TITLE 12

OFFICIAL COMPILATION
OF
CODES, RULES AND REGULATIONS,
OF
THE STATE OF NEW YORK

(CITED AS 12 NYCRR)

Parts adopted under the Public Employee
Safety and Health Act

Part 801
Part 802
Part 803
Part 804
Part 805

State of New York
Department of Labor

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PART 801

RECORDING AND REPORTING PUBLIC EMPLOYEES' OCCUPATIONAL INJURIES AND ILLNESSES

(Cited as 12 NYCRR Part 801)

As Amended
Effective January 14, 2004

State of New York
Department of Labor

Part 801

Recording and Reporting Public Employees' Occupational Injuries and Illnesses

(Statutory authority: Labor Law § 27-a)

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§ 801.0 Purpose.

This Part implements Labor Law, section 27-a, subdivision 9, which provides for recordkeeping and reporting by public employers as necessary or appropriate for enforcement of Labor Law, section 27-a, for developing information regarding the causes and prevention of occupational injuries and illnesses, and for making public periodic reports of work-related deaths, injuries and illnesses.

§ 801.1 Reserved.

§ 801.2 Reserved.

§ 801.3 Reserved.

§ 801.4 Recording criteria.

(a) Each employer required by this Part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:

(1) is work-related; and

(2) is a new case; and

(3) meets one or more of the general recording criteria of section 801.7 or the application to specific cases of sections 801.8 through 801.12.

§ 801.5 Determination of work-relatedness.

(a) The Employer must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, subject to certain restrictions set forth in section 901.5 of SH901 Instructions for Recording and Reporting Public Employees' Occupational Injuries and Illnesses and accompanying Forms SH900, SH90.1 and SH900.2.

§ 801.6 Determination of new cases.

(a) The employer must consider an injury or illness to be a "new case" if:

(1) the employee has not previously experienced a recorded injury or illness of the same type that affects the same part of the body; or

(2) the employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms had disappeared) from the previous injury or illness and an event or exposure in the work environment caused the signs or symptoms to reappear.

§ 801.7 General recording criteria.

(a) The employer must consider an injury or illness to meet the general recording criteria, and therefore to be recordable, if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. The employer must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

§ 801.8 Recording criteria for needlesticks and sharps injuries.

(a) The employer must record all work-related needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material (as defined by 29 CFR 1910.1030). The employer must enter the case on the SH 900 Log as an injury. To protect the employee's privacy, the employer must treat needlestick injuries and cuts from sharp objects that are contaminated with another person's blood, or other potentially infectious material, as a "Privacy Concern Case" as defined in section 801.29 (b) and (c).

§ 801.9 Recording criteria for cases involving medical removal under PESH standards.

(a) If an employee is medically removed under the medical surveillance requirements of a PESH standard, the employer must record the case on the SH 900 Log.

§ 801.10 Recording criteria for cases involving occupational hearing loss.

(a) If an employee's hearing test (audiogram) reveals that the employee has experienced a work related Standard Threshold Shift (STS), as defined in the instructions, and the employee's total hearing level is 25 decibels (dB) or more above the audiometric zero (averaged at 2000, 3000, and 4000 Hz) in the same ear(s) as the STS, the employer must record the case on the SH 900 Log.

§ 801.11 Recording criteria for work-related tuberculosis cases.

(a) If any of the employer's employees has been occupationally exposed to anyone with a known case of active tuberculosis (TB), and that employee subsequently develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional, the employer must record the case on the SH 900 Log by checking the "respiratory condition" column.

§ 801.12 Recording criteria for cases involving work-related musculoskeletal disorders.

Historical Note.

Sec. Repealed, filed Dec. 24, 2003, eff. Jan. 14 2004.

§ 801.13 to § 801.28 Reserved.

§ 801.29 Forms.

(a) The employer must use SH 900, SH 900.1, and SH 900.2 forms, or equivalent forms, and associated instructions, for recordable injuries and illnesses. The SH 900 form is called the Log of Work-Related Injuries and Illnesses, the SH 900.1 is the Annual Summary of Work-Related Injuries and Illnesses, and the SH 900.2 form is called the Injury and Illness Incident Report.

(b) If the case is to be considered a "privacy concern case," the employer may not enter the employee's name on the SH 900 Log. Instead, the employer must enter "privacy case" in the space normally used for the employee's name. This will protect the privacy of the injured or ill employee when another employee, a former employee, or an authorized employee representative is provided access to the SH 900 Log under section 801.35. The employer must keep a separate, confidential list (the Privacy Case List) of the case numbers and employee names for the employer's privacy concern cases so the employer can update the cases and provide the information to the government if asked to do so.

(c) The employer must consider the following injuries or illnesses to be privacy concern cases:

(1) an injury or illness to an intimate body part or the reproductive system;

(2) an injury or illness resulting from a sexual assault;

(3) mental illnesses;

(4) HIV infection, hepatitis, or tuberculosis;

(5) needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material (see 801.7 for definitions); and

(6) other illnesses, if the employee independently and voluntarily requests that his or her name not be entered on the log. Effective January 1, 2004, musculoskeletal disorders (MSDs) are not considered privacy concern cases.

This is a complete list of all injuries and illnesses considered privacy concern cases. No other types of injuries or illnesses may be classified as privacy concern cases.

§ 801.30 Multiple establishments.

(a) The employer must keep a separate SH 900 Log for each establishment that is expected to be in operation for one year or longer.

§ 801.31 Covered employees.

(a) The employer must record on the SH 900 Log the recordable injuries and illnesses of all employees on the employer's payroll, whether they are labor, executive, hourly, salary, part-time, seasonal, or other workers. The employer also must record the recordable injuries and illnesses that occur to employees who are not on the employer's payroll if the employer supervises these employees on a day-to-day basis.

§ 801.32 Annual Summary.

