STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petitions of:

CITY OF NEW YORK DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION,

CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

FIRE DEPARTMENT OF THE CITY OF NEW YORK,

CITY UNIVERSITY OF NEW YORK,

Petitioners,

To Review Under Section 101 of the Labor Law: Notices of Violations and Orders to Comply Issued January 14 and July 19, 2010,

- against -

THE COMMISSIONER OF LABOR,

Respondent,

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and the MUNCIPAL LABOR COMMITTEE,

Interveners.

DOCKET NOS. PES 10-003
PES 10-004
PES 10-005
PES 10-016
PES 11-007

RESOLUTION OF DECISION

APPEARANCES

Ilene A. Lees, General Counsel, Alan Deutsch of Counsel, for Petitioner City of New York Department of Citywide Administrative Services.

Alessandro G. Olivieri, General Counsel, for Petitioner City of New York Department of Parks and Recreation.

Thomas Merrill, General Counsel, Roslyn Windholz of Counsel, for Petitioner City of New York Department of Health and Mental Hygiene.

Julian Bazel, Counsel, Tayo Kurzman of Counsel, for Petitioner Fire Department of the City of New York.

Frederick P. Schaffer, General Counsel, for The City University of New York.

Maria L. Colavito, Counsel, New York State Department of Labor, Jeffrey G. Shapiro of Counsel, for Respondent Commissioner of Labor.

Mary J. O'Connell, General Counsel, Aaron S. Amaral of Counsel, for Intervener District Council 37, AFSCME, AFL-CIO.

Greenberg, Burzichelli Greenberg P.C., Harry Greenberg of Counsel, for Intervener Municipal Labor Committee.

WHEREAS:

The captioned Petitioners challenge the validity of regulations that Respondent Commissioner of Labor (Respondent or Commissioner) promulgated to implement the Workplace Violence Prevention Act (WVPA), codified at Labor Law § 27-b, and the Notices of Violation and Orders to Comply (together, NOVs) based on the WVPA's regulations that Respondent issued against each Petitioner.

On February 23, 2010, March 5, 2010, March 12, 2010, and September 20, 2010, respectively, Petitioners City of New York Department of Citywide Administrative Services (DCAS), City of New York Department of Parks and Recreation (DPR), City of New York Department of Health and Mental Hygiene (DOHMH), and the Fire Department of the City of New York (FDNY) filed petitions challenging separate NOVs that Respondent issued against them. The NOVs against DCAS, DPR and DOHMY are dated January 14, 2010 and the NOV against the FDNY is dated July 19, 2010. The docket numbers assigned to the cases are, respectively, PES 10-003, PES 10-004, PES 10-005, and PES 10-016. The City University of New York (CUNY) filed a Petition on April 4, 2011 appealing an NOV issued against it by the Commissioner on February 2, 2011.

Each NOV, by its own terms, "describes violations of the Public Employee Safety and Health Act of 1980" (PESHA or Labor Law § 27-a), denominates the violations as "serious," and sets abatement dates. Attached to each NOV is an Investigative Narrative (Narrative) peculiar to the cited Petitioner. Each Narrative states that an inspection was conducted in response to an employee representative's formal complaint in accordance with Labor Law § 27-a. District Council 37, AFSCME, AFL-CIO (DC 37) is identified as the employee representative in the Narrative pertaining to the FDNY. There is no dispute that it was DC 37's formal complaint that led to Respondent's investigations of the other Petitioners. The Narratives were based on

inspections that occurred on December 15, (DCAS), 16 (DPR), and 17 (DOHMH), 2009, March 8, 2010 (FDNY), and January 4, 2011 (CUNY).

On application of Respondent and without opposition, the cases were consolidated as raising identical questions of law (Rules § 65.44; 12 NYCRR 65.44). All Petitioners designated a single lead attorney, and DC 37 and the Municipal Labor Committee (MLC) intervened in the consolidated cases without objection.

As part of its petitions, the Petitioners requested a stay of enforcement pursuant to Board Rules 66.9. We issued an Interim Resolution of Decision on June 7, 2011, denying the Petitioners' application for a stay. Following issuance of our Interim Resolution of Decision, the parties agreed to confer and file a Stipulation of Facts and a Notice narrowing the issues for the Board to decide. The Stipulation of Facts was filed with the Board on August 15, 2012, legal briefs were filed by the parties, and oral argument was held before the Board in New York, New York on March 20, 2013. The parties agreed during the oral argument that if we adopted our Interim Resolution of Decision, there would be no issues remaining to decide. Accordingly, our Interim Resolution of Decision is adopted and incorporated herein and attached as Exhibit "A", and we find as follows with respect to the allegations made by the Petitioners.

The Petitioners allege that the inspections leading to the issuance of the NOVs failed to satisfy the pre-conditions that Labor Law § 27-b (6) imposes on an inspection by Respondent and therefore the NOVs are invalid. As we discussed in our Interim Decision, we find that not only does Labor Law § 27-b (6) (c) itself make exceptions to the employee referral procedure that the Petitioners allege is the only mechanism for triggering an inspection by the Respondent, but that the procedure prescribed by the statute for employees and their representatives to follow does not limit the Respondent's broad statutory authority to inspect (*see e.g.* Labor Law § 27-b [6] [f]; Labor Law § 21 (1), (2), and (8); *Matter of Garcia v Heady*, 46 AD 3d 1088 [3d Dept 2007], *appeal denied* 10 NY 3d 705 [2008] [Respondent possesses the inherent authority to investigate Labor Law violations even in the absence of a formal complaint]). We hold, therefore, that the Respondent had authority to conduct the inspections that led to the NOVs.

