STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: TOWN OF LEE, Petitioner, To Review Under Section 101 of the New York Labor Law a Determination made under Article 2 of the Labor Law, dated September 15, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 14-014 RESOLUTION OF DECISION

APPEARANCES

Bond, Schoeneck & King PLLC, Syracuse (*Laura H. Harshbarger* of counsel), for petitioner.

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

WITNESSES

William J. Baker, Karl Matt, and John C. Urtz, for petitioners.

Timothy T. Hyde, Douglas Finster, Charles F. Riley, John Martin and William Valade, for respondent.

WHEREAS:

The petition filed with the Industrial Board of Appeals on November 13, 2014, seeks review of a determination by the Commissioner of Labor against the Town of Lee in Oneida County, New York. Respondent filed an answer on January 23, 2015.

Upon notice to the parties a hearing was held before Michael A. Arcuri, Board member and designated hearing officer in this matter on April 23, 2014 and July 28, 2015. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file legal briefs.

SUMMARY OF EVIDENCE

The Claim

On or about February 23, 2012, Timothy T. Hyde filed a complaint with the Department of Labor alleging he was laid off as a Machine Equipment Operator (MEO) by the Town of Lee in retaliation for representing a coworker in a grievance proceeding against the Town of Lee. By letter dated September 15, 2014, the Commissioner notified Hyde and the Town of Lee of its determination that the Town of Lee had "behaved in a discriminatory and/or retaliatory manner" against Hyde for engaging in Public Employee Safety and Health Act (PESHA) protected activities in violation of Labor Law § 27-a (10).

Respondent's Evidence

Testimony of William Valade, Machine Equipment Operator

William Valade has been an MEO for petitioner since 1993 and was MEO Hyde's coworker. Valade testified that in January 2012, Superintendent William Baker sent Valade home from work and docked his pay for refusing to use a payloader to raise personnel to do work overhead. Valade refused to perform that task because he felt it was unsafe. Valade grieved the disciplinary action and participated in a meeting involving the grievance where Hyde acted as his union representative. The grievance was resolved by settlement on February 21, 2012

Testimony of Timothy Hyde, Complainant

Timothy Hyde was employed by petitioner as an MEO from February 2010 to February 2012. Hyde was present at the January 2012 grievance meeting resulting from MEO Valade's refusal to use the payloader as a man lift. Hyde testified that "throughout the grievance hearing," Baker would get "agitated and start[] to threaten jobs."

On or around February 17, 2012, Hyde was served with a notice of layoff. The union contract between the Town of Lee and Local 1088-G and New York Council 66 provides that to "lay off" means reducing the workforce "due to decrease of work." The contract further provides that should petitioner effect a layoff, employees must be laid off according to seniority, which shall be "on a town-wide basis," according to the employee's last date of hire. When MEO Valade accompanied Hyde to inquire with Town of Lee Supervisor John Urtz into the reason for his termination, Supervisor Urtz stated that Hyde was being laid off "due to lack of work and other reasons that he could not say at the time."

Testimony of Charles F. Riley, Senior Industrial Hygienist

Charles F. Riley is a Senior Industrial Hygienist whose job it is to enforce New York State and Federal health and safety regulations for public employees. As the discrimination investigator for this matter, Riley took the complaint from Hyde and took witness statements. Hyde's complaint alleged that he was laid off after representing a co-worker who was disciplined. Riley testified that Hyde's "protected activity was his showing his concern for safety to his employer and then he was ultimately laid off because of his concern for safety and health."

Petitioner's Evidence

Testimony of William J. Baker, Highway Superintendent

William J. Baker is and, at all times relevant to this matter, was Highway Superintendent for the Town of Lee. He is responsible for maintaining roads during winter, roadside mowing, ditching, patching roads, leaf and brush pick up, and responding to public calls. As Superintendent, it is his duty to direct personnel, including five of six MEO positions filled at the time, to complete these tasks and follow up on any incidents reported from members of the community.

