

In the Matter of
ANDRES V. BERMUDEZ,
dba Bermudez Brothers, Respondent.

Case Number 01-98
Final Order of the Commissioner
Jack Roberts
Issued January 23, 1998.

SYNOPSIS

Where an unlicensed person bid for and obtained a USFS contract to apply big game repellent and entered into a subcontract with respondent (a licensed farm labor contractor) to perform this contract; where the unlicensed person took these actions before a rule change that made the application of big game repellent an activity that required a farm labor contractor license; and where respondent provided the workers and performed the contract before and after the rule change, the commissioner held that the unlicensed person was not a farm labor contractor within the definition of ORS 658.405(1) and OAR 839-15-004 (4), and therefore respondent did not assist the person to act as a farm labor contractor without a license when respondent performed the subcontract in part after the rule change. ORS 658.405(1); *former* OAR 839-15-004 (4) and (8)(c), 839-15-125. Where respondent failed to furnish 41 employees with a written statement of the terms and conditions of employment as required by ORS 658.440(1)(f), and where respondent failed to execute written agreements with the 41 employees as required by ORS 658.440 (1)(g), the commissioner found 41 violations of ORS 658.440(1)(f) and 41 violations of ORS 658.440(1)(g). The commissioner assessed respondent a civil penalty of \$20,500, pursuant to ORS 658.453(1), for the 82 violations. ORS 658.440(1)(f) and (g), 658.453 (1); OAR 839-015-0310, 839-015- 0360,

and 839-015-0505 to 839-015- 0512.

The above-entitled contested case came on regularly for hearing before Administrative Law Judge (ALJ) Douglas A. McKean. The hearing was held on November 18, 1997, in the hearings room of the Oregon State Employment Department, 119 North Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Andres Bermudez (Respondent) represented himself.

The Agency called the following witnesses: Susan Dix, administrative specialist in the Wage and Hour Division of the Agency; Maria Gonzalez, United States Forest Service (USFS) contracting officer; Dan Parazoo, USFS contracting officer; Raul Ramirez, compliance specialist in the Farm Labor Unit of the Agency; and Dottie Williams, administrative specialist in the Farm Labor Unit of the Agency.

Respondent called the following witnesses: himself; Rubin Garcia, Respondent's bookkeeper; Jose Trinidad Ramirez, Respondent's employee; and Guadalupe Valero, Respondent's employee.

Administrative exhibits X-1 to X-21, Agency exhibits A-1 to A-15, and Respondent exhibit R-1 were offered and received into evidence. The record closed on November 18, 1997.

Manuela Marney, appointed by the forum and under proper affirmation, acted as an interpreter for witnesses Jose Trinidad Ramirez and Guadalupe Valero called by Respondent.

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 June 13, 1997, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondent. The Agency alleged that (1) Respondent assisted an unlicensed person (Richard Cole) to act in violation of the farm labor contractor law, in violation of ORS 658.440(3)(e); (2) Respondent failed to furnish 41 workers with a written statement disclosing the workers' rights and remedies, in violation of ORS 658.440(1)(f) and OAR 839-015-0310; and (3) Respondent failed to execute a written agreement with each of 41 workers at the time of hiring and prior to the worker performing any work, in violation of ORS 658.440(1)(g) and OAR 839-015- 0360. The Agency sought a civil penalty of \$2,000 for the alleged violation of ORS 658.440(3)(e), \$20,500 for 41 alleged violations of ORS 658.440(1)(f) and OAR 839-015-0310, and \$20,500 for 41 alleged violations of ORS 658.440(1)(g) and OAR 839-015- 0360. In addition, the Agency alleged aggravating circumstances under OAR 839-015-0510. The notice was served on Respondent's bookkeeper, Rubin Garcia.

2) By a letter dated June 30, 1997, Respondent requested a hearing on the Agency's intended action and denied each allegation.

