

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Joel Garcia and Angela's Café II, Inc.,

Nos. LB-22-271, LB-22-272, LB-22-275,
LB-22-276, LB-22-277, LB-22-278

Petitioners,

Dated: November 7, 2022

v.

Office of the Attorney General, Fair Labor

Division,

Respondent.

ORDER

These are consolidated appeals from six civil citations issued to petitioners Joel Garcia and Angela's Café II, Inc. by respondent the Fair Labor Division. The division has filed a motion to dismiss, which the petitioners oppose.

I

The documents on file reflect the following chronology. The citations are dated June 29, 2022. They were emailed to the petitioners' counsel on June 30, 2022. The petitioners' counsel prepared a formal notice of appeal bearing the date June 30, 2022. That notice included a certificate stating that, on that same date, the notice was served on the division. The notice arrived at DALA postmarked July 7, 2022.

On July 12, 2022, the parties discussed the citations by email. The division's counsel wrote, "At this point, the appeal period has passed." The petitioners' counsel responded, "We sent the appeal a long time ago."

In August 2022, the division moved to dismiss, arguing that the petitioners had not filed a timely appeal with the division. When the petitioners did not respond, an order dated September 26, 2022 threatened to dismiss the appeals for failure to prosecute. That order also required the petitioners to file an affidavit explaining whether the certificate of service

contained in the notice of appeal was true or false. The petitioners then responded to the motion to dismiss, stating in part: “The appeal was mailed to the Office of Attorney General as well as the Division of Administrative Law [Appeals] on July 3, 2022.” The petitioners did not file a supporting affidavit.

II

Four of the citations at issue state violations of the child labor laws. G.L. c. 149, §§ 65, 67, 86, 100. To be timely, appeals from such citations must be filed “within 15 calendar days of the date of issuance of the citation[s].” *Id.* § 78A(b). The two remaining citations state violations of other labor law provisions, *id.* § 148C(b) and G.L. c. 151, §§ 15, 19(3). Appeals from citations under these provisions 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).

The statutes provide no guidance about the notice of appeal’s necessary content. In the judicial courts, the demands imposed on such notices are minimal, flexible, and waivable. They are satisfied when the appealing party provides fair notice of the identities of the parties pursuing the appeal and the decision(s) being appealed from. *See* Mass. R. Civ. P. 3(c)(1); *Imprimis Inv’rs, LLC v. KPMG Peat Marwick LLP*, 69 Mass. App. Ct. 218, 220 (2007); *Palriwala v. Palriwala Corp.*, 64 Mass. App. Ct. 663, 667-68 (2005); *Shehan v. Schlegel*, 86 Mass. App. Ct. 1118 (2014) (unpublished memorandum opinion).¹ Here these minimal

¹ An applicable regulation requires the “notice of claim for an Adjudicatory Proceeding” to contain certain elements, including “the facts upon which the Party is relying as grounds.” 801 C.M.R. § 1.01(6)(c). It is DALA’s standing practice to require petitioners to supply the content of their claims through memoranda filed some time after the appeal-commencing document. *See Aberjona Nursing Center, Inc. v. EOHHS*, No. RS-21-0470, at 5 n.5 (DALA

requirements were met by the email from the petitioners' counsel stating, "We sent the appeal a long time ago." This message provided clear notice that an appeal was underway. Emails appearing lower in the same chain fairly identified both the appealing parties and the pertinent citations.²

The petitioners' counsel sent her email on July 12, 2022. Fifteen days had not yet passed since the issuance of the four child-labor-law citations. Those citations were therefore timely appealed. On the other hand, ten days had already elapsed since the petitioners' receipt of the two remaining citations.

