COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

March 13, 2017

Suffolk, ss.

Docket No. LB-14-439

DANA CHILES and DAISHER-CHILES COMPANIES, LTD., Petitioners

v.

OFFICE OF THE ATTORNEY GENERAL– FAIR LABOR DIVISION, Respondent

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DECISION - ORDER OF DISMISSAL

Appearance for the Petitioners:

Jeffrey Holden Fonseca, Esq.
23 Courtney Street, #7
Fall River, MA 02720

Appearance for Respondent:

Bruce Trager, Esq.
Assistant Attorney General
Office of the Attorney General
Fair Labor Division
1 Ashburton Place, Suite 1813
Boston, MA 02108

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Petitioners' appeal challenging a citation issued to them by the Office of the Attorney General's Fair Labor Division for failure to timely pay wages to an employee, in violation of M.G.L. c. 149, § 148, is dismissed for lack of prosecution, following warnings of this sanction, after they (1) did not appear for a status conference scheduled by prior order; (2) ignored several prior orders directing them to specify the grounds on which they challenged the citation, identify their hearing witnesses and the subject of their expected direct testimony, and identify their hearing exhibits; (3) did not identify, on multiple occasions, their authorized representative in this appeal, or notify DALA or the Fair Labor Division of changes of the address to which the petitioners were requesting that filings in this appeal, or notices, orders and decisions issued, were to be mailed; and (4) did not respond to a subsequent order to show cause why their appeal should not be dismissed. The dismissal makes final the appealed citation, the restitution amount it directed the petitioners to pay ($2,302), and the civil penalty it assessed against the petitioners ($250), for a total of $2,552.00.

Introduction

The petitioners in this Massachusetts Wage and Hour Law appeal challenged a citation issued to them by the Office of the Attorney General's Fair Labor Division for failure to pay wages to one of their employees. The appeal's adjudication has been protracted significantly by their failure to comply with several orders directing them to specify the grounds on which they appealed the citation and to identify their witnesses and hearing exhibits, their failure to appear for a scheduled status conference, by persistent confusion as to the petitioners' representation and mailing addresses, and, most recently, their failure to respond to an order to show cause why their appeal should not be dismissed. In addition to demonstrating their indifference to prosecuting this appeal, the petitioners' conduct has wasted a significant amount of this forum's time, frustrated the Fair Labor Division's reasonable efforts to recover unpaid wages on the employee's behalf, and delayed unfairly the finalization of the unpaid wage amount the employee is entitled to recover. These circumstances

weigh heavily in favor of exercising discretion to dismiss this appeal for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(d)2, as does the absence of any effective lesser sanction for the delay, disruption and prejudice caused by the petitioners' conduct. The appeal is therefore dismissed for lack of prosecution, and the appealed citation is made final, together with the restitution and civil penalty amounts it assessed.

Background

Petitioner Daisher-Chiles Companies. Ltd. is a Massachusetts corporation engaged in the property management business. According to its latest corporate filings with the Secretary of the Commonwealth, (1) the corporation's principal office address is 691 Washington Street, South Easton, MA 02375; (2) petitioner Dana M. Chiles is Daisher-Chiles's registered agent, with an address at 274 Broadway, Taunton, MA 02780; and (3) Mr. Chiles is Daisher-Chiles's sole officer (president, treasurer and secretary), with the same Taunton address.[1]

On August 21, 2014, the Office of the Attorney General's Fair Labor Division issued a citation (No. WH140147) to the petitioners for failing, without specific intent, to make timely

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[1]/ *See*, at the Secretary of the Commonwealth's Corporations Division website:

(1) Daisher-Chiles, Ltd.'s business entity summary:

http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=000985082&SEARCH_TYPE=1

(2) Daisher-Chiles's most recent annual report (filed on Nov. 21, 2013):

http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx

payment of wages to an employee (Joshua Thompson) from June 13, 2014 to July 2, 2014, in violation of M.G.L. c. 149, § 148. The citation ordered them to pay the Division $2,302 in restitution and a $250 civil penalty, for a total of $2,552.00. It also included a statement of the petitioners' right to appeal the citation to the Division of Administrative Law Appeals (DALA) by filing a "notice of appeal," together with a copy of the appealed citation, with both DALA and the Fair Labor Division within ten days from their receipt of the citation. The Division mailed the citation to Mr. Chiles and to Daisher-Chiles Companies, Ltd. at two addresses—3 Equestrian Way, South Easton, MA 02779, and P.O. Box 609, South Easton, MA 02375.

At least one of those mailings must have reached the petitioners, because a notice of appeal was filed on their behalf within the relatively short time for doing so.[2] The notice of appeal, in letter form, was filed by Attorney Jack I. Smolokoff, who faxed it to the Division of Administrative Law Appeals (DALA) on September 2, 2014. Attorney Smolokoff stated that he filed it as a courtesy to the petitioners, in order to preserve their right to appeal the citation. The notice of appeal explained that he represented Mr. Chiles and Daisher-Chiles as to other matters, and was filing the appeal

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[2]/ The citation included the following statement:

> You have the right to appeal the issuance of this citation to the Division of Administrative Law Appeals ("DALA"). A notice of this appeal must be filed with the Attorney General and DALA within 10 days from receipt of the citation.

The citation stated that it was sent by first class mail and by certified mail on August 21, 2014 to both petitioners at 3 Equestrian Way, South Easton, MA 02779. With Sunday, August 31, 2014 and Labor Day, September 1, 2014, a legal holiday, not counted in computing when the time to appeal expired, *see* 801 C.M.R. § 1.01(4)(d), September 2, 2014 was the tenth and last day for the petitioners to file their appeal.

because "[c]ounsel responsible for this matter [was] not available."

The rules governing adjudicatory appeals at DALA—the "formal rules" of the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01 *et seq*.—provide that a notice of claim for an adjudicatory proceeding (also known as a " notice of appeal," as the Fair Labor Division called it in the citation it issued to the petitioners) or as an"appeal," "shall identify the basis for the claim" and "shall state clearly and concisely the facts upon which the Party is relying as grounds, the relief sought and any additional information required by statute or Agency rule." 801 C.M.R. § 1.01(6)(c). The appeal filed on the petitioners' behalf did not include any of this information. In all fairness to the petitioners and to the attorney who filed their notice of appeal, the citation's statement of appeal rights did not refer to, or quote, 801 C.M.R. § 1.01(6)(c), and did not state what, if anything, the petitioners' notice of appeal needed to say other than "I appeal the citation," or words to that effect. As a practical matter, filing the notice of appeal before the relatively short ten-day appeal period expired was likely Attorney Smolokoff's primary concern at the time, rather than pleading specific claims. Per the Standard Rules, claims can be specified or amplified later once the appeal is timely filed, either on the petitioner's own initiative by way of a motion for leave to amend the appeal, *see* 801 C.M.R. § 1.01(6)(f), or in response to a motion for a more definite statement, *see* 801 C.M.R. § 1.01(7)(b). In addition, DALA, or the administrative magistrate to whom the appeal is assigned, may order that the appealing party supply the missing appeal details.

