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 New York State Labor Law a Determination made under Article 2 of the New York State Labor Law, dated September 14, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 17-010 RESOLUTION OF DECISION

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APPEARANCES

Joel W. Frederick, petitioner pro se.

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

WITNESSES

Joel W. Frederick, Charles Riley, and Chad McLaughlin, for petitioner.

WHEREAS:

On September 22, 2017, petitioner Joel W. Frederick (hereinafter "Frederick") 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 dated September 14, 2017. Respondent filed an answer on November 20, 2017. With permission of the Board, the petitioner amended his petition on September 10, 2018 and respondent filed an amended answer on October 19, 2018.

The determination under review dismissed Frederick's discrimination complaint in which he claimed that his public employer, Rochester Psychiatric Center (hereinafter "RPC"), had engaged in retaliatory discrimination in violation of Labor Law Article 2, Section 27-a (10) by removing Frederick from an overtime call list, confiscating certain keys essential to his job performance, and requesting that he be placed under a mental health arrest. Respondent's determination dismissed petitioner's retaliatory discrimination complaint stating that it was untimely because it was filed beyond the statutory 30-day filing deadline. Respondent additionally

determined that there was no causal connection between petitioner's protected activity and the adverse actions petitioner suffered, and that the petitioner's employer had legitimate non-discriminatory reasons for its actions.

The petition alleges that the determination was unreasonable because respondent failed to timely provide petitioner with a discrimination complaint form and that respondent's investigation and determination contain "several facts that aren't presented and dates and statements that are incorrect." Frederick's amended petition, filed September 10, 2018, states that Frederick's public employer, RPC, retaliated against him for filing a workplace violence report and that "[i]mmediately after words [sic] Ron Germain removed me from the overtime list for lock repairs and maintenance." The amended petition further alleges that on "March 1, 2016 I reported Joseph Coffee (Director of Facilities) & Ron Germain (Plant Superintendent) to [the] office of Mental Health Internal Affairs for bid rigging & falsifying building conditions to the Joint Commissions. March 2, the facility, Joseph Coffee & others requested a mental hygiene arrest maliciously[.]"

Upon notice to the parties a hearing was held before Matthew D. Robinson-Loffler, Associate Counsel to the Board, and the designated hearing officer in this matter, on February 6 and 28, 2019 in Rochester, New York. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

Based on the record evidence, we find that petitioner failed to meet his burden of proof to establish that petitioner's retaliatory discrimination complaint was filed prior to the expiration of the statutory 30-day filing deadline. Accordingly, the Board finds that it was reasonable for respondent to determine that Frederick's discrimination complaint was untimely (Labor Law § 27-a [10] [b]). Because the Board finds that respondent's determination that petitioner's complaint was untimely was reasonable, the Board need not decide the prima facie elements of retaliation in this matter.

SUMMARY OF EVIDENCE

A. Petitioner's Prior Workplace Violence Complaint

Frederick was also the petitioner in a prior case involving RPC's compliance with its Workplace Violence Protection Program (hereinafter "WPVP") (*Matter of Joel W. Frederick*, Board Docket No. PES 16-010 [August 8, 2018] (decision corrected and reissued [May 29, 2019])). Frederick filed a workplace violence complaint on February 8, 2016, which alleged that during an August 8, 2015 meeting with Ron Germain (hereinafter "Germain"), RPC Plant Superintendent, Germain verbally threatened to throw Frederick out a window. RPC did not classify the alleged verbal threat as an act of workplace violence, but rather deemed it inappropriate or disrespectful behavior. After investigation, respondent determined that RPC had complied with its WPVP and issued no violation. After hearing, the Board found that respondent's determination that RPC had complied with Department of Labor Regulation (12 NYCRR) § 800.6 was unreasonable because RPC failed to properly implement its WPVP by not classifying this alleged verbal threat as an act of workplace violence (*Matter of Joel W. Frederick*, Board Docket No. PES 16-010, at pp. 9-10).

B. Petitioner's Discrimination Complaint

On May 17, 2016, Frederick filed a PESH Discrimination Complaint Intake Form (hereinafter "discrimination complaint"), alleging that:

> "On March 1[,] 2016 I reported the Director Joseph Coffee & Ron Germain Plant Superintendent. The following day the facility had me mentally health arrestted [sic]. Sent in for 2 evaluations passed both Interogatted [sic] twice on matters that happened outside work. When returned to work I was taken off 4hr ot call in list for overtime on lock calls. from [sic] March 2, on. [sic] Master keys & other key essential to me doing my job taken away. While other General Mechanic Chad McLaughlin remains on the list and still has keys. All in retaliation."

