

# **Industrial Board of Appeals**

## **Rules of Procedure and Practice**

**Parts 65, 66, 67, 68, 69, 70, 71, 72 and 73 of Title 12 of the Official Compilation of  
Codes, Rules and Regulations of the State of New York State  
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**New York State  
Department of Labor  
Industrial Board of Appeals**

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## **Introduction**

The New York State Industrial Board of Appeals was established by the Legislature in 1975, within the Department of Labor only for administrative purposes. The Board is an autonomous, independent, quasi-judicial review agency. It consists of five members appointed by the Governor with the advise and consent of the Senate. Its duties and powers include:

1. Review of the validity of reasonableness of certain rules, regulations or orders made under the Labor Law (Section 101 of the Labor Law).
2. Approval of certain corporate instruments. (Business Corporation Law, Sections 404(j) and 1002)(Not for Profit Corporation Law, Section 404)
3. Cancellation of the provisional filing or the revocation of the permanent filing of union labels on grounds set forth in Section 208 of the Labor Law.
4. Review of determinations made by the Commissioner of Labor upon applications for a dispensation under Article 5 of the Defense Emergency Act.
5. Review of minimum wage orders and regulations and determination of security for a stay thereof pursuant to Sections 657 and 676 of the Labor Law.
6. Determination of appeals from minimum wage compliance orders issued by the Commissioner of Labor in respect to minimum wage orders or regulations, or any provision of Article 19A of the Labor Law and to determine security for a stay pursuant to Sections 658 and 677 of the Labor Law.

### **Note**

**The board is not a law enforcement agency and exercises no enforcement functions.**

**New York State Industrial Board of Appeals  
Rules of Procedure and Practice**

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## **The Industrial Board of Appeals Rules of Procedure and Practice**

Title 12 of the New York State Official Compilation of Codes, Rules and Regulations, Chapter 1,  
Subchapter B, Part 65-73, inclusive.

### **Part 65 Sub-Part A General**

(References to “Article” and “Section” are to Articles and Sections of the New York State Labor Law, unless otherwise indicated).

#### **65.1 Application.**

- (a) This Part shall apply to the filing, processing, hearing, consideration and determination of every proceeding wherein they may be relevant and appropriate.
- (b) When no substantial right is prejudiced thereby, the Board may on its own motion or that of any party, suspend the application of any provision of these rules in a specific proceeding, or waive compliance therewith.

#### **65.2 Gender and number.**

- (a) Words importing the singular number may extend to be applied to the plural, and vice versa.
- (b) Words importing the masculine gender may be applied to the feminine gender.
- (c) The word *person* shall include an individual, corporation, partnership, unincorporated association, or other legal entity, as context may require.

#### **65.3 Computation of Time.**

- (a) In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.
- (b) When the period of time prescribed or allowed is less than seven (7) days, Saturdays, Sundays and legal holidays shall be excluded in the computation.
- (c) Where a period of time prescribed by these rules (except in the case of Petitions required to commence a proceeding) is measured from the service of a paper, and service is by mail; five (5) days shall be added to the prescribed period.
- (d) Where a period of time prescribed by these rules (except in the case of Petitions required to commence a proceeding) is measured from the service of a paper, and service is by overnight delivery service, one (1) day shall be added to the prescribed period.

#### **65.4 Record Address.**

- (a) All pleadings and papers filed with the Board shall contain the name, address and telephone number of the person filing the same. Any change in such information must be communicated promptly, in writing to the Board.

- (b) The failure to furnish such information shall be deemed a waiver of the right to notice and service under these rules.

**65.5 Filing and Docketing.**

- (a) An original and three conformed copies of all papers required to be filed with the Board under these rules shall be filed with the Board, at its Albany office.
- (b) Unless otherwise ordered, all filing may be accomplished by first class mail or by personal service.
- (c) Papers shall be deemed filed only upon receipt at the Board's office.
- (d) Any pleading post-marked within the time provided for by these rules shall be deemed timely filed.
- (e) The Board shall maintain a docket of all cases, and all papers filed in such proceedings shall be appropriately docketed.
- (f) The time period provided for the filing of Petitions, applications and other documents may vary depending upon the specific nature of the proceeding. Reference is made to several provisions of Parts 66-73, inclusive, of this Subchapter, as they may apply to a relevant proceeding.
- (g) Requests for extensions of time for filing or any pleading or other paper must be received in advance of the date on which the pleading or paper is due to be filed.

**Note: (Time periods prescribed by statute cannot be extended.)**

**Sub-Part B  
Parties and Notice of Proceedings**

**65.6 Party Status.**

- (a) The term *party* shall include a petitioner, an applicant, a respondent, an intervenor, an objector, and the Commissioner of Labor.
- (b) The service of any Petition, application or notice in a proceeding upon any person (including the Commissioner of Labor or the Department), either by a party or by the Board, shall constitute such person a party to such proceeding.

**65.7 Intervention.**

- (a) Intervention shall be permitted, if at all, in the Board's sole discretion.
- (b) An application for leave to be heard or to intervene as a party shall be made in writing (an original and three complete conformed copies). While the application may be made at any stage of a proceeding, it must be received by the Board prior to the commencement of the hearing.
- (c) The application shall:
  - (1) identify the applicant;
  - (2) specify the interest of the applicant in the proceeding;
  - (3) show that applicant's participation will assist in the determination of the issues raised in the proceeding; and
  - (4) show that such participation as the Board may permit will not unnecessarily delay the proceeding.

- (d) If an application for leave to be heard or to intervene as a party is granted, the Board may limit the extent of and the terms on which such participation shall be permitted.

**65.8 Representative of Parties.**

- (a) Any party may appear in person, by an attorney-at-law or by a designated agent authorized to act in such capacity. Such authorization shall be set forth in a written statement signed by such party, or by an appropriate officer thereof and filed with the Board.
- (b) An attorney-at-law or designated agent of a party shall be deemed to control all matters respecting the interest of such party in the proceeding.
- (c) Withdrawal of appearance of any representative may be effected by filing the original and two copies of a written notice of withdrawal with the Board.
- (d) Attorneys or other authorized agents shall file an appearance notice on forms to be provided by the Board.

**65.9 Service and Notice by or on Parties.**

Proof of service shall be endorsed upon or annexed to all pleadings (other than the initial application or Petition) and other papers to be submitted to or filed with the Board.

**65.10 Service and Notice by Board.**

- (a) Service and notice by the Board shall be accomplished by postage-prepaid first class mail. Service is deemed effected at the time of mailing.
- (b) Service upon a party who has appeared through a representative shall be made upon such representative.

**Sub-Part C  
Pleadings and Motions**

**65.11 Form.**

- (a) Except as provided herein, there are no specific requirements as to the form of any pleading. A pleading must contain information sufficient to identify the parties and include the Board's docket number, if assigned.
- (b) Pleadings and other documents (other than exhibits) shall be legible, preferably typewritten or printed, double-spaced, on letter-size opaque paper (approximately 8 1/2 x 11 inches).

**65.12 Pleadings and Motions.**

- (a) Reference is made to the various provisions of Parts 66-73, inclusive, of this Subchapter, for rules regarding pleadings.
- (b) All motions, rulings and orders, except as otherwise provided for in any other of these rules, shall become part of the record. Except by permission of the Board, rulings by the Hearing Officer during the conduct of a hearing shall not be appealed or referred directly to the Board, but shall be considered by the Board upon its review of the complete record.
- (c) The right to make motions or to make objections to rulings shall not be deemed waived by participation in a proceeding.

