COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala

Elias Delana, Jr. and Idea Painting Company, Inc.,
Petitioners

v. Docket No. LB-23-0327, LB-23-0437

Office of the Attorney General, Fair Labor Division,
Respondent Date: OCT 17 2023

ORDER OF DISMISSAL

PROCEDURE

First citation: Citation #23-03-74681-001

On June 1, 2023 the Office of the Attorney General (OAG) issued Citation #23-03-74681-001 to the petitioners. On the same date OAG advised the petitioners of various things, including:

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**

All emphasis is in the original. The notice refers to "both...agencies" and "both

agencies," and provides two addresses in bold with the word "AND" in both bold and all capital letters. The words "both of the following agencies" are bolded and italicized; the word "both" is bolded, italicized, and underlined. The notice is clear and emphatic enough.

On June 9, 2023 the petitioners appealed to DALA but not to OAG. (Appeal)

On June 20, 2023 OAG learned from DALA that the petitioners had appealed. Also on that date, OAG asked the petitioners for the appeal.

On June 26, 2023 OAG again asked the petitioners for the appeal. Their lawyer acknowledged the request and said that they would send it later that day.

On June 27, 2023 OAG once again asked the petitioners for the appeal. The petitioners did not send it to OAG.

On June 30, 2023 OAG received the petitioners' appeal from DALA.

On August 16, 2023 OAG filed its Respondent's Motion to Dismiss for Lack of Jurisdiction and emailed it to the petitioners. On September 11, 2023 the petitioners filed their opposition.[1]

Second citation: Citation #23-03-74681-002

On July 28, 2023 I sent to the parties Instructions for Communicating with DALA. It included this instruction about emails to DALA: "If your submission is longer than two pages, you must send it by U.S. mail." It also instructed parties to "send a copy to DALA's automatic docketing system, DALApleadings@mass.gov."

[1] Under 801 CMR 1.01(7)(a)1, the petitioners' response was due in seven days, that is, on August 23, 2023. The petitioners' response was 19 days late. They did not move for a continuance. On my own motion, I extended the deadline for the petitioners' *response*. Doing so was within my authority. Extending the deadline for the petitioners' *appeal* is not within my authority.

On August 9, 2023 OAG issued Citation #23-03-74681-002 to the petitioners. On the same date OAG advised the petitioners of various things, including that they could appeal to OAG and DALA.

Under G.L. c. 149, §27C(b)(4), the petitioners had until August 19, 2023 to appeal the citations to both OAG and DALA.

The petitioners did not appeal to or otherwise communicate with OAG about the second citation.

On August 21, 2023 the petitioners appealed to DALA but not to OAG. (Appeal; Affidavit of Kate Watkins) Five days earlier, on August 16, 2023, OAG had moved to dismiss the petitioners' appeal because the petitioners had not appealed to OAG – and the petitioners, once again, on August 21, did not appeal to OAG.

On August 31, 2023, because the second citation remained unpaid and because OAG did not know that the petitioners had appealed the second citation to DALA, OAG notified the petitioners that it intended to report the second citation to the Department of Revenue (DOR) for issuance of a lien. The petitioners did not respond to this notification. (Affidavit of Kate Watkins)

On September 15, 2023 OAG asked DOR to issue a lien for the second citation's unpaid penalties. (Affidavit of Kate Watkins)

On September 20, 2023 the following things happened: DALA asked OAG whether its motion to dismiss, which has the docket number LB-23-0327, also applied to LB-23-0437. OAG learned that the petitioners had appealed the second citation to DALA. (Affidavit of Kate Watkins) DALA mailed to OAG the petitioners' appeal of the second citation. (Email from

Administrative Magistrate Bresler to parties)

After receiving from DALA the petitioners' appeal of the second citation, OAG began the process of having the lien released. (Affidavit of Kate Watkins)

On September 26, 2023 OAG filed Respondent's Motion to Dismiss Appeal for Lack of Jurisdiction pertaining to the petitioners' appeal of the second citation.

On September 28, 2023 I emailed the petitioners' lawyer in part:

If you file an opposition you must:

1. respond within seven days, as required by 801 CMR, or move for a continuance.
2. include a certificate of service, as my Instructions for Communicating With DALA require,[2] so that I don't have to guess whether OAG received a copy.

