STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CHARLES W. TERMINI, 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 May 17, 2019, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 19-007 <u>RESOLUTION OF DECISION</u>

APPEARANCES

Charles W. Termini, petitioner pro se.

Jill Archambault, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Senior Safety Health Inspector Raymond Veneable,[1] Clarence Cunningham, Tina Christiano, Thomas Murray, Joseph DePierro, Carl Heitner, Charles Termini, Senior Industrial Hygienist Douglas Dubner.

WHEREAS:

On July 17, 2019, petitioner Charles W. Termini (hereinafter "Termini") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law § 101 to contest the May 17, 2019 determination issued by the Division of Safety and Health (hereinafter "PESH") of the New York State Department of Labor (hereinafter "DOL" or "Department") that dismissed Termini's complaint that he was retaliated against by his employer for making a safety and health complaint. Respondent filed an answer to the petition on August 26, 2019.

[1] Raymond Veneable testified on two separate hearing dates. On February 11, 2020, he stated that his name is Raymond Veneable when noting his appearance on the record. On March 11, 2020, he stated that his name is Raygo Veneable when noting his appearance on the record. We find that Raymond Veneable and Raygo Veneable are the same person and use the name Raymond Veneable for purposes of this decision.

Petitioner filed an amended petition on October 2, 2020 and again on October 7, 2020 that assert that petitioner was again not hired for positions that would have been promotions in or around August 2020. On November 6, 2020, respondent moved to dismiss the amendments to the petition stating that the purported adverse action(s) occurred after the PESH determination that there was no retaliation and, thus, are not reviewable in this proceeding before the Board. Petitioner opposed the motion, asserting that his employer's continued refusal to promote him was part of the same adverse action that was done in retaliation for his safety complaint. At the first day of hearing, petitioner's request to amend the petitions to include allegations that he was also denied promotions in or around August 2020 was denied because respondent had not received a complaint regarding that purported retaliation by petitioner's employer and, thus, had not investigated the matter or issued a determination on that action for the Board to review.

Upon notice to the parties, a hearing was held on February 11, February 12, March 11, and March 12, 2021, before Benjamin Shaw, Counsel to the Board and the designated hearing officer in the proceeding. The parties were afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

Petitioner asserts that he was denied a promotion by his employer because he engaged in protected activity that his employer knew about when he complained that his employer did not have a sufficient fire safety or evacuation plan in place, in violation of Labor Law § 27-a. Respondent does not dispute that PESH issued a violation against petitioner's employer but respondent determined that petitioner was not retaliated against when he was not given a promotion because petitioner's employer had a legitimate non-discriminatory reason for not promoting petitioner.

Respondent moved to dismiss on the fourth day of hearing after petitioner rested his case, asserting that petitioner failed to make out a prima facie case of retaliation. Decision was reserved on that motion and respondent proceeded to put on her case. As discussed further below, respondent's motion to dismiss is denied. We do find on the record evidence that petitioner did not meet his burden to prove that the respondent's determination made under Labor Law § 27-a, which found that petitioner was not retaliated against, was invalid or unreasonable.

SUMMARY OF EVIDENCE

Testimony of Senior Safety Health Inspector Raymond Veneable

Senior Safety Health Inspector Raymond Veneable (hereinafter "Veneable") testified that he handled a safety and health complaint that petitioner filed on May 19, 2017, which alleged that petitioner's employer, the New York State Insurance Fund (hereinafter "NYSIF"), did not have a sufficient evacuation plan in place and/or posted in the office, did not have enough fire wardens, and that the existing fire wardens did not do their jobs correctly. That complaint was entered into evidence. Veneable testified that he conducted an investigation based on the complaint that included several visits or meetings at the subject NYSIF office. He testified that the first visit took place on May 25, 2017, and that was an unannounced visit. An investigation narrative for that visit was entered into evidence. When asked if Veneable told Carl Heitner (hereinafter "Heitner"), a manager at petitioner's White Plains work location, if Veneable informed Heitner that petitioner