**65.13 Motions Addressed to Pleading; Time for Filing.**

- (a) If any matter contained in a petition, answer or reply be frivolous, irrelevant, redundant, repetitious, unnecessary, impudent, or scandalous, or may tend to embarrass or delay the hearing or consideration of a proceeding, the Board, on its own motion or on the motion of any party made on ten (10) days' notice of motion, may order such material stricken. In such case, the pleading will be deemed amended accordingly, or the Board may order that an amended pleading be served, omitting the objectionable material.
- (b) If any material contained in a petition, answer or reply be so indefinite, uncertain or obscure that the precise meaning or application thereof is not readily apparent, the Board, on its own motion or on the motion of any party made on ten (10) days' notice of motion, may order the party responsible to file and serve an amended pleading.
- (c) The motions referred to in subdivision (a) and (b) of this section shall be made by a party within thirty (30) days after service of the Petition, answer or reply.
- (d) (1) Within thirty (30) days after the receipt of a Petition, any respondent may, upon ten (10) days' notice of motion, move for an order dismissing the Petition where it appears that:
  - (i) the Board lacks jurisdiction in the matter;
  - (ii) the Petitioner is not an interested party; or
  - (iii) the Petition fails to comply with the provisions of either Section 101 or the Board's Rules.
- (2) Thereafter, such motion shall be made only by permission of the Board.

**65.14 Failure to File.**

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

**Sub-Part D  
Pre-Hearing Procedure and Discovery**

**65.15 Withdrawal of Petition or Application.**

At any stage of a proceeding, a party may withdraw his Petition or application, subject to the approval of the Board.

**65.16 Pre-hearing Conference.**

At any time before a hearing, the Board or the Hearing Officer, on their own motion or on motion of a party, may direct the parties or their representatives to exchange information or to participate in a pre-hearing conference for the purpose of considering matters which will tend to simplify the issues, or expedite the proceeding.

**65.17 Bills of Particulars; Procedures.**

- (a) Within eight days after issue is joined, any party to a proceeding under this Part may demand a bill of particulars from any other party of the claim or contentions set forth in a pleadings. Thereafter, such demand shall be made only by motion to the Board.
- (b) A demand for a bill of particulars shall be made by serving a written notice stating the times concerning which such particulars are desired. If the party upon whom such notice is served is unwilling to give such particulars, in whole or in part, he may move to vacate or modify such notice within eight (8) days after receipt thereof. Such motion shall be

made on eight (8) days' notice. The notice or supporting papers shall specify clearly the objections and the grounds therefor. If no such motion is made, the bill of particulars shall be served within eight (8) days after the demand therefor, unless the Board shall otherwise direct.

- (c) The original demand and, if a bill of particulars is served, the original and three (3) copies of such bill shall be filed promptly with the Board.
- (d) In the event that a party fails to serve a bill of particulars or where a bill of particulars is regarded as defective or insufficient by the party upon whom it is served, the Board, upon written application, may make an order of preclusion, direct the service of a further bill or grant such other order as it may deem proper. In the absence of special circumstances, application for such relief shall be made within eight (8) days after the time to serve a bill has expired or within eight (8) days after the receipt of the bill claimed to be defective or insufficient, as the case may be. Such application shall be filed with the Board, with proof of service upon the other party attached or annexed thereto, and shall be returnable before the Board not less than eight (8) days from the date of service.

**65.18 Discovery Depositions and Interrogatories.**

- (a) Except by order of the Board, discovery depositions of parties or witnesses, or interrogatories directed to parties or witnesses, shall not be allowed.
- (b) In the event the Board grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate terms and conditions governing the discovery.

**65.19 Failure to Comply with Orders for Discovery.**

If any party fails to comply with an order of the Board directing discovery in accordance with the provisions of these rules, the Board may issue appropriate orders.

**65.20 Subpoenas.**

- (a) The Board, by one or more members, shall have the power to issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, papers, documents and other evidence. Applications for subpoenas shall be filed with the Board and such applications may be ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.
- (b) Any person served with a subpoena shall, within ten (10) days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena, if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceeding, or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Board shall make a statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto and any ruling thereon, shall become a part of the record.
- (c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.
- (d) Subpoena forms shall be requested and obtained from the Board, completed by the requesting party and submitted to the Board for issuance. Service of subpoenas shall be effected by the requesting party.

## **Sub-Part E Hearings**

### **65.21 Notice.**

Notice of the time, place and nature of a hearing shall be given by the Board to the parties at least ten (10) days in advance of such hearing.

### **65.22 Hearing: Who Shall Conduct; To be Public Unless Otherwise Ordered.**

A hearing in any proceeding may be conducted by one or more Board members or an employee of the Board designated as a Hearing Officer by the Board. At anytime a Hearing Officer may be designated by the Board to take the place of a person or persons previously designated to conduct a hearing. Every hearing shall be public unless otherwise ordered by the Board.

### **65.23 Postponement.**

- (a) Postponement of a hearing ordinarily will not be allowed.
- (b) Except in the case of an emergency or in unusual circumstances, no request for postponement will be considered unless received in writing at least seven (7) days in advance of the time set for hearing.
- (c) No postponement shall be allowed without the Board approval.

### **65.24 Failure to Appear.**

- (a) Subject to the provisions of subdivision (c) of this section, the failure of a party to appear at a hearing shall be deemed to be a waiver of all rights except the rights to be served with a copy of the decision of the Board and to request Board review pursuant to Section 65.41 of this part.
- (b) Request for reinstatement must be made, in the absence of extraordinary circumstances, within five (5) days after the scheduled hearing.
- (c) The Board upon a showing of good cause, may excuse such failure to appear and in such event the hearing will be reopened.

### **65.25 Payment of Witness Fees and Mileage; Fees of Persons Taking Depositions.**

Witnesses summoned before the Board or the Hearing Officer shall be paid the same fees and mileage that are paid witnesses under the provisions of the Civil Practice Law and Rules of the State of New York, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the State of New York. Witness fees and mileage shall be paid by the party of whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

### **65.26 Transcript of Testimony.**

Hearings shall be transcribed verbatim. A copy of the transcript of testimony taken at the hearing, duly certified by the reporter, shall be maintained on file with the Board. Copies of the transcript may be obtained by the parties upon written application filed with the Board pursuant to the provisions of Part 73 of these Rules.

### **65.27 Duties and Powers of Hearing Officer.**

A member or employee of the Board designated to conduct a hearing or investigation shall have the following duties and powers:

- (1) To conduct any investigation ordered by the Board.
- (2) To report findings of investigations to the Board.
- (3) To hold and conduct a hearing, when ordered by the Board, relating to any matter pertaining to the Board's exercise of its functions.
- (4) To call, examine and cross-examine witnesses.
- (5) 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 the investigation.
- (6) To examine and receive any document or other evidence which is deemed pertinent, relevant or necessary to the investigation.
- (7) 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.
- (8) To regulate, in any matter, the course of the hearing, subject to confirmation by the Board.
- (9) 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.
- (10) 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.

**65.28 Duties and Powers of Board Members.**

In addition to those powers and duties mentioned and described in Section 65.27 of this Part, the Board by one or more of its members shall have the following duties and powers:

- (1) To administer oaths and affirmations;
- (2) To take affidavits.
- (3) To issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, papers, documents and other evidence.
- (4) To rule upon petitions to revoke, amend or modify subpoenas or subpoenas duces tecum, subject to confirmation by the Board;
- (5) To rule upon offers of proof and receive relevant evidence;
- (6) To dispose of procedural requests or similar matters; and
- (7) To allow any petition, answer or other paper 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.

**65.29 Rules of Evidence.**

The Board and the Hearing Officer shall not be bound by technical rules of procedure and evidence.

**65.30 Burden of Proof.**

The burden of proof of every allegation in a proceeding shall be upon the person asserting it.

### **65.31 Examination of Witnesses.**

Witnesses shall be examined orally under oath or affirmation. Opposing parties shall have the right to cross-examine any witness whose testimony is introduced by an adverse party.

### **65.32 Exclusion from Hearing; Striking Testimony.**

Contumacious or contemptuous conduct before the Board or Hearing Officer shall be ground for exclusion from a hearing. The refusal of a witness at any hearing to answer a question which has been found by the Board to be proper shall, in the discretion of the Board, be ground for striking of all or any part of the testimony previously given by such witness on related matters.

