

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

PAUL COPPA,

Petitioner,

To Review Under Section 101 of the Labor Law:
A Notice of Violation and Order to Comply With
Articles 6 and 19 of the Labor Law, dated March 9, 2007,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 08-072

RESOLUTION OF DECISION

In the Matter of the Petition of:

TEN'S CABARET, INC.,

Petitioner,

To Review Under Section 101 of the Labor Law:
A Notice of Violation and Order to Comply With
Articles 6 and 19 of the Labor Law, dated March 9, 2007,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

APPEARANCE

Maria L. Colavito, Counsel to the New York State Department of Labor, Jeffrey G. Shapiro,
of Counsel, for Respondent.

WHEREAS:

Petitioners Paul Coppa (Coppa) and Ten's Cabaret, Inc. (Ten's) filed separate Petitions with the Industrial Board of Appeals (Board) on June 2, 2008 and June 10, 2008, respectively, and initially appeared by two separate law firms. The Petitions seek review of the Order to Comply with Labor Law articles 6 and 19 (Order) that Respondent Commissioner of Labor (Respondent) issued against "Paul Coppa and/or Ten's Cabaret Inc." on March 9, 2007. The Order demands payment of unpaid wages in the amount of \$9,807,309.97 as well as \$3,430,677.63 in interest and \$2,451,825.00 in civil penalty, for a total of \$15,689,812.60.

The appeals were consolidated pursuant to the Board's Rules of Procedure and Practice (Rules) 65.44 (12 NYCRR 65.44). The Board served the Petitions on Respondent, who moved to have them dismissed as untimely filed under Labor Law § 101, which requires that a petition "be filed with the board not later than sixty days after the issuance" of the order on review. By Interim Resolution of Decision, dated March 25, 2009, the Board denied the motion to dismiss on the ground that Respondent failed to serve a copy of the Order on Petitioners' attorneys as required by Executive Law § 168. Respondent filed an Answer to both Petitions on May 4, 2009.

On August 3, 2009, the law firm that had initially appeared solely on behalf of Coppa filed a Notice of Appearance on behalf of both Petitioners. Also on August 3, 2009, a telephonic pre-hearing conference was held during which the parties agreed to February 2, 3, 4, and 5, 2010 as hearing dates. By letter dated August 3, 2009, the Board's Deputy Counsel confirmed the parties' agreed-upon hearing dates and advised that "the Board will not cancel a mutually agreed-upon hearing date unless it receives either a fully executed stipulation, including a provision that the petition is withdrawn, or a letter signed by both parties (or their representatives) that states that a settlement has been reached and that the petitioner withdraws the petition." On August 14, 2009, a Notice of Hearing for February 2, 3, 4, and 5, 2010 was sent to Petitioners in care of their attorney.

By letter dated October 9, 2009, Petitioners' attorney informed the Board that the firm was withdrawing its appearance on behalf of both Ten's and Coppa. The Board acknowledged the withdrawal by letter dated October 16, 2009, a copy of which was also mailed to Coppa and to Ten's. Neither copy of the Board's letter that was mailed to Ten's and Coppa was returned by the postal service.

On November 24, 2009, the Board mailed a letter to all parties, scheduling a case management telephone conference for 3:00 p.m. on January 11, 2010. None of the copies of the November 24, 2009 letter was returned by the postal service. At the scheduled time for the conference, the Board's Deputy Counsel telephoned Ten's and Coppa. She did not reach either of them, and neither of them participated in the conference call. By letter dated January 12, 2010, mailed to each party, the Board again confirmed the hearing dates and notified the parties that "failure to appear at hearing will likely result in an adverse determination against the absent party without any further advance notice." None of the mailed copies of this letter was returned to the Board by the postal service.

On February 1, 2010, an attorney with the firm that had initially represented Ten's before the Board telephoned the Board's Deputy Counsel to advise that Ten's had been unable to secure counsel for the hearing and requested an additional thirty (30) days to do so. On February 2, 2010, the same attorney filed a Notice of Appearance on behalf of Ten's solely for the purpose of requesting an adjournment of the evidentiary hearing to give Ten's additional time to retain counsel. The hearing was convened on February 2, 2010 and the hearing officer ruled on the request for an adjournment:

“[W]e will set a new date for hearing. This hearing date will not be able to be continued. This is the last date set for hearing. It will be June 8th, 9th, 10th and 11, 2010 starting at 10:00 a.m. The Notice of Hearing will go out to the parties. But, again, that date is set in stone and it is conditioned upon the travel expenses of the Department of Labor being paid within the next 30 days.”¹

Neither Coppa nor anyone on his behalf appeared at hearing on February 2, 2010.

By letter dated February 4, 2010, mailed to Ten's, Coppa, the Respondent's attorney, and the attorney who appeared for the sole purpose of requesting an adjournment, the Board reiterated that:

“There will be no further adjournment of the hearing in this matter.” [Emphasis in the original.]

None of the letters was returned to the Board by the postal service.

By letter dated February 22, 2010, Respondent's attorney notified the Board that he had been reimbursed for his travel expenses.

