

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Sylvania Lighting Services Corp.**

Case No.: **16-0457-PWH**

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor Sylvania Lighting Services Corp. (SLS) 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) with respect to a work of improvement known as “Energy Management – Lighting at Multiple Sites (Phase 2)” (Project) performed by SLS and its subcontractor, JPM & Associates, LLC (JPM) for the Conejo Valley School District in Ventura County, California.<sup>1</sup> The Assessment determined that the following amounts were due: \$391,929.15 in unpaid prevailing wages; \$100,920.00 in Labor Code section 1775 statutory penalties;<sup>2</sup> \$18,275.00 in section 1813 statutory penalties; \$11,160.00 in section 1777.7 statutory penalties; and \$202,300.00 in section 1776 statutory penalties.

The matter was assigned to Hearing Officer John J. Korbol. On July 11, 2017, through its counsel Soltivear Sim, DLSE moved to dismiss the Request for Review by filing an Application for Order to Show Cause Why Request for Review Should Not Be Dismissed as Untimely (Application). In its Application, DLSE contended that the Request for Review was filed 122 days late. In response to the Application, on August 14,

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<sup>1</sup> JPM did not file a request for review.

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

2017, the Hearing Officer served an Order to Show Cause (OSC) as to why the Request for Review should not be dismissed as untimely under section 1742, subdivision (a), which requires that a request for review of a civil wage and penalty assessment be transmitted to the Labor Commissioner within 60 days after service of the assessment. Gregory Iskander, counsel for SLS, timely filed an Opposition to Application For Order To Show Cause Why Request For Review Should Not Be Dismissed As Untimely (SLS Opposition). DLSE did not file a reply.

SLS asserts that its Request for Review was timely filed because 16 days after service of the Assessment, SLS sent its Request for Review to the DLSE's Bureau of Field Enforcement office located at 320 W. 4th Street, Los Angeles, CA 90031, which is one of the addresses that appears in the Assessment. Further, SLS asserts that DLSE deceived SLS because it did not advise SLS until 100 days later that SLS's Request for Review had not been received by the correct DLSE office for the filing of a Request for Review, namely the Civil Wage and Penalty Assessment Review Office (Assessment Review Office). This Decision finds, as set forth below, that the Request for Review was untimely. The Assessment conspicuously designated DLSE's Assessment Review Office at P.O. Box 32889, Long Beach, CA 90832, as the address to which any Request for Review had to be submitted. SLS did not submit its Request for Review to that designated address until 122 days after the Assessment was served, well after the 60-day period for submitting a Request for Review. Time limits for requesting review of the Assessment are jurisdictional. Accordingly, the Director issues this Decision dismissing SLS's Request for Review.

## **FACTS**

On August 2, 2016, DLSE served the Assessment on SLS and JPM. At the top left of the first page of the Assessment, an address is listed for a Labor Commissioner Bureau of Field Enforcement-Public Works office located at 320 W. 4th Street, Suite 450, Los Angeles, CA 90013, denominating the office that conducted the investigation and issued the Assessment<sup>3</sup>

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<sup>3</sup> The Labor Commissioner is the Chief of DLSE. The term "Labor Commissioner" includes the Chief and designees for purposes of the Labor Commissioner's duties under the California Prevailing Wage Law, section 1720 et seq. (Cal. Code Regs, tit. 8, § 17202, subd. (i) and § 21.)

Page two of the Assessment, however, provides notice of the right to seek review. 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

On August 18, 2016, SLS sent a Request for Review by Federal Express to:

Paul Tsan  
State of California  
320 W. 4<sup>th</sup> Street, Suite 450  
Division of Labor – Public Works  
Los Angeles, CA 90013<sup>[4]</sup>

On August 19, 2016, the Request for Review was date-stamped as received by the “Labor Standards Enforcement, Public Works – Los Angeles Office.”

In support of SLS’s contention that its Request for Review was timely filed, SLS cites to DLSE’s file notes, which state: “LETTER FROM PC: SYLVANIA LIGHTING SERVICES REQUESTING A REVIEW WAS SENT VIA FEDEX AND REC’D ON 8-19-18; FWD TO PT. ~~ VIVIAN KELLEY / L.A[.]” (Declaration of Nicholas Koch In Support of SLS Opposition, Exhibit D, (Koch Declaration).)

