

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:	:	
	:	
JULY 4 EVER, INC. and VINCENT ESPOSITO,	:	
	:	
Petitioners,	:	DOCKET NO. PES-07-009
	:	
To review under Sections 101 and 463 of the New York	:	
State Labor Law: An Order and Determination of the	:	<u>RESOLUTION OF DECISION</u>
Commissioner of Labor issued May 15, 2007	:	
	:	
-against-	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	
	:	
-----X		

WHEREAS:

The Petition in the above-captioned case was filed with the Industrial Board of Appeals (Board) on July 17, 2007, seeking review of the Determination and Order of the Commissioner of Labor (Commissioner) issued on May 15, 2007. In the proceedings below, after an evidentiary hearing held pursuant to Labor Law § 460, the Commissioner adopted the Report and Recommendations of the Hearing Officer and determined that:

- (1) Petitioner “violated Labor Law § 453 by storing explosives (Class C fireworks) in trailers without Certificates;” and
- (2) Petitioner “is not sufficiently reliable to be authorized to own, possess, store, transport, use, manufacture, deal in, sell, purchase or otherwise handle explosives.” (“Report & Recommendation”, dated May 14, 2007 at 12.)

Based on these determinations, the Commissioner ordered that Petitioner's seized fireworks be destroyed and that its License to Deal or Manufacture Explosives and its three Explosive Magazine Certificates be revoked. Petitioner contests the reasonableness and validity of these Determinations and Orders.

On August 3, 2007 the Commissioner moved to have the Board decide the appeal solely on the record below, together with the parties' written and oral arguments. She also moved to strike portions of the Petition as frivolous. Petitioner raised no objection to the record below being submitted to the Board but requested the opportunity to present further legal arguments and also for the Board to receive evidence on the issue of whether consumer fireworks are explosives. At a case management conference held on September 19, 2007 the parties were informed that the Board would not hold an evidentiary hearing in this case and directed that the Department of Labor (DOL) submit the complete record of the proceedings below; that the parties brief the issues and that the matter be set for oral argument before the entire Board on December 19, 2007.

At oral argument the Petitioners, July 4 Ever, Inc. and Vincent Esposito (together referred to as Petitioner or July 4 Ever) were represented by Bernfeld, DeMatteo & Bernfeld, LLP by Joseph R. DeMatteo, Esq. and the Commissioner was represented by Maria Colavito, Counsel to DOL, Jeffrey G. Shapiro, Esq. of counsel.

The issues before the Board are whether Petitioner was in violation of Labor Law § 453 regarding the storage of explosives and whether Petitioner's license and certificates should be revoked. These issues turn on whether Class C fireworks, as defined in 27 Code of Federal Regulations § 555.11, constitute explosives as defined in Labor Law § 451(1).

#### THE STATUTORY SCHEME

In Article 16 of the Labor Law, the Legislature has delegated to DOL the authority to regulate the sale, storage and manufacture of explosives. Labor Law § 450(1) provides: "This article shall apply to persons engaged in the manufacture, ownership, possession, storage, use, transportation, purchase, sale or gift of explosives as defined in subdivision one of section four hundred fifty-one." Labor Law § 451(1) defines explosives:

"Explosives' means gunpowder, powders used for blasting, high explosives, blasting materials, detonating fuses, detonators and other detonating agents, smokeless powder and any chemical compound or any mechanical mixture containing any oxidizing and combustible units, or other ingredients in such proportions, quantities, or packing that ignition by fire, friction, concussion, percussion or detonation of any part thereof may and is intended to cause an explosion, but shall not include gasoline, kerosene, naphtha, turpentine, benzene, acetone, ethyl ether, benzol and all quantities of black powder not exceeding five pounds for use in firing of antique firearms or artifacts or replicas thereof. Fixed ammunition and primers for small arms, fire-crackers, safety fuses and matches shall not be deemed to be explosives when, as may be determined by the board in its rules, the individual units contain any of the above-mentioned articles or

substances in such limited quantity, of such nature and so packed that it is impossible to produce an explosion of such units to the injury of life, limb or property.”

Pursuant to its authority under Labor Law § 459, DOL issues licenses to manufacturers, dealers and owners of explosives. It also issues explosive magazine certificates and requires that every explosive storage facility contain such a certificate, per Labor Law § 453 which provides:

“No person shall store explosives except in a magazine constructed and located in accordance with the provisions of this article and the rules of the board and unless a certificate, which shall be attached to the magazine on the inside thereof, has been issued for such magazine. No person shall store more than three hundred thousand pounds of explosives in any one magazine at any time.”

Regulations have been promulgated to enforce the provisions of Article 16. In particular, regulations define high explosives and low explosives and specify the type of facility required for the storage of each.

