

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

GRFCO, Inc.

Case No.: **16-0059-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor GRFCO Inc. (GRFCO) submitted a Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE or Labor Commissioner) on November 20, 2015, with respect to work of improvement known as "Trunk D Sewer Improvements" (Project) performed by GRFCO for the County of San Diego, California. The Assessment determined that the following amounts were due: \$769.34 in unpaid prevailing wages, \$12,800.00 in Labor Code section 1775 statutory penalties,¹ \$625.00 in section 1813 statutory penalties, and \$102,900.00 in section 1777.7 statutory penalties.²

The matter was initially assigned to Hearing Officer Jessica Pirrone and then re-assigned to Hearing Officer John J. Korbol. A Hearing on the Merits was conducted April 10, 2018, and May 5, 2019. Lance A. Grucela appeared as counsel for DLSE, and Thomas W. Kovacich appeared as counsel for GRFCO. DLSE Deputy Labor Commissioner Kari Anderson testified in support of the

¹ A pre-hearing motion by DLSE to amend the Assessment downward was granted with no objection, reducing the dollar amount of section 1775 penalties by \$480.00, from \$12,800.00 to \$12,320.00.

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

Assessment and GRFCO Project manager James Craig Jackson, Leon Lopez, and Ruben Mendoza testified for GRFCO. Prior to the Hearing, the parties jointly submitted a statement of eleven issues to be tried. Among these issues were two interrelated threshold issues: (1) whether the Assessment was timely served by DLSE; and (2) whether the Request for Review was timely filed by GRFCO. All of the issues identified by the parties, including the two threshold issues, were addressed during the Hearing by means of oral testimony and documentary evidence. At the conclusion of the Hearing, each party submitted a closing brief. The matter was taken under submission as of July 3, 2019.

For the reasons set forth below, the Director finds that the Assessment was timely served but the Request for Review was untimely filed. Time limits for requesting review of the Assessment are mandatory and jurisdictional. (§ 1742, subd. (a); Cal. Code Regs., tit. 8, § 17222, subd. (a).) Accordingly, the Director issues this Decision dismissing GRFCO's Request for Review, and the other issues raised by the parties and tried at the Hearing will not be addressed.

FACTS

The County of San Diego advertised the Project for bid by publication in December 2012 and January 2013. On April 9, 2013, GRFCO was awarded the contract to construct Trunk D sewer improvements, including the installation of a sewer line and manholes. GRFCO's employees performed work on the Project from June 12, 2013, to May 21, 2014. The County of San Diego recorded a Notice of Completion and Acceptance of Work and Materials on May 23, 2014.

DLSE Deputy Labor Commissioner Anderson testified that upon receipt of a complaint from the Center for Contract Compliance in September 2014, she opened an investigation into allegations that GRFCO had underpaid some of its workers on the Project. The investigation was eventually expanded to include the question of whether GRFCO had complied with the legal requirements regarding the employment of apprentices on public works projects. The

investigation culminated in the Assessment, which was served on GRFCO by certified U.S. postal service mail on November 20, 2015.

Anderson testified that, in preparing the Assessment for mailing, she followed a DSLE practice to check the Secretary of State's website for a corporate contractor's mailing address. As of November 20, 2015, when Anderson checked it, that website displayed two addresses for GRFCO: its corporate address at P.O. Box 7689, Moreno Valley, CA 92552-7689, and its address for the registered agent for service of process, George Frost, at 117 E. Nance St., Perris CA 92571.³ Consequently, on November 20, 2015, Anderson caused the Assessment to be served to GRFCO at both addresses.

GRFCO's business address, as listed on the construction contract, is "P.O. Box 7689 Moreno Valley CA 92552." This was the address filed with the California Secretary of State as GRFCO's corporate address in 2008. On October 2, 2014, GRFCO changed its mailing address to P.O. Box 1747, Brea, CA 92822.⁴ Jackson testified that he orally advised Anderson of the new Brea post office box in mid-January 2014. In the latter part of 2014 and throughout 2015, in connection with the current and other matters, Anderson and Jackson exchanged a series of letters, all mailed from or to GRFCO at the Brea address. The earliest such letter to Anderson from GRFCO, bearing the Brea address, is dated October 22, 2014.⁵

³ The record at the Hearing contains no evidence such as a signed return receipt as to the mailing of the Assessment to George Frost at the Perris address. As of the time of the Hearing, the Perris address was occupied by an empty lot.