On October 4, 2023 the petitioners' lawyer emailed to me an opposition to OAG's motion to dismiss. The lawyer emailed it OAG, but not to DALApleadings@mass.gov. The opposition was five pages long. It did not contain a certificate of service. The lawyer did not mail a hard copy to DALA.

The opposition missed the seven-day deadline to respond to OAG's motion to dismiss. The petitioners did not move for a continuance. Because the petitioners attempted to file its opposition by email, without sending it to DALApleadings@mass.gov and without mailing a hard copy to DALA, both of which would have docketed the opposition, the opposition was not docketed. I have not considered it.

RULING ON THE SECOND CITATION: Citation #23-03-74681-002

The deadline for the petitioners' appeal on the second citation was August 19, 2023. On August 21, 2023 the petitioners purported to appeal. (Appeal) Before I even reach the issue of

[2] The petitioners' opposition to OAG's motion to dismiss their appeal of the first citation did not include a certificate of service.

whether the petitioners appealed by appealing only to DALA and not to OAG, it is clear that the petitioners missed the deadline by two days. DALA has no jurisdiction to hear the appeal. *E.g.*, *Hector Enrique Garcia Andino and Coliman Construction, Inc. v. Office of the Attorney General, Fair Labor Division*, LB-21-572-575 (DALA 2021). I dismiss the appeal

RELEVANT STATUTE

Massachusetts General Laws, Chapter 149, §27C(b)(4) provides in part:

> Any person aggrieved by any citation or order issued pursuant to this subsection may appeal said citation or order by filing a notice of appeal with the attorney general and the division of administrative law appeals within ten days of the receipt of the citation or order.

Not only does the statute mention both OAG and DALA, the statute mentions OAG first.

The words in the statute, "filing a notice of appeal," of course mean "appeal" as a verb, which I will use.

ANALYSIS

Introduction

OAG's motion to dismiss the petitioners' appeal of the first citation does not present the simple issue of the petitioners' failing to appeal within the statutory deadline of 10 days, as does the OAG's motion dismiss the petitioners' appeal of the second citation. Rather, the petitioners appealed to the Division of Administrative Law Appeals (DALA) within 10 days and failed to appeal at all to OAG.

Statute is clear and unambiguous and must be enforced

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). The statute at issue is "clear and unambiguous," *William Rodman & Sons, Inc. v. State Tax Commission*, 364 Mass. 557, 560 (1974); *Greeley v. Zoning Board of Appeals of*

Framingham, 350 Mass. 549, 552 (1966) ("The procedure for obtaining review under [G.L. c. 40A,] § 16 is plain and unambiguous"). The way to appeal a citation is "by filing a notice of appeal with the attorney general and the division of administrative law appeals." G.L. c. 149, §27C(b)(4). The statute is about appealing to two entities. It is not about appealing to DALA and serving the appeal on OAG or notifying OAG about the appeal. It is significant that the statute mentions OAG first.

Because this statute's language is clear and ambiguous, 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"). The language does not produce an absurd result. 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.

Thus, G.L. c. 149, §27C(b)(4) means what it says about when and how the recipient of a citation is to appeal it. And failure to comply with what the statute says and means has

consequences. "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. That is, a late appeal of an administrative decision to an administrative agency is no appeal. 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").

Nor can this consequence – dismissal – be easily evaded.

> 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]es 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. Having established those related principles under *Nissan Motor Corporation* and *Rodman & Sons*, I revisit and re-examine those cases for what they say or imply about meeting another statutory requirement of G.L. c. 149, §27C(b)(4): not the deadline, but the 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 petitioners failed to appeal to OAG. Thus, DALA lacks jurisdiction to hear their appeals and must dismiss them.

I next consider whether other case illuminate the proper interpretation of Chapter 149, §27C(b)(4).

