

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

DOMINICK HUDYBERDI, :

Petitioner, :

To Review Under Section 101 of the Labor Law: :

A Notice of Violation and Order to Comply dated April 1, 2022, :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent, :

DOCKET NO. PES 22-005

RESOLUTION OF DECISION

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APPEARANCES

Dominick Hudyberdi, petitioner pro se.

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

WHEREAS:

This proceeding was commenced when petitioner filed a petition with the Industrial Board of Appeals (hereinafter “Board”) on June 3, 2022. On June 16, 2022, the Board served the petition on respondent Commissioner of Labor. Respondent moved on July 6, 2022, to dismiss the petition for being untimely. Petitioner submitted opposition to the motion on July 14, 2022 and respondent filed a reply on August 18, 2022. Petitioner filed another response on August 19, 2022 and respondent filed a reply October 12, 2022.

The petition seeks the Board’s review of a Notice of Violation and Order to Comply dated April 1, 2022 against petitioner’s employer. Petitioner objects to the Notice of Violation and Order to Comply because the inspection did not follow the protocol set forth in the Public Employee Safety and Health (hereinafter “PESH”) Division field operations manual and because the PESH Division did not properly follow-up on a violation to a related matter that was issued against the employer in 2012.

Respondent moved to dismiss the petition because it was filed more than 60 days after the Notice of Violation and Order to Comply being appealed was issued. Labor Law § 101 (1) 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 . . . order made by the commissioner . . . Such petition shall be filed with the board no later than sixty days after the issuance of such . . . order.”

The order to be reviewed was issued on April 1, 2022, and therefore, respondent asserts, any petition for review filed with the Board after May 31, 2021, is untimely. Petitioner opposes respondent’s motion asserting that he was never served with the Notice of Violation and Order to Comply as required by the PESH Division’s Field Operations Manual, rather only the “union leaders” were served with it, nor was it posted on the bulletin board at his worksite, as required the PESH Division’s Field Operations Manual. Petitioner also asserts that Board Rules of Procedure and Practice (hereinafter “Board Rules”) (12 NYCRR) § 65.19 [a] does not assert whether the 60-day deadline for filing a petition is 60 calendar or 60 business days and petitioner asserts that respondent must prove that petitioner was served with a copy of the Notice of Violation and Order to Comply. Petitioner additionally states that he received the Notice of Violation and Order to Comply in “late May of 2022.” Respondent filed a reply letter asserting that respondent did not know petitioner’s identity because he filed a complaint with the federal Occupational Safety and Health Administration (hereinafter “OSHA”), which referred it to the PESH Division without identifying petitioner. As such, respondent asserts, petitioner did not have standing during the investigation. Respondent further asserted that she is only required to serve the Notice of Violation and Order to Comply on the employee representative of the union, which she did, and provided it to the employer with a directive to place it on the bulletin board on the worksite. Respondent contends that when an investigator conducted an investigation of petitioner’s worksite, the Notice of Violation and Order to Comply was posted on the bulletin board. Thus, respondent asserted, she served the Notice of Violation and Order to Comply as required and petitioner had constructive notice of it.

Petitioner also argues that since a later inspection (#1601428) states that some of the alleged hazards were covered by the inspection (#1518464) which gave rise to the Notice of Violation at issue here, and he was a complainant in that later investigation, he was required to be served with the Notice of Violation at issue here. Respondent argues that the Notice of Violation in this matter was issued on April 1, 2022, while the later inspection report (#1601428) indicates that it was based on a complaint which was not received until April 20, 2022, so it could not serve as a basis to find that petitioner was a complainant in this matter and thus required to be served with the Notice of Violation contested herein.

The order to be reviewed was issued on April 1, 2022, and therefore, any petition for review filed with the Board after May 31, 2022, is untimely (Board Rules [12 NYCRR] § 65.19). Petitioner asserts that the Board Rules are silent as to whether a petition must be filed 60 calendar or business days after the date of the notice or order under review. Unless defined as business days, the days shall be counted as calendar days and the Board Rules explicitly provide that if the last day of filing falls on a Saturday, Sunday or legal holiday, the filing deadline is extended until the next business day (Board Rules [12 NYCRR] § 65.10 [a]). Petitioner asserted that he received the Notice of Violation and Order to Comply in late May 2022 but does not assert what date he received it. Nonetheless, as the final date to file was on May 31, 2022, petitioner has no excuse for his late filing, nor is the Board permitted to extend the statute of limitations for filing a petition (Board Rules [12 NYCRR] § 65.19 [b]). Petitioner has also failed to prove that he was entitled to

service of the Notice of Violation based on his possible status as a complainant in a later investigation. As the petition in this proceeding was filed on June 3, 2022, clearly after the statutory deadline to file it, and petitioner has not offered a legally sufficient reason to excuse the late filing, we find that the petition was untimely and must be dismissed.

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 November 9, 2022.



Molly Doherty, Chairperson



Michael A. Arcuri, Member



Najah Farley, Member



Patricia Kakalec, Member



Sandra Abeles, Member