COMMONWEALTH OF MASSACHUSETTS

CONCIERGE SERVICES, INC. and GREGORY DOYLE Petitioners	:	Docket No. LB-24-0079
v.	:	
OAG, FAIR LABOR DIVISON Respondent	:	

Appearances:

For Petitioners: Leonard Kesten, *Esq.*
For Respondent: Alex Sugerman-Brozan, *Esq.*

SUMMARY OF DECISION

The Fair Labor Division issued several citations to Concierge Services, Inc. It did not serve the citations on the corporation but, rather, e-mailed them to their attorney who had been negotiating with the Division on the company's behalf. However, their attorney was not authorized to receive service of the citations. He was not a resident agent of the corporation and had no actual or apparent authority to receive service. Thus, service of the citations was not effectuated, and the Petitioners did not "receive" notice.

INTRODUCTION

The Attorney General's Fair Labor Division ("FLD") opened an investigation of the Petitioners in September 2020. The Petitioner's counsel, attorney Leonard Kesten, began representing the Petitioners in 2021. From that point on, Attorney Kesten communicated with the FLD on his clients' behalf.[1] The parties attempted to resolve this dispute. When they failed to resolve the matter, the FLD issued various citations and e-mailed them to counsel, not the

[1] The initial investigation resulted in citations served on the company's president, Gregory Doyle, which Mr. Doyle appealed to DALA. After attorney Kesten entered an appearance, those appeals were dismissed in December 2021. *See Fair Labor Div. v. Concierge Services Inc., et al.*, LB-21-0314 & 0338. However, the investigation remained active.

Petitioners. After 10 days elapsed, counsel filed an appeal of all the citations. The parties then exchanged a series of motions. In short, the FLD moved to dismiss the appeals as untimely (because they were filed after the 10-day deadline). The Petitioners, in turn, moved to dismiss the citations, arguing that service of the citations was improper because counsel was not authorized to receive service on behalf of his clients.

After a pre-hearing conference, I issued a scheduling order. I explained that in order to resolve the issues I had to make evidentiary findings. I asked the parties to submit a joint list of agreed facts and exhibits, disputed facts and exhibits, and to indicate whether the matter could be resolved on the papers. I also suggested the parties might consider submitting sworn affidavits in lieu of testimony if there was no objection. The parties responded with some of the requested materials: a list of agreed facts and four joint exhibits (but no affidavits); there were no disputed exhibits. They also submitted pleadings suggesting there were disputed facts, but they nevertheless believed the case could be decided on the papers. *See* 801 Code of Mass. Regs. § 1.01(10)(c).

I then scheduled another conference call because I was not sure the case was ready to be submitted. At the conference call, I gave the parties another chance to schedule an evidentiary hearing and/or submit affidavits. Neither party wished to do so. After further argument, I attempted to narrow the issue and gave the parties more time to file supplemental briefs, which both parties submitted on July 29, 2024; the FLD's brief included an additional proposed exhibit.

I now enter into evidence Exhibits 1-4. I also mark three documents for Identification, A-C.[2]

---

[2] Each party submitted some exhibits in their original motions to dismiss which they did not resubmit with their joint submission. Nor did either party submit them as disputed exhibits. This is why I am not entering them into evidence but rather marking them for Identification. Identification A is an e-mail exchange attached to the FLD's February 26, 2024 opposition. Identification B is an affidavit from Gregory Doyle submitted with the Petitioner's February 27, 2024 reply.

FINDINGS OF FACT

1. Concierge Services, Inc. is a Massachusetts corporation based in Plymouth, MA; it provides "concierges" to residential and commercial properties in greater Boston. (Agreed facts.)
2. Gregory Doyle is its President, Secretary and Treasurer. (Agreed facts.)
3. The FLD began an investigation into Concierge's payroll and wage practices in September 2020. (Agreed facts.)
4. In November 2021, attorney Leonard Kesten began representing Mr. Doyle and Concierge. (Agreed facts.)
5. The parties attempted to resolve the matter and had some substantive communications. However, the parties have not submitted any evidence, affidavits, or testimony to explain the scope of these discussions, despite their pleadings suggesting various facts.
6. For example, in its closing brief the FLD compiled a long list of duties it says attorney Kesten undertook on behalf of his clients: representation for prior citations, responding to requests for documents, timing and format of producing those documents, discussions about whether the Petitioners had remedied the alleged violations, attempts to resolve the matters, and more.
7. But there is no admissible evidence that demonstrates attorney Kesten's involvement in

---

Identification C is an e-mail exchange attached to the FLD's July 29, 2024 supplemental submission. There is no explanation about why it was not submitted before as either an agreed to, or disputed, exhibit. Nor is there any indication the FLD sought the Petitioners' assent to include that as another exhibit. Therefore, I am not entering that document into evidence either.