The petitioners' notice of claim accomplished its primary mission, which was to commence an appeal challenging the Fair Labor Division's citation before the ten day appeal period expired. It stated only that the petitioners were appealing the citation, which it identified by giving the citation

number and attaching a copy of the citation to the notice of appeal. It did not state the grounds for appealing the citation, or the relief that the petitioners' sought.

The notice of appeal asked that further requests for information from the petitioners, and notice of a hearing when one was scheduled, be be sent to two other attorneys—Attorney Thomas J. Filipek of South Easton, Massachusetts, and Attorney Tammy Fern Bouchard of Attleboro, Massachusetts. It did *not* request that notices, orders or decisions issued by DALA, or filings by the Fair Labor Division, be sent to Attorney Smolokoff, or to the petitioners personally.

Consistent with this request, DALA sent its next notice—an acknowledgment of receipt of the petitioners' appeal issued on September 3, 2014— to attorneys Filipek and Bouchard on the petitioners' behalf, as well as to the Fair Labor Division. The acknowledgment was sent by regular mail, per DALA's regular practice. It advised the parties of the docket number DALA had assigned to this appeal and directed them to use it on all correspondence and pleadings related to it. It also advised the parties that the appeal would proceed under the Standard Rules.

None of these mailings was returned to DALA by the United States Postal Service, and there is no evidence in the record that delivery of the notice to Attorneys Filipek or Bouchard failed. The petitioners's appeal had directed that they receive notice solely via attorneys Filipek and Bouchard, and for that reason DALA mailed the acknowledgment to them alone. DALA's mailing of the acknowledgment by regular mail conformed to its regular practice. Taken together, these factors were prima facie evidence of proper notice to the petitioners, and their receipt of the acknowledgment that DALA mailed to their purported authorized representatives is presumed. *See Berezedy v. Dep't of Veterans' Services*, Docket No. VS-08-806, Order of Dismissal at 3 (Mass.

Div. of Admin. Law App., Mar. 11, 2013).

The acknowledgment did not require a response, but, more to the point, neither attorney objected to having received the acknowledgment, and neither of them requested that further notice to the petitioners be sent to someone else.

On March 17, 2015, DALA mailed notice of a prehearing conference (scheduled for April 21, 2015) to Attorneys Filipek and Bouchard, and to the Fair Labor Division. Several days later, Attorney Smolokoff (but not Attorney Filipek or Attorney Bouchard) mailed a letter to DALA and to the Division notifying them that, as a result of receiving "erroneous information," he had previously requested (in the earlier notice of appeal) that notice or requests for information to the petitioners be sent to Attorneys Filipek and Bouchard, but that he had been "mistaken as to Attorney Filipek's involvement in this matter," and that, in addition, he was "unable to determine what, if any, involvement Attorney Bouchard has or had in the matter." Attorney Smolokoff's letter did not request that the prehearing conference be continued, and did not state who (if anyone) was authorized to appear in this matter for the petitioners and receive notice on their behalf. The letter listed Attorneys Filipek and Bouchard, and Mr. Chiles, as recipients of copies, but it did not supply a mailing address for Mr. Chiles.

By letter dated April 10, 2015, Mr. Chiles advised DALA that Attorney Bouchard "was not involved with this case" and that he had not yet received "all the previous documents about this case back from her." Mr. Chiles also stated that he had "a new attorney," whose name he did not supply, and that the new attorney was "away for the balance of the month on vacation with his family." Mr. Chiles added that the petitioners that "have a very strong defense to this fine and would like the

opportunity to present it," although he did not state what that defense was. Mr. Chiles requested that "the hearing" be continued to June 2015 so that he could consult with his new attorney in advance of it.

In view of Mr. Chiles's letter, I issued, on April 21, 2015, an order continuing the prehearing conference to June 9, 2015 at 2:00 p.m. The order also directed that:

> In the interim, the petitioners must clarify who represents them here and what that representative's address, telephone number and fax number is. To do this, the petitioners shall, **by May 5, 2015**, file and serve a response to this order designating one person to whom notices, orders and filed papers will be sent in this appeal, whether this person is Mr. Chiles, a new attorney, or one of the several attorneys who have contacted DALA on the petitioners behalf, but none of whom has thus far represented that he or she represents the petitioners in this matter. In addition, the petitioners must furnish a single mailing address for the person they designate as their representative. If the petitioners' representative is an attorney, that attorney must file and serve a notice of appearance.

Order Continuing Prehearing Conference (Apr. 21, 2015)(emphasis in original).

On May 6, 2015, Attorney Richard Thomas Davies filed with DALA, and served upon Fair Labor Division counsel, a notice of appearance on behalf of both petitioners. His notice supplied the information required by the April 21, 2015 order.[3] Attorney Davies appeared for the petitioners at the June 9, 2015 prehearing conference. During the conference, the Fair Labor Division supplied him with copies of documents relevant to this matter. Because the parties were engaged in settlement discussions, I set deadlines by which the parties were to file settlement status reports (August 21 and September 25, 2015), and scheduled a hearing to begin on October 28, 2015. *See*

[3]/ Because Attorney Davies appeared serious about moving his clients' appeal toward a conclusion, I overlooked as inconsequential the filing of the notice of appearance one day after the deadline for responding to the April 15, 2015 order.

Order Following Prehearing Conference (Jun. 9, 2015). As Attorney Davies still represented the petitioners at the time, and the petitioners had not requested that notice be sent to anyone else, a copy of my June 9, 2015 order was mailed to him but not to the petitioners individually.

The parties' first joint status report, filed on August 21, 2015, advised that the petitioners were examining Daisher-Chiles's financial records in an "attempt to resolve its financial situation" and this matter as well. However, the report also stated that "Attorney Davies may withdraw his representation" if "things [did not] improve" by August 24, 2015, "due to non-payment [of his counsel] by Mr. Chiles."[4]

On September 22, 2015, Fair Labor Division counsel filed a status report advising that Attorney Davies would be withdrawing. This suggested strongly a return to the previous confusion as to who (if anyone) represented the petitioners here and to which address notices, orders, decisions and filings in this appeal were to be mailed. In addition, the record still did not show the grounds for the petitioners' appeal.

