

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

Suffolk, ss.

Peter Alves and Lighthouse Masonry, Inc.,
Petitioners,
v.

Docket Nos. LB-06-466
LB-06-467
LB-06-468
LB-06-469

Office of the Attorney General,
Fair Labor and Business Practices
Division,
Respondent.

Appearance for Petitioner:

Harvey B. Heafitz, Esq.
Heafitz & Sullivan
56 Chestnut Hill Ave
Brighton, MA 02135

Appearance for Respondent:

Bruce Trager, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Administrative Magistrate:

Shelly Taylor, Esq.

RULING ON RESPONDENT'S MOTION FOR RECONSIDERATION

This case arises from an appeal by Peter Alves and Lighthouse Masonry Inc. ("Lighthouse") of citations the Attorney General issued against Lighthouse for violating the prevailing wage law. After Lighthouse appealed the citations pursuant to G.L.

c. 149, § 27C (b)(4), ¹ DALA's final decision issued on July 29, 2008. Now before me is a Motion for Reconsideration filed by the Office of the Attorney General ("OAG"), which motion Lighthouse opposes. The underlying facts of this case appear in the July 2008 decision. The record reflects the following, additional procedural facts.

FINDINGS OF FACT

1. On July 29, 2009, DALA's final decision issued ("the Decision"). The Decision was sent to the parties by U.S. mail. A copy was also faxed to the offices of counsel for each party.

2. On Friday August 29, 2008, the OAG's Motion for Reconsideration ("Motion") was received at DALA by a hand-delivery slipped under the door of the DALA office.

3. September 1, 2008 was Labor Day.

4. The record does not show if or when counsel received the facsimiles.

5. The record also does not show what time of day the Motion for Reconsideration was delivered to the DALA office. Affidavits offered by the OAG attest that the delivery must have been made before 5:00 p.m. on the 29th.

CONCLUSION AND ORDER

A. TIMELINESS OF MOTION FOR RECONSIDERATION

¹ 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 Any such appellant shall be granted a hearing before the division of administrative law appeals in accordance with chapter 30A. The hearing officer may affirm or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation or order. Any person aggrieved by a decision of the hearing officer may file an appeal in the superior court pursuant to the provisions of said chapter 30A. G.L. c. 149, § 27C (b)(4).

The Standard Rules of Adjudicatory Practice and Procedure, promulgated pursuant to G.L. c. 30A, govern this proceeding. The rule on motions for reconsideration states:

Motion for Reconsideration. After a decision has been rendered and before the expiration of the time for filing a request for review or appeal, a Party may move for reconsideration. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A, § 14(1) for the purposes of tolling the time for appeal.

801 Code Mass. Regs. 1.01(7)(l) (emphasis supplied). A decision is appealed by filing a complaint for judicial review in Superior Court. The appealing party must commence such an action "within thirty days after receipt of notice of the final decision of the agency." G.L. c. 30A, § 14(1).

Lighthouse contends that the Motion for Reconsideration was not timely filed because July 29, 2008, the day the decision was faxed to the parties, is the date "of receipt of notice" within the meaning of the rules set forth above. This would mean that the period for seeking reconsideration expired on August 28, 2009. The OAG contends that the operable date for purposes of starting the appeal clock is the date the decision was mailed. I agree.

The applicable rules, *i.e.* the Standard Rules of Adjudicatory Practice and Procedure, address only notice by hand-delivery and notice by mail, and do not address notice by facsimile:

Notice of actions and other communications from the adjudicating Agency...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.

801 Code Mass. Regs. 1.01(4)(c).

Faxes, like emailed messages, are sent for many reasons including courtesy and expediency. Given that the applicable rule does not provide for notice by fax, however, the OAG could have, and should properly have relied on what the rule does say in order to determine the deadline for seeking reconsideration. It may be reasonable to assume that facsimiles of the decision were received in the offices of counsel for the OAG and Lighthouse on the day the transmissions were made. I decline to give this assumption greater force than the operable, legal presumptions about notice which are clearly stated in the rule. Parties must rely on the rules as written, and I have no authority to disregard them.

I therefore apply the so-called "mailbox" rule in § 1.01(4)(c), quoted above, and the regulation pertaining to computation of time:

Unless otherwise specifically provided by 801 CMR 1.00 or by other applicable law, computation of any time period referred to in 801 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Agency is closed, when the period shall run until the end of the next following business day.

801 Code Mass. Regs. 1.01 (4)(d). Applying these rules, the filing period ran from July 29, 2008 when the decision was mailed, through August 31, 2008, *i.e.* thirty-three days later. Because August 31, 2008 was a Sunday the filing period was extended to the next business day, September 2, 2008, the day after Labor Day. A third rule, 801 Code Mass. Regs. 1.01 (4)(b), provides that "[p]apers received after usual business hours shall be deemed filed on the following business day." Whether the Motion was delivered before or after the close of business, it was timely; if it was delivered after 5:00 p.m., it is deemed to have been filed on the following business day, September 2, 2008. *Id.*

B. THE MERITS OF THE MOTION FOR RECONSIDERATION

A motion for reconsideration "must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. 801 Code Mass. Regs. 1.01(7)(1). The OAG asserts that the findings of fact I made in the Decision compel the conclusion that the citations in issue were valid and therefore my decision was wrongly decided. This amounts to a claim of legal error and is not grounds for seeking reconsideration.

The OAG also asserts that the Decision may rest on a failure to understand the OAG's purpose in introducing opinion letters, such as the March 2007, post-citation opinion of the Commissioner of Occupational Safety offered in this case. On this point, the OAG relies on an affidavit from counsel explaining why opinion letters are obtained after a citation is issued, and argues based on this explanation that I erred in disregarding the Commissioner's opinion in this instance. This also amounts to a claim of legal error. The affidavit sheds light on important administrative, resource and policy considerations pertinent to the challenges of prosecuting prevailing wage violations. In my view, however, the Decision is based as it should be on what was, and what was not, in evidence.

Finally, the OAG asserts that the Decision errs by holding in effect, that the statute at issue was unconstitutionally vague, and/or that I have read into the statute a requirement that the contractor have actual notice that it was violating the law in order to be liable. I respectfully disagree. The question is not whether the wage rates and classifications for this project were known, but whether and when they were determined or revised. G.L. c. 149, § 27 requires the commissioner to "classify said jobs, and he may

revise such classification from time to time, as he may deem advisable." I do not read the appeal provisions in c. 149, § 27A as eliminating this requirement. *See* G.L. c. 149, § 27A (two or more "employers of labor...may appeal to the commissioner or his designee from a wage determination, or a classification of employment *as made by the commissioner...*" (emphasis supplied).

I do not read c. 149 as authorizing the OAG to cite a contractor for a violation without being able establish that a violation occurred if called upon to do so. Strict liability attaches, if at all, when the law is violated. Adequate evidence of a violation is required.

For the foregoing reasons above, the motion for reconsideration is denied. SO ORDERED.

DIVISION OF ADMINISTRATIVE
LAW APPEALS

/s/ Shelly Taylor
Chief Administrative Magistrate

DATED: June 12, 2009