⁴ Jackson did not fully explain where he made the address change, but the record as a whole supports the inference that the change in address was made at the U.S. Postal Service for purposes of mail delivery and on GRFCO records for purposes of GRFCO's business.

⁵ Anderson's file notes reflect that as of October 24, 2014, the postal service had returned to sender (DLSE) unspecified certified mail that had been addressed to GRFCO's old Moreno Valley post office box.

When GRFCO changed its mailing address from Moreno Valley to Brea, GRFCO closed its Moreno Valley post office box and filed a mail-forwarding change of address order with the postal service. GRFCO also registered its new Brea address with the Contractors State License Board. Additionally, GRFCO prepared and provided its business partners with a written change of address notice "To whom it may concern," notifying them of the new Brea address. The DLSE enforcement file did not include such a notice. There is no evidence that GRFCO's corporate address on file with the Secretary of State's website was updated from Moreno Valley to Brea at any time before DLSE served the Assessment on November 20, 2015. As Anderson acknowledged, the Assessment was not mailed to GRFCO at the new Brea address.

On December 4, 2015, Jackson signed a signed postal service return receipt signifying delivery of the Assessment that had been mailed to GRFCO at the Moreno Valley address. Jackson testified that he was already familiar with the 60-day time limit for requesting review of civil wage and penalty assessments. GRFCO sent its Request for Review by certified mail to the Labor Commissioner in the form of a letter dated January 26, 2016. The letter's envelope bears a postmark from the following day, January 27, 2016. The Request for Review and its envelope was date-stamped as received by the "DIR/DLSE BOFE-PW Long Beach" on February 2, 2016.

The Assessment provides notice of the right to seek review by making a written request to the Labor Commissioner.⁶ The notice states in part:

Notice of Right to Obtain Review - Formal Hearing

In accordance with Labor Code Section 1742, an affected contractor or subcontractor may obtain review of this Civil Wage and Penalty Assessment by transmitting a written

⁶ The Labor Commissioner is the chief of DLSE. The term "Labor Commissioner" includes the chief and her designees for purposes of her duties under the California Prevailing Wage Law, section 1720 et seq. (Cal. Code Regs, tit. 8, § 17202, subd. (i) and § 21.)

request to the office of the Labor Commissioner that appears below within 60 days after service of the assessment.

To obtain a hearing, a written Request for Review must be transmitted to the following address:

Labor Commissioner - State of
California Civil Wage and Penalty
Assessment Review Office
PO Box 32889
Long Beach, CA 90832

DISCUSSION

The Assessment Was Timely Served.

Section 1741, subdivision (a), provides, in pertinent part, that an “assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder” In this case, the County of San Diego recorded a notice of completion for this Project on May 23, 2014. That gave DLSE until November 23, 2015, to issue the Assessment in this case. The Assessment was served by DLSE on November 20, 2015, within the 18-month period allowed by law. GRFCO’s argument appears to be based on its claim that DLSE’s service of the Assessment was defective, a defect that allegedly arises from the fact that the Assessment was not served on GRFCO at its Brea address. That argument is rejected, as addressed more fully below.

The Director Has No Jurisdiction to Review the Civil Wage and Penalty Assessment Because GRFCO Did Not Timely File a Request for Review.

Section 1742, subdivision (a), provides for review of the Assessment. It states:

An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the

assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

After the Assessment was served on November 20, 2015, GRFCO had 60 days from the date of service within which to submit a Request for Review. This period was enlarged by an additional five days for mailing under Code of Civil Procedure section 1013. Since the 65th day after service fell on Sunday, January 24, 2016, GRFCO's time was extended one additional day, to the following Monday, January 25, 2016.⁷ GRFCO mailed the Request for Review two days beyond this deadline, on January 27, 2016. The postmark date is controlling. (Cal. Code Regs., tit. 8, §17203, subd. (b).)

Under the last sentence of section 1742, subdivision (a), absent a timely request for review of an assessment, "the assessment shall become final." (§ 1742, subd. (a).) California Code of Regulations, title 8, section 17222, subdivision (a), reiterates that point, expressly stating that "[f]ailure to request review within 60 days shall result in the Assessment . . . becoming final and not subject to further review under these Rules." 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 Ass'n. v. State Personnel Bd.* (1995) 10 Ca1.4th 1133, 1145; *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540, 546-548.) Section 1742, subdivision (a), sets out just such a consequence in the case of failure to timely file a request to review.

