

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Marjani Builders, Inc.

Case No.: **18-0252-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Marjani Builders, Inc. (Marjani) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on April 13, 2018. Pursuant to California Code of Regulations, title 8, section 17227, on September 18, 2018, the appointed Hearing Officer, Steven A. McGinty, served an Order to Show Cause Why Request for Review Should Not Be Dismissed as Untimely under Labor Code section 1742, subdivision (a) (OSC).¹ Section 1742, subdivision (a), mandates that a request for review be transmitted to the Labor Commissioner within 60 days after service of the Assessment.

For the reasons stated below, this Decision finds that the time limit for requesting review is mandatory and jurisdictional, and that Marjani's Request for Review was not filed timely. Accordingly, the Request for Review must be dismissed.

Facts

DLSE issued the Assessment against Marjani on April 13, 2018. Marjani received the Assessment on April 16, 2018.² Marjani filed a Request for Review on August 20,

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

² Marjani's representative acknowledged receipt of the Assessment on April 16, 2018, in a pleading filed with the Labor Commissioner on August 20, 2018, entitled Request for Relief from Default (C.C.P. 473(b); Declaration of Alexander A. Marjani [in Support of Request from Relief from Default] (Marjani Declaration), p. 4.)

2018. One hundred and twenty-nine (129) days lapsed between the date DLSE issued the Assessment and the date Marjani filed the Request for Review.

Notice of the right to seek review is found at the top of page two of the Assessment. 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 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

Twice between the dates of issuance of the Assessment and the filing of the Request for Review, Marjani contacted the Deputy Labor Commissioner who prepared the Assessment, Lori Rivera, in writing. On April 23, 2018, Mr. Marjani, an officer of Marjani, wrote a letter to Rivera indicating that the Assessment included misinformation that needed clarification and requesting a settlement meeting to review “more valid documents.” On April 26, 2018, Rivera replied to Marjani’s letter indicating that she understood that it disagreed with the Assessment, and advising that: “If you wish to request review of this case, please submit your request to the address as indicated on page 2 of the Civil Wage and Penalty Assessment you received.” Rivera also informed Marjani that it could schedule a settlement meeting at any time; that settlement meetings were informal and conducted over the telephone; and, that if Marjani had additional evidence for her to review it should be submitted in advance of the meeting so she would have time to review it, and apply credit to the audit if applicable. Mr. Marjani understood

Rivera's response as an invitation to file a request for review. (Marjani Declaration, ¶ 11, p. 1.)

On May 4, 2018, Marjani wrote a letter to Rivera responding to various contentions in the Assessment. Attached to the letter was a summary timesheet for the subcontractor's employees covering 14 weeks on the Project. Mr. Marjani concluded the letter by stating, "Unless for information, please remove Marjani Builders, Inc., from the assessment and kindly let me know if we still have to ask for a hearing."³ On May 11, 2018, Rivera replied to Marjani's letter stating, inter alia, that:

...Marjani Builders, Inc., will not be removed from the assessment. Again if you wish to request review of the case please submit your request to the address as indicated in the Civil Wage and Penalty Assessment you received.

Rivera also indicated in her letter that Marjani had failed to provide sufficient evidence to result in any credit against the amount assessed. (Declaration of Lori Rivera in Support of DLSE's Response to Order to Show Cause (Rivera Declaration), ¶ 9, pp. 3, ll. 11-16, and Exhibit 5 attached thereto.)

In addition to communicating in writing, Rivera and Mr. Marjani spoke on the telephone. On April 26, 2018, Rivera told Marjani that if he disagreed with the Assessment, he needed to file an appeal. According to Rivera:

I told Mr. Marjani that the worst thing he could do was to do nothing. He asked how to file the request. I explained to him how to request for review and where it [*sic*] mail it as indicated on the assessment.

(Rivera Declaration, ¶ 7, pp. 2-3, ll. 1-3.)