(a) At the end of each calendar year, the employer must:

(1) review the SH 900 Log to verify that the entries are complete and accurate, and correct any deficiencies identified;

(2) create an annual summary of injuries and illnesses recorded on the SH 900 Log;

(3) certify the summary; and

(4) post the annual summary, for the previous calendar year, from February 1 through April 30 each year.

§ 801.33 Retention and updating.

(a) The employer must save the SH 900 Log, the privacy case list (if one exists), the annual summary, and the SH 900.2 Incident Report forms for five (5) years following the end of the calendar year that these records cover.

§ 801.34 Reserved.

§ 801.35 Employee involvement.

(a) The employer's employees and their representatives must be involved in the recordkeeping system in the following ways:

(1) the employer must inform each employee of how he or she is to report an injury or illness to the employer;

(2) the employer must provide limited access to its injury and illness records for its employees and their representatives by:

(i) When an employee, former employee, personal representative, or authorized employee representative asks for copies of the employer's current or stored SH 900 Log(s) for an establishment the employee or former employee has worked in, the employer must give the requester a copy of the relevant SH 900 Log(s) by the end of the next business day.

(ii) The employer must leave the names on the SH 900 Log. However, to protect the privacy of injured and ill employees, the employer may not record the employee's name on the SH 900 Log for certain "privacy concern cases," as specified in 801.29 (b) and 801.29 (c).

(iii) When an employee, former employee, or personal representative asks for a copy of the SH 900.2 Incident Report describing an injury or illness to that employee or former employee, the employer must give the requester a copy of the SH 900.2 Incident Report containing that information by the end of the next business day.

(iv) When an authorized employee representative asks for a copies of the SH 900.2 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement, the employer must give copies of those forms to the authorized employee representative within 7 calendar days. The employer is only required to give the authorized employee representative information from the SH 900.2 Incident Report section titled "Information about the case." The employer must remove all other information from the copy of the SH 900.2 Incident Report or the equivalent substitute form that the employer gives to the authorized employee representative.

(v) The employer may not charge for these copies the first time they are provided. However, if one of the designated persons asks for additional copies, the employer may assess a reasonable charge for retrieving and copying the records.

§ 801.36 Reserved.

§ 801.37 Reserved.

§ 801.38 Reserved.

§ 801.39 Reporting fatalities and multiple hospitalization incidents to PESH.

(a) Within eight (8) hours after the death of any employee in the work environment, regardless of the cause, or the in-patient hospitalization of two (2) or more employees as a result of a work-related incident, the employer must orally report the fatality/multiple hospitalization by telephone or in person to the nearest office of the New York State Department of Labor, Division of Safety and Health (DOSH).

§ 801.40 Providing records to government representatives.

(a) When an authorized government representative asks for the records the employer keeps under Part 801, the employer must provide copies of the records within four (4) business hours, regardless of where the records are maintained. The government representative authorized to receive the records is a representative of the Commissioner of Labor of the State of New York, conducting an inspection or investigation under State Labor Law.

§ 801.41 Annual DOSH injury and illness survey.

(a) If the employer receives the DOSH annual survey form, the employer must fill it out and send it to DOSH or the DOSH designee, as stated on the survey form. The employer must report the following information for the year described on the form:

(1) the number of workers employed;

(2) the number of hours worked by employees;

(3) the requested information from the records that the employer keeps under Part 801.

§ 801.42 Requests from the Bureau of Labor Statistics for data..

(a) If the employer receives a Survey of Occupational Injuries and Illnesses Form from the Bureau of Labor Statistics (BLS), or a BLS designee, the employer must promptly complete the form and return it following the instructions contained on the survey form.

§ 801.43 Reserved.

§ 801.44 Retention and updating of old forms.

(a) The employer must save his or her copies of the SH 900 and, to the extent used as an illness and injury report, C2, forms for five years following the year to which they relate and continue to provide access to the data as required in the Part. The employer is not required to update old DOSH 900 and C2 forms.

§ 801.45 Reserved.

§ 801.46 Definitions.

As used in this Part:

(a) *Establishment.* An establishment is a single physical location where services, operations or other activities are performed. For activities where employees do not work at a single physical location, such as construction; transportation; electric, and sanitary services; and similar operations, the establishment is represented by main or branch offices, terminals, stations, etc. that either supervise such activities or are the base from which personnel carry out these activities. An establishment may include more than one physical location provided:

(1) the employer operates the locations as a single operation under common management;

(2) the locations are all located in close proximity to each other;

(3) the employer keeps one set of records for the locations, such as records on the number of employees, their wages and salaries, sales or receipts, and other kinds of business information. For example, one establishment might include the main plant, a warehouse a few blocks away, and an administrative services building across the street.

(b) *Injury or illness.* An injury or illness is an abnormal condition or disorder. Injuries include cases such as, but not limited to, a cut, fracture, sprain, or amputation. Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning. (Note: Injuries and illnesses are recordable only if they are new, work-related cases that meet one or more of the section 801.4- 801.12 recording criteria.)

(c) *Physician or Other Licensed Health Care Professional.* A physician or other licensed health care professional is an individual who meets the definition for such a professional under the New York State Education Law.

(d) *Work environment.* The work environment is an establishment or other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work.

(e) *Employer.* Any State, any political subdivision of the State, a public authority or any other governmental agency or instrumentality thereof is an employer within the meaning of this Part.

(f) *Public employee.* Any employee of the State, any political subdivision of the State, a public authority or any other governmental agency or instrumentality is a public employee within the meaning of this Part.

§ 801.47 Posters for Public Employees.

(a) Each employer shall post and keep posted in each establishment a poster providing information relating to the job safety and health protection afforded to public employees by the provisions of Labor Law, section 27-a. These posters may be obtained from the New York State Department of Labor, Division of Safety and Health. A poster for each establishment shall be posted in a conspicuous place or places where notices to employees of that establishment are customarily posted, and the employer shall take steps to insure that the posters are not altered, defaced, or covered by other material.

