

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Batista Contracting, L.L.C &
Idael Batista, Individually,
Petitioners,

Docket No. LB-23-0364

Dated: FEB - 8 2024

v.

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

ORDER OF DISMISSAL

This appeal is one from one current civil citation issued to Petitioners Idael Batista and Batista Contracting L.L.C. by Respondent, the Fair Labor Division (“Division”) of the Office of the Attorney General (“OAG”), on July 6, 2023. The Division has filed a motion to dismiss, to which the Petitioners state but do not substantively argue their opposition.

Factual and Procedural Background

The citation in this case is dated July 6, 2023. It notified the Petitioners that the Division was imposing a civil penalty of \$15,000.00 for a violation of M.G.L. c. 151, §§ 15, 19(3), specifically an alleged “Failure to furnish true and accurate payroll records to the AGO 6/14/23, without specific intent. Subsequent offense.”

A notice attached to the citation provided payment instructions and also provided a right to appeal the citation to the Division of Administrative Law Appeals (“DALA”). The notice provided, in pertinent part, “To appeal this citation, you must file a notice of appeal *within 10 days to both of the following agencies...*” (Emphases in original). The notice went on to provide information on how to pay the filing fee associated with an appeal, as well as how to file the appeal itself. The notice provided an address for the OAG at its principal place of business, its address in Boston, and provided both the link with instructions

on filing an appeal at DALA, as well as providing DALA's mailing address in Malden, MA. The instructions were set forth in the following manner, as well as in the text of the notice provided to the parties. The notice stated:

Right to Appeal This Citation

You have the right to appeal the issuance of this citation to the Division of Administrative Law Appeals ("DALA")....

To appeal this citation, you must file a notice of appeal *within 10 days to both of the following agencies*....In addition to notifying both agencies, **there is an appeal fee of \$200 per citation that must be sent to DALA**....Please enclose a copy of the civil citation you are appealing.

Office of the Attorney General Fair Labor Division, Civil Citation Unit One Ashburton Place, Rm. 1813 Boston, MA 02108	AND	Division of Administrative Law Appeals 14 Summer Street, 4th Floor Malden, MA 02148
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DALA received an appeal from the Petitioners via its electronic filing portal. The appeal was filed on July 15, 2023. The Petitioners are being represented by Robert George, Esq. and listed the Respondent and its counsel, Amy Goyer, Esq. under the heading, "Respondent Information." The Petitioners provided contact information for both Attorney George and the OAG. The Petitioners did not file an appeal of this citation with the Attorney General's Office. DALA sent an acknowledgement that the appeal had been filed and the notice was copied to both the "OAG Fair Labor Division" and to Attorney George.

By notice dated July 17, 2023, sent to the OAG and Attorney George, DALA informed the parties of a telephonic pre-hearing conference scheduled for Tuesday, August 15, 2023 at 10AM. The conference was intended to clarify the issues before DALA and informed the parties that, "Failure to appear may result in the entry of an order of default."

On August 7, 2023, the Division moved to dismiss, arguing that the petitioners had not filed a timely appeal with the Division. By email to counsel for the parties that same day, the undersigned advised the counsel for both parties that any opposition to the motion would need to be filed in accordance with 801 CMR 1.01(7)(a)(1). DALA did not receive any opposition before the deadline stated in the regulation.

On August 15, 2023 at 10AM, counsel for the Respondent appeared (telephonically) at the scheduled pre-hearing conference; neither counsel for the Petitioners nor the Petitioner himself appeared. That same day, I issued an Order to Show Cause to counsel for the parties, ordering the Petitioners' counsel to explain the failure to appear at the scheduled pre-hearing conference. I received a timely response on August 30, 2023.

