

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

FRANK MARINO,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 of the Labor Law
and an Order under Article 19 of the Labor Law, both
dated February 19, 2010,

DOCKET NO. PR 10-327

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Frank Marino, *pro se*, for petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl of Counsel, for Respondent.

WHEREAS:

This proceeding was commenced when the petitioner filed a petition with the Industrial Board of Appeals (Board) on October 21, 2010, in an envelope post-marked October 19, seeking review of orders that the respondent Commissioner of Labor (respondent or Commissioner) issued February 19, 2010, and explaining that the petition was filed late because the petitioner, who had closed his business, had not received "regular mail forwarded" and therefore did not see the orders until October 15, 2010.

The Board served the petition on the respondent on December 8, 2010. The respondent moved on January 3, 2011 to dismiss the petition on the ground that the petitioner failed to comply with Labor Law § 101 (1) by filing the petition with the Board more than sixty days after the orders were issued. The petitioner's response, received by the Board on March 1, 2011, did not offer any additional explanation as to why the petitioner filed his petition after the sixty day statute of limitations for filing an appeal had run.

Labor Law § 101 (1) provides that

“Except where otherwise prescribed by law, any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner . . . Such petition shall be filed with the board no later than sixty days after the issuance of such . . . order.”

In the instant proceeding, the orders sought to be reviewed were issued on February 19, 2010, and therefore, unless otherwise excusable, the petitioner’s time to file the petition expired on April 20, 2010. The Board received the petition enclosed in an envelope post-marked October 19, 2010, and the petitioner does not contest that he filed his petition late, explaining that he did not receive it until October 15, 2010 because he did not have “regular mail forwarded.”

Labor Law § 33 entitled “service of notice” states in relevant part that, “[w]henver the commissioner . . . is required to give notice in writing to any person, such notice may be given by mailing it in a letter addressed to such person at his last known place of business . . .” The last known business address of the petitioner was the address where the orders were sent. The Board has excused late filings where service of the order was improper or not reasonably calculated to notify a petitioner. (See e.g. *Matter of Angelo Gambino et al.*, Docket No. PR 10-150 [November 18, 2010]; *Matter of Nordin*, PR 09-076 [December 14, 2009]. However, here the orders were sent to the petitioner’s last known business address, and petitioner apparently filed neither a change of address nor otherwise notified the respondent or the Secretary of State of another address where service could be made (See *Matter of Macpherson et al.*, PR 09-337 [October 20, 2010] [failure to have mail forwarded does not excuse late filing of petition]). We find that the respondent complied with Labor Law § 33 and that service was reasonably calculated to notify the petitioner of the issuance of the orders. Accordingly, the petition must be dismissed as untimely.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Commissioner of Labor’s motion to dismiss the petition for review is granted, and the petition for review be, and the same hereby is, dismissed.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grunet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office of the Industrial Board of Appeals at New York, New York, on April 27, 2011.