

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | : |
| | : |
| JOHN HARDY, | : |
| | : |
| 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 16, 2020, | : |
| | : |
| - against - | : |
| | : |
| THE COMMISSIONER OF LABOR, | : |
| | : |
| Respondent. | : |
| -----X | |

DOCKET NO. PES 20-005

RESOLUTION OF DECISION

APPEARANCES

Satter Ruhlen Law Firm, PLLC, Syracuse (Mimi C. Satter of counsel), for petitioner.

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

WITNESSES

John Hardy, Lisa Jock, Sarah Baldwin, and Senior Industrial Hygienist Andrew Cody

WHEREAS:

On June 16, 2020, petitioner John Hardy (hereinafter “petitioner” or “Hardy”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) pursuant to Labor Law § 101 to contest the April 16, 2020 determination issued by the New York State Department of Labor (hereinafter “DOL” or “Department”) that dismissed petitioner’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 24, 2020.

Upon notice to the parties, a hearing was held on December 10, 2020, February 1, February 8, and June 23, 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. Prior to hearing, the parties submitted a joint letter stating that all exhibits offered by the parties could be admitted into evidence, that the issue in dispute is

whether petitioner was terminated for a legitimate non-discriminatory reason or whether the asserted reasons for his termination were pretextual. The parties additionally stipulated to certain facts and the entry into evidence of certain documents, detailed below.

The April 16, 2020 determination letter under review was issued by Amy Karp (hereinafter “Karp”), an Associate Attorney with the Department of Labor. It states that petitioner was not retaliated against by his employer for his protected activity. The letter specifically states that the employer “provided legitimate business reasons for your termination, in particular your failure to follow directives of your superiors and failing to complete tasks assigned, rendering your behavior insubordinate.” The determination further states that petitioner did not provide evidence to the Department showing that the employer’s legitimate business reason for terminating him was pretext. The determination letter concludes that petitioner’s termination was not retaliation for his protected activity but “was for insubordination and failure to complete tasks.”

The petition asserts that petitioner was terminated by his employer in violation of Labor Law § 27-a because he tried to bring his employer’s Workplace Violence Prevention Program into compliance with the New York State Public Employee Safety and Health Act and corresponding regulations and for complaining to his supervisor about his employer’s Workplace Violence Prevention Program. Respondent does not dispute that petitioner established a prima facie case of retaliation by his employer but asserts that the employer had a legitimate non-discriminatory reason for terminating petitioner.

As discussed further below, 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

Prior to hearing the parties agreed to stipulate into evidence the following facts:¹

1. That Jefferson County (hereinafter “the County”) is a public employer.
2. Petitioner was a provisional or probationary employee at the time of his termination and regardless of which, petitioner was entitled to New York State Labor Law § 27-b’s protection against retaliation.
3. Petitioner reported to Lisa Jock (hereinafter “Jock”).
4. New York State public employers must implement a Workplace Violence Protection Program (hereinafter “WVPP”) and petitioner was to bring the County’s WVPP into compliance as part of his duties.
5. Employees must participate in a WVPP through an authorized employee representative (hereinafter “AER”) who must be an

¹ Because the parties stipulated to the above-identified specific facts, those facts are not repeated in the summary of testimony unless necessary to accurately convey the testimony. Those facts, however, are referenced in the analysis below, if relevant.

- employee authorized by the employees or the designated representative of an employee organization.
6. A WVPP that does not have an authorized AER is non-compliant and subject to a serious violation under Department of Labor Regulations (12 NYCRR) § 800.6 (d) (8) (i).
 7. Petitioner was directed to act as the AER by Jock and petitioner complained to Jock that he could not serve in that role.
 8. Petitioner understood that the AER must be authorized by the employees or their representative and not by the employer.
 9. Petitioner conducted some WVPP hazard assessments with lawfully designated AERs.
 10. Jock chastised petitioner for not serving as AER repeatedly.
 11. Petitioner could not confirm to the Public Employee Safety and Health Division (hereinafter “PESH”) that the County had a compliant WVPP because hazard assessments were conducted without an AER since petitioner could not lawfully serve as the AER.
 12. Petitioner was terminated on April 3, 2017, and Jock was the sole decision-maker relative to petitioner’s termination.
 13. Jock did not give petitioner anything in writing or a reason for his termination at the time he was terminated.

The parties also stipulated to enter all exhibits offered by each side into evidence prior to the hearing. Thus, the following evidence was made part of the record:²

1. PESH intake document regarding petitioner’s retaliation complaint docketed April 26, 2017.
2. Petitioner’s PESH questionnaire completed May 3, 2017.
3. Jefferson County’s May 19, 2017 and August 20, 2018 responses to the PESH complaint.
4. Andrew Cody’s (hereinafter “Cody”) interview notes.
5. Cody’s report of investigation.
6. Respondent’s April 16, 2020 determination letter regarding petitioner’s PESH complaint.
7. Report of personnel change document dated April 3, 2017 regarding petitioner’s termination from County employment.
8. Jefferson County safety officer job description.

² The documents entered in evidence are listed in this decision in a consolidated fashion. Thus, the number of the document in the ordered list in decision does not necessarily correspond to the number or letter assigned to the document when it was entered into the record.

9. October 26, 2016 PESH consultation report regarding County's WVPP.
10. October 28, 2016 PESH letter regarding consultation report and regarding changes needed to County's WVPP.
11. November 4 and 7, 2016 emails between Hardy and Jock regarding possible changes to the County's WVPP.
12. November 14, 2016 emails between Hardy and Jock regarding union designation of AERs.
13. January 12, 2017 PESH letter extending deadlines for the County's changes to WVPP including attachments.
14. February 8 and 9, 2017 emails between Hardy and Jock regarding Hardy's work performed.
15. February 27, 2017 email forward from Hardy to Jock regarding PESH.
16. February 28 and March 3, 2017 emails between Sarah Baldwin (hereinafter "Baldwin") and Jock regarding risk assessments.
17. March 2, 2017 PESH letter extending deadlines again for the County's changes to WVPP.
18. March 3, 2017 employer report of action to PESH including letter signed by Hardy.
19. March 7, 2017 emails from Becken to Hardy regarding what more PESH needs for the County's WVPP to be in compliance.
20. March 9, 2017 emails between Hardy and Jock regarding PESH report.
21. March 21, 2017 emails between Jock and Baldwin regarding the WVPP policy statement.
22. March 20 and 21, 2017 emails between Hardy and Donna Danks regarding AER and between Donna Danks and Department of Social Services Commissioner Teresa Gaffney.
23. March 21, 2017 email from Jock To Baldwin regarding Hardy as AER.
24. March 22, 2017 emails between Jock and Baldwin regarding AERs for assessments and response to PESH.
25. March 22, 2017 emails between Jock and Hardy regarding meeting with "Kelly," "Mark," "Sarah," and "Spike" for risk assessments at County Administration building.
26. March 24, 2017 County Clerk office letter regarding risk assessment.
27. March 27, 2017 email forward from Hardy to Jock regarding PESH extensions.

