New York State
Industrial Board of Appeals

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: RAM HOTELS, INC. (T/A Rodeway Inn), Petitioner, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-078 INTERIM RESOLUTION OF DECISION

WHEREAS:

STATEMENT OF THE CASE

On June 10, 2008,[1] Petitioner's owner Manish Patel, appearing *pro se*, filed with the Industrial Board of Appeals a petition for review of an order issued by Respondent Commissioner of Labor (Commissioner). The petition states that "we. . . hereby formally appeal . . . for several reasons," and alleges that:

> "Most of the employees listed [in the order] have incorrect occupational classifications, incorrect wage calculations and the Order shows conflicting civil penalty amounts.
>
> "At the time the audit was taken, we notified the auditors of the correct occupational classifications, but they remain incorrect on the Order to Comply. Also, many of the calculations are incorrect."

[1] Unless otherwise noted, all dates are in 2008.

By letter dated June 13, enclosing a copy of the Board's Rules of Practice and Procedure (Rules) (12 NYCRR Part 66), the Board directed Mr. Patel to file an amended petition and a copy of the Order(s) sought to be reviewed in accordance with the Rules. The letter states:

> "The petition that the Board received from you does not conform to the Rules' requirements for the content of a petition for review of a Commissioner's order. *See* section 66.3 of the Rules. Among the deficiencies in the petition are that it fails to state your telephone number and the telephone number of the petitioner RAM Hotel, Inc., if different. The petition also fails to include a copy of the order(s) sought to be reviewed. The order is jurisdictional, and in its absence we are unable to determine the timeliness of the appeal."

The letter directs the Petitioner to file an amended petition on or before July 14 or risk dismissal of the appeal.

The Petitioner failed to file either an amended petition or any orders, and accordingly the Board dismissed the petition by Resolution of Decision (Decision) dated September 24. A certified copy of the Board's Decision was served by mail on the Petitioner and the Respondent on September 26.

Through counsel, on October 30 the Petitioner filed a motion for reconsideration of the Board's September 24 Decision pursuant to Rule 65.41(b). The motion requests reinstatement of the petition for review and leave to amend the petition. A copy of two orders sought to be reviewed, both dated April 29, and a proposed amended petition were filed with the motion, along with supporting affidavits of Petitioner's attorney and Petitioner's General Manager Kruti Patel.

The enclosed order to comply with Labor Law article 19 (wage order) finds that the Petitioner paid certain named employees at "a wage rate below the minimum prescribed in [the] Minimum Wage Order" during various periods from September 2004 through January 23, 2008.The wage order finds that Petitioner owes wages in the amount of $78,382.33, interest at 16% in the amount of $13,720.47, and a civil penalty of $19,596.00, for a total of $111,698.80 due and owing.

The other order enclosed with the motion (penalty order) was issued under Labor Law articles 6 and 19 and finds that Petitioner violated: (1) Labor Law § 661 and 12 NYCRR § 138-3.1 "by failing to keep and/or furnish true and accurate payroll records for each employee" for the period from about March 29, 2005 through January 13, 2008; (2) Labor Law § 191.1a "by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned" during the period from about August 8, 2004 through January 13, 2008; and (3) Labor Law § 191.1d "by failing to pay clerical and other workers in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on pay days designated in advance" during the period from about March 29, 2005 through January 13, 2008. For each of these three counts the penalty order assesses a civil penalty against the Petitioner in the amounts of $200, $100, and $100, respectively, for a total due of $400.

The affidavit of Petitioner's General Manager supporting the motion states that she was present during the Department of Labor's investigation of the Petitioner and that she provided the payroll records that the Department of Labor's investigator requested. After the investigation was concluded, the General Manager advised the Department of Labor (DOL) investigator that some of employees had been misclassified and that minimum wage underpayments had been miscalculated. In response, the investigator told her to request a DOL compliance conference. Although Petitioner's owner requested such a conference (a copy of his January 17 letter making such a request is attached to the General Manager's affidavit), the General Manager was later informed that DOL no longer uses a compliance conference procedure. Thereafter the April 29 wage and penalty orders were issued.

The General Manager's affidavit continues that on about June 30, the Petitioner received a letter from DOL's Supervisor of Labor Standards Investigators stating that DOL had not received any notice from the Board that a petition appealing the orders had been filed with the Board. (A copy of this letter is annexed to the General Manager's affidavit.) However, when the General Manager contacted the DOL Supervisor soon after receipt of the June 30 letter and apparently in response to it, she was informed that an appeal had been received and assigned a docket number.

The General Manager's affidavit asserts that it was only upon receipt of the Board's September 24 Decision dismissing the petition that she first became aware of the June 13 letter directing the Petitioner to file an amended petition by July 14. Her affidavit continues that she was "simply waiting for a hearing to be scheduled" and that when the Petitioner received the Decision, the General Manager checked the Petitioner's records and found nothing indicating that the Board's June 13 letter was ever received. She states that had she received the Board's June 13 direction, she "certainly would have complied. . . and [is] unable to explain why RAM Hotels never received this correspondence."

