

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CORY WRIGHT,

Petitioner,

To Review Under Section 101 of the Labor Law:  
A Determination Made Under Article 2 of the Labor  
Law, dated July 18, 2016,

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
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DOCKET NO. PES 16-013

RESOLUTION OF DECISION

**APPEARANCES**

*Cory Wright*, petitioner pro se.

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

**WITNESSES**

Petitioner Cory Wright and Anthony Bento, for petitioner.

Safety and Health Investigator Varghese Mathew, for respondent.

**WHEREAS:**

On August 22, 2016, petitioner Cory Wright (hereinafter "Wright") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law § 101 seeking review of a determination under Article 2 of the Labor Law issued by respondent Commissioner of Labor (hereinafter "Commissioner" or "DOL") on July 18, 2016. The Commissioner filed her answer on September 29, 2016.

Hearings were held on March 15, April 21, and July 21, 2017 in New York, New York before former 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 dismissed petitioner's complaint claiming that his employer, Medgar Evers College (hereinafter "the college") of the City University of New York (hereinafter "CUNY"), had discriminated against him in violation of the provisions of Labor Law

§ 27-a (10) by terminating him on February 10, 2015 from his position as Chief Administrative Superintendent of Buildings and Grounds.

The petition alleges that the determination was unreasonable because petitioner was terminated in retaliation for engaging in activities protected by the statute.

Based on the record evidence, we find that petitioner met his burden of proof to establish that the Commissioner's determination dismissing his complaint and declining to take further action was unreasonable because there was sufficient evidence that the public employer retaliated against petitioner after he complained about health and safety concerns, in violation of Labor Law § 27-a (10). We remand this matter to the Commissioner for further proceedings in accordance with this decision and, pursuant to Labor Law § 27-a (10) (b), to "request the attorney general to bring an action in supreme court against the person or persons alleged to have violated the provisions of this subdivision."

## **I. SUMMARY OF EVIDENCE**

### ***A. Introduction***

Wright was hired as Principal Custodial Supervisor for the college in December 2007 and promoted to Administrative Superintendent in January 2008. He was provisionally appointed as Chief Administrative Superintendent of Building and Grounds in December 2009. On February 10, 2015, he was terminated following an incident involving one of the boilers in a building on the campus.

Wright filed a complaint with the New York State Department of Labor's (hereinafter "DOL") Public Employee Safety and Health Bureau (hereinafter "PESH") on March 10, 2015 claiming that his termination was in retaliation for engaging in activities protected by the Public Employment Safety and Health Act (hereinafter "PESHA") (Labor Law § 27-a). After investigation, DOL dismissed his complaint and declined to take further action, finding that a prima facie case of retaliation could not be established and that his employer had proffered a legitimate, nondiscriminatory reason for the adverse action.

### ***B. Petitioner's Evidence***

#### ***1) Testimony of Petitioner Cory Wright***

##### ***a) Background***

Wright testified that his duties included oversight of the daily functioning of the physical plant and grounds of the college, including 80 staff employed in its Facilities department. These included approximately 15 to 20 licensed stationary engineers who operated equipment in the heating, ventilation, and air conditioning system (HVAC) and other ancillary equipment.

The engineers were normally supervised by a senior stationary engineer, except for periods when the senior position was vacant, and Wright filled in and supervised them until another acting

or permanent senior engineer was placed in the position. Wright estimated that oversight of the HVAC system occupied perhaps 10% of his time.

The Facilities department had an established line of supervision and reporting “chain of command” in which Wright reported to an Assistant Vice President (hereinafter “AVP”), who in turn reported to a Vice President (hereinafter “VP”). The VP then reported to a Senior Vice President (hereinafter “SVP”) and the SVP ultimately reported to the President of the college. During the relevant time, Wright’s AVP was Linda Corcoran (hereinafter “Corcoran”). David Taylor (hereinafter “Taylor”) was Wright’s VP until September 2014 when the SVP, Jerry Posman (hereinafter “Posman”), assumed VP Taylor’s duties and continued as SVP. Rudy Crew (hereinafter “Crew”) was the college President beginning in the summer 2013.

Wright held weekly meetings with his AVP and VP, or SVP after the VP left, and the department’s safety officer to report on all the critical Facilities issues on the campus, including health and safety issues. Any health and safety issues Wright reported were then relayed by his AVP to CUNY’s Department of Design and Construction Management to look into and where necessary the Dormitory Authority of the State of New York (hereinafter “DASNY”). DASNY was responsible for construction of new buildings on CUNY campuses and for oversight and management of those projects, and for the college’s buildings, grounds, and equipment.

From 2008 until 2010 a new Academic and Science building (hereinafter “AB1”) was constructed on campus. Wright testified that there were many deficiencies in the construction that contributed to ongoing problems with the boilers and other systems until at least his termination in February 2015. Wright testified that these problems raised serious health and safety concerns, which Wright told his AVP and VP about repeatedly.

***b) Petitioner’s Health and Safety Complaints and the Events Prior To His Termination***

In 2013, Wright’s staff discovered leaks in all three boilers in the building, just three years after they were installed. Wright believed this was due to premature corrosion of the pipes caused by deficiencies in the construction of the pipes and the water treatment system installed for the pipes as part of the new construction. Wright reported the premature corrosion and leaks to his AVP and VP and informed them of the safety concerns he had with respect to the pipes and boilers. CUNY performed a test on each boiler with a borescope that was inserted inside the boiler tubes to look for abnormalities. The tests revealed that the tubes were warped and had pitting and indentations from corrosion that resulted in reduced thermal transfer and leaks in the tubes that came through the front of the boilers and dripped onto the floor.<sup>1</sup> CUNY decided to re-tube each of the boilers and placed the project under the supervision of its safety officer Esther Hundley (hereinafter “Hundley”), who oversaw the water treatment performed by vendors and consultants hired by CUNY and coordinated inspections of the boilers and HVAC equipment for insurance companies representing DASNY. Wright estimated that he communicated with Hundley and dealt with the matters she had oversight of maybe one or two hours a week. These communications included Wright raising concerns about deficiencies with the boilers with Hundley.

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<sup>1</sup> Wright added that the re-tubing done to remedy the leaks also revealed that all 13 valves controlling water to the boilers were not “holding” because the “seats” in the valves had been rotted away by corrosion.

The re-tubing was performed in phases one boiler at a time from 2013 to late spring or early summer 2014. Wright testified that he emailed Hundley and requested the "protocols" for it so his staff would know the step-by-step sequence for the work and be assured that repair of this major equipment complied with standards. In light of the history described above where the safety of employees had been placed at risk from defective installation of equipment, Wright believed the information was necessary to protect their health and safety. Although Hundley claimed the procedures were given to him, Wright never received them and persisted with his requests until they were provided because "it was important that my staff knows what's going on in their place of work." The procedures she provided were copied from an earlier project description by a vendor that CUNY had stopped using.

