

Anne P. Stevason
Chairman

State of New York
Industrial Board of Appeals

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

MT. KISCO DESIGN CENTER, INC.
AND/OR ROBERTA J. PICARILLO,

Petitioner,

To review under Section 101 of the Labor Law:
Order to Comply with Article 6 of the Labor Law,
dated September 22, 2006,
- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR-06-095

RESOLUTION OF DECISION

WHEREAS:

1. Petitioner, by documents mailed to the Department of Labor (DOL) by United States Postal Service (USPS) Certified Return Receipt Mail, postmarked November 22, 2006 and received by the DOL mailroom on November 24, 2006, sought to file a Petition for Review of an Order to Comply (Order) with Article 6 of the Labor Law, issued by the Commissioner of Labor on September 22, 2006; and
2. Thereafter, Petitioner filed a Petition for Review of the Order by documents mailed by USPS, postmarked December 5, 2006, and received by the Industrial Board of Appeals (Board) on December 7, 2006; and

3. Pursuant to the Board's Rules of Procedure and Practice (Rules) § 65.13 (d) (1) (iii), on or about December 13, 2006, the Commissioner moved to dismiss the Petition on the ground that Petitioner failed to comply with Labor Law § 101 and the Rules § 66.2 (a) by filing the Petition, first with DOL more than 60 days after the Order was issued, and later by filing the Petition with the Board more than 60 days after the Order was issued; and
4. Petitioner responded to the Commissioner's motion, asserting that she followed the directions for filing a petition for review which she solicited and obtained from an unnamed DOL employee after she received the Order; and
5. The Board has considered the parties' arguments, the documents, and all of the papers filed here; and
6. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated by reference in its entirety in this Resolution of Decision; and
7. The Board having concluded, as a matter of law, that the Petition was not timely filed with the Board;

NOW, THEREFORE, IT IS HEREBY RESOLVED:

That the Commissioner's motion to dismiss is granted and the Petition be, and hereby is, dismissed.



 Anne P. Stevason, Chairman

ABSENT

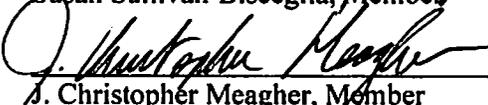
 Mark S. Perla, Member



 Gregory A. Monteleone, Member



 Susan Sullivan-Bisceglia, Member



 J. Christopher Meagher, Member

Dated and Filed in the Office of the Industrial Board of Appeals, at Albany, New York, on August 22, 2007

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DOCKET NO. PR-06-095

MEMORANDUM OF DECISION

STATEMENT OF THE CASE

The Order to Comply with Labor Law Article 6 that is the subject of the above-captioned case (Order) was issued by the Commissioner of Labor (Commissioner) on September 22, 2006. The Order found that Petitioner failed to pay wages earned and directed that payment be made to the Commissioner in the amount of \$29, 680.46 for wages due and owing for the period of November 1, 2001 through June 30, 2004, with continuing interest thereon at the rate of 16%, calculated to the date of the Order, in the amount of \$10,590.63, and assessed a civil penalty in the amount of \$7,420.00, for a total due of \$47,691.09.

The Petitioner, appearing *pro se*, mailed a Petition for Review (Petition) of the Order to the Board in an envelope post marked December 5, 2006 and received on December 7, 2006. Along with the petition, the envelope enclosed several other documents: a copy of a U.S. Postal Service (USPS) return receipt indicating that a mailing addressed to the Department of Labor (DOL) had been received by the DOL mailroom on November 24, 2006; a copy of a USPS receipt dated November 22, 2006, for payment of the cost of sending certified mail, return

receipt requested, bearing the same label number as the postal return receipt for the mail delivered to DOL; and a copy of the Order.

The last decretal paragraph of the Order states that

“in the event that the [monies due] are not paid within 60 days following service . . . of this Order upon the employer, and no petition has been filed by the employer with the Industrial Board of Appeals for review of this determination, said Order may be filed with the County Clerk . . . and the Clerk shall . . . enter judgment....” (Emphasis supplied.)

In addition, immediately under the signature of the Director of the Division of Labor Standards and in the same font type and size as the other text, the Order also states:

“If you are aggrieved by this Order, you may appeal within 60 days from the date issued to the Industrial Board of Appeals as provided by Section 101 of the Labor Law. Your appeal should be addressed to the Industrial Board of Appeals, Empire State Plaza, Agency Building #2, 20th Floor, Albany, NY 12223, as prescribed by its Rules of Procedure, a copy of which may be obtained from the Board upon request.” (Emphasis supplied.)