The *Kravitz Brothers* case

The case of *Kravitz v. Director of Division of Employment Security*, 326 Mass. 419 (1950) concerned an appeal of a decision of the Division of Employment Security's Board of Review. The case involved a version of a statute, G.L., c. 151A, §42. (The statute still exists, but not the version that *Kravitz Brothers* interpreted.) To appeal a decision of the Board of Review, an aggrieved party had to file a "petition for review" in District Court. Every other person who, or entity that, had been a party before the Board of Review became "a party respondent." The director of the Division of Employment Security was automatically a party to the appeal in District Court under the statute. *Id.* at 420.

An aggrieved party had to do the following, at least 14 days before the return day of the petition for review: (1) serve on the director a copy of the petition and the notice of the petition

from the District Court; and (2) also serve on the director as many copies of the petition and notice as there were party respondents. Then the director had to perfect service by sending the petition and notice to each party respondent. *Id.* at 421.

I note one thing right away: The statute and the case did not involve an appeal to more than one entity.

In *Kravitz Brothers*, there was one party respondent, the employer. Thus, the appellant should have served two copies of the petition and notice on the director. However, the appellant served only one copy of each document. *Id.*

The District Court dismissed the petition and the Supreme Judicial Court upheld the dismissal. *Id.* at 420, 422.

In dictum in a 1975 case, the Supreme Judicial Court doubted the continued validity of the *remedy* in Kravitz *Brothers*. It wrote:

> But [was][3] imposition of the extreme penalty of dismissal of the appeals called for? Whether the other precedents and the influence of the Rules of Appellate Procedure would cause us to decide the *Kravitz* and *Estey* [*v. Director of Division of Employment Security*, 338 Mass. 797 (1959)] cases differently today, we need not say.

Schulte v. Director of Division of Employment Security, 369 Mass. 74, 83 (1975).

Nonetheless, some of *Kravitz Brothers* survived or may have survived, namely the principle that

> [t]he filing of an appeal with someone other than the official designated by the statute is not an effective filing and does not confer jurisdiction.

Greeley, 350 Mass. *Greeley* cited *Kravitz Brothers* for that principle, and in 1993, *Friedman* reiterated that principle without citing *Kravitz Brothers*. 414 Mass. at 665. Here, the petitioners

[3] The word "we" appears on Westlaw. I assume it should be "was."

failed to file their appeal with someone designated by the statute. Therefore, the petitioners did not effectively file their appeal. DALA lacks jurisdiction.

I further discuss both *Kravitz Brothers* and *Schulte* below.

Zoning appeals

Zoning appeals are relevant here because they involve appeals to more than one entity or official.

In general, under G.L. c. 40A, the Zoning Act, entities and municipal officials aggrieved by a permitting or zoning decision may appeal. G.L. c. 40A, §§8, 13. The appeals go to a zoning board of appeals. G.L. c. 40A, §§13, 14.

The process for an appeal to the zoning board of appeals follows: An appeal under G.L. c. 40A, §8 must be taken within 30 days of the order or decision. The petitioner must "file a notice of appeal specifying the grounds" with the city or town clerk. The clerk must certify the date and time that the petitioner filed the notice of appeal. The petitioner must file a copy of the notice of appeal, along with the clerk's certification, "with the officer or board whose order or decision is being appealed, and to the permit granting authority...." G.L. c. 40A, §15. (A permit granting authority is the board of appeals or zoning administrator. G.L. c. 40A, §1A.)

That is, a petitioner must file an appeal in three places: (1) the city or town clerk; (2) "the officer or board whose order or decision is being appealed"; and (3) "the permit granting authority."

Similarly, an appeal under G.L. c. 40A, §13 must be taken within 30 days of, generally, the order or decision of a zoning administrator. The petitioner must "file a notice of appeal, specifying the grounds" with the city or town clerk. Again, the clerk must certify the date and time that the petitioner filed the notice of appeal. The petitioner must file a copy of the notice of

appeal, along with the clerk's certification, with the zoning administrator *and*, in an appeal under G.L. c. 40A, §8, "the officer whose decision was the subject of the initial appeal to [the] zoning administrator." G.L. c. 40A, §15.

That is, a petitioner must file an appeal under G.L. c. 40A, §13 in two and possibly three places: (1) the city or town clerk; (2) the zoning administrator; and possibly (3) the officer whose decision is being appealed. A petitioner initiates an appeal under G.L. c. 40A, §13 with a zoning board of appeals by filing an appeal in two or three places – but the places do not include the zoning board of appeals itself. The zoning administrator transmits the appeal's record to the zoning board of appeals. G.L. c. 40A, §15.

