STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of ADAM CROWN, Petitioner, To Review Under Section 101 of the Labor Law: A Final Determination of the Labor Law dated April 16, 2010, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 10-009 RESOLUTION OF DECISION

APPEARANCES

Adam Crown, petitioner pro se.

Pico Ben-Amotz, Acting Counsel, New York State Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Adam A. Crown, Jeffrey N. Baker, Lee Shurtleff, Linda Wyatt, Kathleen Crown, John Gaden, L. Patrick Caveney, Sarah Wyatt, for Petitioner.

Roger Grant, Christel Trutmann, Mark Butler, Michael Cappelli, Robert Parker, for Respondent.

WHEREAS:

On May 17, 2010, petitioner Adam Crown filed a petition with the Industrial Board of Appeals (Board) pursuant to Labor Law § § 27-a (6) (c) and 101 to review a determination by the respondent Commissioner of Labor (respondent or Commissioner) dismissing his complaint of unlawful retaliation by his public employer. Specifically, Crown, a volunteer firefighter, complained to the New York State Department of Labor's (DOL) Bureau of Public Employee Safety and Health that his employer, the Danby Fire District (district), forced him to resign under threat of disciplinary proceedings and

possible criminal charges, in retaliation for raising numerous safety related concerns during his tenure as a volunteer firefighter attached to the Danby Volunteer Fire Company (company). The Commissioner's determination, issued April 16, 2010, summarily dismissed Crown's complaint on the basis that "[d]uring the interview process the four elements of a prima facie case could not be realized." The determination provided no further explanation as to what those four elements are, why they could not be realized, who, if anybody, was interviewed, or what evidence, if any, supported the Commissioner's determination.

Crown's appeal to the Board followed, and hearings were conducted on March 15 and April 12, 2011 in Syracuse, New York, and on May 12 and 13, 2011, in Ithaca, New York, before Board Member Jeffrey R. Cassidy, the designated hearing officer in this matter.

ISSUES

Crown argues that the Commissioner's determination dismissing his discrimination complaint was invalid and unreasonable because:

1. The only reasonable conclusion the Commissioner could have reached was that he was coerced to resign under threat of disciplinary charges and possible criminal charges for engaging in protected activity;
2. The DOL's investigation of his discrimination complaint was based on a flawed understanding of his complaint;
3. DOL failed to interview any witnesses; and
4. The Commissioner's determination failed to provide the basis for dismissing the complaint.

The Commissioner argues that the determination was valid and reasonable because:

1. Crown failed to establish a prima facie case of discrimination because his safety and health concerns were non-specific, were not notorious, and were not proximate to the alleged adverse employment action;
2. The district provided a non-discriminatory reason for bringing disciplinary charges against Crown, which was that Crown had forged the fire chief's signature on registration forms for training courses;
3. Crown did not prove that the district's actions were a pretext for discrimination;
4. Crowns's safety and health complaint postdated the alleged adverse employment action and could not form the foundation of a retaliation case, and that such complaint was a preemptive strategy to defeat any adverse employment action; and
5. There was no adverse employment action because Crown voluntarily resigned his position.

SUMMARY OF EVIDENCE

DOL Safety and Health Inspector Michael Cappelli testified that Crown filed a safety and health complaint with DOL on or about March 8, 2010, raising various allegations concerning the safety of the district and company's operations. Cappelli investigated the company on March 29, 2010, and issued an investigative narrative that substantiated some of Crown's allegations, and dismissed others. A notice of violation and order to comply was issued by DOL against the company on April 19, 2010, setting forth the specific safety and health violations found by DOL.

