

**In the Matter of**  
**MANUEL M. GALAN,**  
**aka Manuel G. Mosqueda, dba**  
**Campesino # 95, Respondent.**

Case Number 19-97  
Final Order of the Commissioner  
Jack Roberts  
Issued July 2, 1997.

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**SYNOPSIS**

Respondent, an unlicensed farm labor contractor, recruited and transported workers in Oregon for herbicide application in California. Finding that Respondent acted as a farm labor contractor without an Oregon license, failed to provide at least three workers with required disclosure statements, and failed to execute required written agreements with at least three workers, the Commissioner imposed civil penalties of \$8,000. ORS 658.405(1); 658.407(3); 658.410(1); 658.415(1); 658.417(1); 658.440(1)(f) and (g); 658.453(1)(a), (c), and (e); 659.501; OAR 839-15-004(8)(c).

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The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 10 and 11, 1996, in a conference room of the Oregon Department of Transportation, 63055 N. Highway 97, Bend, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Manuel M. Galan, aka Manuel G. Mosqueda (Respondent), was present for a portion of the hearing on December 10 and was represented by Anthony V. Albertazzi,

Attorney at Law, Bend, who left the hearing in the afternoon of December 10, 1996. Walter Armstrong, Certified Interpreter, Madras, appointed by the forum and under proper affirmation, acted as interpreter for the Spanish speaking witnesses. Agency Compliance Specialist (CS) Lesley Laing assisted with documents and telephone facilities in Medford.

The Agency called as witnesses: forest workers Jose Baltazar Escalante and Jesus Uribe Garcia (both by telephone from Medford); Agency Compliance Supervisor Nedra Cunningham; Agency CS Victor Muniz; and Agency CS Raul Ramirez. Respondent called no witnesses.

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

#### **FINDINGS OF FACT -- PROCEDURAL**

1) On August 8, 1996, the Agency issued a "Notice Of Intent To Assess Civil Penalties" (Notice of Intent) to Respondent. The Notice of Intent informed Respondent as follows:

"THIS WILL NOTIFY YOU that the Commissioner intends to assess civil penalties against Manuel M. Galan aka Manuel G. Mosqueda, dba Campesino # 95 [Respondent] in the amount of \$8,000.00, pursuant to ORS 658.453.

"THE BASIS FOR CIVIL PENALTIES IS AS FOLLOWS:

"1. Acting As A Farm/Forest Labor Contractor Without A Valid License Or Indorsement Issued By The Commissioner. (One Violation) On or about July 1 and July 2, 1996, [Respondent] recruited, solicited, supplied, or employed workers in Oregon to perform labor upon [Respondent]'s forestation or reforestation contract on the Stanislaus National Forest at Sonora, California, USFS Contract No. 53-9A55-6-1S030. At all times material herein, [Respondent] did not possess a valid farm/forest labor contractor license, in violation of ORS 658.410, 658.415 and 658.417. Civil Penalty Assessed: \$2,000.00.

"2. Failure To Furnish 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 Contractor To Communicate With Workers Containing The Terms And Conditions Of Employment And A Statement Of The Workers' Rights and Remedies. (Three Violations) [Respondent], on or about July 1 and July 2, 1996, solicited, recruited, hired and transported at least two workers in Madras, Oregon and at least one worker in Medford, Oregon to perform labor upon [Respondent]'s forestation contract in Sonora, California, USFS Contract No. 53-9A55-6-1S030, and failed to furnish each worker a written statement in English and Spanish containing the terms and conditions of employment and statement of the workers' rights and remedies, in violation of ORS 658.440(1)(f). Civil Penalty Assessed: \$3,000.

"3. Failure To Execute A Written Agreement Containing The Terms And Conditions Of Employment For Each Worker At The Time Of Hire Or Prior To Work Being Performed. (Three violations) [Respondent], on or about July 1 and July 2, 1996, solicited, recruited, hired and transported at least two workers in Madras, Oregon and at least one worker in Medford, Oregon to perform labor upon [Respondent]'s forestation contract in Sonora, California, USFS Contract No. 53-9A55-6- 1S030, and failed to execute prior to hire or prior to work being performed, a written agreement between [Respondent] and each worker in English and Spanish containing the terms and conditions of employment, in violation of ORS 658.440(1)(g). Civil Penalty Assessed: \$3,000.00.

"THE BASIS FOR ENHANCED PENALTIES IS AS FOLLOWS:

"[Respondent] has been unlicensed since 1992 and from March through July, 1994, acted as an unlicensed contractor in violation of a Consent Order executed by [Respondent] on March 11, 1994. The magnitude and seriousness of the violations and [Respondent]'s knowledge of the licensing requirement for the activities [Respondent] is engaged in warrants enhanced civil penalties."

The Notice of Intent was served on Respondent personally at 815 NW 9th Street, Redmond, Oregon, by the Deschutes County Sheriff on September 2, 1996.

