

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

DEBORAH SUE CAPELL, :

Petitioner, :

DOCKET NO. PES 20-006

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 28, 2020, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :

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APPEARANCES

Harvey P. Sanders, Esq., Sanders & Sanders, for petitioner.

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

WITNESSES

Deborah Capell, Jody Fonner, and Cheryl Fenn for petitioner.

Kevin Bancroft and Charles Riley for respondent.

WHEREAS:

On June 20, 2020, Deborah Sue Capell (hereinafter “Capell”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) pursuant to Labor Law § 101 to contest the April 28, 2020 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 Capell’s complaint that she was retaliated against by her employer for engaging in protected activity about workplace safety and health. Respondent filed an answer to the petition on August 20, 2020.

Upon notice to the parties, a hearing was held on January 8, May 4, June 2, and June 4, 2021, before Matthew Robinson-Loffler, then 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, her position was reduced from full-time to part-time by her employer, City of Lockport Housing Authority (hereinafter “Housing Authority” or “employer”) because she engaged in the protected activity of making a workplace violence complaint.

At hearing, the parties stipulated that petitioner established a prima face case of retaliation and that the Housing Authority had a legitimate non-discriminatory reason for reducing petitioner’s position from full-time to part-time. The parties agreed that the issue to be decided by the Board is whether the respondent’s determination that the Housing Authority’s legitimate, non-discriminatory reason for terminating petitioner was not pretext for retaliation was valid and reasonable.

We find that petitioner failed to meet her burden to prove that the respondent’s determination that the Housing Authority did not reduce petitioner’s position from full-time to part-time in retaliation for her filing workplace violence complaints was invalid or unreasonable.

SUMMARY OF EVIDENCE

Testimony of Deborah Capell

Capell testified that she was hired by the Housing Authority on February 4, 2013, as a resident service coordinator based on her degree in psychology and experience in human services management. Capell stated that her salary was \$45,000.00 per year with benefits and her duties included job placement and service coordination with the goal of helping families increase their income. According to Capell, the Housing Authority applied for a grant from the United States Department of Housing and Urban Development (hereinafter “HUD”) each year, which required justifying the requested grant amount with the number of families served by Capell’s program. Capell stated that she was working with approximately 57 families and had leads with another 10 when she stopped working for the Housing Authority. Capell also testified that according to HUD documentation, a full-time resident service coordinator should be working with 25 to 74 families and earning a maximum salary of \$69,000.00. She further stated that the maximum salary, again according to the HUD documentation, for a part-time coordinator with 15 to 24 families was \$34,500.00. Capell testified that when she started in the position, there were no families being served and that she built the program from the ground up. Capell also stated that the HUD guidelines for the program permitted the Housing Authority to use other sources of funding to support the program in addition to the HUD grant. The HUD guidelines for the grant that Capell testified about were entered into evidence and, as Capell stated, HUD permits other sources of funding to be used to support the program.

Capell testified that she requested a salary increase in January 2015, and that her supervisor, Kevin Bancroft (hereinafter “Bancroft”), was in favor of it, but he indicated to her that some sort of “adjustment on something else” might need to be made to make it work. Capell also testified that Bancroft told her that she would need “to give up something to get something.” Capell stated that she drafted a memo to the Housing Authority’s board, as requested by Bancroft, which

proposed limiting contributions to the retirement system made by the Housing Authority on Capell's behalf as a way to give her a salary increase. Capell denied having an understanding after her discussion with Bancroft that her compensation had to be fully funded by the HUD grant.

