

In the Matter of
CHARLES HURT AND KAREN CHESNEY, dba DIAMOND H

Case Number 18-99
Final Order of the Commissioner
Jack Roberts
Issued May 7, 1999.

SYNOPSIS

Where two Respondents acted as farm labor contractors without a farm labor contractor license or forestation indorsement with regard to one BLM contract, failed to carry workers' compensation insurance for persons engaged in manual labor, and the BLM terminated their right to proceed on the contract based on their failure to complete the work in a timely manner and failure to obtain a farm labor contractor's license from BOLI, the Commissioner assessed civil penalties of \$1,000 against each Respondent for each violation, for a total of \$6,000 in civil penalties. ORS 658.410(1), 658.415(1), 658.417(1), 658.417(4), 658.440(1)(d), 658.453.

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on March 9, 1999, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Respondents Charles Hurt and Karen Chesney appeared by telephone and were present throughout the hearing. Respondents were not represented by counsel at the hearing.

The Agency called the following witnesses: Charles Hurt and Karen Chesney,

Respondents, and Madeline Small, BLM Contracting Officer.

Administrative exhibits X-1 to X-12 and Agency exhibits A-1 through A-4 were offered and received into evidence. The record closed on March 9, 1999.

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

FINDINGS OF FACT -- PROCEDURAL

1) On October 27, 1998, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The Agency alleged that (1) Respondents each acted as a farm/forest labor contractor in Oregon without having a farm labor contractor license issued by BOLI; (2) Respondents each acted as a farm/forest labor contractor in Oregon without having a forestation indorsement issued by BOLI; (3) Respondents each acted as a farm/forest labor contractor in Oregon without maintaining workers compensation insurance for each individual who performed manual labor; and (4) Respondents, while acting as farm labor contractors in Oregon, failed to comply with the terms and provisions of all legal and valid agreements or contracts entered into in Respondents' capacity as farm labor contractors. The Agency sought civil penalties of \$1,000 from each Respondent for each violation.

2) On October 30, 1998, the Agency served Respondent Chesney with the Notice of Intent. On November 2, 1998, the Agency served Respondent Hurt with the Notice of Intent.

3) On November 24, 1998, the Agency issued a "Notice of Intent To Issue Final Order By Default" to Respondents Hurt and Chesney.

4) On December 4, 1998, Respondents, through counsel, filed an answer to the Notice of Intent and requested a hearing.

5) On December 7, 1998, the Agency sent the Hearings Unit a Request for Hearing. The Hearings Unit issued a Notice of Hearing to the Respondents and the Agency indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On January 4, 1999, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by February 26, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

7) On February 18, 1999, Respondents, through counsel, submitted their Case Summary.

8) On February 26, 1999, the Agency submitted its Case Summary.

9) On February 26, 1999, Respondents submitted an addendum to their Case Summary.

10) On March 5, 1999, the ALJ conducted a pre-hearing conference with the Agency case presenter and Respondents' counsel. During the conference, Respondents' counsel stated that he would not be representing Respondents at the hearing and moved for a telephonic hearing, based on the fact that Respondents live in Las Vegas, Nevada, and desired to testify by telephone. Based on a representation by Respondents' counsel that Respondent had been sent copies of the Case Summaries, the Agency did not object to the motion and the motion was granted by the ALJ. The hearing was reset to begin at 10 a.m. on March 9 in Portland, instead of 9 a.m. on March 9 in Coos Bay.

11) At 10 a.m. on March 9, the ALJ telephoned Respondent Chesney and was told that Respondent Hurt was not available, but was on his way to appear at the hearing. The ALJ informed Respondent Chesney that he would call back at 10:30 a.m., and that Respondent Hurt would be in default if he was not available by telephone at 10:30 a.m.

12) At 10:30 a.m., the ALJ telephoned Respondent Chesney again. Respondent Hurt was present and the ALJ started the hearing.

13) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) On March 25, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondents, who reside in Las Vegas, Nevada, both had a financial interest in and were partners in a business with an assumed business name of Diamond H. Respondents are not related by blood or marriage. At the time of the hearing, they were engaged to be married.

2) In July 1998, Respondents bid on or submitted a price on a contract offer on Contract #1422H952- P98-1020 with the Bureau of Land Management (hereinafter "the BLM contract") for clearing and hand piling 41 acres of brush and slash and covering the piles with plastic in the BLM's Coos Bay District in Oregon. Neither Respondent had an Oregon farm labor contractor's license at that time. Respondents planned to share in the financial profits from the contract.

3) Respondents were counseled by Small, who was the BLM's contracting officer on the BLM contract, that it involved work on difficult terrain, and that they should consider revising their bid, which was substantially lower than the next lowest

bid. In response, Respondents increased their bid from \$8,487 to \$21,115, which was still substantially lower than the next lowest bid, as well as substantially lower than Small's original estimate of \$37,500.

4) On August 3, 1998, Respondents' bid was accepted. Respondents entered into a contract with the BLM that included terms and conditions requiring Respondents to obtain and maintain, during the term of the BLM contract, an Oregon "Farm/Forest Labor Contractor's License" and to complete work on the contract within 30 days after being issued a Notice to Proceed.

5) At the time their bid was accepted, Respondents anticipated that they would be commencing work on the BLM contract on or about September 1, 1998.

6) On or about August 7, 1998, Respondent Hurt contacted BOLI's Farm Labor Unit about obtaining a farm labor contractor's license and an application packet was sent to him on or about that same day.

7) On August 17, 1998, BOLI's Farm Labor Unit received Respondents' license application packet, which had been completed by Respondent Chesney. About that same time, Respondent Hurt telephoned Julye Robertson, an administrative specialist in BOLI's Farm Labor Unit responsible for processing applications for farm/forest labor contractor licenses,¹ and requested that she expedite the licensing procedure.

8) The application submitted by Respondents was incomplete in that it did not have certifications of compliance with the Internal Revenue Service and Oregon Department of Revenue, did not show proof of having workers compensation insurance coverage, did not show registration with the Corporation Division of the Oregon Secretary of State, and did not show that Respondents had obtained a federal taxpayer or Oregon business identification numbers. In response, Robertson returned the application to Respondent Chesney, along with a standard form letter stating that Respondents' application could not be processed until the

aforementioned documentation was provided.

9) On August 21, 1998, the BLM issued a Notice to Proceed to Respondents, effective August 22, 1998.

10) Respondent Hurt and Richard Chesney,² Respondent Chesney's brother, then began performing manual labor on the BLM contract. Subsequently, Respondent Hurt called a crew, consisting of Hurt's stepson and a friend of his stepson, to drive from Las Vegas to the worksite to deliver visqueen plastic needed on the job, with the intent that they would remain and work with Hurt and Chesney on the BLM contract. The stepson and his friend delivered the plastic, saw the type of work involved, and left the worksite without performing any work. Respondents did not employ anyone else to work on the BLM contract.

11) By September 3, 1998, Respondents had fallen behind on the work schedule and Respondent Hurt, acting on behalf of Diamond H, entered into a subcontract on that date with Antonio Osorio to slash and pile a minimum of 20 acres on the BLM contract. Osorio's 10-man crew slashed approximately 20 acres from September 5-7, 1998, but failed to return to complete the work and performed substandard work on the 20 acres that they slashed.

12) Sometime before September 29, 1998, Robertson received Respondents' original application, along with some of the previously missing documentation. The additional documents provided showed proof of business registration with the Oregon Secretary of State, filed August 24, 1998;³ a federal taxpayer employer identification number; an Oregon Employment Department tax compliance certificate; and an Oregon Department of Revenue tax compliance certification, certified August 31, 1998.