2) On September 10, 1996, Respondent through counsel answered the Notice of Intent as follows (eliminating caption and cause):

"REQUEST FOR HEARING

"Employer Manuel M. Galan, aka Manuel G. Mosqueda, dba Campesino # 95 by and through its attorney, Anthony V. Albertazzi, hereby requests a contested case hearing in the above-referenced matter

and answers the allegations in the Notice of intent to Assess Civil Penalties as follows:

"ANSWER TO PARAGRAPH 1

"Employer denies recruiting, soliciting, employing or supplying workers in Oregon to perform labor for USFS Contract number 53-9A55-6-1S030.

"ANSWER TO PARAGRAPH 2

"Employer alleges that it furnished each worker on USFS Contract No. 53-9A55-6-1S030 with a written statement complying with ORS 658.440(1)(f).

"ANSWER TO PARAGRAPH 3

"Employer alleges that it complied with ORS 658.440(1)(g) with respect to all workers on USFS Contract No. 53-9A55-6-1S030.

"EMPLOYER'S AFFIRMATIVE DEFENSE

"Employer alleges that ORS 658.410, 658.415 and BOLI's application thereof violate the Commerce Clause of the United States Constitution.

"Employer alleges that the procedure being used herein to adjudicate its rights amounts to a denial [of] due process of law in violation of the Constitution of the United States and the Constitution of the State of Oregon because the adjudicating party is not neutral."

3) The Agency requested a hearing date. On October 18, 1996, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing and the designated ALJ, together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and b) a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-50-000 through 839-50-420.

4) On November 19, 1996, the ALJ issued a discovery order pursuant to OAR 839-50-200 and 839-50-210 directing each participant to submit a summary of the case to be due December 2, 1996.

5) On December 2, 1996, the Agency filed its summary of the case

containing a list of witnesses to be called at hearing and copies of 19 exhibits to be offered, and on December 4, 1996, the Agency filed a supplement to its summary of the case containing two additional documents to be offered. Respondent failed to file a summary of the case.

6) On December 9, 1996, the forum received by fax Respondent's motion transmitted December 6, 1996,<sup>1</sup> at 6:01 p.m. and signed and dated by counsel on December 6, 1996, requesting a postponement of the hearing scheduled for December 10, 1996, in Bend. The motion was based on a recitation of

1. Respondent's scheduled appearance<sup>2</sup> at a hearing before the Federal Board of Contract Appeals for the United States Department of Agriculture on December 11, 1996;
2. Receipt by Respondent on December 5, 1996, of discovery requested on November 19, 1996;
3. Inadequacy of discovery responses, necessitating a motion to compel;
4. The motion to compel would include names, addresses, telephone numbers, and substance of testimony of Agency witnesses for the hearing; Agency telephone bill; names and positions of Agency employees who prepared and/or advised in preparation of the charging document; disclosure of any communications by Agency personnel or witnesses to be called to any Agency ALJ, citing ORCP Rule 36(B)(1);
5. Hearing without the requested discovery would prejudice Respondent unfairly.

Respondent requested that the hearing "be continued until such time as discovery issues has [sic] been resolved."

7) On December 9, 1996, the ALJ issued an order denying postponement providing in part:

"The USDA Board of Contract Appeals letter "Notice of Hearing" is dated November 22, 1996, at Washington, D.C. and calls for hearing at 9 a.m. December 11, 1996, in Seattle, Washington. A letter from Seattle attorney Mark Walters to Respondent's counsel of record herein, dated December 5, 1996, states 'It is imperative that Mr. Galan and his witnesses be in Seattle no later than December 10, 1996 to assist in the preparation of Staff, Inc.'s case.'

"The files and records of this proceeding disclose that on October 18, 1996, a Notice of Hearing was issued by this forum for hearing on December 10, 1996. On November 19, 1996, a routine Discovery Order pursuant to OAR 839-50-210(1)(a) was issued to the participants requiring the filing of case summaries on December 2, 1996. The Agency timely filed its case summary on December 2 and a supplement thereto on December 4. Respondent did not file a Case Summary, timely or otherwise. The hearings file reveals no prior request for discovery filed by Respondent for adjudication by this forum.

"This proceeding is not governed by the Oregon Rules of Civil Procedure. It is a contested case proceeding under the Oregon Administrative Procedures Act, ORS chapter 183. Procedure in this matter is governed by Oregon Administrative Rules (OAR) 839-50- 000, *et seq.* The Agency, the Bureau of Labor and Industries, is not a "party" under the statute and those rules. A copy of those rules was served on Respondent.

"As a matter of policy, this forum will defer to other matters scheduled by a respondent or a respondent's counsel for the same date as a hearing before this forum provided the conflicting matter was docketed prior to the hearing before this forum. The showing here is to the contrary, and there is no indication of any attempt by Respondent to reset or postpone the USDA matter. The forum infers from the fact that Respondent made no attempt to comply with the existing Discovery Order by filing a Case Summary or a motion for discovery on or before the due date of December 2, 1996, that Respondent did not intend to comply therewith.