In *Pressler v. Bren* (1982) 32 Cal.3d 831, the court analyzed section 98.2, which sets the time limit for appealing from a Labor Commissioner ruling on a claim for unpaid wages. Section 98.2, subdivision (a), provides, in part: "Within 10 days after service of notice of an order, decision, or award the parties may

⁷ See California Code of Regulations, title 8, section 17203, subdivision (a).

seek review by filing an appeal to the superior court, where the appeal shall be heard de novo.” The court found this requirement to be jurisdictional, in light of the language of former subdivisions (c) and (d) (now, (d) and (e)) of section 98.2, which provide that an order, decision, or award that has not been timely appealed is final and enforceable. *Pressler* held that “[a] late filing may not be excused on the grounds of mistake, inadvertence or excusable neglect.” (*Pressler, supra* at p. 837.)

GRFCO contends that its Request for Review must be deemed timely because the 60-day statute of limitations was not triggered by DLSE’s mailing of the Assessment to its old mailing address. This stance rests on two facts: Anderson’s own notes reflect that DLSE’s mail to the old Moreno Valley address had been returned, and Anderson had been corresponding with GRFCO at the new Brea address for about a year before the Assessment in this case was served. The legal argument rests on the presumption provided in California Code of Regulations, title 8, section 17203, subdivision (b), which states:

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, or the date of delivery to a common carrier promising overnight delivery as showing on the carrier’s receipt.

GRFCO asserts that the service of the Assessment was defective in that the envelope was not properly addressed, whereby DLSE used two invalid addresses for GRFCO despite actual knowledge of GRFCO’s current address when service was effectuated. GRFCO contends that such defective service does not give rise to the legal presumption that the document served was received, so that the 60-day time limit for serving the Request for Review was never triggered and, therefore, GRFCO’s Request for Review cannot be deemed untimely.

GRFCO also cites the legal presumption contained in Evidence Code section 641, providing that "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."

DLSE, however, does not rely on either legal presumption to establish GRFCO's receipt of the Assessment. Instead, actual receipt of the Assessment by Jackson on behalf of GRFCO is established by the return receipt that Jackson signed on December 4, 2015, despite the fact that the old Moreno Valley address had been used. As Jackson himself testified at the Hearing, the Assessment he took delivery of somehow "made its way" to GRFCO's current Brea address despite having first been sent to the old Moreno Valley address, albeit after the passage of two weeks' time. In addition, there is no dispute over the mailing *date* of the Assessment, November 20, 2015, a date that appears on the face of the Assessment, and a date that is established by the proof of service attached to the Assessment.

GRFCO also argues that DLSE is equitably estopped from asserting the 18-month statute of limitations under section 1742, subdivision (a), due to Anderson's actual knowledge of GRFCO's Brea address and failure to use this address for service of the Assessment. Again, however, Jackson ultimately did receive and sign for the Assessment that had been directed to the old Moreno Valley address. At all times, Jackson was aware of the 60-day time limit for requesting review, and the Assessment clearly sets forth the rule that the 60 days runs from the date of service. When it received the Assessment on December 4, 2015, GRFCO stood on notice that the 60-day period, enlarged by five days for mailing, within which to file a request to review had commenced on November 20, 2015.

GRFCO cannot plausibly argue that it was ignorant of the existence of the Assessment or the statute of limitations under these facts.

Furthermore, equitable estoppel should not be applied if it would nullify a policy embodied in the law to benefit the public. Such a policy is recognized in

REO Broadcasting Consultants v. Martin (1999) 69 Cal.App.4th 489 (*REO Broadcasting*). In *REO Broadcasting*, the court relied on *Pressler* in holding that, under The Talent Agencies Act (§ 1700.44), the time to appeal the Labor Commissioner's determination to Superior Court was jurisdictional; and reliance on the relief for a late appeal based on mistake, inadvertence or other excuse under California Code of Civil Procedure section 473 was erroneous. (*REO Broadcasting*, 69 Cal.App.4th at pp. 495-496.) The court cited *Pressler* to conclude that "the granting of relief under Code of Civil Procedure section 473 would undercut *the legislative purpose and public policy - of assuring the expeditious collection of wages which are due but unpaid* [citation omitted] [emphasis added]." (*Id.* at p. 496.) The court also observed that the plaintiffs in the administrative proceeding had not provided any logical reason with respect to:

why the general holding in *Pressler* as to the timeliness of an appeal from a final determination by the Labor Commissioner is not equally applicable to *any* kind of administrative proceeding held before the Labor Commissioner

(*Ibid.*, emphasis in original.)