### **65.33 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 shall be included in the record. No such objection shall 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 shall be included in the record of the proceeding.

### **65.34 Deposition in Lieu of Oral Testimony; Application; Procedures; Form; Rulings.**

- (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 shall be in writing and shall set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected he will testify and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for purposes of this section, hereinafter referred to as the officer). Such application shall be filed with the Board, with proof of service thereof on all other parties. If the application is granted, the Board shall 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. Such officer may or may not be the officer specified in the application.
- (b) Such deposition 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 shall 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 shall be recorded verbatim and reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objection, but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer, who shall attach his certificate stating that the witness was duly sworn by him, 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 he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may be used as fully as though signed. The officer shall immediately deliver an original and four copies of the transcript, together with his certificate, in person or by certified mail to the Board at its Albany office.

- (d) The Board shall rule upon the admissibility of the deposition or any part thereof.
- (e) The right to object to any error or irregularity that does not comply with the provisions of this section 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.
- (f) If the parties so stipulate in writing, the disposition 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.

**65.35 Exhibits.**

- (a) All exhibits offered in evidence shall be numbered and marked with a designation identifying the party by whom the exhibit is offered.
- (b) In the absence of objection by another party, exhibits shall be admitted into evidence as part of the record, unless excluded by the Board upon proper ground.
- (c) Unless the Board finds it impractical, a copy of each exhibit shall be provided by the offering party to the other parties, and the Board.
- (d) All exhibits offered, but denied admission into evidence, shall be identified as in subdivision (a) of this section and shall be placed in a separate file designated for rejected exhibits.

**65.36 Filing of Briefs and Proposed Findings with the Board; Oral Argument at Hearing.**

Any party shall be entitled, upon request, to a reasonable period before the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief, proposed findings of fact, and conclusion of law, or both, with the Board. The Hearing Officer shall fix a reasonable period of time for such filing.

**65.37 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.

**Sub-Part F  
Decisions and Post Decision Actions**

**65.38 Record of Proceedings.**

- (a) The Hearing Officer shall, within a reasonable time after any hearing held, transmit the record of the proceeding together with his report to the Board for decision.
- (b) The record in any proceeding held pursuant to this Part shall include: the Petition or application; the answer; the reply, if any; motions and requests filed in written form and rulings thereon; any documents or papers filed in connection with pre-hearing conferences; the transcript of the testimony taken at the hearing, together with the exhibits admitted in evidence; any written statement, objections or briefs as may have been filed.

**65.39 Decision of the Board.**

Within a reasonable time after any hearing held pursuant to this Part, the Board shall make, and issue to each affected party, a decision which shall be in the form of a resolution adopted by a

majority vote of the Board. Such resolution shall contain findings of fact and law upon which the decision is based.

**65.40 Finality for Purposes of Judicial Review.**

A Resolution of Decision of the Board shall be final, subject to judicial review as provided in the Labor Law.

**65.41 Reconsideration of Petition or Application.**

- (a) Application for reconsideration after a determination made by the Board shall be in writing, and shall state specifically the grounds upon which the application is based. When any determination, resolution, requirement or order of the Board is sought to be reversed, modified, changed, rescinded or terminated on account of facts or circumstance arising subsequent to a hearing or on account of consequences resulting from compliance with such determination, resolution, requirement or order, which are claimed to justify a reconsideration of the proceeding, the matters relied upon by the applicant shall be set forth fully.
- (b) A copy of the application for reconsideration shall be served on all parties to the proceeding by the party asking for the reconsideration, and proof of service shall be attached to the application filed with the Board. If any party to the proceeding wishes to oppose the granting of a request for reconsideration, such party must file, within ten (10) days from the receipt of a copy of the application, a statement setting forth the reasons why it is believed such a request should not be granted.
- (c) The Board, at any time, may reopen a proceeding or require a rehearing.

**Sub-Part G  
Miscellaneous Provisions**

**65.42 Settlement.**

- (a) Settlement is encouraged at any stage of the proceedings where such settlement is consistent with the provisions and objectives of the Labor Law.
- (b) Notification of a settlement agreement must be submitted in writing to the Board or entered on the record of the hearing.

**65.43 Expedited Proceedings.**

- (a) Upon application of any party or upon its own motion, the Board may order an expedited proceeding.
- (b) When such proceeding is ordered, the Board shall give notice thereof to all parties.
- (c) The Hearing Officer assigned in an expedited proceeding shall make necessary rulings with respect to time for filing of pleadings and all other matters, without reference to time set forth in these rules, shall order daily transcripts of the hearings, and shall do all other things necessary to complete the proceeding in the minimum time consistent with fairness.

**65.44 Consolidation.**

Proceedings may be consolidated on the motion of any party, or on the Board's own motion, where there exist common parties, common questions of law or fact, or both, or in such other circumstances as justice and the administration of the law require.

**65.45 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.

**65.46 Standards of Conduct.**

All persons appearing in any proceeding shall conform to the standards of conduct required in the courts of the State of New York.

**65.47 Joinder of Petitioners.**

All persons in whom any right to relief in respect of or arising out of any rule, regulation or order 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 shall appear to the Board that such 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 make such other order as may be expedient.

**65.48 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, provided that no substantial right is thereby prejudiced.

**65.49 Dismissal.**

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

**65.50 Ex Parte Communication.**

- (a) There shall be no *ex parte* communication, with respect to the merits of any case not concluded, between the Board (including any member, officer, employee, or agent of the Board who is employed in the decisional process) and any of the parties.
- (b) In the event such *ex parte* communication occurs, the Board may make such orders or take such action as fairness requires. Upon notice and hearing, the Board may take such disciplinary action as is appropriate in the circumstances against any person who knowingly and willfully makes or solicits the making of a prohibited *ex parte* communication.

**65.51 Restrictions as to Participation by the Commissioner of Labor.**

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

**65.52 Inspection and Reproduction of Documents.**

- (a) Subject to the provisions of law governing public disclosure of information and the provisions of Part 73 of this Subchapter, any person may, at the offices of the Board in Albany, inspect and copy any document filed in any proceeding.
- (b) Costs shall be borne by such person, in accordance with section 73.5 of this Subchapter.

**65.53 Restrictions with Respect to Former Employees.**

- (a) No former employee of the Board or of the Commissioner of Labor, or a member of the Board or the Commissioner of Labor, shall appear before the Board as an attorney or other representative for any party in any proceeding or other matter, formal or informal,

in which he participated personally and substantially during the period of his employment.

- (b) No former employee of the Board or of the Commissioner of Labor, or a member of the Board or the Commissioner of Labor, shall appear before the Board as an attorney or other representative for any party in any proceeding or other matter, formal or informal, for which he was personally responsible during the period of his employment, unless one year has elapsed since the termination of such employment.

## **Part 66**

### **Proceedings under Section 101 of the Labor Law**

#### **66.1 Application.**

- (a) Under Section 101 any person in interest or his duly authorized agent may, except where otherwise prescribed by law, Petition the Board for a review of the validity or reasonableness of any rule, regulation or Order made by the Commissioner of Labor under any provision of the Labor Law.
- (b) For general rules of procedure and practice not specified in this Part, see Part 65 of this Subchapter.
- (c) The Board's procedure in these matters approximates that of a judicial proceeding. Customarily, a hearing is held at which the Commissioner of Labor, represented by counsel, appears as a defending party. The hearing is de novo (original) in nature and is in no sense an appeal. The parties may submit oral or documentary evidence which is material and relevant to the issues. The Board will not take cognizance of any evidence submitted to any unit or division of the Department of Labor prior to the Petition unless it is introduced and accepted in the record of the proceeding or is a matter properly a subject of official notice.

#### **66.2 How Review to be Commenced.**

- (a) Review may be had only by filing a written Petition with the Board at its Albany office, no later than 60 days after the issuance of the rule, regulation or order objected to.
- (b) A Petition for review of an order issued under article 13 (industrial homework law) must be filed within 30 days following service of the order.