For these reasons I issued an order, on October 2, 2015, cancelling the hearing that was scheduled to begin on October 28, 2015. The order directed the petitioners to clarify in writing, by November 13, 2015, who was representing them here, and to specify their claims, identify their witnesses and the expected subject matter of their testimony, and identify their intended hearing

[4]/ The joint status report was entitled as such, and had signature blocks for Attorney Davies and for Division counsel, but the copy filed with DALA was signed by Division counsel only. In his cover letter accompanying the report, Division counsel stated that he "had not received Mr. Davies's authorization to sign on his behalf." The letter showed that a copy of it was sent to Attorney Davies, who filed no objection to the joint status report afterward. For that reason, and because counsel were discussing this matter at the time, I presumed that Attorney Davies at least knew of the contents of the status report and did not object to its filing as a joint document.

exhibits—information I needed to determine the expected scope and length of a hearing before I scheduled further proceedings. I noted in the order that:

> The record thus far underscores a continuing confusion as to who represents the petitioners here on more than an event-by-event basis. It is also uncertain whether the petitioners have availed themselves of the time, to which the parties agreed, for examining Daisher-Chiles Companies, Ltd.'s financial records and attempting to resolve its "financial situation." There is a suggestion on the record that the petitioners have not paid their current attorney, leaving uncertainty as to whether he will withdraw or, if so, when he will do so.
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> In a proceeding such as this one, the state of a party's attorney-client relationship is generally its own business, unless and until it affects its obligation to prosecute the appeal and/or the appeal's orderly adjudication. That has already happened here. Confusion as to whether the petitioners maintain a working relationship with their current attorney appears to have made settlement efforts and voluntary discovery initiated at the prehearing conference a one-sided effort by the Fair Labor Division. It has also delayed clarification of the corporate petitioner's "financial situation," a matter of apparent interest to the Fair Labor Division in determining how it should proceed here. With no clarification thus far as to whether current counsel is still representing the petitioners or has authority to act on the petitioners' behalf, the Division cannot know with whom it should deal in pursuing settlement discussions commenced at the prehearing conference or in pursuing informal discovery. It also leaves uncertain the basis for the petitioners' appeal, what issues they intend to address at a hearing, who their witnesses would be, and what exhibits they intend to present.
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> The sum total of these uncertainties is an overall misgiving about the petitioners' commitment to prosecuting their appeal, which includes dealing fairly with the opposing party and with this forum.

Order Continuing Hearing and Directing Petitioners to Clarify Representation and File Status Report (Oct. 2, 2015) at 4-5. The order stated that I would "determine whether to schedule a status conference or a hearing based upon the filings that are made in response to it." It also warned that failure to comply with the order's filing requirements "will result, without further notice, in the dismissal of this appeal for lack of prosecution, or in the issuance of an order to show cause why the

appeal should not be dismissed, depending upon the degree of non-compliance with this Order." *Id*. at 6.

The order was mailed to Division counsel and to Attorney Davies on the petitioners' behalf, as DALA had not yet received any formal confirmation of his withdrawal as the petitioners' authorized representative. It apparently crossed in the mail with Attorney Davies's withdrawal, which was dated October 1, 2015, a Thursday, and was sent to DALA by regular mail, was. DALA received it on Monday, October 5, 2015.[5] As there had been no appearance by a different authorized representative, I issued an order on October 6, 2015 revising the service list to show that Mr. Chiles was to receive mailings on behalf of both petitioners, together with the two addresses for him that the record showed.[6] The order also directed Mr. Chiles to file, by October 21, 2015, either a notice of appearance for himself as the petitioners' authorized representative, with a current, single mailing address, or an appearance by a different authorized representative. The order was mailed to Mr. Chiles at each of the two addresses, together with a copy of the October 2, 2015 order, as the earlier order had been mailed to Attorney Davies but not to the petitioners individually, and it was apparent that Attorney Davies had indeed withdrawn as their authorized representative here. *See Order Revising Service List and Re-Mailing October 2, 2015 Order to the Petitioners Without Change*

[5]/ The accompanying certificate of service stated that a copy of the withdrawal was mailed to Division counsel, and to "Dana Chiles/Daisher Chiles Co's Ltd." (sic) at 691 Washington Street in Easton, MA.

[6]/ The two addresses for Mr. Chiles were: (1) Dana Chiles, Daisher-Chiles Companies, Ltd., 3 Equestrian Way, South Easton, MA 02779; and (2) Dana Chiles, Daisher-Chiles Companies, Ltd., P.O. Box 609, South Easton, MA 02375.

(Oct. 6, 2015). Neither of these mailings was returned to DALA by the United States Postal Service.

Mr. Chiles filed no response to the order. However, on November 3, 2015, shortly after the deadline for responding to the order had expired, a new attorney (Jeffrey Fonseca, Esq.) called the DALA Docket Clerk to request that a copy of the citation appealed in this matter be faxed to him.[7] The Docket Clerk did so at 3:32 p.m. that afternoon. Attorney Fonseca then filed a notice of appearance on the petitioners' behalf, which DALA received on November 9, 2015. The notice of appearance gave Attorney Fonseca's address as 691 Washington St., P.O. Box 609, South Easton MA 02375, and it requested that "all further correspondence and pleadings in this matter" be sent to him at that address.

New counsel's appearance was not followed by any effort to prosecute this appeal. There remained no response to my October 2, 2015 order. As I had stated in that order, the information I had directed the petitioners to supply—an identification of their claims, witnesses, expected witness testimony, and hearing exhibits—was needed before I scheduled further proceedings here. The petitioners' ongoing failure to respond with any of this information delayed the adjudication of their appeal for an additional year after I issued the October 2, 2015 order.

On December 29, 2016, the Fair Labor Division moved for an order scheduling a status conference. The accompanying certificate of service stated that a copy of the Division's motion was mailed to Attorney Fonseca at 691 Washington St., P.O. Box 609, South Easton MA 02375. This

[7]/ Attorney Fonseca did not request any other documents, and did not follow up his telephonic request for the citation by filing or serving a written request to view or copy the record.

was the sole address that counsel had supplied in his notice of appearance.

On January 9, 2017, I issued an order scheduling a status conference at DALA for January 26, 2017 at 2:00 p.m. The order stated that:

> At a minimum, I intend to discuss the following matters at the conference:
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> (1) The status of settlement efforts, including whether the parties are discussing settlement, and what efforts the petitioners have made to resolve this matter since Attorney Fonseca, their current attorney of record, filed his notice of appearance on November 5, 2015.
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> (2) Identifying the scope of a hearing if this matter does not settle, including the following information the petitioners were ordered to specify in the Order Continuing Hearing that I issued on October 2, 2015:
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> > (a) The grounds upon which they appeal the Fair Labor Division's August 21, 2014 citation;
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> > (b) The witnesses whose direct testimony they intend to present at a hearing, and the subject matter of each witness's expected direct testimony; and
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> > (c) The exhibits they intend to introduce at the hearing.
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> (3) Rescheduling the hearing that I continued on October 15, 2015 on account of confusion, at that time, as to the petitioners' claims, who their witnesses would be at a hearing, what their hearing exhibits would be, and who their authorized representative was in this appeal.

