



**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY**

In the Matter of:

Patrick C. Togawa,

Complainant,

v.

Imperial Pacific International (CNMI)
LLC dba Best Sunshine International Ltd.,

Respondent.

Labor Case No. 16-025

**ORDER DENYING
RESPONDENT'S
MOTION FOR
RECONSIDERATION**

I. INTRODUCTION

On March 5, 2019, Respondent, by and through its counsel, Attorney Kelley Butcher, filed a Motion for Reconsideration of the Secretary of Labor's Order Denying Respondent's Motion to Extend Time for Appeal. For the reasons discussed below, Respondent's Motion for Reconsideration is hereby **DENIED**.

II. BACKGROUND

This matter concerns a claim for wrongful termination by Complainant Patrick C. Togawa (hereinafter, "Complainant") against Respondent Imperial Pacific International (CNMI) LLC *dba* Best Sunshine International Ltd. (hereinafter, "Respondent"). Complainant was hired by Respondent as a Security Supervisor on June 22, 2015, promoted to Security Manager in August of 2015, then ultimately resigned from his position on August 23, 2016. On October 17, 2016, Complainant filed a labor complaint

alleging, in part, he was never given any training, subjected to offensive profanity by his supervisor, and forced to resign from his position when threatened with termination.

The matter was scheduled for an Administrative Hearing over a span of three dates, February 28, 2017, March 22, 2017, and April 24, 2017. On December 28, 2018, the Hearing Officer issued an Administrative Order entering judgement in favor of Complainant and awarding damages in the amount of \$7,800. The last page of the Administrative Order stated: “Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of issuance of this Order. 3 CMC § 4948(a).” Complainant was personally served on December 31, 2018. Respondent was served through Alternative Service pursuant to NMIAC § 80-20.1-475(d)(4).¹ Specifically, on December 31, 2018, the Administrative Hearing Office emailed a copy of the Administrative Order to Respondent through its Attorney Kelley Butcher and Investigator Debra Camacho.² Approximately one hour late, Investigator Camacho, on behalf of Respondent, responded to the email and acknowledged receipt of the Administrative Order. As of the date of this Order, an appeal was never filed.

On January 16, 2019, Respondent, by and through its attorney, filed a Motion to Extend Time for Appeal at the Office of the Secretary. The motion was not supported by any legal authority. Respondent’s Motion set forth the following:

1. Counsel was off-island from December 17, 2018 through January 7, 2019 and did not have access to her work email address because the password expired.
2. Counsel received the Administrative Order only after she returned on island on January 8, 2019.

¹ “Notice may be given by telephone or electronic mail as the Administrative Hearing Office determines appropriate.” NMIAC § 80-20.1-475(d)(4).

² The Administrative Hearing Office found that alternative service was appropriate due to previous practices with Respondent. Further, the Administrative Hearing Office found that service onto Investigator Debra Camacho was appropriate due to verbal instruction from Respondent to include Ms. Camacho in communications.

3. In an email sent on January 8, 2019, Counsel stated that Respondent intended to file an appeal but needed advice on the timeline for filing;
4. A response to her email inquiry was not provided;
5. On January 15, 2019, counsel went to the Hearing Office to with questions regarding Appeal process, the timelines for submission and to request a transcript of the hearings;
6. The response from the administrative staff did not indicate whether an extension would be given or not;
7. No information was given on the form or filing fee for Appeal;
8. No information was given as to the Petitioner's information for service of process;
9. Respondent needs until February 8, 2019 for filing the Appeal so that the transcript of three separate hearing dates may be transcribed and certified.

On February 6, 2019, the Secretary of Labor issued an Order Denying Respondent's Motion to Extend Time for Appeal. Therein, the Secretary of Labor found that: (1) Respondent was properly served under the applicable regulations; (2) the fifteen day deadline for filing an appeal under 3 CMC § 4948 and NMIAC § 80-20.1-620(b) had passed; and (3) good cause or any other basis for extension did not warrant an extension. The undersigned Secretary also noted that administrative staff cannot provide legal advice and the Hearing Officer cannot engage in ex parte communications. The proper course of action would have been to refer to the applicable law and file a notice of appeal form within the necessary time frame. The notice appeal form is a simple one page form available on the Department's website, as stated in the regulations, and does not require transcription.

