STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of:<br><br>PAUL COPPA,<br>Petitioner,<br><br>To Review Under Section 101 of the Labor Law:<br>A Notice of Violation and Order to Comply With<br>Articles 6 and 19 of the Labor Law, dated March 9, 2007,<br><br>- against -<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | DOCKET NO. PR 08-072<br><br>INTERIM<br>RESOLUTION OF DECISION |
| In the Matter of the Petition of:<br><br>TEN'S CABARET, INC.,<br>Petitioner,<br><br>To Review Under Section 101 of the Labor Law:<br>A Notice of Violation and Order to Comply With<br>Articles 6 and 19 of the Labor Law, dated March 9, 2007,<br><br>- against -<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | |

APPEARANCES

Cole, Schotz, Meisel, Forman & Leonard, P.A., by Stephen I. Adler, Esq., for Petitioner Paul Coppa.

Alonso, Andalkar & Kahn, P.C., by Joan Toro, Esq., for Petitioner Ten's Cabaret, Inc.

Maria L. Colavito, Counsel to Department of Labor, Jeffrey G. Shapiro of counsel, for Respondent, Commissioner of Labor.

WHEREAS:

Petitioners Paul Coppa (Coppa) and Ten's Cabaret, Inc. (Ten's) filed separate Petitions with the Industrial Board of Appeals (Board) on June 2, 2008 and June 10, 2008, respectively. The Petitions seek review of the Order to Comply (Order) with Labor Law Articles 6 and 19 that Respondent Commissioner of Labor (Respondent or Commissioner) issued against "Paul Coppa and/or Ten's Cabaret Inc." on March 9, 2007. The Order demands payment of unpaid wages in the amount of $9,807,309.97 as well as $3,430.677.63 in interest and $2,451,825.00 in civil penalty for a total of $15,689,812.60.

The appeals were consolidated and are being processed in a single proceeding pursuant to the Board's Rules of Procedure and Practice (Rules) 65.44 (12 NYCRR 65.44). After service of the Petitions on Respondent, she moved to have them dismissed as untimely under Labor Law § 101, which requires that a petition "be filed with the board not later than sixty days after the issuance" of the order on review. In the matter here, it is undisputed that the Petitions were filed more than one year after the Order was issued. In opposition to the motion, Petitioners argue, *inter alia*, that their time to file a petition has not yet commenced since the Commissioner failed to properly serve the Order. In particular, Petitioners assert that the Commissioner failed to comply with Executive Law § 168 which requires that an administrative agency serve a party's attorney once that attorney has filed an appearance in the agency's proceeding. In reply, the Commissioner asserts that Executive Law § 168 does not apply since the procedures at issue here do not constitute a proceeding.

The Board finds that DOL's post-investigation procedures here constitute proceedings within the meaning of Executive Law § 168; that Executive Law § 168 applies to DOL's post-investigation procedures here; and that the Commissioner was required to serve Petitioners' counsel with a copy of the Order, but did not. In the absence of service upon Petitioners' attorneys, the Commissioner failed to properly serve Petitioners. Therefore, the time in which to file a petition to review the Order has not commenced, and Respondent's motion to dismiss the Petitions as untimely is denied.

## STATEMENT OF THE CASE

In March 2005, the New York State Attorney General's Office (AG's Office) issued a Subpoena Duces Tecum to Ten's seeking various documents. The subpoena was responded to in writing by the law firm of Alonso, Andalkar & Kahn, P.C. (Alonso, Andalkar). Additional documents were sought in June and July of 2005 by letter addressed to Alonso, Andalkar and again Alonso, Andalkar responded in writing and produced the requested documents. On November 4, 2005, a letter was sent to Alonso, Andalkar, informing them that the AG's Office, with the assistance of DOL, "had concluded their investigation against Ten's" and Coppa[1] and determined that there were violations of

[1] Based on the uncontroverted allegations of Ten's Petition, Coppa was the owner of Ten's from 2000 through April 2006. Pursuant to the terms of Coppa's sale of Ten's, Coppa agreed to assume responsibility for management of all matters relating to the joint AG - DOL investigation. Coppa hired Cole, Shotz to defend the matter before DOL.

various provisions of the Labor Law. The letter also conveyed a settlement offer. No copy of the letter was sent to Ten's or Coppa,

On May 3, 2006, the law firm of Cole, Shotz, Meisel, Forman & Leonard P.A. (Cole, Shotz) responded to the November 4, 2005 letter and notified the AG's Office that it was representing Ten's. On November 6, 2006, Cole, Shotz wrote to DOL informing it that it represented Ten's and Coppa and to request a District Meeting. On November 17, 2006, DOL sent a letter addressed to Cole, Shotz giving them notice of a conference set for December 7, 2006. The letter states in part: "The Department of Labor has made an investigation concerning wages paid at the above establishment. We have scheduled a conference to determine what further action is to be taken." This letter was sent to Cole, Shotz only, with no copy to either Ten's or Coppa. A conference was held at DOL on December 7, 2006 and Cole, Shotz appeared on behalf of Ten's and Coppa. Cole, Shotz wrote to DOL on December 11, 2006 requesting legal authority for DOL's position that Ten's dancers are employees rather than independent contractors. Counsel for DOL sent a response to this request on January 9, 2007, again addressing the letter to Cole, Shotz, without copying either Ten's or Coppa.