PART 802

INSPECTION OF PLACES OF PUBLIC EMPLOYMENT

(Cited as 12 NYCRR Part 802)

As Amended
Effective September 25, 1984

State of New York
Department of Labor

PART 802

INSPECTION OF PLACES OF PUBLIC EMPLOYMENT

(Statutory authority: Labor Law, § 27-a)

Sec.	
802.1	Purpose
802.2	Authority for inspections
802.3	Objection to inspection
802.4	Advance notice of inspections
802.5	Inspection walkaround rights
802.6	Opening and closing conference
802.7	Inspections involving personal property and privacy

Section 802.1 Purpose. This Part implements Labor Law, section 27-a, subdivision 5, which authorizes the Department of Labor to conduct inspections of premises occupied by a public employer. The purpose of this Part is to prescribe rules and to set forth general policies governing the right of entry for, advance notice of, and walkaround rights on, such inspections.

802.2 Authority for inspections. Safety and health inspectors and hygienists of the Department of Labor (hereinafter referred to as "D.O.L. inspector") are authorized, for the following purposes, to enter without delay and at reasonable times any building, institution, facility, construction site, establishment or other area, workplace or environment where work is performed by a public employee:

(a) to inspect and investigate during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, any such place of public employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein;

(b) to question privately any employer or employee; and

(c) to review records required by Labor Law, section 27-a, and the regulations promulgated thereunder, and other records which are directly related to the purpose of the inspection.

802.3 Objection to inspection. (a) Upon a refusal to permit the D.O.L. inspector, in exercise of his official duties, to enter without delay and at reasonable times any place of public employment or any place therein, to inspect, to review records, or to question any employee or any person in charge of or responsible for the care and maintenance of the workplace, in accordance with section 802.2 of this Part, or to permit an authorized employee representative to accompany the D.O.L. inspector during the physical inspection of any workplace in accordance with section 802.5 of this Part, the D.O.L. inspector shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The D.O.L. inspector shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to his supervisor. If the public employer does not countermand such refusal, the Commissioner of Labor shall take appropriate action, including obtaining compulsory legal process, if necessary. For purposes of this section, the term, *compulsory legal process* shall mean the institution of any appropriate legal action, including *ex parte* application for an inspection warrant or its equivalent.

(b) Compulsory legal process shall be sought in advance of an attempted inspection or investigation if, in the judgment of the Commissioner of Labor, circumstances exist which make such compulsory process desirable or necessary.

802.4 Advance notice of inspections. (a) Advance notice of inspections shall not be given, except in the following situations:

(1) in cases of apparent imminent danger to enable the employer to abate the danger as quickly as possible;

(2) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for inspection;

(3) where necessary, to assure the presence of a representative of the employer and an authorized employee representative needed to aid in the inspection; or

(4) in other circumstances where the Director of the Division of Safety and Health determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(b) Advance notice in any of the situations described in subdivision (a) of this section shall not be given more than 24 hours before the inspection is scheduled to be conducted, except that the 24-hour time limitation shall not apply to apparent imminent danger situations.

(c) When advance notice is given to the employer, it shall promptly notify the authorized employee representative(s) of the inspection, if the identity of such representative(s) is known to the employer, or it may request the D.O.L. inspector to inform the authorized employee representative(s) of the inspection if it furnishes the identity of such representative(s) and any other pertinent information.

802.5 Inspection walkaround rights. (a) Section 27-a, subdivision 5 (b), of the Labor Law requires that, "A representative of the employer and an authorized employee representative shall be given the opportunity to accompany the commissioner during an inspection for the purpose of aiding such inspection."

(b) *Authorized employee representative* as defined by section 27-a, subdivision 1(c), of the Labor Law means an employee authorized by the employees or the designated representative of an employee organization recognized or certified to represent the employees pursuant to article 14 of the Civil Service Law. If there is no authorized employee representative, or if the D.O.L. inspector is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(c) The D.O.L. inspector shall be in charge of the inspection and questioning of persons, and may permit additional employer representatives and additional authorized employee representatives to accompany him during inspection where he determines that such additional representatives will further aid an inspection. However, for purposes of this section, where there is more than one recognized or certified employee organization representing the employees, the designated representative of each such employee organization shall be given the opportunity to accompany the D.O.L. inspector during an inspection.

(d) Where there is no recognized or certified employee organization, an employee representative who is authorized by the employees to accompany the D.O.L. inspector during an inspection shall be an employee who is employed in the workplace to be inspected. An employee representative who is the designated representative of an employee organization to accompany the D.O.L. inspector during an inspection may be such an employee or a third party who is not an employee employed in the workplace to be inspected. The D.O.L. inspector shall have authority to resolve all disputes as to who are the representative(s) of the employer and the authorized employee representative(s) for the purpose of this section.

802.6 Opening and closing conference. (a) At the beginning of an inspection, the D.O.L. inspector shall explain to the persons who are to accompany him during the inspection the nature, purpose and scope of the inspection.

(b) At the conclusion of an inspection, the D.O.L. inspector shall confer with the representative(s) of the employer and the authorized employee representative(s) and informally advise them of any apparent safety and health violations disclosed by the inspection.

802.7 Inspections involving personal property and privacy. (a) When con- ducting an inspection, the D.O.L. inspector shall not examine the personal property of employees without their permission.

(b) When the D.O.L. inspector conducts an inspection in a locker room, restroom, washroom or other area involving employees' personal property or privacy rights, employees present must be permitted to remove their personal property and leave the area prior to the inspection. Employees shall be informed of their right to do so immediately before the inspection of such area is conducted.

(c) The rights granted under this section shall accrue only to employees and shall not be exercisable by an employer.