3) On July 7, 1997, the Agency requested a hearing from the Hearings Unit. On July 15, 1997, the ALJ issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-050-0000 through 839-050-0440.

4) On July 22, 1997, the ALJ issued a discovery order to the participants directing them each to submit a summary of the case according to the provisions of OAR 839-050-0200 and 839-050-0210. The Agency and Respondent each submitted a timely summary. The Agency submitted addenda.

5) On July 24, 1997, the Agency filed a motion to amend the Notice of Intent to change the caption of the notice to read as it does in this order and to correct a contract number. The ALJ notified Respondent of the motion and set a response deadline. Respondent did not respond. The ALJ granted the motion and gave Respondent until August 15, 1997, to submit an amended answer. Respondent did not do so.

6) On August 4, 1997, Respondent asked the ALJ to change the location of the hearing from Salem to Medford because all of his witnesses resided in the Medford area. The Agency did not object. The ALJ granted the motion and issued an Amended Notice of Hearing.

7) On August 22, 1997, the Agency requested a discovery order directing Respondent to produce the originals of various WH-151 and WH-153 forms at the hearing. Respondent did not respond to the motion and the ALJ granted it.

8) On September 9, 1997, Respondent requested a postponement of the hearing because he had to travel to Mexico to be with a relative who had emergency surgery. The Agency did not object and the ALJ granted the motion. Following a conference call with the participants, the ALJ reset the hearing for November 18, 1997.

9) At the start of the hearing, the ALJ reviewed the "Notice of Contested Case Rights and Procedures" with Respondent and the ALJ explained these rights and procedures to him.

10) Pursuant to ORS 183.415(7), the ALJ orally advised the Agency and

Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On December 15, 1997, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Respondent, a natural person, was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with a forestation indorsement. At times he did business as Bermudez Brothers.

2) In early 1994, Agency Compliance Specialist Raul Ramirez met Respondent during a compliance inspection. Ramirez explained to Respondent and his bookkeeper, Rubin Garcia, the requirements of ORS 658.440, and specifically that form WH-151 (Rights of Workers) and form WH-153 (Agreement Between Contractor and Workers) must be furnished and executed, respectively, before work on a contract begins.

3) On February 7, 1996, the Deschutes National Forest issued a contract solicitation (number R6-1-96- 108) for application of big game repellent (BGR).¹ Work on the contract was to be performed at two times, in the spring and in the fall of 1996.

4) On March 7, 1996, Richard Cole made an offer to perform this contract. During all times material, Cole was not licensed by the Commissioner as a farm labor contractor.

5) On March 15, 1996, Cole signed the following statement:
"I, Richard D. Cole in pursuance with U.S. Forest Service contract #R6-1-96-108 agrees to pay Bermudez Bros. an amount equal to all expenses incurred by Bermudez [sic] Bros., including, BGR, wages, fuel for transportation, boarding for employees, vehicles, and all other miscellaneous items, including spray bottles and mixing tools. Upon

receiving all receipts for aforementioned expenses, Richard C. Cole will compensate Bermudez Bros. providing they do not exceed the bid amount, for those expenses incurred."

6) On March 19, 1996, Respondent signed the following statement:
"Bermudez Bros. will be responsible for all supplies and services and will perform all of the duties as stated under U.S. Forest Service contract number R6-1-96-108 for the amount of \$9.75 per acre or less. Any loss or liability will be the sole responsibility of Bermudez Bros."

7) Richard Cole was awarded USFS contract number 53-04GG-6- 1080. Cole and Respondent entered into an agreement for Respondent to perform the duties of USFS contract number 53-04GG-6-1080.

8) CO Gonzalez received no notice from Cole that he had subcontracted the work on contract number 53-04GG-6-1080 to Respondent.

9) Cole twice designated Fortunato (Nato) Chavez as his representative for the contract, in Cole's absence. Chavez was Respondent's employee.

