

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | : |
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| MICHAEL WOLK, and MICHAEL MORRISON | : |
| (T/A RIKER HILL RECORDS, LLC), | : |
| | : |
| Petitioners | : |
| | : |
| 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 January 22, 2010, | : |
| | : |
| - against - | : |
| | : |
| THE COMMISSIONER OF LABOR, | : |
| | : |
| Respondent. | : |
| -----X | |

DOCKET NO. PR 10-104

RESOLUTION OF DECISION

APPEARANCES

Michael B. Wolk, Esq., for Petitioners

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

STATEMENT OF THE CASE

The Commissioner issued an Order to Comply with Article 6 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 Michael Wolk and Michael Morrison (T/A Riker Hill Records, LLC) (Petitioners), dated January 22, 2010.¹ On or about January 25, 2010, Petitioners wrote to the Department of Labor (DOL) contesting the Orders.

¹ The Wage Order finds that Petitioners failed to pay wages earned or payable to claimant Joseph A. Belle for the period December 16, 2008, through December 31, 2008, and directs that \$1,875.00 be paid to the Commissioner for the wages due, with \$318.08 continuing interest thereon at the rate of 16% calculated to the date of the Wage Order. The Commissioner also assessed a civil penalty of \$1,875.00 in the Wage Order, for a total of \$4, 068.08. Count one of the Penalty Order finds that Petitioners violated Labor Law § 661 and 12 NYCRR Part 142-2.6 by failing to keep and/or furnish true and accurate employee payroll records for the period December 16, 2008, through December 31, 2008 and assesses a \$500 penalty.

In response, on January 26, 2010, DOL sent a letter to Petitioners informing them that the Department had received their January 25, 2010 letter and that:

“if you are aggrieved, a review of the Order may be requested by filing a petition with the Industrial Board of Appeals, Empire State Plaza, Agency Building #2, 20th Floor, Albany, NY 12223 within sixty (60) days of the Order.” [Emphasis in the original.]

On March 29, 2010, DOL sent another letter to Petitioners requesting payment of the Order or the matter would be referred to the Attorney General’s office to institute legal action. On April 5, 2010 the Board received a Petition in this matter in an envelope postmarked April 3, 2010. Due to the fact that copies of the Orders did not accompany the Petition, on April 22, 2010, the Board wrote to Petitioner requesting that an Amended Petition with a copy of the Orders be sent in. A copy of the Board’s letter was sent to Counsel for DOL, for informational purposes. An Amended Petition was filed on May 26, 2010.

A judgment against Petitioners was filed in the New York County Clerk’s office on May 18, 2010, in the amount of the Orders. By letter to the DOL and the Board, dated June 23, 2010, Petitioners moved to vacate the Judgment. Petitioners requested that DOL and the Board take “appropriate steps” to vacate the Judgment and agree to a stay of enforcement of it until a review of the Petition before the Board. By letter dated June 25, 2010, the Board served the Petitions and informed Petitioners that the Board did not have jurisdiction over the enforcement of, nor the authority to vacate, the Commissioner’s orders. We note that DOL received notice that a Petition was filed in this case on April 22, 2010 when it was copied to the letter requesting that Petitioners amend their Petition.² The Commissioner then filed a motion to dismiss the Petition.

This motion is brought pursuant to Board Rules of Procedure and Practice (Rules) 65.13 (d) (1) (iii) (12 NYCRR 65. 13 [d] [1] [iii]) which 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, supported by an attorney’s affirmation, asserts that “Petitioners failed to comply with both the statute and Board Rules by filing their petition with the Board more than 60 days after the issuance of the Order at issue” The motion also asserts that:

“The Petitioners also failed to state a cause of action in compliance with the Board’s Rules” Rule 66.3 (e) requires that the petition “state clearly and concisely the grounds on which the matter to be reviewed is alleged to be invalid or unreasonable”

Labor Law § 101 (1) states, in relevant part, that “any person in interest . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the

² We also note that the letter was directed to Petitioners who were the subject of the Order but did not contain the number of the Order to Comply.

commissioner Such petition shall be filed with the board no later than sixty days after the issuance of such . . . order.” Following Rule 65.5, entitled “Filing and Docketing,” the Rules note that “[t]ime periods prescribed by statute cannot be extended.” Similarly, Rule 66.2 (a) states that “[r]eview may be had only by filing a written Petition with the Board . . . no later than 60 days after the issuance of the . . . order objected to.” Finally, Rule 65.5 (c) provides that “[p]apers shall be deemed filed only upon receipt at the Board’s office.”

