

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME	January 30, 2015, 9:00 a.m.	DEPT. NO	31
JUDGE	HON. MICHAEL KENNY	CLERK	S. LEE
MJB/Bixby Construction, Inc., a corporation; Mark J. Bixby, RMO/CMO/President <p style="text-align: center;">Petitioners</p> <p style="text-align: center;">v.</p> REGISTRAR OF CONTRACTORS, CONTRACTORS STATE LICENSING BOARD, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA, <p style="text-align: center;">Respondents.</p>		Case No.: 34-2014-80001926	
Nature of Proceedings:		RESPONDENTS' DEMURRER TO THE PETITION FOR WRIT OF MANDATE	

The following shall constitute the Court's tentative ruling on the demurrer to the petition for writ of mandate, which is scheduled to be heard by the Court on Friday, January 30, 2015 at 9:00 a.m. in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

Any party desiring an official record of this proceeding shall make arrangements for reporting services with the Clerk of the Department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day of proceedings lasting more than one hour. (Local Rule 1.12(B) and Government Code § 68086.) Payment is due at the time of the hearing.

Factual And Procedural Background

Petitioners allege they were engaged in the business of commercial construction in Northern California pursuant to a Contractor's License, when, on January 24, 2013, Respondents filed an accusation alleging a violation of Business and Professions Code sections 7109(a), 7113, 7159(a)(5), 7110 and 7116. Petitioners engaged the services of an attorney, Chuck Tweedy, and

negotiated a stipulated settlement with Respondents, which the parties signed on January 16, 2014. The Stipulation provided that Petitioner was,

“fully aware of its legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at its own expense; the right to confront and cross-examine the witnesses against them; the right to present evidence and to testify on its own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

8. [Petitioner] voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.”¹

The Stipulation further provided that Petitioners agreed a factual basis could be established for the charges and Petitioners gave up the right to contest the charges.² Petitioners agree that its Contractor’s License was subject to discipline and agreed to “be bound by the Registrar’s imposition of discipline as set forth in the Disciplinary Order below.”³ The Stipulation was made contingent in that if the “Registrar fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect...”⁴

The portion of the Stipulation at issue in this demurrer is paragraph 4 of the Disciplinary Order. The prior paragraphs provide for Petitioner to pay the costs of the investigation and enforcement, and be subject to a disciplinary contractor’s bond. Paragraph 4 provides “The parties agree to recommend to the Registrar that the Respondent MJB/Bixby Construction, Inc. and Mark Jonathan Bixby, pursuant to Business and Professions Code section 7102, be allowed to apply for reinstatement of his license, or apply for another license, after a period of one (1) year from the effective date of the decision.”⁵

The Order to Adopt Stipulated Settlement (hereinafter the “Order”) was issued May 19, 2014 providing that the Stipulation was adopted by the Registrar of Contractors as his Decision.⁶ The Order provided that Petitioners “shall not apply for reissuance or reinstatement of any license for five year(s) from the effective date of this Decision.”⁷ The Order further provided that it would become effective on June 23, 2014.

Petitioners filed a petition for writ of mandate on August 19, 2014. Petitioners contend that because the Order did not provide for the one year time period during which Petitioners could not apply for reinstatement of the Contractor’s License, Respondents had not in fact

¹ “Stipulated Revocation of License and Disciplinary Order” (hereinafter “Stipulation”) attached to Petition, at p. 2.

² *Id.* at p. 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at p. 5.

⁶ Order to Adopt Stipulated Settlement attached to Petition.

⁷ *Id.*

adopted the Stipulation. Petitioners contend the waiver of rights in paragraph 7 of the Stipulation is void, and they are entitled to a hearing on the merits. Respondents filed a demurrer on September 17, 2014. Petitioners filed an opposition to the demurrer on January 16, 2015.

The instant demurrer is based on Respondents' contention that the petition is time-barred because it was filed more than thirty days from the effective date of the Registrar's June 23, 2014 order adopting the stipulated settlement. Government Code section 11523 requires a petition for writ of mandate appealing from an administrative adjudication by a State agency to be filed "within 30 days after the last day on which reconsideration can be ordered." Section 11521 provides, "The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period..."

