

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CHEMUNG COUNTY, NOTICED AS “CHEMUNG  
COUNTY SHERRIF” AND “CHEMUNG COUNTY  
JAIL”,

Petitioner,

To Review Under Section 101 of the Labor Law: Two  
Notices of Violation and Orders to Comply to Comply  
with Section 27-a of the New York State Labor Law,  
both dated January 6, 2021,

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
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DOCKET NO. PES 21-003

RESOLUTION OF DECISION

**APPEARANCES**

*Chemung County, Elmira, (Jeffrey D. Walker, Esq., Assistant County Attorney), for petitioner.*

*Jill Archambault, Acting General Counsel, NYS Department of Labor, Albany (Steven J. Pepe of counsel), for respondent.*

**WHEREAS:**

This proceeding was commenced when the petitioner filed a petition with the Industrial Board of Appeals (hereinafter “Board”) on April 6, 2021. The petition was served on the respondent Commissioner of Labor (hereinafter “Commissioner” or “DOL”) on June 8, 2021. The Commissioner moved, on July 8, 2021, to dismiss the petition as untimely because it was filed more than 60 days after the orders were 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.”

It is undisputed that the petition for review was untimely filed. Petitioner, however, argues that the 60-day period contained in Labor Law § 101 and the Board’s Rules of Procedure and Practice (hereinafter “Board Rules”) (12 NYCRR) § 66.2 (a) should be waived as no substantial right of any party would be prejudiced by the Board’s acceptance of the late petition.

The Notices of Violation and Orders to Comply both provided clear and unambiguous instructions to the recipient as to how the orders may be appealed.<sup>1</sup> Petitioner asserts that the untimely filing was caused by challenges presented by the Covid-19 pandemic, their investigation into the violations, and discussions with respondent’s staff and counsel as to the validity of the citations. Petitioner, however, does not allege that respondent provided inaccurate information with respect to the 60-day time period, and, thus, we are not persuaded by their argument (*cf. Matter of Outstanding Transport, Inc.*, Docket No. PR 09-316, at pp. 2-3 [May 26, 2010]).

The failure to file a petition within 60 days of issuance of the orders is a “fatal defect” and may not be extended by the Board (*Matter of Budget Tire Automotive, Inc. v O’Dell*, 223 AD2d 988, 989 [3d Dept 1996]; *Matter of May Street Restaurant*, Docket No. PR 17-083, at p. 2 [January 23, 2018]). The orders sought to be reviewed were issued on January 6, 2021, therefore, any petition for review filed with the Board after March 8, 2021, would be untimely (Board Rules [12 NYCRR] §§ 65.5 and 65.3 [a]). As the petition in this proceeding was sent to the Board after March 8, 2021, and petitioner provided no legally sufficient reason to excuse their late filing, the petition was untimely and must be dismissed.

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

The respondent’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.

Dated and signed by the Members  
of the Industrial Board of Appeals  
on September 29, 2021.

  
Michael A. Arcuri, Member

  
Patricia Kakalec, Member

  
Molly Doherty, Chairperson

  
Najah Farley, Member

  
Sandra Abeles, Member

<sup>1</sup> The orders to be appealed, as attached to the petition, contain, in relevant part, the following language: “An employer who wishes to file an appeal of the violation(s) cited, including but not limited to appeals which raise issues concerning the application of the cited standard(s) to the employer or to the violations(s) cited, as well as issues concerning the appropriateness of the abatement period(s), must do so within 60 days of the issuance date of the Notice by filing a petition with the Industrial Board of Appeals. Appeals of the violation(s) cited, including but not limited to appeals raising the issues listed above, will be considered time barred if not filed within the 60 day period.”