Pursuant to the Board’s Rules of Procedure and Practice (Rules) § 65.13 (d) (1) (iii), the Commissioner moved to dismiss the petition on the ground that Petitioner failed to comply with Labor Law § 101 and Rule § 66.2 (a) by filing the petition more than 60 days after the Order was issued. The motion, supported by an attorney’s affirmation, argues that Petitioner mailed the petition to the DOL one day after the 60-day limitations period expired and did not file the petition with the Board until 74 days after the Order issued.

Petitioner responded to the motion to dismiss with a signed, unsworn letter. As relevant here, Petitioner’s letter states:

“[T]he . . . gentleman made a decision from the [DOL] and an order to comply was sent to me by mail indicating such. I then called the NYS Department of Labor and they advised me that I could send a letter to appeal [the Order] and be given a hearing. I was told that I should explain in this letter why I would like to appeal this decision and I should send this to the Department of Labor in Albany, NY. My understanding from this conversation implied I had to give all the details in stating my case and why I would like to appeal this decision. Once again, I did as instructed by the [DOL]. It took some time for me to formulate all this in my appeal letter and sent this out in the time frame I was given. I sent the letter out by certified mail to the [DOL] in Albany, NY.

“I received a response letter from the [DOL] indicating that I was to send this to [the Board] in Albany, NY. I immediately contacted [an attorney at the Board] and explained that I was told to send this letter to the [DOL]. He noted our

conversation and instructed me to send him a copy of my correspondence. . . . [The Board's attorney] also informed me that it was not necessary for me to have written a detailed appeal letter, that I could have written a short paragraph simply stating that I wish to appeal the decision for the Order. I wished that I had been informed of that when I called the [DOL]. That letter could have been written in 5 minutes and sent out the same day I had phoned them. But, once again I had been misled.

"Now . . . the [DOL] is trying the [sic] have my appeal dismissed because they are saying my letter had arrived 1 day after the 60-day time frame. It would not have taken me the 60 days to send this letter of appeal had I known that all that was required to write was that I appeal this decision.

I am extremely upset by this entire situation and strongly feel that I have been misled, misinformed and intimidated by [DOL] from the very beginning."

LAW

Pursuant to Labor Law § 101, the Board may review the validity or reasonableness of an Order of the Commissioner that is "filed with the board no later than sixty days after the issuance of such . . . Order." A note under § 65.5 of the Rules states that "[t]ime periods prescribed by statute cannot be extended." (Emphasis in original.) The Rules provide that review of an Order of the Commissioner, other than an Order issued under Article 13 of the Labor Law, "may be had only by filing a written Petition with the Board at its Albany office, no later than 60 days after the issuance of the . . . order objected to;" however, "[a]ny pleading post-marked within the time provided for by these rules shall be deemed timely filed." Rules §§ 65.5 (d) and 66.2 (a).

DISCUSSION

Labor Law § 101 requires a petition to be "filed with the Board no later than sixty days after the issuance" of the Commissioner's Order. The Rules emphasize that "[t]ime periods prescribed by statute cannot be extended," define "filed" as "receipt at the Board's office," and provide that no time for the delivery of a document shall be added to the 60-day limitations period for filing a petition. *See* Rules §§ 65.3 (c) and (d), 65.5 (c), and "*Note*" following Rule § 65.5(g). The limitations period here expired on November 21, 2006, a Tuesday. The Rules § 65.5 (d) provide that "[a]ny pleading post-marked within the time provided for by these rules shall be deemed timely filed." Consequently, even if the Board were to conclude that Petitioner's asserted November 22, 2006 mail service of the petition on DOL constituted a filing with the Board, that filing was already a day late when placed in the mail. Similarly, if DOL's receipt of the petition on November 24, 2006, were considered a filing with the Board, that filing was three days late. Finally, the petition that was mailed to the Board in an envelope postmarked December 5, 2006, was filed well beyond the 60-day limitations period. Accordingly, unless Petitioner establishes an applicable exception to the limitations period, it must be concluded that, as a matter of law, the petition is untimely.

