

# **New Part 65**

## Subpart A

### General

#### 65.1. Application

(a) This part applies to filing, processing, hearing, consideration, and determination of every proceeding wherein they may be relevant and appropriate.

(b) The word “Board,” shall include the Board, any individual member of the Board, or an employee of the Board designated and delegated such authority by the Board.

(c) The Board may on its own motion, or the motion of any party, suspend the application of any provision of these rules in a specific proceeding, or waive compliance with any provision of these rules, so long as no substantial right is prejudiced.

#### 65.2. Number and person

(a) Singular words may be interchanged with the plural as required by context.

(b) The word “person” shall include an individual, corporation, partnership, unincorporated association, governmental body or any other legal entity, as context may require.

#### 65.3. Documents

A “document” is any written, printed, or electronic matter filed with the Board or introduced as evidence at hearing.

#### 65.4. Pleading

A “pleading” is a document setting forth the claims, defenses, admissions, and denials of a party in a proceeding before the Board.

#### 65.5. Petition

A “petition” is a pleading filed to commence a proceeding before the Board, and which must allege that an order, determination, rule, or regulation issued by the Commissioner of Labor is invalid or unreasonable.

#### 65.6. Party; Commissioner of Labor

(a) “Party” includes petitioner, applicant, respondent, Commissioner of Labor, intervenor, and objector.

(b) “Commissioner” when referred to in these rules means the Commissioner of Labor, and may be used interchangeably with the terms “Department of Labor,” “Department,” and “DOL.”

#### 65.7. Proof of service

Proof of service when required by these rules must specify the document served, the person serving it, the parties it was served on, the method of service, place of service, and the date the document was served. When a document has been electronically filed with the Board, and a party being served has opted to receive electronic service of documents, proof of service may be accomplished by copying the served party on the electronic transmission of the document being filed with the Board, provided the electronic transmission of the filing with the Board, copied to the party being served, contains all required information for proof of service.

#### 65.8. Language

Each document, other than an affidavit or exhibit, served or filed must be in the English language. Where an affidavit or exhibit attached to a document or offered as evidence at hearing is in a language other than English,

it must be accompanied by an English translation and an affidavit by the translator stating the translator's qualifications and certifying that the translation is accurate.

#### 65.9. Interpreters

(a) If a party or witness requires an interpreter at any stage of the proceeding, an interpreter will be provided by the Board upon a party's request. Interpreters are provided at no cost to the parties, except as provided for in paragraph (c) of this section.

(b) The Board may establish reasonable deadlines for the parties to make a request for an interpreter.

(c) The Board may direct a party to pay the reasonable costs incurred by the Board caused by a party's failure to request an interpreter by the deadline set by the Board if such untimely request causes an adjournment or unnecessary delay.

#### 65.10. Computing time

(a) In computing the time period for filing a paper under these rules, the day the period begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, or legal holiday, in which case, the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(b) If a period of time prescribed by these rules is measured from the service of any paper other than a petition, and service is by mail, five days shall be added to the prescribed period.

(c) If a period of time prescribed by these rules is measured from the service of any paper other than a petition, and service is by overnight delivery, one day shall be added to the prescribed period.

## Subpart B

### Parties and notice

#### 65.11. Representative of parties; notice of appearance; withdrawal of representation

- (a) Any party may appear for themselves, by an attorney, or by a designated representative.
- (b) An attorney or designated representative is considered to control all matters related to the party they represent.
- (c) All attorneys, agents, and representatives appearing on behalf of any person, that receive a fee for that representation shall file a written notice of appearance, as required by the Executive Law, and the Board will provide such a form to the attorney, agent or representative.
- (d) All attorneys, agents, and representatives appearing on behalf of any person, that receive no fee or compensation for that representation shall file a written designation of representative on a form provided by the Board.
- (e) Withdrawal of representation may only be accomplished by filing an original and two copies of a written notice of withdrawal with the Board. The notice of withdrawal must advise the Board of the last known address, telephone number and email address of the party for whom representation is being withdrawn, and include proof of service on all parties to the proceeding, including the party for whom representation is being withdrawn.

#### 65.12. Intervention

- (a) A party wishing to intervene in a proceeding may file an application with the Board at any time prior to the start of hearing with proof of service on the other parties. The Board has discretion to allow intervention on a

showing that an applicant has an interest in the proceeding, the applicant's participation will assist in the determination of the issues raised in the proceeding, and the applicant's participation, as the Board may permit, will not unnecessarily delay the proceeding. Where intervention is granted, the Board will determine the scope of the intervenor's participation in the proceeding and issue an order setting forth such scope.