The process for an appeal from the zoning board of appeals to a court follows: Generally, any person aggrieved by a zoning board of appeals' decision or inaction, or a "municipal officer or board" may file a complaint in Land Court, Housing Court, Superior Court, or District Court. "Notice of the action with a copy of the complaint" must be given to the city or town clerk "within twenty days." G.L. c. 40A, §17.

The same procedure, with similar wording, appears in a different statute, G.L. c. 41, §81BB.

Thus, zoning appeals must be filed in (or in the case of G.L. c. 40A, §17, given to) more than one place – at two separate stages. In the first stage, an appeal to a zoning board of appeals must be filed with (1) the city or town clerk; (2) the officer or board whose order or decision is being appealed; and (3) the permit granting authority (which can be the zoning board of appeals). Alternatively in the first stage, in different circumstances, an appeal to a zoning board of appeals must be filed with (1) the city or town clerk; (2) the zoning administrator; and possibly (3) the officer whose decision is being appealed.

In the second stage, a complaint, constituting an appeal from a zoning board of appeals to court, must be filed in court, and the notice and complaint must "be given" to the city or town clerk.

In the first stage, G.L. c. 40A, §15, as written, requires a petitioner to *file* appeals with various officials and entities. The statute is not about *serving* officials and entities.

The second stage, G.L. c. 40A, §17, is almost certainly about *filing* a complaint in court and *serving* the city or town clerk. For one thing, that's how complaints are filed in court – by filing them in court, not by filing them in court and also filing them with another entity or official. For another thing, the statute's wording indicates that the what the appellant does with a clerk is service or something akin to service, not filing. Section 17 refers three times to the notice and complaint "be[ing] given" to a clerk, not filed. In *Konover Management Corp. v. Planning Board of Auburn*, 32 Mass. App. Ct. 319 (1992), the court assumed that the statute involved service, not filing. *Id.* at 327.

A 1957 case interpreted G.L. c. 41, §81BB and involved the second stage of an appeal, from a zoning board of appeals to court. The Supreme Judicial Court wrote:

> This provision for *notice* to the clerk is, we think, designed to give to third persons who may be concerned with the land at least constructive notice of the appeal, which, if sustained, may invalidate an outstanding, apparently valid plan. See §§ 81T, 81U and 81V. It is a jurisdictional requirement.... *Notice and the appeal both* must be within twenty days.

Carey v. Planning Board of Revere, 335 Mass. 740, 745 (1957) (emphasis added). The Supreme Judicial Court distinguished between the appeal in the form of the complaint to Superior Court and the notice to the clerk.

Because the record in *Carey* was unclear whether "such notice was or was not given" to the clerk, *id.* at 744, "[i]t must first be determined whether the court has jurisdiction of the

appeal." *Id.* at 745. The Supreme Judicial Court remanded the case to Superior Court for this determination. *Id.*

A 2018 Appeals Court case interpreted G.L. c. 40A, §17, involving the second stage of an appeal, from a zoning board of appeals to court. In that case, the petitioners timely filed a complaint in Land Court. They sent copies of the complaint to each member of the zoning board of appeals at their homes and to the chairman of the board at the town hall. The chairman's complaint and related documents were routed to the town planner – who told the assistant town clerk about the complaint. Thus, the assistant town clerk knew that the plaintiffs had appealed before the appeal period expired. *Hickey v. Zoning Board of Appeals of Dennis*, 93 Mass. App. Ct. 390, 391-92 (2018).

However, the plaintiffs did not mail the complaint to the town clerk. Neither the clerk nor the assistant clerk saw the complaint before the appeal deadline of 20 days. *Id.* at 392. The Land Court granted summary judgment. The Appeals reversed because "it is the state of the clerk's knowledge that controls." *Id.* at 394.

The *Hickey* case does not control the instant case for two reasons. One, *Hickey* was about G.L. c. 40A, §17, in which a complaint must "be given" to a city or town clerk. *Hickey* was not about G.L. c. 40A, §15, in which an appeal must be "file[d]" with a clerk and other officials or entities. G.L. c. 40A, §15 is more analogous to the statute at issue in the instant case, G.L. c. 149, §27C(b)(4), than is the statute in *Hickey*.