The response was written as if the Petitioners were not represented by counsel. The response described the Petitioner as being "assisted in this appeal by undersigned counsel." Attorney Robert George signed the response as counsel for the Petitioners. The response stated that the Petitioner did not receive notice of the pre-hearing conference so he did not appear¹. It went on to state that the Petitioner was aware of the Motion to Dismiss that had been filed but that the Petitioner had "incorrectly assumed that the email that the undersigned had sent was "only an acknowledgment of the Respondent's filing." It went on to explain that the Petitioner believed that notice of the appeal was "served on all parties involved, including DALA and the Attorney General's Office." The response requested that DALA not enter an order of default related to the Petitioner's failure to appear at the scheduled pre-

¹ The notice was sent to Attorney George at the address listed in DALA's filing portal.

hearing conference, and that DALA deny the Petitioner's motion to dismiss for lack of proper service.²

Rulings

The Petitioners timely filed a response to DALA's Order to Show Cause, explaining the failure to appear at the scheduled pre-hearing conference and that response is accepted. I will not enter a default under these circumstances.

I now turn to the Respondent's Motion to Dismiss. Appeals from citations under G.L. c. 151, §§ 15, 19(3) must be filed "within ten days of the receipt of the citation[s]." G.L. c. 149, § 27C(b)(4). The governing statutes require each "notice of appeal" to be filed with "the attorney general and the division of administrative law appeals." *Id.* §§ 27C(b)(4), 78A(b). (Emphasis added.)

The Petitioners do not claim to have filed an appeal with the Fair Labor Division. The response to the Order to Show Cause states that the Petitioners appealed the citations via DALA's online portal and received confirmation of the filing which confirmed that they had "...successfully completed the steps required to submit an online appeal with the Massachusetts Division of Administrative Law Appeals ('DALA')...no further action is required of you at this time." The Petitioner states that he "incorrectly assumed that the notice was served on all parties involved, including DALA and the Attorney General's Office."

² As noted above, the Order was issued directing the Petitioners to explain the failure to appear at the pre-hearing conference and did not direct the Petitioners to address the lack of proper service. Presumably, the reference to proper service was intended to respond substantively to the motion to dismiss filed by the OAG.

A court, and by extension, an administrative agency “must presume that the Legislature intended what the words of the statute say.” *DiMasi v. Secretary of Commonwealth*, 491 Mass. 186, 194 (2023). As an initial matter, the plain language of G.L. c. 149, § 27C(b)(4) requires that the appeal of a citation be filed with both DALA and the Division, in that it provides, “Any person aggrieved by any citation or order...may appeal...by filing a notice of appeal **with the attorney general and the division of administrative law appeals....**” (Emphases added.) When the statutory language is plain and unambiguous, there is no need to look beyond that language in order to properly interpret it. *See State Board of Retirement v. Boston Retirement Board*, 391 Mass. 92, 94 (1984); *Massachusetts Broken Stone Co. v. Weston*, 430 Mass. 637, 640 (2000) (“Where the language of a statute is clear, courts must give effect to its plain and ordinary meaning and the courts need not look beyond the words of the statute itself”).

The word “and” is defined as, *inter alia*, “[a] conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first”.³ The use of the word “and” mandates that both requirements (filing with the Division and DALA) must be met in order for a party to perfect an appeal. *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 428 (1984) (“Since the requirements for the grant of a variance are conjunctive, not disjunctive, a failure to establish any one of them is fatal.”) (internal citations omitted) To interpret the statutory language as the Petitioners suggest (i.e. that filing an appeal only with DALA is sufficient to perfect an appeal) would require DALA to read the words “and” and “or” synonymously, which would be contrary to principles of statutory construction. *Siebe, Inc. v.*

³ Black’s Law Dictionary, Revised 4th Edition.