The Town of Lee was responsible for maintaining five plow routes. After taking office, Baker talked to the Town Board about whether he could or should hire a sixth MEO. The Town councilmembers were "adamant" that they did not want to fill the position but that the 2010 town budget had allocated funds for the position. The councilmembers also informed him that once the position was taken out of the budget, they were not inclined to add it back in at a later time, which contributed to Baker feeling "leery" about losing the sixth MEO position. Baker testified that it was "difficult" for six MEOs to stay occupied during the non-snow season, but because Baker was new to the superintendent position he was unsure if the position should be eliminated.

Baker decided to hire a sixth MEO. Baker's plan was to implement five plow routes and create a night shift to allow for twenty-four-hour coverage. He envisioned four MEOs would work daytime shifts, and an "extra man or two" would work the night shift. In February 2010, Baker offered the full-time MEO position to Hyde. Before hiring Hyde, Baker recalls having a conversation with him regarding the uncertainty of the MEO position. With Hyde as the sixth MEO, in the winter 2010, Baker instituted his plan for twenty-four-hour plow coverage. The MEOs took turns on the night shift.

During September and October 2011, the budgeting process started for 2012 and Town Supervisor John Urtz began discussing with Baker whether Baker would keep the sixth MEO position. Contributing to Baker's uncertainty was the fact that the MEOs declined to work the night shift for the upcoming winter. Creating a night shift was "the whole idea of keeping the sixth guy on for the winter." With no one to work the night shift, Baker decided to revert to "the way we've always done it, call guys in as needed and hope that they would be available." Baker, however, deferred to Supervisor Urtz to make the decision because Baker "was still not sure which direction to go in." Supervisor Urtz decided to leave the sixth MEO position in the 2012 Town budget.

In early 2012, a contractor was inspecting a heating unit for petitioner. Consistent with past practice, Baker instructed MEO Valade to use the payloader to lift the contractor to where the heating unit was located. Valade refused to follow Baker's directive, and the contractor left without completing the inspection. When Baker found out, he said to Valade: "I gave you a direct order to do something and you didn't." Baker sent Valade home without pay per the union contract, over which Valade filed a grievance with the union.

Baker testified that internal discussions with the Town Board regarding laying off Hyde started in December 2011. The snow load in early 2012 was considerably less than the year before, and Baker began considering reducing his MEO staff from six to five positions. Baker made the decision to downsize to five positions in February 2012, while the sixth position remained in the

budget. This way, if the sixth position was needed or Baker later decided to not completely eliminate the position, he could bring the MEO back. Hyde, the MEO with the least seniority in the department, was laid off in February 2012. Baker testified the particular date on which he chose to terminate Hyde "just happen to be that day"—there was "no particular reason that date was picked."

Baker testified that he was not concerned about the possibility of snow once the number of MEOs was reduced because the five remaining MEOs were able to do the work. In Baker's estimation, the cost of the amount of overtime worked with five MEOs would be less than hiring a sixth MEO. To date, five MEOs continue to complete all necessary work.

Testimony of Karl Matt, Member of Town Council

Karl Matt testified that he was a Town Councilmember for the Town of Lee from the 1970s until he was elected and served as Town Highway Superintendent from 2005 until 2009. William Baker succeeded Matt as Superintendent in 2009 and Matt was again elected to the Town Board in 2010. Matt testified that during the time he was Superintendent there were six MEO positions and that these positions were included in the budget proposal he submitted to the Town Board each year. Although he never recommended to the Town Board that the sixth MEO position be eliminated, he believed that a sixth position was not necessary due to the replacement and updating of old highway department equipment and the addition of new equipment. Matt testified: "My thinking was that if we did reduce [the number of MEOs] to five, it would have to be when someone retired. I did not want to go in and lay anybody off." When Baker became Superintendent, Matt recommended to Baker not filling the MEO vacancy created by Baker's election to Superintendent in 2009. Matt testified that as Superintendent he did not anticipate the Town Board making any determinations with respect to personnel reductions absent him formally proposing such a change.

Matt hired Hyde as a substitute MEO in the event of an emergency or if other MEOs were not able to attend work due to illness. Matt testified that during non-snow season, however, it was often difficult to keep the MEOs fully occupied. At times, the MEOs would be sent to work in other departments of the town.