(b) Objections to an application for intervention, if any, must be filed with the Board, with proof of service, within 10 days after service of the application to intervene, and must set forth the reasons intervention should not be allowed. If the application was filed less than 10 days prior to hearing, objections, if any, must be filed by a date determined by the Board, with proof of service.

#### 65.13. Record address

(a) Any document filed with the Board must contain the name, address, telephone number, and email address, if any, of the person filing it.

(b) Any change in such information must be communicated promptly, in writing, to the Board.

(c) The Board may dismiss a proceeding as abandoned if a party fails to comply with paragraph (b) of this section.

#### 65.14. Service and notice by the Board

Service and notice by the Board may be by postage-prepaid first class mail, electronic mail or personal delivery unless otherwise agreed by the parties to a proceeding or ordered by the Board. For petitions filed electronically, service and notice will take place through electronic mail unless petitioner requests an alternative method permitted by these rules.

## Subpart C

### Documents, pleadings, and motions

#### 65.15. Form of documents

(a) Unless otherwise provided by these rules, a document other than an exhibit must be legible and be produced on standard 8 ½" x 11" white paper or electronic equivalent. Whenever possible, each document other than an exhibit should be typewritten and contain print no smaller than 12 point.

(b) A document other than an exhibit must contain information sufficient to identify the parties and must include the Board's docket number if one has been assigned.

(c) A party filing a document or offering it as evidence must redact any confidential personal information, including, but not limited to:

(1) all but the last four digits of any taxpayer identification number of an individual or an entity, including a social security number, employer identification number, and individual taxpayer identification number;

(2) the month and day of any individual's birthdate;

(3) the full name of an individual known to be a minor, except the minor's initials; and

(4) all but the last four digits of any financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or insurance account number. The Board may direct any party to redact confidential personal information from their documents or require a party to file amended documents that conform to this rule. A party's failure to redact such information as directed may, at the discretion of the Board, constitute a waiver of the right to further participation in the proceeding.

#### 65.16. Place of filing

Unless filing electronically or otherwise directed, an original and three copies of any paper required under these rules must be filed at the Board's principal office in Albany, New York. Electronic filings do not require any copies to be filed and are to be filed at the location designated by the Board.

#### 65.17. Method of filing

(a) All documents may be filed by mail, courier, delivery service, or in person at the Board's principal office in Albany during normal business hours; electronically, at a location determined and designated by the Board; or by any other method authorized by the Board.

(b) A document is timely if it is postmarked or electronically timestamped within the time provided for by these rules but is not deemed filed until received by the Board. A document filed electronically will be considered filed with the Board at the time the electronic transmission indicates it was received by the Board.

#### 65.18. Form of petition

(a) A petition for review must state the reasons the order, determination, rule or regulation being appealed is invalid or unreasonable and specify the relief requested.

(b) The petition must clearly indicate the name or names of all petitioners, which includes all persons on whose behalf the petition is being filed. The petition must also include the name, address, telephone number, and email address, if any, of each petitioner. If the petition is filed by a representative, the representative's name, address, telephone number, and email address must be indicated.

(c) If the petitioner is not named in the order, determination, rule or regulation being appealed, the petition must state the facts that support the petitioner as an interested party.

(d) If the petition seeks review of a determination issued under Labor Law § 30 or of a notice of violation and order to comply issued under Labor Law § 27-a, the petition must state the name, address, and email address of any representative of the employees affected by the decision or notice of violation and order to comply.

(e) The petition must be signed by the person who is filing it.

(f) A copy of the order, determination, rule, or regulation being appealed must be included with or attached to the petition.

#### 65.19. Time for filing of petition to review order, determination, or rule or regulation of Commissioner of Labor

(a) Unless otherwise provided by statute, rule or regulation, a petition for review of an order, determination, rule or regulation issued by the Commissioner must be filed with the Board within 60 days after the date the order, determination, rule or regulation was issued.

(b) Statutes of limitations for filing a petition cannot be extended by the Board.

#### 65.20. Docketing of petition

All petitions filed with the Board will be assigned a docket number. Documents filed after a docket number is assigned must include the docket number.

#### 65.21. Service of petition on the Commissioner of Labor by the Board

(a) After a petition is filed that complies with section 65.18, the Board will serve it upon the Commissioner, through their General Counsel. Acknowledgment of service in a form determined by the Board will be sent to all parties indicating the date the petition was served.



