STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: EDWARD J. BROUILLETTE, 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 July 22, 2020, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 20-009 RESOLUTION OF DECISION

APPEARANCES

Edward J. Brouillette, petitioner pro se.

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

WITNESSES

Michael Fahey, Joseph Buechs, Kevin Snay, and Edward J. Brouillette for petitioner.

Paul Narkiewicz, Rosemarie Perez Jaquith, and Associate Industrial Hygienist Priya Desai for respondent.

WHEREAS:

On September 18, 2020, Edward J. Brouillette (hereinafter "Brouillette") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law § 101 to contest the July 22, 2020 determination issued by the New York State Department of Labor's (hereinafter "DOL" or "Department") Division of Safety and Health (hereinafter "PESH") that dismissed Brouillette's complaint that he was retaliated against by his employer for engaging in protected activity about workplace safety and health. Respondent filed an answer to the petition on December 16, 2020.

Upon notice to the parties, a hearing was held on January 12 and March 1, 2022, before Benjamin Shaw, Counsel to the Board and the designated hearing officer in the proceeding. The parties were afforded a full opportunity to present documentary evidence, to examine and cross-

examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs. Petitioner filed a post-hearing brief, respondent did not.

Petitioner asserts in the petition that he was afraid of being injured when he refused to clean glue from an electrical machine with a razor blade and notified his supervisors that he believed it to be dangerous. Petitioner also asserts that he worked for his employer for a long time and would "do any, and everything," or when he could not, presented a "reasonable alternative." Petitioner asserts it was unreasonable for respondent to have determined that he had not been retaliated against by his employer.

SUMMARY OF EVIDENCE

PESH Discrimination Complaint and Respondent's Determination Letter

The PESH Discrimination Complaint Intake Form filed by petitioner and entered into evidence asserts, in relevant parts, that petitioner has "a medical condition that restricts my mobility," and that petitioner was asked to perform tasks such as "to move a table weighing approximately 200 pounds down a flight of stairs," and "to carry a number of heavy jugs of water up ( ) stairs," which he felt were unsafe because of his medical condition. Petitioner also indicated on this form that he had been asked "to remove some dried glue from a bunch of live electrical wires using a razorblade," which petitioner stated was unsafe. Petitioner stated on the form that he was terminated on May 14, 2018, for his refusal to perform these tasks.

The respondent's July 22, 2020 determination letter from which petitioner is seeking review states that PESH acknowledged petitioner's April 2, 2018 complaint about moving an office table to an upstairs office, an April 30, 2018 complaint about removing glue from a binding machine, and a May 2, 2018 complaint about delivering jugs of water, as tasks petitioner was asked to do and refused to do because of safety concerns. The determination letter further states that petitioner's refusal to do the above-named tasks was not justified because petitioner did not report to or provide documentation to the employer of a work restriction on performing such duties, petitioner did not attempt to report any hazard to a regulatory agency or seek an alternative assignment prior to the refusal, and the employer provided legitimate, non-discriminatory reasons for termination, including poor work performance and insubordination.

Testimony of Michael Fahey

Michael Fahey (hereinafter "Fahey") testified that he worked as a digital print operator and then senior print operator in the print center at the New York State Legislative Bill Drafting Commission (hereinafter "LBDC") during the relevant period. According to Fahey, in 2018 he was not a supervisor but a co-worker of Brouillette, and they got along well. Fahey explained that the print center uses printing presses and binding equipment, as well as computers, which are set up in three cubicles throughout the print center. Fahey testified that in the print center there is a cubicle with two computers near the front of the center, in the middle of the center there is another computer, which is where Fahey sat, and in the far end of the center, there is another computer, which Joe Buechs used. Fahey testified that because he sat in the middle of the print center, he is not sure how the two computers in the front cubicle were shared and he stated that Brouillette, "Mr. Harris," and "Mr. Snay" shared the computers in the front cubicle.

According to Fahey, the print center often had long hours and the workers were able to sleep in the print room while waiting for tasks. Fahey testified that they sometimes work during the night until 3:00, 4:00, or 9:00 a.m. while waiting for bills from the legislature that need to be printed. Fahey stated that they did not sleep in the office during the normal working hours of 9:00 a.m. to 5:00 p.m.

Fahey explained that they use a machine to bind the documents they print, and they have used the same machine since the center opened in 2009. He stated that the machine has "a glue pot and it heats up, and unfortunately, it leaks. So, it gets down underneath it, which we have a lot of mechanisms of the machine in there, so we have to clear it out so that it doesn't interfere with the machine. And it's just a maintenance procedure." Fahey further explained that to clean out the glue, the machine, which is directly wired rather than plugged in, is turned off. He continued that they use a tool similar to a putty knife "[a]nd we heat it up with the heat gun, and the handle is insulated so your hand doesn't get hot." Fahey testified that they then carve out the spilled glue, which had the consistency of butter. Fahey stated that there were no wires in the area where they were cutting out the glue, and there were gloves available to use for the task, which Fahey brought in. According to Fahey, the machine is turned off to remove spilled glue so there is no charge running through the machine. Fahey stated that at the time of petitioner's termination, the print center staff was working on a foot and a half square of glue located below the electrical areas with the machine off, so there was no electrical charge in the machine. Fahey stated that he did not know of any maintenance contract on this binding machine, but there may have been one on an "on-call basis" for maintenance. Fahey denied that he was part of a conversation with petitioner about there being more power in the print room than necessary. Fahey did not recall a specific incident with Brouillette cleaning glue out of the binding machine because they were all asked to do that work at some point. Fahey stated that he has cleaned out the binding machine approximately two times a year.

