

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

ROBERT SHAPIRO,

Petitioner,

To Review Under Sections 27a and 101 of the Labor
Law: a Determination dated November 12, 2008,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PES 09-001

RESOLUTION OF DECISION

APPEARANCES

Michael J. Borelli, Esq., for petitioner

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of
counsel), for the respondent.

WITNESSES

Robert Shapiro, for petitioner. Kwo Lam; Safety and Health Inspector, for respondent.

WHEREAS:

The Petition for review in the above-captioned case was timely filed with the Industrial Board of Appeals (Board) and answered by the Commissioner of Labor (Commissioner). Upon notice to the parties a hearing was held before Anne P. Stevason, Board Chairman and the designated hearing officer in this matter, on August 18, 2010 in New York, New York. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to submit briefs relevant to the issues. Briefing was complete on December 10, 2010.

Although only two witnesses testified at hearing, a significant amount of documentary evidence was introduced by both parties.

PROCEDURAL HISTORY

This is the second time that a determination regarding this retaliation complaint has been reviewed by the Board.

On June 7, 1991 Robert Shapiro (Shapiro) filed a Public Employee Safety and Health (PESH) complaint against the New York City Board of Education (BOE) Office of Home and Hospital Instruction (Homebound) alleging that he was not being allowed to wear gloves and a mask, personal protective equipment, while teaching ill children. He maintained that he was threatened with poor ratings or dismissal for use of the equipment. The initial PESH complaint eventually led to a Notice of Violation against BOE for failing to maintain a log and summary of all recordable occupational injuries and illnesses. No citation was issued for failure to provide or allow personal protective equipment.

On April 7, 1993, Shapiro filed a complaint alleging that he was given unsatisfactory evaluations, that his probation was discontinued, and he was terminated in retaliation for having worn a mask and gloves while teaching homebound students and complaining about safety and health issues, in violation of Section 27-a(10) of the Labor Law. The complaint was first dismissed as untimely by PESH, but was reopened on March 6, 1995.

On June 24, 1996 counsel for the Department of Labor (DOL) recommended that Shapiro's case be closed with a "no" finding of discrimination. However, petitioner was not informed until August 2003 when he received a letter indicating that DOL found that the actions taken against petitioner "were not taken in retaliation for your safety and health complaints but were taken in response to your work performance." Mr. Shapiro appealed the 2003 PESH determination to the Board. After hearing, the Board concluded that the DOL's finding of no discrimination was not supported by the evidence because of the facts presented. Partially based on the fact that the investigation took 12 years, the Board revoked the determination and remanded the case back to DOL for further investigation.

Pursuant to the first Board determination, further investigation was done by Kwo Lam, a DOL safety and health inspector, who was assigned in 2005 to investigate whether there was discrimination. Mr. Lam communicated with Shapiro and BOE representatives and, in June 2006 forwarded his report to counsel's office at the DOL, making a preliminary finding that a prima facie case of retaliation had been established. On November 12, 2008, DOL issued the following determination, which is the subject of the petition currently before the Board:

"Your allegation that you were discriminated against for complaining about alleged violations of the Act has been found to be unsubstantiated. Based on the investigation conducted by PESH, and the review of that investigation by this office, it is our conclusion that you did not file a timely complaint, did not engage in protected activity of which your employer was aware as required by the Act, and, even if you were to have filed timely and were deemed to have engaged in protected activity, you failed to establish

the necessary nexus to support your claim. In addition, your employer provided a legitimate non-discriminatory basis for its actions taken throughout your term of employment in the New York City School District.”

In his second petition to the Board, challenging the Respondent’s findings, Shapiro alleges that the determination by the DOL is erroneous because his complaint states a prima facie case of discrimination, and because BOE did not have a legitimate reason for the adverse actions it took against him and requests a reversal of the DOL determination, reinstatement with back pay and lost benefits, damages for emotional distress, award of reasonable attorney’s fees and any further relief that the Board sees fit.

