

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

**Hector Enrique Garcia Andino
and Coliman Construction, Inc.,**
Petitioners,

Nos. LB-21-572, LB-21-573,
LB-21-574, LB-21-575

Dated: January 21, 2022

v.

**Office of the Attorney General, Fair Labor
Division,**
Respondent.

ORDER OF DISMISSAL

Petitioners Hector Enrique Garcia Andino and Coliman Construction, Inc. appeal from four civil citations issued by the Office of the Attorney General, Fair Labor Division (division). Each citation states a statutory violation under the fair labor laws. *See* G.L. c. 149, §§ 148, 148B, 148C(o); G.L. c. 151, §§ 15, 19(3).

The division moves to dismiss. *See* 801 C.M.R. § 1.01(7)(g)(3). Petitioners were ordered to respond to the motion by January 14, 2022, but have not done so. In the circumstances, disposition of the motion without a motion hearing would best serve the public interest. *See* 801 C.M.R. § 1.01(7)(a)(2).

The division's uncontested affidavits relate the following information. Before issuing the citations, the division communicated with petitioners about the division's investigation for approximately eleven months. The communications took place through Mr. Andino, who used an email address at a domain name featuring the corporate petitioner's name (colimanco.com). The division transmitted the citations to that email address on October 28, 2021. An appeal letter arrived at the division's offices twenty-one days later, on November 18, 2021, in an envelope bearing no postmarked date.

DALA's case file likewise reflects receipt of an appeal letter on November 18, 2021. The envelope to DALA displays a 65-bar U.S. Mail barcode, but no postmarked date. The bodies of the appeal letters to the division and to DALA both state the date November 5, 2021 in their headings.

The governing statute authorizes persons aggrieved by the division's citations to "appeal . . . by filing a notice of appeal . . . within ten days of the receipt of the citation." G.L. c. 149, § 27C(b)(4). The notice must be delivered both to the division and to DALA. *Id.* The general rule is that "[a] statutory appeal period constitutes a jurisdictional prerequisite to a [tribunal's] authority to consider any matter on appeal." *Commonwealth v. Claudio*, 96 Mass. App. Ct. 787, 791-92 (2020). DALA magistrates have consistently applied that rule to appeals from the division's citations. *See Schwartz v. FLD*, No. LB-19-379 (DALA Dec. 16, 2019); *Igoe v. FLD*, No. LB-17-649 (DALA Nov. 30, 2017); *Nelson v. FLD*, No. LB-12-76 (DALA Sept. 11, 2012). *See also* 801 C.M.R. § 1.01(4)(e) (presiding officers' power to extend time limits does not reach statutory deadlines).

It is generally appropriate and efficient for an agency to communicate its formal actions by email. *See* 801 C.M.R. § 1.01(4)(c). The fact that petitioners received the citations is not in doubt here, given that they filed an appeal. Ordinarily, communications by email are presumed to be available to recipients promptly upon being sent. *See id.* § 1.01(4)(a). Nothing in the record suggests that the division's transmissions of the citations to petitioners on October 28, 2021 encountered any delays. Petitioners' deadline to appeal was therefore ten days later, i.e., Monday, November 8, 2021.

Papers filed by U.S. Mail are deemed filed "on the date contained in the U.S. postal cancellation stamp or U.S. postmark." 801 C.M.R. § 1.01(4)(a). When a filing envelope is

delivered without a postmark, it is reasonable to “afford[] three to four business days for mail handling.” *Town of Rockland v. Civ. Serv. Comm’n*, 99 Mass. App. Ct. 1127, slip op. at 6-9 (2021) (unpublished memorandum opinion) (citing *Falmouth v. Civ. Serv. Comm’n*, 447 Mass. 814, 816 & n.3 (2006)). *See also* 801 C.M.R. § 1.01(4)(c) (notice of agency action sent by U.S. Mail is presumed received after three days). Applying the more generous measure, petitioners’ appeal letters would be deemed filed as of November 14, 2021, four days before their arrival, but still six days after the deadline.

The appeals were therefore untimely. Consequently, this tribunal lacks jurisdiction to either adjudicate the appeals or entertain any request for an enlargement of the filing deadline (even if petitioners had made and supported such a request).

The division’s motion to dismiss is therefore ALLOWED, the appeals are DISMISSED, and the prehearing conference is CANCELED. In accordance with G.L. c. 30A, § 14(1), any appeal from the instant order must be brought in the superior court within thirty days.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

Sent to:

Hector Enrique Garcia Andino (for petitioners)

Brian C. O’Donnell (for respondent)