

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMV Construction, Inc.

Case No. 14-0090-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

RMV Construction, Inc. (RMV), a prime contractor on the Replacement of Guardrail End Sections and Installation of Guardrails (Project) in San Diego County, submitted Requests for Review of both a Civil Wage and Penalty Assessment (Assessment), Case Number 14-0022-PWH, and a Determination of Civil Penalty (Determination), Case Number 14-0090, issued by the Division of Labor Standards Enforcement (DLSE) arising from RMV's work on the Project. DLSE moved to dismiss RMV's Request for Review of the Determination because the request was untimely filed.¹ The appointed Hearing Officer, Richard T. Hsueh, served an Order to Show Cause (Order) why RMV's Request for Review of Determination should not be dismissed for untimeliness. RMV did not respond to the Order.

For the reasons below, I find that the time limit for requesting review of a Determination of Civil Penalty is jurisdictional and accordingly that RMV's Request for Review of the Determination must be dismissed.

FACTS

On October 30, 2013, DLSE issued the Assessment against RMV based on RMV's failure to comply with the Labor Code's prevailing wage requirements with respect to the Project. On November 4, 2013, DLSE issued the Determination against

¹ DLSE did not file an application for an order to show cause why RMV's Request for Review of Assessment should be dismissed as untimely. Accordingly, this decision only addresses the timeliness issue in the Determination.

RMV based on RMV's failure to submit contract award information to an applicable apprenticeship program pursuant to Labor Code section 1775, subdivision (e) and to hire apprentices in violation of Labor Code section 1777.5, subdivision (g) on the same Project.² DLSE served the Determination by mail on November 4, 2013.

RMV's Request for Review of the Determination, postmarked January 24, 2014, states the following:

We are requesting a Request for Review for the Replacement of Guardrail End Sections. We submitted the requested documents to the state and feel that this is a bogus claim considering we complied with all Regulations.

On October 30, 2014, the Hearing Officer held a consolidated Prehearing Conference on RMV's Requests for Review of both the Assessment and Determination. There was no appearance by RMV. DLSE advised the Hearing Officer that it intended to file an application for an order to show cause as to why RMV's Request for Review of the Determination should not be dismissed as untimely. On October 31, 2014, DLSE filed and served its Application for Order to Show Cause Why Request for Review in the Determination Should Not be Dismissed as Untimely (Application). The Hearing Officer granted DLSE's Application and thereafter served an Order to Show Cause why RMV's Request for Review should not be dismissed for untimeliness (Order). The Order was served on RMV on November 3, 2014. RMV was ordered to serve its response to the Order by November 18, 2014. There was no response from RMV.

DISCUSSION

Section 1777, subdivision (c)(1) provides that an affected contractor or subcontractor may request review of a determination within 60 days of service of the determination.³ If no hearing is requested within this period, "the determination shall

² All further statutory references are to the California Labor Code unless otherwise specified.

³ Since section 1777, subdivision (c)(1) requires that service of the assessment be completed by mail "pursuant to Section 1013 of the Code of Civil Procedure," the time extension rules of Code of Civil Procedure section 1013 are taken into account, thus giving an in-state contractor or subcontractor 65 days

become final.” (§1777, subd. (c)(1).)⁴ California Code of Regulations, title 8, section 232.27 similarly gives the Director authority to dismiss a request for review that is untimely under the statute.

Therefore, under section 1777.7, subdivision (c)(1), RMV's Request for Review of the Determination needed to be served no later than January 8, 2014, 65 days after service of the Determination on November 4, 2013. The postmark on RMV's envelope is dated January 24, 2014. The Determination became final on January 9, 2014. Under the plain language of section 1777.7, subdivision (c)(1), the Director is without jurisdiction to proceed on RMV's untimely Request for Review of the Determination. (See *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831.) Where a statute sets out a duty and a consequence for the failure to act in conformity, that statute is said to be "mandatory." (*California Correctional and Peace Officers Association v. State Personnel Board* (1995) 10 Cal. 4th 1133). (See also *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540.)

Had RMV filed a timely request for review, it would have forestalled the finality of the Determination and would have vested the Director with jurisdiction to conduct a hearing. However, when the time has passed, there was no jurisdiction to proceed because the Determination has become final. (§ 1777.7, subd. (c)(1).)

from the date of mailing of the assessment to file a request for review. (See Cal. Code Regs., tit. 8, §§ 232.03, subd. (c) and 232.20, subd. (a).)

⁴ California Code of Regulations, title 8, section 232.22 restates the filing requirement but provides that "Failure to request review within 30 days shall result in the Determination becoming final and not subject to further review under these Rules." However, the Determination contains an admonishment entitled "Notice of Right to Obtain Review-Formal Hearing" and admonished an affected contractor and subcontractor to file its request for review within 60 days after service of the Determination. Since RMV's Request for Review of the Determination is more than 65 days after service of the Determination, it is unnecessary to address the discrepancy between section 1777.7 and California Code of Regulations, title 8, section 232.22.

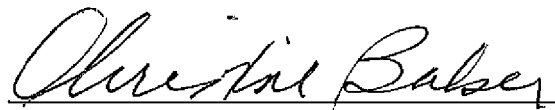
FINDINGS

1. RMV did not timely request review of the November 4, 2013 Determination of Civil Penalty.
2. The Determination became a final order on January 9, 2014.
3. The Director has no jurisdiction to proceed on RMV's untimely Request for Review of the Determination.

ORDER

RMV Construction Inc.'s Request for Review in Case Number 14-0090-PWH is dismissed as untimely as set forth in the foregoing findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 12/23/2014



Christine Baker
Director of Industrial Relations