(b) If the petition seeks review of a decision issued under Labor Law § 30 or of a notice of violation and order to comply issued under Labor Law § 27-a, the Board will send a copy of the petition for informational purposes to any representative of the affected employees identified in the petition.

#### 65.22. Response to petition

(a) The Commissioner must file an answer or a motion to the petition with the Board, with proof of service, within 30 days of service of the petition by the Board.

(b) The answer shall be so drawn as to advise the petitioner and the Board of the nature of the defense, in reasonable detail. It shall contain a specific admission, denial, or explanation of each of the material facts alleged in the petition. Such a denial may be upon information and belief or a denial of knowledge or information sufficient to form a belief as to the truth of the allegation. The answer must also contain a statement of any facts upon which the Commissioner relies for an affirmative defense.

(c) (1) The Commissioner shall serve one copy of the answer upon each petitioner or attorney of record and shall file the original with the Board, with proof of such service.

(2) If a representative of petitioner's employee is named in the Petition, the Commissioner shall also serve, by mail, one copy upon such representative and shall file with the Board proof of such service.

#### 65.23. Reply to answer

Any party may file a reply to the Commissioner's answer, with proof of service, within 10 days of service of the answer.

#### 65.24. Motions addressed to pleadings

(a) Unless otherwise provided by these rules or directed by the Board, a motion addressed to a pleading must be filed, with proof of service, within 30 days after service of the pleading that is the subject of the motion.

(b) A response to a motion addressed to a pleading, if any, must be filed, with proof of service, within 30 days after service of the motion unless otherwise directed by the Board. A reply, if any, must be filed with proof of service, within 15 days after service of the response.

(c) The moving party must advise the other party or parties in its notice of motion of the time periods set forth by these rules for filing and serving a reply and response to a motion.

(d) If an evidentiary hearing or oral argument is required by the Board to rule on a motion, the Board will fix the time and place for such hearing or argument and notify the parties in writing.

#### 65.25. Amendment of petition

(a) A petitioner may file an amended petition without the Board's permission at any time prior to service of a response to the petition. Thereafter, a petition may only be amended with the Board's permission.

(b) Unless otherwise directed, an amended petition will be served by the Board in the same manner as set forth at section 65.21 of these rules, a response to an amended petition, if any, must be made in the same manner as set forth at section 65.22 of these rules, and a reply to an answer to an amended petition, if any, must be made in the same manner as set forth at section 65.23 of these rules.

#### 65.26. Amendment of pleading other than petition; amendment to conform to proof

(a) Pleadings, other than petitions, may only be amended with the Board's permission.

(b) Pleadings may be amended with the Board's permission to conform to the proof at any time prior to the conclusion of the hearing.

#### 65.27. Extension of time to file a pleading or other document

(a) Any application for an extension of time to file any pleading or other document required by these rules must be filed with the Board, and copied to all other parties, no later than three days prior to the date the pleading or other document is due and must state the ground or grounds for the request. Any party objecting to an application for an extension of time to file a pleading or other document must do so promptly in writing and copy all other parties to the proceeding.

(b) The statute of limitations for filing a petition to commence a proceeding cannot be extended by the Board.

#### 65.28. Failure to file a pleading

Failure to file any pleading pursuant to these rules when due, may at the discretion of the Board, constitute a waiver of the right to further participation in the proceeding.

#### 65.29. Withdrawal of petition or other pleading

A party may withdraw a petition or other pleading at any time by notifying the Board in writing with a copy to all other parties to the proceeding.

#### 65.30. Mistakes, omissions, defects and irregularities

At any state of a proceeding the Board may permit a mistake, omission, defect, or irregularity to be corrected, upon such terms as may be just, or if a substantial right of a party is not prejudiced, the mistake, omission, defect, or irregularity may be disregarded.

#### 65.31. Stays

(a) The filing of a petition may, at the discretion of the Board, operate to stay all proceedings against the petitioner under such order, determination, rule, or regulation until the determination of such petition. Such

discretion may be exercised, if at all, upon written application therefor, which application shall be supported by affidavits, documentary evidence, or other evidence demonstrating the necessity for such stay, the financial responsibility of the applicant when relevant, and that the grant of such stay will not unduly prejudice any employee, the public or the Department of Labor. The Commissioner of Labor shall have such opportunity as the Board shall deem reasonable and sufficient to object to or oppose the application for a stay.

(b) Application for a stay of enforcement of an order issued under Labor Law § 200 shall be granted or denied by the Board within 72 hours after the filing of the application.

(c) A stay of enforcement of a minimum wage compliance order requires the posting of security or the obtaining of a waiver of security as provided for in Labor Law § 657. The application shall be made in the manner provided in rule 71.10 of these rules.