The Petitioners next allege that the WVPA is the sole enabling statute for the regulations governing workplace violence prevention, and therefore, the NOVs are void to the extent that they are based on inspections conducted pursuant to PESHA, or describe violations of PESHA. As we previously held in *Matter of City of New York Department of Juvenile Justice*, PES 07-012, 07-013, and 07-014 (April 21, 2010), *confirmed sub nom. Matter of City of New York v Commissioner of Labor*, 31 Misc 3d 398 (Sup Ct, New York County 2011), *affirmed by* 100 AD 3d 519 (1st Dept 2012), and discussed at some length in our Interim Decision, the regulations implementing the WVPA are standards enforceable under Labor Law § 27-a as they were adopted in accordance with the provisions of Labor Law § 27-a (4) (b) and that "[t]he current PESH administrative plan will be used for the enforcement of . . . section [800.6], including a general schedule of inspections, which provides a rational administrative basis for such inspection (12 NYCRR 800.6 [j] [5])." We hold that the WVPA is enforced through PESHA and that therefore Respondent properly issued the NOVs under Labor Law § 27-a.

The Petitioners further allege that since the WVPA does not require an employer to develop a written policy statement on its workplace violence prevention program, have an

authorized employee representative participate in an evaluation of the workplace for the presence of factors that may place employees at risk of violence, or require an employer to have an authorized employee representative participate in the development of a workplace violence prevention program, the Respondent was not authorized to promulgate regulations imposing such requirements. As we discussed in our Interim Decision, there is nothing in either the language of the WVPA or its underlying purposes that is inconsistent with the regulatory requirements that public employers develop a written workplace violence prevention policy statement, have an authorized employee representative participate in evaluating the workplace, and have such employee representative participate in the development of a workplace violence prevention program. We find that these regulatory requirements fill in the interstices of the WVPA and are consistent with it and, although going beyond the text of the statute, are not inconsistent with the statutory language or its underlying purposes (*Allstate Ins. Co. v Rivera*, 12 NY3d 602, 608 [2009]). It seems evident to us that involving the employees with the evaluation of their workplaces is entirely consistent with Legislative intent to which states in relevant part that "It is critical to the maintenance of a productive workforce that employers and workers evaluate their workplaces to determine the risk of violence and to develop, and implement programs to minimize the hazard" (L 2006, c 82, § 1 [emphasis added]). To the extent that the Petitioners challenge the requirement of a written policy statement to be posted where employees normally view notices and that tells them what to do in the event of an incidence of violence, it is beyond dispute that such is entirely consistent with the legislative purposes and statutory language of the WVPA and a manifestly logical requirement.

The Petitioners allege that the requirements that public employers include authorized employee representatives in the evaluation of the workplace for the presence of factors that may place employees at risk of violence and to assist in the development of a workplace violence prevention program conflicts with the Taylor Law (Civil Service Law article 14, §§ 200 et seq.) and the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (NYCCBL), to the extent that the requirement purports to remove the issues of safety and health program development from collective bargaining without clear legislative direction. As we explained in our Interim Decision, the Legislature specifically stated in enacting the WVPA that "the provisions of the act shall not diminish the rights of employees pursuant to any law, rule, regulation or collective bargaining agreement" (L 2006, c 82, § 3) (emphasis added). Accordingly, the WVPA explicitly safeguards the employees' statutory right to collective bargaining and the Petitioners' concerns that union participation in risk evaluation and program development will in some way diminish or conflict with collective bargaining are unfounded. The employees' representative's role here as we understand it is to participate in the process, not to veto it, with the employer having the ultimate authority and responsibility in developing a workplace violence prevention plan. In any event, the WVPA places a duty on the Petitioners to provide for authorized employee representatives' participation in risk evaluation and program development that is a separate and different duty than under the laws governing collective bargaining. We leave to the NYS Public Employment Relations Board and the New York City Board of Collective Bargaining the determinations as to whether the evaluation of workplace violation and development of a prevention program are mandatory subjects of bargaining, or not, and what if any are the parties' bargaining duties. Furthermore, we note, that the Petitioners may have employees who are not represented for purposes of collective bargaining or who have no collective bargaining rights, but who are nonetheless protected by the WVPA.

For the reasons set forth above and in our Interim Resolution of Decision we affirm the NOVs.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Notices of Violation are affirmed; and

2. The Petitions be, and the same hereby are, denied.

Anne P. Stevason, Chairman

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
June 12, 2013.

EXHIBIT A

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petitions of:

CITY OF NEW YORK DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION,

CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioners,

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- against -

THE COMMISSIONER OF LABOR,

Respondent,

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and the MUNCIPAL LABOR COMMITTEE,

Interveners.

DOCKET NOS. PES 10-003/SA 10-008
PES 10-004/SA 10-004
PES 10-005/SA 10-007
PES 10-016/SA 10-012

INTERIM
RESOLUTION OF DECISION

APPEARANCES

Ilene A. Lees, General Counsel, Alan Deutsch of Counsel, for Petitioner City of New York Department of Citywide Administrative Services.

Alessandro G. Olivieri, General Counsel, for Petitioner City of New York Department of Parks and Recreation.

Thomas Merrill, General Counsel, Roslyn Windholz of Counsel, for Petitioner City of New York Department of Health and Mental Hygiene.

Julian Bazel, Counsel, Tayo Kurzman of Counsel, for Petitioner Fire Department of the City of New York.

Maria L. Colavito, Counsel, New York State Department of Labor, Jeffrey G. Shapiro of Counsel, for Respondent Commissioner of Labor.

Mary J. O'Connell, General Counsel, Aaron S. Amaral of Counsel, for Intervener District Council 37, AFSCME, AFL-CIO.

Greenberg, Burzichelli Greenberg P.C., Harry Greenberg of Counsel, for Intervener Municipal Labor Committee.

WHEREAS:

The captioned Petitioners challenge the validity of regulations that Respondent Commissioner of Labor (Respondent or Commissioner) promulgated to implement the Workplace Violence Protection Act (WVPA), codified at Labor Law § 27-b, and the Notice of Violation and Order to Comply (together, NOV) based on those regulations that Respondent issued against each Petitioner.

This Interim Resolution of Decision constitutes the Industrial Board of Appeals' determination of the Petitioners' applications under Board Rules of Procedure and Practice (Rules) § 66.9 (12 NYCRR 66.9) to stay, during the pendency of Board proceedings, enforcement of the NOVs.