I also stated that:

> I strongly encourage counsel for the parties to discuss this matter generally, and the conference topics I listed above, before the conference.

Order re Status Conference (Jan. 9, 2017).

A copy of the order was mailed to Attorney Fonseca at the address he gave in his November 15, 2015 notice of appearance, and to Fair Labor Division counsel. The mailing to Attorney Fonseca

was returned by the United States Postal Service on January 27, 2017 with the notation "Return to Sender Not Deliverable as Addressed Unable to Forward."

I held the status conference as scheduled on January 26, 2017. Division counsel appeared. Attorney Fonseca did not appear, and no one else appeared for the petitioners. Division counsel reported that the envelope in which he had mailed a copy of his December 29, 2016 motion for a status conference to Attorney Fonseca at the address he gave in his notice of appearance was returned by the United States Postal Service as undeliverable, with no address to which it could be forwarded. I viewed the returned mailing and confirmed what Division counsel had reported. After advising Division counsel that I would issue an order to show cause regarding the dismissal of this appeal for lack of prosecution, I concluded the conference.

Immediately following the status conference, I checked the attorney registration information at the Massachusetts Board of Bar Overseers website for the most recent address Attorney Fonseca had reported to the Board, which was 23 Courtney St., #7, Fall River, MA 02720. Attorney Fonseca had not reported that address, or any change of address, to DALA.

Later that day, I issued an order directing the petitioners to show cause, by February 6, 2017, why I should not dismiss this appeal for lack of prosecution and finalize the citation they appealed here, in view of their:

> (1) Failure to appear for the January 26, 2017 status conference despite prior written notice to their only current authorized representative of record in this appeal, Attorney Jeffrey H. Fonseca, at his only address of record in this appeal, 691 Washington St. P.O. Box 609, South Easton, MA 02375, which mailing was not returned to DALA by the United States Postal Service;
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> (2) Failure to comply with my October 2, 2015 Order directing them to file a response

> identifying the grounds upon which they appealed the Fair Labor Division's August 21, 2014 citation, the witnesses whose direct testimony they intend to present at a hearing, and the subject matter of each witness's expected direct testimony, and the exhibits they intended to introduce at the hearing; and
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> (3) Failure to timely send, to DALA or to the Fair Labor Division, notice of their authorized representative in this appeal, changes in their authorized representative, or updated notice of the address to which they were requesting that filings in this appeal, or notices, orders and decisions in this appeal be sent by regular mail.

Order to Show Cause re Dismissal (Jan. 26, 2017) at 1-2. The order stated that the petitioners' response to it had to include all of the information they had been ordered to file by the October 2, 2015 order, as well as an identification of their authorized representative and the mailing address to which they were requesting that further filings, notices, orders and decisions be sent. *Id*. at 2-3. Finally, the order warned that failure to timely file the required response would result in the issuance of a final decision dismissing the appeal for lack of prosecution, and making final the citation they had appealed here, without further notice. *Id*. at 2.

To assure notice to the petitioners of the order to show cause, a copy of the order was mailed to Attorney Fonseca at the address he furnished in his notice of appearance (691 Washington St., P.O. Box 609, South Easton MA 02375) and the address shown for him at the Board of Bar Overseers website (23 Courtney St., #7, Fall River, MA 02720). Copies of the order to show cause were also sent to Mr. Chiles at P.O. Box 609, South Easton, MA 02375 (the last address that Mr. Chiles gave for himself and Daisher-Chiles Companies, Ltd., in his April 10, 2015 letter to DALA; *see* above at 6), and to the address shown for him on Daisher-Chiles Companies, LLC's most recent filing with the Secretary of the Commonwealth (Dana M. Chiles, Registered Agent, Daisher-Chiles Companies, Ltd., 274 Broadway, Taunton, MA 02780).

The United States Postal Service returned to DALA the mailings of the January 26, 2017 order to show cause that were addressed to Attorney Fonseca at 691 Washington Street, P.O. Box 609, South Easton, MA 02375, and to Mr. Chiles at P.O. Box 609, South Easton, MA 02375, both with a yellow label stat stated "Return to Sender Not Deliverable as Addressed Unable to Forward." The United States Postal Service also returned to DALA the mailing of the January 26, 2017 order to show cause that was mailed to the Daisher-Chiles Companies, Ltd. address at 691 Washington Street, P.O. Box 609, South Easton, MA 02375, with a yellow label that stated "Forward Time Expired) Rtn to Sender."

However, two of the order to show cause mailings were *not* returned by the United States Postal Service—to Attorney Fonseca at 23 Courtney St., #7, Fall River, MA 02720, and to Mr. Chiles at 274 Broadway, Taunton, MA 02780. Their receipt of the order to show cause is therefore presumed.

The petitioners have filed no response to the order to show cause, and the deadline for doing so has expired.

Discussion

1. Lack of Prosecution Dismissal Under the Standard Rules and its Civil Practice Analogue

Appeals at DALA that are governed by the formal rules of the Standard Adjudicatory Rules of Practice and Procedure, such as this one, may be dismissed for lack of prosecution upon the administrative magistrate's initiative, or upon motion of a party challenging an agency action or

decision (typically, the petitioner), pursuant to 801 C.M.R. § 1.01(7)(d)2.[8] The rule provides that:

> When the record discloses the failure of a Party to file documents required by statute or by 801 CMR 1.00, to respond to notices or correspondence, to comply with orders of the Presiding Officer, or otherwise indicates an intention not to continue with the prosecution of a claim, the Presiding Officer may initiate or a Party may move for an order requiring the Party to show cause why the claim shall not be dismissed for lack of prosecution. If a Party fails to respond to such order within ten days, or a Party's response fails to establish such cause, the Presiding Officer may dismiss the claim with or without prejudice.