(d) Upon the filing of an application for a stay of enforcement of an order issued under Labor Law § 27-a, a hearing officer, designated by the Board, shall promptly schedule an onsite inspection to be attended by representatives of the applicant, of the affected employees and of the Commissioner of Labor. After inspecting the condition or conditions on which the alleged violation is based, and after hearing the representatives of the applicant, of the employees and of the Commissioner of Labor, the hearing officer shall report promptly to the Board. The hearing officer's report shall also include the application, any writings or documents submitted in connection with the application, and such other material as the hearing officer may deem appropriate. The Board may deny such application or may grant the same to such an extent and upon such terms and conditions as the Board shall determine.

(e) The granting of a stay does not affect the general enforcement of an order, determination, rule or regulation against anyone who has not filed a petition.

## Subpart D

### Pre-hearing procedure and discovery

#### 65.32. Pre-hearing conference; document exchange

- (a) At any time prior to hearing, the Board or a designated hearing officer may direct the parties or their representatives to exchange documents, to participate in a pre-hearing conference, or both.
- (b) Pre-hearing conferences are conducted by telephone or video-teleconference, unless otherwise directed by the Board or hearing officer.
- (c) Except in the case of emergency or unusual circumstances, any party seeking postponement of a scheduled pre-hearing conference must file a written request with a copy to all other parties at least seven days prior to the date scheduled for the pre-hearing conference. The request for postponement must state the reason or reasons for the request.

#### 65.33. Prehearing briefs

- (a) The Board or hearing officer may, when it appears necessary, require the parties to submit prehearing briefs that include any or all of the following:
  - (1) statements of the principal contentions of the parties;
  - (2) identification of evidence to be submitted at hearing and the purpose of the evidence;
  - (3) names of witnesses and subjects of their testimony; and/or
  - (4) discussion of the legal issues.

(b) When prehearing briefs are requested, the Board or hearing officer will fix the time for submission of such briefs and any responses or replies, as well as give notice to the parties of the issues to be addressed. If oral argument is required, the Board or hearing officer will send notice to the parties of the time and place for oral argument.

#### 65.34. Bills of particulars

(a) A demand for a bill of particulars may be made by any party to a proceeding within 10 days after an answer to a petition is filed. Thereafter, a demand for a bill of particulars may only be made with the Board's approval.

(b) A bill of particulars must be served on the party demanding it, or objections filed with the Board, no more than 10 days after the date the demand was served.

(c) If objections to a demand for a bill of particulars are filed, a copy of the demand must be attached to the objections. The demanding party's response to the objections, if any, must be filed with the Board, with proof of service on the objecting party, within 10 days after service of the objections.

(d) If a party fails to serve a timely bill of particulars or the bill of particulars is insufficient, the demanding party may file a motion requesting the Board to enforce the demand. The motion must include a copy of the demand, and if a bill has been served, a copy of the bill. The motion must be made in the manner set forth by section 65.24 of these rules except that such motion may be made within 10 days after the time to serve the bill has expired. A response to the motion, if any, must be filed, with proof of service, within 10 days after service of the motion. A reply to the response, if any, must be filed, with proof of service, within 5 days after service of the response.

### 65.35. Interrogatories

- (a) Interrogatories directed to a party or witness are not allowed unless ordered by the Board upon a showing of good cause.
- (b) An application to serve interrogatories on a party or witness must be made by motion in the same manner as a motion addressed to the pleadings.

### 65.36. Depositions

- (a) Depositions of parties or witnesses are not allowed unless ordered by the Board upon a showing of good cause.
- (b) An application to depose a party or witness must be made by motion in the same manner as a motion addressed to the pleadings brought under section 65.24.

### 65.37. Subpoenas

- (a) The Board, by one or more members, or by a designated employee, has the power to issue subpoenas for and compel the attendance of witnesses and the production of evidence.
- (b) Applications for subpoenas must be filed with the Board no later than 30 days prior to a scheduled hearing and must show the name and address of the party at whose request the subpoena is to be issued.
- (c) Any person who is served with a subpoena may move within 10 days after service of the subpoena to revoke or modify it if the evidence requested is not relevant to the proceeding, the subpoena does not adequately describe the evidence requested, or for any other reason sufficient in law that the subpoena should be revoked or modified.

(d) A motion to revoke or modify a subpoena must be made in the same manner as a motion addressed to a pleading brought under section 65.24 of these rules except a response to a motion to revoke or modify a subpoena must be filed, with proof of service, within 10 days after service of the motion unless otherwise directed by the Board. A reply, if any, must be filed with proof of service, within 10 days after the service of the response unless otherwise directed by the Board.