Capell testified that, according to the documentation from her specific grant entered in evidence, the Housing Authority received \$68,000.00 in 2015, which was, according to the Housing Authority budget documents entered in evidence, \$3,470.00 short of satisfying the cost of her position, including salary, health insurance, federal payroll tax, or "FICA," and retirement contributions. The same documentation for 2015 also shows a \$1,788.00 shortfall from 2014, and includes reference to travel and training, as well as "[s]undry," but there are no amounts listed for those categories. Capell testified that in 2015, the Housing Authority planned to switch health insurance plans, which would have resulted in a savings greater than the shortfall between the cost of her position and the grant amount projected for that year. Capell testified that the cost of the new health insurance plan, which had a high deductible, included \$5,000.00 per participant held in escrow by the Housing Authority to reimburse participants for payments that they had to make toward that high deductible. Capell stated that she and her husband only used a small percentage of that \$5,000.00 deductible so the Housing Authority did not have to actually spend that money as part of the overall funding for her position. When explaining how she and her husband did not use much of the \$5,000.00, Capell described the co-payments that she and her husband regularly paid for prescription medicines.

Capell testified that she submitted monthly reports on her program to Bancroft, and the reports for November and December 2015, as well as January 2016, were entered into evidence. She also testified that when individuals living in Housing Authority housing had their income increase through participation in the program, their rent, and thus the money that the Housing Authority received for rent from the participant, went up as well. Capell stated that the Housing Authority received additional rent in the amount of \$1,500.00 in November 2015, \$1,700.00 in December 2015, and \$1,900.00 in January 2016, as shown in those months' reports entered in evidence. Capell opined that this yielded between \$18,000.00 and \$24,000.00 in extra rent per year for the Housing Authority.

Capell testified that the Housing Authority did not have a workplace violence prevention plan until someone filed a complaint about the lack of a plan and the Housing Authority was cited for not having one. According to Capell, the Housing Authority then developed a workplace violence plan and Capell, as well as the other employees, received training on the plan in 2015. She testified that the training covered verbal abuse, swearing, insults and condescending language, which were a common occurrence at the Housing Authority, and the workplace violence plan included a zero-tolerance policy, but it was not actually implemented. Capell asserted that tenants and other members of the public had direct access to Housing Authority employees in the offices, which was unsafe. Capell testified that in 2015, her office was moved to an area that she described as "a big open gym." The door from the lobby of the building to the area where her office was initially located was locked at all times, but the door from the lobby to the new area where her office was moved was often unlocked and sometimes even propped open, making it unsafe. Capell testified that Bancroft was unwilling to do anything about it.

Capell testified that another Housing Authority employee, Sherry Gruber (hereinafter "Gruber"), gave a tenant a master key, which that tenant used to access the area where Capell's office was located. Capell testified that she filed a complaint on December 15, 2015 about the

incident, which was entered into evidence as part of the Housing Authority's April 21, 2016 response to the Capell's retaliation complaint, the entirety of which was also entered in evidence. In that complaint, Capell asserted that Gruber acted inappropriately in the workplace by giving a master key to a tenant, and by engaging in inappropriate behavior toward Capell and other co-workers. The complaint further states that Capell brought the problem up with Bancroft, who agreed that it was unsafe for Gruber to have given the master key to a tenant. Capell acknowledged that Bancroft told her that she could file a workplace violence complaint based on the incident when she told him about it, but she felt that Bancroft was angry with her after she filed the complaint, and she testified that Bancroft stopped talking to her.

Capell also acknowledged that she met with Bancroft and the property manager two days after her complaint was filed, and they agreed that both doors to the two different office areas, including the door to the area where Capell's office was, should be locked. However, according to Capell, the Housing Authority only posted a sign on the door between the two office areas stating that it needed to be kept locked, which did not address Capell's complaint that people could enter her office area from the lobby. Capell also testified that while she did not know if Gruber was disciplined as a result of the incident, Gruber's behavior did not change. Capell filed a second complaint on December 17, 2015, which was also entered into evidence, detailing the shortcomings in the Housing Authority's response to her prior complaint. When nothing was done, Capell wrote a letter to the Housing Authority's board on January 14, 2016.