Wright testified that by requesting that Hundley identify the sequence and protocols for the project he was holding her accountable for the work before any incident happened from it not being done properly. According to Wright, Hundley then began a "campaign" to discredit him as "a resistance" and a "problem" to Crew. Corcoran, Wright's immediate supervisor, got "heat" from Crew as a result. He was not aware at the time that Hundley sought to have Wright removed from his position. While Crew was receiving negative information about Wright from Hundley, Crew never once met with Wright to discuss it. Sometime in 2013 or 2014, Corcoran told him that she would handle all communications with Hundley in the future.

The re-tubing project was completed by early summer 2014. As there was no need for heating then, there was no testing process done to verify the boilers would function properly. CUNY went through an "undocumented process of clearing the equipment" and told the college that everything was okay with it. Within one month after Wright's staff started the boilers up in fall 2014, however, they were leaking again and not communicating with the master panel. Wright testified that he brought these issues and the ongoing deficiencies with the boilers to Hundley's attention through his AVP and VP and "because it was parallel to my complaints about her not having a process or protocol, she amped up her campaign."

On the evening of December 28, 2014, operating engineer Paul Point du Jour (hereinafter "Point du Jour") was on duty when he heard an irregularity with one of the boilers. The event was actually a "blow-back" or "puff back" occurring within the boiler where an excessive amount of pressure built up inside and triggered it to engage an emergency pressure release in the back and shut-off. Point du Jour notified Wright and the other engineers of the incident and Wright called him to assess the boiler's condition. Point du Jour told him that he had looked inside, did not find anything wrong, and would restart the boiler to see how it operated and watch it closely. Wright called the boiler manufacturer's representative, Miller Proctor Nickolas, Inc. (hereinafter "MPN"), to have them come out to assess the situation and make any necessary repairs. He also notified Corcoran of the incident and told her that Point du Jour had restarted the boiler and it was operating normally. At some point in time, Wright understood that Point du Jour reported the incident to the New York City Department of Buildings (hereinafter "DOB") but he did not tell Point du Jour to do so nor did Point du Jour tell Wright that he did so.

On December 30, 2014, DOB inspector Donovan Allen (hereinafter "Allen") called Wright to inform him that he would visit the campus that evening to take a look at the boiler. Allen met Wright at the building at 7:00 p.m. and asked Wright to shut the boiler down and drain it so he could return the next day to look at the internals and see if there was any damage. On December 31, 2014, Allen and two other DOB inspectors returned and found there was no internal damage



to the boiler. Rather than simply put the unit back on line, Allen put a cease to operate notice, informally known as a "red tag," on the boiler and worked with Wright and the manufacturer's representative over the next month to find out the cause of the malfunction.

Wright testified that, while he did not contact DOB himself, he welcomed the inspector's interest in getting to the bottom of the boiler problem and curing it, not just treating it. He saw him as someone with authority who agreed that there were unsafe conditions in the boiler room area and might be an asset in "explaining it to the CUNY administration to get these things done" so the safety issues might finally get resolved. Prior to this time, he had always kept his safety complaints internal within the college and CUNY, believing it was the best process to follow to resolve health and safety issues within the workplace.

In response to Allen's inquiries during his initial walk-around and follow-up inspections, Wright explained the history of the conditions his staff had been dealing with and demonstrated how the water treatment was corroding the boilers and piping and equipment from the inside out. Allen opened up the front of the boiler to examine the tubes and Wright took pictures of the interior that he submitted into evidence. Wright testified that the pictures showed calcium build-up from corrosion on the metal face sheet of the tubes and similar circles of calcium around the tube openings, typically indicating leaks. The boiler was re-tubed in spring 2014.

After Allen saw the corrosion in the boiler, he requested to see other examples of the corrosion and the equipment it affected. Wright showed him large "chiller" units in an adjoining room that used water to provide cooling for the air conditioning system. Allen took the front door off one of them and Wright took pictures of the interior that he testified showed calcium build-up from corrosion on the metal face sheet of the tubes and similar calcium circles around the tube openings. Wright discussed with Allen how the boiler and chillers were supplied water by the same large water line and because of the faulty water treatment "there's a consistency with the chillers corroding as well as the boiler tubes corroding and effectively the whole piping system is corroded ... and so, effectively all of the equipment in the boiler room will eventually be corroded." Wright also showed Allen a computer operated air conditioning unit showing corrosion "on all the equipment that carries water ... going from the inside out as a result of the poor water treatment that was being done." Pictures of these two pieces of equipment were submitted into evidence.

To further illustrate the extent of the corrosion, Wright showed Allen a gauge pipe in the main switchgear room where electrical power for the building was supplied that "snapped off" in December 2014 after "rotting from the inside out." The break resulted in water gushing out onto the main electrical breaker, flooding the room, and going down the hallway. Wright testified that he gave Allen pictures he took of the broken pipe at the time "as an example of the extent of the corrosion and how it's even reached the gauges through all the small piping as well as the major piping going to all the major equipment. It shows the totality of the destruction." The pictures were submitted into evidence.

Allen asked why the boiler room area was so cold. Wright showed him where DASNY had installed an oversized fresh air intake that exposed the boiler room to sub-freezing temperatures in the winter and froze boilers. The conditions undermined the life of the boilers, froze and broke pipes, valves, and pumps that did not have water moving through them, and disabled an emergency eye wash station. CUNY put a piece of plexiglass over the intake, but the measure failed to mitigate the hazard.

Wright testified that he met with Allen five or six times during January 2015 to discuss all of the safety issues that Wright believed were caused by these conditions, including MPN's discovery that during the re-tubing process "a lot of critical safety parts were taken off one boiler to put them onto another." Allen, Wright, and MPN agreed that this practice should be stopped and "you fix each individual boiler one at a time instead of taking parts off one to make something work, to see if it works, and now the first one is not operational." Wright ordered new safety parts for the boiler and kept Allen informed of the status of their procurement and of the repairs being done by MPN so the boiler could eventually be returned to service. Allen also asked Wright to have the boiler cleaned and after the cleaning found that there were holes in the welds of the tubes installed by CUNY's contractor during the re-tubing. Wright testified that if the welds were not done properly, this defect itself could have been responsible for the leaks.

In his weekly meetings and in phone calls and emails with AVP Corcoran and SVP Posman in January 2015, Wright informed them of all the discussions he had with Allen and of the procurement of parts and repairs being done to eventually bring the boiler back into service. He described the conditions he showed Allen to give them examples of how the water treatment was accelerating the existing corrosion in the piping system and causing all the equipment to prematurely rust and lose operative capabilities. He provided them with the pictures he took of the boiler and chiller to demonstrate the extent of the corrosion and "what the college could look forward to as far as equipment failure and the cost not only of maintaining the equipment, but the safety and insurance issues involved ...." Wright had previously, in December 2014, given AVP Corcoran and SVP Posman the pictures of the pipe that broke off and flooded the electrical room.