A lack of prosecution dismissal under 801 C.M.R. § 1.01(7)(d)2 has its origin in Massachusetts and Federal court civil practice. *See* Mass. R. Civ. Proc. Rule 41(b), and Fed. R. Civ. Proc. Rule 41(b). As is the case under Massachusetts and Federal Rule 41(b), this type of dismissal is discretionary, and the exercise of that discretion is grounded upon the forum's authority to administer the proceedings before it fairly and efficiently, and to remedy misconduct that delays adjudication, abuses the forum and appeal process, and prejudices the other parties' rights. For this

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[8]/ Lack of prosecution may also be visited upon a respondent who fails to prosecute its defense of an adjudicatory proceeding commenced by agency action. *See, e.g., Mass. Dep't of Elementary and Secondary Education v. Andrade*, Docket No. MS-16-430, Final Decision-Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 27, 2017)(teacher's appeal challenging proposed revocation of his educator's license dismissed for lack of prosecution following (1) failure to appear for two scheduled prehearing conference at which attendance was mandatory—the first held pursuant to written notice, and the second held pursuant to a second prehearing conference order following an order to show cause regarding dismissal for not attending the first conference, a ruling denying the teacher's subsequent motion to stay the appeal pending the resolution of criminal charges against him, and a second prehearing conference order stating that attendance was mandatory and that failure to attend could result in dismissal of the appeal; (2) the issuance of an order to show cause regarding dismissal for failure to attend the second conference, which warned that the continued pendency of criminal charges was not good cause for failure to attend the conference; and (3) petitioner's response asserting that, upon advice of counsel, he had a constitutional right not to appear at a DALA proceeding prior to his criminal trial); *Dep't of Public Health v. Galvin*, Docket No. PHNA-15-11, Order of Dismissal (Mass. Div. of Admin. Law App., Apr. 1, 2015)(home health aide's appeal challenging the Department of Public Health's proposed entry on the Nurse Aide Registry that she had misappropriated the property of a home health care client dismissed for lack of prosecution, after she failed to appear for a previously-scheduled prehearing conference or respond to an order to show cause why the appeal should not be dismissed).

reason alone, the dismissal of an adjudicatory appeal before DALA for lack of prosecution is regarded properly as the analogue of such dismissal in civil practice. There are several differences but, that said, the more extensive court federal caselaw on the subject of lack of prosecution dismissals illustrates the balancing of circumstances (including, but not limited to, the delay's length) that determines whether this type of discretionary dismissal is granted or denied.

801 C.M.R. § 1.01(7)(d)2 treats lack of prosecutions initiated by a party's motion and those initiated by court order in a single subsection. It applies the same grounds and procedure to both—no particular lapse of time due to inactivity is required to show lack of prosecution, but an order to show cause is needed before an appeal may be dismissed on this ground. Even when the response to the show cause order (or the absence of one) is considered, the decision whether or not to dismiss the adjudicatory appeal remains a matter of discretion on the administrative magistrate's part under 801 C.M.R. § 1.01(7)(d)2. Even if the circumstances are persuasive that the appeal should be dismissed for lack of prosecution, the administrative magistrate may still determine, as a matter of discretion, that the dismissal should be without prejudice.[9]

In contrast, Federal and Mass. Rule 41(b) each imposes different prerequisites for "involuntary" lack of prosecution dismissals initiated on motion of a defendant from those initiated

[9]/ Dismissal "with prejudice" means that the appeal, or the claims it asserts, cannot be refiled, and in that respect it acts as a decision on the merits. In DALA practice, dismissal is assumed to be with prejudice unless the final decision (usually entitled "Order of Dismissal") specifically provides otherwise, as that is most consistent with a final decision's "finality" and the rights of further review and appeal that accrue pursuant to M.G.L. c. 30A when DALA issues a final decision. Dismissal "without prejudice" leaves open the possibility that the appeal or the claims it asserts can be re-asserted at DALA. The difference may be without significance if, as is usually the case, an order of dismissal is the final decision, and the next stop for a dismissed party seeking further review is, per M.G.L. c. 30A, an action in the Superior Court, or if the time to appeal to DALA has expired.

on the court's own motion. A court may initiate such a dismissal, upon notice, "in any action which has remained upon the docket for three years preceding such notice without activity shown other than placing upon the trial list, marking for trial, being set down for trial, the filing or withdrawal of an appearance, or the filing of any paper pertaining to discovery." *See* Mass. R. Civ. P. Rule 41(b)2, and Fed. R. Civ. P. Rule 41(b)2. A motion to dismiss for lack of prosecution need not show any such period or degree of inactivity, and may be based, instead, upon any failure to prosecute, or any failure to comply with the civil procedure rules or any order of the court. Whether a lack of prosecution dismissal is sought by motion or upon the court's own initiative, that type of dismissal is a remedy left to the court's discretion, under both Federal and Massachusetts Rule 41(b).

How that discretion is exercised underscores another difference between lack of prosecution under the Federal and Massachusetts Rules of Civil Procedure, and under the Standard Adjudicatory Rules. A prime example of this difference is that the federal courts, in the First Circuit as well as in others circuits, have expressed a reluctance to visit this type of dismissal upon a party whose conduct delays a case, even though Federal Rule 41(b) does not expressly require this sparing approach and the federal courts have inherent power to dismiss a case with prejudice for lack of prosecution. Nonetheless, the federal courts view this as a "harsh sanction" running counter to a "strong policy favoring the disposition of cases on the merits" absent a finding of "extreme misconduct," such as "extremely protracted inaction (measured in years), disobedience of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance such as prejudice to the defendant, glaring weaknesses in the plaintiff's case, and the wasteful expenditure of a significant amount of the district court's time." *Figueroa Ruiz v. Allegria*, 896 F.2d 645, 647-48

(1st Cir. 1990) (dismissal of RICO action by developer against lenders for lack of prosecution with prejudice affirmed as not an abuse of the trial court's discretion, despite a relatively short (three month) period of inactivity, in view of the plaintiff's vaguely-pleaded RICO claims, failure to replead those claims with specificity as ordered by the court, failure to respond to motions to dismiss, and, in response to a court order warning of possible dismissal, offering no explanation for these failures other than being "under stress"); *see also Sherlock v. Stancato*, __ F.Supp. 3rd. __ , 2014 WL 462961, *4 (D. Mass. 2014), *quoting Figueroa Ruiz* (civil rights action against arresting police officer dismissed for lack of prosecution, following an order warning of this possible consequence, after conduct by the plaintiff that delayed adjudication for over three years—discharging court-appointed counsel while discovery was underway; the second court-appointed counsel's inability to reach plaintiff despite diligent efforts, and their subsequent withdrawal with court approval; a letter from the plaintiff explaining that she had been in a mental health facility and was unable during that time to respond to mail or telephonic communications; after second court-appointed counsel renewed representation, and the parties completed discovery and filed pretrial motions in limine and a joint pretrial memorandum, plaintiff disappeared again (which led to the court's cancellation of a scheduled pretrial conference) and then reappeared again requesting a trial continuance based upon "emotional issues," which was denied, and her subsequent refusal to leave her home and appear for a rescheduled trial conference despite her counsel's offer to drive her to the courthouse); *see also Pomales v. Celulares Telefonica, Inc.*, 342 F.3d 44, 48-49 (1st Cir. 2003) (vacating dismissal, with prejudice, of the plaintiffs' Title VII and civil rights action against her former employer for lack of prosecution as an unwarranted drastic sanction in the circumstances, which included efforts by the

plaintiff to prosecute her claims before she discharged her attorney, her diligent efforts to find and retain new counsel, a relatively brief period of discovery and case prosecution delay that had resulted, and the trial court's failure to warn her of its inclination to dismiss her action when she did not resume prosecution pro se).

