



Industrial Board of Appeals

Rules of Procedure and Practice

Parts 65, 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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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 advice and consent of the Senate. Its duties and powers include:

1. Review of the validity or reasonableness of certain orders, determinations, rules, or regulations made under the Labor Law (Sections 101 and 27-a 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

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 applies to filing, processing, hearing, consideration, and determination of every proceeding wherein they may be relevant and appropriate.
- (b) The word “Board,” shall include the Board, any individual member of the Board, or an employee of the Board designated and delegated such authority by the Board.
- (c) The Board may on its own motion, or the motion of any party, suspend the application of any provision of these rules in a specific proceeding, or waive compliance with any provision of these rules, so long as no substantial right is prejudiced.

65.2. Number and person

- (a) Singular words may be interchanged with the plural as required by context.
- (b) The word “person” shall include an individual, corporation, partnership, unincorporated association, governmental body or any other legal entity, as context may require.

65.3. Documents

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

65.4. Pleading

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

65.5. Petition

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

65.6. Party; Commissioner of Labor

- (a) “Party” includes petitioner, applicant, respondent, Commissioner of Labor, intervenor, and objector.
- (b) “Commissioner” when referred to in these rules means the Commissioner of Labor, and may be used interchangeably with the terms “Department of Labor,” “Department,” and “DOL.”

65.7. Proof of service

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

65.8. Language

Each document, other than an affidavit or exhibit, served or filed must be in the English language. Where an affidavit or exhibit attached to a document or offered as evidence at hearing is in a language other than English, it must be accompanied by an English translation and an affidavit by the translator stating the translator’s qualifications and certifying that the translation is accurate.

65.9. Interpreters

- (a) If a party or witness requires an interpreter at any stage of the proceeding, an interpreter will be provided by the Board upon a party’s request. Interpreters are provided at no cost to the parties, except as provided for in paragraph (c) of this section.
- (b) The Board may establish reasonable deadlines for the parties to make a request for an interpreter.
- (c) The Board may direct a party to pay the reasonable costs incurred by the Board caused by a party’s failure to request an interpreter by the deadline set by the Board if such untimely request causes an adjournment or unnecessary delay.

65.10. Computing time

- (a) In computing the time period for filing a paper under these rules, the day the period begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, or legal holiday, in which case, the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.
- (b) If a period of time prescribed by these rules is measured from the service of any paper other than a petition, and service is by mail, five days shall be added to the prescribed period.
- (c) If a period of time prescribed by these rules is measured from the service of any paper other than a petition, and service is by overnight delivery, one day shall be added to the prescribed period.

Part 65 Subpart B Parties and notice

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

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

65.12. Intervention

- (a) A party wishing to intervene in a proceeding may file an application with the Board at any time prior to the start of hearing with proof of service on the other parties. The Board has discretion to allow intervention on a showing that an applicant has an interest in the proceeding, the applicant's participation will assist in the determination of the issues raised in the proceeding, and the applicant's participation, as the Board may permit, will not unnecessarily delay the proceeding. Where intervention is granted, the Board will determine the scope of the intervenor's participation in the proceeding and issue an order setting forth such scope.
- (b) Objections to an application for intervention, if any, must be filed with the Board, with proof of service, within 10 days after service of the application to intervene, and must set forth the reasons intervention should not be allowed. If the application was filed less than 10 days prior to hearing, objections, if any, must be filed by a date determined by the Board, with proof of service.

65.13. Record address

- (a) Any document filed with the Board must contain the name, address, telephone number, and email address, if any, of the person filing it.
- (b) Any change in such information must be communicated promptly, in writing, to the Board.
- (c) The Board may dismiss a proceeding as abandoned if a party fails to comply with paragraph (b) of this section.

65.14. Service and notice by the Board

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

Part 65 Subpart C Documents, pleadings, and motions

65.15. Form of documents

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

- (b) A document other than an exhibit must contain information sufficient to identify the parties and must include the Board's docket number if one has been assigned.
- (c) A party filing a document or offering it as evidence must redact any confidential personal information, including, but not limited to:
 - (1) all but the last four digits of any taxpayer identification number of an individual or an entity, including a social security number, employer identification number, and individual taxpayer identification number;
 - (2) the month and day of any individual's birthdate;
 - (3) the full name of an individual known to be a minor, except the minor's initials; and
 - (4) all but the last four digits of any financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or insurance account number. The Board may direct any party to redact confidential personal information from their documents or require a party to file amended documents that conform to this rule. A party's failure to redact such information as directed may, at the discretion of the Board, constitute a waiver of the right to further participation in the proceeding.