Louis M. Gerson Co., Inc., 74 Mass. App. Ct. 544, 551 (2009) (“Generally, the conjunctive ‘and’ should not be considered as the equivalent of the disjunctive ‘or.’”) (internal citations omitted)

Because this statute’s language is clear and unambiguous, the language is conclusive as to legislative intent, absent an absurd result. *Conservation Commission of Norton v. Pesa*, 488 Mass. 325, 331 (2021). *But see DiStasio v. FLD*, No. LB-10-545, at *5 (DALA 2011) (“the legislature’s likely intent was to speed up the review of the appeal by informing both the Attorney General that its citation was appealed and DALA of a new appeal”)⁴. The language does not produce an absurd result. *Elias Delana, Jr. & Idea Painting Co., Inc. v. OAG*, LB-23-0327; LB-23-0437 (Order of Dismissal October 17, 2023). *Delana* is identical to the present case- the appealing party filed an appeal at DALA but never filed an appeal of the OAG’s citation with that office. DALA granted the OAG’s Motion to Dismiss, stating in part,

It is not an absurd result to require the recipient of a citation to appeal to more than one entity or official. *See* G.L. c. 40A, §15 (discussed below). It is not an absurd result to require the recipient of a citation to appeal both to the entity that issued the citation and to the entity that will hear the appeal. One reason it is not absurd is that OAG must know whether the recipient of an unpaid citation has appealed it so that OAG may decide whether to seek criminal charges against the recipient, G.L. c. 149, §27C(b)(6), or place a lien on the recipient’s property. §27C(b)(6). It is not an absurd result to dismiss an appeal because a would-be appellant appealed to one entity when they were required to appeal to two entities. As a matter of fact, it might be an absurd result to allow an appeal to continue when a party appealed to only one of two entities that it was required to appeal to.

⁴ The facts of *DiStasio* are distinguishable from the instant case. In *DiStasio*, the Petitioner Jill DiStasio had not timely appealed a citation to the Office of the Attorney General but her husband had, which DALA found sufficient to establish that an appeal had been filed in accordance with the statute and was sufficient to show that the appeal had been filed both at DALA and with the OAG. In denying a request to reconsider the denial of a motion to dismiss that case, DALA stated, “Although I found that an appeal letter filed by Mrs. DiStasio was not filed timely, I also found that a letter her husband Joseph DiStasio sent to the Attorney General presenting his objections to the citations issued to his wife was, in effect, an appeal and was timely.” Here, the Petitioner made no effort to file an appeal with the Office of the Attorney General—a fact that he does not dispute. The failure to file any appeal with the Office of the Attorney General is both dispositive and fatal to the appeal in this case.

The statutory requirements about what is required to perfect an appeal are plainly stated and must be followed, or the consequence is dismissal of the appeal. “A statutory appeal period constitutes a jurisdictional prerequisite to a court’s authority to consider any matter on appeal.” *Commonwealth v. Claudio*, 96 Mass. App. Ct. 787, 791 (2020). The same holds true for an administrative agency. A late appeal of an administrative decision to an administrative agency must be dismissed. As the Supreme Judicial Court has written:

It has long been the law of this Commonwealth that, when a remedy is created by statute, and the time within which it may be availed of is one of the prescribed conditions for relief, failure to meet that time limit deprives a judicial body, court, or *administrative appeals board* of jurisdiction to hear the case.

Nissan Motor Corporation in U.S.A. v. Commissioner of Revenue, 407 Mass. 153, 157 (1990) (emphasis added). *See also Friedman v. Board of Registration in Medicine*, 414 Mass. 663, 665 (1993) (citations omitted) (“Failure to file for judicial review of an administrative decision within the time specified in the statute results in the dismissal of the appeal”).

As noted in *Delana*, dismissal is a necessary consequence of the failure to follow statutorily mandated appeal procedures.

Appellate procedures are to be strictly construed. *New England Trust Co. v. Assessors of Boston*, 308 Mass. 543, 33 N.E.2d 268 (1941). We have hitherto held that there is no right of appeal from the [Appellate Tax] Board to this court other than that created by statute, *Hayward v. Assessors of Boston*, 304 Mass. 355, 357, 23 N.E.2d 917 (1939), and it was said in the *New England Trust Co.* case by Chief Justice Qua that ‘(s)tatu[t]les relating to appellate procedure are always construed strictly.’ 308 Mass. 543, 544, 33 N.E.2d 268. *Golden v. Crawshaw*, 302 Mass. 343, 344, 19 N.E.2d 67 (1939), and cases cited. It follows that an appeal ‘not taken according to law is not rightly before us and cannot be considered.’ *Martin’s Case*, 231 Mass. 402, 404, 121 N.E. 152, 153 (1918). The statute we construe here is clear and unambiguous. It does not lie within our power to provide the excuse for those who fail to comply with it.

