

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

**STEVEN D. HARRIS, dba COLOR
WORLD PAINTING,**

Respondent.

Case No. **39-00**

FINDINGS OF FACT
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

Respondent, a contractor on a public works project, failed to pay the fee required by ORS 279.375 and OAR 839-016-0200, and the commissioner ordered him to pay a civil penalty of \$1,000 for one violation. ORS 279.375, ORS 279.370, OAR 839-016-0200, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 October 10, 2000 in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Cynthia L. Domas, an employee of the Agency. Respondent Steven D. Harris did not appear at the hearing and was held in default.

The Agency called Susan Wooley, Wage & Hour Division Compliance Specialist, as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to the hearing);

b) Agency exhibits A-1 through A-8 (submitted prior to the hearing).

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 February 25, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties (“Notice”) in which it alleged that Respondent did not pay the fee required by ORS 279.375 and OAR 839-016-0200 related to the Primate Exhibit Resurfacing Project, a public works contract costing over \$25,000 that was not regulated by the federal Davis-Bacon Act. The Agency sought a civil penalty of \$2,500.

2) The Notice instructed Respondent that he was required to file an answer and written request for a contested case hearing within 20 days of the date on which he received the Notice, if he wished to exercise his right to a hearing.

3) The Agency served the Notice on Respondent on March 29, 2000.

4) On April 21, 2000, the Agency sent a Notice of Intent to Issue Final Order by Default to Respondent notifying him that he had not yet filed an answer or request for hearing, and that a Final Order on Default would be issued if no answer and request for hearing were received by May 1, 2000.

5) On May 1, 2000, Respondent filed an answer with the Agency.

6) On May 2, 2000, the Agency sent a letter to Respondent notifying him that his request for hearing was insufficient because it did not request a hearing, and that a Final Order on Default would be issued if Respondent did not request a hearing by May 12, 2000.

7) On May 11, 2000, Respondent requested a hearing.

8) The Agency filed a request for hearing with the Hearings Unit on June 19, 2000.

9) On July 7, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for October 10, 2000; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

10) On July 31, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim and penalty calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit their case summaries by September 26, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form for Respondent's use in preparing a case summary.

11) The Agency filed a motion for partial summary judgment on September 13, 2000. Respondent filed no response to that motion.

12) On September 26, 2000, the Agency filed its case summary. On September 27, 2000, the Agency filed an addendum to its case summary.

13) On September 29, 2000, the ALJ granted the Agency's motion for partial summary judgment in an interim order that stated:

“Introduction

“On September 13, 2000, the Agency filed a motion for summary judgment, contending that undisputed facts entitle the Agency to summary judgment as a matter of law. Respondent did not file a responsive pleading.

“Summary Judgment Standard

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists and evidentiary burden is as follows:

‘ * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].’ ORCP 47C.

“The Agency’s Allegations

“The Agency’s Notice of Intent to Assess Civil Penalties (“Notice”) alleges that Respondent violated ORS 279.375 and OAR 839-016-0200 by failing to pay the fee required by ORS 279.375 and OAR 839-016-0200 after entering into a public works contract (“Primate Exhibit Resurfacing Project”) in March 1999 with Metro, an Oregon public agency, that cost over \$25,000 and was not regulated by the federal Davis-Bacon Act.

“The Undisputed Facts And The Law

“Respondent, in his answer dated May 1, admitted entering into a contract for more than \$25,000 on the Primate Resurfacing Project. Because Respondent’s answer did not address whether or not the Primate Resurfacing Project was regulated by the Davis-Bacon Act, the Agency’s allegation that the Project *was not* regulated by the Davis-Bacon Act is deemed admitted. OAR 839-050-0130(2). Respondent did not deny the date the contract was entered into or that it was a public works contract with Metro, an Oregon public agency, and those facts are deemed admitted. Respondent also stated that he lost over \$20,000 on the Project. From that statement, the forum infers that Respondent had completed the project by the time he filed his answer.

“The only disputed material fact is whether or not Respondent paid the prevailing wage rate fee required by ORS 279.375. In his answer, Respondent stated “To the best of our knowledge at Color World Painting, [the] Prevailing Wage Fee[s] were paid by our office[.]” In support of its motion, the Agency provided an affidavit by the lead worker assigned to the Prevailing Wage Rate section of BOLI’s Wage and Hour Division, dated September 13, 2000, attesting to the fact that BOLI has never received the prevailing wage rate fee from Respondent for the Primate Resurfacing Project. If Respondent had any evidence that would create a genuine issue of fact as to whether or not he paid the prevailing wage rate

fee, he was obligated to provide that evidence in response to the Agency's motion to avoid summary judgment. Respondent did not do this. Based on the Agency's uncontested affidavit, the forum finds there is no genuine issue of fact as to whether or not Respondent paid the prevailing wage rate fee on the Primate Resurfacing Project.

