

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
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COUNTY OF NASSAU, :
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Petitioner, :
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To Review Under Section 101 of the Labor Law: : DOCKET NO. PES 22-006
A Notice of Failure to Abate Violation and Order to :
Comply dated March 15, 2022, : RESOLUTION OF DECISION
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- against - :
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THE COMMISSIONER OF LABOR, :
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Respondent, :
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APPEARANCES

Lamb & Baronsky, Melville (Richard K. Zuckerman, Esq. and Matthew J. Mehnert, Esq. of counsel), for petitioner.

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 May 23, 2022. The Board stated that the petition was filed on July 7, 2022 when it served the petition on respondent because the petition was received in the Board’s offices on July 7, 2022; however, the petition was deposited with FedEx, according to the envelope in which it was mailed, on May 23, 2022 for delivery to the Board and received in the building where the Board is housed on May 24, 2022. Pursuant to Board’s Rules of Procedure and Practice (hereinafter “Board Rules”) [12 NYCRR] § 65.17, if a petition is timely postmarked, it will be considered timely filed. We do not know why it took approximately 6 weeks for the FedEx envelope in which the petition was mailed to be delivered to the Board’s offices by the building’s mail room. Thus, we now correct the filing date to May 23, 2022.

On July 27, 2022, the Board served the petition on respondent Commissioner of Labor but inadvertently did not include all the pages of the petition. The complete petition was served on

respondent on August 11, 2022. Respondent moved on August 24, 2022, to dismiss the petition for being untimely. Petitioner submitted opposition to the motion on October 7, 2022. Respondent did not file a reply to the opposition.

The petition seeks the Board's review of a Notice of Failure to Abate Violation and Order to Comply (hereinafter "notice and order") dated March 15, 2022 against petitioner. Petitioner asserts that it was in compliance with the regulations that respondent asserts that it violated prior to the compliance date set forth in the notice and order and, thus, it was invalid or unreasonable for respondent to assess penalties.

Respondent moved to dismiss the petition because it was filed more than 60 days after the notice and order being appealed were 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 notice and order to be reviewed were issued on March 15, 2022, and therefore, respondent asserts, any petition for review filed with the Board after May 16, 2022, is untimely. Petitioner opposes respondent's motion asserting that petitioner did not receive the notice and order until March 22, 2022 and, thus, the statute of limitations to file the petition started on March 22, 2022, not March 15, 2022. Petitioner explains that where Labor Law § 101 (1) provides that a petition must be filed within 60 days after the "issuance" of the subject order, the term "issuance" is not defined in the Labor Law and, thus, the statute of limitations should be based on when petitioner received the subject order, which was March 22, 2022 in this case.

We reject petitioner's interpretation of when the statute of limitations to file a petition began to run and agree with respondent that the statute of limitations began to run on March 15, 2022. The Board has repeatedly found that the time to file a petition with the Board runs from the date on the order of which petitioner seeks review, not the date when petitioner receives the order (*Matter of John M. Marra and Long Island Emergency Services*, Docket No. PR 11-043, at p. 1 [July 26, 2011] *citing Matter of Randall J. Friedman*, Docket No. PR 10-175 [April 27, 2011]). That time may not be extended unless service of the order of which petitioner is seeking review is defective. Petitioner alleges no such defect here. The order to be reviewed was issued on March 15, 2022, and therefore, any petition for review filed with the Board after May 16, 2022, is untimely (Board Rules [12 NYCRR] § 65.19). As the petition in this proceeding was filed on May 23, 2022, 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 January 11, 2023.



Michael A. Arcuri, Member



Patricia Kakalec, Member



Molly Doherty, Chairperson



Najah Farley, Member



Sandra Abeles, Member