(e) A person subpoenaed to produce evidence or to appear at a hearing is entitled to the payment of the same fees and mileage as required by the Civil Practice Law and Rules.

(f) Persons subpoenaed to submit data or evidence at a public proceeding are entitled, upon payment of lawfully prescribed costs, to obtain a copy of the transcript of the data or evidence they submitted.

(g) Copies of the Board's subpoena forms may be requested by phone, in writing, or may be found at the Board's website. The subpoena form must be completed by the party requesting issuance of a subpoena and submitted to the Board for issuance. The requesting party must also send notice to each non-requesting party of the subpoena requests. Service of a subpoena issued by the Board is the responsibility of the requesting party.

#### 65.38. Failure to comply with discovery

The Board may issue orders for appropriate relief if any party fails to comply with any provision of sub-part D of these rules, including deeming a party's failure to comply with any provision of sub-part D of these rules as a waiver of the right to further participation in the proceeding.



## Subpart E

### Hearings

#### 65.39. Burden of proof; de novo hearing

- (a) The burden of proof of every allegation in a proceeding shall be on the party asserting it.
- (b) A hearing under these rules is de novo and parties may submit any testimony, documentary, or other evidence which is material and relevant to the issue. Evidence submitted to the Department of Labor prior to the hearing must be resubmitted at the hearing for it to be considered by the Board.

#### 65.40. Notice of hearing

Notice of the time, place, and nature of a hearing will be given by the Board to all parties to a proceeding at least 10 days in advance of the date of the hearing unless otherwise agreed by the parties.

#### 65.41. Postponement of hearing

- (a) Postponement of a hearing ordinarily will not be allowed.
- (b) Except in the case of an emergency or in unusual circumstances, any party seeking postponement of a scheduled hearing must file a written request with a copy to all other parties at least 10 days prior to the scheduled hearing date. The request for postponement must state the reason or reasons postponement should be granted.
- (c) Objections to a request for postponement of a scheduled hearing, if any, must be promptly filed with the Board with proof of service.

(d) No postponement is allowed without the Board's approval, and the Board's approval may, where a request for postponement was not timely made, and no emergency or unusual circumstances otherwise excuse the untimely request, be contingent on payment of reasonable costs incurred by the Board caused by a party's failure to make a timely request for postponement.

#### 65.42. Duties and powers of Board members

The Board by one or more of its members shall have the following duties and powers:

- (a) to conduct any investigation ordered by the Board;
- (b) to report findings of investigations to the Board;
- (c) to examine and receive any document or other evidence which is deemed pertinent, relevant or necessary to an investigation;
- (d) to record the testimony of any such witness, or to obtain from such witness a written statement, under oath or affirmation, on matters pertinent, relevant or necessary to an investigation;
- (e) to take affidavits;
- (f) to hold conferences for the settlement or simplification of the issues, on consent of the parties, and to report thereon, with recommendations, to the Board;
- (g) to hold and conduct a hearing, when ordered by the Board, relating to any matter pertaining to the Board's exercise of its functions;
- (h) to issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, documents and other evidence;

- (i) to rule upon petitions to revoke, amend or modify subpoenas or subpoenas duces tecum, subject to confirmation by the Board;
- (j) to administer oaths and affirmations;
- (k) to call, examine and cross-examine witnesses;
- (l) to receive offers of proof, to receive evidence and testimony, and to receive any objections to such offers of proof, or evidence and testimony, at or during any hearing;
- (m) to rule upon offers of proof and receive relevant evidence, subject to confirmation by the Board;
- (n) to dispose of procedural requests or similar matters;
- (o) to allow any petition, answer or other document in any proceeding to be supplemented, amended or corrected, provided that such change does not operate to prejudice a party's cause or unduly broaden or alter the issues of a proceeding;
- (p) to regulate, in any manner, the course of the hearing, subject to confirmation by the Board; and
- (q) to continue an investigation or hearing from day to day or adjourn same to a later date or to a different place by announcement thereof at the hearing or by other notice.

#### 65.43. Hearing officer; duties and powers

(a) A hearing in any proceeding may be conducted by one or more Board members or an employee of the Board designated and delegated the authority by the Board as a hearing officer. Any member or employee of the Board designated and delegated the authority to conduct a hearing or investigation shall possess those powers and duties mentioned and described in section 65.42, unless otherwise designated by the Board.