Capell testified that on February 1, 2016, she came to work at 8:30 a.m. for her regular full-time shift of 8:30 a.m. to 4:30 p.m. when Bancroft handed her a sealed envelope with a letter stating her position was reduced to part-time effective immediately with new hours of 9:00 a.m. to 4:00 p.m. Capell stated that she did not leave at 4:00 p.m. that day because she was in the middle of something, and she left at 4:30 p.m., but she was only paid for working the new, shorter shift. Capell testified that she would have ordinarily helped program participants with job searches when they were on their lunch break from their current jobs between 12:00 p.m. and 1:00 p.m., but the new work schedule that became effective February 1, 2016 required her to take her lunch break at that time so that her work-day was 6 hours. Capell testified that she lost all flexibility in her work hours. Capell further stated that she lost accrued paid time off, which disappeared from her pay stub when her position went from full-time to part-time. Capell testified that she then resigned because she wanted a full-time job with benefits and health insurance. Capell further stated that she did not know how HUD would react to the Authority only having a part-time position working with a caseload of families at a number which should have warranted a full-time position.

Testimony of Jody Fonner

Jody Fonner (hereinafter "Fonner") testified that she worked for the Housing Authority as a tenant relations coordinator since 2012, and she worked with Capell. Fonner explained that when she started, the HUD grant for Capell's position was new, so they worked together to familiarize Capell with the property and the tenants. Fonner testified that Capell built her program from the ground up. Fonner explained that when tenants in the program that Capell operated increased their income, some of that income would be put in escrow for use by the tenant later, and some of it went into the Housing Authority's general operating budget.

Fonner testified that Capell's salary was \$45,000.00 or \$50,000.00 of the approximately \$69,000.00 grant, but in addition to the salary, there were other costs of the position, such as

benefits and healthcare. Fonner stated that the Housing Authority was not experienced with grant writing or understanding how the expenses other than salary worked, so the money for the position was very tight. Fonner testified that the Housing Authority had, in other circumstances, pulled money from other grants to keep different programs afloat when money was tight and that she thought that the Housing Authority's public housing funds could have been used to cover any shortfall in the HUD grant's funding of Capell's position. Fonner believed that the program run by Capell was so successful that the numbers supported possibly adding another part-time person. She further opined that Capell's success in finding employment for tenants translated into increased rents for the Housing Authority. Fonner testified that Capell also helped save the Housing Authority money by recommending a less expensive health insurance provider. Fonner stated that she believed the HUD grant money just covered the cost of Capell's employment, but she had no specific numbers upon which to base that belief.

Fonner testified that a master key for the Housing Authority allowed the user to unlock any door in the offices, storage shed, or any of the Housing Authority's six properties. Gruber, who was Fonner's assistant, had such a key at the front desk. Fonner testified that she was aware Capell made a workplace violence complaint against Gruber, and she testified that Capell's position was reduced to part-time after she made her complaint. Fonner testified that applicants, tenants, and Housing Authority employees complained about Gruber and her "inappropriate behavior, screaming, cussing, swearing, yelling, banging, hitting, hanging up on people on the phone." Fonner testified that Bancroft was angry and annoyed about Capell's workplace violence complaint but was also angry about Capell's request for a raise and to possibly join a union. After Capell left, according to Fonner, the Housing Authority kept the HUD grant, let it "limp along," and, at the time of her testimony, employed one full-time position for 23 active families.

Testimony of Cheryl Fenn

Cheryl Fenn (hereinafter "Fenn") testified that she was previously employed in tenant relations at the Housing Authority from 2010 to 2019. Fenn stated that at one point during her employment, Bancroft said that her position was going to be reduced to part-time, but it was not. Fenn was also a union representative and she testified that she contacted the Department of Labor regarding the lack of a workplace violence policy at the Housing Authority. Fenn testified that she also filed complaints against Gruber, who Fenn testified was not nice to co-workers or tenants, had a "destructive attitude," and engaged in "nonstop verbal abuse." Fenn was aware of the incident when Gruber inappropriately gave a master key to a tenant, who then had access to the office area where Capell sat. Fenn testified that Capell took the master key from the tenant, which caused Gruber to become very upset and "literally attacked [Capell]. She actually went after her like she was going to jump on her and – and – and have physical contact with her." According to Fenn, after Capell complained about this incident to Bancroft, he ceased communicating with Capell.