When asked about whether it would have been a problem for Brouillette to have used a hand cart to bring a table downstairs, Fahey stated that he was not involved with that issue. Fahey also did not know about the incident involving Brouillette being asked to move water jugs. When asked if he knew of other employees drinking on the job, Fahey responded that he had no knowledge of that. Fahey also stated that he had no personal knowledge of Brouillette using alcohol while on the job. According to Fahey, the job description of those working in the print center did not change because the jobs were general in nature. Fahey also stated that he did not think the print room was understaffed. Fahey stated that he did not know of "Mike" or "Joe" wanting the security position which petitioner had also worked. Fahey testified that he heard about Brouillette's time and attendance issues but did not have any firsthand knowledge. Fahey indicated that his back did bother him at times, so he would tell his supervisor that he had a limitation that day, but he did not go to the LBDC and ask for an accommodation for a back condition. When asked if Fahey thought Brouillette was being "singled out," Fahey responded, "[n]o."

Testimony of Joe Buechs

Joe Buechs (hereinafter "Buechs") testified that he had worked at the LBDC for over 30 years, that during the relevant period he was the Production Print Center Manager, and that he is currently the Production Service Manager. Buechs stated that he started working at the LBDC's print center around 2010, that at first, he worked with Brouillette, and then he supervised Brouillette for about five years. According to Buechs, they needed help in the print center, so

LBDC moved Brouillette over to the print center. Buechs testified that he did not interview Brouillette, and he stated that he was unsure where Brouillette was before he joined the print center.

Buechs testified that Brouillette had time and attendance issues since they began working together as Brouillette was late quite a bit. He also testified that Brouillette spent a lot of time in the parking lot, and he explained that Brouillette went to his car four or five times a day, which was more than normal break amounts. Buechs also stated that Brouillette often did not call before not showing for work, and they would have to call his cell phone to locate him. Buechs testified that Brouillette was late for work two times a week, which Buechs stated that he accommodated sometimes because Brouillette had two young children. Buechs testified that he also accommodated Brouillette getting to work late if he worked security at night the day before, but he was not late on only those days. Buechs recalled one instance that he learned about when Brouillette had the bartender call the print center and ask if Brouillette could have the afternoon off. Buechs testified that the incident was written up as an employee disciplinary action by the previous supervisor, and that write-up dated April 29, 2015, was entered into evidence as an attachment to the employer's response to the discrimination complaint. The write-up states, with respect to that instance, that the supervisor told the bartender, who he knew, that Brouillette could not have the afternoon off work, but Brouillette never came in that day.

Buechs testified that he suspected that Brouillette was under the influence of alcohol more than once while he was working, but he acknowledged that Brouillette never admitted to being under the influence of alcohol while on the job. Buechs stated that he could tell when Brouillette had been drinking because his demeanor, or speech and attitude, changed. Buechs testified, "[t]he only person I've ever had any issue with drinking was yourself, Ed," and he stated that Brouillette was the only person he had to write up for using alcohol while on the job. There was no write-up entered in evidence which had been created by Buechs regarding Brouillette using alcohol while at work. A 2012 write-up and a 2015 write-up that were entered in evidence both referenced alcohol use, but Buechs did not author either of those write-ups.

Buechs denied that Brouillette asked for a work accommodation for a back problem and stated that if Brouillette had applied for one, Buechs would have been involved with the accommodation process. Buechs stated that he did not know Fahey had back problems other than usual aches and pains that they all had from time to time, and he stated that Fahey did not have a change in job duties due to his back. According to Buechs, if Fahey was not feeling well on a particular day, someone else would perform a more strenuous duty, as they all did for one another.

Buechs testified that the binding machine with the glue issue had a service contract, and someone came in to service it as needed but that person did not remove the glue because that was part of the print center workers' job description. Buechs testified that he, himself, has cleaned the glue from the binder machine countless times. Buechs explained that when the equipment door is open or removed, the machine is shut down and does not have any electricity running through it. He stated, "those wires in there are thermal wires that detect the temperature of the glue" and "are not anything that would cause you any harm with the machine even on." According to Buechs, they wait until the machine is cool to clean off the glue with a heat gun to soften the glue, and a putty knife to pry off the glue. Buechs testified that he asked Brouillette to clean the glue off the binding machine, but Brouillette said he did not feel safe doing it. After Brouillette refused, Buechs told him that it was everyone's responsibility, and he was not going to just make one person do it. Buechs testified that everyone takes turns cleaning the glue off of the binding machine because

they have to kneel on a pad on the floor, and they have been doing it that way for the last eight or nine years. He further explained that one person will clean for about 15 minutes, and then another person will clean for about thirty minutes, and they take turns doing it. After Brouillette refused, Buechs informed his supervisor, Paul Narkiewicz (hereinafter "Narkiewicz") that Brouillette refused to clean the glue out of the machine. Buechs testified that he also reached out to Kent Philips, the standard service manager for the binding machine, to verify that glue could be removed safely when the machine was powered off and the doors were open. An email from Kent Philips dated October 12, 2018 was entered into evidence as part of the employer's response to the complaint, and it states, in relevant part, "there is no danger to the operator removing adhesive from the area under the glue pot while the machine has been powered down." The email also stated that the "adhesive build up was common in that vintage machine while binding lager (sic) books."