Wright testified that he did not know how Corcoran was communicating the information he was providing her about the boilers in December 2014 and January 2015 in the chain of command and she did not notify CUNY's administration of the incident until around February 2015. Corcoran scheduled a conference call with CUNY administration on February 3, 2015 so Wright could brief them on the incident, its remediation, the status of the boiler, and his involvement with the manufacturer's representative and DOB inspector.

Present on the call for the college were Wright, AVP Corcoran, SVP Posman, and safety officer Mohamed Bangura (hereinafter "Bangura"). Present for CUNY were the directors, project managers, and other representatives from its Department of Design and Construction Management. Also present were representatives from DASNY and the company that insured the boiler. Wright noted that the chronology of events listed in DOL's final investigative report indicates that AVP Corcoran and SVP Posman made a conference call to CUNY and insurance company representatives on January 3, 2015 and Hundley was on that call. He assumed the date was an error ("typo") because CUNY's administration indicated that it did not learn of the incident until on or around the beginning of February and the only conference call that he was aware of was held on February 3, 2015.

During the February 3, 2015 call, Wright described what had taken place in the incident and summarized all the discussions and things he and his staff had been doing with the DOB inspector throughout its investigation to address and remedy the problem. He explained that there had been a blow-back or puff-back incident with the boiler but when it happened his staff did not know why. He told them that by working in conjunction with Allen and MPN they had drained the boiler and found there was no internal damage. They had the boiler cleaned of soot and debris, found that certain safety parts had been removed by the CUNY contractor who did the re-tubing

in 2014, and ordered the necessary parts. Some parts had not yet been approved for purchase, and other parts were still on route and would be installed once they arrived so the boiler could eventually be returned to service after DOB did a re-inspection.

Wright testified that he went on to explain to them “what I believe to be the root cause of [the incident], why I believe every boiler has to be borescoped and checked for leaks because they’re all leaking, the[ir] status and condition, and how the incident is going to repeat itself because the root cause of the problem is not resolved.”

On February 10, 2015, one week after the conference call with the CUNY administration, Wright was called to a meeting with SVP Posman and Human Resources (hereinafter “HR”) director Tanya Isaacs (hereinafter “Isaacs”) and he was terminated. SVP Posman did not provide him with a reason for the termination other than it was “the President’s decision” and that Crew had “decided to go [in] another direction.”

*c) Petitioner’s Rebuttal to DOL’s Investigation*

Wright testified that DOL investigator Kwo Lam (hereinafter “Lam”) told him in June 2015 that the reason submitted by the employer for his termination was that he failed to report the boiler incident to Crew and Hundley. In November 2015, Lam asked Wright to consider withdrawing his complaint. After Wright declined, he did not hear from DOL again until he learned that DOL dismissed his complaint. He was never provided with a closing conference and an opportunity to rebut the reasons submitted by the employer for his termination prior to DOL’s final determination.

Responding to the allegation that he failed to report the incident to Crew, Wright testified that under the chain of command and reporting structure in the Facilities department he did not have a responsibility to report to the President of the college and never even had a one-to-one meeting with him: “That’s not how chain of command works. You don’t skip over supervisors. That’s insulting. So when we had meetings with Jerry Posman, Jerry was basically the filter to give the president the information he needed or didn’t need. I would have [two] very angry vice presidents if I stepped over them to speak to their boss.” Wright testified that SVP Posman had a duty to communicate information to Crew, was fully informed about the incident, and was not terminated. Wright added that he had no responsibility to report the incident to Hundley either, as she was not a supervisor he reported to. Additionally, after the earlier dispute with Hundley over the boiler re-tubing, Corcoran had directed him not to communicate with her any further.

Responding to the allegation that he and his staff did not properly “maintain” the boiler, Wright explained that his staff of operating engineers are licensed by DOB and are paid to operate equipment and make sure it is operating safely and not in need of repair. They are not boiler technicians, do not receive training in boiler maintenance, and do not perform boiler maintenance. The engineers document their daily observations in a log and boiler repairs are sub-contracted to outside vendors and contractors. Wright testified that he submitted this history to DOL, including the engineer logs and vendor and contractor proposals itemizing the damages and repairs that were made.

Wright noted that the welds in the boiler tubes installed by CUNY’s contractors during the re-tubing were not something that could have been “maintain[ed].” The welds were either done

properly or they were not. Since the holes found in the welds showed that they did not hold, this defect itself could have caused the leaks and the increase in steam and pressure that built up inside the boiler and resulted in the incident. According to Wright, the boilers were re-tubed again after his termination but only the tubes that had defects in their welds were replaced.

Responding to the allegation that he had poor management skills, Wright testified that his supervisors had always issued him positive performance evaluations, consistently rating his performance as satisfactory or outstanding in all areas. He did not have a single negative letter ever placed in his personnel file. In early 2014 he was given a \$13,000.00 raise based on his outstanding performance. He pointed to Corcoran's statement to DOL indicating that she did not finish a final evaluation for him because she felt pressured by Isaacs, the HR Director, to submit a negative review focusing on his alleged shortcomings.

Wright testified that allegations made by SVP Posman attributing significant overtime expenditures to him were false, as all overtime in the Facilities department was pre-approved by Corcoran. Staff overtime in 2014 was occasioned by a project he was put in charge of in which he successfully relocated the admissions office and six other departments in the college to new office space with no interim "swing space" to put them in during the renovations. The project was completed in January of 2015 with no disruption of the academic program.

Finally, Wright testified that Crew's allegation that he was responsible for an incident where a light bulb was out in a building elevator during a tour that Crew was giving the CUNY Chancellor was also false, as the incident happened two months after he was terminated.

## ***2) Testimony of Anthony Bento***

Anthony Bento (hereinafter "Bento") testified that he has worked in the mechanical and control fields of building construction for over 20 years and went through an apprenticeship program for heating and air conditioning systems. He worked as a mechanic on boilers, operated, serviced, and repaired them, and is thoroughly familiar with all aspects of their operation. From 2009 through 2012 Bento worked for Johnson Controls, a subcontractor for the mechanical contractor that worked on construction of the new AB1 building. During that time, he helped commission equipment and trained the engineers in operation of the boilers in AB1. From 2012 to 2016 he was employed at the college in its Facilities department and was responsible for oversight of temperature control in the college buildings.

Bento testified that in 2013 all three boilers in the building started leaking and were re-tubed, a \$2.1 million project. Within one month after they were put back in operation in 2014, they were leaking again. Bento clarified that the incident that happened at the end of 2014 was not an explosion or a puff-back, which is actually a delayed ignition. The incident was instead what is known as a "blow-back", which happened when the boiler had likely been turned off for a while and water dripped from leaking tubes and collected on the tube sheet below. After the boiler was turned on, hot flue gases burning in the fire tube of the boiler quickly heated up the water past its boiling point and built up steam that "popped" the rear door open to release the pressure. That was the sound the operator on duty heard.



