STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NELSON M. FLORES, 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 April 25, 2019, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 19-005 RESOLUTION OF DECISION

APPEARANCES

Nelson M. Flores, petitioner pro se.

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

WITNESSES

Federico Cabrera, Vivian Johnson, Nelson Flores, for petitioner.

Alan Deutsch, Safety and Health Inspector Kwo Lam, and Serafin Gonzalez, for respondent.

WHEREAS:

On May 16, 2019, petitioner Nelson Flores (hereinafter "Flores") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law § 101 to contest the April 25, 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 Flores's complaint that he was retaliated against by his employer for making a safety and health complaint. An amended petition was filed on May 28, 2019. Respondent filed an answer to the petition on June 18, 2019.

Upon notice to the parties, a hearing was held on December 12, 2019, March 13, 2020, March 16, 2021, April 2, 2021, and April 8, 2021, before Matthew Robinson-Loffler, Associate 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 in violation of Labor Law § 27-a, his overtime hours were drastically reduced by his employer, New York City Department of Administrative Services (hereinafter "DCAS" or "employer") because he engaged in the protected activity of complaining about egress issues and the employer's Emergency Action Plan ("EAP"), and his employer knew about these complaints. Respondent does not dispute that petitioner engaged in a protected activity, that petitioner's employer knew of that protected activity, or that petitioner suffered an adverse employment action of working fewer overtime hours. Respondent asserts that any overtime reduction was not done in retaliation for any protected activity but was rather a result of a larger change in the employer's overtime procedure which was already underway at the time of the protected activity, as well as petitioner's own actions.

We find on the record evidence that petitioner met 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

Introduction

A July 15, 2016 safety and health complaint was entered into evidence, which was made by petitioner and another employee. That complaint asserts that EAPs were requested but not provided for six work site locations in Queens. A second safety and health complaint from petitioner, dated August 24, 2016, was also entered into evidence. That complaint asserts that there is a lack of emergency lighting in a basement work location, inoperable emergency lighting in other areas, a fire hose blocked by supplies, an impeded egress, an egress that is not indicated as an exit, a set of double doors opening the wrong way, and exits listed in the EAP are impeded. DCAS responded to the PESH complaints on August 12, 2016, and that response was also entered into evidence. It states that DCAS updated the EAP for Queens Borough Hall, which is Flores's work location, and distributed it to the employee representatives. It further states that the EAPs for the other buildings were being revised in conjunction with the Office of Court Administration (hereinafter "OCA") and would be available within 60 days.

Petitioner's August 29, 2016 PESH Discrimination Complaint Intake Form was entered into evidence. In that form, petitioner states that his email inquiries about his PESH complaints were not properly responded to, DCAS did not have EAPs, and that since August 2016, petitioner had "only been issued 10 ½ hrs overtime," which is less than the 100 hours of overtime he had worked each month for the previous years. A PESH Discrimination Questionnaire, also entered into evidence, states that Flores suffered a drastic loss of overtime in retaliation for making PESH complaints.

On October 17, 2016, DCAS filed a written response to petitioner's retaliation complaint, which was authored by Senior Counsel Alan Deutsch (hereinafter "Deutsch"), and that response was entered into evidence. In addition to addressing petitioner's underlying safety and health complaints in its response to petitioner's retaliation complaint, DCAS responded that after discovering a problem in which overtime was being worked without preapproval, a new procedure was implemented on July 28, 2016, to improve oversight and accountability, wherein any proposed overtime had to be submitted through a written request and approved prior to the work being

performed. According to DCAS, petitioner did not request overtime after July 28, 2016, had worked approximately 10 hours of overtime through a request submitted on his behalf, and was not being denied overtime. DCAS's response also stated that there was an instance on August 8, 2016, when petitioner and five other employees were sent home from overtime work because it was not preapproved overtime, and there was an additional instance on August 20, 2016, when an overtime request made on behalf of petitioner was denied because petitioner was on vacation at the time. DCAS asserted that petitioner had not requested overtime since July 28, 2016, because he disagreed with the new overtime procedures and supervisory structure, to which he had objected repeatedly. DCAS noted in its response that petitioner filed grievances with the union regarding the overtime procedures, but none resulted in action to date.

On October 21, 2016, petitioner filed a responsive document to DCAS's response, which was entered into evidence. With respect to the retaliation complaint, in sum, it states that petitioner did not have to request overtime prior to July 28, 2016 nor did the nature of the job logically require petitioner to request overtime, rather overtime work was determined by a supervisor who would in turn ask employees if they were available work; that DCAS admitted that petitioner was a factor in purportedly creating a new overtime policy; and that petitioner has always followed proper procedure, nor has petitioner been counseled or written up for not following proper procedure, but after filing the safety and health complaints, his overtime was reduced significantly. Petitioner also submitted a February 23, 2017, summation memo regarding the retaliation complaint and his response to DCAS, which was entered into evidence.

DCAS submitted a March 10, 2017, closing statement for the PESH retaliation investigation which states, in part, that petitioner engaged in a work slow-down by refusing to work overtime, and that overtime has been available for Flores, who elected to make himself unavailable for overtime work.

PESH issued a determination letter on April 25, 2019, stating that petitioner engaged in protected activity which his employer knew about and he suffered an adverse action, but there was no causal connection between the protected activity and the adverse action. Specifically, the determination letter states that DCAS began the process of changing their overtime procedures in early June 2016 and petitioner objected to those changes prior to making a safety and health complaint. The letter further states that petitioner was unwilling to comply with the changes in the overtime procedure as evidenced by the grievance that he filed with his union. The letter continues that even had there been a causal connection between the protected activity and the adverse action, DCAS had a legitimate non-discriminatory reason for changing its overtime procedure and petitioner's reduction in overtime was due to his own failure to abide by the new procedure.

Testimony of Federico Cabrera

Federico Cabrera (hereinafter "Cabrera") testified he had been a maintenance mechanic for DCAS for 13 years and he retired in September 2017. He worked in the Queens County Criminal Court building, a different building than Flores, who worked in Queens Borough Hall. Cabrera testified that he regularly did overtime work when he worked at DCAS. Cabrera explained that originally the workers got overtime assignments from a "liaison" in the building or got called directly from "people downtown." The procedure changed on July 28, 2016, so that the senior building custodian was given jobs that needed to be done, and that senior building custodian would ask workers if they were available to work the overtime. Under the new procedure, according to

Cabrera, the change was that the head custodian, rather than the liaison, asked workers if they wanted to work overtime, and then gave assignments.