Concomitant with its authority to issue licenses and certificates is DOL’s power to revoke these licenses and certificates and its power to seize explosives. Upon DOL’s notice of intent to revoke a license or certificate and/or upon its seizure of explosives, the license or certificate holder and the owner of the seized explosives may demand a hearing pursuant to Labor Law §§ 459 and 460 respectively. If demanded, a hearing is held and a hearing officer thereafter makes its Report and Recommendation to the Commissioner. The Commissioner may, after a review of the record, adopt, modify or reject the Hearing Officer’s findings of fact, conclusions of law, determinations and recommended order(s).

Any decision by the Commissioner to revoke a license or certificate may be reviewed by the Board per Labor Law § 463. However, “[a]ll questions of fact arising under (Article 16) shall be decided by the commissioner and there shall be no appeal from his decision on any such questions of fact.” *Id.* Accordingly, the Board is bound by the findings of fact of the hearing officer in this case, as fully adopted by the Commissioner.

#### STATEMENT OF THE CASE

Without repeating verbatim the Commissioner’s findings, the facts are basically as follows: Petitioner has held a license to deal in explosives, as well as three explosive magazine certificates issued by DOL. It has been licensed since the year 2000. In addition, it is licensed by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE).

On August 7, 2006, while BATFE was conducting a compliance inspection of Petitioner’s storage facilities in Walden, New York BATFE investigators observed five long tractor trailers labeled and containing Class C fireworks, also known as consumer fireworks. The BATFE agent called the state in to inspect, since BATFE does not regulate Class C fireworks. There is no dispute that the fireworks in question are Class C fireworks as defined in

27 CFR § 555.11 and not display fireworks which both parties admit are within the definition of explosives.

DOL inspectors arrived at the site and found five metal trailer trucks varying in width and length from eight feet by fifty-two feet to eight feet by thirty-nine feet. The trailers were opened for inspection and it was revealed that they were all stocked with Class C explosives/fireworks. None of the five trailers had storage certificates.

Thereafter, the Commissioner authorized the New York State Police to seize and impound the fireworks pursuant to Labor Law § 460(1) based on her determination that July 4 Ever failed to have a storage certificate for the trailers, in violation of Labor Law § 453. The State Police seized and impounded the trailers and their contents and July 4 Ever was notified of its right to a hearing. An inventory of the seized fireworks was taken by DOL which revealed that there were 57,914.6 pounds of Class C fireworks. The items in the inventory were the same type of fireworks that July 4 Ever advertised for retail sale on its website. Other than the names of the fireworks and their designation as consumer fireworks, there is no information in the record as to the contents or characteristics of the specific fireworks that were seized, except that the parties agree that the fireworks are Class C fireworks and that federal regulations (27 CFR §555.11) define what the parties mean by Class C fireworks.

DOL issued a Notice of Intent to Revoke July 4 Ever's License and three existing storage Certificates. Petitioner requested a hearing on both the seizure of the fireworks and the intended revocation of its license and certificates. An evidentiary hearing was held on September 25, 2006 at which time DOL presented its case. Petitioner elected not to call any witnesses. Both parties submitted post-hearing briefs.

The hearing officer found that "July 4 Ever violated Labor Law § 453 by storing explosives (Class C fireworks) in trailers without Certificates and therefore, the seized fireworks should be ordered destroyed. He also found that "July 4 Ever's storage of 57,914.6 pounds of explosives in uncertified trailers, which were found unattended and without proper locking devices . . . demonstrates that it is not sufficiently reliable to be authorized to own, possess, store, transport, use, deal in, sell, purchase or otherwise handle explosives, and should have its Certificates and License revoked." The Commissioner adopted the findings and issued her Orders that the seized fireworks be destroyed and that July 4 Ever's license and three certificates be revoked.

#### STANDARD OF REVIEW

On review, the Board is charged with determining whether the Commissioner's orders are valid and reasonable. (Labor Law § 101) In the instant case, the Board is reviewing whether the Commissioner's finding that Petitioner violated Labor Law § 453 by not having a certificate for the storage of Class C fireworks was reasonable and valid. Both parties agree that this issue is reduced to the question of whether Class C fireworks, as defined by the federal regulation 27 CFR 555.11, are explosives within the meaning of Labor Law § 451(1) and the implementing regulations. In addition, the Board will be reviewing the order revoking Petitioner's license under the same reasonable and valid standard.

## FINDINGS

The Board having given due consideration to the record below, the parties' arguments and all of the papers filed herein, makes the following findings.