### ***3) Petitioner's Evaluations***

On December 28, 2009, AVP Arthur A. Taylor, Sr. issued Wright a Probationary and Service Report rating his overall performance for the period from March of 2008 to December of 2009 as "outstanding" which is defined as "exceeds highly challenging performance expectations consistently".

On August 27, 2013, AVP Lisa Edwards issued Wright a Performance Evaluation for the three-year period from 2010 to 2013 listing his many challenges and accomplishments each year and rating his overall performance as "surpassing expectations which is defined as "work performance is consistently superior to the standards required for the position." The evaluation rated Wright's performance as satisfactory or surpassing expectations in 11 specific areas, including performance/technical competency, problem solving/decision-making, quality of work product, customer service, effort and initiative, department specific competency, strategic planning and organizing, communication, teamwork, inclusiveness-diversity, and leadership and staff development.

### ***C. Respondent's Evidence***

#### ***1) Testimony of Investigator Varghese Mathew***

Varghese Mathew (hereinafter "Mathew") testified that he started working for DOL as a Health and Safety Investigator in February of 2015. This was the first case he worked on and he trained with the investigator assigned to conduct the investigation, Kwo Lam. During the investigation he accompanied Lam on interviews of witnesses and took turns conducting those interviews and taking notes. After Lam left PESH, Mathew took over the case and submitted a final report to DOL counsel for a determination as to whether to pursue further action on Wright's behalf.

Mathew testified that while Wright's job required him to bring up issues with his employer concerning the operation of "the boilers, chillers, and so on", the very act of raising those issues was by definition protected activity under PESHA: "In the course of the seven years he had been doing that, he's been bringing up those protected activities all the time. Any time he brings up an issue with Linda Corcoran, he is doing it. It is a protected activity in that sense." Wright's verbal reports of safety issues and concerns to DOB inspector Allen were also protected activities, as well as Wright's participation in Allen's inspections of the boiler room and demonstrating to him conditions that raised safety issues. Additionally, Wright's email correspondence with Hundley concerning the boil-out procedures for the boiler re-tubing raised health and safety concerns protected by the Act.

Mathew testified that he conducted an interview of Hundley on August 12, 2015 where she stated that prior to the boiler incident she tried to have Wright terminated. Notes of the interview taken by Lam indicate Hundley stated that she "may have told" VP Taylor prior to the boiler incident that "they should get rid of" Cory Wright. Mathew added that email exchanges submitted into evidence by DOL corroborate that the college made an effort to remove him in March and April of 2014, immediately after the last correspondence between Hundley and Wright over procedures for the boiler re-tubing.



DOL submitted an email exchange between Hundley and Wright on March 11 and 12, 2014 in which she sent him the "cleaning/boil out procedures" for the AB1 boilers and he thanked her for providing them. Hundley then emailed VP Taylor and AVP Corcoran on March 12, 2014, enclosing the exchange and requesting that he be directed to cease "what amounts to nuisance correspondence" regarding the "MEC\_AB1 boil out procedures."

DOL submitted an email from HR director Isaacs to Crew and VP Taylor on March 24, 2014 where she asked them to advise her "what will be occurring" with Wright and informed them that as a provisional employee he could be "let go" at any time. On March 25, 2014, she informed them that, "[w]e are working to see how fast we can have a replacement for Cory. We will have a firm timeline for his exit by the week's end." On March 28, 2014, she informed Crew, VP Taylor and AVP Corcoran that HR was working with a two-month time frame to put Wright on notice of his termination and projected various methods to replace him. According to Mathew, this effort to terminate Wright was not carried through.

Mathew testified that after giving Crew notice that DOL wanted to interview Crew about Wright's employment, Crew claimed in the initial interview that he was with a person of high authority at an elevator bank on the campus that was not functional because it did not have lights. Crew was very angry that proper maintenance had not been done and asserted that Wright was responsible, citing the incident as one of his reasons for terminating him.

Mathew and Lam reviewed the timeline of Wright's employment and discovered that the elevator bank light incident took place well after his termination. DOL advised Crew's office of the discrepancy and they office told them that someone else was responsible. Crew then submitted a second statement in which he provided the same information as before but deleted the elevator bank light incident as a reason for the termination. The investigators took notes of the earlier interview but when the Hearing Officer requested their production, DOL's counsel stated that they were not in the investigative file.

Mathew acknowledged that AVP Corcoran advised DOL that she and Wright requested the HR Department to suspend if not terminate Christopher Curry (hereinafter "Curry"), the engineer who was on duty when the DOB placed "red tag" was removed from the boiler. DOL interviewed and received a written statement from HR Director Isaacs on January 13, 2016 in which she stated that, "I don't remember who the engineer was." DOL interviewed and received a written statement from Curry on February 2, 2016 stating that as of the date of the interview he had been employed at the college "for about 4 years." No evidence was submitted showing that he was suspended, terminated, or disciplined for the incident involving the removal of the "red tag."

Mathew acknowledged that he reviewed Wright's entire HR file and found no documents showing he was ever disciplined for any kind of behavior and found no documents reflecting any behavior that was "negative." He further acknowledged that Wright submitted engineer logs and other maintenance history to DOL that he sent to Hundley on an ongoing basis which identified leaks or other problems going on with the boilers.

At the conclusion of the investigation, Mathew submitted a "Final Report of Investigation" to DOL counsel recommending that Wright's complaint be dismissed. The report stated that although Wright raised concerns about the boilers, a legitimate protected activity was lacking because he was not the person who contacted the DOB about the boiler incident. While

management was aware that he raised concerns about the boilers through verbal and written complaints, employer knowledge of his protected activity was lacking because he did not make the President aware of the boiler incident or the violation issued by the DOB.

The report stated that although Wright's termination was an adverse action and there was temporal proximity between the boiler incident and the termination, there was no causal connection between any protected activity and that adverse action. Furthermore, while there was evidence of animus between Wright and Hundley, there was no animus between him and the President and there was no disparate treatment in the case because Wright and his supervisor were both terminated. Finally, the report stated that the employer provided legitimate, non-discriminatory responses to the allegations made by Wright in his complaint.

By letter dated July 18, 2016, Special Counsel for Enforcement Henry Dunsker advised Wright that DOL would take no further action on his behalf. The letter stated that the investigation was unable to find sufficient evidence conclusively establishing that he engaged in protected activity during his employment and "even if such activity were to have been found to exist, the Department found no evidence that linked the College's decision to terminate you to the alleged safety and health complaint filed during the period of your employment." Inasmuch as protected activity was not clearly established and the investigation revealed that the college proffered a legitimate non-discriminatory basis for the adverse employment action, the letter advised that DOL determined that a prima facie case of discrimination could not be established, and his complaint was dismissed.

## ***2) CUNY Position Statement***

In response to Wright's complaint forwarded to the college on June 5, 2015, the Office of General Counsel of CUNY stated in a letter to DOL on July 15, 2015 that Wright was not terminated because of any health and safety complaints he made but "because he failed to notify the College President and critical personnel at CUNY's central office that there had been an explosion inside one of the boilers at the College."