10) On April 8, 1996, Respondent's crew began work on the contract with 12 applicators and two foremen (Cole and Chavez). They worked again on April 9, 10, 12, 13, 15, 16, 17, 18, and 19, 1996, with a 12 to 15 person crew and the same foremen. On April 22, 1996, work stopped for the spring.

11) On May 30, 1996, the administrator of the Wage and Hour Division of the Agency issued a notice to "Interested Parties" announcing the adoption of rules related to farm and forest labor contractors. The notice stated that, effective July 1, 1996, administrative rules were amended to add several forestation and reforestation activities that required a license to perform. Among the added activities was "Application of big game repellent by contract crew." The notice said, "**Contractors performing these activities will be required to obtain a farm/ forest labor contractor's license as of July 1, 1996.**" (Emphasis original.)

12) Beginning on July 1, 1996, Oregon law required farm labor contractors to

have a license with a forestation indorsement to apply big game repellent with a contract crew.

13) Work on the contract was completed in September 1996. The USFS made payments on the contract to Cole. He in turn paid Respondent for his expenses per their subcontract. Respondent lost money on the deal.

14) Respondent submitted a payroll report to the Agency for the period September 15 to October 5, 1996. The report listed 16 workers including "Fortunato Chavez." The work classification for all employees was "weeding." It showed that the work was done on Forest Service land located near Bend, but there was no contract number. A handwritten timecard, marked "Bend Spray," shows six employees (including Fortunato Chavez) working on September 19, 20, and 21 (marked "1st Week") and 15 employees (including Chavez) working from September 23 to 28 (marked "2nd Week") and from September 29 to October 1, 1996 (marked "3rd Week"). "Cole" is written at the top of the timecard with a telephone number. The timecard shows workers employed by Respondent to perform the subcontract he had with Cole.

15) Around November 4, 1996, Respondent was awarded USFS contract number 53-04GG-7-4012 (hereinafter contract #4012) to process nursery stock at the Bend Pine Nursery. The work involved lifting ponderosa pine seedlings from seed beds in fields, placing them in coolers, and then sorting, grading, and packing them in a shed or warehouse.

16) In the afternoon of February 24, 1997, Respondent's employees began work on the contract. A crew of 19 employees began lifting seedlings. Beginning around 8 a.m. on February 25, 1997, Respondent had 41 employees lifting seedlings in the fields and working in the packing shed. Respondent's employees worked through March 7, 1997, when they completed the contract. The number of employees working each

day ranged from 17 to 47. The quality of their work was very good. USFS Contracting Officer Parazoo received no labor complaints against Respondent.

17) Most of the 19 employees who worked on February 24, 1997, came with Respondent from work on a USFS contract in California. The rate of pay on the California contract was the same as that on contract #4012. On both contracts, Respondent paid half of the workers' hotel bills while they worked. Some workers who began work on February 25 came from the Medford area. Some of the workers had worked for Respondent for many years.

18) On February 25, 1997, compliance specialist Raul Ramirez inspected the Bend Pine Nursery. He talked with Respondent and workers in the warehouse regarding Forms WH-151 (Rights of Workers) and WH-153 (Agreement Between Contractor and Workers).² Before Ramirez had arrived, none of Respondent's employees had signed the WH-151 or WH-153 forms. No worker signed or received copies of the forms before he or she started work. Respondent showed Ramirez the application packet Respondent gives to new employees. The packet contained an employment application, an I-9 form, a W-2 form, and the WH-151 and WH-153 forms. Respondent told Ramirez that the WH-151 and WH-153 forms for this job were at his office in Winters, California. When Ramirez said he would contact Respondent's bookkeeper, Garcia, and ask him to fax copies of the forms to the Bureau's Bend office, Respondent said this was not necessary because he did not have the forms. Ramirez talked to workers. Some said they had signed WH-153 forms, others said they had not. Workers made inconsistent statements about who was supposed to pay for their motel expenses, which is a condition of employment that should be agreed to on the WH-153 form. When Ramirez again talked with him, Respondent said he did not have the WH-151 and WH-153 forms. Ramirez gave Respondent blank WH-151 and WH-153 forms

and showed him a copy of Form WH-87, on which each applicant for a farm labor contractor license certifies that he or she has read and understood the WH-151 and WH-153 forms and will provide the information contained in the forms to workers as required by law. Respondent acknowledged his need to provide and execute the forms. Ramirez told Respondent to fill out the forms and turn them in to the Bureau's Bend office by the next morning.