On March 5, 2019, Respondent filed the present Motion for Reconsideration. Respondent filed a Declaration of Service on March 12, 2019. Complainant did not file a response in opposition. A hearing for oral arguments for the present motion was not requested.

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III. LEGAL STANDARD

Generally, motions and requests are governed by NMIAC § 80-20.1-470 (e). Thereunder,

[a]n application for an order or any other request may be made by motion. The hearing officer may allow oral motions or require motions to be made in writing. The hearing officer may allow oral argument or written briefs in support of motions. Within ten days after a written motion is served, or within such other period as a hearing officer may fix, any party to the proceeding may file and serve a response in opposition of the motion. Within three days after an opposition brief is served, the moving party may file and serve a reply to the opposition.

NMIAC § 80-20.1-470 (e).³ Moreover, a motion for reconsideration is governed by NMIAC § 80-20.1-485(i). Thereunder,

[a] motion for reconsideration may be granted for mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which, by due diligence, could not have been discovered in time to move in evidence at the hearing; fraud, misrepresentation, or misconduct of an adverse party; the judgment is void, has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed; or other reason justifying relief. A party may file a motion for reconsideration within fifteen days after service of an order. A response may be filed no later than five days after the filing of the motion. After a decision on a motion for reconsideration is signed, no further motions or filings may be made with the Administrative Hearing Office other than a notice of appeal.

NMIAC § 80-20.1-485(i).

IV. ANALYSIS

³ When exercising jurisdiction over appeals, the Secretary shall have all the powers and responsibilities of a hearing officer. 3 CMC § 4528(g); *see also* NMIAC § 80-20.1-490(d).

As stated above, a motion of reconsideration is appropriate in cases of “mistake, inadvertence, surprise, or excusable neglect . . . newly discovered evidence . . . fraud, misrepresentation, or misconduct of an adverse party . . . the judgment is void . . . or other reason justifying relief.” NMIAC § 80-20.1-485(i). While Respondent’s Motion for Reconsideration does not clearly delineate the basis for reconsideration, Respondent’s motion argues: (1) the Administrative Order is not effective for failure to publish in the Commonwealth Register, in compliance with the Administrative Procedures Act; (2) the Secretary may hear an appeal for up to 6 months from the date of denial; (3) timeliness shall not be grounds for refusal to accept the papers for a complaint or appeal; and (4) Respondent set forth sufficient good cause for filing and equitable tolling doctrines should apply. For the reasons set forth below, the undersigned Secretary of Labor finds that Respondent has failed to meet its burden in moving to reconsider the Order Denying Respondent’s Motion to Extend Time for Appeal.

1. The Motion for Reconsideration is untimely.

As stated above, “[a] party may file a motion for reconsideration within fifteen days after service of an order.” NMIAC § 80-20.1-485(i). Here, Respondent is filing for reconsideration of the Order Denying Respondent’s Motion to Extend Time for Appeal, issued on February 6, 2019. Respondent was served with the Order Denying Respondent’s Motion to Extend Time for Appeal on the same day. Respondent’s Motion for Reconsideration, however, was filed approximately one month later, March 5, 2019. Having exceeded the fifteen day deadline under NMIAC § 80-20.1-485(i), Respondent’s Motion for Reconsideration is untimely.

2. Respondent was duly served thus had actual knowledge of the Order.

Respondent argues that the agency’s regulations as to appeal deadlines cannot supersede the Administrative Procedures Act (“the APA”) requiring publication in the Commonwealth Register. Respondent’s argument is not persuasive as Respondent had

actual knowledge of the Order and the cited statute and regulations can be read harmoniously.⁴

Generally, with respect to publication, the APA provides, in part, that no agency rule, order, or decision is valid or effective against any person or party unless it has been published in the Commonwealth Register. 1 CMC § 9102(d). The APA further states that the above-mentioned provision “is not applicable in favor of any person or party who has *actual knowledge* thereof.” *Id* (emphasis added).