SUMMARY OF EVIDENCE

Petitioner’s Employment at Board of Education

In 1987, BOE hired Shapiro as a substitute teacher of Homebound children. “Home instruction is an educational program offered to students too severely handicapped either physically or emotionally to be accommodated in a regular or special class in a school building” (Home Instruction Manual at 1). The Manual also provides, at page 3:

“In addition, you must be able to accept students with a wide variety of physical, mental, emotional, and social handicaps.

“You must be prepared to work with students in a terminal stage, with students who are bedridden, seriously crippled, disfigured, or who exhibit bizarre or antisocial behavior. Besides having a broad knowledge of the physical and emotional components of illness and disability and related pedagogical techniques, you must have empathy, maturity, and emotional control in order to teach effectively.

“If by your attitude and actions you are able to convince both parent and student that you are trying to help the student achieve to the full extent of his/her capacity, you will develop the kind of rapport essential to successful learning.” [Emphasis in the original.]

Mr. Shapiro taught for Homebound during the 1987-1988 and 1988-1989 school years. He was invited back for the 1989-1990 school year; however, he only worked the month of September 1989 when he contracted a virus from a student. He was out for the rest of the school year when he had a violent reaction to the medication used to treat the virus. He was invited back to teach for the 1990-1991 school year and, at the discretion of Mr. Reehill, the Principal of the Board of Education’s Office of Home Instruction, was given two years worth of credit for his previous two years at Homebound toward tenure, which ordinarily does not happen when there is a break in service. During the 1987-1988 and

1988-1989 school years Shapiro received satisfactory ratings on his performance reports, although suggestions for improvement were also included.

Prior to his return to work in the fall of 1990, Shapiro and his union representative met with BOE to discuss possible alternative assignments for Shapiro, given his concern about his health and exposure to sick children. However, no alternative was available. Shapiro requested assignment to teleclass where he would teach students over the phone but there was no open position. He returned to Homebound in the fall of 1990. In September 1990 Shapiro was attacked by a home instruction student. After investigation, Albert Struzzi, Shapiro's immediate supervisor, transferred the student to another teacher. Shapiro requested on a number of occasions that he be allowed to see a student's medical information, out of concern for his own health. He was told that it was not possible due to privacy concerns and that each student was cleared medically by the Department of Health prior to being taught.

In November of 1990, a parent of one of Shapiro's students wrote a letter complaining that Shapiro had cancelled a number of lessons because siblings in other areas of the house were sick. Shapiro maintained that he was told that the student was in pain and was not given a clean and healthy area to teach in. The student was reassigned to another teacher and Shapiro was told not to cancel classes unilaterally.

In February 1991, Shapiro was mugged while walking to a student's home and was out of work for a few weeks. When he returned to work, on February 25, 1991, Mr. Shapiro was assigned to teach KR, a student with multiple disabilities, unable to move his arms or legs. When Shapiro went to the child's home he noticed that KR had mucus around his nose and mouth and had labored breathing. He testified that the home attendant told him that KR had an infection. Shapiro called the office to tell them that he had to cancel the lesson because KR was sick. Shapiro was later called by Struzzi, his supervisor, who told Shapiro that he had to teach KR. Mr. Shapiro went back the next day but wore a mask and latex gloves while teaching KR. On February 27, 1991 Shapiro sustained an occupational injury and was out of work until March 8, 1991. At around the same time, KR's mother contacted Struzzi and complained about Shapiro wearing a mask and gloves while teaching her son. By letter dated March 14, Struzzi informed Shapiro that there was to be a conference on March 21 to discuss Shapiro's refusal to teach KR without the use of a mask and gloves and that Shapiro should bring a medical note concerning his need to use a mask and gloves and also union representation since the conference may result in discipline.

