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Case No. OSH 2016-38**

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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. OSH 2016-38
	)	
DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,	)	COMPLAINANT DIRECTOR,
	)	DEPARTMENT OF LABOR AND
Complainant,	)	INDUSTRIAL RELATIONS' PROPOSED
	)	ORDER GRANTING COMPLAINANT
and	)	DIRECTOR, DEPARTMENT OF LABOR
	)	AND INDUSTRIAL RELATIONS'
COUNTRY BUILDERS, INC.,	)	MOTION TO DISMISS RESPONDENT
	)	COUNTRY BUILDERS, INC.'S CONTEST,
Respondent.	)	FILED NOVEMBER 30, 2016;
	)	<del>CERTIFICATE OF SERVICE</del> <i>JM don</i>
	)	
	)	ORDER NO. 3284

**COMPLAINANT DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL  
RELATIONS' PROPOSED ORDER GRANTING COMPLAINANT DIRECTOR,  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS'  
MOTION TO DISMISS RESPONDENT COUNTRY BUILDERS, INC.'S CONTEST,  
FILED NOVEMBER 30, 2016**

Pursuant to the Minute Order Granting Complainant Director, Department of Labor and

Industrial Relations' Motion to Dismiss Respondent Country Builders, Inc.'s Contest, filed on May 25, 2017, Complainant Director, Department of Labor and Industrial Relations (Director), by and through her attorney, Doris Dvonch, Deputy Attorney General, submits the following proposed findings of fact, conclusions of law, and order granting Director's Motion to Dismiss Respondent Country Builders, Inc.'s Contest for the Hawaii Labor Relations Board's (Board) consideration and signature.

I. PROPOSED FINDINGS OF FACT AND PROCEDURAL BACKGROUND

If it should be determined that any of these Proposed Findings of Fact should have been set forth as Proposed 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 August 11, 2016 to Respondent Country Builders, Inc. (Country) by the State of Hawaii, Department of Labor and Industrial Relations, 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."<sup>1</sup>

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<sup>1</sup> 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:

**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 within 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

The Citation was mailed to Country by HIOSH on August 11, 2016 by U.S. Postal Service Certified Mail showing that HIOSH mailed the Citation to Country on that date; the U.S. Postal Certified Mail Receipt shows that the Citation was delivered to Country on August 17, 2016.

On September 26, 2016, Country mailed a letter to HIOSH to contest the Citation by U.S. Postal Mail; the postmark on the envelope that contained the letter was dated-stamped September 26, 2016. On September 29, 2016, HIOSH received Country's letter of contest. The letter was time-stamped September 29, 2016 by HIOSH.

On October 11, 2016, HIOSH transmitted the September 26, 2016 "Notice of Contest" (Contest) to the Board. A copy of the Citation was enclosed with the Contest. On October 12, 2016, the Board issued a Notice of Case Assignment and Order, setting a December 26, 2016 deadline for submission of a case status report by each of the parties.

B. Motion to Dismiss

On November 30, 2016, the Director filed "Complainant Director, Department of Labor and Industrial Relations' Motion to Dismiss Respondent Country Builders, Inc.'s Contest" (Motion) alleging that Country's contest was not timely filed and therefore failed to give the Board jurisdiction over Country's case. The Declaration of Conroy Dang, Acting Safety Branch Manager of HIOSH at the time of the Citation, and copies of the Citation and the Contest letter were filed with the Motion.

On February 14, 2017, the Board issued a Notice of Motion Hearing on Director's

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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; said Notice set a March 1, 2017 hearing on the Motion.

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

On March 1, 2017, the Board held a hearing on the Director's Motion, which was attended by Director's counsel. No one appeared or telephoned the Board on behalf of Country to participate in the Motion hearing, which had been properly noticed to the parties. On the record, a staff member of the Board called Country's telephone number of record, and left a message when there was no response. The Board then proceeded with the hearing on the Motion without any participation by Country. Counsel for Director briefly summarized the contents of the Motion. At the conclusion of this argument, the Board orally took the Motion under advisement.

On May 25, 2017, the Board issued a Minute Order Granting Complainant Director, Department of Labor and Industrial Relations' Motion to Dismiss Respondent Country Builders, Inc.'s Contest; said Minute Order directed the Director, as the prevailing party on the Motion, to submit to the Board proposed findings of fact, conclusions of law, and order granting the Motion for the Board's consideration and signature.

## II. PROPOSED CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

If it should be determined that any of these Proposed Conclusions of Law should have been set forth as Proposed 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 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 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 process 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 Hawaii Intermediate Court of Appeals decision of Si-Nor v. Director, Dep’t. of Labor and Indus. Rels., 120 Hawaii 135, 142-43, 202 P.3d 592, 604 (App. 2009), the Department of Labor and Industrial Relations 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.

Haw. Admin. R. § 12-51-15 (emphasis added).

HAR § 12-51-19 states in relevant part:

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.

Haw. Admin. R. § 12-51-19 (emphasis added).

In this case, the record shows no dispute that Country 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 Country 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 Country's August 17, 2016 receipt of the Citation, Country was required to contest the Citation on or before September 6, 2016, which it failed to do by mailing its Contest to HIOSH on September 26, 2016, 20 days 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 August 11, 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 contest period expired on September 6, 2016. Country posted its Notice of Contest to HIOSH on September 26, 2016, which was, therefore, 20 days late pursuant to HAR § 12-51-19.

In this case, dismissal is proper based on these undisputed facts because “it appears beyond doubt that [Country] 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.” Si-Nor, 120 Hawaii 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 a defect of even a single day. See Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). For all the reasons set forth above, the Board is compelled to find that it lacks jurisdiction to consider Country’s notice of contest postmarked to HIOSH 20 days after the mandatory 20-day deadline.

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

DATED: Honolulu, Hawaii JUN 22 2017.



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DORIS DVONCH  
Deputy Attorney General

Attorney for Complainant Director, Department  
of Labor and Industrial Relations

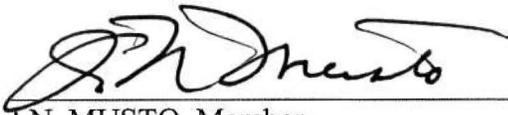
SO ORDERED BY THE  
HAWAII LABOR RELATIONS BOARD:

ORDER NO. 3284

DATED: August 9, 2017



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SESNITA A.D. MOEPONO, Member



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J.N. MUSTO, Member

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In the Matter of Director, Department of Labor and Industrial Relations and Country Builders, Inc., et. al.,  
Case No. OSH 2016-38; Complainant Director, Department of Labor and Industrial Relations' Proposed Order  
Granting Complainant Director, Department of Labor and Industrial Relations' Motion to Dismiss Respondent  
Country Builders, Inc.'s Contest, Filed November 30, 2016