Cabrera testified that he and other maintenance mechanics, including "Curtis"[1] were given overtime work, but not Flores. Cabrera continued that Flores did not work a lot of overtime before the policy change or after the policy change, and he testified that Flores did not work a lot of overtime while employed at DCAS. Cabrera stated that he had no first-hand knowledge of how overtime was approved in the building where Flores worked but believed the procedures would be the same as they were dictated by a memo issued to all of the custodians.

Interview notes created by an unidentified PESH Division employee that document an interview of Cabrera were entered into evidence. Those interview notes state throughout that Cabrera gets his overtime from Curtis O'Neill, who asks Cabrera if he is available for overtime.

Testimony of Vivian Johnson

Vivian Johnson (hereinafter "Johnson") testified that she worked for DCAS for 32 years, and for part of that time, she was a senior building custodian at the Queens Borough Hall, where Flores worked. Johnson retired in 2017. Johnson stated that she assigned work to Flores and supervised him. According to Johnson, prior to July 26, 2016, Curtis O'Neill (hereinafter "O'Neill") ,[2] the building liaison, gave overtime assignments directly to employees, then called Johnson to tell her where the workers under her supervision would be working that overtime so that she could enter the time into the necessary system. The workers then gave Johnson written sheets documenting what they'd done for overtime work.

Johnson testified that after July 2016, she had to verify whether an employee could work overtime first. Johnson testified, "they would have a lady call the building asking, were anybody working overtime. And they would have to call you. And you would say, yes or no. And I would have to put it in an email and send her an email out with every person's name on it that who was to work overtime that evening." Johnson stated that she then sent an email to someone named "Nicky," who sent it to Serafin Gonzalez (hereinafter "Gonzalez") or Harris Colon (hereinafter "Colon"), who would either call or email back approving the overtime. Requests for overtime had to be submitted downtown[3] before 4:00 p.m. Downtown also informed the building if no overtime was going to be approved for a day. According to Johnson, a memo containing the new overtime policy was posted on the bulletin board in the office.

Johnson asserted that after the new policy was in place in July 2016, she got a call from Colon and Derrick Barksdale (hereinafter "Barksdale") telling her not to give Flores any more overtime, but they did not indicate why. Johnson testified that she was directed to go downtown to One Centre Street by Colon and Deutsch and, once there, they asked her questions about whether Flores was a good worker and came to work on time. Johnson testified that she told them Flores

[1] Cabrera did not testify as to "Curtis's" sur-name but other witnesses testified regarding a maintenance worker named Curtis O'Neill.

[2] O'Neill is referred to in the DCAS and respondent's documentation as "O'Neil," "O'Neill," and "O'Neal." Throughout this decision, we use "O'Neill," which is how O'Neill's name is documented in certain evidence such as emails from him and attendance sheets that it appears he signed himself.

[3] As explained by Deutsch during his testimony and for purposes of this decision, "downtown" refers to a central administrative office of DCAS located at One Centre Street.

was a good worker, but they kept trying to get her to say something negative about Flores, which Johnson did not do because Flores did not give her any problems. Johnson stated that she believed she was told not to give Flores overtime because of his PESH complaints regarding outdated building rules. Johnson testified that PESH investigators came to the building sometime after and handed out a new paper posting for the office. According to Johnson, after Flores's complaints, he was no longer allowed to work the daily overtime he previously worked.

Johnson testified that she was aware of two incidents, one on August 8, 2016, where Flores and five other workers were sent home because they did not get their overtime properly approved, and one on August 26, 2016, where Flores was denied overtime. Johnson did not remember if there were any other times when Flores's overtime requests were denied. Johnson stated that Flores never complained to her about the new overtime policy.

Johnson acknowledged that under the new policy, she was not involved in the approval of overtime for Flores. When asked why she would be directed by Colon and Barksdale to not give Flores overtime if she was not responsible for approving his participation in overtime, Johnson stated that it was because she was the one who put the hours into the system and would need to know what was going on regarding employees working overtime.

Testimony of Nelson Flores

Flores testified that he worked for DCAS from July 5, 2011 to May 26, 2017, as a civil service maintenance worker and was the shop steward of the Local 237 Teamsters for the maintenance workers in Queens for four or five years. His job duties involved "minor maintenance to large plastering, installing tiles -- minor repairs to building structures." Flores stated that his supervisor was the building custodian and that he did not know what work he would be performing each day until given his daily work assignments.

Flores testified that as shop steward, he raised health and safety concerns with management, including regarding the EAP. He raised health and safety concerns three times in his four to five years as a shop steward, including a prior complaint involving gates to a courthouse jury area being locked from one side. In the safety and health complaint relative to this matter, Flores stated that he complained of a single means of egress from the maintenance shop which could be locked, and the EAP not being available to the employees. Flores stated that no other workers made health and safety complaints and he believed he was being retaliated against for making his complaints by being denied overtime. Flores acknowledged that DCAS provided him a copy of the EAP weeks after he requested it.

Flores testified that prior to July 2016, he got daily work assignments from Johnson, his supervisor at the time. During the course of the day, Flores stated, he also saw things that needed to be done and thought they should be done after regular work hours, so he would inform his supervisor, who would need to approve the overtime work. Flores also testified that workers were asked if they were available to work overtime and then given those hours if they were available. Flores stated that prior to 2016, he mostly worked seven days a week and was almost always available to work overtime, and he continued to be almost always available after July 28, 2016. Flores testified that prior to 2016, the supervisor would determine what work needed to be done as overtime, ask Flores if he was able to work the overtime, and then send an email downtown to tell them who was going to work overtime.

