

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
PHYLLIS TOOHEY,	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
A determination of the Commissioner of Labor	:
dated June 8, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 09-223

RESOLUTION OF DECISION

APPEARANCES

Phyllis Toohey, *pro se* Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WHEREAS:

On April 29, 2008, the New York State Commissioner of Labor (Commissioner) issued Two Orders to comply with Article 6 of the Labor Law against Phyllis Marcus and the Phyllis Marcus Law Group (collectively, Marcus). The first Order (Wage Order) found Marcus liable for wage supplements due and owing to Petitioner Phyllis Toohey. The second Order assessed civil penalties against Marcus for violations of Article 6 of the Labor Law. Marcus filed a timely petition to the New York State Industrial Board of Appeals (Board) for review of the Orders. The Commissioner advised the Board in writing by letter dated September 10, 2008, that she had withdrawn the Wage Order, against Marcus, and by letter dated September 29, 2008, Marcus withdrew their petition in its entirety. The Board issued a Resolution of Decision on November 19, 2008 approving the withdrawal of Marcus' petition and discontinuing the proceeding (*Matter of Phyllis Marcus and Marcus Law Group PLLC v Commissioner of Labor*, Docket No. PR 08-097 [November 19, 2008]).

Petitioner Toohey wrote to the New York State Department of Labor (DOL), requesting a review of the Commissioner's decision to withdraw the Wage Order against Marcus. By letter dated June 8, 2009, Carmine Ruberto, Director of DOL's Division of Labor Standards advised Toohey that DOL would take no further action on her claim and that "[a]s an aggrieved party, you may petition the Industrial Board of appeals [sic.] to revisit this determination."

On August 11, 2009, the Board received a copy of a petition from Toohey that was subsequently amended. The amended petition seeks to appeal DOL's "Order to withdraw the Order" against Marcus. In other words, Toohey seeks Board review of the Commissioner's decision to withdraw the Wage Order. The petition and amended petition were served on the Commissioner, who moved on October 15, 2009 for an order dismissing the petition.

Labor Law § 101 allows "[e]xcept where otherwise prescribed by law, any person in interest or his duly authorized agent [to] petition the board for a review of the validity or reasonableness of any rule, regulation or order made by the commissioner under the provisions of [the Labor Law]." Toohey's petition must be dismissed, because the Board has no jurisdiction over her petition. Mr. Ruberto's letter of June 8, 2009 is not a "rule, regulation or order of the Commissioner" that may be appealed to the Board. Likewise, the Commissioner's decision to withdraw the Wage Order is not a "rule, regulation or order" over which the Board has jurisdiction.

Additionally, we believe that even if we did have jurisdiction, there is nothing here for the Board to review. Labor Law § 196 vests discretion in the Commissioner to pursue or to not pursue the Petitioner's wage claim as she sees fit, and Labor Law §§ 218 and 219 require the Commissioner to issue an Order only where she determines that certain sections of the Labor Law have been violated. We disagree with the prior Board decisions that assumed jurisdiction to review the reasonableness of determinations by the Commissioner to dismiss claims made under Article 6 of the Labor Law (*see Matter of Giunta v Commissioner of Labor*, PR 104-92 [February 4, 1993]; *Matter of Jennings v Commissioner of Labor*, PR 181-94 [June 7, 1995]). Those cases fail to explain how a determination of the Commissioner to dismiss a claim constitutes a rule, regulation, or order that can be reviewed by the Board, and likewise fail to articulate any basis for reviewing discretionary decisions vested in the Commissioner. We decline to follow these prior Board decisions.

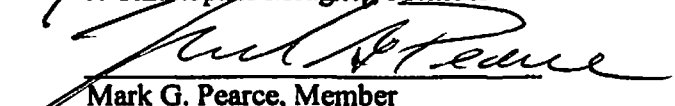
Finally, we note that although the Board does not have jurisdiction over the Petitioner's claim, she is not without recourse. A private right of action exists to seek redress from her prior employer in state court.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Petition for Review be, and the same hereby is, denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Mark G. Pearce, Member


Jean Grumet, Member


LaMarr J. Jackson, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
January 27, 2010.