65.16. Place of filing

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

65.17. Method of filing

- (a) All documents may be filed by mail, courier, delivery service, or in person at the Board's principal office in Albany during normal business hours; electronically, at a location determined and designated by the Board; or by any other method authorized by the Board.
- (b) A document is timely if it is postmarked or electronically timestamped within the time provided for by these rules but is not deemed filed until received by the Board. A document filed electronically will be considered filed with the Board at the time the electronic transmission indicates it was received by the Board.

65.18. Form of petition

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

- (b) The petition must clearly indicate the name or names of all petitioners, which includes all persons on whose behalf the petition is being filed. The petition must also include the name, address, telephone number, and email address, if any, of each petitioner. If the petition is filed by a representative, the representative's name, address, telephone number, and email address must be indicated.
- (c) If the petitioner is not named in the order, determination, rule or regulation being appealed, the petition must state the facts that support the petitioner as an interested party.
- (d) If the petition seeks review of a determination issued under Labor Law § 30 or of a notice of violation and order to comply issued under Labor Law § 27-a, the petition must state the name, address, and email address of any representative of the employees affected by the decision or notice of violation and order to comply.
- (e) The petition must be signed by the person who is filing it.
- (f) A copy of the order, determination, rule, or regulation being appealed must be included with or attached to the petition.

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

- (a) Unless otherwise provided by statute, rule or regulation, a petition for review of an order, determination, rule or regulation issued by the Commissioner must be filed with the Board within 60 days after the date the order, determination, rule or regulation was issued.
- (b) Statutes of limitations for filing a petition cannot be extended by the Board.

65.20. Docketing of petition

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

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

- (a) After a petition is filed that complies with section 65.18, the Board will serve it upon the Commissioner, through their General Counsel. Acknowledgment of service in a form determined by the Board will be sent to all parties indicating the date the petition was served.
- (b) If the petition seeks review of a decision issued under Labor Law § 30 or of a notice of violation and order to comply issued under Labor Law § 27-a, the Board will send a copy of the petition for informational purposes to any representative of the affected employees identified in the petition.

65.22. Response to petition

- (a) The Commissioner must file an answer or a motion to the petition with the Board, with proof of service, within 30 days of service of the petition by the Board.
- (b) The answer shall be so drawn as to advise the petitioner and the Board of the nature of the defense, in reasonable detail. It shall contain a specific admission, denial, or explanation of each of the material facts alleged in the petition. Such a denial may be upon information and belief or a denial of knowledge or information sufficient to form a belief as to the truth of the allegation. The answer must also contain a statement of any facts upon which the Commissioner relies for an affirmative defense.
- (c) (1) The Commissioner shall serve one copy of the answer upon each petitioner or attorney of record and shall file the original with the Board, with proof of such service.

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

65.23. Reply to answer

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

65.24. Motions addressed to pleadings

- (a) Unless otherwise provided by these rules or directed by the Board, a motion addressed to a pleading must be filed, with proof of service, within 30 days after service of the pleading that is the subject of the motion.
- (b) A response to a motion addressed to a pleading, if any, must be filed, with proof of service, within 30 days after service of the motion unless otherwise directed by the Board. A reply, if any, must be filed with proof of service, within 15 days after service of the response.
- (c) The moving party must advise the other party or parties in its notice of motion of the time periods set forth by these rules for filing and serving a reply and response to a motion.
- (d) If an evidentiary hearing or oral argument is required by the Board to rule on a motion, the Board will fix the time and place for such hearing or argument and notify the parties in writing.

65.25. Amendment of petition

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

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

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

- (a) Pleadings, other than petitions, may only be amended with the Board's permission.
- (b) Pleadings may be amended with the Board's permission to conform to the proof at any time prior to the conclusion of the hearing.

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

- (a) Any application for an extension of time to file any pleading or other document required by these rules must be filed with the Board, and copied to all other parties, no later than three days prior to the date the pleading or other document is due and must state the ground or grounds for the request. Any party objecting to an application for an extension of time to file a pleading or other document must do so promptly in writing and copy all other parties to the proceeding.
- (b) The statute of limitations for filing a petition to commence a proceeding cannot be extended by the Board.