C. Respondent's Determination

On or about September 14, 2017, respondent issued a determination dismissing petitioner's complaint, which claimed that RPC had engaged in retaliatory discrimination in violation of Labor Law Article 2, Section 27-a (10). Specifically, respondent determined, in relevant part, that petitioner's discrimination complaint was untimely as it was "was submitted on May 17, 2016, which is over 90 days past the February 7, 2016 [WPV] complaint and 75 days from the March 2, 2016 date alleging retaliation for the mental health arrest." Respondent further determined that petitioner's complaint must be "dismissed as there is no causal connection between your complaint and suspension, and your employer had legitimate non-discriminatory reasons for placing you on mental health arrest. Further, you exhibited behavior at work that warranted a mental health arrest and the Department finds that RPC had legitimate, non-discriminatory reasons for the actions it took."

D. Testimony and Documentary Evidence Entered at Hearing

1. Joel W. Frederick

Frederick was employed at RPC as a general mechanic performing carpentry, painting and general maintenance. Prior to 2016, Frederick was offered overtime locksmith assignments at RPC. During that time, each overtime locksmith assignment was offered to one of the three participants: (1) Frederick, (2) Chad McLaughlin, also a general mechanic (hereinafter "McLaughlin"), and (3) Tom Demarco, a locksmith (hereinafter "Demarco"). Overtime locksmith assignments were shared among these three individuals on a rotational basis, as demonstrated in the Overtime Roster – Maintenance /Locks (hereinafter "roster 1"). Roster 1, dated October 13, 2015, has McLaughlin's, Frederick's, and Demarco's name listed in a group together and with McLaughlin listed as 1 in sequence for service, Frederick as 2 in sequence for service and Demarco as 3 in sequence for service and instructions on the bottom of the document reading "1. Recall in order of sequence. 2. Give 10 minute grace period between calls. 3. Msg left does not designate as refusal."

Frederick testified that during a February 5, 2016 meeting, Germain made Demarco the primary responder for overtime locksmith assignments. This meant, according to Frederick, that

"if [Demarco] answered the call, he would get every single lock call instead of the three-man rotations." Frederick did not think that Germain had the authority to make changes to the overtime procedures because they were governed by union rules. After the meeting with Germain, Frederick testified that he went to speak with Joseph Coffee, Director of Administration (hereinafter "Coffee"). Frederick testified that his master key was taken away after he complained to Coffee that day. On March 1, 2016, Frederick reported Germain and Coffee to the Joint Commission on Accreditation for Healthcare Organizations (JCAHO) and the internal affairs office of the New York State Office of Mental Health for bid rigging. In response to these complaints, Frederick testified, RPC placed Frederick under a mental health arrest on March 2, 2016 when he was taken to a hospital emergency department. Frederick was discharged the same day without any follow-up instructions from the hospital. Despite being released, Frederick testified that he could not return to work because RPC requested that he be evaluated further and placed him on involuntary leave, again in retaliation. The evaluating psychiatrist determined on April 18, 2016 that Frederick could return to work. Frederick testified that RPC continued to delay his return to work until after a JCAHO site visit was completed. Frederick was permitted to return to work on May 17, 2016.

After filing a PESH retaliation complaint, Frederick received a letter from respondent along with a "NYS Department of Labor PESH Discrimination Questionnaire" (hereinafter "questionnaire"). The questionnaire is dated July 11, 2016, and contains the following responses, in part, to the following numbered questions:

Question: 8- What retaliatory action was taken against you?
Response: Loss of overtime, job duties revoked, master keys taken away impeding me from doing my job. Keys taken away to parts cabinets.

Question: 9- When did your employer take this action?
Response: 2/5/16

Question: 11- In your opinion, *why* did the employer take adverse actions against you?
Response: I reported Ron Germain Plant Sup. for workplace violence. Also reported Ron Germain & Joseph Coffee Director of Facilities Administration for bid rigging & corruption.

Question: 17 (e.) What was the result of your refusal to work?
Response: Taken off 4hr ot lock call in for repairs

Question: 17 (h.) When were you first told to do this assignment or that you would have to do it?
Response: 2/5/16 told need on 2/7/16 for a hr.

