STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NANCY J. KANE, Petitioner, To Review Under Section 101 of the Labor Law: A Final Determination dated March 7, 2019, - against - THE COMMISSIONER OF LABOR, Respondent,	DOCKET NO. PES 19-004 RESOLUTION OF DECISION

APPEARANCES

Nancy Kane, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel) for respondent.[1]

WITNESSES

Nancy Kane, John Fracchia, Michael Blakely-Armitage, Senior Industrial Hygienist Andrew Cody, Richard Dugan, and Assistant Program Manager Darren Mrak.

WHEREAS:

On April 19, 2019, Nancy J. Kane (hereinafter "Kane") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law §§ 27-a (10) and 101 to review a determination issued by the Commissioner of Labor (hereinafter "respondent," "Commissioner," or "DOL") dismissing her complaint of unlawful retaliation and discrimination by her public employer, the City of Ithaca Youth Bureau (hereinafter "Youth Bureau"). The Commissioner filed her answer to the petition on June 3, 2019.

A hearing was held on October 29, 2019, in Syracuse, New York before Associate Counsel Matthew Robinson-Loffler, the designated Hearing Officer in this proceeding. Each party was

[1] Pico P. Ben-Amotz was respondent's General Counsel at the time of the hearing. Jill Archambault is respondent's Acting General Counsel at the time of decision.

afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The determination that is under review dismissed petitioner's complaint that the Youth Bureau discriminated against petitioner in violation of Labor Law § 27-a (10) by terminating her after she requested safety training and personal protective equipment. The determination stated that petitioner was not terminated as a result of her protected activity and that the Youth Bureau had legitimate, non-discriminatory reasons for terminating her employment. Kane asserted in her petition that the respondent incorrectly determined that her complaint should be dismissed because the Youth Bureau terminated her position in retaliation for her safety and health complaints.

The Board finds that the petitioner did not meet her burden of proof to establish that the respondent's determination dismissing her complaint was invalid or unreasonable.

SUMMARY OF EVIDENCE

Prior to the first witness being called to provide testimony, the parties agreed that the elements of retaliation – that petitioner engaged in protected activity, that petitioner's employer terminated her, and that the termination occurred in close proximity to her protected activity, evidencing a causal connection – had been met in this case; and, the only issues to be determined by the Board are whether the Youth Bureau had a legitimate non-discriminatory reason for terminating petitioner's employment and whether such reason was in fact pretextual. Thus, the parties agreed to limit testimony to these issues.

Petitioner Nancy Kane's[2] *Documentary Evidence*

Kane was hired by the Youth Bureau as a part-time Recreation Program Coordinator in March 2016 and she became a full-time employee in May 2016. Kane's employment was terminated on October 28, 2016 and Kane was given no reason for her termination at the time that it occurred. Kane was on probation at the time she was terminated because as a new employee, she had a one-year probation.

Kane made a complaint to the DOL's Public Employee Safety and Health Bureau (hereinafter "PESH") in November 2016, which was entered into evidence. Kane stated that she received the determination on her PESH complaint in 2019. The determination letter is dated March 7, 2019 and was entered into evidence. The determination letter specifically states,

> ". . . you were not terminated as the result of your safety and health protected activity, but because of multiple documented incidents of substandard performance which began shortly after your assignment to the position on 5/16/2016. Your employer cited incidents including, but not limited to: late arrival/failure to appear for meetings and work assignments, failure to complete critical tasks such as event registration and grant applications, an incident of sleeping during work hours, and cash handling concerns. All of the

[2] Petitioner elected not to provide testimony.

> incidents are shown to have had an adverse effect on Youth Bureau programs."

Photographs taken by Kane of garbage at a park where she worked were entered into evidence, as were a photograph of the women's restroom at the same park and a photograph of the cleaning supply closet at the same park. Printed text message exchanges between Kane and Jim D'Alterio, an employee of the park where the photographs of the garbage were taken, were also offered into evidence. Neither party to those text message gave testimony. Kane also offered into evidence DOL records, including email correspondence between PESH employees, case contact logs, the intake documents for Kane's complaint, and notes taken by the PESH investigator that was assigned to the case. All of that evidence was entered into evidence. Kane did not testify about any of the documents that she offered into evidence, but the respondent consented to their admission.

