



STATE OF HAWAII

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Case No. OSH 2012-15

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

R.D. OLSON CONSTRUCTION, INC.,

Respondent.

CASE NO. OSH 2012-15

ORDER NO. 800

ORDER REJECTING RESPONDENT'S
MOTION FOR RELIEF UNDER HAR §
12-41-4 AND HRCP 60(b)(1) TO SET
ASIDE FINAL DECISION
(SUBMITTED 05-23-2016); EXHIBITS
A, B, C, D

ORDER REJECTING RESPONDENT'S MOTION FOR RELIEF UNDER HAR § 12-41-4
AND HRCP 60(b)(1) TO SET ASIDE FINAL DECISION (SUBMITTED 05-23-2016)

On May 23, 2016, Respondent R.D. OLSON CONSTRUCTION, INC. (Respondent) submitted to the Hawaii Labor Relations Board (Board) its Motion for Relief Under HAR § 12-41-4 and HRCP 60(b)(1) to Set Aside Final Decision (Motion for Relief). On May, 27, 2016, Complainant Director, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant) filed its Complainant Director of Labor and Industrial Relations' Objection to Respondent R.D. Olson Construction, Inc.'s Motion for Relief Under HAR Section 12-42-4 and HRCP 60(b)(1) to Set Aside Final Decision (Complainant Objections).

After reviewing the Motion for Relief, including (1) the Declaration of Kevin D. Bland (Bland Declaration) attached as Exhibit A to the Motion for Relief, (2) Kevin D. Bland's (Bland) February 22, 2013 letter to Complainant regarding his representation of Respondent and the direction to address all "future contact and/or correspondence" to him (Representation Letter)

attached as Exhibit B to the Motion for Relief and (3) Soon H. Edgerton's March 11, 2016 e-mail to Karel Taska with an attached copy of the Board's Order No. 714, Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on November 9, 2016 (Proposed Decision), the Board rejects the Motion for Relief for the following reasons:

1. On April 1, 2016, Respondent filed its Statement of Exceptions (Respondent Exceptions) to the Proposed Decision. Respondent represented that it did not receive a copy of the Proposed Decision until March 11, 2016. Respondent also represented that it filed a motion for an extension of time to file exceptions to the Proposed Decision on March 16, 2016. After receiving Complainant's objections to the Respondent Exceptions, on April 14, 2016, the Board filed its Amended Order Rejecting Respondent's Untimely State of Exceptions (Filed 04/1/2016) (Board Order). A copy of the Board Order is attached as Exhibit A. In the Board Order, the Board specifically found that:

(a) The USPS Tracking system notified the Board that a copy of the Proposed Decision mailed (Priority Mail 3-Day) on November 9, 2015 and received by Bland's office on November 12, 2015. A copy of the USPS Tracking information was attached as Exhibit 1 to the Board Order. The Tracking Number used by the United States Postal Service (USPS) was *9405503699300184624077*.

(b) Similarly, the USPS Tracking system notified the Board that a copy of the Board's Order No. 725, Final Order Adopting order No. 714 and Its Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on December 3, 2015 (Final Decision) mailed (Priority Mail 3-Day) on December 3, 2015 and received by Bland's office on December 7, 2015. A copy of the USPS Tracking information was attached As Exhibit 2 to the Board Order. The Tracking Number used by the USPS was *9405503699300203991012*.

(c) Based on the foregoing, the Board rejected Respondent's claim that it did not receive the Proposed Decision until March 11, 2016, and rejected the Respondent Exceptions.

2. On April 14, 2016, the Board Order was mailed to Bland at the following address by Certified Mail, Return Receipt Requested:

Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.
Park Tower, Suite 1500
695 Town Center Drive
Costa Mesa, CA 92626

The Board received the return receipt indicating that it was received by Bland's office. A true and correct copy of the Receipt is attached hereto as Exhibit B.

3. The Board Order was sent by certified mail in light of Respondent's assertion that it did not receive a copy of the proposed Decision. Bland (and therefore, Respondent) received the Board Order since Respondent argues that:

"Respondent was not served a copy of the Proposed Decision or the Final Decision. *See*, Exhibit A, Declaration of Kevin D. Bland ¶ 4 and ¶ 5. Relying on tracking information from the United States Postal Service (USPS), the Board found that Respondent received a copy of the Proposed Decision from the Board on November 12, 2015 and a copy of the Final Decision from the Board on December 3, 2015. *See* Order at 2. However, this USPS tracking information does not support the Board's finding. This USPS tracking information only indicates that the Proposed Decision and Final Decision were delivered to a mailbox located in 'Costa Mesa, CA 92626.' It does not state that the Proposed Decision and the Final Decision were delivered to Respondent's address on record -- 695 Town Center Drive, Suite 1500, Costa Mesa, CA 92626. Also, the copy of the Proposed Order that Respondent received from Ms. Edgeton does not state whether Respondent was served by mail at its address on record. Instead, page 21 of the Proposed Order simply states:

Copies:

Lawrence H. Nakano, Deputy Attorney General

Kevin D. Bland, Esq., Attorney for Respondent R.D. Olson
Construction, Inc.

