

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Travelers Casualty and Surety Company

Case No. **09-0120-PWH**

From a Notice of Withholding issued by:

Los Angeles Unified School District.

DECISION OF DIRECTOR

INTRODUCTION

Travelers Casualty and Surety Company (“Travelers”), the surety which bonded the work and payment of the affected contractor, Pulsar Construction Company (“Pulsar”) requests review from a Notice of Withholding of Contract Payments (“Notice”) issued by Los Angeles Unified School District (“LASUD”) on March 18, 2009 regarding Bell High School¹. The Notice assessed Pulsar and its subcontractor N.S. Plumbing, Inc. (“N.S. Plumbing”) for unpaid prevailing wages in the amount of \$5,956.81, unpaid training fund contribution of \$51.87, and penalties under Labor Code sections 1775 and 1813 in the amount of \$450.00.

On June 12, 2009, the Hearing Officer, Makiko I. Meyers, issued an Order to Show Cause re Timeliness of the Request of Review (“OSC”). In response, the parties filed briefs simultaneously on June, 22, 2009. Travelers argued that the Notice was served on an inappropriate address. As Travelers argument was not supported by any evidence and LASUD’s brief was silent on this point, the Hearing Officer ordered the parties to submit supplemental briefs with supporting evidence. Both parties submitted supplemental briefs on July 15, 2009².

¹ N.S. Plumbing filed its own request for review on April 9, 2009 (“N.S. Plumbing Case,” Case No. 09-0186-PWH”). Travelers requested to participate in the N.S. Plumbing Case on June 9, 2009. Travelers’ request was granted, and Travelers now participates in the N.S. Plumbing Case as an Interested Person under Rule 8(d).

² Traveler did not submit any evidence with either the original or supplemental brief.

FACTS

LASUD issued the Notice on March 18, 2009. The Notice was mailed via certified mail to Travelers on March 18, 2009 at 21688 Gateway Center Dr., Diamond Bar, CA 91765. This was the address indicated on the performance and payment bonds issued for the project. Travelers filed the Request for Review on May 28, 2009.

DISCUSSION

Labor Code section³ 1742, subdivision (a) provides that a request for review must be filed within 60 days from the date a notice is served.⁴ Section 1742, subdivision (a) further provides: “[i]f no hearing is requested within 60 days after service of the assessment, the assessment shall be final.” California Code of Regulations, title 8 section 17222 expressly states that “[f]ailure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages 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 v. State Personnel Board (“CCPOA”)* (1995) 10 Cal.4th 1133. (See also, *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540.)

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 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 subsections (c) and (d) [now (d) and (e)] of section

³ All unspecified section references are to the Labor Code, unless otherwise specified.

⁴ “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.” Since Labor Code section 1741(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 Procedures section 1013 are also taken into account, thus giving an in-state contractor or

98.2, which make an order, decision or award that has not been timely appealed final and enforceable. *Pressler* held that “[a] late filing may not be excused on the grounds of mistake, inadvertence or excusable neglect.” *Id.* at 837.

Travelers argues that its request, made 71 days after service of the Notice, should be considered timely because the service on March 18, 2009 was improperly made on “an office that was not responsible for handling and processing the Pulsar-related claims.” When Travelers initially made this argument, it provided no information or evidence as to the office that was responsible for handling the Pulsar-related claims. Travelers still has not provided that information or evidence to show that LAUSD knew of the “proper” address. Travelers now argues that LAUSD should have checked the address for Travelers’ agent of process with the Secretary of State and the Notice should have been served on the agent, citing *Dill v Berquist Const. Co. Ins.* (1994) 24 Cal.App. 4th 1426.

LAUSD has provided the Payment Bond and Faithful Performance Bond, which show that the address Travelers used was 21688 Gateway Center Dr., Diamond Bar, CA 91765, the address to which the Notice was mailed.

Section 1741 provides, in part:

Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first class and certified mail to the contractor, subcontractor, and awarding body. . . . The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body.