Buechs described an incident involving water jugs which needed to be moved. Buechs explained that moving the water jugs entailed wheeling a cart that had five-gallon jugs from one floor to another using an elevator. Buechs testified that he asked Kevin Snay (hereinafter "Snay") to tell Brouillette to move the water jugs because Brouillette was not in the room. Buechs learned that Brouillette did not move the water jugs when he saw them still sitting where he asked them to be moved from and Brouillette stated that he did not move them. Buechs subsequently learned that Snay moved them. When asked if Buechs was aware that Snay was given directives by Buechs that he sometimes passed off on others, Buechs responded that he was not aware of that.

When asked about an incident in which Brouillette did not help move a table, Buechs recalled that he asked a few workers, including Brouillette, to help him carry the table down the stairs by removing the legs and moving the tabletop and the legs separately. Buechs acknowledged that Brouillette wanted to use a cart to move the table, but Buechs did not think it was necessary because it only needed to be moved down two sets of stairs, which Buechs thought was the safest way to move the table. Buechs testified that four people helped move the table, including Buechs. Buechs testified that after Brouillette refused to assist with carrying the table, he asked Brouillette to carry the legs of the table down the stairs, but Brouillette also refused to do that, even though, according to Buechs, each leg only weighed five to eight pounds. Buechs did not recall if the table needed to be moved by a certain time. Buechs testified that he wrote Brouillette up because of his refusal to help carry the table or its legs. No such write-up was entered in evidence. Buechs testified that after the incident with the table, he went to his supervisor, Narkiewicz, and informed him that when he asked Brouillette to do tasks, Brouillette refused. Buechs stated that they met with Brouillette to talk about it.

Buechs testified that he was part of the decision to terminate Brouillette and he wanted to terminate him because Brouillette constantly refused to do his tasks, continued to be late, slept on the job, drank on the job, and Buechs could not depend on him. Buechs stated that sometimes Brouillette would be asleep at his desk at 10:00 or 11:00 a.m. Buechs testified, "he's got his feet up on the desk sleeping during the day." Buechs testified that from 9:00 a.m. to 5:00 p.m., there is no sleeping on the job, but after 5:00 p.m. the print center will make accommodations because "we never know when we're going to be released. We have work around – we have work around the clock, so we do have a couple of couches inside the print center. Chairs if you feel comfortable. We – if you feel the need to take a nap and there's no work going on. Obviously, we never know when the work's coming in. So obviously, after 5 o'clock, it gets slow and you want to take a nap, that's acceptable." Buechs testified that Brouillette's sleeping at his desk was not an isolated

incident, Brouillette was reprimanded for it many times, and because of the location of his desk, people would walk through the doors and see him sleeping.

Buechs testified that human resources at the LBDC would reach out to workers to see if anybody was interested in working additional shifts at security, and then they worked around their schedules. Buechs testified that people were interested in working extra shifts as security, as Brouillette did, but Buechs did not recall being interested himself in doing it. Buechs acknowledged that he filled in for security shifts sometimes when Brouillette was not available.

Testimony of Kevin Snay

Snay testified that during the relevant period he was a print operator one, and a coworker, not a supervisor, of Brouillette. He still worked at the print center at the time of his testimony. Snay testified that as part of his job duties, he did a variety of things, such as pick up supplies, stock supplies, and deliver supplies to other units, among other duties.

Snay testified that the binding machine servicer came in to change the glue supply and "clean it up" and the print shop employees clean the glue from the machine. Snay stated that when glue needed to be cleaned off of the binding machine, everyone was told to take turns, and everyone did it, including Buechs. Snay estimated that he has removed the glue 17-28 times over the years. Snay testified that you hear the binding machine shut off when the door is opened to clean the glue, so he did not believe there was a safety concern with respect to power still running through the machine while the glue was being cleaned off. Snay further stated that he did not believe that the wires from which they were removing glue were electric wires but were more akin to telephone wires. Snay stated that he had witnessed Brouillette cleaning the glue a couple of times but did not witness Brouillette refusing to remove the glue in the incident that led to his termination.

Snay testified that when the supply area started to be integrated with the print center, they started to have to take water jugs to different floors and to move supplies, but he did not know of a formal job description change. Snay stated that he was present when Brouillette refused to carry the table, and that Snay and Buechs carried the table while another employee carried the legs. Snay did not recall Brouillette refusing to carry the table legs during that incident. Snay testified that in another instance, Buechs asked him to tell Brouillette to take water jugs to another office, which he did, but Brouillette responded, according to Snay, "yeah, no, I'm not doing that." Snay testified that he decided to move the water jugs himself.

