

In the Matter of
TOMAS BENITEZ,
Case No. 14-00
January 7, 2000

SYNOPSIS

Respondent was a farm labor contractor from the mid 1980s until the commissioner refused to renew his license in 1996 and prohibited him from applying for another license for three years. Despite the fact that he had no license, Respondent acted as a farm labor contractor on six different occasions in 1996, 1997, 1998, and 1999. The commissioner imposed penalties totaling \$9500.00 for those six violations of ORS 658.410(1). In addition, while Respondent was acting as a farm/forest labor contractor, he failed to provide 88 workers with statements of their rights, in violation of ORS 658.440(1)(f), and also failed to execute written agreements with these workers, in violation of ORS 658.440(1)(g). The commissioner ordered Respondent to pay a civil penalty of \$250.00 for each of these 176 violations, for a total of \$44,000.00. The Commissioner also found that Respondent's character, competence and reliability made him unfit to act as a farm labor contractor, and denied his application for a farm labor contractor's license. ORS 658.405, ORS 658.410(1), ORS 658.440(1)(f)-(g), ORS 658.453(1), OAR 839-015-0004, OAR 839-015-0145, OAR 839-015-0508, OAR 839-015-0510, OAR 839-015-0512, OAR 839-015-0520.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 16 and 17, 1999, at the Bureau of Labor and Industries office at 3865 Wolverine Street, NE, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Respondent Tomas Benitez was present throughout the hearing and was not represented by counsel. A certified and qualified Spanish interpreter translated the entire proceedings for Respondent's benefit.

The Agency called as witnesses: Respondent; Paula Benitez, Respondent's wife; Karen Guthrie, an employee of Holiday Tree Farms, Inc.; Agency employees Kay Nichols, Enrique Hidalgo, Katy Bayless, and Rolando Ramirez; Spanish interpreter Terry Rogers; and CEBECO International Seeds, Inc., employee Clifford King. Respondent called himself and Paula Benitez as witnesses.

The forum received into evidence:

a) Administrative Exhibits X-1 through X-32 (filed or generated prior to hearing), X-33 (submitted at hearing), and X-34 to X-35 (filed or generated after the hearing).

b) Agency Exhibits A-1 through A-10 and A-7a (submitted prior to hearing with the Agency's case summary) and A-4a, A-10b and A-11 through A-17 (submitted at hearing). The Agency did not offer, and the forum did not receive, the document initially labeled as Exhibit A-10 submitted with the Agency's November 12, 1999, addendum to its case summary, later labeled Exhibit A-10A.

c) Respondent's Exhibits R-4 through R-9 and R-11 (submitted prior to hearing with Respondent's case summary). Respondent did not offer, and the forum did not receive, the documents labeled Exhibits R-1 through R-3 and R-10 that Respondent filed with his case summary.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about August 24, 1999, the Administrator of the Wage and Hour Division issued a Notice of Intent to Refuse to Issue Farm Labor Contractor License and to Assess Civil Penalties, naming Tomas Benitez as Respondent. The Division alleged

that: 1) on six different occasions, Respondent acted as a farm labor contractor when he did not have a valid farm labor contractor's license; 2) Respondent failed to provide 89 workers with a written statement containing the information required by ORS 658.440(1)(f); and 3) Respondent failed to execute written agreements with those workers as required by ORS 658.440(1)(g). The Division sought a total of \$363,500.00 for these alleged violations. The Division also asked the forum to find that Respondent was unfit to act as a farm labor contractor because of his lack of character, competence, and reliability, and to refuse to issue Respondent a farm labor contractor license.

2) The Agency served Respondent with the Notice of Intent on August 24, 1999.

3) On or about September 7, 1999, Respondent filed an Answer and requested a hearing regarding the matters alleged in the Notice of Intent.

4) The Agency requested a hearing on September 24, 1999.

5) On September 30, 1999, the forum issued a Notice of Hearing setting forth the time and place for hearing in this case. The Notice of Hearing identified "Tomas Benetiz" as Respondent. With the Notice of Hearing, the forum included a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) By order dated October 11, 1999, the forum asked the participants to clarify the spelling of Respondent's last name in the case caption. The Agency promptly informed the forum that Benitez spells his name B-E-N-I-T-E-Z and moved for a correction of the case caption to reflect that spelling. Respondent confirmed that his last name was spelled B-E-N-I-T-E-Z in a letter the Hearings Unit received on October 20, 1999. The forum later issued an order correcting the case caption to accurately reflect the spelling of Respondent's name.

