



EFiled: Apr 12 2016 01:30PM HAST
Transaction ID 59090931
Case No. 2015-36

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

SUNBEAM MASONRY, INC.,

Respondent.

CASE NO. 2015-36

ORDER NO. 778

ORDER GRANTING
COMPLAINANT DIRECTOR,
DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS'
JANUARY 29, 2016 MOTION TO
DISMISS RESPONDENT SUNBEAM
MASONRY, INC.'S CONTEST

ORDER GRANTING COMPLAINANT DIRECTOR, DEPARTMENT OF
LABOR AND INDUSTRIAL RELATIONS' JANUARY 29, 2016
MOTION TO DISMISS RESPONDENT SUNBEAM MASONRY, INC.'S CONTEST

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

A. Notice of Contest and Citation

This case arises from a Citation and Notification of Penalty (Citation), issued on June 10, 2015 to Respondent Sunbeam Masonry, Inc. (Sunbeam) by the State of Hawaii, Department of Labor and Industrial Relations (DLIR), Hawaii Occupational Safety and Health Division (HIOSH). The Citation states under "Employer's Right to Contest", that to contest the Citation, "you must submit a signed original letter of contest to the [HIOSH] Administrator within 20 calendar days after you receive the Citation and Notification of Penalty."¹

¹ Also, a booklet entitled "Employer Rights and Responsibilities following a HIOSH Inspection" (Booklet) was included with the Citation. The Booklet, Section 10, entitled **How to Contest**, states in relevant part:

The Citation was mailed to Sunbeam by HIOSH on June 10, 2015, by U.S. Postal Service Certified Mail showing that HIOSH mailed the Citation to Sunbeam on that date, however, the Citation was returned to HIOSH as "Unclaimed."

On July 8, 2015, the Director of DLIR (Director or Complainant) through HIOSH, re-issued and re-mailed the same Citation to Sunbeam, and this attempt was successful; the U.S. Postal Certified Mail Receipt shows that the Citation was delivered to Sunbeam Masonry, Inc. on July 17, 2015.

On September 4, 2015, HIOSH received a letter dated September 1, 2015, addressed to "Sonny" at HIOSH, from Sunbeam, and signed by Kuli Teaupa (Teaupa), President of Sunbeam, who confirmed that Sunbeam received the Citation on July 17, 2015 by certified mail. The letter states that Sunbeam contacted HIOSH on August 6, 2015, and was informed that "the 20 day allowance of time had passed." Teaupa requested that HIOSH "reconsider by allowing us to reduce the fines to 1,000.00 and make 4 monthly payments of \$250.00 each." The envelope addressed to HIOSH containing Teaupa's letter was postmarked in Honolulu on September 2, 2015.

On November 6, 2015, HIOSH transmitted the "Notice of Contest" (HIOSH Notice) notifying the Hawaii Labor Relations Board (Board or HLRB) that Sunbeam was contesting that Citation. A copy of Sunbeam's September 1, 2015 letter was attached to the HIOSH Notice. On December 4, 2015, the Board issued a Notice of Initial/Settlement Conference, which was superseded by a February 2, 2016 Notice of Case Assignment and Order, setting a March 28, 2016 deadline for submission of a case status report by each of the parties.

How to Contest

If you wish to contest any portion of your citation, a Notice of Contest must be submitted in writing within 20 calendar days after receipt of the Citation and Notification of Penalty even if you have orally stated your disagreement with a citation, penalty, or abatement date during a telephone conversation or an Informal Conference.

The Notice of Contest must be a written and signed original. The notice must be postmarked (if mailed) within twenty calendar days of receipt of the citation. If it is not mailed, the date of receipt stamped by the Director's office must be within twenty calendar days of receipt of the citation.

(Emphasis added)

Motion to Dismiss

On January 29, 2016, the Director filed "Complainant Director of Labor and Industrial Relations' Motion to Dismiss Respondent Sunbeam Masonry, Inc.'s Contest" (Motion) for lack of jurisdiction based on Sunbeam's untimely filing of the contest.

On February 2, 2016, the Board issued a Notice of Hearing on Complainant's Motion to Dismiss Respondent Sunbeam Masonry, Inc.'s Contest, Filed on January 29, 2016.

Sunbeam did not file an opposition or otherwise respond to Complainant's January 29, 2016 Motion.