Flores explained that on July 28, 2016, an email was sent to all the supervisors, including Johnson, who gave Flores a copy of the email, about the new process for overtime approval that requires the supervisor to request pre-approval from downtown for overtime hours for any employees. That email was entered into evidence. That new policy, according to Flores, meant that a supervisor asked a worker if they want to work overtime and if so, then sought approval from downtown via email prior to 3:00 p.m. each day. Flores asserted that under the new policy, the worker does not request overtime, but rather the supervisor determines what overtime work needs to be done and asks workers if they are willing to work it. Flores stated that of the seven maintenance workers in his building, only three regularly worked overtime, O'Neill, Cabrera, and himself, and there was always enough overtime work for all of them. Flores stated that prior to July 2016, he was never written up for not following overtime procedures and never had his overtime denied. Flores testified that he learned from DCAS's response to the retaliation complaint that DCAS was claiming that he did not properly follow overtime procedures, but DCAS never brought that up to him. Flores explained that prior to 2016, O'Neill was the "liaison team leader, go-to guy," who got calls about there being overtime work; but after July 2016, Johnson told Flores what needed to be done regarding overtime work. Flores testified that prior to July 28, 2016, O'Neill never told maintenance workers that they needed to notify him in writing if they wanted overtime and after July 28, 2016, according to the July 28, 2016 email, O'Neill was not part of the overtime policy or procedure. According to Flores, he was never given the forms that he asserted were needed to sign up to work overtime under the new policy and he asserted that they were given to every other employee. The July 28, 2016 email does not reference any forms. Three forms were entered into evidence: (1) Employee Overtime Scheduling/Follow-up form, which purports to list the employees who agreed to work overtime on a specific date and at a specific location, has a space for the employee to initial next to their printed name, and has a space to document whether the employee showed up for overtime and if they did not, why not; (2) Employee Overtime Denial form, which purports to list employees who "were asked to work overtime" but were not available or refused to work overtime and there is a space to state the reason for the employee's "refusal" to work the overtime; and (3), the Overtime Survey form, which purports to list employees who request to be scheduled for overtime whenever there is overtime work needed. Flores, the only person who offered testimony about these forms, testified that a supervisor completed the forms and sought an employee's signature if the employee rejected overtime, said they would work overtime but did not show up for that work, or for signature when an employee showed up for the overtime work.

Flores stated he had no objection to the new policy other than being supervised by custodians. Flores testified that he filed a union grievance regarding maintenance workers reporting to custodians on August 1, 2016, the union started "typing the letter" on August 8, 2016, and DCAS did not receive the grievance until August 12, 2016. The August 8, 2016 grievance letter was entered into evidence. Flores testified that the retaliation had already begun by August 12, 2016, so the grievance regarding overtime could not have been the basis for DCAS's actions toward him. Flores testified that the grievance was that maintenance workers should be supervised by maintenance workers, not custodians, and the grievance was not about overtime. Letters denying the grievance were also entered into evidence. None of the grievance documents reference overtime work.

Flores further testified that he was sent home from work on August 8, 2016, because the overtime was not timely pre-approved according to the new policy. Flores acknowledged that being sent home was not retaliation towards him because five or six other workers were also sent

home that day for the same reason. Flores testified that DCAS claimed in its responsive paper to his retaliation complaint that his failure to follow the policy was one of the reasons they were all sent home. Flores clarified that he was both not at fault and did not believe that DCAS had actually found him at fault, just that he believed DCAS had inaccurately asserted that it was this fault in its "brief or the summation" regarding his retaliation complaint.

After August 8, 2016, according to Flores, he requested overtime on numerous occasions and was denied. Subsequently, Flores clarified that by requesting overtime, he meant that he was not being offered overtime. Flores testified that there was an instance where he took a vacation, was off Monday through Friday, and was called by O'Neill on his personal phone during his vacation to see if he wanted to work overtime that Sunday, August 21, 2016. Flores stated he was willing to work it, but the overtime was denied, and he was told that it was denied because he had been on vacation. When asked if it was true that overtime is not permitted if the employee is on vacation prior to the overtime shift, Flores testified, no. When asked if Flores personally has to request overtime for it to be approved, Flores testified no. Flores did not inquire why it mattered that he was on vacation prior to the overtime shift if he had been called and said he was available to work that date. According to Flores, another employee had been permitted to work overtime on a weekend between a workday and a vacation day. When asked who was permitted to work overtime after vacation, Flores testified regarding one employee who was permitted to work overtime prior to taking vacation and after having worked a shift, and he testified about O'Neill being permitted to work overtime the day before Thanksgiving, after having worked a shift. Flores did not testify specifically about anyone working overtime as a first shift after a vacation.

Flores stated that he suspected soon after August 8, 2016, that he specifically was being denied overtime hours, but did not bring it up to anyone because he thought it was a result of the new policy. Flores testified that he asked Johnson why he was not being asked to do overtime work and Johnson always responded that she did not know why. Flores also sent an email to Colon in which he stated that he was not getting overtime and that email was entered into evidence. Colon's email response was also entered into evidence, which stated, in part, that that Flores had always been allowed to work overtime, that the change to the overtime procedure is that overtime must be preapproved by the main office, and that "you can no longer just decide to overtime on your own." Flores acknowledged that Colon's email stated that overtime was available, including for him but Flores reiterated that he doesn't personally request overtime for approval, rather the building superintendent must request the overtime in writing and get approval before it is worked. A second email, dated December 7, 2016, from Colon to O'Neill, Johnson, and others, was entered into evidence regarding a need for employees to work overtime and Colon specifically states in his email to be sure that Flores is aware of the overtime work that is available starting December 7, 2016. Flores did not recall if he ever asked Johnson to work overtime after August 8, 2016. Flores stated that before August 8, 2016, he worked seven days a week for years, so he did not have to ask for overtime because everyone knew he was willing to work it. According to Flores, after August 8, 2016, no one asked him to work any overtime. Flores believed the retaliation was self-evident because when overtime requests included only his two co-workers, they were approved. Flores testified that he was offered overtime once after August 8, 2016, when there was an emergency in Manhattan.