28. March 31, 2017 email forwards from Baldwin to Jock regarding Employee Assistance Program (hereinafter "EAP") reference in risk assessment document and regarding WVPP trainings.
29. April 19, 2017 email from PESH to Jock regarding WVPP deficiencies.
30. May 10, 2017 email forward from Baldwin to Jock regarding PESH meeting with the County's safety committee.
31. August 2, 2017 emails to Jock and union representatives regarding AER.
32. July 2017 Jefferson County revised WVPP.
33. September 27, 2017 PESH notice of violation regarding County's WVPP.
34. Hardy's resume.
35. CSEA Civil Service Law Section 75 primer.

For purposes of this decision, any reference to a document or exhibit can assume that document or exhibit was entered into the record as evidence.

Testimony of petitioner John Glenn Hardy

Hardy testified that, at the time of his testimony, he was employed as a supply technician at Fort Drum, a military installation. He stated that he joined the Army after high school, where he remained for 20 years until his retirement in 2005. After that, Hardy went to college, where he got a Bachelor of Science degree in aviation studies, and then in 2007, he got a Master of Science degree in occupational health and safety. Hardy testified that he has had various jobs since leaving the Army and other than the job at issue in this proceeding, he had never been terminated from a job, resigned in lieu of termination, or left a job involuntarily.

Hardy testified that he applied to be a safety officer with the County, interviewed for that job with Jock, and was offered the job by Jock at the interview. He began working for the County on October 1, 2016. Hardy testified that the safety officer position was a civil service position, so he took a test for it in December 2016, and in July 2017, Hardy got the written results from that test, which showed that he "was the number one rated . . . on the test." Hardy also testified that Jock told him how he fared on the test in January or February 2017 and told him that he changed from being a provisional employee to a permanent employee with a one-year probationary period that started once he passed the test, without any of the prior time counting toward the one-year period.

Hardy testified that as a safety officer for the County, he did risk assessments and/or trainings for the towns, villages, and fire departments; conducted safety inspections and audits of the towns and villages; worked as part of the safety committee; and worked on the County's safety policy. Hardy testified that the job posting or job description for the County safety officer position accurately described his duties. Hardy further testified that he distributed a weekly newsletter that he produced to all department heads in the County and villages; he checked on safety operations of the Department of Transportation of the road crews with that Department's supervisor; and he

arranged for the “Mind Safety Health Administration” to do trainings for the County. Hardy gave specific examples of other trainings he performed with local governments, such as risk assessments with Alexandria Bay, Rutland, Adams, Clayton, Rodman, Watertown City, Watertown Airport and Carthage, as well as HAZMAT training, chainsaw safety, and a ride along with the DOT supervisor to check road crew safety operations.

Hardy testified that Jock asked him to start doing trainings for the County’s WVPP. While Hardy acknowledged that he was not familiar with the requirements of a workplace violence prevention program under New York State Public Employee Safety and Health Act (hereinafter “PESHA”) and its corresponding regulations, he testified that he was very familiar with the Army’s workplace violence prevention work, which, according to Hardy, is something that is dealt with daily in the Army. Hardy testified that his initial work on the WVPP was to audit the County’s WVPP to evaluate whether each program under the County’s purview complied with PESHA. Hardy testified that he found some aspects of programs’ WVPP that were not compliant with PESHA so he discussed those with Jock. Hardy learned that PESH offered consultation services and thus, with agreement from Jock, he contacted PESH to ask for consultation.

Hardy testified that Jamie Becken (hereinafter “Becken”) from PESH contacted him and then came to the County offices and met with Hardy to review the County’s WVPP. Hardy testified that Becken met with him on October 26, 2016, and that Jock did not attend that meeting though she was invited to it. During that meeting, Hardy testified, Becken requested documents for the County’s WVPP from 2011 to 2016. Hardy testified that prior to his meeting with Becken, he looked for documents from 2011 to 2016 but never found any documents other than 2007 and 2009 documents. Hardy testified that Jock told him that the only documentation she had regarding the WVPP were the 2007 and 2009 documents that he found.

After meeting with Becken, Hardy received a letter from her dated October 28, 2016 and a report based on her visit with Hardy, which identified four violations: (1) the County did not have a WVPP written policy statement that describes how the AER is involved with the WVPP; (2) the County did not conduct an evaluation of the workplace with an AER to determine what risks are present; (3) the County’s WVPP policy document did not include a list of the risks identified and a plan to review them and update the list at least annually; and, (4) the County did not review, with an AER, workplace violence incident reports at least annually. According to Becken’s report, the first violation had to be resolved by December 16, 2016, the second violation had to be resolved by February 3, 2017, the third violation had to be resolved by March 3, 2017, and the fourth violation had to be resolved by February 3, 2017. Hardy testified that he discussed Becken’s report with Jock, who told him that the County’s WVPP was compliant and she told Hardy to send the necessary documentation showing this to Becken. Hardy also testified, “I did not have any documentation to submit to satisfy that report” and he stated that he told Jock that he did not have the necessary documentation to show the County’s compliance. According to Hardy, Jock told him that the documentation from 2007 was sufficient because a consultant from 2007 had found it sufficient.

Hardy testified that after discussing the report with Jock, he began setting up meetings with department heads to discuss the WVPP and that two of the department heads had AER’s present at the meeting. He also testified that the WVPP policy statement needed review by the County’s board of legislature, which was not meeting until March or April 2017. Hardy testified that in the interim he created a folder that included a list and some details of communications he had with

Jock about the WVPP, information on the WVPP regulations, forms, and other things relevant to the program, and a list of each department and department head with three columns for Hardy to date. Hardy testified that the first column was to note when Hardy met with a department head to discuss the WVPP requirements; the second column was to note when Hardy conducted the risk assessment using a PESH checklist for that department; and the third column was to date when everything was completed. Hardy testified that he left that folder in the County office when he was terminated. Those documents were not offered into evidence although Hardy testified that he had requested them.

Hardy testified that the County did not comply with the first violation regarding the WVPP written policy by the December 2016 deadline because the County needed more time to allow the board of legislature to review the policy. Hardy requested more time from Becken and she agreed to more time for each violation to be abated, as indicated in a letter dated January 12, 2017, which extended the compliance date by 60 days. Hardy testified that the County was also unable to meet the later deadlines because the WVPP policy statement was not completed timely. Thus, according to Hardy, he requested, and the County was granted, an additional extension, as reflected in a letter from Becken dated March 2, 2017 that provides for an additional 60 days. Hardy testified that the County did not meet the deadlines set forth in the March 2, 2017 correspondence either.

