

In the Matter of
Thomas L. Fery, dba Tom Fery Farm

Case Number 16-99
Final Order of the Commissioner
Jack Roberts
Issued May 6, 1999.

SYNOPSIS

Respondent, a licensed farm/forest labor contractor, failed to provide ten reforestation workers with written statements of their rights, in violation of ORS 658.440(1)(f), and failed to execute written agreements with the workers, in violation of ORS 658.440(1)(g). Respondent also failed to timely submit one certified true payroll report, in violation of ORS 658.417(3), but the Agency failed to prove a second alleged violation of that statute. The Agency also established that Respondent violated ORS 658.437(2) by failing to inspect the farm/forest labor contractor's license of a person who acted on Respondent's behalf in supplying Respondent with four reforestation workers. The Commissioner ordered Respondent to pay civil penalties of \$500.00 for each violation of ORS 658.440(1)(f), \$750.00 for each violation of ORS 658.440(1)(g), \$500.00 for the single violation of ORS 658.417(3), and \$500.00 for the violation of ORS 658.437(2), for a total of \$13,500.00. ORS 658.405, 658.407, 658.417(3), 658.437(2), 658.440(1)(f)- (g), 658.453(1), 658.501; OAR 839- 015-0004, 839-015-0300, 839-015- 0310, 839-015-0360, 839-015-0510.

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts,

Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 24, 1999, in the conference room of the Oregon Bureau of Labor and Industries, 3865 N.E. Wolverine Street, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Respondent was present and was not represented by counsel during the hearing.

The Agency called Respondent, Agency compliance specialist Katy D. Bayless, and Virgilio Urena as witnesses. The Agency also called Agency compliance manager Nedra Cunningham as a rebuttal witness. Respondent called himself, Alejandro Corona, and Seraphim Garcia Corona as witnesses.

The ALJ received into evidence Administrative Exhibits X-1 through X-13, Agency Exhibits A-1 through A-5 (submitted with the Agency's case summary), Agency Exhibit A-6 (offered at hearing), Respondent Exhibits R-1 through R-9 (submitted with Respondent's case summary), and Respondent Exhibits R-10 through R-12 (offered at hearing). The evidentiary record closed on February 24, 1999.

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 October 7, 1998, the Agency issued a Notice of Intent to Assess Civil Penalties to Respondent. The Notice of Intent cited the following bases for the assessment: 1) Using an Unlicensed Farm/Forest Labor Contractor * * * in violation of ORS 658.437((2). **CIVIL PENALTY OF \$2,000. ONE VIOLATION**"; 2) "Failure to Provide Workers With Written Statements of Terms, Conditions and Rights * * * as required by ORS 658.440(1)(f) and OAR 839-015- 0360(4). **CIVIL PENALTY OF**

\$7,500. TEN VIOLATIONS"; 3) "Failure to Execute Written Agreement With Workers at Time of Hiring * * * as required by ORS 658.440(1)(g) and OAR 839-015-0360(4). **CIVIL PENALTY OF \$7,500.** TEN VIOLATIONS"; and 4) "Failure to File Certified True Payroll Reports * * * in violation of ORS 658.417(3) and 839-015-0300. **CIVIL PENALTY OF \$2,000.** TWO VIOLATIONS * * *." The Notice of Intent stated that Respondent had 20 days from the date he received the Notice to request a contested case hearing.

2) The Notice of Intent was served on Respondent on October 16, 1998.

3) By letter dated October 29, 1998, attorney Louis D. Savage, of Garvey, Schubert & Barer, notified the Agency that he represented Respondent in this matter. In that letter, Respondent requested a hearing on the Notice of Intent. Respondent's counsel also stated that he understood that Respondent had until November 16 to file an answer and that, if an answer was not filed by November 5, 1998, the Agency would issue a ten-day notice letter.

4) On November 9, 1998, the Agency issued a Notice of Intent to Issue Final Order by Default if Respondent did not submit an answer by November 19, 1998. Respondent submitted his Answer and Request for Contested Case Hearing on that date.

5) On December 17, 1998, pursuant to an Agency request for hearing, 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 Respondent a "Summary 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.

6) Respondent later filed a motion for leave to file an Amended Answer along with the proposed Amended Answer. The ALJ granted the motion.

7) On January 20, 1999, the ALJ issued a case summary order to the participants directing them each to submit a summary of the case, including: 1) a list of the witnesses to be called; 2) the identification and description of any document or physical evidence to be offered into evidence, together with a copy of any such document or evidence; and 3) a statement of any agreed or stipulated facts. The summaries were due by February 12, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency and Respondent submitted timely summaries, although Respondent sent a copy of his summary only to the Agency case presenter and not to the Hearings Unit.

8) By letter dated February 12, 1999, Respondent's counsel, Louis Savage, informed the forum that he would not be representing Respondent in the contested case hearing.

9) At the start of the hearing, Respondent said he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

10) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. The ALJ also explained most of the procedural matters identified in ORS 183.413(2), all of which had been addressed in the materials received by Respondent prior to hearing.

11) Pursuant to the Agency's request, the ALJ arranged for a Spanish interpreter to be available throughout the hearing. Under oath or affirmation, Ilse Wefers translated the questions put to, and the answers given by, witnesses Alejandro Corona and Seraphim Corona.

12) Just before making his closing statement, the Agency case presenter moved to amend the Notice of Intent by adding an allegation that Respondent had assisted an unlicensed contractor -- Alejandro Corona -- in violation of ORS

658.440(3)(e) and OAR 839-015-0508(1)(n).¹ The forum denied the motion. That ruling is hereby affirmed.

