

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

CONCURRING AND DISSENTING OPINION OF FUJISE, J.

I concur with parts III A and III B of the majority's opinion but part company with my colleagues regarding part III C as I disagree that the Director's interpretation of his department's rules was so plainly erroneous or contrary to the legislative mandate that it should be disregarded.

It is well-established that the timely filing of an agency appeal is a jurisdictional requirement. See Assoc. of Apt. Owners of the Governor Cleghorn v. M.F.D., Inc., 60 Haw. 65, 68-70, 587 P.2d 301, 304 (1978) (untimely appeal to building appeals board and subsequent appeal to circuit court dismissed for lack of jurisdiction); Tanaka v. Dep't of Hawaiian Home Lands, 106 Hawai'i 246, 249, 103 P.3d 406, 409 (App. 2004) (untimely appeals to Tax Appeals Board and circuit court dismissed for lack of jurisdiction).

The ability to challenge a HIOSH citation is defined by HRS § 396-11 (1993). Subsection (a) of this statute provides that the citation and penalty shall become final "unless the employer files with the director a written notice of contest of the citation, . . . within twenty days after receipt of the citation" and subsection (g) of the same statute directs that "[u]pon receipt, the director shall advise the appeals board of any notice of contest."

In implementing the statute, the DLIR promulgated¹ HAR § 12-51-19, which provides, with added emphasis,

Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. The department

¹ The DLIR is authorized by HRS § 396-4(a)(1)(1993) to promulgate rules "as may be necessary for carrying out the purposes and provisions of this chapter."

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will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each contest petition shall be posted where they shall be readily observed by all affected employees.

The Director interpreted the DLIR rule to require that the original notice of contest must actually be received by the Director within the time specified. In my view, this interpretation is consistent with the purposes of the statute and should therefore be honored. Hawaii Teamsters & Allied Workers, Local 996 v. Dep't of Labor & Indus. Relations, 110 Hawai'i 259, 265, 132 P.3d 368, 374 (2006); see also Floyd S. Pike Elec. Contractor, Inc. v. Occupational Safety & Health Review Comm'n, 576 F.2d 72, 75 (5th Cir. 1978) ("[T]he Secretary's interpretation of an OSHA regulation is entitled to great deference. 'We have held that the promulgator's interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.'").

The Majority provides a cogent rationale for a contrary interpretation of the DLIR's rules. However, the Director's interpretation is also supported by the plain and ordinary meaning of the terms used in the enabling statute. HRS § 396-11(a) requires that the employer "files with the director a written notice of contest." The common understanding of the word "file" means to "deliver a legal document to the court clerk or record custodian for placement into the official record." Black's Law Dictionary 660 (8th ed. 2004); see also United States v. Lombardo, 241 U.S. 73, 76 (1916) ("'Shall file' means to deliver to the office, and not send through the United States mails."), In re Bryan, 261 B.R. 240, 244 (B.A.P. 9th Cir. 2001) ("A 'filing' occurs when papers are delivered to the actual custody of a proper officer.").

Finally, the requirement of actual receipt makes practical sense. Without actual receipt of the notice of contest, the Director would not know that he must forward the

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same to the appeals board, as required by HRS § 396-11(g). Indeed, in this case, there was evidence before the HLRB that Si-Nor's December 5, 2002 notice of contest was not received by HIOSH and that the Director was not aware of this December 5, 2002 notice until the hearing before the HLRB. The HLRB apparently believed that the Director had not received this notice as it ruled "HIOSH's non-receipt of the original notice of contest dated December 5, 2002, does not persuade the [HLRB] to conclude" that the notice of contest was not mailed on time.

In short, because the Director's interpretation was not at odds with the intent of the enabling statute, I believe that the failure of the HLRB to give effect to the Director's interpretation of the regulation that actual receipt of the notice of contest was required, was error, and would have affirmed the circuit court's decision to overturn the HLRB's decision on that basis.

Anna S. N. J. J. 