7) By letter dated October 12, 1999, the Agency informed the forum that it had misspelled the name of the street in Respondent's address – 88389 Walterville Loop, Springfield, OR. The next day, the Agency informed the forum by e-mail that it understood that Respondent wished to have his mail sent to a different address. The forum disclosed this *ex parte* contact by order dated October 14, 1999, and ordered Respondent to notify the Hearings Unit in writing of the address to which he preferred mail be sent. Respondent confirmed that his correct address was 88389 Walterville Loop in a letter the Hearings Unit received on October 20, 1999.

8) On October 11, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all witnesses to be called; the identification and description of any documents of physical evidence to be offered, together with a copy of such document or evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, or penalty calculations (for the Agency only). The forum enclosed a form designed to help *pro se* respondents comply with case summary orders. Respondent and the Agency filed timely case summaries.

9) The Agency filed a motion for discovery order on October 27, 1999. Two days later, the forum granted that motion and issued a discovery order requiring Respondent to produce certain documents that the forum found were relevant to the case. On November 3, Respondent filed objections to the Agency's motion, which the forum construed as a motion for reconsideration of its discovery order. The forum denied the motion for reconsideration and adhered to its earlier determination that the requested documents were relevant to the allegations in the Notice of Intent.

10) On October 31, 1999, Respondent notified the forum that he intended to have his wife, Paula Benitez, serve as his "authorized representative" during the hearing. The forum denied that request, noting that only corporations, partnerships, and other associations were entitled to be represented by "authorized representatives." See ORS 183.457(1), (5).

11) On October 31, 1999, Respondent requested the services of a Spanish interpreter during the hearing. The forum granted that request by order dated November 4, 1999.

12) On November 5, 1999, the forum granted Respondent's request for the issuance of subpoenas to Nichols and Hernandez, noting that Respondent's request suggested that the two individuals might have information related to the case. The forum sent the subpoenas to Respondent along with an order that stated, in pertinent part:

"The forum has enclosed subpoenas for Hernandez and Nichols. **It is Respondent's responsibility to serve the subpoenas and to pay applicable witness and mileage fees in accordance with ORCP 55D and ORS 44.415(2) (copies enclosed).** The subpoenas have no effect unless and until they are properly served."

Respondent did not call either Hernandez or Nichols to testify at the hearing.

13) On November 12, 1999, the Agency asked the forum to reconsider its order granting Respondent the services of an interpreter. The Agency argued that Respondent could speak English fluently and that Respondent's request for an interpreter was untimely because it was not filed 20 days prior to hearing.

14) Later on November 12, the forum issued an order granting, in part, the Agency's motion for reconsideration of the order granting Respondent's request for an interpreter. The forum rejected the Agency's argument that it should deny Respondent's request as untimely, holding that it had inherent authority to consider late-filed requests, especially where, as here, the Hearings Unit already had arranged for the

services of an interpreter at the Agency's request (for translation of documents). The ALJ stated that she would rule at the beginning of the contested case hearing whether Respondent was able to speak English effectively enough so that he was not entitled to the services of an interpreter.

15) On November 12, 1999, the Hearings Unit received an envelope from Respondent addressed to the Hearings Unit. The ALJ opened the envelope and discovered that the letter in it was addressed to case presenter Domas. The ALJ asked another case presenter, David Gerstenfeld, to read the letter and determine whether it was supposed to go to the Hearings Unit or to Domas. Gerstenfeld determined that the letter was meant only for Domas. The ALJ sent copies of the letter to Domas by facsimile transmission and state shuttle service and – without reading the letter -- retained the original letter and envelope in a sealed envelope in the hearing file. The ALJ issued an order asking Respondent to notify her if he had meant the ALJ to review the letter to Domas. At the beginning of the contested case hearing, Respondent reviewed the letter in the envelope and confirmed that it was, in fact, meant for Domas and not for the Hearings Unit.

16) In the same order mentioned in the preceding Finding, the forum noted that the case presenter had not been served with a copy of Respondent's request for an interpreter. The forum reminded Respondent to send the case presenter a copy of any document he filed with the Hearings Unit and to indicate on any document filed with the Hearings Unit that he had, in fact, served the case presenter with a copy.

17) At the beginning of the hearing, the ALJ had a short conversation with Respondent in which she determined that he was able to speak conversational English. However, the ALJ also found that Respondent did not read much English and would be able to participate effectively in the hearing, which involved subtle legal and factual

issues, only with the services of an interpreter. Accordingly, the ALJ appointed a certified and qualified interpreter to translate the entirety of the proceedings for Respondent. The ALJ noted that she was not prejudging or ruling on Respondent's ability to conduct business in English, to the extent that might be an issue in the case.