CUNY stated that Esther Hundley of CUNY's central office became aware of the boiler incident in mid-January 2015 and informed President Crew in early February. CUNY stated that Crew learned of the boiler incident from that communication with Hundley. "He felt [Wright and Corcoran's] lack of urgency about the situation indicated that they were incompetent to manage the physical plant, and he could not trust them." Crew directed SVP Posman to terminate Wright and AVP Corcoran for their lack of judgment regarding the situation.

Summarizing the reason for Wright's termination, CUNY stated that "he was terminated for failure to understand, and to make the proper parties aware of, the dangers posed by the College's boiler explosion." No other reasons were listed for the adverse action taken.

## ***3) Statement of Jerry Posman***

SVP Posman submitted a written statement on CUNY letterhead to DOL dated August 11, 2015. SVP Posman stated that he came to the college in March 2014 after serving at other colleges in the CUNY system. As SVP and Chief Operating Officer he reported directly to Crew.

In September 2014, Crew relieved VP Taylor of responsibility for oversight of the Facilities department and transferred those functions to SVP Posman. When he assumed responsibility for Facilities he discovered a number of ongoing problems including: “[s]tructural problems in all four campus building[s], especially regarding HVAC malfunctions; [s]ignificant overtime expenditures . . . ; [r]ampant absenteeism in all facilities areas . . . ; [c]ontinual lateness issues of all employees; [h]igh number of grievances by facilities staff; [v]iolence in the workplace incidents; [and] [l]ack of periodic evaluations of employees.”

SVP Posman stated that Crew “had strongly suggested” to Corcoran that she remove Wright. Corcoran wanted Wright to have another chance. “Crew reluctantly agreed to have Mr. Wright stay on.”

Posman met approximately every other week with Corcoran, Wright, and others. AVP Corcoran and Wright told SVP Posman about the “blow-back” incident with the boiler in mid-January of 2015. At that time, he also learned that the incident was reported to the DOB and that DOB put a “red tag” on the boiler, and that the “red tag” was removed by an MPN technician in the presence of one of the college engineers.

SVP Posman stated that “. . . Crew was informed by someone in the CUNY Central facilities office of the boiler incident – (1) the blowback condition was described as a series of electrical explosions, which could be dangerous; (2) the possibility that the university’s insurance concerning HVAC could be cancelled because of the Medgar boiler; (3) the call to the DOB involving the placement of the “red tag” contrary to rules and regulations.” Crew informed SVP Posman that “. . . this was another example of the failure of supervision in the facilities area, which appeared to illustrate the incompetence of leadership and staff. He felt that this reflected poorly on the entire College and all its activities.”

SVP Posman also stated that during the first week of February 2015, the CUNY Chancellor was visiting the school and an elevator was out of service because a lightbulb needed to be replaced. Because of that incident, Crew directed SVP Posman to remove Corcoran and Wright from their positions. SVP Posman terminated Wright on February 10, 2015 but asked Crew that Corcoran be given more time before she be removed.

#### ***4) Statement of Rudy Crew***

Crew submitted a written statement on the college’s letterhead to DOL dated October 7, 2015. In his written statement, Crew cited three reasons why he ordered Wright’s termination: (1) his “poor management skills”; (2) his “incompetence in managing College facilities,” and; (3) his “failure to inform [him] of the crisis with the boiler.”

Crew stated that Wright came to his attention in a negative way “early in 2014” when he received complaints from Corcoran and the human resources department that people under his supervision “felt” talked down to or otherwise threatened. Crew “was told” that Wright had anger management problems. Crew then held a meeting with Facilities employees, including Wright, where he advised them of his expectations including telling him about problems getting work done and treating each other respectfully. He also said managers have to try to solve problems with their employees

Crew stated that he continued to hear that Wright was having confrontations with employees and other problems. Despite having given Wright a raise and the meeting with facilities employees in his office, Crew wrote that Wright continued to be a problem. Crew told Corcoran he wanted Wright terminated. Corcoran asked him to keep Wright and he agreed as long as she supervised him. Crew then felt like Facilities employees hid problems from him and he started to distrust Wright and Corcoran.

Crew learned of the December 2014 boiler incident after he returned from a December 2014 vacation. Had he learned right when the incident occurred, Crew stated, he would have returned from his vacation to deal with it. Crew's statement says that he felt this was ". . . a continuation of the pattern of . . . Corcoran and Wright, not keeping him informed." Crew stated that "someone on that management team" should have told him about the explosion. Crew asserted that Wright should have at least texted or emailed him about the problem and that CUNY Central was involved and what the next steps were. He added, "I have always stressed to my managers that if a crisis hits in their area, they must call me."

Crew stated that he learned about the DOB "red tag" being removed from the boiler improperly and he was very angry that was done. He "held Mr. Wright accountable for this mistake, as it was his role to supervise the employees who worked with the boilers."

Crew stated that he met with the vendor called in by CUNY for the boiler because he did not trust his Facilities employees to tell him the truth. According to Crew, the vendor explained that there "was a buildup of material inside the boiler caused by negligent maintenance, which had caused the explosion." He asked the vendor to assess ". . . the capabilities of the facilities personnel, and they found significant problems at every level. In the opinion of the vendor, 'the boiler had had issues that should have been red-flagged all along, but had not under Mr. Wright's supervision.'"

Crew stated that Hundley told him that ". . . Wright had been writing negative emails and had posed many problems for her in her efforts to work with the College." Crew stated he asked SVP Posman to terminate Corcoran and Wright. At SVP Posman's request, he allowed Corcoran to remain for another month.

Crew's October 7, 2015 written statement was submitted to DOL after he was interviewed by DOL and during that interview attributed an incident with an elevator lightbulb to Wright as a reason for his termination even though the elevator lightbulb incident occurred after Wright had already be terminated.

##### ***5) Statement of Linda Corcoran***

Corcoran submitted a written statement to Lam and Mathew dated February 19, 2016. Corcoran stated that she began work as AVP of the Facilities department in October 2013 and Crew was already president then.

Corcoran reported on Facilities issues to VP Taylor and then to SVP Posman after Crew transferred oversight of the department to Posman in 2014. Corcoran and her direct reports, including Wright, met weekly with Taylor and later Posman to discuss any issues in Facilities.

While Corcoran did not have direct contact with Crew other than on a few occasions, her direct supervisors, Taylor and then Posman did have direct access to Crew.

Corcoran stated that she had a positive work relationship with Wright. Her only concerns were his communication and management style. She stated that after she addressed this with him, he "improved noticeably." Corcoran's predecessor had given Wright a very positive review the previous August and had recommended that his salary be increased commensurate with his duties and performance. Corcoran concurred with that evaluation, including the areas he needed to work on, communication and management style. In January 2014, she recommended that he be given a salary raise and Crew approved the salary increase effective January 14, 2014.

