

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Don Martinez, an individual dba Alpha 1 Construction

Case No. 16-0040-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

Don Martinez dba Alpha 1 Construction (Martinez), the prime contractor on the Second Access Road – Slope Stabilization Project (Project) in Los Angeles County, submitted a Request for Review (RFR) of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) arising from Martinez' work on the Project. American Safety Casualty Insurance Company (Surety) served a Notice of Intervention.¹ DLSE made an oral Application for an Order to Show Cause (OSC) why Martinez's RFR 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. Neither Martinez nor the Surety filed a brief in response to the OSC. At the Prehearing Conference following the OSC, Martinez and the Surety again failed to offer any facts or law to dispute DLSE's contention that the RFR was untimely.

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

¹ Surety's Notice of Intervention was filed with DLSE, but not the Hearing Officer. DLSE told the Hearing Officer about the Notice of Intervention at the first Prehearing Conference.

FACTS

On October 23, 2015, DLSE issued the Assessment against Martinez based on its failure to comply with the Labor Code's prevailing wage requirements with respect to the Project.² 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.

In a letter postmarked January 14, 2016,³ 83 days after service of the Assessment, Martinez filed and served the RFR of the Assessment. On April 8, 2016, the Hearing Officer issued a Notice of Appointment of Hearing Officer and Telephonic Prehearing Conference on April 25, 2016.

At the April 25, 2016 Prehearing Conference, the Hearing Officer attempted to reach Martinez, but there was no answer at the telephone number that Martinez provided on the RFR. DLSE advised that it did not have an alternative telephone number for Martinez, but that it would email Martinez and inquire as to whether the telephone number on file is correct. The Hearing Officer conducted the Prehearing Hearing Conference in Martinez's absence.

During the conference, DLSE advised that it had been served with a Notice of Intervention by the Surety, but that the proof of service indicated that it had not been served on the Hearing Officer. DLSE agreed to contact the surety and advise that it had to serve the Hearing Officer with any request to intervene. DLSE also made an oral application for an Order to Show Cause why the RFR should not be dismissed as untimely. The Hearing Officer granted DLSE's Application for an Order to Show Cause

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

³ 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."

regarding dismissal of the RFR for untimeliness, set a briefing schedule for opening and responsive briefs, and set a post-briefing Prehearing Conference for June 27, 2016 at 10:00 a.m. The Minutes of the Prehearing Conference and Orders were duly served on May 11, 2016.

On May 20, 2016, DLSE filed and served its opening brief setting forth the facts and law in support of its contention that the RFR should be dismissed as untimely. Neither Martinez nor the Surety served a responsive brief.

At the June 27, 2016 Prehearing Conference, Martinez appeared, but did not offer a factual or legal basis for finding that the RFR was timely. The Surety also appeared, but stated that it would not dispute that the RFR was untimely.

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.⁴ If no hearing is requested within this period, “the assessment shall become final.” (§1742, subd. (a).) California Code of Regulations, title 8, section 17222, subdivision (a), restates the 60-day filing requirement and expressly provides 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.” 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 October 23, 2015, under section 1742, subdivision (a), Martinez’s RFR of the Assessment needed to be served no later than

⁴ 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. (Cal. Code Regs., tit 8, § 17203, subd. (a).) If the last day is a holiday, it is extended to the next business day. (Civ. Code § 9.)

December 28, 2015.⁵ Martinez did not transmit its RFR until January 14, 2016 – 83 days late. Under the plain language of sections 1742, subdivision (a), the Director is without jurisdiction to proceed on Martinez’s untimely RFR. (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.)

Since Martinez’s RFR was not timely served, the Assessment has become final, and the Director does not have jurisdiction to conduct a hearing. (§§1742, subd. (a) and 1777.7, subd. (c)(1).)

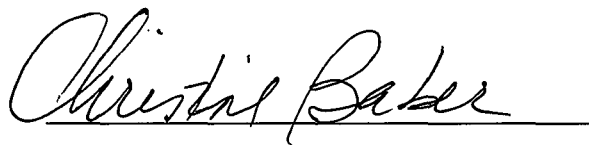
FINDINGS

1. Martinez did not timely request review of the October 23, 2015, Civil Wage and Penalty Assessment.
2. The Civil Wage and Penalty Assessment became a final order on December 28, 2015.
3. The Director has no jurisdiction to proceed on Martinez’s untimely Request for Review of the Assessment.

ORDER

Don Martinez, an individual dba Alpha 1 Construction’s Request for Review in Case Number 16-0040-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

⁵ The 65-day period described in footnote 4, *supra*, would conclude on Sunday, December 27, 2015, so it is extended to the next business day, December 28, 2015. (Civ. Code § 9.)