

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

PAUL GAMBINO AND P.C. CONSULTING
MANAGEMENT CORP.,

Petitioners,

DOCKET NO. PR 11-388

To Review Under Section 101 of the Labor Law:
Two Orders to Comply With Article 6 of the Labor
Law dated October 20, 2011,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Rabinowitz & Galina, (Michael Rabinowitz of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa Bates of counsel), for the respondent.

WHEREAS:

This proceeding was commenced when the petitioner filed a petition with the Industrial Board of Appeals (Board) on December 21, 2011. The petition was served on the respondent Commissioner of Labor (Commissioner) on January 18, 2012. The Commissioner moved on February 1, 2012 to dismiss the petition as untimely because it was filed more than 60 days after the order was issued.

Labor Law § 101 (1) states 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.”

Respondent argues that the order sought to be reviewed was issued on October 20, 2011, and therefore, any petition for review filed with the Board after December 19, 2011 would be untimely (Board Rules of Procedure and Practice 66.3 [a], 65.5 and 65.3 [a]; [12 NYCRR 66.3 [a], 65.5 and 65.3 (a)]). As the petition in this proceeding was not received by the Board until December 21, 2011, and sent on December 20, 2011, the respondent states that it was untimely.

The petitioner filed an opposition to the motion arguing that the petition was filed within the 60 day time limit since the time for counting the 60 days commenced on October 21, 2011, the day following the issuance of the order, and not October 20, 2011. However, in calculating the 60 day time period, Board Rule 65.3 also dictates that the first day is not counted but the last day is included. In calculating the 60 day period in this case, starting from October 21, 2011, the petition had to be filed, i.e. received or post-marked by December 19, 2011. It was not postmarked until December 20, 2011, therefore, the petition was not filed within 60 days as required.

Petitioner also argues that since the order was mailed, petitioner had an additional three days [five days] per CPLR § 2214 (McKinney 2011). The Board has previously held, in *Matter of Business Credit Corp.*, PR 08-061(December 17, 2008) that there are no additional days added to the 60 day time period within which to file a petition when the order is mailed. The Board stated:

“The Petitioner, in its opposition to the Commissioner’s motion to dismiss, argues that five days must be added to the time allowed for filing by mail. 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]).

Board Rule 65.5 also states: “Note: (Time periods prescribed by statute cannot be extended.” [Emphasis in the original.]

The Board finds that the petition is untimely and therefore, it lacks jurisdiction to consider this appeal, *In the Matter of Gregory Lorenzo and Lorenzo Holding Corp.*, PR 09-094 (December 14, 2009).

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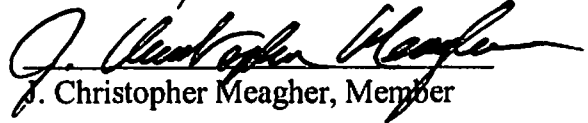
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

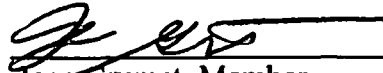
The Commissioner of Labor's motion to dismiss the petition for review is granted in its entirety, and the petition for review be, and the same hereby is, dismissed.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 10, 2012.

LaMarr J. Jackson, Member

ABSENT

Jeffrey R. Cassidy, Member

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

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.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 10, 2012.

Jeffrey R. Cassidy, Member