Overtime documentation entered into evidence for Flores shows him working approximately 26 overtime hours between August 7, 2016, and April 23, 2017, during the months of August 2016, November 2016, February 2017, and April 2017. Overtime documentation was

entered into evidence for Cabrera, which showed that he worked about 165 hours during the same period; and overtime documentation for O'Neill and Mackey Kahn evidenced that they both worked more hours than Cabrera for the same period. Overtime records entered into evidence showed that during the same period, Frank Ciulla worked almost 80 hours of overtime. Pay records showing total overtime hours worked in a year were entered into evidence and indicate that in 2014 Flores worked 1,416.50 overtime hours, in 2015 he worked 950 overtime hours, in 2016 he worked 1,283.75 overtime hours, and in 2017, he worked 164.50 overtime hours. Similar records were entered for O'Neill, which show that he worked 1,134.25 overtime hours in 2014, 1,416 overtime hours in 2015, 1,141.50 overtime hours in 2016, and 656 overtime hours in 2017; for Antonio Ortiz, records show that he worked 660.50 overtime hours in 2014, 799.50 overtime hours in 2015, 925 overtime hours in 2016, and 1,088.75 overtime hours in 2017; and for Mackey Kahn, records show that he worked 464.75 hours in 2014, 375.25 hours in 2015, 1,116.25 hours in 2016, and 928.41 hours in 2017.

Flores asserted that when he was part of an overtime request, it was denied for everyone, and when he was not a part of it, it was approved. Flores testified that O'Neill told a PESH investigator that O'Neill stopped including Flores in overtime work requests because two requests with Flores were denied. The interview notes of O'Neill, which were entered into evidence, state that O'Neill told the PESH investigator that no one told him not to include Flores in overtime work requests and also stated that O'Neill stopped asking for overtime with Flores because he was denied the overtime the previous times that he included Flores. Flores also asserted that O'Neill previously stated that they had to be aware of an OCA audit regarding overtime. However, Flores stated, he received an email from OCA stating that they did not audit other agencies for overtime and that email was entered into evidence, as was an email from the New York City Comptroller's Office, which included some links to audit information on DCAS.[4]

Testimony of Alan Deutsch

Deutsch testified that he was Senior Counsel at DCAS and had been for 15 years. Deutsch testified that he is DCAS's FOIL officer and privacy officer, and he also supports litigation and works with the Citywide Office of Occupational Safety and Health. Deutsch testified that he was familiar with Flores because he frequently filed FOIL requests. Deutsch explained that DCAS received Flores's PESH retaliation complaint, and it was assigned to him for a response. Deutsch testified that he learned that Johnson was scheduled to appear at an informal PESH conference regarding petitioner's complaint, so he called Colon and asked him to have Johnson meet with him at One Centre Street for an interview on December 26, 2016. Deutsch stated that he wanted to know from Johnson how the change in overtime policy played out in Queens Borough Hall. Deutsch testified that Johnson told him that prior to the change in policy, O'Neill, a maintenance worker, emailed her weekly with overtime information on hours worked and work performed. Deutsch assumed that O'Neill reported this information to Johnson because she had to complete paperwork related to it. Deutsch also testified that after the change in policy, overtime had to be pre-approved by sending a request to the borough superintendent's office, which was forwarded to One Centre Street for approval, a 2-step process that had to be done prior to the start of the overtime work. Deutsch stated that Johnson's role was to package the overtime requests to send to the borough superintendent by a certain time each day. Deutsch testified that Johnson told him that she never mentioned the possibility of working overtime to Flores because Flores told Johnson

[4] The information included in those links in the email was not entered into evidence.

that he was not going to be working any overtime. Deutsch stated that Johnson told him of one instance of an overtime project in Manhattan that she mentioned to Flores, but Flores stated that he was not interested in it. According to Deutsch, Flores did not complain to Johnson about a lack of overtime. Deutsch testified that Johnson made no mention of a call from Barksdale telling her not to give Flores any overtime. Deutsch testified that Colon passed away since the relevant period, but Deutsch interviewed Colon and according to Deutsch, Colon did not state anything about telling Johnson not to give Flores any overtime. Deutsch testified that O'Neill was also interviewed at the informal PESH conference.

Deutsch signed the October 17, 2016 response to petitioner's retaliation complaint and in that response, Deutsch stated, in part, that prior to July 28, 2016, building services staff requested overtime orally or in writing from the senior building custodian and after July 28, 2016, building services staff had to request overtime from the senior building custodian, who then sent the request to the borough supervisor, who then sent it to the DCAS building services management. According to Deutsch's October 17, 2016 response, forms to request overtime were included with the July 28, 2016 email that was sent out regarding the overtime procedure change. The only forms related to overtime that were entered into evidence are forms that appear to be maintained by the senior building custodian and/or another employee who oversees the overtime assignments, as Flores testified to without contradiction. There is no indication in the July 28, 2016 email that was entered into the record that forms were attached to that email nor were they referenced at all in the email. Deutsch's October 17, 2016 response also states that petitioner was the only maintenance staff that did not follow procedure and request overtime pursuant to that procedure. Deutsch further stated in that response, "[w]hile the fact that Mr. Flores had worked substantial amounts of overtime without following existing procedures for approval was a factor in devising the revised procedures, the new procedures were designed to address agency-wide procedural issues, and they were not developed to retaliate against Mr. Flores for raising safety and health related issues."

Deutsch also signed a March 10, 2017 document titled "Investigation Closing Statement." In that statement, Deutsch asserted that petitioner engaged in a "job action – a slowdown - . . . by declining to work overtime that is abundantly available to him in order to protest DCAS policies." Deutsch's statement further asserts that Cabrera, when interviewed by PESH, stated that he asks O'Neill for overtime. Deutsch's statement also indicates that James Foster (hereinafter "Foster") stated during his interview that the team leader or liaison, who was O'Neill during the relevant time, is responsible for "reaching out" to maintenance staff to see who is available for overtime.