filed the safety and health complaint with PESH, Veneable responded that he did not and he further stated that he would not tell employers which employee filed safety and health complaints. Veneable testified that petitioner was not present at the May 25, 2017 visit that he made and that he may have asked another union representative for petitioner's phone number. Veneable further testified that he attempted to reach several other union representatives from petitioner's union to see if someone could be present during Veneable's site visit. Veneable testified that Heitner seemed annoyed during Veneable's unannounced visit on May 25, 2017. During that visit, Veneable observed that there was no posted written emergency evacuation plan, as required by OSHA. On August 9, 2017, PESH issued a violation against NYSIF for failure to have a written emergency evacuation plan implemented and for failure to post that plan in the workplace. The violation included a date by which the violation had to be abated – August 28, 2017. A copy of the Notice of Violation was entered into evidence. On August 14, 2017, Veneable returned to the NYSIF White Plains office and observed that the violation was abated, as documented in an investigation narrative written by Veneable dated August 21, 2017 that was entered into evidence. Notes taken by Douglas Dubner (hereinafter "Dubner"), a PESH investigator, during an interview of Veneable from the PESH retaliation investigation were entered into evidence.

Testimony of Clarence Cunningham

Clarence Cunningham (hereinafter "Cunningham") testified that he is a claim service representative at NYSIF, where he worked since 1996. Cunningham testified that he was a PEF union rep, along with Termini. In that role, Cunningham dealt with health and safety matters, as did petitioner. According to Cunningham, this required a lot of meetings with Heitner. Cunningham described Heitner, stating that he "never was amicable." Cunningham testified that he, petitioner, and Melanie Rush (hereinafter "Rush") were concerned that there was not a clearly established evacuation plan for the office and that Heitner, Murray Shore (hereinafter "Shore"), a manager, and Joseph DePierro (hereinafter DePierro), a claims manager, were not concerned. Various emails were entered into evidence from March and April 2017 regarding the petitioner, Cunningham, or Rush's concerns regarding the evacuation plan.

Cunningham testified that Heitner was hostile toward petitioner during health and safety meetings. He explained that when petitioner asked Heitner for specific answers in the May 2017 meeting regarding the office evacuation plan, Heitner became "irate." Cunningham stated that all of the union reps were "considered the enemy" by Heitner. Cunningham testified that petitioner was not the only person to complain about the evacuation plan but Cunningham and Rush also did. Dubner's interview notes of Cunningham were entered into evidence. Those notes do not contain any information different from Cunningham's testimony.

Testimony of Tina Christiano

Tina Christiano (hereinafter "Christiano") was a director of the risk control department in NYSIF's Binghamton office at the time of her testimony. She testified that she began working for NYSIF in 2005 or 2006 as a policy holder services rep I trainee in the White Plains office, when Heitner was a business manager there. Christiano was eventually promoted to a supervisor of the field services department in the White Plains office. Christiano acknowledged that she did have interactions with Heitner when she worked in the White Plains office, including some supervisor meetings that he attended, but she testified, "I wouldn't say I had a lot of interaction with [Heitner]." At the end of 2013, Christiano moved to the Binghamton office when she was promoted

to policy holder services manager. Sometime in 2017, Christiano became the business manager in Binghamton and eventually she was promoted to the director of the risk control department, with one other promotion in between, which she did not identify in her testimony. As the business manager in 2017, Christiano would deal with health and safety complaints at the Binghamton office but she did not have information about health and safety complaints in other offices.

Christiano testified that the position of hearing representative that petitioner applied for was posted in May 2017 and only one position was to be filled at that time. Christiano acknowledged that she was in charge of the hiring process for that position. She testified that she received lists of people who were eligible and interested in the position, so she set up interviews from that list. Christiano interviewed candidates with Tom Ingerson and Joe Pavlovich, a claims manager and a hearing representative supervisor. Christiano testified that she had never heard of petitioner prior to interviewing him in summer 2017.

Christiano testified that she believed that she contacted Heitner after interviewing petitioner. She stated that she told Heitner that petitioner did not interview well and that Heitner said that petitioner's work was "adequate or met expectations or something to that." She further testified that during the investigation of petitioner's retaliation complaint, when petitioner asked her if Heitner spoke highly of petitioner or some similar question, Christiano answered that Heitner did not speak of petitioner in a positive or negative way but only said that petitioner does what he is expected to do. Christiano further testified that when she asked Heitner about petitioner, Heitner's response "was not laudatory nor was it disparaging." When asked if Heitner said that petitioner was one of the best or hardest working case managers, Christiano testified that she did not recall that. Christiano testified that she never had any other conversations with Heitner about petitioner. Christiano testified that Heitner did not tell her about the PESH complaint regarding the White Plains office in 2017 but she thought she learned about it when she was asked to write a statement in response to petitioner's retaliation complaint. Christiano testified that she believed Heitner was the only person from the White Plains office that she spoke to when she was hiring for the hearing representative position in summer 2017 and she testified that she typically would not speak to a job candidate's immediate supervisor. Christiano testified that she never spoke with DePierro about petitioner or about petitioner's application for the hearing services representative position.

