

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

SANJA DRINKS-BRUDER,

Petitioner,

To review under Section 101 of the New York State
Labor Law a Determination made under Article 2 of the
New York State Labor Law, dated December 5, 2019,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PES 19-010

RESOLUTION OF DECISION

APPEARANCES

Sanja Drinks-Bruder, ¹ petitioner pro se.

Jill Archambault, Acting General Counsel, NYS Department of Labor, Albany (Steven J. Pepe of counsel), for respondent.²

WITNESSES

Petitioner Sanja Drinks-Bruder.

Safety and Health Investigator Charles Riley, for respondent.

WHEREAS:

On August 14, 2019, petitioner Sanja Drinks-Bruder (hereinafter “Drinks-Bruder”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) pursuant to Labor Law § 101 to contest an Investigative Narrative dated December 5, 2019 issued by the Public Employee Safety and Health Division (hereinafter “PESH”) of the New York State Department of Labor (hereinafter “DOL”). The petition filed a final amendment to her petition on March 18, 2020. Respondent filed an answer to the petition on January 4, 2021. Upon notice to the parties, a hearing was held on June 10, 2021, before Counsel Benjamin Shaw, the designated hearing officer in the proceeding. The parties were afforded a full opportunity to present documentary evidence, to

¹ This matter was originally captioned “Sanja Drinks-Binder.” That error is corrected in the decision here.

² Jill Archambault was respondent’s Acting General Counsel at the time of the hearing. Michael Paglialonga is currently respondent’s Acting General Counsel at the time of the decision.

examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

Petitioner asserts that the employer, Niagara Falls Police Department (hereinafter “NFPD”), in violation of Labor Law § 27-a, caused police officer employees to be exposed to serious injury or death when it changed its policy or practice in November 2017 such that police officer employees assigned to keep watch over individuals in custody and brought to the psychiatric emergency room at Niagara Falls Memorial Medical Center (hereinafter “NFMMC”) had to remain inside a locked room of NFMMC’s psychiatric emergency room where non-prisoner patients were permitted to freely move around. According to petitioner, the prior policy or practice of NFPD and/or NFMMC required that police officer employees remained outside of the locked room of NFMMC’s psychiatric emergency room and kept watch over the individual in police custody via the window to the room or monitors linked to cameras in the locked unit and individual patient rooms. Petitioner contends that this unnecessary change in policy or practice put her in an unsafe work environment where she was at risk of suffering serious injury or death.

Respondent asserts that it conducted a complete investigation of petitioner’s complaint to PESH and determined that there was no evidence that police officer employees assigned to the NFMMC psychiatric emergency room were exposed to unsafe working conditions. Respondent further asserts that it was reasonable for her to determine that no violation was warranted because Labor Law § 27-a does not require DOL to substitute its judgement for that of police department management because of the special risk factors of police work.

We find on the record evidence that petitioner did not meet her burden to prove that the respondent’s determination under Labor Law § 27-a to not issue a violation was invalid or unreasonable.

SUMMARY OF EVIDENCE

Petitioner’s Evidence

Testimony of Petitioner Sanja Drinks-Bruder

Drinks-Bruder testified that, at the time of hearing, she had been a police officer with NFPD for 28 years. According to Drinks-Bruder, prior to November 2017, when a police officer was assigned to keep watch over a person in custody with the NFPD who was brought to NFMMC’s psychiatric emergency room, the police officer stayed outside of the locked room in the psychiatric emergency room and watched the person in police custody through windows and via cameras inside the locked room. Drinks-Bruder explained under the prior policy or practice, the police officer would be located at the same desk area where nurses and doctors were located and the police officers would never enter the locked room alone, but only with hospital staff who used their swipe card to unlock the room to enter it.

Drinks-Bruder testified that sometime in November 2017, the police officer assigned to watch the person in custody with the NFPD who was brought to NFMMC’s psychiatric emergency room was required to remain inside the locked area, which only a nurse or other certain NFMMC staff could unlock. Drinks-Bruder further explained that the locked part of the psychiatric

emergency room has individual patient rooms in it, as well as a hallway outside of those patient rooms. The person in police custody would be located in one of the patient rooms, and Drinks-Bruder was outside of that patient room. Drinks-Bruder noted that when she is assigned a duty to be with a prisoner admitted to NFMMC's psychiatric unit, she is not required to be inside a locked room, so her complaint specifically relates to the duty to watch persons while they are in the psychiatric emergency room.