#### **66.3 Form and Content of Petition.**

The Petition shall be filed by mailing or delivering the original and three conformed copies thereof to the Board's Albany office. The Petition shall:

- (a) contain a caption in the following form:

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X

In the matter of the Petition of	:	
(insert name of Petitioner),	:	
	:	
Petitioner,	:	
	:	
To review under Section 101 of the Labor Law	:	
(state matter to be reviewed)	:	
	:	
- against -	:	
	:	
The Commissioner of Labor,	:	
	:	
Respondent.	:	

-----X

- (b) (1) state the correct mailing address and telephone number of each Petitioner;
- (2) state the location of the premises or establishment affected by the rule, regulation or order sought to be reviewed, if different from Petitioner’s address; and
- (3) state the name and address of the representative, if any, of Petitioner’s employees, if the petition is for review of a decision issued under section 30 or of a notice of violation and order to comply issued under section 27-a.
- (c) state the facts supporting the allegation that the Petitioner is a person in interest, except in cases where the Petitioner has been named in and served with a compliance order upon which the Petition is predicated;
- (d) annex a complete copy of the order, notice or decision in issue; if a rule or regulation is in issue, set it forth or identify it with particularity;
- (e) state clearly and concisely the grounds on which the matter to be reviewed is alleged to be invalid or unreasonable, omitting conclusions of fact or law;
- (f) state any other material or relevant facts;
- (g) set forth with particularity the relief requested; and
- (h) be signed by Petitioner or authorized representative

**66.4 Service of Petition on Commissioner of Labor for Answer.**

Upon the filing of a Petition, the Board shall serve a copy thereof upon the Commissioner of Labor by transmittal to the office of the Commissioner’s general counsel. If the Petition contains a statement of the name and address of the employees’ representative, the Board will mail a copy of the Petition to such representative, for informational purposes.

**66.5 Answer to Petition; Time for Answer; Contents of Answer; Service and Filing of Answer.**

- (a) The Commissioner of Labor shall, within thirty (30) days after receipt of the Petition, file an answer with the Board or move with respect to the Petition.

- (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 of Labor relies for an affirmative defense.
- (c) (1) The Commissioner of Labor shall serve by mail 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.

**66.6 Reply to Answer; Time for Reply; Contents of Reply; Service of Reply.**

- (a) If a Petitioner desires to dispute any allegations in an answer other than denials, or reply to any affirmative defense, he shall file a written reply with the Board, with proof of service of a copy thereof upon the Commissioner of Labor.
- (b) Such reply shall be served and filed within 10 days after the date of service of the answer.
- (c) The reply shall contain clear and concise factual allegations and shall contain a specific admission, denial or explanation of each of the material facts alleged in the answer. Such a denial may be upon information and belief or may be a denial of knowledge or information sufficient to form a belief as to the truth of the allegation.

**66.7 Amendment of Pleadings.**

The Petition may be amended at any time prior to the service of the answer. After an answer has been served or the time within which to serve an answer has elapsed, a pleading may be amended only by leave of the Board. Any application for leave to amend made prior to the hearing shall be made upon at least 10 days' prior written notice, and must be accompanied by the proposed amended pleading.

**66.8 Amendment of Pleadings to Conform to Proof.**

Amendment of pleadings to conform to the proof may be obtained by a party, upon leave of the Board, at any time before conclusion of the hearing.

**66.9 Stay of Rule, Regulation or Order Sought to be Reviewed; Exceptions.**

- (a) The filing of a Petition may, in the discretion of the Board, operate to stay all proceedings against the Petitioner under such rule, regulation or order 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 Section 200 shall be granted or denied by the Board within seventy-two 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 Section 658. (See subdivision 3 through 7 of Section 657.) The application shall be made in the manner provided in Section 71.10 of these Rules.
- (d) Upon filing of an application for a stay of enforcement of an order issued under Section 27-a, a Hearing Officer, designated by the Board, shall promptly schedule an on-site 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 a rule, regulation or order against anyone who has not filed a petition.

## **Part 67**

### **Proceeding for Approval of Certain Corporate Documents**

#### **67.1 Application.**

- (a) The provisions of this Part shall apply to the filing, processing, hearing, consideration and determination of an application for approval of corporate documents pursuant to Section 104 of the Labor Law. See Part 65 of this Subchapter for general rules of procedure and practice not specified in this Part.
- (b) If it is the purpose or one of the purposes of a corporation to form an organization of wage earners for their mutual betterment, protection and advancement; the regulation of hours of labor, working conditions or wages; or the performance, rendition or sale of services as labor consultant, or as an advisor on labor-management relations, arbitrator or negotiator in labor-management disputes; or if the corporate name contains certain words or phrases as set forth in Section 404(j) of the Not-for-Profit Corporation Law or Sections 201(b) and 301(a) (6) of the Business Corporation Law, the Board's approval is required prior to the filing with the Department of State of the State of New York of any of the following instruments:
  - (1) any certificate of incorporation, certificate of change and amendment, restated certificate of incorporation, certificate of consolidation, certificate of dissolution of a domestic not-for-profit (formerly membership) corporation or a statement and designation of a foreign non-profit corporation for authority to do business in this State, and amendments thereof;
  - (2) Any certificate of incorporation, certificate of change and amendment, restated certificate of incorporation, certificate of merger or consolidation of a business corporation or application of a foreign business corporation for authority to do business in this State.

**NOTE:** The Board's jurisdiction is provided for in:

1. Not-For-Profit Corporation Law, Section 404(j).
2. Business Corporation Law, Section 201(b), 301(a) (6).

(c) Labor Law Section 104 states:

“104. Corporate instruments; inquiry by Board. Whenever any corporate instrument is submitted to the Board for approval in accordance with the requirements of any statute, the Board shall make such inquiry as it may deem advisable, and shall order a hearing, if necessary, in accordance with such rules as it shall prescribe, to determine whether or not the purposes of the proposed corporation are in all respects consistent with public policy and the Labor Law, and whether the corporate name is in all respects consistent with its purposes and activities or tends to be misleading. Notice of the time and place of such hearings shall be given to the applicant and to such other persons as the Board may determine.

The Board’s statutory function is quasi-judicial rather than merely ministerial in nature. In discharging this function, the Board investigates every application to determine whether the aims, structure and proposed internal management of the applicant are consistent with the public policy and Labor Law of the State. The phrase “consistent with public policy and the Labor Law” in the above sections of the law, denotes a legislative mandate to the Board to approve incorporation only of those proposed corporate organizations whose activities and operations will not adversely affect or exert any prejudicial influence upon the State labor policy as expressed in the State and Federal laws, the decisions of the courts, and official administrative pronouncements.

- (d) Every corporate document submitted for approval is examined by the Board’s legal staff to determine its legal sufficiency. Thereafter, an investigation is made to ascertain if a public hearing is necessary. If a public hearing is held, persons and organizations who may be interested in or affected by the granting of an approval are invited to submit written comments and to attend the hearing. At the conclusion of the hearing, the applicant and objectors, if any, may at the discretion of the Hearing Officer or the Board, be permitted to file briefs.
- (e) If the Board grants approval of the document, a Resolution of Approval is appended to the submitted document and returned to the applicant for filing in the Office of the Secretary of State of the State of New York.
- (f) Board approval of documents for the dissolution of such corporations requires proof that dissolution of the corporation is essential to preserve the interests of its members and will not be injurious to the public. Such proof might include: evidence establishing that a corporation is inactive and the probability of its reactivation is remote; that the purpose or purposes for which the corporation was formed have become frustrated; that the corporate assets are in danger of being dissipated; that the corporation cannot continue to function because of a paralyzing failure of management and it is reasonably inferable that such condition cannot be remedied.

