

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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| -----X   |   |
| In the Matter of the Petition of:                | : |
|  | : |
| WILLIAM M. CAPICOTTO, M.D. AND WILLIAM           | : |
| M. CAPICOTTO, M.D., P.C.,                        | : |
|  | : |
| Petitioners,                                     | : |
|  | : |
| To Review Under Section 101 of the Labor Law:    | : |
| An Order to Comply under Article 19 of the Labor | : |
| Law, dated March 9, 2009,                        | : |
|  | : |
| - against -                                      | : |
|  | : |
| THE COMMISSIONER OF LABOR,                       | : |
|  | : |
| Respondent.                                      | : |
| -----X   |   |

DOCKET NO. PR 09-108

RESOLUTION OF DECISION

APPEARANCES

Gibson, McAskill & Crosby, LLP, Melissa L. Zittel of counsel for Petitioners.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WHEREAS:

The Commissioner issued an Order under Article 19 of the Labor Law against Petitioners William N. Capicotto, M.D. and William N. Capicotto, M.D., P.C. on March 9, 2009. The Order alleges that Petitioners violated § 661 of Article 19 of the Labor Law and 12 NYCRR part 142-2.6 by failing to keep and/or furnish true and accurate employee payroll records for the period September 11, 2008 through September 11, 2008 and assesses a penalty of \$1,000.00. The Board received Petitioners' petition for review of the Order on May 8, 2009 and served it on the Commissioner on May 21, 2009, with notice that a response should be filed with 35 days of May 21, 2009, in accordance with the Board's Rules of Procedure and Practice ("Rules"). Thirty-five days from May 21, 2009, is June 25, 2009.

By letter dated June 25, 2010, the Commissioner informed the Board that she found a "clerical error" in the Order and that she sent an Amended Order, dated June 29, 2009, to Petitioners and Petitioners' attorney. The Amended Order alleges that Petitioners violated Labor Law § 661, as supplemented by 12 NYCRR part 142-2.6, "by failing to permit the commissioner or his duly authorized representative to question any employee of such employer in the place of employment and during work hours in respect to the wages paid to and the hours worked by such employee or other employees on September 11, 2008." The Commissioner's June 25<sup>th</sup> letter informs the Board that the original order was "amended for accuracy," and proposes that she not be required to answer the original order and only be required to answer an Amended Petition. Petitioners oppose the Commissioner's proposal and move to dismiss the Order on the grounds that the Commissioner failed to timely answer their petition.

Petitioners aver that the "deadline for the [Commissioner's] Answer was June 8, 2009, as they served a copy of the petition on the Commissioner on May 7, 2009 by FEDEX and that Rule 66.5 requires the Commissioner to file an answer within thirty days after receipt of the petition, and that by Rule 65. 3 (d) one day is added to the prescribed period if service is by overnight delivery service. The Commissioner replied to Petitioners' motion to dismiss stating that the deadline for the Commissioner's answer was June 25, 2009, as evidenced by the Board Deputy Counsel's May 21, 2010 memorandum to the Commissioner, which accompanied service of the petition.

By letter decision dated November 20, 2009, the Board Chairman, subject to Board approval, denied Petitioner's motion on the grounds that Rule 66.5 immediately follows Rule 66.4, and that the "thirty day filing period does not commence until the Commissioner is served the Petition by the Board," and that the Commissioner's time to answer had not expired. The Chairman also ruled that "if the Commissioner seeks to issue an Order based on a failure to allow interviews of employees that must be the subject of a separate Order to Comply." The Board hereby confirms the Chairman's rulings.

The November 20, 2009 letter-decision informed the Commissioner that an answer to the original petition had to be filed by December 15, 2009. No answer was filed and by letter dated December 30, 2009, the Board Deputy Counsel informed the Commissioner that the Commissioner's answer had not been filed and the failure to file an answer constituted a waiver of the right to further participation in this matter, unless a motion was brought within 30 days establishing good cause of the failure to file an answer. To date, the Commissioner's answer has not been filed and accordingly, we affirm the finding that the Respondent has waived her right to further participate in Petitioner's appeal proceeding.

As the Commissioner has failed to deny any of the allegations in the petition, we find the factual allegations admitted for purposes of the instant review. Included in those allegations is the assertion that the Department of Labor investigator responsible for the investigation of Petitioners told Petitioners' attorney, on December 1, 2008, that "she did not see any problems with the records and that she would be recommending that the charges with respect to the violation of Section 661 of the New York State Labor Law be dropped." By letter dated December 16, 2008 to the investigator's supervisor, Petitioners' attorney confirmed this understanding, and her understanding that the Department of Labor was still considering whether to pursue the charges of violations of Labor Law sections 25, 31 and 32.

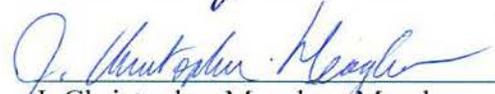
All of these sections relate to the obligation of employers to cooperate in Labor Department investigations.

Based on these facts, we grant the petition, and find that the Order should be revoked in its entirety.

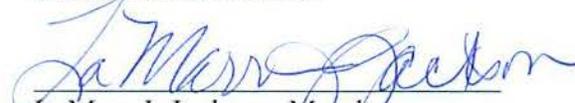
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

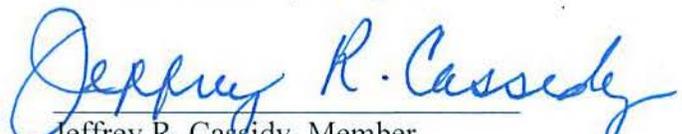
1. The petition is granted; and
2. The Order is revoked.

  
Anne P. Stevason, Chairman

  
J. Christopher Meagher, Member

  
Jean Grumet, Member

  
LaMarr J. Jackson, Member

  
Jeffrey R. Cassidy, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
December 15, 2010.