13) After the Agency case presenter delivered his verbal closing argument, Respondent asked for leave to file a written closing statement. The Agency did not oppose that request, which the ALJ granted. Respondent timely filed a written closing statement and the Agency, pursuant to an order of the ALJ, timely filed a written rebuttal argument.

14) On April 8, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed timely exceptions, which are addressed in this Final Order. Respondent filed no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At the time of hearing, Respondent was a licensed farm labor contractor with a forest indorsement, and had been since at least 1994. By 1998, Respondent had about 70 people working for him.

2) Respondent authorized his supervisors to give his workers advances on their paychecks. Supervisors Alejandro Corona and Seraphim Corona often advanced money to workers so they could pay for rent and groceries.

3) Respondent paid his supervisors a higher hourly wage than he paid his other workers. Respondent's supervisors were responsible for ensuring the quality of other workers' job performance and had additional duties beyond those required of other workers. Respondent authorized at least one of his supervisors, Alejandro Corona, to find new workers, hire them, and help them fill out employment forms.

4) Respondent contracted to perform reforestation activities in the Malheur National Forest pursuant to United States Forest Service ("USFS") Contract No. 52-04KK-8-3B (the "Malheur contract"),² and performed that contract starting on April 27, 1998. Respondent's performance of the contract continued through June 1998.

5) At least ten individuals performed reforestation work for Respondent on the Malheur contract.

6) In May 1998, Respondent contacted Virgilio Urena to learn whether he was available to work as a supervisor on the Malheur contract. Urena agreed to work as a supervisor and asked whether Respondent could use the services of four workers Urena knew were available. Respondent, who unexpectedly was going to have to perform work on three USFS contracts at the same time, was relieved to hear that the workers were available and agreed to hire them. Seraphim Corona later spoke with Urena and asked him if he could organize a group to work on the Malheur contract, with Urena as supervisor. During that conversation and others, Seraphim Corona and Urena coordinated details of Urena's work, including organization of the work and the date and time at which Urena should bring the workers to John Day.

7) Respondent gave Urena \$2000.00 during a May 15, 1998 meeting, which Respondent believed Urena would use to give living expense advances to the workers he was going to bring to Respondent's job site. In Respondent's view, this arrangement was similar to the understanding he had with other supervisors that they were authorized to advance money to employees as they saw fit. Although Urena stated during the meeting that he would use the money for worker advances, he testified at hearing that he believed he was entitled to use some of the money to cover the expenses he incurred in transporting workers.

8) After Respondent had agreed to hire Urena and had given him the \$2000.00, Urena did bring four workers to the Malheur contract job site: Juan Manuel Rivera, Pedro Jimenez, Arturo Varela, and Gerardo Martinez Rangel. Those individuals performed forestation/reforestation work on the contract, but Urena did not. Urena spent his time supervising and checking the quality of the other workers' labor.

9) At the time he supplied the four workers to Respondent, Urena was acting at Respondent's request, and Respondent had the right to control his actions. Urena also had agreed to act as Respondent's supervisor, subject to his control.

10) Respondent did not ask to examine Urena's farm/forest labor contractor's³ license before allowing the four workers to begin working on the Malheur contract, did not examine a license, and did not keep a copy of one. In fact, Urena did not have a farm labor contractor's license or a forest indorsement.

11) Urena and Respondent agreed that Urena would bring more workers to the job site the following week. Urena did bring additional workers to the job site, but they left within a day, without performing any work for Respondent.

12) Urena advanced a total of \$456.00 to the four workers he originally had supplied to Respondent. Urena retained the remainder of the money and did not respond to an invoice for \$1500.00 that Respondent sent him.

13) ORS 658.440(1)(f) requires farm/forest labor contractors to furnish each worker with a written statement that describes certain terms and conditions of employment, including: the method of computing the rate of compensation; the terms and conditions of any bonus offered; the terms and conditions of any loan to the worker; the conditions of any housing, health and child care services to be provided; the terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof; the terms and conditions under which the worker is furnished clothing or equipment; the existence of a labor dispute at the worksite; the name and address of the owner of the operation where the worker will be working; and the worker's rights and remedies under the worker's compensation laws, the farm and forest labor contractor laws, the Federal Service Contracts Act, the federal and Oregon minimum wage laws, the Oregon wage collection laws, the unemployment compensation laws, and civil rights laws.

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

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

16) When Respondent renews his farm/forest labor contractor license each year, the Agency sends him a packet of information that includes Forms WH-151 and WH-153. Each year, he signs a document certifying that he received and understands the forms. Respondent signed such certifications of compliance each year from 1994 through 1997. At all material times, Respondent was aware that he was required to give WH-151 forms (or their equivalents) to workers and to enter into written agreements with workers.

17) In 1994, Respondent used the WH-151 and WH-153 forms supplied by the agency. After that, he began using an employee handbook, printed in both English and Spanish, that included information that Respondent believed met all legal requirements. When Respondent started using the handbook, he stopped using the WH-151 and WH-153 forms.

18) Respondent paid his workers different hourly wages depending on their job classification and experience. Respondent's employee handbook does not state what wages workers would earn for performing various jobs on the Malheur contract. Rather, Respondent's supervisors told the other workers how much they would be paid. Nor does the handbook identify the name and address of the owner of the operations where workers would be performing any particular job. Instead, workers

received that information at the job site. The handbook also does not contain information regarding: the starting date of the contract; the expected length of the season or period of employment; or the workers' rights and remedies under ORS Chapter 654. Respondent expressly reserved the right to change or revoke his employment policies at any time.

