

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JOEL W. FREDERICK,

Petitioner,

To Review Under Section 101 of the Labor Law:

A Determination Made Under Article 2 of the Labor
Law, dated May 31, 2016,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PES 16-010

RESOLUTION OF DECISION

APPEARANCES

Joel W. Frederick, petitioner pro se.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel),
for respondent.

WITNESSES

Petitioner Joel W. Frederick, Glenn Litzenberger, Nicholas Arnold, and Charles Sisson, for
petitioner.

Supervising Safety and Health Inspector James Reeves, for respondent.

WHEREAS:

On July 25, 2016, petitioner Joel W. Frederick filed a petition with the Industrial Board of
Appeals pursuant to Labor Law § 101 seeking review of a determination under Article 2 of the
Labor Law issued by respondent Commissioner of Labor on May 27, 2016. The Commissioner
filed her answer on November 21, 2016. Petitioner filed an amended petition on February 1, 2017.

A hearing was held on March 28, 2017 in Rochester, New York, before Board member and
designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity
to present documentary evidence, examine and cross-examine witnesses, and make statements
relevant to the issues.

The determination under review found that petitioner's employer, Rochester Psychiatric
Center, was in compliance with the Workplace Violence Protection Program requirements of 12

NYCRR 800.6 and declined to find any violations of the health and safety standard set forth in those regulations.

As amended, the petition alleges that the Commissioner's determination was unreasonable because: (1) the employer does not properly investigate and enforce its Workplace Violence Prevention Program against supervisors who commit acts of workplace violence, and; (2) the Commissioner's investigation of petitioner's complaint was flawed by the investigator's conflict of interest, failure to address the role of supervisors at the facility, and failure to interview relevant witnesses.

Based on the record evidence, we find that the public employer violated the requirements of 12 NYCRR 800.6 by failing to properly implement its Workplace Violence Protection Program and we revoke the Commissioner's determination.

SUMMARY OF EVIDENCE

A. Employer's Workplace Violence Protection Program

Rochester Psychiatric Center (RPC) provides individualized psychiatric treatment and rehabilitation services for people with serious mental health challenges. Services include adult inpatient, residential, and community support programs, and forensic inpatient programs. RPC serves a multi-county area in Western and Central New York and employs over 500 employees at its Rochester location.

Employees at RPC represented by the Public Employees Federation include social workers, occupational and physical therapists, counselors, psychologists, medical doctors, pharmacists, registered nurses, and supervisory personnel. Employees represented by the Civil Service Employees Association include clerical employees, direct care staff such as licensed practical nurses and mental health therapy aides, housekeeping, dietary, and maintenance employees.

Pursuant to the requirements of 12 NYCRR 800.6 (Part 800.6), RPC adopted a Workplace Violence Prevention Policy Statement and a Workplace Violence Prevention Program (WVPP). The policy statement recognizes that the legal requirements of Part 800.6 are intended to ensure that workplace violence prevention programs are designed and implemented "to prevent and minimize the hazard of workplace violence to employees."

The WVPP lists the specific risk factors ("Types of Risks") identified in RPC's examination of the hazard of workplace violence. Workplace violence engaged in by one co-worker to another is one of those risks identified and "always includes violent acts, attempted violence, and threats of violence." In a section listing the measures RPC will use to prevent incidents of workplace violence and the controls it will use to eliminate or minimize the risks identified ("Controls"), the program states that where engineering controls are not feasible,¹ administrative and work practice controls will be used to limit employees' exposure from the

¹ Engineering controls are physical changes to the workplace to minimize a worker's exposure to the hazard of workplace violence, such as card swipes on doors, panic buttons, etc.

hazard. These administrative controls include “enforcing a zero-tolerance policy to workplace violence incident[s].”