"ORS 279.375 requires the Commissioner of the Bureau of Labor and Industries, by rule, to establish a fee to be paid by the contractor to whom a contract for a public work subject to ORS 279.348 to 279.380 has been awarded. That rule has been promulgated. OAR 839-016-0200 to 839-016-0240. The fee, which is set at one tenth of the contract price,ⁱ with a minimum fee of \$100 and a maximum fee of \$5,000, must be paid at the time of the first progress payment or 60 days after work on the contract begins, whichever is earlier. ORS 279.375(1)(b).

"In this case, the undisputed material facts are that Respondent entered into a public works contract subject to ORS 279.348 to 279.380 and did not pay the prevailing wage rate fee required by ORS 279.375 within 60 days after work on the contract began. These facts establish a violation of ORS 279.375 as a matter of law, and subject Respondent to a potential civil penalty.

"The Agency's motion for summary judgment is **GRANTED** on the issue of whether or not Respondent violated ORS 279.375. However, the hearing will be convened on the date scheduled, October 10, to determine the amount of civil penalty, if any, to be assessed against Respondent for his violation. At the hearing, Respondent and the Agency will be expected to present evidence of any mitigating or aggravating circumstances relevant to the Agency's proposed assessment of a civil penalty.

"This interim order will become part of the Proposed Order that is issued subsequent to the hearing."

14) In the same interim order, the ALJ reset the hearing time from 9:00 a.m. to 10:30 a.m.

15) When Respondent did not appear at the hearing on October 10 by 10:30 a.m., the ALJ recessed the hearing until 11:00 a.m. Respondent did not appear by 11:00 a.m. and the ALJ declared him in default and commenced the hearing.

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

17) On October 26, 2000, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) On March 21, 1999, Respondent was awarded a contract called the Primate Exhibit Resurfacing Project (“Project”) to perform painting at the Oregon Zoo in Portland, Oregon for Metro, an Oregon public agency. The contract award was for the amount of \$74,994.00 and was not regulated by the Davis-Bacon Act (40 U.S.C. 276a).

2) On March 23, 1999, Respondent signed a contract with Metro authorizing him to perform the work that was the subject of the contract award. The following language was included in the terms of the contract:

“The contractor is required to pay a fee equal to one-tenth of one percent (.1 percent) of the price of the contract, but not less than \$100 nor more than \$5,000, under ORS 279.352(2) and section 5(1), ch 594, 1995 Oregon Laws. The fee shall be paid on or before the first progress payment or 60 days from the date work first began on the contract, whichever comes first. The fee is payable to the Bureau of Labor and Industries at the following address:

Bureau of Labor and Industries, Wage and Hour Division, Prevailing Wage Unit, 800 NE Oregon Street, #32, Portland, Oregon 97232

“* * * * *

“For public work subject to ORS 279.348 to 279.365, the Contractor shall pay prevailing wages and shall pay an administrative fee to the Bureau of Labor and Industries pursuant to the administrative rules established by the Commissioner of the Bureau of Labor and Industries.”

3) On July 1, 1999, the contract was amended to increase the amount payable to a maximum of \$87,464.00.

4) On July 29, 1999, Hedera Trumbo, Prevailing Wage Coordinator of the Wage & Hour Division (“WHD”), sent a letter to Respondent at 11949 SE Dorset Lane, Portland, Oregon 97266-6820ⁱⁱ advising that contractors on public works projects were required to pay a fee equal to one-tenth of one percent of the total contract price, that

the fee could be no more than \$5,000 and no less than \$100, and that BOLI had not received Respondent's \$100 fee for the Project.

5) On August 12, 1999, Trumbo sent Respondent another letter at 11949 SE Dorset Lane stating that the prevailing wage rate fee for the Project had not been received, and that BOLI was considering taking action against Respondent for failure to submit the fee. Trumbo advised Respondent that the minimum civil penalty was "an amount equal to the unpaid fee or \$1,000, whichever is greater."