"Respondent's motion to postpone the hearing scheduled herein for December 10, 1996, at 9 a.m. in Bend, said motion being received in a closed office on Friday, December 6, 1996, and actually received by the ALJ at 8:30 a.m. on December 9, 1996, is denied as being untimely and because Respondent has failed to demonstrate acceptable good cause for the request. OAR 839-50-150(5).

"Hearing will proceed as scheduled at 9 a.m. December 10, 1996. At that time, I will hear any objections Respondent may have to proceeding."

That order was transmitted by fax to Respondent's counsel at approximately noon, December 9, 1996.

8) At the commencement of the hearing, Respondent's counsel stated that Respondent had received the Notice of Contested Case Rights and Procedures and had no questions about it.

9) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The hearing convened at 9:20 a.m., Tuesday, December 10, 1996. Respondent and his counsel were present. Respondent's counsel renewed the motion for postponement. The ALJ's ruling at hearing on the motion is set out in a separate section of this Order.

11) At 11 a.m. on December 10, 1996, Respondent left the hearing with the announced intention of driving to Seattle. At 11:20 a.m., the ALJ adjourned the hearing until 1:00 p.m. to accommodate the arrival of the interpreter. Respondent's counsel's office telephoned the ALJ at 1:00 p.m. to advise that counsel was delayed in court. He arrived in the hearing room at approximately 1:20 p.m.

12) The Agency called witnesses Jose Baltazar Escalante (Baltazar) and Jesus Uribe Garcia (Garcia), who testified by telephone from Medford through interpreter Armstrong. Respondent's counsel cross-examined both witnesses through the interpreter.

13) Following the testimony of the Spanish-speaking witnesses, Respondent's counsel announced that he was leaving the hearing to obtain impeaching testimony of other witnesses interviewed by CS Ramirez for presentation on the following morning, December 11, 1996, and that he would waive cross-examination of anticipated Agency witnesses Hatfield, Muniz, and Cunningham. The ALJ suggested that the Agency could present those witnesses on December 11, 1996, in order to accord counsel the opportunity for cross-examination, but counsel declined. Counsel was advised on the record that the proceedings would reconvene in the same location at 9 a.m., December 11, 1996. On the record, counsel left the hearing voluntarily for the

avowed purpose of obtaining witnesses. The Agency then continued its presentation of witnesses, during which the ALJ admitted certain Agency exhibits provisionally, subject to Respondent's record objection the following day. The ALJ adjourned the proceedings at 4:10 p.m. on the afternoon of December 10 until 9 a.m., December 11, 1996.

14) The Agency and the ALJ were present and ready to proceed at 9 a.m., December 11, 1996. Neither Respondent nor his counsel were present. The ALJ determined to wait 30 minutes, pursuant to the rules of the forum. At 9:31 a.m., the ALJ received a telephone call from Respondent's counsel's office advising that counsel was "tied up in court," would not attend, and would submit a written closing argument.

15) The hearing was reconvened at 9:33 a.m., December 11, 1996, and the ALJ put the circumstances on the record and admitted without reservation those exhibits admitted provisionally the day before. The Agency completed its presentation and closing remarks. No written closing or other communication was received from Respondent's counsel or from Respondent between the adjournment of the hearing on December 11, 1996, and the issuance of the proposed order on February 24, 1997.

16) The proposed order, containing an exceptions notice, was issued on February 24, 1997. Exceptions were due March 6, 1997. Respondent, acting pro se, sought and received two extensions of time in which to file exceptions, which were received. The Agency moved to disregard the exceptions as untimely. On June 6, 1996, the ALJ found that Respondent's exceptions were timely. They are dealt with in the Opinion section of this Order.

#### **RULING ON MOTION**

At hearing, Respondent's counsel renewed portions of his motion for postponement, alleging that Respondent would be prejudiced unless the Agency were compelled to provide discovery of the following, which the Agency had allegedly failed

or refused to make available:

- 1) logs of telephone conversations regarding this case made within 60 days prior to the date of the Notice of Intent;
- 2) a copy of the Agency's telephone bill for a period of 60 days prior to the date of the Notice of Intent;
- 3) copies of position descriptions of Agency personnel doing the investigation of the case;
- 4) identification, substance of testimony, and location of Agency witnesses;
- 5) disclosure of any ex parte communications<sup>3</sup> made by Agency personnel to any ALJ employed by the Agency concerning the case.

Respondent's counsel requested that the hearing be postponed until the information was provided or, in the alternative, that the hearing be held open until the information was provided.