William Rodman & Sons, Inc. v. State Tax Commission, 364 Mass. 557, 560 (1974) (cited with approval, *S.M.P. v. M.J.B.*, 68 Mass. App. Ct. 1102 n.1 (2007) (unpublished decision under Rule 1:28)).

The words of a statute are not to 'be stretched beyond their fair meaning...to relieve against what may appear to be a hard case.' *Grove Hall Savings Bank v. Dedham*, 284 Mass. 92, 96, 187 N.E. 182, 184 [(1933)]. What 'may appear to be a hardship and inequitable may be considered only where the construction is doubtful.' *Tilton v. Haverhill*, 311 Mass. 572, 578, 42 N.E.2d 588, 591 [(1942)].

Boston Five Cents Savings Bank v. Assessors of Boston, 317 Mass. 694, 703 (1945). *See also Herrick v. Essex Regional Retirement Board*, 77 Mass. App. Ct. 645, 652 (2010) ("words of a statute...are not to be stretched beyond their fair meaning in order to rationalize a particular result"). And here, the construction of G.L. c. 149, §27C(b)(4) is not doubtful. Therefore, a court should not consider any hardship or inequity. DALA certainly should not consider any such hardship or inequity, because it lacks equity power. *E.g., David Lynn v. Essex Regional Retirement Board*, CR-14-550 (DALA 2018). *But see DiStasio*, No. LB-10-545, at *5 (interpreting G.L. c. 149, §27C(b)(4)) ("To dismiss an appeal that was timely because the same appeal was not also sent timely elsewhere would be unduly harsh").

Thus, for an appeal to meet a deadline is a jurisdictional issue, and for an appeal to miss a deadline is cause to dismiss a case for lack of jurisdiction. The result is the same if the procedural defect is that the appealing party did not properly file the appeal in the requisite places to file an appeal.

Nissan Motor Corporation states that

when a remedy is created by statute, and the time within which it may be availed of is *one of the prescribed conditions for relief*, failure to meet that time limit deprives a[]...administrative appeals board of jurisdiction to hear the case.

407 Mass. at 157 (emphasis added). Time is only "one of the prescribed conditions" for an appeal under G.L. c. 149, §27C(b)(4). Another prescribed condition is a dual appeal to OAG and DALA. If an appeal lacks this prescribed condition, DALA lacks jurisdiction and must dismiss the appeal.

Rodman & Sons states that “an appeal not taken according to law is not rightly before us and cannot be considered.” 364 Mass. at 560 (citation and internal quotation marks omitted) (cited with approval, *Commonwealth v. Santiago*, 97 Mass. App. Ct. 1103 (2020) (unpublished decision under Rule 1:28)). The instant would-be appeal was not taken according to law; it failed to comply with the dual appeal requirement. Therefore, it is not rightly before DALA, which cannot consider it. *See also Harper v. Division of Water Pollution Control*, 412 Mass. 464, 465 (1992) (citation omitted) (“A rule of court cannot override a contrary statutory provision concerning *the manner* and time for the effective taking of an appeal from an administrative agency”) (emphasis added).

The Petitioner failed to appeal to OAG. Thus, DALA lacks jurisdiction to hear this appeal and it must be dismissed. For the foregoing reasons, the OAG’s Motion to Dismiss this appeal is granted.

SO ORDERED,

DIVISION OF ADMINISTRATIVE LAW APPEALS

Melinda E. Troy

Melinda E. Troy
Administrative Magistrate

Dated: FEB - 8 2024