6) On August 25, 1999, Trumbo called Respondent and left a message for him to call back. Respondent did not call her back.

7) On September 17, 1999, Lois Banahene, WHD Lead Compliance Specialist, sent a letter to Respondent at 11949 SE Dorset Lane stating that he had not yet paid the prevailing wage rate fee for the Project, and that if the \$100.00 fee was not paid by September 27, 1999, BOLI would initiate administrative action that might include assessment of civil penalties. Banahene enclosed a copy of OAR 839-016-0200(1) with her letter.

8) On October 18 and 19, 1999, Susan Wooley, WHD Compliance Specialist, telephoned Respondent and left messages requesting that he return her call regarding an outstanding prevailing wage rate fee. Respondent did not return Wooley's calls.

9) On October 27, 1999, Wooley sent a letter to Respondent at 11949 SE Dorset Lane making a "last request for payment" of the \$100.00 prevailing wage rate fee due from the Project. Wooley enclosed a copy of ORS 279.375.

10) None of the letters sent from BOLI to Respondent were returned by the U.S. Postal Service and Respondent did not contact BOLI in response.

11) Effective September 17, 1999, Metro terminated the contract with Respondent "due to cost over run and changes in the scope of the work." At that time, Respondent had performed more than \$25,000 worth of work.

12) Respondent has never paid the \$100 prevailing wage rate fee due to BOLI from the Project.

13) Respondent performed another public works contract for Metro in the amount of \$70,255 that began on November 30, 1998. Respondent paid the correct prevailing wage rate fee of \$100 to BOLI for this contract.

14) Respondent entered into two public works contracts in amounts over \$25,000 in 1996 (Otty Rd. Reservoir Repainting Project) and 1998 (Exterior Painting Thomas Junior High) and paid the correct prevailing wage rate fee of \$100 to BOLI for both of these projects.

ULTIMATE FINDINGS OF FACT

1) On March 21, 1999, Respondent was awarded a contract called the Primate Exhibit Resurfacing Project to perform painting at the Oregon Zoo in Portland, Oregon for Metro, an Oregon public agency. The contract award was for the amount of \$74,994.00 and was not regulated by the Davis-Bacon Act (40 U.S.C. 276a).

2) ORS 279.375 required Respondent to pay a \$100 prevailing rate fee to BOLI for this Project.

3) From the date of signing the contract for the Project, Respondent knew that he was required to pay a \$100 prevailing wage rate fee to BOLI.

4) More than 60 days has gone by since Respondent begun work on the Project.

5) Before initiating this action, BOLI sent Respondent four letters reminding him of his obligation to pay the prevailing wage rate fee for the Project and unsuccessfully attempted to contact him by telephone on three occasions.

6) Respondent has not paid the \$100 prevailing wage rate fee due to BOLI for the Project.

7) Respondent paid the correct prevailing wage rate fee on three other public works projects he performed between 1996 and 1998.

PROPOSED CONCLUSIONS OF LAW

1) ORS 279.348(3) defines "Public works" as follows:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004 further provides:

"(17) 'Public work,' 'public works,' or 'public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

The Primate Exhibit Resurfacing Project was a public works project subject to Oregon's prevailing wage rate laws.

2) ORS 279.375 provides, in pertinent part:

"(1)(a) The Commissioner of the Bureau of Labor and Industries, by rule, shall establish a fee to be paid by the contractor to whom the contract for a public work subject to ORS 279.348 to 279.380 has been awarded. * * *

“* * * * *

(b) The fee shall be .1 percent of the contract price. However, in no event shall a fee be charged and collected that is more than \$5,000 nor less than \$100.

“* * * * *

“(3) The fee to be paid pursuant to this section shall be paid at the time of the first progress payment or 60 days after work on the contract has begun, whichever date is earlier.

“(4) Failure to make timely payment pursuant to subsection (3) of this section shall subject the contractor to a civil penalty under ORS 279.370, in such amount as the commissioner, by rule, shall specify.”

OAR 839-016-0200 provides, in pertinent part:

“(1) Every contractor awarded a contract for a public work which is regulated under the Prevailing Wage Rate Law ORS 279.348 to 279.380 shall pay a fee.

“(2) The amount of the fee shall be one tenth of one percent (.001) of the contract price. However, the fee shall be no less than \$100 nor more than \$5,000 regardless of the contract price.

“(3) The fee is payable to the Bureau of Labor and Industries and shall be mailed or delivered to the bureau at the following address: Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #32, Portland, OR 97232.

