

New York State
Industrial Board of Appeals

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Application of:	:
	:
FOSTER PROPERTIES, LLC,	:
(T/A MAGGIE'S PUB),	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	:
dated January 18, 2008,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 08-026

INTERIM
RESOLUTION OF DECISION

WHEREAS:

On May 12, 2008, Respondent Commissioner of Labor (Respondent or Commissioner) filed a Motion to Dismiss the Petition of Foster Properties, LLC (T/A Maggie's Pub) (Petitioner) pursuant to the Board's Rules of Procedure and Practice (Rules) 65.13(d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]) on the ground that the Petitioner failed to comply with Labor Law § 101 by filing the Petition more than 60 days after the Order was issued. The Petitioner filed its opposition to the Commissioner's motion on June 25, 2008. Because the *pro se* Petition was timely filed within 60 days, established that the Petitioner was objecting to the January 18, 2008 Order to Comply, and was amended in accordance with Board Rule 65.13 (b), the Board hereby denies the Respondent's motion.

The Order to Comply (Order) which is the subject of this case was issued by the Commissioner on January 18, 2008. The Order directs payment of \$440.00 in wages due and owing together with \$39.00 in interest at 16% per annum calculated to the date of the Order, a civil penalty of \$220.00 and an additional civil penalty of \$250.00 for failing to keep and/or furnish true and accurate payroll records for each employee. The Petitioner, appearing *pro se*,

filed the Petition on March 4, 2008. The Petition stated “Re Order to Comply #10-08-19 . . . I would like to formally request an appeal of this order. Please supply prescribed rules of procedure to do so. I called into your office to obtain this information and was told that the rules would be sent to me upon my formal request.” By letter dated March 7, 2008, Sandra M. Nathan, the Board’s Deputy Counsel, requested that the Petitioner file an original and three copies of an amended petition that states each reason that the order is believed to be invalid or unreasonable, and that a copy of the order be attached to each copy of the new letter. Deputy Counsel Nathan provided the Petitioner with a copy of the Board’s Rules, and indicated that “Section 66.3 of the enclosed Rules (page 17-18) will help you write the amended petition.” The March 7, 2008 letter also stated “Please mail the amended petition so that this office receives it on or before April 11, 2008.”

On April 16, the Petitioner personally filed an amended Petition which disputed the number of hours worked by the Claimant, as well as the Petitioner’s established work week, and alleged that the Claimant “received compensation that was unaccounted for in Respondent’s investigation.” Respondent moved to dismiss the Petition on May 14, 2008. Respondent’s argument for dismissal is based on the assertion that “No Petition was, in fact, filed in this matter until April 16, 2008, almost a full month after the time for timely filing of such a Petition” (Affirmation of Jeffrey G. Shapiro, ¶ 10), and that the Board’s April 16, 2008 receipt of the Petition occurred “five days after the final day for receipt set by the Board” (Affirmation of Jeffrey G. Shapiro, ¶ 12). The Petitioner filed its Affidavit in Opposition to the Motion to Dismiss on June 25.

Labor Law § 101 provides that a petition for review of the validity or reasonableness of any rule, regulation or order made by the Commissioner “shall be filed with the board no later than 60 days after the issuance of such rule, regulation or order (Labor Law § 101 [1]) . . . in accordance with such rules as the board shall prescribe, and shall state the rule, regulation or order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable” (Labor Law § 101 [2]). Board Rule 65.5 states: “Note: Time periods prescribed by statute cannot be extended” (12 NYCRR 65.5) (emphasis in original).

Pursuant to Board Rule 65.13(b) (12 NYCRR 65.13 [b]):

“If any material contained in a petition, answer or reply be so indefinite, uncertain or obscure that the precise meaning or application thereof is not readily apparent, the Board, on its own motion or on the motion of any party made on ten (10) days’ notice of motion, may order the party responsible to file and serve an amended pleading.”