The Commissioner argues that the governing statutory and regulatory language and the Orders themselves are clear and unambiguous and that Petitioners did not file the petition until April 5, 2010, or 13 days later than the March 23rd filing period.³

Petitioners respond that on January 25, 2010, or three days after the issuance of the Orders, they made an application to vacate the Orders to the Division of Labor Standards of the Department of Labor. They assert that the New York Civil Practice Law and Rules (CPLR) should be applied by the Board where the Labor Law, or the Board’s rules, do not clearly address issues of administrative appeals.

Further, Petitioners argue that the Orders, which they characterize as “Default Orders,” should not have been issued because the Petitioners had previously notified the Commissioner that Riker Hill Records, LLC ceased doing business prior to the two-week-claim period. Finally, Petitioners rely on *Matter of Outstanding Transport* PR 09-316 (May 26, 2010) for its position that the Board will excuse an otherwise untimely petition where there is ambiguity as to the filing period.

Petitioners ask the Board to issue an Order: (1) denying the Commissioner’s Motion to Dismiss the Petitions as untimely filed; (2) directing the Commissioner to “issue and serve an appealable order denying the Default Vacatur Motion...;” (3) denying the Commissioner’s Motion to Dismiss for failure to state a cause of action; (4) “directing that the Default Orders are void because the facts and circumstances of this proceeding indicated that such Default Orders were issued in violation of the Petitioners’ due process rights under U.S. Constitution, the New York State Constitution and applicable civil procedure rules . . .;” and (5) directing that the Commissioner’s entry of the May 18th judgment violates Labor Law § § 218 and 219 and is “void and of no force or effect” and directing the Commissioner to file for vacatur of the judgment, or alternatively, issuing an order staying the Commissioner from enforcing the judgment “pending the IBA’s issuance of a final determination on all aspect of the appellate proceedings herein.”

The Commissioner replied to Petitioners’ response papers and answered Petitioners’ cross motions. The Commissioner avers that she does not allege that Riker Hill Records, LLC owes wages, interest, and penalties under the Orders, but rather, the Orders name Michael Wolk and Michael Morrison as the employers, and that they were transacting business in the name Riker Hill Records, LLC, regardless of whether it was a legal entity during the claim period. Also, the Commissioner argues that despite Petitioners contention

³ The Commissioner incorrectly calculated 60 days from January 22, 2010 as March 21, 1010. Sixty days from January 22 is March 23, 2010.

that Riker Hill Records, LLC had ceased to exist prior to the claim period, it continues to operate a website, and its address listed on that website is the same address used by Michael B. Wolk in his correspondence with the Commissioner.

The Commissioner also responds that (1) Petitioners' reference to the Orders as "Default Orders" is in error as "there is no such thing . . . in the context of this case;" (2) contrary to Petitioners position, the Board does not apply the CPLR but rather applies its own rules and regulations; (3) Petitioners contention that they filed a "Default Vacatur Motion" is similarly misplaced as no such thing exists in the context of this matter; (4) Petitioners' claim that there is no clear direction of when a petition must be filed "from an order rendered on default" belies the clear statutory and Board rules requiring a petition to be filed within 60 days of the issuance of an order; (5) Petitioners' reliance on *Matter of Outstanding Transport* is misplaced. In *Outstanding Transport*, a petition was deemed timely filed because the Labor Department misrepresented when the petition needed to be filed, facts inapposite to this matter; and, (6) no Designation of Representation or Notice of Appearance has been filed and as only Mr. Morrison filed the petitions, Mr. Wolk is not authorized to file the "Response/Motion."