On March 9, 2007, the Commissioner issued the Order to Comply against "Paul Coppa and/or Ten's Cabaret Inc" for $15,689.812.60 and mailed it by Certified Mail with Return Receipt Requested addressed to "Paul Coppa and/or Ten's Cabaret Inc., 35 East 21st Street, New York NY 10019," the address of Ten's. Cole, Shotz was not served with a copy of the Order. On April 7, 2008, DOL sent a letter to Coppa at his home address in Warren, New Jersey with a carbon copy to Christopher Reda, CEO of Ten's Cabaret, stating that an Order to Comply was issued on March 9, 2007 and that $15,689,812.60 was due. The instant Petitions were then filed in June 2008 and this motion ensued.

## THE MOTION TO DISMISS

In its Motion DOL argues that the Petitions must be dismissed as untimely. The Order to Comply was issued in March 2007 and the Petitions were filed more than one year later, in June 2008. The sixty-day limitations period for appeal from a Commissioner's order to the Board that Labor Law § 101 prescribes is mandatory, jurisdictional and as Rule 65.5 states, cannot be extended by the Board.

In opposition, Petitioner Coppa argues that he was not properly served and therefore, the time within which to file a Petition never began. First, Coppa asserts that he was no longer the owner of Ten's and, therefore, did not receive a copy of the Order which was mailed to Ten's address. Secondly, Coppa asserts that since he was represented by counsel throughout his dealings with DOL and, in fact, did not receive any direct correspondence from DOL after his counsel appeared on his behalf, the service was insufficient since his counsel was not served with a copy of the Order as required by Executive Law § 168. Further, Coppa maintains that he did not receive a copy of the Order until it was mailed to his home address in April 2008. Similarly, Petitioner Ten's argues that it was not properly served with the Order due to the fact that its attorney was not served. It also maintains that it did not receive a copy of the Order since the certified mail containing the order was signed for by its janitor and not someone authorized to accept service.

In reply, DOL asserts that service of an order is governed exclusively by Labor Law § 33 which provides that an order may be served by first class mail at the person's last known address. In addition, DOL argues that Executive Law § 168 does not apply since there was no "proceeding." The Commissioner issued the Order here pursuant to her authority under Labor Law § 21 (1) and the Order is presumed valid pursuant to Labor Law § 103 (1). If no petition for review is filed, then the Order becomes a judgment per Labor Law § 218 (3).

Executive Law § 168, entitled "Notices to attorneys at law by state bodies or officers," provides, in pertinent part:

> "1. Whenever a person is involved as a party in a proceeding before any body or officer exercising quasi-judicial or administrative functions, and an attorney at law has filed a notice of appearance in such proceeding on behalf of such person, a copy of all subsequent written communications or notices to such person in such proceeding (other than subpoenas) shall be sent to such attorney at law, and if any such subsequent written communication or notice is sent to the party in the proceeding, a copy of the same shall be sent to the attorney at law at the same time. . . .
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> "2. For the purpose of this section:
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> (a) 'person' shall mean one or more individuals, partnerships, corporations or associations;
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> (b) 'proceeding' shall mean any quasi-judicial or administrative procedure instituted by a written application by a person to a body or officer, by a notice of assessment given by a body or officer or transmitted by a body or officer to a person, or by a notice of any hearing before a body or officer whether or not such hearing is prescribed by statute.
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> "3. This section shall not apply to preliminary investigations."

Executive Law § 168 was enacted in 1960 as the result of a joint endeavor of the Attorney-General, respective counsel to the State agencies, and representatives of bar associations. An earlier version of the bill was introduced and passed by the legislature in 1959 but vetoed by the then Governor due to the breadth of the language which "would have mandated an unnecessary administrative burden and expense."[2] In his approval message, the Governor stated that "[t]he rights of the public to effective legal representation in administrative proceedings must be protected" and called on the above-three groups to fashion appropriate legislation. In approving the legislation that followed, the Governor reiterated his statement from the previous year's veto message:

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[2] "In vetoeing the bill passed in 1959 the Governor expressed agreement with the objectives of the bill but said that it would cause unnecessary effort because many administrative functions not substantially affecting any interests or rights of persons would be covered by the bill." (Association of the Bar of the City of New York, Committee on State Legislation, 1960, at 39) The 1960 version thus limited the scope of the bill to a proceeding in which the person involved is a party and such person's attorney filed a notice of appearance.

> "Where an attorney has filed an appearance on behalf of a party in a pending administrative proceeding, it is important that he receive copies of notices relating to hearings and determinations and copies of such other written communications as substantially affect his client's interest. Otherwise, a client, unfamiliar with the administrative process, might fail to take timely action, on the assumption that his attorney has received copies of such papers."