Testimony of Associate Safety and Health Inspector Kwo Lam

PESH Associate Safety and Health Inspector Kwo Lam (hereinafter "Lam") testified that he has been employed as a health and safety inspector with PESH since 2001. In July 2016, Lam was a Senior Safety and Health Inspector. Lam testified that with respect to this matter, Flores filed a discrimination complaint, and then completed a PESH discrimination questionnaire, both of which were entered into evidence. Lam testified, according to records in the Department's file,[5] that Flores asserted that he was being denied overtime because he filed health and safety complaints. Lam testified that DCAS responded that Flores was not being retaliated against for making complaints. Lam further explained that DCAS asserted that Flores was free to request overtime just like anyone else but Flores had not been requesting it because Flores had a grievance

[5] During his testimony, Lam explained the contents of the discrimination complaint, and the PESH discrimination questionnaire as well as DCAS's October 17, 2016 response to petitioner's retaliation claim.

about having to request approval for overtime with someone in a job title that he did not believe was in his chain of command. Specifically, DCAS asserted that Flores did not think he, as a maintenance worker, should be making a request through someone in a custodian job title. According to Lam, DCAS conceded that Flores had been working less overtime, but that was because there had been a change in overtime procedure around the same time as the safety and health complaint. Lam explained, based on DCAS's response, that prior to the change in policy, the team leader asked employees if they wanted to work overtime and employees did not have to request it, while the new procedure required that overtime be requested and approved through a process before it could be worked.

Lam testified that PESH obtained a copy of the new overtime policy, which required employees to get approval to work overtime prior to working it, and to put the request through a formal process which began with the building custodian. Lam stated that Flores informed PESH that O'Neill told him that when he submitted overtime requests which involved Flores, they would get denied, so O'Neill stopped including Flores in the requests. Lam testified that O'Neill generally confirmed this during the investigation but also did not allege that anyone had ever instructed him not to give Flores any overtime. Lam stated that Flores indicated during the investigation that he felt he should not have to ask for overtime, but should be offered overtime, as happened prior to the change in policy in July 2016, and that Flores did not indicate that he had asked any supervisors why he was not getting any overtime. Lam testified that Colon appeared at the compliance conference and stated that "he never told anyone not to deny Mr. Flores any overtime." Lam stated that the documentation supports that O'Neill continued to work overtime.

Interview notes from interviews that PESH investigators conducted with Flores, Cabrera, Antonio Ortiz, Colon, Gonzalez, O'Neill, Frank Ciulla, Foster, Richard McCarthy, Melissa Rodriguez, and Christopher Fulgieri were entered into evidence. The notes from an interview of Antonio Ortiz indicate that he never asked for overtime, rather it is offered to him. A questionnaire completed by Antonio Ortiz was also entered into evidence and it indicates that Ortiz recorded in it that he does not request overtime, but it comes in via email or phone call from a supervisor. The notes from an interview of Colon indicate that Colon reported that there is plenty of overtime work available. They further indicate that Colon reported that Johnson and O'Neill told him that they offered Flores overtime work, but Flores declined it. According to the notes, Colon also reported that O'Neill asks the maintenance workers for their overtime schedule and then asks if they can come in on a specific day to do overtime work. The notes further state that Colon stated that he has never told Johnson or O'Neill to deny petitioner overtime work. According to the notes from Foster's interview, Foster stated that the "point person" reaches out to maintenance workers to see who is available for overtime. Foster also stated, according to the notes, that the team leader determines who to contact to do overtime. The notes further state that Foster had not received a request for overtime for Flores since fall 2016 and stated that O'Neill became difficult to get a response from and he was not acting like a team leader. The notes also state that Foster stated that the request for overtime does not come from the maintenance worker and that Foster was not sure why petitioner was not being asked to do overtime work. They also state that Foster reported a decline in overtime work in Queens but he was not sure why that occurred and he surmised that it may have been because O'Neill was difficult to reach.

Lam stated that when the investigation was completed, Varghese Mathew (hereinafter "Mathew"), a PESH inspector, submitted a report of investigation. In that report, Mathew states that overtime needs are based, in part, on a flow chart showing where the overtime jobs originate

from. That flow chart was not offered into evidence. The report further states that maintenance workers are offered overtime by the team leader or the senior building custodian and specifically stated that a team leader reaches out to coworkers and asks them by phone, in person, or by email if they are available for overtime work. The report also notes that DCAS has not taken steps to determine why petitioner was receiving less overtime after July 28, 2016. "Yet, it appears that the [DCAS] has not taken responsibility for identifying the root cause of the Complainant's reduction in overtime." The report further states that the overtime procedure does not ensure that all employees are receiving the same information about overtime work being available, nor does it seem to document when offers of overtime are declined by an employee.

The report of investigation then recommends that the Department finds that the claim be dismissed because there was no demonstrated nexus between the protected activity and the alleged adverse employment action. Lam explained that the Department did not find that DCAS was denying overtime to Mr. Flores, and Mathew found in his final report that the dispute and resulting decrease in overtime was based on a dispute over the overtime itself, not the protected activity of making a health and safety complaint.

Testimony of Serafin Gonzalez

Gonzalez testified that, at the time of his testimony, he had worked for DCAS for 16 years and that he was the Director of Building Services for DCAS, which he had been for about three years at the time of his testimony. In July and August 2016, he was the Assistant Director, which was a DCAS, and not a civil service, title. Gonzalez explained that DCAS's Building Services Unit handles the cleaning and maintenance of 55 city-owned buildings, including minor repairs that are made by maintenance staff and bigger repairs handled by "the trades." Gonzalez testified that he assisted Colon in operations of about 48 of the 55 buildings that are managed by DCAS's Building Services and that included tracking overtime, managing scheduling, and communication with tenants, among other things. Gonzalez testified that Rich McCarthy, who was the Senior Borough Supervisor during the relevant time, worked with Gonzalez to approve overtime. Gonzalez stated that his understanding was that during normal business hours, the senior building custodian is the building manager to whom the maintenance staff in the building reports. The senior building custodian reports to the borough supervisor, who reports to the main office. Gonzalez explained that Foster, the maintenance supervisor, was in charge of the maintenance workers after hours, coordinating overtime. Gonzalez explained that the building in which Flores worked had a New York State Court System presence, so the State and State Comptroller's office periodically audited expenses to determine how much the State would reimburse to the City for the maintenance services, including overtime hours.