Christiano testified that when they were hiring a hearing services representative in summer 2017, they had a candidate from within their office in mind that they wanted to hire but because of the civil service laws, they had to go through a process using civil service lists and not just offer the position to the inside candidate, who was not on the civil service list then. According to Christiano, after following that process and interviewing five people, she was told that they could interview the inside candidate and one other person that she was told she had to interview, who also was not on the civil service list. Christiano testified that they hired the inside candidate, who subsequently took the test to get on the civil service list and she scored high enough to be able to be placed on the list and given permanent status in the position. Christiano testified that the person that they wanted to hire and did hire communicates well and is bright.

Christiano further stated that she wanted to hire "a team player and a good fit for the office" and that petitioner did not come across as either of those. She explained that petitioner disparaged other people during his interview, he portrayed his peers negatively and called some employees stupid. According to Christiano, petitioner also spoke about hearing judges negatively. She felt

like he conveyed that he works harder than everyone and knows more than everyone. Christiano did not recall the names of employees that petitioner purportedly spoke negatively about during the interview other than the White Plains business manager, and the roles that people had in the office. Christiano was concerned about petitioner's impact in an office that historically did not always work well together but had been working well together at the time that petitioner was interviewed. Notes taken by Dubner during an interview of Christiano from the PESH retaliation investigation were entered into evidence. Those notes state that Christiano did not know about petitioner's safety complaint until he filed the PESH discrimination complaint. They also indicate that Christiano stated that petitioner was critical of co-workers and customers, including supervisors and hearing judges, and that petitioner seemed competitive. Christiano sent petitioner a letter dated August 16, 2017, informing him that he did not receive the hearing services representative job. That letter was entered into evidence.

Testimony of Thomas Murray

Thomas Murray (hereinafter "Murray") testified that he began working for NYSIF in 1990 and in about 1998 he became a hearing representative for NYSIF. In 2010, Murray became a supervisor of the hearing department, which he was still doing at the time of his interview. Murray testified that because he worked in the White Plains office, where petitioner also worked, he knew petitioner and believed petitioner's work as a case manager was "acceptable" but he had no other information about petitioner's work. Murray then testified that petitioner did some good work on some cases to get a good outcome. Murray never spoke with Christiano or anyone in the Binghamton office about petitioner.

Testimony of Joseph DePierro

Joseph DePierro (hereinafter "DePierro") testified that he began working at NYSIF in 2010 and in April 2016, he became a claims manager in NYSIF's White Plains office. DePierro testified that an evacuation plan was posted on the White Plains office intranet but he did not recall if it was emailed to all of the White Plains office employees. The evacuation plan that was posted on the intranet prior to the May 2017 PESH safety and health complaint was entered into evidence as was the plan that was posted on the intranet after the May 2017 PESH safety and health complaint. DePierro testified that he did not specifically recall a March 7, 2017 meeting regarding health and safety but after reviewing the minutes for the March 7 meeting, which were entered into evidence, he testified that he did recall talking about having enough marshals for evacuations. He did not recall who suggested most of the changes to the evacuation plan. DePierro testified that he was responsible for coming up with an emergency evacuation plan, which was actually the building's plan, so he just had to make sure that there were sufficient marshals assigned. DePierro also testified that the original evacuation plan was posted on the intranet but he did not recall if it was posted in the office. DePierro did not recall what the PESH violation specifically addressed with regard to posting the evacuation plan. DePierro also testified that he did not recall if the evacuation plan was posted on the back of the doors before or after the violations were issued.

DePierro testified regarding a fire alarm during which one employee fell down the stairs. He felt that people rushed too much and did not wait for direction from the marshals. As a result, they held emergency evacuation training classes which, according to DePierro, Heitner conducted. Emails regarding that fire alarm and the mandatory training classes were entered into evidence.