On February 25, 2016, the Board held a hearing on the Director's Motion attended by Complainant's counsel. Teaupu did not appear for the hearing, and the Board called Teaupu who then participated in the hearing by telephone. Complainant relied on its Memorandum and the Declarations and Exhibits attached to its January 29, 2016 Motion. Despite arguing that an employee of Sunbeam was responsible for the handling of the Contest, Teaupu nevertheless admitted that (1) Sunbeam received the Citation on July 17, 2015, (2) he was the author of the September 1, 2015 letter to HIOSH in which he stated that he was informed that the 20 day time period to contest the Citation had passed, and (3) he did not dispute Sunbeam's failure to submit or postmark a written contest of the Citation to HIOSH on or before the August 6, 2015 deadline. At the conclusion of these arguments, the Board orally granted Sunbeam's January 29, 2016 Motion and informed the parties that a written decision would be issued.

II. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Applicable Standards for a Motion to Dismiss

The Board adheres to the legal standards established by the Hawaii appellate courts for motions to dismiss brought under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b) (1) is based on the contents of the complaint, the allegations of which must be accepted as true, and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d

1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007); Director, Dep't. of Labor and Indus. Rels. v. 1st Green Solutions, LLC, Board Case No. OSH 2011-19, Order No. 530, at *6 (2013).

B. The Board Lacks Jurisdiction Based on Untimely Filing of the Contest.

The Board agrees with the Director that the Board lacks jurisdiction for the following reasons.

Hawaii Revised Statutes (HRS) §396-11(a), setting forth the review procedure for citations and penalties issued under HRS Chapter 396, states that any citation or proposed penalty shall be final and conclusive against the employer unless "the employer files with the director a written notice of contest of the citation,.... the proposed penalty, ...within twenty days after receipt of the citation, proposed penalty...." (Emphasis added)

As noted in the Intermediate Court of Appeals (ICA) decision in Si-Nor v. Div. Dep't. of Labor and Indus. Rels. 120 Hawai'i 135, 142-43, 202 P.3d 596, 604 (2009), DLIR promulgated Hawaii Administrative Rules (HAR) §§12-51-15 and 12-51-19 to clarify this review process in more detail.

HAR §12-51-15 states in relevant part:

§12-51-15 Proposed penalties. (a) ...Any notice of proposed penalty shall state that the proposed penalty shall be the final order and not subject to review by any court of agency unless, within twenty calendar days from the date of receipt of notice, the employer files a notice of contest in accordance with section 12-51-19 for review of the order in accordance with the law.

(Emphasis added)

HAR §12-51-19 states:

Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director.

(Emphasis added)

In this case, the record shows no dispute that Sunbeam filed its appeal more than 20-days after receipt of the Citation. Consequently, in her Motion, the Director takes the position that the Board lacks subject matter jurisdiction because Sunbeam did not properly and timely contest its citation. In support, the Director asserts that the applicable rule is that the Board has no jurisdiction unless the mandatory statutory requirement of a timely perfecting of an appeal is met. The Director maintains that in this case HRS §396-11(a) requires that a citation and proposed penalty shall be final and conclusive unless a written notice of contest is filed within 20 days after receipt of the citation. The Director further argues that based on its receipt of the Citation on July 17, 2005, Sunbeam was required to contest the Citation on or before August 6, 2005, which it failed to do. Thus, the Board has no jurisdiction over this case, which should be dismissed. In support, the Director relies on HRS § 396-11(a), HAR §12-51-19 and the general rule articulated by the ICA ruling in Si-Nor that “the time limit for filing an appeal is generally considered to be mandatory and jurisdictional in both civil and criminal cases and cannot be waived by the parties.”

Based on the foregoing, the Board concludes that satisfying the requirements of HAR §12-51-19 for a timely valid notice of contest is mandatory. The record is undisputed that the Citation was re-issued and re-mailed by HIOSH on July 8, 2015 and received by Sunbeam on July 17, 2015. In addition, that Citation contained the advisement that to contest the Citation, “you must submit a signed original letter of contest to the [HIOSH] Administrator within 20 calendar days after you receive the Citation and Notification of Penalty.” Accordingly, the 20-day period expired on August 6, 2015. Nevertheless, on September 2, 2015, twenty-seven (27) days after the filing deadline, Sunbeam mailed its notice of contest, which was filed by HIOSH on September 4, 2015. In this case, dismissal is proper based on these undisputed facts because “it appears beyond doubt that the [Sunbeam] can prove no set of facts in support of his claim which would entitle him to relief.” As noted in Si-Nor, “[t]he right of appeal is purely statutory and therefore, the right of appeal is limited as provided by the legislature and compliance with the method and procedure prescribed by it is obligatory.” 120 Hawai‘i at 145, 202 P.3d at 606. The 20-day statute of limitations for filing a contest is a jurisdictional requirement which the Board has no authority to waive. For all of these reasons set forth above, the Board is compelled to find that it lacks jurisdiction to consider Sunbeam’s notice of contest.

The Board hereby grants the Director’s Motion to Dismiss. This case is closed.

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ORDER NO.

DATED: Honolulu, Hawaii, June 6, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

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