SLS asserts that on August 18, 2016, its manager, Nicholas Koch, also sent by Federal Express a Request for Review to the Civil Wage and Penalty Assessment Review Office at the P.O. Box address in Long Beach, which the Assessment had clearly stated was the address to which any Request for Review had to be directed. However, neither SLS nor Koch identifies the complete address used in that Federal Express mailing.

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<sup>4</sup> Paul Tsan was the Deputy Labor Commissioner who prepared the Assessment.

Further, SLS acknowledges that Federal Express would not deliver the package to a P.O. Box address. SLS did not receive notice of the failed Federal Express delivery to the Assessment Review Office's P.O. Box address.

On August 31, 2016, SLS made copies of the DLSE's enforcement file. SLS asserts that "Mr. Tsan made clear to [Koch] that [Koch] could not copy the file until the Request for Review was processed." (Koch Declaration, p. 2, line 28 - p. 3, line 1.)

On November 30, 2018, Tsan notified Koch via email that the Assessment Review Office had not received its Request for Review. Tsan requested a copy of the Federal Express tracking information showing that SLS's Request for Review was sent to the Assessment Review Office. SLS did not produce the Federal Express tracking information to Tsan. Koch stated when he followed up with Federal Express, Federal Express provided no explanation as to why it did not inform him the package was undeliverable. (Koch Declaration, p. 3, lines 1-19.)

SLS admits it was unable to obtain any record from Federal Express because Federal Express had not processed its package. On December 1, 2016, SLS sent its Request for Review by Priority Mail Express via the United States Postal Service to the P.O. Box address for the DLSE Assessment Review Office as it is designated on the Assessment. On December 2, 2016, the Request for Review was date-stamped received by the Assessment Review Office in Long Beach.

SLS also asserts that in December 2016, Tsan informed Koch that "[Koch] needed to send a copy of the Request to the Hearing Office, and that [Tsan] did not tell [Koch] that the Request would be considered untimely." (Koch Declaration, p. 3, lines 22-23.) Koch also states that "as the Hearing Office informed me that the Request would be processed and a hearing officer assigned, and as I continued to work with Tsan to resolve this matter, I believed that there were no issues with the timeliness of the Request." (Koch Declaration, p. 3, lines 24-27.) Koch does not state the date on which a Assessment Review Office representative informed him the Request for Review would be processed, nor does he allege the Assessment Review Office representative informed him the Request for Review was timely submitted.

## DISCUSSION

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

Labor Code 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.

SLS contends that, in conformity with section 1742, subdivision (a), on August 18, 2018, it timely filed its Request for Review at the DLSE office in Los Angeles, California 90013, which is an address of one of DLSE's many offices of the Bureau of Field Enforcement, and which is an address that appears at the top left of page one of the Assessment. However, the Assessment bears prominent, boldface type on page two that states "Notice of Right to Obtain Review-Formal Hearing." That wording is followed by boldface type that reads, "To obtain a hearing a written Request for Review must be transmitted to the following address:" which, in turn, is followed by the address of the Assessment Review Office in Long Beach, California. By that wording, SLS was notified that a timely Request for Review of the Assessment had to be sent to the Assessment Review Office in Long Beach, California. Further, California Code of Regulations, title 8, section 17222, subdivision (b), expressly provides that a "Request for Review shall be transmitted to the office of the Enforcing Agency *designated on the Assessment* or Notice of Withholding of Contract Payments from which review is sought [emphasis added]."

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 v. State Personnel Board* (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 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 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.)

In *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489 (*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 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].” (*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.)

Here, SLS did not timely transmit its Request for Review to the address designated on the Assessment for that purpose. Instead, SLS erroneously sent its Request for Review to the Labor Commissioner’s Bureau of Field Enforcement office in Los Angeles. While this address “appears” on the Assessment (as the office from which the Assessment was issued), it is *not* the address expressly designated in the Assessment for transmittal of a Request for Review. The Assessment provides clear and explicit instructions for

requesting review, including by designating the address to which a written Request for Review had to be sent. In accordance with California Code of Regulations, title 8, section 17222, subdivision (b), the designated address on the Assessment is the Assessment Review Office located in Long Beach. It was not until December 1, 2016, well beyond the statutory appeal period, that SLS finally filed its Request for Review at the designated address.