The Agency opposed any postponement, responding to Respondent's motions as follows:

- 1) The Agency provided a complete copy of the Agency's investigative file in this case; other than the telephone conversations noted in that file, there were no telephone logs in existence;
- 2) A copy of the Agency's telephone bill for a period of 60 days prior to the date of the Notice of Intent was not relevant, providing it would be burdensome, and it would contain no information regarding the identity of callers, the identity of persons called, or the substance of conversations;
- 3) A copy of Compliance Specialist Ramirez's position description was supplied together with the information that it was identical to that of Mr. Muniz, whose position description could not be readily located, and the position descriptions were in any event not relevant;
- 4) The Agency identified its witnesses and the area of their testimony in its case summary, pursuant to the hearings rules;
- 5) The Case Presenter had advised counsel that, to her knowledge, no ex parte contacts had taken place.

Respondent's counsel argued that the information was needed to facilitate discovery for purposes of impeachment and to determine how much investigation was done before bringing the charges, which counsel alleged were brought in bad faith.

Counsel suggested that the case was unusual and was handled improperly and that the position descriptions would include the "legal" description of the employee's position and level of competence.

The ALJ determined that Respondent could obtain only documents that existed, and that no logs of the type sought existed. Noting that the Agency's offices were in several geographic locations, each of which had multiple telephone stations, each accessible to several employees, and that the bill would reflect only numbers<sup>4</sup> and not the subject matter of conversations, the ALJ ruled that using the telephone bill was not an efficacious method of discovery and that its production would be burdensome. The ALJ determined that the position descriptions were not relevant absent a showing that the investigators did something unlawful or totally outside the scope of investigating farm/forest labor practices. The ALJ noted that the Agency complied with the rules, providing the identity of Agency witnesses in its case summary and, in addition, the Agency supplied Respondent with a copy of its investigative file, which included the statement and location of each witness. The ALJ stated on the record that as the decision maker, he was unaware of any ex parte conversation about this case; the Case Presenter stated on the record that she knew of no ex parte conversation with any Agency ALJ about this case and that the Agency investigators had denied having any such conversations. Based on these findings, the ALJ denied the postponement. That ruling is confirmed.

#### **FINDINGS OF FACT -- THE MERITS**

- 1) At times material herein, Respondent, using the names Manuel Galan Mosqueda and Manuel Mosqueda Galan, did business under the assumed business name of Campesino #95 at 815 NW 9th Street, Redmond, Oregon.
- 2) On June 14, 1996, as a result of solicitation number R5-16-96-31 of April

15, 1996, the Forest Service of the United States Department of Agriculture (USFS) awarded contract number 53-9A55-6-1S030 to Respondent for the application of herbicide on 727 acres of the Groveland Ranger District, Stanislaus National Forest, Sonora, California. Contract time, that is, the date that work could begin and the date from which progress and completion requirements were to be measured was June 24, 1996.

3) At times material herein, Respondent, whose prior company had been licensed in Oregon, had no Oregon farm/forest labor contractor license.<sup>5</sup>

4) Respondent, with a crew of from 17 to 19 workers, began work on contract number 53-9A55-6-1S030 on July 3, 1996.

5) At the time of the hearing, Raul Ramirez had been employed in the Agency Farm Labor Unit (FLU) in Medford for over two and one half years. Acting on information received from Thad Waterbury, Contracting Officer with the USFS Stanislaus National Forest, Ramirez sought out for interview workers who had been employed by Respondent on the Groveland Ranger District contract. He obtained statements in Medford from Jesus Uribe Garcia<sup>6</sup> on July 23, 1996, and from Jose Baltazar Escalante<sup>7</sup> on July 24, 1996.

6) In July 1996, Jose Baltazar resided at 412 Manzanita, Medford, Oregon. At 4 p.m. on July 1, he left that address to be driven to Sonora, California, by Victor De Leon to work for Respondent applying herbicides. He worked on the Groveland Ranger District contract from July 3 through July 5, 1996.

7) In July 1996, Jesus Garcia resided at 833 W. Jackson, #14, Medford, Oregon. At 4 p.m. on July 1, he left the address of his friend Baltazar to be driven to Sonora, California, by Victor De Leon to work for Respondent applying herbicides. He worked on the Groveland Ranger District contract from July 3 through July 5, 1996.

8) Garcia signed a document in California written in Spanish. In English the document reads as follows:

"Campesino '95

"Manuel Galan, Owner

PO Box 1529

Redmond OR 97756

Tel/Fax: (503) 548-2358

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"6/30/96

"On June 30, 1996, I was employed by a supervisor of the Campesino #95 company. The supervisor by the name of Victor De Leon has informed us that our job consisted in spraying chemicals in Sonora, California. The minimum salary for this will be \$10.23 per hour plus 90 cents of extra benefits. The documents for work has been filled out prior to starting to work. They explained to me that all loans will be deducted from my salary."

Garcia signed as laborer and Victor De Leon signed as supervisor ("El Mayordomo").

9) Victor De Leon was a foreman for Respondent on the Groveland Ranger District contract number 53-9A55-6-1S030 in July 1996.