In the introductory section of the program (“Policy/Purpose Statement”), RPC describes the zero-tolerance policy it will enforce to prevent and/or minimize the risk of workplace violence to employees:

“RPC prohibits any person from engaging in violent conduct on facility property or in connection with facility business. Workplace violence is defined as any physical assault, or acts of aggressive behavior occurring in the workplace setting. Examples of workplace violence include, but are not limited to:

An attempt or threat, whether verbal, or physical, to inflict personal injury upon an employee ... [referencing further clarification for patient on employee threats];”

RPC states that it will address “any” incident of employee on employee workplace violence immediately through prompt administrative action. Such action “may range from a review by Employee Health Services (EHS) through and including potential recommendation for termination.”

Employees are expected to promptly report incidents of workplace violence to administration on Workplace Violence Reporting Forms (“Reporting”). The reports are reviewed annually by a joint labor-management committee to evaluate the risk assessments made and to identify trends in the types of incidents of workplace violence and the effectiveness of mitigation actions taken (“Risk Assessment” and “Incident Review and Program Update”).

B. Testimony of petitioner Joel W. Frederick

Petitioner Joel W. Frederick testified that he has been employed as a general mechanic in the “work control” department at RPC for approximately six years, performing carpentry, painting, welding, plumbing, and general maintenance. He worked under the supervision of Ron Germain, who was a maintenance supervisor for many years and was recently promoted to plant superintendent. Germain’s supervisor is the director for facilities administration, Joseph Coffey.

Frederick testified that over the years Germain has subjected him to what he characterized as demeaning comments, bullying, and intimidating behavior. On Saturday August 8, 2015, Frederick was at a meeting in the forensic control room at RPC’s main building with locksmith Tom DeMarco and Germain to discuss a “new matrix” for the key system in the room. Also present were a special security officer (SSO) named Scott Baitz and another SSO, later identified as Frank Rivera. Germain was talking in rapid fashion about the new measure when Frederick pointed out that something was out of order with it. Germain then told him, “Shut the fuck up or I will throw you out the window.” Frederick testified that Germain made the remark to him in a very hostile manner and he believed it was a threat to do him bodily harm.²

² In the section of its WVPP describing the annual training it provides employees (“Training”), RPC states that workplace violence verbal warning signs include “[u]sing an angry or threatening tone” and “cursing.”

Frederick did not immediately report the incident for fear of retaliation because he was up for several promotions at the time, including a position as a mechanic supervisor 3 that he believed he had a “shot at” because he had filled in for Germain in the position several times. All promotions in the work control department went through Germain, who previously told Frederick that a fellow mechanic named Chad McLaughlin once filed a complaint against him and “as long as he is there he’s [McLaughlin] never going to go anywhere.” According to Frederick, McLaughlin applied for promotions several times after the complaint but never received one. Several co-workers who had been at RPC a long time also told Frederick that if an employee made a complaint against Germain their career was pretty much over.

Frederick testified that Germain’s intimidating behavior towards him escalated and on February 5, 2016 he removed Frederick from the list to be assigned overtime locksmith duties when the regular locksmith was unavailable. Believing that the relationship with his supervisor had finally deteriorated to the point of “just enough was enough”, Frederick complained to director Coffey about the overtime issue and informed him of the threat Germain made to him. Coffey advised him to file a formal Workplace Violence report about the incident.

On February 8, 2016, Frederick filed a Workplace Violence Reporting Form with RPC, describing the incident and stating that Germain told him to “shut up before he throws me out the window.” Frederick stated that he was in total fear of Germain, was constantly working in a hostile environment, and that he did not immediately report the incident for fear of retaliation. Frederick listed the three witnesses who were present, although he did not know the name of the second SSO at the time. On February 29, 2016, Coffey informed him that because of his delay in reporting the incident it did not meet the criteria of workplace violence. He added that the administration had discussed the matter with Germain.