Drinks-Bruder testified that the individuals brought to NFMMC's psychiatric emergency room had somehow already made contact with the police department and the "the brass" of the NFPD determines that the individual needs to be transported to the mental health unit of NFMMC's emergency room. That transportation is provided by an ambulance service, not by the NFPD and the assigned police officer goes to the hospital separately from the ambulance. Drinks-Bruder further testified that the prisoner was handcuffed to the bed and both feet were shackled together. She stated, "they're secure in a room and cannot get out." Drinks-Bruder also testified that other patients who were brought to the mental health unit of NFMMC's emergency room were not in police custody and, thus, not secured to a bed, but are also in the locked room where the person in police custody and the police officer are located. This is what created the risk to police officers, according to Drinks-Bruder.

Drinks-Bruder testified that the psychiatric emergency room has two doors, one to the nurses' station and one to the lobby of the emergency room. She testified that a NFMMC staff person who is outside of the locked room has to unlock it for the police officer to be able to leave. She testified about two occasions in 2017 when she was watching a person in police custody inside the locked mental health unit of NFMMC's emergency room during the midnight shift when there was no one present at the nurse's desk to unlock the room to let her out.

Drinks-Bruder testified that she was shown a paper with the change in policy by someone at NFMMC in March 2017 but she subsequently acknowledged that there was no written policy from her employer that she could not leave her post from inside the locked part of the psychiatric emergency room at NFMMC. Drinks-Bruder testified that "[t]hat's what the chief announced. And that's what the brass said to me."

Drinks-Bruder testified that she was assigned the duty to watch persons in police custody who were getting a mental health evaluation or treatment at NFMMC two or three times each year; however, sometimes, she was assigned to watch persons admitted to the hospital and not in the emergency room. Drinks-Bruder also testified that she was last on duty in the psychiatric emergency room in November 2017. She stated that in July 2019, she was assigned to work in the psychiatric emergency room but she refused to be in the locked unit and when she or her Lieutenant asked the nurse on duty for a key card to use to exit the locked unit, she was told that she could not have one. Drinks-Bruder testified that she, thus, refused to work in the psychiatric emergency room at NFMMC on that date in July 2019 and she was written up. She further testified that she had not received that assignment again because she "was no longer at work" a few months after August 2019.

Drinks-Bruder testified that in any other mental health call, a police officer is always provided back-up, however, in this assigned duty, the police officer is not provided back-up. Drinks-Bruder testified that she had her duty weapon with her when she was on psychiatric emergency room duty. She also had a "Taser" and pepper spray or mace. Drinks-Bruder testified

that she is trained in “prisoner handling,” self-defense, use of her duty weapon, and use of pepper spray. Drinks-Bruder acknowledged her training but testified that people dealing with mental illness present challenges that when not in a hospital setting require consultation with mental health professionals to help determine what action should be taken. Drinks-Bruder specified that when on duty in the psychiatric emergency room at NFMMC, she did not have back-up and there were multiple people with mental illness locked in the same area that she was locked into, both factors which do not exist when she is on duty in places other than NFMMC’s psychiatric emergency room. She stated that she was concerned about who would be held liable if she were to shoot a patient in the psychiatric emergency room because she was being attacked. Drinks-Bruder further testified that there is no reason why she cannot be on duty at NFMMC’s psychiatric emergency room and watch through the window and on camera from outside of the locked area, as she used to do, and being on duty outside of the locked area would expose her to less of a risk. Thus, Drinks-Bruder felt like she was being placed unnecessarily in a situation of imminent danger, which she testified is different from the unknown imminent danger that police officers face every day.

Drinks-Bruder testified that she was never attacked by a patient but prior to November 2017, when she was permitted to watch the prisoner from outside the locked unit, she had to go into the locked unit when there was an incident but she was able to call for backup before going inside since she was outside observing. Drinks-Bruder did not provide further detail about what occurred during that incident.

Respondent’s Evidence

Testimony of Associate Industrial Hygienist and Discrimination Investigator Charles Riley

Charles Riley (hereinafter “Riley”) testified that he had been an Associate Industrial Hygienist for about two years at the time of his testimony and a discrimination investigator with PESH since 2010. At the time of the investigation in this matter, Riley was a Senior Industrial Hygienist and his responsibilities were to investigate and inspect for safety and health violations.