In the instant case, the *pro se* Petition was filed on March 4, 2008, well within the 60 day limitations period. While the original *pro se* Petition stated that the Petitioner was “formally requesting an appeal” of Order to Comply 10-08-19 without explaining the basis for such appeal, the Board’s Deputy Counsel directed the Petitioner to file an amended petition to clarify the reasons behind its initial Petition pursuant to Board Rule 65.13(b). Petitioner’s April 16, 2008 filing complied with Board Rule 65.13 (b) and the Board’s Deputy Counsel’s direction.

Respondent’s argument for dismissal is based on an assertion that “no Petition was filed until April 16, 2008, a full month after the time for timely filing of such a Petition.” (Affirmation

of Jeffrey G. Shapiro, ¶ 10), but as stated above a *pro se* Petition was timely filed on March 4, 2008, and later amended by the April 16th submission pursuant to Board Rule 65.13(b). *Matter of Mt. Kisco Design Center*, PR-06-095 (Aug. 22, 2007), cited by Respondent, is inapposite since in that case the petitioner's initial filing of a petition, indeed its initial attempt to file a petition, occurred after the statute of limitations had expired.

In addition to being authorized by Board Rule 65.13(b), acceptance of the April 16th filing clarifying the original timely filed Petition is also consistent with both directly applicable and broadly analogous precedent.

In *Angello v. National Finance Corp.*, 1 A.D.3d 850, 853, 769 N.Y.S.2d 66, 69 (3d Dept. 2003), the court rejected the Commissioner's contention that the Board should not have considered issues supposedly outside the scope of a petition as originally filed, and ruled that under the circumstances, that petition's allegation that the Commissioner grossly overstated the amount due and owing to the stated employees adequately establishes that it was objecting to Commissioner's calculations, including the imposition of penalties and interest, as invalid and unreasonable." Similarly, the original, timely filed Petition in this case alleged that the amount of penalties was too high. That the Petition was *pro se* makes liberal construction appropriate. (See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 9 [1980]; *Tapia-Ortiz v. Doe*, 171 F.3d 150 [2d Cir 1999]; *Du-Art Film Laboratories, Inc. v. Wharton Internat'l Films, Inc.*, 91 A.D.2d 572, 573, 457 N.Y.S.2d 60, 61 [1st Dept. 1982]).

New York law also generally permits subsequent amendment, correction or clarification of a pleading which was timely filed (*see* CPLR § 2001 [permitting subsequent correction of a mistake, omission, defect or irregularity . . . upon such terms as may be just]; *cf.* CPLR § 5520 [a] [permitting an extension of time for curing the omission if a notice of appeal is timely filed but the appellant "neglects through mistake or excusable neglect to do another required act within the time limited"]). In light of Board Rule 65.13 (b) permitting clarification of a petition, no greater stringency is called for with respect to the timely filed Petition in this case.

Respondent also argues that the Petition should be dismissed because the amended Petition was not received by the Board until April 16, 2008, "five days after the final day for receipt by the Board." Board Rule 65.1 (b) (12 NYCRR 65.1 [b]) states:

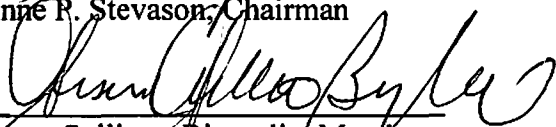
"When no substantial right is prejudiced thereby, the Board may on its own motion or that of any party, suspend the application of any provision of these rules in a specific proceeding, or waive compliance therewith."

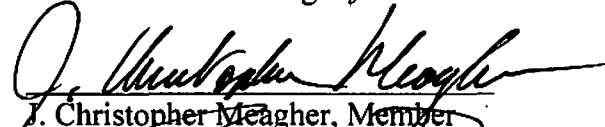
We find that although the amended Petition was filed five days after the date set by the Board's Deputy Counsel, there was substantial compliance by the *pro se* Petitioner and there is no prejudice to the Respondent by our acceptance of the late filing of the amended Petition.

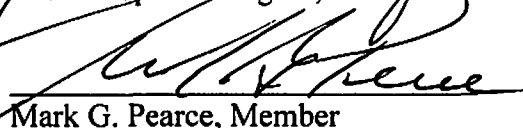
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Motion to Dismiss the Petition is hereby denied.



Anne R. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 24, 2008.