**67.2 Applications; How and Where Made.**

- (a) Every application for approval of a corporate document shall be made by submitting to the Board at its Albany office:
  - (1) a letter requesting approval;
  - (2) the original or a conformed copy of all of the duly executed documents which are required to be filed in the Office of the Secretary of State of the State of New York;
  - (3) notification from the Office of the Secretary of State that the proposed name is available, or the letter of a licensed attorney stating that name availability has been verified by a search of the records of the Secretary of State, except if the document

refers to an existing New York corporation and does not involve a change of name;  
and

- (4) such other materials and data pertinent to the application.
- (b) If an individual, trade or corporate name or a part thereof forms a part of a proposed corporate title, the applicant shall also file a consent to the use of such corporate title. If the incorporated is of an existing unincorporated group or association, the applicant must also file or attach to the document the affidavit required by Section 402(b), Not-for-Profit Corporation Law.

### **67.3 Evidence at Hearing in Support of Applications for Approval of Certificates of Incorporation or Authority to do Business in this State.**

Such persons as the Board may indicate in its notice of hearing must appear and must be prepared to show by competent and reliable evidence:

- (a) that the purposes set forth in the proposed corporate document are in fact the real aims of the subscribers to the instrument;
- (b) a description of the proposed structure and internal management of the corporate entity;
- (c) if the proposed corporation is to function as a labor union or if it is likely to affect the activities of existing labor unions, a sufficient description of the labor-management conditions and relations in the industry in which the proposed corporate organization is to operate; its intended scope of activities; its geographical area; and the impact which its operations will or are likely to have on existing labor-management relations in the field in which it seeks to operate;
- (d) such other matters, if any, as may tend to establish that the granting of the Board's approval is consistent with public policy and the Labor Law.

### **67.4 Intervention, Objections; How Raised; Evidence Thereon.**

Any person or party affected or likely to be affected by an application for approval of a corporate document may appear and be heard in support or in opposition thereto. The Board may, in its discretion, direct objections to be filed in writing and adjourn the proceeding to allow all parties a reasonable opportunity to submit evidence thereon.

## **Part 68**

### **Registration and Revocation Proceedings for Union Labels, Brands and Marks**

#### **68.1 Application.**

- (a) The provisions of this Part relate to Board proceedings pursuant to Section 208 of the Labor Law for objections to the registration of union labels, brands and marks, and to revoke such a registration if granted improperly or obtained fraudulently.
- (b) See Part 65 of this Subchapter for general rules of procedure and practice not specified in this Part.
- (c) Registration proceedings.
  - (1) Practically every labor organization has adopted a device in the nature of a label or mark to identify the products of its members. Section 208 authorizes the registration of such devices by the Commissioner of Labor.
  - (2) The rules and forms governing the registration and filing of such labels, brands and marks may be obtained from the Commissioner of Labor's office located in Building

12, State Office Campus, Albany, N.Y., 12240. Notice of the filing of such application shall be given by the Commissioner to interested persons and unions in such manner as the Commissioner shall by rule prescribe.

- (3) Within 20 days following such notice by the Commissioner, any union or aggrieved person may submit to the Commissioner a written objection to the registration of the device. If no objection is submitted, the Commissioner may register the device and issue a certificate of registration.
- (4) Objections duly filed with the Commissioner are promptly referred to the Board for a determination on whether the registration should be granted or denied.
- (5) The Board may deny registration of a device on any of the following grounds:
  - i. That the union or association of employees filing the application for registration is not a bona fide union;
  - ii. That the union or association of employees filing the application for registration is not the rightful owner thereof;
  - iii. That the union or association of employees filing the application for registration has made misrepresentations concerning the device; or
  - iv. That the device sought to be registered by the union or association of employees is so similar to a device previously registered by a union or association of employees that it is calculated to deceive.

(d) Revocation proceedings. Section 208, subdivision 4, provides:

“4. On Petition of a union or aggrieved person, the registration of any device may be revoked by the Board if it determines that the registration was granted improperly or was obtained fraudulently.”

### **68.2 How Proceeding to be Commenced.**

- (a) After objection to registration is filed (see Section 68.1(c) of this Part), or if revocation of a registered device is sought, such proceeding is initiated by the filing of a Petition with the Board. Thereafter a hearing is held at which interested parties are afforded full opportunity to present any evidence which may be relevant or have a bearing upon the issues raised in the Petition.
- (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 66 of this Subchapter

### **68.3 Service of Petition on Interested Parties.**

Upon the filing of a Petition as herein provided, the Board shall serve a copy thereof by mail or delivery to the Commissioner of Labor and to the union or association of employees which has filed or submitted for filing or registration the label or device in issue.

### **68.4 Answer to Petition; Time for Answer; Contents of Answer; Service and Filing of Answer.**

- (a) The Commissioner of Labor and the union or association of employees which has filed or submitted the device shall, within 30 days after receipt of the Petition, file their answers with the Board or move with respect to the Petition.

- (b) The respondents shall each serve personally or by mail one copy of the answer upon Petitioner, or the attorney or authorized representative of record, and shall file the original with the Board with proof of such service.
- (c) Each 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 respondent relies for an affirmative defense.

**68.5 Reply to Answer; Time for Reply; Contents of Reply; Service of Reply.**

- (a) If the Petitioner desires to dispute any allegations in an answer, other than denials, or reply to any affirmative defense, a reply shall be filed with the Board with proof of service of a copy thereof upon the respondents.
- (b) Such reply shall be served and filed within ten (10) days after service of the answer.
- (c) The reply shall contain clear and concise factual allegations and shall contain a specific admission, denial or explanation of each of the material facts alleged in the answer. Such a denial may be upon information and belief or may be a denial of knowledge or information sufficient to form a belief.

**68.6 Amendment of Pleadings.**

The Petition may be amended at any time prior to the service of the answer. After an answer has been served or the time within to serve an answer has elapsed, a pleading may be amended only by leave of the Board. All applications to amend must be accompanied by the proposed amendment and must be made upon not less than 10 days' prior written notice.

**68.7 Amendment of Pleadings to Conform to Proof.**

A motion to amend a pleading to conform to the proof may be made at any time before the conclusion of the hearing.

**68.8 Motion to Dismiss Petition; When Made; Grounds.**

- (a) Within 30 days after receipt of the Petition, any respondent may, upon 10 days' written notice of motion, move as of right for an order dismissing the Petition where it appears that:
  - (1) the Board lacks jurisdiction in the matter;
  - (2) the Petitioner is not an aggrieved party;
  - (3) the Petition fails to comply with the provisions of section 208.
- (b) Thereafter, such motion shall be made only by permission of the Board.

**Part 69**

**Appeals under the Defense Emergency Act**

**69.1 Application.**

- (a) The provisions of this Part relate to the procedure to be followed in appeals from orders issued by the Commissioner of Labor pursuant to Article 5 of the New York Defense Emergency Act.
- (b) See Part 65 of these Rules for general rules of procedure and practice not specified in this Part.

- (c) During the 1951 legislative session, the Legislature enacted the York Defense Emergency Act which became a law April 12, 1951, and, as amended, is still in force. Article 5 of this law authorizes the Commissioner of Labor in appropriate cases to grant to employers engaged in defense work dispensations from requirements imposed by or pursuant to law which prevent or employment in such defense work:
  - (1) on a seven (7) day basis;
  - (2) on a multiple shift basis
  - (3) under waiver of Section 201-a; or
  - (4) under waiver of such other provisions of law as may regulate or restrict operation, hours, equipment, places or conditions of employment, persons that may be employed, or types of work in which certain persons may engage.
- (d) Any person in interest who is aggrieved by a determination of the Commissioner of Labor with respect to an application under the said Act may, within twenty (20) days after the date of notice of such determination by the Commissioner of Labor, appeal the Commissioner's findings and decision to the Board. In such proceedings the Board acts as an administrative appellate tribunal and is empowered to affirm, reverse or modify the initial determination rendered by the Commissioner. The Board gives such appeals priority over all other matters.