Question: 22 (a.) What was the work you refused to perform?
Response: Come in on Sunday for 1 hr. voluntary

Question: 22 (b.) When did you refuse the work?
Response: 2/5/16

Frederick entered two additional overtime rosters (hereinafter "roster 2" and "roster 3" respectively) to demonstrate that he was not removed from the overtime list until his return to

work on or about May 17, 2016. Both rosters are dated February 5, 2016. Roster 2 contains Frederick's name, but Demarco is now identified as the primary responder and Frederick is listed as 3 for sequence of service. Additionally, the instructions now read "1. Locksmith is first called to all lock issues. 2. Give 10 minute grace period between calls. 3. Msg left does not designate a refusal." Roster 3[1] also contains Frederick's name and the instructions are the same as those in roster 2. Frederick's name, however, is no longer grouped with Demarco and McLaughlin and he no longer has a sequence of service number.

Frederick denied previously testifying in a separate matter that on February 5, 2016 he was removed from the overtime list by Germain and no longer had access to his master keys because of Frederick's refusal to accept an overtime assignment. When provided with a transcript including this prior testimony, Frederick stated that there were many errors in the transcript.

Respondent, according to Frederick, had knowledge of his discrimination complaint prior to May 17, 2016 and had purposefully interfered with his ability to file a timely complaint. Frederick testified that he had contacted respondent on various occasions seeking to submit his discrimination complaint. In support, Frederick entered a letter, dated July 12, 2016, from respondent addressed to Frederick at an incorrect address, which, according to Frederick was done purposefully by respondent as the letter's signatory, Darren Mrak, was involved in Frederick's corresponding PESH workplace violence complaint. Frederick also entered an informal conference report in petitioner's workplace violence case, which stated that issues related to his discrimination complaint were being "investigated separately." The report is dated June 28, 2016.

2. Testimony of Chad McLaughlin

Chad McLaughlin, (hereinafter "McLaughlin") is employed at RPC, also as a general mechanic. During a routine meeting on February 5, 2016, Mclaughlin and Frederick were asked to come to RPC on Sunday, February 7, 2016, to perform "lock duty," which was a volunteer overtime request. McLaughlin and Frederick did not volunteer for the assignment. The same day, Frederick and McLaughlin had their master keys taken away. Additionally, the overtime procedure was changed so that Demarco, the locksmith, would be called first for all overtime locksmith assignments.

3. Testimony of Charles F. Riley, Senior Industrial Hygienist

Charles F. Riley (hereinafter "Riley") is an industrial hygienist and is a discrimination investigator in respondent's Division of Safety and Health (hereinafter "DOSH") Public Employee Safety and Health Bureau (hereinafter "PESH"). Riley receives and reviews discrimination complaints, determines if they are valid and conducts investigations when warranted. Generally, when performing an investigation, Riley collects information from both the complainant and the employer, shares that information with each party and allows them an opportunity to respond. Once that is done, an investigative conference is usually held. Lastly, he reviews the file with his supervisor and the case is finalized with a report and sent to respondent's counsel's office, which issues a determination on the complaint. The determination is sent to the parties as a letter.

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[1] Roster 3 is also dated February 5, 2016 but contains entries as late as May 1, 2016 which supports a finding that the document was created sometime after May 1, 2016.

Riley was officially assigned Frederick's case on May 17, 2016. Riley testified that Frederick, however, had made contact with Riley and Riley's supervisor on a few occasions prior to May 17, 2016. Frederick spoke with Riley twice in April, first to report that he had been mental health arrested and later to report that he had been placed on suspension. In both conversations, Riley asked Frederick if he had suffered a material loss. Frederick told Riley he had not, but that he would follow up if any accruals he was required to use while on suspension were not returned to Frederick. On May 17, 2016, Frederick contacted Riley's supervisor and reported that all of his accruals were returned, but that he had been removed from the overtime call list on March 2, 2016. Riley instructed Frederick to submit a discrimination complaint. Riley also testified that despite Frederick's report of retaliation being filed more than 30 days after the adverse action occurred, Riley was told by his supervisor to take the discrimination complaint and proceed with the investigation.

Riley later received a letter from Frederick, dated June 6, 2016, in which Frederick reiterated the allegations contained in his discrimination complaint. Riley sent Frederick a questionnaire about the retaliation to an incorrect address. Riley testified that this error would not have affected respondent determination that petitioner's discrimination complaint was untimely because the complaint was filed on May 17, 2016, prior to the questionnaire being mailed to the incorrect address.

Riley testified that RPC stated that Frederick and McLaughlin were asked to volunteer for an hour of overtime on Super Bowl Sunday and that Frederick and another employee refused the assignment, which angered Demarco, the locksmith. Frederick's supervisor then changed the overtime distribution procedure by reverting back to a previous method.