(b) At any time, a hearing officer may be designated and delegated the authority by the Board to take the place of a person or persons previously designated to conduct a hearing.

#### 65.44. Form of hearing

(a) Hearings before the Board will be conducted in person or by video-teleconference, as determined by the Board.

(b) A party may request that the hearing be held in a different form than determined by the Board but must do so, in writing, with all parties copied, setting forth the reason(s) a party, representative or witness must appear in person or by video-teleconference.

#### 65.45. Evidence and hearing sequence

Compliance with technical rules of evidence, including hearsay rules, is not required. Traditional rules governing trial sequence do apply, but traditional trial sequence may be altered by the hearing officer for the convenience of the parties, representatives, or witnesses, or if required by the hearing officer for any other reason, so long as there is no substantial prejudice to a party.

#### 65.46. Exhibits

(a) All exhibits offered in evidence must be numbered or lettered and marked with a designation identifying the party offering the exhibit. Unless the Board finds it impractical, each party's exhibits must also contain a unique sequential number for each page, file or image.

(b) Unless the Board or hearing officer finds it impractical, a copy of each exhibit must be provided to all other parties and the Board or hearing officer.

(c) In the absence of an objection, exhibits will be admitted into evidence as part of the record unless excluded by the Board or hearing officer.

(d) All exhibits offered, but denied admission into evidence, must be identified and placed by the hearing officer into a separate file designated for rejected exhibits.

#### 65.47. Witnesses; Witness fees

(a) Witnesses who appear before the Board shall testify orally under oath or affirmation and are subject to cross-examination by opposing parties and the Board.

(b) A party who subpoenas a witness to testify at a hearing in person must pay the same fees and mileage to the witness as required by the Civil Practice Law and Rules.

#### 65.48. Objections

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the hearing officer, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and will be included in the record. No objection will be deemed waived by further participation in the hearing.

(b) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which will be included in the record of the proceeding.

#### 65.49. Exclusion from hearing; striking testimony

(a) Disobedient or contemptuous conduct before the Board or hearing officer is grounds for exclusion from a hearing.

(b) The refusal of a witness at any hearing to answer a question which has been found by the Board to be proper may, at the discretion of the Board, be grounds for striking all or any part of the testimony previously given by the witness on related matters and drawing inferences from such refusal.

#### 65.50. Deposition in place of oral testimony

(a) A deposition in lieu of oral testimony ordinarily will not be allowed, except in exigent circumstances. An application to take the deposition of a witness in lieu of oral testimony must be in writing and must set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected they will testify and the time and place proposed for the taking of the deposition, together with the name and address of the officer before whom it is desired that the deposition be taken. Such application must be filed with the Board, with proof of service on all other parties. If the application is granted, the Board will make and serve on the parties an order which specifies the name of the witness whose deposition is to be taken and the time, place and designation of the officer before whom the witness is to testify.

(b) Such deposition, when permitted by the Board, may be taken before any officer authorized to administer oaths by the laws of the State of New York, or of the place where the examination is held.

(c) At the time and place specified in the order, the officer designated to take such deposition will permit the witness to be examined and cross-examined under oath or affirmation by all parties appearing, and the questions asked of and answers given by the witness will be recorded verbatim and reduced to typewriting by the officer before whom the deposition is taken or under his or her direction.

(d) All objections to questions or evidence are deemed waived unless made at the examination. The officer does not have power to rule upon any objection, but they shall note them upon the deposition. The testimony will be subscribed by the witness in the presence of the officer, who shall attach his or her certificate stating that the witness was duly sworn, that the deposition is a true record of the testimony and exhibits given by the witness,

and that the officer is not of counsel or attorney to any of the parties nor interested in the proceeding. If the deposition is not signed by the witness because they are ill, dead, cannot be found, or refuse to sign it, such fact will be included in the certificate of the officer and the deposition may be used as fully as though signed. The officer will immediately deliver, in accordance with sections 65.16 and 65.17 of these rules, a copy of the transcript, together with the officer's certificate, in person or by certified mail to the Board at its Albany office.

(e) The Board will rule upon the admissibility of the deposition or any part thereof.

(f) The right to object to any error or irregularity that does not comply with the provisions of this rule shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, discovered.

(g) If the parties so stipulate in writing, the deposition may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used as other depositions.

#### 65.51. Failure to appear

(a) Subject to the provisions of subdivisions (c) and (d) of this section, the failure of a party to appear at a hearing is a waiver of all rights except the right to be served with a copy of the decision of the Board and to request Board review pursuant to section 65.60 of these rules.