18) At the start of the hearing, Respondent stated that he had no questions about the Notice of Contested Case Rights and Procedures.

19) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and procedures governing the conduct of the hearing.

20) During the lunch break on the first day of hearing, the participants agreed to stipulate to the allegations in paragraphs 1, 2, 3, 6, 7, and 8 of the Notice of Intent. The case presenter read the stipulations into the record after the break and Respondent acknowledged his agreement with the case presenter's reading of the stipulations.

21) On July 22, 1999, the forum issued a Final Order Based on Informal Disposition in *In the Matter of Holiday Tree Farms, Inc.*, Case Number 49-99. That order reflected a settlement agreement between the Agency and Holiday Tree Farms, Inc., in which Holiday Tree Farms, Inc., admitted that it had contracted for the services of four unlicensed farm labor contractors, including Respondent. During the November 1999 hearing in the case against Respondent, the Agency called Karen Guthrie, an employee of Holiday Tree Farms, Inc., as a witness and asked her whether she ever had given written statements of rights to workers that Respondent supplied in 1998 or had entered into written agreements with those workers. Paul Connolly, attorney for both Guthrie and Holiday Tree Farms, objected to the Agency's questions regarding Guthrie's failure to supply workers with statements of their rights and written agreements on the ground that she had a Fifth Amendment right not to testify regarding

these matters. The ALJ overruled the objection and ordered Guthrie to testify, which she did.

22) Connolly also objected to the introduction of certain Holiday Tree Farms records on the basis that the Agency improperly had contacted Holiday Tree Farms directly, rather than contacting the company through its counsel. Connolly also claimed that the documents were obtained improperly because the Agency obtained them in preparation for hearing and did not get them by use of a subpoena, by consent of Holiday Tree Farms through counsel, or “voluntarily without counsel.” The ALJ asked whether there had been a pending proceeding against Holiday Tree Farms at the time of the alleged improper contact by the Agency. Connolly conceded that there had not been and that the Final Order already had issued in Case Number 49-99 when the contact occurred. The ALJ overruled the objection and that ruling is hereby affirmed.

23) The evidentiary record closed on November 17, 1999.

24) The ALJ issued a proposed order on December 13, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondent first was licensed as an Oregon farm labor contractor in the mid-1980s.

2) In 1996, the Commissioner of the Bureau of Labor and Industries denied Respondent's application to renew his farm labor contractor's license, finding that Respondent did not have the necessary character, competence, or reliability to act as a farm labor contractor. The commissioner's decision was based on Respondent's failure to comply with federal and state laws related to the payment of income taxes, workers' compensation insurance premiums, and unemployment compensation taxes and fees.

The commissioner also prohibited Respondent from applying for a new farm labor contractor's license for three years. See *In the Matter of Tomas O. Benitez*, 15 BOLI 19 (1996). As a result of this order, Respondent has not had a farm labor contractor's license since March 14, 1996.

3) On or about November 2, 1996, Respondent contracted with Holiday Tree Farms, Inc., ("Holiday Tree Farms") to supply approximately 75 workers to Holiday Tree Farms for the harvesting of Christmas trees. A portion of the written contract specified that Holiday Tree Farms would pay Respondent a certain amount of money for each hour worked by "crew he provides." Respondent did supply the workers to Holiday Tree Farms, which paid him at the agreed rate. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1996 Holiday Tree Farms job.

4) At all material times, the headquarters for Holiday Tree Farms was located in Corvallis, Oregon.

5) On or about May 21, 1997, Respondent contracted with Harnisch Farms, Inc., ("Harnisch Farms") to supply workers to Harnisch Farms for the transplanting of rhubarb, and did supply those workers. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1997 Harnisch Farms job.

6) At all material times, the headquarters for Harnisch Farms was located in Albany, Oregon.

7) On or about October 18, 1997, Respondent contracted with Holiday Tree Farms to supply approximately 75 workers to Holiday Tree Farms for the harvesting of Christmas trees. Again, Holiday Tree Farms agreed to pay Respondent a specified amount of money for each hour worked by "crew he provides." Respondent and the

Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1997 Holiday Tree Farms job.

8) On or about November 6, 1998, Respondent contracted with Holiday Tree Farms to supply approximately 75 to 100 workers to Holiday Tree Farms for the harvesting of Christmas trees.

