

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Cooks and Son, Inc.

Case No. 16-0075-PWH

From a Civil Wage and Penalty Assessment and a
Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Cooks and Son, Inc. (Cooks), the prime contractor on the 2013 Curb Ramps Improvement Project (Project) in San Luis Obispo, submitted a Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) arising from Cooks' work on the Project. DLSE filed an Application for an Order to Show Cause (OSC) why Cooks' Request for Review should not be dismissed as untimely. The appointed Hearing Officer, Jessica L. Pirrone, granted the Application for an OSC, issued an Order setting a schedule for opening and responsive briefs, and continued the previously scheduled Prehearing Conference to a date after the briefs would be submitted. Cooks did not file a brief or otherwise respond to the OSC. At the Prehearing Conference, for the first time, Cooks contended that it did not timely request review because it did not receive notice of the Assessment until it was past due. The facts do not support Cooks' belated contention that it did not receive timely notice of the Assessment.

For the reasons below, I find that the Request for Review was not timely, the time limits for requesting review are jurisdictional and therefore Cooks' Request for Review must be dismissed.

FACTS

On April 17, 2015, DLSE issued the Assessment against Cooks based on its failure to comply with the Labor Code's prevailing wage requirements with respect to the Project.¹ The face of the Assessment provides that a Request for Review must be transmitted to the Labor Commissioner within 60 days after service of the assessment. It further provides that failure to submit a timely Request for Review will result in a final order, which may then be filed with the office of the clerk of the superior court in any county in which the affected contractor has property or has had a place of business.

As of June 21, 2015, 60 days after service of the Assessment, Cooks had not submitted a request for review. On July 2, 2015, 76 days after service of the Assessment, DLSE requested a judgment on the Assessment and the judgment was issued on July 6, 2015.

In a letter dated January 13, 2016, and postmarked February 9, 2016,² Cooks' requested review through its counsel. The letter states:

A Civil Wage and Penalty Assessment (CWPA) was issued against the above named company. Unfortunately, even though company personnel had provided documentation to Jafeer Islam, the Industrial Relations Representative, on May 20, 2015, involving supporting the claim that the company did in fact use apprentices for the Curb Ramp job, the fines were imposed. . . . Furthermore, time went by and the company did not realize that the time ran out to appeal the judgment.

* * *

On behalf of Cooks & Son, Inc. and Mr. Willie Cooks, please accept this request for an appeal of the CWPA decision and allow the company to present evidence showing that they are not in violation of the Wage and Penalty laws.

On April 8, 2016, the Hearing Officer issued a Notice of Appointment of Hearing

¹ All further statutory references are to the California Labor Code unless otherwise specified.

² California Code of Regulations, title 8, section 17203, subdivision (b) states in relevant part that "Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be a postmark date imprinted on the envelope by the U.S. Postal Service if first-class postage was prepaid."

Officer and Prehearing Conference. On April 13, 2016, DLSE filed an Application for an OSC regarding dismissal of the Request for Review as untimely. The Application was supported by a statement of facts as well as points and authorities.

The Hearing Officer issued an Order: (1) granting DLSE's Application, (2) issuing an OSC why the Request for Review should not be dismissed as untimely, (3) setting a schedule for opening and responsive briefs, and (4) setting a post-briefing Prehearing Conference for June 6, 2016. Cooks did not respond to the OSC.

At the June 6, 2016 Prehearing Conference -- 416 days after service of the Assessment -- Cooks stated, for the first time, that it did not timely respond to the Assessment because it did not have actual notice of the Assessment within the time period to respond. Despite the fact that Cooks did not respond to the OSC or otherwise raise this issue earlier, the Hearing Officer gave Cooks twenty-four hours to file and serve affidavits supporting its contention, at which point the issue would be submitted.

In an affidavit dated June 6, 2016, Adrian Cooks, the treasurer of Cooks, states that in December 2014, Cooks closed its business and let its employees go. Accordingly, it had no business or employees at the location where the Assessment was served in April 2015. The person who signed for receipt of the Assessment was a former employee of Cooks and did not notify Cooks that she had signed for receipt of the Assessment. Cooks first learned of the judgment, which was issued on the Assessment, in late 2015.

DISCUSSION

Section 1742, subdivision (a) provides that an affected contractor or subcontractor may request review of a civil wage and penalty assessment within 60 days of service of the assessment.³ If no hearing is requested within this period, "the assessment shall become final." (§1742, subd. (a).) California Code of Regulations, title 8, section 17222,

³ Since section 1741, subdivision (a) 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 from the date of mailing of the assessment to file a request for review. (See Cal. Code Regs., tit 8, § 17203, subd. (a).)

subdivision (a), restates the 60-day filing requirement and expressly provides that “Failure to request review within 60 days shall result in the Assessment ... becoming final and not subject to further review under these Rules.” California Code of Regulations, title 8, section 17227 authorizes the Director to dismiss a request for review that is untimely under the statute.

As the Assessment was served on April 17, 2015, under section 1742, subdivision (a), Cooks’ Request for Review of the Assessment needed to be served no later than June 22, 2015.⁴ Cooks did not transmit its Request for Review until February 9, 2016 – 233 days late. Under the plain language of sections 1742, subdivision (a), the Director is without jurisdiction to proceed on Cooks’ untimely Request for Review. (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.)

In an affidavit dated June 6, 2016, Adrian Cooks claims that Cooks did not timely serve its Request for Review because it did not have actual notice of the Assessment “until late 2015.” Mr. Cooks explains that the Assessment was served on someone who was no longer an employee of Cooks and did not advise Cooks of the Assessment.

This appears to be inconsistent with Cooks’ contention in its Request for Review. In the Request for Review, Cooks’ counsel states that Cooks was in contact with an Industrial Relations Representative on May 20, 2015 – after the Assessment issued but before the time to submit a Request for Review expired – regarding the allegations that Cooks had not paid the prevailing wage on the Project. As the alleged notice issue is not borne out by the facts, the related legal issues need not be addressed here.

Had Cooks filed a timely request for review, it would have forestalled the finality of the Assessment and would have vested the Director with jurisdiction to conduct a hearing.

⁴ The 65-day period described in footnote 3, *supra*, would conclude on Sunday, June 21, 2015, so it is extended to the next business day, June 22, 2015. (Civ. Code § 9.)

Since the time has passed, however, there is no jurisdiction to proceed because the Assessment has become final. (§§ 1742, subd. (a) and 1777.7, subd. (c)(1).)

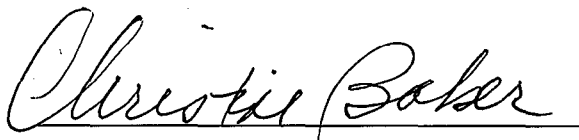
FINDINGS

1. Cooks did not timely request review of the April 17, 2015, Civil Wage and Penalty Assessment.
2. The Assessment became a final order on June 22, 2015.
3. The Director has no jurisdiction to proceed on Cooks' untimely Request for Review of the Assessment.

ORDER

Cooks and Son, Inc.'s Request for Review in Case Number 16-0075-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: 7/20/2016



Christine Baker
Director of Industrial Relations