Riley explained that Drinks-Bruder filed a complaint with PESH, which was entered into what he called a “sanitized” complaint form. The “sanitized” form is created without the complainant’s name so that PESH can give it to the employer without the employer knowing who complained. This “sanitized” complaint form was entered into evidence and it states “[e]mployees (police officers) are exposed to serious injury or death from being required to remain in a locked room with mental illness patients at the Niagara Falls Memorial Hospital. Officers are provided a duty weapon, but no backup or the ability to exit the locked room.” The three-page complaint that Drinks-Bruder handwrote and filed with PESH, dated that it was received on August 26, 2019, was also entered into evidence.

Riley testified that he went to the NFPD and provided the “sanitized” complaint to Lieutenant Ronald Cirrito (hereinafter “Cirrito”) and he also met with the union president. Riley testified that he informed both of those individuals that he would need to go to NFMMC to look at the psychiatric emergency room. Riley testified that while he would typically show up at a site for an inspection unannounced, because he had been speaking to the NFPD regarding another complaint from petitioner, he called them to schedule a time to go to the NFPD and to NFMMC.

Riley testified that when he went to NFMMC to inspect the psychiatric emergency room, he “looked at whether or not police officers were able to – to leave – were able to – to get out, and also what was the training, . . . what is the policies.” Riley further testified that he and Cirrito met with a safety manager and a nurse at NFMMC during the psychiatric emergency room inspection. Riley observed that security guards were stationed about fifty feet away from the door to enter the psychiatric emergency room. He also observed that there were two doors to the psychiatric emergency room. Riley testified that he saw that the nurses’ station also has two doors, one on each side of “this small five-by-ten nurses’ area” and the nurses’ station has large windows looking into the hallway of the psychiatric emergency room. Riley testified that the nurses can also see what is happening inside the psychiatric emergency room on three cameras placed in the hallway of the psychiatric emergency room, as well as on a camera in each of the five patient rooms located inside the psychiatric emergency room. Riley testified that he was told the five patient rooms are never locked and that often patients sleep in their rooms with the doors closed. Riley also testified that he was told that the key cards used to unlock doors in NFMMC are issued by the safety manager and a police officer will be provided with a key card if one is requested, or a nurse can give one to a police officer who arrives with a patient for the psychiatric emergency room.

Riley further testified that he was told that the NFPD police officers receive training in self-defense, use of force, including Tasers and batons, and use of deadly force throughout their career and they receive 65-hours of officers’ trainings while they are cadets. Riley testified that Cirrito and others conveyed to him that police officers have access to key cards and are trained in such a way that there were no safety or health concerns with respect to a police officer being stationed inside the locked part of the psychiatric emergency room. Riley interviewed a police officer who, at the time of the interview, was assigned to work downtown and was frequently required to go to the NFMMC psychiatric emergency room with people in police custody as part of his normal duties. Riley testified that the officer told him that he requested and received a key card to unlock the psychiatric emergency room doors and that he never had any problems with the non-prisoner patients in the psychiatric emergency room, who often stayed in their rooms and were often sleeping. Riley testified that he also interviewed a police officer who had only brought people to the psychiatric emergency room a few times. According to Riley, that officer told him that she also never had any problems with non-prisoner patients in the psychiatric emergency room. Riley also testified that he interviewed a nurse at NFMMC who told him that a nurse is always at the nurses’ station outside of the psychiatric emergency room because someone must be observing the psychiatric patients at all times.

Riley testified that he reviewed three years of injury and illness logs from the NFPD, which were entered into evidence, training sign-in sheets that included Drinks-Bruder and some training agendas from the NFPD, as well as relevant policies, which were also all entered into evidence. Specifically, Riley received a copy of an NFMMC policy regarding persons in police or prison custody in the psychiatric emergency room, or psychiatric in-patient rooms. This policy, which was entered into evidence, was from NFMMC, was unsigned and did not have a specific effective date. The policy states that that police officers can handcuff a person in custody to the bed provided it does not interfere with medical care in the psychiatric emergency room, and that police officers must remain with that person in the room until the person receives medical treatment. Riley testified that he was also given a separate NFMMC policy regarding psychiatric patients in police or prison custody, which was entered into evidence. It also does not have a signature nor a clear specific date of its effectiveness. Riley testified that this policy, in relevant part, states that hospital security is to be notified when a psychiatric patient in police custody is brought to the hospital.

According to Riley, the fact that security is on notice of the presence of a psychiatric patient in police custody relates to the safety concern that Drinks-Bruder complained about. According to Riley, Drinks-Bruder did not provide him with any documented policies related to her complaint.

Riley testified that he did not see a single instance of an injury acquired at NFMCC's psychiatric emergency room in the injury and illness logs provided by the NFPD. Riley also testified that based on his review of the training records of the NFPD, he understood that NFPD police officers, including petitioner, received training on use of force, use of deadly force, and self-defense.