Snay testified that Buechs was not interested in performing security work because Buechs did not have time for that work. Snay further stated that a lot of employees come in late, including himself, but he was told that he needed to give prior notification if he was going to be late. Snay also stated that Brouillette is the only person he ever knew in the unit who was drinking on the job. Snay denied that he was concerned that any of the tasks in the print center put him at risk of serious injury or death, and he testified that Brouillette is the only employee that has refused to do a task as far as he knew. Snay testified that usually when people needed help because of back problems, they generally asked someone else to do it, but nobody outright refused to do tasks. Snay testified that he was aware that Brouillette had back problems and that Brouillette sometimes walked in a way indicating that. Snay testified that he never heard Buechs discuss terminating Brouillette.

Testimony of Edward Brouillette

Brouillette testified that he began working in the print center in 2009, after having worked for the LBDC for about 27 years. He testified that he also worked doing overnight security at the LBDC and he was responsible for moving legal books across the street, a duty shared by no one else. Brouillette testified that Buechs likely saw him in the parking lot so frequently because he had to transport law books across the street. Brouillette testified that he earned extra money from the security job, but it required working at night, after his shift in the print center, and sometimes until 9:00 a.m. Brouillette stated that during his time at the LBDC, the number of people working in the print center decreased from eight to four. According to Brouillette, prior to the reduction in staff, there were enough people doing the work in the print center to allow Brouillette more liberty in calling out when he had worked security during the night, but with fewer people working in the print center, he was not able to call out in the same way. Brouillette acknowledged that his work in security was voluntary but stated that since the LBDC had accommodated him working both jobs before, they should have continued to do so, or told him that he could not continue to do both jobs. Brouillette was upset when he was terminated from both the print center and the security job, and not given an explanation for the loss of the security job. Brouillette testified that he thought Buechs and others were jealous of the fact that he had the second job doing security, and that they wanted to do that work.

Brouillette testified that he never scraped the glue off of the binding machine when he worked in the print center because he thought it was too dangerous to take a metal knife and heat gun to the machine. Brouillette testified that he did clean up around the binding machine and vacuum it out. Brouillette stated that the binding machine never had any signs from OSHA or PESH saying the machine was shut off, they did not have any training on how to clean the machine, and the electric circuit breaker for the machine was not shut off when it was cleaned of glue. Brouillette also testified that rubber mats and gloves were not sufficient protection for cleaning the glue off the machine.

Brouillette testified that his back was bothering him on the day of the incident regarding the table being moved. According to Brouillette, Snay knew or saw that Brouillette's back was hurting. Brouillette testified that he suggested using the cart to move the table because that would have allowed him to help move it. Brouillette stated that Buechs was not happy with him trying to use the cart, so Buechs just grabbed the table and walked off with it. Brouillette acknowledged that Buechs had the authority and right to direct how a task is conducted but thought that Buechs would be open to suggestions on how to complete the task. Brouillette stated that he offered to take the table legs, but that another employee moved them.

Brouillette testified that his back was also bothering him on the day that Snay told him that Buechs asked Brouillette to move the water jugs, and that Snay knew Brouillette was in pain that day. Brouillette, testified that he thought Snay was trying to put off work on him and that Buechs had not actually asked that Brouillette move the water jugs. Brouillette stated that he did not move the water jugs because he would have had to pick them up to place on racks, some of which were high, and he believed that he would have injured his back further if he had done the task. Brouillette knew other people had bad backs and, according to Brouillette, Buechs would accommodate them without formal accommodation, but that accommodation was not given to him. Brouillette testified that Snay and Fahey knew he had a back problem, and Buechs saying he did not know Brouillette had a back problem is "unfathomable." Brouillette did not think he had to ask for an

accommodation because they all took care of each other, worked together, and helped each other out if someone did not feel well. Brouillette believed that Buechs did not accommodate him in the same way he did other employees.

Brouillette acknowledged being made aware of an issue alleging inebriation at work in 2015. Brouillette also acknowledged that he had been late seven out of fourteen days in January 2018, but asserted that "session" had just started, and he was working overnight doing security. Brouillette testified that he was aware he had time and attendance issues between 2012 and 2018 because of his performance evaluations. Brouillette stated that despite some attendance problems, he still worked 80 to 90 hours per week. Brouillette further testified that prior to Buechs being his supervisor, taking a day off after working security overnight had not been a problem. Brouillette acknowledged that he sometimes slept at work, and, according to Brouillette, others also slept as he did.

Brouillette testified that when he came to work on Monday, he was told he had been fired the previous Friday. Brouillette stated that Buechs never brought up the issues of the glue removal, table moving, and water jugs until he was brought in that day to be told that he was terminated. Brouillette asserted that if those things were so important, then someone would have mentioned them beforehand. Brouillette thought that some of the issues mentioned at his termination concerned practices he had for years so he did not understand why he was suddenly fired for them. Brouillette believed that Buechs took over the management and wanted to fire him. Brouillette stated that he knew he had issues prior to his termination but believed he was still capable of doing the three different positions within the LBDC. Brouillette stated that after he was fired, he filed a PESH complaint and also, on August 31, 2018, one with the Division of Human Rights (hereinafter "DHR"). Due to his wife being sick and then passing away, he did not appeal the DHR determination that found that he was not subjected to discrimination or retaliation. Brouillette stated that because of his termination, he lost his house and declared bankruptcy.