Testimony of Kevin Bancroft

Bancroft testified that he was employed as the executive director of the Housing Authority and had been in that position, at the time of his testimony, for eleven years. Bancroft testified that Capell's job involved helping residents of the Housing Authority find jobs and improve their lives so they could move out of public housing. Bancroft explained that Capell was hired using a \$68,000.00 HUD grant already in place upon her hiring at a starting salary of \$45,000.00. According to Bancroft, the HUD guidelines provided minimum numbers of families required to

be served for an award to be granted for a full-time position, and it was not a requirement of the grant that a full-time position, instead of a part-time position, needed to be used to service a particular number of families. Bancroft testified that the grant was not renewed after Capell left employment with the Housing Authority.

Bancroft testified that Capell was effective in her duties, and there were no problems with her performance, although she sometimes did work beyond her duties without permission, and she was very dissatisfied when her office was moved. Bancroft testified that in February 2015, Capell requested a salary increase to \$50,000.00, which she wrote up in a memo asserting that based on the number of tenants she had helped find jobs and the extra money coming into the Housing Authority because of it, she should get a salary increase. Bancroft stated that he explained to Capell that part of her regular job duties was to help tenants find better jobs and thereby increase the rental income for the Housing Authority. Bancroft also explained that the extra rental income for the Housing Authority was used for other operating expenses. Bancroft testified that he did take Capell's request for a raise to the Housing Authority's board in February 2015 and again in spring 2015. According to Bancroft, the Board discussed that Capell's program had been "kind of over budget for the last couple years," and the need to keep the program within the \$68,000.00 limit and decided not to give Capell a raise.

Bancroft testified that while the Housing Authority board decided not to give Capell a raise, it also discussed, beginning summer 2015, what changes could be made to reduce the costs of the program, which included Capell's salary, benefits, and retirement contributions, as well as office supplies and training. Bancroft later indicated that he did not know exactly what training costs were incurred by Capell and did not know, without looking at documentation that was not in evidence, how much was spent on office supplies for Capell. Bancroft further explained that the budget projections, which were entered into evidence for 2014 and 2015, show that the grant did not fully fund her position in 2014 and 2015. Those budget projections do not list amounts for training or "sundry."

According to Bancroft, Capell saw the documentation indicating that the HUD grant did not fully cover the costs of her position, but she demanded a raise anyway. Bancroft testified that he suggested to Capell that the Housing Authority's healthcare costs might be reduced if she claimed only herself on her healthcare and not also her husband. Bancroft denied that Capell proposed the idea that the Housing Authority change health insurance providers and instead testified that the plan to change providers was already in the works with the union. According to Bancroft, the change in health insurance providers only saved the Housing Authority just under \$2,000.00 a year because, in addition to the cost of the plan, the Housing Authority also put \$5,000.00 in escrow for each plan participant to cover the high deductible costs that the participating employees incurred. Bancroft further testified that he could not verify that the Housing Authority took in more rental income as a result of Capell's work because a large portion of that money went into escrow for the client and was not part of the Housing Authority's revenue. Bancroft specifically referenced the November 2015 monthly report, which showed that out of \$9,000.00 in rent increases, only \$1,600.00 was new rental income for the Housing Authority and \$7,500.00 went into escrow for use by the program participants. Bancroft stated that he did not verify if the numbers provided by Capell were accurate because it was not part of her job to document such numbers.

Bancroft testified that after having discussed Capell's compensation at four prior Board meetings, in January 2016, the Board passed a resolution to make Capell's position part-time beginning February 2016 in order to cover the cost of the position with the money from the HUD grant. Bancroft explained that this required reducing the hours that Capell worked each week and also required Capell to take a one-hour lunch break each day rather than work during lunch. This schedule change also resulted in Capell no longer being eligible to receive health benefits. Bancroft further testified that Capell also lost paid time off that had accrued but had not been used at the time that her position was reduced from full-time to part-time. On January 29, 2016, Bancroft told Capell that her position was being reduced to a part-time position and on February 1, 2016, he gave her a letter memorializing that, as well as detailing her new work hours. Bancroft explained that her position would have been reduced to a part-time position sooner but because the HUD grant is annually funded, the Housing Authority waited to reduce Capell's position until they knew the grant was renewed for an additional year. According to Bancroft, because the Housing Authority could not rely on the HUD grant coming through each year, the Housing Authority's board did not want to use monies from other funding streams to make up the shortfall from the HUD grant to fully fund Capell's position as a full-time position.