Two, in the instant case, OAG did not receive even notice or knowledge of the petitioners' appeal before the deadline.

Hickey actually supports OAG here. In that case, the Appeals Court stated:

> "[R]eceipt of notice by the town clerk is a *jurisdictional prerequisite* for an action under G. L. c. 40A, § 17, which the courts have 'policed in the *strongest*

> *way*' and given '*strict enforcement.*' " *See Konover*, 32 Mass. App. Ct. at 322–323, 588 N.E.2d 1365, quoting from *Pierce v. Board of Appeals of Carver*, 369 Mass. 804, 808, 343 N.E.2d 412 (1976) and *O'Blenes v. Zoning Bd. of Appeals of Lynn*, 397 Mass. 555, 558, 492 N.E.2d 354 (1986). The purpose of notice to the town clerk is to provide "notice to interested persons that the decision of the board of appeals has been challenged and may be overturned." *Pierce*....
>
> However, "[s]trict compliance with all the details of the notice provision is not required, *so long as notice adequate to serve the purpose of the provision is given within the period limited.*" *Costello v. Board of Appeals of Lexington*, 3 Mass. App. Ct. 441, 443, 333 N.E.2d 210 (1975).

Hickey, Mass. App. Ct. 392–93 (emphasis added). Here, the petitioners did not give adequate notice within the deadline. They did not meet a jurisdictional prerequisite; the requirement should be policed strictly and in the strongest way.

I have discussed two cases interpreting G.L. c. 40A, §17 and involving the second stage of a zoning appeal. I now discuss a case interpreting the more relevant §15.

A 1966 case (interpreting what was then G.L. c. 40A, §16 and is now §15) involved the first stage of an appeal, namely, to a zoning board of appeals. In that case, a building inspector issued a permit. Intervenors in the case purported to appeal the issuance by handing an appeal to the counsel for the zoning board of appeals.

The plaintiffs objected that the zoning board of appeals lacked jurisdiction. The intervenors countered that

> since all the parties received notice of the appeal, the filing of an appeal with the board's counsel was an effective filing.

Greeley, 350 Mass. at 552. The Supreme Judicial Court ruled that jurisdiction was absent:

> The procedure for obtaining review under § 16 is plain and unambiguous....The filing of an appeal with someone other than the official designated by the statute is not an effective filing and does not confer jurisdiction.

Id. (citing *Kravitz Brothers* and another case) (cited with approval *Friedman*, 414 Mass. at 665 (1993)). The court continued:

> The parties agree that the appeal filed with the town clerk was not taken 'within thirty days from the date of the order or decision which is being appealed.' [Citing the statute] '(W)hen a remedy has been created by statute and the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, the court has no jurisdiction to entertain proceedings for relief begun at a later time.' *Cheney v. Assessors of Town of Dover*, 205 Mass. 501, 503, 91 N.E. 1005, 1006 [(1910)].

Id. (also citing *Carey* and another case).

When a statute, such as G.L. c. 40A, §15, requires a would-be appellant to file an appeal with more than one entity or official, the would-be appellant must do so. If the would-be appellant fails to do so, an administrative tribunal lacks jurisdiction to hear the appeal. That's the holding of *Greeley*, and *Greeley* is good law.

Greeley survived the holding in *Schulte*, which I discuss below. *See Board of Assessors of Sandwich v. Commissioner of Revenue*, 382 Mass. 689, 689 (1981) (citing with approval both *Greeley* and *Schulte*); *Friedman v. Board of Registration in Medicine*, 414 Mass. 663, 665 (1993) (same); M*cLellan v. Commissioner of Correction*, 29 Mass. App. Ct. 933, 934 (1990) (same).

General Laws Chapter 149, §27C(b)(4) is analogous to G.L. c. 40A, §15. Therefore, the petitioners here had to comply with G.L. c.149, §27C(b)(4)'s requirement that they appeal to both OAG and DALA. Their failure to do so means that DALA lacks jurisdiction to hear their appeals.