Testimony of Paul Narkiewicz

Narkiewicz testified that he is the Chief Information Officer for the LBDC and has worked there for 40 years. Narkiewicz works on the technological aspects of the LBDC. Narkiewicz was also responsible for the print center and Buechs reported directly to him. Narkiewicz stated that he knew the print center employees but did not keep track of time and attendance or see infractions firsthand. Narkiewicz testified that the print center went from having eight employees and two shifts, to having five employees and one shift, as they had intentionally overstaffed when the print center was first opened because they did not know what the total work demand was going to be. When the print center first opened, they were running 300 paper copies of each bill for the Senate, and another 300 for the Assembly, but then decreased to only printing 25 paper copies, which can be done with only one shift. Narkiewicz stated he was not aware of any OSHA or PESH signs being posted at the print center.

Narkiewicz testified that prior to when Buechs became his supervisor, Brouillette received numerous needs improvements performance evaluations from other managers. Four performance evaluations for Brouillette were entered in evidence from 2013, 2015, 2016, and 2017. Each of those performance evaluations rates Brouillette in a number of categories and the ratings are mostly "meets expectations," with some "needs improvement" on each evaluation. The 2016 and 2017 evaluations state that Brouillette "needs improvement" on attendance but the 2013 and 2015

evaluations state that he "meets expectations" for attendance. Narkiewicz further stated that he was involved with two prior written warnings from other managers because Brouillette, according to Narkiewicz, "caused great problems within the print center." Two write-ups were entered in the record, one from 2012 regarding alcohol use, and one from 2015 regarding alcohol use and time and attendance.

Narkiewicz stated that some of the concerns previous managers had about Brouillette involved alcohol concerns and insubordination, including an instance when Brouillette had not reported to work and when he was told to report, he did not. The 2015 written warning entered in evidence addresses that incident and indicates that Brouillette called his supervisor prior to his shift starting on April 28, 2015 and asked if he could start two hours late, and he was given permission to do so. It further states that prior to the later start time, a bartender from a local venue called to ask if Brouillette could have the day off. According to the write-up, the supervisor told the bartender that Brouillette could not have the day off and he must report to work, but he did not.

Narkiewicz testified that there were numerous times that Buechs reported Brouillette as being late. Narkiewicz further testified that accommodations were made to adjust Brouillette's starting time from 8:00 a.m. to 9:30 a.m. because he had to get his children to school. Narkiewicz testified that Brouillette continued to call at 9:25 a.m. to say that would be a half hour late, which Narkiewicz did not consider sufficient notice to be late for the shift. Narkiewicz stated that this happened frequently, including in the months leading up to his termination. Narkiewicz testified that between January 5 and 24, 2018, Brouillette called in sick seven out of the fourteen workdays, and was absent another day; and, between February 1 and 8, 2018, Brouillette was late or called in sick five times. Time and attendance records for January 2018 to May 2018 were entered in evidence. Narkiewicz testified that Brouillette had time and attendance issues for the duration of his time working at the LBDC.

Narkiewicz stated that the security duty that Brouillette did was considered a secondary job and the print center took priority. Narkiewicz also stated that the security work is an "hourly, as-needed" job when the legislature was in session "Monday through potentially Friday on January through June," not a full-time position. Narkiewicz testified that if Brouillette was having trouble doing his print center job, he should have stopped doing the security shifts.

Narkiewicz testified that he helped prepare the LBDC response to Brouillette's PESH retaliation complaint, which was signed by Rosemarie Perez Jaquith and entered into evidence. Attached to that response and also entered in evidence is, among other documents already identified in this decision, an LBDC response to a complaint filed by Brouillette at the DHR; emails relating to a missing page from an LBDC publication; and a Determination and Order After Investigation from the New York State Division of Human Rights (hereinafter "DHR Determination") finding there was insufficient evidence to support the allegations that the LBDC discriminated against Brouillette based on age, disability, and/or retaliation. That DHR Determination notes Brouillette's complaints regarding moving the table and delivering water jugs, and further states that the employer had legitimate reasons for terminating Brouillette, including insubordination, and other performance problems.

Narkiewicz stated that Buechs told him that Brouillette was refusing to do certain tasks. Narkiewicz testified that had Brouillette made a request for a medical accommodation, Narkiewicz would have been involved, as he had for other employees that requested one, but he would not

make the final determination. He further testified that the LBDC did make a non-medical accommodation to change Brouillette's work hours based on his family needs which, Narkiewicz said, "is not something that we take lightly or do for every individual." Narkiewicz testified that there would have been no issue with Brouillette asking for an accommodation, but Brouillette never made one. According to Narkiewicz everyone was dealt with fairly in the department and Brouillette would have had his accommodation considered the same as everyone else.

Narkiewicz participated in the termination discussions and testified that Brouillette was fired for "[h]istory of poor work performance, history of written warnings, tardiness, not reliable, accompanied with the events of insubordination and the latest evaluation that was last presented to him, and we were keeping weekly tabs of any progress; we were not seeing progress being made." Narkiewicz testified that he participated in a meeting with Brouillette in February[1] during which Brouillette was given a verbal warning about his time and attendance and his job performance, "and it was kind of going to be the last straw if we did not see improvement."

Testimony of Rosemarie Perez Jaquith

Rosemarie Perez Jaquith (hereinafter "Jaquith") testified that she was Director of Administration and Administrative Counsel during the relevant time period and Director of Administration and Human Resources for the LBDC at the time of her testimony. Jaquith stated that she has been involved with human resources and administration for the duration of her tenure at the LBDC. She further testified that the LBDC complies with "the ADA requirements," and accommodates employees as long as there is not an undue burden to the employer and the employee can complete the essential elements of the job.