**69.2 How Appeal Commenced; Time.**

- (a) An appeal under Section 75 of Article 5 of the Defense Emergency Act shall be commenced by filing a written Petition with the Board at its Albany office on or before the twentieth (20<sup>th</sup>) day after the Petitioner has received written notice of and a copy of the Commissioner's determination.
- (b) The Petition shall be filed by mailing or delivering the original and three (3) conformed copies thereof to the Board at its Albany office.

**69.3 Content of Petition.**

- (a) The Petition shall state what dispensation is desired, what action was taken before and by the Commissioner of Labor, and the facts which the appellant claims to justify the dispensation.

(b) No special form is required. The following form is a suggestion:

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X  
:  
:  
Defense Emergency Act Appeal: : Petition  
by :  
(Insert name of Appellant) :  
-----X

1. Appellant is (a resident of \_\_\_\_\_, residing at) (New York  
(insert address)  
Corporation with office at) \_\_\_\_\_ engaged in  
(state nature of business)

\_\_\_\_\_  
(insert plant address)

2. The following dispensation is desired \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(insert date)

3. Application was therefore made on \_\_\_\_\_ to  
The commissioner of Labor, who has taken the following action:

\_\_\_\_\_  
\_\_\_\_\_  
4. The facts justifying the dispensation are: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Type name of Appellant)

\_\_\_\_\_  
(Signature of Appellant or  
authorized representative)

**69.4 Construction of Petition; No Answer Required.**

- (a) The Petition shall be deemed to ask for such relief as may be just and proper.
- (b) All allegations of fact in the Petition shall be deemed controverted by the Commissioner of Labor unless expressly admitted. No answer shall be required.

**69.5 Service of Petition on Commissioner of Labor.**

Upon the filing of a Petition as herein provided, the Board shall serve a copy thereof upon the Commissioner of Labor by mail or delivery to the offices of the Commissioner's general counsel.

Upon receipt thereof, the Commissioner shall submit to the Board at its Albany office all files, papers and records relevant to the subject of the Petition.

#### **69.6 Actions after Service of Petition.**

The Petitioner and the Commissioner of Labor may file with the Board such further relevant matter in writing as they think proper, provided that the Board's proceedings shall not be delayed thereby.

#### **69.7 Hearings.**

Hearings ordered upon such appeals shall be held at such times and places as the Board may direct and upon such notice to the Petitioners and the Commissioner of Labor as the Board may deem reasonable.

Such appeals shall have precedence over all other matters.

#### **69.9 Duration of Rules.**

The duration of rules contained in this Part shall be concurrent with that of the New York State Defense Emergency Act.

### **Part 70**

#### **Appeals from Minimum Wage Orders and Regulations under Sections 657 and 676 of the Labor Law**

##### **70.1 Application.**

- (a) The provisions of this Part shall apply to the filing, processing, hearing, consideration and determination of an appeal from minimum wage orders and regulations pursuant to Sections 657 and 676.
- (b) See Part 65 of these Rules for general rules of procedure and practice not specified in this Part.
- (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 (60) 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 66).

##### **70.2 How Appeal Commenced; Time.**

An appeal from a wage order or a regulation shall be made by filing an original and three (3) conformed copies of a Petition with the Board at its Albany office. The Petition must be filed

within forty-five (45) days after the date of the publication of the notice of the challenged order or regulation. The Petition need not be verified.

**70.3 Form and Contents of Petition.**

The Petition shall:

- (a) contain a caption in the following form:

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X  
:  
In the Matter of the Petition of  
*(Insert name of Petitioner)* :  
:  
Petitioner, :  
:  
:  
To review under Section (657 or 676 of the Labor Law :  
:  
:  
*(state minimum wage order or regulation to be reviewed )* :  
:  
:  
-against- :  
:  
The Commissioner of Labor, :  
:  
Respondent, :  
-----X

- (b) state the address of the Petitioner;
- (c) identify or set forth the wage order or regulation in issue; state whether the Petitioner is an aggrieved person in interest as defined in Section 657 or Section 676 and show the nature of the interest and the respects in which the Petitioner is aggrieved;
- (d) state clearly the grounds on which the wage order or regulations being challenged is contrary to law;
- (e) show any other material facts, by affidavit or other reliable relevant evidence, to support the Petitioner's contentions and the relief requested;
- (f) specify with particularity the precise relief requested; and
- (h) be signed by Petitioner, or authorized representative.

**70.4 Service of Petition on Commissioner of Labor for Answer.**

Upon the filing of a Petition as provided in this Part, the Board shall serve a copy thereof upon the Commissioner of Labor by transmittal to the office of the Commissioner's general counsel.

**70.5 Answer to Petition; Time for Answer; Contents of Answer; Service and Filing of Answer; Filing; Transcript of Records.**

- (a) The Commissioner of Labor shall, within eight (8) days after receipt of the Petition, file with the Board an answer to the Petition, and a certified transcript of the record as provided by Paragraph 2 of Sections 657 or 676, as the case may be.
- (b) The answer shall contain a denial or an explanation of the material facts which are deemed relevant to the issues raised by the Petitioner.
- (c) The Commissioner of Labor shall serve by mail one (1) 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.

**70.6 Inspection of Record.**

The certified transcript of the record filed by the Commissioner of Labor in relation to the promulgation of a minimum wage order or regulation under review pursuant to Section 657 or 676, shall be open for inspection and copying during the Board's regular business hours by the parties concerned in such a proceeding.

**70.7 Oral Arguments; Briefs.**

Oral argument in the matter shall be had at a time and place fixed by the Board. Reasonable notice thereof shall be given to the parties and to such other persons as the Board may determine. In the discretion of the Board, briefs may be submitted in accordance with such terms as it may prescribe.

**70.8 Intervention.**

Intervention as a party will not be permitted.

**70.9 Amendment of Pleadings to Conform to Proof.**

A motion to amend a pleading to conform to the proof may be made at any time before the conclusion of the hearing.

**70.10 Security for Stay. (Paragraphs 3 and 8 of Sections 657 and 676).**

- (a) An application for a determination by the Board as to the sufficiency of security to cause an appeal to operate as a stay of the order or regulation shall be made by filing with the Board a separate written and verified Petition identifying the appeal and setting forth:
  - (1) the name and address of the applicant;
  - (2) the number and employment classification(s) of affected employees;
  - (3) the pay periods of the affected employees during the stay;
  - (4) the wage per pay period proposed to be paid to affected employees during the stay;
  - (5) the wages per pay period that such employees would be entitled to receive under the terms of the order or regulation appealed from;
  - (6) the underpayments of each affected employee per pay period;
  - (7) the total proposed underpayment;
  - (8) the type of security proposed;
  - (9) (i) the name and address of the issuing fidelity or surety company and the amount of the proposed bond; or the name and address of the bank or trust company in

which a proposed escrow account is established, and the amounts and schedule of deposits to be made into the escrow account; and

- (ii) such other allegations as may be relevant and proper.
- (b) The Petition shall not be accepted by the Board for filing unless accompanied by proof that a copy thereof has been delivered or mailed to the Commissioner of Labor.
- (c) The Commissioner of Labor on behalf of the Board shall inspect the books and records of the applicant in respect to the allegations of the Petition and report forthwith to the Board and promptly serve a copy thereof upon the applicant. The Petition shall be deemed true except as the Commissioner of Labor in his report may assert error therein, and may be amended or withdrawn by the applicant without prejudice.
- (d) The determination of the Board shall be made upon the Petition, the report and such other evidence as the Board may require, with or without a hearing in the Board's discretion, and shall be effective from a date therein specified until further action by the Board or decision of the appeal.