At the March 21 conference Struzzi instructed Shapiro that he was to teach KR without the use of gloves and a mask. On March 25 Struzzi conducted a formal observation of Shapiro at KR's house. On May 7, 1991, Principal Reehill sent a letter to the Superintendent regarding discontinuing Shapiro's probation. On May 8, Shapiro was again given a formal observation by Struzzi. On June 11, 1991, Shapiro was observed by Principal Reehill. Reehill noted that Shapiro's lesson lacked planning and failed to take into account the educational needs of the students. On June 13, 1991, Shapiro was formally observed by Deputy Assistant Superintendent of City Programs Weintraub who rated Shapiro unsatisfactory and noted that while Shapiro was amenable to the observation, he

was unwilling to engage in a pre or post observation conference without union representation and that Weintraub found the lesson of no apparent value to the student.

As a teacher of Homebound, between 1987 and 1991, 11 evaluations were given to Mr. Shapiro, each evaluation had a pre and/or post-observation conference. Shapiro was given Satisfactory Performance Evaluations by Principal of Home Instruction Reehill for the 9/87-6/88 and 9/88-6/89 school years. Mr. Shapiro received six evaluations after the March 21, 1991 meeting with Mr. Struzzi, they were all unsatisfactory. Observations were conducted with other students. Mr. Struzzi noted that Mr. Shapiro had organizational flaws in his lesson, including no lesson plan and no appropriate assessment of the student.

Shapiro filed grievances regarding the results of the May and June 1991 evaluations and requests for lesson plans. All grievances were denied.

In July, 1991, Mr. Shapiro was notified that he would not be teaching for the Department of Education. He did not receive tenure. As of September, 3, 1991, Mr. Shapiro's probationary service as a teacher of the Homebound was terminated. Several days later, Mr. Shapiro was rehired and given a special education assignment. On or around October 1991, Mr. Shapiro was mugged and unable to return to work during the 1991-1992 school year.

In September, 1992, he returned to work for the Board of Education's Special Education program in the Bronx. This position was for a tenure track. After an incident in November, 1992, Mr. Shapiro was transferred and placed in another classroom. The students started throwing objects and an item hit Mr. Shapiro. He was out because of injury. When he returned one month later, Mr. Shapiro was placed on lunchroom duty at P.S. 40 in the Bronx. He refused to take lunchroom duty because of an allergy. When the Principal of the school received medical documentation for this allergy, he was examined by a Board of Education Medical Bureau physician and it was determined that no medical accommodation was necessary with respect to Mr. Shapiro's claim. In December, Mr. Shapiro was asked to come in for another medical exam. He would not cooperate with the doctor and his medical evaluation could not be completed. In February, Mr. Shapiro was sent a letter from the Board of Education Medical Bureau, directing him to report for a medical evaluation on February 23, 1993. He was found fit to return to duty and when he returned to P.S. 40, he refused to resume his teaching duties in the class unless he could wear gloves and a face mask, and refused to take children to the lunchroom.

Mr. Shapiro has not worked for the Board of Education since August, 1993. Mr. Shapiro's employment was terminated by District #7 as of August 31, 1993. This was confirmed by the Board of Education Interim Chancellor Harvey Garner in a September 9, 1993 letter.

DOL's investigation

At the Board's direction in its 2008 decision, the DOL reopened the case. A DOL Safety and Health Inspector reviewed materials submitted by Mr. Shapiro, met with him, interviewed his supervisors, and reviewed documents related to his discharge. The investigator, Kwo Lam, completed a review, obtaining contemporaneous records for the matter, including daily logs, correspondence, reports, publications, notes, medical records and the then-current manual for home instruction teachers. Much of this information was not collected in the initial investigation of this matter. Mr. Lam testified to several letters being sent to Mr. Reehill, one of petitioner's supervisors, during the investigation. No reply was ever received from Mr. Reehill.

Mr. Lam found that Mr. Shapiro received unsatisfactory reviews after insisting on wearing a mask and gloves while teaching a student. However, DOL counsel's office disagreed with Mr. Lam's findings and concluded that no discrimination occurred.