Bancroft testified that he became aware of Capell's workplace violence complaints in December 2015. Bancroft testified that a tenant, who was given the master key to access the restroom, stopped by Capell's office on the way back from the restroom. Bancroft stated that contrary to what Capell asserted, the key was not a master key for all of the Housing Authority's properties but was just for some of the doors in the administration building where Capell worked. Bancroft testified that in addition to Capell filing a workplace violence complaint regarding Gruber giving a master key to a tenant, Gruber filed a workplace violence complaint against Capell on December 15, 2015, the same date as Capell's complaint.

Bancroft testified that once he received Capell's complaint about unlocked doors, he provided the complaint to the Housing Authority's property manager, the union president, and the Housing Authority's legal counsel. Bancroft stated that he told Gruber not to give out the key again, discussed Gruber's office behavior with her, provided workplace violence trainings for all staff, and issued a memo to all office staff that the main door and the office hallway door were to remain locked. Further, according to Bancroft, Gruber was both informally and formally counseled based on Capell's complaint, as well as complaints from other employees. Bancroft testified that none of the other employees who filed complaints against Gruber around the same time as Capell's complaint had their schedules reduced or faced termination. Bancroft testified that Capell's position was not reduced to part-time because of her complaints but was reduced because of the budget. Bancroft stated that Capell also complained about having her office moved, but he testified that Capell's actual concern was about the office being constructed of drywall over studs, and not a safety concern.

Testimony of Associate Industrial Hygienist Charles Riley

PESH Associate Industrial Hygienist Charles Riley (hereinafter "Riley") testified that he has been employed as a health and safety inspector with PESH since 2007. Riley stated that PESH received the discrimination complaint and discrimination questionnaire filed by Capell, which were entered into evidence, and in which Capell alleged that she submitted two workplace violence complaints to her employer regarding keys, locked doors, and a coworker, after which she claimed to have suffered the adverse employment action of having her full-time employment with benefits

cut to a part-time position without benefits, and also lost paid time off and flexibility in her working hours. There was, according to Riley, a short time period between the protected activity and adverse action, which indicated a possible causal connection between them. Riley stated that he discussed the case with Capell, then notified the Housing Authority of the complaint in writing. Riley further stated that the Housing Authority responded to Capell's complaint, stating that the workplace violence complaints were not valid workplace violence complaints because they did not contain allegations of threats or violent action, and that the change in Capell's position was based on the need to keep the cost of the position within the HUD grant, not to retaliate against Capell because of her complaints.

Riley testified that there was no evidence of animus by the Housing Authority for Capell's protected activity as the employer addressed her complaints and provided a legitimate reason for reducing Capell's position from full-time to part-time, which was that the Housing Authority wanted the position to be fully funded by the HUD grant. Riley also stated that the Housing Authority board began discussing the shortfall of money to fund Capell's position prior to Capell's complaints. Riley stated that he held an investigative conference, which was attended by Capell, Capell's husband, Bancroft, an attorney for the employer, and a Housing Authority board member and nothing took place at that conference to change Riley's belief that the employer did not retaliate against Capell. After the meeting, according to Riley, he received further documentation from the employer's attorney and he spoke to three witnesses for Capell, including Fonner. Riley stated that those witnesses suggested that other things could have been done with the budget to keep Capell employed full-time and with benefits. Riley testified that he did not make a determination as to whether other reductions could have been made to permit Capell to stay on full-time because the case turned on the fact that the Housing Authority board was concerned about the budget shortfall for Capell's position prior to when Capell's workplace violence complaints were made. Riley testified that he concluded that there was also no evidence that the reason for the reduction in the position by the Authority was pretext for retaliation.

An investigative report completed by Riley was entered into evidence. The report indicates, among other things, that Riley contacted a HUD Portfolio Management Specialist, who stated that it was the Housing Authority's discretion whether the position would be part-time or full-time, and that if the position were changed to part-time, HUD would reclaim the grant money at the end of the year. Riley's report states that he concluded that there was no causal connection between the protected activity and the adverse action because there was no indication of animus by the Housing Authority since Bancroft instructed Capell to file the workplace violence report. Riley's report further states that the Housing Authority reduced the position to part-time because it wanted the position fully funded by the HUD grant. Riley recommends in the report that the complaint be dismissed.

Riley testified that he did not investigate whether cutting the position from full-time with benefits to part-time without benefits would have put the Housing Authority in a better financial position. Riley also did not investigate the accuracy of the assertions made by Capell regarding the amount of money her work brought into the Housing Authority. Riley also stated that he did not consider the Housing Authority's assertion that the complaint was not a valid workplace violence complaint because the protected activity was the act of making the complaint itself, not what the employer thought of it. Riley did not speak with Gruber or investigate any history of workplace violence at the Housing Authority. Violations were issued against the employer during the

investigation regarding the sufficiency of the workplace violence training, but Riley stated that those violations did not indicate whether retaliation occurred against Capell for her complaints.

Additional Documents Entered into Evidence

Petitioner's PESH Discrimination and Complaint Intake Form (hereinafter "intake"), as well as the PESH Discrimination Questionnaire (hereinafter "questionnaire"), were entered into evidence. The intake states that petitioner's office was moved in May 2015; vending machines were moved in October 2015; a written workplace violence incident report was filed on December 15, 2015 regarding Gruber's behavior and that Gruber gave a tenant a master key to the offices; another workplace violence incident report was filed on December 17, 2015 regarding the lack of sufficient response to the first complaint; a meeting with Bancroft was held on December 18, 2015 regarding the locking of office doors; and a letter was written by petitioner on January 14, 2015 to the Housing Authority board regarding a safety issue. Attached to the intake was a letter signed by petitioner stating that she was informed on Friday, January 29, 2016 that her position was reduced to part-time unless there was some other way to cut the cost of the program, such as switching her health insurance coverage from family coverage to single coverage. The letter further states that on Monday, February 1, 2016, Bancroft notified petitioner in writing that her position was reduced to part-time with reduced hours, effective immediately.

The Housing Authority's reply to the discrimination complaint was also entered into evidence. It states that the workplace violence complaints did not involve any workplace violence; the complaints were properly and timely handled; petitioner's position was reduced to part-time because the grant did not cover the cost of her position; and petitioner voluntarily resigned her position. The Housing Authority's workplace violence prevention policy; the December 16, 2015 memo regarding locked doors; the minutes from the Housing Authority's board meeting at which petitioner's position was reduced to part-time; petitioner's written request for a raise; and petitioner's resignation letter were also entered into evidence.

A Public Employment Relations Board (hereinafter "PERB") improper practice charge was entered into evidence wherein the Housing Authority was alleged by the union to have reduced petitioner's job to part-time after petitioner requested that her job be reclassified and made part of the union. Included with that document is the Housing Authority's response that since the position was not a civil service position and was governed by the HUD grant, there was no "community of interest" between Capell's job and the rest of the bargaining unit, so it should not be included in the bargaining unit.

The Housing Authority filed a second response dated June 17, 2016, which was also entered into evidence. This response contains a timeline of events, which includes an October 22, 2015 date when the Housing Authority board, while in executive session, discussed "[c]omplainant's demand for a salary increase and the Board's expectation that [c]omplainant's total compensation would fall within the limits of the grant issued by HUD for the position," and a December 14, 2015 date when the Housing Authority received HUD approval for the grant with continued funding at \$68,000.00 for the program. The Housing Authority asserts in the response that a spreadsheet was then completed which showed the total cost of Capell's position to be over \$71,000.00. The response also asserted that despite Capell's request at the investigative conference that other witnesses be interviewed regarding the incidences of workplace violence, such witnesses were not necessary because whether the incidents took place as Capell claimed was not an issue

for the Department of Labor to resolve. Attached to this response were a HUD letter awarding the grant in December 2015, grant material, and budgets from 2014 and 2015 showing that the \$68,000.00 grant did not fully cover the total cost of the program.

