

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

**RODRIGO AYALA OCHOA and
Ochoas' Greens, Inc.,**

Respondents.

Case No. **142-01**

FINDINGS OF FACT
(PROCEDURAL AND ON THE MERITS)
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
REVISED ORDER ON RECONSIDERATION

SYNOPSIS

After reconsidering the forum's ruling on Respondents' motion to amend its answer to include an additional issue, the Commissioner granted Respondents' motion and determined that a preponderance of evidence establishes that Respondents' workers were employees as contemplated under ORS chapter 653 and not cone sellers or independent contractors as Respondents contended. The Commissioner further found that Respondent Ochoas' Greens, Inc. issued 106 paychecks to 29 of its employees and failed to provide the employees with itemized statements of earnings, in violation of ORS 653.045(1). Respondent Ochoas' Greens, Inc. also failed to make and retain required employment records for its 29 employees, in violation of ORS 653.045(3). The Commissioner also found that Respondents, an individual and his corporation, while acting jointly as a farm labor contractor, failed to file complete and accurate certified true copies of payroll reports on four USFS contracts, in violation of ORS 658.417(3). Respondents also made misrepresentations and willfully concealed information on their joint farm labor contractor license application, in violation of ORS 658.440(3)(a). Additionally, the Commissioner found the Agency failed to establish that Respondents, while acting jointly in the capacity of farm labor contractor, failed to pay an employee wages when due with money entrusted to Respondents for that purpose, in violation of ORS 658.440(1)(c). The Agency also failed to prove that Respondents, while acting jointly in the capacity of farm labor contractor, failed to comply with lawful contracts, in violation of ORS 658.440(1)(d). The Commissioner ordered Respondents Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa to pay civil penalties of \$1000 for each violation

1 of ORS 658.417(3), and \$2,000 for the violation of ORS 658.440(3)(a), for a total of
2 \$10,000. The Commissioner ordered Respondent Ochoas' Greens, Inc. to pay \$150 for
3 each violation of ORS 653.045(1), and \$200 for each violation of ORS 653.045(3), for a
4 total of \$21,700. The Commissioner further found that Respondents lacked the
5 character, competence and reliability to act as farm labor contractors and denied them a
license pursuant to ORS 658.420. ORS 658.417; ORS 658.440; ORS 653.045; ORS
658.453; ORS 653.256; OAR 839-015-0300; OAR 839-015-0508; OAR 839-015-0520;
OAR 839-020-1010; and OAR 839-015-0140.

6 The above-entitled case came on regularly for hearing before Linda A. Lohr,
7 designated as Administrative Law Judge ("ALJ") by Jack Roberts, former Commissioner
8 of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on
9 March 26, 2002, in the Bureau of Labor and Industries hearing room located at 800 NE
10 Oregon Street, Portland, Oregon.

11 David Gerstenfeld, an employee of the Agency, represented the Bureau of Labor
12 and Industries ("BOLI" or "the Agency"). Richard W. Todd, Attorney at Law,
13 represented Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa. Respondent Ochoa was
14 present throughout the hearing on his own and Respondent Ochoas' Greens, Inc.'s
15 behalf.

16 The Agency called as witnesses: Julye Robertson, BOLI Farm Labor Unit
17 Administrative Specialist; Bernadine Murphy, Special Forest Products Coordinator,
18 Timber Department, USDA Deschutes National Forest; Katy Bayless, BOLI Farm Labor
19 Unit Compliance Specialist; and Rodrigo Ayala Ochoa, Respondent.

20 In addition to Respondent Ochoa, Respondents called Stephanie Wing and
21 Beatrice Boden, Respondent's daughters, as witnesses.

22 The forum received as evidence:

- 23 a) Administrative exhibits X-1 through X-12;
24 b) Agency exhibits A-1 through A-33 (filed with the Agency's case summary)
25 and A-35 (submitted during the hearing);

1 c) Respondent exhibits R-1 and R-7 through R-10 (submitted with
2 Respondents' case summary).

