

In the Matter of
SPOT SECURITY, INC.

Case No. 112-01

Final Order of the Commissioner Jack Roberts

Issued September 21, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a \$350 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 7, 2001, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. No one appeared on behalf of Respondent, and Respondent was held in default.

The Agency called Susan Wooley, Wage & Hour Division compliance specialist, as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-4 (submitted or generated prior to hearing);
- b) Agency exhibit A-1 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On February 15, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey (“wage survey”) by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged the violation was aggravated in that Respondent knew, or should have known of the violation and had more than ample opportunity to comply with the law, but failed to do so. The Agency alleged the violation was further aggravated by its seriousness and magnitude and the effect Respondent’s failure to complete the survey had on the Commissioner’s ability to accurately determine the prevailing wage rates, including potential skewing of the established rates. The Agency sought a civil penalty of \$500 for the single alleged violation.

2) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice, if it wished to exercise its right to a hearing.

3) On March 12, 2001, Respondent sent an answer and request for hearing on Respondent’s letterhead that was signed by Don St. Mary and included the following statements:

“* * * We did return this [the 2000 Construction Industry Occupational Wage] survey and respectfully request you waive the \$500.00 fine set forth. Our company forwarded this survey only a few days after receiving it with all answers being no, and it was not necessary for us to provide any further information. I am our company’s authorized representative for this hearing, as I am the individual who signed and returned it. * * *”

The following address was printed on Respondent's letterhead: "Spot Security, 3323 SW Harbor Drive, Portland, OR 97201."

4) There is no evidence in the record to establish how the Agency served the Notice on Respondent, or the address at which Respondent was served. However, the Notice bears the following name and address immediately under its caption: "SPOT SECURITY, INC., 3323 SW NAITO PARKWAY, PORTLAND, OR 97201."

5) The Agency filed a request for hearing with the Hearings Unit on April 26, 2001.

6) On May 16, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for August 7, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent. These documents were mailed to Respondent at 3323 SW Naito Parkway, Portland, OR 97201.

7) On July 6, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by July 30, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum sent to Respondent a form designed to assist non-attorneys in filing a case summary.

8) The Agency filed a case summary on July 18, 2001. Respondent did not file a case summary.

9) Respondent did not appear at the time set for hearing and nobody appeared on Respondent's behalf. No one had notified the forum that Respondent

would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When no one had appeared on Respondent's behalf, the ALJ declared Respondent to be in default and commenced the hearing.

10) The Agency waived the ALJ's recitation of the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On August 23, 2001, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Respondent was an employer in the year 2000.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner planned to, and did use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the name of each business contractor to whom wage survey packets were sent, the address where the packets were sent, whether it was returned, the date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet addressed to "Spot Security" at "3323 SW Naito Pkwy, Portland, OR 97201" that included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed

Respondent to complete and return the survey by September 15, 2000. Reminder cards were sent to Respondent on September 26 and October 16, 2000, at that same address, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

5) The Employment Department received a completed 2000 wage survey packet from Respondent on February 22, 2001. By this time, data received from 2000 wage survey packets had already been processed and Respondent's data could not be used in the commissioner's determination of prevailing wage rates.

6) Respondent knew or should have known of its failure to timely complete and return the 2000 wage survey.

ULTIMATE FINDINGS OF FACT

- 1) Respondent was an Oregon employer in the year 2000.
- 2) The Commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.
- 3) Respondent received the 2000 wage survey packet.
- 4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the Commissioner. Respondent did not return the completed survey until February 22, 2001, by which time the Commissioner's prevailing wage rate determination based on the 2000 wage survey was already completed.

CONCLUSIONS OF LAW

- 1) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by

the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

"* * * * *

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2).

Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

2) ORS 279.370 provides, 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 \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

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

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

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

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

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

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

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

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

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

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

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

“* * * * *

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

“* * * * *

“(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]”

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

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

“* * * * *

“(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.”

The imposition of a \$350.00 civil penalty for Respondent's violation of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

OPINION

DEFAULT

Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 136 (1997). The Agency met that burden in this case, as discussed *infra*.

THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a “person;”

- (2) The commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;
- (3) Respondent received the commissioner's 2000 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000). The Agency's Notice alleged that Respondent was an "employer" who "received the 2000 Survey." Respondent did not deny either allegation. OAR 839-050-0130(2) provides that "factual matters alleged in the charging document and not denied in the answer, shall be deemed admitted by the party." Based on Respondent's failure to deny the allegation that it was an "employer," the forum concludes that Respondent was a "person." for purposes of ORS 279.359. The Agency's uncontested evidence establishes that the Commissioner conducted a wage survey in 2000 requiring people to return completed survey forms by September 15, 2000. Respondent's failure to deny that it received the forms constitutes an admission that Respondent received the forms. Respondent's belated submission of the forms on February 22, 2001, months past the time prescribed by the Commissioner, bolsters this conclusion.

CIVIL PENALTY

The Agency seeks a \$500 civil penalty for the single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the magnitude and seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-016-0520.

In this case, the Agency has not alleged any prior violations. However, it would have been relatively easy for Respondent to comply with the law by simply returning the

wage survey, and Respondent was given several opportunities to do so. Moreover, because it received at least two reminders, Respondent knew of the violation before the Agency issued its Notice of Intent. The violation is serious, in that the Commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. However, the magnitude is less severe, as there is no evidence from which the forum is able to conclude that the data Respondent finally provided would have been included in the data used to set prevailing wage rates, and consequently, could have skewed those rates. There are no mitigating circumstances.

Under the circumstances of this case, and considering other cases in which this forum has imposed penalties for violation of ORS 279.359(2), the forum finds \$350 to be an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Spot Security, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of THREE HUNDRED FIFTY DOLLARS (\$350.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.