Corcoran stated that "sometime in the winter of 2013-14" she went to a meeting with Crew, Taylor and HR director Isaacs at which Crew was upset because he heard from Hundley at CUNY that Wright was sending her hostile emails. Hundley was asking Crew to terminate Wright and Crew wanted to do so, despite having recently approved a raise for Wright. Corcoran then directed Wright not to communicate directly with Hundley and, instead, Corcoran would handle those communications.

During "mid-2014" Corcoran learned that Crew was still unhappy with Wright and wanted him terminated. Corcoran requested a meeting with Crew to discuss this matter. During the meeting, she asked that Wright be able to stay on because she relied on his work and did not have other capable staff to assume his duties. Crew did not instruct Corcoran to terminate Wright during that meeting.

Corcoran valued Wright's work. She relied on him. He worked late and on weekends to supervise work projects. He was very involved in a major space reallocation project that was a priority of Crew's and that required skilled employees that Wright supervised to work a lot of overtime to complete the project without disruption to classes.

While Corcoran was on vacation during the 2014-2015 holiday break, she learned from Wright about the boiler incident. Wright was also on vacation then but came into work right away when he learned what had occurred. Wright assured Corcoran that the situation was under control. Corcoran believed Wright that the matter was under control and elected not to tell Posman until after the holiday break, in January 2015. Wright and Corcoran met with Posman together to explain what occurred with the boiler. Wright and Corcoran did not believe there was a life or safety issue because the boiler that had the incident was "red tagged" by DOB and there was another functioning boiler to provide heat to the campus. Wright had also arranged for the boiler manufacturer to repair the boiler such that DOB would clear the "red tag" and allow the boiler to operate again. However, the manufacturer, for some reason, removed the "red tag" themselves and did so while a college engineer, Curry, was present and supervising. Wright and Corcoran knew this was against protocol and asked the HR department to take action against the Curry.

Wright was in communication with DOB and its inspector, Allen, throughout the incident. Corcoran, Wright and Posman also communicated with CUNY Central as needed during this incident and the repair. Because the boilers had been problematic for the entire time that Corcoran worked at the college, she had repeatedly had conversations with Wright, Taylor or Posman and CUNY Central staff about the boiler problems.



Corcoran stated that on February 4, 2015, Hundley told Crew about the boiler incident. Crew's assistant contacted Corcoran and told her that Crew was very unhappy to not have heard about the incident prior to Hundley telling him. Under Posman's advice, Corcoran sent an email to Crew explaining the incident and why she felt like it was under control throughout. Crew called Corcoran that evening and he was very upset. He said Wright should be fired. Wright was fired soon thereafter while Corcoran was out on family medical leave. Posman told Corcoran that he fired Wright.

At the time that Wright was fired, Corcoran was working on Wright's evaluation. She was receiving pressure from HR director Isaacs to give Wright a negative evaluation. Corcoran did not agree. Corcoran was also told that Crew wanted to read her evaluation of Wright. She expressed her concern to Posman that she was being pressured to do a negative evaluation. Posman told her to be honest in her evaluation of Wright.

#### ***6) Statement of Mohamed Bangura***

Mohamed Bangura (hereinafter "Bangura") was interviewed and DOL created a statement based on that interview that Bangura signed on January 13, 2016. The statement says that Bangura had been employed at the college since 2002 as Director of Environmental Safety and Health in its Facilities department since 2009. Bangura was still employed by the college at the time that he signed his interview statement. His direct supervisor is Allen, who is the AVP. Previous to Allen, he reported to AVP Corcoran and prior to AVP Corcoran, he reported to AVP Lisa Edwards.

Bangura stated that he held regular meetings with his AVP and other staff in the department to report on Facilities issues. He reported any health or safety issues to his AVP. Describing the chain of command in the department, Bangura stated: "I am not aware of any management staff of being required or told that any issues on the campus should be reported to the college president. I think upper management does need to report it to the college president. Any issues that I would bring, I would bring [them] to my supervisor or through the president's committee board. We do have a chain of command which I follow."

Bangura's statement says that he was not aware of any boiler problems from Wright during the regular meetings with their AVP.

## **II. GOVERNING LAW**

### ***A. Standard of Review***

Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the Commissioner's determination dismissing his complaint and declining to take further action was "invalid or unreasonable" (Labor Law § 101 [3]; State Administrative Procedure Act § 306 [1]; Industrial Board of Appeals Rules of Practice and Procedure (hereinafter "Board Rules") [12 NYCRR] § 65.30). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

### ***B. PESHAs Prohibition of Employer Discrimination for Engaging in Protected Activities***

In 1980 the Legislature adopted the Public Employment Safety and Health Act, finding that “it is a basic right of all employees to work in an environment that is as free from hazards and risks to their safety as is practicable” and providing employees working in the public sector with the same or greater workplace protections as those provided workers in the private sector by the Occupational Safety and Health Act (“OSHA”) (29 USC § 651 et seq.) (L 1980, ch 729 § 1; Governor’s Mem approving L 1980, ch 729, 1980 NY Legis Ann at 285). Under PESHA, every public employer must provide employees with workplaces that are “free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protections to the lives, safety, and health of its employees” (general duty clause) and “comply with safety and health standards” promulgated under the statute (Labor Law §§ 27-a [3] [a] [1] and [2]).

To effectuate the goal of ensuring a safe and healthy work environment, PESHA encourages employees and their representatives to report workplace safety violations (Labor Law § 27-a [5] [a]) and makes it unlawful for an employer to discharge, discipline, or discriminate against any employee “because such employee has filed any complaint” or “because of the exercise by such employee on behalf of himself or others of any right afforded by this section.” (Labor Law § 27-a [10] [a]). PESHAs anti-retaliation provisions parallel the “whistleblower” protections that are provided to private sector employees by Section 11 (c) of OSHA (29 USC § 660 [c] [1]).<sup>2</sup> Federal regulations require that each state plan enforcing occupational safety and health standards include whistleblower protections that are at least as effective as those of Section 11 (c) to protect employees from discharge or discrimination (29 CFR 1977.23).

Employees who believe they have been unlawfully discharged or discriminated against in violation of PESHAs may file a complaint with the Commissioner within 30 days of the violation (Labor Law § 27-a [10] [b]). If upon investigation “the commissioner determines that the provisions of this subdivision have been violated, [she] 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.” (*id.*). If the Commissioner dismisses the complaint and declines to do so, the employee may seek review of that determination before the Board within 60 days of the determination (Labor Law § 27-a [6] [c]). The Board’s role in a case alleging discrimination under the statute is not to determine as a final matter that the public employer violated PESHAs, but to review whether the Commissioner’s determination that the employer did not and there was no basis to request the Attorney General to bring an action on the employee’s behalf was valid and reasonable (Labor Law §§ 27-a [6] [c], 101 [3]; *Matter of Janice Razzano*, Docket No. PES 11-009, at pp. 8-9 [December 14, 2012]).

