

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
JAY GUSLER,	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
A Determination dated June 22, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent,	:
	:
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DOCKET NO. PES 09-012

RESOLUTION OF DECISION

APPEARANCES

Jay Gusler, *pro se* petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of Counsel), for the respondent.

WITNESSES

For petitioner: Matthew Setteducati, PESH Senior Compliance Safety and Health Officer; James Cutrone, PESH Supervising Safety and Health Inspector; William Piazza; Daniel Fraser; Edward Thursland; and Jay Gusler.

For respondent: Matthew Setteducati, PESH Senior Compliance Safety and Health Officer.

WHEREAS:

On July 27, 2009, petitioner Jay Gusler (petitioner or Gusler) filed a petition contesting a determination issued on June 22, 2009 by the Commissioner of Labor (Commissioner or respondent) finding that Gusler's Public Employee Safety and Health (PESH) complaint against the City of Long Beach Fire Department (LBFD) alleging a violation of the Workplace Violence Protection Act (WVPA) could not be sustained. The initial petition was amended on September 5, 2009 and then answered by the Department of Labor (DOL) on November 23, 2009.

In his petition, Gusler alleges that the determination was invalid or unreasonable because the respondent's investigation was flawed and a citation should have been issued because the LBFD violated the General Duty Clause of the PESH Act (Labor Law § 27a [3] [a] [1]) in its failure to comply with the WVPA. In its answer, respondent alleges that an investigation was conducted after which it was determined that the circumstances involved did not rise to the level of a serious violation and therefore, there was no General Duty Clause violation. Upon notice to the parties, a hearing was held on October 15, 2010 and November 5, 2010 in New York City and Old Westbury, before Anne P. Stevason, Esq., Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs. Post-hearing briefing was complete on May 24, 2011.

BACKGROUND INFORMATION

1. The PESH Statutory Scheme

Every employer has the duty to comply with the safety and health standards promulgated under PESH (Labor Law § 27-a [3]). PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that “[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated”

2. The Workplace Violence Protection Act

The WVPA (Labor Law § 27-b) was enacted in 2006 “to insure that the risk of workplace assaults are evaluated and that [public] employers design and implement workplace violence protection programs to protect and minimize the hazard of workplace violence” (Labor Law § 27-b [1]). It also provided that the Commissioner shall adopt rules and regulations implementing the act. Final WVPA regulations became effective on April 29, 2009 and are found at 12 NYCRR 800.6. Affected employers were required to be in compliance with the regulations by August 28, 2009. Since the regulations had not yet been promulgated in February 2009, at the time of the incident underlying Gusler's complaint, the only possible citation that could be issued to LBFD was under the General Duty Clause (*See In the Matter of the Petition of the City of New York Department of Juvenile Justice, et al.*, Docket Nos. PES 07-012, 013 and 014 [April 21, 2010]) which provides at Labor Law § 27-a (3) (a) (1) that:

“Every employer shall...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 will provide reasonable and adequate protection to the lives, safety or health of its employees.”

3. The Long Beach Fire Department

The LBFD is comprised of both paid and volunteer firefighters. The highest rank that a paid firefighter can attain is Lieutenant, and only volunteers can become Chief or Assistant Chiefs. The consensus of the parties is that this structure has caused tension among the firefighters since the paid firefighters must always answer to the volunteers and the paid firefighters consider themselves to be more professional.

The City of Long Beach has an Employee Policy Manual that includes the City's Workplace Violence Prevention Policy. The Policy defines workplace violence, explains prohibited conduct and its consequences, provides for a risk evaluation, a workplace security coordinator, procedures for reporting and investigating workplace violence, and for training. Pursuant to this policy, at the time of the incident, all paid firefighters had received workplace violence prevention training. However, the training was not required of the volunteer firefighters.

FINDING OF FACTS

On February 17, 2009, petitioner filed a health and safety complaint with PESH based on an incident that occurred on February 11, 2009. At the time, Gusler was a Lieutenant with the LBFD. On February 11, Gusler responded to a fire call with a fire truck and crew. Fire Chief Marco Passaro arrived at the scene at some time after Gusler. There was conflicting testimony as to what occurred next but it is clear that there was at the very least a heated verbal exchange between Gusler and Passaro concerning fire department procedure. This exchange was witnessed by other firefighters as well as two police officers and members of the public.

According to Gusler, he arrived at the fire call after Chief Gargan, who had indicated that there was no fire. Passaro then arrived and started yelling and cursing, criticizing the way the fire call was being handled. Gusler approached Passaro to tell him that his behavior in front of the public was unprofessional, at which time Passaro continued yelling and lunged at Gusler and threatened that he "would kick [Gusler's] ass," and would have physically assaulted Gusler except for the intervention of Police Officer Gelberg and Firefighter Cuevas who restrained Passaro. Gusler believed that Passaro was intoxicated at the time and told the police officers.

Gusler's statement that Passaro lunged at him and had to be physically restrained was supported in part by the testimony of Firefighters William Piazza, Anthony Fallon and Daniel Fraser, who all indicated that Passaro had to be physically restrained. Piazza testified that he had an incident with Passaro at an earlier date where he felt that Passaro was "baiting" him.

Safety and Health Officer Matthew Setteducati testified that he interviewed a number of witnesses and read a police report which indicated that there was no physical contact between Passaro and Gusler, that Passaro never had to be restrained, and that Passaro left the scene when requested by the police. Although Passaro had a history of yelling and cursing and had been reprimanded in the past for unprofessional behavior and told to take some anger management training, he had no prior history of violence or engaging in physical altercations.