In his declaration, Koch states that “as the Hearing Office informed me that the Request would be processed and a hearing officer assigned, and as I continued to work with Mr. Tsan to resolve this matter, I believed that there were no issues with the timeliness of the Request.” While Koch may have engaged in discussions with Tsan to resolve the issues raised in the Assessment, the mandatory statutory appeal period remained in effect, and nothing in the record demonstrates that either Tsan or the unidentified Assessment Review Office representative waived, or had authority to waive, the requirement as to the proper DLSE office for submission of a Request for Review. Moreover, Tsan would not necessarily have known or noted that SLS failed to timely file a Request for Review in the Assessment Review Office given that a separate copy had been sent to him directly, and he may simply have assumed that SLS had done so based on Koch’s own representations. Further, page three of the Assessment also expressly states, again in boldface type, that requesting a settlement meeting does not extend the 60-day period during which a formal hearing must be requested. That reference derives from California Code of Regulations, title 8, section 17221, subdivision (d), which states:

Neither the making or pendency of a request for a settlement meeting, nor the fact that the parties have met 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.

Although Koch apparently believed, mistakenly, that there were no issues with the timeliness of the SLS Request for Review given his ongoing discussions with DLSE, SLS’s late filing cannot be excused on the grounds of mistake, inadvertence, or excusable neglect because the limitations period under Section 1742, subdivision (a), is mandatory and jurisdictional by statute. (*Pressler, supra*, 32 Cal.3d at p. 837.)

Lastly, SLS relies on *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 relief may be obtained based on allegations of a Deputy Labor Commissioner's fraud. This argument is rejected. There is no evidence of extrinsic fraud of the nature addressed in *Davis Moreno*. In that case, the contractor 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 to the Superior Court to determine whether the final assessment order and judgment against Davis Moreno had in fact been obtained by extrinsic fraud, which the Court of Appeal defined as "one party's preventing the other from having his day in court." (*Davis Moreno, supra*, 193 Cal. App. 4th at p. 570.) In this case, SLS attributes no statement to Tsan comparable to the statements alleged in *Davis Moreno*, and SLS offers nothing to show that at the time of any communications, Tsan was aware that a Request for Review had not been timely filed in the Assessment Review Office. SLS failed to demonstrate that anything Tsan said or did within the 60 day period for filing a Request for Review prevented or dissuaded it from verifying with Federal Express the successful delivery of its Request for Review to the Assessment Review Office, or verifying with the Assessment Review Office the receipt thereof, or otherwise verifying or ensuring that a timely Request for Review had been properly submitted. And SLS alleges no affirmative statement from Tsan or any other DLSE official about the timeliness or viability of SLS's misdirected Request for Review when DLSE evidently allowed SLS to photocopy the file records.

Since a timely Request for Review was not filed in this case, the Director has no jurisdiction to proceed because the Assessment has become final. (§ 1742, subd. (a).) Because the time limit is mandatory and jurisdictional by statute, SLS's late filing cannot be excused.

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

### **FINDINGS**

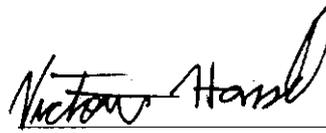
1. Sylvania Lighting Services Corp. did not timely request review of the August 2, 2016, Civil Wage and Penalty Assessment.

2. The Civil Wage and Penalty Assessment became a final order on October 3, 2016.
3. The Director has no jurisdiction to proceed on Sylvania Lighting Services Corp.'s untimely Request for Review of the Civil Wage and Penalty Assessment.

**ORDER**

Sylvania Lighting Services Corp.'s Request for Review in Case No. 16-0457-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: June 15, 2019



Victoria Hassid  
Chief Deputy Director  
Department of Industrial Relations<sup>5</sup>

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<sup>5</sup> See Government Code sections 7, 11200.4.