The determination letter issued by respondent on April 28, 2020, and entered into evidence, states that Capell engaged in protected activity, there was an adverse employment action, and the temporal proximity between the activity and the action created the inference of a causal connection. The determination letter continues that the Housing Authority provided a legitimate, non-discriminatory reason for the action in that the cost of the position exceeded the money provided by the HUD grant. The determination letter further stated that there was no demonstrated animus by the Housing Authority about Capell's protected activity. Respondent determined that Capell did not provide evidence to discredit the legitimate non-discriminatory reason provided by the Housing Authority as pretext for impermissible discrimination.

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 her 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 PESH

To prevail on a claim of unlawful retaliation under Labor Law § 27-a (10), petitioner must establish that the Authority retaliated against her 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 PESH 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 established a prima facie case of retaliation.

Once the employee meets her burden to establish a prima facie case, the burden shifts to the employer to produce legitimate, nondiscriminatory reasons for the adverse action (*Texas Dept. of Community Affairs v Burdine*, 450 US 248, 255 [1981]; *Kwan*, 737 F3d at 845; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). 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). In this matter, the parties agreed that the Housing Authority had a legitimate, non-discriminatory reason for reducing petitioner's position from a full-time position to a part-time position. 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 of retaliating against the employee for engaging in the protected activity (*Kwan*, 737 F3d at 845; *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).

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 did not meet her burden to prove that the respondent's determination was invalid or unreasonable. As stated above, the parties agreed that petitioner established a prima facie case of retaliation. The parties also agreed that the employer had a legitimate, non-discriminatory reason to reduce Capell's position from full-time to part-time. Thus, the question for the Board to resolve in this matter is whether it was reasonable and valid for the respondent to determine that petitioner did not establish that the employer's stated reason for reducing her to a part-time employee was pretext for retaliating against her for filing workplace violence complaints.

Respondent's Determination that the Employer's Legitimate, Non-Discriminatory Reason for the Adverse Action Was Not Pretext for Retaliation Is Reasonable and Valid

The parties agreed that the Housing Authority's decision to reduce Capell's position to part-time because of a budget shortfall from the HUD grant was legitimate and non-discriminatory. Petitioner argues, however, that the fact that the Housing Authority had other options but chose not to exercise those options indicates that their reason was actually pretext for its retaliation against her for filing workplace violence complaints. More specifically, petitioner asserts that she and her husband did not use the full \$5,000.00 put in escrow by the Housing Authority for reimbursement for health insurance deductibles during the plan year; thus her position in fact cost less than what was budgeted, and the Housing Authority could have used funding sources other than the relevant HUD grant to make up for any shortfall in the budget for her position. Petitioner further argues that the Housing Authority neglected to consider the additional revenue that she caused the Housing Authority to receive based on her success at her job. Lastly, petitioner argues that there is evidence of the Housing Authority's animus toward her in its denial that her complaints constituted workplace violence, its failure to sufficiently address her workplace violence complaints, and its objection to petitioner's request that Riley interview additional witnesses during the investigation of her retaliation complaint.

We are not compelled by petitioner's argument that the Housing Authority incorrectly budgeted for her position or should have used other sources to help fund her position in the context of whether it was reasonable for respondent to determine that the Housing Authority did not retaliate against petitioner. Petitioner did not establish through sufficient, corroborated proof that she and her husband did not use the \$5,000.00 put in escrow by the Housing Authority during any particular year such that the Housing Authority did not need to consider the full \$5,000.00 an expense for her position. But, even had petitioner established this, the facts in this case did not require respondent to second-guess the employer's budget management to reasonably determine that the employer's explanation for why it reduced petitioner's position from full-time to part-time was legitimate. Similarly, the possibility that the Housing Authority could have chosen to continue to fund petitioner's full-time position by taking funds from other programs or funding sources does not, in and of itself, demonstrate that the legitimate, non-discriminatory reason provided by the Housing Authority for the adverse employment action is pretext for impermissible retaliation. We also reject petitioner's argument that her job performance brought in additional revenue for the Housing Authority that could have been used to fund her position as evidence that it was unreasonable for respondent to determine that she did not establish pretext. The record contains insufficient evidence to upset the operational determination of the Housing Authority in its decision to only fund the program with money from the grant and use the additional funds obtained as a result of petitioner's work for other functions. Bancroft credibly explained that any money taken from another source would have meant less money for another program. Respondent reasonably determined that the budget shortfall explanation for why petitioner's position was reduced to a part-time position was legitimate.