Code of Civil Procedure, section 1013(a) provides, in part:

In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed en-

subcontractor 65 days from the date of mailing of the Assessment to file a Request for Review. *See* Rule 03(a) [Cal. Code Regs., tit. 8, §17203(a)] and *Clavell v. North Coast Business Park* (1991) 232 Cal.App.3rd 328.

velope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence.

The regulations governing these proceedings provide “[a] copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the payment of the wages covered by the Assessment or Notice ... the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.” (Cal. Code Regs., tit. 8, § 17220(b).) These regulations are entitled to substantial deference because they are reasonable interpretations of the two operative sections quoted above and were issued pursuant to authority from the Legislature. (Lab. Code, § 1742(b), 4th par.) Travelers’ authority, which addressed service of a summons on an out of state defendant, is completely inapposite. The Notice was therefore served on the right address.

Travelers’ request for review dated May 28, 2009 was made 71 days after the Notice was properly served on Travelers, well after the statutory deadline. Once the time period during which a party can seek review expires, the Notice becomes final automatically. The statute governing these particular proceedings is clear that the failure to file a timely request for review deprives the Director of jurisdiction to hear the merits of the case. Travelers did not make a timely request and the Director therefore lacks jurisdiction to hear this case.

ORDER

The Request for Review is dismissed for lack of jurisdiction. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

SO ORDERED

Dated: July 27, 2009



John C. Duncan, Director of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Travelers Casualty and Surety Company

Case No. **09-0122-PWH**

From a Notice of Withholding issued by:

Los Angeles Unified School District.

DECISION OF DIRECTOR

INTRODUCTION

Travelers Casualty and Surety Company (“Travelers”), the surety which bonded the work and payment of the affected contractor, Pulsar Construction Company (“Pulsar”) requests review from a Notice of Withholding of Contract Payments (“Notice”) issued by Los Angeles Unified School District (“LASUD”) on March 17, 2009 regarding San Fernando Middle School¹. The Notice assessed Pulsar and its subcontractor N.S. Plumbing, Inc. (“N.S. Plumbing”) for unpaid prevailing wages in the amount of \$88,164.79, unpaid training fund contribution of \$1,355.93, and penalties under Labor Code sections 1775 and 1813 in the amount of \$19,075.00.

On June 12, 2009, the Hearing Officer, Makiko I. Meyers, issued an Order to Show Cause re Timeliness of the Request of Review (“OSC”). In response, the parties filed briefs simultaneously on June, 22, 2009. Travelers argued that the Notice was served on an inappropriate address. As Travelers argument was not supported by any evidence and LASUD’s brief was silent on this point, the Hearing Officer ordered the parties to submit supplemental briefs with supporting evidence. Both parties submitted supplemental briefs on July 15, 2009².

¹ N.S. Plumbing filed its own request for review on April 9, 2009 (“N.S. Plumbing Case,” Case No. 09-0085-PWH”). Travelers requested to participate in the N.S. Plumbing Case on June 9, 2009. Travelers’ request was granted, and Travelers now participates in the N.S. Plumbing Case as an Interested Person under Rule 8(d).

FACTS

LASUD issued the Notice on March 17 2009. The Notice was mailed via certified mail to Travelers on March 17, 2009 at 21688 Gateway Center Dr., Diamond Bar, CA 91765. This was the address indicated on the performance and payment bonds issued for the project. Travelers acknowledged receipt of the Notice on March 19, 2009. Travelers filed the Request for Review on May 28, 2009.

DISCUSSION

Labor Code section³ 1742, subdivision (a) provides that a request for review must be filed within 60 days from the date a notice is served.⁴ Section 1742, subdivision (a) further provides: “[i]f no hearing is requested within 60 days after service of the assessment, the assessment shall be final.” California Code of Regulations, title 8 section 17222 expressly states that “[f]ailure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages 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 v. State Personnel Board (“CCPOA”)* (1995) 10 Cal.4th 1133. (See also, *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540.)

