

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

46 NEW YORK CITY PUBLIC SCHOOL  
EMPLOYEES,

Petitioner,

To Review Under Section 101 of the Labor Law:  
An Email dated October 30, 2020,

- against -

THE COMMISSIONER OF LABOR,

Respondent,  
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DOCKET NO. PES 20-011

RESOLUTION OF DECISION

**APPEARANCES**

*Public Employees for Environmental Responsibility and Environmental Justice Initiative (Kevin H. Bell, Esq. and Joel R. Kupferman, Esq.) for petitioner.*

*Jill Archambault, Acting General Counsel, NYS Department of Labor, Albany (Peter M. Parry of counsel) for respondent.*

**WHEREAS:**

This proceeding was commenced when petitioner filed a petition with the Industrial Board of Appeals (hereinafter “Board”) on December 7, 2020. On December 9, 2020, the Board served the petition on respondent Commissioner of Labor. Respondent moved on January 8, 2021 to dismiss the petition asserting that it is not an order, rule or regulation that may be appealed to the Board. Petitioner submitted opposition on February 10, 2021 and respondent filed a reply on February 25, 2021.

The petition seeks the Board’s review of an October 30, 2020 email issued by a Department of Labor’s Public Employee Safety and Health Bureau (hereinafter “PESH”) program manager that states “[t]he complaint items, which are under review within the Department of Labor, concern compliance with Executive Orders, and do not fall within the jurisdiction of the PESH Bureau.” Respondent’s motion to dismiss the petition asserts that the Board does not have jurisdiction to review the subject email because it is not “an Order of the Commissioner, nor a rule or regulation of the Commissioner.” Petitioner opposes the motion, asserting that the email does constitute an order since it includes a determination that PESH does not have jurisdiction over petitioner’s

complaint. Petitioner also asserts that PESH's statement that it does not have jurisdiction over executive orders issued by the governor is a rule or regulation.

We dismiss the petition because the October 30, 2020 email is not a final determination issued by respondent. The Board's general jurisdiction is set forth in Labor Law § 101 (1), which provides 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 rule, regulation or order made by the commissioner under the provisions of this chapter. Such petition shall be filed with the board no later than sixty days after the issuance of such rule, regulation or order.”

The Public Employment Safety and Health Act (hereinafter “PESHA”), which is codified at Labor Law § 27-a, gives the Commissioner of Labor authority to enforce the safety and health standards set forth in the act as they apply to public employees (Labor Law § 27-a [2]). Labor Law § 27-a (6) (c) states that “[a]ny employer, or other party affected by a determination of the industrial commissioner issued pursuant to this section may petition the industrial board of appeals for review of such determination in accordance with section 101 of this chapter.” The Board's jurisdiction under Labor Law §§ 101 (1) and 27-a (6) (c) permits review of orders, rules and regulations, as well as determinations issued by the Department of Labor. Consistent with this, and contrary to respondent's assertion, the Board has reviewed determinations issued by respondent on complaints filed under PESHA. We have reviewed determinations not to issue violations, we have reviewed determinations issued by the Department of Labor's Counsel's Office, as well as determinations issued by PESH Bureau employees (*see e.g. Matter of Civil Services Employees Association, Inc.*, Docket No. PES 18-003 [February 24, 2021]; *Matter of Paul F. Harrington*, Docket No. PES 18-001 [June 24, 2020]; *Matter of Village of Port Chester*, Docket No. PES 16-012 [December 11, 2019]). Therefore, the issue we must now decide is not whether the subject email is more properly construed as an order, rule, or regulation but whether or not the subject email is a final determination ready for our review.

For an agency determination to be considered final, the “agency must have reached a *definitive position* on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party” (*Matter of Best Payphones, Inc. v Dept. of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]) (emphasis added). Petitioner asserts that the subject email, which states that “[t]he complaint items . . . do not fall within the jurisdiction of the PESH Bureau,” is a determination by PESH not to take jurisdiction and, thus, reviewable by the Board. However, the email also states that “complaint items” which are “under review within the Department of Labor.” Further indication that respondent has not yet issued a final determination in this matter is contained in respondent's counsel's assertion in the motion and corrected in the reply brief that “the complaint was forwarded to the PAUSE Enforcement Task Force,” which respondent is a part of. Similar to the Court of Appeals definition of final agency determination in *Best Payphones*, there must also be a definitive determination on a PESH complaint from respondent for the matter to be ripe for our review.

Labor Law § 27-a vests the enforcement of PESHA with the Commissioner of Labor, who is the head of the Department and, according to the subject email, the underlying complaint in this matter is still being reviewed within her Department (Labor Law §§ 27-a; 10). Because the October 30, 2020 email does not express a definitive position with respect to petitioner's complaint, we find it is not a final determination ready for our review (*Best Payphones*, 5 NY3d at 34).

Accordingly, we dismiss the petition and remand this matter back to the Department of Labor to proceed with the investigation of the complaint and/or issue a final determination to petitioner. This decision does not preclude petitioner from seeking any and all other available relief to compel the Department of Labor to act on their complaint.

As we have determined that the email does not constitute a final determination, we need not address petitioner's remaining arguments.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

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

Dated and signed by the Members  
of the Industrial Board of Appeals  
on April 7, 2021.



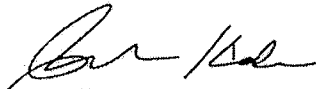
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Molly Doherty, Chairperson  
New York, New York

**ABSENT**

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Michael A. Arcuri, Member  
Utica, New York



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Gloribelle J. Perez, Member  
New York, New York



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Patricia Kakalec, Member  
Brooklyn, New York



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Najah Farley, Member  
Brooklyn, New York