13) On September 18, 1998, Small issued a letter of termination for default on the BLM contract, which terminated Respondents' right to proceed under the contract. The termination document was issued because Respondents had failed to

complete the work within the required 30 days and because Respondents had not obtained an Oregon farm/forest labor contractor's license.

14) On September 29, 1998, Robertson sent Respondent Chesney a second form letter indicating her application had been received, but it could not be processed until Respondents submitted a certificate of insurance issued by Respondents' worker's compensation carrier and an Oregon address.

15) Respondents did not have worker's compensation insurance during the performance of the BLM contract.

16) The BLM contract was the first forestation/reforestation job Respondents had ever attempted to perform.

17) As of the date of the hearing, BOLI had never issued a farm/forest labor contractor's license to Respondents.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents Charles Hurt and Karen Chesney both had a financial interest in and were partners in a business with an assumed business name of Diamond H.

2) At all times material herein, Respondents did not possess a valid Oregon farm labor contractor's license and did not have a special indorsement authorizing them to act as a farm labor contractor with regard to the forestation or reforestation of lands.

3) In July 1998, Respondents bid on or submitted a price on a contract offer for the clearing and hand piling of 41 acres of brush and slash and covering the piles with plastic for the BLM's Coos Bay District in Oregon.

4) On August 3, 1998, Respondents were awarded the BLM contract.

5) Between August 22, 1998, and September 18, 1998, Respondent Hurt and Richard Chesney performed manual labor on the BLM contract on behalf of Diamond H.

6) Between August 22, 1998, and September 18, 1998, Respondent Hurt, on behalf of Diamond H, recruited workers to work on the BLM contract.

7) On September 3, 1998, Respondent Hurt, on behalf of Diamond H, entered into a subcontract with Antonio Osorio to perform work on the BLM contract. Osorio began work on the subcontract, but did not complete the work he subcontracted to perform.

8) On September 18, 1998, Respondents' right to proceed on the BLM contract was terminated based on Respondents' failure to complete the work within the required 30 days and because Respondents had not obtained an Oregon farm/forest labor contractor's license.

9) Respondents did not have worker's compensation insurance during the performance of the BLM contract.

CONCLUSIONS OF LAW

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

" * * * * *

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

At all times material herein, ORS 658.501 provided:

"ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to * * * the recruitment of workers outside of this state to perform work in whole or in part within this state, * * * ."

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

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

"(1) 'Farm labor contractor' means any person who * * * in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products; recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who bids or submits prices on contract offers for those activities; or who enters into a subcontract with another for any of those activities."

At all times material herein, OAR 839-15-004 provided in pertinent part:

"(14) 'Worker' means an individual performing labor in the forestation or reforestation of lands * * * or any person who is recruited, solicited * * * to perform such labor, notwithstanding whether or not a contract of employment is formed or the labor is actually performed.

"(15) 'Person' means any individual, sole proprietorship, partnership * * *."

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

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

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

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

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

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

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

At all times material herein, OAR 839-15-004 provided in pertinent part:

"As used in these rules, unless the context requires otherwise;

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

" * * *

"(b) The clearing, piling and disposal of brush and slash * * * [.]"

Between July and September 1998, clearing and hand piling of brush and slash was an activity related to the forestation or reforestation of lands, and was within the statutory definition of forestation or reforestation of lands. Respondents, in July 1998, bid or submitted prices on contract offers for clearing and hand piling of brush in Oregon. Respondents, during the time period encompassed by July, August, and September 1998, recruited and solicited at least two workers in Las Vegas, Nevada, to work in Oregon to perform labor for another clearing and hand piling brush and slash on the BLM contract. During the same time period, Respondents entered into a subcontract with another for those activities. Respondent did not have a farm labor contractor's license or special forestation/reforestation indorsement during this time period. As a result, Respondents' acts of recruiting, soliciting, and subcontracting violated ORS 658.410(1), ORS 658.415(1), and 658.417(1).⁴

- 3) At all times material herein, ORS 658.417 provided in pertinent part "In addition to the regulation otherwise imposed upon farm labor contractors pursuant to 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(4) Provide workers' compensation insurance for each individual who performs manual labor in forestation or reforestation activities regardless of the business form of the contractor and regardless of any contractual relationship which may be alleged to exist between the contractor and the workers notwithstanding any provision of ORS chapter 656, unless workers' compensation insurance is otherwise provided."

Respondent Hurt and Richard Chesney, Respondent Chesney's brother, performed manual labor on the BLM contract between August 22, 1998, and September 18, 1998. During this time, Respondents did not carry workers' compensation insurance. By failing to carry provide workers' compensation insurance to individuals who performed manual labor on the BLM contract, Respondents violated ORS 658.417(4).

- 4) At all times material herein, ORS 658.440(1)(d) provided in pertinent part:
"(1) Each person acting as a farm labor contractor shall:

" * * *

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

The BLM contract was a legal and valid contract entered into in Respondents' capacity as a farm labor contractor. By failing to complete performance on the contract within the required 30 days and by failing to obtain and maintain an Oregon farm labor contractor's license and forestation indorsement during the term of the BLM contract, Respondents failed to comply with the terms and provisions of a legal and valid contract entered into in Respondents' capacity as a farm labor contractor and violated ORS 658.440(1)(d).

- 5) At all times material herein, ORS 658.453 provided in pertinent part:
"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

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

" * * * * *

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

"(e) A farm labor contractor who fails to comply with ORS 658.417(1), (3) or (4)."

OAR 839-15-510 provides in pertinent part:

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

" * * *

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

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

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

OAR 839-15-512 provides in pertinent part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

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

OPINION

Respondents are each charged with four violations of Oregon's laws regulating farm labor contractors. The Agency seeks \$1,000 in civil penalties for each violation.

1. Acting as a farm labor contractor with regard to the forestation or reforestation of lands without a farm labor contractor's license or the special indorsement required by ORS 658.417(1).

Undisputed evidence established that Respondents have never had a farm labor contractor's license or forestation indorsement, that Respondents bid on or submitted a price on the BLM's contract offer for a reforestation or forestation activity, the clearing and piling of slash and brush, and that Respondents entered into a subcontract with another for the clearing and piling of slash and brush. Respondent Hurt testified that he called two workers from Las Vegas to come and assist him on the contract, and that these workers drove all the way from Las Vegas to the southern Oregon coast. From this testimony, the forum infers that Respondents "recruited" and "solicited" two workers to perform labor on the BLM contract.⁵ All of these activities, when conducted without a license and indorsement, constitute violations of ORS 658.410(1) and 658.417(1) and subject Respondents to the assessment of a civil penalty.

The Agency also alleges that Respondents acted as farm labor contractors

without a license or indorsement by bidding or submitting a price on a contract offer. ORS 658.410(1) includes in its definition of farm labor contractors "any person * * * who bids or submits prices on contract offers for those activities." Although Respondents clearly engaged in this behavior, the forum must consider an Agency policy statement before concluding that Respondents violated the statute by engaging in this behavior.

The policy statement, effective April 4, 1994,⁶ states, in relevant part:

"Taken together, ORS 658.410(1), 658.417(1) and 658.405(1) prohibit bidding upon forestation/reforestation contracts to be performed on land within this state, without first being licensed in Oregon as a farm labor contractor with a forestation indorsement. When, however, the contract solicitation is for forestation or reforestation work on federally owned land (i.e., BLM, USFS), the Bureau will not require pesons [*sic*] to obtain a license or temporary permit until such time as the contract is awarded. The mere act of bidding on such contracts does not require a permit or a license. * * * "

The Oregon Supreme Court has held that an agency policy that meets the definition of a "rule" under ORS 183.310(8) but is not in the form of a written rule or has not been promulgated according to the APA is, nevertheless, binding on the agency until it is declared invalid by a court or until it is amended or repealed by the agency in accordance with proper rulemaking procedures. *Burke v. Children's Services Div.*, 288 Or 533, 537-38 (1980). A "rule" includes "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." ORS 183.310(8). The Agency's policy statement clearly falls under this definition. Consequently, the Agency is bound by its policy statement. As a matter of law, the forum cannot conclude that Respondent acted unlawfully as an unlicensed farm labor contractor in bidding or submitting a price on the BLM's contract offer.

ORS 658.453(1)(a) allows the commissioner to assess a civil penalty against a

farm labor contractor who recruits or solicits a worker without a license. ORS 658.453(1)(e) allows the commissioner, in addition, to assess a civil penalty against a farm labor contractor who fails to comply with ORS 658.417(1), which requires a forestation indorsement. The Agency seeks separate civil penalties of \$1,000 each for Respondents' activity as a farm labor contractor without a license or forestation indorsement. The forum previously addressed this issue in the case of *In the Matter of Victor Ovchinnikov*, 13 BOLI 123, 156 (1994). In *Ovchinnikov*, the forum concluded that a Respondent's failure to obtain a farm labor contractor license and special indorsement should be treated as one simultaneous violation, reasoning that the basic license and indorsement form one license, the license needed to engage in forestation activities. Consequently, the forum finds one violation against each Respondent based on Respondents' failure to obtain a farm labor contractor license and forestation/reforestation indorsement.

In mitigation, Respondents testified that they would have had their license and indorsement if the BLM had issued the notice to proceed on September 1, 1998, the date Respondents anticipated. Given the fact that Respondents did not have all the certificates necessary for a farm labor contractor's license or workers' compensation insurance by September 1, this argument is simply not credible and is given no weight by the forum.

Since licensure is at the heart of the state's effort to regulate farm labor contractors, the forum always regards acting as a farm labor contractor without a license to be a serious violation. *In the Matter of Alejandro Lumbreras*, 12 BOLI 117, 127 (1993). In recent cases, the forum has assessed a civil penalty of \$2,000 against each Respondent for this violation. *In the Matter of Manuel Galan*, 16 BOLI 51, 69 (1997), *aff'd without opinion*, *Galan v. Bureau of Labor and Industries*, 155 Or App ___, 963 P2d 755, *rev den* ___ Or ___, ___ P2d ___ (1998); *In the Matter of Odon Salinas*, 16 BOLI 42, 51 (1997); *In the Matter of Manuel Galan*, 15 BOLI 106, 138

(1996), *aff'd without opinion, Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997). There are no mitigating circumstances. The forum concludes that \$1,000 is an appropriate civil penalty against each Respondent under the facts of this case.

2. Failing to carry provide workers' compensation insurance to individuals who performed manual labor on the BLM contract.

The evidence was undisputed that manual labor was performed on the BLM contract by Respondent Hurt and Richard Chesney, and that Respondents did not carry workers' compensation insurance during the performance of the contract. The requirement that farm labor contractors carry workers' compensation insurance is a critical component of the statutory scheme regulating farm labor contractors. In the past, the forum has regarded this type of violation as "particularly serious because it frustrates the commissioner's ability to implement the law's requirements, and the requirement of providing workers' compensation insurance is fundamental for the protection of this state's workers." *In the Matter of Tolya Meneyev*, 14 BOLI 6, 14 (1995). The serious nature of this violation is further illustrated by the fact that failure to carry workers' compensation insurance is sufficient grounds for denying a license application or revoking an existing license. *OAR 839-15-520(3)(j)*. Respondents' testimony that they were told they didn't have to have workers' compensation insurance because they weren't hiring anyone does not mitigate the failure to carry insurance.⁷

In *Meneyev*, the forum assessed a \$2,000 civil penalty against a respondent with a farm labor contractor's license and forestation indorsement who failed to provide workers' compensation insurance for almost a month for his crew after his insurance policy was canceled. In this case, a civil penalty of \$1,000 against each Respondent is appropriate.