19) On the morning of February 26, 1997, Respondent brought a stack of WH-151 and WH-153 forms to the Bureau's office. They were original forms (that is, the signatures were in ink and not photocopied). Respondent had had his workers sign the forms the previous evening. At that time, Respondent also had some workers sign another set of WH-151 and WH-153 forms, which he sent to his own office.

20) Jose Trinidad Ramirez and Guadalupe Valero have worked for Respondent for many years. They have had no problem getting paid by Respondent. They think he treats the employees very well. At the time of hearing, Respondent believed he was doing a good job with the forms.

ULTIMATE FINDINGS OF FACT

1) During all times material, Respondent was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with a forestation indorsement.

2) During all times material, Richard Cole was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

3) In March 1996, Richard Cole bid on USFS contract number 53- 04GG-6-1080 to apply big game repellent.

4) In March 1996, Richard Cole entered into a subcontract with Respondent to perform USFS contract number 53-04GG-6-1080.

5) Respondent supplied all employees who performed USFS contract number 53-04GG-6-1080. The employees performed the contract during April and September 1996. Richard Cole was involved in the performance of the contract. He received payments from the Forest Service and paid Respondent pursuant to the subcontract.

6) During all times material, Richard Cole was not a farm/forest labor contractor, as defined by ORS 658.405 (1) and OAR 839-15-004(4) and (8)(c).

7) On February 25, 1997, Respondent failed to furnish 41 of his employees with Agency forms WH-151 (Rights of Workers) and failed to execute WH-153 (Agreement Between Contractor and Workers), or comparable written forms, in English or any other language before the 41 employees started work on a reforestation contract.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.503.

2) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991 (2) and (3), unless the context requires otherwise:

"(1) '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, and clearing, piling and disposal of brush and slash and other related activities * * *; 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."

Former OAR 839-15-004 (BL 2-1996) provided in part:

"As used in these rules, unless the context requires otherwise:

"* * * * *

"(4) 'Forest 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 forestation or reforestation of lands; or

"* * * * *

"(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

"(e) Any person who subcontracts with another for the forestation or reforestation of lands.

"* * * * *

"(8) 'Forestation or reforestation of lands' includes, but is not limited to:

"* * * * *

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land."

OAR 839-015-0004 (BL 5-1996, effective July 1, 1996) provides in part:

"As used in these rules, unless the context requires otherwise:

"* * * * *

"(4) 'Forest 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 forestation or reforestation of lands; or

"* * * * *

"(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

"(e) Any person who subcontracts with another for the forestation or reforestation of lands.

"* * * * *

"(8) 'Forestation or reforestation of lands' includes, but is not limited to:

"* * * * *

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide

application in the forest by contract crew; gopher baiting; gopher trapping and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

"* * * * *

"(23) 'Application of big game repellent by contract crew' means work performed by workers who are recruited, solicited, supplied or employed by a person who has contracted to supply a crew of workers to apply big game repellent." (Emphasis added.)