Jaquith testified that Brouillette was terminated because he had performance issues including time and attendance problems for a number of years. Jaquith stated that Brouillette received repeated counseling including five formal counseling memos. Two written warnings, detailed above, were entered in evidence. Jaquith testified that Brouillette also received verbal counseling sessions, at least one of which occurred a month or two prior to his termination, for the three issues that constituted insubordination that were the basis of the termination. According to Jaquith, Brouillette never requested for an accommodation for a disability or physical circumstances. She acknowledged that Fahey, Snay, and Buechs had also not requested accommodations. Jaquith also acknowledged that Brouillette was not written up for insubordination and testified that he was written up for time and attendance problems and he was given a verbal warning about his conduct. She explained that Brouillette was told that they wanted to see improvement and that if there were further incidences that he was facing the possibility of termination.

Testimony of Associate Industrial Hygienist Priya Desai

Associate Industrial Hygienist Priya Desai (hereinafter "Desai") testified that she has been employed as an industrial hygienist since 2012, and she also serves as a discrimination investigator. Desai testified that a PESH complaint normally must be filed within 30 days of the

[1] Narkiewicz did not state what year this occurred but based on other facts in evidence, the Board finds that he was referencing February 2018.

adverse action, but because the print center did not maintain PESH information on site, Brouillette was allowed to submit his complaint after the 30-day period.

Desai testified that Brouillette alleged he was terminated because of his refusal to perform three tasks, scraping glue from the wires on the binding machine, carrying the table down a flight of stairs, and carrying water cooler jugs up a flight of stairs, which Brouillette felt were unsafe. Desai found a prima facie case for retaliation based on the information provided by Brouillette during the interview and in a PESH discrimination questionnaire (hereinafter "questionnaire"). The notes from the interview and the questionnaire were entered in evidence. The questionnaire indicates Brouillette using the terms "razorblade and hair dryer" to describe the tools used in glue removal.

Desai testified that she sent a letter to the LBDC asking for their response to Brouillette's complaint. That LBDC response letter, detailed above, was entered in evidence. Desai stated that she also interviewed Jaquith, and she reviewed the LBDC's response letter with Brouillette. Desai testified that she conducted a group interview with Buechs, Jaquith, Fahey, and Brouillette, and those interview notes were entered into evidence. Those notes state that Brouillette used the terms "hairdryer and exacto knife" to describe cleaning the glue. According to Desai, Brouillette denied the allegations in the LBDC response letter, but the other members of the print center staff told Desai that nobody else thought that the glue scraping from the binding machine was dangerous because the machine was off, and they used a putty knife. Desai stated that she found several inconsistencies in Brouillette's version of the facts and the LBDC's version of the facts, including that Brouillette stated that he was asked to clean the glue with a razorblade and a hair dryer while the employer stated that it was done using a putty knife and a heat gun; Brouillette stated that he had to carry the water jugs up several flights of stairs but the employer stated that it was done by an elevator in the building and with a hand truck; and Brouillette stated that the table was 200 lbs. and the employer stated that it was between 100 and 150 pounds.

Desai testified that the standard for an employee to legitimately refuse a job task or duty they feels is unsafe is under 29 CFR 1977.12. She further testified that legitimate work refusal requires that an employee "refuse[s] the task in good faith, truly believing it was dangerous and likely to cause death and serious physical harm. . . there was not enough time to contact PESH or OSHA . . . due to the urgency of the hazard, and the employer has to offer or be asked to correct the hazard themselves." Desai stated that she thought that Brouillette could have contacted PESH regarding the task of moving the table because it was not urgent, and she understood that he was given a reasonable alternative because the table was taken apart and he was not doing the task alone. Desai stated that she did not think that Brouillette provided accurate information about the tools he was given to do the glue removal task, and he also did not accurately describe the task itself, since the wires were not electrical wires, but signal wires "which are not capable of producing an electric shock." Desai stated that she did not think that an actual hazard existed with respect to the water jugs task because Brouillette was supplied with a hand truck and was able to use an elevator to do the task. Desai testified that she determined that Brouillette did not have a valid case for work refusal because there were no hazards present with the tasks he was assigned and because no one contacted OSHA or PESH regarding the supposed hazards.

Desai also testified that the LBDC offered a reasonable nondiscriminatory reason for terminating Brouillette and that she did not believe that he was retaliated against. Desai's final report of the investigation was entered into evidence. She testified that even had there not been the

time and attendance issues or the alcohol issues, she still would have determined that there was no retaliation because the determination was based on the refusal to perform job duties.

GOVERNING LAW

Standard of Review

Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the Commissioner's determination dismissing his complaint and declining to take further action was "invalid or unreasonable" (Labor Law § 101 [3]; State Administrative Procedure Act § 306 [1]; Board Rules of Practice and Procedure (hereinafter "Board Rules") [12 NYCRR] § 65.39 [a]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 65.39 [b]).