3 On September 6, 2002, after fully considering the entire record in this matter,
4 Jack Roberts, then-Commissioner of the Bureau of Labor and Industries, issued the
5 Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions
6 of Law, Opinion, and Order in this case.

7 After Respondents timely sought judicial review in the Oregon Court of Appeals,
8 the Agency, through counsel, filed a Notice of Withdrawal of Order for Purposes of
9 Reconsideration in the Court of Appeals.

10 On June 5, 2003, I, Dan Gardner, Commissioner of the Bureau of Labor and
11 Industries, issued an Order on Reconsideration. After Respondents timely sought
12 judicial review of the Order on Reconsideration, the Agency, through counsel, filed a
13 second Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of
14 Appeals on July 28, 2003. Having reconsidered the record and the legal issues
15 presented in this case, I hereby issue this Revised Order on Reconsideration.

16 **FINDINGS OF FACT – PROCEDURAL**

17 1) On June 26, 2001, the Agency issued a Notice of Intent to Assess Civil
18 Penalties and Rejection of Farm Labor Contractor License Application (“Notice”) to
19 Respondents. The Notice informed Respondents that the Commissioner: a) intended to
20 deny Respondents’ farm labor license application, pursuant to ORS 658.425; and b)
21 intended to assess civil penalties against Respondents, jointly and severally, totaling
22 \$45,900, pursuant to ORS 653.256 and 658.453. The Notice cited the following bases
23 for the Agency’s actions: Respondents’ failure to file certified payroll records in
24 accordance with ORS chapter 658 and applicable rules (8 violations); Respondents’
25 failure to pay wages when due (2 violations); Respondents’ failure to comply with a
lawful contract (2 violations); Respondents’ failure to provide pay stubs to employees

1 (106 violations); Respondents' failure to make and retain required records (30
2 violations); and Respondents' intentional misrepresentations, false certifications, and
3 willful concealment of information on a farm labor license application (one violation).

4 The Notice was served on Respondents on July 2, 2001. (Exhibits X-1a, X-1b)

5 2) On August 17, 2001, Respondents, through counsel, timely filed an
6 answer to the Notice and requested a hearing. (Exhibit X-1d)

7 3) On September 12, 2001, the Agency requested a hearing and on October
8 25, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would
9 commence at 9:00 a.m. on March 19, 2002. With the Notice of Hearing, the forum
10 included a copy of the Notice of Intent to Assess Civil Penalties, a "SUMMARY OF
11 CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's
12 contested case hearings rules, OAR 839-050-0000 to 839-050-0440. (Exhibits X-1, X-
13 2)

14 4) On January 8, 2002, the forum issued a case summary order requiring the
15 Agency and Respondents to submit case summaries that included: lists of all persons to
16 be called as witnesses; identification and copies of all documents to be offered into
17 evidence; a brief statement of the elements of the claim (for the Agency only); a brief
18 statement of any defenses to the claim (for Respondents only); a statement of any
19 agreed or stipulated facts; and any penalty calculations (for the Agency only). The
20 forum ordered the participants to submit their case summaries by March 8, 2002, and
21 advised them of the possible sanctions for failure to comply with the case summary
22 order. The Agency and Respondents timely filed case summaries. (Exhibits X-3, X-11,
23 X-12)

24 5) On January 15, 2002, the Agency moved for a discovery order requiring
25 Respondents to produce eight categories of documents. Respondents did not file a

1 response to the Agency's motion and on January 24, 2002, the forum granted the
2 Agency's motion. (Exhibits X-4, X-5)

3 6) On February 6, 2002, the Agency moved to amend its Notice to correct a
4 typographical error. Respondents did not file a response to the Agency's motion and
5 the forum granted the Agency's motion to amend the Notice. (Exhibits X-6, X-7)

6 7) On February 20, 2002, Respondents moved for a postponement of the
7 hearing date. The Agency advised the Hearings Unit that it did not intend to file a
8 response to the motion. On February 26, 2002, the forum granted Respondents' motion
9 and the hearing was rescheduled to commence on March 26, 2002. The case summary
10 due date was changed to March 15, 2002. (Exhibits X-8, X-9)