Moreover, the undersigned has declared under the perjury of
law that he has never received copies of these documents
from the Board."

4. Attached as Exhibit C is a true and correct copy of the USPS-Click-N-Ship Payment Confirmation for the November 9, 2015 mailing of the Proposed Decision to Bland. The Payment Confirmation shows that the Board mailed a Flat Rate Envelope containing the Proposed Decision to Bland on November 9, 2015 to the following address:

Kevin D. Bland, Esq.
Ogletree Deakins Nash Smoak & Stewart
695 Town Center Dr
STE 1500
Costa Mesa CA 92626-7106

The Tracking Number assigned to this article was *9405 5036 9930 0184 6240 77*. This is the *same* Tracking Number on the USPS Tracking information attached as Exhibit 1 to the Board Order.

5. Further, attached as Exhibit D is a true and correct copy of the USPS-Click-N-Ship Payment Confirmation for the December 3, 2015 mailing of the Final Decision to Bland. The Payment Confirmation shows that the Board mailed a Flat Rate Envelope containing the Final Decision to Bland on December 3, 2015 to the following address:

Kevin D. Bland, Esq.
Ogletree Deakins Nash Smoak & Stewart
695 Town Center Dr
STE 1500
Costa Mesa CA 92626-7106

The Tracking Number assigned to this article was *9405 5036 9930 0203 9910 12*. This is the *same* Tracking Number on the USPS Tracking information attached as Exhibit 2 to the Board Order.

6. Further, in the Respondent Exceptions, Respondent stated that "on March 16, 2016 [Respondent] timely filed a motion for extension of time until April 1, 2016 to file its exceptions to the Proposed Decision."¹ In the Board Order, there was a specific finding that "the Board has not received any such motion," and the Board noted that "Respondent fails to submit any sworn declaration of any individual to this factual claim."² The Bland Declaration does not address this issue. Therefore, Respondent's statement that a motion for extension of time until April 1, 2016 to file exceptions to the Proposed Decision was timely filed is unsupported.

7. Given the foregoing, the Board finds that (a) Respondent's statements that it did not receive the Proposed Decision and the Final Decision until March 11, 2016 are without support and the Proposed Decision was mailed to Bland (per his instructions) to his office address and were, in fact, received by his office and (b) Respondent's statement that it filed with the Board a timely motion for extension of time to file exceptions to the Proposed Order is without support and no such motion was filed with the Board.

8. Based on the foregoing, the Motion for Relief is rejected because:

(a) Service Complete Upon Mailing. Hawaii Rules of Civil Procedure (HRCPP) Rule 5(b)(1)(b) provides that service may be made upon an attorney for a party "by mailing it to the attorney at the attorney's last known address." Further, HRCPP Rule 5(b)(3) specifically provides that "[s]ervice by mail is *complete upon mailing*. (Italics added.)" As shown by the foregoing, the Proposed Decision was *mailed* on November 9, 2015 to Bland using the address he provided to the Board, and the Final Decision was *mailed* on December 3, 2015 to Bland using the address he provided to the Board. Thus, for both the Proposed Decision and the Final Decision,

¹ Respondent Exceptions at 1.

² Board Order at 2.

service upon Respondent through Bland, Respondent's attorney, was *completed* when mailed. There is no requirement that the Board show or be responsible for Bland's actual receipt of the same.

(b) No Credible Showing that Bland Did Not Receive the Proposed and Final Decisions. As noted in the Board Order and above, there is no credible showing that Bland did not receive the Proposed Decision on or about November 12, 2015, and the Final Decision on or about December 7, 2015. Although it is not necessary for the Board to prove receipt, the Board rejects the Bland Declaration (in light of the USPS documents attached to the Board Order and to this order), and specifically finds that Bland's statements are not credible. Therefore, there is no factual basis for the Board to grant relief to Respondent.