**70.11 Waiver of Security (paragraphs 7 of Section 657 and 676).**

- (a) An application for waiver of security to cause an appeal to operate as a stay shall be made by filing with the Board a separate, written and verified Petition identifying the appeal and setting forth:
  - (1) the name and address of the applicant;
  - (2) the number and employment classification(s) of the employees affected;
  - (3) the pay periods of the affected employees during the stay;
  - (4) the wages per pay period proposed to be paid to the affected employees during the stay;
  - (5) the wages per pay period that such employees would be entitled to receive under the terms of the order or regulation appealed from;
  - (6) the total proposed underpayment; and,
  - (7) such facts as may tend to establish that applicant is of such financial responsibility that payment of the proposed underpayment is assured if required. The total of the proposed underpayments may be calculated upon the assumption that the appeal will be decided by the Board within forty-five (45) days after the expiration of the time of for filing a Petition.
- (b) The applicant shall file the original and three (3) conformed copies of the Petition with the Board at its Albany office.
- (c) The Board shall serve a copy of the Petition on the Commissioner of Labor, who will serve and file with the Board with proof of service, an answer to the Petition within (10) days after such service by the Board.
- (d) The determination of the Board shall be made upon the Petition, the answer and such other evidence as the Board may require, with or without a hearing in the Board's discretion, and shall be effective from a date therein specified until further action by the Board or decision of the appeal.

## **70.12 Decision of the Board; Time.**

Within forty-five (45) days after the expiration of the time for filing of a Petition under Section 657 or Section 676, the Board shall make, file, and issue to each affected party, an order confirming, amending or setting aside the order or regulation appealed from.

### **Part 71**

## **Appeals under Section 677 of the Labor Law from Minimum Wage Compliance Orders Relating to Farm Workers**

### **71.1 Application.**

- (a) The provisions of this Part shall apply to the filing, processing, hearing, consideration and determination of an appeal from minimum wage compliance orders pursuant to Article 19-A.
- (b) See Part 65 of this Subchapter for general rules of procedure and practice not specified in this Part.
- (c) Article 19-A provides that minimum wage standards shall apply to farm workers. Minimum wage orders and regulations established by the Commissioner of Labor pursuant to Article 19-A of the Labor Law are administered and enforced by the Commissioner of Labor through the Division of Labor Standards of the Department of Labor. In order to effectuate those functions, the Division is required to make an initial determination respecting the interpretation and application of the provisions of an applicable wage order and regulations. If the Division concludes that an employer has failed to conform with a minimum wage order or a regulation, or with a provision of Article 19-A, it serves an order directing the employer to comply therewith and, when pertinent, to make payment to the Commissioner of Labor, who will disburse according to law any underpayment of wages alleged to be due to employees named in a schedule annexed to the compliance order. If a party deems that such an order is incorrect, redress is available by filing a Petition under Section 677 as prescribed in this Part.
- (d) The Board's procedure in these matters approximates that of a judicial proceeding. Customarily, a hearing is held at which the Commissioner of Labor, represented by counsel, appears as a defending party. The hearing is de novo (original) in nature. The Petitioner and the Commissioner of Labor may submit oral or documentary evidence which is material and relevant to the issues. The Board will not take cognizance of any evidence submitted to any unit or division of the Department of Labor prior to the Petition unless it is introduced and accepted in the record of the proceeding or is a matter of which it may properly take official notice.
- (e) The commencement of such a proceeding does not stay an order to comply involving an alleged underpayment of wages unless the employer provides security or obtains a waiver of security as prescribed in Section 657 or 676.

### **71.2 Questions Raised; Scope of Inquiry.**

The fundamental questions that may be raised in a proceeding under this Part are whether in issuing the order to comply, the provisions of the minimum wage act or of the minimum wage order or the regulations under which the order to comply was made were correctly construed and applied to a given state of facts or whether the computation of the amount of an underpayment is erroneous. **Such proceedings shall not be used to challenge the terms or requirements of a minimum wage order or of a regulation.**

**71.3 How Appeal Commenced; Time.**

An appeal from an order to comply with a minimum wage order or regulation shall be made by filing an original and three (3) conformed copies of a Petition with the Board at its Albany office. The Petition must be filed within sixty (60) days after the issuance by the Commissioner of the order to comply. The Petition need not be verified.

**71.4 Form and Content of Petition.**

The Petition shall:

- (a) contain a caption in the following form:

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----	X
	:
In the matter of the Petition of	:
(insert name of Petitioner)	:
	:
Petitioner,	:
	:
To review under Section 677, of the	:
Labor Law an order to comply with	:
Minimum Wage Order No. . . . . or	:
Regulation . . . . .	:
-against -	:
	:
The Commissioner of Labor	:
Respondent,	:
-----	X

- (b) state the address of the Petitioner;
- (c) attach a complete copy of the compliance order in issue;
- (d) state clearly and concisely the grounds on which the order in issue is alleged to be incorrect, improper, unreasonable or invalid;
- (e) state any other material or relevant facts;
- (f) set forth with particularity the relief requested; and
- (g) be signed by Petitioner or authorized representative.

**71.5 Service of Petition on Commissioner of Labor for Answer.**

Upon the filing of a Petition as herein provided, the Board shall serve a copy thereof upon the Commissioner of Labor by transmittal to the office of the Commissioner’s general counsel.

**71.6 Answer to Petition; Time for Answer; Service and Filing of Answer.**

- (a) the Commissioner of Labor shall, within thirty (30) days after receipt of the Petition, file with the Board an answer or move with respect to the Petition.
- (b) The Commissioner of Labor shall serve by mail one (1) copy of the answer upon each Petitioner or the attorney or authorized representative of record and

### **71.7 Contents of Answer.**

The answer shall:

- (a) contain a specific admission denial or explanation of each of the material facts alleged in the Petition;
- (b) specify the facts upon which the Commissioner of Labor relied to support the findings of fact and conclusion of law recited in the order;
- (c) if an underpayment is alleged, set forth how it was computed; and
- (d) contain any other facts which the Commissioner of Labor considers relevant to support the order.

### **71.8 Amendment of Pleadings.**

The Petition may be amended at any time prior to the service of the answer. After an answer has been served or the time within which to serve an answer has elapsed, a pleading may be amended only by leave of the Board. Any application for leave to amend made prior to the hearing shall be made upon at least ten (10) days' prior written notice and must be accompanied by the proposed amended pleading.

### **71.9 Amendment of Pleadings to Conform to Proof.**

A motion to conform a pleading to the proof may be made at any time before the conclusion of the hearing.

### **71.10 Security for Stay; Waiver of Security.**

In an appeal from a compliance order an application for a determination by the Board as to the sufficiency of security to cause the appeal to operate as a stay of the order, or an application for waiver of security to cause the appeal so to operate shall be made as provided in Part 70 of these Rules, Sections 70.10 and 70.11.

## **Part 72**

### **Applications for a Stay from a Notice of a Dangerous Condition ("Unsafe Notice") Issued Pursuant to Section 200.2 of the Labor Law**

#### **72.1 Application.**

- (a) The provisions of this Part shall apply to the filing, processing, hearing, consideration and determination of an application for a stay from a notice of a dangerous condition ("unsafe notice") issued by the Commissioner of Labor pursuant to Section 200, subdivision 2.
- (b) Section 200, subdivision 2 provides:

"2. If the Commissioner finds that any machinery, equipment, or device in any place to which this chapter applies is in a dangerous condition, or finds that any area to which this chapter applies is in a dangerous condition, he may attach a notice to such machinery, equipment, or device, or post a notice in such area warning all persons of the danger. Such notice shall prohibit the use of such machinery, equipment, or device or prohibit further work in or occupancy of such area until the dangerous condition is corrected and the notice is removed by the Commissioner. Upon receipt of a written notification from the employer that the dangerous condition has been corrected, the Commissioner shall make a re-inspection within ten working days, and if the Commissioner finds that the dangerous condition has been corrected, he shall remove the notice. The filing with the Board of a Petition for a review of the validity and reasonableness of the Commissioner's

order pursuant to section one hundred one of this chapter, shall not stay further proceedings; provided, however, that the Board, in its discretion, may upon application of the Petitioner stay further proceeding. The Board shall grant or deny such application for a stay within seventy-two hours after the filing of the application."

