

In the Matter of
RICHARD COLE,
Respondent.

Case Number 03-98
Final Order of the Commissioner
Jack Roberts
Issued December 10, 1997.

SYNOPSIS

Where respondent bid for and obtained a USFS contract to apply big game repellent and entered into a subcontract with another to perform this contract; and where respondent 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 the licensed subcontractor provided the workers and performed the contract before and after the rule change; the commissioner held that respondent was not a farm labor contractor within the definition of ORS 658.405(1) and OAR 839-15-004(4) and therefore did not act as a farm labor contractor without a license when the contract was completed after the rule change. ORS 658.405(1), 658.410(1), 658.417(1), 658.453(1), OAR 839-15-004(4) and (8)(c), 839-15-125.

The above-entitled contested case came on regularly for hearing before Administrative Law Judge (ALJ) Douglas A. McKean. The hearing was held by telephone on September 9, 1997.

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

The Agency called the following witnesses: Maria Gonzalez, United States Forest Service (USFS) Contracting Officer; and Shirley Barshaw, supervisor of the Licensing Unit of the Agency. Respondent testified on his own behalf.

Administrative exhibits X-1 to X-11 and Agency exhibits A-1 to A-12 were offered and received into evidence. The record closed on September 9, 1997.

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 Respondent acted as a farm labor contractor with regard to the forestation or reforestation of lands without a valid Farm Labor Contractor's License or Forestation Indorsement, in violation of ORS 658.410, and 658.417(1), and OAR 839-15-125. The Agency sought a civil penalty of \$2,000 for this one violation. The notice was served on Respondent on July 2, 1997.

2) By a letter dated July 21, 1997, Respondent requested a hearing and submitted an answer and two documents.

3) On July 28, 1997, the Agency requested a hearing from the Hearings Unit. On July 31, 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 31, 1997, the ALJ issued a discovery order to the participants directing each of them to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050- 0200 and 839-050-0210. The summaries were due by August 29, 1997. The order advised the participants of the sanctions, pursuant to OAR 839- 050-0200(8), for failure to submit the summary. The Agency submitted a timely summary and an addendum.

5) On August 7, 1997, the Agency filed a motion to amend the Notice of Intent to make a correction and add a new factual allegation as an alternative basis for the proposed civil penalty. In addition, the Agency moved for a telephone hearing. During a conference call among the ALJ, Respondent, and the Agency case presenter, Respon- dent did not object to the motion to amend. The ALJ granted the motion and gave Respondent until August 25, 1997, to submit an amended answer. Respondent did not do so. Respondent initially objected to the motion to hold the hearing by telephone. However, during the conference call he withdrew this objection and the ALJ granted the motion.

6) At the start of the hearing, Respondent said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

8) On November 17, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. The Hearings Unit

received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Respondent, a natural person, was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

2) On February 7, 1996, the Deschutes National Forest issued a contract solicitation (number R6-1-96- 108) for the 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.

3) On March 7, 1996, Respondent made an offer to perform this contract.

4) On March 15, 1996, Respondent 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 Burmudez [*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."

5) On March 19, 1996, Andrez Bermudez 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."

6) Respondent and Andrez Bermudez entered into an agreement for Bermudez to perform the duties of USFS contract number 53-04GG-6- 1080.

7) Andrez Bermudez had a valid farm labor contractor's license with a forestation indorsement during the performance of USFS contract number 53-04GG-6-1080.

8) At the request of the USFS, on March 19, 1996, Respondent reviewed and verified in writing his bid price.

9) Respondent Richard Cole was awarded USFS contract number 53-04GG-6-1080. Richard Cole was the contractor on USFS contract number 53-04GG-6-1080.

10) On March 26, 1996, USFS Contracting Officer (CO) Maria D. Gonzalez awarded contract number 53-04GG-6-1080 to Respondent. The contract was based on solicitation number R6-1-96-108.

11) USFS contract number 53-04GG-6-1080 required, among other things, that Respondent promptly notify the Contracting Officer upon entering into any subcontract agreement. The written notification had to include at least the name, address, and telephone number of the subcontractor, the date the subcontract was entered into and its duration, a detailed description of the work being subcontracted, and documentation of the subcontractor's representative authority. In addition, the contract required Respondent to obtain all necessary federal, state, and municipal licenses and permits applicable to the performance of the contract. USFS usually lets contractors know what licenses and permits they need. At the time the contract was awarded, only a repellent applicator's license was required.

12) CO Gonzalez received no notice from Respondent that he had subcontracted work to Andrez Bermudez. She did not know that Bermudez would perform work on the contract in September 1996. Respondent never gave Gonzalez or the USFS a copy of his subcontract with Bermudez.

13) On March 28 or 29, 1996, Gonzalez held a prework conference with

Respondent and Thomas Hittlet, the USFS contracting officer's representative (COR). Among the matters discussed was Respondent's responsibility to obtain any applicable licenses and permits to comply with federal, state, and local regulations, laws, and codes. At this time, Respondent designated Nato Chavez as his representative for the contract, in Respondent's absence. On April 8, 1996, Respondent again designated Nato Chavez as his representative, but gave Chavez the additional authority to sign invoices, contract modifications, and settlement agreements, and full authority in all contractual matters. Chavez was an employee of Bermudez.

