasonable (Labor Law §§ 27-a [6] [c], 101).

Petitioner bears the burden of proof (Labor Law § 101; Board Rules [12 NYCRR] § 65.30; *see also Angello v Nat'l. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). Petitioner must prove that the challenged determination is invalid or unreasonable by a preponderance of the evidence (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). If the Board finds that petitioner has met its burden in this matter, it shall revoke, amend or modify the Department of Labor's determination (Labor Law § 101 [3]).

Discrimination under PESHA

PESHA provides public-sector employees the right to enjoy a workplace free from recognized hazards that are likely to cause death or serious physical harm (Labor Law § 27-a [3] [a]). PESHA further protects an employee's right to file a complaint or institute a hearing relating

[1] The first day noticed for the hearing was on January 14, 2014 and simply for the assigned hearing officer to recuse herself. The first full day of hearing during which evidence was presented was on March 3, 2016.

to workplace safety and health, and protects employees when exercising that right (Labor Law § 27-a [10] [a]).

To prevail on a claim of retaliation under Labor Law § 27-a (10), New York courts have followed the standard established by federal courts. Thus, a retaliation claim pursuant to Labor Law § 27-a (10) requires evidence that (1) the employee engaged in a protected activity under the statute; (2) the municipality was aware of the protected activity; (3) the employee suffered an adverse employment action; and (4) there was a sufficient nexus between the protected activity and the adverse employment action (*McDonnell Douglas Corp. v Green*, 411 US 792, 803 [1972]; *Dept of Correctional Services v Division of Human Rights*, 238 AD2d 704, 706 [3d Dept 1997] [applying *McDonnell Douglas* burden-shifting in New York discrimination cases]; *Matter of Robert Shapiro*, PES 09-001 at 7). Under the "minimal" requirements of *McDonnell Douglas* (*Gordon v New York City Bd. of Educ.*, 232 F3d 111, 116 [2d Cir 2000]), the prima facie case establishes a rebuttable presumption of retaliation (*El Sayed v Hilton Hotels Corp.*, 627 F3d 931, 932 [2010]).

The *Collins* Presumption

Federal courts have also established that if an employee has had an opportunity to fully and fairly litigate a retaliation claim in a disciplinary proceeding pursuant to a collective bargaining agreement, that employee should not be permitted to re-litigate the retaliation claim in another proceeding if the arbitrator was independent and not subject to a claim of bias and determined that the termination was legitimate (*Collins v New York City Transit Authority*, 305 F3d 113; *see also Cortes v MTA N.Y. City Transit*, 802 F3d 226 [2d Cir 2015]). Where the employee can offer new evidence that was not considered by the arbitrator or can show that the arbitrator was biased or compromised in some other way, the employee may still be able to make out a claim of discriminatory retaliation (*Id.*) The Board has previously applied the so-called *Collins* Presumption. In *Matter of Gusler*, PES 10-002 (Feb. 14, 2013), Gusler filed a retaliation complaint with the Department of Labor under PESHA. In that case, the Department of Labor dismissed Gusler's complaint because there was an arbitration held pursuant to a collective bargaining agreement that found Gusler guilty of all the disciplinary charges that his employer filed against him. The Board affirmed the Department of Labor's order and dismissed Gusler's petition agreeing that the *Collins* Presumption applied (*Matter of Gusler*, PES 10-002). The Board held that Gusler's retaliation claim had already been fully litigated in an arbitration before an independent tribunal and, thus, he should not have a second chance to litigate the same issue (*Id.*)

Petitioner asks the Board to determine as a matter of law that pursuant to the *Collins* Presumption the Commissioner's determination is invalid or unreasonable. The Commissioner asserts that petitioner both failed to plead the *Collins* Presumption in the petition and failed to properly move to amend the petition to include it. While we agree with the respondent that petitioner did not include the *Collins* Presumption theory in its petition, we find that petitioner did properly amend its petition to include the *Collins* Presumption as one of the grounds on which it sought revocation of the Commissioner's order. As set forth above, petitioner requested that the order be revoked as a matter of law under the theory of the *Collins* Presumption at the commencement of the hearing and renewed such request on the final day of hearing. Both parties were asked to address the *Collins* Presumption in post-hearing briefs. Under Board Rules of Procedure and Practice (12 NYCRR) § 65.28 (7), a hearing officer has the power to allow a petition to be amended if there is no prejudice to the responding party. Respondent had sufficient notice

and opportunity to respond to petitioner's arguments regarding the *Collins* Presumption and cannot claim that permitting the petition to be amended to include it prejudices her.

The *Collins* Presumption says that a retaliation claim is effectively barred by an independent arbitrator's decision finding a claimant guilty of all disciplinary charges brought against him unless there is proof that the arbitrator's decision was wrong as a matter of fact or that the arbitrator was biased (*Collins v New York City Transit Authority*, 305 F3d 113). We find that the *Collins* Presumption applies to the instant matter and, thus, grant the petition to revoke the Commissioner's determination. Petitioner brought up Van Orden-Johnson on disciplinary charges and a hearing was held pursuant to a collective bargaining agreement and pursuant to Civil Service Law § 75. An attorney represented Van Orden-Johnson for the duration of the hearing. In addition to hearing evidence and multiple witnesses for both sides on the disciplinary charges, the arbitrator also considered Van Orden-Johnson's whistleblower defense/claim in which she asserted that she was brought up on disciplinary charges in retaliation for complaining about health and safety violations, a protected activity. The arbitrator found Van Orden-Johnson guilty of all the disciplinary charges and found her whistleblower claim unsubstantiated. She appealed the decision in an Article 78 proceeding. She was also represented by counsel in that proceeding and she based her appeal, in part, on her claim that the arbitrator was biased. The court determined that there were no indicia of bias or other reason to overturn the arbitrator's decision and the Article 78 was dismissed (*Lucy Van Orden v Gates Chili Central School District*, Index No. 13-1508 [Sup Ct, Monroe County. 2013]). The facts at issue in this proceeding are precisely what were litigated by the neutral arbitrator in the proceeding to decide if Van Orden-Johnson should be terminated. There is nothing in the record from the ten days of hearing that can be considered new evidence that was not considered by the arbitrator in the termination hearing. Nor has the Department of Labor offered any evidence to show that the arbitrator in the termination hearing was biased. The Board finds that the Department of Labor incorrectly determined that petitioner violated the PESHA in that it failed to properly consider the arbitration hearing or decision. As such, we revoke the Department of Labor's determination.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review be, and it hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
March 7, 2018.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

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Vilda Vera Mayuga, Chairperson

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Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
March 7, 2018.