ORS 658.410(1) provides in part:

"No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

Former OAR 839-15-125 (BL 3-1990) provided in part:

"No person may perform the activities of a Farm or Forest Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. No person may perform the activities of a Forest Labor Contractor * * * without first obtaining a special indorsement from the Bureau authorizing such performance. * * *"

Likewise, OAR 839-015-0125 (BL 5-1996, effective July 1, 1996) provides in part:

"No person may perform the activities of a farm or forest labor contractor without first obtaining a temporary permit or license issued by the bureau. No person may perform the activities of a forest labor contractor * * * without first obtaining a special indorsement from the bureau authorizing such performance. * * *"

Richard Cole was not a farm labor contractor. Because he bid on a big game repellent contract and subcontracted that activity before July 1, 1996, and because he did not employ workers to perform the contract after July 1, 1996, Richard Cole was not acting

as a farm labor contractor with regard to the forestation or reforestation of lands. Accordingly, Richard Cole did not need a farm labor contractor license issued by the commissioner.

3) ORS 658.440 provides in part:

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

" * * * * *

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

Richard Cole was not acting as a farm labor contractor without a license. Thus, Respondent did not assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830 and Respondent did not violate ORS 658.440(3)(e) as alleged.

4) ORS 658.440(1) provides in 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 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 day 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.

"(l) The worker's rights and remedies under ORS chapter 656, ORS 658.405 to 658.485, 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.

"(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 (l) 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 839-015-0310 provides in part:

"(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 occurs 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."

OAR 839-015-0360(4) provides:

"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 violated ORS 658.440 (1)(f) 41 times by failing to provide a written statement as described in subsection (1)(f) to each worker at the time the worker was hired, recruited, solicited, or supplied, whichever occurred first. Respondent also violated ORS 658.440(1)(g) 41 times by failing to execute the written agreement described in subsection (1)(g) with each worker at the time of hiring and prior to the worker performing any work for him.

5) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"* * * * *

"(c) A farm labor contractor who fails to comply with ORS 658.440(1)[.]"

OAR 839-015-0505(2) provides:

"'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-015-0508 provides in part:

"(1) Pursuant to ORS 658.453, the commissioner may impose a civil penalty for violations of any of the following statutes:

"* * * * *

"(g) Failing to furnish each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement that contains the terms and conditions described in ORS 658.440(1)(f);

"(h) Failing to execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in ORS 658.440(1)(f), at the time of hiring and prior to the worker performing any work for the farm labor contractor[.]"

OAR 839-015-0510 provides in part:

"(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."

OAR 839-015-0512 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"* * * * *

"(4) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to OAR 839-015-0510.

"(5) The civil penalties set out in this rule are in addition to any other penalty assessed by law or rule."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.475 and of Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

RESPONDENT DID NOT ASSIST AN UNLICENSED FARM LABOR CONTRACTOR

The Agency alleged that Respondent assisted Richard Cole to act as an unlicensed farm labor contractor by subcontracting with Cole and then performing the contract to apply big game repellent in September 1996, after the law had changed and required a license for that activity. Respondent's defense was that he believed Cole was licensed.

The facts show that application of big game repellent was not an activity that required a license until July 1, 1996. Cole bid on the BGR contract in March 1996, when no license was required for that activity. He entered into a subcontract with Respondent in March 1996, before a license was required to do that. The evidence is uncontradicted that Respondent's employees performed the contract in September 1996. There is no evidence that Cole, for an agreed rate of pay, employed or supplied workers to perform the contract.

The statutory definition of a farm labor contractor includes a person "who enters into a subcontract with another for [forestation and reforestation] activities." ORS 658.405(1). Thus the act that brings a person within the definition of a farm labor contractor is the act of entering into a subcontract. It is not the performance of the subcontract. Here, the act of entering into a subcontract occurred in March 1996, not in September 1996.