Procedural History

On February 23, 2010[1], March 5, March 12, and September 20, respectively, Petitioners City of New York Department of Citywide Administrative Services (DCAS), City of New York Department of Parks and Recreation (DPR), City of New York Department of Health and Mental Hygiene (DOHMH), and the Fire Department of the City of New York (FD) filed petitions challenging separate NOVs that Respondent issued against them. The NOVs against DCAS, DPR and DOHMY are dated January 14, and the NOV against the FD is dated July 19. The docket numbers assigned to the cases are, respectively, PES 10-003/SA10-008, PES 10-004/SA10-004, PES 10-005/SA10-007, and PES 10-016/SA10-012.

Each NOV, by its own terms, "describes violations of the Public Employee Safety and Health Act of 1980" (PESHA or Labor Law § 27-a), denominates the violations as "serious," and sets abatement dates. Attached to each NOV is an Investigative Narrative (Narrative) peculiar to the cited Petitioner. Each Narrative states that an inspection was conducted in response to an employee representative's formal complaint in accordance with

[1] Unless otherwise noted, all dates are in 2010.

Labor Law § 27-a. District Council 37, AFSCME, AFL-CIO (DC 37) is identified as the employee representative in the Narrative pertaining to the FD. There is no dispute that it was DC 37's formal complaint that led to Respondent's investigations of the other Petitioners. The Narratives were based on inspections that occurred on December 15 (DCAS), 16 (DPR), and 17 (DOHMH), 2009 and March 8, 2010 (FD).

On application of Respondent and without opposition, the cases were consolidated as raising identical questions of law (Rules § 65.44; 12 NYCRR 65.44). All Petitioners designated a single lead attorney, and DC 37 and the Municipal Labor Committee (MLC) intervened in the consolidated cases without objection.

Regulations in issue and violations cited in the NOVs.

Below are the four regulations in issue in this appeal, each followed by the corresponding NOV citation and Respondent's findings for each indicated Petitioner. The FD appeals from only Items 1 and 3 of Citation 1.

1. Title 12 NYCRR § 800.6 (e) (1) Workplace Violence Policy Statement: The employer shall develop and implement a written policy statement on the employer's workplace violence prevention program goals and objectives and provide for full employee participation through an authorized employee representative.

    (i) The workplace violence policy statement shall be posted where notices to employees are normally posted.

    (ii) The policy statement shall briefly indicate the employer's workplace violence prevention policy and incident alert and notification policies for employees to follow in the event of a workplace violence incident.

Citation 1 Item 1

> "12 NYCRR Part 800.6(e) (1): The employer did not develop and implement a written policy statement on the employer's workplace violence prevention program goals and objectives."
>
> DCAS and DPR – "The employer did not have a written policy statement."
>
> DOHMH – "The employer did not implement a written policy statement on the workplace violence prevention program goals and objectives."
>
> FD – "The inspector requested a copy of the employer's Workplace Violence Prevention Policy statement during the inspection. The employer's representative . . . did not provide a copy of the [FD]

Workplace Violence Prevention Policy statement for all [FD] worksites during the inspection. The employer's policy statement shall include all the elements that are listed in 12 NYCRR Part 800.6 (e) (1) (i) and (ii)."

2. Title 12 NYCRR § 800.6 (f) (3) Evaluation of Physical Environment: The employer, with the participation of the authorized employee representatives, shall evaluate the workplace to determine the presence of factors which may place employees at risk of workplace violence.

Citation 1 Item 2

"12 NYCRR Part 800.6 (f) (3): The employer did not include the participation of authorized employee representatives, during the evaluation of the workplace to determine the presence of factors which may place employees at risk of workplace violence."

DCAS, DPR, and DOHMH – "The evaluation of the workplace was done without the participation of an authorized employee representative."

3. Title 12 NYCRR § 800.6 (g) (1) Employers with 20 or more full-time permanent employees, with the participation of the authorized employee representative, shall develop a written workplace violence prevention program. Such participation shall include soliciting input from the authorized employee representative as to those situations in the workplace that pose a threat of workplace violence, and on the workplace violence prevention program the employer intends to implement under these regulations. Safety and health programs developed and implemented to meet other federal, state or local regulations, laws or ordinances are considered acceptable in meeting this requirement if those programs cover or are modified to cover the topics required in this paragraph. An additional or separate safety and health program is not required by this paragraph.

Citation 1 Item 3

"12 NYCRR Part 800.6 (g) (1): The employer with 20 or more full time permanent employees did not develop a written workplace violence prevention program with the participation of authorized employee representative(s)."

DCAS, DPR, and DOHMH – "An authorized employee representative did not participate in the development of the employer's workplace violence prevention program."

> FD – "The inspector requested a copy of the employer's workplace violence prevention program during the inspection. The employer's representative . . . did not provide a written workplace violence prevention program for all [FD] worksites to the inspector during the inspection. The employer's representative . . . stated that [FD] had solicited input from union representatives during the development and implementation of the [FD] Command Orders pertaining to workplace violence prevention prior to the enactment of 12 NYCRR Part 800. The union representative . . . from [DC 37] stated that the employer did not solicit input from the authorized employee representative during the development of the draft [FD] Workplace Violence Program or the [sic] during development and implementation of [FD] Command Orders pertaining to workplace violence prevention. The employer's representative . . . did not provide documentation demonstrating that [FD] solicited input from the authorized employee representatives during the development of [FD] Command Orders pertaining to workplace violence prevention for all [FD] worksites. The employer did not develop a written workplace violence prevention program that meets the requirements of 12 NYCRR Part 800.6 (g) (2) (i) through (viii)."

4. Title 12 NYCRR § 800.6 (h) (1) Upon completion of the workplace violence prevention program, every employer shall provide each employee with information and training on the risks of workplace violence in their workplace or workplaces at the time of the employee's initial assignment and at least annually thereafter.

Citation 1 Item 4

> "12 NYCRR Part 800.6 (h) (1): The employer did not provide each employee with information and training on the risks of violence in their workplace or workplaces at least annually."
>
> DCAS and DPR – "The employer did not provide the employees with training on the risk of violence in their workplace."
>
> DOHMH - "The employer did not provide all employees with training on the risk of violence in their workplace."