Where the Board finds that the employee has met his burden of proof to show the Commissioner’s determination was invalid or unreasonable, it may remand the matter to the Commissioner “to 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” as required by the statute (*Matter of Adam Crown*, Docket No. PES 10-009, at p. 13 [October 11, 2011]; *Matter of Brian Colella*, Docket No. PES 05-004, at p. 5 [August 22, 2007]).

<sup>2</sup> Section 11 (c) of OSHA provides that “No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint ... or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act” (29 USC § 660 [c] [1]).

### ***C. Burden of Proof to Establish Employer Retaliation Under PESHHA***

To prevail on a claim of unlawful retaliation under Labor Law § 27-a (10), petitioner must establish that he was discharged or discriminated against under the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas v Green*, 411 US 792, 802-804 (1973) (*Kwan v Andalex Group, LLC*, 737 F3d 834, 843 [2d Cir 2013] [federal and state discrimination claims are reviewed under the burden-shifting framework of *McDonnell Douglas*]; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6 [May 3, 2017] [*McDonnell Douglas* burden shifting applies to PESHHA retaliation cases before the Board]).

Under the first step of the framework, petitioner must establish a prima facie case of retaliation by showing: (1) participation in a protected activity; (2) the employer's knowledge of that activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action (*Kwan*, 737 F3d at 844). The employee's "burden of proof as to this first step 'has been characterized as minimal and de minimis.'" (*id.* at 844 quoting *Jute v Hamilton Sunstrand Corp.*, 420 F3d 166, 173 [2d Cir 2005]) (internal quotation marks omitted). The showing by the employee thereby raises a rebuttable "presumption" of retaliation (*Tex. Dept. of Cmty. Affairs v Burdine*, 450 US 248, 254 [1981]).

Once the employee has met the "minimal" burden of establishing a prima facie case, the burden shifts to the employer to rebut the presumption by coming forward with evidence showing a legitimate, non-retaliatory reason for the adverse employment action (*Kwan*, 737 F3d at 845; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). The employer must make this showing through the introduction of "admissible evidence" and the explanation must be legally sufficient to justify a judgment for the employer (*Burdine*, 450 US at 255-256).

If the employer does so, the presumption of retaliation no longer exists and the employee must come forward with evidence that the employer's "proffered, non-retaliatory reason is a mere pretext for retaliation" (*Kwan*, 737 F3d at 845). "[R]ejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" (*St. Mary's Honor Ctr. v Hicks*, 509 US 502, 511 [1993]).

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

### ***A. Petitioner Engaged in Activities Protected by PESHHA***

In order to satisfy the protected activity prong of a prima facie case of retaliation, petitioner must demonstrate that he engaged in an activity protected by PESHHA. Respondent's determination states that petitioner failed to engage in protected activity as there was no documentation demonstrating that petitioner "filed a safety and health complaint with either the College, the New York City Department of Buildings, the federal Occupational Safety & Health Administration ("OSHA") or the New York State Department of Labor until March 10, 2015, after you were terminated by the College."

Wright testified that he and his staff discovered leaks in all three boilers in the building, which Wright believed were due to premature corrosion of the pipes caused by deficiencies in their construction and the water treatment system. Wright reported the premature corrosion and leaks to his AVP and VP and informed them of the safety concerns he had with respect to the pipes and boilers. Wright also raised concerns about deficiencies with the boilers with Hundley at CUNY.

The boilers were re-tubed to address these issues in the summer of 2014 and the boilers were brought back on line in the fall of 2014. On December 28, 2014, an incident occurred with one of the boilers causing an emergency pressure release and ultimately resulting in the boiler being “red tagged” by DOB and removed from operation. Wright participated in inspections and an investigation of the boiler room area at his workplace by the DOB. He made complaints to the inspector about hazards involving the boilers, equipment, water treatment, piping, and other conditions and communicated with him about those matters throughout the course of the investigation culminating in the February 2015 conference call with Corcoran, Posman, Bangura, and CUNY representatives, including Hundley. During the call Wright summarized all the discussions and things he and his staff had been doing with the DOB inspector throughout its investigation to address and remedy the problem. Wright testified that he went on to explain to them that “the incident is going to repeat itself because the root cause of the problem is not resolved.”

At hearing, respondent’s investigator, Mathew, acknowledged that these communications were protected activity when he testified that Wright’s oral and written complaints, communications, and concerns expressed to his supervisors, the DOB inspector, and Hundley about occupational health and safety matters were protected activities under PSHA. Petitioner thereby satisfied the protected activity prong of the prima facie case.

### ***B. The Employer Had Knowledge of Petitioner’s Protected Activities***

In order to satisfy the employer knowledge prong of a prima facie case of retaliation, petitioner need not prove that the individual decision-maker who took the adverse action had knowledge of his protected activities but simply that the employer had “general corporate knowledge” of that activity (*Kwan*, 737 F3d at 844 citing *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 116 [2d Cir 2000]; *Alston v New York City Transit Auth.*, 14 F Supp 2d 308, 311 [SDNY 1998]).

Petitioner established that during the period prior to his termination he participated in inspections and an investigation of the boiler room area at his workplace by the DOB. He made complaints to the inspector about hazards involving the boilers, equipment, water treatment, piping, and other conditions and communicated with him about those matters throughout the course of the investigation. Petitioner informed his supervisors of the discussions and activities he engaged in with the inspector at meetings in January 2015 and expressed complaints and concerns to them about those same hazards. In a conference call with CUNY’s managers and its safety officer, Hundley, on February 3, 2015, Wright informed them of his participation in the inspections and his cooperation with the inspector throughout the DOB’s investigation. He advised them of missing safety parts on the boilers and expressed complaints and concerns to them about the ongoing leaks in the boilers, what he believed was the root cause of the incident with the boiler, and the consequences to health and safety if that root cause was not resolved.



Petitioner's supervisors and CUNY's management personnel were agents of the employer, Medgar Evers College of CUNY. His complaints, communications and concerns expressed to them about health and safety matters and his participation in the investigation were sufficient to impute to the employer "general corporate knowledge" of his protected activities (*Kwan*, 737 F3d at 844 [complaints to officer of company sufficient to impute general corporate knowledge]). Petitioner thereby satisfied the knowledge prong of the prima facie case.

***C. The Adverse Action Taken Against Petitioner Was Caused by His Protected Activities***

It is undisputed that petitioner's "discharge" from his position on February 10, 2015 was an adverse action under PESH (Labor Law § 27-a [10] [a]). The remaining element of the prima facie case is whether there was a causal connection between petitioner's protected activities and that adverse action. Causation may be established indirectly by circumstantial evidence "showing that the protected activity was closely followed in time by the adverse action" (*Kwan*, 737 F3d at 845) (citations omitted).

