

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CHILDRENS COMMUNITY SERVICES,

Petitioner,

To Review Under Section 101 of the Labor Law:  
An Order to Comply with Article 6 and an Order Under  
Article 19 of the Labor Law, both dated September 11,  
2017,

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
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DOCKET NO. PR 18-049

RESOLUTION OF DECISION

**APPEARANCES**

*Davis & Gilbert LLP*, New York, New York (*Gregg Brochin*, of counsel), for petitioner.

*Pico Ben-Amotz*, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry*, of counsel), for respondent.

**WHEREAS:**

This proceeding was commenced when petitioner filed a petition with the Industrial Board of Appeals (Board) on August 27, 2018 seeking review of orders issued by respondent on September 11, 2017. The petition was filed with the Board in an envelope post-marked August 24, 2018. The petition was amended on September 21, 2018 and the Board served the amended petition on respondent Commissioner of Labor on October 1, 2018. Respondent moved on October 29, 2018, to dismiss the petition as untimely because it was filed more than 60 days after the orders being appealed were issued and there was no evidence that the subject orders were served improperly.

It is undisputed that the petition for review was untimely filed. Petitioner argues, in opposition to respondent's motion, that the 60-day time period should be tolled because respondent "deceitfully concealed from [petitioner] that [petitioner] was required to appeal to the Board of Appeals until after the 60-day deadline passed." Petitioner further argues that due process requires that the matter be heard on the merits.

Respondent argues in reply that petitioner acknowledged receiving the orders to be appealed in September 2017 and that the orders to be appealed included clear instructions as to

where an appeal may be sought and that such appeal must be made with within 60 days of the date of the order. Respondent further objected to petitioner's accusation that the Department of Labor misled petitioner.

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.”

It is uncontested that the September 11, 2017 orders to be appealed were served on the petitioner and, by petitioner's own admission, received by the petitioner in September 2017. Those orders to be appealed provided clear and unambiguous instructions to the recipient as to how the orders may be appealed.<sup>1</sup> Petitioner's general and unsupported accusation that respondent “deceitfully concealed from CCS that it was required to appeal to the Board of Appeals until after the 60-day deadline passed,” is not sufficiently compelling where there is clear evidence that the deadline by which an appeal must be filed with the Board was set forth in the orders.

We also reject petitioner's contention that they were denied due process. The Board has previously held that due process is satisfied by the *opportunity* to contest the orders at the hearing before the Board, where a petitioner has the right to present evidence and cross-examine witnesses and where the Board reviews the order de novo and renders its decision based on the evidence presented at hearing (*Matter of Angelo A. Gambino and Francesco A. Gambino T/A Gambino Meat Market, Inc.*, Docket No. PR 10-150, at p. 6 [July 25, 2013]; *Matter of Michael E. Fischer DBA MEFCO Builders*, Docket No. PR 06-099, at p. 6 [April 23, 2008]; [emphasis added]). Had petitioner timely filed an appeal of the orders, petitioner would have had an opportunity to contest the orders at a hearing before the Board.

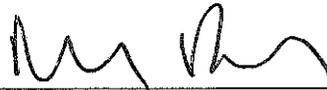
The orders to be reviewed here were issued on September 11, 2017, and therefore, any petition for review filed with the Board with a post-mark after November 10, 2017 is untimely (*id.*; Board Rules of Procedure and Practice 65.5 [d] and 65.3 [a] [12 NYCRR 65.5 (d) and 65.3 (a)], *Matter of Wiley Christopher Harrison et al.*, Docket No. PR 18-022, at p. 2 [October 24, 2018]; *Matter of Andrew Kirtzman*, Docket No. PR 18-025, at p. 2 [October 24, 2018]). Failure to file a petition within 60 days of issuance of the orders is a “fatal defect” (*Matter of Budget Tire Automotive, Inc. v O'Dell*, 223 AD2d 988, 989 [3d Dept 1996]). As the petition in this proceeding was post-marked after November 10, 2017 and the petitioner admitted receipt of the orders in September 2017, the petition was untimely and must be dismissed.

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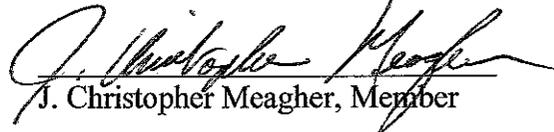
<sup>1</sup> The orders to be appealed, as attached to the petition, contain the following language: “If you are aggrieved by this Order, you may appeal within 60 days from the date issued to the Industrial Board of Appeals as provided by Section 101 of the Labor Law. Your appeal should be addressed to the Industrial Board of Appeals, Building 12, Room 116, The Governor Averell Harriman State Office Building Campus, Albany, NY 12240. For a copy of the Rules of Procedure, contact the Board at the above address, by visiting their web site at <http://industrialappeals.ny.gov> or by calling 518-474-4785.”

**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.

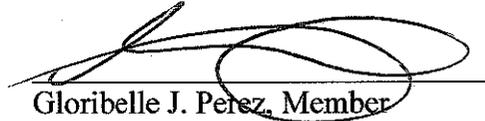


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Molly Doherty, Chairperson



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J. Christopher Meagher, Member

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Michael A. Arcuri, Member



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Gloribelle J. Perez, Member

Dated and signed by the Members  
of the Industrial Board of Appeals  
in New York, New York, on  
January 30, 2019.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

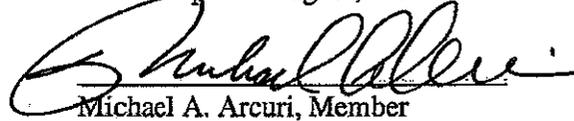
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Molly Doherty, Chairperson

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J. Christopher Meagher, Member



Michael A. Arcuri, Member

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Gloribelle J. Perez, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
in Utica, New York, on  
January 30, 2019.