Claims Raised in the Petitions.

Collectively, the petitions ask the Board to issue a Resolution of Decision revoking the NOVs based on the following claims.

1. The inspections leading to the issuance of the NOVs failed to satisfy the pre-conditions that Labor Law § 27-b (6) imposes on an inspection by Respondent and therefore the NOVs are invalid.

2. The WVPA is the sole enabling statute for the regulations governing workplace violence prevention, and therefore, the NOVs are void to the extent that they are based on inspections conducted pursuant to PESHA, or describe violations of PESHA;

3. As the WVPA does not require an employer to develop a written policy statement on its workplace violence prevention program, Respondent was not authorized to promulgate a regulation that imposes such requirement;

4. As the WVPA does not require an employer to have an authorized employee representative participate in an evaluation of the workplace for the presence of factors that may place employees at risk of violence, Respondent was not authorized to promulgate a regulation that imposes such requirement;

5. The requirement that public employers include authorized employee representatives in the evaluation of the workplace for the presence of factors that may place employees at risk of violence conflicts with the Taylor Law (Civil Service Law article 14, §§ 200 et seq.) and the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (NYCCBL), to the extent that the requirement purports "to remove the issues of safety and health program development from collective bargaining without clear legislative direction;"

6. As the WVPA does not require an employer to have an authorized employee representative participate in the development of a workplace violence prevention program, Respondent was not authorized to promulgate a regulation that imposes such requirement;

7. The requirement that public employers include authorized employee representatives in the development of workplace violence prevention programs conflicts with the Taylor Law and NYCCBL to the extent that the requirement purports "to remove the issues of safety and health program development from collective bargaining without clear legislative direction;"

8. At the time of Respondent's inspections, Petitioners' evaluations of their workplaces and development of their written workplace violence prevention programs were preliminary, but ongoing, so that the citations for not including authorized employee representatives in risk assessment and program development, or for otherwise failing to comply with the regulatory requirements for a written violence prevention program were premature.

The FD's petition does not raise the claims in items numbered 1 and 4.

Respondent answered the petitions, denying their material allegations and interposing affirmative defenses. Intervener DC 37 also opposed the Petitions.

Stay of Enforcement

As amended by applications later filed pursuant to Rule 66.9, the petitions ask the Board to stay enforcement of the NOVs pending the Board's disposition of the petitions. Affidavits of DCAS' Safety & Health Coordinator, DPR's Deputy Director for Labor Relations, DOHMH's Director of Health and Safety, and the FD's Assistant Commissioner for Facilities were filed in support of the applications. Respondent and DC 37 filed papers in opposition to a stay.

Rule 66.9 governs the disposition of the applications for a stay.

Rule 66.9 provides as relevant here:

> "(a) The filing of a Petition may, in the discretion of the Board, operate to stay all proceedings against the Petitioner under such . . . order until the determination of such Petition. Such discretion may be exercised, if at all, upon written application therefor, which application shall be supported by affidavits, documentary evidence, or other evidence demonstrating the necessity for such stay, the financial responsibility of the applicant when relevant, and that the grant of such stay will not unduly prejudice any employee, the public or the Department of Labor. The Commissioner of Labor shall have such opportunity as the Board shall deem reasonable and sufficient to object to or oppose the application for a stay.

Discussion

By this interim decision, we do not decide the merits of the claims raised in the petitions except to the extent that such claims must be considered to decide Petitioners' application for a stay.

Petitioners have not demonstrated that a stay is necessary.

Petitioners contend that a stay is necessary because they should not be required to expend time and other resources to attend to actions that Respondent may take in enforcing the regulations that Petitioners are cited for violating when the inspections that led to the citations were invalid, and the regulations themselves are invalid because they exceed the statutory authority that the WVPA delegates to Respondent. Petitioners assert further that two of the regulations conflict with laws governing collective bargaining. Petitioners' arguments are vague in that the amount of time or the nature of the resources that they claim would be unnecessarily expended is not stated in their applications while their claims are

baldly stated, in large part without cited authority. Such vague and unsupported arguments pale further when considering that the subject of these cases is the risk of violence to their employees in their workplaces.

The inspections.

Petitioners argue that Respondent's inspections leading to the issuance of the NOVs failed to comply with required pre-conditions set out in Labor Law § 27-b (6) and therefore the NOVs are invalid. Labor Law § 27-b (6) (c) states:

> "Any employee or representative of employees who believes that a serious violation of a workplace violence protection program exists or that an imminent danger exists shall bring such matter to the attention of a supervisor in the form of a written notice and shall afford the employer a reasonable opportunity to correct such activity, policy or practice. This referral shall not apply where imminent danger or threat exists to the safety of a specific employee or to the general health of a specific patient and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action."

According to Petitioners, this provision imposes pre-conditions to an inspection by Respondent: "(1) the submission of a written complaint by an employee or representative of employees to a supervisor; (2) the affording of a reasonable time to the employer to resolve the complained-of issue; and (3) the submission of a written notice to the Department of Labor by the employee or representative of employees indicating that the complained-of issue has not been resolved." Petitioners say that the first two pre-conditions have not been satisfied resulting in a denial of their "statutorily-derived" opportunity to resolve workplace violence complaints "without being subjected to inspections and other enforcement activity by Respondent."

At the outset, we note that Labor Law § 27-b (6) (c) itself makes exceptions to the employee referral procedure. Furthermore, the language that Petitioners rely on applies when "any employee" or his/her "representative. . .believes that a serious violation of a workplace violence protection program exists," and Petitioners have admitted that they do not have workplace violence prevention programs in place. In this regard then, as Petitioners admit to no basis for Respondent to conduct an inspection other than under Labor Law § 27-b (6) (c), their logic would forever bar inspections so long as Petitioners' fail to institute workplace violence prevention programs. The absurdity of this result is self-evident.