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

In 1980 the Legislature adopted the Public Employment Safety and Health Act (hereinafter "PESHA"), finding that "it is a basic right of all employees to work in an environment that is as free from hazards and risks to their safety as is practicable" and providing employees working in the public sector with the same or greater workplace protections as those provided workers in the private sector by the Occupational Safety and Health Act (hereinafter "OSHA") (29 USC § 651 et seq.) (L 1980, ch 729 § 1; Governor's Mem approving L 1980, ch 729, 1980 NY Legis Ann at 285). PESHA's general duty clause requires that every public employer 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" and "comply with safety and health standards" promulgated under the statute (Labor Law §§ 27-a [3] [a] [1] and [2]). PESHA encourages employees and their representatives to report workplace safety violations (Labor Law § 27-a [5] [a]) and makes it unlawful for an employer to discharge, discipline, or discriminate against any employee "because such employee has filed any complaint" or "because of the exercise by such employee on behalf of himself or others of any right afforded by this section." (Labor Law § 27-a [10] [a]).

Employees who believe they have been unlawfully discharged or discriminated against in violation of PESHA may file a complaint with the Commissioner within 30 days of the violation (Labor Law § 27-a [10] [b]). If upon investigation "the commissioner determines that the provisions of this subdivision have been violated, [she] shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision" (*id.*). If the Commissioner dismisses the complaint, the employee may seek review of that determination before the Board within 60 days of the determination (Labor Law § 27-a [6] [c]). The Board's role in a case alleging discrimination under the statute is not to determine as a final matter that the public employer retaliated against petitioner, but to review whether the Commissioner's determination that the employer did not retaliate and, thus, that there was no basis to request the Attorney General to bring an action on the employee's behalf, was valid and reasonable (Labor Law §§ 27-a [6] [c], 101 [3]; *Matter of Mateusz J. Nadolecki*, Docket No. PES 07-008, at p. 7 [May 20, 2009]; *see also Matter of Janice Razzano*, Docket No. PES 11-009, at pp. 8-9 [Dec. 14, 2012]).

Burden of Proof to Establish Employer Retaliation Under PESHA

To prevail on a claim of unlawful retaliation under Labor Law § 27-a (10), petitioner must establish that the LBDC 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 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). The employee's "burden of proof as to this first step 'has been characterized as minimal and de minimis.'" (*id*. *quoting Jute v Hamilton Sunstrand Corp.*, 420 F3d 166, 173 [2d Cir 2005]) (internal quotation marks omitted). The showing by the employee thereby raises a rebuttable "presumption" of retaliation (*Tex. Dept. of Cmty. Affairs v Burdine*, 450 US 248,254 [1981]).

The protected activity can include a complaint to a regulatory agency or to the employer about a safety or health concern in the workplace (*Matter of Adam Crown*, Docket No. PES 10-009, at p. 9 [Oct. 11, 2011] or it can include a refusal to perform work (*Matter of Molly Hastings*, Docket No. PES 11-005, at pp. 5-9 [Jan. 30, 2012]). A complaint regarding an unsafe or unhealthy work condition does not have to be valid to constitute protected activity (*id.* at p. 8), but it must be made in good faith (29 CFR § 1977.12[c]; *Matter of Molly Hastings*, Docket No. PES 11-005, at p. 6). A work refusal, however, requires further analysis to be a protected activity. While PESHA does not specifically authorize work refusal in such circumstances, an implementing regulation of OSHA does and PESHA's anti-retaliation provision closely mimics that of OSHA. Thus, OSHA's implementing regulation regarding work refusal is applicable here to determine if petitioner engaged in protected activity. As set forth in 29 CFR § 1977.12:

> ". . . when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

Once the employee meets the 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).

Once an employer has provided legitimate, non-discriminatory reasons for its actions, the burden shifts back to petitioner, who 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 his burden to prove that the respondent's determination that petitioner was not retaliated against by his employer was unreasonable or invalid.

Petitioner Did Not Prove that He Engaged in a Protected Activity

Petitioner failed to establish that he engaged in a protected activity, which is the first required element in a prima facie case of retaliation.

1. *Petitioner's purported refusal to move a table and to move water jugs because of his bad back did not constitute a protected activity under PESHA.*

It appears, based on the record, that the parties agree that petitioner refused to move a table when asked to do so because of a bad back. However, the record does not establish that petitioner refused to move water jugs as requested because of a bad back. Rather, the record indicates that petitioner refused to move the water jugs, at least in great part, because he believed Snay was asked to move them and that Snay was trying to foist his work on to petitioner. Nonetheless, even were it true that petitioner refused to move the water jugs because of a bad back, as with petitioner's refusal to move the table due to his purported bad back, those do not constitute a PESHA-type safety or health complaint. PESHA exists to guarantee "reasonable and adequate protection to the lives, safety or health of employees . . ." (Labor Law § 27 [2]). It requires public employers to "furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which provide reasonable and adequate protection to the lives, safety or health of its employees" and to "comply with the safety and health standards" (Labor Law § 27-a [3][a]). The need to move the table or water jugs as described by the witnesses in this matter in this place of employment is not a recognized hazard from which PESHA requires the employer to take steps to protect against. Further, there is no evidence in the record that petitioner ever reported a back condition that prohibited him from moving a table or water jugs other than possibly having mentioned a bad back in a cursory manner when he was asked to move a table. Were petitioner's refusal to move a table, or water jugs, because of a bad back to fall under the jurisdiction of the PESHA, petitioner still failed to demonstrate that he actually complained of a back condition that

prevented him from performing certain tasks other than his cursory mention of a bad back. Thus, we find that petitioner's purported refusal to move a table and water jugs do not constitute PESHA-related protected activity, a necessary element of a prima facie retaliation case.