Testimony of John C. Urtz, Town Supervisor

John C. Urtz, is and was at all times relevant to this matter the Supervisor of the Town of Lee and is also a member of the Town Board. Efficiency and the bottom line are a concern for the Town of Lee. Unlike its neighboring towns, Lee has a property tax rate of zero, and the New York State Comptroller's Office has rated Lee number ten in the state for fiscal responsibility. When he started as Supervisor there were eight MEOs. Today there are five MEOs; petitioner's cost for one MEO is in excess of $70,000 per year. It is more cost effective for the town to pay five MEOs "a little additional [o]vertime," than it would be to employ a sixth MEO for a year. After Baker won the election, Supervisor Urtz had a conversation with him regarding cutting the sixth MEO position by not filling the position Baker was leaving because "here was an attrition situation where no one would get hurt."

In July 2011, Hyde contacted Supervisor Urtz to ask if there was going to be a layoff. Urtz responded "absolutely not." He said so because "there was [sic] none planned," but Supervisor

Urtz did not understand that to mean there would or could never be a layoff. Several weeks later, however, when negotiations about the town budget began, there was talk of a layoff. There had also been talk of a layoff in January 2011 and Supervisor Urtz agreed that the "normal transition" between superintendents would have been "the opportune time" for a layoff to happen. Nonetheless, Supervisor Urtz affirmed that when he spoke with Hyde in July 2011, Urtz had had no discussion with Superintendent Baker about reductions in personnel at or around that time.

Supervisor Urtz attended the January 2012 grievance meeting involving MEO Valade and in which Hyde participated as the union representative. Supervisor Urtz testified that it was sometime after the January 2012 grievance meeting that there was discussion of terminating Hyde; Baker "was ready to make a move and to reduce a man." Since Hyde's position was terminated, the Town continues to operate with five MEOs.

DISCUSSION

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule (12 NYCRR) § 65.39. As set out below, we find that petitioner failed to meet its burden pursuant to Labor Law § 101 (3) of proving that the Commissioner's determination that Timothy Hyde's discharge was discriminatory and retaliatory was unreasonable.

STANDARD OF REVIEW

Orders issued by the Commissioner are presumed valid (Labor Law § 103). In this matter, the Board's review is limited to determining whether the Commissioner's determination that petitioner unlawfully discriminated against complainant is valid and reasonable (*see* Labor Law §§ 27-a [6] [c], 101).

Petitioner Town of Lee bears the burden of proof (Labor Law § 101; Board Rules [12 NYCRR] § 65.30; *see also Angello v. Nat'l. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept. 2003]). That the record contains some evidence which may give rise to another conclusion is not sufficient for us to unsettle the Commissioner's determination (*Matter of Shapiro*, PES 09-001 at 7 [May 30, 2012]). Petitioner must prove that the challenged determination is invalid or unreasonable by a preponderance of the evidence (Labor Law § 101 [1]; *Matter of Ram Hotels*, Inc., PR 08-078, at 24 [2011]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the record before us, we find that petitioner failed to meet its burden of proving that the Commissioner's determination of discrimination in violation of PESHA was unreasonable.

I. Discrimination under PESHA

PESHA provides public-sector employees the right to enjoy a workplace free from recognized hazards that are likely to cause death or serious physical harm (Labor Law § 27-a [3] [a]). PESHA further protects an employee's right to file a complaint or institute a hearing relating

to workplace safety and health, and also protects employees when exercising that right (Labor Law § 27-a [10] [a]).

Complainant showed a prima facie case of unlawful discrimination existed.

To prevail on a claim of retaliation, Labor Law § 27-a (10) requires evidence that (1) the employee engaged in a protected activity under the statute; (2) the municipality was aware of the protected activity; (3) the employee suffered an adverse employment action; and (4) there was a sufficient nexus between the protected activity and the adverse employment action (*see McDonnell Douglas Corp. v Green*, 411 US 792, 803 [1972] [*McDonnell Douglas*]; *Dept of Correctional Services v Division of Human Rights*, 238 AD2d 704, 706 [3d Dept. 1997] [applying *McDonnell Douglas* burden-shifting in New York discrimination cases]; *Matter of Robert Shapiro*, PES 09-001 at 7 [same]). Under the "minimal" requirements of *McDonnell Douglas* (*Gordon v New York City Bd. of Educ.*, 232 F3d 111, 116 [2d Cir. 2000]), the prima facie case establishes a rebuttable presumption of retaliation (*El Sayed v Hilton Hotels Corp.*, 627 F3d 931, 932 [2010]). Because petitioner bears the burden of proof, it must, through reliable and credible evidence, show that respondent unreasonably determined that claimant met the "minimal" requirements of a prima facie case of unlawful discrimination under PESHA. It is uncontested that Hyde acting as MEO Valade's representative during a grievance proceeding relating to MEO Valade refusing to perform work he understood to be unsafe was a protected activity under PESHA, that the municipality was aware of the protected activity, and that Hyde suffered an adverse employment action. At issue in this matter is whether respondent reasonably determined there was a sufficient nexus between the protected activity and the adverse employment action.