65.28. Failure to file a pleading

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

65.29. Withdrawal of petition or other pleading

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

65.30. Mistakes, omissions, defects and irregularities

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

65.31. Stays

- (a) The filing of a petition may, at the discretion of the Board, operate to stay all proceedings against the petitioner under such order, determination, rule, or regulation until the determination of such petition. Such discretion may be exercised, if at all, upon written application therefor, which application shall be supported by affidavits, documentary

evidence, or other evidence demonstrating the necessity for such stay, the financial responsibility of the applicant when relevant, and that the grant of such stay will not unduly prejudice any employee, the public or the Department of Labor. The Commissioner of Labor shall have such opportunity as the Board shall deem reasonable and sufficient to object to or oppose the application for a stay.

- (b) Application for a stay of enforcement of an order issued under Labor Law § 200 shall be granted or denied by the Board within 72 hours after the filing of the application.
- (c) A stay of enforcement of a minimum wage compliance order requires the posting of security or the obtaining of a waiver of security as provided for in Labor Law § 657. The application shall be made in the manner provided in rule 71.10 of these rules.
- (d) Upon the filing of an application for a stay of enforcement of an order issued under Labor Law § 27-a, a hearing officer, designated by the Board, shall promptly schedule an onsite inspection to be attended by representatives of the applicant, of the affected employees and of the Commissioner of Labor. After inspecting the condition or conditions on which the alleged violation is based, and after hearing the representatives of the applicant, of the employees and of the Commissioner of Labor, the hearing officer shall report promptly to the Board. The hearing officer's report shall also include the application, any writings or documents submitted in connection with the application, and such other material as the hearing officer may deem appropriate. The Board may deny such application or may grant the same to such an extent and upon such terms and conditions as the Board shall determine.
- (e) The granting of a stay does not affect the general enforcement of an order, determination, rule or regulation against anyone who has not filed a petition.

Part 65

Subpart D

Pre-hearing procedure and discovery

65.32. Pre-hearing conference; document exchange

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

65.33. Prehearing briefs

- (a) The Board or hearing officer may, when it appears necessary, require the parties to submit prehearing briefs that include any or all of the following:
 - (1) statements of the principal contentions of the parties;
 - (2) identification of evidence to be submitted at hearing and the purpose of the evidence;
 - (3) names of witnesses and subjects of their testimony; and/or
 - (4) discussion of the legal issues.
- (b) When prehearing briefs are requested, the Board or hearing officer will fix the time for submission of such briefs and any responses or replies, as well as give notice to the parties of the issues to be addressed. If oral argument is required, the Board or hearing officer will send notice to the parties of the time and place for oral argument.

65.34. Bills of particulars

- (a) A demand for a bill of particulars may be made by any party to a proceeding within 10 days after an answer to a petition is filed. Thereafter, a demand for a bill of particulars may only be made with the Board's approval.
- (b) A bill of particulars must be served on the party demanding it, or objections filed with the Board, no more than 10 days after the date the demand was served.
- (c) If objections to a demand for a bill of particulars are filed, a copy of the demand must be attached to the objections. The demanding party's response to the objections, if any, must be filed with the Board, with proof of service on the objecting party, within 10 days after service of the objections.
- (d) If a party fails to serve a timely bill of particulars or the bill of particulars is insufficient, the demanding party may file a motion requesting the Board to enforce the demand. The motion must include a copy of the demand, and if a bill has been served, a copy of the bill. The motion must be made in the manner set forth by section 65.24 of these rules except that such motion may be made within 10 days after the time to serve the bill has expired. A response to the motion, if any, must be filed, with proof of service, within 10 days after service of the motion. A reply to the response, if any, must be filed, with proof of service, within 5 days after service of the response.

65.35. Interrogatories

- (a) Interrogatories directed to a party or witness are not allowed unless ordered by the Board upon a showing of good cause.

- (b) An application to serve interrogatories on a party or witness must be made by motion in the same manner as a motion addressed to the pleadings.