Cappelli further testified that Crown filed a discrimination complaint against the district and the company on March 29, 2010. In the discrimination complaint, the petitioner stated, among other things, that he believed "the action taken against [him] was primarily retaliatory for . . . raising issues of safety and management." The discrimination complaint then goes on to outline numerous examples of safety issues raised by Crown to the District and/or Company from 2007 to 2009, particularly as related to concerns about the training of company members and officers. Cappelli understood Crown's discrimination complaint to be that the district and company had retaliated against him for the safety and health complaint he filed with DOL on March 8, 2010, and after reviewing several documents forwarded to DOL by Crown, he recommended that DOL dismiss the discrimination complaint because there was no nexus between the March 8, 2010 safety and health complaint Crown made to DOL and the disciplinary charges. Cappelli explained that the required nexus between the protected activity, filing a safety and health complaint with DOL on March 8, 2010, did not exist because at the time of the adverse employment action, the disciplinary charges of March 23, 2010, the company was not yet aware that Crown had filed a formal safety and health complaint.

Cappelli testified that he did not believe that an adverse employment action had occurred, because Crown resigned for "something not related to the safety and health complaint prior to the safety and health complaint taking place." In any event, Cappelli testified that he did not consider the company's filing of disciplinary charges or intent to file disciplinary charges to be an adverse action. With respect to the investigation that he conducted, Cappelli stated that he did not interview any of the witnesses named by Crown in the discrimination complaint.

Supervising Safety and Health Inspector Robert Parker testified that he and Program Manager Tom Rath reviewed Cappelli's recommendation to dismiss Crown's discrimination complaint and agreed that it should be dismissed because no prima facie case of retaliation could be established. Parker explained that the "quantum of proof" that he uses to determine whether a discrimination complaint is valid is "reasonable suspicion." Parker further testified that he left it to Cappelli to determine what witnesses to interview, and that he did nothing more in this investigation than accept Cappelli's recommendation to dismiss the complaint.

Petitioner Adam Crown joined the Company as a volunteer firefighter in January 2007. The company and the West Danby Volunteer Fire Company are under the jurisdiction of the district, which is governed by a five-member board of commissioners. L. Patrick Caveney was the chairman of the board of fire commissioners during the relevant time period, and the company chief was John Gaden.

Crown testified that for as long as he had been with the company, he had been concerned that the company was not operating safely, particularly with respect to training, and voiced those concerns to company officers and the district commissioners. Crown testified that in April 2008, he expressed his concern at a company meeting that a firefighter applicant had not completed the required hours of training. He also expressed this concern in an email to an assistant fire chief. Despite the concerns raised by Crown, the fire fighter was admitted to the company. Crown complained about this in a March 9, 2009 letter to Caveny, in which he accused chief Gaden of dereliction of duty. Caveny responded by letter dated April 22, 2009 that the board had reviewed the matter and saw no need for further action.

Company member Linda Wyatt corroborated Crown's testimony. She testified that she and Crown both opposed the admission of the prospective company member and voiced their concerns to company officers.

In December 2008, Crown sent an email to the company secretary, Sharon Gaden, wife of chief Gaden, requesting information such as the company officers' length of service and records of training. Caveny refused the request, but eventually provided the information after Crown explained that the information requested had a direct bearing on his physical safety.

Crown testified that in January 2009 after an incident occurred while fighting a fire, he sent an email entitled "PESH" to chief Gaden requesting that he issue an order restricting anyone from performing a task for which they were not trained. Wyatt confirmed this, testifying that Crown raised the issue at a company meeting. In April or May 2009, Crown asked chief Gaden and Sharon Gaden how many officers had taken a specific course related to "live burn" training exercises. The records, according to Crown, showed that Gaden was the only officer who would be in charge of such exercises who had taken the requisite training course. Crown informed Gaden that he was not going to participate in the live burn trainings because it would not be safe to do so.

In October 2009, Crown met with Lee Shurtleff, Director of the Tompkins County Department of Emergency Response, to show him a draft of a safety and health complaint he intended to file with DOL. At that meeting, Crown informed the official that he could mention his name if he wanted because the company would assume that he was the one behind the complaint. Shurtleff testified that he recalled meeting with Crown, that although he met frequently with company officers, he did not recall ever discussing Crown's concerns with them, and that he advised Crown to take his concerns to the board of commissioners and ultimately to DOL if the board could not resolve the issues.

In November 2009, Crown sent an email to chief Gaden referring to an incident from the previous winter where his breathing equipment had been damaged, and inquiring as to the status of the replacement unit that was to be ordered.