On the evidence before us, we find a nexus exists between Hyde's protected activity and the adverse action. While petitioner contends that timing alone is insufficient to prove retaliation, it is settled law that the causation element of the prima facie case of retaliation can be established "indirectly by showing that the protected activity was followed closely by discriminatory treatment" (*De Cintio v Westchester County Medical Ctr.*, 821 F2d 111, 115 (2d Cir. 1987); *accord Gordon* 232 F3d 111). In *Matter of Crown*, we found sufficient proximity in time to establish causation where complainant was suspended on March 12, 2010 and had disciplinary charges brought against him on March 23, 2010 after complainant's January 2010 protected activity (PES 10-009, at 9 [Oct. 11, 2011]; *see also Matter of South Glens Falls Fire Company, Inc.*, PES 14-016 at 8 [Mar. 1, 2017] ["[P]etitioner's retaliation began within weeks of the April 2011 complaints and within days of respondent's May 2011 site inspection."]). Similarly, the record before us reflects that MEO Valade filed his grievance with the union regarding the payloader incident on January 10, 2012. The related February 2012 grievance meeting, at which Hyde acted as the union representative, was protected conduct. Hyde was served with notice of layoff dated February 17, 2012, effective February 25, 2012. The grievance at issue was resolved by settlement on February 21, 2012, meaning that the date of Hyde's effective termination was four days after the resolution of MEO Valade's grievance. By another measure, Hyde received the notice of lay off less than one month after Hyde's protected conduct. Either measure—four days or one month—are well within the timeframe at issue in *Matter of Crown*. We find that the Commissioner reasonably concluded that Hyde's termination was causally related to his protected activity, thus respondent reasonably determined Hyde had a prima facie case of retaliatory discrimination in violation of PESHA.

The Commissioner reasonably concluded that petitioner's reasoning for terminating complainant was pretextual and substantially related to protected activity.

When a petitioner fails to sufficiently challenge the reasonableness of respondent's finding of a prima facie case of unlawful discrimination, petitioner must come forward with evidence of a legitimate, nondiscriminatory reason for the adverse employment decision (*McDonnell Douglas Corp.*, 411 US at 802). Petitioner contends that Hyde's termination was the lawful result of a longstanding concern among members of the Town Board regarding the cost-effectiveness of operating with six MEOs. It is uncontested that Baker spoke with Hyde about the town's interest in eliminating the sixth MEO position before Hyde accepted the offer of employment. Petitioner also introduced into evidence records of the MEO's weekly hours, which show that for the two years following Hyde's termination, other than during winter months, MEOs did not accrue appreciable amounts of overtime work after Hyde's termination. This was supported by testimony that, at times, when work was slow at the Department, it would loan MEOs to other town departments. Petitioner alleges a savings to the town of $70,000.00 by paying five MEOs nominal amounts of overtime as needed rather than employing a sixth full-time. These facts exist against the backdrop of the town's zero percent property tax rate. Petitioner has satisfied its intermediary burden (*see Laverack & Haines v. New York State Div. of Human Rights*, 88 NY2d 734, 738 [NY 1996] [holding that downsizing in personnel due to fiscal considerations constitutes a nondiscriminatory explanation for a disputed employment decision]).

