

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

JACINTO ABREU AND ROSEARI MEAT :
MARKET INC. (T/A SUPER EXTRA :
SUPERMARKET), :
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 Article 19 of the Labor Law, :
both dated April 6, 2010, :

- against - :

THE COMMISSIONER OF LABOR, :
Respondent. :

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DOCKET NO. PR 10-356

INTERIM
RESOLUTION OF DECISION

APPEARANCES

Alan G. Peyrouton, Esq., for Petitioners.

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

WHEREAS:

Respondent Commissioner of Labor (Commissioner or Respondent) moves to dismiss the petition here on the grounds that it was untimely filed. In opposition, Petitioners move to strike Respondent's motion to dismiss due to Respondent's unfair delay. The Board holds that the Orders were not served on Petitioners in accordance with Labor Law § 33 and therefore, the motion to dismiss is denied and Respondent has 35 days to file an answer to the petition.

The Commissioner issued an Order to comply with Article 19 of the New York Labor Law (Wage Order) and an Order under Article 19 of the New York Labor Law (penalty Order) (together, Orders), against Petitioners Jacinto Abreu and Roseari Meat Market, Inc. (T/A Super Extra Supermarket) (Petitioner), dated April 6, 2010. The Wage Order finds \$568,145.19 in minimum wages due to 22 employees, plus \$467,407.75 in

interest and \$568,145.19 in a civil penalty, for a total of \$1,603,698.13 due. The Penalty Order assesses \$3,000 for failure to furnish/maintain payroll records and an additional \$3,000 for failure to give each employee a wage statement with every payment of wages in accordance with 12 NYCRR 142-2.6 and 2.7 for the period December 1, 2005 to December 22, 2005.

A petition for review of the Orders was mailed on November 10, 2010 and received by the Board on November 15, 2010. The petition alleges that the meat market business was in New York City and was dissolved in 2008, that Petitioner Abreu resides in Fort Lee, New Jersey and that the Petitioners never received the Orders. The petition also alleges that Petitioners were not properly served pursuant to Labor Law § 33 since Respondent failed to serve them at the New Jersey address even though Petitioners had responded to all correspondence from Respondent using the New Jersey address.

The Board served the petition on the Commissioner, and her motion to dismiss, brought pursuant to Board Rules of Procedure and Practice (Rules) 65.13 (d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]), followed. Rule 65.13 (d) (1) (iii) states that “[w]ithin thirty (30) days after the receipt of a Petition, [the commissioner] may . . . move for an order dismissing the Petition where it appears that . . . the Petition fails to comply with the provisions of either Section 101 [of the Labor Law] or the board’s Rules.” The motion asserts that “Petitioners failed to comply with both statute and Board Rules by filing their petition with the Board more than sixty (60) days after the issuance of the Order at issue.” The Orders were mailed to both the business’ New York City address and Petitioner Abreu’s home address in New Jersey on April 6, 2010 according to the affidavit of service attached to the motion.

In response to the Commissioner’s motion, Petitioners filed a motion to strike Respondent’s motion to dismiss, which the Board is treating as Petitioner’s opposition to the motion to dismiss. Petitioners urge that the Commissioner’s motion be denied because Petitioners never received a copy of the Orders; Petitioners’ accountant appeared before the Department of Labor (DOL) during its investigation of Petitioner, but was never served with a copy of the Orders; and petitioners were not personally served with the Orders.

In reply the Commissioner argues that a statement of non-receipt of the Orders is insufficient to overcome the presumption of proper mail service and due receipt and cites the Board’s decision in *Matter of Jeffrey H. Astor and JEFFCO Plumbing Inc.*, PR 08-050 (March 24, 2010). The Commissioner asserts that there was ongoing correspondence between Petitioners at the New Jersey address and DOL and that correspondence from that address was signed “Jacinto Abreu – Pres., Roseari Meat Market Inc.” This was the same New Jersey address to which the Orders were sent and therefore, they must have been received.