- (c) The foregoing procedure for tagging *unsafe* an object or an area referred to in Section 200, subdivision 2 is invoked when an enforcement representative of the Commissioner of Labor finds that the condition of any machinery, equipment, device or area to which the Labor Law applies or that the circumstances under which any of the aforesaid items or areas are or may be used – evinces or is likely to occasion a degree of danger or a severity of hazard – justifying summary prohibition of the use of the tagged object or area.
- (d) An “unsafe notice” which is affixed to an object or which is posted in an area pursuant to the above quoted Labor Law provision customarily is accompanied with a *Notice of Violation and Order to Comply* which includes: (1) an order forbidding the use of the tagged object or area until the “unsafe notice” is OFFICIALLY removed or otherwise LAWFULLY terminated; and (2) if not previously issued, an order directing that the alleged dangerous condition be corrected.
- (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, amended or modify the same may be filed under Section 101 as provided in Part 66 of these Rules. If a party desires to continue to use the tagged machinery, equipment, device or area pending the resolution of the Section 101 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 under Section 101.

### **72.2 Application; How Made.**

An application for a stay of an “unsafe notice” shall be made by a VERIFIED Petition on notice to the Commissioner of Labor as herein after set forth. The original and three (3) conformed copies of the Petition and of all accompanying papers with proof of service thereof upon the office of the Commissioner’s general counsel and the office of the Director of the Division which issued the said order shall be filed with the Board at its Albany office.

**72.3 Form and Content of Petition.**

The Petition shall:

- (a) contain a caption in the following form:

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS  
-----X  
In the Matter of the Application of :  
(insert name of applicant) :  
: :  
Applicant, :  
: :  
For a stay to permit use after issuance of :  
an “unsafe notice” by the Commissioner :  
of Labor declaring unsafe and prohibiting :  
the use of (identify subject in issue) :  
: :  
-against - :  
: :  
The Commissioner of Labor, :  
: :  
Respondent. :  
-----X

- (b) state the address of the applicant;
- (c) state the address and location of the machinery, equipment, device or area which is the subject of the notice;
- (d) describe the machinery, equipment, device or area prohibited to be used;
- (e) describe the manner in which the machinery, equipment, device or area is used or operated;
- (f) state whether the persons using the machinery, equipment, device or area have any special training or competence and the extent of their supervision if any;
- (g) annex a complete copy of the notice sought to stayed, including copies of any other orders, notices and supporting documents issued in connection therewith;
- (h) state the facts showing why the notice is erroneous or unreasonable and where possible submit supporting affidavits or other reliable relevant evidence to justify a stay;
- (i) set forth the relief requested; and
- (j) be signed and verified by applicant or an authorized representative.

**72.4 Answer to Petition Not Required.**

All allegations of fact in the Petition shall be deemed controverted by the Commissioner of Labor, unless expressly admitted. No answer shall be required.

**72.5 Conduct of Proceeding.**

- (a) The Board may decide the application on the basis of the papers and other materials submitted in the matter or it may in its discretion hear argument or hold a hearing for such purposes as it may consider appropriate. If a hearing is to be held or argument had,

the Board shall fix a time and place therefor and shall notify the parties and any person which it deems might aid it in arriving at a determination.

- (b) In the discretion of the Board, interested persons may be allowed to intervene.
- (c) The Board may affirm, revoke, or modify the “unsafe notice” under review or make such determination as it may deem proper. Such determination shall be effective from a date there-in specified until further action by the Board or decision of the Section 101 proceeding.

### **Part 73**

#### **Public Access to Industrial Board of Appeals Records (Statutory Authority: Public Officers Law, Art. 6; Labor Law 101)**

##### **73.1 Application.**

The provisions of this Part relate to the procedures to be followed by the Industrial Board of Appeals in compliance with chapters 578-580 of the Laws of 1974, entitled “Freedom of Information Law”.

##### **73.2 Location and hours for public access; designation of records access and fiscal officers.**

- (a) The following office of the Industrial Board of Appeals is hereby designated to receive requests for information under the Freedom of Information Law:

State of New York  
Industrial Board of Appeals  
Empire State Plaza  
Agency Building 2, 20<sup>th</sup> Floor  
Albany, NY 12223

- (b) The records access officer shall be Counsel to the Industrial Board of Appeals. All requests for records pursuant to this Part received by the Board shall be referred to Counsel for disposition.
- (c) The Industrial Board of Appeals fiscal officer, for purposes of the Freedom of Information Law, shall be Counsel to the Industrial Board of Appeals.
- (d) Requests for information will be considered and inspections will be permitted between the hours of 10 a.m. and 3 p.m., at the Board’s office on all days when such office is open for business.

##### **73.3 Requests for records.**

- (a) Requests for payroll information made by bona fide members of the news media upon a form (AC-375) prescribed by the Comptroller of the State of New York shall be referred to Counsel to the Board at the Board’s Albany office.
- (b) Requests for all other information should be made in writing.
- (c) Persons appearing in person to request access to records will be required to produce photo identification and complete the prescribed forms.
- (d) Requests made orally will not be entertained.
- (e) (1) Requests by mail will be processed at the Board’s Albany offices, either by mail or by intradepartmental routing.  
(2) Such requests will be processed if the requester and material sought are sufficiently identified to make compliance practicable. In the absence of such identification, the

Board may send to the requester a request for more information in order that the request may be filled.

#### **73.4 Responses to requests.**

- (a) (1) The records access officer shall respond promptly to a request for records. Except under extraordinary circumstances, a response shall be made no more than five business days after receipt of the request by the records access officer.
- (2) If more than five business days are required to respond to a request, the records access officer shall acknowledge receipt of the request within five business days after the request is received. The acknowledgement shall state the reason for delay, and estimate the date when a reply will be made.
- (b) The records access officer shall:
  - (1) if the request does not clearly identify the records sought, seek additional information from the applicant;
  - (2) approve the request and authorize inspection of and copying of the record, if available, and certify the correctness of such copy; or
  - (3) deny the request and state the reason therefor in writing.
- (c) The records access officer shall, in authorizing issuance of copies, direct such omissions and deletions as may be required to protect the personal privacy of individuals in accordance with the requirements of the Freedom of Information Law, or any other applicable law or regulation.

#### **73.5 Fees.**

- (a) A charge will be made of 25 cents per photocopy of pages not larger than 8½ by 14 inches.
- (b) Charges for materials or services not specified by statute or regulation shall be based on the actual cost thereof to the Board.
- (c) Payment for information services should be made by cash or check or money order, payable to the New York State Department of Labor.

#### **73.6 Industrial Board of Appeals subject matter list.**

The Industrial Board of Appeals shall maintain a subject matter list of records required to be disclosed by Article 6 of the Public Officers Law, and such subject matter list shall be located in the office of the Industrial Board of Appeals in Albany.

#### **73.7 Denial of access to records.**

- (a) The denial of access to records shall be in writing, setting forth the reason therefor and advising the requester of the right of appeal and the procedure therefor.
- (b) If requested records are not provided promptly, as required by Section 73.4(b) of this Part, such failure shall also be deemed a denial of access.
- (c) Appeals from the denial of access to records shall be heard by the Board or its authorized representative. Appeals shall be decided by resolution of the Board. (d) The time for deciding an appeal shall commence upon receipt of written appeal identifying:
  - (1) the name and address of the requester;
  - (2) the date of the appeal;

- (3) the date of the requests for records and the location of the records; and
- (4) the records to which the requester was denied access.
- (e) The requester shall be informed of the Board's decision in writing.
- (f) A final denial of access to a requested record issued by the Board shall be subject to court review, as provided for in Article 78 of the Civil Practice Law and Rules.

**73.8 Posted Notice.**

The Board shall cause to be conspicuously displayed, a notice clearly indicating:

- (a) the records access locations, times and officer designated by the Industrial Board of Appeals;
- (b) the schedule of applicable fees; and
- (c) the right of a requester to appeal a denial of access and an outline of the procedure to be followed.

**73.9 Severability.**

If any provision of this Part or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons and circumstances.