19) Respondent did not give WH-151 forms to any of the workers on the Malheur contract, including the four supplied by Urena. Respondent did make copies of the employee handbook available to the workers in company vans that transported them to the job site, and employees were able to take a copy of the handbook at that time, if they so desired. Respondent, did not, however, distribute a handbook to each worker either at the time they were transported to the job site or before that. Respondent also posted certain federally required materials in the vans, including information about the federal minimum wage for reforestation work.

20) Respondent did not execute a written agreement using Form WH-153 or an equivalent with any of the workers on the Malheur contract.

21) On May 27, 1998, Katy Bayless, an Agency Compliance Specialist, notified Respondent that several workers had claimed that they had not received all their wages from the Malheur contract job. Bayless determined that Respondent did owe wages to at least some of those workers.

22) Within a few days, Respondent called Bayless about the wage claims. He and Bayless arranged for Respondent to bring checks covering the claims to the Agency office. On June 5, 1998, Respondent delivered checks that covered most, but not all, of the hours claimed. Respondent told Bayless that one of the workers had agreed to be paid for only a certain number of hours; that worker told the Agency that he had not so agreed. Bayless determined that, after delivering the paychecks, Respondent still owed one worker an hour's pay and owed two other workers pay for four hours each. Respondent eventually paid all the wages that

Bayless had determined were owed.

23) Respondent paid his employees on the Malheur contract directly.

24) By letter dated June 15, 1998, Bayless asked Respondent to furnish various records, including "all payroll for reforestation projects for Tom Fery Farm" and copies of Forms WH-151 and WH-153 "for each and every employee that appears on your payroll records for contracts performed under the definition of (ORS 658.440) farm/forest labor activity." When Bayless wrote this letter, she had not yet received any certified payroll reports ("CPRs") from Respondent for the Malheur contract.

25) With a letter dated June 21, 1998, Respondent enclosed checks covering the remaining amounts of wages claimed by the workers who had complained to the Agency. Respondent stated that it had always been his policy to pay employees what they thought they were due when they thought they had been underpaid.

26) On or about June 28, 1998, Respondent gave Bayless a June 2, 1998, payroll record for the four workers Urena had brought to the job site. Respondent also provided employee time sheets for weeks 3 and 4 of the Malheur contract. Those documents did not include the USFS contract number, the time period covered by the payroll, the location of work, or an itemization of deductions. Before this date, Respondent had not submitted any payroll records or report for the Malheur contract (other than copies of paychecks) to the Agency.

27) In a cover letter submitted with the documents, Respondent informed the Agency of the USFS contract number for the Malheur contract. In that letter, Respondent also purported to provide information regarding the dates on which that contract had been performed. The information Respondent provided was incorrect. In fact, work on the Malheur contract began on April 27, 1998, not May 27, 1998, as stated in the cover letter. The cover letter also indicated the location where work on the contract had been performed.

28) On July 2, 1998, Respondent brought more information to Bayless, including a CPR. He told her that his CPRs were running late because he had been very busy with three USFS contracts and because he had a problem with his payroll clerk. Respondent also told Bayless that he believed his employee handbook covered the requirements of Forms WH-151 and WH-153, and sent a copy of the handbook to the Agency.

29) Although the record includes a document titled "TOM FERY FARM PAYROLL JOURNAL FOR THE PERIOD 06/01/98 TO 06/30/98," no testimony or other evidence established that this document (or any other document in the record) was the document Respondent submitted to Bayless on July 2, 1998.

30) On July 16, 1998, Bayless told Respondent that substantial information still was missing from his CPRs, including: location of work; contract number; dates work began and ended; and deductions from net pay. Respondent agreed to add the missing information to the reports.

31) ORS 658.417 and OAR 839-015-0300 do not describe what information must be included in CPRs, but provide that CPRs must contain certain "all the elements of Form WH-141," a reporting form available from the Agency. The record does not include a copy of the Form WH-141 in use at material times, and the record does not include testimony precisely describing the information Form WH-141 requests.

32) After the Agency conducted its investigation, Respondent started using Forms WH-151 and WH-153. Respondent, however, used 1993 versions of those forms, which since have been revised. The fact that the forms were outdated meant that some of the information conveyed was inaccurate. In addition, the Form WH-153 that Respondent submitted as an example of his current compliance does not include required information regarding the approximate ending date of employment and the workers' working hours and days.

33) Before investigating the charges that are the subject of this order, the Agency had not previously determined that Respondent had violated wage and hour laws. During the 1998 investigation, Respondent generally was cooperative and timely responded to Bayless's inquiries.

34) Respondent alleged that Bayless told him the Agency would not assess civil penalties against him, but offered no persuasive evidence to support that claim. In fact, Bayless assumed that civil penalties would be assessed because that almost always happens when violations are found.

35) At no time did Bayless give Respondent an extension of time in which to file CPRs. In her June 15, 1998, letter, she did state that Respondent should submit the missing CPRs by June 30. That statement did not constitute a waiver of the legal requirement that CPRs be filed no later than 35 days from the date Respondent began work on the contract. Rather, Bayless merely was setting a date by which Respondent should comply with a request associated with the Agency's investigation of a violation that already had occurred.

36) The ALJ carefully observed the testimony of Katy Bayless, Alejandro Corona and Seraphim Corona. All three witnesses delivered their testimony in a straightforward manner and did not appear to slant their testimony in favor of either Respondent or the Agency. The ALJ found the testimony of these three witnesses to be credible.