9) Respondent supplied 88 workers (not including himself) to Holiday Tree Farms in November 1998. He received a certain amount of money for each crew member he provided and, in addition, was paid an hourly wage. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1998 Holiday Tree Farms job.

10) ORS 658.440(1)(f) requires any person acting as a farm labor to give each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement that describes certain terms and conditions of employment, including: the terms and conditions of employment, including the approximate length of season or period of employment and its approximate starting and ending dates; the name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor; and the worker's rights and remedies under the worker's compensation laws, the farm and forest labor contractor laws, the Federal Service Contracts Act, the federal and Oregon minimum wage laws, the Oregon wage collection laws, the unemployment compensation laws, and civil rights laws.

11) ORS 658.440(1)(g) requires farm labor contractors to execute written agreements with workers containing certain terms and conditions, including those outlined in the previous Finding. These agreements must be executed at the time of hiring and prior to the worker performing any work for the farm labor contractor.

12) The Agency has developed forms that farm labor contractors may use to fulfill the requirements of ORS 658.440(1)(f) and (g) – Form WH-151 and Form WH-153, respectively. Farm labor contractors may use these forms or may develop their own statements of rights and agreements with workers that contain all the elements of the Agency forms.

13) Respondent did not give any of the workers he supplied to Holiday Tree Farms in November 1998 either Form WH-151 or another document stating the workers' rights, as required by ORS 658.440(1)(f). Respondent did not enter into written agreements with the workers using either Form WH-153 or another document containing all of the elements required by ORS 658.440(1)(g).

14) Respondent believed he was not required to provide statements of rights to workers or enter written agreements with them because he was an employee of Holiday Tree Farms, not "a contractor." He believed that Holiday Tree Farms was responsible for providing these documents.

15) In 1998, Karen Guthrie was a Human Resources employee of Holiday Tree Farms and was responsible for giving employees paperwork to complete. Guthrie did not give statements of rights to the workers supplied by Respondent; nor did she enter into written agreements with them. Guthrie did not give Respondent copies of these documents to give to the workers.

16) Holiday Tree Farms gave Respondent application forms to give to the workers, which he had the workers complete. Those application forms did not include: the approximate length of season or period of employment and its approximate starting and ending dates; the address of Holiday Tree Farms; or a statement of the worker's rights and remedies under the worker's compensation laws, the farm and forest labor contractor laws, the Federal Service Contracts Act, the federal and Oregon minimum

wage laws, the Oregon wage collection laws, the unemployment compensation laws, and civil rights laws.

17) Some documentation related to terms and conditions of work was posted at the Holiday Tree Farms job site in 1988. Respondent testified that the documentation included Form WH-151. One person who worked on the job, however, stated that he never had seen Form WH-151 before an Agency employee showed it to him. Moreover, no other evidence in the record establishes that each worker at Holiday Tree Farms had ready access to whatever information was displayed. The forum finds it unnecessary to make a finding regarding whether Form WH-151 was posted at the job site because, even if it was posted, no evidence establishes that every worker had an opportunity to access the form and review the information it contained.

18) On April 23, 1999, Respondent filed an application for a farm labor contractor's license.

19) On or about May 10, 1999, Respondent contracted with Harnisch Farms to supply 60 workers to Harnisch Farms for the harvesting of rhubarb, and did supply those workers.

20) Harnisch Farms paid Respondent \$68.00 per hour. Bayless testified persuasively that farm labor contractors commonly receive a base rate of pay, plus a certain amount per hour for each worker they supply. The forum infers that the \$68.00 per hour Respondent received consisted of a base rate of \$8.00 per hour plus \$1.00 per hour for each of the 60 workers Respondent supplied. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1999 Harnisch Farms job.

21) Harnisch Farms paid Respondent as an employee, not as an independent contractor. In a letter to the Agency, Harnisch Farms stated that Respondent had not

provided the company with an Oregon farm labor contractor's license because the company understood that it "was not using him as a contractor."

22) On or about June 16, 1999, Respondent contracted with CEBECO International Seed, Inc., ("CEBECO") to supply approximately 15 workers to CEBECO to rouge¹ a field of rye grass. At all material times herein, the principal office for CEBECO was located in Halsey, Oregon.

23) Respondent did supply the workers to CEBECO, which paid him at an agreed rate for the workers' services. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the CEBECO job.

24) Respondent entered into written agreements with the workers he provided to CEBECO using Spanish-language form WH-153S and gave them written statements of their rights using Spanish-language form WH-151S.