DALA, in contrast, has neither declared nor implemented any such "strong policy," and nor has it ruled that dismissal, with prejudice, for lack of prosecution must be based upon "extreme misconduct." In contrast with court-initiated dismissals under Mass. R. Civ. Proc. Rule 41(b), the Standard Rules do not require any particular period of inactivity as a prerequisite for a lack of prosecution dismissal initiated by an administrative magistrate. Additionally, neither the Standard Rules nor DALA decisions dismissing appeals for lack of prosecution make that type of dismissal contingent upon a finding of misconduct, or upon characterizing particularly types of inaction (such as failing to respond to an order) as misconduct (and, actually, neither does the federal rule).

In practice, the distinctions between Federal / Massachusetts Rule 41(b) and 801 C.M.R. § 1.01(7)(d)2 may be without meaningful substantive difference. DALA's administrative magistrates have been relatively sparing in dismissing appeals for lack of prosecution. When they have done so, the lack of prosecution dismissal has generally followed an order to show cause warning of dismissal as a consequence for noncompliant conduct, and that conduct has generally been, or has included, failure to appear at a previously-scheduled prehearing, status conference or hearing, and failure to state the basis for an appeal, file prehearing memoranda, disclose witnesses, or identify hearing exhibits as a prior order required. *See, e.g., Mass. Dep't of Elementary and Secondary Education v. Andrade*, Docket No. MS-16-430, Final Decision-Order of Dismissal (Mass. Div. of

Admin. Law App., Feb. 27, 2017), and *Dep't of Public Health v. Galvin*, Docket No. PHNA-15-11, Order of Dismissal (Mass. Div. of Admin. Law App., Apr. 1, 2015), both discussed above at 17 n. 8. Those types of conduct would outweigh relatively short periods of inaction and justify a lack of prosecution dismissal under both the Standard Rules and Fed. R. Civ. Proc. Rule 41(b) as *Figueroa Ruiz, Pomales* and *Sherlock* applied it.

2. Lack of Prosecution Dismissal as the Appropriate, Discretionary Outcome in this Appeal

I consider, next, the factors that 801 C.M.R. § 1.01(7)(d)2 lists as grounds for granting a lack of prosecution dismissal as a matter of discretion and that the record discloses here—failure to file documents required by the Standard Rules, failure to respond to notices or correspondence, failure to comply with orders of the Administrative Magistrate, and other factors that indicate the petitioners' intention not to continue with the prosecution of their claims.

a. Failure to File Documents Required by the Standard Rules

801 C.M.R. § 1.01(6)(c) requires that an appeal "state clearly and concisely the facts upon which the Party is relying as grounds, the relief sought and any additional information required by statute or Agency rule." The petitioners' appeal did not do so, but that alone does not weigh heavily in favor of a lack of prosecution dismissal, for the reasons I discussed above (at 5)—the citation's statement of appeal rights did not state that the information required by 801 C.M.R. § 1.01(6)(c) had to be provided in the notice of appeal; the relatively short ten-day appeal period that applied here made timely filing, rather than pleading detail, the priority in filing the appeal; and the Standard

Rules provide opportunities to add the missing information later—for example, in response to a motion for a more definite statement, *see* 801 C.M.R. § 1.01(7(b), or to an order requiring that the missing detail be supplied.

However, the uncured absence of detail in the petitioners' notice of appeal shows why DALA needed to issue an order directing that the petitioners supply it in the first place. It also shows that the petitioners' continuing failure to identify the facts upon which they relied dates back to their September 2, 2014 notice of appeal, as does the lack of clarity regarding what the petitioners claim and what relief they seek. Because the petitioners have not cured the omission either voluntarily or in response to orders directing them to do so, the absence of claim detail and the resulting confusion have persisted for two and a half years. That circumstance weighs more heavily here than the omission of claim detail from the notice of appeal.

b. Failure to Comply with the Administrative Magistrate's Orders

There have been multiple instances of this type of noncompliance throughout this appeal.

(i) Failure to supply information as ordered. The October 2, 2015 order cancelling the hearing (in view of Attorney Davies's impending withdrawal as petitioners' counsel) directed the petitioners to specify their claims, identify their witnesses and the expected subject matter of their testimony, and identify their intended hearing exhibits by November 13, 2015. (*See* above at 8.) The order was re-mailed to the petitioners individually on October 6, 2015 after their attorney filed a notice of withdrawal, but the due date for filing the information required by the October 2, 2015 order was not changed. (*See* above at 9-10.) The petitioners did not comply with the October 2,

2015 order, and that noncompliance is ongoing. They have provided none of the information that the October 2, 2015 order required. The petitioners also failed to respond to the February 6, 2017 order to show cause, which required that a response to the order include the claim, witness and exhibit information the petitioners should have supplied in response to the October 2, 2015 order. (*See* above at 13-15.)

The petitioners' failure to comply with these orders weighs heavily in determining whether to dismiss this appeal for lack of prosecution. So, too, does the fact that the orders identified the significance of the missing information that the petitioners were directed to supply, and warned that failure to supply it could result in dismissal.[10]

(ii) Failure to appear for a status conference as ordered. On January 27, 2017, I issued an order scheduling a status conference upon motion by the Fair Labor Division, for the purpose of clarifying the status of settlement efforts, identifying the scope of a hearing if the matter did not settle, and rescheduling the hearing that I had continued in October 2015 due to confusion as to who represented the petitioners, what their claims were, who their witnesses would be, and what their hearing exhibits would be. (*See* above at 12.) Although the January 9, 2017 prehearing conference

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[10]/ The orders gave clear notice to the parties that I considered the missing claim, witness and exhibit information the petitioners were required to furnish important to meaningful efforts to resolve this matter by agreement and, if it did not settle, to resolving confusion as to what claims needed to be adjudicated, what the scope of a hearing would be, and assuring that both parties could prepare for the hearing. S*ee* above at 8-9 (as to the explanation given by the October 2, 2015 order) and at 11-12 (as to the explanation given by the January 9, 2017 scheduling order).