In January 2010, Crown started the Fire Officer III training course. The coursework, according to Crown, required the collection and analysis of company data, including response times, illnesses, and injuries. On January 25, 2010, Crown emailed chief Gaden to inform him that he was enrolled in the course and would be researching

the company. On January 25, 2010, Crown informed the district's assistant secretary that he was enrolled in the course and needed a history of the company and its rescue services. In a follow-up email on January 31, 2010, Crown explained that he needed data of responder or civilian injuries or fatalities. Bowles replied that the information might not be provided because of privacy issues.

On January 28, 2010, Crown emailed Sharon Gaden to request company accident and injury date and a summary of work-related injuries and illnesses.

Crown testified that aside from Fire Officer III, he had taken numerous other firefighting and fire officer training courses while with the company, and that he paid for them himself. Most of the courses were taken at the Tompkins County Fire Training Center or the Academy. Crown further testified that in summer 2009, he told chief Gaden that he intended to take Fire Officer I, II, and III at the Academy. Crown explained that when he met with chief Gaden, he only had one enrollment form, but did not have the specific class information. According to Crown, chief Gaden signed the form and told him to fill it in later. Crown further explained that when he asked chief Gaden about the other classes he intended to take, chief Gaden told him to make copies of the form that he signed and to fill in the information for the other courses, which Crown believed meant to make copies of the signed form and use it for other classes. On cross-examination, Crown did not recall how many times he used the same photo copied form to enroll in courses. After reviewing the signed registration forms, he testified that his prior testimony was incorrect, because in fact he had used four forms signed by chief Gaden to register for classes, and copied an authorization signed by Gaden for registering in another class that he never took to enroll in Fire Officer III.

Crown completed Fire Officer I in August 2009, and Fire Officer II in November 2009. When he completed the courses, he sent a copy of the certificates of completion to the district. Crown testified that when he talked to chief Gaden in November and December, 2009, Gaden did not raise any issues about his earlier enrollment in Fire Officer I or II. Crown testified that, likewise, chief Gaden did not raise any issues about Fire Officer III when he informed him he was taking that course.

By email dated March 4, 2010, chief Gaden directed Crown to meet with him on March 12, 2010. Crown requested an earlier date and time, but chief Gaden was unwilling to change the date. Crown then informed chief Gaden that he could not meet on the scheduled date and suggested the following Monday. Chief Gaden did not respond and on March 12, 2010, informed Crown that he was suspended and was to appear at a March 23, 2010 meeting of the board of fire commissioners. Chief Gaden told Crown that he could bring an attorney to the meeting.

When Crown arrived at the board meeting, the district's attorney, Mark Butler, gave him a resignation letter to sign. Crown testified that Butler told him if he did not resign the district would pursue disciplinary charges and possibly bring criminal charges against him for forging chief Gaden's signature on course authorization forms. Crown further testified that Butler told him defending himself would "run into six figures," and, if he wanted to speak to a lawyer, charges would be filed against him and they would have law enforcement there in minutes.

Butler then reconvened the executive session of the board meeting and went through the specific charges. The charges alleged that Crown forged Gaden's signature on authorization forms for a Fire Officer II and a Fire Officer III course that Crown took at the Academy. He was also charged with insubordination for refusing Gaden's directive to meet with him on March 12, 2010.

Butler testified that during their meeting Crown expressed frustration with trying to bring about change within the company and that he told Crown that the manner in which he was trying to enact change was "confrontational and challenging" rather than "participatory and contributory." He agreed that he encouraged Crown to resign, and that he stated that the company would proceed with disciplinary, and possibly criminal charges, if he did not resign. However, he denied threatening Crown and also denied stating that he would summon the police. He maintained that he asked Crown if he wanted to speak to an attorney, explained the disciplinary process, and told him if he chose not to resign a hearing on the charges would not take place that evening.