Testimony of John Fracchia

John Fracchia (hereinafter "Fracchia") is Kane's husband and he volunteered at the Youth Bureau, helping with a basketball tournament and the fall soccer program, along with other activities. Fracchia described an occurrence during which he helped Kane remove trash from Cass Park. He testified that the photographs entered into evidence showed the garbage that he and Kane encountered on the day that they cleaned it up.

Fracchia testified that Kane has anxiety, depression, and sleep apnea and that when she is under stress, her sleep is disrupted. Fracchia further testified that he also has sleep apnea and it can cause "tiredness almost to the point of almost the state of narcolepsy." Fracchia testified that Kane's sleep was disrupted when she felt very anxious about things as work such as being reprimanded for letting Fracchia help her clean up trash or for asking for training from employees from City Hall. Fracchia testified that Kane had an incident in which she slept during work hours not too long before she was terminated and, thus, could not timely retrieve the Youth Bureau's cash box for an event the next day. Fracchia testified that Kane used her own money in place of the cash box at the event. Fracchia also testified that Kane used her own money to pay for a training related to her job with the Youth Bureau and to purchase supplies for the Stewart Park summer camp.

Fracchia testified that he was not present during any of the meetings or substantive conversations that Kane had with her supervisors at the Youth Bureau regarding her job performance. He was "not originally part of the communication chain" between Kane and her supervisors, learning about them from Kane and from seeing written documentation.

Testimony of Michael Blakely-Armitage

Michael Blakely-Armitage (hereinafter "Blakely-Armitage") is the Recreation Program Coordinator for the City of Ithaca. During the relevant period, Blakely-Armitage was the Recreation Program Administrator and supervised Kane. Blakely-Armitage testified that a civil service job description for Kane's job was presented to her prior to her being hired. This job description was entered into evidence. He further testified that, as evidenced in a May 9, 2016 letter entered into evidence, Kane was hired as a probationary employee. Blakely-Armitage tried to meet with Kane weekly in May, June, September, and October 2016 to discuss her performance

since she was on probation. The meetings were suspended during the summer when everyone was busy running the camps, but Blakely-Armitage did discuss Kane's job performance with her during the summer. Blakely-Armitage testified that he scheduled the meetings weekly; but Kane did not always attend. When Kane missed meetings, she would not tell him that she would not attend, and he would have to follow-up with her to find out why she missed the meeting. Blakely-Armitage testified that he met with Kane at least four times to discuss his concerns with her job performance.

Blakely-Armitage testified that Kane was terminated and under the advice of Human Resources, "[i]n matters of termination, we are advised . . . not to give any reasoning." Blakely-Armitage also testified that Kane was not a permanent employee and her work behavior and abilities to do her job were such that they decided not to make her a permanent employee and instead to terminate her. He testified that he did not personally decide to terminate Kane, but he participated in the decision with Liz Klohmann[3], the Director of the Youth Bureau. Blakely-Armitage testified regarding Kane's employment, ". . . we had regular kind of check-in meetings about work performance and just general job duties and one of those were not necessarily taken very seriously. You are . . . routinely late or would not show up for them. . .. [Y]ou were asked to pick up a cash bank and help load a van by a certain time period of day and you failed to show up for those things . . . [a]nd that put an undue load on co-workers at that time to get ready." He testified that the performance issues that the Youth Bureau had with petitioner were discussed during the weekly meetings both before and after petitioner requested additional training. Blakely-Armitage further testified that they thought Kane's experience in theater would improve their theater programming, but they did not see any improvement and one of the theater classes was cancelled. Blakely-Armitage acknowledged that classes had been cancelled in the past in theater and other areas prior to Kane working there. He also testified that no other probationary employees had been terminated because of cancelled classes. Blakely-Armitage testified that they also expected her to submit a grant application, but it was not completed, thus they lost funding and had to cancel a long-standing theater activity that had been offered to the community. He further testified that Kane did not stay within the small budget of the Youth Bureau and used her personal funds to buy items such as cheerleading trophies without approval. Blakely-Armitage also testified that Kane did not make sure that the first aid kit was appropriately stocked. He testified that Kane made decisions that she did not have authority to make.