The record did not clearly establish what happened with the HUD grant after petitioner resigned from her position because while Fonner testified that there was another full-time employee who did that job after petitioner, that testimony was not corroborated by another witness or documentary evidence. Bancroft testified that the grant was not renewed after petitioner left but that testimony was general and did not establish what happened for the time left on the grant after petitioner left the Housing Authority. Thus, petitioner did not establish that the Housing Authority

paid for a full-time position akin to her position after she left which may have been sufficient evidence to question the Housing Authority's asserted budget management.

With respect to petitioner's assertion that the Housing Authority demonstrated animus toward her for filing workplace violence complaints, that argument is belied by the undisputed fact that Bancroft told petitioner to file a workplace violence complaint after she spoke with him about her concerns. Capell and Fenn testified generally that Bancroft stopped communicating with petitioner after petitioner filed a workplace violence complaint, but neither of them testified more specifically about it. That testimony, as well as petitioner's and Fonner's testimony that Bancroft was angry with petitioner, was too vague to be of any probative value or to establish animus. While the Housing Authority's management of its workplace violence policy, program, and processing of petitioner's complaint may have been insufficient, that is not what the Board need evaluate in this matter. The burden of proof in this matter and under these facts is on petitioner to prove that it was invalid or unreasonable for respondent to determine that the reason provided by the Housing Authority for its actions was not pretext, not whether the workplace violence complaints were valid workplace violence complaints, as respondent does not dispute the protected activity. We are also not compelled by petitioner's assertion that the Housing Authority's efforts to dissuade or even prevent respondent from interviewing additional witnesses evidences animus because respondent did interview those additional witnesses and reasonably determined that they did not contribute to petitioner's lack of evidence that the Housing Authority's reason for reducing her to a part-time employee was pretext for retaliation.

The record demonstrates that the funds from HUD had not covered the full cost of the program for 2014 and 2015 as the Housing Authority budgeted for that position and that the Housing Authority had been evaluating the funding of the position for months and made a legitimate budget decision to not take funds from other programs to make up for a shortfall in funding petitioner's program. Petitioner did not present sufficient evidence to discredit the Housing Authority's reason for reducing her position.

Respondent's Determination Was Reasonable

Petitioner failed to prove that the determination reached by respondent was invalid or unreasonable (*see Matter of Mateusz J. Nardolecki*, Docket No. PES 07-008, at pp. 8-9 [May 20, 2009]). Respondent correctly determined that the legitimate non-discriminatory reason provided by the employer was not pretext for impermissible retaliation (*see Matter of Nancy Kane*, Docket No. PR 19-004, pp. 7-9 [Apr.7, 2021]; *Matter of Robert Shapiro*, Docket No. PES 09-001, at p. 9 [May 30, 2012]; *Matter of Mateusz J. Nardolecki*, Docket No. PES 07-008, at pp. 8-9). As petitioner did not prove that the employer's legitimate, non-retaliatory reason for reducing her position to part-time to fit within the funding of the grant was pretextual, she did not meet her burden to prove that the determination dismissing her retaliation complaint was invalid or unreasonable. The Board denies the petition.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The petition for review filed herein is denied.

Dated and signed by the Members
of the Industrial Board of Appeals
on January 11, 2023.



Michael A. Arcuri, Member

RECUSED

Patricia Kakalec, Member



Molly Doherty, Chairperson



Najah Farley, Member



Sandra Abeles, Member