Gonzalez testified that a significant amount of work had to be done in the building where Flores worked outside of regular business hours and, thus, required extensive overtime to complete the work. According to Gonzalez, around summer 2016, there was an abundance of overtime so anyone who wanted to work overtime could work overtime. Gonzalez testified that the overtime process changed in summer 2016 because there were several incidences when people who should not have been in the buildings after hours were there and because the process needed more accountability. Gonzalez also stated that the overtime policies process he described was for the building services' staff, which is what he is familiar with, not all of DCAS. Prior to the change to the overtime process, there was a pre-approval of overtime requirement through telephone calls, but not everyone was using that process and there was not a lot of documentation for overtime of

the building services' staff. Gonzalez explained that prior to the overtime process change for building services staff in summer 2016, workers learned from the team leader what overtime work was available that day. He continued that maintenance workers could reach out to team leaders to ask about overtime work, team leaders could reach out to maintenance workers to inquire if someone was available to do overtime work, the maintenance supervisor could ask team leaders if there was overtime work in other boroughs, or overtime could come from a work order communicated directly to the maintenance worker. According to Gonzalez, since different workers could get overtime assignments from different people and since the requests were done by phone and email, and approved by either a team leader, a senior building custodian, a maintenance supervisor or a borough supervisor, there was no sure way to tell who had appropriately approved overtime work.

Gonzalez testified that the process for building services staff changed in July or August 2016 to require an overtime request to be documented in a spreadsheet to be filled out with names, titles, hours and overtime assignments, and submitted for review before 3:00 p.m. to Colon, Rich McCarthy, and Gonzalez. The spreadsheet was submitted per borough not per building. Gonzalez explained that the change was in how overtime was required to be pre-approved, not in how overtime was distributed or scheduled. Gonzalez testified that the information in the spreadsheet was "provided by the senior building custodian and given to the borough supe" and the team leader may have also informed what was entered in the spreadsheet to be sure maintenance staff was included. Subsequently, Gonzalez testified that O'Neill, Flores's team leader in summer 2016, told Barksdale, the borough supervisor in summer 2016, who to put on the spreadsheet for overtime approval each day. Gonzalez explained that once the overtime work was approved, it was sent back to the borough supervisor for distribution and copied to the maintenance supervisor. Gonzalez also testified that maintenance workers learned about overtime work from their team leader, which was an "in house" title for which a maintenance worker volunteered and who was O'Neill during summer 2016, or from the maintenance supervisor, who was Foster in summer 2016 for Flores's work location. Gonzalez stated that the team leader worked with the senior building custodian to make sure maintenance workers were also included in the overtime request so as to create a clear record of who was supposed to be in the buildings. According to Gonzalez, the overtime policy does not specifically mention team leaders, but team leaders continue to be part of the process. Gonzalez also testified that after the overtime process changed in summer 2016, notification of overtime work was given to maintenance workers by phone, email or face to face. Gonzalez explained that maintenance workers were asked for their availability to work overtime hours during a given week, and as jobs came up, team leaders knew who to schedule to work the overtime and would confirm they still wanted to work the overtime on the date that the pre-approved work needed to be done. Gonzalez acknowledged that he was not part of the process between team leaders, building supervisors and maintenance workers but that was what he understood it to be. Gonzalez testified that he was not aware of any instances of maintenance workers being excluded from overtime. Gonzalez acknowledged that the email explaining the new policy as of July 28, 2016, only explained how overtime was to be reported for pre-approval, not how the overtime work was to be distributed. Gonzalez did not testify regarding any forms that maintenance staff purportedly needed to complete or sign to be able to work overtime and the email that Gonzalez sent in July 2016 regarding the change in overtime procedure made no mention of forms.

Gonzalez explained that when the new policy was rolled out, some of the maintenance workers complied with it, while others indicated that they did not like the extra work in obtaining overtime approval or the accountability that it instilled. Gonzalez testified that Colon told him that

Flores did not like getting overtime from a building custodian, although, Gonzalez explained, Johnson did not approve the overtime requests, as it was the main office that approved overtime, but Johnson was responsible for issuing the work orders for overtime which had been approved. According to Gonzalez, Johnson did not have anything to do with maintenance workers contacting her to work overtime, rather maintenance workers contacted O'Neill or Foster for overtime work. Gonzalez testified that after the change in policy, Gonzalez approved overtime requests which included Flores, and also denied overtime requests which included Flores, but Gonzalez never personally spoke with Flores.

Gonzalez testified that Flores was one of the top earners under the prior overtime policy and was very affected by the change. According to Gonzalez, the building services management did not have a problem with any particular worker earning a lot of money through working overtime because they needed help getting work done. Gonzalez did recall one time in which overtime for Flores was cancelled, which is also addressed in an email from Gonzalez that was entered into evidence, but he did not recall a time when a request for Flores to work overtime was denied. Gonzalez explained that the incident in which Flores's overtime was cancelled was because the spreadsheet for overtime approval was not submitted so the overtime work was unauthorized. As such, he stated, everyone at the facility, not just Flores, was directed to go home. Gonzalez agreed that Flores was not at fault for that overtime work being cancelled and he testified that the senior building custodian or someone who worked for her was the person at fault. Gonzalez recalled a second instance when Flores was added to an overtime sheet while he was on vacation. Gonzalez did not know how Flores could have been added to the overtime list while he was on vacation, so that overtime request was only approved for the people who were actually working at the building at that time. Gonzalez testified that Flores was removed from that overtime request because they did not know how he could have been informed there was overtime available and how his availability to work it could have been confirmed while he was on vacation. Gonzalez testified that Colon told him that it was not common practice for a worker to be called on vacation to offer them overtime or for a worker to call from vacation to sign up for overtime. When asked if anyone else was put on the overtime spreadsheet while on vacation and then had the overtime denied or cancelled, Gonzalez answered "no."[6] Gonzalez acknowledged that the official policy did not contain a prohibition against workers signing up for overtime while on vacation. Gonzalez stated that neither Flores nor O'Neill contacted him about Flores not working overtime and Gonzalez was not aware of anyone being told to withhold overtime from Flores. According to Gonzalez, if Flores wanted overtime, he could have just called his team leader, his supervisor, or even Gonzalez and asked for it.