10) At the time of the hearing, Victor Muniz had been employed in the FLU in Salem from May to December 1996. On July 23, 1996, at the request of his co-worker Ramirez, he obtained a statement at 23 SW Depot Road, # 42, Madras, Oregon, from Jose Gilberto Arreola Sanchez,<sup>8</sup> a worker who had been employed by Respondent on the Groveland Ranger District contract.

11) On or about July 2, 1996, Arreola left the Madras address to be driven to Sonora, California, by Respondent to work for Respondent applying herbicides. He worked on the Groveland Ranger District contract from July 3 through July 5, 1996. He returned home from Sonora in a car with Respondent.

12) Form WH-151 is an Agency form headed "Rights of Workers." It is intended to be receipted for by each worker before each job begins and explains the

rights of workers and responsibilities of farm labor contractors in Oregon. It explains that contractors must be licensed, provide written agreements and notices of rights to workers, have a bond, pay and give notice of minimum wage, and explains that workers have legal rights, may make a claim for unpaid wages or for on-the-job injuries, may earn unemployment benefits, and are protected against discrimination. It includes the address of each Agency office. Form WH-151s is the same form in Spanish. A contractor furnishing this form or its equivalent is considered to be in compliance with ORS 658.440(1)(f).

13) Form WH-153 is an Agency form headed "Agreement Between Contractor and Workers (To be executed by both parties)." It is intended to memorialize between the labor contractor and the worker such items as rate of pay, bonus, personal loans, housing, health and day care services, employment conditions, equipment and clothing, the existence of any labor dispute, the owner of the land, any other working conditions, and acknowledgment of the WH-151 rights and remedies form and provisions of the federal service contract act, if applicable. It is intended to be signed by each worker and the contractor before each job begins. Form WH-153s is the same form in Spanish. A contractor furnishing this form or its equivalent is considered to be in compliance with ORS 658.440(1)(g).

14) Neither Respondent nor Victor De Leon furnished Garcia, Baltazar, or Arreola with a WH-151 form or its equivalent in connection with the employment in Sonora, California, in July 1996.

15) Neither Respondent nor Victor De Leon furnished Baltazar or Arreola with a WH-153 form or its equivalent in connection with the employment in Sonora, California, in July 1996. The form signed by Garcia was not equivalent to a WH-153.

16) At times material herein, Nedra Cunningham was a Compliance

Supervisor in the FLU. She supervised seven compliance specialists in investigation of farm labor and wage claim matters, including Ramirez and Muniz.

17) Pursuant to Oregon statute, the Commissioner of the Bureau of Labor and Industries has adopted Oregon Administrative Rules (OAR) 839-15- 000 to 839-15-610 regulating farm and forest labor contractors.

18) Prior to July 1, 1996, the activities of forest fire suppression by contract crew, application of big game repellent by contract crew, herbicide or pesticide application in the forest by contract crew, gopher baiting, and gopher trapping were among activities that were exempted from the definition of forestation and reforestation activities requiring a farm/forest labor contractor license.

19) In January 1996, Cunningham was present at a meeting which included Respondent and Commissioner Roberts. At that time, the Commissioner informed Respondent that the Agency intended to propose changing the farm labor contractor rules to include the activities of forest fire suppression by contract crew, application of big game repellent by contract crew, herbicide or pesticide application in the forest by contract crew, gopher baiting, and gopher trapping as licensed forestation activities.

20) OAR 839-15-004(8)(c) defines in part the activities constituting the "forestation or reforestation of lands." Pursuant to statute, the Agency gave notice of rules hearings to be held in March 1996 regarding a proposed rule change intended to add activities related to the forestation or reforestation of lands in OAR 839-15-004(8)(c), with the result that persons engaged in such activities would become subject to the requirements of the Oregon farm/forest labor contracting law.

21) In a summary of proposed changes published in March 1996 and distributed at each rules hearing, the Agency gave notice that the change to OAR 839-15-004(8)(c) was a major substantive change which, if adopted, might result in licensing

requirements for persons not currently licensed.

22) The summary of proposed changes was available at rules hearings held in Bend on March 26, 1996, and in Salem on March 28, 1996. Respondent attended both hearings and testified at both hearings.

23) Persons attending rules hearings were notified of the final Agency action regarding the rules involved. On or about May 30, 1996, the Agency transmitted a memorandum notice to "Interested Parties" regarding the adoption of rules relating to farm and forest labor contractors which contained the following, in pertinent part:

"Effective July 1, 1996, administrative rules relating to farm and forest labor contractors will be amended as follows:

" \* \* \* \* \*

"The following activities by a contractor have been added to the definition of activities relating to the forestation and reforestation of lands. Contractors performing these activities will be required to obtain a farm/forest labor contractor's license as of July 1, 1996:

Forest fire suppression by contract crew

Application of big game repellent by contract crew

Herbicide and pesticide application by contract crew

Gopher baiting and gopher trapping

" \* \* \* \* \*

"Copies of the amended rules may be obtained by calling (503) 731-4742." (Emphasis in original.)