The Commissioner states that she has complied with her service obligations as set out in Labor Law § 33 which provides:

“Whenever the commissioner or board or any person affected by the provisions of this chapter 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 or by delivering it to him personally. Notice to a partnership may be given to any of the partners and notice to corporation may be given to any officer or agent thereof upon which summons may be served as provided by the civil practice laws and rules. Whenever an order or demand of the department is required to be served it shall be served in the manner hereinbefore provided for the service of a notice or by delivering it to any person of suitable age and discretion in charge of the premises affected by such order, or if no person is found in charge by affixing a copy thereof conspicuously upon the premises.”

Petitioners requested an opportunity for oral argument on the motion which the Board granted. Prior to oral argument the Board sent the parties a letter attaching the Board’s Interim Resolution of Decision in *Matter of Gambino*, PR 10-050 (November 18, 2010) and requested that the parties address the issue of whether Petitioners were properly served under Labor Law § 33 as interpreted by *Gambino*.

In *Gambino*, upon a motion to dismiss by Respondent, the Board held that under Labor Law § 33, service of Orders may be by mail to an employer’s last known business address or by personal delivery anywhere. However, the statute does not authorize service by mail to an employer’s home address, and as the Commissioner served the Orders by mail to the employer’s home addresses service was not effectuated and the motion to dismiss was denied.

At oral argument before the Board on April 27, 2011, the Commissioner argued that she complied with Labor Law § 33 because Petitioners’ New Jersey address was its “last known place of business” as evidenced by that address on Petitioners’ correspondence with DOL which, in addition, listed Roseari Meat Market in the signature line. The Commissioner also produced a copy of a bank statement for Roseari Meat Market which listed the New Jersey address.

In response, Petitioners argued that its last known place of business was the New York City address listed in the Department of State records which also showed that Roseari Meat Market, Inc. had dissolved in February 2008, long before the Orders were served. Petitioners emphasized that the New Jersey address was Petitioner Abreu’s home address and not a meat market or place of business. Therefore, as in *Gambino*, the Commissioner was required to personally serve Petitioner Abreu since the New Jersey address was Abreu’s home address. The Petitioners further argued that personal service was particularly appropriate given that one of the Orders was for over \$1.6 million.

In closing, the Commissioner argued that Petitioners need not be conducting a meat market *per se* at the New Jersey address for it to be the last known place of business. The fact that it was winding up its affairs and corresponding with DOL from that address was sufficient for it to be deemed its “last known place of business.” The Board disagrees with Respondent’s argument. Although the New Jersey address was used for the bank statements and for correspondence on behalf of both Petitioners that does not establish that there was a place of business at that location. The corporation had dissolved and was no longer in

business. The New Jersey address was not its place of business. "Place of business" is defined as:

"an establishment (a factory or an assembly plant or retail store or warehouse etc.) where business is conducted, goods are made or stored or processed or where services are rendered." (Modern Language Association (MLA): "place of business." WordNet® 3.0. Princeton University. 03 Jun. 2011. <Dictionary.com http://dictionary.reference.com/browse/place_of_business>.)

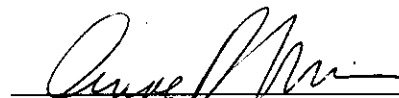
Since the New Jersey address was not the "last known place of business" Petitioner Abreu needed to be personally served.


In the absence of proper service on the Petitioners, the limitations period did not begin to run, and the petition is timely filed with the Board. We find that the petition filed with the Board here is timely and that the Board's review proceedings have been commenced. (*cf. Matter of Paul Coppa and Ten's Cabaret, Inc.*, PR 08-072 [interim decision, March 25, 2009].)

With respect to Petitioners' other arguments, there is no rule that requires the Respondent to serve the Petitioners' accountant, even if he has made an appearance. That requirement is limited to attorneys who have made an appearance (*Matter of Paul Coppa*).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

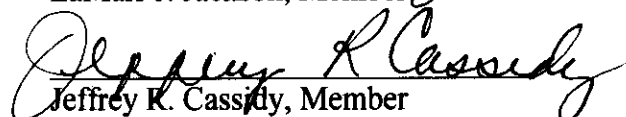
1. Respondent Commissioner of Labor's motion to dismiss the petition be, and hereby is, denied; and
2. Respondent Commissioner of Labor be, and hereby is, required to answer the amended petition within 35 days of the service of this Interim Resolution of Decision upon her.


Anne P. Stevenson, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member


LaMarr J. Jackson, Member


Jeffrey K. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 7, 2011.