DePierro testified that as deputy fire warden he was to handle communications with the building if Heitner was not present, that he took part in deciding who would be sweepers and whether to get yellow or orange vests, flashlights, and other stuff. DePierro testified, however, that he was not part of the meetings with the PESH investigator. DePierro also testified that Heitner was the one to post the evacuation plan on doors.

DePierro testified that he did not think that he discussed petitioner with Heitner between May 2017 and August 2017. DePierro further stated that he did not recall talking with Heitner about petitioner's work performance in summer 2017. He also testified that Heitner never spoke to him about petitioner's work ability nor did Heitner tell DePierro about a conversation he had with Christiano about petitioner. DePierro testified that Christiano never contacted him regarding petitioner's work ability. DePierro testified that, in his opinion, petitioner's work performance was satisfactory.

DePierro testified that he never saw Heitner get angry or yell at petitioner but he acknowledged that Heitner got annoyed because people would make complaints to shop stewards rather than go right to Heitner, delaying Heitner from being able to try to resolve the complaint.

Dubner's interview notes of DePierro were entered into evidence. Those notes do not contain any information different than what DePierro testified to.

Testimony of Carl Heitner

Heitner testified that he retired but previously worked at NYSIF, as the business manager of the White Plains office where Termini worked. Heitner stated that he was not petitioner's direct supervisor as there were at least two lines of supervision between him and petitioner. Heitner recalled being part of health and safety committee meetings but he did not specifically recall discussing the evacuation plan at any of those meetings. Upon reviewing documents related to a March 7, 2017 meeting, Heitner could generally recall a meeting during which the evacuation plan was discussed, but he testified that did not have an independent recollection of what occurred at the meeting. Heitner testified that he did recall meeting with Veneable on May 25, 2017. He also recalled meeting with Veneable two or three times regarding the PESH complaint about the evacuation plan. Heitner's recollection was that upon learning a violation would be issued by PESH, he asked the building landlord for drawings to post on exit doors, which he then received from the building's architect several days later and he posted them on the exit doors. Heitner testified that he believes they posted the evacuation plan drawings on the exit doors within a week of learning Veneable required it. Heitner did not recall the date when this occurred.

Heitner recalled telling Dubner that petitioner's work abilities were that he was "quite capable." He further stated that he recalled that he described petitioner's work as a case manager as "among the most capable, meaning that [Termini] had among the highest capabilities." Heitner testified that he thought he spoke to Christiano about petitioner around or after petitioner interviewed to be a hearing representative in the Binghamton office. Heitner testified that he told Christiano that petitioner was "a very bright fellow who is very capable, and that – there was no doubt of that, but that there were – that there was elements of [Termini's] conduct having to do with how [he] interacted with some of the other staff that wasn't so positive . . . [he] put down a lot of people in the office . . . [he was] openly expressive of [his] dissatisfaction with how other peers and people did their jobs, and that was a – a negative." Heitner testified that he did not discuss

petitioner's PESH complaint with Christiano "on that instance." Heitner testified that if he did tell anyone about the PESH investigation, it was to let managers know that he was unaware of the requirement to post evacuation plans. Heitner did not recall whether he spoke directly to Christiano about the PESH investigation in the context of letting people know about the posting requirement. Notes from Dubner's interview of Heitner were entered into evidence. Those notes do not indicate that Heitner told Dubner that he spoke with Christiano regarding petitioner's purported criticisms of his co-workers and only indicate that Heitner told Dubner that he told Christiano that petitioner was one of the most qualified employees in the office.

Heitner testified that when he first met with Veneable, he did not know who filed the PESH complaint regarding the evacuation plan and when he asked Veneable who made the complaint, Veneable declined to tell him. Heitner testified that Veneable never revealed who filed the complaint to Heitner. Heitner testified that he believed that he first learned that petitioner filed the complaint about the evacuation plan in October 2017, when Heitner learned about petitioner's retaliation complaint that he filed with PESH. Heitner testified that he did not know that petitioner filed the safety and health complaint about the evacuation plan between May and August 2017, so he could not have told Christiano that petitioner filed it during that time.