37) Respondent's memory regarding specific dates was not always accurate, and the forum has given little weight to his description of documents he gave Bayless on particular days during the investigation. In other respects, Respondent's testimony was credible, internally logical, and consistent with the testimony of other credible witnesses. The forum's decision in this matter is based largely on Respondent's testimony and admissions.

38) By the time of the hearing, the Agency had issued Urena a Notice of Intent

to Assess Civil Penalties based in part on allegations that Urena improperly had supplied workers to Respondent. Urena had legal counsel with him while he testified, and testified by telephone. The forum has given little weight to Urena's testimony that he never entered into an agreement to supply any workers to Respondent. In part, that testimony was overly self-serving, given the pending charges. Moreover, Urena's testimony on this point was internally inconsistent -- he testified at times that he had no agreement to bring workers to Respondent; at other times, he testified he had satisfied Respondent's request that he furnish Respondent with a crew. Additionally, Urena's explanation of why he felt justified in keeping the \$2000.00 Respondent paid him was unconvincing and somewhat contrived. For these reasons, the forum has not accepted Urena's testimony where it conflicted with other, more credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a farm/forest labor contractor doing business in the State of Oregon.

2) Urena solicited four workers to perform work on reforestation of lands for Respondent, and supplied the four workers to Respondent for that purpose. Urena did not solicit or supply the four workers for an agreed remuneration or rate of pay.

3) Respondent and Urena mutually agreed that Urena would act on Respondent's behalf, subject to his control, in supplying the four workers to Respondent. Respondent had the right to control Urena's actions in supplying the workers.

4) Respondent did not examine or retain a copy of the farm/forest labor contractor's license that Urena was required to, but did not, have. Respondent knew or should have known that he was required to examine and retain a copy of the farm/forest labor contractor's license of any person who supplied workers to him on his behalf.

5) With regard to each of at least ten workers on the Malheur contract, Respondent failed to furnish the worker, at the time of hiring, recruiting, soliciting or supplying, a written statement of workers' rights that included all statutorily required information.

6) With regard to each of at least ten workers on the Malheur contract, Respondent failed to execute Form WH-153 or any written agreement incorporating the statutorily required information, at the time of hiring and prior to the worker performing work for Respondent on the contract.

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

8) Respondent paid his employees on the Malheur contract directly, and was required to file his first CPR for the contract by June 2, 1998. Respondent filed no payroll records by that date.

9) Respondent knew or should have known that he was legally required to file timely CPRs. Respondent's failure to do so was willful.

10) Respondent was required to file another CPR for the Malheur contract by July 7, 1998. Respondent filed a CPR on July 2, 1998, and the Agency did not establish by a preponderance of the evidence that the CPR Respondent submitted did not contain all required information.

11) Respondent cooperated with the Agency's investigation and intends to comply with the requirements of ORS 658.440(1)(g) and OAR 839-015-360 in the future.

CONCLUSIONS OF LAW

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

2) ORS 658.405 provides, in pertinent part:

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

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

"(3) 'Farm labor contractor' means:

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

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

"* * * * *

"(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

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands[.]"

At all material times, Respondent employed workers to perform labor for another to work in forestation or reforestation of lands pursuant to the USFS Malheur contract. Respondent was a farm labor contractor for purposes of ORS 658.405, a forest labor contractor for purposes of OAR 839-015-0004(4), and, at all material times, was a licensed farm/forest labor contractor.

3) Urena acted on Respondent's behalf in supplying him with four reforestation workers. In doing so, Urena acted as a farm/forest labor contractor.

4) ORS 658.437 provides, in pertinent part:

"(2) Prior to allowing work to begin on any contract or agreement with a farm labor contractor, the person to whom workers are to be provided, or the person's agent shall:

"(a) Examine the license or temporary permit of the farm labor contractor; and

"(b) Retain a copy of the license or temporary permit provided by the farm labor contractor pursuant to subsection (1)(b) of this section."

Respondent violated ORS 658.437(2) by failing to examine or retain Urena's license before Urena supplied him with workers.

5) ORS 658.440(1) provides, in relevant part:

"Each person acting as a farm labor contractor shall:

"* * * * *

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

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

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

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

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

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

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

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

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

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41

U.S.C. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner."

OAR 839-015-0310 provides:

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

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

Respondent violated ORS 658.440(1)(f) and OAR 839-015-0310 by failing to furnish at least ten workers a written statement of rights containing all of the information required by statute and administrative rule. Respondent's employee handbook does not satisfy the requirements of ORS 658.440(1)(f) both because it does not include all the required elements and because Respondent did not distribute a copy of it to each employee at the time of hiring, recruiting, soliciting, or supplying, whichever occurred first.

- 6) ORS 658.440(1) also provides, in relevant part:
"Each person acting as a farm labor contractor shall:

"* * * * *

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

OAR 839-015-0360 provides:

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

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

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

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

Respondent violated ORS 658.440(1)(g) and OAR 839-015-360(4) by failing to execute written agreements with at least ten workers at the time of hiring and prior to the workers performing work on Respondent's contracts. Respondent's employee handbook does not satisfy the requirements of ORS 658.440(1)(g) both because it is not a written agreement contractually binding on Respondent and because it does not include all the required elements.

- 7) ORS 658.417 provides, in pertinent 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:

"* * * * *

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays the employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-015-0300 provides, in pertinent part:

"(1) Forest labor contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly as follows:

"(a) The first report is due no later than 35 days from the time the contractor begins work on each contract and must include whatever payrolls the contractor has paid out at the time of the report;

"(b) The second report is due no later than 35 days following the end of the first 35 day period on each contract and must include whatever payrolls have been issued as of the time of the report;

"* * * * *

"(2) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141."

