

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :  
 :  
 AKBER H. HASSAM :  
 (T/A DR. AKBER H. HASSAM, M.D.), :  
 :  
 Petitioner, :  
 :  
 To Review Under Section 101 of the Labor Law: :  
 An Order to Comply with Article 19 of the Labor :  
 Law and An Order under Article 19 of the Labor :  
 Law, both dated January 4, 2008, :  
 :  
 - against - :  
 :  
 THE COMMISSIONER OF LABOR, :  
 :  
 Respondent. :  
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DOCKET NO. PR 08-014

INTERIM  
RESOLUTION OF DECISION

APPEARANCES

Robert M. Subik, Esq., for Petitioner.

Maria L. Colavito, Counsel to the Department of Labor, Mary McManus of counsel, for Respondent.

Board denies Respondent's motion to dismiss; strikes certain claims in petition; and orders Respondent to file an answer within 35 days of the date of service of this Interim Resolution of Decision on Respondent.

WHEREAS:

On February 5, 2008, Petitioner filed a petition with the Industrial Board of Appeals (Board), seeking review of wage and penalty orders that the Commissioner of Labor (Commissioner) issued against the Petitioner on January 4, 2008. The wage order finds that from March 7, 2005 through December 31, 2006, Petitioner failed to comply with Labor Law article 19 by paying an employee at a rate below the minimum wage rate prescribed in the Minimum Wage Order of 12 NYCRR Part No. 142 and directs the Petitioner to pay wages of \$1, 897.00, continuing interest at 16% calculated to the date of the order as \$306.84, and a civil penalty of \$949.00. The penalty order assesses a civil penalty of \$300.00 under Labor Law article 19 for failure "to keep and/or furnish true and accurate

payroll records for each employee” for the period from June 5, 2001 through June 5, 2007, in violation of Labor Law § 661 and 12 NYCRR 142-2.6.

By letter of February 22, 2008, the Board requested that Petitioner file an amended petition by March 14, 2008, specifying each reason that Petitioner claims the orders to be invalid and/or unreasonable. Receiving no response from Petitioner, the Board wrote again on May 6, 2008, and extended the time to file an amended petition to May 26, 2008, which Petitioner did on May 22, 2008.

The amended petition claims that the wages found to be due are inaccurate, and accordingly, the interest is also inaccurate; a civil penalty of 50% of the wages, as assessed in the wage order, is excessive; the finding that Petitioner failed to comply with record keeping and/or other non-wage requirements is not substantiated; the Department of Labor (DOL) never advised Petitioner of any requirement that he make and keep records; neither DOL, the Department of Taxation and Finance, nor “others” provided the Petitioner with specific requirements of the records that he is charged with having failed to keep or the manner and time period for which he was to keep such records; Petitioner is “a solo practitioner Medical Doctor” and immigrant who “received a portion of his training overseas and as such has no formal training or experience in business record preparation or keeping;” and Petitioner is required to rely on others with more skill in bookkeeping.

On July 14, 2008, the Commissioner filed a motion to dismiss the petition pursuant to the Board’s Rules of Procedure and Practice (Rules) 65.13(d) (1) (iii), asserting that the petition is untimely and “fails to state a cause of action upon which relief may be granted in that it fails to state grounds upon which the matter to be reviewed is alleged to be invalid or unreasonable or to state any other material or relevant facts.” Petitioner did not file a response to the motion.

The Board denies the motion as to timeliness, but strikes Petitioner’s claims that the orders under review unreasonably find that Petitioner’s failure to keep records violated Labor Law § 661 and regulations at 12 NYCRR 142-2.6 because Petitioner was not advised of or trained in the specific record keeping requirements, is a medical doctor and immigrant who must rely on others to keep adequate records. None of these reasons states a legal basis for finding that the orders under review are unreasonable or invalid.

#### GOVERNING LAW

Labor Law § 101 provides that a petition to review an order of the Commissioner must be filed with the Board “no later than sixty days after the issuance of such . . . order,” comply with the Board’s Rules, and “state . . . in what respects [the order] is claimed to be invalid or unreasonable.”

Rule 66.2 (12 NYCRR 66.2), entitled “How Review to be Commenced,” provides that “[r]eview may be had only by filing a written Petition with the Board . . . no later than 60 days after the issuance of the . . . order objected to.” Rule 65.5 (12 NYCRR 65.5) concludes with “**Note:** (Time periods prescribed by statute cannot be extended [emphasis in original].)”

Rule 66.3 (12 NYCRR 66.3) is entitled “Form and Content of Petition” and requires, among other things, that a petition “state clearly and concisely the grounds on which the matter to be reviewed is alleged to be invalid or unreasonable, omitting conclusions of fact or law” and include “any other material or relevant facts.”