FINDINGS

The Orders sought to be reviewed were issued on January 22, 2010, and therefore, any petition for review filed with the Board after March 23, 2010, would be untimely (Labor Law §101 [1], Board Rules 66.2 [a], 65.3 [a] and 65.5 [12 NYCRR 66.2 (a), 65.3 (a) and 65.6]). As the Petition was post-marked April 3, 2010, and received by the Board on April 5, 2010, it is untimely, unless otherwise excused. The Petitioners argue that there is ambiguity as to whether a petition for review can be filed upon an "order rendered on default" and, therefore, they were entitled to file their motion to vacate the Orders with the Labor Department before filing a petition for review with the Board. However, Petitioners were specifically directed both in the Orders and by letter dated January 26, 2010, that if they were aggrieved by the Order they could seek review with the Board. In its papers, Petitioners admit that they received the letter dated January 26, 2010 in which they were told that if they were aggrieved "our only remedy was to file an appeal with the IBA."

We find that that the Petition was not timely filed. The Labor Law and Board Rules are clear and unambiguous that a petition for review must be filed no later than 60 days from the issuance of an order. DOL informed Petitioners of their appeal rights two times during the appeal period.

The provision for issuing Orders and reviewing Orders is a separate statutory scheme within the Labor Law. Petitioners' characterization of the Orders as "default orders" is in error. Section 3215 of the CPLR provides for a default judgment when "a defendant has failed to appear, plead, or proceed to trial . . . or when the court orders a dismissal for any other neglect to proceed" No such circumstance here exists. Moreover, the Commissioner issued the Orders under Labor Law § 21 because the Petitioners allegedly failed to comply with the Labor Law, not because they were in default.

Further, Petitioners' reliance on CPLR 5511, which states, in relevant part, that "an aggrieved party . . . may appeal from any appealable . . . order except one entered upon the default of the aggrieved party" as entitlement for Petitioners to file their "Default Vacatur Motion" before filing a petition with the Board is similarly in error. The Board's rules, not the CPLR, control Board procedures, and the rules are clear as to when a petition must be filed (*see* Matter of 238 Food Corp., Docket No. PR 05-068 [April 25, 2008] [CPLR not applicable to Commissioner or Board because issuance of orders to comply by the Commissioner is administrative, not judicial proceeding]). Moreover, while CPLR 5511 may restrict an aggrieved party from appealing from a default order, orders issued by the Commissioner are, as found above, not "default orders." Similarly, CPLR 2219, which the Petitioners state entitles them, if not requires them, to file a "Default Vacatur Motion" governs court orders, and is inapplicable to Board proceedings. The Orders are not, as the Petitioners argue, a non-appealable "letter from a court" but are orders appealable by filing a petition with the Board.

Petitioners' reliance on the Board's holding in *Outstanding Transport, Inc.* for the position that petitions will be held timely "where Respondent [Commissioner] has created ambiguity in the expiration of the statute of limitations. . . ." is misplaced. In *Outstanding Transport*, the Board held timely an otherwise untimely petition where petitioners relied upon incorrect information provided by the respondent. Here, the Commissioner correctly informed Petitioners of the appellate process by the Order and by a letter dated January 26, 2010.

We deny Petitioners' motion to direct the Commissioner to "issue and serve an appealable order denying the Default Vacatur Motion..." We also deny Petitioners' motion to void the Commissioner's entry of the May 18th judgment. We note, however, that DOL was informed about the Petitions prior to the entry of judgment. Once DOL was on notice that a petition had been filed, it should not have entered judgment. Labor Law § 218 provides that judgment may be entered provided that no administrative review is pending. Therefore, we grant Petitioners' request to issue an order staying the Commissioner from enforcing the judgment pending service of this Decision.

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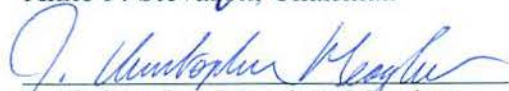
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:


1. The Commissioner of Labor's motion to dismiss the petition for review is granted in its entirety, and the petition for review be, and the same hereby is, dismissed; and
2. Enforcement of the Commissioner's judgment is stayed until service of this Decision.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
December 15, 2010.