25) At some point, a dispute arose between Respondent and CEBECO regarding which of them was responsible for obtaining workers' compensation coverage for the workers Respondent supplied to CEBECO.

26) From 1996 through 1999, Respondent suffered some financial hardship as a result of losing his farm labor contractor's license and the need to pay debts to the Internal Revenue Service and other government agencies. Respondent acted as a farm labor contractor from 1996 through 1999 -- even though he knew that he did not have a license -- at least in part to alleviate this financial hardship.

27) No evidence in the record suggests that any worker suffered a loss in pay or other harm because of Respondent's failure to supply statements of rights to the workers or to enter into written contracts with them.

ULTIMATE FINDINGS OF FACT

1) The commissioner denied Respondent's application for renewal of his farm labor contractor's license on March 14, 1996, and prohibited him from applying for

a new license for three years. Respondent has not had a farm labor contractor's license since March 14, 1996.

2) Respondent supplied workers to Holiday Tree Farms in November 1996 for the harvesting of Christmas trees and, in doing so, acted as a farm labor contractor.

3) Respondent supplied workers to Harnisch Farms in May 1997 for the transplanting of rhubarb and, in doing so, acted as a farm labor contractor.

4) Respondent supplied workers to Holiday Tree Farms in November 1997 for the harvesting of Christmas trees and, in doing so, acted as a farm labor contractor.

5) Respondent supplied Holiday Tree Farms with 88 workers in November 1998, plus himself, for the harvesting of Christmas trees and, in doing so, acted as a farm labor contractor.

6) Respondent supplied workers to Harnisch Farms in May 1999 for the harvesting of rhubarb and, in doing so, acted as a farm labor contractor.

7) Respondent supplied workers to CEBECO in June 1999 for the rouging of a field of rye grass and, in doing so, acted as a farm labor contractor.

8) Each time Respondent supplied workers to farmers from November 1996 through June 1999, he did so with full knowledge that he no longer had a farm labor contractor's license.

9) Respondent did not furnish any of the 88 workers on the 1998 Holiday Tree Farms contract, at the time of hiring, recruiting, soliciting or supplying, a written statement of workers' rights that included all statutorily required information.

10) Respondent did not execute Form WH-153 or any written agreement incorporating the statutorily required information with any of the 88 workers on the 1998 Holiday Tree Farms contract, at the time of hiring and prior to the worker performing work on the contract.

11) Respondent knew or should have known that he was legally required to supply workers with written statements of their rights and to execute written agreements with them. Respondent's failure to take these actions was willful.

12) Respondent's repeated violations of ORS 658.410(1), 658.440(1)(f), and 658.440(1)(g) demonstrate that his character, competence and reliability make him unfit to act as a farm labor contractor.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over this matter and Respondent pursuant to ORS 658.407 and ORS 658.501.

2) ORS 658.405 provides, in pertinent part:

"Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers to gather evergreen boughs, yew bark, bear grass, salal or ferns from public lands for sale or market prior to processing or manufacture; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who, in connection with the recruitment or employment of workers to work in these activities, furnishes board or lodging for such workers; or who bids or submits prices on contract offers for those activities; or who enters into a subcontract with another for any of those activities. * * *

OAR 839-015-0004 provides, in pertinent part:

"(3) 'Farm labor contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products;

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products * * *

Respondent acted as a farm labor contractor on six occasions between November 1996 and June 1999: by supplying workers to Holiday Tree Farms for Christmas tree harvesting in 1996, 1997, and 1998; by supplying workers to Harnisch Farms in 1997 for rhubarb transplanting and in 1999 for rhubarb harvesting; and by supplying workers to CEBECO in 1999 for the purpose of rouging a field of rye grass.

3) ORS 658.410(1) provides, in pertinent part:

"Except as provided by ORS 658.425, no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

Respondent committed six violations of ORS 658.410(1) by acting as a farm labor contractor on the six occasions described above, when he did not have a valid farm labor contractor's license.

4) ORS 658.440(1) provides, in pertinent part:

"Each person acting as a farm labor contractor shall:

"* * * * *

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with the workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and child care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner."

OAR 839-015-0310 provides:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights Laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever comes first.

"(3) The commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

Respondent committed 88 violations of ORS 658.440(1)(f) and OAR 839-015-0310 by failing to furnish 88 workers on the 1998 Holiday Tree Farms contract with a written statement of rights containing all the statutorily required information.

5) ORS 658.440(1) also provides, in pertinent part:

"Each person acting as a farm labor contractor shall:

"* * * * *

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

OAR 839-015-0360 provides:

"(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers."