Testimony of Charles Termini

Termini testified that he began working in the claims section of the White Plains office of NYSIF in December 2013. Termini testified that he began as a claims service representative trainee and after completing the requisite probationary period successfully, he became a claims service representative 1. According to the performance review documents entered into evidence each year or twice a year from 2014 to November 2017, Termini's performance was always rated as effective and in the August 2015 performance review, he was rated as highly effective in all categories. None of those performance reviews indicate any concern with petitioner's criticisms of co-workers or inability to work well with co-workers. According to Termini, his supervisor and manager wanted to have Termini advance through the probationary period more quickly than the typical two-years, and so management put highly effective in all the categories on the performance review document. Ultimately, Termini was told that the probationary period could not be shortened or that "the administration" would not approve it. Termini testified that his supervisor at the time, Trevor Jackson, seemed unwilling to advocate for Termini's probationary period to be shortened, which surprised Termini. Termini testified that the performance evaluation forms do not include any notations of Termini being disliked by the office.

In 2016, Termini's office was relocated from a two-story building in a corporate park to the 10th floor of a 21-story building. Also during that year, Termini was elected a union steward for PEF, commencing October 1, 2016. Termini testified that the union members were concerned about the safety and evacuation plan in the new office space because they were on a much higher floor in a tall building, rather than the prior office space, which was only two stories and had windows that could be opened to climb out of in the event of an emergency. According to Termini, the office's health and safety committee, which included three PEF reps -- Termini, Cunningham, and Rush, Pam Clark -- a CSEA rep, and management reps -- Heitner, DePierro, and Shore, among some others, met to discuss the new office evacuation plan. Termini testified that the health and safety committee met on March 7, 2017 and Termini prepared a list of topics to discuss at that meeting, which was provided to everyone who attended the meeting. That list of topics was entered into evidence. Termini testified that a big concern that he had was that there were enough people

doing the work of fire wardens in case of an emergency. He explained that he did not think four people was sufficient in the new office space, which was large. Termini testified that for the March 7, 2017 meeting, he also raised concerns that the fire marshals did not have sufficient equipment, such as bright colored vests. Termini also testified about a May 18, 2017 meeting that took place after a fire alarm sounded in the building earlier in May and one employee was hurt going down the stairs during the evacuation. According to Termini, at that meeting, which included union stewards, Shore, DePierro, Heitner, and an attorney from the office, Heitner was upset because employees spoke with the building's management regarding what was needed for an evacuation plan. Termini testified that Heitner stated that disciplinary action would be brought against any employees who spoke to the building managers. On Friday, May 19, 2017, Termini filed the PESH complaint regarding the insufficient emergency evacuation plan for the White Plains office.

According to Termini, NYSIF management resolved the complaint regarding the emergency evacuation plan in October 2017. Subsequently, Termini testified "it's not until August 14 that everything was fully implemented" regarding the emergency evacuation plan. Termini testified that on August 14, 2017, when Veneable was at the office, the evacuation plan was posted on exit doors and the violation was abated.

Termini testified that in summer 2017, he applied to be a NYSIF hearing representative at the Binghamton office. Termini testified that he interviewed and he received a letter dated August 16, 2017 from Christiano that states that he was not being offered the position. Termini stated that prior to receiving that letter, Joseph Pavlovich, a supervisor in the Binghamton office who participated in the interview of Termini, called Termini to tell him that he was not being offered the hearing representative position but he did not explain the reason. Petitioner also testified that he scored a 100 on the civil service exam relevant to the hearing services representative position that he applied for. A score list for that exam dated October 26, 2017, was entered into evidence.

Termini also testified that about a week prior to receiving the letter stating that he was not being offered the hearing representative position, his supervisor, Hormis Thekkekunnel, (hereinafter "Thekkekunnel") called Termini into a conference room for informal counseling regarding complaints that Termini spent a lot of time in the hearing rep section of the office. Notes from Dubner's interview of Thekkekunnel indicate that Thekkekunnel acknowledged calling petitioner into a room on August 3, 2018[2] for an "informal talk" regarding a complaint from the hearing representative division. According to those notes, which were entered into evidence, Thekkekunnel stated that it was not an official counseling session or a warning or any other kind of disciplinary action but he was receiving complaints from the hearing rep section so he spoke to petitioner about it. Petitioner's PESH retaliation complaint states that he was counseled to not talk to NYSIF hearing representatives or go to the hearing representative section. The complaint also stated that Thekkekunnel told petitioner that Heitner was going to make sure he did not get the hearing representative job in Binghamton. The PESH discrimination questionnaire that petitioner completed indicates that the Thekkekunnel called petitioner into a room on August 10, 2017, to tell him not to go to the hearing representative section, talk to the hearing representatives about claims he worked on, or tell the customers what happens with their claims in court. That document also indicates that Thekkekunnel told petitioner that same date that Heitner could prevent petitioner from getting a promotion.