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 seek review by filing an appeal to the superior court,

² Traveler did not submit any evidence with either the original or supplemental brief.

³ All unspecified section references are to the Labor Code, unless otherwise specified.

⁴ “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.” Since Labor Code section 1741(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 Procedures section 1013 are also 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 Rule 03(a) [Cal. Code Regs., tit. 8, §17203(a)] and *Clavell v. North Coast Business Park* (1991) 232 Cal.App.3rd 328.

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

Travelers argues that its request, made 72 days after service of the Notice, should be considered timely because the service on March 17, 2009 was improperly made on “an office that was not responsible for handling and processing the Pulsar-related claims.” When Travelers initially made this argument, it provided no information or evidence as to the office that was responsible for handling the Pulsar-related claims. Travelers still has not provided that information or evidence to show that LAUSD knew of the “proper” address. Travelers now argues that LAUSD should have checked the address for Travelers’ agent of process with the Secretary of State and the Notice should have been served on the agent, citing *Dill v Berquist Const. Co. Ins.* (1994) 24 Cal.App. 4th 1426.

LAUSD has provided the Payment Bond and Faithful Performance Bond, which show that the address Travelers used was 21688 Gateway Center Dr., Diamond Bar, CA 91765, the address to which the Notice was mailed. Travelers acknowledged receipt of the Notice on March 19, 2009, two days after it was served.

Section 1741 provides, in part:

Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first class and certified mail to the contractor, subcontractor, and awarding body. . . .The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body.

Code of Civil Procedure, section 1013(a) provides, in part:

In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence.

The regulations governing these proceedings provide “[a] copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the payment of the wages covered by the Assessment or Notice ... the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.” (Cal. Code Regs., tit. 8, § 17220(b).) These regulations are entitled to substantial deference because they are reasonable interpretations of the two operative sections quoted above and were issued pursuant to authority from the Legislature. (Lab. Code, § 1742(b), 4th par.) Travelers’ authority, which addressed service of a summons on an out of state defendant, is completely inapposite. The Notice was therefore served on the right address.

Travelers’ request for review dated May 28, 2009 was made 72 days after the Notice was properly served on Travelers, well after the statutory deadline. Once the time period during which a party can seek review expires, the Notice becomes final automatically. The statute governing these particular proceedings is clear that the failure to file a timely request for review deprives the Director of jurisdiction to hear the merits of the case. Travelers did not make a timely request and the Director therefore lacks jurisdiction to hear this case.

ORDER

The Request for Review is dismissed for lack of jurisdiction. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

SO ORDERED

Dated: July 27, 2009



John C. Duncan, Director of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Travelers Casualty and Surety Company

Case No. **09-0123-PWH**

From a Notice of Withholding issued by:

Los Angeles Unified School District.

DECISION OF DIRECTOR

INTRODUCTION

Travelers Casualty and Surety Company (“Travelers”), the surety which bonded the work and payment of the affected contractor, Pulsar Construction Company (“Pulsar”) requests review from a Notice of Withholding of Contract Payments (“Notice”) issued by Los Angeles Unified School District (“LASUD”) on February 6, 2009 regarding Bell High School¹. The Notice assessed Pulsar and its subcontractor N.S. Plumbing, Inc. (“N.S. Plumbing”) for unpaid prevailing wages in the amount of \$48,407.36, unpaid training fund contribution of \$1,599.46, and penalties under Labor Code sections 1775 and 1813 in the amount of \$6,180.00.

On June 12, 2009, the Hearing Officer, Makiko I. Meyers, issued an Order to Show Cause re Timeliness of the Request of Review (“OSC”). In response, the parties filed briefs simultaneously on June, 22, 2009. Travelers argued that the Notice was served on an inappropriate address. As Travelers argument was not supported by any evidence and LASUD’s brief was silent on this point, the Hearing Officer ordered the parties to submit supplemental briefs with supporting evidence. Both parties submitted supplemental briefs on July 15, 2009².