Riley testified that he wrote up a final report after his investigation and that report, which is dated December 5, 2019, was entered into evidence. Riley testified that if there was a problem in the psychiatric emergency room with the non-prisoner patients, the nurse had a view of the entire area via windows and video feed, so they could contact the security desk, which was only 50 feet away from the psychiatric emergency room, or they could contact the Rapid Response Team. According to Riley, the Rapid Response Team of NFMCC is a team of 15 people, including doctors, nurses, and security staff. Riley also testified that he determined that police officers stationed in the psychiatric emergency room can also obtain key cards to unlock doors themselves and thus had a means of egress if necessary.

I. GOVERNING LAW

A. Standard of Review

Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the Commissioner's determination that there was no safety or health violation and to have dismissed petitioner's complaint was "invalid or unreasonable" (Labor Law § 101 [3]; State Administrative Procedure Act § 306 [1]; Board Rules of Practice and Procedure (hereinafter "Board Rules") [12 NYCRR] § 65.30). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

B. The PESH Statutory Scheme

The federal Occupational Safety and Health Act, 29 USC §§ 651 – 678, was enacted "to assure so far as possible [to] every working man and woman in the Nation safe and healthful working conditions" (29 USC § 651 [b]). OSHA "was not enacted for the principal purpose of punishing employers . . . ; rather, '[i]t authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring'" (*People v Pymm*, 76 NY2d 511, 518 [1990] quoting *Whirlpool Corp. v Marshall*, 445 US 1, 12 [1980]). OSHA permits states to seek federal approval for plans to develop and enforce safety and health standards for public employees (29 USC § 667 [b]). A state's plan will be approved if it contains "satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards" promulgated under OSHA (29 USC § 667 [c] [2] and [6]).

Pursuant to this federal mandate the New York Legislature enacted PESH (Labor Law § 27-a) in 1980 to provide individuals working in the public sector with the same or greater workplace protections as are provided to employees in the private sector under OSHA (*Matter of Goldstein v New York State Indus. Bd. of Appeals*, 292 AD2d 706, 706 [3d Dept 2002]; *Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 442 [1995]).

As required under the PESH Act, Labor Law § 27-a (4) (a), DOL has adopted the federal OSHA standards, including the General Industry Standards found in Part 1910 (29 CFR 1910). DOL has also adopted and publishes a Field Operations Manual for its PESH program, which sets forth DOL's policies and procedures regarding conducting inspections, issuance of violations and other PESH activities. Every public employer in New York has the duty to comply with the safety and health standards promulgated under PESH (Labor Law § 27-a [3] [a] [2]). Additionally, Labor Law § 27-a (3) (a) (1) requires employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm," "reasonable and adequate protection to ... lives, safety or health," and compliance with safety and health standards by both public employers and public employees. PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that "[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Respondent's Determination Not to Issue a Violation Was Reasonable

We find that based on the record evidence, that petitioner did not meet her burden to prove that it was invalid or unreasonable for respondent to determine not to issue a violation. Based on the record evidence, there is no dispute that NFPD police officers assigned to the duty of watching a person in police custody at NFMMC's psychiatric emergency room must remain in the locked part of the psychiatric emergency room, rather than watch the person in police custody through windows or on video with live camera feed. There is also no dispute that patients in NFMMC's psychiatric emergency room who are not in police custody may freely come and go from their patient rooms. There is dispute over whether police officers assigned to this duty are provided key cards to be able to exit the locked unit and there is dispute over whether there is always a nurse at the nurses' station observing the locked part of the unit.

Respondent established that after receiving petitioner's complaint, Riley inspected the psychiatric emergency room at NFMMC, reviewed written policies from NFMMC relevant to a police officer's presence with emergency room psychiatric patients, reviewed training records and injury logs from NFPD, and interviewed NFPD and NFMMC employees.

Both petitioner and Riley testified regarding the physical lay-out of the psychiatric emergency room at NFMMC but Riley's testimony was more detailed. Notably, Riley testified

that a security staff station was located approximately 50 feet from the locked psychiatric emergency room. Otherwise, their testimony was primarily consistent regarding the lay-out of the psychiatric emergency room.