(b) Request for reinstatement must be made, in the absence of extraordinary or unusual circumstances, within five days after the scheduled hearing.

(c) The Board, upon a showing of good cause, may excuse a party's failure to appear and reopen the hearing.

(d) The Board may require a party to pay reasonable costs incurred by the Board caused by a party's failure to appear as a condition for reopening a hearing.

65.52. Post-hearing briefs and proposed findings of fact; oral argument

(a) A party may request at any time prior to conclusion of the hearing, or the Board or hearing officer may direct the parties at any time, to submit written summations, briefs, or proposed findings of fact on any issue raised in the proceeding, or for an oral argument on the record, or both.

(b) The Board or hearing officer will fix the schedule for post-hearing submissions after the hearing, or by written notice to the parties upon receipt of the transcript of hearing.

(c) If the Board or hearing officer requires oral argument after submission of the parties' briefs, the Board will notify the parties in writing of the time and place for argument.

65.53. Transcript of hearing; correcting the transcript

(a) Hearings will be transcribed by a stenographer or court reporter, and a copy of the transcript, certified by the stenographer or reporter, will be maintained by the Board in accordance with the Board's records retention policy.

(b) A copy of a transcript may be obtained upon written request made under the Freedom of Information Law pursuant to Part 73 of the Board's Rules (12 NYCRR Part 73).

(c) Any party to a proceeding may file proposed corrections to the transcript with the Board, copied to all other parties, within 30 days after their receipt of the transcript. Objections to any proposed corrections may be filed, and copied to all other parties, within 10 days after service of the proposed corrections. The Board, within a reasonable time, will rule on any proposed corrections and, if necessary, issue an errata sheet to be attached to the transcript.

(d) The Board, on its own motion, with notice to the parties, may propose corrections and issue an errata sheet to be attached to the transcript.



#### 65.54. Settlement

(a) Settlement is encouraged at any stage of the proceeding.

(b) Notice of settlement must be filed with the Board in writing prior to hearing or stated on the record at hearing.

#### 65.55. Hearing is open to the public

Every hearing is open to the public unless otherwise ordered by the Board.

#### 65.56. Submission without hearing or appearance

With leave of the Board, any proceeding where sufficient facts have been admitted, stipulated, or otherwise included in the record may be submitted at any time for decision or other appropriate action upon consent of all parties.

## Subpart F

### Decisions and post decision actions

#### 65.57. Record of proceedings

The record in any proceeding under this part will be prepared by the Board in accordance with Section 302 of the State Administrative Procedure Act.

#### 65.58. Decision

The Board will issue a resolution of decision adopted by a majority vote of the Board within a reasonable time after the conclusion of any hearing held pursuant to this Part, and serve it on the parties, or if represented by a designated representative or attorney, on such representative or attorney.

#### 65.59. Finality of decision for purposes of judicial review

A resolution of decision of the Board is final, subject to judicial review as provided by the Labor Law.

#### 65.60. Reconsideration

(a) An application for reconsideration after a determination or decision made by the Board must be filed with the Board in writing, with proof of service, and state the reasons reconsideration should be granted by the Board.

(b) Any objections to an application for reconsideration must be filed, with proof of service, within 10 days after service of the application for reconsideration.

(c) The Board may, at any time, reopen a proceeding or require a hearing.

## Subpart G

### Miscellaneous provisions

#### 65.61. Ex parte communications prohibited

(a) Ex parte communication is prohibited with respect to the merits of any case between any party to a proceeding and any employee, officer, or member of the Board.

(b) If any employee, officer, or member of the Board receives an ex parte communication concerning the merits of a case, the employee, officer or member of the Board must promptly disclose the communication and place it on the record of the proceeding, with any party wishing to rebut the ex parte communication given the opportunity to do so.

#### 65.62. Conduct

(a) Individuals appearing before the Board must comply with the Board's rules, any other applicable rules, and all orders and directions of the Board or the designated hearing officer.

(b) Attorneys and representatives appearing before the Board must be familiar with the Board's rules, and follow all applicable rules of professional conduct.

#### 65.63. Oral argument

(a) Where oral argument is required under these rules before the Board or a hearing officer, the Board will notify the parties in writing of the time and place of argument.

(b) If the Board or hearing officer requires briefs prior to argument, the Board will notify the parties in writing of the dates for filing such briefs.

#### 65.64. Consolidation

Proceedings may be consolidated where there are common questions of law or fact, or both, or in other appropriate circumstances, on the application of any party by filing a motion in the same manner as a motion addressed to the pleading, or by the Board's own motion.