After May 11, 2018, there was no further communication from Marjani. (*Id.*, ¶ 10, p. 3, ll. 17-18.)

On June 29, 2018, DLSE filed with the Superior Court in Orange County a Request That Clerk Enter Judgment on the Final Civil Wage and Penalty Assessment.

³ Both parties submitted copies of the letters dated April 23, April 26, and May 4, 2018, as attachments to declarations. Marjani submitted the letters as part of its Request for Relief from Default filed with the Labor Commissioner along with its Request for Review. DLSE submitted the letters as part of its Response to the Order to Show Cause.

Judgment in favor of DLSE was entered that day. (Declaration of Luong Chau in Support of DLSE's Response to Order to Show Cause (Chau Declaration), ¶ 4, p. 2, ll.16-21, and Exhibit 2 attached thereto.) On July 9, 2018, Marjani received the Notice of Entry of Judgment. (Marjani Declaration, ¶ 16, p. 2.) On August 20, 2018, Marjani filed with the Labor Commissioner a Request for Relief from Default (C.C.P. 473(b) (Request for Relief) and its Request for Review of the Assessment.

The parties were provided ten days to file a response in writing to the Hearing Officer's OSC of September 18, 2018, and five days to reply to any submission by any other party. On September 27, 2018, Marjani's representative requested an extension of time to respond to the OSC. The representative informed the Hearing Officer that Marjani had filed a Motion with the Superior Court seeking relief from the Judgment, and that counsel for DLSE had agreed to the extension of time. On September 28, 2018, the Hearing Officer extended the time to respond to the OSC by thirty days.

On October 26, 2018, DLSE filed its Response to the Order to Show Cause. In the Response pleadings, DLSE noted that on August 21, 2018, Marjani filed in Superior Court a Motion to Set Aside the Clerk's Judgment (Motion). On September 28, 2018, the Court granted Marjani's Motion and the Judgment was vacated. (Chau Declaration, ¶5, p. 2, ll. 22-28, and Exhibit 3 attached thereto.)

Discussion

Section 1742, subdivision (a), provides that an affected contractor may request review of a civil wage and penalty assessment within 60 days after service of the assessment. If no hearing is requested within that period, "the assessment shall become final." (§ 1742, subd. (a.) The applicable regulations, at title 8, section 17222, restate the 60-day filing requirement, and expressly provide that, "Failure to request review within 60 days shall result in the Assessment...becoming final and not subject to further review under these Rules."

Section 17227 of the regulations governs the early disposition of a Request for Review that appears untimely. Under the rule, the Hearing Officer issues an Order to

Show Cause why the Request for Review should not be dismissed as untimely under section 1742. The Order is served on all parties and provides the parties an opportunity to respond to the Order and to reply to any submission by any other party. Evidence in support or opposition to the Order is submitted by affidavit or declaration. (Cal. Code Regs., tit. 8, § 17227, subds. (a) and (b).) There is no right to an oral hearing under the rule. (*Id.*, subds. (b) and (c).)⁴ The rule expressly authorizes the Director to dismiss a Request for Review that is untimely under section 1742. (*Id.*, subds. (c) and (d).)

This case proceeded under procedures set forth in Section 17227 of the regulations. The Hearing Officer issued an OSC. The parties filed various pleadings in response and reply.

The evidence in the record established that the last day to transmit a written request for review in this matter was June 18, 2018.⁵ The Assessment became final on June 18, 2018. Therefore, under section 1742, Marjani's Request for Review transmitted on August 20, 2018, was untimely. The Director is without jurisdiction to proceed on the untimely Request for Review. (§ 1742, subd. (a); Cal. Code Regs., tit. 8, § 17222, subd. (a); see also *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831 [where the time for filing is mandatory and jurisdictional, a late filing may not be excused on the grounds of mistake, inadvertence, or excusable neglect]; *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489 [same].)