The Respondent points to records which indicate that Mr. Shapiro's disciplinary actions began during the 1990-1991 school year. The record indicates that he was counseled for having cancelled a student's classes without authorization and in violation of procedure in November, 1990. Mr. Shapiro testified, during the August 18, 2010 Board hearing that his doctors told him to sit several feet away from sick students and wear a mask and gloves. However, Mr. Shapiro was repeatedly told by his supervisors that no contagious students were scheduled for home visits, yet Mr. Shapiro continued wearing a mask and gloves.

Further investigation by the DOL indicated that Mr. Shapiro could not satisfactorily perform his duties as a teacher for the Board of Education. Mr. Shapiro was found fit to teach after a medical exam on June 10, 1991, as requested by the Principal at P.S. 40. Another medical exam was conducted on December 21, 1992. Mr. Shapiro refused to cooperate and did not complete his medical evaluation.

The Commissioner, in reaching her decision that the petitioner's claim had no merit, found that there was no nexus between his termination and his complaint to the Public Employee Safety and Health Bureau. The DOL's conclusion was that multiple nondiscriminatory reasons resulted in Mr. Shapiro's termination.

The Board finds that the investigation was thorough and reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing, testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39). As explained below, we find that Petitioner did not meet his burden of proving that DOL's Determination that he was discharged or discriminated against in violation of PESHSA was unreasonable.

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

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

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

Although Shapiro has requested a number of remedies in his petition, such as reinstatement, back pay, and damages for emotional distress, the DOL is limited to referring the complaint to the attorney general to request that an action is brought after which the attorney general has broad discretion. The Board is limited to reviewing whether DOL's determination is unreasonable or invalid.

In *Matter of Brian Colella*, Docket No. PES 05-004 (August 22, 2007), we held that the petitioner in a PESH discrimination case met his burden of proof where the only reasonable conclusion based on the evidence presented was that the employee had been discriminated against. We then directed DOL to refer the matter to the attorney general. That is not the case here.

To establish a *prima facie* case of retaliation, in the context of filing a safety and health complaint, the Petitioner has to establish that: 1) he engaged in protected behavior; 2) the employer was aware of the protected behavior; 3) he suffered an adverse employment action; and 4) there is a causal connection between the protected activity and the adverse employment action. (*see McDonnell Douglas Corp. v Green*, 411 US 792 [1972]; *Dept of Correctional Services v Division of Human Rights*, 238 AD2d 704 [3d Dept. 1997] [federal standards followed in New York discrimination cases]). In addition, the complaint must be filed within 30 days of the adverse action.

Timeliness

Petitioner's complaint was not untimely. Although Labor Law § 27-a (10) (b) provides that any employee may file a complaint of retaliation with PESH within 30 days of the violation, the Court of Appeals has stated that the 30 day period is not a statute of limitations and may be waived by the Commissioner (*Hartnett v New York City Transit Authority*, 86 NY2d 438 [1995]).

Petitioner filed his initial complaint in June 1991. Although this was not technically a retaliation complaint, he did mention retaliation in the complaint. The PESH investigator suggested that Shapiro file a separate retaliation complaint in 1993. In addition, DOL impliedly waived the 30 day limit when it opened and then reopened the investigation based on its merits.

Protected Activity

PESHA (Labor Law § 27-a), on its face, protects employees who have filed any complaint or instituted any proceeding relating to PESHA, or has testified or exercised any rights on behalf of himself or others under the Act. DOL argues that Shapiro did not engage in protected activity. However, it characterizes Shapiro's protected activity as his refusal to work while petitioner frames it as a complaint about safety and health conditions and lack of personal protective equipment.

Federal regulation 29 CFR § 1977.9, which was promulgated under OSHA and relates to a similarly worded section as Labor Law § 27-a (10) (b), provides:

“Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3).) Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.”