Company member Linda Wyatt was present during the board meeting and testified that Crown told her that if he did not resign, he was going to receive disciplinary charges seeking his discharge, and also be charged with "felony forgery". Crown's wife, Kathleen Crown, confirmed that he had called her that evening and said that if he did not resign the company would bring criminal charges against him. After discussing his options with Wyatt and his wife, he signed the company's prepared resignation letter.

Chief Gaden testified that he read Crown's January 25, 2010, email, but he did not raise the issue with him until the March 23rd meeting because he started checking into the matter, including sending FOIL requests to the state seeking the authorization forms. He also testified that he did not talk to Crown about it because he did not see him after January 25th.

Chief Gaden testified that he ordered Crown to the March 12th meeting in order to discuss only the Fire Officer III course, even though the disciplinary charges included allegations of misconduct over both the Fire Officer II and III courses. He maintained that he did not sign, or at least did not recall signing, an authorization form for Crown to take the Fire Officer II or the Fire Officer III courses, and that he did not give him verbal permission to take either. He opined that the signature on the Fire Officer II course form was a photocopy of his original signature.

Chief Gaden subsequently testified that the Fire Officer II signature could have been his, and later still, testified that the signature on the Fire Officer II form "was an original signature" and that the course titles were filled in later. Ultimately, chief Gaden agreed that it was possible that he authorized and signed the Fire Officer II form, but believed Crown acted improperly "at least" for the Fire Officer III course:

While chief Gaden testified that it was possible that he authorized the Fire Officer II course, on cross-examination he stated that Crown never sought approval for it and that he never signed a training form, nor gave verbal authorization, for him to take the course. However, when specifically asked by the hearing officer whether the signature on the Fire Officer II form was his original signature, he responded 'Yeah." He also agreed that the course information was not filled in when he signed the Fire Officer II

form, though later stated that if he did not remember if he actually signed the form, he would not remember whether the course information was filled in.

Despite this earlier testimony, when asked specifically about Crown's five registration forms all dated September 9, 2008, chief Gaden testified that he gave him approval, and signed enrollment forms, for only two courses, Strategy and Tactics and Legal Issues, and did not give approval for Fire Officer I, Fire Officer II, nor Fire Officer III. However, at the end of his testimony he agreed that he must have also signed the authorization for Fire Officer I, and that it was possible that he also signed the registration form for Fire Officer II.

Chief Gaden maintained that had Crown sought approval for Fire Officer III, he would not have approved the course because Crown had not been active in the Company for over a year.

Former company member Jeffrey Baker testified that he took 65 fire related courses, including Fire Officer I, II, and III, on the county or state level from 1986 to 2001. These courses were taken when Gaden was fire chief and according to Baker, Chief Gaden told him to photocopy his signature and use them for whatever courses he wanted to take. He used chief Gaden's signature on two forms for all his courses, and submitted course certifications upon completion of each course. He was never disciplined for using chief Gaden's signature.

Wyatt testified that in October 2010, she and her son, who were both company EMTs were told that there would be "EMS" medical training on a certain Monday in October as long as two EMTs showed up, and that the EMS director would do the training, or they could do whatever training they wanted to do. The EMS director did not show, so Wyatt and her son proceeded to train a new EMT. The following week, the training director told the Wyatts that he had talked to chief Gaden and that they were being reprimanded for conducting unauthorized training. Wyatt responded that since the meeting where she and Crown has opposed the appointment of a prospective company member, the company's officers had treated her, her son, and her daughter, also a company member, poorly. The training director replied, "Well you know that you're treated that way because of Adam Crown, right?"

Wyatt further testified that in February 2011 the company member she and Crown has opposed, who had by then been appointed assistant training officer, suggested to her that she develop an EMS training program for the Company. Wyatt stated that during that conversation the assistant training officer stated, "Well, you know that you're treated the way you are because of Adam Crown and because they think you're feeding him information."

DISCUSSION

The Board's role in this matters is to review whether the Commissioner's determination that Crown was not discriminated against was reasonable and valid (Labor Law §§ 27-a (6) (c) and 101; *Matter of Nadolecki*, Docket No. PES 07-008 [May 20, 2009]). Additionally, the petitioner, in this case Adam Crown, bears the burden of proof in proceedings before the Board (Labor Law § 101; Board Rules 65.30). We find that

the petitioner has met his burden to show that the Commissioner's determination was unreasonable and invalid.