In any event, these documents are of little evidentiary value in this case. The e-mail exchanges are essentially long threads of the parties trying to schedule a time to talk. The affidavit is self-serving, was not agreed to and not subject to cross examination. Thus, even if it was in evidence, I would place no weight on it.

this case. None of the exhibits reflect the FLD's interpretation of attorney Kesten's representation. And, given multiple chances to submit affidavits and/or have a hearing, the FLD chose neither.

8. Similarly, the Petitioners make several representations about what authorizations Concierge did or did not give attorney Kesten. But again, there is no evidence in the record to support this.

9. What is clear is that the parties did not resolve their differences. On February 7, 2024, the FLD issued 10 citations against Concierge Services and Mr. Doyle. (Ex. 1.)

10. It e-mailed the 10 citations to attorney Kesten with the following message:

> Attached you will find 10 citations that were issued today by the Fair Labor Division to Concierge Services, Inc. and Gergory Doyle. Instructions for payment or appeal are contained in each citation. If you have any questions, please let me know.

(Ex. 2.)

11. Attorney Kesten e-mailed counsel for the FLD the next day asking if they could "talk, today, late afternoon." There is no evidence about whether they spoke and, if they did, what they spoke about. (Ex. 3.)

12. There is no dispute attorney Kesten received this e-mail. There is also no dispute that the FLD did not serve these citations on Mr. Doyle or any other agent of Concierge Services.

13. Attorney Kesten filed appeals of the citations on February 22, 2024 and entered a limited notice of appearance to challenge service of the citations.

DISCUSSION

A party aggrieved by a Fair Labor Division's citation must file an appeal "within ten days of the *receipt* of the citation or order." G.L. c. 149, § 27C(4) (emphasis added). Failure to file a timely appeal deprives DALA of jurisdiction—that means DALA does not have the ability to hear

the appeal. *See Carron et al. v. OAG*, LB-20-437-439 (DALA Aug. 6, 2021). If the Petitioners received the citations on February 7, 2024, then their appeal filed on February 22, 2024 was late. However, the FLD did not serve Concierge Services (or Mr. Doyle). It sent the citations to Petitioners' attorney. Thus, the question becomes whether receipt by counsel in this case suffices. If it does, the appeal is untimely. If it does not, then the Petitioner have not yet "received" the citations.

Agencies need not serve notices as formally as is required in court litigation. Rather than hire a process server, an agency simply needs to assure the party receives notice of its action in some form; often that notice is by mail, but more and more it is by e-mail. When there is a dispute about whether an appeal is timely, magistrates make factual findings to resolve the dispute. If there is some ambiguity, certain presumptions help narrow down the timeline. *See e.g.* 801 Code of Mass. Regs. § 1.01(c)(4) ("Notice of actions and other communications by mail shall be presumed to be received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail. The postmark shall be evidence of the date of mailing.").[3]

However, there is not usually a dispute about whether the person that received the notice was the right party. The parties have not furnished any case law discussing how to determine if the right party was served with a notice of an agency action. The cases I have found are not entirely apposite. Like the litigants, I will draw an analogy to the rules regarding proper service or process in court recognizing, however, that it is not a perfect analogy.