According to Hardy, on March 3, 2017, Jock directed him to respond to PESH to show the County complied by attaching any documentation, which Hardy testified he could not do because such documentation did not exist. Hardy testified that Jock wanted to review that response before Hardy sent it to Becken, which, according to Hardy, Jock did and approved his sending it to Becken. The response, dated March 3, 2017, states that with respect to the first violation, the County's WVPP policy was reviewed by the County's safety committee and that it would go through the County's policy making process; with respect to the second violation, injury reports were reviewed in May 2007; with respect to the third violation, a list of hazards and steps to mitigate those hazards was created for each department in May 2007; with respect to the fourth violation, the County's safety committee would recommend that the WVPP be reviewed annually and that recommendation would go through the County's policy making process. Hardy testified that Jock had also previously told him to submit the documentation necessary to comply with the PESH requirements but Hardy also did not submit it then because no such documentation existed.

Becken responded to the March 3, 2017 letter in a March 7, 2017 email stating that the County was not in compliance with the WVPP requirements because the documentation was not complete or current. Specifically, Becken's email states that a plan to implement a new WVPP policy is not compliant with the requirement to have a new WVPP policy; that the May 2007 risk assessment required additional necessary information and it needed to be updated to reflect any new work places or work environments that did not exist in 2007; that the WVPP must include the risks and mitigating steps needed, as well as a plan to review the WVPP at least annually; and, the date of the review of workplace violence incident reports and verification that an AER was present for the review of those reports was required. Hardy testified that Becken sent her March 7, 2017 email to him and Jock and that Jock went into Hardy's office and "threw it on my desk and said, Jamie is being a pit bull about this. I want her gone and I want her gone now." Hardy testified that Jock did not tell Hardy what she wanted him to do to effectuate on her wanting Becken "gone." Hardy testified that the only thing that could be done to have Becken or PESH leave the County alone was to go through the required process for a WVPP.

Hardy testified that he began the process of completing the risk assessments for the WVPP at the County worksites in March 2017. Hardy testified that on March 21, 2017, Jock told him that he would be the AER for the purpose of conducting the risk assessments and, thus, Jock said he should do the assessments only with department heads, not employees. Hardy stated that he did not understand Jock's direction because the AER's role is to speak with the employees to hear their concerns, which Jock was prohibiting him from doing. The next day, Hardy did a risk assessment with the head of the Department of Motor Vehicles and a union representative, who Hardy treated as the AER, was also present. Hardy testified that on March 27, 2022, Jock entered his office and asked if he met with the Department of Motor Vehicle's department head and union representative. Hardy confirmed to Jock that he did and Jock asked why he did that as she told him only to meet with departments heads. Hardy testified that Jock then told him she did not feel well and she left. Hardy next spoke to Jock when she terminated him on April 3, 2022. According to Hardy, Jock did not give him a reason for why she terminated him or a written document regarding the termination, nor did Hardy ever have a counseling session or performance evaluation with Jock while he worked there. Hardy testified that Jock only gave him positive feedback prior to his termination.

Hardy testified that he never failed to follow a directive from Jock. He subsequently testified that Jock did tell him not to do risk assessment meetings with employees, but Hardy did not understand that directive since he did not understand how an AER can do their job without talking with employees. He also stated that Jock directed him to be the AER in late February or early March 2017, and she told him to be the AER more than once. Hardy testified that he did not consider himself the AER because there was no authority appointing him as the AER and he testified that he provided Jock with an email from Becken explaining who can serve as an AER pursuant to the WVPP regulations. Despite that email, according to Hardy, Jock instructed him to serve as an AER, which he was not comfortable with. Hardy testified that when he did risk assessment meetings at which only department heads were present, Hardy did assume the role of AER as directed despite the fact that he did not work at the worksites being assessed. Hardy further testified that he did not determine who attended risk assessment meetings; rather, the department heads did and he did not feel that he had the authority to tell a department head who could be present at those meetings. Hardy explained that his initial meetings regarding the workplace risk assessments were only with department heads and then some department heads chose to have employees from their departments present for the actual assessments, such as the Department of Motor Vehicles and the Department of Social Services. Hardy testified that during those assessments when employees were present, he directed his questions to the department heads and the department head, in turn, would sometimes ask the employee that was present those questions. Hardy specifically testified that he did not speak to the employee or ask the employee questions, which was how Jock directed him to handle it. Hardy testified that he would not be subject to criminal liability or other personal liability for serving as an AER even if it was contrary to the requirements of the WVPP regulations. Hardy acknowledged that as his superior, Jock could expect that he would follow her direction even if her direction was incorrect.

Hardy testified that he responded to emails that he received, and he was not aware of any emails that he did not respond to, nor did anyone complain to him that he did not respond to emails. Hardy also testified that he often had to work outside of the office to do trainings or workplace safety assessments and that he maintained his appointments on a shared calendar that anyone could see. Hardy also informed the employee who operated like a receptionist in the office of his whereabouts, and he kept Jock informed of his whereabouts. Hardy did not recall Jock asking him

about his whereabouts when there was not an appointment on his calendar. Hardy testified that when he was hired, Jock told him that the prior safety officer spent a lot of unaccounted time away from the office so Hardy was determined that no one could say that about him. Hardy testified that he always ended his duty at the office even if he was closer to home for an appointment. Hardy testified that Jock was fully informed about what he was working on from in-person or email communications.

Hardy testified that Jock told him to redact the County's injury and illness logs and he acknowledged that he did not redact the information in time for a scheduled safety committee meeting. Hardy also testified, "[w]ell, there was a – there was a condition on that directive. The condition was if I showed – if I took the logs to the committee, the Jefferson County safety committee meeting, and I showed them to the committee members, that I would have to redact the names. Well, I never showed the committee the documents and it wasn't for a lack of trying." Hardy testified that he asked Jock for a redacting pen, which she gave to him "shortly" before the meeting, because a permanent marker did not effectively redact the names. Hardy stated that he intended to maintain possession of those logs at the safety committee meeting so that names were not revealed but the meeting never occurred because the union members of the safety committee cancelled it.

When asked if Hardy was insubordinate to Jock, Hardy answered, "I thought I was always professional and courteous through every interaction I've ever had with [] Jock" and he stated that he had a "wonderful rapport" with Jock. Hardy denied that he ever spoke critically about Jock to other department heads. He also denied that he went to other departments without appointments and testified that he knew department heads were busy so he always planned to see them in advance and put those appointments on the County calendar, so Jock could see them. Hardy denied that he told County staff that they were handling workers' compensation matters incorrectly; rather, when PESH visited the County and indicated a deficiency with workers' compensation, he reported what PESH said to Jock and the other employee who dealt with that matter.