The rule definition of a forest labor contractor closely tracks the statutory definition, but the language is slightly different. The rule's definition of a forest labor contractor includes "any person who subcontracts with another for the forestation and reforestation of lands." *Former* OAR 839-15-004(4)(e); OAR 839-015-0004(4)(e). Nothing in the rule's language suggests that a subcontractor's performance of a forestation and reforestation contract is an act that brings the contractor within the

definition. Each subsection of *former* OAR 839-15-004(4) and the current OAR 839-015-0004(4) refers to actions by a person that would bring that person within the definition of a forest labor contractor. No subsection refers to an action by another, such as a subcontractor (Respondent), that would bring the person (Cole) within the definition of a forest labor contractor. The forum will not read the rule to be broader than the statute. *In the Matter of Richard Cole*, 16 BOLI 221, 229 (1997). Thus, under the definition of forest labor contractor in *former* OAR 839-15-004(4)(e) and OAR 839-015-0004(4)(e), the act that brings a person within the definition of a farm labor contractor is the act of entering into a subcontract, not the performance of the subcontract.

Since Cole entered into the subcontract for application of BGR at a time when no license was required to do so (that is, before July 1, 1996), and since he took no action that would make him a farm/forest labor contractor after July 1, 1996, the forum concludes that he did not act as a farm labor contractor without a license.³ *Cole, supra*. Accordingly, Respondent did not violate ORS 658.440(3)(e) as alleged when he performed the subcontract in September 1996.

RESPONDENT FAILED TO FURNISH WORKERS WITH A WRITTEN STATEMENT CONTAINING A DESCRIPTION OF THE TERMS AND CONDITIONS OF EMPLOYMENT AND THE WORKERS' RIGHTS AND REMEDIES

The Agency alleged that Respondent failed to furnish each of 41 employees with a written statement disclosing the worker's rights and remedies, as required by ORS 658.440(1)(f). At hearing, Respondent admitted that he did not give any of his workers a WH-151 until the evening of February 25, 1997. On February 24, 1997, nineteen employees began working on the USFS contract. By the morning of February 25, 1997, forty-one employees were working on the contract. There is no evidence that Respondent gave his workers on this contract any written statement that would be the equivalent of a WH-151 before he gave them the WH-151 on February 25.

ORS 658.440(1)(f) requires a farm labor contractor to 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 workers) that contains a description of the terms and conditions of employment and disclosing the worker's rights and remedies. The commissioner has prepared WH-151 for contractors' use in complying with this requirement. Like the statute, OAR 839-015-0310 requires the farm labor contractor to give the form "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 occurs first."

The evidence proves that Respondent did not comply with the requirements of ORS 658.440(1)(f) or OAR 839-015-0310 with respect to the 41 employees working on February 25, 1997. Thus, Respondent violated the statute and rule 41 times.

RESPONDENT FAILED TO EXECUTE A WRITTEN AGREEMENT BETWEEN EACH WORKER AND HIMSELF CONTAINING A DESCRIPTION OF THE TERMS AND CONDITIONS OF EMPLOYMENT AND THE WORKERS' RIGHTS AND REMEDIES AT THE TIME OF HIRING AND PRIOR TO THE WORKERS PERFORMING ANY WORK FOR RESPONDENT

The Agency alleged that Respondent failed to execute a written agreement with each of 41 employees, as required by ORS 658.440(1)(g). At hearing, Respondent admitted that he did not execute a written agreement with any of his workers until the evening of February 25, 1997. As mentioned above, by the morning of February 25, 1997, forty-one employees were working on the contract.

Pursuant to ORS 658.440(1)(g), each farm labor contractor shall, at "the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agree- ment 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." Likewise, OAR 839-015- 0360(4) requires the farm labor contractor to furnish a copy of the agreement to workers prior to the workers starting work.

The evidence proves that Respondent did not comply with the requirements of ORS 658.440(1)(g) or OAR 839-015-0360(4) with respect to the 41 employees working on February 25, 1997. Thus, Respondent violated this statute and rule 41 times.