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[2] It appears that Dubner incorrectly wrote 2018 in his notes when he should have written 2017 because petitioner's PESH discrimination complaint was filed in August 2017.

Termini testified that he filed a PESH retaliation complaint after he received the August 16, 2017 letter stating that he was not being offered the hearing representative position.

Testimony of Senior Industrial Hygienist Douglas Dubner

Dubner testified that, at the time of his testimony, he had been working for PESH for 15 years. He stated that he is a safety inspector and he also performs safety discrimination investigations. Dubner received training from OSHA on how to conduct whistleblower investigations and interviews. According to Dubner, these trainings are periodic. Dubner explained that after receiving a discrimination claim, the information regarding the prima facie elements of the claim are entered into the computer, along with address, telephone and other data. The claim is then assigned to an investigator, who will contact the claimant to determine whether the claim is timely and meets the prima facie elements of retaliation. The investigator then sends the information to the supervisor with a statement regarding whether the investigator thinks the claim met the prima facie elements for discrimination. If the supervisor agrees that the prima facie elements were met, a more detailed questionnaire is sent to the claimant and a notice of the complaint is sent to the employer with a request for a response and relevant documentation. The investigator will then interview the claimant, employer and other witnesses. The claimant and the employer will then have another opportunity to send more information and then the investigator will write up a report on the claim for the supervisor. The supervisor makes a determination about whether there was retaliation.

Dubner testified that PESH only investigates discrimination related to the protected activity of safety complaints. Dubner further testified that petitioner filed a retaliation complaint, formally referred to as a safety discrimination intake form, which was entered into evidence. Dubner testified that petitioner also completed a PESH discrimination questionnaire, which was entered into evidence. Dubner testified that petitioner's discrimination claim was that he made a PESH safety complaint regarding an emergency action plan at his NYSIF office, NYSIF knew petitioner made that complaint, and then petitioner was denied a promotion because he made the safety complaint. Dubner stated, "it could also be just safety complaints that he made additionally, directly to his employer. It didn't have to be the PESH complaint," asserting that any safety complaint to an employer, not just one filed with PESH, is relevant in a retaliation claim analysis.

Dubner testified that he was not sure if he informed NYSIF of petitioner's retaliation claim at the same time that he sent the PESH discrimination questionnaire to petitioner or if he waited until he received petitioner's questionnaire back before sending the notice of complaint to NYSIF. The September 26, 2017 notice of complaint was entered into evidence. NYSIF sent in a response to the retaliation complaint, which was entered into evidence. Dubner testified that after receiving NYSIF's response he "organized an investigative conference of all the parties" and he took notes from that conference. Dubner interviewed Heitner, Christiano, Cunningham, Thekkekunnel, DePierro, and petitioner. Notes from those interviews were entered into evidence.

Dubner testified that after his investigation, his findings were that there was no connection between petitioner's safety complaint and his not being promoted. More specifically, Dubner testified that he found that the reasons for passing petitioner over for a promotion were not in retaliation for his having filed a safety complaint but were non-discriminatory because Christiano had someone else she wanted to hire for the position petitioner applied for and she did not think petitioner interviewed well for the position or was a good fit for the office because he spoke

negatively about coworkers during his interview. Dubner put his findings in a report of investigation, which was entered into evidence, dated November 18, 2019. Dubner testified that he submitted his report of investigation to his superiors, who made a determination, based on Dubner's investigation, that petitioner was not retaliated against. That determination letter, dated May 17, 2019, and created and signed by Darren Mrak, was entered into evidence.