Respondent violated ORS 658.417 and OAR 839-015-0300 by failing to submit a certified true payroll record to the Agency within 35 days from the date Respondent began work on the Malheur contract (April 27, 1998). Respondent was required to submit another CPR by July 7, 1998, and did submit a CPR on July 2, 1998. The Agency did not prove by a preponderance of the evidence that the CPR Respondent submitted on July 2, 1998, did not include all required information.

8) The actions, inactions, and statements of Alejandro Corona and Seraphim Corona properly are imputed to Respondent because they were made within the course and scope of their jobs as Respondent's supervisors.

9) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. ORS 658.453(1)(c), (e). With regard to the magnitude of the penalties, OAR 839-015-

0510 provides:

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

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

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

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

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

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

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

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

The assessment of the civil penalties specified in the Order below is an appropriate exercise of the Commissioner's authority.

OPINION

Failure to Inspect Urena's Farm/Forest Labor Contractor's License

1. Violation

The Agency claims Respondent violated ORS 658.437(2) by failing to examine and retain a copy of the farm/forest labor contractor's license that the Agency alleges Urena was required to have. The Agency argues that Urena acted as a farm/forest labor contractor by supplying Respondent with four workers: Juan Manuel Flores Rivera, Pedro Jimenez, Arturo Varela, and Gerardo Martinez Rangel. The evidence is clear that Urena did supply these four workers to Respondent to perform reforestation work on the Malheur contract -- he brought those workers from another

location to John Day for the specific purpose of working for Respondent. The question in this case is whether the circumstances surrounding Urena's act of supplying workers to Respondent brought him within the definition of a farm/forest labor contractor.

The statute defining farm labor contractor includes two provisions regarding persons who supply other persons with farm workers. The first clause states that 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" is a farm labor contractor. The second clause states that any person "who recruits, solicits, supplies or employs workers on behalf of an employer engaged in" forestation or reforestation activities also falls within the definition of a farm labor contractor. ORS 658.405(1).

These clauses establish two circumstances under which the act of supplying workers makes a person a farm/forest labor contractor. First, if the person supplies workers "for an agreed remuneration or rate of pay," he or she is such a contractor and must be licensed. In this case, Respondent did give Urena \$2000.00, of which Urena retained \$1544.00. Based on Respondent's credible testimony, the forum finds that Respondent intended Urena to use the \$2000.00 to give living expense advances to workers, a common practice for Respondent and his supervisors. Under these circumstances, the forum will not infer from the fact that Urena kept the bulk of the \$2000.00 that Respondent paid him for supplying the workers. Likewise, this forum will not infer that, by giving a supervisor money to advance to workers for living expenses, Respondent paid the supervisor for the act of supplying workers. Nor will the forum draw that inference from the mere fact that Respondent paid his supervisors higher wages than other workers, given that the supervisors had more responsibilities than Respondent's other employees.

The Agency notes correctly that the second clause of the statute does not require

an agreed remuneration or rate of pay for the act of supplying workers. The second clause does, however, contain an element not required under the first clause -- the act of supplying workers must be done "on behalf of an employer" engaged in reforestation to bring the supplier within the definition of farm/forest labor contractor.⁴ To determine whether Urena's act of supplying workers made him a farm/forest labor contractor, this forum must decide whether Urena supplied the workers "on behalf of" Respondent.⁵

One person acts on "behalf of" another if he or she acts as the other's agent. *Cf. Larrison v. Moving Floors, Inc.*, 127 Or App 720, 724, 873 P2d 1092 (1994) (discussing existence of agency relationship in terms of whether one party was authorized to act on the other's "behalf"); *Gaha v. Taylor-Johnson Dodge, Inc.*, 53 Or App 467, 632 P2d 483 (1981) (same). Consequently, to establish that Urena was a farm/forest labor contractor, the Agency had to prove that in supplying the four workers to Respondent, Urena acted as Respondent's agent.

The Oregon Court of Appeals has defined agency as follows:

"Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.

"An agency relationship may be evidenced by an express agreement between the parties, or it may be implied from the circumstances and conduct of the parties. In all cases, however, both the principal's consent to the agency and the principal's right to control the agent are essential elements of the relationship."

Larrison, 127 Or App at 723 (citations and internal quotation marks omitted); see also *Gaha*, 632 P2d at 486 (1981) ("In order to establish an agency relationship, there need not be a formal contract, but the person for whom the service is performed must consent to the existence of the relationship and must have the right of control").

Under this definition, the Agency had to prove three things to establish that

Urena acted as Respondent's agent: 1) that Respondent consented that Urena should act on his behalf; 2) that Respondent had the right to control Urena's actions; and 3) that Urena agreed to act on Respondent's behalf. In this case, the ALJ concluded that at least the second element had not been established because she found "no evidence in the record from which [she] reasonably [could] infer that Respondent had the right to restrain or direct Urena's actions in supplying the four workers." (Proposed Order at 25).

In its exceptions to the Proposed Order, the Agency argues that Urena already was acting as Respondent's agent when he brought the four workers to John Day. Specifically, the Agency points out that "[a]t the time Urena offered to supply four workers to Respondent he had been hired by Respondent." (Agency Exceptions at 3; footnote omitted). Upon further examination of the evidence, the forum agrees.