After the incident, on February 11, 2009, Gusler filed a complaint with Fire Commissioner Fraser concerning the incident and requested that Passaro be suspended. A

copy of the complaint went to the City Manager, Charles Theofan. On the evening of February 11, Gusler also went to the police station to file a complaint. On February 17, 2009, after reviewing the city's workplace violence prevention policy which indicated that a complaint could be filed with DOL, Gusler also filed a complaint with PESH about the incident.

Inspector Setteducati commenced his investigation of the PESH complaint on February 26, 2009. He held an opening conference with Theofan, Assistant City Manager Lisa Hirsch, Piazza, the union president, and Gusler. After the conference Setteducati interviewed several witnesses including Gusler.

City Manager Theofan told Setteducati that he was made aware of the incident on the next business day and that he interviewed Passaro, Gargan and several other witnesses the same day. After determining that there was no imminent danger he appointed Assistant City Manager Hirsch to conduct a full investigation. He stated that he knew both parties well and did not feel that there was any danger of physical harm. He also noted that Gusler came in to the firehouse the day after the incident even though it was his day off and there was some chance of encountering Passaro. This was confirmed by Gusler who stated that although there was some interaction with Passaro after the incident there was no altercation.

Setteducati also interviewed one of the police officers at the scene, Michael Gelberg, by phone and received a copy of the police report. Both Gelberg and the report indicated that there was a loud verbal argument between Passaro and Gusler with both individuals yelling, and after they were instructed a couple of times to take the argument to the firehouse, both parties left. Gusler accused Passaro of being intoxicated but Gelberg saw no evidence of intoxication or that any law was being violated. Gelberg also stated that there was no physical contact and that Passaro did not have to be restrained.

Setteducati concluded his investigation on May 4, 2009 and found: "Upon review of all information and interview, it was decided by the inspector that a General Duty violation for workplace violence would not be considered and the complaint would not be sustained." He noted that the city has had a workplace violence prevention program in place for over two years which contained all major items needed. Although the city does not mandate WVPA training for volunteers, this violation, although a violation of the WVPA, would not be considered serious enough to warrant a General Duty citation.

The Determination in question was then issued on June 22, 2009.

DISCUSSION

1. The Four Components of a Violation of the General Duty Clause.

A violation of the General Duty Clause requires the establishment of four factors: (1) that the employer failed to keep its workplace free of a hazard to which employees were exposed; (2) the hazard is recognized; (3) the hazard is causing or is likely to cause death or serious physical harm; and (4) there is a reasonably adequate method to abate the hazard. (*Natl. Realty & Constr. Co. v OSHRC*, 489 F2d 1257 [DC Cir 1973]).

All four factors must be present for there to be a violation.

2. The DOL Determination that there was no General Duty Clause violation was reasonable.
 - a. The incident did not rise to the level of a serious violation.

A serious violation “shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment....” (29 U.S.C. § 666 [k]). “There need not be a substantial probability that an accident will in fact occur, but only that death or serious physical harm would result if the accident were to occur.” Rabinowitz, (ABA Section of Labor and Employment Law) Occupational Safety and Health Law at 224 (2nd ed 2003).

There were conflicting versions of what occurred on February 11, 2009. The City Manager credited the police report and the statements of some of the witnesses that the incident was limited to a loud, verbal argument and that there was no physical contact and Passaro did not need to be restrained and no threats were made. None of the versions of the incident, including Gusler’s, alleged that there was any physical contact between Gusler and Passaro. As such, this is not the type of hazard, that if it recurred, could result in death or serious physical harm. Examples of serious physical harm, as noted in the Department of Labor Field Operations Manual at Chapter IV, Section B. 1.b (3)(a)1, include impairment of part of the body, amputation, concussion and fracture.

Many witnesses stated that although Passaro is loud and uses crass language, they do not believe that he is capable of violence or doing physical harm. The City Manager was familiar with Passaro and made that assessment himself.

The City responded reasonably to the complaint of workplace violence.

At the time of the incident, the City had a written Workplace Violence Prevention Policy which had been in place for approximately two years. Gusler was familiar with the policy and all paid firefighters had been trained on it. He knew that he was able to make a complaint to the city, as well as to the DOL.

After the City Manager was informed of the incident, he immediately interviewed a number of people and made an assessment that there was no imminent danger. He then assigned an assistant city manager the job of thoroughly investigating the incident.

In combination with the policy, the City’s immediate assessment of the situation by speaking with various witnesses and relying, for the most part on the police report, was a reasonable response to the complaint. Accordingly, we find that the respondent’s determination not to sustain the petitioner’s WVPA complaint was reasonable.

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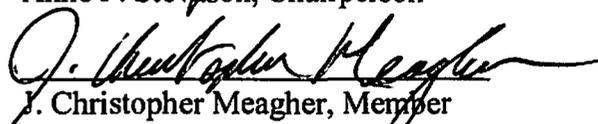
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

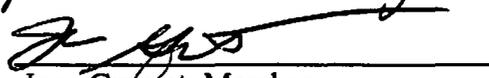
1. The Determination is hereby affirmed; and
2. The Petition is denied.



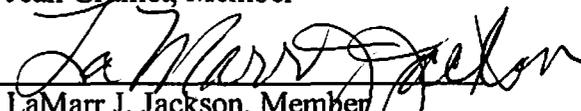
Anne P. Stevenson, Chairperson



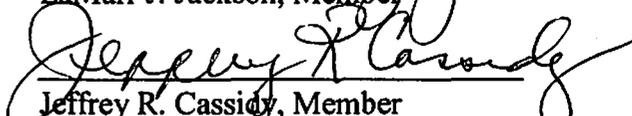
J. Christopher Meagher, Member



Jean Grunnet, Member



LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 16, 2012.