Respondent committed 88 violations of ORS 658.440(1)(g) and OAR 839-015-360(4) by failing to execute written agreements with the 88 workers on the 1998 Holiday Tree Farms contract at the time of hiring and prior to the workers performing work on that contract.

6) The Commissioner of the Bureau of Labor and Industries has the authority to assess a civil penalty not exceeding \$2000.00 against Respondent for each of the violations. ORS 658.453(1)(a), (c), OAR 839-015-0508(1)(a), (g), (h).

7) With regard to the magnitude of the penalties for violations of ORS 658.410(1), OAR 839-015-0512 provides, in pertinent part:

"(2) For purposes of this rule, 'repeated violations' means violations of a provision of law or rule which have been violated on more than one contract within two years of the date of the most recent violation.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first violation;

"(b) \$1,000 for the first repeated violation;

"(c) \$2,000 for the second and each subsequent repeated violation."

Respondent first violated ORS 658.410(1) when he supplied workers to Holiday Tree Farms in 1996. The commissioner appropriately has assessed a \$500.00 penalty for that first violation, as ordered below. Respondent's second violation of the statute occurred when he supplied workers to Harnisch Farms in 1997. The commissioner appropriately has exercised his authority by assessing a \$1000.00 penalty for that first repeated violation, as ordered below. For each of the remaining four repeat violations of ORS 658.410(1), the commissioner appropriately has exercised his authority by assessing civil penalties of \$2000.00.

8) Civil penalties for Respondent's violations of ORS 658.440(1)(f) and (g) are governed by OAR 839-015-0510, which provides:

"(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

The commissioner has appropriately exercised his authority in imposing a \$250.00 penalty for each of the 176 violations of ORS 658.440(1)(f) and (g), as ordered below.

9) ORS 658.445 provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries may revoke, suspend or refuse to renew a license to act as a labor contractor upon the commissioner's own motion or upon complaint by any individual, if:

"* * * * *

"(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

OAR 839-015-0520 provides, in pertinent part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny or refuse to renew a license application or to suspend or revoke a license:

"* * * * *

"(i) Acting as a farm or forest labor contractor without a license.

"* * * * *

"(3) The following actions of a farm or forest labor contractor license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a farm or forest labor contractor:

"(a) Violations of any section of ORS 658.405 to 658.485[.]"

Respondent's repeated violations of ORS 658.410(1), 658.440(1)(f), and 658.440(1)(g) demonstrate that Respondent's character, competence and reliability make him unfit to act as a farm labor contractor.

10) OAR 839-015-0520(4) provides:

"(4) When a farm or forest labor contractor's license application is denied or a license is revoked or when the commissioner refuses to renew a license, the commissioner will not issue the applicant or licensee a license for a period of three (3) years from the date of the denial, refusal to renew or revocation of the license."

Under the facts of this case, the commissioner has authority to deny Respondent's application for a farm labor contractor's license. Denial of Respondent's application for a farm labor contractor's license as specified in the order below is an appropriate exercise of that authority.

OPINION

ACTING AS A FARM LABOR CONTRACTOR WITHOUT A FARM LABOR CONTRACTOR'S LICENSE

A The Alleged Violations

ORS 658.410(1) prohibits people from acting as farm labor contractors unless they are licensed. A person who supplies farm workers to another person acts as a farm labor contractor if he or she either: 1) supplies the workers "for an agreed remuneration or rate of pay" to work in the production or harvesting of farm products; or 2) supplies the workers "on behalf of an employer engaged in" the production or harvesting of farm products. A person supplies farm workers "on behalf of an employer" if he or she acts as the employer's agent when supplying the workers. *In the Matter of Thomas L. Fery*, 18 BOLI 220, 235-36 (1999).

In this case, the participants agree that Respondent has not had a farm labor contractor's license since March 14, 1996. They also stipulated that, on six occasions after that date, he acted as a farm labor contractor. The evidence in the record, as set forth in the Findings of Fact, supports that stipulation.

B Civil Penalties

OAR 839-015-0512 provides that the minimum penalties for acting as a farm labor contractor without a license are \$500.00 for the first violation, \$1000.00 for the first repeat violation, and \$2000.00 for each subsequent violation. The forum has assessed penalties in accordance with this rule as follows: for the 1996 Holiday Tree Farms job, \$500.00; for the 1997 Harnisch Farms job, \$1000.00; for the 1997 Holiday Tree Farms

job, \$2000.00; for the 1998 Holiday Tree Farms job, \$2000.00; for the 1999 Harnisch Farms job, \$2000.00; for the 1999 CEBECO job, \$2000.00. Thus, the penalties for Respondent's six violations of ORS 658.410(1) total \$9500.00.