Petitioner argues that her late filing should be excused by her justifiable reliance on misleading DOL advice that she was given with respect to where her petition should be filed and the information that it should contain. Petitioner's letter is not sworn to; it does not provide the name(s) of the DOL employee(s) who gave allegedly inaccurate advice, or the date(s) that Petitioner sought advice, or what precisely she was told regarding the time limit for appealing. Petitioner does not explain why she did not follow the directions for filing an appeal that appear in the Commissioner's Order, or why she did not initially call the Board's office for guidance in pursuing her appeal. Petitioner clearly had a copy of the Order, which directed her to appeal to the Industrial Board of Appeals; it was her receipt of the Order that prompted her to call DOL for guidance. Finally, Petitioner does not claim that she was confused about the relationship between DOL and the Board, or that she thought (or was told by DOL) that the two were one and the same and that was the reason that she filed her appeal with DOL.

Petitioner blames DOL for advising her to write an unnecessarily detailed explanation of the bases of her appeal and attempts to justify the delay in filing her appeal by the time that it took her to compose such a detailed petition. However, nowhere does she state exactly what information the DOL employee told her to provide in the appeal that was unnecessary. In this regard, the information that Petitioner describes receiving from DOL appears to be good advice: "they advised me that I could send a letter to appeal this decision and be given a hearing. I was told that I should explain in this letter why I would like to appeal this decision. . . . My understanding from this conversation implied [sic] I had to give all the details in stating my case and why I would like to appeal this decision."

It is relevant to note here that Petitioner does not state the date that she sought advice from DOL. Was it immediately upon her receipt of the Commissioner's Order, or was it on the last day she had for filing the appeal? If Petitioner delayed in seeking information relative to the appeal, DOL cannot be held responsible. Petitioner's papers do not provide adequate information in this respect. It is also relevant to note that although Petitioner appears *pro se* before the Board, she states in her response to the Commissioner's motion that she had an attorney, at least when she attended a meeting before DOL.

Turning to Board case law, in *Matter of Dr. Arthur O. Anyah (T/A Search Computer Academy)*, Docket No. 03-091, the Board requested "information supporting the Board's continued jurisdiction" of a petitioner who filed a petition several weeks after the limitations period expired. There, the petitioner responded with a letter that did not refute that the petition was filed late, but asserted "extenuating circumstances involving the Petitioner's extended absence from the address stated on the Orders to Comply, which the Petitioner requests that the Board consider as sufficient justification to overlook the late filing." The Board's Resolution of Decision does not recite what the extenuating circumstances were, but concludes that they did not rise "to the necessary level to support the Board's finding of any legal and sufficient justification for accepting the late filing," and dismissed the petition as untimely. Read in the light most favorable to Petitioner here, we can conclude from *Dr. Arthur O. Anyah* only that circumstances that even the Board may find extenuating do not necessarily justify treating a late-filed petition as timely.

Finally, the courts disfavor the kind of excuse that Petitioner attempts to use to circumvent the statute of limitations, and in *Matter of Budget Tire Automotive, Inc. v O'Dell*, 223 AD2d 988 (3d Dept 1996), affirmed the Board's Resolution of Decision rejecting such an excuse as a defense to an untimely petition. Here, Petitioner herself indicates that she had conflicting information about where to file her appeal, but failed to make reasonable inquiry to determine which information was correct. It was unreasonable for Petitioner to rely on information that she asserts that she received from DOL when the Order that prompted her to seek guidance in filing the appeal itself stated where she was to file. Petitioner knew, or should have known, that the information that she received from DOL differed from that in the Order, and she failed to follow-up to ascertain which information was correct. *See Putter v North Shore Univ. Hospital*, 7 NY3d 548 (2007).

For all of the above reasons, we find that the Commissioner's motion to dismiss the Petition as untimely should be granted.

CONCLUSION

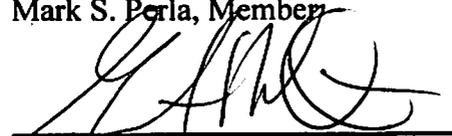
The foregoing constitutes our findings pursuant to the Rules § 65.39. 12 NYCRR 65.39.

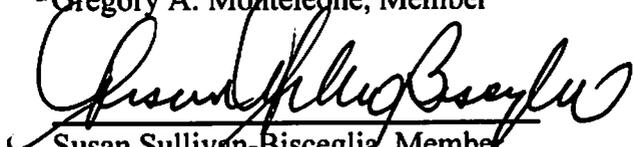
Let a Resolution of Decision issue accordingly.


 Anne P. Stevason, Chairman

ABSENT

Mark S. Perla, Member


 Gregory A. Monteleone, Member


 Susan Sullivan-Bisceglia, Member


 J. Christopher Meagher, Member

Dated and Filed in the Office of
 the Industrial Board of Appeals,
 at Albany, New York,
 on August 22, 2007