Although Jackson may have mistakenly believed he had 60 days to request review from the date he took delivery of the Assessment, GRFCO's late filing cannot be excused even if it presented grounds for mistake, inadvertence, or excusable neglect because the time limits are mandatory and jurisdictional by statute. (See *Pressler, supra*, 32 Cal.3d at p. 837.)

GRFCO also cites *Division of Labor Standards v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560 (*Davis Moreno*) in seeking relief from its untimely filing of the Request for Review, arguing that GRFCO was denied the statutory 60 days to respond to the Assessment by Anderson's failure to serve GRFCO at the Brea address that Anderson knew to be valid. *Davis Moreno*, however, is inapposite. The contractor in *Davis Moreno* alleged that it

did not timely file a request to review the civil wage and penalty assessment because the DLSE deputy affirmatively “instructed” it to “do nothing further until further notice from the DLSE” because the amounts in assessment were “grossly inflated.” (*Id.* at p. 568.) The Court of Appeal remanded the matter back to the Superior Court to determine whether the final assessment order and judgment against Davis Moreno was obtained by extrinsic fraud. If the Superior Court granted the motion, it was directed to vacate the final order of assessment and judgment and order the Director of the Department of Industrial Relations to grant Davis Moreno’s request for review of the assessment pursuant to section 1742. If not, then the judgment against Davis Moreno would stand. (*Id.*, at p. 582.) In remanding the case back to the Superior Court for further proceeding, the Court of Appeal specifically held that “a motion to vacate a judgment for extrinsic fraud is not governed by any statutory time limit, but rather is addressed to the *court’s inherent equity power.*” (*Id.* at p. 570, emphasis added.) While a court may possess such inherent equity power to vacate a judgment for extrinsic fraud, there is no such “inherent” authority provided to the Director of the Department of Industrial Relations, by case law or otherwise, once an Assessment has become final under section 1742, subdivision (a).

Moreover, the type of extrinsic fraud in *Davis Moreno*, defined by the Court of Appeal as “one party’s preventing the other from having his day in court,” is not present here. (*Davis Moreno, supra*, 193 Cal. App. 4th at p. 570.) GRFCO attributes no statement to Anderson comparable to the statements alleged in *Davis Moreno*. GRFCO does not explain why it neglected to update its address with the Secretary of State for a year after moving.⁸ And GRFCO not only received the Assessment in spite of the old Moreno Valley address, it had its day in court by virtue of the Hearing on the Merits.

⁸ Corporations Code section 1502, subdivision (a) (5) and (6), requires corporations annually to file statements of information with the California Secretary of State showing the street addresses of the corporation’s principal executive office and the corporation’s mailing address, if different from the street address of its principal executive office.

Since the time has passed for the filing of a request for review of the Assessment, however, the Director has no jurisdiction to proceed because the Assessment has become final. (§ 1742, subd. (a).) Because the time limits are mandatory and jurisdictional by statute, GRFCO's late filing cannot be excused.

Based on the foregoing, the Director makes the following findings:

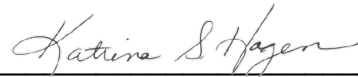
FINDINGS

1. DLSE timely served the Civil Wage and Penalty Assessment on GRFCO, Inc. on November 20, 2015.
2. GRFCO, Inc. did not timely request review of the November 20, 2015 Civil Wage and Penalty Assessment.
3. The Civil Wage and Penalty Assessment became a final order on January 25, 2016.
4. The Director has no jurisdiction to proceed on GRFCO, Inc.'s untimely Request for Review of the Civil Wage and Penalty Assessment.

ORDER

GRFCO, Inc.'s Request for Review in Case No. 16-0059-PWH is dismissed as untimely, as set forth in the foregoing Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 5/14/20



Katrina S. Hagen
Director, Department of Industrial
Relations