For the prior warnings that failure to respond to the orders or otherwise comply with them could result in dismissal, *see* above at 10-11 (warning given by the October 2, 2015 order) and at 13-14 (warning given by the January 26, 2017 order to show cause).

order did not warn that failure to attend the conference could result in dismissal, it was clear from the order that attendance was compulsory in view of the conference's objectives (*see* above at 11-12). The petitioners did not request a continuance, and failed to appear for the scheduled status conference. They offered no explanation of that failure. In failing to respond to the order to show cause that followed, the petitioners did not avail themselves of an opportunity to explain and correct their failure to attend the prehearing conference or comply with prior orders.

The petitioners' disregard of the January 9, 2017 prehearing conference order followed a multiple instances of noncompliance with notices and orders issued by DALA and by the Administrative Magistrate. It wasted this tribunal's time, as well as the time of another public body—the Fair Labor Division—which attended and, presumably, prepared for, the January 26, 2017 prehearing conference. Because the petitioners made no effort to correct this misconduct, and in view of their pattern of disregarding orders over this appeal's course, its continuation is practically certain if I do not impose an effective deterrent. For these reasons, the petitioners' failure to comply with the January 9, 2017 order is of great significance, and weighs heavily in balancing the factors relevant to a discretionary dismissal for lack of prosecution.

c. Other Factors Indicating the Petitioners' Intention Not to Prosecute

801 C.M.R. § 1.01(7)(d)2 identifies this lack of prosecution dismissal factor broadly enough to encompass many of those that were considered, and weighed, by the First Circuit in *Pomales*, *and Figueroa Ruiz,* and by the local federal District Court in *Sherlock.* A number of those factors are present here, and all of them indicate the petitioners' intention not to prosecute this appeal.

(i) Failure to respond to the February 6, 2017 order to show cause. The order to show cause was a last chance for the petitioners to avoid a lack of prosecution dismissal, and it warned clearly that their appeal could be dismissed if the petitioners did not timely respond as the order directed—for example, by including, in the response, the claim, witness and hearing exhibit information they had failed to supply despite prior orders directing them to do so. Their failure to respond to the order to show cause is the strongest, and most recent, indication that they did do not intend to prosecute this appeal.

(ii) Failure to supply accurate contact information. With the exception of a brief period during which they were represented by Attorney Davies, the petitioners have not clearly identified a mailing address to which the Fair Labor Division could send copies of its filings in this matter, and to which DALA could mail copies of notices, orders and decisions issued in this appeal. This conduct began with the notice of appeal itself, which directed that mailings not be to the attorney who filed the appeal but, instead, to two other attorneys who did not themselves appear and who, as it happened, denied representing the petitioners in this matter, although they did not themselves so advise DALA or the Fair Labor Division. *See* above at 5-8. The petitioners' mailing address has never been entirely clear, as mailings to them have been returned to DALA by the United States Postal Service. Petitioners' current counsel of record, Attorney Fonseca, supplied a mailing address with his November 15, 2015 notice of appearance (691 Washington St., P.O. Box 609, South Easton, MA 02375) that may have been viable at the time, but was no longer so at the end of 2016. The Division's mailing of its December 29, 2016 motion for a status conference to him at the address he supplied on his notice of appearance was returned as undeliverable by the United States Postal

Service, as was DALA's mailing of the January 9, 2017 order scheduling status conference to counsel at the same address. Attorney Fonseca has furnished this forum with no new or different address, and nor has he filed a notice of withdrawal.

In an effort to assure effective notice to Attorney Fonseca, this forum searched for the address he supplied to the Board of Bar Overseers for attorney registration purposes, and mailed an additional copy of the order to show cause to him at that address (23 Courtney St,, #7, Fall River, MA 02720). That mailing was not returned by the United States Postal Service. (*See* above at 13-14.) DALA was under no obligation to do this, however, and lacks the resources to provide wake-up calls to counsel and parties who do not keep their contact information current and miss filings, orders and deadlines as a result. Even if this were not the case, the adage "communication is a two-way street" is well applied here (or in any judicial or administrative forum), and updating contact information is too fundamental an obligation of attorneys and parties alike to require reminding.

A forum such as DALA must work with the mailing information a party gives it. The party knows best, or perhaps alone, where it actually receives mail. So long as it has a case pending, it must supply that information to DALA. Not supplying it, and not advising DALA or another party about address changes, risks missing filings, orders and deadlines and, ultimately, portends delays in adjudication, especially when parties assert that they did not receive mailings sent to them, and that they failed to take required action as a result. It also risks the appeal's dismissal as these curable mishaps continue.

Where the petitioners or their authorized representative should receive mail in this matter remains as inscrutable as it has ever been. Attorney Fonseca's current mailing address of record in

this case, which he supplied on his November 2015 notice of appearance, is a non-viable one; mail addressed to it has been returned to the Fair Labor Division and to DALA; and he has not updated his contact information to show a new address. I note that even after a copy of the order to show cause was mailed to Attorney Fonseca at the Fall River address shown at the Board of Bar Overseers website, and was presumptively received by him as it was not returned as undeliverable by the United States Postal Service, Attorney Fonseca did not file a change of address or withdraw as petitioners' authorized representative. In addition, the petitioners have filed no change of address for themselves or for an authorized representative since Attorney Fonseca filed his appearance over fifteen months ago.

Whether intended to hinder adjudication or not, the petitioners' continuing failure to supply a viable mailing address has impeded effective notice to them in this case, whether by DALA or by the Fair Labor Division. In turn, that has delayed adjudication, and DALA has also expended significant time and resources in attempting to insure that what it issues reaches the petitioners. The petitioners' conduct in this regard conduct is particularly difficult to understand, as it blocks their receipt of effective, timely notice and defeats the resolution of their claims, whatever those may be. I am not obliged to make sense of such conduct, however. I go no further than conclude that the petitioners' longstanding failure to supply a viable mailing address is thoroughly inconsistent with a party's obligations in an appeal such as this one, and is not commensurate with the conduct expected of a party that wants its claims resolved and its grievances redressed. It indicates strongly, as a result, that the petitioners do not intend to prosecute this appeal.

(iii) Absence of meaningful effort to prosecute this appeal diligently. This appeal presents

only occasional efforts at prosecution with minimal effectiveness overall. One such effort was the appeal's timely commencement (*see* above at 4), which preserved the petitioners' right to challenge the citation, but furnished no information about the appeal's basis or the relief that the petitioners sought. Although the absence of detail from the appeal was curable by an amended pleading, or in response to an order requiring that the missing information be supplied such as those I issued here, the petitioners furnished none of the missing detail. Another effort at prosecuting the appeal occurred while Attorney Davies represented the petitioners; he appeared for the June 9, 2015 prehearing conference and, afterward, conducted settlement-related discussions with the Fair Labor Division. Those efforts came to a end shortly afterward, however. In late September 2015, Attorney Davies advised the Fair Labor Division that he would likely be withdrawing, apparently because his clients had not paid him for his services. (*See* above at 7-8.) His formal withdrawal followed on October 1, 2015. There is no indication in the record that the petitioners continued the settlement efforts that Attorney Davies had begun. More to the point, the petitioners' persisting failure to supply information identifying their claims, witnesses and hearing exhibits, even when ordered to do so on multiple occasions, effectively precluded informed efforts to resolve this matter by agreement or adjudication.