The General Manager urges that the Board grant the motion because to do otherwise prejudices the Petitioner by requiring that it pay $111,698.80 in back pay, interest, and civil penalties when it has meritorious objections to the orders as set out in the petition filed on June 10.

Similarly, the affidavit of Petitioner's counsel urges that the motion be granted because Petitioner should not be deprived of the opportunity to have the issues raised in the petition and the proposed amended petition addressed on the merits because of an "apparent mailing irregularity." Petitioner's proposed amended petition asserts that some employees whom the Commissioner classified as clerical were actually manual workers and vice versa; wages were found due for a Claimant for a period in which he was not employed by Petitioner; the Commissioner failed to credit Petitioner for lodging that Petitioner provided to some employees; employees were paid in excess of the required minimum wage rate; and the Commissioner's findings result from miscalculations.

The Commissioner opposes the motion for reconsideration, asserting through counsel that "Petitioner has made no legally recognizable argument for grant of the relief requested." First, the Commissioner argues that the document that Petitioner filed on June 10 "could not be considered a Petition due to numerous deficiencies in complying with the Board's Rules on the

proper form of a Petition (Board Rule § 66.3)" and Petitioner's time for filing a petition has expired.

Next, the Commissioner argues that because "'a properly executed affidavit of service raises a presumption that a proper mailing occurred and *a mere denial of receipt is not enough to rebut this presumption*,' (*Kihl v. Pfeffer*, 94 NY2d 118, 122 (1999)," (emphasis added by Commissioner's counsel) and because the Board "knows full well whether it mailed its own June 13 letter," the Petitioner's "mere denial of receipt" does not rebut the presumption that it received the letter.

Finally, the Commissioner characterizes the statement of Petitioner's General Manager that the Petitioner "has no record" of having received the Board's June 13 letter as equivocal and since an unequivocal denial is insufficient to rebut a presumption of Petitioner's receipt of the letter, an equivocal denial is that much more inadequate to rebut the presumption.

In reply to the Commissioner's arguments, Petitioner asserts that the Board's September 24 Decision "has already construed the Petitioner's June filing to be a petition by stating that the "[t]he above[-captioned] proceeding was commenced by the *filing of a Petition* for review pursuant to Labor Law § 101 [emphasis supplied by Petitioner]," and that a Board decision dismissing the petition would have been unnecessary if a petition had not been filed. Petitioner also points to the Board's June 13 letter which directs the filing of an amended petition as evidence that the Board treated the Petitioner's June 10 filing as a petition. Finally, Petitioner argues that as it has actively participated in appealing the findings of the Commissioner's April 29 orders, "it defies logic that [it] would have willfully ignored the Board's directive to amend the petition."

DISCUSSION

We find that Petitioner filed a timely petition on June 10. The petition provided notice of an appeal and the bases of the appeal: miscalculation of wages and penalties, misclassification of employees' occupations, and investigation errors. Board precedent requires that we reject the Commissioner's argument that Petitioner's June filing is not a petition and that Petitioner has therefore failed to timely commence review of the orders at issue. *Matter of the Petition of Borough Park Food Mart, LLC,* Docket No. PR 08-022 (September 24, 2008); *Matter of the Petition of Foster Properties, LLC (T/A Maggie's Pub)*, Docket No. 08-026 (September 24, 2008).

Next, we reject the Commissioner's argument that the Board cannot rely on Petitioner's assertion that it did not receive the Board's June 13 letter. The *Kihl* case cited in support of that argument is distinguishable. There, the presumption was based exclusively on "a properly executed affidavit of service," a critical fact that is not present in the matter before us. In addition, the presumption that the Court found was "that a proper mailing occurred" (94 NY2d at 122), not that the document that was mailed was actually received. Furthermore, such presumption, even if it were available to the Commissioner here, is rebuttable. We find that the affidavits filed in support of Petitioner's motion for reconsideration do more than "merely deny"

receipt of the Board's letter;[2] they also establish that Petitioner actively and repeatedly responded to DOL's investigation and the Commissioner's orders such that the Board may reasonably infer that Petitioner was unlikely to ignore the Board's June 13 letter if it had actually received it or known about it.

Finally, we note that the Commissioner does not argue that any prejudice would result from granting Petitioner's motion, while Petitioner urges that the Board's failure to grant its motion would prejudice it.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Petitioner's motion for reconsideration is granted; and

2. The Petitioner's petition filed on June 10, 2008 is reinstated; and

3. The Petitioner's proposed amended petition is accepted as Petitioner's amended petition and deemed filed as of the date of this Interim Resolution of Decision; and

4. A copy of the amended petition with the orders to be reviewed attached is to be served by the Board on the Commissioner of Labor in accordance with the Rule 66.4; and

5. The Commissioner of Labor's answer to Petitioner's amended petition shall be filed with the Board in accordance with the Rule 66.5.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 17, 2008.

[2] We read the affidavit of Petitioner's General Manager differently than the Commissioner urges us to; we do not find her assertion that the Petitioner did not receive the Board's June 13 letter to be equivocal.