(c) HAR § 12-41-4 Is Not Applicable. In addition to the foregoing, Respondent's reliance on Hawaii Administrative Rules (HAR) § 12-41-4 is misplaced. HAR § 12-41-1 provides that "this chapter is adopted to aid the Hawaii employment relations board (hereinafter called the board) and interested persons in proceedings under Hawaii employment relations act, chapter 377, Hawaii Revised Statutes, as amended." Hawaii Revised Statutes (HRS) Chapter 377 applies to labor-management matters, and not to HRS Chapter 396 occupational safety and health matters. Therefore, HAR § 12-41-4 is not applicable to this case.³

(d) Respondent Did Not Meet the Requirements of HRCF Rule 60(b)(1).
HRCF Rule 60(b) provides that:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
(1) *mistake, in advertence, surprise, or excusable neglect;*

³ For the same reasons HAR § 12-41-4 is not applicable to this Chapter 396 proceeding, HAR §§ 12-41-35(a), 36(b) and 37 are not applicable.

(2) newly discovered evidence which by due diligence could have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. *A motion under this subdivision (b) does not affect the finality of a judgment or its operation.* This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (Italics added.)"

In the Motion for Relief, Respondent relies upon HRCF Rule 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect") based upon its assertion that it "was not served with copies of the Proposed Decision or the Final Decision," and therefore, "the Board lacked authority to issue a final decision in this matter."⁴ However, as outlined above, the Board found, in the Board Order (which is binding upon Respondent), that Respondent (through Bland) was in fact timely served with a copy of both the Proposed Decision (mailed November 9, 2015) and the Final Decision (mailed December 3, 2015). In this order, the Board found that the Proposed Order and the Final Order were, in fact, mailed to Bland's address, and that, pursuant to HRCF Rule 5(b)(3) service was complete when served.

⁴ Motion for Relief at 4.

What Bland did with the Proposed Decision and the Final Decision and whether his office misplaced either was not addressed, and was not posited as a reason for the failure to file timely exceptions to the Proposed Decision or take further action on the Final Decision. Bland took the position that he never received either the Proposed Decision or the Final Decision. Since service was complete upon mailing, non-receipt, without more, is not a basis for relief under HRCF Rule 60(b). Thus, there is no factual basis for the Board to find that there was a mistake, inadvertence, surprise or excusable neglect justifying relief from the Final Decision or the Board Order.

9. Furthermore, as noted above, the Board has concerns regarding the credibility and veracity of the statements made in the Motion for Relief and the Bland Declaration (e.g., stating that a motion for extension was timely filed which the Board determined it was not). Frankly, it appears that Respondent and its attorney are "blaming" the Board for not timely serving the Proposed Decision and the Final Decision. As far as the Board is concerned, it timely placed the Proposed Decision and Final Decision in Flat Rate envelopes, used Bland's current address, paid the postage and properly mailed them. This completed the Board's service obligations. The Board then took the extra step of obtaining from USPS "confirmation" of delivery. The Board is not responsible for what happens at Respondent's or its attorney's office, and more importantly, Bland's representations and statements are not credible.⁵

⁵ HAR § 12-42-8(a)(5) provides that:

"The signature of the person signing the document constitutes a *certification* that such person has read the document; that to the best of such person's knowledge, information, and belief *every statement* contained in the instrument is *true and correct and no such statements are misleading*; and that the document is not interposed for delay. (Italics added.)"

Although the purpose of this order is not to rule on the issue of whether or not HAR § 12-42-8(a)(5) was violated, the Board will not allow Bland or his firm to appear before the Board on any matters unless (1) it receives a detailed and satisfactory explanation regarding the issues pointed out herein or (2) Bland and his firm comply with

Based on the foregoing, the Board:

1. Hereby rejects the Motion for Relief.
2. The filing of the Motion for Relief and this order do not affect the finality of the Final Decision or the Board Order nor their operation. Thus, the thirty (30) day appeal period has run for both the Final Decision and the Board Order. *See*, HRS § 91-14(b).

Dated: Honolulu, Hawaii, May 31, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member

EXCUSED

ROCK B. LEY, Member

Copies:

Frances Lum, Deputy Attorney General

Kevin D. Bland, Esq., Attorney for Respondent R.D. Olson Construction, Inc.

the *pro hac vice* rules of the Hawaii Supreme Court such that the Board may report any professional misconduct issues to the Hawaii Office of Disciplinary Counsel in the event of any future disputes of this nature or (3) otherwise agree to be subject to the jurisdiction of the Hawaii Office of Disciplinary Counsel. *See*, HAR § 12-42-7(c) ("[t]he board may at any time require any person transacting business before the board in a representative capacity to show authority and qualification to act in such capacity").