PART 803

VARIANCE REGULATIONS

(Cited as 12 NYCRR Part 803)

As Amended
Effective April 4, 1990

State of New York
Department of Labor

PART 803

VARIANCE REGULATIONS

(Statutory authority: Labor Law, § 27-a)

Sec.	
803.1	Purpose
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803.3	Petitions for amendments to this Part
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803.27	Effect of appeal of a hearing officer's decision
803.28	Finality for purposes of judicial review

Section 803.1 Purpose. This Part contains rules of practice for administrative proceedings to grant variances and other relief under section 27-a(8)(a)-(c) of the Labor Law, the Public Employee Safety and Health Act, effective December 29, 1980. It does not apply to the granting of variances under section 27-a(8)(b) when the commissioner determines that such variance is necessary to permit an employer to participate in an experiment approved by him designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers. Whenever appropriate, the procedure for granting such a variance shall be published in the *State Register.*

803.2 Definitions. (a) *Law* means section 27-a of the New York State Labor Law.

(b) *Commissioner* means the Commissioner of Labor.

(c) *Employer* means the State, any political subdivision of the State; a public authority or any other governmental agency or instrumentality thereof.

(d) *Employee* means a person permitted to work by an employer.

(e) *Authorized employee representative* means an employee authorized by the employees or the designated representative of an employee organization recognized or certified to represent the employees pursuant to article 14 of the Civil Service Law.

(f) *Variance* means any relief under section 27-a(8)(a) and (c) of the Labor Law wherein conditions, practices, means, methods, operations or processes used or proposed to be used by an employer must provide employment and places of employment to employees which are as safe and healthful as those which would prevail if the employer complied with the standard.

803.3 Petitions for amendments to this Part. Any person or entity may at any time petition the commissioner in writing to revise, amend or revoke any provision of this section. The petition should set forth the terms or the substance of the rule desired, with a statement of the reasons therefor and the effects thereof.

803.4 Amendments to this Part. The commissioner may at any time revise, amend or revoke any provision of this section, on his own motion or upon the written petition of any person in accordance with the State Administrative Procedure Act.

803.5 Effect of variances. All variances granted pursuant to this section shall have only future effect. The commissioner may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued and a proceeding on the citation or a related issue concerning the period of abatement is pending before the Industrial Board of Appeals or State courts pursuant to article 78 of the Civil Practice Law and Rules until the completion of such proceeding or the abatement date has passed.

803.6 Public notice of a granted variance. Every order granting a variance shall be published in the *State Register* and shall specify the alternative to the standard involved which the variance permits.

803.7 Form of documents; subscription; copies. (a) Applications for temporary or permanent variances shall be submitted in triplicate carbons on forms furnished by the commissioner or processed copies of sheets other than the original are permitted. Additional $8\frac{1}{2}$ x 11 typed narrative sheets may be attached. Any clear submission of proposed hazard abating plans, constructions, installations, processes, equipment or catalog information is permissible.

(b) Each application shall bear the signature, typed name, title and date of filing of the applicant or the attorney or authorized representative. Attached sheets shall bear sufficient information to clearly relate to the application.

803.8 Temporary variances. (a) *Application for variance.* Any employer or group of employers may apply to the commissioner for an order for a temporary variance from a newly adopted standard or any provision thereof when such employer or group of employers is unable to comply with a newly adopted standard by its effective date.

(b) *Contents.* The application for a temporary variance shall include:

(1) the name and address of the applicant;
(2) the address of the place or places of employment involved;
(3) a specification of the standard or portion thereof from which the applicant seeks a variance;
(4) a representation by the employer, supported by representation from qualified persons who have firsthand knowledge of the facts represented, that it is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor;
(5) a statement of the steps the employer has taken and will take, with specific dates, to protect employees against the hazard covered by the standard;
(6) a statement of when the employer expects to be able to comply with the standard and what steps he has taken and what steps he will take, with dates specified, to come into compliance with the standard;
(7) a statement of the facts the applicant would show to establish that:

(i) the applicant is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;
(ii) he is taking all available steps to safeguard employees against the hazards covered by the standard; and
(iii) he has an effective program for coming into compliance with the standard as quickly as practicable;

(8) any request for a hearing, as provided in this Part;
(9) a certification that he had informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means;
(10) a description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the commission /1 for a hearing; and

/1 So in original, probably should read "Commissioner"

(11) the name(s), title(s), address(es) and union affiliation(s) of the employee representative(s) notified.

(c) *Commissioner's action.* When no hearing request has been received from the employer, employees or employees' representative within 15 working days after notification by the employer that a variance is being sought, the commissioner shall render a decision on the application. Where a timely hearing request has been received from the employer, employees or employees' representative, the commissioner shall designate a hearing officer to conduct a hearing and submit a report and recommendation.

(d) *Interim order.* Prior to or at the hearing, upon the written request of the employer, the commissioner may issue an interim order describing conditions to be met by the employer prior to the decision on the application for a variance. If the

request is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor. If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties and the terms of the order shall be published in the *State Register.* It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

(e) *Time allowed.* No order granting a temporary variance may be in effect for longer than the period needed by the employer to achieve compliance with the standard or for one year, whichever period is shorter, except that such an order for a temporary variance may be renewed not more than twice, so long as the requirements of this section are met and conditional requirements stipulated by the commissioner continue to be met. Application for renewal must be filed at least 90 days prior to the expiration date of the order. No interim renewal of an order for temporary variance may remain in effect longer than 180 days.

803.9 Permanent variance. (a) *Application for variance.* Any employer or group of employers may apply to the commissioner for a permanent variance from any safety and health standard or any provision thereof adopted by the commissioner.

(b) *Contents.* The application for a permanent variance shall include:

(1) the name and address of the applicant;
(2) the address of the place or places of employment involved;
(3) a specification of the standard or portion thereof from which the applicant seeks a variance and the date by which abatement is required;
(4) a description of the conditions, practices, means, methods, operations or processes used or proposed to be used by the applicant and a statement showing how they would provide employment and places of employment to employees which are as safe and healthful as those which would prevail if the standard were complied with;
(5) a certification that the applicant has informed its employees of the application by:

(i) giving a copy to their authorized representative;
(ii) posting the application or a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted;
(iii) attaching to the application a copy of the notification letter, the posting notice and other appropriate means; and
(iv) submitting the name(s), title(s), address(es) and union affiliation(s) of the employee representative(s) notified;

(6) in all instances where a permanent variance is sought the commissioner will schedule and conduct a hearing; and
(7) employers, employees and/or employee representatives will be informed of the dates, times and places of the hearings according to procedures established in the State Administrative Procedure Act.