¹ N.S. Plumbing filed its own request for review on April 9, 2009 (“N.S. Plumbing Case,” Case No. 09-0046-PWH”). Travelers requested to participate in the N.S. Plumbing Case on June 9, 2009. Travelers’ request was granted, and Travelers now participates in the N.S. Plumbing Case as an Interested Person under Rule 8(d).

FACTS

LASUD issued the Notice on February 6, 2009. The Notice was mailed via certified mail to Travelers on February 6, 2009 at 21688 Gateway Center Dr., Diamond Bar, CA 91765. This was the address indicated on the performance and payment bonds issued for the project. Travelers acknowledged receipt of the Notice on February 9, 2009. Travelers filed the Request for Review on May 28, 2009.

DISCUSSION

Labor Code section³ 1742, subdivision (a) provides that a request for review must be filed within 60 days from the date a notice is served.⁴ Section 1742, subdivision (a) further provides: “[i]f no hearing is requested within 60 days after service of the assessment, the assessment shall be final.” California Code of Regulations, title 8 section 17222 expressly states that “[f]ailure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages 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 v. State Personnel Board (“CCPOA”)* (1995) 10 Cal.4th 1133. (See also, *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540.)

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 seek review by filing an appeal to the superior court,

² Traveler did not submit any evidence with either the original or supplemental brief.

³ All unspecified section references are to the Labor Code, unless otherwise specified.

⁴ “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.” Since Labor Code section 1741(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 Procedures section 1013 are also 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 Rule 03(a) [Cal. Code Regs., tit. 8, §17203(a)] and *Clavell v. North Coast Business Park* (1991) 232 Cal.App.3rd 328.

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

Travelers argues that its request, made 112 days after service of the Notice, should be considered timely because the service on February 6, 2009 was improperly made on “an office that was not responsible for handling and processing the Pulsar-related claims.” When Travelers initially made this argument, it provided no information or evidence as to the office that was responsible for handling the Pulsar-related claims. Travelers still has not provided that information or evidence to show that LAUSD knew of the “proper” address. Travelers now argues that LAUSD should have checked the address for Travelers’ agent of process with the Secretary of State and the Notice should have been served on the agent, citing *Dill v Berquist Const. Co. Ins.* (1994) 24 Cal.App. 4th 1426.

LAUSD has provided the Payment Bond and Faithful Performance Bond, which show that the address Travelers used was 21688 Gateway Center Dr., Diamond Bar, CA 91765, the address to which the Notice was mailed. Travelers acknowledged receipt of the Notice on February 9, 2009, three days after it was served.

Section 1741 provides, in part:

Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first class and certified mail to the contractor, subcontractor, and awarding body. . . . The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body.

Code of Civil Procedure, section 1013(a) provides, in part:

In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence.

The regulations governing these proceedings provide “[a] copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the payment of the wages covered by the Assessment or Notice ... the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.” (Cal. Code Regs., tit. 8, § 17220(b).) These regulations are entitled to substantial deference because they are reasonable interpretations of the two operative sections quoted above and were issued pursuant to authority from the Legislature. (Lab. Code, § 1742(b), 4th par.) Travelers’ authority, which addressed service of a summons on an out of state defendant, is completely inapposite. The Notice was therefore served on the right address.

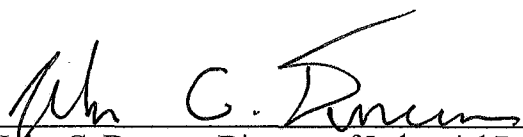
Travelers’ request for review dated May 28, 2009 was made 112 days after the Notice was properly served on Travelers, well after the statutory deadline. Once the time period during which a party can seek review expires, the Notice becomes final automatically. The statute governing these particular proceedings is clear that the failure to file a timely request for review deprives the Director of jurisdiction to hear the merits of the case. Travelers did not make a timely request and the Director therefore lacks jurisdiction to hear this case.

ORDER

The Request for Review is dismissed for lack of jurisdiction. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

SO ORDERED

Dated: July 27 2009



John C. Duncan, Director of Industrial Relations