In litigation before a court, because the responsibility of service of process falls on

---

[3] The FLD argues it is inconceivable that, if attorney Kesten had actual notice of the citations, his client did not. However, there is no evidence as to when, or even if, attorney Kesten may have notified his client of the citations. Absent such evidence, receipt (and notice) may only be imputed if attorney Kesten was authorized to accept service of the citations. That, in turn, is what the rest of this decision addresses.

plaintiffs, a plaintiff bears the burden of proof that they properly served the defendant. *Dumas v. Tenacity Construction Inc.*, 95 Mass. App. Ct. 111, 114 (2019). In administrative proceedings there are no plaintiffs or defendants. But there are statutes and regulations that imply who is responsible for serving notice of a citation. Because the time to appeal here does not begin to run until a party has "received" a citation, G.L. c. 149, § 27C(4), by implication, it is up to the Attorney General's office to assure receipt. The Attorney General's office is the entity that issues the citations and thus the only entity that can serve it. The Attorney General therefore has the burden of proof. *Cf. City of Boston Inspectional Serv. Dept. v. Shipyard Quarters Marina*, 10H84CR00458 (Housing Court Dec. 8, 2010) ("Agency must establish that the notice of violation was properly served on the prospective defendant."). In this respect, the only thing the FLD has proven is that it e-mailed the citations to attorney Kesten.

That then begs the question: was attorney Kesten an authorized agent of Concierge and Mr. Doyle such that service of the citations on him proves the Petitioners received the citations? The answer is not simple. Going back to civil litigation, there are rules that explain how a corporation may be served with process:

> Service of process on a domestic corporation is governed by G. L. c. 223, § 37, which states that "service shall be made upon the president, treasurer, clerk, resident agent appointed pursuant to [c. 156D, part 5],[4] cashier, secretary, agent or

---

[4] G.L. c. 156D, § 5.01, reads as follows:

> Each corporation shall continuously maintain in the commonwealth:
> (1) a registered office that may, but need not be, the same as any of its places of business; and
> (2) a registered agent who may be any of the following individuals or entities whose business office is also the registered office of the corporation:
> (i) an individual, including the secretary or another officer of the corporation;
> (ii) a domestic corporation or not-for-profit domestic corporation; or
> (iii) a foreign corporation or not-for-profit foreign corporation qualified to do business in this commonwealth.

> other officer in charge of its business," and by Mass. R. Civ. P. 4 (d) (2), as amended, 370 Mass. 918 (1976), which requires service "to an officer, to a managing or general agent, or to the person in charge of the business at the principal place of business thereof within the Commonwealth, if any."

Dumas, at 115. But these exceptions are of little use in this case. It is not clear if Concierge had a "registered agent," or someone authorized to receive service under these rules, *other* than Mr. Doyle. However, there is no evidence that attorney Kesten was Concierge's "registered agent" and I do not understand the FLD to argue otherwise.

The only argument then left for the FLD is that attorney Kesten had the authority to accept service of the citations as the Petitioners' lawyer. A lawyer may have actual or apparent authority to do many things on behalf of a client, which sometimes includes accepting service. Whether that authority exists depends on several factors, all of which require some factual basis.

As noted above, the factual record here is sparce. There is nothing in evidence to support the FLD's assertion that attorney Kesten had actual authority to accept service of the citations; the FLD did not produce any e-mails, affidavits, or testimony that attorney Kesten told them he was authorized and willing to accept service of the citations. Even after the FLD sent him the citations, he did not indicate that he was accepting service of the citations on behalf of his client; he simply tried to set up a phone call with the FLD.

That leaves the theory of apparent authority. Apparent authority here means that although there was no actual authority, the FLD could rely on attorney Kesten's actions in imputing he was authorized to receive service of the citations. "The party asserting the existence of apparent authority bears the burden of proof." *Licata v. GGNSC Malden Dexter LLC,* 466 Mass. 793, 801 (2000). The first problem with this argument is the same as above—a total lack of evidence in the record as to what attorney Kesten did on behalf of his clients. Just because the FLD represents he did something is not evidence that he did that. I gave both parties ample opportunities to expand

the record and introduce evidence in myriad ways but neither did.

