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Case No. OSH 2016-05

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

DELIVERY HAWAII, INC.,

Respondent.

CASE NO. OSH 2016-05

ORDER NO. 781

ORDER GRANTING
COMPLAINANT DIRECTOR,
DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS'
FEBRUARY 22, 2016 MOTION TO
DISMISS RESPONDENT DELIVERY
HAWAII INC.'S CONTEST

ORDER GRANTING COMPLAINANT DIRECTOR, DEPARTMENT OF
LABOR AND INDUSTRIAL RELATIONS' FEBRUARY 22, 2016
MOTION TO DISMISS RESPONDENT DELIVERY HAWAII, 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 November 13, 2015 to Respondent Delivery Hawaii, Inc. (Delivery) 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 Delivery by HIOSH on November 13, 2016 by U.S. Postal Service Certified Mail showing that HIOSH mailed the Citation to Delivery on that date; the U.S. Postal Certified Mail Receipt shows that the Citation was delivered to Delivery on November 16, 2015.

On December 14, 2015, HIOSH received a hand-delivered letter dated December 14, 2015 from Delivery's counsel contesting the Citation. The letter was time stamped by HIOSH on December 14, 2015.

On January 21, 2016, HIOSH transmitted the December 14, 2015 "Notice of Contest" (Contest) to the Hawaii Labor Relations Board (Board or HLRB). A copy of the Citation was enclosed with the Contest. On January 22, 2016, the Board issued a Notice of Case Assignment and Order, setting an April 6, 2016 deadline for submission of a case status report by each of the parties.

B. Motion to Dismiss

On February 22, 2016, the Director of DLIR (Director or Complainant) filed "Complainant Director of Labor and Industrial Relations' Motion to Dismiss Respondent Delivery Hawaii, Inc.'s Contest" (Motion) alleging that Delivery's Contest was not timely filed and therefore failed to give the Board jurisdiction over Delivery's case. The Declaration of Tin Shing Chao, Manager of HIOSH, and copies of the Citation and the Contest letter were filed with the Motion.

On February 29, 2016, Delivery filed "Respondent Delivery Hawaii, Inc.'s Memorandum in Opposition to Complainant Director, Department of Labor and Industrial Relations' Motion to Dismiss Respondent Delivery Hawaii, Inc.'s Contest, Filed February 22, 2016" (Opposition). Attached as exhibits to Delivery's Opposition were Declaration of Counsel, a Honolulu Star-Advertiser Obituary (for Delivery's counsel's sister), Hawaii State Judiciary Ho'ohiki Court

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)

minutes lists for unrelated cases, signature pages from the Settlement and Mutual Release Agreement in an unrelated matter, the Notice of Appearance of Co-Counsel for Defendant and Third-Party Plaintiff in an unrelated matter, the Stipulation for Dismissal with Prejudice of All Claims and Parties in an unrelated case, a copy of a photograph of Delivery's worksite tables mounted on wheels, and statements taken from Delivery employees.

On March 1, 2016, the Board issued a Notice of Hearing on Complainant's Motion to Dismiss Respondent Delivery Hawaii, Inc.'s Contest, Filed on February 22, 2016.

On March 1, 2016, the Director filed "Complainant's Reply to Respondent's Memorandum in Opposition to Complainant Director, Department of Labor and Industrial Relations' Motion to Dismiss Respondent Delivery Hawaii, Inc.'s Contest Filed February 26, 2016" (Reply).

On March 14, 2016, the Board held a hearing on the Director's Motion attended by Complainant's counsel and Delivery's counsel, who presented oral argument. Counsel for Complainant summarized the contents of her Motion and Reply briefs, arguing that Delivery's untimely Contest is a jurisdictional defect that cannot be waived by the parties or disregarded by the Board. Counsel for Delivery relied on and summarized his Memorandum and attached Declaration and Exhibits. He discussed the circumstances, both personal and work-related, leading to his untimely filing of Delivery's Contest. Notably, upon questioning by the Board, Delivery's counsel stated that he is not aware of any case law to support his argument that Director's Motion should be denied. At the conclusion of these arguments, the Board orally granted Director's February 22, 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 (HRCPP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCPP 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. Div. Dep't. of Labor and Indus. Rels. 120 Hawai'i 135, at 142-43, 202 P.3d 592, at 604 (2009), 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 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 Delivery 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 Delivery 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 contest is filed within 20 days after receipt of the citation. The Director further argues that based on its receipt of the Citation on November 16, 2005, Delivery was required to contest the Citation on or before December 7, 2015, which it failed to do by filing its Contest on December 14, 2015. Thus, the Board has no jurisdiction over this case, which should be dismissed. In support, the Director relies on HRS § 396-11(a), Hawaii Administrative Rule (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.” Delivery offered no legal opinion to the contrary.

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 November 13, 2015 and received by Delivery on November 16, 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 December 7, 2015. Delivery hand-delivered its notice of contest on December 14, 2015, which was filed on December 14, 2015, one week late. In this case, dismissal is proper based on these undisputed facts because “it appears beyond doubt that the [Delivery] 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 the filing of 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 Delivery’s notice of contest.

The Board hereby grants the Director’s February 22, 2016 Motion to Dismiss. This case is closed.

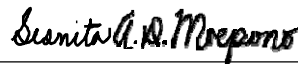
DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS v. DELIVERY
HAWAII, INC.,
CASE NO. OSH-2016-05
ORDER GRANTING COMPLAINANT DIRECTOR OF LABOR AND INDUSTRIAL
RELATIONS' JANUARY 29, 2016 MOTION TO DISMISS RESPONDENT SUNBEAM
MASONRY, INC.'S CONTEST
ORDER NO. 781

DATED: Honolulu, Hawaii, April 12, 2016.

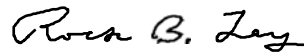
HAWAII LABOR RELATIONS BOARD



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