Schulte

The relevant part of *Schulte* stated:

> Sloppiness in following a prescribed procedure for appeal is not encouraged or condoned, but at the same time a distinction is taken between serious missteps and relatively innocuous ones. Some errors or omissions are seen on their face to be so repugnant to the procedural scheme, so destructive of its purposes, as to call for dismissal of the appeal. A prime example is attempted institution of an appeal seeking judicial review of an administrative decision after expiration of the period

> limited by a statute or rule....With respect to *other* slips in the procedure for *judicial review*, the judge is to consider 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. After such an assessment, the judge is to decide whether the appeal should go forward without more, or on terms, or fail altogether.

Schulte, 369 Mass. at 79–80 (emphasis added). The court continued:

> [T]he mistake attributed to the petitioner is quite different from that conventionally considered to be serious, namely, attempted late institution of an appeal.

Id. at 81.

I make several related points here. A "prime example" of an error "so repugnant" and "so destructive" as to warrant dismissal of a case is for a would-be appellant to miss a deadline to appeal. *Id.* at 79. A would-be appellant's missing a deadline is "conventionally considered to be serious." *Id.* at 81.

For an error *not* involving an appeal deadline ("With respect to *other* slips in the procedure for judicial review"), a judge must assess how much it interfered with the statutory scheme and prejudiced the other party.

A judge's assessment about an error's interference with the statutory scheme and prejudice to the other party comes *after* a determination that the would-be appellant has met the appeal deadline. Thus, a judge's assessment comes *after* establishing that the court has jurisdiction.

A judge does *not* assess how much a party's *missing an appeal deadline* interfered with the statutory scheme and prejudiced the other party, as the petitioners appear to argue. That is, a judge does not decide *whether* the court has jurisdiction by assessing interference with the statutory scheme and prejudice to the other party. *But see Konover*, 32 Mass. App. Ct. at 327 (court may have assessed *Schulte* criteria to determine jurisdiction).

Finally, *Schulte* pertains to an appeal for judicial review, not an appeal for administrative review. *See Attorney General v. Department of Public Utilities*, 390 Mass. 208, 212–13 (1983) ("[R]ules of court do not govern procedures in the Executive Department. They apply to proceedings in courts"); *Board of Assessors of Marlborough v. Commissioner of Revenue*, 383 Mass. 876, 876 (1981) ("The appellate remedy is statutory, and therefore, the statute governs").

Petitioners' opposition

The petitioners' opposition is flawed for several reasons. It contains incomplete sentences, making it hard to understand. The petitioners also misleadingly begin their motion by saying "Respondent brings this Motion *solely* under 801 CMR 101(5)(f)." (Emphasis added) That regulation is about service. OAG, the respondent, did *not* move under that regulation. The petitioners consider this issue to be about service. (Opp. 1-3). They are entitled to make that argument if they make it candidly; they are not entitled to misrepresent OAG's argument and misdirect me. Ultimately, their argument is wrong. The statute is not about service; it is about how to appeal.[4]

The petitioners make at least one factual allegation that is inaccurate: "...respondent was at all times aware [of the petitioners' appeal] and did indeed have a copy." (Opp. 2) That is not so.

The petitioners made at least one factual allegation that is disingenuous: They could not get a copy of the appeal once they had filed it online with DALA. (Opp. 3) That is probably true logistically – if the petitioners did not print their appeal before submitting it to DALA, they may not have been able to obtain it online afterward – but not a significant point. The statute required

[4] 801 CMR 101(5)(f) required the petitioners to include a certificate of service with their opposition. They did not do so, which is ironic considering their invocation of the regulation.

the petitioners to appeal to OAG, not to retrieve the same online appeal that they had filed with DALA and submit it to OAG. They submitted nothing to OAG.

The petitioners did not even comply with their incorrect understanding of the statute, namely, that it is about service.

RULING ON THE FIRST CITATION: Citation #23-03-74681-001

For the reasons stated above, I dismiss the petitioners' appeal of the first citation.

DIVISON OF ADMINISTRATIVE LAW APPEALS

Kenneth Bresler

Kenneth Bresler
Administrative Magistrate

Sent to: David R. Sullivan, Esq.
Kate Watkins, Esq.

OCT 17 2023