Rule 65.13 (d) (1) (iii) (12 NYCRR 65.13[d][1][iii]) states in relevant part:

“Within thirty (30) days after the receipt of a Petition, any respondent may . . . move for an order dismissing the Petition where it appears that . . . the Petition fails to comply with the provisions of either section 101 [of the Labor Law] or the Board’s Rules.”

Under Rule 65.13 (b) (12 NYCRR 65.13 [b]), the Board may order a petitioner to file an amended petition “[i]f any material contained in a petition. . . be so indefinite, uncertain or obscure that the precise meaning or application thereof is not readily apparent.”

#### DISCUSSION

*The petition and the amended petition were timely filed.*

The Commissioner argues that neither the petition nor the amended petition is timely. She does not deny that the Petitioner filed a letter within 60 days of the issuance of the January 4, 2008 orders, but asserts that the letter does not comply with the Rule 66.3 requirements for the contents of a petition, and therefore, the letter does not constitute a petition. As to the amended petition, she asserts that it was not filed either within the 60-day statutory time limit for commencing an appeal, or by the March 14, 2008 deadline that the Board initially imposed.

The Petitioner’s letter, enclosed in an envelope postmarked February 5, 2008, and received by the Board on February 7, 2008, constitutes a petition for review in that it expressly states that the Petitioner is appealing and encloses both orders that Petitioner wishes to have the Board review. We find that the letter provides adequate notice that the orders are being appealed and therefore objected to as unreasonable and/or invalid, and as the letter was filed within 60 days of the orders’ issuance on January 4, 2008, the letter constitutes a timely filed petition. *Matter of the Petition of Foster Properties, LLC, (T/A Maggie’s Pub)*, Docket No. PR 08-026 (September 24, 2008); *Matter of the Petition of Borough Park Food Mart, LLC*, Docket No. PR 08-026 (September 24, 2008).

It is true that the initially filed letter does not state the specific grounds on which Petitioner claims that the orders under review are invalid or unreasonable as required by Rule 66.3, but that deficiency may be cured by the Board’s direction that Petitioner file an amended petition (Rule 65.13[b]). *See Matter of the Petition of Foster Properties, LLC, (T/A Maggie’s Pub)*, Docket No. PR 08-026 (September 24, 2008); *see also Matter of the Petition of Nathan Rosenblatt and Ashland Maintenance Corp. (T/A Ashland Corp.)*, Docket No. PR 07-103, at 2 (October 8, 2008) (“dismissal of a timely, albeit inartfully drafted, petition is an extreme measure that must not be undertaken lightly particularly as review by the Board

affords the Petitioners their only meaningful opportunity to contest the Orders issued against them”).

The Commissioner argues that because Rule 65.13 (d) (1) (iii) authorizes motions for the dismissal of petitions that do not comply with Labor Law § 101’s time constraints or the Rules, the Board is required to dismiss a petition that lacks Rule 66.3 specificity that is not cured by the filing of an amended petition within the 60-day limitations period. We disagree.

Rule 65.13 (d) (1) (iii) permits Respondent to move the Board to dismiss a petition, and Rule 65.13 (b) empowers the Board, on its own motion, to order that an amended petition be filed if the claims raised in the petition are not specific. However, while Rule 65.13 (d) (1) and (2) expressly limits the Respondent to 30 days from service of a petition to move for its dismissal without Board permission, there is no time limitation at all within Rule 65.13 for the Board to order that an amended petition be filed. Indeed, this is consistent with the balance of Rule 65.13 which imposes a 30-day time limit on party motions (Rule 65.13 [c]), but no time limit at all on equivalent Board actions.

Respondent’s construction of the Rules in effect imposes a time limit on the Board’s exercise of its authority to obtain a specific statement of the grounds for an appeal that does not exist in Rule 65.13. Concomitantly, Respondent’s construction gives her the ability to preempt the Board from exercising its authority to obtain a specific statement of the grounds for an appeal by simply moving to dismiss a petition within 30 days of its service on Respondent. Respondent argues for the precise opposite of what Rule 65.13 actually provides.

Respondent’s interpretation must be rejected for the additional reason that it is inconsistent with principles of construction that here require that Rule 65.13 be interpreted as a whole and its individual sections considered with reference to each other so as to give effect to each and not to nullify another (*People v Mobil Oil Corp.*, 48 N.Y.2d 192, 199 [1979]; *Delaware County Elec. Co-op, v Power Auth. of State of New York*, 96 AD 154, 163 [4th Dept 1983], *affd* 62 NY2d 877 [1984]). Respondent’s construction effectively nullifies the Board’s ability to employ Rule 65.13 (b) much of the time. This is especially true where, as here, after receipt of a petition that is timely filed but lacking specificity, it is often a practical impossibility for the Board to order a petitioner to amend the petition and for the petitioner to file an amended petition before the 60-days limitations period expires.