Hardy testified that he worked with Baldwin, the Deputy County Administrator for the County, because they were both on the County's safety committee, and Baldwin was Chairperson of the committee. Hardy stated that he did not report to Baldwin instead of Jock nor did Jock ever complain to Hardy that he was doing that. Hardy communicated with Baldwin but before discussing safety committee meeting agenda topics with Baldwin, Hardy ran it by Jock. Hardy testified that a PESH-created checklist for the WVPP included a reference to an EAP and in anticipation of the WVPP risk assessment of the County's administrative building, Hardy sent that checklist to Baldwin. Hardy testified that Baldwin emailed back stating that she was surprised that Hardy left the EAP question on the checklist. Hardy had no recollection of Baldwin mentioning the EAP reference before that email, and he testified that he then took steps to remove the EAP reference from it. Hardy acknowledged that Baldwin discussed the frequency and length of emails on safety issues that he sent to department heads and other representatives of towns and villages with him. Hardy testified that after Baldwin told him that the emails were too long, he shortened the topics that they covered from five topics to two or three topics. Hardy did not think there was time to send separate emails on specific topics to the relevant people because there were 52 departments at that time.

Testimony of Lisa Jock

Jock is employed by Jefferson County as the Director of Insurance. She began in that position in 2000 and, at the time of her testimony, had worked for the County for more than 26 years. Jock oversees the County's health insurance and workers' compensation plans, as well as the unemployment insurance program, and other insurance matters. Jock testified that she hired Hardy to be the County's safety officer in October 2016 on a provisional or non-permanent basis. According to Jock, the County safety officer provides training on safety and health matters, conducts building and equipment inspections, and serves as a resource to departments. Jock testified that Hardy also served on the County's safety committee along with the chairman of the county board of legislators, or a designee, two union members, and the County's buildings and grounds superintendent. According to Jock, that committee meets quarterly regarding safety reports, activities, or concerns, and the safety officer is responsible for setting an agenda and keeping minutes at that meeting. Jock supervised Hardy, and she testified that they interacted daily, so that she was able to evaluate his job performance. Jock testified that Hardy stopped working as the County's safety officer in April 2017 when he was terminated for insubordination.

Jock testified that Hardy was very qualified for his job, and she was happy with his performance during the first two months that he had the job. Jock also testified that she felt Hardy's cooperativeness diminished after the first month of him having the job. Jock testified that Hardy did not respond to some emails that she sent to him, but she did not specify or reference an example of this. Jock also testified that Hardy left the office for more than 15 minutes at a time without telling her or her staff where he was going. Jock acknowledged that Hardy's job required him to be out of the office but Jock testified that she told Hardy he had to communicate his whereabouts. Jock could not recall a specific instance when Hardy was not in the office and did not inform anyone of his whereabouts. Jock also acknowledged that other than her initial instruction upon hiring Hardy that he must keep her informed of his whereabouts through the shared office calendar or direct communication, she never spoke about it with Hardy again in person or in writing. Subsequently, Jock recalled that she may have spoken about it with him once in January or February but she did not remember the specific date. Jock further testified that she did not think Hardy was offering enough trainings in the County nor was he reaching out to the highway department. When asked if Jock conveyed her expectations on those matters to Hardy, she responded "[t]hat was part of the job description and requirements, yes." Jock testified that she did not think she told Hardy that she expected more trainings.

Jock testified that Hardy reported his work activity to the Deputy County Administrator, Baldwin, who was not his supervisor, and Jock believe this evidenced that Hardy was avoiding Jock's authority. Without specifying who petitioner told this to, Jock testified that Hardy told his staff that he should report to the County Administrator not Jock and he told other department heads that Jock did not know what she was doing. Jock did not recall if she discussed or sent an email to Hardy regarding his reporting to the Deputy County Administrator and not to Jock. Jock also stated that Hardy went to other departments to speak to the department head without appointments, and she specifically recalled that he did that in the public defender's office and the IT department. She did not recall when this occurred at the public defender's office, but she believed Hardy's unannounced visit at the IT department happened in February or March 2017. Jock did not counsel Hardy or otherwise communicate with him about either instance.

Jock testified that Hardy was responsible for maintaining records, such as incident reports, for the County's WVPP, as well as working on the trainings for the WVPP. Jock believed that the County's WVPP followed the Labor Law requirements for a program at the time that Hardy was hired whereas, she testified, Hardy did not think it was compliant. Jock testified that Hardy was concerned that workplace violence risk assessments were not completed for all the offices, that the incident reports were not reviewed annually, and that WVPP trainings were not being completed. Jock suggested that Hardy contact PESH to see if they could help with figuring out what needed to be done for the WVPP. Jock did not attend the initial meeting with PESH that Hardy attended, but she did receive PESH's report after that consultation.

Jock testified that Hardy attempted to complete the WVPP risk assessments, and he spoke with union members and the County's safety committee about doing so. Jock testified that she suggested that Hardy update the risk assessments, but she did not specifically direct him to do that. Jock testified that she did ask Hardy to meet with three or four department heads -- County administration, buildings and grounds, purchasing department, and the County's auditor's office - - and no one else -- to conduct risk assessment inspections. Jock testified that Hardy told her several times that he could not be the AER for the risk assessments, but she disagreed, and she did not "believe that issue was ever really resolved." Subsequently, Jock testified that she believed the matter was settled after she told Hardy that he had to be the AER. Jock believed that Hardy could serve as the AER because between 2007 and 2009, the County's then-safety officer served as the AER for the risk assessments that were done. Jock testified that she instructed petitioner to conduct risk assessments with only department heads present, without other employees present, and with Hardy acting as the AER. Jock further stated that, at least twice, Hardy conducted risk assessments while other employees were present. Jock testified that Hardy did not follow her directive because he believed that he could not be the AER. Jock subsequently acknowledged that Hardy did indicate to her that he would follow her direction and serve as the AER but because he still did some risk assessments with employees present, Jock considered that in deciding to terminate him. Jock testified that one of the risk assessments that he did with employees present was with the County Clerk's office, and a union representative was present, and a March 24, 2017 letter from the County Clerk's office also indicated this. Jock testified that she asked Hardy why the union representative was at the risk assessment at the County Clerk's office, and she recalled him responding that he cannot be the AER. Jock testified that she did not recall Hardy telling her that the union representative was invited to the meeting by the County Clerk. Jock believed that Hardy refused to serve as the AER and, at the time, she believed that he could have served in that role. Jock testified that she did not tell Hardy what to do if another employee was present at a risk assessment meeting, that she did not tell Hardy to cease the risk assessment if another employee was present, and that she did not tell Hardy to tell a department head to "release" an employee from the meeting if such employee showed up at a risk assessment. Jock acknowledged that by conducting the risk assessment with the County Clerk's office with a union representative present, Hardy was not actually violating Jock's directive. Jock also acknowledged that the directive she gave petitioner to serve as the AER was incorrect because the union had to appoint the AER and they did not appoint petitioner to be it. Subsequently, Jock testified that she did not recall telling Hardy that no other employee representative could be present, stating that it was her "understanding" after a discussion about Hardy serving as the AER that one would not be present. When asked if she thought that Hardy or any other employee was at risk of "serious bodily harm or death" by Hardy serving as AER, Jock responded, "[n]o."

Jock testified that she asked Hardy more than once to send the Department of Labor required documentation in response to the communication that they sent regarding the WVPP and that she was referring to the County's 2007 risk assessments, which she believed would have satisfied PESH's request for risk assessment records. Jock testified that she never told Hardy to certify the County's compliance with the WVPP requirements of the Labor Law when she knew the County was not actually compliant. Jock testified that sometime in 2017, after Hardy's termination, she came to an understanding that the County's 2007 risk assessment records were not compliant with PESH requirements. Jock denied telling Hardy to send PESH whatever they want so that they would leave the County alone, but she did tell Hardy to submit documents responsive to PESH's request.

Jock testified that the safety committee was to review accident reports and injury logs at one of its meetings and Jock wanted names of employees listed in those reports and logs redacted before they were shared at the meeting. Jock stated that Hardy did not redact those names, and she testified that Hardy told her that he needed a redacting tool to complete the task. According to Jock, she told Hardy that he could black out the names and then photocopy the pages so that the names would not remain visible through the blacked-out areas, but Hardy never did that. Jock did not know if the reports and logs were submitted to the safety committee, but she testified that they were copied and ready for submission without any redactions. Jock believed that Hardy intended to submit them to the committee and, thus, she felt this was insubordination. Jock acknowledged that the safety committee meeting was cancelled but she did not recall when the cancellation happened.

Jock testified that she decided that she would terminate Hardy at the end of March 2017, and the two events that contributed to her making that decision were Hardy holding a risk assessment meeting in which he allowed employees to serve as AERs, rather than himself, and Hardy not removing language regarding an EAP from the risk assessment forms that were to be completed during risk assessment meetings or inspections despite having been asked to do so repeatedly by Baldwin. Jock testified that she learned about Hardy not removing the reference to EAP from the risk assessment form when Baldwin copied her on an email about it to Hardy on March 31, 2017. Jock acknowledged that she never spoke with Hardy about the matter.

Testimony of Sarah Baldwin

Baldwin testified that she is the Deputy County Administrator of the County, and, at the time of her testimony, she had held that job for almost 8 years. In that role, Baldwin is the designated chair of the County's safety committee. Baldwin testified that the safety committee is responsible for recommending actions on safety issues, and the County's departments are responsible for implementing those actions. Baldwin testified that she works with Jock because Jock is the head of the department of insurance and, technically, subordinate to Baldwin, and Jock deals with safety matters in her position, which intersects with the safety committee that Baldwin chairs.

Baldwin testified that she did not participate in Hardy's hiring, but she interacted with him because he was also part of the safety committee. She stated that she and Hardy jointly determined the schedule and agenda of the safety committee meetings. Baldwin did not interact with Hardy daily and did not supervise his day-to-day work. According to Baldwin, the safety committee was meeting monthly when Hardy worked there, so she dealt with him each month and sometimes he

contacted her in relation to the safety committee at other times. Prior to Hardy's hiring, Baldwin stated, the safety committee had been dormant from 2015 to 2017. Baldwin also testified that Hardy sometimes contacted her related to his other job duties and she would try to redirect him to Jock on those matters, but Baldwin did not recall how many times that occurred. Baldwin did specifically recall "a couple of times" when Hardy reported to her on trainings that he had done or planned to do, and she told him to report that to Jock but she did not recall when those occurred. Baldwin acknowledged that Hardy seemed proud of that work that he reported on to her, but Baldwin did not think it was necessary to report about it to her. Baldwin could not recall any other instances when Hardy was directed to report on something to Jock and not Baldwin. Baldwin testified that she told Jock that she told Hardy about reporting to Jock and not her. Baldwin described Hardy as very knowledgeable on safety matters, but he did not recognize the role of the safety committee as something different from the responsibilities of the department heads. She testified that Hardy continued to try to have the safety committee be responsible for implementation of safety-related tasks, and Hardy continued to try to report to Baldwin on certain work on a weekly basis. Baldwin testified that PESH advised that the safety committee be more involved in the WVPP than it had been previously, and the union representatives on the committee wanted to work on the WVPP templates that PESH provided, as well as take PESH's other recommendations on the role of the safety committee.

Baldwin testified that in March 2017, Hardy did not redact personal information from injury reports as he had been told to do by Jock for a safety committee meeting that was ultimately cancelled. Baldwin testified that she saw that the forms had not been redacted and that Hardy handed out those unredacted forms to the committee members who were present -- Baldwin, Hardy, and the building's superintendent, who is also a manager. Baldwin testified that before the meeting was to start, the union representatives on the committee informed them that they would not be able to attend, so the meeting was cancelled. She stated that Hardy then took back the unredacted forms, which were not given to any union representatives on the safety committee. Baldwin did not know if Hardy would have given them to the union representatives had they attended the meeting. Baldwin testified that Jock said that the personal information was required to be redacted from the injury reports but acknowledged that she did not know whether, under the WVPP regulations, personal information was to be redacted from injury logs or not. Baldwin also acknowledged that she did not know what, if anything, Hardy did to try to redact the injury logs.

Baldwin testified that two PESH representatives met with the safety committee in February 2017 to discuss the WVPP, and they provided a lot of information at that meeting, including risk assessment templates. Baldwin testified that during that meeting, she asked Hardy to edit the PESH-provided risk assessment templates to remove the reference to EAP since the County did not have an EAP. Baldwin testified that she again asked him to do so in an email communication. According to Baldwin, the risk assessment form still contained the reference to EAP when it was presented to three department heads during a late March 2017 meeting at which Baldwin was also present. Baldwin testified that it was after that late March 2017 meeting that she first learned from Hardy that he had been unable to remove the reference to EAP because the forms were PESH-provided templates. According to Cody's interview notes from his interview with Baldwin, Hardy did fix the documents as she requested once IT was able to help him, but Baldwin did not recall if the three department heads at that meeting then got corrected forms with the EAP reference removed.

Baldwin testified that prior to Hardy being the County's safety officer, a practice was established that the safety officer sent email updates to department heads monthly. She stated that Hardy increased the frequency of those emails to "pretty much weekly," added additional people to the recipient list of those emails, and would include five or six attachments to those emails, most of which were not relevant to the work of most recipients of the email. She testified that department heads complained to her that Hardy's email updates were too much information, and much of it was not relevant to them. Thus, Baldwin testified, in late December 2016, she advised Hardy that "less would be more" and that the information should be more targeted, so separate emails should go out. Baldwin testified that she relayed that information to Jock as well in January or February 2017. Baldwin testified that Hardy's emails did not change after she spoke to him. Baldwin specifically recalled the probation director sending an email back to the entire distribution list in late March 2017 stating that much of the information in Hardy's email was not relevant to that department. Baldwin did not recall any other emails complaining about Hardy's update emails, but the building director also spoke to her as did others, though she could not recall who they were, other than possibly the County attorney. Baldwin testified that Hardy was polite when told to do things differently but then did not do things differently.

The Employer's Written Responses to Petitioner's Retaliation Complaint

The County's May 19, 2017 response states that petitioner was terminated for poor performance and it gives several examples of his purported poor performance. Specifically, the response states that petitioner failed to inform PESH of work the County did previously on the WVPP; petitioner failed to provide PESH with 2007 and 2009 documents regarding the County's WVPP as directed to do so by Jock; petitioner went outside of the chain of command by reporting to Baldwin not Jock; petitioner did not remove certain wording from a form that Baldwin directed him to remove; petitioner did not redact names from illness and injury logs despite being told to do so verbally and in email; petitioner did not follow direction on how to do updated risk assessments; petitioner's whereabouts were not always known; and petitioner did not respond to emails and requests. The response further stated that petitioner did not engage in protected activity prior to his termination, and it states that petitioner refused to serve as the AER as Jock directed him to do. The County's August 17, 2018 response additionally states that petitioner did not understand the function of the safety committee; petitioner walked into the department head's offices without making appointments; petitioner spoke to other staff that he should report to Baldwin, not Jock; petitioner told the workers' compensation staff that they and Jock were handling things incorrectly; petitioner asked a department head for 24/7 access to a facility without prior discussion with Jock; and petitioner was not well-liked by other County staff.

Testimony of Senior Industrial Hygienist Andrew Cody

Senior Industrial Hygienist Andrew Cody (hereinafter "Cody") testified that, at the time of his testimony, he had been employed by the Department of Labor for 9 years and that he handles safety and health inspections, as well as whistleblower retaliation complaints. Cody described the process typically followed in a PESH retaliation complaint. Cody explained that through the investigation, the PESH investigator will consider any evidence an employer presents regarding a reason other than retaliation for the action that they took against the employee.

Cody testified that he became involved in petitioner's complaint when he filed it with PESH. Cody testified that Hardy's retaliation complaint was that because of his work with respect

to the County's WVPP, specifically, his disagreement with his supervisor that he could appropriately serve as an AER, he was terminated. Cody explained that with respect to the WVPP, management and employees must be represented in the development of the WVPP, including during the assessments of workplace violence risks. Cody testified that petitioner's disagreement with who could be the AER was protected activity as was petitioner's participation in the risk assessment meetings.

Cody testified that he held an investigative conference in this matter during which Hardy, Jock, Baldwin, and two CSEA union representatives were each brought into the conference separately and interviewed by Cody. These interviews were documented in notes that Cody created. Cody then drafted an investigative report and recommendation that is dated April 21, 2017; however, it includes a timeline that falls after April 21, 2017.³ Cody's report of investigation details what was considered in the investigation and states in relevant part:

The Employer's assertion that the Complainant failed to follow a directive by his supervisor by involving the union on workplace violence prevention program assessments as authorized representatives does not appear to be accurate. . . .

Even following the termination of the Complainant, the Employer failed to provide documentation of a properly implemented workplace violence prevention program . . . resulting in several violations related to the implementation of their workplace violence prevention program. The Complainant's supervisor repeatedly referenced the Complainant's failure to follow their directive to contact PESH, yet the supervisor signed off on the response letter to PESH and was aware that it had been sent. . . .

[T]he supervisor referenced a number of items such as failure to reply to emails or follow through on tasks, but they also stated that they made no effort to address those issues with the complainant and conducted no counseling sessions or performance reviews with the employee. The respondent did not provide evidence of emails that were not replied to by the Complainant. . . .

The [injury and illness] logs would not be required to be redacted as a privacy case, but the Complainant was ordered to redact them by his supervisors and had not redacted them prior to the Safety Committee Meeting that was later cancelled.

Other assertions such as the Complainant beginning to report to a different department were not raised during the investigative conference, and interviews with both supervisors indicated that at no point did the complainant begin reporting to a different department . . . at no point were concerns about the Complainant reporting to an incorrect department raised. . . .

³ There was no explanation for why the date on Cody's final report of investigation is prior to his work on the investigation being complete, as evidenced by the timeline included in his final report of investigation.

The Respondent stated that several employees, including department heads, did not like to work with the Complainant, but no direct evidence of this was provided by the employer or indicated in any of the interviews conducted. . . .

The temporal proximity to the termination as well as the internal discussion between managers indicate that the Complainant's participation in safety and health activities was a primary concern in their determination. The clear directives by the employer are also factors that must be considered, and the Complainant failed to follow directives from supervisors both in the redaction of names from injury and illness logs, and more notably by including union representatives in the WPV risk assessment meeting in direct opposition to a supervisory directive. Other factors raised by the employer were not well documented and never presented to the Complainant in the form of counseling or feedback prior to the termination.

Cody's report of investigation then states in the recommendation that the County's "actions against [Hardy] are not conclusively the result of retaliation as the result of the protected activities in violation of 27-a.10."

Cody testified that Hardy was correct that he should not have been the AER and the County was incorrect to assign him that role. Nonetheless, Cody testified, PESH did not determine that Hardy's termination was in retaliation for his work on the WVPP because the County asserted that Hardy did not follow directives and even if those directives were incorrect, Hardy still had to follow them. Cody testified that Hardy admitted that he did not follow certain directives. When asked what specific admission Hardy made, Cody testified, "I believe there was at least one, maybe a couple, of the assessments that had been done where Mr. Hardy had basically invited a union representative to sit in as the AER. So when he conducted the assessment, he notified the union and had them appoint[] someone to – to act in that role" Cody could not recall which departments those meetings were with but thought maybe one was the DMV. When asked if Hardy had not invited the union representatives to that meeting, would it change Cody's opinion as to Hardy's retaliation complaint, Cody responded that it would "influence it." Subsequently, Cody testified that he believes Hardy should have told the department head who invited the union representative that he would not continue the assessment with the union representative present. Cody testified that had Hardy been serving as AER at the direction of Jock or the County's management, during a PESH enforcement inspection, PESH would have issued a violation against the County, not Hardy. Cody did not believe that Hardy was justified in refusing to serve as AER because he was directed by his supervisor to do so.