11 8) On February 28, 2002, the forum issued a notice that advised
12 Respondents of changes in the contested case hearing rules, which took effect
13 February 15, 2002. The notice included a summary of the changes, a copy of the
14 administrative rules, and a revised copy of the Summary of Contested Case Rights and
15 Procedures. (Exhibit X-10)

16 9) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally
17 advised the Agency and Respondents of the issues to be addressed, the matters to be
18 proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

19 10) At the start of the hearing, the Agency and Respondents orally stipulated
20 to the following facts:

- 21 a) One bushel is the equivalent of approximately 9.31 gallons.
- 22 b) Respondents did not provide paystubs with any of the 106
23 payments they made to people who gathered pine cones for them
24 in May through August 2000.
- 25 c) Respondents did not make or retain records regarding the number
of hours worked each day, week and pay period for the 30 persons
who gathered pine cones in approximately May through August
2000.

1 (Stipulation of Participants; Statement of ALJ)

2 11) At the start of the hearing, Respondents withdrew their “Third Affirmative
3 Defense” that alleged “[o]n numerous of the allegations contained in the [Notice] the
4 State of Oregon lacks jurisdiction to oversee the alleged activities.” (Statement of ALJ)

5 12) At the start of and during the hearing, the ALJ made rulings on certain
6 motions of the participants that are set out in a separate section of this order.

7 13) On July 23, 2002 the ALJ issued a proposed order and notified the
8 participants they were entitled to file exceptions to the proposed order. The Agency did
9 not file exceptions. Respondent timely filed exceptions, which were addressed in the
10 Opinion section of the Final Order that issued on September 6, 2002.

11 14) Thereafter, the Agency withdrew the Final Order twice for reconsideration
12 as described elsewhere herein and the record and legal issues are hereby reconsidered
13 and addressed in this Revised Order on Reconsideration.

14 **RULINGS ON MOTIONS**

15 **AGENCY’S MOTIONS TO AMEND CHARGING DOCUMENT**

16 1) At the start of hearing, the Agency moved to amend the Notice to correct a
17 typographical error, changing the reference in paragraph 10, page 4, from ORS chapter
18 659 to ORS chapter 658. Over Respondents’ objection, and finding the interest of
19 justice so required, the forum granted the Agency’s motion. That ruling is hereby
20 confirmed.

21 2) At the close of hearing, the Agency moved to amend the Notice to include
22 five additional violations of ORS 653.045(1) which requires employers to “make and
23 keep available to the Commissioner * * * for not less than two years, a record or records
24 containing * * * [t]he actual hours worked each week and each pay period by each
25 employee.” The Agency based its motion on Respondent Ochoa’s daughter’s testimony
that she had “shredded” her copies of employees’ hours worked after she filled out the

1 certified payroll records in her charge. Respondent objected on the ground that the
2 witness testimony alone did not support the allegation that Respondents failed to make
3 and keep available records of hours worked by each employee. The forum denied the
4 Agency's motion. That ruling is hereby confirmed.

5 **RESPONDENT'S MOTION TO AMEND ANSWER**

6 During their closing argument, Respondents moved to amend their answer to
7 conform to evidence Respondents contend was presented during the hearing showing
8 that in May 2000 Respondent corporation engaged "independent contractors," rather
9 than employed workers, to harvest cones on federal and private land. The Agency
10 objected to the motion based on Respondents' failure to raise the issue in its initial
11 pleading and asserted there was no evidence introduced in support of the proposed
12 amended pleading. The forum considered and denied the motion in the proposed order
13 issued July 23, 2002. Based on a review of the hearing transcript, the forum
14 reconsiders that ruling and grants Respondents' motion for reasons set forth below.

15 OAR 839-050-0140(2)(a) allows amendment of pleadings to conform to the
16 evidence under the following circumstances:

17 "After commencement of the hearing, issues not raised in the pleadings
18 may be raised and evidence presented on such issues, provided there is
19 express or implied consent of the participants. Consent will be implied
20 where there is no objection to the introduction of such issues and
evidence or where the participants address the issues. Any participant
raising new issues must move the administrative law judge to amend its
pleading to conform to the evidence and to reflect issues presented."