(New York Legislative Annual – 1960, A.I. 2614, PR 2658)

The Court of Appeals applied this policy in *Matter of Bianca v Frank*, 43 NY2d 168 (1977), holding the statute of limitations for appealing a determination of the Police Commissioner did not commence where petitioner's attorney, who represented petitioner at the agency disciplinary proceeding, was not served with a copy of the determination. The court stated:

> "[O]nce a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus, any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified." [Citations omitted.]

*Id.* at 173.

All of the concerns about basic fairness and traditional, accepted practice that led the Legislature to pass and the Governor to sign Executive Law § 168 and that also led to the Court of Appeals' holding in *Bianca* are present in the instant case. All communications leading up to the Commissioner's Order were between DOL and Cole, Shotz. Subsequent to the service of the subpoenas duces tecum in 2005, DOL did not even bother to send courtesy copies of correspondence to Ten's or Coppa. Then, when the Commissioner served the most significant legal paper of all – the Order requiring payment of over $15 million, an Order that would result in judgment unless appealed – she failed to serve Petitioners' counsel. This is precisely the "unfair" situation that Executive Law § 168 was enacted to correct. Ten's and Coppa, even if served, failed to understand the significance of the Order and understandably reasoned, especially since this was the first correspondence that Petitioners received from DOL since first represented by counsel, that their interests were being protected by counsel. [3]

The Commissioner argues that Executive Law § 168 does not apply to DOL procedures which, she contends, do not constitute a "proceeding" as that term is defined in §

[3] In an email communication, attached to Ten's Petition, on March 12, 2007, Coppa writes to Chris Reda, the current owner of Ten's: "I will speak with my attorney as far as the labor case goes that is a matter for my attorneys and any communication with you or the club is meaningless."

168, that is, "any administrative procedure instituted by a written application, notice of assessment, written complaint or notice of hearing" that is not a "preliminary investigation."

On November 4, 2005, Petitioners were informed through counsel that DOL's investigation was complete; that they were in violation of numerous sections of the Labor Law; and that to resolve these violations they were was told to pay a sum certain. Clearly DOL admits that its investigation of Petitioners had concluded by November 4, 2005. Also clearly, DOL's procedures subsequent to November 4, 2005 involved its determination that Petitioners had violated the Labor Law and consequently owed wages, interest, and penalty. We find that DOL's actions subsequent to November 4, 2005 constituted 'any administrative procedure [emphasis added]' that was equivalent in substance to a "notice of assessment and/or a written complaint." After this point in time, Cole, Shotz filed its notice of appearance by letter. Thereafter, DOL had a statutory obligation to send a copy of all subsequent written communications or notices to Cole, Shotz, including and most especially the Order at issue here. Our conclusion is particularly warranted given the remedial purposes underlying Executive Law § 168. *See* Statute § 321 ("Generally, remedial statutes are liberally construed to carry out the reforms intended and to promote justice.")

The Commissioner also asks the Board to consider the case of *Budget Tire Automotive, Inc. v. O'Dell*, 223 AD2d 988 (1996). In *Budget* the Board dismissed a petition for review of an order to comply because it was filed more than sixty days after issuance of the order. The court held: "Petitioner's failure to comply with the 60-day time limit for challenging the Commissioner's order is a fatal defect." Petitioner in that case invoked the doctrine of equitable estoppel on the ground that its counsel did not receive a copy of the order although counsel had received carbon copies of earlier correspondence. The court rejected Petitioner's argument, noting that equitable estoppel is generally not available against a public agency discharging its statutory duties. The court made a point of noting that while petitioner was aware from a 'cc' notation on correspondence to him that counsel had received "courtesy" copies of correspondence, there was no such notation on the Order and therefore, any claim of being misled was not supported. This case is not controlling as the facts are distinguishable and the issues are different. In the instant case, defense counsel sent a letter that was in effect, if not in words, a notice of appearance and DOL consistently dealt directly with counsel and consistently did not deal with Petitioners at all. DOL's correspondence was directed to counsel and not provided to them as a mere courtesy. Finally, *Budget Tire* was decided on the issue of equitable estoppel; the applicability of Executive Law § 168 was not before the court.

The Commissioner also argues that she fulfilled her statutory requirements for service by complying with Labor Law § 33. However, requiring compliance with Executive Law § 168 where there has been a notice of appearance is neither inconsistent with nor precluded by Labor Law § 33. The Commissioner can comply with both sections by serving parties and their attorneys who have filed a notice of appearance.

We do not reach the issue of whether the Commissioner otherwise properly served each Petitioner since our decision that the Commissioner's failure to comply with Executive Law § 168 is dispositive of the motion.

In the absence of service of the Order on Petitioners' counsel, the limitations period did not begin to run, and the Petitions are timely filed with the Board. We find that the Petitions filed with the Board here are timely and that the Board's review proceedings have been commenced.

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 Petitions within 35 days of the service of this Interim Resolution of Decision upon her.

Anne P. 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 March 25, 2009.