RESPONDENT UNLAWFULLY FAILED TO EXECUTE WRITTEN AGREEMENTS WITH 88 WORKERS ON THE 1998 HOLIDAY TREE FARMS CONTRACT OR TO PROVIDE THEM WITH WRITTEN STATEMENTS OF THEIR RIGHTS

A The Alleged Violations

ORS 658.440(1)(f) requires any person acting as a farm labor contractor to furnish each worker with a written statement of certain rights. Respondent did not provide any of the 88 workers on the 1998 Holiday Tree Farm contract with a written statement of rights that included all statutorily required information. The Holiday Tree Farms application forms the workers completed did not incorporate some of the most important required information, including the explanation of the workers' rights under the civil rights, wage and hour, worker's compensation, and farm labor laws. Respondent also failed to provide any of the 88 workers with written agreements of any sort, much less agreements including all the information required by ORS 658.440(1)(g).

Respondent testified credibly that he believed he was not required to give the workers these documents because he was an employee of Holiday Tree Farms and, therefore, did not feel he was acting as a "contractor." Inclusion of the word "contractor" in the term "farm labor contractor" is unfortunate, given that a person qualifies as a "farm labor contractor" by engaging in certain activities, including the supplying of farm workers under specified circumstances, whether the person acts as a "independent contractor" of the farm or as its employee. A person not familiar with the detailed statutory definition of "farm labor contractor" could easily, but mistakenly, assume that it covered only independent contractors. Nonetheless, the statutory language is clear – a person acts as a farm labor contractor when he or she supplies farm workers to another

either as that other's agent or for an agreed remuneration or rate of pay, whether or not the person is the other's employee. Respondent was obliged to understand the laws regulating the business in which he was engaged, including the statutory definition of "farm labor contractor." That obligation was heightened by the fact that he had been a licensed farm labor contractor for approximately 10 years.

B Civil Penalties

In considering the appropriate magnitude of the penalties for Respondent's 176 violations of ORS 658.440(1)(f) and (g) on the 1998 Holiday Tree Farm contract, this forum must consider aggravating and mitigating factors, including "the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule" (839-015-0510(3)) and:

- "(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;
- "(b) Prior violations, if any, of statutes or rules;
- "(c) The magnitude and seriousness of the violation;
- "(d) Whether the contractor or other person knew or should have known of the violation."

OAR 839-015-0510(1).

Respondent was a licensed farm labor contractor for many years and had a duty to understand his obligation to provide the laborers on the 1998 Holiday Tree Farm contract with statements of their rights and to execute written agreements with those workers. Respondent had the ability to provide those documents, as evidenced by the fact that he did provide them to the workers on the CEBECO contract. As explained in two recent cases, this forum considers violations of ORS 658.440(1)(f) and (g) to be very serious. See *In the Matter of Thomas L. Fery*, 18 BOLI 220, 238-40 (1999); *In the Matter of Paul A. Washburn*, 17 BOLI 212, 222-25 (1998). Moreover, these violations

are aggravated by Respondent's previous violations of ORS 658.410(1) in 1996 and 1997. These factors weigh in favor of a heavy penalty against Respondent.

On the side of mitigation, the forum notes that there is no evidence in the record that any person suffered a monetary loss as a result of Respondent's many violations of the farm labor contracting statutes. There are, however, no other mitigating circumstances. Even if Form WH-151 was posted at the job site, that would not mitigate the severity of the violations because there is no evidence that each of the 88 workers had ready access to the posted form and an opportunity to review its contents.

In *Fery*, this forum imposed civil penalties of \$500.00 for each of ten violations of ORS 658.440(1)(f) where the respondent used an employee handbook that contained some of the statutorily required information, cooperated with the Agency's investigation, had no previous violations on his record, and intended to comply fully with the Agency in the future. 18 BOLI at 239. In the same case, the forum imposed penalties of \$750.00 for each of ten violations of ORS 658.440(1)(g); the penalties were higher for those violations because Respondent had provided no written agreement to the workers. *Id.* at 240.