In any event, it is clear that Labor Law § 27-b (6) (c) prescribes a procedure for employees and their representatives to follow and is not a procedure that limits Respondent's broad statutory authority to inspect. WVPA itself states that "[t]he Commissioner may, upon his or her own initiative, conduct an inspection of any premises occupied by an employer if he or she has reason to believe that a violation of this section has

occurred or if he or she has a general administrative plan for the enforcement of this section" (Labor Law § 27-b [6] [f]). Respondent's Notice of Adoption of 12 NYCRR Part 800.6 in the *New York State Register* (April 29, 2009) at 16, expressly states that "[t]he current PESH administrative plan will be used for the enforcement." *See* Labor Law § 27-a (5) (e).

Section 27-b (6) (f) is in addition to other sections within Labor Law article 2, establishing that Respondent is charged with a broad duty and given concomitant authority to inspect in order to insure the health and safety of public employees. Labor Law § 21, entitled "General powers and duties of commissioner," provides as relevant here:

> "The commissioner shall . . . have, notwithstanding any provision of law to the contrary, general administrative supervision over the several divisions, boards, commissioners, bureaus, and agencies [of the Department of Labor] . . . and in connection therewith, the commissioner:
>
> "(1) Shall enforce all the provisions of this chapter and may issue such orders as he finds necessary directing compliance with any provision of this chapter, except as in this chapter otherwise provided;
>
> "(2) Shall cause proper inspections to be made of all matters prescribed by this chapter;
>
> . . .
>
> "(8) May make investigations, collect and compile statistical information and report upon the conditions of labor generally and upon all matters relating to the enforcement and effect of the provisions of this chapter and of the rules thereunder."

Finally, relying on the general authority that Labor Law article 2, § 21 (1) grants the Commissioner, in *Matter of Garcia v Heady*, 46 AD 3d 1088 (3d Dept 2007), *appeal denied* 10 N.Y.3d 705 (2008), a case involving Labor Law article 19 and the underpayment of wages, the Court stated that "DOL possesses the inherent authority to investigate Labor Law violations even in the absence of a formal complaint." The argument that Respondent has no independent power to conduct an inspection but must, in effect, wait for an employee to complain to a supervisor that "a serious violation of a workplace violence protection program exists or that an imminent danger exists" and then await possible resolution of the complaint is simply inconsistent with the statutory scheme as well as the public policy to protect public employees that is the basis for Labor Law article 2, which includes both Labor Law §§ 27-a and 27-b.

Statutory authority for the regulations.

Petitioners contend that Respondent cannot enforce the at-issue regulations because they exceed her authority under the Labor Law § 27-b and are not otherwise enforceable under Labor Law § 27-a because they were promulgated solely pursuant to Labor Law § 27-b.

The official authority or source for New York State agencies' rules and regulation is the Official Compilation of Codes, Rules and Regulations of the State of New York, cited as "NYCRR." Title 12, Part 800 of NYCRR is entitled "Public Employees' Occupational Safety and Health Standards." Immediately below Part 800's title appears the notation: "(Statutory authority: Labor Law § 27-a)." Following this notation, the sections within 12 NYCRR Part 800 are listed; they include §§ 800.1 through 800.7. All of the sections pertain to public employee safety and health. Section 800.6, the subject here, is entitled "Public employer workplace violence prevention programs."

Section 800.1 ("Purpose") states that "[t]his Part promulgates occupational safety and health standards for the protection of the lives, safety and health of public employees in compliance with the mandates of Labor Law, section 27-a."

Section 800.2, in substantial part, reiterates Labor Law § 27-a (4) (a). This subdivision of the statute is entitled "Safety and health standards" and provides:

> "The [Respondent] shall by rule adopt all safety and health standards promulgated under the United States Occupational Safety and Health Act of 1970 (Public Law 91-596) [OSHA]. . . in order to provide reasonable and adequate protection to the lives, safety and health of public employees and shall promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to [OSHA] or pursuant to such act or pursuant to paragraph b of this subdivision."

Paragraph b of Labor Law § 27-a (4) states:

> "Notwithstanding the provisions of paragraph a of this subdivision, [Respondent], in consultation with the state occupational safety and health hazard abatement board, shall promulgate rules and standards whenever such board finds (1) that no federal standard exists for the particular condition being addressed and that such a standard is necessary for the protection of the public employees at risk, or (ii) a federal standard exists, but conditions in public workplaces in this state require a different standard, and such state standard will be at least as effective in providing safe and healthful places of employment as the federal standard."

In enacting the WVPA, the Legislature found that "the hazard of workplace violence is not currently addressed by a specific federal or state statute and regulation" (L 2006, c 82, §1).

In *Matter of City of New York Department of Juvenile Justice,* PES 07-012, 07-013, and 07-014 (April 21, 2010), *confirmed sub nom. Matter of City of New York v Commissioner of Labor,* 31 Misc 3d 398 (Sup Ct, New York County 2011), *appeal pending,* the Board determined that the regulations implementing WVPA are standards enforceable under Labor Law § 27-a as they were adopted in accordance with the provisions of Labor Law § 27-a (4) (b) and that "[t]he current PESH administrative plan will be used for the enforcement of . . .section [800.6], including a general schedule of inspections, which provides a rational administrative basis for such inspection (12 NYCRR 800.6 [j] [5])."

We are puzzled by Petitioners' failure to treat with our decision in the *Juvenile Justice* cases in their applications for a stay when our analysis and decision there are directly on point here (*see, Nachbaur v Am. Tr. Ins. Co.*, 300 AD2d 74, 76 [1st Dept 2002], *appeal denied* 99 NY2d 576 [2003]). We disagree that a stay is necessary to the extent that Petitioners' request is based on the assertion that only Labor Law § 27-b, and not Labor Law § 27-a, authorizes the at-issue regulations which consequently, the Petitioners' argument continues, may not be enforced through the provisions of Labor Law § 27-a.

Statutory authority for the regulatory requirements Petitioners have a written workplace violence prevention policy statement and that Petitioners' employees' authorized representatives participate in evaluating the risks of workplace violence and in developing workplace violence prevention program.

Respondent found Petitioners in violation of regulations requiring a written workplace violence prevention policy statement and the participation of authorized employee representatives in the evaluation of factors at the workplace that may involve a risk of violence and in the development of violence prevention programs. Petitioners contend that as the WVPA does not impose such requirements, the regulations exceed the authority that the statute delegates to Respondent and are therefore invalid.