(c) *Interim order.* Prior to or at the hearing, upon the request of the employer, the commissioner may issue an interim order describing conditions to be met by the employer prior to the decision on the application for a variance. If the request is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(1) Application. An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The commissioner may rule ex parte upon the application.

(2) Notice of denial of application. If an application filed pursuant to paragraph (1) of this subdivision is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) Notice of the grant of an interim order. If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be published in the *State Register*. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

803.10 Modification, revocation and renewal of orders. (a) *Modification or revocation.*

(1) An order granting a temporary or permanent variance may be modified or revoked upon application by an affected employer, an employee or employee representative, or by the commissioner on his own motion, in the manner prescribed for its issuance under this subdivision at any time after six months from its issuance. The application shall include:

(i) the name and address of the applicant;
(ii) a description of the relief sought;
(iii) a statement setting forth with particularity the grounds for relief;
(iv) if the applicant is an employer, a certification that the applicant has informed its affected employees of the application:

(a) giving a copy to their authorized representative;
(b) posting at the place or places where notices to employees are normally posted, the application or a statement giving a summary of the application and specifying where a copy of the application may be examined; and
(c) other appropriate means;

(v) if the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer; and
(vi) any request for a hearing.

(2) The commissioner may on his own motion proceed to modify or revoke an order issued under section 27-a(8)(a), (b) or (c) of the Labor Law. In such event, the commissioner shall cause to be published in the *State Register* a notice of his intention, affording interested persons an opportunity to submit written data, views or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and shall take such other action as may be appropriate to give actual notice to affected employees. Any request for a hearing shall include a short and plain statement of:

(i) how the proposed modification or revocation would affect the requesting party; and
(ii) what the requesting party would seek to show on the subjects or issues involved.

(b) *Renewal.* No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice: (1) so long as the requirements of this subdivision are met; and (2) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

803.11 Action on applications. (a) *Defective applications.*

(1) If an application does not conform to this Part, the commissioner may deny the application. Notice of the denial of an application shall be given promptly to the applicant and shall include, or be accompanied by, a brief statement of the grounds for the denial.
(2) A denial of an application pursuant to this paragraph shall be without prejudice to the filing of another application.

(b) *Adequate applications.*

(1) If an application pursuant to a temporary variance under section 803.8(a) of this Part has not been denied pursuant to subdivision (a) of this section, the commissioner shall initiate the action described under section 803.8(c).

(2) If an application pursuant to a permanent variance under section 803.9(a) of this Part has not been denied pursuant to subdivision (a) of this section, the commissioner shall initiate the action described under

section 803.9(b)(6) and shall cause to be published in the *State Register* a notice of the filing of the application.

(3) Notice of the filing of an application for a permanent variance shall include:

(i) the terms, or an accurate summary, of the application;
(ii) a reference to the section of the law under which the application has been filed;
(iii) an invitation to interested persons to submit within a stated period of time written data, views or arguments regarding the application; and
(iv) information to affected employers, employees and the appropriate governmental authority having jurisdiction over employment or places of employment covered in the application of any right to request a hearing on the application.

803.12 Requests for hearings on applications. (a) *Request for hearing.* Within 15 working days after notice of the filing of an application, any affected employer or employee may file with the commissioner, in triplicate, a request for a hearing on the application.

(b) *Contents of a request for a hearing.* The request for a hearing shall include:

(1) a concise statement of facts showing how the employer or employee would be affected by the relief applied for;

(2) a specification of any statement or representation in the application which is denied, and a concise summary of the evidence that would be adduced in support of each denial; and

(3) any views or arguments on any issue of fact or law presented.

803.13 Consolidation of proceedings. The commissioner on his own motion or that of any party may consolidate or contemporaneously consider two or more applications from variances from cited standards which involve the same or closely related issues.

803.14 Notice of hearings. (a) *Service.* The commissioner shall give reasonable notice of hearing to all affected parties.

(b) *Contents.* The notice of hearing shall include:

(1) the time, place and nature of the hearing;

(2) the legal authority under which the hearing is to be held;

(3) a specification of issues of fact and law; and

(4) a designation of a hearing officer appointed to conduct the hearing.

(c) *Referral to hearing officer.* A copy of a notice of hearing served pursuant to subdivision (a) of this section shall be referred to the hearing officer designated therein, together with a case file compiled by the director, Division of Safety and Health, containing copies of the following:

(1) a cover sheet listing parties indicated on the application who should be informed of the hearing;

(2) the application for the variance and any documents submitted in connection therewith; and

(3) copies of the pertinent portions of any notice of violation and order to comply in issue.

803.15 Manner of service. Service of any document upon any party may be made by personal delivery of, or by mailing a copy of the document to the last known address of the party. The hearing officer serving the document shall certify to the manner and the date of the service.

803.16 Hearing officers: power and duties. (a) *Powers.* A hearing officer designated to conduct a hearing shall have all powers necessary or appropriate to conduct a fair, full and impartial hearing, including the following:

(1) to administer oaths and affirmations;

(2) to rule upon offers of proof and receive relevant evidence;

(3) to provide for discovery and to determine its scope;

(4) to regulate the course of the hearing and the conduct of the parties and their counsel therein;

(5) to consider and rule upon procedural requests;

(6) to hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) to make, or to cause to be made, an inspection of the employment or place of employment involved;

(8) to make decisions in accordance with the law, this regulation and the State Administrative Procedure Act; and

(9) to take any other appropriate action authorized by the law, this regulation or the State Administrative Procedure Act.

(b) *Private consultation.* Except to the extent required for the disposition of ex parte matters, a hearing officer may not consult a person or a party on any fact at issue, unless upon notice and opportunity for all parties to participate.