One of the regular duties of Respondent's supervisor Alejandro Corona was to locate and hire new workers when Respondent needed them. Here, it appears that Urena assumed a similar responsibility. On May 15, 1998 -- *before* Urena supplied him with the four workers -- Respondent agreed to employ Urena as a work crew supervisor and gave him \$2000.00 to use for worker advances. Only after he had received the \$2000.00 and knew he would be supervising any people he brought to Respondent's job site did Urena bring the workers to John Day.⁶ The forum infers from these facts that Urena was acting as Respondent's agent when he supplied the workers -- Respondent and Urena mutually agreed that Urena should act on Respondent's behalf, and Respondent had the right to control Urena's actions in supplying the workers.⁷ By supplying the workers on Respondent's behalf, Urena acted as a farm/forest labor contractor and was required to have the appropriate license and endorsement. ORS 658.405(1); ORS 658.410. Respondent violated ORS 658.437(2) by having Urena supply workers on his behalf without first examining and retaining a copy of such a license.

2. Civil Penalty

The Agency seeks a civil penalty of \$2000.00 for the single violation of ORS 658.437(2), the maximum penalty allowed by ORS 658.453(1)(f). In determining the amount of a penalty, this forum considers all the facts of the case, the seriousness of the violation, and any mitigating and aggravating circumstances. OAR 839-015-0510, OAR 839-015-0512(1). The only aggravating factor in this case is that Respondent is a licensed contractor and should have known of the requirement to examine the farm/forest labor contractor's license of any person who supplied workers on his behalf. Respondent did, however, cooperate with the Agency's investigation and has no prior violations on his record. After considering the circumstances of the case and other cases in which this forum has imposed penalties for violation of ORS 658.437(2), the forum finds a **\$500.00** penalty appropriate.⁸

Failure to Provide Workers with Written Statements of Rights

1. Violations

Respondent testified that he employed at least ten workers on the Malheur contract, and that fact also may be inferred from Respondent's amended answer. Respondent admitted at hearing that he had not provided Form WH-151 to any of those workers. Nonetheless, Respondent argued that he had satisfied all the requirements of ORS 658.440(1)(f) by giving his workers copies of an employee handbook in lieu of Form WH-151.

Respondent's argument fails for two reasons. First, Respondent did not provide each worker with a handbook "at the time of hiring, recruiting, soliciting or supplying, whichever occurs first," but merely made those handbooks available in the company van once the workers were being transported to or around the job site. Second, the handbook did not contain all information required by ORS 658.440(1), including: the method of computing the rate of compensation; the name and address of the owner

of the operations where workers would be performing any particular job; the starting date of the contract; the expected length of the season or period of employment; or the workers' rights and remedies under ORS Chapter 654. Moreover, because Respondent expressly reserved the right to change or revoke the policies outlined in the employee handbook, that handbook does not qualify as a statement of workers' legal rights. By failing to provide at least ten workers with a written statement of rights containing all statutorily required information, Respondent committed ten violations of ORS 658.440(1)(f).

As his fourth affirmative defense, Respondent alleged that the penalties for any violations of ORS 658.440(1)(f) should be suspended because the violations were corrected within 15 days of the date on which Respondent was put on notice of them. This defense fails for two reasons. First, even if Respondent promptly had complied with the law after the investigation was initiated, the forum still would impose penalties for the initial failure to comply. *Cf. In the Matter of Andres Bermudez*, 16 BOLI 229, 242-43, 245 (1997) (penalties assessed for multiple violations of ORS 658.440(1)(f) despite the fact that Respondent "furnished the written statements * * * [to] the workers within at most 48 hours after they had begun work"). Second, the evidence established that, although Respondent started using Forms WH-151 and WH-153 after Bayless told him that was advisable, he used obsolete forms that contained inaccurate information.⁹

2. Civil penalties

The Agency has asked the forum to impose a civil penalty of \$750.00 for each of the ten violations of ORS 658.440(1)(f). In determining the appropriate amount of civil penalties, this forum considers the seriousness and magnitude of the violation. See OAR 839-015-0510(1)(c). In this case, the violations are serious because the workers were not provided with some of the information required by statute. In addition, Respondent knew or should have known of the violations because he was

a licensed farm/forest labor contractor and regularly received information from the Agency, including Form WH-151, that explained his legal obligations. There are mitigating factors in this case -- Respondent used an employee handbook that contained some of the statutorily required information; Respondent cooperated with the Agency's investigation; Respondent has no previous violations on his record; and Respondent intends to comply with ORS 658.440(1)(f) in the future.

Under the circumstances, and after considering penalties this forum previously has imposed for violations of ORS 658.440(1)(f),¹⁰ the forum finds that a penalty of **\$500.00** for each of the ten violations is appropriate.¹¹

Failure to Execute Written Agreements with Workers

1. Violations

ORS 658.440(1)(f), discussed above, requires farm/forest labor contractors to provide workers with certain information. Subsection (g) of the statute imposes an additional requirement -- it orders farm/forest labor contractors to enter binding written agreements with their workers that spell out the terms and conditions of employment. Those agreements protect workers by providing concrete evidence of the terms and conditions of employment -- including the hourly wage rate -- to which farm/forest labor contractor have bound themselves. By executing written agreements with their workers, farm/forest labor contractors also provide themselves with a means of defending against false wage claims. See *In the Matter of Paul A. Washburn*, 17 BOLI 212, 223 (1998).

Respondent admitted in his answer that he failed to execute written agreements with any of the workers on the Malheur contract. Respondent also admitted in his testimony that he had not executed written agreements with his workers. Respondent's employee handbook does not satisfy the requirements of ORS 658.440(1)(g) for two reasons: 1) it does not contain all the information required by statute;¹² and 2) it is not a binding agreement executed by Respondent and his

workers. By failing to execute a binding written agreement with at least ten workers on the Malheur contract, Respondent committed ten violations of ORS 658.440(1)(g).