The regulations requiring a written workplace violence prevention policy statement say that the statement "shall be posted where notices to employees are normally posted" and "shall briefly indicate . . . incident alert and notification policies for employees to follow in the event of a workplace violence incident" (12 NYCRR § 800.6 [e] [1] [i] and [ii]).

The City of New York previously challenged the regulations at issue here on precisely the grounds raised here – that WVPA does not authorize the Respondent's promulgation of them because they exceed the statutory authority that the WVPA delegates to her. In *Matter of City of New York v New York State Dept of Labor* (Sup Ct, Albany County December 11, 2009, Egan, Jr., J., Index No. 6813-09, slip opinion), the Court held in an unpublished decision that the City had failed to exhaust its administrative remedies to appeal to the Board and that although agency actions that are "unconstitutional or wholly

beyond its grant of power" are exceptions to the exhaustion rule (*id.* at 5), "none of the exceptions of the exhaustion doctrine are applicable" to § 800.6 (*id.* at 7).

The Court continued, "[t]he fact that the regulations increased employers' obligations under the law, allowed employees and unions to participate in the evaluation process and imposed additional program elements upon the employer does not rise to the level that exempts the [City] from exhausting its administrative remedies" (*id.* at 5-6). In short, the Court determined that "increased employer obligations" that the regulations may impose are not "wholly beyond" the grant of power that the Legislature delegated to the Respondent in Labor Law § 27-b.

In rejecting the City's arguments, the Court observed that "the administrative official is accorded flexibility in determining the proper methods to achieve the legislative mandates and the degree of flexibility varies according to the nature of the problem sought to be remedied by the legislature" (*Broderick v Lindsay,* 39 NY2d 641 [1997]) (*id.* at 4) and that "[t]he Legislature is free to announce its policy in general terms and authorize administrators 'to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation' (*Matter of Citizens for an Orderly Energy Policy v Cuomo,* 78 NY 2d 398, 410 [1991], rearg. denied, 79 NY 2d 851 [1992] and *Nicholas v Kahn*, 47 NY 2d 24, 31 [(1979])" (*id.* at 5).

We find the analysis and reasoning of Supreme Court persuasive and consistent with the decision in *Allstate Ins. Co. v Rivera,* 12 NY3d 602, 608 (2009), where the Court of Appeals stated: "The Legislature may authorize an administrative agency to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation. In so doing, any agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (internal quotation and citation omitted).

In Labor Law 27-b (6) (f), the Legislature requires Respondent to "adopt rules and regulations implementing" the WVPA, and as to the WVPA's underlying purposes, the Legislature found and declared:

> It is critical to the maintenance of a productive workforce that employers and workers evaluate their workplaces to determine the risk of violence and to develop, and implement programs to minimize the hazard. Experience has shown that when employers evaluate the safety and health hazards in their workplaces and implement employee protection programs, the incidence of workplace injuries is reduced. The legislature, therefore, further finds and declares that the public health, safety and welfare would be advanced by enactment of a law to require that employers develop and implement workplace violence protection programs designed to minimize the danger to employees of workplace violence."

L 2006, c 82, § 1. We find nothing in either the language of WVPA or its underlying purposes that is inconsistent with the regulatory requirements that Respondent adopted and that Petitioners challenge. Nor do Petitioners assert any such inconsistency.

Petitioners' objections to the participation of authorized employee representatives and to the requirement that Petitioners develop a written policy statement do not establish necessity for a stay for additional reasons.

The Legislature expressly stated its intention that employees be involved in the evaluation of risks of violence in the workplace: "The purpose of this section is to ensure that the risk of workplace assaults and homicides is evaluated by affected public employers and their employees. . ." (Labor Law § 27-b [1]). Together, employees and employers are to evaluate their workplaces and determine whether "factors or situations" are present "that might place employees at risk" of violence (Labor Law § 27-b [3]). The risk factors are to be identified in written violence prevention programs, along with the methods to be used to prevent the risk of violence that is identified (Labor Law § 27-b [4]). Appropriate methods may include "training in conflict resolution and nonviolent self-defense responses" and "establishing and implementing reporting systems for incidents of aggressive behavior" (*id.*).

Employees and their designated representatives are to have access to the written violence prevention program (Labor Law § 27-b [5] [a]), and at the time of employees' initial job assignments and annually thereafter, they are to be informed of and receive training on WVPA's requirements, the factors associated with the risk of violence at their workplaces, and the location and availability of the written violence prevention program (Labor Law § 27-b [5] [b]). Employee training is also to include measures that employees may take to protect themselves and the details of the written violence prevention program (*id.*).

Any employee or employee representative may bring to a supervisor's attention a serious violation of the written violence prevention program or the existence of imminent danger, and if the matter is not resolved, the danger is exigent, or reporting to a supervisor "would not result in corrective action," then the employee or employee representative may bring the matter to Respondent's attention (Labor Law § 27-b [6]). Further, "an authorized employee representative shall be given the opportunity to accompany [Respondent] during an inspection for the purpose of aiding such inspection. Where there is no authorized employee representative, [Respondent] shall consult with a reasonable number of employees concerning matters of safety in the workplace" (Labor Law § 27-b [6] [c]).

In short, WVPA's provisions establish the Legislature's intention that employees be involved in the evaluation of factors associated with risk of workplace violence and through the evaluation process, aid the employer in identifying and developing written violence prevention programs to minimize or eliminate the risk factors and to reasonably empower employees to protect themselves; the Legislature clearly did not intend employees to be passive, but rather actively involved in helping to prevent workplace violence.

In light of the role that WVPA prescribes for employees, it is at this juncture important to consider the numbers of Petitioners' employees and the scope of Petitioners' operations in terms of multiplicity of locations, geographic distances, and mandated duties and/or services as Petitioners themselves have described in the petitions.