65.36. Depositions

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

65.37. Subpoenas

- (a) The Board, by one or more members, or by a designated employee, has the power to issue subpoenas for and compel the attendance of witnesses and the production of evidence.
- (b) Applications for subpoenas must be filed with the Board no later than 30 days prior to a scheduled hearing and must show the name and address of the party at whose request the subpoena is to be issued.
- (c) Any person who is served with a subpoena may move within 10 days after service of the subpoena to revoke or modify it if the evidence requested is not relevant to the proceeding, the subpoena does not adequately describe the evidence requested, or for any other reason sufficient in law that the subpoena should be revoked or modified.
- (d) A motion to revoke or modify a subpoena must be made in the same manner as a motion addressed to a pleading brought under section 65.24 of these rules except a response to a motion to revoke or modify a subpoena must be filed, with proof of service, within 10 days after service of the motion unless otherwise directed by the Board. A reply, if any, must be filed with proof of service, within 10 days after the service of the response unless otherwise directed by the Board.
- (e) A person subpoenaed to produce evidence or to appear at a hearing is entitled to the payment of the same fees and mileage as required by the Civil Practice Law and Rules.
- (f) Persons subpoenaed to submit data or evidence at a public proceeding are entitled, upon payment of lawfully prescribed costs, to obtain a copy of the transcript of the data or evidence they submitted.
- (g) Copies of the Board's subpoena forms may be requested by phone, in writing, or may be found at the Board's website. The subpoena form must be completed by the party requesting issuance of a subpoena and submitted to the Board for issuance. The requesting party must also send notice to each non-requesting party of the subpoena requests. Service of a subpoena issued by the Board is the responsibility of the requesting party.

65.38. Failure to comply with discovery

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

Part 65 Subpart E Hearings

65.39. Burden of proof; de novo hearing

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

65.40. Notice of hearing

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

65.41. Postponement of hearing

- (a) Postponement of a hearing ordinarily will not be allowed.
- (b) Except in the case of an emergency or in unusual circumstances, any party seeking postponement of a scheduled hearing must file a written request with a copy to all other parties at least 10 days prior to the scheduled hearing date. The request for postponement must state the reason or reasons postponement should be granted.
- (c) Objections to a request for postponement of a scheduled hearing, if any, must be promptly filed with the Board with proof of service.
- (d) No postponement is allowed without the Board's approval, and the Board's approval may, where a request for postponement was not timely made, and no emergency or unusual circumstances otherwise excuse the untimely request, be contingent on payment of reasonable costs incurred by the Board caused by a party's failure to make a timely request for postponement.

65.42. Duties and powers of Board members

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

- (a) to conduct any investigation ordered by the Board;
- (b) to report findings of investigations to the Board;
- (c) to examine and receive any document or other evidence which is deemed pertinent, relevant or necessary to an investigation;
- (d) to record the testimony of any such witness, or to obtain from such witness a written statement, under oath or affirmation, on matters pertinent, relevant or necessary to an investigation;
- (e) to take affidavits;
- (f) to hold conferences for the settlement or simplification of the issues, on consent of the parties, and to report thereon, with recommendations, to the Board;
- (g) to hold and conduct a hearing, when ordered by the Board, relating to any matter pertaining to the Board's exercise of its functions;
- (h) to issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, documents and other evidence;
- (i) to rule upon petitions to revoke, amend or modify subpoenas or subpoenas duces tecum, subject to confirmation by the Board;
- (j) to administer oaths and affirmations;
- (k) to call, examine and cross-examine witnesses;
- (l) to receive offers of proof, to receive evidence and testimony, and to receive any objections to such offers of proof, or evidence and testimony, at or during any hearing;
- (m) to rule upon offers of proof and receive relevant evidence, subject to confirmation by the Board;
- (n) to dispose of procedural requests or similar matters;
- (o) to allow any petition, answer or other document in any proceeding to be supplemented, amended or corrected, provided that such change does not operate to prejudice a party's cause or unduly broaden or alter the issues of a proceeding;
- (p) to regulate, in any manner, the course of the hearing, subject to confirmation by the Board; and

- (q) to continue an investigation or hearing from day to day or adjourn same to a later date or to a different place by announcement thereof at the hearing or by other notice.

65.43. Hearing officer; duties and powers

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

65.44. Form of hearing

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

65.45. Evidence and hearing sequence

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

65.46. Exhibits

- (a) All exhibits offered in evidence must be numbered or lettered and marked with a designation identifying the party offering the exhibit. Unless the Board finds it impractical, each party's exhibits must also contain a unique sequential number for each page, file or image.
- (b) Unless the Board or hearing officer finds it impractical, a copy of each exhibit must be provided to all other parties and the Board or hearing officer.
- (c) In the absence of an objection, exhibits will be admitted into evidence as part of the record unless excluded by the Board or hearing officer.
- (d) All exhibits offered, but denied admission into evidence, must be identified and placed by the hearing officer into a separate file designated for rejected exhibits.

