STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: BADRUL CHOWDHURY, Petitioner, To Review Under Sections 27-a (6) (c) and 101 of the Labor Law: A Notice of Violation and Order to Comply issued December 29, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 17-004 RESOLUTION OF DECISION

APPEARANCES

Badrul Chowdhury, petitioner pro se.

Pico Ben-Amotz, General Counsel, New York State Department of Labor, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Badrul Chowdhury, for petitioner.

Associate Industrial Hygienist Olushola Abolarinwa, for respondent.

WHEREAS the Board makes the following findings of fact and conclusions of law pursuant to the provision of the Board Rules of Procedure and Practice (12 NYCRR) § 65.39:

Petitioner Badrul Chowdhury filed a claim with respondent's Public Employee Safety & Health Bureau (PESH) on or about September 20, 2016, alleging that his employer, the City University of New York (CUNY), Brooklyn College, was in violation of several safety and health regulations. Petitioner, who worked as Environmental Health and Safety Manager and Hazardous Materials Manager at Brooklyn College, complained to PESH about alleged unsafe working conditions at Brooklyn College.

On October 18, 2016, PESH Associate Industrial Hygienist Olushola Abolarinwa conducted an inspection at Brooklyn College in response to petitioner's complaint. Based on Abolarinwa's inspection, respondent issued a notice of violation and order to comply to CUNY on December 29, 2016, finding a serious violation of 29 CFR 1910.134 (c) (1) (iii) because the

respiratory protection program provided by CUNY did not include fit testing procedures; a serious violation of 29 CFR 1910.134 (d) (1) (iii) because CUNY did not identify and evaluate the respiratory hazards in the workplace including a reasonable estimate of employee exposures to respiratory hazards and identification of the contaminant's state and physical form; a serious violation of 29 CFR 1910.1200 (c) (1) (i) because the written hazard communication program did not include a list of the hazardous chemicals known to be present, using an identity that was referenced on the appropriate material safety data sheet; a serious violation of 29 CFR 1910.1200 (b) (2) (i) because CUNY did not provide information to employees on the requirements of the Hazard Communications Standard, 29 CFR 1910.1200; a serious violation of 29 CFR 1910.100 (h) (3) (ii) because employee training did not include the physical and health hazards of chemicals in the work area; a non-serious violation of 12 NYCRR Part 801.29 (a) for failing to follow the associated instructions for recording injuries and illnesses on the SH 900, SH 900.1, and SH 900.2 or equivalent forms; and a non-serious violation of 29 CFR 1910.1020 (c) (3) (i) for failing to ensure, upon request, prompt access by the Assistant Secretary of Labor for Occupational Safety & Health to employee exposure and medical records and/or to analyses using exposure or medical records.

On February 21, 2017, petitioner filed a petition with the Industrial Board of Appeals pursuant to Labor Law §§ 27-a (6) (c) and 101 alleging respondent's notice of violation and order to comply is unreasonable because it failed to find CUNY violated 29 CFR 1910.146 by requiring him to work in a permit-required confined space without proper personal protective equipment or training. Respondent filed her answer on April 24, 2017. Upon notice to the parties a hearing was held on August 9, 2017, in New York, New York, before Joshua Riegel, 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 make statements relevant to the issues. For the reasons set forth below, we find petitioner failed to prove that the notice of violation and order to comply is unreasonable or invalid, and the petition is denied.

Labor Law § 27-a, known as the Public Employees Safety and Health Act (PESHA), governs safety and health standards applicable to public employment in New York. Under PESHA, safety and health standards promulgated by the federal Occupational Safety and Health Administration apply to public employees in New York (Labor Law § 27-a [4] [a]). Respondent may also promulgate standards where no federal standard exists or conditions in public work places in New York require a different standard that is at least as protective as the applicable federal standard (Labor Law § 27-a [4] [b]). PESHA provides that any public employee who believes that a violation of a safety or health standard exists, or that an imminent danger exists, may request that respondent conduct an inspection (Labor Law § 27-a [5]). PESHA further provides the procedures respondent must follow with respect to such inspection (*id.*), and governs notice requirements and issuance of notices of violation and orders to comply. Petitioner filed a complaint pursuant to Labor Law §§ 27-a (4) and (5), and, the record shows, respondent conducted an investigation and found numerous violations. Respondent, however, did not find a violation of the confined space standard, which applies to a space that:

> "(1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
>
> "(2) Has limited or restricted means for entry or exit (for example,

tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and

"(3) Is not designed for continuous employee occupancy" (29 CFR 1910.146 [b]).

Abolarinwa credibly testified that he inspected the area petitioner complained about and determined it was not a confined space under the standard. Petitioner, who had the burden of proof in this proceeding (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; Board Rule [12 NYCRR] § 65.30), failed to present any evidence that the area in question was a confined space subject to 29 CFR 1910.146. Having failed to meet his burden of proof, the petition is denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The petition be, and the same hereby is, denied.

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
October 25, 2017.

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Dated and signed by a Member
of the Industrial Board of Appeals
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October 25, 2017.