DCAS

> "performs a variety of functions which support [New York] City agencies, including, but not limited to, supporting City agencies' workforce needs in recruiting, hiring and training City employees; providing overall facilities management for 54 public buildings; purchasing, selling and leasing non-residential real property; inspecting and distributing supplies and equipment; auditing and paying utility accounts that serve more than 4,000 buildings; and implementing energy conservation programs throughout City facilities."

DPR "is responsible for the management and maintenance of approximately 29,000 acres of City property, which includes parks, playgrounds, beaches, athletic fields and other recreational facilities for the use and enjoyment of the public."

DOHMH has jurisdiction, with certain exceptions,

> "to regulate all matters affecting health in the city of New York and to perform all those functions and operations that relate to the health of the people of the City. In seeking to fulfill this responsibility to promote and protect the public health of the people of the City, [DOHMH's] over 6,000 employees work in a variety of different types of facilities throughout the City, such as schools, correctional facilities and public health clinics. In addition, the agency's employees are responsible for visiting or inspecting many types of establishments throughout the City ranging from private homes and buildings to restaurants and mobile food units, which are located in all neighborhoods and boroughs of the City."

The FD "provides firefighting and emergency rescue services, ambulance and emergency medical services, as well as fire investigation, fire prevention, and fire safety education services to the people of New York City." Citing as authority the FD's Vital Statistics for the calendar year 2009, found on the Internet at www.nye.gov/html/fdny/pdf/vital_stats_2009.pdf, the FD's petition also states that the FD

> "has approximately 16,600 employees, and of that total, approximately 11,200 are Fire personnel, approximately 3,200 employees are members of the Emergency Medical Services

> ('EMS'), and approximately 1,600 are Fire Protection Inspectors, and other civilians who perform administrative functions."
>
> In addition, the FD "is responsible for managing more than 300 facilities, which include fire houses, EMS stations, dispatch facilities, training facilities, fleet services, and other types of support services facilities."

Unquestionably, the scope of each Petitioner's operations is immense, varied, and complex, strongly suggesting that the challenges of evaluating the risks of workplace violence and developing violence prevention programs are likely to require time, skill, resources, expertise, and training. Yet, in the face of this, Petitioners argue that Respondent may not require the participation of authorized employee representatives in the undertakings that WVPA mandates. We simply are not persuaded that it is reasonable to stay enforcement of a regulation that appears to aid in implementing the Legislature's intended goal and accomplishing the WVPA's mandates, especially when the absence of such regulation in light of Petitioners' self-described circumstances would appear to make achieving the same goals less likely.

Furthermore, the requirements that an authorized employee representative participate in risk assessment and program development to prevent workplace violence is entirely consistent with and supported by other provisions within Labor Law article 2. Labor Law § 21 (5) and (6), provide that the Commissioner

> "[s]hall institute methods and procedures for the establishment of a program for voluntary compliance by employers and employees with the requirements of this act and all applicable safety and health standards and rules and regulations promulgated pursuant to the authority of this article; [and]
>
> "[s]hall provide a method of encouraging employers and employees in their efforts to reduce the number of safety and health hazards arising from undesirable, inappropriate, or unnecessary working conditions at the workplace and of stimulation employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions."

Finally, it is beyond dispute that the requirement of a written policy statement to be posted where employees normally view notices and that briefly tells them what to do in the event of an incidence of violence is entirely consistent with the legislative purposes and statutory language of the WVPA and a manifestly logical requirement.

The laws governing collective bargaining and the regulatory requirements that Petitioners "with the participation of the authorized employee representatives [evaluate] the workplace to determine the presence of factors which may place employees at risk of workplace

violence" (12 NYCRR [f] [3] and also "with the participation of the authorized employee representative . . . develop a written workplace violence prevention program" (12 NYCRR 800.6 [g] [1]).

Petitioners contend that these requirements conflict with the Taylor Law and the NYCCBL "to the extent that [they] remove the issue of safety and health program development from collective bargaining without clear legislative direction." Petitioners continue:

> "As the issue of safety and health program development (including the development of programs relating to workplace violence prevention) is included within the ambit of the Collective Bargaining Agreement between the City of New York and . . . DC 37, any requirements which Respondent seeks to impose . . . relating to the participation of authorized employee representatives in any aspect of the development of Petitioner[s'] Workplace Violence Prevention Program without clear legislative authority violates the [NYCCBL] and the Taylor Law and prejudices Petitioner[s], as [they are] being compelled . . . to act in a manner which abrogates the law and impairs the integrity of [their] established Collective Bargaining Agreement and, generally, the collective bargaining process established by law in New York State. If a stay is not granted, Petitioner[s] will be further prejudiced should Respondent continue to take enforcement action, including the conducting of inspections and the issuance of further orders, which would have the effect of impairing the integrity of the collective bargaining process."

A simple answer to Petitioners' concern is provided by the enactment of the WVPA itself which provides: "The provisions of this act shall not diminish the rights of employees pursuant to any law, rule, regulation or collective bargaining agreement" (L 2006, c 82, § 3). Accordingly, whatever the nature of the participation that the regulations require cannot diminish employees' statutory right to collective bargaining or any collectively bargained right. WVPA safeguards these.

Additionally, although Petitioners argue that enforcement of the regulations requiring authorized employee representatives participation impairs the integrity of their "established Collective Bargaining Agreement," no such agreement was filed in support of their applications nor even an excerpt quoted, nor any explanation provided on how the integrity of such contract is adversely affected. Accordingly, this argument is rejected as a basis for granting Petitioners' stay applications.

In any case, we note without deciding that it may be possible that the health and safety provisions of a collective bargaining agreement meet requirements of a workplace violence prevention program. The regulations at 12 NYCRR 800.6 (g) (1) state that

> "[s]afety and health programs developed and implemented to meet other Federal, State or local regulations, laws or ordinances are considered acceptable in meeting this requirement if those programs cover or are modified to cover the topics required in this paragraph. An additional or separate safety and health program is not required by this paragraph."

"Collective bargaining" is a term of art defined in Civil Service Law § 204 (3) as

> "the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

The New York City Administrative Code 12-307 (a) has a substantially similar provision (*see* Civil Service Law § 212): "public employers and certified or designated employee organizations shall have the duty to bargain in good faith . . . ."