14) On April 8, 1996, Respondent began work on the contract with a crew of 12 applicators and two foremen (himself 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.

15) On May 26, 1996, Respondent submitted copies of receipts to CO Gonzalez for reimbursement. The receipts were for dye (which was mixed with the BGR). On September 27, 1996, CO Gonzalez authorized payment to Respondent.

16) 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. Interested parties included all currently licensed farm labor contractors, the USFS, and all persons who had testified at public hearings regarding the proposed rule changes. 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.)

17) 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.

18) CO Gonzalez believed that Respondent needed a farm labor contractor's license to perform contract number 53-04GG-6-1080 in September 1996. Because the contract had to be completed within 30 days or the trees would be damaged, she decided to let Respondent finish the contract without requiring him to get the state license. Gonzalez never notified Respondent that he needed a state farm labor contractor license to complete the contract.

19) Respondent was not aware the administrative rules had changed. He was not notified of the change by either the Agency or USFS.

20) On September 16, 17, 18, 1996, Respondent and COR Hittlet talked by telephone daily about resuming work on the contract. There were nine days remaining of the contract time. Respondent said his crew had left him to pick pears and tomatoes. On September 19, 1996, Respondent resumed work on the contract with a crew of five applicators and two foremen (himself and Chavez). They worked again on September 20 and 21, 1996, with a four-to-five person crew and Chavez. Respondent was not present at the work units on September 22, 1996. Because of the small crew and poor weather, work on the contract was behind schedule. On September 23, 1996, COR Hittlet issued a Notice of Noncompliance to Respondent because work was behind schedule. Respondent helped transfer repellent to applicator packs and other small tasks for one-to-two hours per day. Work on the contract was completed in September 1996. USFS made payments on the contract to Respondent. Each time Respondent received a payment from the USFS, he in turn paid Bermudez for his expenses per their subcontract.

21) Bermudez Bros. 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.

22) 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 Bermudez to perform the subcontract he had with Respondent.

ULTIMATE FINDINGS OF FACT

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

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

3) In March 1996, Respondent entered into a subcontract with Andrez Bermudez, a licensed farm labor contractor with a forestation indorsement, to perform USFS contract number 53-04GG-6-1080.

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

5) During all times material, Respondent was not a farm/forest labor

contractor, as defined by ORS 658.405(1) and OAR 839-15-004(4) and (8)(c).

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. * * *"

Respondent was not a farm labor contractor. By bidding on a big game repellent contract and subcontracting that activity before July 1, 1996, and because he did not employ workers to perform the contract after July 1, 1996, Respondent was not acting as a farm labor contractor with regard to the forestation or reforestation of lands. Accordingly, Respondent did not need a farm labor contractor license issued by the Commissioner and did not violate ORS 658.410, 658.417(1), and OAR 839-15-125 as alleged.

OPINION

The Agency alleged that Respondent acted as a farm labor contractor without the required license and forestation indorsement when he performed a big game repellent application contract in September 1996. The Agency offered two alternative theories in support of the alleged violation. First, the Agency claimed that Respondent, for an agreed rate of pay, employed workers to perform the contract in September 1996.

Second, the Agency claimed that Respondent subcontracted with Bermudez, who performed the contract in September 1996. By subcontracting with Bermudez for work that required a farm labor contractor's license in September 1996, the Agency alleged that Respondent acted as a farm labor contractor without a valid license.

Respondent claimed that he entered into a subcontract with Bermudez Bros. in March 1996, before a license was required to apply BGR. He contended that Bermudez provided and paid all the workers and had the necessary state farm labor contractor license. As mitigation, he claimed that the Forest Service was negligent in not informing him of the change in the licensing rules and that he was ignorant of the change, which occurred in the middle of the contract performance.

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

In the amended charging document, the Agency alleged that by "subcontracting with Bermudez for work performed in September 1996 that required a farm labor contractor's license, Respondent acted as a farm labor contractor without a valid farm labor contractor's license." Apparently, the Agency reads the definition of farm/forest labor contractor to include not only the act of subcontracting, but also the performance of a contract by the subcontractor.

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." OAR 839-15-004(4)(e). The Agency did not argue that this definition is broader than its statutory counterpart. 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 OAR 839-15- 004(4) refers to actions of the forest labor contractor -- actions that would bring the person within the definition of a forest labor contractor. No subsection refers to an action by another, such as a subcontractor, that would bring the person within the definition of a forest labor contractor. The forum will not read the rule to be broader than the statute. Thus, under the definition of forest labor contractor in OAR 839- 15-004(4), 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. Again, the act of entering into a subcontract occurred in March 1996, not in September 1996.

Therefore, the Agency failed to prove its second theory because Respondent 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.

Having failed to prove that Respondent took any action that would make him a

farm/forest labor contractor after July 1, 1996, the forum concludes that Respondent did not act as a farm labor contractor without a license and did not violate ORS 658.410, 658.417(1), and OAR 839-15-125 as alleged.²

ORDER

NOW, THEREFORE, as Respondent has not been found to have violated any statute or rule as charged, the Notice of Intent to Assess Civil Penalties filed against Respondent is hereby dismissed. ORS 658.453, 183.090.

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

²Compare *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)).