Additional Documents Entered into Evidence

Minutes from statewide NYSIF health and safety meetings in April and July 2017 were entered into evidence. A NYSIF White Plains office workplace violence prevention building inspection checklist was entered into evidence, as was an email related to that checklist from Heitner dated June 5, 2017. Meeting minutes from a PEF meeting were entered into evidence.

I. 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]; Board Rules of Practice and Procedure (hereinafter "Board Rules") [12 NYCRR] § 65.39 [a]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 65.39 [b]).

B. 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 retaliate and, thus, 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 Janice Razzano*, Docket No. PES 11-009, at pp. 8-9 [Dec. 14, 2012]).

C. 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 NYSIF retaliated against him 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 petitioner engaged in protected activity but they disagree that the employer had knowledge of that activity and they also disagree that NYSIF's failure to promote petitioner had a causal connection to the protected activity.

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 (*Kwan*, 737 F3d at 845; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). 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 his burden to prove that the respondent's determination was invalid or unreasonable.

Petitioner's Safety Complaints Were Protected Activity

There is no dispute that petitioner filed a safety and health complaint with PESH in May 2017, which constituted protected activity under Labor Law § 27-a (5) (a), and is the first required element of a prima facie retaliation claim. Additionally, as conceded by Dubner, petitioner made similar safety complaints directly to NYSIF during meetings with Heitner and DePierro and also in email communications sent to Heitner and DePierro. Thus, the safety complaints that petitioner made regarding the evacuation plan other than the PESH complaint also constitute protected activity (*see Matter of Cory Wright*, Docket No. PES 16-013, at p. 17 [Sept. 11, 2019]).

The Employer Knew that Petitioner Engaged in Protected Activity

In order to satisfy the employer knowledge element 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]). While petitioner did not prove that NYSIF knew that petitioner was the person who filed the PESH safety and health complaint, the record clearly established that NYSIF, through Heitner and DePierro, knew that petitioner repeatedly complained about the evacuation plan at his office, including in meetings of the office's safety and health committee that petitioner, Heitner, and DePierro were all part of. Heitner and DePierro acknowledged petitioner's complaints about the evacuation plan by acknowledging that they were in those meetings with petitioner and that they received or saw communications on the subject. Additionally, Dubner conceded that petitioner's complaints at the office about the evacuation plan constituted protected activity, as did his PESH complaint. While there is no evidence in the record that Christiano knew that petitioner complained about a safety matter because she, Heitner, and DePierro all credibly testified that they did not discuss petitioner's PESH or other complaints and petitioner did not refute that testimony, we find the record sufficiently established that NYSIF generally had knowledge of petitioner's protected activity. Petitioner's repeated complaints, communications, and concerns expressed to Heitner and DePierro about the evacuation plan 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]; *Matter of Cory Wright*, Docket No. PES 16-013, at p. 18-19). Petitioner thereby satisfied the knowledge prong of the prima facie case.

<u>The Employer Took Adverse Action Against Petitioner</u>

There is no dispute that petitioner applied for a position at NYSIF that would have effectively been a promotion and he was not offered that position, an act that constituted adverse action against petitioner. Thus, the third element of a prima facie retaliation claim was satisfied.

Petitioner also asserted in his underlying retaliation complaint filed with PESH, the PESH discrimination questionnaire, and his petition and post-hearing brief that Thekkekunnel's calling petitioner into a conference room to tell him that he could not spend so much time in the hearing representative section of the office or talk to hearing representatives about claims constituted a counseling session and restriction of petitioner's work and, thus, constituted an adverse action. Petitioner did not establish at the hearing that this conversation with Thekkekunnel, his immediate supervisor, constituted adverse action. He did not call Thekkekunnel as a witness to testify and petitioner's testimony and statements in his complaint to PESH are insufficient to establish that this incident constituted adverse action.

<u>The Temporal Proximity Between the Protected Activities and the Adverse Action Sufficiently Establish Causation</u>

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]). Here, petitioner complained about the evacuation plan from at least April 2017 to August 2017, according to the record evidence. He applied for a position that would have been a promotion and was denied that promotion in August 2017. The protected activities and the adverse action are so closely related in time to support 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."]). Petitioner satisfied the causation element of a prima facie retaliation case because of the temporal proximity between the protected activities and the adverse action. As such, petitioner met his "minimal" burden to establish a prima facie case of retaliation and we deny respondent's motion to dismiss for petitioner's failure to make out a prima facie case.