As stated above, it is undisputed that the fireworks in question are Class C or consumer fireworks as defined in 27 CFR § 555.11:

“Consumer fireworks. Any small firework device *designed to produce visible effects by combustion* and which must comply with the construction, chemical composition, and labeling regulations of the U.S. Consumer Product Safety Commission, as set forth in title 16, Code of Federal Regulations, parts 1500 and 1507. Some small devices designed to produce audible effects are included, such as whistling devices, ground devices containing 50 mg or less of explosive materials, and aerial devices containing 130 mg or less of explosive materials. Consumer fireworks are classified as fireworks UN0336, and UN0337 by the U.S. Department of Transportation at 49 CFR 172.101. This term does not include fused setpieces containing components which together exceed 50 mg of salute powder.” [Emphasis added.]

The parties agree that consumer fireworks are not regulated by BATFE. The state regulations mirror the statutory definition of explosives but contain certain exceptions.<sup>1</sup> In addition, the regulations define “high” and “low” explosives and provide for the type of storage facility required for each. High Explosives are defined as “[e]xplosive materials which can be caused to *detonate* by means of a blasting cap when unconfined as, for example, dynamite.” [Emphasis added.] 12 NYCRR 39.2(l). Low explosives are defined as “[e]xplosive materials

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<sup>1</sup> “Explosives” are defined at 12 NYCRR 39.2(k) as follows:

“The term *explosives* is defined in subdivision 1 of 451 of the Labor Law, but shall not be deemed to include any of the following:

- (1) Matches that will not ignite spontaneously when subjected for eight consecutive hours to a temperature of 200 degrees Fahrenheit in a properly conducted laboratory test.
- (2) Firecrackers, the explosive content of which does not exceed 12 grains each in weight when packed in strong, tight, sparkproof, wooden barrels or wooden or fibreboard boxes.
- (3) Fixed ammunition for small arms, such as is used in pistols, revolvers and rifles, which do not exceed 0.50 inches caliber, in shotguns and similar firearms or in machine guns with nonexplosive bullets, when packed in pasteboard or other similar inside boxes in strong wooden or fibreboard outside boxes or metal containers.
- (4) Primers for small arms when packed in cellular inside packages with partitions separating the layers and columns of the primers in strong, tight outside wooden boxes.
- (5) Safety fuse, consisting of a core of black powder overspun with yarns, tapes and/or waterproofing compound, and packed in outside fibreboard boxes, wooden boxes, wooden barrels, bales or metal containers.
- (6) Any of the above when in their completed form and temporarily loosely stored in vented containers at the place of their manufacture prior to packaging or after removal from their original containers or packages prior to lawful use.”

which can be caused to *deflagrate* when confined as, for example, black powder.” [Emphasis added.] 12 NYCRR 39.2(n).<sup>2</sup> Neither definition includes the term “combustion.”

“Consumer fireworks” is not defined or referenced anywhere either in Article 16 of the Labor Law or in the regulations implementing Article 16. However, “pyrotechnics” is defined in the regulations, at 12 NYCRR § 39.2(q) as:

“Any combustive or explosive compositions of manufactured articles designed and prepared for the purpose of producing audible or visible effects which are commonly referred to as fireworks, including signaling devices such as flames, fuses and torpedoes.”

DOL argues that because pyrotechnics are defined in the regulations and are not among the specific exclusions to the definition of explosives, they are explosives.<sup>3</sup> It further argues that since New York does not differentiate between consumer and display fireworks, they are considered either high or low explosives. However, pursuant to the regulatory definitions, high explosives detonate and low explosives deflagrate,<sup>4</sup> while consumer fireworks, as defined, only combust.

July 4 Ever argues that consumer fireworks, which are defined as providing effects by combustion and not detonation, explosion or deflagration, takes it out of the statutory definition of explosives and even out of the further refinement of that definition as high and low explosives in the regulations. The Board agrees with the Petitioner.

To begin with, the statutory definition of explosives provides that an essential element of an explosive is that when it is ignited “by fire, friction, concussion, percussion or detonation” it “may or is intended to cause an explosion.” The term “explosion” is not defined in the statute. The regulations flush out the meaning of explosives by defining high and low explosives. These definitions speak in terms of “detonating” or “deflagrating” but do not refer to “combustion.”

The dictionary definitions of explosion, deflagration and combustion further explain the difference in meaning of these terms. The American Heritage Dictionary of the English Language: Fourth Edition, 2000 defines explosion as “A release of mechanical, chemical, or nuclear energy in a sudden and often violent manner with the generation of high temperature and usually with the release of gases. **b.** A violent bursting as a result of internal pressure. **c.** The loud, sharp sound made as a result of either of these actions.”

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<sup>2</sup> The federal definitions of high and low explosives for purposes of storage requirements are contained in 27 CFR § 555.202: “High explosives. Explosive materials which can be caused to detonate by means of a blasting cap when unconfined...” “Low explosives. Explosive materials which can be caused to deflagrate when confined.”