21 Thus, a pleading may be amended to conform to the evidence only where a new issue
22 has been litigated at the hearing through the express or implied consent of the
23 participants.

24 In this case, Respondents raised an "independent contractor" issue in their
25 *opening* statement that was not previously raised in their answer. The Agency did not

1 object and Respondents introduced a modicum of evidence during the hearing that may
2 be construed as relevant to that issue. Since it is evident that the “independent
3 contractor” issue was technically introduced and addressed during the evidentiary
4 portion of the hearing so as to be litigated by the participants’ express or implied
5 consent, albeit barely, the forum hereby grants Respondents’ motion to amend their
6 answer to include the issue that the workers in question were independent contractors.
7 OAR 839-050-0140(2)(a).

8 **FINDINGS OF FACT – THE MERITS**

9 1) At times material herein, Respondent Rodrigo Ayala Ochoa was corporate
10 president of Respondent Ochoas’ Greens, Inc. (“OGI”). Respondent Ochoa started a
11 family landscape nursery business in 1985. The business incorporated in 1994 as
12 Ochoas’ Greens, Inc. Respondent Ochoa’s wife is the corporate secretary.
13 Respondent Ochoa and his wife have been the only shareholders since incorporation.
14 The Ochoas have four children and at least three of them work for the business, which
15 is located in North Plains, Oregon (Washington County). (Testimony of Respondent
16 Ochoa, Wing, Boden; Exhibit A-26)

17 2) As part of its nursery business, OGI cultivates plants such as
18 rhododendrons, blooming forsythia, and several kinds of willows. OGI employs
19 approximately 25 to 35 workers to work in the nursery, assemble wreaths during the
20 winter, and to perform labor on farm labor contracts. The workers are paid hourly or
21 sometimes on a piece rate basis. Most of OGI’s employees come from Mexico and
22 some from Guatemala. Most of OGI’s workers do not speak English. (Testimony of
23 Respondent Ochoa; Exhibits A-1-16; A-20)

24 3) Rather than lay off workers during the nursery’s slow season, May through
25 July, OGI offers the nursery crew the opportunity to harvest cones in Central Oregon
when cones are abundant. OGI uses most of the cones for making wreaths to sell

1 during the winter months and some are “boxed” for sale. Some workers go home to
2 Mexico or Guatemala during the slow season and others choose to avoid lay-off by
3 harvesting cones for OGI. (Testimony of Respondent Ochoa)

4 4) OGI harvests cones on federal and private land. The business is required
5 to obtain a “special use permit” and pay a fee to harvest cones on federal land. OGI
6 does not have to pay a fee to harvest cones on private land, but it always obtains oral or
7 written permission from landowners before collecting cones from private property.
8 (Testimony of Respondent Ochoa, Murphy)

9 5) The U.S. Forest Service (“USFS”) permits cone harvesting on federal land
10 subject to certain terms and conditions. Anyone can obtain the requisite special use
11 permit to harvest cones, but some form of identification is required before a permit is
12 issued. Persons seeking a permit decide how many bushels they want to purchase and
13 that number is recorded on the “Forest Product Contract and Cash Receipt” that the
14 “purchasers” sign after they have paid a fee. The number of bushels “purchased”
15 determines the fee. The USFS designates the cone harvest area covered by the permit
16 and provides a “Sale Area” map to the purchaser. The location of the “Sale Area” and
17 the estimated acreage are indicated on the face of the permit. The purchaser agrees to
18 record on the permit the dates and quantity of cones removed. The purchaser also
19 agrees to harvest only those cones that are on the ground; climbing trees for cones is
20 prohibited. Purchasers are not guaranteed the number of cones purchased and the
21 designated harvest area is open to other permit holders subject to the same conditions.
22 The Ranger District’s “field officers” regularly patrol the forest and randomly inspect
23 permits if cone harvesters are present in the patrolled area. (Testimony of Murphy,
24 Respondent Ochoa; Exhibit A-20)