We find illogical Petitioners' argument that any form of authorized employee participation in risk assessment and program development inexorably violates collective bargaining obligations. Petitioners have a duty to provide for authorized employee representatives' participation and may also have a separate and different duty to bargain under the laws governing collective bargaining. We leave to the NYS Public Employment Relations Board (PERB) and the New York City Board of Collective Bargaining the determinations as to whether the evaluation of workplace violence risks and the development of a program to prevent workplace violence are mandatory subjects of bargaining, or not, and what if any are the parties' bargaining duties. We observe, without deciding the issue, that collective bargaining may constitute participation by an authorized employee representative within the meaning of the at-issue regulations and therefore conclude that Petitioners have not established the need for a stay by asserting that WVPA regulations necessarily abrogate collective bargaining laws.

Moreover, Petitioners' arguments regarding collective bargaining are entirely inapplicable to a portion of their workforce. The term "authorized employee representative" is defined at 12 NYCRR § 800.6 (d) (1) as "[a]n employee authorized by the employees or the designated representative of an employee organization recognized or certified to represent the employees pursuant to article 14 of the Civil Service Law."[2] Accordingly, an authorized employee representative may be another employee, and Petitioners are likely to

[2] The same definition of this term is found at Labor Law § 27-a (1) (c).

have employees who are not represented for purposes of collective bargaining or who have no collective bargaining rights under the NYCCBL or the Taylor Law (*see,* Civil Service Law § 201 [7]), but who are nonetheless protected by WVPA. As to employees who are either not represented by an employee organization or who have no collective bargaining rights, Petitioners' argument does not establish the need for a stay.

Petitioners have not established that a stay will not unduly prejudice any employees.

Petitioners' applications recite somewhat varying, but mostly identical ongoing control measures to protect their employees. These include access controls; the operation of Police or Fire Marshals and security personnel; and the use of security, surveillance, and reporting systems. DPR's application also notes the use of pre-employment screening, conflict resolution procedures, and customer service training. Petitioners claim that employees will not be prejudiced if a stay is granted because these existing measures to insure employee safety continue in effect while Petitioners continue work to finalize their workplace violence prevention programs; communicate concerning workplace violence prevention among staff, management and bargaining agents; and review written policies and programs during labor-management meetings and through site surveys, and the inspection of facilities.

Although Petitioners do not say when these various measures were instituted, their description of them as "ongoing" and "existing" suggests that the measures have been in use for some time. Implicit in Petitioners' argument is that ongoing measures are enough to insure employee safety during the period of a stay. However, the very enactment of the WVPA runs contrary to that argument, based as it was on the inadequacy of existing measures to reduce workplace violence:

> "[W]orkplace assaults and homicides are a serious public health problem that demands the attention of the state of New York. During the last decade, homicide was the third leading cause of death for all workers and the leading cause of occupational death for women workers. Workplace violence presents a serious occupational safety hazard for workers, but many employers and workers may be unaware of the risk. Moreover, the hazard of workplace violence is not currently addressed by a specific federal or state statute and regulation."

(L 2006, c 82, § 1).

Glaring in its absence from Petitioners' description of their ongoing measures is any method to "evaluate . . . workplaces to determine the risk of violence" (*id.*). The Legislature declared that "[e]xperience has shown that when employers evaluate the safety and health hazards in their workplaces and implement employee protection programs, the incidence of workplace injuries is reduced" (*id.*). The importance that the Legislature accorded to risk assessment and consequent identification of risk factors for violence is reflected in the

multiple references to those in the WVPA. *See, for example*, Labor Law § 27-b (3), (4) (a), and (5) (b) (1). Also absent from Petitioners' recitation of ongoing measures is employee training on the risks of workplace violence and measures that employees can take to protect themselves (*see* Labor Law § 27-b [5]). Accordingly, we are not persuaded that Petitioners' employees will not be unduly prejudiced if a stay is granted.

We distinguish the instant matter from our decision in *Petition of City of Syracuse, Department of Aviation,* Docket No. PES 99-08 (June 23, 1999). There, the Commissioner found that an employer had failed to come into compliance with a new health and safety standard and issued a notice of violation and order citing four violations, including two serious ones. Upon appeal to the Board, the employer requested a stay on the grounds that the question on appeal was whether the new standard applied to its employees; a standard previously approved by the appropriate regulatory agencies was in place and would be continued to safeguard employees; and compliance with the Commissioner's order required the hiring and training of additional personnel, at great expense, which expense would not be easily reversed if the employer were successful in its appeal. Despite the opposition of both the Commissioner and the employees' collective bargaining representative on the ground that such stay would unduly prejudice the employer's employees, the Board granted the employer's application for a stay of enforcement of the order.

Here, the safety measures that Petitioners argue will protect employees during the period of a stay were not a previous standard or previously approved by the appropriate authorities; the Legislature found that existing safety measures were not adequate; and Petitioners have not asserted that there is a dollar cost associated with compliance. Also, Petitioners here seek to have the Board find regulations invalid, while in the earlier case, the employer sought a less severe result, that is, that a regulation did not apply to its employees. As Respondent and DC 37 point out in their papers in opposition to Petitioners' application, and relying in part on the Court of Appeals' decision in *Consolidated Nursing Home v Commissioner of Health,* 85 NY2d 326, 331-332 (1995), there is a very heavy burden to show that Respondent's regulations are not valid.

The Board finds that Petitioners have not met the requirements of Rule 66.9 to show that a stay is necessary and that a stay will not unduly prejudice their employees. Although Petitioners did not address whether the grant of a stay would not unduly prejudice the public, they and Respondent did present their positions on whether Respondent would be unduly prejudiced by the grant of a stay. However, given our decision here, it is unnecessary to, and we do not, reach any other issues.

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THEREFORE:

The applications of the City of New York Department of Citywide Services, the City of New York Department of Parks and Recreation, the City of New York Department of Health and Mental Hygiene, and the Fire Department of the City of New York for a stay of the Notice of Violation issued against each be, and the same hereby is, denied.

Anne P. Stevason, Chairman

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
June 7, 2011.