

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X	
In the Matter of the Petition of:	:
	:
ALEMNESH MENGESHA D/B/A MJM MINI	:
MARKET,	:
	:
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	:
issued February 5, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 09-085

RESOLUTION OF DECISION

APPEARANCES

Miguel Reyes, Esq. for the Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw, of Counsel, for Respondent.

WHEREAS:

1. On April 13, 2009 the Board received a petition in the above-referenced matter mailed by the Petitioner on April 10, 2009 appealing two Orders issued by the Commissioner of Labor (Commissioner) on February 5, 2009.
2. The Commissioner filed a motion to dismiss dated August 5, 2009, on the grounds that the petition was untimely and does not state a cause of action. The Petitioner did not oppose the Commissioner's motion.
3. Labor Law § 101 provides that a petition for review must be filed with the Board no later than sixty days after the issuance of the Order to be reviewed. The date of filing pursuant to Board Rules of Procedure and Practice 65.5 (d) (12 NYCRR 65.5 [d]) was the date of mailing, April 10, 2009. The Orders to be reviewed were issued on February 5, 2009. Therefore, the petition was untimely as the time to appeal expired on April 6, 2009.

4. The Petitioner, apparently aware that its petition was not timely, included with its petition a brief arguing that the petition was timely filed. The two bases for the Petitioner's claim that the petition was timely are that five additional days should be allowed for mailing, and that the time should run from the date of service, not the date of issuance.
5. With respect to the Petitioner's argument that five additional days must be allowed for mailing, we held in *Matter of Business Credit Corp.* PR 08-061 (December 17, 2008), under identical circumstances that:


While it is correct that under certain circumstances the Civil Practice Law and Rules (CPLR) allows for an additional five days when service of a paper is done by mail (*see e.g.* CPLR 2103), such provisions are not applicable here where the issue is filing and not service, and the Board's Rules of Procedure and Practice are explicit that "[w]here a period of time prescribed by these rules (except in the case of petitions required to commence a proceeding) is measured from the service of a paper, and service is by mail, five (5) days shall be added to the prescribed period. (Board Rules 65.3 [c] [emphasis added]).

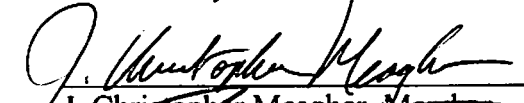
6. Accordingly, there is no provision for an additional five days for the filing of a petition with the Board.
7. With respect to the Petitioner's argument that the 60 day period should start on the date of service, and not on the date of issuance, we disagree. Labor Law § 101 is unambiguous that a petition "shall be filed with the board no later than sixty days after the issuance" of the order appealed" (emphasis added). The statute clearly provides for the 60 day time period to be measured from the date of issuance and not the date of service. In any event, the Commissioner has provided the Board with an affidavit of service indicating that the Orders were served on February 5, 2009 which is the very same date that they were issued. Therefore, at least in this case, there is no distinction between the date of service and the date of issuance.
8. We understand from the Petitioner's brief that there is some question as to whether the Orders were properly served due to the fact that the Orders were mailed to the Petitioner's place of business but were not received there because the business had been closed and the Orders were therefore forwarded by the Post Office to another address. First of all, the Commissioner's affidavit of service indicates that the Commissioner complied with Labor Law § 33 by mailing a copy of the Orders to the Petitioner's last known address. Second, the return receipt indicates that the Petitioner received the Orders on February 11, 2009, which was well within the 60 day time period for appealing the Orders to the Board and does not excuse the Petitioner's late filing of the petition.


9. For the reasons set forth above, the petition in this matter must be dismissed. We do not need to consider the Commissioner's allegation that the petition fails to state a cause of action.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law, dated February 5, 2009, and the Order under Article 19 of the Labor Law, dated February 5, 2009, are hereby affirmed; and
2. The petition is hereby dismissed.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Mark G. Pearce, Member


Jean Grumet, Member

ABSENT
LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 21, 2009.