(c) *Disqualification.*

(1) When a hearing officer deems himself disqualified to conduct a hearing, he shall withdraw therefrom by notice directed to the commissioner.

(2) Any party who deems a hearing officer for any reason to be disqualified to conduct or to continue to conduct a particular hearing, may file with the commissioner a motion to disqualify and remove the hearing officer, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. The commissioner shall rule upon the motion.

(d) *Contumacious conduct; failure or refusal to appear or obey the rulings of a presiding hearing officer.*

(1) Contumacious conduct at any hearing before the hearing officer shall be grounds for exclusion from the hearing.

(2) If a witness or a party refuses to answer a question after being directed to do so, or refuses to obey an order to provide or permit discovery, the hearing officer may make such orders with regard to the refusal as are just and appropriate, including an order denying the application of an applicant or regulating the contents of the record of the hearing.

(e) *Referral to the Civil Practice Law and Rules.* On any procedural question not regulated by the law, this regulation or the State Administrative Procedure Act, a hearing officer shall be guided to the extent practicable by any pertinent provisions of the Civil Practice Law and Rules.

803.17 Prehearing conferences. (a) *Convening a conference.* Upon his own motion or the motion of a party, the hearing officer may direct the parties or their counsel to meet for a conference to consider:

(1) simplification of the issues;

(2) necessity or desirability of amendments to documents for purposes of clarification, simplification or limitation;

(3) stipulations, admissions of fact, and of contents and authenticity of documents;

(4) limitation of the number of parties and of expert witnesses; and

(5) such other matters as may tend to expedite the disposition of the proceeding, and to assure a just conclusion thereof.

(b) *Record of conference.* The hearing officer shall make an order which recites the action taken at the conference, the amendments allowed to any documents which have been filed, and the agreements made between the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admission or agreements; and such order when entered controls the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

803.18 Consent findings and orders. (a) *General.* At any time before the reception of evidence in any hearing, or during any hearing a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be in the discretion of the hearing officer, after consideration of the nature of the proceeding, the requirements of the public interest, the representation of the parties, and the probability of an agreement which will result in a just disposition of the issues involved.

(b) *Contents.* Any agreement containing consent findings and an order disposing of a proceeding shall also provide:

(1) that the order shall have the same force and effect as if made after a full hearing;

(2) that the entire record on which any order may be based shall consist solely of the application and the agreement;

(3) a waiver of any further procedural steps before the hearing officer and the commissioner; and

(4) a waiver of any right to challenge or contest the validity of the findings and of the order made in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their representatives may submit the proposed agreement to the hearing officer for consideration or inform the hearing officer that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the hearing officer may issue a decision based upon the agreed findings.

803.19 Discovery. (a) *Depositions.*

(1) For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition. Depositions may be taken orally or upon written interrogatories before any officer designated by the hearing officer and having power to administer oaths.

(2) Application. Any party desiring to take the deposition of a witness may make application in writing to the hearing officer, setting forth:

(i) the reasons why such deposition should be taken;
(ii) the time when, the place where, and the name and address of the person before whom the deposition is to be taken;
(iii) the name and address of each witness; and
(iv) the subject matter concerning which each witness is expected to testify.

(3) Notice. Such notice as the hearing officer may order shall be given by the party taking the deposition to every other party.

(4) Taking and receiving in evidence. Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him. The questions propounded and the answers thereto, together with all objections made,shall be reduced to writing, read and subscribed by him, and certified by the officer before whom the deposition is taken. Thereafter, the officer shall forward two copies thereof, by registered mail to the hearing officer. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by any party. No part of a deposition shall be admitted in evidence unless there is a showing that the reasons for the taking of the deposition in the first instance exist at the time of the hearing.

(b) *Other discovery.* Whenever appropriate to a just disposition of any issue in a hearing, the hearing officer may allow discovery by any other appropriate procedure, such as by written interrogatories upon a party, production of documents by a party or by entry for inspection of the employment or place of employment involved.

803.20 Hearings. Hearings conducted under the law are considered administrative hearings and as such the general rules of evidence do not apply.

(a) *Order of proceeding.*

(1) Parties appearing at the hearing shall be given an opportunity to make an opening statement of their position prior to presentation of their facts, narrative, exhibits or witnesses and shall appear in the following order:

(i) the applicant or agent;
(ii) the director, Division of Safety and Health or designated representative;
(iii) employees and/or employee representative(s) of persons working at the cited premises; and
(iv) other interested parties.

(b) *Burden of proof.* The party applying for the variance or interim order requested shall have the burden of proof.

(c) *Evidence.*

(1) Admissibility. A party shall be entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any oral or documentary evidence may be received, but the hearing officer may exclude evidence which is irrelevant, immaterial or unduly repetitious.

(2) Testimony of witnesses. The testimony of a witness shall be upon oath or affirmation administered by the hearing officer.

(3) Objections. A party who objects to the admission or rejection of any evidence, or to the limitation of the scope of any examination or cross-examination, or to the failure to limit such scope, shall state briefly the grounds for such objection. Any party having an objection to a question need only make that objection once and the party will have a continuing objection on the record to preserve rights on appeal. Rulings on all objections shall appear in the record. Only objections made before the hearing officer may be relied upon subsequently in a proceeding.

(4) Exceptions. Formal exception to an adverse ruling is not required.

(d) *Official notice.* Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the Department of Labor by reason of its functions is presumed to be expert; provided, that the parties shall be given adequate notice, at the hearing or by reference in the presiding hearing officer's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

(e) *Transcript.* Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

803.21 Decisions of hearing officers. (a) *Proposed findings of fact, conclusion, and rules or orders.* Within 10 days after receipt of notice that the transcript of the testimony has been filed or such additional time as the presiding hearing officer may allow, each party may file with the hearing officer proposed findings of fact, conclusion of law, and rule or order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all other parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the hearing officer.* Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and rule or order, the hearing officer shall make and serve upon each party a decision, which shall become final upon the 20th day after service thereof, unless exceptions are filed thereto. The decision of the hearing officer shall include:

(1) a statement of findings and conclusions with reasons and bases therefor, upon each material issue of fact, law or discretion presented on the record; and

(2) the appropriate rule, order, relief or denial thereof.