Marjani advanced the argument that it should be relieved from "default" due to mistake, inadvertence, and excusable neglect, citing Code of Civil Procedure, section 473, subdivision (b). That section authorizes a trial court to set aside an entry of default

⁴ Marjani requested a hearing on the OSC. The request is denied, as the operative facts are clear. Rule 27 was designed to prevent the Director from having to provide a hearing where the Request for Review appears untimely. The rule serves to conserve resources and promotes efficient use of hearing calendar time. The Parties were provided ample opportunity to submit responses and replies in writing. The Hearing Officer extended the time to respond to the OSC by thirty days. The Requesting Party had previously submitted a Request for Relief from Default with the accompanying Marjani Declaration. Thus, there was already argument and sufficient evidence on the issue of timeliness in the record.

⁵ The Assessment issued on April 13, 2018. The 65th day after April 13, was June 17, 2018, a Sunday. Thus, Monday, June 18, 2018, was the last day to transmit the Request for Review.

or judgment because of mistake, inadvertence, surprise, or excusable neglect. However, neither the prevailing wage laws in the Labor Code nor the applicable regulations provide the Director authority to excuse a contractor from its failure to timely request review based on mistake, inadvertence, surprise, or excusable neglect. To the contrary, the plain language of section 1742, subdivision (a), unequivocally provides that if there is a failure to timely request review within 60 days after service of the assessment, “the assessment *shall* become final.” (Emphasis added). The word “shall” is mandatory.” (§ 15.) Once the Assessment has become final, the Director lacks authority under the rules to further review the Assessment. (Cal. Code Regs., tit. 8, § 17222.)

Even if the Director had the authority to relieve a contractor from “default,” the record in this case would not support such relief. Marjani was advised several times of the importance of submitting a request of review if it wished to appeal the Assessment. In support of its “default” argument, Marjani argued that its letter dated May 4, 2018, was a Request for Review but that Marjani transmitted it to the wrong office by mistake. (Request for Relief from Default (C.C.P. 473(b)); Marjani Declaration, ¶¶ 12 and 13, p. 2.) The evidence belies the argument. The letter was, in fact, an attempt to furnish information to Rivera for her evaluation. The paragraph numbered “1” says as much, where it states, “We are just trying to furnish all information we possess for your [Rivera’s] correct evaluation.” Most importantly, the letter ends with the phrase, “[K]indly let me know if we still have to ask for a hearing.” Marjani used that phrase after being told twice how to request review and, importantly, encouraged, or as he himself admitted, “invited,” to request review.

In addition, the evidence established that Rivera wrote to Marjani on May 11, 2018, in response to the May 4 letter, making clear that it was necessary to file a Request for Review. Rivera’s letter stated “If you wish to request review of the case please submit your request to the address as indicated in the Civil Wage and Penalty Assessment you received.” At that time, there was still more than a month in which to act to preserve the right to contest the Assessment. Even after learning of the default taken in Superior Court on July 9, 2018, Marjani did not take action for another forty-two (42) days.

Had Marjani timely filed a Request for Review, it would have vested the Director with jurisdiction to review the Assessment and to conduct a hearing as necessary. Marjani failed to do so. The time limit is mandatory and jurisdictional, and accordingly, the Assessment is final. (§ 1742, subd. (a).)

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

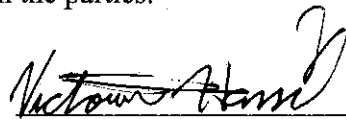
FINDINGS

1. Marjani Builders, Inc. did not timely request review of the Civil Wage and Penalty Assessment issued April 13, 2018.
2. The Assessment became final on June 18, 2018.
3. The Director has no jurisdiction to proceed on the untimely Request for Review filed by Marjani Builders, Inc.

ORDER

Marjani Builder, Inc.'s Request for Review is dismissed. The Hearing Officer shall issue and serve a Notice of Findings on the parties.

Dated: JUNE 15, 2019



Victoria Hassid
Chief Deputy Director⁶
Department of Industrial Relations

⁶ See Government Code sections 7, 11200.4.