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 public safety and health complaint. Labor Law § 27-a (10) (b) sets forth the only statutory process available to a public employee who believes that he or she has been discriminated against in retaliation for filing such a complaint:

> "Any employee who believes that he has been discharged, disciplines, or otherwise discriminated against by any person in violation of this subdivision may, within thirty days after such violation occurs, 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. . . ."

The civil prosecution of a public employee safety and health retaliation case in supreme court requires evidence that (1) Crown engaged in a protected activity; (2) the company and/or district were aware of the protected activity; (3) Crown suffered an adverse employment action; and (4) there was a nexus 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 the case before us, under no circumstances can the record be seen to reflect that the Commissioner's determination to dismiss Crown's discrimination complaint was reasonable or valid, because there is no evidence that DOL conducted even the most cursory of investigations. Crown filed a detailed, and indeed, comprehensive discrimination complaint on March 29, 2010. Safety and Health Inspector Cappelli dismissed the complaint because he misconstrued the complaint to be based solely on retaliation for the safety and health complaint Crown had filed on March 8, 2010, when in fact, the discrimination complaint clearly alleged retaliation for raising safety and health concerns throughout Crown's tenure with the company. According to Cappelli, there was no nexus between the March 8 safety and health complaint and the disciplinary charges brought against Crown, because the district was not made aware of the safety and health complaint until after the March 23 board meeting where Crown resigned. Accordingly, Cappelli took no steps to interview the witnesses proposed by Crown, and summarily dismissed his complaint with the approval of his supervisors. This determination was *ipso facto* unreasonable and invalid, not only because the determination itself failed to provide any basis for the dismissal, but because the DOL investigators did not understand that Crown's complaint alleged the disciplinary charges were retaliation for the numerous safety issues he had raised, not for the one formal safety and health complaint he had filed with DOL.

Indeed, the record before the Board is replete with evidence sufficient to establish a prima facie case of retaliation. Crown engaged in protected activity when he raised various safety and health issues to the company and the district throughout his tenure as a volunteer firefighter. We find that he opposed admission of a prospective firefighter because she did not meet the company's training requirements, requested length of service and training records related to the company's officers, raised concerns about firefighters performing tasks for which they were not formally trained, refused to participate in live burn exercises because he believed they were not safe, inquired about the status of a replacement breathing apparatus, and requested various safety related records as part of the Fire Officer III course, all of which clearly show that Crown was engaged in protected activity. We also find that the company and district were aware that Crown was engaged in protected activity. The evidence before the Board shows numerous instances where Crown emailed or otherwise openly communicated his safety concerns to the company chief, district board members, and other company members.

We also find that Crown suffered an adverse employment action. His suspension on March 12, and the threat of disciplinary and possible criminal charges was an adverse action (*see e.g. Schultz v United States Navy*, 810 F2d 1133 [Fed Cir 1987]).

Finally, we find that on the evidence before us, a nexus exists between the various notorious safety complaints and the adverse action. This nexus can be established by showing that the protected activity was followed closely by adverse action, or through circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or through evidence of retaliatory animus directed against the Crown by the company (*Gordon v NYC Bd of Elections*, 232 F3d 111, 117 [2d Cir 2000]). We find that the suspension on March 12, 2010, and disciplinary charges brought on March 23, 2010, so quick on the heels, of Crown's most recent protected activity – the January 2010 requests for responder and civilian injuries – is sufficiently proximate in time to establish the requisite causation (*see e.g. El Sayed v Hilton Hotels Corp.*, 627 F3d 931 [2d Cir 2010]). Furthermore, Crown presented credible evidence of both disparate treatment and discriminatory animus. Jeffrey Baker, a former company member, testified that he took numerous courses using photocopies of chief Gade's signature, and was never disciplined for it. Additionally, Crown presented credible evidence of discriminatory animus. Linda Wyatt testified that on two occasions company officers told her she was being treated badly because of Adam Crown or because the company believed she was providing information to him. Accordingly, we find that Crown presented sufficient evidence to establish the elements of a prima facie case of retaliation.