The decision of the hearing officer shall be based upon a consideration of the whole record and shall state all facts officially noticed and relied upon. It shall be made on the basis of a preponderance of reliable and probative evidence.

803.22 Exceptions. Within 20 days after service of the decision of the hearing officer, any party may file with the hearing officer written exceptions thereto with supporting reasons. Such exceptions shall refer to the specific findings of fact, conclusions of law, or terms of the rule or order excepted to, the specific pages of transcript relevant to the suggestions, and shall request corrected findings of fact, conclusions of law, or terms of the rule or

order. Upon receipt of any exceptions, the hearing officer shall fix a time for filing any objections to the exceptions and any supporting reasons.

803.23 Transmission of record. If exceptions are filed, the hearing officer shall transmit the record of the proceeding to the commissioner for review. The record shall include: the application, any request for hearing thereon, motions and requests filed in written form, rulings thereon, the transcript of the testimony taken at the hearing, together with the exhibits admitted in evidence, any documents or papers filed in connection with prehearing conferences, such proposed findings of fact, conclusions of law, rules or orders, and supporting reasons as may have been filed, the hearing officer's decision, and such exceptions, statements of objections, and briefs in support thereof, as may have been filed in the proceeding.

803.24 Decision of the commissioner. If exceptions to a decision of a hearing officer are taken, the commissioner shall upon consideration thereof, together with the record references and authorities cited in support thereof, and any objections to exceptions and supporting reasons, make a decision. The decision may affirm, modify, or set aside, in whole or in part, the findings, conclusions, and the rule or order contained in the decision of the hearing officer, and shall include a statement of reasons or bases for the actions taken on each exception presented.

803.25 Motion for summary decision. (a) Any party may, at least 15 days before the date fixed for any hearing under section 803.14 of this Part, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within 7 days after service of the motion, serve opposing affidavits or countermove for summary decision. The hearing officer may set the matter for argument and call for the submission of briefs, and other materials or render a decision on the papers submitted.

(b) The filing of any documents under subdivision (a) of this section shall be with the hearing officer, and copies of any such documents shall be served in accordance with section 803.15 of this Part.

(c) The hearing officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise obtained, or matters officially noticed show that there is not genuine issue as to any material fact and that a party is entitled to summary decision. The hearing officer may deny such motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

(d) Affidavits shall set forth such facts as would be admissible in evidence in an administrative hearing and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(e) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(f) The denial of all or any part of a motion for summary decision by the hearing officer shall not be subject to interlocutory appeal to the commissioner unless the hearing officer certifies in writing:

(1) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion; and

(2) that an immediate appeal from the ruling may materially advance the ultimate termination of the proceeding.

The allowance of such an interlocutory appeal shall not stay the proceeding before the hearing officer unless the commissioner shall so order.

803.26 Summary decision. (a) *No genuine issue of material fact.*

(1) Where no genuine issue of a material fact is found to have been raised, the hearing officer may issue an initial decision to become final 20 days after service thereof, unless within such period of time any party has filed written exceptions to the decision. If any timely exception is filed, the hearing officer shall fix a time for filing any objections to the exception and any supporting reasons. Thereafter, the commissioner, after consideration of the exceptions and any supporting briefs filed therewith and of any objection to the exceptions and any supporting reasons, may issue a final decision.

(2) An initial decision and a final decision made under this paragraph shall include a statement of:

(i) findings and conclusions, and the reasons or bases therefor, on all issues presented; and
(ii) the terms and conditions of the rule or order made.

(3) A copy of an initial decision and a final decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine material question of fact is raised, the hearing officer shall, and in any other case may, set the case for an evidentiary hearing in accordance with section 803.16(e) of this Part.

803.27 Effect of appeal of a hearing officer's decision. A hearing officer's decision under this Part shall not be operative pending a decision on appeal by the commissioner.

803.28 Finality for purposes of judicial review. Only a decision by the commissioner shall be deemed final agency action for purposes of judicial review. A decision by a hearing officer which becomes final for lack of appeal is not deemed final agency action for purposes of article 78 of the Civil Practice Law and Rules.

PART 804

PETITION FOR MODIFICATION OF ABATEMENT DATE

(Cited as 12 NYCRR Part 804)

As Amended
Effective April 4, 1990

State of New York
Department of Labor

PART 804

PETITION FOR MODIFICATION OF ABATEMENT DATE

(Statutory Authority: Labor Law, § 27-a)

Sec.
804.1 Application
804.2 Content of petition
804.3 When and where filed
804.4 Posting and service requirement
804.5 Response to petition
804.6 Determination of the commissioner
804.7 Review of employee objection
804.8 Review by employer

Section 804.1 Application. An employer may file a petition for modification of the abatement date when compliance with the abatement requirements of a notice of violation and order to comply have not been completed due to factors beyond its reasonable control.

804.2 Content of petition. A petition for modification of abatement date shall be in writing and shall:

(a) state the name and address of the petitioner;

(b) state the address and location of the place or places of employment affected by the petition;

(c) annex a complete copy of the notice of violation and order to comply which sets forth the standard and abatement date in issue;

(d) contain a statement by the petitioner, supported by representations from qualified persons having first hand knowledge of the facts represented, that it is unable to comply with the standard or portion thereof cited in the notice of violation and order to comply by the original abatement date and a detailed statement of the reasons therefor;

(e) contain a statement of all interim steps the employer has taken and will take, with dates specified, to protect employees against the hazard covered by the standard or portion thereof cited in the notice of violation and order to comply;

(f) contain a statement of when the petitioner expects to be able to comply with the standard or portion thereof cited in the notice of violation and order to comply and what steps it has taken and what steps it will take, with dates specified, to come into compliance with the standard;

(g) annex a certification that a copy of the petition has been posted and, if appropriate, served on the authorized representative of the affected employees in accordance with section 804.4 of this Part, including the date and location of such posting and service of the petition;

(h) set forth with particularity the relief requested; and

(i) be signed by petitioner or its representative.