Regarding the original PESH safety and health complaint, Gonzalez testified that he was only "vaguely" aware of it in the summer 2016, and that it had something to do with a fire action plan in Flores's building. Gonzalez explained that such complaints would not come through his department. He was not aware of anyone having an issue with Flores for filing the health and safety complaint. Gonzalez testified that he is not aware that Flores was ever written up or disciplined for not following DCAS policies or procedures.

Notes from an interview with Gonzalez that a PESH investigator conducted were entered into evidence. According to those notes, Gonzalez stated that overtime has been questioned but

[6] During the hearing, respondent stipulated to the fact that O'Neill worked overtime when returning from a vacation.

never denied and he also stated that the only overtime request that was denied was the one for petitioner to work overtime after he had been on vacation.

Additional Documents Entered into Evidence

The following documents were also entered into evidence but are not included in the summation of testimony above:

1. Audio recordings of petitioner's conversations with Nathaniel Gales, Johnson and Colon;
2. Notes taken by O'Neill from the Queens Criminal Court logbook;
3. January 22, 2020 FOIL response containing hours worked by another employee;
4. March 3, 2020 FOIL response containing overtime and vacation payroll records for another employee;
5. PESH Questionnaires completed by Gonzalez and Colon.

Additionally, during the course of the hearing, petitioner offered three emails into evidence, which were not entered into the record at the time that they were initially offered. We now find that those emails are part of the record. The first is a January 6, 2020 email from Deutsch informing Flores that DCAS has no separate policy or procedure regarding an employee's ability to work overtime in a week in which they also took leave time, beyond the Fair Labor Standards Act and the applicable collective bargaining agreements. The second is a December 8, 2019 email from "Curtis" to Flores indicating that "Curtis" informed Flores that he had been summoned to a meeting regarding Flores. The third is a March 3, 2020 email from Flores to Deutsch in which Flores stated that DCAS is not in compliance with a Mayoral Directive.

GOVERNING LAW

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]).

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 retaliated against petitioner, 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 Mateusz J. Nadolecki*, Docket No. PES 07-008, at p. 7 [May 20, 2009]; *see also Matter of Janice Razzano*, Docket No. PES 11-009, at pp. 8-9 [Dec. 14, 2012]).

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 DCAS 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, the employer had knowledge of the protected activity, and that the claimant experienced an adverse employment action of working less overtime. The parties disagree on whether any adverse action was taken against petitioner because of his 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) § 65.58. Petitioner met his burden to prove that the respondent's determination was invalid or unreasonable. As stated above, the parties agree that petitioner established the first three factors in a prima facie case of retaliation – his safety and health complaints were protected activity, DCAS knew petitioner made safety and health complaints, and petitioner suffered an adverse action in that he worked less overtime hours. Thus, the first question to resolve in this matter is whether it was reasonable and valid for the respondent to determine that there was no causal connection between petitioner's protected activity and his reduced overtime hours.

Respondent Incorrectly Determined that Petitioner
Did Not Establish the Causation Element of Retaliation

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 first filed a safety and health complaint with PESH on July 15, 2016, which the parties agree constituted protected activity. Petitioner began to work less overtime hours sometime in August 2016. 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.

Respondent incorrectly determined that despite the temporal proximity between petitioner's safety and health complaints and the overtime reduction, there is still no causal connection between the protected activity and the adverse action, because DCAS had begun the process of changing the overtime procedures, and petitioner had complained about those changes, prior to petitioner filing safety and health complaints. There is, however, no supported evidence in the record that petitioner complained about an impending overtime procedure change prior to his filing safety and health complaints. Even were such evidence to exist, which it does not, petitioner did not experience a reduction in overtime hours until after he filed safety and health complaints. It was the loss in hours that was the adverse action, not an impending change in overtime procedures (*Kwan*, 737 F3d at 845 [citations omitted]).

Respondent also determined that there was no causal connection between petitioner's protected activity and the adverse action because petitioner was unwilling to comply with the July 28, 2016 overtime procedures and that was why he suffered reduced overtime hours. Again, the record does not support this conclusion. Other than Deutsch's conclusory assertions, there is insufficient evidence in the record that petitioner did not comply or was unwilling to comply with overtime procedures before or after the changes in those procedures. Deutsch's October 17, 2016 letter to PESH, in response to petitioner's retaliation complaint, stated that petitioner did not follow

procedure and that he was the only maintenance worker to do so. Deutsch's letter specifically states,

> "[w]hile the fact that Mr. Flores had worked substantial amounts of overtime without following existing procedures for approval was a factor in devising the revised procedures, the new procedures were designed to address agency-wide procedural issues, and they were not developed to retaliate against Mr. Flores for raising safety and health related issues."

However, neither in that letter nor in his testimony did Deutsch explain how petitioner did not follow procedure. Gonzalez also did not testify regarding a single instance in which he alleged that petitioner did not follow policy or procedure. There is insufficient evidence in the record showing that petitioner did not follow a policy or procedure other than respondent's incorrect assertion that petitioner had to request overtime if he wanted to work it, a fact contrary to the record as discussed in greater detail below, since multiple individuals provided statements and/or testimony that the majority of building services staff did not request overtime themselves, but were instead contacted regarding their availability. DCAS failed to submit any documentary or other evidence of petitioner's alleged failure not to follow policy or procedure during the investigative stage or during the hearing before the Board. In addition to there being insufficient evidence in the record to support that assertion, Mathew's own report of investigation gives no indication that Mathew concluded that petitioner was not following policy or procedure. Rather, Mathew states in his report of investigation that DCAS did not try to determine why petitioner was working less overtime, which presumably would be of interest to DCAS given Deutsch's statements regarding Flores's conduct being a failure to follow policy or procedure. Additionally, Deutsch then added to his March 10, 2017 closing statement on the retaliation investigation that Flores engaged in a job action that was a slowdown, without providing any evidence of that. As such, we find petitioner met his "minimal" burden to establish a prima facie case of retaliation and respondent incorrectly determined that he did not.