The Order indicated the effective date of the decision was June 23, 2014. Pursuant to section 11521, the last day on which reconsideration could have been ordered was June 23, 2014. Consequently, Petitioners were required to file a petition for writ of mandate challenging the decision by July 23, 2014. Petitioners did not file the subject petition until August 19, 2014.

Pursuant to California Code of Civil Procedure section 430.10, a party against whom a complaint has been filed may object, by demurrer, on a number of grounds. The moving defendants have filed the instant demurrers on the grounds that: "(e) the pleading does not state facts sufficient to constitute a cause of action."

Petitioners argue section 11523 does not apply because they are not appealing a decision on the merits, but instead are claiming a violation of due process for the failure to provide Petitioners with a hearing after deciding to adopt a longer punishment period than was recommended by the Stipulation. Petitioners contend that ordinary mandate pursuant to Code of Civil Procedure section 1085 can be filed within a "reasonable time". Petitioners allege the ministerial act was the Registrar's duty to give Mr. Bixby the opportunity for a hearing or obtain a valid waiver of the 30-day time period.

Discussion

"Traditional mandate (Code Civ. Proc., § 1085) is the appropriate vehicle to challenge a ministerial act by an agency, i.e., the performance of a mandatory duty. If the agency's action is quasi-judicial, i.e., if it involves an administrative hearing and the exercise of discretion, then an aggrieved party's remedy is administrative mandate per Code of Civil Procedure section 1094.5." (citations omitted)(*Morton v. Board of Registered Nursing* (1991) 235 Cal.App.3d 1560, FN 5.) "Traditional mandate may apply to review an agency's action if that action is compelled by law and does not involve a factual determination by the agency. Under that circumstance, '[r]evocation...constitute[s] a ministerial action by the board rather than quasi judicial action.'" (*Id.* at 1566)(citing *DiGenova v. State Board of Education* (1955) 45 Cal.2d 255, 260.)⁸

⁸ In *DiGenova*, the court compares a credential revocation, which requires notice and a hearing (an issue for a section 1094.5 petition) with the automatic revocation of a license for conviction of a specified crime (an issue for a section 1085 petition.) 45 Cal.2d at 260.

Section 1094.5 provides, “(a) [w]here the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury.” Here, the validity of an order is being questioned. Specifically, Petitioners allege a violation of due process as a result of Respondents’ imposition of a five-year ban instead of the recommended one-year ban on Petitioners’ right to apply for reissuance of a Contractor’s License. The decision was made as the result of a proceeding in which Petitioner had a right to a hearing involving the taking of evidence. Section 1094.5 clearly applies and is the proper basis for Petitioners’ instant writ petition.

The Court disagrees with Petitioners’ contention that this is a case of ordinary mandamus; it is a case of administrative mandamus. The petition is an appeal from the discretionary administrative decision made by the Registrar to deny Petitioners the right to reapply for a Contractor’s License for five years. Petitioners were afforded the right to a hearing and elected to waive that right. Petitioners then entered into a stipulated settlement agreement in which the parties agreed to a recommended one-year ban. Nothing in the agreement precluded the Registrar from rejecting the one-year timeframe and instituting a different timeframe. In fact, all parties recognized that the Registrar had discretion; otherwise the use of the word “recommended” was without meaning.

As the petition clearly resulted from an administrative hearing which involved the exercise of discretion, it implicates administrative mandamus. Government Code section 11523 provides the deadline within which the petition must be filed. Petitioners clearly missed the deadline of July 23, 2014, having failed to file the petition until August 19, 2014. The statute and interpreting case law do not provide an exception to this deadline. Petitioners’ contention that such a deadline is inapplicable when the alleged violation is one of due process is not supported by any citation to authority. As such, it is unavailing.

Furthermore, the 30-day time limit is strictly construed. (See *Morton v. Board of Registered Nursing* (1991) 235 Cal.App.3d 1560) (holding that a petition filed two-weeks after the deadline was subject to dismissal.) Petitioners’ failure to comply with the statutory requirements for the filing of the instant petition renders this case subject to demurrer and dismissal.

Conclusion

Respondent’s demurrer to the petition for writ of mandate is hereby granted. The petition is dismissed with prejudice.

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In the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule 1.06, counsel for Respondent is directed to prepare an order granting the demurrer, and dismissing the petition, incorporating this ruling as an exhibit to the order, and a

separate judgment; submit them to counsel for Petitioners for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).