<sup>3</sup> In fact, 12 NYCRR § 39.1(b)(3) provides that Part 39 does not apply to “the authorized use (public display) of pyrotechnics, commonly known as fireworks. . .” In addition § 39.1(c) provides that manufacturers of pyrotechnics shall be subject to Part 37 relating to Military Pyrotechnics, as well as this Part. Therefore, the definition of pyrotechnics in the regulations is explanatory of these two parts

Therefore, in common verbiage, the difference between explosion, deflagration and combustion is a question of degree: explosion is a violent release accompanied by high temperature; deflagration is burning with great heat and intense light and combustion is the process of burning accompanied by heat and light. A look to the comparable federal definitions and how they are interpreted provides further instruction on the meaning of these terms.<sup>4</sup>

In *Tripoli Rocketry Assn., Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006), the court analyzed the manner in which the BATFE classifies a chemical as explosive so that it is designated as such on its annual published list of explosive materials. The court found that based on the statutory definition of explosives which “encompasses materials whose primary or common purpose is to function by explosion” the BATFE determines whether a material fits that definition by characterizing the speed at which the material burns. Materials which burn the fastest detonate, the slowest ones burn or combust and substances in between deflagrate. BATFE “treats a material as explosive if it functions by detonation or deflagration.” The issue before the court was a challenge to the designation of a rocket fuel used in hobby rockets, as an explosive on the annual list of explosive materials. The court held that the BATFE’s determination that the fuel was an explosive could not be sustained since there was insufficient evidence in the administrative record that the material deflagrates. The court analyzed the difference between detonation, deflagration and burning as a question of burn velocity. “[T]he deflagration reaction is *much faster* than the reaction achieved by what is more commonly associated with burning.” *Id.* at 81.

The only evidence before the Board as to composition of the seized fireworks is that they are “consumer fireworks” as defined by federal law. As such, it does not fit into the definition of explosives in the statute nor in the further explanation of explosives in the regulatory definition of high or low. Since consumer fireworks are defined by combustion and the regulations speak only in terms of detonation or deflagration, DOL has failed to prove by substantial evidence that the seized fireworks are explosives and therefore, the finding that there was a violation due to improper storage is invalid and unreasonable since the storage requirements only apply to high and low explosives.

Since the Commissioner’s order revoking the license and certificates was based on the finding that the fireworks seized were improperly stored explosives, we find that the order is invalid and unreasonable based on our finding that DOL failed to prove that the fireworks seized were explosives.<sup>5</sup>

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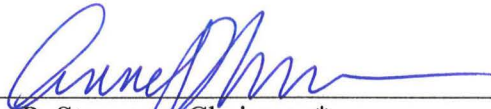
<sup>4</sup> The federal definition of explosives ” includes “any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion.” 18 U.S.C. § 841(d). In addition, the storage requirements contained in the New York regulations at 12 NYCRR 39.8(b) which provides for Type 1 through Type 5 storage facilities and specifies their construction mirrors the federal requirements, as do the definitions of high and low explosives.


<sup>5</sup> The Board makes no finding as to whether the storage of 57,914.6 pounds of fireworks in unattended and unlocked trailers would endanger public safety, another ground for revocation, or that it is not in violation of any other laws regarding hazardous substances.

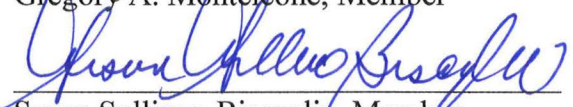


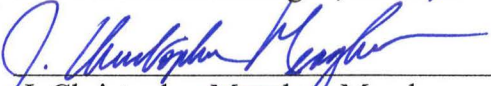
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

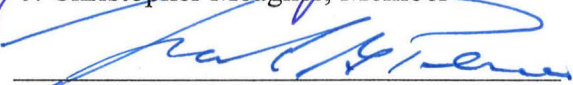
1. The Commissioner's Order that Petitioner is in violation of Labor Law § 453 is hereby reversed; and
2. The Commissioner's Order revoking Petitioner's License and three Certificates is hereby reversed; and
3. The Petition for Review is hereby granted.

  
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Anne P. Stevason, Chairman\*

  
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Gregory A. Monteleone, Member

  
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Susan Sullivan-Bisceglia, Member

  
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J. Christopher Meagher, Member

  
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Mark G. Pearce, Member

Dated and signed in the Office of the  
Industrial Board of Appeals,  
at New York, New York,  
on February 27, 2008.

Filed in the Office of the  
Industrial Board of Appeals  
at Albany, New York  
on February 29<sup>th</sup>, 2008.