As discussed above, on December 28, 2014, an incident occurred with one of the boilers. Bento credibly testified that the incident happened when the boiler had likely been turned off for a while and water dripped from leaking tubes and collected on the tube sheet below. When the boiler was turned on, hot flue gases in the fire tube of the boiler quickly heated up the water past its boiling point and built up steam pressure that "popped" a rear safety door to open and release the pressure. On December 30, 2014 DOB inspector Allen met Wright at the building and had the boiler drained so he could return the next day to see if there was any internal damage. When Allen returned, he found no internal damage but put a "red tag" cease to operate notice on the boiler so he could work with Wright and his staff to find out the cause of the malfunction. Wright informed Corcoran and Posman of the discussions and activities he engaged in with Allen during their weekly meetings in January 2015 and voiced complaints and concerns about the same hazards he had shown Allan. He provided them with pictures showing the extent of the corrosion and advised them that they should be proactive in addressing the water treatment and corrosion before the other boilers "have the same experience."

CUNY's administration and Hundley became aware of the boiler incident in mid-January 2015 and the DOB's investigation when it was served with the "red tag" notice and violation later in January or early February 2015. At CUNY's request, on February 3, 2015, a conference call was scheduled with the college for Wright to brief them on the incident, the status of the boiler, and Wright's involvement with the manufacturer's representative and DOB inspector. Wright informed those on the call that the incident "would repeat itself because the root cause is not resolved." On February 4, 2015, the very next day, Hundley met with Crew and discussed the boiler incident. That evening Crew called Corcoran and told her that Wright "should have been fired previously" and that changes would be made. On February 10, 2015, Wright was terminated.

We find that Wright's termination, within four to six weeks after his health and safety complaints to the DOB, within four to six weeks after his complaints to his supervisors, and within one week of his complaints and notice to Hundley of his participation and cooperation with the DOB's investigation, supports a reasonable inference of retaliation (*Kwan*, 737 F3d at 845 [three week period between complaint and adverse action sufficient to establish temporal proximity and causation] citing *Gorzynski v Jet Blue Airways Corp.*, 596 F3d 93, 110 [2d Cir 2010] ["Though



this Court has not drawn a bright line defining, for the purposes of a prima facie case, the outer limits beyond which a temporal relationship is too attenuated to establish causation, we have previously held that five months is not too long to find the causal relationship.”)).

We find that the temporal proximity of the adverse action taken against Wright in relation to his protected activities satisfied petitioner’s “minimal” burden to establish causation and a prima facie case.

***D. Respondent Failed to Prove that the Employer Had Legitimate, Nondiscriminatory Reasons for the Adverse Action***

Once the employee meets his burden to establish a prima facie case, the burden shifts to the employer to produce legitimate, nondiscriminatory reasons for the adverse action (*Burdine*, 450 US at 255). These reasons must be shown through the introduction of “admissible evidence” that frames the factual issue with sufficient clarity so that the employee will have “a full and fair opportunity to demonstrate pretext.” (*id.* at 255-256). The burden then shifts back to the employee to demonstrate pretext, which he may do by submitting additional evidence or by relying on his initial evidence “combined with effective cross-examination” of the employer that will suffice to discredit the employer’s explanation (*id.* at 255 n 10).

Respondent failed to demonstrate that the employer had legitimate, nondiscriminatory reasons for Wright’s termination in this case. The evidence respondent offered to show legitimate, nondiscriminatory reasons for Wright’s termination was hearsay evidence of little probative value because it is the only evidence offered to refute petitioner’s firsthand knowledge of events. Additionally, petitioner did not have a full and fair opportunity to prove pretext because respondent’s only evidence of legitimate, non-discriminatory reasons for Wright’s termination was in the form of written statements from witnesses that did not testify or hearsay testimony. Crew and Posman did not testify at hearing and their written statements are rife with vague and conclusory statements of opinion and multiple hearsay. Petitioner was not afforded a full opportunity to show pretext through cross-examination of those witnesses and the Board was not able to perform its duty of assessing their credibility through testimony so it could properly weigh that evidence to determine the ultimate question of discrimination. Although hearsay may be admissible in administrative hearings in many contexts, in this case such evidence was insufficient to meet the respondent’s burden under the legal framework applicable to the issue that must be decided (*id.* at 255-256; *Kwan*, 737 F3d at 843; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6; *Matter of Janice Razzano*, Docket No. PES 11-009, at p. 11). As such, the presumption of discrimination from petitioner’s prima facie case stands un-rebutted and the burden does not shift back to petitioners to prove pretext.

***F. Petitioner Met His Burden of Proof to Establish He Was Discriminated Against in Violation of PESH***

We find on the record evidence that petitioner met his burden of proof to establish a prima facie case that his employer discriminated against him in violation of Labor Law § 27-a (10) by terminating him from his position of Chief Administrative Superintendent of Buildings and Grounds on February 10, 2015. Respondent failed to meet its burden to prove that the employer

had legitimate, non-discriminatory reasons for that termination and petitioner thereby met his burden of proof to establish retaliation under the statute. DOL failed to rebut petitioner's proof with credible and reliable evidence and we find its determination dismissing his complaint and declining to take further action was therefore unreasonable.

The matter is remanded to the Commissioner for further proceedings in accordance with this decision and to "request the attorney general to bring an action in supreme court against the person or persons alleged to have violated the provisions of this section" as required by the statute (*Matter of Colella*, PES 05-004, at p. 5; *Matter of Crown*, PES 10-009, at p. 13).

**NOW, THEREFORE IT IS HEREBY RESOLVED THAT:**

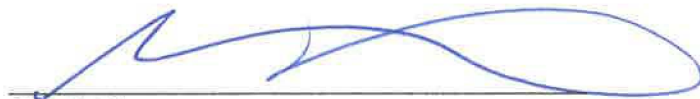
1. The petition for review filed herein is granted; and
2. This matter is remanded to the Commissioner for further proceedings in accordance with this decision and to "request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision" as required by Labor Law § 27-a (10).



Molly Doherty, Chairperson  
New York, New York

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Michael A. Arcuri, Member  
Utica, New York



Gloribelle J. Perez, Member  
New York, New York



Patricia Kakalec, Member  
New York, New York

Dated and signed by the Members  
of the Industrial Board of Appeals  
on September 11, 2019.



Najah Farley, Member  
New York, New York

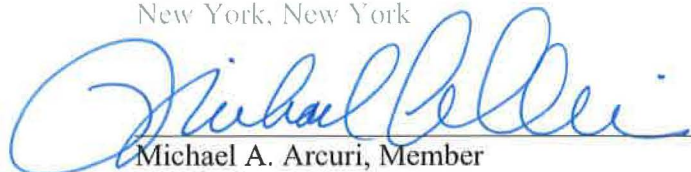
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Molly Doherty, Chairperson  
New York, New York

  
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Michael A. Arcuri, Member  
Utica, New York

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Gloribelle J. Perez, Member  
New York, New York

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Patricia Kakalec, Member  
New York, New York

Dated and signed by the Members  
of the Industrial Board of Appeals  
on September 11, 2019.

\_\_\_\_\_  
Najah Farley, Member  
New York, New York