Petitioner did not offer any documentary evidence of a policy regarding the duty of police officers at the psychiatric emergency room and the policy that respondent entered into evidence corroborated petitioner's testimony that a police officer was required to be present in the locked unit of the psychiatric emergency room, although that policy specifically stated that the police officer was required to remain inside the room of the person in custody of the police officer, not outside the room, as petitioner described. Nonetheless, the policy that respondent offered into evidence was primarily consistent with petitioner's testimony about the policy to which she objected. Petitioner's only evidence of a NFPD policy was her testimony that "brass" told her that it was the policy for the police officer to remain in the psychiatric emergency room, and that she was written up when she refused to enter the locked unit of the psychiatric emergency room in July 2019. That write-up was not offered into evidence.

There is also no dispute that NFPD police officers, including petitioner, were trained in self-defense, use of force and deadly force. Respondent contends that this evidence showed that petitioner and other police officers were trained in the necessary skills to manage an attack of the police officer by someone in NFMMC's psychiatric emergency room. Respondent further asserts that the evidence of these trainings contributed to her determination not to issue a safety and health violation. Petitioner did not present any evidence challenging the legitimacy of those training documents and acknowledged that she was trained in use of force, use of deadly force, and self-defense. In fact, rather than disputing a police officer's skills at being able to manage an attack in NFMMC's psychiatric emergency room, petitioner expressed concern over who would be held liable if she shot a patient in NFMMC's psychiatric emergency room when she was being attacked.

Petitioner pointed to no specific example of a police officer being injured after being attacked by a patient in NFMMC's psychiatric emergency room. She gave vague testimony about an incident in the locked part of the psychiatric emergency room prior to November 2017, but the vagueness of that testimony renders it of no probative value. Respondent's evidence that Riley reviewed the injury logs of the NFPD, which indicated that there were no injuries of NFPD employees at the NFMMC psychiatric emergency room from 2016 to 2018, was not challenged by petitioner.

Finally, respondent's evidence that it interviewed NFPD and NFMMC employees was insufficiently refuted by petitioner. Petitioner did not challenge the statements, which Riley asserted came from interviews, other than to testify that she was told that she could not have a key card by a NFMMC nurse in July 2019 when petitioner was assigned to psychiatric emergency room duty and to testify that on two occasions when petitioner was on psychiatric emergency room duty, there was no nurse at the nurses' station. With respect to petitioner's testimony regarding her access to a key card, we do not need to determine whether that indeed occurred, but it is insufficient evidence to undermine the respondent's evidence that Riley was told by two police officers and NFMMC's safety manager in September 2019, that police officers had access to key cards when they were assigned to the psychiatric emergency room. It was reasonable for respondent to rely on the statements of three people to determine that police officers could obtain key cards and, thus, a means of egress from the psychiatric emergency room. We do not credit petitioner's testimony

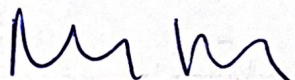
that on two occasions there was not a nurse at the nurse's station when she was on psychiatric emergency room duty because that testimony lacked sufficient detail.

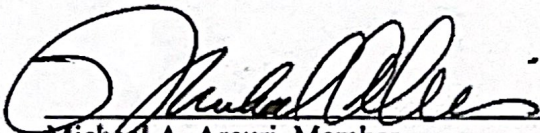
Respondent's investigation of petitioner's complaint was sufficiently thorough. While the written policies that respondent relied on in its investigation were not issued by the NFPD but by NFMMC and they were unsigned and not clearly dated, they corroborated petitioner's statements about the policy she understood to be in effect, thus, the shortcomings of those policies as evidence did not impact the completeness of the respondent's investigation in this matter. Respondent's determination, after its thorough investigation, that NFPD did not violate Labor Law § 27-a because police officers on duty inside the locked unit of NFMMC's psychiatric emergency room had a means of egress, had access to back-up via the hospitals' rapid response team and security staff, the police officers were sufficiently trained to manage any physical encounters that might occur, and there was no evidence of such physical encounters with NFPD police officers occurring in NFMMC's psychiatric emergency room was reasonable. We affirm the respondent's determination not to issue a violation and dismiss the petition.

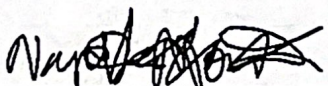
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

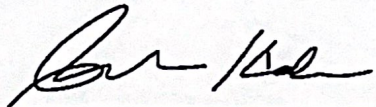
1. The respondent's determination not to issue a violation is affirmed; and,
2. The petition for review is hereby dismissed.

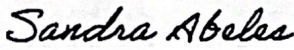
Dated and signed by the Members
of the Industrial Board of Appeals
on February 9, 2022.


Molly Doherty, Chairperson


Michael A. Arcuri, Member


Najah Farley, Member


Patricia Kakalec, Member


Sandra Abeles, Member