1 6) Prior to the cone harvest, OGI's president, Respondent Ochoa, first
2 "scouts" for an area to harvest cones. After he determines the harvest area, he drives
3 OGI's foreman, Andre Gaspar, to Central Oregon to identify each work site because the
4 sites change from year to year. He and Gaspar then go to the ranger station to
5 purchase required permits. (Testimony of Respondent Ochoa)

6 7) In May 2000, OGI obtained two special use permits for cone harvesting in
7 the Bend Fort Rock Ranger District. The permits were issued on May 5, 2000, to
8 Respondent Ochoa and Raul Barrera Barrera, OGI's employee, and permitted cone
9 harvesting in a designated area approximately 140 miles outside of Bend covering
10 125,000 acres. The permits were valid until July 31, 2000. The total fee for both
11 permits was \$2,500, assessed at .25 per bushel for 10,000 bushels of cones. OGI paid
12 the fee for both permits. The reason one of the permits was purchased in Raul Barrera
13 Barrera's name was to avoid designating the workers as "employees." (Testimony of
14 Respondent Ochoa, Murphy; Exhibit A-24)

15 8) In May 2000, OGI agreed to pay workers \$1.55 per "bag" of cones
16 collected during the harvest season. Most of the workers were OGI's "regular" nursery
17 crew and others were temporary workers who were either friends of the nursery workers
18 or workers in labor camps in Central Oregon who wanted to make extra money before
19 the berry-picking season started. After the cone harvest, OGI's regular crew went back
20 into the nursery to work and others either went to work elsewhere or went back to
21 Mexico or Guatemala. Some workers harvested cones the full season and others
22 harvested for awhile and then left for other work or went home. (Testimony of
23 Respondent Ochoa)

24 9) During the 2000 harvest, OGI used at least three vans, owned by either
25 OGI or its president, Respondent Ochoa, to transport its nursery workers and others

1 who lived outside the Bend area to the cone harvest site. None of the workers spoke
2 English and none owned automobiles. OGI also provided three to five camping trailers
3 for the workers and OGI foreman Andre Gaspar to live in during the harvest season.

4 (Testimony of Respondent Ochoa)

5 10) OGI provided the workers with 33-gallon plastic bags, approximately 16.5”
6 in diameter and 16.5” high, to collect the cones. Each day, after Gaspar sorted through
7 and inspected the cones for imperfections, the workers were instructed to take full bags
8 of cones to a site in the forest where the cones were loaded in a truck for transport back
9 to OGI’s nursery business. When the truck was full, Gaspar then contacted
10 Respondent Ochoa who picked up the cones at the site and handed out pay checks to
11 the workers. (Testimony of Respondent Ochoa)

12 11) Respondent Ochoa was not present during most of the cone harvest, but
13 OGI foreman Gaspar was on site monitoring the cone harvest. He kept track of the
14 number of bushels harvested on each site and inspected the cones and rejected any
15 that were broken, sun bleached or otherwise not suitable for OGI’s use. The workers
16 did not harvest cones on rainy days due to the effects of water on the quality of the
17 cones. The workers harvested cones on federal and private land. (Testimony of
18 Respondent Ochoa)

19 12) OGI issued a total of 106 checks on May 15, May 25, June 2, June 6-7,
20 June 14, June 20, June 29-30, and August 4, 2000, to a total of 29 workers for cones
21 collected during that period. Individual checks ranged from a minimum of \$117.80 for
22 76 bags to \$1,295.80 for 836 bags of cones. Some workers received several checks
23 and others received one check. (Testimony of Respondent Ochoa; Exhibit A-20)

1 13) Workers collected approximately 75,000 bushels and OGI paid
2 \$59,785.95 to its workers for all of the cones collected during the May-August 2000
3 season. (Testimony of Respondent Ochoa; Exhibit A-20)

4 14) The USFS did not cite OGI or terminate OGI's permits for breach of terms
5 and conditions, nor did it ever determine that OGI collected more cones than permitted
6 under the special use permits. (Testimony of Murphy, Respondent Ochoa)

7 15) OGI did not provide any of the 29 workers with an itemized statement of
8 earnings with the checks that were handed out May-August 2000. (Stipulation of
9 Participants)