With respect to those two citations, the merits of the motion to dismiss hinge on questions of both law and fact. As a matter of law, it is clear that notices of appeal filed only with DALA (or only with the division) do not conform to the governing statutes. But it is less clear whether this defect is jurisdictional, or whether its consequences are discretionary. DALA's case law is equivocal on this point. *See DiStasio v. FLD*, No. LB-10-545, at 5 (DALA Sept. 15, 2011). In the judicial courts, the rule is that "timely institution of an appeal should be held a condition sine qua non, while other steps in the carrying out of the appeal should be treated on a less rigid basis." *Pierce v. Board of Appeals of Carver*, 369 Mass. 804, 811 (1976). *See Schulte v. Director of Div. of Employment Sec.*, 369 Mass. 74, 79-80 (1975). But given the unusual language of the applicable statutes, it may be that appeals from the division's citations are "instituted" through filing with both DALA *and* the division. Then again, this theory's force may be diminished by the rule that an appeal "lodged . . . in the wrong court . . . is not

Sept. 30, 2022). Given the typical terseness of the division's citations, it would not make sense to expect notices of appeal from such citations to make substantive presentations.

² Email was an appropriate delivery method both for the citations and for the notice of appeal. *See* 801 C.M.R. § 1.01(4)(c).

necessarily to be regarded as a nullity.” *Palriwala*, 64 Mass. App. Ct. at 667 n.9. *Cf.* *Massachusetts Oilheat Council v. Department of Pub. Utilities*, 418 Mass. 798, 802 (1994).³

The legal nuances are academic if, as a factual matter, the petitioners mailed a notice of appeal to the division within the ten-day deadline. The petitioners state that they made a timely mailing on July 3, 2022. The strength of the claim is challenged by its inconsistency with the notice of appeal’s certificate of service. The petitioners’ failure to file an affidavit regarding that certificate, as they were required to do, also detracts from their credibility. Additional input is therefore necessary before the pertinent facts can be found.

III

In view of the foregoing, it is ORDERED as follows:

1. The motion to dismiss is DENIED with respect to the four appeals from citations under the child labor laws (nos. LB-22-271, LB-22-272, LB-22-275, LB-22-276). The motion remains under advisement with respect to the two other appeals (nos. LB-22-277, LB-22-278).
2. Within 10 days, the petitioners shall file one or more affidavits, under the penalties of perjury, supporting their claim that they mailed a notice of appeal to the division within the ten-day deadline under G.L. c. 149, § 27C(b)(4). The affidavits shall also explain the apparent inaccuracy of the notice of appeal’s certificate of service. If the petitioners comply with this paragraph satisfactorily, then the timeliness of appeals nos. LB-22-277 and LB-22-278 is

³ *If* failure to file a timely notice of appeal with the division is *not* a jurisdictional defect, then there is another step to the analysis. The consequences of non-jurisdictional missteps depend on “how far they have interfered with the accomplishment of the purposes implicit in the statutory scheme and to what extent the other side can justifiably claim prejudice.” *Schulte*, 369 Mass. at 79-80. *See Mailer v. Mailer*, 387 Mass. 401, 406 (1982). The division emphasizes that a petitioner’s failure to file a timely appeal with the division *could* cause mischief. But in this instance, no frustrated statutory purpose or prejudice appear to have materialized.

likely to be decided only after consideration of any pertinent testimony at the evidentiary hearing.

3. The law favors trials on the merits. *See Monahan v. Washburn*, 400 Mass. 126, 128-29 (1987). Even so, the parties' compliance with procedural orders is "critical." *Ivy v. Boston Med. Ctr.*, 97 Mass. App. Ct. 1117 (2020) (unpublished memorandum opinion). The system of administrative adjudication would break down if parties could ignore orders "with impunity." *Greenleaf v. Massachusetts Bay Transp. Auth.*, 22 Mass. App. Ct. 426, 429-30 (1986). The petitioners have already failed to file the affidavit required of them by the order of September 26, 2022. If they do not comply strictly with paragraph 2, then their six appeals are likely to be dismissed based on failure to prosecute. *See* 801 C.M.R. § 1.01(7)(g)(2).

4. If the appeals are still then pending, a prehearing conference will take place on December 22, 2022, at 10:00 AM. The conference will be conducted by WebEx. Counsel will receive forwardable invitations to the conference by email. The topics of the conference will be those enumerated in 801 C.M.R. § 1.01(10)(a).

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate