

In the Matter of

LABOR READY NORTHWEST, INC.

Case No. 77-04

Final Order of Commissioner Dan Gardner

Issued January 4, 2007

SYNOPSIS

Respondent was a subcontractor that provided workers to perform manual labor for another contractor on a public works project. Respondent initially paid fifteen workers less than the applicable prevailing wage rate, committing four violations of *former* ORS 279.350(1). Respondent also failed to post the prevailing wage rate on the project in violation of *former* ORS 279.350(4). Respondent intentionally failed to post the prevailing rate as required by *former* ORS 279.350(4), and the Commissioner placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for three years. The Commissioner also assessed \$25,000 in civil penalties based on Respondent's four violations of *former* ORS 279.350(1) and single violation of *former* ORS 279.350(4). *Former* ORS 279.348(3) and (5), *former* ORS 279.350(1), *former* ORS 279.350(4), *former* ORS 279.361(1), *former* ORS 279.370(1); *former* OAR 839-016-0033(1), *former* OAR 839-016-0035(1), *former* OAR 839-016-0085(1)(c), *former* OAR 839-016-0520, *former* OAR 839-016-0530(3)(a) & (b), *former* OAR 839-016-0540(3)(a).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 20-21, 2006, in the W. W. Gregg Hearings Room, 1045 State Office Building, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Danielle Coverrubias, Respondent's paralegal services manager, was present during the hearing as the person designated to assist in Respondent's case.

The Agency called the following witnesses: Dylan Morgan, BOLI Wage and Hour Division Compliance Specialist; Susan Wooley, BOLI Prevailing Wage Rate Technical Assistance Coordinator; and Michael Garrison, Respondent's Hillsboro, Oregon branch manager.

Respondent called the following witnesses: Ivy Finnegan, Labor Ready's prevailing wage administrator; and Michael Garrison.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9;
- b) Agency exhibits A-1 through A-46 (submitted prior to hearing);
- c) Respondent exhibits R-2 through R-35 (submitted prior to hearing), and R-36 (submitted at hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 26, 2005, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$25,000 in which it made the following charges against Respondent:

“1. Respondent entered into contracts or subcontracts to perform a public works for the Hillsboro School District involving construction, reconstruction and/or major renovation. The public works was known as the Hillsboro High School #4 Liberty HS Project (the ‘Public Works’). The Public Works was located in Hillsboro, Washington County, Oregon.

“2. The Public Works was being conducted by Hillsboro School District 1J and consisted of construction, reconstruction and/or major renovation. The Public Works was not regulated under the federal Davis-Bacon Act and cost in excess of \$25,000. The Public Works was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*) and was first advertised for bid on November 14, 2000.

3. Failure or Refusal to Pay Prevailing Wages. Respondent provided Laborers on the Public Works. Respondent failed or refused to pay four employees approximately \$1,334.90 in prevailing wages between approximately July 7, 2003 and July 28, 2003. The employees were David Becker, Jason Harris, Richard Thompson and Margarito Martinez. This is in violation of ORS 279.350 and OAR 839-016-0035. **CIVIL PENALTY of \$20,000.** Four (4) violations (\$5,000 per violation) – ORS 279.370, OAR 839-016-0530(3)(a) and 839-016-0540(3)(a).

“4. Failure to Post Prevailing Wage Rate. Respondent intentionally failed to keep the prevailing wage rates for the Public Works project posted in a conspicuous and accessible place in or about the Public Works project. This is a violation of ORS 279.350(4) and OAR 839-016-0033. **CIVIL PENALTY of \$5,000** against Respondent. One (1) violation – ORS 279.370 and OAR 839-016-0530(3)(b).

“5. Placement on List of Ineligibles. Respondent, and any firm, corporation, partnership or association in which it had a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years pursuant to ORS 279.361 and OAR 839-016-0085, based on Respondent’s intentional failure or refusal to post the prevailing wage rates as previously alleged herein.

“6. Aggravating Factors. Respondent has had the opportunity to comply with the rules and laws regulating prevailing wage rates on public works and compliance would not have been difficult. Respondent’s violations were serious and repetitious, and resulted in significant underpayment of wages to multiple employees. Respondent’s violations were ongoing. Respondent knew, or should have known, of its violations. Respondent was advised that it had failed to pay the prevailing rate of wage and that its employees were engaged in work on a public works, but Respondent never posted the prevailing wage rate as previously alleged herein. OAR 839-016-0520.”

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 Respondent wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent’s registered agent on October 28, 2005.

4) Respondent, through counsel, filed an answer and request for hearing on November 8, 2005.

5) The Agency filed a request for hearing with the Hearings Unit on March 17, 2006.

6) On March 21, 2006, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 20, 2006; 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.

7) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

8) On September 5, 2006, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

9) On September 11, 2006, Respondent moved for an extension of time to file exceptions and requested a copy of the mechanical recording of the hearing. The Agency did not object, and the forum granted Respondent and the Agency an additional ten working days after receipt of the mechanical record to file exceptions.

10) On October 2, 2006, Respondent timely filed exceptions. Respondent's exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon. At all times material herein, Respondent was a licensed contractor with the State of Oregon Construction Contractor's Board.

2) Respondent's corporate office is in Tacoma, Washington. At all times material herein, Respondent administered Oregon prevailing wage rate jobs through its Tacoma office by ensuring that employees were paid the required rates, that certified payroll reports were processed, that posting was done, and that Respondent notifies BOLI every time Respondent is "onsite" on a prevailing wage rate job.

3) On November 14, 2000, Hillsboro School District 1J ("Hillsboro 1J") first advertised the "Hillsboro High School #4 Liberty HS DB# 43188" job ("Liberty HS project") for bid. The job involved constructing a new high school. On "1/2001," Hillsboro 1J awarded the project contract to Robinson Construction Co. ("Robinson"), in the amount of \$37,549,800. The contract was not subject to the Federal Davis-Bacon Act.

4) Hillsboro 1J subsequently issued an "Invitation to Bid", with bids open until March 3, 2003, for "Equipment and Furnishings For Liberty High School." The Invitation to Bid cover letter stated, among other things, that "[t]he provisions of Oregon Revised Statutes 279.348 to 279.365, relating to prevailing wage rates, are applicable to work under this Contract." The contract was to furnish the high school that Robinson had constructed. Hillsboro 1J subsequently disputed that the furnishing of Liberty HS required the payment of the prevailing wage rate.

5) On March 11, 2003, Hillsboro 1J accepted a bid from the School Specialty Group ("School Specialty") to provide equipment and furnishings for the Liberty HS project. School Specialty's bid was in the amount of \$1,516,787.10. School Specialty then contracted with JBH Installation ("JBH") to receive and set the furniture and equipment in place, assembling the furniture as necessary.

6) Hillsboro 1J failed to include within the specifications for the equipment and furnishing of the Liberty HS project a provision setting forth that the contractor must

pay a prevailing wage rate fee to the Bureau of Labor and Industries. Hillsboro 1J also failed to include within the contract for the equipment and furnishing of the Liberty HS project a provision requiring that workers will be paid the prevailing wage rate.

7) On July 7, 2003, Bud Hart of JBH placed a job order with Respondent's Hillsboro branch to provide four workers to do the work of "moving furniture" at Liberty High School for a period of "6-10 weeks."

8) On July 7, 2003, Michael Garrison was branch manager of Respondent's Hillsboro branch. He was a relatively new employee, having been initially employed by Respondent on or about May 1, 2003, as an account representative in Respondent's Beaverton, Oregon office and promoted to branch manager in Respondent's Hillsboro office around the end of May 2003.

9) Garrison received some training from a "training branch manager" when he became manager. A "small section" was devoted to prevailing wage. He was told that construction paid for by the government should be prevailing wage. He was not told that Respondent was required to post the prevailing wage rate at public works jobsites to which it sent workers.

10) As Hillsboro branch manager, Garrison came to work at 5:30 a.m. and dispatched employees to Respondent's customers. After 9:30 a.m., he usually left the office and did sales, site visits, and met with customers.

11) Garrison dispatched four workers to the Liberty HS project on July 7, 2003. One of Respondent's customer service representatives pointed out that since the Liberty HS project was a school, Garrison should check out whether the job was subject to prevailing wage rate by visiting the job site. After dispatching the workers, Garrison called Bud Hart, who assured him that the job was not a prevailing wage rate job. On the same day, Garrison visited the Liberty HS project job site. He observed that

construction had just been finishedⁱ and asked Phil, JBH's job site supervisor ("Phil") if the job was a prevailing wage rate job. Phil told him it was not because there was no construction project, and that construction had been completed, the permit to use the building had been issued, and the keys had been turned in. Garrison also called Robinson Construction and was told that the construction was complete, that the permit to use the building had been issued, and the keys had been turned in.

12) During his July 7 visit to the Liberty HS project, Garrison observed Respondent's workers unloading trucks and putting desks and chairs together with screwdrivers and wrenches. The desks and chairs had to be assembled inside the school because they wouldn't fit through the doors when assembled. Garrison did not see Respondent's workers attaching anything to the building.

13) Garrison completed a "Job Site Evaluation Report" after visiting the Liberty HS project on July 7, 2003. Garrison's pertinent notes are printed below in italics:

"Customer Name: JBH Installations

Person Interviewed: Phil

Job Site Address: Liberty High School

Nature of Operations (Describe service or finished product): Office Supplies Installation

What type of work will Labor Ready workers be doing at this site? Moving

Number of Labor Ready workers at site: 4

REMARKS: *Are your observations consistent with the customer's responses? Double check this is not prevailing wage. Per Phil*

14) Later on July 7, 2003, Garrison called Bud Hart, Phil's supervisor at JBH. Hart told him that JBH's work on the Liberty HS project was not subject to the prevailing wage rate.

15) The Liberty HS project was the first prevailing wage rate job to which Garrison dispatched workers on Respondent's behalf.

16) Respondent's workers on the Liberty HS project performed work that was properly classified as Group 1 Laborers, with a basic hourly pay rate of \$20.44 and a fringe benefit of \$7.85 per hour, for a total of \$28.29 per hour.

17) On the Liberty HS project, Respondent used daily work tickets to track its workers' hours and paid its workers by the day, either by check or voucher.

18) The week of July 7-11, 2003, employees dispatched by Garrison worked the following dates and hours on the Liberty HS project:

July 7: David Becker (8), Chris Darr (8), Todd Jordan (8), Richard Thompson (8).

July 8: David Becker (8), Chris Darr (8), Todd Jordan (8), Richard Thompson (8).

July 9: David Becker (8), Chris Darr (8), Todd Jordan (8), Richard Thompson (8).

July 10: Nicholas Crews (8), Todd Jordan (8), Margarito Martinez (2), Johnny Redman (6), Alfredo Rodriguez (2), Carl Sperber (6).

July 11: Nicholas Crews (8), Todd Jordan (8), Carl Sperber (8), Richard Thompson (8).

Respondent paid each worker \$6.90 per hour for each hour worked.

19) Becker received his first pay for the Liberty HS project on July 7, 2003, via check #1128173291 for \$47.10. Calculated at \$28.29 per hour, Becker earned \$226.32 in wages on July 7, 2003.

20) Thompson received his first pay for the Liberty HS project on July 7, 2003, via check #1128173292 for \$47.10. Calculated at \$28.29 per hour, Becker earned \$226.32 in wages on July 7, 2003.

21) Martinez received his first pay for the Liberty HS project on July 10, 2003, via voucher #03266000000000 for \$11.00. Calculated at \$28.29 per hour, Martinez earned \$56.58 in wages on July 10, 2003.

22) The week of July 14-18, 2003, employees dispatched by Garrison worked the following dates and hours on the Liberty HS project:

July 14: Scott Clason (8), Rich Hardy (8), Jason Harris (8), Todd Jordan (8).

July 15: Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Ramiro Sanchez (8).

July 16: Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

July 17: Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

July 18: Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

Respondent paid each worker \$6.90 for each hour worked.

23) Harris received his first pay for the Liberty HS project on July 14, 2003, in via voucher #48240000000000 for \$42.00. Calculated at \$28.29 per hour, Harris earned \$226.32 in wages on July 14, 2003.

24) The week of July 21-25, 2003, employees dispatched by Garrison worked the following dates and hours on the Liberty HS project:

July 21: Scott Clason (8), Gregory Coggin (8), Rich Hardy (8), Todd Jordan (8).

July 22: Gregory Coggin (8), Rich Hardy (8), Todd Jordan (8), Catherine Ross (8).

July 23: Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

July 24: Scott Clason (8), Gregory Coggin (8), Rich Hardy (8), Todd Jordan (8), Catherine Ross (8).

July 25: Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

Respondent paid each worker \$6.90 for each hour worked.

25) On July 23, 2003, Todd Jordan, one of Respondent's employees on the Liberty HS project, told Garrison that the Liberty HS project was a prevailing wage rate job. Jordan told Garrison he had obtained this information by using the internet to contact BOLI. Jordan gave Garrison the phone number of Dana Woodward, an employee in BOLI's Prevailing Wage Unit, and told Garrison to call BOLI as soon as possible.

26) Immediately after speaking with Jordan, Garrison visited the Liberty HS project and spoke with Phil. Garrison again asked Phil if the job was prevailing wage, and if not, why not. Once more, Phil told him that the project was not prevailing wage because JBH was a vendor, not a contractor. Garrison returned to his office and called Woodward. He did not reach her, but left a message.

27) On July 24, 2003, Garrison called Woodward again. On July 25, 2003, he entered the following note into Respondent's computer to memorialize his conversation with Woodward:

"7/24/03 I CALLED AND SPOKE WITH DANA LATE IN THE DAY. SHE HAD BEEN IN A MEETING THE ENTIRE DAY. AFTER SPEAKING WITH HER, I WAS TOLD THAT LIBERTY HIGHSCHOOL [sic] WOULD BE PREVAILING WAGE. WHEN I ASKED FOR SOMETHING IN WRITING THAT I COULD TAKE TO JBH TO SHOW THERE [sic] PROJECT WAS PREVAILING WAGE. DANA ASKED ME TO EMAIL THE SITUATION TO HERE [sic]. I EMAILED THE SITUATION OVER TO HERE AND RECEIVED HERE [sic] RESPONCE [sic] ON 7/25/03. DANA REQUESTED FURTHER INFORMATION."

28) The next day, Garrison again visited the Liberty HS project and spoke once more with Phil, who provided him with "the list showing [JBH was] a vendor not a subcontractor." Garrison then telephoned Robinson Construction again, and a representative from Robinson told him "the school was completed. The keys were turned over and the occupancy [sic] permit was issued." Garrison e-mailed Woodward with this information and left a message asking her to call him if she had any questions.

29) A printout of e-mail communications between Garrison and Dana Woodward on July 24-25, 2003, contained in BOLI's investigative file, shows the following communications took place:ⁱⁱ

"'1128 – Branch' <1128-BR@laborready.com> 7/24/2003 2:37:31 PM>>>
Dana, I have workers furnishing Liberty Highschool [sic]. The issue of prevailing wage has been brought to my attention. I have spoke [sic] with Phil (Site Supervisor) and he has assured me that this is not a prevailing wage job. Phil explained that his company JBH Installations is a vendor Hispeaking [sic] with you it is my understanding that this is a prevailing wage job. Can you please clarify this for me?"

“Sincerely,
Michael Garrison
Labor Ready
Hillsboro Branch Manager”

* * * * *

“From: Dana Woodward [<mailto:Dana.Woodward@state.or.us>]
Sent: Thu 7/24/2003 3:11 PM
To: 1128 – Branch
Cc:
Subject: Re: PREVAILING WAGE QUESTION

“Hi Michael

“I received your email. I do have a couple additional questions. Can you tell me the name of the prime contractor for this project? And if possible, can you tell me the name of the original project?

“Thanks,

“Dana Woodward
Administrative Specialist
PREVAILING WAGE RATE Unit
Wage and Hour Division-Portland Office
(503) 731-4723”

* * * * *

“From: ‘1128 – Branch’ <1128-BR@laborready.com>
To: ‘Dana Woodward’ <Dana.Woodward@state.or.us>
Date: 7/25/2003 6:38:41 AM
Subject: RE: PREVAILING WAGE QUESTION

“I will try and get that for you this morning.

“Michael G.”

* * * * *

“From: ‘1128 – Branch’ <1128-BR@laborready.com>
To: ‘Dana Woodward’ <Dana.Woodward@state.or.us>
Date: 7/25/2003 10:08:29 AM
Subject: RE: PREVAILING WAGE QUESTION

“Dana, here is the information that I was able to obtain.

“Project: Liberty Highschool [sic] or Hill High #4
General Contractor: Robinson Construction Co.
Project Status: Complete (Keys turned over/School Open/Occupancy [sic]
Permit Issued)

“Our Customer is JBH Installations. My contact is the Project Manager (Phil) at Liberty Highschool [sic]. I spoke with him again today. He assured me again (Third Time) that this project is not prevailing wage due

to the fact that they are a vendor not a contractor. He gave me a copy of the Preject [sic] by Design Vendor & Shipping Detail Report that shows them as a vendor for Project by Design. I will attach a copy of the Vendor & Shipping Detail Report. Please feel free to call me anytime on my Cell Phone (971-506-4077) if you have any further question [sic].

“Thank you for your time.

“Michael Garrison
Hillsboro Branch Manager”

30) On July 25, 2003, Garrison entered the following single note into Respondent's computer:ⁱⁱⁱ

“7/25/03 I CALLED BUD BACK TO LET HIM KNOW THAT I DID NOT HEAR FROM DANA. I ALSO WANTED TO KNOW IF HE HAD HEARD FROM HER. BUD INFORMED ME THAT HIS LEGAL OFFICE IS WORKING ON IT. HE ALSO EXPLAINED THAT HE HAD SPOKE [sic] WITH DANA AND THAT SHE WAS NOT VERY RECEPTIVE TO WHAT BUD WAS TRYING TO EXPLAIN TO HER. HE WAS NOT VERY PLEASED WITH THE SITUATION. HE AGAIN SAID THAT THIS IS NOT PREVAILING WAGE. HE TOLD ME THAT HIS LEGAL OFFICE CONFIRMED THAT IT WAS NOT PREVAILING WAGE. HE TOLD ME THAT HE NEEDED THE WORKERS ON MONDAY. HE WANTED TO KNOW IF I WAS GOING TO SERVICE HIM OR NOT. IF NOT HE WOULD TAKE THE BUSINESS ELSEWHERE. **** BASED ON THE FACT THAT DANA DID NOT PROVIDE ME WITH ANYTHING IN WRITING AFTER TWO REQUEST [sic] I DECIDED TO SERVICE JBH ON MONDAY. I DID NOT FEEL IT WAS THE RIGHT CHOOSE [sic] TO NOT SERVICE THEM BASED ON DANA'S OPINION ONLY. I WILL FOLLOW UP WITH HER FIRST THING MONDAY MORNING. ***** MICHAEL GARRISON”

31) On July 25, 2003, Garrison entered the following additional notes into Respondent's computer as a single entry:^{iv}

“7/25/03 DANA CALLED ME TO LET ME KNOW THAT JBH INSTALLATION SHOULD BE PAYING PREVAILING WAGE. DANA TOLD ME THAT SHE CONFIRMED THIS WITH THE HILLSBORO SCHOOL DISTRICT.

7/25/03 I CALLED BUD HEART^v TO LET HIM KNOW THE LATEST NEWS. I EXPLAINED THAT DANA AT BOLI TOLD ME THAT THIS IS PREVAILING WAGE. I ALSO EXPLAINED [sic] THAT SHE CHECKED WITH THE SCHOOL BOARD. BUD INSISTED THAT THIS JOB IS NOT PREVAILING WAGE BECAUSE THEY ARE A VENDOR NOT A CONTRACTOR.

7/25/03 I CALLED DANA AGAIN AND LET HER KNOW THE RESPONCE [sic] I RECIEVED [sic] FROM BUD HEART. SHE WAS VERY SURE THAT THIS JOB WAS PREVAILING WAGE. I ALSO GAVE HER BUD HEART["']S PHONE NUMBER. DANA TOLD ME THAT SHE WOULD WORK ON THIS RIGHT AFTER LUNCH. SHE WAS GOING TO ATTACH A LETTER TO THE EMAIL WHEN SHE REPLIED BACK TO ME. THIS WOULD GIVE ME SOMETHING I CAN GIVE TO JBH WITHOUT GIVING THE EMPLOYEES["'] NAME.

7/25/03 I THEN CALLED BUD HEART BACK TO LET HIM KNOW THAT I WAS GETTING A LETTER FROM DATA [sic] STATING THAT THIS WAS A PREVAILING WAGE JOB. I ASSURED HIM I WOULD SEND IT TO HIM VIA EMAIL AS SOON AS I GOT IT. HIS EMAIL IS JBHINSTALLATIONS@AOL.COM.

7/25/03 I NEVER RECEIVED AN EMAIL FROM DANA. I TRIED TO CALL HER OFFICE

BUT SHE HAD LEFT FOR THE WEEKEND. I ASKED TO SPEAK TO SOMEONE ELSE IN THE OFFICE THAT COULD HELP ME WITH THIS ISSUE. I WAS TOLD THAT HIDI^{vi} WAS THE ONLY ONE LEFT BUT SHE WAS ON HERE [sic] PHONE. I ASKED TO HOLD. THE RECP. SAID WAIT SHE JUST GOT OFF HERE [sic] PHONE AND THEN FORWARDED ME TO HIDI. I THEN GOT HIDI'S VOICE MAIL. I EXPLAINED WHO I WAS AND THAT I REALLY NEEDED TO SPEAK TO SOMEONE ABOUT THIS ISSUE. THIS WAS AT 3:55 PM. I KNOW HIDI GOT OFF AT 4PM BECAUSE THE RECP. TOLD ME SO. IT IS CURRENTLY 5:14P AND I STILL HAVE NOT RECIEVED [sic] ANYTHING FROM B.O.L.I. NO EMAIL OR PHONE CALL. DANA HAS MY CELL NUMBER AS WELL AS MY OFFICE NUMBER.
7/25/03 I CALLED BUD BACK TO LET H"

32) On July 25, 2003, Dana Woodward mailed a letter to Garrison that contained the following text:

"July 25, 2003

"Sent Via Email:

1128-BR@laborready.com (Michael Garrison)

"Michael Garrison
Labor Ready
Hillsboro Branch Manager

"Dear Mr. Garrison:

"This letter [is] in response to your email received yesterday, July 24, 2003. You indicated that JBH Installations has contracted with Labor Ready to have employees 'furnishing' Liberty High School. The site supervisor for JBH Installations indicated that this contract is not subject to prevailing wage rate requirements because he is [a] vendor.

"The fact that JBH Installations is considered a 'vendor' is irrelevant to whether or not the contract is subject to the prevailing wage rate requirements. What is relevant is whether the contract is a 'public works' contract subject to the prevailing wage rate provision. If so, what is the type of work being performed?

"The term 'public works' refers to the construction, reconstruction, major renovation or painting carried on or contracted for the public agency.

"If the project primarily serves the public interest, then it is 'by of [sic] for' a public agency even if the property involved is not owned by the agency. (ORS 279.348(3); OAR 839-016-0004(19)

"In this case, information received from the Hillsboro School District indicates that this is a small portion of the larger contract called 'Liberty High School #4', which is subject to the prevailing wage rate provisions.

"This leaves the remaining question, what duties are the employees performing on the job site? Pursuant to OAR 839-016-004(27), the term 'worker' means a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use

tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term worker includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage.

“In a phone conversation this afternoon, Bud Hart, JBH Installations indicated that the Labor Ready employees are unloading furniture. Because Labor Ready’s employees are performing work on a job site subject to the PWR requirements and the duties are manual or physical in nature, the prevailing wage rate requirements do apply.

“If you have any additional questions regarding this matter, please call (503)731-7423.”

33) On July 25, 2003, Hannah Wood, on behalf of Woodward, signed and mailed a letter to Garrison that contained the following text:

“July 25, 2003

“Sent Via Email:

1128BR@laborready.com (Michael Garrison)

“Michael Garrison
Labor Ready
Hillsboro Branch Manager

“Dear Mr. Garrison:

“This letter is in response to your email received July 24, 2003. You indicated that JBH Installations has contracted with Labor Ready to have employees ‘furnish’ Liberty High School. The site supervisor for JBH Installations claims that as a vendor, the work being performed by JBH employees is not subject to prevailing wage.

“The fact that JBH Installations is considered a ‘vendor’ is irrelevant to whether or not the contract is subject to prevailing wage rate requirements. What is relevant is whether the contract is a ‘public works’ contract subject to the prevailing wage rate provisions. According to Hillsboro School District, their contract with JBH Installations is part of a larger ongoing project called ‘Liberty High School #4.’

“Because this project was bid in November 2000 the July 2000 rates are in effect. It is my understanding that the employees in question are unloading furniture, moving it and installing it in the building. This type of work is classified under the Laborers and Material Movers classification which is paid at a rate of \$20.44 base rate and a fringe rate of \$7.85 for this project. If the employees are assembling furniture and attaching it to the floor, wall or ceiling, the correct classification would be Carpenters 1 at a rate of \$23.94 base and \$7.92 fringe.

“If you have any additional questions regarding this matter you may contact me at (503)731-4723.”

BOLI faxed Wood’s letter to Respondent on July 28, 2003, at “13:30.” The letter also shows that Respondent’s office faxed it to someone else on “07-28-03” at “17:14.” Garrison remained in his office until 5:14 p.m. on July 25, 2003, but did not receive Wood’s or Woodward’s July 25, 2003, letters by e-mail on July 25, 2003. He received the letters in the mail on July 28, 2003.

34) On August 28, 2003, Garrison entered the following single note into Respondent’s computer:^{vii}

“7/28/03 WE RECEIVED A LETTER FROM THE B.O.L.I. STATING THAT THE JOBSITE AT LIBERTY HIGHSCHOOL IS PREVAILING WAGE. ONCE I RECEIVED THE LETTER I MADE COPIES AND TOOK A COPY OUT TO THE JOBSITE AND GAVE IT TO PHIL. PHIL TOLD ME THAT I WOULD HALF [sic] TO CALL BUD HEART. PHIL DID NOT FEEL THAT BUD WOULD USE LABOR READY ANYMORE. HE DID NOT SAY IT QUITE THAT WAY BUT I GOT THE MESSAGE JUST THE SAME. 7/28/03 3:11PM I TRIED TO CALL BUD HEART ON HIS CELL PHONE BUT NO BODY [sic] ANSWERED. I COULD NOT LEAVE A MESSAGE. I WILL TRY BACK LATER. MG”

35) Garrison’s computer notes were based on handwritten notes and accurately reflect the communications conveyed in the notes.

36) At all times material, Garrison’s e-mail address was 1128-BR@laborready.com.

37) On July 28, 2003, employees dispatched by Garrison worked the following hours on the Liberty HS project: Scott Clason (8), Gregory Coggin (8), Rich Hardy (8), Todd Jordan (7), Catherine Ross (8). They were paid \$6.90 per hour for that day’s work.

38) On July 29, 2003, Garrison began paying the prevailing wage rate to Respondent’s workers on the Liberty HS project. Garrison did not start paying until after he received Woodward’s letter stating that the Liberty HS project was a prevailing wage rate job because JBH did not agree that the job was a prevailing wage rate job and Garrison wanted written confirmation to show JBH.^{viii}

39) Respondent paid its workers on the Liberty HS project the correct prevailing wage rate of \$28.29 per hour from July 29 through September 11, 2003, the last day that Respondent dispatched workers to the Liberty HS project.

40) On August 5, 2003, Respondent issued back pay checks to all its workers who had performed work on the Liberty HS project between July 7 and July 28, 2003. Respondent calculated back pay at the rate of \$21.39 per hour, the difference between the correct prevailing wage rate of \$28.29 per hour and \$6.90 per hour, the amount initially paid by Respondent to its workers. The amount on each check was the actual amount underpaid to each worker.^{ix} Some workers were issued multiple checks because each check was intended as back pay for work performed in separate weeks. In total, Respondent's employees worked a total of 497 hours on the Liberty HS project from July 7 through July 28, 2003, and were underpaid the amount of \$10,630.83.

41) Respondent issued these checks before JBH paid Respondent for the back wages due to the Respondent's workers.

42) Once Respondent issued the back pay checks, Garrison and other employees at Respondent's Hillsboro branch office tried to telephone every worker to whom a back pay check or checks had been issued to let them know that a back pay check or checks had been issued and to ask them to come into the branch office to pick up their checks.

43) On August 5 and 8, 2003, Respondent's corporate headquarters completed certified payroll reports for Respondent's workers on the Liberty HS project. The reports reflected "restitution" payments made to those workers for the work they performed prior to July 29, 2003.

44) Respondent and Garrison both make more money if Respondent's workers are paid prevailing wage rate.

45) During the time that Respondent's workers were employed at the Liberty HS project, Garrison did not post the prevailing wage rates, even after he learned the Liberty HS project was a prevailing wage rate job. This was because he was unaware of Respondent's obligation to post the rates. No one else employed by Respondent posted the prevailing wage rates applicable to Respondent's workers at the Liberty HS project.

46) JBH did not post the prevailing wage rates on the Liberty HS project.

47) In November 2003, Dylan Morgan, a compliance specialist in BOLI's Prevailing Wage Rate unit, began an investigation to determine whether Respondent had paid the prevailing wage rate on the Liberty HS project. On November 26, 2003, Morgan wrote a letter to Respondent's corporate headquarters that stated, in pertinent part:

"RE: Hillsboro High School #4, Liberty High School
No.: 03-2736

"Dear Employer:

"This office is responsible for the administration and enforcement of Oregon's prevailing wage rate * * * regulations[.] In this regard we regularly receive information from the public, employees, and associates regarding possible violations of the statutes and rules the Bureau enforces.

"* * * * *

"The Bureau has received information that your company has failed to pay the correct prevailing wage rates for all employees on the above named project. An investigation is being conducted regarding all your employees who worked on this project.

"Pursuant to the investigation, the Bureau requests that you supply any and all time cards, time records and payroll records for all persons who performed work for your company in relation to this project. These records must include hours worked each day, rates of pay, wages paid, withholdings made, job descriptions, last known addresses, and phone numbers. You must also include copies (front and back) of all cancelled checks paid to the employees in relation to this project. The job description information should include specific descriptions of the work performed by each worker.

“In addition, if you paid fringes to a third party trust, plan, fund, or program (such as vacation, holiday, medical, pension, etc.), please provide the hourly rate paid to each program and copies (front and back) of canceled checks showing payments to the fund.

“Please submit the above information to the Bureau’s Portland address no later than December 15, 2003. Failure to respond will result in additional enforcement action according to the PWR laws.”

48) On December 1, 2003, Charlene Baldwin, Respondent’s Prevailing Wage Administrator,^x wrote a letter responding to Morgan in which she stated:

“Dear Mr. Morgan:

“I received a letter from you today informing us that we are in violation of prevailing wage regulation of underpaying the workers that worked on the above project. We did underpay them. But we did do a restitution back in August. I have requested the cancelled checks from our A/P department. It can take up to 6 weeks to receive those items. I have, also, requested that the Hillsboro branch send all of the work tickets for that project to my attention immediately. Once I have received any of the requested information I will forward it on to you.

“I will do all in my power to get all information to you as soon as possible.”

49) Subsequently, either Baldwin or Ivy Finnegan, Respondent’s current Prevailing Wage supervisor, sent records to Morgan that were responsive to his request. The records included certified payroll reports, daily work tickets, and copies of the front and back sides of paychecks made out to workers for the work performed by Respondent’s employees at the Liberty HS project.

50) Morgan examined Respondent’s records and compiled a 28 page wage transcription summarizing the records. He concluded that all but six of Respondent’s workers – David Becker, Jason Harris, Todd Jordan, Patrick Lake, Margarito Martinez, and Richard Thompson -- had been fully paid. He also concluded that Respondent had issued checks to Becker, Harris, Martinez, and Thompson, for the full amounts of back pay owed, but due to time elapsed, they had “dropped off the map” and never received their paychecks.

51) On April 23, 2004, Morgan sent a letter to Marlisa Adams, Respondent's corporate treasury assistant, that stated:

"RE: Liberty High School; Hillsboro School District 1J
No. 03-2736

"Dear Ms. Adams:

"The Bureau has completed its review of the payroll documents pertaining to work performed on the above-referenced prevailing wage rate project. Wage transcriptions have been prepared and attached for your review. Some individuals who performed work for Labor Ready under the direction of JBH Installations, Inc. on this project were improperly paid; their names and the amounts due to each appear below.

Employee	Gross Unpaid Wages
David Becker	\$ 513.36
Jason Harris	\$ 397.44
Todd Jordan	\$ 55.20
Patrick Lake	\$ 452.64
Margarito Martinez	\$ 56.58
Richard Thompson	\$ 684.48

"For two workers, Todd Jordan and Patrick Lake, documentation was not provided showing proof of payment. Mr. Jordan is owed \$55.20 for wages earned on July 9, 2003. Mr. Lake is owed \$452.64 for the week ending August 16, 2003. The remaining amounts shown reflect payments which were either not made to the worker or which never cleared Labor Ready's account.

"Absent additional documentation or information, the amounts listed above should be sent to the Bureau's Portland office by May 7, 2004. Your payments should be made to the order of the worker for the total amount due, less legal withholdings on taxable amounts. At this point the Bureau is not pursuing liquidated damages, however, you should be aware that addition [sic] action to collect these wages may result in the assessment of liquidated damages.

"Please feel free to contact me at the number listed below with any questions you may have.

"Sincerely,

"Dylan Morgan
Compliance Specialist
Wage & Hour Division
503-731-4785

"encl. Wage Transcriptions

"cc: (letter only)
Hillsboro School District 1J"

52) On May 5, 2004, Marlisa Adams, from Respondent's Treasury Department sent a letter to Morgan that stated:

"RE: Liberty High School; Hillsboro School District 1J
No. 03-2736

"Dear Mr. Morgan:

"I have completed the required research into the payments requested by your division. I have included along with the payment, the canceled checks for Patrick Lake and Todd Jordan.

"As per our conversation, Patrick Lakes' original checks were voided and reissued on September 8, 2003.

"Here's the breakdown for the total amount remitted:

Employee	Gross Unpaid Wages	Net Wages
David Becker	\$ 513.36	\$ 433.63
Jason Harris	\$ 397.44	\$ 272.96
Margarito Martinez	\$ 56.58	\$ 52.21
Richard Thompson	\$ 684.48	\$ 576.10
Totals	\$1651.86	\$1334.90

"If you require any additional documentation or information in regards to your request, please don't hesitate to contact me. I appreciate your patience in this matter.

"Sincerely,

"Marlisa Adams
Treasury Department
(800)610-8920 x8586

"enc. Remittance
Copies of checks"

Adams enclosed a check in the amount of \$1334.90 made out to the Bureau of Labor and Industries, as well as cancelled checks showing payments to Lake and Jordan.

53) As a result of Adams's May 5, 2004, letter and its enclosures, Morgan concluded that Lake and Jordan had "ultimately been fully compensated" for all the work

they performed on the Liberty HS project, and that Becker, Harris, Martinez, and Thompson had “not been fully compensated” for their work on the Liberty HS project.

54) Morgan, through the Bureau’s Fiscal Unit, caused checks to be issued in the following amounts after receiving Adams’s letter: David Becker - \$513.36; Jason Harris - \$397.44; Richard Thompson - \$684.48. On May 25, 2004, Morgan mailed these checks, along with cover letters and itemized statements of deductions provided by Adams, to Becker, Harris, and Thompson. Morgan did not cause a check to be issued to Martinez because he was unable to locate Martinez. Instead, Morgan requested BOLI’s Fiscal Unit to deposit \$52.21 in BOLI’s “Lost Claimant Account.”

55) On June 26, 2003, the Oregon Court of Appeals issued an opinion in the case of *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) (“Labor Ready #1). One of the issues before the court was whether Labor Ready Northwest, Inc., as a subcontractor, was required to post prevailing wage rates on a prevailing wage rate job to which it dispatched workers. The court held “ORS 279.350(4) requires every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees’ work on the project.” *Id.* at 369, 572. Respondent appealed the court’s decision to the Oregon Supreme Court, which denied review on May 5, 2004.

56) On September 9, 2003, Timothy Adams, president and then general counsel of Labor Ready, sent an e-mail to Siobhan Rischman, Finnegan’s boss, and Todd Gilman, one of Labor Ready’s corporate attorneys, on the subject of “Oregon posting of prevailing wage.” In pertinent part, the e-mail stated:

“As you may know, the Oregon Court of Appeals recently rejected BOLI’s order of disbarment. The court agreed with our position that inadvertent errors do not form a basis for disbarment under the statute. BOLI has

appealed this ruling, but we are fairly confident their appeal will be unsuccessful.

“However, the court did agree with BOLI that each subcontractor, including Labor Ready, has an affirmative duty to post the required prevailing wage schedule at each PV jobsite. Although this creates the absurd result of many identical postings on each jobsite, that’s the law and we are going to have to deal with it.

“I would appreciate it if you two could put your heads together and come up with a process that ensures compliance with this requirement in Oregon.”

57) On September 15, 2003, Gilman e-mailed an “action plan” to Rischman that was designed to assure compliance with Oregon prevailing wage rate posting requirements. In pertinent part, the e-mail stated:

“Oregon Prevailing Wage Compliance

“GOALS

“(1) Comply with ORS 279.350(4) by training OR operations.

“(2) Avoid disbarment for “intentional violation” of ORS 279.350(4) by having an affirmative policy that complies with the law.

“(3) Be able to prove compliance, by posting a Labor Ready labeled rate sheet, and making a record of when and where posted.

“ACTIONS:

“(1) Creation of an OR only PREVAILING WAGES intra-site. Include the basic guidelines that have been in-force for some time.

“(2) Instructions to Branch Managers/CSRs on complying with the posting requirements.

- Get the rate sheet form [sic] the customer.
- Copy of rate sheet on Labor Ready Letter head, or copy rate sheet with business card, or attach card to rate sheet.
- Post this LR identified rate sheet at the job site. (Post next to the rate sheet posted by the general contractor. Ensure the rate sheets match.) Keep an exact copy of what you posted in the customer file, with a note of when and where it was posted.
- On later job site visits, ensure that the posting is still there.

“(3) Contact PW/Legal depts. If customer protests a posting by Labor Ready.

“(4) Also put the statute on the intranet site.

“(5) Assign as a training to all current OR DMs/BMs/CSRs.

“(6) Assign as a training to all future hires in OR.”

Gilman, Rischman, and Ivy Finnegan, Respondent’s prevailing wage administrator, all approved this plan.

58) On September 27, 2003, Rischman sent an e-mail to Respondent’s “IT” department requesting that Gilman’s “action plan” be implemented.

59) On October 24, 2003, Rischman met with Brad McKnight from Respondent’s IT department to discuss putting BOLI’s powerpoint presentation on Labor Ready’s Prevailing Wage department’s intranet site. (Testimony of Finnegan; Exhibit R-24)

60) On November 25, 2003, the notes from Rischman’s October 24, 2003, meeting with McKnight were added to Rischman’s September 27, 2003, request to Labor Ready’s IT department.

61) On January 28, 2004, Finnegan sent an e-mail to Siobhan Hanna^{xi} that stated:

“Just to outline the possible Oregon changes that need to be made. It seems that all the OR branches are up to date on submitting the BOLI notification. So, once the notification and rate sheet are sent to corporate the appropriate processor would make a copy of the rate sheet on LRR letterhead and overnight this back to the branch for posting on site. I have some additional thoughts I wanted to run by you. Should someone sign the letterhead before sending it off to the branch? Do you think that would be necessary? Should we have the customer acknowledge it somehow at the job site? If the customer protests, as Todd mentioned could happen, what would be the protocol for that? Should they be forwarded to Legal? How can we be assured that after the rate sheet is submitted to us and then sent back to the branch for posting that it is actually posted. If this process would ensure avoiding debarment we would need something to finalize the act. That way we know it’s done. Also, would one of us handle this whole piece or would be [sic] keep flipping it around each week like we are now.

“Just a few thoughts to ponder. I will make sure that we include the finalized version of this process on the separate piece for OR for the

intranet site? I like the idea of each CSR/BM doing a training. :) We will get together next week and start pounding that out for the other states.

“Let me know what you need...”

62) On April 13, 2004, Hanna sent an e-mail to Gilman that read, in pertinent part:

“Hi Todd,

“Well, believe it or not, MIS has begun work on the site as detailed below. Part of the requirement was to post the statute on the intranet site, any chance you have that?

“It’s the last piece I need and we will be able to roll out. I’ve also made it to the final draft of the PW on line training module.”

On April 14, 2004, Gilman sent an e-mail back to Hanna with a copy of Oregon posting law attached.

63) On April 12, 2004, Hanna met with McKnight and Sue Van Dyken, another Labor Ready employee in “development,” to “further discuss putting an Oregon BOIL [sic] (Bureau of Labor and Industries) web page on the Prevailing Wage department’s web site.”

64) As of May 3, 2004, Respondent’s corporate office established intranet training for its Oregon employees on the subject of Oregon’s prevailing wage posting requirement. Respondent’s Oregon employees and employees in Labor Ready’s prevailing wage group have access to the intranet site. Respondent’s intranet page entitled “Oregon BOLI” contains the following information and policy statement:

“Processing of Oregon Prevailing Wage work requires Labor Ready to comply with some state specific guidelines. This site is intended to provide the following:

- Oregon specific BOLI information
- Instructions for posting of rate sheet on all Oregon Prevailing Wage job sites
- Oregon statute relating to the posting of rate sheets on all job sites

“Oregon Prevailing Wage Rate Sheet Posting Requirement

“When staffing a prevailing wage job site in the state of Oregon the following process must be followed:

- Obtain the current rate sheet from your customer
- Fax to the corporate Prevailing Wage Department
- Corporate Prevailing Wage Department will review rate sheet, transfer it to Labor Ready Prevailing Wage letterhead and send it back to your branch immediately via certified mail.
- Upon receipt this rate sheet must be posted on the job site next to the sheet posted by the general contractor. Attach a branch manager business card to the rate sheet prior to posting. Keep an exact copy of what you posted in the customer file, with a note of when and where it was posted.
- Contact the corporate Legal/PW Department if any customer protests the posting by Labor Ready.
- Make a follow up visit to be sure the posting is still there.

“Statute Form

“Oregon BOLI powerpoint presentation

“Please contact the corporate PW department with any questions.

Questions about the PWW Website?

Email: intranet@laborready.com”

65) An intranet user who clicks on “Statute Form” is linked to another page that contains Oregon’s laws that regulate posting on prevailing wage rate jobs.

66) An intranet user who clicks on “Oregon BOLI powerpoint presentation” is linked to a powerpoint presentation created by BOLI in 2002 that explains Oregon prevailing wage rate rules and regulations.

67) When Respondent’s local branches call corporate headquarters and state that they have a new prevailing wage rate job, corporate tells them they have to complete a BOLI notice form and post on site.

68) Garrison was a forthright witness and, with one exception, the forum found his testimony to be credible. When cross examined by Respondent, he testified that he and Woodward were trying to work together on July 24 and 25 to determine if the Liberty HS project was a prevailing wage rate job, but Woodward never “made it clear”

that the Liberty HS project was a prevailing wage rate job, although she “believed” it was. Four different contemporaneous computer notes made by Garrison on July 25, 2003, reveal no ambiguity in Woodward’s or Garrison’s minds at that time about whether the job was subject to the prevailing wage rate. The first states “Dana called me to let me know that JBH Installation should be paying prevailing wage.” The second states “I explained [to Bud Heart] that Dana at BOLI told me that this is prevailing wage.” The third states “I called Dana again * * * She was very sure that this job was prevailing wage.” The fourth states “I then called Bud Heart back to let him know that I was getting a letter from [Dana] stating that this was a prevailing wage job.” Garrison’s testimony also shows that the primary reason he wanted a letter from BOLI was to help him with the customer relations problem he was having with JBH due to JBH’s contention that the job was not a prevailing wage job. An example of Garrison’s testimony supporting that conclusion was -- “I just needed something on BOLI letterhead that said ‘yes, it’s prevailing wage’ so that I can go out there and be credible when I talk to my customers.”

69) Morgan, Finnegan, and Wooley were credible witnesses and the forum has credited their testimony in its entirety.

70) On November 28, 2005, the Commissioner issued a Final Order on Reconsideration in consolidated cases ## 122-01 and 149-01. In both cases, the Agency charged that Respondent had violated provisions of Oregon’s prevailing wage rate laws. The Commissioner’s Final Order included several conclusions of law. One of the Commissioner’s conclusions was that Respondent committed five violations of *former* ORS 279.350(1) in 2000 by failing to pay the prevailing rate of wage to five workers while providing manual labor as a subcontractor on a public works (Cornelius Project) and one violation by failing to pay the prevailing rate of wage to a single worker

while providing manual labor as a subcontractor on a second public works (Central Project). The Commissioner ordered Respondent to pay \$15,000 in civil penalties for the Cornelius violations (\$3,000 per violation) and \$5,000 in civil penalties for the Central violation. Another of the Commissioner's conclusions was that Respondent committed two violations of *former* ORS 279.350(4) in 2000 by failing to post the prevailing wage rates while providing manual labor as a subcontractor on two public works (Cornelius and Central Projects). Respondent appealed the Commissioner's Final Order to the Oregon Court of Appeals, assigning error to the Commissioner's determinations that: (1) Respondent intentionally failed to pay its worker the prevailing wage rate on the Central Project; (2) Respondent intentionally failed to post and keep posted the prevailing wage rate at the Cornelius job site; and (3) Respondent should be debarred for one year. Respondent did not assign error to the Commissioner's conclusions that Respondent failed to pay the prevailing wage rate to six workers or that Respondent failed to post. On September 27, 2006, the Oregon Court of Appeals affirmed the Commissioner's Final Order. *In the Matter of Labor Ready Northwest*, 27 BOLI 83 (2005), 208 Or App 195 (2006), *petition for recon. filed*. ("Labor Ready #2)

71) On December 13, 2001, the Commissioner issued a Final Order in case 31-01, a case in which the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed eight violations of *former* ORS 279.350(1) by failing to pay the prevailing rate of wage to six workers in 1998 while providing manual labor as a subcontractor on a public works (New Bend Middle School Project). The Commissioner ordered Respondent to pay \$12,000 in civil penalties (\$1,500 per violation). Another of the Commissioner's conclusions was that Respondent committed one violation of *former* ORS 279.350(4) by

failing to post the prevailing wage rates on the same project. The Commissioner assessed \$2,000 in civil penalties based on Respondent's violation of *former* ORS 279.350(4). On appeal, Respondent did not assign error to the Commissioner's conclusion that Respondent committed eight violations of *former* ORS 279.350(1), and the court upheld the Commissioner's conclusion that Respondent committed one violation of *former* ORS 279.350(4). *Labor Ready #1*.^{xii}

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon.

2) On November 14, 2000, Hillsboro School District 1J first advertised the Liberty High School project, a public works project not subject to the Federal Davis-Bacon Act that involved constructing a new high school. The project contract was awarded to Robinson Construction Co. in the amount of \$37,549,800.

3) On March 11, 2003, Hillsboro 1J accepted a bid from the School Specialty Group, in the amount of \$1,516,787.10, to provide equipment and furnishings for Liberty High School. School Specialty then contracted with JBH Installation to receive and set the furniture and equipment in place, assembling the furniture as necessary.

4) On July 7, 2003, JBH Installation placed a job order with Respondent's Hillsboro branch to provide four workers to move furniture at Liberty High School.

5) On July 7, 2003, Respondent's Hillsboro office dispatched four workers to the Liberty HS project. From July 7 through July 28, 2003, Respondent dispatched 15 workers to the Liberty HS project. Respondent's workers performed the tasks of unloading furniture from trucks, taking them into the school, and putting desks and chairs together with screwdrivers and wrenches.

6) On the Liberty HS project, Respondent paid its workers by the day. From July 7 through July 28, 2003, Respondent paid each of its 15 workers \$6.90 per hour for all work performed. David Becker, Jason Harris, Richard Thompson, and Margarito Martinez were among those workers; the four were underpaid a total of \$1,334.90.

7) Respondent's workers on the Liberty HS project performed work that was properly classified as Group 1 Laborers, with a basic hourly pay rate of \$20.44 and a fringe benefit of \$7.85 per hour, for a total of \$28.29 per hour.

8) On July 25, 2003, BOLI orally notified Garrison, Respondent's Hillsboro branch manager, that the Liberty HS project was a prevailing wage rate job. On July 28, 2003, Garrison received written notice from BOLI confirming that the Liberty HS project was a prevailing wage rate job.

9) On July 29, 2003, Respondent began paying its workers on the Liberty HS project the correct prevailing wage rate of \$28.29 per hour (basic hourly rate of \$20.44 + fringe benefit of \$7.85 per hour) on July 29, 2003, and continued paying its workers the correct prevailing wage rate through September 11, 2003, the last day that Respondent dispatched workers to that project.

10) On August 5, 2003, Respondent issued back pay checks to all its workers who had performed work on the Liberty HS project from July 7 through July 28, 2003. The amount on each check was the actual amount underpaid to each worker, calculated at \$21.39 per hour (\$28.29 per hour earned *minus* \$6.90 already paid).

11) Respondent did not post the prevailing wage rates applicable to Respondent's workers at the Liberty HS project at any time while Respondent's workers were employed at the project.

12) On May 5, 2004, Respondent sent a check to BOLI in the amount of \$1334.90 as a result of BOLI's determination that Respondent had issued checks to

Becker, Harris, and Thompson, and Martinez for the full amount of back pay owed, but that the four workers had never received their checks because of Respondent's inability to locate them.

CONCLUSIONS OF LAW

1) The Liberty HS project was a public works project that was not regulated under the Davis-Bacon Act for which the contract price exceeded \$25,000, and Respondent was a subcontractor that employed workers on the project. *Former* ORS 279.348(3),^{xiii} *former* ORS 279.357(1)(a), *former* OAR 839-016-0004(30).^{xiv}

2) Respondent initially paid its workers, including David Becker, Jason Harris, Margarito Martinez, and Richard Thompson, less than the prevailing wage rate for work performed from July 7 through July 28, 2003. This constitutes four violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035.

3) Respondent did not post or keep posted the prevailing rates of wage for the Liberty HS project, constituting one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033.

4) The Commissioner's imposition of civil penalties for Respondent's four violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035 and one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033 is an appropriate exercise of his discretion. *Former* ORS 279.370(1); *former* OAR 839-016-0530(3)(b); *former* OAR 839-016-0540(3)(a).

5) Respondent's failure to post the prevailing rates of wage on the Liberty HS project was intentional. When the Commissioner determines that a contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required by *former* ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible, for a period not to exceed three years from the date

of publication of the name of the contractor or subcontractor on the ineligible list (“List”) maintained by the Commissioner, to receive any contract or subcontract for public works. The Commissioner’s decision to place Respondent on that List for three years based on Respondent’s intentional failure to post the prevailing rates of wage as required by *former* ORS 279.361 is an appropriate exercise of his discretion.

OPINION

RESPONDENT FAILED TO PAY THE PREVAILING WAGE RATE

The Agency alleged that Respondent violated ORS 279.350 by failing to pay the prevailing wage rate to four workers – David Becker, Jason Harris, Margarito Martinez, and Richard Thompson – on the Liberty HS project. *Former* ORS 279.350(1) required payment of the prevailing rate of wage on public works contracts. To establish a violation of that statute in this case, the Agency must prove: (1) The project at issue was a public work, as that term was defined in *former* ORS 279.348(3)^{xv}; (2) Respondent was a subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) Respondent failed to pay four workers -- Becker, Harris, Martinez, and Thompson at least the prevailing rate of wage for each hour worked on the project. See *In the Matter of William George Allmendinger*, 21 BOLI 151, 169-70 (2000).

A. The Liberty HS project was a public works.

Former ORS 279.348(3)^{xvi} provided that:

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

Former ORS 279.348(5)^{xvii} provided:

“Public agency’ means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity

and any of their instrumentalities organized and existing under law or charter.”

Hillsboro School District 1J is a public agency that entered into two separate contracts, with two separate contractors, to build and provide equipment and furnishings for Liberty High School. The first contract was with Robinson Construction Co., in 2001, in the amount of \$37,549,800, to build Liberty High School. The second contract was with School Specialty Group, in 2003, in the amount of \$1,516,78.10, to provide equipment and furnishings for the high school. School Specialty contracted with JBH Installation to receive and set the furniture and equipment in place, and JBH in turn contracted with Respondent to provide the labor needed to set the furniture in place and assemble it as needed.

“Construction,” as used in *former* ORS 279.348(3), is defined in *former* OAR 839-016-004(5) as “the initial construction of buildings and other structures[.]” Robinson’s work, which involved building an entire public high school while under contract with a public agency, fits within this definition, and the forum concludes that Robinson’s work was on a “public works” as defined in *former* ORS 279.348(5).

Although Robinson had completed its construction by the time School Specialty, through JBH and Respondent, commenced delivering and assembling furniture at Liberty High School, the Liberty HS project remained a “public works.” The forum bases this conclusion on three factors. First, the District itself believed that the work performed under this contract was subject to the prevailing wage rate, stating in the cover letter to its Invitation to Bid for “Equipment and Furnishings For Liberty High School” that “[t]he provisions of Oregon Revised Statutes 279.348 to 279.365, relating to prevailing wage rates, are applicable to work under this Contract.” Second, the work was performed in the same building that Robinson had just constructed, with no significant break in time between the end of construction and the installation of furniture.

Third, the work performed by JBH and Respondent's workers was in fact the completion of the same project that Robinson had begun. In support of this conclusion, the Commissioner takes notice that the public high school constructed by Robinson was unusable for the purpose for which it was intended without the equipment and furniture that Respondent's workers carried into the high school and assembled.

B. Respondent was a subcontractor that employed workers on the Liberty HS project whose duties were manual or physical in nature.

It is undisputed that School Specialty contracted with JBH to deliver and install furniture pursuant to School's contract with the District and the JBH paid Respondent to provide employees to perform that task. This makes Respondent a subcontractor. *Former* OAR 839-016-0004(29) defined "worker" as "a person employed on a public works project and whose duties are manual or physical in nature[.]" From July 7 through September 11, 2003, Respondent's employees, including Becker, Harris, Martinez, and Thompson, moved and assembled furniture using screwdrivers and wrenches at the Liberty HS project. Moving and assembling furniture with hand tools are both "manual" and "physical" duties that were performed by persons employed by Respondent on a public works project.

C. Respondent failed to pay four workers at least the prevailing rate of wage for each hour worked on the Liberty HS project.

The Agency presented credible evidence, in the form of Morgan's testimony and BOLI's Prevailing Wage Rate book in effect when the Liberty HS project was first advertised for bid, that Respondent's workers were properly classified as Laborers, Group 1, and that the prevailing wage rate for workers in that category was a \$20.44 basic hourly rate and a \$7.85 per hour fringe benefit. Respondent paid its workers by the day on the Liberty HS project, and the evidence is undisputed that all four workers -- Becker, Harris, Martinez, and Thompson -- were initially paid \$6.90 per hour, \$21.39 per

hour less than the prevailing wage rate, and that Respondent did not issue back pay checks to make up the difference until August 5, 2003.

RESPONDENT'S LIABILITY

On the Liberty HS project, Respondent paid its workers by the day. On their first day of work, Harris, Thompson, and Becker each worked eight hours and earned \$226.32 (8 hours x \$28.29). On their first day of work, they were paid \$42.00, \$47.10, and \$47.10, respectively. They were similarly underpaid on every other day they worked through July 28, 2003. Martinez worked two hours on July 10, 2003, his first and only day of work through July 28, 2003, and earned \$56.58 (2 hours x \$28.29). That same day, he was paid \$11.00. Respondent issued back pay checks to all four workers on August 5, 2003, but Harris, Thompson, and Becker did not receive them until May 2004, and Martinez had still not received his back pay check by the time of hearing due to the inability of Respondent and BOLI to locate him. Respondent's failure to pay the prevailing rate of wage to Becker, Harris, Martinez, and Thompson when it first issued paychecks to them constitutes four violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035. See *North Marion School District v. Acstar Insurance Co.*, 205 Or App 484, 494, 136 P3d 42, 47 (2006) (prevailing wage requirement in *former* ORS 279.350 is violated by tendering checks to workers less than the prevailing wage rate).

CIVIL PENALTY

The Commissioner may assess a civil penalty of up to \$5,000 for each violation of *former* ORS 279.350(1). *Former* ORS 279.370(1); *former* OAR 839-016-0540(1). In this case, the Agency cited *former* OAR 839-016-0540(3)(a) as partial authority for the \$20,000 in civil penalties it proposed to assess for Respondent's four violations. That

rule, stated below, set a minimum civil penalty for a first violation of *former* ORS 279.350(1):

“(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:

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

As noted, this rule established a minimum, not an upper limit, on the Commissioner’s authority to determine an appropriate civil penalty.^{xviii} In determining an appropriate penalty, the forum must also consider any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. *In the Matter of Harkcom Pacific, Inc.*, 27 BOLI 62, 77 (2005). When seeking more than the minimum civil penalty, the Agency must establish aggravating circumstances to justify the increased amount. *In the Matter of Design N Mind*, 27 BOLI 32, 44 (2005).

A. Aggravating Circumstances

Former OAR 839-016-0520 set out the following criteria for the Commissioner to consider in determining the amount of civil penalty:

“(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 section (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.”

There are several aggravating circumstances in this case.

1. Respondent's prior violations of statutes and rules.

Respondent has committed 14 prior violations of *former* ORS 279.350(1), eight in 1998 and six in 2000 for which civil penalties were assessed.^{xix} These 14 violations were litigated at two different contested case hearings and Final Orders issued in both. Respondent filed appeals in both cases, but did not assign error to the assessment of civil penalties for those 14 violations. In its exceptions, Respondent contends that these violations should not be considered because of their remoteness in time and because the cases were on appeal. Respondent's exceptions are DENIED for two reasons. First, when he elects to do so, the Commissioner is capable of writing a rule that explicitly provides for disregarding past violations based on their remoteness in time. See *former* OAR 839-016-0540(2) (“For purposes of this rule ‘repeated violations’ means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.”) The Commissioner has not elected to do so with regard to *former* OAR 839-016-0520(1)(b).^{xx} Second, in *Labor Ready #1* and *Labor Ready #2*, Respondent did not assign error on appeal to the Commissioner's determinations that Respondent committed 14 violations of *former* ORS 279.350(1).

2. Opportunity and degree of difficulty to comply.

In its exceptions, Respondent argued that “The Labor Ready manager exercised extraordinary diligence in dealing with BOLI to determine whether prevailing wage rates

applied.” The forum agrees that Garrison, Labor Ready’s manager, exchanged numerous phone calls and e-mails with BOLI on this subject. However, Garrison’s own contemporaneous notes demonstrate that Dana Woodward, BOLI’s representative, told Garrison in two different phone conversations^{xxi} on July 25, 2003, that the Liberty HS project was a prevailing wage rate job, and that Garrison even communicated that fact to JBH that same day. In pertinent part, Garrison wrote:

“7/25/03 DANA CALLED ME TO LET ME KNOW THAT JBH INSTALLATION SHOULD BE PAYING PREVAILING WAGE. DANA TOLD ME THAT SHE CONFIRMED THIS WITH THE HILLSBORO SCHOOL DISTRICT.

“7/25/03 I CALLED BUD HEART TO LET HIM KNOW THE LATEST NEWS. I EXPLAINED THAT DANA AT BOLI TOLD ME THAT THIS IS PREVAILING WAGE. I ALSO EXPLAINED [sic] THAT SHE CHECKED WITH THE SCHOOL BOARD. BUD INSISTED THAT THIS JOB IS NOT PREVAILING WAGE BECAUSE THEY ARE A VENDOR NOT A CONTRACTOR.

“7/25/03 I CALLED DANA AGAIN AND LET HER KNOW THE RESPONSE [sic] I RECEIVED [sic] FROM BUD HEART. SHE WAS VERY SURE THAT THIS JOB WAS PREVAILING WAGE. I ALSO GAVE HER BUD HEART[']S PHONE NUMBER. DANA TOLD ME THAT SHE WOULD WORK ON THIS RIGHT AFTER LUNCH. SHE WAS GOING TO ATTACH A LETTER TO THE EMAIL WHEN SHE REPLIED BACK TO ME. THIS WOULD GIVE ME SOMETHING I CAN GIVE TO JBH WITHOUT GIVING THE EMPLOYEES['] NAME.”

“7/25/03 I THEN CALLED BUD HEART BACK TO LET HIM KNOW THAT I WAS GETTING A LETTER FROM DANA [sic] STATING THAT THIS WAS A PREVAILING WAGE JOB. I ASSURED HIM I WOULD SEND IT TO HIM VIA EMAIL AS SOON AS I GOT IT. HIS EMAIL IS JBHINSTALLATIONS@AOL.COM.”

“7/25/03 I CALLED BUD BACK TO LET HIM KNOW THAT I DID NOT HEAR FROM DANA. I ALSO WANTED TO KNOW IF HE HAD HEARD FROM HER. BUD INFORMED ME THAT HIS LEGAL OFFICE IS WORKING ON IT. HE ALSO EXPLAINED THAT HE HAD SPOKE [sic] WITH DANA AND THAT SHE WAS NOT VERY RECEPTIVE TO WHAT BUD WAS TRYING TO EXPLAIN TO HER. HE WAS NOT VERY PLEASED WITH THE SITUATION. HE AGAIN SAID THAT THIS IS NOT PREVAILING WAGE. HE TOLD ME THAT HIS LEGAL OFFICE CONFIRMED THAT IT WAS NOT PREVAILING WAGE. HE TOLD ME THAT HE NEEDED THE WORKERS ON MONDAY. HE WANTED TO KNOW IF I WAS GOING TO SERVICE HIM OR NOT. IF NOT HE

WOULD TAKE THE BUSINESS ELSEWHERE. **** BASED ON THE FACT THAT DANA DID NOT PROVIDE ME WITH ANYTHING IN WRITING AFTER TWO REQUEST [sic] I DECIDED TO SERVICE JBH ON MONDAY. I DID NOT FEEL IT WAS THE RIGHT CHOOSE [sic] TO NOT SERVICE THEM BASED ON DANA'S OPINION ONLY. I WILL FOLLOW UP WITH HER FIRST THING MONDAY MORNING. ***** MICHAEL GARRISON"

These notes do not reflect any uncertainty on Garrison's part, as of July 25, 2003, as to whether or not the Liberty HS project was a prevailing wage rate job. Rather, they show that he understood the project was a prevailing wage rate job, that he communicated that fact to JBH, and that he sought written confirmation from BOLI's representative so he could provide an official confirmation to JBH, Respondent's unhappy client. Despite this knowledge, Garrison continued to pay Respondent's workers \$6.90 per hour on July 28, 2003, using the excuse that he had not received written confirmation from BOLI. Respondent, through Garrison, had the opportunity to comply with the law on July 28, 2003, and elected not to do so. This constitutes an aggravating circumstance.

3. Magnitude and seriousness of Respondent's violations.

Former OAR 839-016-0520(1)(d) required the Commissioner to consider "[t]he magnitude and seriousness of the violation" in determining the amount of a civil penalty. In the proposed opinion, the ALJ found that Respondent's violations were aggravated by their "seriousness" and "substantial magnitude." Respondent excepted to the conclusive nature of the ALJ's finding, correctly pointing out that the ALJ had concluded the violation was serious simply because the violations, if intentional, require the Commissioner to debar Respondent.

In *former* ORS 279.349, the Legislature set forth four specific purposes for the prevailing wage rate law. The second purpose was "[t]o recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards." *Former* ORS 279.349(2). To carry

out that purpose, *former* ORS 279.350(1) required that “[t]he hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall not be less than the prevailing rate of wage[.]” This requirement goes to the very heart of the Legislative policy expressed in *former* ORS 279.349(2). As a result, the commissioner considers violations of *former* ORS 279.350(1) to be a serious matter. In determining the magnitude, the forum considers the following facts:

- (1) Over a three week period, Respondent initially underpaid 15 workers the total amount of \$10,630.83;^{xxii}
- (2) In making the underpayments, Respondent only paid its workers \$6.90 per hour instead of \$28.29 per hour, the applicable prevailing wage rate; and
- (3) As a direct result of Respondent’s initial underpayment, three of Respondent’s workers did not receive their back pay until 10 months after they earned that pay.

Based on these facts, the forum concludes that Respondent’s violations were of substantial magnitude.

B. Mitigating circumstances.

There are three mitigating circumstances. First, credible evidence shows that Garrison, Respondent’s manager, made a diligent effort to determine if the Liberty HS project was a prevailing wage rate job on the first day that Respondent dispatched workers to the job site. Second, Respondent issued back pay checks to all underpaid workers within a week after BOLI informed Respondent that the Liberty HS project was a prevailing wage rate job. Third, Respondent promptly sent BOLI a check to cover back pay to Decker, Harris, Martinez, and Thompson when BOLI’s investigator informed Respondent that the earlier paychecks issued to those four individuals had not cleared.

C. Amount Of Civil Penalty.

Although mitigating circumstances are present, they are considerably outweighed by the gravity of the aggravating circumstances. In LRNW #1, the Commissioner

imposed a \$1,500 civil penalty for each of Respondent's eight violations of *former* ORS 279.350(1) on the New Bend Middle School Project. In LRNW #2, the Commissioner imposed a \$3,000 civil penalty for each of Respondent's five violations of *former* ORS 279.350(1) on the Cornelius Project and a \$5,000 civil penalty for Respondent's violation of *former* ORS 279.350(1) on the Central Project. In this case, an appropriate assessment is a \$5,000 civil penalty for each of Respondent's four violations, for a total of \$20,000.

RESPONDENT FAILED TO POST THE PREVAILING WAGE RATE

Michael Garrison, Respondent's Hillsboro branch manager, testified that he did not post or keep posted any prevailing wage rates on the Liberty HS project, and there was no evidence that anyone else posted or kept them posted on Respondent's behalf. If someone else had posted on Respondent's behalf, Respondent presumably would have called them to testify as a witness and Respondent did not do so. Accordingly, the forum concludes that Respondent committed one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033.

CIVIL PENALTY

A. Aggravating Circumstances

There are several aggravating factors in this case.

1. Respondent's prior violations of statutes and rules.

Respondent committed three prior violations of *former* ORS 279.350(4) on the New Middle School, Cornelius, and Central Projects. *Labor Ready #1, Labor Ready #2.*

2. Opportunity and degree of difficulty to comply.

Respondent had ample opportunity to comply, as Garrison, Respondent's branch manager, could have posted the prevailing wage rate for Respondent's workers on any of one of his visits to the Liberty HS project. Had Garrison posted on or soon after July

25, 2003, the date he acquired actual knowledge that the Liberty HS project was a prevailing wage rate job, that act would have been a potentially mitigating circumstance. There was no evidence that posting posed any degree of difficulty for Respondent, and there was no dispute that Garrison knew that Respondent's workers were properly classified as Group 1 Laborers.^{xxiii} Respondent contends in its exceptions that "[a]s a practical matter, posting is never 'difficult' unless, for example, the work place is on a cliff or under water." The forum declines to explore the universe of circumstances that might make it difficult for a contractor or subcontractor to post and reaffirms that, in this case, there is no evidence that posting posed any degree of difficulty for Respondent.

3. Magnitude and seriousness of Respondent's violation.

The requirement that every contractor or subcontractor post the prevailing wage rates for its employees promotes the statutory purpose of assuring compliance by informing employees of the rate of pay they should be receiving. *LRNW #1* at 369. When contractors or subcontractors do not post, this directly undermines the Legislature's intent of ensuring that workers on public works be paid the prevailing wage rate. Consequently, the forum considers failure to post to be a serious matter. In determining the magnitude, the forum considers the following facts:

- (1) Respondent did not provide its workers with any way of finding out they were being underpaid due to its failure to post or otherwise inform its workers of the prevailing wage rate they were entitled to receive;^{xxiv}
- (2) Respondent still did not post when it learned the Liberty HS project was a prevailing wage rate job;
- (3) Over a three week period, Respondent initially underpaid 15 workers the total amount of \$10,630.83.^{xxv} Respondent's workers were unaware of this underpayment primarily because of Respondent's failure to post, and three of Respondent's workers – Becker, Thompson, and Harris – did not become aware of the underpayment until 10 months later due to the fact that they were no longer working for Respondent when Respondent finally began paying the prevailing wage.

Based on these facts, the forum concludes that Respondent's violations are of substantial magnitude.

4. Respondent knew or should have known of its violation.

On June 26, 2003, two weeks before Respondent dispatched workers to the Liberty HS project and one month before Respondent, through its branch manager Garrison, learned that the Liberty HS project was a prevailing wage rate job, the Oregon Court of Appeals issued an opinion in a case involving this very issue in which Respondent was a party. In that case, Respondent argued the position that ORS 279.350(4) "does not require every subcontractor and contractor to independently post the prevailing wage rates." *Labor Ready Northwest*, 188 Or App at 368. ("LRNW #1") The court held that "ORS 279.350(4) requires every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Id* at 369. Despite this unequivocal statement of Oregon's prevailing wage rate posting requirement, Garrison's credible testimony that Respondent had not trained him on the posting requirement, and that he would have posted, had he been aware of the law, leads the forum to conclude that Respondent failed to inform Garrison of the posting requirement at any time prior to September 11, 2003, the last day Respondent's workers were employed on the Liberty HS project.^{xxvi} In fact, there is no evidence in the record that Respondent took any action to develop a consistent policy with regard to Oregon's posting requirements until September 9, 2003, and that the actual policy was not posted on Respondent's intranet and available to Respondent's Oregon employees until May 3, 2004. Under these circumstances, the forum concludes that Respondent knew of the posting requirement and that Garrison should have and would have known

of the violation, had Respondent provided him with any training on the posting requirement.

B. Mitigating Circumstances

Respondent's subsequent development of intranet training for its Oregon employees on Oregon prevailing wage rate law and its posting requirements is a mitigating circumstance. However, in this case it is offset by the fact that Respondent did not train Garrison, its branch manager, on Oregon's posting requirement at any time prior to September 11, 2003, despite the Court of Appeals' June 26, 2003, decision in *Labor Ready #1*.

C. Amount Of Civil Penalty.

The Agency sought a \$5,000 civil penalty for Respondent's single violation of *former* ORS 279.350(4). In LRNW #1, the Commissioner imposed a \$2,000 civil penalty for Respondent's first violation of *former* ORS 279.350(4). In LRNW #2, the Commissioner imposed a \$4,000 civil penalty for Respondent's second violation and a \$5,000 civil penalty for Respondent's third violation of *former* ORS 279.350(4). Considering the number of aggravating circumstances and absence of any mitigating circumstances, the forum concludes that \$5,000 is an appropriate penalty.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar^{xxvii} Respondent for three years based on the charge that Respondent's undisputed failure to post the prevailing wage rates on the Liberty HS project as required by *former* ORS 279.350(4) was "intentional."

LIABILITY OF RESPONDENT

Former ORS 279.361 provided that when a subcontractor "intentionally" fails or refuses to post the prevailing wage rates as required by *former* ORS 279.350(4), the subcontractor and any firm in which the subcontractor has a financial interest shall be

placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that Respondent failed to post the applicable prevailing wage rates on the Liberty HS project. The only question is whether that failure was “intentional.” If so, the Commissioner is required to place Respondent on the List of Ineligibles.

Respondent, through Garrison, knew that its workers would be performing manual and physical duties on a high school when its workers were initially dispatched to the Liberty HS project. In the first few days that Respondent’s workers were employed at the Liberty HS project, Garrison was proactive in attempting to determine if Respondent needed to pay the prevailing wage rate. He spoke with two managers employed by JBH and with Robinson’s office, and was assured by Robinson that construction was complete and by JBH that the work was not subject to the prevailing wage rate because JBH was a “vendor.” Although Garrison could have called BOLI for a definitive answer, under the circumstances, the forum concludes that Respondent did not intentionally fail to post before July 25, 2003, for the reason that Garrison, who as branch manager was responsible for the posting, did not know that the job was a prevailing wage rate job.

On July 23, 2003, Garrison was notified by one of Respondent’s workers that the Liberty HS project, according to BOLI, was a prevailing wage rate job. Garrison again was proactive in attempting to clarify whether the Liberty HS project was in fact a job on which Respondent was required to pay its workers the prevailing wage rate. On July 25, Dana Woodward, an employee in BOLI’s Prevailing Wage unit, told Garrison that she was sure the Liberty HS project was a prevailing wage rate job and that she would send him written confirmation. Garrison received the written confirmation from Woodward on July 28. On July 29, he began paying Respondent’s workers at the rate

of \$28.29 per hour, the prevailing wage rate for workers classified as Group 1 Laborers, and the correct classification for Respondent's workers. On August 5, he caused back pay checks to be issued in the full amounts owed to all 15 of Respondent's workers who were owed back pay as a result of Respondent's failure to pay them the prevailing wage rate for work performed on the Liberty HS project prior to July 29. On August 5 and 8, Respondent's corporate headquarters completed certified payroll reports for Respondent's workers on the Liberty HS project to reflect "restitution" payments made to those workers for the work they performed prior to July 29, 2003. At that point, Garrison and Respondent's corporate headquarters had actual knowledge that work was being performed on a prevailing wage rate job in Oregon. However, Respondent, through Garrison or another employee or agent, failed to take the critical step at issue in this case – posting the prevailing wage rate applicable to Respondent's workers on the Liberty HS project job site. This step was not taken because Garrison did not know that Oregon law required posting, and Garrison did not know that Oregon law required posting because Respondent gave him no training on this subject.

In *Labor Ready #1*, the court held that, under *former* ORS 279.350(4), a "negligent or otherwise inadvertent failure" to post the prevailing wage rate is insufficient to require debarment, and that a "heightened level of culpability [must] be proven before an employer [can] be debarred." *Labor Ready Northwest*, 188 Or App at 366. Applying that standard, the court concluded that, even though Labor Ready Northwest made no attempt to post, its failure to post the applicable prevailing wage rate was not "intentional" within the meaning of ORS 279.361(1) "for either of two reasons. First, [Labor Ready Northwest] acted from a good-faith, albeit legally mistaken, belief that the posting in the general contractor's shack obviated any need for petitioner itself to post. *

* * Thus, there was no conscious choice on petitioner's behalf not to perform a known

duty. Second, as noted, [Labor Ready Northwest] was mistaken as to the correct prevailing wage for its employees' work; thus, it did not know the correct rate and, consequently, did not elect not to post *that* rate." *Id* at 366.

The exculpatory circumstances found in *Labor Ready Northwest* are absent in this case. After July 28, 2003, both Garrison and Respondent's corporate office knew that the Liberty HS project was a prevailing wage rate job, the correct classification for Respondent's workers, and the correct prevailing wage rate that applied to those workers. No evidence was presented to show that anyone else had posted the prevailing wage rate or that Garrison or Respondent believed that anyone else had posted the prevailing wage rate. Garrison may have been ignorant of the legal requirement to post because of Respondent's failure to apprise him of that requirement, but Garrison's ignorance of the law does not provide a defense for Respondent. Only a month before Respondent dispatched its first workers, the Court of Appeals held that Respondent specifically and all other subcontractors engaged on a project for which there is a contract for a public work were required to individually post and keep posted the prevailing wage rates. *Id.* at 569. Inexplicably, Respondent's corporate office failed to inform Garrison, its branch manager, of this legal requirement, even after it became aware that its Hillsboro branch had underpaid workers on a prevailing wage rate job and issued restitution checks. Despite this red flag, Respondent's corporate office did nothing else to make certain that Respondent was in compliance with Oregon prevailing wage rate law regarding posting on the Liberty HS project. Ironically, Garrison credibly testified that he would have posted, had he but known that Oregon law required posting on prevailing wage rate jobs. Under these circumstances, the forum concludes that Respondent intentionally failed to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Liberty HS project.

LENGTH OF DEBARMENT.

The Commissioner is required to debar Respondent based on its intentional failure to post the prevailing wage rate on the Liberty HS project. The only question is the length of the debarment.

Former ORS 279.361 provided that debarment shall be for “a period not to exceed three years.” Although that statute and the Agency’s administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. See *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988). Aggravating factors may also be considered. See, e.g., *Testerman* at 129. The aggravating circumstances considered may include those set out in *former* OAR 839-016-0520(1).

Aggravating circumstances include: the magnitude and seriousness of the violation -- 15 workers were initially underpaid a total of \$10,630.83; at least three workers remained unpaid for ten months; Respondent’s failure to post despite ample opportunity to comply and the relative ease of compliance; Respondent’s failure to train its manager of Oregon’s prevailing wage posting requirement, despite clear direction from the Oregon Court of Appeals; Respondent’s failure to post despite its corporate headquarters having knowledge that the Liberty HS project was a prevailing wage rate job; and Respondent’s three prior violations of *former* ORS 279.350(4) in the previous five years, including one intentional violation.

Mitigating circumstances include Respondent's prompt issuance of checks to the 15 workers once Respondent learned the Liberty HS project was a prevailing wage rate job and Respondent's development of a corporate policy and intranet training site for Oregon employees on the subject of Oregon prevailing wage rate laws, including the posting requirement. The former is partially abated by the fact that three workers did not receive their checks until 10 months after the wages were earned. The latter is abated because Respondent did not even begin developing its policy and intranet training site until two and one half months after the Court of Appeals decided the *Labor Ready* case.

In *Labor Ready #2*, Respondent was debarred for one year based on its intentional violation of *former* ORS 279.350(4). Considering all the aggravating and mitigating circumstances, three years is an appropriate period of debarment in this case.

RESPONDENT'S AFFIRMATIVE DEFENSES

In its answer, Respondent asserted two affirmative defenses – that the Agency's action is barred by the applicable statute of limitations and by laches. Respondent did not cite an applicable statute of limitations at hearing and the forum is unaware of any statute of limitations that applies to this proceeding. To prevail on the defense of laches, Respondent must prove three elements: (1) there was an unreasonable delay by the agency; (2) the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) the unreasonable delay resulted in such prejudice to respondent that it would be inequitable to afford the relief sought by the agency. The mere passage of time is not sufficient to invoke the equitable doctrine of laches. Respondent must prove that it suffered actual prejudice attributable to the

passage of time. *In the Matter of Staff, Inc.*, 16 BOLI 97, 122-23 (1997). Respondent did not prove any of these elements.

RESPONDENT'S EXCEPTIONS

Respondent filed 15 exceptions to the proposed order. Those exceptions are discussed below.

A. Exception 1.

Respondent excepted to Proposed Finding of Fact 6 -- The Merits, stating it should have contained the following relevant facts: "Hillsboro 1J disputed that the furnishing of Liberty HAS project required the payment of the prevailing wage rate." Respondent's exception is GRANTED. The requested language has been included in Finding of Fact 4 – The Merits.

B. Exception 2.

Respondent excepted to Proposed Finding of Fact 70 -- The Merits, stating it should have contained the following relevant facts: "the Court held that a 'heightened degree of culpability' must be proven before an employer can be debarred. The Court held that an employer cannot be debarred for a negligent failure to pay or post the prevailing wage rate." Respondent's exception is DENIED because the subjects of the finding in question are violations subject to civil penalties, not debarment.

C. Exception 3.

Respondent excepted to the forum's failure to include a Proposed Finding of Fact containing the following language: "[T]he case of *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries* was on appeal until an appellate judgment was entered May 5, 2004. During the period of time the case was on appeal, the opinion issued therein was not binding on either the Agency or Labor Ready. (Exhibit 70 R-36, BOLI website press release dated May 10, 2006, paragraph 5.)" Respondent cites no legal

authority to support its exception. In fact, Respondent is in record in this case as having taken the opposite position. On September 9, 2003, Respondent's general counsel and corporate president Timothy Adams sent an e-mail on the subject of "Oregon posting of prevailing wage" in which he stated, with regard to the Court of Appeals decision in *Labor Ready #1*:

"[T]he court did agree with BOLI that each subcontractor, including Labor Ready, has an affirmative duty to post the required prevailing wage schedule at each PV jobsite. Although this creates the absurd result of many identical postings on each jobsite, **that's the law** and we are going to have to deal with it." (emphasis added)

To the extent the second sentence of Respondent's exception implies that Respondent was entitled as a matter of law to rely on its own interpretation of *former* ORS 279.350(4) – which was that as a subcontractor, it was not required to post, despite the decision of the Oregon Court of Appeals' opinion to the contrary, until its appellate rights were exhausted -- Respondent's exception is DENIED. The forum has added a sentence to Finding of Fact 55 – The Merits that contains the gist of the first sentence of Respondent's exception. The forum takes official notice that the referenced press release states: "Gardner noted that while the appeal [of a court decision concerning the application of the state's prevailing wage rate law] is pending, the [Circuit Court] judge's decision is not binding on the agency's interpretation in that case or in any other cases." This an incorrect statement of the law and Respondent has not articulated how this statement provides a legal defense, if any, to Respondent that would make the statement relevant to this case.

D. Exception 4.

Respondent excepted to the ALJ's credibility finding concerning Michael Garrison that found Garrison to be credible "with one exception." Respondent stated that Garrison's testimony should have been considered credible in its entirety.

Respondent's exception is DENIED, and Finding of Fact 68 – The Merits, has been rewritten to address Respondent's exception.

E. Exception 5.

Respondent excepted to the reference in Proposed Finding of Fact 70 -- The Merits to a Final Order issued by the Commissioner on November 28, 2005, in a previous prevailing wage rate case involving Respondent. Respondent's exception was based on the fact that that case was on appeal, and that the reference to the Order was therefore "legally inappropriate." That case was decided by the Oregon Court of Appeals and a decision issued on September 27, 2006. *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195 (2006), *petition for recon. filed*. Respondent cites no legal authority in support of its argument. Respondent's exception is DENIED.

F. Exception 6.

Respondent excepted to the part of Proposed Conclusion of Law #2 that concludes that Margarito Martinez was paid less than the prevailing wage rate for work performed from July 7, through July 28, 2003. That Conclusion has been rewritten in response to Respondent's exception.

G. Exception 7.

Respondent excepted to Proposed Conclusion of Law #5 in its entirety, stating that the Respondent's "failure to post prevailing rates of wage was unintentional given the legal standard set forth in *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346 (2003)." This part of Respondent's exception is DENIED. Respondent also disputed the statement that the Commissioner "must place Respondent on the List of Ineligibles for a period not to exceed three years, noting that

the period of debarment can be less than three years. The forum has reworded its Conclusion of Law in response to the latter part of Respondent's exception.

H. Exception 8.

Respondent excepted to the portion of the Proposed Opinion that states that Hillsboro 1J believed that the work performed by Respondent's workers was subject to the prevailing wage rate. In support of its position, Respondent cites an *after-the-fact* interview with and letter from Orville Alleman, Hillsboro 1J's Director of Construction Management, that were offered and admitted as evidence. Although Alleman may have taken this position that the work performed was not subject the prevailing wage rate after the work was completed and BOLI commenced its investigation, the forum finds that Hillsboro 1J's Invitation to Bid, which states that "[t]he provisions of Oregon Revised Statutes 279.348 to 279.365, relating to prevailing wage rates, are applicable to work under this Contract" is a more reliable indicator of Hillsboro 1J's belief as to the applicability of Oregon's prevailing wage rate laws to the Liberty HS project because of its contemporaneous nature.

I. Exception 9.

Respondent excepted to all the aggravating circumstances cited by the ALJ in support of the proposed civil penalties of \$5,000 for each violation of *former* ORS 279.350(1). In response, the section of the Proposed Opinion discussing aggravating circumstances has been rewritten to provide greater clarification.

J. Exception 10.

Respondent excepted to the amount of civil penalties assessed for Respondent's violations of *former* ORS 279.350(1), characterizing them as "staggering" and a "mockery of discretion" in light of the facts. Respondent proposes that it be assessed civil penalties in the amount of the actual gross unpaid wages, which amounts to

\$1,651.86. Respondent's exception is DENIED. This is the third case in which Respondent has been assessed civil penalties for violating the same statute. In *Labor Ready #1*, Respondent was assessed \$1,500 per violation for eight violations. In *Labor Ready #2*, Respondent was assessed \$3,000 per violation for five violations, and \$5,000 for a single violation on another project that involved underpayment of \$34.50. Respondent's prior violations, coupled with the other aggravating circumstances, makes a civil penalty of \$5,000 per violation, for a total of \$20,000, an appropriate assessment.

K. Exception 11.

Respondent excepted to all the aggravating circumstances cited by the ALJ in support of the proposed civil penalty for Respondent's violation of *former* ORS 279.350(4). In response, the section of the proposed opinion discussing aggravating circumstances has been rewritten to provide greater clarification.

L. Exception 12.

Respondent excepted to the ALJ's conclusion that Respondent's failure to train Garrison, its branch manager, on Oregon's posting requirement at any time prior to September 11, 2003, offset Respondent's subsequent development of intranet training for its Oregon employees on Oregon prevailing wage rate law. Respondent based its exception on the reasons set forth in Exception 3. Respondent's exception is DENIED.

M. Exception 13.

Respondent excepted to the ALJ's proposed debarment of Respondent, arguing that "there is simply no evidence that Labor Ready 'intentionally' failed to post." Based on the facts of this case, the forum's conclusion that Respondent "intentionally" failed to post is consistent with the standard set by the Court of Appeals in *Labor Ready #1*. Respondent's exception is DENIED.

N. Exception 14.

Respondent excepted to the proposed length of debarment. Under the circumstances, the proposed length of debarment is an appropriate exercise of the Commissioner's discretion. Respondent's exception is DENIED.

O. Exception 15.

Respondent excepted to the content and conclusions of the "Proposed Order," specifically objecting to the "consecutive sequencing of any debarment period." In response, the forum has modified the ALJ's proposed order.

ORDER

NOW, THEREFORE, as authorized by *former* ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that, based on its intentional failure to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Liberty HS project, Respondent **Labor Ready Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts that is maintained and published by the Commissioner of the Bureau of Labor and Industries. This period of ineligibility shall be in addition to any other period of ineligibility imposed as a result of a separate proceeding by the Commissioner of the Bureau of Labor and Industries against Respondent.

FURTHERMORE, as authorized by *former* ORS 279.370, and as payment of the penalties assessed as a result of its violations of *former* ORS 279.350(1), *former* ORS 279.350(4), *former* OAR 839-016-0033, and *former* OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders **Labor Ready Northwest, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and

Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of TWENTY FIVE THOUSAND DOLLARS (\$25,000), plus interest at the legal rate on that sum between the date ten days after the issuance of the final order and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

ⁱ The following is Garrison's pertinent testimony on this issue:

"It looked brand new, completed. * * * I remember looking around and not finding any construction going on. In my mind, that was what you looked for prevailing wage with construction, and I didn't see any. The school looked completed to me. * * * I don't recall seeing any [Robinson pickups]; I know that there was one of the big storage bins out in the garage or out in the parking lot, but there was no Robinson employees working, nobody I could talk to or see or anything like that. That's why when I received that information from both Bud and Phil that the project was complete, that's why it wasn't prevailing wage, it made sense to me. The project looked completed to me."

ⁱⁱ The e-mail communications have been rearranged chronologically.

ⁱⁱⁱ The forum concludes that this was a single entry because there is a single date – "07/25/03" – printed in a column to the left of the note that corresponds to the note.

^{iv} The forum concludes that this was a single entry because there is a single date – "07/25/03" – printed in a column to the left of the note that corresponds to the series of notes.

^v This individual's last name was spelled both as "Hart" and "Heart" in exhibits received into the record and there was no evidence indicating the correct spelling.

^{vi} There is no evidence in the record to indicate the identity of "HIDI."

^{vii} The forum concludes that this was a single entry because there is a single date – "08/28/03" – printed in a column to the left of the note that corresponds to the note.

^{viii} Garrison testified as follows, in response to Burgess's question:

Burgess: "It appears that, with respect to these entries, that as of the time that these phone calls came in that she had already determined that information [that the Liberty HS project was a prevailing wage job]."

Garrison: "It wasn't that cut and dried, unfortunately. She said that she checked with the school district but Bud Hart told me he checked with the school district. Bud was telling me it wasn't prevailing wage; Dana was telling me it was. So that's why I requested it in writing from Dana so that I could give it to Bud so that I had something from BOLI, in writing, saying I'm sorry but this is the way it's going to go because I was stuck in the middle and there's a note in there referring to the fact that I felt stuck in the middle because I had a customer that had the same argument that Dana had. And all I asked from Dana was something in writing stating that it was prevailing wage, and I was ready to rock and roll. And it took several days for her to get that to me. The day she got it to me, we immediately started paying prevailing wage and everything started rolling that way. That's all I was waiting for."

^{ix} Whether or not Martinez ultimately *received* all wages due was disputed. However, the Agency did not seek to debar Respondent based on the allegation that Respondent intentionally failed or refused to pay Martinez all the wages he was owed. Since the Agency's only allegation regarding Martinez was undisputed -- that Martinez was not initially paid prevailing wages for 2 hours that he worked on July 10, 2003 – and it was undisputed that Respondent *issued* checks for the full amounts Martinez had earned, it is not necessary for the forum to resolve the issue of whether or not he was ultimately paid all wages due.

^x The forum infers that Baldwin was Respondent's Prevailing Wage Administrator at the time because she signed the letter and the words "Prevailing Wage Administrator" are typed under her signature.

^{xi} Rischman's last name had changed to Hanna.

^{xii} This is the same case referred to in Finding of Fact 55 – The Merits, *supra*.

^{xiii} Effective March 1, 2005, ORS chapter 279 was reorganized and *former* ORS 279.005 to 279.833 and 279.990 were repealed or renumbered.

^{xiv} Effective July 2005, *former* OAR 839-016-000 *et seq* was renumbered as OAR 839-025-000 *et seq*.

^{xv} Presently renumbered as ORS 279C.800(5).

^{xvi} Presently renumbered as ORS 279C.800(5).

^{xvii} Presently renumbered as ORS 279C.800(4).

^{xviii} *See, e.g., In the Matter of Harkcom Pacific, Inc.*, 27 BOLI 62, 77 (2005) (\$2,000 civil penalty assessed for each of respondent's seven "first" violations of ORS 279.350(1)); *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 283 (2001), *reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) (\$1,500 civil penalty assessed for each of respondent's eight "first" violations of ORS 279.350(1)); *In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 124 (2000) (\$2,000 civil penalty assessed for each of respondent's three "first" violations of ORS 279.350(1)).

^{xix} *See Findings of Fact – The Merits* 70, 71, *supra*.

^{xx} The current rule, OAR 839-025-0520(1)(b), is identical.

^{xxi} The Agency attempted to prove that it provided Respondent with two written statements, via e-mail, on July 25, 2003, confirming that the Liberty HS project was a prevailing wage rate job. However, the Agency's proof failed because one of the statements contains an incorrect e-mail address for Garrison, Garrison credibly testified that he did not receive the other on July 25, and the Agency did not call any witness to confirm that the e-mail had in fact been sent or that an "e-mail version" of it existed in the Agency's files.

^{xxii} The forum also considers this dollar amount under *former* OAR 839-016-0520(3), which required the commissioner to consider the amount of underpayment of wages, if any, in arriving at the actual amount of a civil penalty.

^{xxiii} *See Findings of Fact* 15, 39 – The Merits, *supra*.

^{xxiv} Respondent's argument in its exception that this fact is "simply another way of saying that the Respondent did not post" ignores the fact that Respondent could have informed its workers, orally or in writing, of the correct wage without actually posting the wages. Respondent did provide that information to some of its workers, albeit constructively, when it issued back pay checks and when it began paying its workers the correct rate.

^{xxv} *See* fn 20, *supra*.

^{xxvi} There was no evidence as to the actual date that Garrison, who was still employed as branch manager of Respondent's Hillsboro office at the time of the hearing, learned of the posting requirement.

^{xxvii} In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.