In any event, courts are stingy when it comes to finding an attorney had the apparent authority to accept service. For one, the cases the FLD cites in support of its argument are about the apparent authority of an agent to do many things other than accept service of process. *See Theos & Sons, Inc. v. Mack Trucks Inc.*, 431 Mass. 736 (2000) (apparent authority of agent to perform warranty work on vehicle); *Von Schonau-Riedweg v. Rothschild Bank AG*, 95 Mass. App. Ct. 471 (2019) (apparent authority of agent of bank to recommend private equity investments); *Greenstein v. Flatley*, 19 Mass. App. Ct. 351 (1985) (apparent authority of agent to execute contracts). To be sure, there are cases which discuss the apparent authority of a non-lawyer to accept service of process. *See e.g. Blair v. City of Worcester,* 522 F.3d 105 (1st Cir. 2008) (Principal Clerk at police department); *Dogan v. Michigan Basic Prop. Ins. Ass'n*, 130 Mich. App. 313, 318 (1983) (defendant's receptionist directed process server to clerk as person designated to accept service). But the standard for the apparent authority to accept service of process by a non-lawyer agent and a lawyer are not the same. That may be because "defense counsel has no obligation to accept service of process on behalf of his client for the convenience of plaintiff's counsel." *Carrigan v. Commissioner of Revenue*, 45 Mass. App. Ct. 309, 313 (1998), *citing Gordon v. Hunt,* 116 F.R.D. 313, 323 (S.D.N.Y. 1998).[5]

---

[5] The FLD argues that attorney Kesten had notice for months that citations might issue and "never once made any statement over that lengthy period narrowing or limiting his representation." However, since he has no obligation to accept service of the citations, he had no obligation to tell the FLD he would not accept service. The FLD's argument flips the presumption on its head. Indeed, it is quite common for counsel seeking to serve a party to reach out to that party's attorney and ask if they will accept service. The response will normally answer the question of whether counsel is authorized to accept service. *But see Olympus Corp. v. Dealer Sales & Service, Inc.*, 107 F.R.D. 300, 305 (E.D.N.Y. 1985) ("an attorney's claim that he is authorized to receive process is not by itself sufficient; there must be some evidence that the client intended to grant such authority").

The FLD's argument boils down to this: because attorney Kesten engaged in (some fairly typical) pre-litigation conduct, that must mean he was authorized to accept service of the citations. In the service of process context, that leap of logic is not recognized by the courts:

> Even where an attorney exercises broad powers to represent a client in litigation, these powers of representation alone do not create a specific authority to receive service. Instead, the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service.

U.S. v. Ziegler Bolt and Parts, 111 F.3d 878, 881 (Fed. Cir. 1997); s*ee Beaver Brook Farms v. Towers Realty Investors, Inc.*, 1999 Mass. App. Div. 124 (1999) ("Plaintiff contends that because defendant had retained counsel in connection with its dispute with plaintiff prior to the commencement of any litigation, that counsel was authorized by law as the agent of defendant to receive service . . . We disagree."). I see no reason to depart from that logic in this context.

The closest analogy I have found is a line of cases addressing whether receipt by an attorney of a right-to-sue letter from the Equal Employment Opportunity Commission will generally suffice to trigger the 90-day period in which to commence an employment discrimination action. *See Jones v. Madison Service Corp.*, 744 F.2d 1309, 1311-14 (7th Cir. 1984) (collecting cases). But in such cases, formal administrative proceedings had already commenced and there has typically been some request by counsel that all future contact with their client be directed to counsel's office. *Id.* Here, no formal proceedings had commenced yet, and, as far as this record discloses, no request by attorney Kesten that any communications the FLD might wish to make to the Petitioners be directed to him—and certainly no communication that he was authorized to accept service of the citations on behalf of his client.

CONCLUSION

When properly notified of a citation, a party does not have much time to file a notice of appeal. And failure to do so leads to drastic results—the total inability to pursue the appeal. Given

that, the onus of assuring the right party receives notice of a citation is on the agency issuing the citation. That means the agency has the burden of showing that it sent the citation to the right party and, if it sent the citation to someone else—like the party's attorney—that third-party was authorized to receive notice of the citation on the party's behalf. Given that standard, on this record, the FLD has not met their burden of showing the Petitioners received notice of the citations when they e-mailed them to their attorney.

Accordingly, this appeal is hereby **dismissed** for want of jurisdiction because the FLD did not properly serve the Petitioners with the citations.[6]

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

_____

Eric Tennen
Administrative Magistrate

[6] In an initial pleading, the FLD expressed concern that a dismissal would void the citations—that the Petitioner was asking the citations themselves to be dismissed. That is not the effect of this order. I am dismissing the "matter" or "the appeal" and by doing so do not, and cannot, express any opinion on the validity of the citations themselves. Additionally, nothing precludes the FLD from serving the Petitioner (or an authorized agent) with the citations now.