Riley was advised by RPC that the employer would not participate in the scheduled September 19, 2016 investigative conference due to pending litigation between RPC and Frederick. Riley also testified that investigative conferences are held in the normal course of his investigations, but that it is not required and are just "one way of doing an investigation."

On October 17, 2016, Frederick visited Riley to provide him with certain documentation and made a statement that Riley reduced to writing and placed in respondent's file. According to the record, Frederick's statement provides a similar account regarding the reasons and timing for Frederick's removal from the overtime list.

At the end of his investigation, Riley wrote in his report that Frederick's discrimination complaint was untimely because the alleged adverse action, Frederick's removal from the overtime list, occurred on February 5, 2016 and the discrimination complaint was submitted on May 17, 2016, which is beyond the 30-day deadline for accepting such complaints. Riley's recommendation was based on information gathered during the investigation, including statements provided by Frederick himself in the questionnaire. Riley further testified that Frederick's discrimination complaint would still have been untimely had the adverse action taken place on March 2, 2016, the date of Frederick's mental health arrest. Riley also wrote in his report that there was no causal connection between Frederick's protected activity and the adverse action because the adverse action occurred prior to Frederick's protected activity. Riley also wrote that RPC had a legitimate, non-discriminatory explanation for its actions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board Rules of Procedure and Practice (hereinafter "Board Rules") (12 NYCRR) § 65.39. As set out below, we find that pursuant to Labor Law § 101 (3) petitioner failed to meet his burden of proof that the Commissioner's determination was invalid or unreasonable.

STANDARD OF REVIEW

Orders issued by the Commissioner are presumed valid (Labor Law § 102). Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the Commissioner's determination dismissing his discrimination complaint and declining to take further action was "invalid or unreasonable" (Labor Law § 101 [3]; State Administrative Procedure Act § 306 [1]; Board Rules [12 NYCRR] § 65.30). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). That the record contains some evidence that may give rise to another conclusion is not sufficient for us to find that the Commissioner's determination was unreasonable or that her investigation was not appropriate. (*See Matter of Town of Lee*, Docket No. PES 14-014, at p. 5 [May 3, 2017]; *Matter of Shapiro*, Docket No. PES 09-001, at p. 7 [May 30, 2012].

GOVERNING LAW

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]). Labor Law § 27-a (10) (a) 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." Employees who believe they have been unlawfully discharged or discriminated against in violation of PESHA may, "within thirty days after such violation occurs, file a [discrimination] complaint with the commissioner alleging such discrimination" (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 discrimination complaint, 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 PESHA, but to review whether the Commissioner's determination that the employer did not and that 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] and 101 [3]; *Matter of Razzano*, Docket No. PES 11-009, at pp. 8-9 [December 14, 2009]).

It is undisputed that Frederick engaged in a protected activity by filing a workplace violence report on February 8, 2016, that Frederick's public employer had knowledge of the protected activity and that Frederick suffered an adverse action in the form of being removed from

the overtime list and being placed under a mental health arrest and placed on involuntary leave. The question before the Board is whether petitioner has provided sufficient evidence demonstrating that respondent's determination that Frederick's discrimination complaints were untimely; that there was no causal connection between his protected activity and his removal from the overtime list; and that his employer had legitimate non-discriminatory reasons for requesting Frederick be placed under a mental health arrest was invalid or unreasonable.

Petitioner's Discrimination Complaint Was Untimely

As discussed above, employees who believe they have been unlawfully discharged or discriminated against in violation of PESHA may file a complaint with the Commissioner within 30 days of the violation (Labor Law § 27-a [10] [b]). It is undisputed that Frederick was placed on involuntary leave, which began immediately following his mental health arrest on March 2, 2016. Frederick's May 17, 2016 PESH complaint that he was placed on mental health arrest in retaliation for filing a workplace violence report was not made to PESH until more than 30 days after the mental health arrest and involuntary leave occurred.

Frederick also complained on May 17, 2016 that he was removed from an overtime list in retaliation for filing a workplace violence report. Frederick testified that his removal from the overtime list and his loss of use of the master keys, undisputedly adverse actions, occurred upon his return to work on or about May 17, 2016, the same date as his complaint to respondent. While Frederick's retaliation complaint, Frederick's letter to RPC's Director of Human Resources, and Frederick's June 6, 2016 letter to respondent also indicate that he was removed from the overtime list on May 17, 2016, they are contradicted by other statements made by Frederick including his testimony before the Board in his corresponding workplace violence matter, responses to questions asked in the questionnaire as well as statements made in his petition.