3. Failure to comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor.

ORS 658.440(1)(d) requires a person acting as a farm labor contractor to "comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor." In this case, the "legal and valid * * * contract[s]" alleged to have been violated was Respondents' contract with the BLM for the clearing and piling of slash and brush. The forum has previously concluded that forestation contracts with government agencies are "legal and valid * * * contracts" within the meaning of the statute. *In the Matter of Bill Martinez*, 14 BOLI 214, 221 (1995); *In the Matter of Jose Carmona*, 14 BOLI 196, 212-13 (1995); *Meneyev, supra*, at 14.

Undisputed evidence shows demonstrates that Respondents' right to proceed on the BLM contract was terminated based on Respondents' failure to complete the work within the required 30 days and because Respondents had not obtained an Oregon farm/forest labor contractor's license.

In mitigation, Respondents testified concerning their inexperience as farm labor contractors, and their lack of readiness to begin work on the contract at the time the notice to proceed was issued based on misinformation from the BLM. Respondents further asserted that their lowball bid should have put the BLM on notice of their inexperience. However, testimony from the BLM contracting officer established that Respondents were warned about the difficulties of the project. By bidding on and accepting the award of the BLM contract, Respondents represented that they had the ability to perform the contract. It was not the responsibility of the BLM to protect Respondents from themselves. Under the circumstances, the forum will not consider Respondents' inexperience as a mitigating factor. Likewise, their lack of readiness to proceed, which encompasses failure to obtain an Oregon farm labor contractor's license and forestation indorsement, is not a mitigating factor.

Respondents' failure to comply with the terms of the contract is aggravated by the fact that the work on the BLM contract was not completed, either by Respondents or their subcontractor, and the fact that the subcontractor's work was substandard.

Under the circumstances of this case, the forum finds that the civil penalty of \$1,000 sought against each Respondent by the agency is appropriate.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the civil penalties owed as a result of violations of ORS 658.410(1), ORS 658.415(1), ORS 658.417(1), ORS 658.417(4), and ORS 658.440(1)(d), the Commissioner of the Bureau of Labor and Industries hereby orders **Charles Hurt and Karen Chesney, each dba Diamond H**, to each deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of THREE THOUSAND DOLLARS (\$3,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondents comply with the Final Order. This assessment is the sum of the following civil penalties against Respondents: \$1,000 each for one violation of ORS 658.410(1), ORS 658.415(1), and ORS 658.417(1); \$1,000 each for one violation of ORS 658.417(4); and \$1,000 each for one violation of ORS 658.440(1)(d).

¹This order uses the term "farm/forest labor contractor" to refer to a person engaged in activities related to the forestation or reforestation of lands that requires the person to obtain both a farm labor contractor's license pursuant to ORS 658.405(1) and ORS 658.410 and a forestation/reforestation indorsement pursuant to ORS 658.417(1).

²Respondent Hurt testified that Richard Chesney was also a part owner of Diamond H. However, this fact is of limited significance, as Richard Chesney was not named as a Respondent and the Agency did not move to amend the Notice of Intent during the hearing to name him as a Respondent.

³The document is stamped "Filed August 24, 1998, Oregon Secretary of State."

⁴See discussion in Proposed Opinion, *infra*, concerning bidding and submitting prices on contract offers.

⁵See *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989), where the forum specifically defined the terms "recruit" and "solicit" within the context of the statute.

⁶Wage and Hour Division Field Operations Manual, Vol. IV (Farm/Forest Labor Contractor), Policy Section, at p.309.

⁷First, Respondents did not testify who told them this. Second, Respondents were made aware by BOLI that workers' compensation insurance was required as a condition of obtaining a farm labor contractor's license. Third, Respondents did intend to hire two workers. See also *In the Matter of Francis Kau*, 7 BOLI 45, 54-55 (1987), where the forum held that a contractor's confusion about his duty to provide workers' compensation insurance did not mitigate violations of the law.