Despite petitioner's lawful reason for the adverse employment action, respondent can still prevail by providing credible evidence that the legitimate reason offered by petitioner is pretext for discrimination (*see McDonnell Douglas*, 411 US at 805). Petitioner's evidence casts no light on the key fact that on February 17, 2012, the Town of Lee acted to terminate Hyde's position—for which it had already appropriated funds for the 2012 calendar year—less than one month after Hyde engaged in protected conduct and four days before resolution of the underlying grievance. Superintendent Baker testified that in 2011, when he first took on the superintendent position, because he was new to the job and the Town Board indicated that a decision to eliminate an MEO position was irreversible, he decided the prudent course was to retain the position. Petitioner does not explain, however, why Baker would defer to Supervisor Urtz as to whether to keep the sixth MEO position in the 2012 budget in light of the fact that the MEOs refused to work the night shift, which was the principal reason Baker offered for why he kept the MEO position in the 2011 budget. Furthermore, petitioner's evidence fails to explain why Baker, without explanation, "was ready to make a move and to reduce a man" in "late January or early February" 2012, at the precise moment of Hyde's involvement in MEO Valade's grievance proceeding.

We also note that petitioner argues that Hyde was laid off pursuant to the union contract which requires layoffs in order of seniority. Pursuant to the union contract a union employee must be laid off according to seniority "on a town-wide basis," in accordance with the employee's last date of hire. Hyde was, by a multitude of years, the most junior MEO in his unit. Petitioner, however, produced no evidence to show that Hyde had the least seniority on a town-wide basis or that union membership was limited to personnel in his specific unit. Respondent's prima facie case, together with unanswered questions surrounding the specific timing of Hyde's termination and the evidentiary gap with respect to petitioner laying him off pursuant to union contract, suggests intentional, unlawful discrimination (*see Sandiford*, 94 AD3d at 595).

Our finding is further supported by the fact that Superintendent Baker's decision to terminate the sixth MEO position due to "lack of work" is inconsistent with past practice. For 29 years before Baker was elected as superintendent, the number of MEOs was reduced from 10 to 6 solely by attrition. Superintendent Baker explained that he hoped that if the Department was to eliminate a second position, consistent with prior practice, it would be by attrition rather than layoffs. Attrition was also Councilmember Matt's professed preference for downsizing personnel. Similarly, Supervisor Urtz recognized that the "opportune time" to downsize the workforce would have been in the transition between superintendents. Under the "workplace realities as demonstrated by the record," petitioner has failed to address why petitioner took action against Hyde when it did (*see Sandiford*, 94 AD3d at 596). On the record before us, we find that the Commissioner reasonably determined that petitioner's proffered reason for Hyde's termination—economic efficiency—was pretextual (*see Ferrante*, 90 NY2d at 630).

Even if petitioner could show that it would have terminated Hyde despite his protected conduct, an employer violates Labor Law § 27-a (10) (a) when a retaliatory motive plays a substantial part or was a motivating factor in an adverse employment action whether or not it was the sole cause (*see Raniola v Bratton*, 243 F3d 610, 625 [2d Cir. N.Y. 2001]; *accord* Gordon, 232 F3d at 117; *Davis v. New York City Dep't of Educ.*, 804 F.3d 231, 236 [2d Cir. 2015]). Hyde testified that at MEO Valade's grievance hearing Superintendent Baker became "agitated" and began "threaten[ing] jobs." Hyde further testified that when he inquired with Supervisor Urtz into the reasoning behind Hyde's termination, Urtz informed him it was "due to lack of work *and other reasons*" (emphasis added). Other than fiscal efficiency, which, as discussed above, fails to directly address the specific timing of Hyde's termination, petitioner has offered no non-discriminatory explanation of these "other reasons." Petitioner's argument that it terminated Hyde solely because of financial expediency is insufficient to negate the strength of the Commissioner's unrebutted evidence that retaliatory discrimination played a motivating factor in petitioner terminating Hyde's employment (*see De Cintio*, 821 F.2d at 116 n.8 ["Title VII would be violated even though there were objectively valid grounds for the proceeding and the resulting discharge"]).

Because petitioner has not met its burden of showing by a preponderance of the evidence that the only reasonable conclusion based on the evidence presented was that respondent erred in determining that Hyde was unlawfully discriminated against, we deny the petition (*see Matter of Shapiro*, PES 09-001 at 7).

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The order of the Commissioner is affirmed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
May 3, 2017.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The order of the Commissioner is affirmed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
May 3, 2017.