

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of:

SOTIRIOS D. ECONOPOULY, SR. AND 84th ST.
FOOD CORP.,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order To Comply With Article 19 of the Labor
Law and an Order Under Articles 5 and 19 of the
Labor Law, both dated October 2, 2013,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 13-180

RESOLUTION OF DECISION

APPEARANCES

Certilman Balin Adler & Hyman, LLP (Desiree M. Gargano of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Kathleen Dix of counsel), for respondent.

WHEREAS:

1. The above proceeding was commenced on November 7, 2013, when the Board received a petition for review pursuant to Labor Law § 101 and Part 66 of the Industrial Board of Appeals' Rules of Procedure and Practice (12 NYCRR Part 66) of an order to comply issued by respondent Commissioner of Labor against petitioners on October 2, 2013; and
2. On November 19, 2013, the petition was served on respondent, who timely moved on December 19, 2013, to dismiss the petition in its entirety or to strike certain of its paragraphs; and
3. On January 17, 2014, petitioners timely filed and served a cross-motion for leave to amend their petition, together with a proposed amended petition; and
4. Having received no response to the cross-motion from respondent, on January 30, 2015, the Board denied respondent's motion to dismiss; granted, in part, respondent's motion to strike; granted petitioners' motion for leave to amend their petition; and directed petitioners to file their amended petition by March 2, 2015, and respondent to file an answer to the amended petition within 30 days of receipt of the amended petition; and

5. Having received no amended petition by March 2, 2015, the Board granted petitioners additional time to file their amended petition by June 23, 2015; and
6. On June 22, 2015, petitioners timely filed and served an amended petition; and
7. On June 23, 2015, the Board directed respondent to file its answer to the amended petition by July 23, 2015; and
8. On July 31, 2015, respondent notified the Board that the matter had been reassigned to another attorney, and requested an extension of the time to file an answer to August 21, 2015; and
9. The Board granted respondent's request for an extension making the answer due on August 21, 2015; and
10. On August 4, 2015, respondent notified the Board that the matter had been reassigned to another attorney; and
11. On October 15, 2015, respondent untimely filed and served its answer; and
12. On October 16, 2015, the Board received a letter from respondent dated August 18, 2015, requesting an extension of time to respond to the amended petition until October 15, 2015; and
13. Pursuant to Board Rule 65.5 (g), "[r]equests for extensions of time for filing or any pleading . . . must be received in advance of the date on which the pleading . . . is due to be filed"; and
14. Pursuant to Board Rule 65.14, "the failure to file any pleading pursuant to these rules when due may . . . constitute a waiver of the right to further participation in the proceeding"; and
15. Having no record prior to October 16, 2015 of respondent requesting on August 18, 2015 an additional extension of time to file its answer to the amended petition, the Board directed respondent to bring a motion, by November 20, 2015, to establish good cause for its failure to timely file an answer to the amended petition; and
16. Having received no motion from respondent as directed, on December 1, 2015, the Board extended respondent's time to file the motion until December 4, 2015, and petitioners' time to file any reply thereto until December 14, 2015; and
17. On December 8, 2015, respondent untimely filed its motion to establish good cause for its failure to timely file an answer; and
18. In its motion, respondent:
 - a. stated that "[h]aving heard no objection to the extension request, and receiving no letter that said extension was denied," respondent filed its answer on October 15, 2015; and
 - b. asserted that petitioners were not prejudiced by the delay in the filing of its answer to the amended petition as petitioners were served with that answer; and
 - c. explained that its motion to establish good cause for its failure to timely file an answer to the amended petition itself was untimely filed because respondent misread the Board's directive in its December 1, 2015 letter; and

19. On December 18, 2015, in an envelope post marked December 14, 2015, petitioners timely filed and served their opposition to respondent's motion to establish good cause for its failure to timely file an answer; and
20. On January 19, 2016, respondent filed a reply to petitioners' opposition stating that:
 - a. petitioners' attorney had consented to respondent's extension of time to file answer by October 15, 2015; and
 - b. respondent's failure to timely file an answer was due to the loss of two out of four attorneys and that is "justifiable reason for the delay"; and
 - c. part of the delay was due to "[r]espondent's attempt to work constructively with the [p]etitioners regarding the issues asserted in their [a]mended [p]etition; and
 - d. respondent agrees to "a stay of interest from the time the original [a]nswer was to have been served on August 21, 2015 to the date of the filing of [respondent's reply] on January 13, 2015; and
21. Respondent missed several deadlines established by Board Rules or in the Board's discretion, for filing requisite documents and pleadings; and
22. The Board finds that in the circumstances of this case:
 - a. law office failure is not good cause; and
 - b. not receiving a response from the Board to a request for an extension of time to file a pleading means that it has not been approved; and
 - c. a lack of objection from opposing party to a request or a consent to a request, does not mean the Board agrees and will grant the request; and
23. The Board finds that respondent has otherwise not presented good cause to excuse its failure to comply with Board Rules and directives; and
24. For these reasons, we do not accept respondent's answer and the petition is granted.

////////////////////

////////////////////

////////////////////

////////////////////

////////////////

///

////

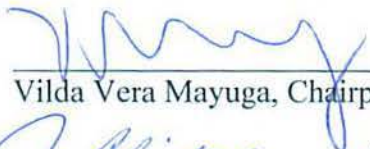
///

///

11

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner of Labor's motion for leave to file a late answer be, and hereby is, denied;
2. The petition be, and hereby is, granted; and
3. The order be, and hereby is, revoked in its entirety.



Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed by the Members
of the Industrial Board of Appeals
at Albany, New York,
on January 20, 2016.