The Employer Had a Legitimate Non-Discriminatory Reason for Not Hiring Petitioner into a Promoted Position

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).

Christiano credibly testified that she did not hire petitioner for the hearing representative position that would have been a promotion both because she did not get a good impression of him during the interview but also because she had another candidate that she wanted to hire for the position. Christiano testified that her impression of petitioner was not favorable because petitioner spoke negatively about other NYSIF employees during the interview, an attitude that she did not want in the office. Petitioner did not refute Christiano's testimony other than to assert in his post-hearing brief that without specific names of who petitioner disparaged, Christiano's testimony was not credible. We disagree. We found Christiano's testimony about why she did not want to hire petitioner to be sufficiently detailed and consistent with Dubner's notes of his interview of Christiano to be credible. Petitioner did enter performance reviews into evidence that indicated that petitioner's work performance was satisfactory or exceeded standards but those performance reviews were check-off forms that did not contain sufficiently specific language regarding petitioner's treatment of those he works with. Those performance reviews do not undermine Christiano's testimony. We find that Christiano's credible testimony about petitioner's interview performance combined with her credible testimony that she did not personally know that petitioner was complaining about safety concerns at the time she did not offer him the promotion are sufficient evidence to establish that NYSIF had a legitimate, non-discriminatory reason to not promote petitioner.

Petitioner Did Not Prove Pretext

Petitioner did not offer sufficient evidence to show that the reasons the NYSIF proffered to respondent for not offering petitioner a promotion were pretext for retaliation. Christiano's explanation for why she did not offer petitioner the hearing representative position was credible, and not refuted by petitioner[3]. Petitioner's testimony that he performed his job well never

[3] Christiano also credibly testified that she had a candidate that she wanted to hire, did hire, and who she stated is doing well in the position, for the position that petitioner applied for but because she also testified that she would not

addressed Christiano's testimony that he spoke poorly about other NYSIF employees during his interview. Petitioner's testimony primarily focused on the safety matter of the non-compliant evacuation plan, an element of a prima facie retaliation case that was not in dispute. Cunningham's testimony was of little value on the retaliation matter because it focused primarily on the evacuation plan and while Cunningham testified positively about petitioner's reputation in the office, his testimony focused on petitioner's reputation as a union representative. Ultimately, Cunningham had no knowledge of Christiano's explanation for why petitioner was not hired and Cunningham's positive statements about petitioner did not refute what Christiano testified that petitioner said about other NYSIF employees during his interview. DePierro's testimony was also not probative on the question of whether petitioner's reason for not offering petitioner the promotion was legitimate and non-discriminatory or pretext because petitioner's direct examination of him primarily focused on the safety complaint. While DePierro acknowledged that petitioner performed his job well, petitioner did not ask him specifically about his relationship with co-workers and/or his attitudes toward co-workers. Murray had no specific relevant information that he testified about.

Petitioner Did Not Prove that the Respondent's Determination Was Unreasonable or Invalid

Petitioner did not prove that the determination reached by respondent was invalid or unreasonable (*see Matter of Mateusz J. Nadolecki*, Docket No. PES 07-008, at pp. 8-9 [May 20, 2009]. The record evidence is consistent with the investigative documents that Christiano had a legitimate, non-discriminatory reason to not hire petitioner that was unrelated to his safety complaint (*see Matter of Nancy Kane*, Docket No. PR 19-004, pp. 7-9 [Apr. 7, 2021]; *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 reason for denying him a promotion were pretextual, he did not meet his burden to prove that the PESH determination dismissing his 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.

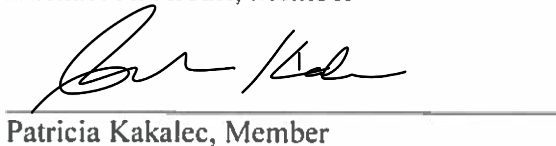
Dated and signed by the Members
of the Industrial Board of Appeals
on September 21, 2022.

Molly Doherty, Chairperson

Michael A. Arcuri, Member

ABSENT

Najah Farley, Member



Patricia Kakalec, Member

Sandra Abeles, Member

have hired petitioner even had she not had the candidate she did hire, our decision relies on her explanation for why she did not want to hire petitioner.