In Frederick's workplace violence matter before the Board, Frederick testified that:

> "[I]t was February 5th, [Ron Germain] comes down and says he needed somebody to work for an hour Sunday. Me and another guy didn't volunteer quick enough. So he told us we're off the work list for overtime, and four hour call-in for locks, turn in your master keys, you no longer have master keys to get around the facility and so forth in relation for us not going in the hour. So at this point I was little upset and I said I was going to talk to Mr. Coffey about this, the director of administration" (*Matter of Joel W. Frederick*, Board Docket No. PES 16-010, tr at 16-17).

Frederick's prior sworn account regarding the timing of the adverse action, removal from the overtime list and loss of master keys, is consistent with McLaughlin's testimony in the present matter. McLaughlin testified, that on February 5, 2016, Mclaughlin and Frederick said they would not volunteer for overtime lock duty on February 7, 2016 and on that same day they were both required to surrender their master keys and were no longer given opportunities for overtime assignments.

Frederick's argument that he was not "removed" from the overtime list until sometime after May 1, 2016, as evidenced by the three rosters is not persuasive as those rosters, which

contain errors, are insufficient to overcome the other sworn testimony and documentary evidence that all indicate that Frederick knew that he was removed from the overtime list and had his master keys taken away on or about February 5, 2016. Frederick's own testimony at hearing demonstrates that Frederick understood that his opportunity to participate in lock duty overtime was materially altered by Germain when Germain made Demarco the primary responder because it meant, according to Frederick, that "if [the Locksmith] answered the call, he would get every single lock call instead of the three-man rotations." This account is consistent with statements Frederick made to respondent in his questionnaire, which identifies February 5, 2016 as the day Frederick was removed from the overtime list. Lastly, Fredrick's amended petition supports a finding that Frederick was removed from the overtime list in early February. The amended petition unequivocally states that "*[i]mmediately* after [reporting Germain for workplace violence] Ron Germain removed me from the overtime list for lock repairs and maintenance" (emphasis added). It is undisputed that Frederick's workplace violence complaint was filed on February 8, 2016. Frederick's complaint that he was removed from the overtime list and had his master keys taken away in retaliation for his workplace violence complaint was not made to PESH until more than 30 days after the change in access to overtime hours and the master keys were taken away.

While, Frederick testified that he contacted respondent repeatedly prior to May 17, 2016 regarding alleged retaliation, he failed to offer other evidence to support that testimony and to prove a date that a PESH retaliation complaint was filed other than May 17, 2016. Frederick's assertions that respondent interfered with his attempts to file a complaint are unfounded as his evidence to support such an assertion all post-date May 17, 2016, such as the July 12, 2016 letter mailed to the wrong address for Frederick.

The Board finds it was reasonable for respondent to determine that the adverse actions suffered by Frederick occurred on February 5, 2016 (overtime and loss of master keys) and March 2, 2016 (mental health arrest), and thus, Frederick's retaliation complaint filed with PESH on May 17, 2016 was untimely. Because the Board determined that the respondent's finding that petitioner's complaint was untimely was reasonable, the Board need not decide the prima facie elements of retaliation in this matter.

The Board finds that it was reasonable for respondent to determine that Frederick's discrimination complaint was untimely (Labor Law § 27-a [10] [b]) and, thus, denies the petition.

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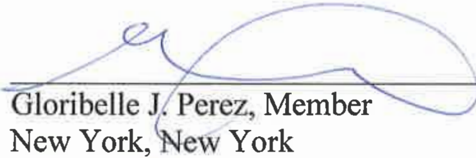
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

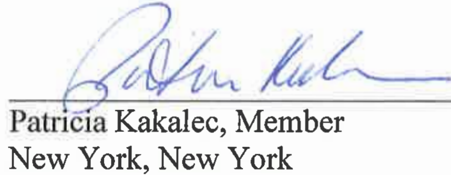
1. The petition for review is hereby denied.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York



Gloribelle J. Perez, Member
New York, New York



Patricia Kakalec, Member
New York, New York

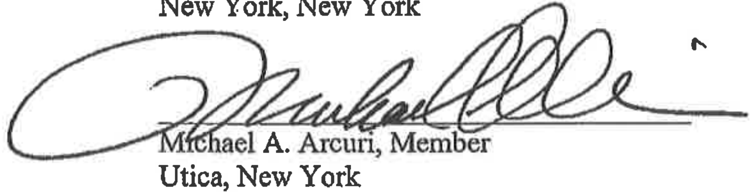
Najah Farley, Member
New York, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on October 23, 2019.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review is hereby denied.

Molly Doherty, Chairperson
New York, New York



Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
New York, New York

Najah Farley, Member
New York, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on October 23, 2019.