

New York State
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: :
 :
BOROUGH PARK FOOD MART, LLC, :
 :
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Petitioner, :
 :
 :
To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 19 of the Labor :
Law, dated February 22, 2008, :
 :
- against - :
 :
THE COMMISSIONER OF LABOR, :
 :
 :
Respondent. :
-----X

DOCKET NO. PR 08-022

INTERIM
RESOLUTION OF DECISION

WHEREAS:

On May 29, 2008, Respondent Commissioner of Labor (Respondent or Commissioner) filed a Motion to Dismiss the Petition of Borough Park Food Mart, LLC (Petitioner) pursuant to the Board's Rules of Procedure and Practice (Rules) 65.13(d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]) on the ground that the Petitioner failed to comply with Labor Law § 101 by filing the Petition more than 60 days after the Order was issued. The Commissioner's motion argues that Petitioner's "attempted filings" on February 27 and March 13, 2008 do not constitute petitions, and that Board Rule 66.7 which permits amendment of a petition anytime until the service of an answer, does not "allow a document that fails to meet the requirements of a petition to be later deemed a petition." Because the *pro se* Petition was timely filed within 60 days, adequately established that the Petitioner was objecting to the amount of the penalty imposed, and was amended in accordance with Board Rule 65.13(b), the Board hereby denies the Respondent's motion.

The Order to Comply (Order) which is the subject of this case was issued by the Commissioner on February 22, 2008. Count I imposed a penalty of \$1,000.00 for failure to furnish true and accurate payroll records. Count II imposed an additional penalty of \$1,000.00 for failure to provide each employee a complete wage statement with every payment of wages. The Petitioner, appearing *pro se*, filed the Petition on March 4, 2008, eleven days after the Respondent issued its Order. The Petition stated "we are contesting the amount of the penalties as we feel the amount is too high." By letter dated March 7, 2008, Sandra M. Nathan, the Board's Deputy Counsel, provided the Petitioner with a copy of the Board's Rules and requested that he file an original and three copies of a letter stating each reason that the Order is believed to be invalid or unreasonable, and that a copy of the Order be attached to each copy of the new letter. Deputy Counsel Nathan's letter stated, "Upon receipt, we will treat the letter that we are requesting from you as an amended Petition."

By letter dated March 13, 2008, the Petitioner stated that he was not claiming that the charges were invalid, but that the \$2,000.00 penalty was too high. On April 8, 2008, Deputy Counsel Nathan requested that the Petitioner file an original and three copies of "an amended petition" explaining why he claimed the amount of the penalty is unreasonably high. On May 5, 2008, the Petitioner filed an original and three copies of its amended Petition. The Petitioner claimed that he had previously paid \$31,435.15, which he believed was in full settlement of the Commissioner's claims. He was subsequently notified that there would be a penalty of \$875.00 and contacted the Labor Department and was informed that had he attended a Labor Department seminar, the penalty would have been expunged. According to the Petitioner, he requested another opportunity to attend a seminar and waited to hear from the Labor Department when the next seminar would occur, but instead, he received the \$2,000.00 Order.

Labor Law § 101 provides that a petition for review of the validity or reasonableness of any rule, regulation or order made by the Commissioner "shall be filed with the board no later than 60 days after the issuance of such rule, regulation or order (Labor Law § 101 [1]) . . . in accordance with such rules as the board shall prescribe, and shall state the rule, regulation or order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Board Rule 65.5 states: "Note: Time periods prescribed by statute cannot be extended." (12 NYCRR 65.5.)

Pursuant to Board Rule 65.13(b) (12 NYCRR 65.13 [b]):

"If any material contained in a petition, answer or reply be so indefinite, uncertain or obscure that the precise meaning or application thereof is not readily apparent, the Board, on its own motion or on the motion of any party made on ten (10) days' notice of motion, may order the party responsible to file and serve an amended pleading."

In the instant case, the Petition was filed on March 4, 2008, well within the 60 day limitations period. While the original *pro se* Petition stated that the Petitioner was "contesting the amount of the penalties as we feel the amount is too high" without explaining the basis for such contest, the Board's Deputy Counsel directed the Petitioner to clarify the reasons behind the initial Petition and stated that on receipt, his submission would be treated as an amended Petition. Petitioner's May 5, 2008 filing complied with Board Rule 65.13(b) and the Board's Deputy Counsel's direction.

Respondent's argument for dismissal is based on an assertion that the Petition was not filed until May 5, 2008, thirteen days after the date for service of a petition had expired (Affirmation of Jeffrey Shapiro, ¶ 15), but as stated above a *pro se* Petition was timely filed on March 4, 2008, and later clarified by the May 5th submission pursuant to Board Rule 65.13(b). *Matter of Mt. Kisco Design Center*, PR-06-095 (Aug. 22, 2007), cited by Respondent, is inapposite since in that case the petitioner's initial filing of a petition, indeed its initial attempt to file a petition, occurred after the statute of limitations had expired.

In addition to being authorized by Board Rule 65.13(b), acceptance of the May 5th filing clarifying the original timely filed Petition is also consistent with both directly applicable and broadly analogous precedent.

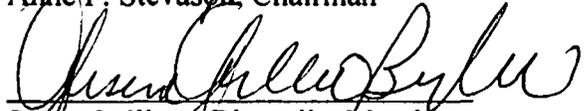
In *Angello v. National Finance Corp.*, 1 A.D.3d 850, 853, 769 N.Y.S.2d 66, 69 (3d Dept 2003), the court rejected the Commissioner's contention that the Board should not have considered issues supposedly outside the scope of a petition as originally filed, and ruled that under the circumstances, that petition's allegation that the Commissioner "grossly overstated the amount due and owing to the stated employees adequately establishes that it was objecting to Commissioner's calculations, including the imposition of penalties and interest, as invalid and unreasonable." Similarly, the original, timely filed Petition in this case alleged that the amount of penalties was too high. That the Petition was *pro se* makes liberal construction appropriate. (See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 9 [1980]; *Tapia-Ortiz v. Doe*, 171 F.3d 150 [2d Cir 1999]; *Du-Art Film Laboratories, Inc. v. Wharton Internat'l Films, Inc.*, 91 A.D.2d 572, 573, 457 N.Y.S.2d 60, 61 [1st Dept 1982].)

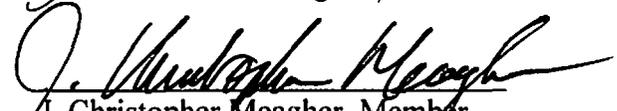
New York law also generally permits subsequent amendment, correction or clarification of a pleading which was timely filed (*see* CPLR § 2001 [permitting subsequent correction of "a mistake, omission, defect or irregularity. . . upon such terms as may be just"]; *cf.* CPLR § 5520 [a] [permitting "an extension of time for curing the omission" if a notice of appeal is timely filed but the appellant "neglects through mistake or excusable neglect to do another required act within the time limited"]). In light of Board Rule 65.13(b) permitting clarification of a petition, no greater stringency is called for with respect to the timely filed Petition in this case.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

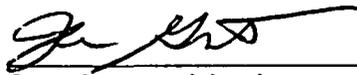
The Motion to Dismiss the Petition is hereby denied.


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 New York, New York, on
September 24, 2008.