10 16) The only record OGI maintained for the 29 workers between May and
11 August 2000, was an "Ochoas' Greens, Inc. Account Quick Report" for the "cost of
12 goods" that listed the payment method (check), the date the check issued, the check
13 number, the workers' names, the number of bags collected and the rate per bag per
14 worker, and the total amount paid each worker. OGI did not make and maintain a
15 record of the number of hours each worker worked between May and August 2000.
16 (Testimony of Respondent Ochoa; Exhibit A-20; Stipulation of Participants)

17 17) In June 2000, in response to a verbal complaint made by OGI employee
18 Jacobo Ramirez-Escobar to compliance specialist Katy Bayless, the Agency requested
19 that Respondents produce Ramirez-Escobar's pay stub for the pay period April 28 to
20 June 11, 2000, for inspection. The pay stub that was provided shows OGI issued a
21 paycheck to Ramirez-Escobar on May 12, 2000, and that he worked 21 hours at \$6.50
22 per hour for a total of \$136.50 for the pay period April 28 to June 11, 2000. The
23 itemized deductions include required withholdings and \$55 for rain gear. The year to
24 date ("YTD") column reflects two deductions for rain gear for a total of \$110.
25 Respondents did not provide the Agency with a written authorization for the deductions.

1 The pay stub does not include information about the nature of the work performed
2 during the pay period or whether OGI paid the employee from monies entrusted by
3 another to OGI for the purpose of paying employees. (Testimony of Bayless; Exhibit A-
4 16)

5 18) Before 1994, Respondent Ochoa held an Oregon farm labor contractor
6 license. OGI and its president, Respondent Ochoa, jointly held a farm labor contractor
7 license after Respondent Ochoa incorporated sometime in 1994. (Testimony of
8 Respondent Ochoa; Entire Record)

9 19) In 1992, Respondent Ochoa signed a "Settlement of Claims" document
10 wherein Respondent Ochoa agreed to pay - and did pay - \$8,000 to seven workers for
11 wage claims arising out of:

12 "a) work for the 1991 Christmas tree season for which the workers
13 were recruited, employed or supplied by Rodrigo Ochoa in his capacity as
14 a farm labor contractor; and

15 "b) work performed by the workers from December 1991 until March
16 1992 at the nursery owned by Rodrigo Ochoa, Rodrigo Ochoa Greens."

17 Respondent Ochoa acknowledged that the claims arose "from his alleged violations of
18 the [Fair Labor Standards Act, the Migrant and Seasonal Worker Protection Act, ORS
19 658.405, *et. seq.*, and Oregon's wage and hour laws], and he agree[d] that hereinafter
20 he [would] abide by these laws." (Exhibit A-30)

21 20) In December 1994, Oregon Legal Services obtained a Consent Judgment
22 against "Rodrigo Ochoa, Patricia Ochoa dba Rodrigo Ochoa Greens, Defendants"
23 wherein the defendants were ordered by a federal judge to comply with the
24 requirements of the Migrant and Seasonal Agricultural Worker Protection Act, ORS
25 658.705, *et. seq.*, and Oregon wage and hour statutes, including "to provide itemized
written statements at each payday with the information required by [former ORS
658.440(1)(h)]" and "to pay applicable minimum wage and overtime wage for every hour

1 worked, as required by [former ORS 653.025(2) and 653.261].” The amount
2 Respondents agreed to pay under the consent judgment was described as
3 “confidential.” (Exhibit A-31)

4 21) In February 1999, as a result of the Agency’s Notice of Intent to Assess
5 Civil Penalties issued December 31, 1998, Respondents Ochoa and Ochoas’ Greens,
6 Inc. signed a “Stipulation and Consent Final Order” that stated, in pertinent part:

7 “(3) Respondents admit, and the Commissioner finds, that Respondents
8 failed to file certified true copies of payroll records with the Bureau of
9 Labor and Industries until August 24, 1998, for work their employees
10 performed on the Contract between approximately August 16 and
11 September 12, 1997. This is in violation of ORS 658.417(3) and OAR
12 839-015-0300.

