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Case No. OSH 2016-08

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR OF LABOR AND INDUSTRIAL
RELATIONS,

Complainant,

and

OCEAN TILE, LLC.,

Respondent.

CASE NO. 2016-08

ORDER NO. 786

ORDER GRANTING
COMPLAINANT DIRECTOR OF
LABOR AND INDUSTRIAL
RELATIONS' MARCH 4, 2016
MOTION TO DISMISS OCEAN TILE,
LLC'S CONTEST

**ORDER GRANTING COMPLAINANT DIRECTOR OF LABOR
AND INDUSTRIAL RELATIONS' MARCH 4, 2016 MOTION TO
DISMISS RESPONDENT OCEAN TILE, LLC'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 December 23, 2015 to Respondent Ocean Tile, LLC (Ocean or Respondent) 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 which must be postmarked or, if not mailed, received by the Administrator within 20 calendar days after you receive this 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 Ocean by HIOSH on December 23, 2015, through U.S. Postal Service (USPS) Certified Mail showing that HIOSH mailed the Citation to Ocean on that date; the USPS Certified Mail Receipt shows that the Citation was delivered to and received Respondent on January 7, 2016.

On January 29, 2016, HIOSH received and file-stamped an undated letter from Respondent contesting the Citation (Notice of Contest). The USPS Priority Mail 1-Day (delivery) envelope addressed to HIOSH containing Respondent's letter was postmarked on January 28, 2016.

On February 17, 2016, the Hawaii Labor Relations Board (Board or HLRB) filed Ocean's Notice of Contest letter transmitted by HIOSH together with the Citation and USPS documents. On February 18, 2016, the Board issued a Notice of Case Assignment and Order, setting a May 3, 2016 deadline for submission of a case status report by each of the parties.

B. Motion to Dismiss

On March 4, 2016, the Director of DLIR (Director or Complainant) filed "Complainant Director of Labor and Industrial Relations' Motion to Dismiss Respondent Ocean Tile, LLC's Contest" (Motion) alleging that Ocean's Contest was not timely filed; and therefore, failed to give the Board jurisdiction over Ocean's case. The Declaration of Soon Hye Edgerton, the Manager of the Occupational Safety Branch of HIOSH, and copies of the Citation, the Contest letter and USPS mailing and delivery documents were filed with the Motion.

On March 7, 2016, the Board issued a Notice of Hearing on Complainant's Motion to Dismiss Ocean Tile, LLC's Contest, Filed on March 4, 2016 (Notice); said Notice set a March 18, 2016 hearing on the Motion.

Ocean did not file an opposition or response to the Motion.

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)

On March 18, 2016, the Board held a hearing on the Director's Motion, which was attended by Complainant's counsel. No one appeared or telephoned the Board on behalf of Respondent to participate in the Motion hearing, which had been properly noticed to the parties. On the record, the Board placed a telephone call to Respondent's business number of record, and the individual who answered the Board's call, self-identified as the husband of Respondent's representative, Monique DePonte (DePonte), referred the Board to the cell phone number of Ms. DePonte. The Board then placed a call to Ms. DePonte's cell phone but received only a recorded message. The Board then proceeded with the hearing on the Motion without any participation by Respondent. Counsel for Complainant briefly summarized the contents of the Motion, arguing that Ocean's untimely Contest is a jurisdictional defect that cannot be waived by the parties or disregarded by the Board. At the conclusion of this argument, the Board orally took the Motion under advisement.

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 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. Director, Dep't. of Labor and Indus. Rels., 120 Hawai'i 135, at 142-43, 202 P.3d 592, at 604 (Haw. Ct. App., 2009) (Si-Nor case), DLIR promulgated 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 or 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 Ocean filed its Contest more than 20-days after receipt of the Citation. Consequently, in the Motion, the Director takes the position that the Board lacks subject matter jurisdiction because Ocean did not properly and timely contest the 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 the Citation is contested within 20 days after receipt

of the citation. The Director further argues that based on Respondent's January 7, 2016 receipt of the Citation, Ocean was required to contest the Citation on or before January 27, 2016, which it failed to do by mailing its Contest to HIOSH on January 28, 2016, one day late. 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 the Si-Nor case 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 issued and mailed on December 23, 2015 and received by Ocean on January 7, 2016. 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 contest period expired on January 27, 2016. Ocean posted its Notice of Contest to HIOSH on January 28, 2016, which was, therefore, one day late pursuant to HAR § 12-51-19. In this case, dismissal is proper based on these undisputed facts because "it appears beyond doubt that [Ocean] can prove no set of facts in support of [its] claim which would entitle [it] to relief." As noted in the Si-Nor case, "[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. See also, Kissell v. Labor & Indus. Rel. App. Bd., 57 Haw. 37, 38, 549 P.2d 470, 471 (1976). The 20-day statute of limitations for filing a contest is a jurisdictional requirement which the Board has no authority to waive. Therefore, the Board must strictly construe the limitation period and will not waive the defect of even a single day. See, Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). For all of the reasons set forth above, the Board is compelled to find that it lacks jurisdiction to consider Ocean's notice of contest postmarked to HIOSH one day after the mandatory 20-day deadline.

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

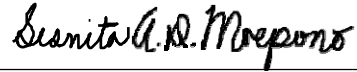
DATED: Honolulu, Hawaii, April 20, 2016.

HAWAII LABOR RELATIONS BOARD

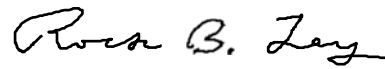


KERRY M. KOMATSUBARA, Chair

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SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:
Doris Dvonch, Deputy Attorney General
Monique M. DePonte.