First, the Administrative Order is effective onto Respondent as Respondent was duly served and had actual knowledge of the Administrative Order. As discussed above, the Administrative Hearing Office served Respondent via alternative service pursuant to NMIAC § 80-20.1-475(d)(4). Thereunder, “[n]otice may be given by telephone or electronic mail as the Administrative Hearing Office determines appropriate.” NMIAC § 80-20.1-475(d)(4). On December 31, 2018, the Administrative Hearing Office served Respondent, by and through its Attorney Kelley Butcher and Investigator Debra Camacho. The fact that Respondent’s attorney was not able to access her email address due to password issues does not equate to ineffective service on behalf of the Department.⁵ Further, it is clear that service was effective because Investigator Debra Camacho acknowledged receipt of the email approximately one hour after service. Accordingly, Respondent had actual knowledge of the Order.

⁴ It is a basic canon of statutory interpretation that all parts of an enactment should be harmonized with each other as well as with the general intent of the whole enactment, with meaning and effect given to all provisions. *Deleon Guerrero v. Dep’t Publ. Lands*, 2011 MP 3 ¶ 11. When construing statutes, rules or regulations, the court will use the plain meaning of words. *Santos v. Pub. Sch. Sys.*, 2002 MP 12 ¶ 22. Courts generally do not disregard words or phrases when construing statutes or administrative regulations. *Id.* at ¶ 23. When one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors avoided that phrasing suggests, all other things being equal, that they in fact intended a different interpretation. *Manglona v. Commonwealth*, 2002 MP 7 ¶ 24.

⁵ “Employers and employees are responsible for keeping contact information in the Department’s records up to date and accurate.” NMIAC § 80-20.1-475(c).

Second, the undersigned Secretary finds that Respondent confuses publication of orders with the issuance and service of orders. Here, the Administrative Order was issued on December 28, 2018 pursuant to 1 CMC § 9110⁶ The Administrative Order was subsequently served on December 31, 2018 pursuant to NMIAC § 80-20.1-475(d)(4). Seemingly, Respondent contests the Department’s regulatory definition of the term “issuance,” allowable methods of service, and deadlines to appeal. While 3 CMC § 4945 uses discretionary language regarding service of process for a notice of a proceeding, there is no provision in the Administrative Procedures Act that prohibits, preempts, or restricts the Department’s ability to promulgate regulations regarding the definition of “issuance,” allowable methods of service, or deadlines to appeal. Further, the deadline to file an appeal to the Secretary is governed by statute and mirrored in the regulations. *See* 3 CMC § 4948; *see also* NMIAC § 80-20.1-620(b). In consideration of above, the Department’s regulations do not supersede the APA.

3. The fifteen day deadline to file an appeal has passed.

The deadline to appeal is established by statute and mirrored in the Department’s regulations. *Compare* 3 CMC § 4948 and NMIAC § 80-20.1-620(b). Certainly, the statute is controlling. The statute provides,

[w]ithin fifteen days of issuance, any person or party affected by findings decisions, or orders made pursuant to 3 CMC § 4947 of this chapter may appeal to the Secretary by filing a written notice of appeal, in a form prescribed by regulations, stating the ground for the appeal. If no appeal is made to the Secretary within fifteen days, the findings, decisions, or orders shall be unreviewable administratively or judicially.

⁶ Any ambiguity in the term “issued” may be resolved in the regulations. *See Nansay Micronesia Corp. v. Govendo*, 3 N.M.I. 12 (1992) (Ambiguity in statute permitting appeal of coastal resources management regulatory agency decision to Coastal Resources Management Office Appeals Board concerning commencement of thirty-day filing period was resolved by agency regulation interpreting period to run from date of issuance of decision); *see also* NMIAC § 80-20.1-485(h) (“The hearing officer shall sign and enter the date on which an order was signed. The date on which the order was signed is the date the order was issued or entered.”). As defined by the Department’s regulations, the Administrative Order was issued on December 28, 2018.