On March 3, 2016, Frederick filed a “Notice of Alleged Safety or Health Hazards” against RPC with the Department of Labor’s (DOL) Public Employee Safety & Health Bureau, describing the incident as a health hazard which he believed existed at the facility. Frederick stated that in the meeting on August 8, 2015, Germain “got very [h]ostile and threatened to throw me through a window.” He reported the incident to top administrators but administration informed him that they did not believe the incident fell under workplace violence. For purposes of the investigation, Frederick authorized DOL to reveal his name to the employer.

Frederick asserted that DOL erred in failing to sustain his complaint because he had reported to his employer an explicit threat to inflict physical harm on him that was made by his supervisor but RPC failed to classify the threat as an act of workplace violence. RPC thereby failed to fully investigate and enforce its WVPP against supervisors.

Frederick further asserted that DOL’s investigation was flawed by the investigator’s failure to interview the two SSO’s who witnessed the incident and other employees he recommended be interviewed. Frederick asserted that investigator Reeves focused interviews mostly on supervisors like director Coffey who hired Germain, and other supervisors who were subordinate to Germain, and those individuals would be unlikely to provide constructive criticism of what went on in the facility. Frederick also testified that at the informal conference following DOL’s dismissal of his complaint, Reeves stated that he was a former employee of RPC, thereby making it a conflict of interest for him to conduct the investigation.

C. Testimony of Glenn Litzenberger and Nicholas Arnold

Glenn Litzenberger testified that he has been employed at RPC for 10 years as a general mechanic, locksmith, maintenance supervisor, and plant utility supervisor. While he never worked directly with Germain, he was familiar with his position as plant superintendent and corroborated that Germain had final authority over all issues in the work control department, including employee promotions and assignments.

Nicholas Arnold testified that he has been employed as a maintenance assistant in RPC's work control department for four years and corroborated that Germain had full authority over all promotions within the department. He once filed a grievance against RPC over interview policies that involved Germain and later applied for a promotion. Arnold testified that he was never even interviewed for the job and nothing came of it.

D. DOL's Investigation

Supervising Safety and Health Investigator James Reeves testified that Frederick's complaint was initially reviewed by his supervisor to determine whether it satisfactorily alleged a violation of a health and safety standard of the Public Employee Health and Safety Act (Labor Law § 27-a or PESHSA). DOL determined that it did and classified the complaint as alleging that the employer "does not properly investigate workplace violence incidents." Reeves conducted an investigation of RPC's program in 2013 that cited it for deficiencies in its written policy statement, WVPP, and training. As the earlier investigation reviewed reports of patient on employee workplace violence, DOL determined that the current one would focus on reports involving employee on employee workplace violence.

On March 25, 2016, Reeves held an opening conference at the facility with Coffey and representatives of the employee unions where he explained the scope of the inspection and reviewed PESHSA materials. He thereafter requested and reviewed various workplace violence records, including the employer's written policy statement and WVPP, risk assessment forms, training logs, and incident reports for the 2014 and 2015 calendar years.

Reeves testified that early in the investigation, Coffey provided him with a written log of the steps RPC took after receiving Frederick's complaint on February 8, 2016. The unsigned document states that administrators met with Frederick, DeMarco, and SSO Baitz to discuss the incident. They did not meet with the second SSO who was present, identified in the log as Frank Rivera. Administrators met with Germain, but the log does not reference any statement from him explaining his version of the incident.

According to the log, Frederick stated that he felt threatened by the remark. DeMarco stated that Germain made the comment about "throwing" him "through a window" but described it more as a joking kind of comment such as one family member might make to another. SSO Baitz stated that the mood among the three work control employees in the meeting was "tense" and that Germain made a comment about "throwing Joel out the f --- ing window" [expletive deleted in original] or maybe just "out the window." The situation became very quiet among the three work control employees after the comment was made. The employees later went to lunch and after returning to the project they all seemed fine. He added that at no time did he feel there was any real danger for anyone, and if he had, he would certainly have intervened.

