STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of

Spirit Drywall **Case No. 08-0184-PWH**

[DLSE Case No. 40-21809/213]

From a Notice of Withholding issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

INTRODUCTION

The Division of Labor Standards Enforcement ("DLSE") has requested Early Disposition of Untimely Request for Review, asserting that the Affected Contractor, Spirit Drywall ("Spirit") 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 Spirit responded.

Spirit claims that its failure to timely file a Request for Review ("Request") was based upon its mistaken belief that its Request would be timely if filed within 60 days after a telephone conversation with a Deputy Labor Commissioner subsequent to service of the Assessment. For the reasons below, I find that the time limit is jurisdictional and accordingly that DLSE's Motion to Dismiss Request for Review must be granted. This case is dismissed.

FACTS

DLSE served the Assessment by mail on Spirit on July 7, 2008, against Jenn-Matt, Inc. ("Jenn-Matt"), the prime contractor, and Spirit, the subcontractor, on a public works project based on Spirit's failure to comply with the Labor Code's prevailing wages requirements. Jenn-Matt has not filed its own Request, and the Assessment is final as to it. DLSE determined that unpaid prevailing wages in the amount of $71,826.88 were due, as well as penalties pursuant to Labor Code sections 1775 and 1813 in the amount of $17,650.00.

Spirit's president, Bobby Flores, claims that that prior to filing the Request, he had spoken with Deputy Labor Commissioner Yoon-mi Jo, who told him that he had 60 days to request review. Flores was under the impression Ms. Jo "was telling [him] the exact days." Jo's contemporaneous records show that she spoke with Mr. Flores on July 11, 2008, and told him on that occasion "that he should not miss the 60 day time limit to request review." Jo "never told Bobby Flores that he had more than 60 days from the date the Civil Wage and Penalty Assessment was issued to file a Request for Review."

Spirit's Request was filed on September 16, 2008, 71 days after service of the Assessment and 67 days after the July 11, 2008, telephone conversation.

DISCUSSION

Labor Code section 1742(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.[1] 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 or the Withholding of Contract Wages becoming final and not subject to further review under these Rules." Moreover, Rule

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[1] "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.

21(d) 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." 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.[2] 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(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.

The last sentence of Labor Code section 1742(a) provides that "[i]f no hearing is requested within 60 days after service of the assessment, the assessment shall become final."[3] 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.

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

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[2] Rule 22(e) states, in part: A Request for Review shall be liberally construed in favor of its sufficiency …."

[3] 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.

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 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).

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 Spirit filed a timely Request, it would have forestalled the finality of the Labor Commissioner's 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, Spirit's late filing cannot be excused. Spirit has not presented grounds for delay due to mistake, inadvertence or excusable neglect, as the Request was untimely even under its description of the facts.

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FINDINGS and ORDER

1. Spirit Drywall did not timely request review of a July 7, 2008, 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 Spirit Drywall.

3. In light of the foregoing findings, Spirit Drywall's September 16, 2008, Request for Review must be dismissed.

Accordingly, IT IS ORDERED that Spirit Drywall'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: December 23, 2008

John C. Duncan, Director