Blakely-Armitage testified that he was responsible for putting on a cross-country race, and it is an all hands-on deck event so everyone is expected to help. He testified that Kane did not show up to help when she was supposed to. Kane told him that she had fallen asleep in her car while doing a mindfulness exercise. Blakely-Armitage also testified that Kane was not present on the first day of the day camp program, where she should have been helping with the camper check-in. Kane was responsible for making sure all the part-time camp employees were present, doing what they were supposed to do, and had what they needed. It was also important for parents and campers to meet Kane, who was the year-round employee running the camp programming and the camp logistics, whereas, the camp directors were seasonal employees. Blakely-Armitage testified that Kane was swimming laps at a pool at another park at the time that she should have been at the day camp check-in. He testified that Kane did show up on the first day of camp eventually but not until later in the morning. Blakely-Armitage recalled that when he asked Kane why she wasn't at the day camp check-in, she told him that she did not realize it was one of her job responsibilities.

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[3] The documentary evidence includes "Liz Vance" as the Director of the Youth Bureau, but Blakely-Armitage referred to her as "Liz Klohmann" in his testimony. The spelling of "Klohmann" is based on what was included in the transcript during his testimony. The name was also spelled "Liz Cloman" in the transcript.

Blakely-Armitage testified that Kane's request to be trained on trash pick-up at a park was acceptable and he did not have any issues with her seeking training on that. He testified that all recreation programs are told that the program is responsible for any waste that it creates at a park, which does not include garbage left by others outside of the program. He testified that a program is responsible for cleaning up garbage and recycling created by concession stands at one of its programs. He also stated that the program coordinator would be responsible for providing personal protective equipment to do the clean-up, such as gloves that could be found in the first aid kit or at a store.

Blakely-Armitage testified that he did not tell Kane not to speak with Ithaca's health and safety coordinator. He also testified that he did not find a personal protective equipment request from Kane in his mailbox until the afternoon after Kane was terminated but he acknowledged that it could have been there prior to Kane's termination.

Blakely-Armitage testified that Kane did not tell him that she had a disability.

Testimony of Senior Industrial Hygienist Andrew Cody

Andrew Cody (hereinafter "Cody") is a senior industrial hygienist with PESH. Cody testified that he became involved in the investigation of Kane's discrimination complaint the same day or within a day or two of PESH receiving the complaint. Cody testified that typically after he writes up a final report of the investigation, he submits it to the program manager for his review. The program manager would ask questions for clarification and go over all of Cody's work and they would together make changes to the final report. Cody testified that the report typically is not sent to the complainant, rather a determination letter is sent. Cody testified that he did not interview potential witnesses that he identified in his report because Kane corroborated what the employer told him. Cody testified that for the investigation in this matter, he communicated with Kane and with the City of Ithaca's attorney. Cody later testified that he spoke to Kane on the phone during which she corroborated what the employer told him prior to him providing Kane with a copy of the employer's response to PESH. Cody testified that typically he would tell a complainant over the phone what the employer's response is and tell them they can respond in writing if they want to but that testimony was not specific as to what he told Kane in this matter. Cody did testify that after he spoke to Kane about the employer's response, she sent him a copy of a complaint that she filed with the federal Equal Employment Opportunity Commission (hereinafter "EEOC"). The EEOC complaint was admitted into evidence. Cody testified that the investigative file does not contain any record that Kane responded to the employer's response in any way other than what she said during the phone call with Cody. Cody testified that a closing conference in a PESH discrimination case can consist of a phone call with a complainant.