2. Civil penalties

The Agency requests a \$750.00 penalty for each of the ten violations of ORS 658.440(1)(g). The forum agrees with the suggested magnitude of the penalty for the following reasons. First, a farm/forest labor contractor's complete failure to provide workers with a binding written agreement is extremely serious. See *In the Matter of Paul A. Washburn*, 17 BOLI at 225. The violation of ORS 658.440(1)(g) goes to "the heart of farm labor contractor statutes" because it denies workers the ability to protect themselves in the event of a dispute. *Id.* The seriousness of the violations weighs in favor of a heavy civil penalty. Second, as noted above, the forum also has found that Respondent knew or should have known of the violations. On the other hand, Respondent was cooperative with the investigation and intends to comply with the law in the future. These violations, however, remain more serious than Respondent's violations of ORS 658.440(1)(f) because Respondent did not provide his workers with *any* sort of binding written agreement, not even one that contained only some of the statutorily required terms. For that reason, and after considering the penalties imposed in other cases, the forum finds that a penalty of **\$750.00** for each of the ten violations of ORS 658.440(1)(g) is appropriate.¹³

Failure to File Certified True Payroll Reports

1. Alleged violations

The evidence clearly establishes both that Respondent's first CPR was due on June 2, 1998, and that he filed no payroll records by that date. Those facts establish a single violation of ORS 658.417(3) and OAR 839-015-0300. The forum's finding that the Agency did not extend the deadline by which the CPR was to be filed disposes of Respondent's first affirmative defense.

Respondent was required to file a second CPR by July 7, 1998, pursuant to OAR 839-015-0300. Respondent filed a CPR on July 2, 1998. As stated in Proposed Finding of Fact -- the Merits 29, *supra*, it is not clear whether there is a copy of that document in the record. Although Bayless testified that the CPR Respondent submitted on July 2, 1998, did not contain all the required elements of Form WH-141, no copy of that form is in the record, and Bayless did not describe precisely what information the document requires farm/forest labor contractors to include in their CPRs. In sum, there are proof problems regarding both the content of the CPR Respondent submitted and the information that CPR was legally required to include. The forum will not conclude that Respondent violated the law based solely on Bayless's conclusory testimony to that effect. The Agency did not prove by a preponderance of the evidence that the CPR Respondent submitted on July 2, 1998, did not contain all required information, and the second charged violation of ORS 658.417(3) is hereby dismissed.

Respondent's sixth affirmative defense is that any violations of ORS 658.417(3) should be suspended, "as the matter for which the civil penalty was assessed was corrected within 15 days of the time Fery Farm received notice of violation." Again, this forum has not previously suspended, and generally will not suspend, penalties for violations of the farm/forest labor statutes merely because they were corrected after the Agency began an investigation. Moreover, there is no persuasive evidence in the record to support Respondent's claim that he submitted a CPR that included all required information within 15 days of June 2, 1998.

2. Civil penalty

Respondent knew he was required to file a CPR for the USFS contract by June 2, 1998, and failed to do so. The violation is aggravated by the fact that several workers claimed they were due additional wages, and Respondent's difficulty with keeping his payroll up to date may have contributed to those claims. The violation is

Respondent's first, however, and in light of other recent orders related to violations of ORS 658.417(3), the forum finds that a civil penalty of **\$500.00** is more appropriate than the \$1000.00 requested by the Agency.¹⁴

The Agency's Exceptions

The Agency's exceptions focus on the ALJ's conclusion that Urena did not act as a farm/forest labor contractor in supplying four workers to Respondent. After further consideration, the forum agrees with the Agency's argument that Urena supplied the workers on Respondent's behalf, thereby acting as a farm/forest labor contractor whose license Respondent was required to examine. The Findings of Fact, Conclusions of Law, and Opinion section of this Order have been amended accordingly.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and in payment for the penalties assessed as a result of Respondent's violations of ORS 658.417(3), ORS 658.440(1)(f), and ORS 658.440(1)(g), Respondent Thomas L. Fery, dba Tom Fery Farm, 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 **THIRTEEN THOUSAND FIVE HUNDRED DOLLARS** (\$13,500.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order. This assessment is made as civil penalty against Respondent as follows: \$500.00 for each of ten violations of ORS 658.440(1)(f); \$750.00 for each of ten violations of ORS 658.440(1)(g); \$500.00 for the single violation of ORS 658.417(3); and \$500.00 for the single violation of ORS 658.437(2).

¹In its exceptions to the Proposed Order, the Agency did not renew its motion to add an alleged violation of ORS 658.440(3) to the Notice of Intent. Instead, it argued that the pleading should be amended to include a second charged violation of ORS 658.437. That exception is denied. This forum generally will not grant a motion to add a new substantive allegation to a pleading -- whether it be a new charged violation or a new affirmative defense -- when that motion is made for the first time in exceptions to a proposed order.

²In some portions of the record, the contract is referred to as the "Wallowa-Whitman" contract. At hearing, Respondent clarified that the work had taken place in the Malheur National Forest, not in the Wallowa-Whitman National Forest.

³ORS 658.405(1) defines the term "Farm labor contractor" to include people who engage in certain activities related to the production and harvesting of farm products, the gathering of certain wild forest products, or the forestation or reforestation of lands. Persons who act as farm labor contractors are required to obtain a license. ORS 658.410(1). In addition, persons who act as farm labor contractors "with regard to the forestation or reforestation of lands" must obtain a special indorsement on their farm labor contractor licenses. ORS 658.417(1).