At the conclusion of RPC's review, the log indicated that Coffey and a second unnamed administrator met with Frederick and informed him that Germain's remark was inappropriate but based on the consensus of those interviewed it was not deemed "a credible threat." The administrator explained that the delay between the event and its reporting "added to the sense that the remark may not have been viewed by him [Frederick] as causing fear of physical harm." The administrator told Frederick that Germain's behavior in the incident was considered by RPC to be inappropriate and in conflict with its "Respect Policy and Rules of Conduct" and that Coffey met with him to review the situation, noting the strong impact it could have on subordinates and the department. A report titled "RPC Workplace Reporting Follow-up" states that the facility's WVP committee reviewed Frederick's report on April 19, 2016 and classified it as "Not Meeting WVP Criteria."

Reeves testified that aside from Frederick, he interviewed eight other RPC employees during his investigation, including a plumber/steamfitter, two maintenance assistants, two mechanics, DeMarco, a maintenance supervisor, and Germain. He did not interview the two SSO's who were present at the incident. DOL did not submit any of the interview statements taken from individuals during its investigation at the hearing.

Reeves testified that pursuant to DOL's classification of the complaint as a facility wide investigation of whether the employer properly investigates incidents of WV, he purposefully did not reveal Frederick's name to any of those interviewed to protect his identity and generally inquired of the interviewees what knowledge they had of workplace violence within the facility. Many employees were reluctant to talk but did provide information concerning incidents of alleged bullying and employee to employee disputes, which would be dealt with through union procedures and arbitration and not acts of workplace violence covered by the WVPP.

At the conclusion of the investigation, Reeves issued a final investigation narrative report on May 27, 2016 finding that RPC's policy statement, written WVPP, risk assessment records and procedures, and employee training program complied with regulations. No deficiencies were found.

As to RPC's incident reports, Reeves stated that he reviewed copies of completed reports for the 2014 and 2015 calendar years in an attempt to identify any trend or emerging pattern that could indicate "any deficiencies in the employer's program or response to incidents of workplace violence." No deficiencies were found.

As to RPC's annual labor-management records reviews, Reeves stated that he looked at documentation from the 2014 review to identify any trends or patterns relating to the reports for that year to verify if the employer's final determination "followed their written plan." While the 2015 review had not been completed yet, he looked at reports for 2015 and the employer's final determination. Reeves found that the final determinations for both years were either not classified as incidents of workplace violence or addressed through the employer's EAP program or Traumatic Stress Response Team.

The narrative made no specific findings whether RPC's "response" to Frederick's WV report filed in 2016 was deficient or whether its final determination "followed their written plan." Based on his investigation, Reeves found no violations during his inspection and determined that the employer was in compliance with the regulations set forth in Part 800.6.

Upon Frederick's request, Reeves met with him and representatives of the administration and employee unions on June 28, 2016 to explain the basis of DOL's determination and address his concerns about the complaint not being sustained. One of those concerns related to an alleged conflict of interest. Reeves testified that he was never employed at RPC. From 1984 to 1987 he was employed by the NYS Office of General Services and had an office at RPC to review construction jobs there and at other sites in Central and Western New York. During that time he became acquainted with one of RPC's current human relations administrators. During his 2013 DOL investigation he also met with Coffey and other administrators to obtain records. He did not maintain a personal relationship with any of those administrators.

Finally, Reeves testified on direct examination that DOL's investigation of a workplace violence incident includes an examination of the specific facts of the incident and whether the employer's determination was consistent with Part 800.6. He acknowledged that the remark Germain made to Frederick in this case met the definition of a "threat" under that health and safety standard and "pretty clearly he felt threatened, so it was a threat." However, DOL could not find a violation because in his view the standard does not permit it to substitute its judgment for how the employer "handled" the incident and proscribe what corrective action should be taken. According to Reeves, the employer investigated the incident, it was rectified, and there were no further complaints between the two people. Reeves added that the matter involved a single incident and if there were a pattern of supervisor on employee threats then DOL would consider whether there were any deficiencies in the employer's implementation of its WVPP.