65.47. Witnesses; Witness fees

- (a) Witnesses who appear before the Board shall testify orally under oath or affirmation and are subject to cross-examination by opposing parties and the Board.
- (b) A party who subpoenas a witness to testify at a hearing in person must pay the same fees and mileage to the witness as required by the Civil Practice Law and Rules.

65.48. Objections

- (a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the hearing officer, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and will be included in the record. No objection will be deemed waived by further participation in the hearing.
- (b) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which will be included in the record of the proceeding.

65.49. Exclusion from hearing; striking testimony

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

65.50. Deposition in place of oral testimony

- (a) A deposition in lieu of oral testimony ordinarily will not be allowed, except in exigent circumstances. An application to take the deposition of a witness in lieu of oral testimony must be in writing and must set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected they will testify and the time and place proposed for the taking of the deposition, together with the name and address of the officer before whom it is desired that the deposition be taken. Such application must be filed with the Board, with proof of service on all other parties. If the application is granted, the Board will make and serve on the parties an order which specifies the name of the witness whose deposition is to be taken and the time, place and designation of the officer before whom the witness is to testify.
- (b) Such deposition, when permitted by the Board, may be taken before any officer authorized to administer oaths by the laws of the State of New York, or of the place where the examination is held.
- (c) At the time and place specified in the order, the officer designated to take such deposition will permit the witness to be examined and cross-examined under oath or affirmation by

all parties appearing, and the questions asked of and answers given by the witness will be recorded verbatim and reduced to typewriting by the officer before whom the deposition is taken or under his or her direction.

- (d) All objections to questions or evidence are deemed waived unless made at the examination. The officer does not have power to rule upon any objection, but they shall note them upon the deposition. The testimony will be subscribed by the witness in the presence of the officer, who shall attach his or her certificate stating that the witness was duly sworn, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the proceeding. If the deposition is not signed by the witness because they are ill, dead, cannot be found, or refuse to sign it, such fact will be included in the certificate of the officer and the deposition may be used as fully as though signed. The officer will immediately deliver, in accordance with sections 65.16 and 65.17 of these rules, a copy of the transcript, together with the officer's certificate, in person or by certified mail to the Board at its Albany office.
- (e) The Board will rule upon the admissibility of the deposition or any part thereof.
- (f) The right to object to any error or irregularity that does not comply with the provisions of this rule shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, discovered.
- (g) If the parties so stipulate in writing, the deposition may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used as other depositions.

65.51. Failure to appear

- (a) Subject to the provisions of subdivisions (c) and (d) of this section, the failure of a party to appear at a hearing is a waiver of all rights except the right to be served with a copy of the decision of the Board and to request Board review pursuant to section 65.60 of these rules.
- (b) Request for reinstatement must be made, in the absence of extraordinary or unusual circumstances, within five days after the scheduled hearing.
- (c) The Board, upon a showing of good cause, may excuse a party's failure to appear and reopen the hearing.
- (d) The Board may require a party to pay reasonable costs incurred by the Board caused by a party's failure to appear as a condition for reopening a hearing.

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

- (a) A party may request at any time prior to conclusion of the hearing, or the Board or hearing officer may direct the parties at any time, to submit written summations, briefs, or proposed findings of fact on any issue raised in the proceeding, or for an oral argument on the record, or both.
- (b) The Board or hearing officer will fix the schedule for post-hearing submissions after the hearing, or by written notice to the parties upon receipt of the transcript of hearing.
- (c) If the Board or hearing officer requires oral argument after submission of the parties' briefs, the Board will notify the parties in writing of the time and place for argument.

