

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of

**J. Poot Electric**

**Case No. 10-320-PWH**

[DLSE Case No. 40-25814/308]

From a Notice of Withholding issued by:

Division of Labor Standards Enforcement

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**DECISION OF THE DIRECTOR**

**INTRODUCTION**

The Division of Labor Standards Enforcement (“DLSE”) has asserted that the Affected Contractor, J. Poot Electric (“Poot”) failed to file its Request for Review within 60 days after service of the Civil Wage and Penalty Assessment (“Assessment”), as required by Labor Code section 1742(a) and Rule 22 [Cal. Code Regs., tit. 8, §17222(a)]. The appointed Hearing Officer, Douglas P. Elliott, served an Order to Show Cause whether this matter should be dismissed for untimeliness, to which Poot failed to respond.

For the reasons below, I find that the time limit is jurisdictional and accordingly that the Request for Review must be **dismissed**.

**FACTS**

DLSE issued the Assessment against DB/CM Construction (“DB/CM”), the prime contractor, and Poot, the subcontractor, based on Poot’s failure to comply with the Labor Code’s prevailing wages requirements with respect to a public works project for the Chino Valley United School District. DLSE served the Assessment by mail on September 9, 2010. DB/CM did not file its own Request for Review, and the Assessment is final as to it. DLSE determined

that unpaid prevailing wages in the amount of \$35,020.64 were due, as well as penalties pursuant to Labor Code sections 1775 and 1813 in the amount of \$3,600.00. Poot's Request for Review was dated November 18, 2010 (70 days after service of the Assessment) and was received by DLSE on November 22, 2010 (74 days after service of the Assessment).

At the Prehearing Conference on January 24, 2011, Poot's owner, Jesus Hebert Poot, stated that he had been away and did not see the Assessment until shortly before he mailed the Request for Review. On February 1, 2010, the Hearing Officer issued an Order to Show Cause ("OSC"), stating in pertinent part:

Pursuant to Title 8, California Code of Regulations, section 17227, Requesting Party J. Poot Electric is hereby ORDERED to show cause why the Request for Review should not be dismissed as untimely. Requesting Party shall respond to this order in writing within 15 days of this order. Enforcing Agency may submit a written reply within 5 days following service of said response. Evidence submitted in support or opposition to this Order shall be by affidavit or declaration under penalty of perjury. Copies of any and all submissions must be served on the opposing party.

Poot has filed no response to the OSC.

## DISCUSSION

Labor Code section 1742, subdivision (a) provides that a Request for Review must be filed within 60 days from the date that an Assessment is served on an affected contractor or subcontractor.<sup>1</sup> Rule 22(a) restates the 60 days filing requirement. Rule 22(a) expressly states that "Failure to request review within 60 days shall result in the Assessment ... becoming final and not subject to further review under these Rules." Moreover, Rule 21(d) states: "Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met

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<sup>1</sup> "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.

or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 below.” There is no standard form or elaborate process to make a Request; a letter from the contractor or subcontractor to the Labor Commissioner simply stating the request suffices to start the process of having a Hearing Officer appointed.<sup>2</sup> However, if no timely request for review is filed, the statute then provides that “the assessment shall become final.” (*Id.*)

In *Pressler v. Bren* (1982) 32 Cal.3d 831, the court analyzed Labor Code 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 Labor Code 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.*, 32 Cal.3d at 837.

*Pressler* has been cited numerous times in different circumstances, including in 1999 in *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, where the court followed the core holding of *Pressler* that the time for taking appeal under the Talent Agencies Act (Lab. Code, §1700.44) was jurisdictional and reliance on California Code of Civil Procedure section 473 was error. That court quoted *Pressler* 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 to *Pressler*]” *Id.* at 496. The Court found that the plaintiffs in the administrative proceeding, had not provided any logical reason

why the general holding in *Pressler* as to the timeliness of an appeal from a final determination by the Commissioner is not equally applicable to *any* kind of administrative proceeding held before the Commissioner, nor can they, in light of the *Pressler* court’s comments that: “Historically, the courts have not

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<sup>2</sup> Rule 22(e) states, in part: A Request for Review shall be liberally construed in favor of its sufficiency ....”

hesitated to apply the rules governing conventional appeals to appeals in which a trial de novo is required [citations]” and ... “[t]he timely filing of the notice of appeal (1) forestalls the finality of the Labor Commissioner’s decision; (2) terminates the jurisdiction of the Labor Commissioner; and (3) vests jurisdiction to conduct a trial de novo in the appropriate court.” *Id.*, 69 Cal.App.4th at 496, emphasis in original).

The last sentence of Labor Code section 1742, subdivision (a) provides that “[i]f no hearing is requested within 60 days after service of the assessment, the assessment shall become final.”<sup>3</sup> 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. Once the time period during which a party can seek review expires, the Assessment 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.

Had Poot filed a timely Request, it would have forestalled the finality of the Assessment and would have vested the Director with jurisdiction to conduct a hearing at which its defenses could be heard. However, when the time has passed, there was no jurisdiction to proceed because “the assessment is final.” Labor Code section 1742(a). Because the time limit is mandatory and is jurisdictional by statute, Poot’s late filing cannot be excused. Poot has not presented grounds for delay due to mistake, inadvertence or excusable neglect, and indeed failed to respond at all to the OSC.

#### **FINDINGS and ORDER**

1. J. Poot Electric did not timely request review of a September 9, 2010, Civil Wage and Penalty Assessment issued by the Labor Commissioner.
2. The Director has no jurisdiction to proceed on the untimely request for review filed by J. Poot Electric.

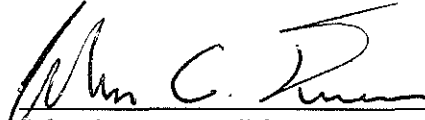
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<sup>3</sup> Similar to section 98.2(e), section 1742(d) provides that when an assessment becomes final, it may be filed and entered as a judgment of the superior court.

3. In light of the foregoing findings, J. Poot Electric's November 18, 2010, Request for Review must be dismissed.

Accordingly, IT IS ORDERED that J. Poot Electric's Request for Review is dismissed, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: March 30, 2011

  
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John C. Duncan, Director