Also overshadowing the isolated efforts to prosecute this appeal was the involvement of multiple counsel acting on the petitioners' behalf at a variety of levels, sometimes formal, sometimes not. This pattern of conduct began with the filing of the notice of appeal as a favor by Attorney Smolokoff on September 2, 2014 as a favor to two other counsel who later denied representing the petitioners here. Attorney Davies, the first attorney who filed a notice of appearance on the

petitioners' behalf, did what he could to move his clients' appeal along during the summer of 2015, until he was compelled to withdraw for nonpayment. Petitioners' current attorney, Mr. Fonseca, appeared for the petitioners toward the end of 2015, but nothing has been done on his watch to cure his clients' failure to furnish information required by several orders, or to otherwise move the appeal along.

There is no magic formula for determining with precision when efforts to prosecute an appeal justify a party's surprise at a lack of prosecution dismissal with prejudice and tip the scales against imposing that sanction, as they did in *Pomales*. Without doubt, however, the sporadic and ineffective efforts by the petitioners to move their appeal along did not reach that level. Those efforts are outweighed, moreover, by the petitioners' prolonged failure to comply with orders directing them to furnish the most basic information about their claims, witnesses and exhibits, all of which was needed to resolve this appeal.

(iv) Prejudice to the opposing party (and to another person whose rights are at stake). The petitioners' prolonged noncompliance with orders issued in this appeal, and their failure to prosecute it diligently delayed its resolution. This impeded the Fair Labor Division's efforts to recover wages that the petitioners failed to pay a former employee, and delayed further the employee's effort to recover wages he had earned but had not been paid. This conclusion as to unpaid wages owed is justified by the petitioners' failure to identify, since commencing their appeal in September 2014, either the factual basis for their appeal, or the "very strong defense" to the "fine" assessed by the citation (meaning, apparently, the restitution amount and/or the civil penalty that the citation assessed) that Mr. Chiles asserted in seeking a continuance of the schedule prehearing conference

in April 2015. (*See* above at 7-8.) The absence of this detail suggests very strongly that the petitioners' reasons for challenging the citation here are without merit. Although the petitioners appealed the citation, they have not denied, as the citation asserted, that the individual in question (Mr. Thompson) was their employee, was not paid wages he was owed between June 13, and July 2, 2014, and was owed unpaid wages in the amount of $2,302, or that the failure to pay those wages violated M.G.L. c. 149, § 148 and warranted the imposition of a $250 civil penalty against them.

The point here is not whether these facts are established—they certainly would be, or at least would be deemed both material and not genuinely disputed in the context of a motion for summary decision, but this determination is not necessary in the context of a lack of prosecution dismissal. In this context, what matters here is that lack of prosecution has significantly delayed the Division's recovery of an unpaid wage debt, and that this delay, together with the prejudice this has worked to the detriment of both the Fair Labor Division and the former employee, weighs heavily in favor of dismissing the petitioners' appeal for lack of prosecution.

(v) Futility of a less drastic sanction. I reach, at last, the final circumstance present here that falls within the ambit of "Other Factors Indicating the Petitioners' Intention Not to Prosecute."

The futility of a sanction less drastic than dismissal for lack of prosecution is underscored by the petitioners' continuing failure to supply the most basic information regarding the grounds for their appeal, their witnesses, and their hearing exhibits despite orders directing them to do so, and by their failure to respond to the order to show cause, which gave them an opportunity to cure their failure to supply the missing information. It is possible that another indulgence might reignite this appeal's prosecution. It might prompt yet another appearance by a new attorney for the petitioners,

possibly the disclosure of a viable address to which DALA and the Fair Labor Division could send mail for a spell, possibly a promise to file the missing information not yet supplied in response to several orders, and perhaps some type of filing or attempt to reinitiate settlement efforts. The history of this matter suggests more strongly, however, that counsel's authority to act on the petitioners' behalf might be as conditional and brief as those of his or her predecessors in this matter. Hopes of belated compliance aside, the reality that presents here is an ongoing failure by the petitioners to supply the slightest information about what claims they might take to a hearing, and with what evidentiary support, and there has not been the slightest effort on their part to make this right. This history makes it doubtful that a lesser sanction than dismissal would ignite this appeal's prosecution and spare DALA or the Fair Labor Division (and the petitioners' unpaid former employee) from the time and expense of further delay.

Disposition

I conclude that, upon balance, this appeal presents factors material to the exercise of discretion under 801 C.M.R.§ 1.01(7)(d)2 that tip the scales heavily in favor of dismissal for lack of prosecution, which I now grant. I also conclude that the petitioners were warned sufficiently that their failure to supply the claims, witness and exhibit information required of them by multiple orders, and their failure to respond to the order to show cause, could result in the dismissal of their appeal for lack of prosecution.

Although dismissal with prejudice must be assumed unless a final decision such as this one states otherwise, I emphasize that the dismissal ordered here is with prejudice so that there will be

no question that it is unconditional and final. As a result of this dismissal, the appealed citation is final as well, as is the restitution amount it demands and the civil penalty it assesses. Both amounts must be paid as the citation directs.

To assure notice of this order of dismissal to the petitioners, a copy of it will be sent by regular mail to each of the addresses shown for the petitioners and their current counsel of record, Attorney Fonseca, on the attached service list. This is the same service list I used in issuing the January 26, 2017 order to show cause.

Mailing of the order to show cause to two of the addresses shown on the service list for the petitioners and their current counsel of record were not returned by the United States Postal Service (*see* above at 16) , and their receipt is presumed as a result. The petitioners and their counsel had, therefore, an opportunity to notify DALA after receiving the order to show cause of any incorrect addresses shown on the service list and supply a different, viable mailing address. The petitioners did not do so, which I consider to be an ongoing representation by them that all of the addresses shown on the attached service list are those at which they will receive mail addressed to them, including copies of this order of dismissal.

Accordingly, the mailings I direct here shall be good and sufficient notice of the order of dismissal to the petitioners, even if any or all of the mailings are returned to DALA by the United States Postal Service.

SO ORDERED.

This is a final decision. Each of the parties is hereby notified that any person aggrieved by this decision may, within 30 days of receiving notice of it, seek judicial review by filing an appeal

with the Superior Court, pursuant to M.G.L. c. 30A, § 14.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: March 13, 2017