Respondent's violations of ORS 658.440(1) are more severe than were the respondent's in *Fery* because of Respondent's other statutory violations. In addition, the application form given to the workers on the 1998 Holiday Tree Farm contract is not comparable to the employee handbook the *Fery* respondent gave his workers. If the forum were to consider only the appropriate magnitude of the penalty for each violation, it would impose a civil penalty of \$1000.00 for each of Respondent's 176 violations of ORS 658.440(1)(f) and (g), as the ALJ suggested in the Proposed Order.²

The commissioner, however, has discretion to determine not only the proper penalty per violation, but also whether the cumulative amount of penalties imposed is

appropriate. In a case involving many violations, the commissioner may determine that the penalty per violation should be reduced so that the *total* penalty is proportionate to the seriousness of the respondent's offense where:

- 1) Many violations are associated with a single farm labor contract;
- 2) The violations involve breaches of only one statutory requirement or only a few related requirements; and
- 3) There is no evidence that any worker suffered a loss of wages or other harm.

In this case, Respondent's 176 violations of ORS 658.440(1) were associated with a single farm labor contract, involved only two related types of misdeeds,³ and there is no evidence that any worker suffered a loss of wages or other harm. The commissioner finds that a total penalty of \$176,000.00 for these violations is excessive and, therefore, orders that Respondent pay only a \$250.00 penalty for each of the 176 violations of ORS 658.440(1)(f) and (g), for a total of \$44,000.00.

RESPONDENT'S EXCEPTIONS

In his exceptions, Respondent asserts that he did not believe he was required to supply statements of rights and written agreements to workers on the 1998 Holiday Tree Farms contract because he, too, was an employee of Holiday Tree Farms. As explained in the Opinion section of this Order, Respondent's belief was mistaken. A person may fall within the definition of a farm labor contractor even if he is employed by the farm to which he supplies workers and is not an independent contractor.

Respondent also claims that Form WH-151 was posted at the Holiday Tree Farms job site in 1998. The forum has added new Finding of Fact -- The Merits 17 and expanded its discussion of the civil penalties imposed to explain why it does not consider the posting of information to be a mitigating factor in this case.

In his next exception, Respondent asserts that in 1997, a BOLI employee named Hernandez told him that "it" was "ok [as] long as I was a worker and not making payroll."

No evidence in the record supports this claim, which, in any event, is far too vague to support a claim of estoppel, assuming that to be the point of Respondent's assertion.

Respondent asserts that he did not understand all of the English that was spoken during the hearing. That may be true, and that is the reason the forum supplied a certified and qualified Spanish interpreter, who translated the entire proceedings for Respondent's benefit. Respondent also claims he did not understand some of what was said even after it was translated into Spanish. The few times that Respondent asked for clarification during the hearing, it was given, and the forum has no reason to believe that Respondent did not understand the proceedings. Respondent's complaint comes too late for any relief to be granted, and the exception is denied.

Finally, Respondent argues that the penalties the ALJ proposed are excessive. In support of that argument, he discusses a settlement offer purportedly made by the Agency. The forum has disregarded Respondent's assertions regarding the settlement offer, which it deems irrelevant to its determination of appropriate penalties in this case.

However, as discussed above, the commissioner agrees that the ALJ's proposed penalty of \$1000.00 for each violation of ORS 658.440(1) is excessive. The commissioner has lowered the penalty for each of those 176 violations to \$250.00.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for his violations of ORS 658.410(1), ORS 658.440(1)(f) and ORS 658.440(1)(g), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Tomas Benitez** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, #32, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIFTY-THREE THOUSAND FIVE HUNDRED DOLLARS (\$53,500.00), plus any interest thereon that

accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order.

FURTHERMORE, as a result of his finding that Respondent's character, competence and reliability make him unfit to be a farm labor contractor, the commissioner orders that Respondent's application for a farm labor contractor's license is DENIED.

¹ "Rouging" involves removing undesirable strains of grass from a field planted with grass grown for seed.

² See also *Washburn*, 17 BOLI at 225-26 (imposing \$750 penalty for each violation of ORS 658.440(1)(g) where aggravating factors were present but the respondents had no previous violations); *In the Matter of Manuel Galan*, 15 BOLI 106, 138 (1996) (assessing \$1000.00 penalty for each of 14 violations of ORS 658.440(1)(f) and \$2000.00 penalty for each of 14 violations of ORS 658.440(1)(g) where no mitigating factors were found), *aff'd without opinion, Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, *rev den* 326 Or 57, 944 P2d 947 (1997).

³ Respondent committed 88 violations of ORS 658.440(1)(f) by failing to provide each of 88 workers with statements of rights and 88 violations of ORS 658.440(1)(g) by failing to enter into written agreements with those workers.