Civil Penalties

The Agency proposed to assess civil penalties for (1) Respondent's assisting a person to act as a farm labor contractor without a license, in violation of ORS 658.440(3)(e) (\$2,000 for one violation); (2) Respondent's failure to furnish each of 41 employees with a written statement disclosing the terms and conditions of employment and the worker's rights and remedies, in violation of ORS 658.440(1)(f) (\$20,500 for 41 violations); and (3) Respondent's failure to execute a written agreement disclosing the terms and conditions of employment and the worker's rights and remedies with each of 41 employees, in violation of ORS 658.440(1)(g) (\$20,500 for 41 violations). In addition, the Agency alleged aggravating circumstances regarding the violations of ORS 658.440(1)(f) and (g). At hearing, Respondent admitted his mistake in not taking care of the forms until after the Agency inquired about them, and he presented evidence of mitigating circumstances.

The commissioner may assess a civil penalty not to exceed \$2,000 for each of the violations. ORS 658.453 (1)(c); OAR 839-015-0508(1)(g), (h), and (n). Each violation is a separate and distinct offense. OAR 839-015- 0507.⁴ The commissioner may consider mitigating and aggravating circumstances when determining the amount

of any penalty to be imposed. OAR 839-015-0510(1). It is Respondent's responsibility to provide the commissioner with any mitigating evidence. OAR 839-015-0510(2).

The forum found no violation of ORS 658.440(3)(e) (assisting a person to act as a farm labor contractor without a license), so, of course, there is no penalty based on that allegation.

Regarding the violations of ORS 658.440(1)(f) and (g), the forum finds three aggravating circumstances here. First, Respondent knew of his obligation to comply with ORS 658.440(1)(f) and (g) because (1) he certified in his application for a license that he had read and understood the WH-151 and WH-153 forms and would provide the information contained in the forms to workers as required by law; and (2) an Agency compliance specialist, Raul Ramirez, had advised him and his bookkeeper about these legal requirements before work on this contract began.

Second, Respondent told Mr. Ramirez on February 25, 1997, that he (Respondent) had these forms at his California office for the workers on this USFS contract. This representation to the Agency was false. Respondent told Ramirez the truth only when Ramirez said he'd get the forms from Respondent's California office.

Third, these types of violations are serious because protection of farm labor workers is at the heart of farm labor contractor statutes (ORS 658.405 to 658.503, 658.830, and 658.991), and the written statements furnished to workers and the written agreements executed with workers are keys to the workers being able to protect themselves. *In the Matter of Andres Ivanov*, 11 BOLI 253, 264 (1993); *In the Matter of Highland Reforestation, Inc.*, 4 BOLI 185, 210 (1984). Failure to furnish this information and execute these agreements frustrates the law's purpose of protecting this state's workers. *In the Matter of Highland Reforestation, Inc.*, 4 BOLI at 210. A good example of that is evident in this case, where some workers were uncertain whether Respondent

would pay all or a portion of their motel expenses during their work on the contract. That information is required to be furnished to workers and is required to be in their written agreement with the farm labor contractor. Workers must have such information and such an agreement before they begin working.

The forum also finds mitigating circumstances. First, Respondent took prompt action to correct the violations. He provided documents to the Agency within 24 hours of his conversation with Mr. Ramirez, and apparently he furnished the written statements and executed the written agreements with the workers within at most 48 hours after they had begun work. In addition, there was uncontroverted evidence that Respondent had no prior violations of statutes or rules in many years as a farm labor contractor. Further, there was uncontroverted evidence that some workers, at least, considered Respondent a good employer, and these workers had not had problems with him paying them appropriately. Finally, Respondent indicated his desire to comply with the law in the future and his regret for his past mistakes. He and his bookkeeper, Mr. Garcia, testified to their efforts to comply with the law and their belief that they were currently in compliance.