Once a prima facie case of retaliation is established, the burden shifts to the respondent to articulate a legitimate non-discriminatory reason for the adverse action (*McDonnell Douglas*, 411 US at 802). In this matter, the respondent presented evidence that the company suspended and brought charges against Crown and because he had forged Chief Gade's signature on enrollment forms for fire training courses. We are not persuaded by this argument.

Chief Gaden's testimony about the forms was inconsistent and vague. He testified that he ordered Crown to the March 12th meeting in order to discuss only the Fire Officer III course. Yet, he also testified that he believed that he never gave Crown permission to take either Fire Officer II or III, and that the signature on the Fire Officer II

course authorization was a photocopy of his signature. He later changed his testimony by stating that the signature on Fire Officer II was "an original signature," and ultimately testified that it was possible that he did sign and authorize the course. He also testified that he believed that Crown acted improperly for "at least" the Fire Officer III course. Chief Gaden vacillated concerning the reason for the charges against Crown and gave inconsistent testimony on this crucial point. Under cross examination, chief Gaden reverted back to his original position – that Crown never sought approval for the Fire Officer II course, and that he never signed an authorization form for him to take the course. But when chief Gaden was specifically asked if the signature on the Fire Officer II course authorization form was his original signature, he responded "Yeah," and stated that he signed the form without the course information being completed. Later, he changed his testimony again and stated that he did not remember signing the Fire Officer II course form.

Chief Gaden was also confused when he attempted to describe which of five registration forms dated September 9, 2008, he did sign. He testified that of the five forms, which included Fire Officer I, II, and III, he only signed and gave permission for Crown to take two courses, Strategy and Tactics, and Legal Issues, despite the fact that there was no allegation that Crown took Fire Officer I without authorization. Also, in subsequent testimony chief Gaden admitted that he "must have" signed the Fire Officer I authorization, and that it was a "possibility" that he also signed the Fire Officer II authorization.

The Commissioner argues that Crown's testimony regarding the signing of the course authorization forms is unreliable and should not be credited. On direct examination Crown testified that when he met briefly with chief Gaden during the summer of 2009, he told him his intention to take as many courses at the Academy as possible, and specifically mentioned the three fire-officer courses. He said that he believed that he had one enrollment form, but that he did not have the specific class information, and that chief Gaden signed the blank form and told him to fill in the information later. Crown testified that he asked about the other classes and Gaden told him to make copies, which he interpreted to mean copies of the form he gave chief Gaden, and to fill in the information for the other classes. Crown said he then completed the Fire Officer I course, sent in his certificate to the company and in November took Fire Officer II.

On cross examination, Crown testified that he didn't believe he used the photocopies with chief Gaden's signature for all the courses that he took, and that he did not remember how many times he used them, though he was pretty sure he used them for Fire Officer II and III. He stated that he was told at the March 23rd meeting that he copied the chief's signature and made multiple copies of the single form chief Gaden signed, and his testimony was based on what he was told at that meeting.

In evidence are the five original authorization forms for Strategy and Tactics. Legal Issues, Fire Officer I, Fire Officer II, and Fire Officer III. They are all dated September 9, 2008. The "Personal Information" and "Sponsoring Organization" sections on each form contain information that appears to be mirror images of each other. Under chief Gaden's name is a signature line for the "Head of the Sponsoring Agency", and includes signatures that are all slightly different from each other. Next to the signatures are the dates "9-9-08," which are also all slightly different from each other.

The remaining portions of the forms are not copies of each other and show different information on each.

A review of the original authorization forms shows that it is not possible that Crown copied chief Gaden's signature on one form and used that form for the other four courses that he took at the Academy. It appears as if the top portions were photocopied but not the signatures, leaving open the possibility that chief Gaden signed none, some, or all of them.