Respondent was among those persons to whom the memorandum notice was sent.

24) As part of her duties, Cunningham reviewed the investigative file developed by Ramirez and Muniz in this case. Included in the file was a copy of the "Campesino '95" payroll report dated July 9, 1996, identified by the notations "R5-16-96-31," and "Stanislaus N.F.," and signed by Respondent, which detailed worker hours and earnings for July 3, 4, and 5, 1996. Also included was a copy of a computerized check register from Barrett Business Services, Inc., for the week ending July 7,

1996, noted "Customer: 305788 Campesino 95" and listing the hours, rate, pay, deductions, and social security numbers of the persons paid in connection with the Campesino '95 payroll report. The copy of the payroll report and the copy of the check register were requested by the Agency from Barrett Business Services, Inc. and received in the Agency's Salem office on August 8, 1996.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent did not possess a valid Oregon farm/forest labor contractor license.

2) On or about July 2, 1996, Respondent recruited, transported, and employed at least three workers in Oregon to perform labor upon Respondent's forestation or reforestation contract USFS # 53-9A55-6-1S030 on the Stanislaus National Forest at Sonora, California.

3) On or about July 2, 1996, in connection with contract USFS # 53- 9A55-6-1S030 at Sonora, California, Respondent failed to furnish to each of the three Oregon workers a written statement in English and Spanish containing those terms and conditions of employment required by Oregon statute and a statement of the workers' rights and remedies.

4) On or about July 2, 1996, in connection with contract USFS # 53- 9A55-6-1S030 at Sonora, California, Respondent failed to execute at the time of hire or prior to work being performed, a written agreement between himself and each of the three Oregon workers in English and Spanish containing those terms and conditions of employment required by Oregon statute.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, ORS 658.407 provided in pertinent part:  
"The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.803, and in doing so shall:

" \* \* \* \* \*

"(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

At all times material herein, ORS 658.501 provided:

"ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to the recruitment of workers in this state to perform work outside this state, the recruitment of workers outside of this state to perform work in whole or in part within this state, \* \* \* the transportation of workers through this state and the payment, terms and conditions, disclosure and record keeping required with respect to work performed outside this state by workers recruited in this state."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein.

2) At all times material herein, ORS 658.405 provided in pertinent part:  
"As used in ORS 658.405 to 648.503 \* \* \*, unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities \* \* \*."

At all times material herein, ORS 658.410 provided in pertinent part:

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

At all times material herein, ORS 658.415 provided in pertinent part:

"(1) No person shall act as a farm labor contractor unless the person has first been licensed by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 658.405 to 658.503 and 658.830."

At all times material herein, ORS 658.417 provided in pertinent part:

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

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

Effective July 1, 1996, OAR 839-15- 004(8) provided in pertinent part:

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

" \* \* \* \* \*

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide application in the forest by contract crew; gopher baiting; gopher trapping and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land."

As of July 1, 1996, the application of herbicide in the forest by Respondent's contract crew was an activity related to the forestation or reforestation of lands, and was within the statutory definition of forestation or reforestation of lands. In July 1996, Respondent recruited, transported, and employed at least three workers in Oregon to perform labor for another to work in the forestation or reforestation of lands, and thereby acted as a farm labor contractor with regard to the forestation or reforestation of lands without having a farm labor contractor's license or a special indorsement authorizing him to so act and violated ORS 658.410(1) and 658.417(1).

3) At all times material herein, ORS 658.440 provided in pertinent part:

"(1) 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.

"(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."

By failing to furnish to at least three workers in Oregon at the time they were recruited in July 1996 with the written information contained in form WH-151, or its equivalent, Respondent violated ORS 658.440(1)(f) three times.

4) At the time of hiring and prior to the workers performing any work in July 1996 Respondent failed to execute a written agreement between himself and each of at least three workers such as form WH-153 or its equivalent and violated ORS 658.440(1)(g) three times.

5) At all times material herein, ORS 658.453 provided in pertinent part:

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

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, solicits, supplies or employs a worker.

" \* \* \* \* \*

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

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) \* \* \*."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the penalties assessed in the Order below is a proper exercise of that authority.

### OPINION

At the time Respondent bid on and obtained USFS contract # 53-9A55-6- 1S030, the application of herbicide in the forest by a contract crew was not an activity related to the forestation or reforestation of lands. But by the time Respondent actually started work, and by the time he recruited workers in Oregon, the provisions of OAR 839-15-004(8) had become effective. The evidence clearly showed that the workers were recruited and transported in Oregon to California on or after July 1, 1996, and that work began on July 3, 1996. Under such circumstances, the Farm Labor Contractors Act, (ORS 658.405 to 658.503 and 658.830) applied to Respondent and the workers. ORS 658.501; *In the Matter of Manuel Galan*, 15 BOLI 106, 130 (1996), *aff'd without opinion, Staff, Inc. v. Bureau of Labor and Industries*, \_\_ Or App \_\_ (June 11, 1997); *Perez v. Coast to Coast Reforestation Corp.*, 100 Or App 115, 785 P2d 365 (1990); *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989).

By its terms, ORS 658.501 applies "to all transactions, acts and omissions of farm labor contractors \* \* \* including but not limited to the recruitment of workers in this state to perform work outside this state," as well as "the transportation of workers through this state and the payment, terms and conditions, disclosure and record

keeping required with respect to work performed outside this state by workers recruited in this state." Thus, because these workers were recruited and transported in Oregon for work outside the state, all of the requirements of the Farm Labor Contractors Act applied, including the rules promulgated thereunder and including, as of July 1, 1996, the language of OAR 839-15-004(8) effective that date.

The application of herbicide in the forest by Respondent's contract crew was a forestation or reforestation activity for which Respondent had no license. There was no evidence that Respondent provided to any of the three workers a written statement in any language containing the information required by ORS 658.440(1)(f). There was no evidence that at the time of hire of the three workers and prior to any of them performing any work, Respondent executed a written agreement with them, in any language, containing the terms and conditions required by ORS 658.440(1)(g). While the document in Spanish signed by Garcia contained some pay information, it was not an adequate equivalent for WH-153. Although it bore a date of June 30, 1996, it was signed after that date.

It was uncontroverted that Respondent had knowledge that herbicide application would become a regulated activity on July 1, 1996, and that he had prior knowledge of the requirements of the Farm Labor Contractors Act. The penalties assessed are appropriate.

## **RESPONDENT'S EXCEPTIONS**

Respondent excepted to the Proposed Order on several bases:

"1. The refusal of the Administrative Law judge to grant the motion to postpone was unreasonable and not in the interest of justice, infringed upon Respondent's constitutional right to be present at his own hearing to confront and cross-examine witnesses, testify on his own behalf, and adequately defend himself."

The ALJ's order denying postponement was based on the record at the time. On

December 9, 1996 (and, indeed, on December 6, 1996), that record included, in addition to the Notice of Intent and Respondent's answer:

October 18, 1996, Notice of Hearing for hearing on December 10, 1996;

November 19, 1996, ALJ order requiring case summaries due December 2, 1996.

December 2, 1996, Agency case summary containing a list of witnesses and copies of 19 documents to be offered at hearing.

December 4, 1996, supplement to Agency case summary.

Respondent had failed to file a summary of the case. There was no hint or suggestion on the record that Respondent might have a conflicting proceeding or that Respondent was alleging difficulty with discovery. Among the items to be considered by the ALJ on a motion for postponement is the timeliness of the request. In this instance, the ALJ found that the request was untimely, arriving as it did in a closed office the weekend before a Tuesday hearing. One paragraph of the motion references the USDA Board of Contract Appeals matter in Seattle December 11, 1996, and two and one half pages involved alleged discovery problems with the Agency in this case. Enclosures to the motion included a copy of USDA's letter notice of the December 11, 1996, hearing, apparently to Staff, Inc.'s Seattle counsel dated November 22, 1996, and a copy of that attorney's letter of December 5, 1996, to Respondent's counsel herein regarding Respondent's attendance in Seattle. The ALJ may grant a postponement if there is a showing of good cause, that is, that there was an excusable mistake or a circumstance beyond the participant's control. OAR 839-050-0150(5)(a), 839-050-0020 (9).<sup>9</sup> Based on the record, the ALJ denied the postponement.

Respondent enclosed further information with his exceptions, including a copy of an October 9, 1996, letter from the USDA Board of Contract Appeals confirming that on October 7, 1996, "The Board advised the parties to hold open December 10 and 11, 1996." Thus, by mid-October, and certainly by the time the Agency's Notice of Intent

was served, Respondent was aware of the probability of conflict with the date set by this forum. The record herein reveals no communication or suggestion from Respondent regarding a conflict until the December 6 motion. Respondent's exception is overruled and the ALJ's ruling denying postponement is confirmed.

"2. The changes in OAR 839-15-004(8) did not affect the contract in question as no Oregon activities took place on or after July 1, 1996."

There was credible evidence that workers were recruited in Oregon after July 1, 1996, for an activity that was licensable in Oregon after July 1, 1996. Because Garcia testified that he signed the document quoted in Finding of Fact 8 after he arrived in California in July 1996, the forum has inferred that it must have been signed in July, regardless of the typed date. This exception is overruled.

"3. The propriety of the agency's investigative techniques and authority to investigate are questionable."