We hold that the question of whether a petition that clearly seeks review of an order is timely filed is divorced from the question of whether a petition is specific enough to satisfy Rule 66.3 and that a timely filed petition that the Board directs be amended is not untimely because the amended petition is not filed within 60 days of the date of issuance of the order sought to be reviewed. As a corollary to this, we also hold that a Board order directing that an amended petition be filed does not, as a matter of law, extend the statutory time limits for filing a petition. Respondent’s reliance on *Matter of the Petition of Mt. Kisco Design Center*, PR 06-095 (August 22, 2007) is therefore misplaced here. That case is, in any event, factually distinguishable from the instant matter and therefore inapposite.

Respondent also argues that the petition should be dismissed because the amended petition was not received by the Board until long after the initial deadline that the Board set. However, Rule 65.1 (b) (12 NYCRR 65.1[b]) states:

“When no substantial right is prejudiced thereby, the Board may on its own motion or that of any party, suspend the application of any provision of these rules in a specific proceeding, or waive compliance therewith.”

Respondent does not argue that the late filing of the amended petition causes prejudice and we do not find any. Accordingly, we accept the late filing of the amended petition.

*Petitioner's assertions that he was not advised or trained to keep records required by the Labor Law and implementing regulations and is ignorant of the required contents of such records do not state claims that the orders under review are unreasonable and/or invalid.*

The Commissioner asserts that the amended petition's claims, challenging the wage and penalty orders, fail to state a cause of action because they are not, as a matter of law, grounds for finding the orders invalid or unreasonable. She cites Petitioner's obligations to keep and maintain records as set out in the Rules and Regulations of DOL 142-2.6 (12 NYCRR 142-2.6) and Board decisions in *Matter of the Petition of Verb Konviser*, Docket No. PR 098-088 (July 18, 1991), and *Matter of the Petition of Amy's Place, Inc.*, Docket No. PR 07-087 (May 26, 1988), to show that ignorance of the law is not an excuse.

We agree that Petitioner's ignorance of, and lack of training in, the law's record keeping requirements does not excuse his failure to comply with the law and find that his assertions in these respects do not, as a matter of law, state claims that the orders under review are unreasonable and/or invalid. However, we find that Petitioner's assertion that Respondent failed to substantiate the finding that Petitioner did not comply with record keeping and/or other non-wage requirements does state a claim that the orders are unreasonable and/or invalid, but caution that it is Petitioner's burden to prove this claim at hearing. “The burden of proof of every allegation in a proceeding shall be upon the person asserting it” (Rule 65.30).

## CONCLUSION

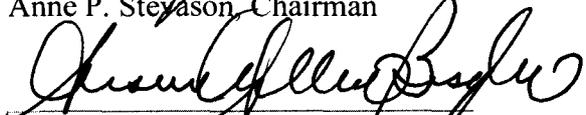
Respondent's motion to dismiss the petition and amended petition as untimely filed is denied. Respondent's motion to dismiss Petitioner's claims that the orders are unreasonable and/or invalid because Petitioner was not advised or trained to keep records and is a medical doctor practicing alone is granted, and these claims are dismissed. The amended petition will be processed on the remaining claims, to wit, the allegations that the wages found to be due are inaccurate; the interest is consequently also inaccurate; a civil penalty of 50% of the wages, as assessed in the wage order, is excessive; and Respondent's finding that Petitioner failed to keep proper records was not substantiated.

To the extent that Respondent's motion raises arguments that are not addressed in this interim resolution of decision, they are rejected as being without merit here.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent's motion to dismiss the petition on the ground that it was not timely filed be, and hereby is, denied; and
2. Respondent's motion to dismiss the amended petition on the ground that it was not timely filed be, and hereby is, denied; and
3. Petitioner's claims that the Order to Comply with Article 19 of the Labor Law and the Order under Article 19 of the Labor Law, both dated January 4, 2008, and issued against Petitioner are unreasonable and invalid because the Petitioner was ignorant and was not advised of his obligations or trained to keep, maintain, and furnish records and the contents of such records be, and hereby is, stricken; and
4. Respondent's motion be, and hereby is, denied in all other respects; and
5. Respondent shall serve and file an answer to the amended petition within 35 days of the date of service of this Interim Resolution of Decision.

  
Anne P. Stevason, Chairman

  
Susan Sullivan-Bisceglia, Member

  
J. Christopher Meagher, Member

  
Mark G. Pearce, Member

  
Jean Grumet, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
April 22, 2009.