Crown attempted to reconcile his earlier testimony that chief Gaden signed one form that he used for a number of courses, with the original forms. Crown stated that he believed that the Fire Officer III form is a copy of a form that was signed by the chief, the original of which Crown was going to use for another course but did not and which he discarded. According to Crown, on September 9th, chief Gaden signed the other four forms and the course information was later added as Crown took the courses.

While Crown's testimony is inconsistent, it is never the less credible. Crown originally testified to what he "believed" occurred with the authorization forms, and when faced with the actual forms, provided a plausible explanation of what may have actually happened. He testified that he did not review the authorization forms prior to his testimony, and when confronted with the originals he readily admitted that his initial testimony was inaccurate.

Moreover, initially on cross examination, and before being shown the original authorization forms, Crown was uncertain exactly how he used chief Gaden's signed form. When asked if all the trainings that he had taken at the Academy were taken using a photocopy of chief Gaden's signature, Crown responded

> "You know, I'm not – I'm not – I'd like to get the documents, if the Fire company would give those sometime, because I'm not sure there wasn't another time when he said use this and Xerox it. And I just don't remember how many times that was that I used a copy. I'm pretty sure I used it for the last two."

The fact that Crown did not recall accurately how many times he used a photocopy of chief Gaden's signature does not establish that he forged his signature on any form. His testimony was consistent that he never forged chief Gaden's signature, and there is no credible evidence to the contrary.

As discussed above, chief Gaden could not accurately recall what forms he signed. At various times he testified that he signed two of the five disputed forms (Strategy and Tactics, and Legal Issues); three of the forms (Strategy and Tactics, Legal Issues and Fire Officer I; and, four of the forms (Strategy and Tactics, Legal Issues, Fire Officer I, and Fire Officer II). Chief Gaden's uncertainty about what courses he actually authorized contributes to the unreliability of his testimony that Crown forged his signature to take the Fire Officer III course. Further, his testimony that he never authorized anyone to photocopy his signature for use on course authorization forms is similarly unreliable.

Former company member Jeffrey Baker credibly refuted chief Gaden's testimony that he never signed a blank course authorization form for any company member. Baker took 65 fire related courses, including Fire Office I, II, and II, on the county or state level from 1986 to 2001. These courses were taken when Gaden was fire chief and according to Baker, chief Gaden told him to photocopy his signature and use them for whatever courses he wanted to take. He used chief Gaden's signature on two forms for all his courses, and submitted course certifications upon completion of each course. He was never disciplined for using chief Gaden's signature.

The Commissioner argues that the treatment of Baker was different from that of Crown, because Baker received verbal permission to take the courses, was not taking them through the company as he was taking them through a community college, and was still actively involved with the company until 2001. We do not believe these distinguishing factors change the character of chief Gaden's testimony. At best, these factors may justify why chief Gaden allowed Baker to use pre-signed forms, but they do not support his testimony that he never allowed anyone to use pre-signed forms.

Crown's testimony that he did not forge Gaden's signature for course work is supported by the fact that Crown had no apparent motive to falsify chief Gaden's signature. Despite Gaden's testimony that he would not have approved Crown's Fire Officer III authorization because he had not been active in the company for almost a year, there is no evidence to believe that Crown was aware that the courses would not be approved. Moreover, Crown had no financial motive for falsifying any authorization forms because he paid for the courses himself.

Also, Crown did not hide his participation in Academy courses, and in fact, provided proof of completion of each course he took to the company. He informed chief Gaden by email that he was taking the Fire Officer III course, conduct that is inconsistent with one falsifying the authorization to take the course.

Simply put, based on the record before us, the explanation that Crown was brought up on disciplinary charges and is a pretext for the company's unlawful retaliatory conduct against him (*McDonnell Douglas*, 411 US at 804). Therefore, we remand this matter back to the Commissioner to refer it to the Attorney General.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The matter is remanded to the Department of Labor for further proceedings in accordance with this decision and to "request the attorney general to bring an action in the supreme court against the person or person alleged to have violated the provisions of this subdivision," as required by Labor Law § 27-a (10).

Anne P. Stevason, Chairman

J. Christopher Megher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Date and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
October 11, 2011.