On March 3, 2010, the Board mailed a Notice of Hearing for June 8, 9, 10 and 11, 2010 to Coppa and Ten's. A copy of the Notice of Hearing was also sent to the attorney who had made a limited appearance on Ten's behalf to request an adjournment. The Notice of Hearing provided: **“***PLEASE TAKE FURTHER NOTICE NO FURTHER ADJOURNMENTS WILL BE GRANTED***.”** None of the copies of the Notice of Hearing was returned to the Board by the postal service.

On June 4, 2010, a third attorney to represent Ten's telephoned the Board's offices and left a message requesting a return call. On Monday, June 7, 2010, the day before the scheduled hearing date, the Board's Deputy Counsel, Respondent's attorney, and Ten's attorney participated in a telephone conference call during which the attorney advised that he was representing Ten's for the limited purpose of requesting a 60-day continuance of the hearing to give Ten's an opportunity to retain counsel for hearing.

On June 8, 2010, the hearing was reconvened. Present were Respondent's attorney; Chris Reda, who is Ten's President; and an attorney who appeared for Ten's solely to

¹ A copy of the transcript of the hearing on February 2, 2010 was sent to the parties on February 18, 2010.

request a continuance. Coppa did not appear, and no one appeared on his behalf. Respondent's attorney opposed the request for another adjournment. The hearing officer ruled that, given that the arguments advanced in support of the request for another adjournment were the exact same arguments posed four months earlier, the request for a continuance would not be granted absent the posting of a bond by July 8, 2010, or the provision of other security acceptable to Respondent by that date, in the amount of 10% of the wages found due in the Order, or \$980,000. The hearing officer further ruled that if the required security were provided, a telephonic case management conference would be held on July 15, 2010 at 10:00 a.m., to set a new date for hearing. If the security were not provided by July 8, 2010, then Ten's Petition would be dismissed.

By letter mailed to the parties on June 15, 2010, the hearing officer reiterated the conditions of the hearing adjournment. None of the copies of the June 15, 2010 letter was returned to the Board by the postal service. As of the date of the instant Resolution of Decision, Petitioner Ten's has failed to post any type of security. On July 15, 2010, at 10:00 a.m., telephone calls were made on behalf of the Board to Ten's attorney, Mr. Reda and Respondent's attorney. Only Respondent's attorney was available.

Board Rule 65.23 states:

“(a) Postponement of a hearing ordinarily will not be allowed.

“(b) Except in the case of an emergency or in unusual circumstances, no request for postponement will be considered unless received in writing at least seven (7) days in advance of the time set for hearing.”

Both of the requests for postponement of the hearing here occurred less than seven days prior to the date set for hearing and neither request was supported by a showing of an emergency or unusual circumstances. From October 2009, when Petitioners' attorney withdrew, until February 2, 2010, the date that the hearing was originally scheduled, Petitioners had four months to retain counsel or otherwise prepare for hearing. From February 2, 2010 to June 8, 2010, Petitioners had an additional four months to retain counsel or otherwise prepare for hearing.

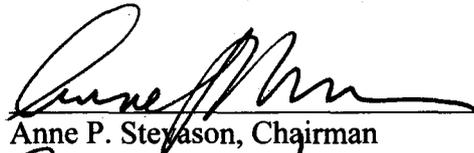
Neither Petitioner has shown a readiness, or even an intention, to proceed. Quite the contrary; since June 8, 2010, the Board has not received any communication from, or on behalf of, Petitioner Ten's, who has shown interest in only delay of the Board's proceeding. Since October 2009, when Petitioners' attorney withdrew his appearance, the Board has not received any communication from, or on behalf of, Petitioner Coppa, who has shown no interest or involvement in the proceeding whatsoever.

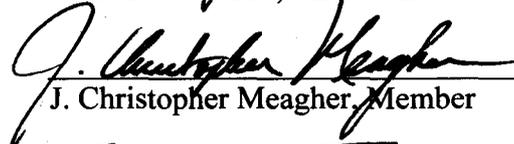
The Board hereby adopts the hearing officer's rulings and dismisses Ten's Petition on the grounds that Ten's failed to satisfy the condition that was imposed for granting an adjournment and that it has failed to prosecute its appeal. The Board dismisses Coppa's petition for failure to prosecute his appeal. Petitioners had the burden of proving that the

Order under review was invalid or unreasonable; they have failed to do that although they have been given the opportunity. The Order was issued over three years ago, and no reasonable basis for further delay has been established.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Petitions be, and the same hereby are, dismissed.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

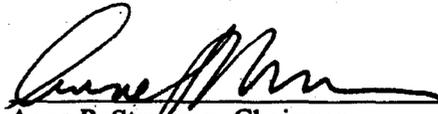
Jeffrey R. Cassidy, Member

Dated and Signed in the Office of the
Industrial Board of Appeals,
at New York, New York,
on July 28, 2010.

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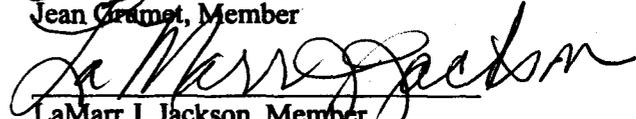
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Petitions be, and the same hereby are, dismissed.


Anne P. Stevenson, Chairman


J. Christopher Meagher, Member


Jean Gramet, Member


LaMarr J. Jackson, Member

Absent
Jeffrey R. Cassidy, Member

Dated and Signed in the Office of the
Industrial Board of Appeals,
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on July 28, 2010.