804.3 When and where filed. A petition for modification of abatement date shall be filed with the Commissioner of Labor by mailing or delivering the petition to the district supervisor of the Public Employee Safety and Health Bureau, Division of Safety and Health, New York State Department of Labor, in the district that issued the notice of violation and order to comply no later than the close of the next working day following the expiration date of the abatement period. A petition filed after that date shall be accompanied by the petitioner's statement of exceptional circumstances explaining the delay. For good cause shown, a petition filed after the time allowed may be accepted by the commissioner.

804.4 Posting and service requirement. A copy of the petition shall be posted in a conspicuous place at or near the location where the violation(s) occurred providing affected employees with notice thereof and of their right to object thereto within 10 working days. A copy of the petition shall remain posted for a period of 10

working days. Where affected employees are represented by an authorized representative, said representative shall also be served personally or by certified mail with a copy of the petition contemporaneously with the posting.

804.5 Response to petition. Affected employees or their authorized representative may file written objections to the petition with the district supervisor within 10 working days of the date of posting and service of the petition, whichever is later. Failure by the affected employees or their authorized representative to file written objections to the petition shall constitute a waiver of any further right to object thereto.

804.6 Determination of the commissioner. The commissioner or his duly auth- orized representative may grant, modify or deny a petition for modification of abatement date filed pursuant to sections 804.2 and 804.3 of this Part. No determination of approval shall be made prior to the expiration of 15 working days from the date the petition was posted and served pursuant to section 804.4 of this Part. The commissioner will mail a copy of the determination to the parties which will also notify the parties of their rights under sections 804.7 and 804.8 of this Part.

804.7 Review of employee objection. When a petition has been objected to by affected employees or their representative, if there is one, such petition shall be processed as follows:

(a) If the commissioner's determination grants, in whole or in part, the employee's application, the petition, citation and any objections shall be forwarded by the commissioner to the Industrial Board of Appeals within 10 working days.

(b) The Industrial Board of Appeals shall docket and process such petitions as expedited proceedings.

(c) Within 10 working days after the receipt of notice of the docketing by the Industrial Board of Appeals of any petition for modification of the abatement date, each party shall file a response setting forth whether it is aggrieved by such determination and the reasons for opposing the granting of the modification date requested in the petition. If no party is aggrieved, the board on its own motion shall dismiss the proceeding.

804.8 Review by employer. (a) The determination of the commissioner under this Part shall be deemed a final order under section 27-a of the Labor Law, subject to review by the Industrial Board of Appeals pursuant to the provisions of section 101 of the Labor Law on a petition filed by the employer.

(b) An employer seeking review of the determination shall have the burden of proving that such employer has made a good faith effort to comply with the abatement requirement of the citation and that abatement has not been completed because of factors beyond the employer's control.

PART 805

PETITION FOR EMPLOYEE CONTEST OF ABATEMENT PERIOD

(Cited as 12 NYCRR Part 805)

Effective April 4, 1990

State of New York
Department of Labor

PART 805

PETITION FOR EMPLOYEE CONTEST OF ABATEMENT PERIOD

(Statutory Authority: Labor Law, § 27-a)

Sec.
805.1 Application
805.2 Content of employee contest petition
805.3 When and where filed
805.4 Determination of the commissioner
805.5 Review of employee contest
805.6 Review by employer

Section 805.1 Application. An affected employee or authorized employee representative may contest the abatement period prescribed in the notice of violation and order to comply by filing an employee contest petition when such person has reason to believe that the abatement period is unreasonable.

805.2 Content of employee contest petition. A petition for an employee contest shall be in writing and shall include:

(a) the name, address and telephone number of the person submitting the petition;

(b) the address and location of the place or places of employment affected by the petition;

(c) the date the notice of violation was issued and the particular order(s) for which the abatement period is contested;

(d) a statement of the reason(s) why the abatement period prescribed is unreasonable;

(e) a statement that a copy was delivered to the employer, advising the employer of the filing and that the employer has 10 working days to respond to the commissioner at the address where such petition was filed; and

(f) the signature and title of the person submitting the petition.

805.3 When and where filed. An employee contest petition shall be filed with the Commissioner of Labor by mailing or delivering the petition to the district supervisor of the Public Employee Safety and Health Bureau, Division of Safety and Health, New York State Department of Labor, in the district that issued the notice of violation and order to comply within 15 days of the posting of the notice of violation and order to comply by the employer. A petition filed after that date shall be accompanied by the petitioner's statement of exceptional circumstances explaining the delay. For good cause shown, a petition filed after the time allowed may be accepted by the commissioner.

805.4 Determination of the commissioner. The commissioner or his duly authorized representative shall respond to the employee contest petition within 15 working days. The commissioner's determination may grant, modify or deny a petition filed pursuant to sections 805.2 and 805.3 of this Part.

805.5 Review of employee contest. The determination of the commissioner under this Part shall be deemed a final order under section 27-a of the Labor Law.

(a) If the commissioner denies the employee contest petition, in whole or in part, such petition, employer response and determination will be forwarded by the commissioner to the Industrial Board of Appeals within 10 working days.

(b) The Industrial Board of Appeals shall docket and process such petitions as expedited proceedings.

(c) Within 10 working days after the receipt of notice of the docketing by the Industrial Board of Appeals, a party shall file a response setting forth whether it is aggrieved by such determination and the reasons therefor. If no party is aggrieved, the board shall on its own motion dismiss the proceeding.

805.6 Review by employer. If the commissioner's determination modifies the abatement period set forth in the notice of violation and order to comply, such determination shall be deemed a final order under section 27-a of the Labor Law and such employer may petition for review by the Industrial Board of Appeals pursuant to the provisions of section 101 of the Labor Law.