Cody testified that he created the final report of the investigation and it was admitted into evidence. The report states that Cody recommends that the complaint be dismissed because there is no evidence of a nexus between Kane's protected activity and her termination. More specifically, Cody wrote in the report that Kane was terminated for

> ". . . a number of reasons which the Complainant has not contested. The incidents involving the Complainant falling asleep during her shift on 10/21/2016 and the 'change bank' for the race event were much closer in temporal proximity to the Complainant's

> termination. The complainant acknowledged that these issues were a primary focus of the meetings on October 25-26, 2016 that occurred shortly before her termination. Other serious instances of substandard performance, documented by the Respondent, occurred well in advance of the Complainant's protected activity and shortly after her assignment to the position."

Testimony of Richard Dugan

Richard Dugan (hereinafter "Dugan") testified that his participation in the underlying PESH investigation was limited to signing a couple of letters issued by his office because he had not taken the whistleblower training course until after the investigation was complete.

Testimony of Assistant Program Manager Darren Mrak

Darren Mrak (hereinafter "Mrak") testified that he is an assistant program manager for PESH and at the time of his testimony, he had been in that position for about three years. Mrak testified that his role in the underlying investigation was to review Cody's report, make suggestions for edits and then to send it to counsel's office for their review. Mrak testified that sometimes his office will make a determination without counsel's office's review. Mrak testified that in this matter, the report was submitted to counsel's office in July 2017 but Mrak's office had not heard back so in February 2019, he helped Cody edit the report on the investigation again. Mrak then issued a determination in March 2019. Mrak testified that equal consideration of both the complainant's position and the employer's position is given in discrimination investigations. He testified that each party's position is shared with the other party so that they can respond.

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 her 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]).

PESHA's Prohibition of Employer Discrimination for Engaging in Protected Activities

Under the Public Employees Safety and Health Act (hereinafter "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]). 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]).

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]). 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, 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], 101 [3]; *Matter of Jay Gusler*, Docket No. PES 10-002, at pp. 2-3 [February 6, 2013]; *Matter of Mateusz J. Nadolecki*, Docket No. PES 07-008, at p. 7 [May 20, 2009]).

Burden of Proof to Establish Employer Retaliation Under PESHA

To prevail on a claim of unlawful retaliation under Labor Law § 27-a (10), petitioner must establish that she 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 PESHA retaliation cases before the Board]). 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). In this matter, the parties agreed that a prima facie case of retaliation was established.

Once the employee meets her burden to establish a prima facie case, the burden shifts to the employer to produce legitimate, nondiscriminatory reasons for the adverse action (*Kwan*, 737 F3d at 845; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 7). 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).

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. Petitioner did not meet her burden to prove that the respondent's determination was invalid or unreasonable.

During the investigation and at hearing, the employer stated that petitioner was terminated during a probationary period due to poor job performance, including missing meetings and not attending to some of her required responsibilities. Blakely-Armitage credibly testified that he spoke with Kane about her performance at least four times and that he had weekly meetings

scheduled with her during the months of May, June, September and October 2016 but Kane was "routinely" late or missed those meetings without giving notice. Blakely-Armitage also testified that he spoke with petitioner about her job performance during the summer when he did not have weekly meetings scheduled with her. Blakely-Armitage described other instances in which Kane did not do what was expected of her, such as missing the first day of a summer camp over which she had oversight, not showing up to help out with a cross-country race and failing to timely complete and submit a grant application. Blakely-Armitage's unrefuted testimony was that on the day when Kane was supposed to be present on the first day of a summer camp, he found her swimming laps at another park. Petitioner did not dispute this. Blakely-Armitage also testified that Kane did not expand the theater programming of the Youth Bureau, as they hoped that she would and that she missed a grant deadline, causing the Youth Bureau to lose some funding that they had previously received. Petitioner also did not refute this. Blakely-Armitage provided specific examples of petitioner's poor performance that were consistent with the documents sent to PESH during the investigation. Given that petitioner was a probationary employee who had only been in her full-time employment position for less than six months at the time that she was terminated, we find that the Youth Bureau sufficiently demonstrated that it had a legitimate, non-retaliatory reason for terminating petitioner.