Petitioner's purported bad back may have been a reason why he should not have to move furniture or water jugs pursuant to a reasonable accommodation requirement under federal or state disability protections, but not under PESHA, and the record reflects that petitioner filed a discrimination complaint with the DHR. As indicated in the DHR Determination, both the DHR and the PESH complaints address the table and water jug work refusals that are at issue in this matter. Petitioner's testimony that, due to some significant life events, he was unable to appeal the February 2019 DHR Determination that dismissed his complaint that the LBDC discriminated against him based on a disability, among other reasons, still supports our finding that his bad back purportedly limiting work activity is not a PESHA issue because it was appropriately handled in another forum on a substantive basis.

2. *We do not credit petitioner's testimony that he refused to remove glue from the binding machine because it was unsafe.*

All that remains as potential protected activity relates to petitioner's refusal to remove glue from the binding machine in the print shop because it was supposedly unsafe. Based on the record, petitioner told Buechs that he thought removing glue from the binding machine was unsafe, which potentially could constitute a sufficient safety complaint under PESHA (Labor Law § 27-a [10] [b]; *Matter of Adam Crown*, Docket No. PES 10-009, at p. 9). Brouillette testified that he never removed glue from the binding machine whereas Snay testified that petitioner had. There is insufficient indication that petitioner previously complained that such task was unsafe prior to when he admittedly refused to perform the task which, according to the LBDC, occurred during the week of April 30, 2018. We credit the testimony of Snay, a witness called by petitioner, that petitioner had performed the task prior to the week of April 30, 2018, when was asked to do it and he refused. We do not credit petitioner's testimony that he never removed glue from the binding machine because no other witness corroborated that testimony, including the witnesses that petitioner called to testify, and petitioner's testimony regarding the task was, otherwise, not credible. Petitioner inaccurately wrote in his PESH complaint that he was asked to clean the glue off of electrical wires using a razor blade, and he referred to the tool used to clean the glue as a "knife" in his testimony. Petitioner also incorrectly stated in his PESH questionnaire that he was supposed to perform the task using a razor blade and a hair dryer, and in his interview with Desai, he reported that he was to do the task using an "exacto" knife and a hair dryer. No one corroborated that testimony and instead, Buechs, Fahey, and Snay all credibly testified that the glue had to be cleaned off the machine and non-electric wires with a putty knife. No witness, other than petitioner, thought this task was unsafe. We simply found petitioner to not be credible and instead credit Buech's, Fahey's, Snay's, Narkiewicz's, and Jaquith's testimony that petitioner did not want to perform certain tasks at the LBDC. We find that petitioner's complaint that cleaning glue from the binding machine was unsafe was not made in good faith (29 CFR § 1977.12[c]; *Matter of Molly Hastings*, Docket No. PES 11-005, at p. 6). Thus, we do not find that his complaint about that task constituted a protected activity for purposes of a PESHA retaliation case.

We also find that petitioner's refusal to remove glue from the binding machine was not a protected activity. Petitioner testified that he refused to clean glue from the binding machine because it required using a metal knife, which he had previously described as a razor blade or

"exacto" knife, on electric wires and the machine maintained a charge while the cleaning task was performed. As discussed above, we do not find petitioner's description of that task credible. While an employee can rightfully refuse to perform unsafe work, respondent reasonably determined that petitioner did not establish that his work refusal was legitimate (29 CFR § 1977.12; *Matter of Molly Hastings*, Docket No. PES 11-005, at p. 8). Petitioner failed to provide sufficient evidence, other than his subjective belief, that removing glue from the binding machine was dangerous. There is no objective evidence that this task posed any risk to anyone, much less a risk of seriously physical injury or death (*id.*). There is no evidence that a reasonable person would find the task dangerous since petitioner's co-workers and supervisor all performed the task (*id.*). Aside from the fact that there is no indication that anyone other than petitioner thought cleaning glue from the binding machine was dangerous, there is also no indication that petitioner took any steps to ask the LBDC for a reasonable alternative to the method used to clean glue from the binding machine, that petitioner sought to file a complaint with PESH regarding the safety of the task, or took any other steps other than his refusal to perform the task (*id.*). Thus, it was reasonable for respondent to determine that petitioner's refusal to clean glue off the binding machine was not justified.

Petitioner failed to prove that respondent's determination to dismiss his retaliation complaint was invalid or unreasonable (*see Matter of Mateusz J. Nardolecki*, Docket No. PES 07-008, at pp. 8-9 [May 20, 2009]). As petitioner also did not prove that he engaged in a PESHA protected activity, the first element of a prima facie case of retaliation, petitioner did not meet his burden to prove that the determination dismissing his retaliation complaint was invalid or unreasonable. The Board denies the petition (*Kwan*, 737 F3d at 844).

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 17, 2024.

Molly Doherty, Chairperson

Michael A. Arcuri, Member

Najah Farley, Member

Patricia Kakalec, Member

Sandra Abeles, Member