Although Shapiro's complaints about teaching ill students without a mask and gloves were not upheld either as a PESH violation or as a grievance, there is no evidence that his complaint was not made in good faith. He had just returned from a long leave related to his reaction to medication which was used to treat an infection allegedly received from a homebound student.

Therefore, the Board finds that Shapiro engaged in protected activity when he complained during the March 21, 1991 meeting about teaching ill students without a mask and gloves.

Knowledge of Employer and Adverse Action

It is not contradicted that BOE had knowledge of Shapiro's complaints about health and safety since the complaints were made directly to his supervisors.

In addition, Shapiro was subject to adverse action. Shapiro alleges that he was subjected to unsatisfactory job performance rankings after his complaint and that he was denied tenure based on his complaint. The test of adverse action under *Burlington Northern Santa Fe Rwy Co. v White*, 548 US 53 (2006), has expanded beyond pecuniary loss to any action taken by an employer which would discourage a reasonable person from filing a complaint. Although Shapiro was offered another position by BOE with the Special Education unit right after his denial of tenure at Homebound, the actions of BOE Homebound were still adverse.

Causal Connection and Mixed Motive

The DOL determination also found that: "even if you were to have filed timely and were deemed to have engaged in protected activity, you failed to establish the necessary nexus to support your claim. In addition, your employer provided a legitimate non-discriminatory basis for its actions taken throughout your term of employment in the New York City School District." The Board finds that this ultimate holding which was determinative of the case was reasonable.

There is no causal connection between the protected activity and the adverse employment action as there were instances of adverse employment actions before the protected activity. Mr. Shapiro canceled classes for a student who he deemed sick in violation of Homebound's procedures. On another occasion, Mr. Shapiro was observed during a lesson in which he failed to teach in conformity with a student's IEP (Individual Education Plan) and refused to touch the student without gloves. Subsequently, when Mr. Shapiro taught in special education, he refused to submit to a medical exam. Mr. Shapiro alleges that he was terminated by the Board of Education for complaining about the unsafe work conditions to PESH. Even if the BOE had considered the health complaint made by Shapiro when it terminated him, there is sufficient evidence in the record to suggest he would have been terminated anyway (*see Price Waterhouse v. Hopkins*, 490 U.S. 228 [1989]). The evidence shows that the Board of Education may have terminated Shapiro for numerous reasons unrelated to his health complaint, including poor performance and unacceptable behavior.

Given the special needs of homebound students, as delineated in the Homebound Manual, Shapiro's insistence on wearing a mask and gloves or teaching a student from six feet away indicated that he was unable to perform the job. There were complaints from parents about his failure to teach and about his wearing of the mask and gloves and about his attitude to the students. His supervisor noted his failure to prepare an adequate lesson plan prior to his unsatisfactory ratings. Shapiro, himself, requested a transfer before even returning to teach after his year off due to illness, and indicated an unwillingness to be with ailing children. He could therefore be deemed unsuited to the work and DOL's determination that he would have been terminated in any event due to other reasons was reasonable.

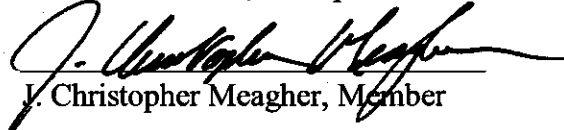
In addition, the BOE offer of a tenured track position to Shapiro soon after his termination from the Homebound division is further evidence of the fact that his termination was not in retaliation for his complaint.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Petition for Review is hereby denied.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 30, 2012.

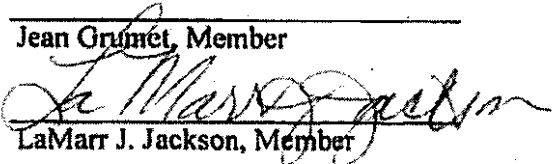
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Petition for Review is hereby denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 7, 2012.