The Employer's Legitimate Non-Discriminatory Reason for a Change in Overtime Procedures Does Not Explain Why Petitioner's Overtime Was Reduced Substantially and Indicates Pretext

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 (*Texas Dept. of Community Affairs* v *Burdine*, 450 US 248, 255 [1981]). 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). Once an employer has provided legitimate, non-discriminatory reasons for its actions, petitioner must provide evidence that those actions were a mere pretext in furtherance of the actual motive or retaliating against him for engaging in his protected activity (*see Matter of Town of Lee*, Docket No. PES 14-014, at p. 7 [May 3, 2017]). The employee can demonstrate pretext 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 (*Burdine*, 450 US at 255 n 10).

We agree with respondent that DCAS demonstrated a legitimate, nondiscriminatory reason for changing the overtime policy and procedure. The record shows that the consistently articulated

reason that DCAS changed the overtime process is because there was a lack of accountability and control over who was working overtime, which made it difficult to determine who was supposed to be in the buildings operated by DCAS, and used by OCA, and who was not. We credit Gonzalez's testimony that the new procedure, which required that all overtime be submitted through a central process and that all overtime be approved before it could be performed, was responsive to DCAS's concerns about there being a lack of accountability and control over who was working overtime. While we agree that DCAS's articulated explanation for why and how it changed the overtime procedure to require a pre-approval before people could work overtime appears legitimate in and of itself, the record does not establish why petitioner's overtime decreased significantly after the procedure purportedly changed.

We credit Gonzalez's testimony about why the overtime procedure changed and about the required pre-approval process in which a spreadsheet had to be transmitted to the main building services management office for approval before anyone could work overtime. However, Gonzalez admittedly did not know how overtime assignments were given to maintenance workers. Gonzalez testified about the role that team leaders had in informing which maintenance workers were listed on the overtime approval spreadsheets, but he acknowledged that the email that he sent announcing the changed procedures made no mention of a team leaders. Furthermore, Cabrera, Johnson and Deutsch all testified that Johnson put the names together of who she was seeking pre-approval for overtime assignments. Cabrera testified that the senior building custodian asked who wanted to do overtime. Johnson testified that she had to provide the names of who could do overtime to the main office and Deutsch testified that Johnson put the names and overtime jobs together to send for pre-approval. We reject respondent's assertion that Johnson was not a credible witness because of her admission that she did not "approve" overtime. While Johnson was not the one approving or denying those "pre-approvals," the record seems clear that during the relevant time she either alone, or in conjunction with O'Neill, determined which workers to include on that pre-approval list for the site where Flores worked. Moreover, Johnson's approval or disapproval is irrelevant to DCAS's asserted position that Flores, himself, was required to request overtime and was intentionally failing to do so in purported protest of the new policy.

As Mathew himself stated in his report of investigation, it does not seem that DCAS has taken any responsibility for determining why Flores was doing less overtime work. Gonzalez's testimony affirmed Mathew's statement in his report of investigation. Gonzalez offered no explanation for Flores's overtime work reduction but Gonzalez also repeatedly testified about the need for employees to do overtime work. Gonzalez indicated his awareness of Flores's work schedule sufficient to know to deny an overtime request for him to work overtime right after being on vacation in August 2016, despite his admission that no such policy existed. Yet Gonzalez did not himself reach out to petitioner to ask him to work overtime when DCAS greatly needed the overtime work performed.

We also reject respondent's contention that petitioner should have asked for overtime if he wanted overtime because the record clearly established that was not the practice among the building services employees. Every witness testified consistently that maintenance workers were asked if they wanted to or were available to work overtime. Flores also established that he had reliably worked overtime almost every day for several years before this change in policy and because he was known as an employee who was always available to work overtime, he did not request to be given overtime assignments. Additionally, as Gonzalez testified that DCAS needed building services staff to work overtime because there was no shortage of jobs to be done during

overtime hours, the failure of DCAS to determine why petitioner stopped working overtime hours is confounding. The only indication that DCAS made sure that petitioner was being offered overtime assignments came after petitioner filed his retaliation complaint.

DCAS's various unsubstantiated reasons for why petitioner was not working overtime and the absence of any records showing petitioner was offered overtime in the same manner as other building services staff does not establish a legitimate, non-discriminatory reason for petitioner's reduced overtime hours. We find that it was unreasonable for respondent to determine that there was a legitimate non-discriminatory reason for petitioner's reduced overtime so close in time to his protected activity. We also find that respondent's failure to consider whether petitioner established pretext in the determination to be unreasonable. Even when there is a legitimate non-discriminatory reason proffered by an employer, the complainant must be offered the opportunity to demonstrate why that reason is pretextual (*Matter of Town of Lee*, Docket No. PES 14-014, at p. 7). In this matter, Mathew makes statements in his report of investigation that infer that he considered pretext, such as his statement that DCAS did not take responsibility to determine why petitioner's overtime hours were reduced, DCAS did not have a mechanism to track employees' declining overtime, and the DCAS process for distributing overtime did not establish that it was done equitably; however, Mathew does not conclude what his recommendation was with respect to whether petitioner offered evidence of pretext. The determination under review is silent as to whether petitioner offered evidence of pretext during the investigation of his retaliation claim because the retaliation analysis ends with discussion regarding whether DCAS had a legitimate non-discriminatory reason for the adverse action.

Respondent's Determination Was Unreasonable

Petitioner proved that the determination reached by respondent was invalid or unreasonable because respondent incorrectly determined that there was no causal connection between the protected activity and the adverse action, respondent unreasonably determined that DCAS explained why petitioner's overtime hours were reduced, and respondent incorrectly did not consider pretext in the determination. Thus, the matter is remanded to the Commissioner to "request the attorney general to bring an action in supreme court against the person or persons alleged to have violated the provisions of this section" as required by the statute (Labor Law §§ 27-a [10] [b], 101 [3]; *Matter of Cory Wright*, Docket No. PES 16-013, at p. 16; *Matter of Brian Colella*, PES 05-004, at p. 5; *Matter of Adam Crown*, PES 10-009, at p. 13).

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The petition for review filed herein is granted; and,

2. The matter is remanded to respondent to request that the Attorney General take action.

Dated and signed by the Members
of the Industrial Board of Appeals
on November 9, 2022.

Molly Doherty, Chairperson

Michael A. Arcuri, Member

Najah Farley, Member

Patricia Kakalec, Member

RECUSED

Sandra Abeles, Member