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 Rule (12 NYCRR) 65.39:

A. Burden of Proof

Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the determination issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30). The hearing before the Board is *de novo* (12 NYCRR 66.1 [c]).

If the Board finds that the determination or any part thereof is invalid or unreasonable, it shall revoke, amend, or modify it (Labor Law § 101 [3]); *Matter of Pamela Orcutt*, PES 16-007 [June 6, 2018]).

B. Requirements of Part 800.6

In 2006, the Legislature enacted Labor Law § 27-b, recognizing that workplace violence to public employees is a health and safety "hazard" and requiring public employers to conduct activities to reduce and/or prevent it (*Matter of City of New York Department of Juvenile Justice*, PES 07-014 at 11 [April 21, 2010], *affd sub nom Matter of City of New York v Commissioner of Labor*, 100 AD3d 519 [1st Dept 2014]).

In 2009, the Commissioner of Labor adopted Part 800.6 to implement the statute and carry out the mandate required by PESH that the Commissioner promulgate specific “standards” to protect employees from recognized hazards (Labor Law § 27-a [4] [b]). Part 800.6 is such a “standard” and provides that the current PESH administrative plan will be used by the Commissioner to inspect and enforce it, with an employer subject to notice of violation and penalties under PESH for any violations found (12 NYCRR 800.6 [j] [5]; Labor § 27-a [6]).

Part 800.6 requires public employers to develop and “implement” Workplace Violence Protection Programs to prevent and minimize the hazards of workplace violence to public employees (12 NYCRR 800.6 [a]). The employer must first develop and post a written policy statement about the program’s goals and objectives, conduct a risk evaluation for potential hazards related to workplace violence, and develop a WVPP that explains how the policy is going to be implemented (12 NYCRR 800.6 [e]; 800.6 [f]; 800.6 [g]). The program must include details about the “risks that were identified” in the evaluation, describe the “methods and means” by which the employer will address each specific hazard identified and the “methods” it will use to prevent the incidence of workplace violence, and include a hierarchy of “controls” it will adhere to in doing so, including engineering controls and “work practice controls” (12 NYCRR 800.6 [g]). Finally, it must provide information and annual training to employees about the WVPP, establish and implement reporting systems for incidents of workplace violence, and provide for an annual review of those reports with the authorized employee representative to identify trends in the types of incidents reported and the “effectiveness of the mitigating actions taken” (12 NYCRR 800.6 [h]; 800.6 [i]; 800.6 [j]).

Part 800.6 defines “Workplace Violence” as “[a]ny physical assault or acts of aggressive behavior” occurring where a public employee performs any work-related duty in the course of his or her employment, including but not limited to “[a]n attempt or threat, whether verbal or physical, to inflict personal injury on an employee” (12 NYCRR 800.6 [d] [11] [i]).

Part 800.6 also defines a “serious violation” of the WVPP as including a failure to develop and “implement” a program (12 NYCRR 800.6 [d] [8]). An employee may file a complaint with the employer if he believes that a serious violation of the program exists, and after providing the employer a reasonable opportunity to correct it, file a complaint with the Commissioner if he believes that it remains (12 NYCRR 800.6 [j] [3]). The Commissioner is not limited to the allegations of the complaint, however, and may inspect the employer if she has reason to believe that a serious violation of Part 800.6 exists (12 NYCRR 800.6 [j] [4]), or on her own initiative if she believes that a violation of it has occurred (12 NYCRR 800.6 [j] [5]).³

C. RPC Failed to Properly Implement Its Workplace Violence Protection Program

On the record evidence, we find that RPC failed to implement its Workplace Violence Protection Program and the Commissioner’s determination finding that it was in compliance with the requirements of Part 800.6 is unreasonable.