Cody testified that Jock also told him that she terminated petitioner because he did not respond to emails, he spent time out of the office without getting her approval first, he reported to Baldwin rather than Jock, and he did not provide documentation to PESH regarding the WVPP. Cody also testified that Jock did not provide Cody with any emails to evidence that Hardy did not reply to emails, nor did Jock provide documents evidencing Hardy being out of the office without notifying Jock of such, or documentary evidence indicating that Hardy was going outside of the chain of command and reporting to Baldwin, not Jock. With respect to Jock's assertion that

petitioner did not provide documentation to PESH showing WVPP compliance, Cody testified that petitioner could not have provided it because it did not exist.

Cody testified that injury logs can be redacted when an employer takes certain steps “to designate something as a privacy case.” Cody gave two examples of when this may be permitted such as a nurse who was concerned about HIV exposure from a needle stick or when an employee specifically requests that an injury be kept private. Cody confirmed that if an injury or accident involves something that would be considered embarrassing or personal, or if it involves reproductive organs, it can be considered a privacy case that allows for certain redactions. Cody testified that, otherwise, injury logs are not to be redacted.

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 Procedure and Practice (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 discriminated against the petitioner, but rather 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]; *Matter of Mateusz J. Nadolecki*, Docket No. PES 07-008, at p. 7 [May 20, 2009]).

C. Burden of Proof to Establish Employer Retaliation Under PESHA

To prevail, petitioner must show that the Commissioner's determination dismissing his complaint and declining to take further action was "invalid or unreasonable," by a preponderance of evidence, on a claim of unlawful retaliation under Labor Law § 27-a (10). To establish that the County retaliated against him under the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. 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 first 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). 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). Pretext can be established directly by persuading the trier of fact that "a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" (*Texas Dept. of Community Affairs v Burdine*, 450 US 248, 256 [1981] [citing *McDonnell Douglas*, 411 US at 804-805]; see also *Kwan*, 737 F3d at 845). The employee can also 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 (*id.* at 255 n 10).

The parties stipulated that the only issues in dispute in this matter are whether it was reasonable and valid for respondent to determine that the County had a legitimate, nondiscriminatory reason for terminating Hardy and whether it was reasonable and valid for respondent to determine that the County's reason was not pretext for retaliation.

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.

Respondent's Determination That the Employer Had Legitimate, Non-Discriminatory Reasons for Terminating Petitioner and That Those Reasons Were Not Pretext for Retaliation Is Unreasonable

As stated above, 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 determination under review, Karp’s April 16, 2020 letter, concludes that petitioner was not retaliated against by the County for his protected activity because the County “provided legitimate business reasons for [petitioner’s] termination, in particular [petitioner’s] failure to follow directives of [petitioner’s] superiors and failing to complete tasks assigned, rendering [petitioner’s] behavior insubordinate.” Karp’s determination does not define how petitioner failed to follow directives or how he failed to complete tasks assigned, thus, we must look to Cody’s investigative documents as well as the record developed at hearing to determine the reasonableness and validity of Karp’s determination.

The parties stipulated that Jock was the sole decision-maker regarding petitioner’s termination. Jock testified that she decided to terminate petitioner at the end of March 2017 for two reasons, because he held a risk assessment meeting in which he allowed employees to serve as AERs, despite her direction that petitioner serve as the AER, and because he did not remove language regarding an EAP from the risk assessment forms that were to be completed during risk assessment meetings or inspections despite having been asked to do so repeatedly by Baldwin. While Jock clearly testified that she decided to terminate petitioner for two reasons, she also testified regarding other purported shortcomings of petitioner, and Cody’s investigation considered other reasons for petitioner’s termination.

In its May 19, 2017 and August 17, 2018 responses filed during the underlying investigation, the County outlined various reasons for petitioner’s termination. Specifically, the May 19, 2017 response states that petitioner was terminated for poor performance; namely petitioner’s failure to inform PESH of work the County had done previously on the WVPP; failure to provide PESH with 2007 and 2009 documents regarding the County’s WVPP as directed to do so by Jock; reporting to Baldwin not Jock; failure to remove certain wording from a form that Baldwin directed him to remove; failure to redact names from illness and injury logs; failure to follow direction on how to do updated risk assessments; failure to advise County staff about his whereabouts; and failure to respond to emails and requests. The County’s August 17, 2018 response reiterated those reasons and also asserted that petitioner was terminated because he did not understand the function of the safety committee; walked into department heads’ offices without making appointments; told other staff that he should report to Baldwin, not Jock; told the workers’ compensation staff that they and Jock were handling things incorrectly; asked a department head for 24/7 access to a facility without prior discussion with Jock; and was not well-liked by other County staff.

Cody’s report of investigation specifically details that many of the County’s assertions for why petitioner was terminated were not supported by evidence. Specifically, the report of investigation’s summation states in relevant part:

The Employer’s assertion that the Complainant failed to follow a directive by his supervisor by involving the union on workplace violence prevention program assessments as authorized representatives *does not appear to be accurate. . . .*

Even following the termination of the Complainant, the Employer failed to provide documentation of a properly implemented workplace violence prevention program . . . resulting in several

violations related to the implementation of their workplace violence prevention program . . . The Complainant's supervisor repeatedly referenced the Complainant's failure to follow their directive to contact PESH, *yet the supervisor signed off on the response letter to PESH and was aware that it had been sent. . . .*

[T]he supervisor referenced a number of items such as failure to reply to emails or follow through on tasks, but they also stated that they made no effort to address those issues with the complainant and conducted no counseling sessions or performance reviews with the employee. *The [County] did not provide evidence of emails that were not replied to by the Complainant. . . .*

Other assertions such as the Complainant beginning to report to a different department *were not raised during the investigative conference, and interviews with both supervisors indicated that at no point did the complainant begin reporting to a different department. . . at no point were concerns about the Complainant reporting to an incorrect department raised. . . .*

The Respondent stated that several employees, including department heads, did not like to work with the Complainant, *but no direct evidence of this was provided by the employer or indicated in any of the interviews conducted* (emphasis added).

In the same way that Cody found many of the employer's reasons for why it terminated petitioner to lack evidence in his investigation, we find that there is insufficient evidence in the record to support many of the County's contentions for why it terminated petitioner. Specifically, neither Jock nor Baldwin testified with any specificity as to an example of when petitioner failed to respond to an email. Jock also did not provide any specific testimony about an incident when petitioner did not keep her informed of his whereabouts, and petitioner credibly testified that he noted his whereabouts on the office shared schedule and that he knew this was important to Jock that he do.