65.53. Transcript of hearing; correcting the transcript

- (a) Hearings will be transcribed by a stenographer or court reporter, and a copy of the transcript, certified by the stenographer or reporter, will be maintained by the Board in accordance with the Board's records retention policy.
- (b) A copy of a transcript may be obtained upon written request made under the Freedom of Information Law pursuant to Part 73 of the Board's Rules (12 NYCRR Part 73).
- (c) Any party to a proceeding may file proposed corrections to the transcript with the Board, copied to all other parties, within 30 days after their receipt of the transcript. Objections to any proposed corrections may be filed, and copied to all other parties, within 10 days after service of the proposed corrections. The Board, within a reasonable time, will rule on any proposed corrections and, if necessary, issue an errata sheet to be attached to the transcript.
- (d) The Board, on its own motion, with notice to the parties, may propose corrections and issue an errata sheet to be attached to the transcript.

65.54. Settlement

- (a) Settlement is encouraged at any stage of the proceeding.
- (b) Notice of settlement must be filed with the Board in writing prior to hearing or stated on the record at hearing.

65.55. Hearing is open to the public

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

65.56. Submission without hearing or appearance

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

Part 65 Subpart F Decisions and post decision actions

65.57. Record of proceedings

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

65.58. Decision

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

65.59. Finality of decision for purposes of judicial review

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

65.60. Reconsideration

- (a) An application for reconsideration after a determination or decision made by the Board must be filed with the Board in writing, with proof of service, and state the reasons reconsideration should be granted by the Board.
- (b) Any objections to an application for reconsideration must be filed, with proof of service, within 10 days after service of the application for reconsideration.
- (c) The Board may, at any time, reopen a proceeding or require a hearing.

Part 65 Subpart G Miscellaneous provisions

65.61. Ex parte communications prohibited

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

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

65.62. Conduct

- (a) Individuals appearing before the Board must comply with the Board's rules, any other applicable rules, and all orders and directions of the Board or the designated hearing officer.
- (b) Attorneys and representatives appearing before the Board must be familiar with the Board's rules, and follow all applicable rules of professional conduct.

65.63. Oral argument

- (a) Where oral argument is required under these rules before the Board or a hearing officer, the Board will notify the parties in writing of the time and place of argument.
- (b) If the Board or hearing officer requires briefs prior to argument, the Board will notify the parties in writing of the dates for filing such briefs.

65.64. Consolidation

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

65.65. Severance

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

65.66. Joinder of petitioners

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

65.67. Joint hearing of proceedings

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

65.68. Dismissal

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

65.69. Expedited proceedings

- (a) Upon application of any party showing good cause or on its own motion, the Board may order an expedited proceeding.
- (b) When an expedited proceeding is ordered, the Board will promptly notify all parties.
- (c) The hearing officer assigned in an expedited proceeding may make necessary rulings and give directions to the parties without reference to time periods prescribed by these rules, may order daily transcripts of the hearings, and will do anything necessary to complete the proceeding in the minimum time consistent with fairness.

65.70. Restrictions on Commissioner of Labor's participation

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

Part 66 [Repealed]

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 for 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 nonprofit 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, sections 201(b), 301(a)

(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 hearing 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 section 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 original 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 and one 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 incorporation 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 hearings 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 Title 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, a Petition executed in accordance with the provisions of Part 65 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 (20th) 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.

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.

69.8. 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 65).

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:
- (b) state the address of the Petitioner;

- (c) identify or set forth the wage order or regulation in issue;
- (d) 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;
- (e) state clearly the grounds on which the wage order or regulations being challenged is contrary to law;
- (f) show any other material facts, by affidavit or other reliable relevant evidence, to support the Petitioner's contentions and the relief requested;
- (g) 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, or by any other method permitted by the Board including but not limited to electronically, one copy of the answer upon each Petitioner, or the attorney or authorized representative of record, and shall file the original with the Board with proof of such service.

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
 - ii. 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
 - (10) 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;
- (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, or by any other method permitted by the Board including but not limited to electronically, one copy of the answer upon each Petitioner, or the attorney or authorized representative of record, and shall file the original with the Board with proof of such service.

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, amend or modify the same may be filed as

provided in Part 65 of this Subchapter. If a party desires to continue to use the tagged machinery, equipment, device or area pending the resolution of that proceeding, an application therefor must be made under this Part. Such an application should be made either contemporaneously with or after the filing of a petition pursuant to Part 65.

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;
- (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 be 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) Requests for records under the Freedom of Information Law may be made in writing to the Board’s principal office located in Albany, New York. The Board shall publish the address of its principal office located in Albany, New York on the Board’s website, as well as any email address or other electronic method designated for such requests.
- (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 8 1/2 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