#### 65.65. Severance

Upon its own motion, or upon motion of any party, the Board may, for good cause, order any proceeding severed with respect to some or all issues or parties.

#### 65.66. Joinder of petitioners

All persons in whom any right to relief arising out of any order, determination, rule or regulation is alleged to exist, whether jointly or severally, may join in one proceeding as petitioners, where, if such persons brought separate petitions, any common question of law or fact would arise; provided that, if it appears to the Board that joinder may embarrass, delay or prejudice a substantial right or the disposition of the matter, the Board may sever the proceeding and order separate hearings or any other order as may be expedient.

#### 65.67. Joint hearing of proceedings

The Board may, by resolution, direct that two or more proceedings, arising out of the same or similar set of facts, be heard together, without consolidation, if no substantial right is prejudiced.

#### 65.68. Dismissal

A proceeding may be dismissed for cause upon motion of a party or by the Board.

#### 65.69. Expedited proceedings

(a) Upon application of any party showing good cause or on its own motion, the Board may order an expedited proceeding.

(b) When an expedited proceeding is ordered, the Board will promptly notify all parties.

(c) The hearing officer assigned in an expedited proceeding may make necessary rulings and give directions to the parties without reference to time periods prescribed by these rules, may order daily transcripts of the hearings, and will do anything necessary to complete the proceeding in the minimum time consistent with fairness.

#### 65.70. Restrictions on Commissioner of Labor's participation

In any proceeding noticed pursuant to these rules, the Commissioner of Labor shall not participate in or advise with respect to any decision of the Board.

## **Amendments to sections 68.2 (b), 70.1 (c), 70.5 (c), 71.6 (b), 72.1 (e), and 73.2.**

Section 68.2 (b) is amended to read as follows:

(b) A proceeding under this Part shall be commenced by filing with the board, at its Albany office, [the original and three conformed copies of] a petition executed in accordance with the provisions of Part 6[6]5 of this Subchapter.

Section 70.1 (c) is amended to read as follows:

(c) The State Minimum Wage Act (Article 19) empowers the Commissioner of Labor to establish minimum wage orders and regulations for certain occupations in accordance with the procedure prescribed therein. Article 19-A provides that minimum wage standards shall apply to farm workers, who prior to that enactment were excluded from minimum wage regulation. Such orders and regulations are final unless appealed as provided in Sections 657 and 676, respectively. Those sections accord an aggrieved party in interest the right to petition the Board to determine whether such orders or regulations are contrary to law. The jurisdiction of the Board to entertain such a proceeding is primary and exclusive. Its decision is final, subject to a direct appeal to the Appellate Division of the Supreme Court, Third Judicial Department, within sixty days after its decision is issued. The findings of the Commissioner of Labor as to the facts on any appeal from the provisions of a minimum wage order or regulation are conclusive. An appeal to the Board does not stay a minimum wage order or regulation issued under the Minimum Wage Acts unless the appellant provides security or obtains a waiver of security as prescribed in sections 657 or 676, supra. The nature of an appeal from wage orders and regulations differs in material respects from an appeal of a compliance order under Section 677 (see Part 71) and from a review of an order issued under Section 218 or Section 219 (see Part 6[6]5).

Section 70.5 (c) is amended to read as follows:

(c) The Commissioner of Labor shall serve by mail, or by any other method permitted by the Board including but not limited to electronically, one copy of the answer upon each petitioner, or the attorney or authorized representative of record, and shall file the original with the Board with proof of such service.

Section 71.6 (b) is amended to read as follows:

(b) The Commissioner of Labor shall serve by mail, or by any other method permitted by the Board including but not limited to electronically, one copy of the answer upon each Petitioner, or the attorney or authorized representative of record, and shall file the original with the Board with proof of such service.

Section 72.1 (e) is amended to read as follows:

(e) If a party deems that an "unsafe notice" or *Notice of Violation and Order to Comply* is unreasonable or invalid, a petition to revoke, amend or modify the same may be filed [under section 101] as provided in Part 6[6]5 of this Subchapter. If a party desires to continue to use the tagged machinery, equipment, device or area pending the resolution of [the section 101] that proceeding, an application therefor must be made under this Part. Such an application should be made either contemporaneously with or after the filing of a petition pursuant to Part 65[under section 101].

Section 73.2 (a) is repealed and replaced with a new Section 73.2 (a) which reads as follows:

(a) Requests for records under the Freedom of Information Law may be made in writing to the Board's principal office located in Albany, New York. The Board shall publish the address of its principal office located in Albany, New York on the Board's website, as well as any email address or other electronic method designated for such requests.