Jock also did not provide specific examples of petitioner disparaging her to other County employees. While Baldwin and Jock both testified that petitioner attempted to report to Baldwin and not Jock, which was inconsistent with the chain of command, their examples of him doing so are only examples of petitioner discussing the work of the safety committee with Baldwin or petitioner seemingly wanting to show Baldwin the work that he felt proud to have performed. The record evidence demonstrates there was significant overlap of petitioner's work with the safety committee, which Baldwin chaired, and the work he performed under Jock. As Baldwin testified, petitioner seemed proud of his work, and based on his involvement with the safety committee, he had reason to seek Baldwin's approval for his work. Additionally, the fact that Baldwin gave petitioner direction with respect to emails that he sent out to multiple department heads and directed him to remove the EAP reference in the assessment template, whether related to the safety committee or not, indicates that Baldwin did exercise some sort of authority over petitioner.

We also do not find that petitioner's failure to submit 2007 and 2009 documentation as evidence that the County's WVPP was compliant with PESH's regulations as evidence of failure to follow direction. Petitioner credibly testified that he understood he had to submit compliant documentation, but he did not think such documentation existed, and, in fact, PESH confirmed that fact when Jock subsequently submitted the 2007 and 2009 documentation, and PESH found it to be insufficient. Additionally, Jock approved correspondence that petitioner sent to PESH regarding the County's WVPP regulation compliance prior to petitioner sending that correspondence.

Cody's documented assessment in his report of investigation finds that many of the County's reasons for why it terminated petitioner were dubious. The report of investigation, however, also finds that petitioner failed to follow direction from supervisors regarding the redaction of names from injury logs and in including union representation in an assessment meeting. We disagree with Cody in his assessment that petitioner's failure to redact names from illness and injury logs as told to do so by Jock constituted a failure to follow direction and/or to complete a task such as to justify his termination. Jock, the sole decision maker in petitioner's termination, was not present at the cancelled safety committee meeting at the end of March when Baldwin stated that the names had not been redacted from the logs, and Jock also did not list this during her testimony as one of the two events in the end of March which led to her decision to terminate his employment.

With respect to Cody's reference to petitioner "including union representatives in the WPV risk assessment meeting in direct opposition to a supervisory directive," we find that the record does not clearly support this determination because Jock's overall testimony lacked credibility. It is established that Jock repeatedly directed petitioner to serve as the AER during risk assessment meetings and that petitioner conducted at least two risk assessment meetings at which employees who were purportedly serving as AERs were present. However, the record does not establish that petitioner's conduct constituted insubordination because, as evidenced in emails between Danks and the department head for her department on March 20, 2017 referenced above, petitioner did not invite Danks to the meeting, but the department head did. Jock admittedly never instructed petitioner what to do if a department head invited an employee to a meeting to serve as the AER.

The County's second reason for terminating petitioner, that he failed to remove a reference to an EAP in a risk assessment document, despite being told to do so by Baldwin, is also not clearly established in the record. Petitioner testified that he had no recollection of Baldwin telling him to remove the EAP reference until the end of March 2017 via email and upon receipt of that email, he contacted IT to help him remove the reference because he did not know how to do it on his own. Baldwin corroborated this during her interview with Cody, as indicated in his notes. While Baldwin testified that she told petitioner to remove the EAP reference more than once, a month earlier, she also conceded that he did it once he received the technical support that he needed to do it.

Thus, while the two reasons testified to by Jock as the basis for her decision to terminate petitioner are perhaps the only reasons that are not wholly undermined by other parts of the record, they are also not clearly established in the record. Additionally, those reasons cannot be looked at in a vacuum but must be considered as legitimate, non-discriminatory reasons that are not pretext for retaliation. Given the myriad post-termination reasons that the employer identified as reasons for terminating petitioner, we find that it was unreasonable for respondent to have determined that

any of the reasons the employer offered as the basis to terminate petitioner to be legitimate, non-discriminatory reasons.

The various unsupported reasons for petitioner's termination are more indicative of pretext than a legitimate non-discriminatory basis for his termination. Because many of the supposed reasons for petitioner's termination lacked support and were not substantiated at hearing, all the asserted reasons for petitioner's termination are undermined, particularly since Jock was substantively incorrect about the two directions regarding compliance with safety and health regulations that she gave to petitioner, that he could serve as the AER and the necessity for redactions of the injury and illness logs. Under these facts, where the employer layered on numerous post-termination justifications for the adverse action which were both not sufficiently supported by the record and not the reasons provided by the sole decision maker, and where the two reasons proffered by the sole decision maker in the termination are undermined both in their factual support as developed by the hearing record and their legal inaccuracy, we are persuaded that the County's proffered explanation "is unworthy of credence" (*Burdine*, 450 US at 256 [citing *McDonnell Douglas*, 411 US at 804-805]; see also *Kwan*, 737 F3d at 845).

Further undermining respondent's contested determination is the fact that Cody's report of investigation, after expressing distrust with many of the County's reasons for why petitioner was terminated, then abruptly and without any further analysis, recommends that the "allegations made by the Complainant in this case are not considered to be substantiated. [The County's] actions against [Petitioner] are not conclusively the result of retaliation as the result of the protected activities in violation of 27-a.10." Karp's determination also states that petitioner did not provide evidence to the department showing that the County's legitimate business reason for terminating him was pretext. However, Cody's conclusion and the determination's conclusory treatment of pretext is at odds with Cody's summation contained in the report of investigation. Respondent's determination in Karp's letter does not evidence that she considered whether the employer's reasons for terminating petitioner were pretext for discrimination, and thus, the respondent's determination to dismiss petitioner's complaint was unreasonable. Because Cody's report of investigation and Karp's letter do not include a complete analysis for a retaliation complaint, given the evidence of pretext that petitioner did in fact present as documented by Cody, we must find that the determination was unreasonable. The failure to reconcile these various competing facts, through a thorough analysis in the very document that embodies a final determination and provides notice to its recipient as to how the investigation was resolved renders the respondent's determination that "[petitioner] failed to provide evidence to establish that the employer's legitimate business reason is pretext" unreasonable in and of itself.

Petitioner proved that the determination reached by respondent was invalid or unreasonable because it did not consider pretext other than Karp's conclusory statement that petitioner did not establish pretext and because both Cody's investigation summary and the record produced at hearing undermined the myriad reasons proffered by the County for termination. 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 [Sept. 11, 2019]; *Matter of Adam Crown*, PES 10-009, at p. 13 [Oct. 11, 2011]; *Matter of Brian Colella*, PES 05-004, at p. 5 [Aug. 22, 2007]).

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 January 11, 2023.



Michael A. Arcuri, Member



Patricia Kakalec, Member



Molly Doherty, Chairperson



Najah Farley, Member



Sandra Abeles, Member