3 CMC § 4948(a) (emphasis added).⁷ As shown above, the fifteen day deadline in the statute is firm. Further, the good cause exception in the regulations related to denial cases, not labor cases, such as the present matter. *Compare* NMIAC § 80-20.1-620(a) and NMIAC § 80-20.1-620(b).

Contrary to the arguments made in Respondent's Motion to Extend Time for Appeal, it is not the Administrative Hearing Office's responsibility to advise attorneys or parties of appeal deadlines and processes. Notwithstanding above, Respondent had notice and knowledge of the deadline because: (1) the applicable statute and regulations were published and available on cnmilaw.org and marianaslabor.net; (2) the Administrative Order specifically stated the deadline and cited the applicable statute;⁸ and (3) in response to Respondent's inquiry, the notice of appeal form, filing fee and filing location were itemized in an email communication between Administrative Hearing Office staff and Respondent. Given above, failure to file a notice of appeal within the applicable time frame was inexcusable.

While Respondent argues that timeliness shall not be grounds for refusal to accept papers for a complaint or appeal, the undersigned Secretary reminds Respondent that an appeal was never actually filed nor an appeal fee ever paid. Instead, Respondent filed a Motion to Extend Time for Appeal, which was denied, and now the present Motion for Reconsideration. Further, while the undersigned Secretary recognizes that timeliness is not sufficient basis to reject the filing of papers, timeliness of the filing will always present an issue in deciding an appeal. To be clear, as of the date of this Order, Respondent has not

⁷ The time limit for filing an intra-agency appeal is mandatory and jurisdictional. *Rivera v. Guerrero*, 4 NMI 79 (1993). A court lacks jurisdiction to review administrative decisions not timely appealed during the administrative process. *Rivera v. Guerrero*, 4 NMI 79 (1993). A court has no jurisdiction to review administrative decisions unless timely appealed during the administrative process. *Pac. Saipan Technical Contractors v. Rahman*, 2000 MP 14 ¶ 14.

⁸ The last page of the Administrative Order states: "3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of issuance of this Order. 3 CMC § 4948(a). ISSUED: December 28, 2018."

filed a notice to appeal, appeal brief, or filing fee for an appeal. Further, any subsequent appeal would be deemed untimely.

4. The equitable tolling doctrine does not apply.

The undersigned Secretary wholly rejects Respondent's argument as to equitable tolling because Respondent fails to show that equitable tolling is available or applicable in this circumstance. Significantly, Respondent cites to *Marianas Insurance Co., Ltd. v. CPA*, 2007 MP 24, to argue that the equitable tolling doctrine should be applied to the appeal deadline. That argument, however, is unpersuasive as the case discusses tolling of the statute of limitations in filing a complaint. This matter is distinguishable as Respondent is seeking an extension in the deadline in filing an appeal, and the subsequent reconsideration thereof. Respondent cites no other legal authority to support the argument that the equitable tolling doctrine, as applied to statutes of limitations for filing a complaint, should be extended or enlarged to apply to the deadline in filing an appeal.

Moreover, the undersigned Secretary finds that *Marianas Insurance Co. v. CPA* cuts against Respondent's argument to reconsider and extension of a firm appeal deadline. Thereunder, when exhausting administrative remedies, claimants must comply with an agency's deadlines and other critical procedural rules. *Marianas Insurance Co. v. CPA*, 2007 MP 24 ¶ 14. It is emphatically clear that Respondent's Motion to Extend Time for an Appeal and subsequent Motion for Reconsideration is an attempt to circumvent the agency's deadlines and other critical procedural rules. Further, the Commonwealth Supreme Court has already determined that deadlines to file an appeal are not matters which should be taken lightly.⁹ The undersigned Secretary concurs with the importance and significance of such deadlines.

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⁹ If an attorney fails to comply with appellate filing deadlines, such conduct is prejudicial to the administration of justice. *In the Matter of Roy*, 2007 MP 28 ¶ 11.

V. CONCLUSION

For the reasons set forth above, Respondent's Motion for Reconsideration is hereby **DENIED.**

So ordered this 23 day of April, 2019.



VICKY BENAVENTE
Secretary of Labor