The Agency requested a civil penalty of \$500 for each of the 82 violations of ORS 658.440(1)(f) and (g). Having fully considered the aggravating and mitigating factors, and having reviewed previous final orders discussing violations of ORS 658.440(1)(f) and (g), including the aggravating and mitigating factors therein, the forum hereby assesses Respondent a \$250 civil penalty for each violation.⁵

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, ANDRES BERMUDEZ is hereby ORDERED to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check

payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWENTY THOUSAND FIVE HUNDRED DOLLARS (\$20,500), plus any interest thereon that accrues at the annual rate of nine per cent between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order. This assessment is the sum of the following civil penalties against Respondent: \$10,250 for 41 violations of ORS 658.440(1)(f) and \$10,250 for 41 violations of ORS 658.440(1)(g).

=====

¹Big game repellent is applied to young trees to prevent deer from eating them.

²Bureau of Labor and Industries forms WH-151 and WH-153 are written in English. The same forms written in Spanish are numbered WH-151s and WH-153s. Unless otherwise noted, any reference in this Order to forms WH-151 and WH-153 is to be read to include forms WH-151s and WH-153s.

³Compare *In the Matter of Manuel Galan*, 16 BOLI 51 (1997) (where an unlicensed person bid on and obtained a contract to apply herbicide before OAR 839-15-004(8) changed (*i.e.*, before July 1, 1996), but then recruited workers to perform the forestation contract after the rule-change became effective, the person acted as a farm labor contractor without a license in violation of ORS 658.410(1) and 658.417(1)).

⁴See *In the Matter of Andres Ivanov*, 11 BOLI 253, 263 (1993) (where a farm labor contractor failed to furnish each of four workers forms WH-151 and WH-153, the commissioner found four violations of ORS 658.440(1)(f)); *In the Matter of*

Manuel Galan, 15 BOLI 106, 124, 127 (1996) (where corporation's foreman recruited and did not furnish 14 workers with a written description of the terms and conditions of the employment and did not execute written agreements with them, the commissioner held that the corporation violated ORS 658.440(1)(f) 14 times and ORS 658.440(1)(g) 14 times); *In the Matter of Stancil Jones*, 9 BOLI 233, 239 (1991) (where respondent failed to furnish workers with written agreements and statements of rights, such failure is a violation of ORS 658.440(1)(f) "as to each worker involved."); *In the Matter of Francis Kau*, 7 BOLI 45, 53 (1987) (contractor's failure to furnish a written statement to at least four workers constitutes four violations of ORS 658.440(1)(f)); *In the Matter of Jose Solis*, 5 BOLI 180, 202 (1986) (failure to furnish each of six workers the written statement required by ORS 658.440(1)(f) constitutes six violations of that statute, for purposes of ORS 658.453(1)(c)). *But see In the Matter of Jefty Bolden*, 13 BOLI 292, 297-98 (1994) (where on two contracts a farm labor contractor failed to furnish up to eight workers on one contract and up to 13 workers on the other contract the written statement required by ORS 658.440(1)(f), the commissioner held that respondent violated ORS 658.440 (1)(f) two times).

⁵See *In the Matter of Manuel Galan*, 15 BOLI 106, 124, 127, 138 (1996) (\$14,000 in civil penalties for 14 violations of ORS 658.440(1)(f) and \$28,000 for 14 violations of ORS 658.440(1)(g)); *In the Matter of Jefty Bolden*, 13 BOLI 292, 297-98 (1994) (\$800 in civil penalties for two violations of ORS 658.440(1)(f), \$300 for the first violation and \$500 for the second; and \$800 in civil penalties for two violations of ORS 658.440(1)(g), \$300 for the first violation and \$500 for the second); *In the Matter of Andres Ivanov*, 11 BOLI 253, 259-60, 263-64 (1993) (\$1,000 in civil penalties for four violations of ORS 658.440(1)(f)); *In the Matter of Francis Kau*, 7

BOLI 45, 53, 55 (1987) (\$500 in civil penalties for four violations of ORS 658.440(1)(f)); and *In the Matter of Jose Solis*, 5 BOLI 180, 202 (1986) (\$2,000 in civil penalties for six violations of ORS 658.440(1)(f)).