The Agency's administrative rules separate the terms "farm labor contractor" and "forest labor contractor." Under the rules, the term "farm labor contractor" is limited to persons who engage in certain activities related to the production or harvesting of farm products or to the gathering of wild forest products. Those persons who engage in certain activities related to the forestation or reforestation of lands are termed "forest labor contractors." OAR 839-015-0004(3), (4).

This order uses the common short-hand term "farm/forest labor contractor" to refer to a person engaged in activities related to the forestation or reforestation of lands that bring the person within both: 1) the statutory definition of a "farm labor contractor" who needs a forestation/reforestation indorsement; and 2) the regulatory definition of a "forest labor contractor."

⁴If the second clause of the statute did not contain this additional element, *all* persons who supply workers to perform reforestation work would be farm/forest labor contractors. That interpretation would render the first clause of the statute (that makes suppliers of workers farm/forest labor contractors *only if* they are paid for supplying the workers) meaningless. "[W]henever possible, [a forum] must construe different provisions of a legislative enactment so as to give effect to each provision." *Owens v. Maass*, 323 Or 430, 918 P2d 808 (1996). In addition, in interpreting a statute, this forum must not "omit what the legislature has inserted." See *Carlson v. Myers*, 327 Or 213, 223, 959 P2d 31 (1998). For these reasons, the phrase "on behalf of an employer" cannot be overlooked.

⁵This forum has not previously been called upon to discuss the significance of these two separate clauses regarding the recruitment, solicitation, supplying, and employment of workers. The Commissioner's earlier decisions construing this statute have related to the meaning of the terms "recruit" and "solicit," not to other portions of the statutory language. See, e.g., *In the Matter of Joann West*, 13 BOLI 233, 244 (1994) (discussing cases). Perhaps for this reason, the forum has used the following shorthand to describe the acts that qualify a person as a farm/forest labor contractor: "A person acts as a farm labor contractor if the person 'recruits, solicits, supplies or employs' a worker for the purpose of forestation or reforestation of lands or the harvesting or production of farm

products." *Id.* That shorthand has the unfortunate effect of appearing to eliminate the other elements the Agency must prove to establish that a person is a farm/forest labor contractor. To the extent *that In the Matter of Joann West* and any other cases imply that mere recruitment, solicitation, supplying, or employment of workers, without more, qualifies a person as a farm/forest labor contractor, they are overruled.

⁶Findings of Fact -- the Merits 6 through 9 have been expanded to make these facts more clear. Ultimate Finding of Fact 3 and Conclusions of Law 3 and 4 also have been amended accordingly.

⁷To some degree, Respondent exercised that right through his agent, Seraphim Corona, who coordinated with Respondent regarding such matters as the organization of work and the date and time at which Urena would supply the workers.

⁸See *In the Matter of Melvin Babb*, 14 BOLI 230, 238-39 (1995) (\$500.00 penalty for single violation of ORS 658.437(2) where no mitigating or aggravating factors were found); *In the Matter of Boyd Yoder*, 12 BOLI 223, 231-232 (1994) (same).

⁹Respondent's similar third and fifth affirmative defense (to the charged violations of ORS 658.437(2) and ORS 658.440(1)(g)) fail for the same reasons.

¹⁰See, e.g., *In the Matter of Andres Bermudez*, 16 BOLI 229, 242-43, 245 (1997) (\$250.00 penalty assessed for each of 41 violations of ORS 658.440(1)(f) where both aggravating and mitigating factors were found, including the fact that Respondent "furnished the written statements * * * [to] the workers within at most 48 hours after they had begun work"); *In the Matter of Manuel Galan*, 15 BOLI 106, 138 (1996) (assessing \$1000.00 penalty for each of 14 violations of ORS 658.440(1)(f) where no mitigating factors were found), *aff'd without opinion, Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, *rev den* 326 Or 57, 944 P2d 947 (1997).

¹¹The forum's findings regarding the appropriate magnitude of penalties in this case dispose of Respondent's second affirmative defense.

¹²The same missing information that makes the handbook insufficient to meet the requirements of ORS 658.440(1)(f) also makes it deficient for purposes of ORS 658.440(1)(g).

¹³See, e.g., *In the Matter of Paul A. Washburn*, 17 BOLI at 225-26 (imposing \$750 penalty for each violation of ORS 658.440(1)(g)). Respondent argues that he can be fined only a total of \$2000.00 for the ten violations of ORS 658.440(1)(g) because those violations do not fall within the definition of "repeated violations" found in OAR 839-015-0512(2). Respondent is mistaken. The Agency's rules provide that "[e]ach violation is a separate and distinct offense." OAR 839-015-0507. A separate penalty may be imposed for each violation. See, e.g., *In the Matter of Andres Bermudez*, 16 BOLI at 242-43, 245 (\$250.00 penalty assessed for each of 41 violations of ORS 658.440(1)(f)). The only effect of OAR 839-015-0512(1) is to limit the penalty for *each* violation to no more than \$2000.00. OAR 839-015-0512(2), upon which Respondent relies, applies only to penalties assessed for acting as a farm or forest labor contractor without a license, and sets only *minimum*, not maximum, penalties for such violations.

¹⁴See, e.g., *In the Matter of Tolya Meneyev*, 14 BOLI 6, 15-16 (1995) (\$500 for the first violation, consisting of late submission of certified payroll records ["CPRs"], and \$1,000 for the second violation, consisting of failure to submit CPRs, where Respondent knew of his obligation to submit CPRs and was twice reminded by the Agency to submit them).