³ Frederick’s complaint to DOL is a proper subject of our review, as expanding on the complaint and on her own initiative the Commissioner clearly found reason to believe that the employer may not properly investigate incidents of workplace violence. The Commissioner thereafter performed a facility wide inspection to determine whether it committed a violation of its WVPP (12 NYCRR 800.6 [j] [4]; 800.6 [j] [5]).

We credit Frederick's testimony that his supervisor made a "threat" to inflict personal injury on him as defined in Part 800.6, as it was credible and not rebutted by reliable evidence from the Commissioner. Frederick testified that in a meeting with Germain on August 8, 2015, he told his supervisor there was something out of order with a security measure they were discussing and Germain told him to "shut the fuck up or I will throw you out the window." According to Frederick, Germain made the remark to him in a very hostile manner and he perceived it as a threat to do him bodily harm. The remark was undisputedly accompanied with cursing and an angry and threatening tone, which RPC's own training guidelines describe as warning signs of workplace violence. DOL did not submit evidence rebutting Frederick's testimony, except for the employer's unsigned written log of steps it took in response to his complaint. The log is double hearsay and insufficient to overcome Frederick's direct and credible testimony about the incident.

We further credit Frederick's explanation that he did not immediately file a WV complaint over the incident for fear of retaliation, as he was up for several promotions at the time that his supervisor had full control over. We find that the delay does not undermine his credible perception of a "threat" as defined in the standard. Frederick testified that Germain told him that after an employee in the department filed a complaint against Germain, the co-worker was "never going to go anywhere" as long as Germain was there. Two other co-workers corroborated that Germain had full control over all promotions in the department. Investigator Reeves acknowledged that he believed the remark met the definition of a threat within the Part 800.6 standard and that Frederick clearly perceived it as such.

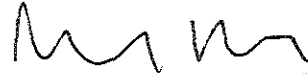
As the evidence establishes that a supervisor committed an "act" of workplace violence on an employee as defined in Part 800.6 and the employer's WVPP, it was required by Part 800.6 to implement its stated controls to address such act. The program identified workplace violence engaged in by one co-worker to another as one of the risks or hazards in the workplace and that the risk "always includes ... threats of violence." As a measure to address that risk or hazard, and to prevent the incidence of workplace violence, RPC committed to using administrative and work practice controls to do so, one being the enforcement of a "zero tolerance policy" to workplace violence incidents. Under that policy, RPC committed to address "any" incident of employee on employee workplace violence immediately through prompt "administrative action." Such corrective action is within RPC's discretion and may range from a review by Employee Health Services through and including recommendation for termination.

We find that RPC was therefore required by Part 800.6 to implement its WVPP by properly classifying the incident as an act of workplace violence, not simply as inappropriate or disrespectful behavior. It was then required to address such incident by appropriate administrative action, the particular action to be applied within its discretion. Only by properly classifying the act as one of workplace violence, not as something less, may the joint labor management committee required by Part 800.6 and the WVPP then review the incident for purposes of risk assessment and the effectiveness of the mitigating actions taken. Under the circumstances of this case, DOL erred by finding that the public employer's workplace violence program complied with the requirements set forth in 12 NYCRR 800.6 and by failing to issue an appropriate Notice of Violation.

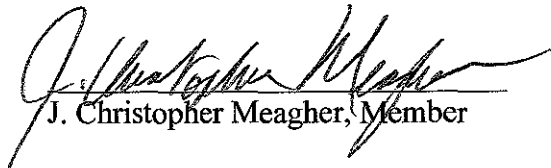
The determination under review is revoked.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The determination under Article 2 is revoked; and
2. The petition for review be, and the same hereby is, otherwise dismissed.



Molly Doherty, Chairperson



J. Christopher Meagher, Member

Michael A. Arcuri, Member



Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The determination under Article 2 is revoked; and
2. ~~The petition for review be, and the same hereby is, otherwise dismissed.~~

Molly Doherty, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Gloribelle J. Perez, Member

~~Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York,
on August 8, 2018.~~