Petitioner did not offer sufficient evidence to show that the reasons the employer proffered to respondent for her termination were pretext for retaliation. Blakely-Armitage testified that he had no objection to petitioner receiving additional training for trash removal at the park, while also testifying that he had no expectation that petitioner was responsible for removing any trash that was not created by a program she had oversight of. He testified that he never told petitioner she should not speak to Ithaca's health and safety coordinator. Petitioner did not refute this testimony because she did not testify, nor did she call the health and safety coordinator to testify to refute this. Blakely-Armitage also testified that he did not see petitioner's request for personal protective equipment until after the meeting during which petitioner was terminated. He acknowledged that the request may have been placed in his mailbox prior to the meeting but he did not see it until after the meeting. Again, petitioner did not testify and, thus, there is no evidence in the record that would allow us to draw an inference about when the personal protective equipment request was made in relation to the meeting during which petitioner was terminated, other than what Blakely-Armitage testified about. Blakely-Armitage testified that the performance concerns that the Youth Bureau had with petitioner were discussed at weekly meetings both before and after she requested additional training on trash pick-up/removal, beginning in July 2016. This testimony was also not rebutted by petitioner.

During cross-examination, Blakely-Armitage acknowledged that, other than petitioner, he had never terminated a probationary employee who had some of their programming cancelled, as he testified happened under petitioner. However, the lack of termination of other probationary employees solely for cancelled programs alone is insufficient to undermine Blakely-Armitage's otherwise detailed, credible, and consistent testimony about the various legitimate and non-retaliatory reasons for terminating petitioner (*Kwan*, 737 F3d at 845).

Fracchia's testimony was of little value with respect to the issues of whether the Youth Bureau had a legitimate, non-retaliatory reason to terminate petitioner and whether such reason was pretextual. His specific testimony about helping petitioner clean up garbage in the park is not probative because no one disputes that petitioner and Fracchia did that garbage pick-up and disposal. Because of that work, petitioner requested training and personal protective equipment from the Youth Bureau, which are also facts that are not in dispute. Otherwise, Fracchia's relevant

testimony was about things that petitioner told him. While hearsay is permissible in an administrative hearing, the best evidence about those statements would have been petitioner's own testimony and she elected not to testify. Fracchia's testimony was not probative evidence to show that the Youth Bureau's legitimate, non-retaliatory reason for terminating petitioner was pretextual.

Petitioner did not prove that the determination reached by respondent was invalid or unreasonable or that the PESH investigation did not support the determination to dismiss her retaliation complaint (*see Matter of Mateusz J. Nadolecki*, Docket No. PES 07-008, at pp. 8-10). Petitioner asked Cody on cross-examination if he sought a response from Kane to the Youth Bureau's submission on her PESH complaint. Cody testified in response that he spoke to Kane on the phone and she "corroborated" what the Youth Bureau said about her work performance. Cody testified that he would typically tell a complainant about an employer's response to a complaint and tell the complainant that they can submit a written response. He further testified that after he told petitioner about the employer's response, she sent him a copy of a complaint that she filed with the EEOC. Petitioner did not testify or otherwise refute Cody's testimony regarding the investigation of her complaint. Cody's testimony regarding the investigation and the documents admitted into evidence reasonably support the respondent's determination. Both during the investigation and at hearing, the evidence shows that the Youth Bureau had multiple reasons to terminate the petitioner that are unrelated to her health and safety complaints to the Youth Bureau (*see Matter of Robert Shapiro*, Docket No. PES 09-001, at p. 9 [May 30, 2012]; *Matter of Mateusz J. Nadolecki*, Docket No. PES 07-008, at pp. 8-9).

As petitioner failed to prove that the employer's legitimate, non-retaliatory reasons for terminating her were pretextual, she did not meet her burden to prove that the PESH determination dismissing her retaliation complaint was invalid or unreasonable. The Board denies the petition.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The petition for review filed herein is denied.

Dated and signed by the Members
of the Industrial Board of Appeals
on April 7, 2021.

Molly Doherty, Chairperson
New York, New York

ABSENT
Michael A. Arcuri, Member
Utica, New York

Patricia Kakalec, Member
Brooklyn, New York

Gloribelle J. Perez, Member
New York, New York

Najah Farley, Member
Brooklyn, New York