Respondent argued that the Agency had no statutory authority at times material to conduct an investigation where there was no complainant. At times material, ORS 658.407 charged that the Commissioner administer and enforce ORS 658.405 to 658.503 and 658.830 and "Investigate \* \* \* controversies between farm labor contractors and their workers with respect to claims arising under ORS 658.415(3)."<sup>10</sup> However, the Commissioner's authority to investigate is not so narrowly limited. Other portions of the chapter give the Commissioner broad authority over applicants and licensees for farm and forest labor activities. In addition to specific protection of worker earnings,<sup>11</sup> the Commissioner is empowered to license farm and forestation contractors<sup>12</sup> and in doing so, may either upon the protest of an individual or on the Commissioner's own motion, investigate an applicant's character and proposed method of operation,<sup>13</sup> revoke, suspend or refuse to renew an existing license,<sup>14</sup> and impose civil penalties for violations.<sup>15</sup> In addition, the Commissioner is generally charged to

"cause to be enforced" all laws protecting employees.<sup>16</sup> Thus, Respondent seems to argue that the Commissioner has authority over applicants and existing licensees, but is unable to investigate abuses by unlicensed operators deliberately ignoring the law. On the contrary, in the context of ORS 659.405 to 658.503 and 658.830, the Commissioner need not wait for or solicit an employee claim in order to initiate an investigation. An agency has such implied authority as is necessary to carry out power expressly granted. *Anderson v. Public Employees Retirement Board*, 134 Or App 422, 895 P2d 1377 (1995). Respondent's exception challenging the authority for the investigation is overruled.

"4. Regarding the charge that statements equivalent to WH-153's were not provided, the ALJ has again ruled contrary to the evidence. The June 30th statements were not provided as a substitute for the WH-153. \* \* \* A complete copy of the payroll records, exactly as provided to the US Department of Labor \* \* \* was provided at the hearing."

Agency exhibits offered and received at hearing consisted of copies of three pages of payroll report forms and three pages of a check register printout (together, A-12) and copies of 19 INS forms I-9 (A-10). Respondent exhibits offered and received at hearing were: a document in Spanish labeled "6/30/96" with signature "Jesus Uribe G." (R-1); a document in Spanish labeled "6/30/96" with signature "Victor Hugo Cruz R." (R-2); an IRS form W-4 with signature "Jose Baltazar" and date of "04-2-96" (R-3); an INS form I-9 signed "Jose Baltazar" with date of "04-02-96" (R-4); BOLI forms WH-151s and WH-153s, each with signature "Jose Baltazar" and each with date of "04-02-96" (R-5). No other payroll records were offered. No BOLI forms WH-151s or WH-153s for contract number 53-9A55-6-1S030 appear in the record. The exception is without merit.

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 658.453, Respondent MANUEL M. GALAN, aka Manuel G. Mosqueda, is hereby ordered to deliver to the Bureau of Labor

and Industries, Fiscal Services Office Suite 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 EIGHT THOUSAND DOLLARS (\$8,000), plus any interest thereon which accrues at the annual rate of nine percent, between a date ten days after the issuance of the Final Order herein and the date Respondent complies therewith. This assessment is made as civil penalty against Respondent as follows: for violation of ORS 658.410 and 658.417, \$2,000; for three violations of ORS 658.440(1)(f), \$3,000 (\$1,000 per violation); and for 3 violations of ORS 658.440(1)(g), \$3,000 (\$1,000 per violation; total \$8,000.

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<sup>1</sup>Unaccountably, the cover letter bears the date "August 29, 1996."

<sup>2</sup>This forum acknowledges that Respondent herein is a principle in Staff, Inc., a corporation involved in the USDA contract appeal.

<sup>3</sup>Counsel and the ALJ agreed that "ex parte communication" meant any discussion by an Agency employee with the decision maker about the facts in issue in this case.

<sup>4</sup>In addition, the bill would show only toll calls; it would not have a record of intercom calls within one office location or of local calls.

<sup>5</sup>As used herein, the term "farm/forest labor contractor license" means a farm labor contractor's license with forestation or reforestation of lands indorsement required by ORS 658.410, 658.415, and 658.417.

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<sup>6</sup>This witness is listed on Respondent's payroll report as "Jesus Uribe," but signed US Department of Justice, Immigration and Naturalization Service Form I-9 (INS form I-9) as "Jesus Uribe Garcia," with the same social security number. He testified as Garcia.

<sup>7</sup>This witness testified that he is generally known as Jose Baltazar.

<sup>8</sup>This worker is listed on Respondent's payroll report as "Jose J. Arreola," but signed INS form I-9 as "Gilberto Arreola," with the same social security number.

<sup>9</sup>Formerly, prior to a change in numbering system only, 839-50-150(5)(a), 839-50-020(9).

<sup>10</sup>ORS 658.415(3) refers to the bonding of contractors to assure wage payment.

<sup>11</sup>ORS 658.407.

<sup>12</sup>ORS 658.410, 658.415, and 658.417.

<sup>13</sup>ORS 658.420.

<sup>14</sup>ORS 658.435, 658.445.

<sup>15</sup>ORS 658.453.

<sup>16</sup>ORS 651.050.