“(4) The fee shall be paid no later than 10 days following receipt by the contractor of the first progress payment on the contract or 60 days after work on the project has begun, whichever date is earlier.

“* * * * *

“(6) As used in this rule:

“(a) ‘Contract price’ means the dollar amount of the contract on the date it was awarded to the contractor and the dollar amount of any subsequent change orders or other adjustments.

“(b) ‘Work on the project’ shall mean work performed after the date the contract was awarded and for which the contractor is paid as part of the contract price.

“(c) The ‘date work on the project has begun’ shall be the date the contractor actually starts work on the project or, if the contractor cannot determine the date the contractor actually started working on the project, the date the contracting agency establishes as the date work actually started on the project or, if neither the contractor nor the contracting agency can determine the date the contractor actually started work on the project, the date the contracting agency authorized the contractor to begin work on the project.”

Respondent was obligated to pay a \$100 fee to BOLI for the Primate Resurfacing Project. By not paying that fee, Respondent committed one violation of ORS 279.375

and OAR 839-016-0200. The ALJ's interim order granting the Agency summary judgment on this issue is affirmed.

3) ORS 279.370(1) provides:

"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 \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, 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, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor * * * regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

“(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

“* * * * *

“(k) Failure to timely pay the fee required by ORS 279.375.”

OAR 839-016-0540 provides, in pertinent part:

“(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

“* * * * *

“(4) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for violations of ORS 279.375, OAR 839-016-0200 or 839-016-0220 regarding fees to be paid by the contractor, the minimum penalty to be assessed shall be calculated as follows:

“(a) An equal amount of the unpaid fee or \$1,000, whichever is greater, for the first violation[.]’

The commissioner has appropriately exercised his authority by imposing \$1,000 in civil penalties for Respondent’s single violation of ORS 279.375 and OAR 839-016-0200.

OPINION

INTRODUCTION

Respondent filed an answer and request for hearing. Prior to the hearing, the Agency moved for partial summary judgment on the issue of liability. The forum granted the Agency’s motion, leaving the amount of civil penalties as the only issue at hearing. Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. As a general rule, when a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 206 (1999). In this case, the ALJ issued an interim order granting the Agency summary judgment on the issue of whether or not Respondent violated ORS 279.375 and OAR 839-016-0200, and that ruling has been affirmed in this proposed order. The remaining task of the forum is to evaluate the evidence presented by the Agency and assess an appropriate civil penalty.

AMOUNT OF CIVIL PENALTY

The Notice of Intent asks that a civil penalty of \$2500 be assessed against Respondent. OAR 839-016-0520 states the mitigating and aggravating circumstances that the commissioner shall consider when determining an amount of civil penalties. Here, the applicable circumstances include the opportunity and degree of difficulty to comply, the magnitude and seriousness of the violation, and Respondent's knowledge of the violation.

Respondent had ample opportunity to comply. BOLI personnel sent him four warning letters stating that the \$100 fee was due and where to send it before issuing a Notice of Intent. Respondent could have complied and avoided this action by simply mailing the \$100 fee to BOLI. However, he chose to ignore those letters. Respondent knew of his legal obligation to pay the fee from paying a fee to BOLI on three previous public works contracts, from the contract language, and from BOLI's four warning letters. The violation is serious and of some magnitude because Respondent failed to pay a fee dedicated to paying the costs of determining the prevailing wage rate, enforcing the prevailing wage rate laws, and educating the public on prevailing wage rate laws. These are significant concerns, and the public interest suffers when contractors and subcontractors fail to pay this fee. Mitigating these concerns is the fact that this is Respondent's first violation of Oregon's prevailing wage rate laws.

This is the first case before the forum in which the Agency has alleged a violation of ORS 279.375 and sought civil penalties for that violation. The minimum civil penalty that can be imposed is \$1,000. Under the facts of this case, the forum finds that a \$2,500 civil penalty is disproportionate to the violation and assesses the minimum civil penalty of \$1,000.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the civil penalty assessed as a result of his violation of ORS 279.375 and OAR 839-016-0200, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Steven D. Harris to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000.00), 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.

ⁱ The fee stated in the ALJ's interim order is in error. The actual fee is ".1 percent of the contract price." ORS 279.375(1)(b).

ⁱⁱ This is the same address that appears on the "Notice of Award of Public Works Contract" that was provided to BOLI by Metro and is the address used by Respondent in his answer and request for hearing.