



STATE OF HAWAII

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Case No. OSH 2017-01

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

MRC ROOFING, LLC,

Respondent.

CASE NO. OSH 2017-01

ORDER NO. 936

ORDER GRANTING COMPLAINANT
DIRECTOR OF LABOR AND INDUSTRIAL
RELATIONS' MOTION TO DISMISS
RESPONDENT MRC ROOFING, LLC'S
CONTEST

ORDER GRANTING COMPLAINANT DIRECTOR OF
LABOR AND INDUSTRIAL RELATIONS' MOTION TO
DISMISS RESPONDENT MRC ROOFING, LLC'S CONTEST

I. FINDINGS OF FACT

The Hawaii Labor Relations Board (Board) makes the following Findings of Fact. 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.

On November 9, 2016, the Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant) issued a Citation and Notification of Penalty (Citation) to Respondent MRC ROOFING, LLC (Respondent) and mailed it by certified mail on the same day. The Citation included the following provision:

Employers' Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may also contest all citation items or only individual items. You may also contest the penalty and/or abatement dates without contesting the underlying violations. To contest you must submit a signed original letter of contest to the 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. The letter of contest must be a signed original and may not be submitted by facsimile or e-mail. Address your letter of contest to the State of Hawaii Occupational Safety and Health Division at the address shown on the top of page 1 of this Citation and Notification of Penalty. Once a letter of contest is

received, it becomes the jurisdiction of the HLRB. If a timely contest is not filed, the Citation and Notification of Penalty will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency. (Emphases original).

On November 10, 2016, Respondent received the Citation as evidenced by the return receipt. Respondent had 20 days from November 10, 2016 or by Wednesday, November 30, 2017 to submit a notice of contest to Complainant. The envelope containing Respondent's notice of contest was postmarked on December 2, 2016.

On January 3, 2017, the Board received the Transmittal of Notice of Contest from the State of Hawaii, Department of Labor and Industrial Relations' Hawaii Occupational and Safety Division (HIOSH) in the above-captioned matter. On the same day, the Board issued a Notice of Initial Conference and Notice of De Novo Hearing which notified the parties that an Initial Conference would be held on February 2, 2017 at 9:00 a.m. and requested each party to submit an initial conference statement (statement) no later than three (3) business days prior to the conference.

On January 11, 2017, the Complainant submitted the investigative file to Respondent.

On January 26, 2017, Complainant filed COMPLAINANT DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS' MOTION TO DISMISS RESPONDENT MRC ROOFING, LLC'S CONTEST (Motion) with the Board. Complainant's Motion requested the Board to dismiss the case based on a jurisdictional issue because Respondent failed to timely file a notice of contest.

On January 27, 2017, the Board received Complainant's Initial Conference Statement of Complainant Director of Labor and Industrial Relations. The Board did not receive an Initial Conference Statement from the Respondent.

On January 30, 2017, the Board issued a Notice of Cancellation of Initial Conference; Notice of Motion Hearing.

On February 9, 2017, the Board held a Motion Hearing on Complainant's Motion. Complainant's counsel and Respondent's representative, Mr. Michael Chu, owner of MRC were present. Mr. Chu stated that he did not receive Complainant's Motion or Board's Notice of Motion Hearing.¹ It was agreed that Complainant's counsel would email Complainant's Motion and a response will be due 30 days to enable Respondent to obtain an attorney. The parties agreed to hold a second hearing on March 30, 2017 at 9:30 a.m.

¹ The Board's staff called Respondent prior to the hearing who agreed to participate by telephone.

On February 17, 2017, the Board issued a Second Notice of Motion Hearing; Notice of Cancellation of *De Novo* Hearing which notified the parties that a hearing on Complainant's Motion would be held on March 30, 2017 at 9:30 a.m.

No response from Respondent to Complainant's Motion has been filed with the Board.

On March 30, 2017 at 9:30 a.m., the Board held a second hearing on Complainant's Motion. Present at the hearing was Complainant's counsel. Respondent's representative was not present. Complainant's counsel represented that she had emailed Complainant's Motion and had an email confirming receipt by Respondent. The Board issued an oral ruling granting Complainant's Motion based on untimeliness and stated that a written order would be issued.

II. CONCLUSIONS OF LAW; DISCUSSION AND STANDARD OF REVIEW

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

Pursuant to Hawaii Revised Statutes (HRS) § 396-3 states that the "Appeals board" means the Hawaii labor relations board.

Pursuant to HRS § 396-3, "Director" means the director of labor and industrial relations or the director's designee.

HRS § 396-11(a) states:

HRS § 396-11 Review. (a) Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after the receipt of the citation, proposed penalty, or order.

(emphasis added)

* * *

(g) Upon receipt, the director shall advise the appeals board of any notice of contest.

(h) The appeals board shall afford an opportunity for a de novo hearing on any notice of contest except where rules require a prior formal hearing at the department level, the proceedings of which are required to be

transcribed, in which case review before the appeals board shall be confined to the record only.

(i) The appeals board may affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate.

Id. § 12-51-19, Title 12 of the Hawaii Administrative Rules (HAR), which pertains to the DLIR, states:

Employer contests of citation, proposed penalty or both. 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. The department will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each contest petition shall be posted where they shall be readily observed by all affected employees. [Eff. 7/12/82; am 8/15/87; am 8/10/95; am 11/16/96] (Auth: Id. § 396-4)

The Respondent received the Citation on November 10, 2016 as evidenced by Complainant's USPS certified mail return receipt contained in the Transmittal of Notice. The Citation provided notice to Respondent on Employers' Right to Contest with the requirements outlined in HAR § 12-51-19. Accordingly, the deadline for the Respondent to submit or mail an original letter of contest to Complainant was November 30, 2016 or twenty days from receipt of the Citation. The Respondent's envelope containing the letter of contest was postmarked on December 2, 2016 which was past the deadline as proscribed by statute and rule.

"[I]t is well established . . . that lack of subject matter jurisdiction can never be waived by any party at any time." Koga Eng'g & Constr., Inc. v. State, 122 Hawaii 60, 84, 222 P.3d 979, 1003 (2010) (citing Chun v. Employees' Ret. Sys., 73 Haw. 9, 13, 828 P.2d 260, 263 (1992); In re Rice,

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68 Haw. 334, 335, 713 P.2d 426 (1986) (citing Meyer v. Territory, 36 Haw. 75, 78 (1942)). It is further well-recognized that the Board is required to do what it is compelled by statute. "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do." Mayland v. Flitner, 28 P.3d 838, 854 (Wyo. 2001); see also: Hoh Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (Held "The law has long been clear that agencies may not nullify statutes.") To emphasize the necessity of subject matter jurisdiction, the Court has noted, "If the parties do not raise the issue, a court *sua sponte* will, for unless jurisdiction of the court over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992))

Accordingly, the Board is required to dismiss this case because it lacks subject matter jurisdiction based on the Respondent's failure to timely file its notice of contest as required by HRS § 396-11(a) and HAR § 12-51-19.

ORDER

Based on the foregoing, the Board GRANTS COMPLAINANT DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS' MOTION TO DISMISS. This case is dismissed and closed.

DATED: Honolulu, Hawaii _____ August 22, 2017 _____.

HAWAII LABOR RELATIONS BOARD



Sesnita A. D. Moepono
SESNITA A.D. MOEPONO, Member

J.N. Musto
J.N. MUSTO, Member

Copies sent to

Doris Dvonch, Deputy Attorney General
Michael Chu