13 “(4) Respondents admit, and the Commissioner finds, that the payroll
14 report for the Contract Respondents submitted to the Bureau of Labor and
15 Industries for the time period August 5 through August 19, 1998, was
16 incomplete in not listing the wage rate paid to employees, the contract
17 number and location, the owner of the land where the work was being
18 performed and not being certified. This is in violation of ORS 658.417(3)
19 and OAR 839-015-0300.”

20 In accordance with the Stipulation and Consent Final Order, Respondents were
21 assessed and paid to the Agency \$4,000 in civil penalties. (Testimony of Ochoa;
22 Exhibit A-32)

23 22) Between June 21 and July 22, 2000, Respondents employed workers to
24 plant trees on USFS contract number 43-05K3-0-0073 (“0073”). On August 7, 2000,¹
25 Respondents submitted a payroll report to the Agency for the payroll period, June 21,
2000. The payroll report was not certified, but included an hourly rate of pay per
employee and the number of hours worked by each employee. On March 20, 2001,
Respondents resubmitted the report and Stephanie Wing, Respondent Ochoa’s
daughter and Respondents’ secretary, certified that the report was “correct and

¹ In its charging document, the Agency alleged the payroll report was filed on August 4, 2000, but the document submitted shows the Agency date stamped the payroll report “Aug 7, 2000.”

1 complete,” that the wage rates paid met the applicable minimum wage standards, and
2 that each employee had been paid all wages earned.² (Exhibits A-10, A-11)

3 23) On August 21, 2000, Respondents submitted a second payroll report to
4 the Agency pertaining to contract number 0073 for the payroll period, July 14–22, 2000.
5 The payroll report was not certified, but included an hourly rate of pay per employee and
6 the number of hours worked by each employee. On March 20, 2001, Respondents
7 resubmitted the report and Wing certified that the report was “correct and complete,”
8 that the wage rates paid met the applicable minimum wage standards, and that each
9 employee had been paid all wages earned. (Exhibits A-12, A-13)

10 24) Between July 24 and July 28, 2000, Respondents employed workers to
11 thin trees on USFS contract number 43-05K3-9-0078. Respondents submitted a payroll
12 report to the Agency that was date stamped August 21, 2000, indicating Respondents’
13 employees had been paid \$30 per acre for the payroll period July 24-28, 2000. The
14 report did not include the number of hours worked by each employee and it was not
15 certified. Respondents resubmitted the report, which was date stamped by the Agency
16 on October 19, 2000, and Wing included and certified the number of hours each
17 employee worked, including overtime hours. The resubmitted report did not include an
18 hourly rate of pay for each employee. Respondents submitted an additional payroll
19 report that was date stamped by the Agency on November 1, 2000 and similar to that
20 which was filed on October 19, except that it showed different hours than those
21 previously reported and it was not certified. (Exhibits A-4, A-5, A-6)

22 25) Between August 1 and August 14, 2000, Respondents employed workers
23 to thin trees on USFS contract number 43-05K3-9-0092. On August 21, 2000,
24 Respondents submitted a payroll report to the Agency indicating Respondents’

25 _____
² Although OGI employed the workers, under the applicable statute both OGI and Respondent Ochoa are

1 employees had been paid \$50 per acre for the payroll period August 1-7, 2000. The
2 report did not include the number of hours worked by each employee. On November 1,
3 2000, Respondents resubmitted the report, which included the number of hours each
4 employee worked and Wing's certification. In March 2001, Respondents filed an
5 additional report pertaining to the same contract purporting to cover the time period of
6 August 1-14, 2000. Wing certified that the report was "correct and complete," that the
7 wage rates paid met the applicable minimum wage standards, and that each employee
8 had been paid all wages earned. (Testimony of Bayless, Wing; Exhibits A-1, A-2, A-3)

9 26) Between November 12 and November 17, 2000, Respondents provided
10 workers to thin and prune trees on USFS contract number 43-05K3-9-0078.
11 Respondents submitted a certified payroll report to the Agency for the payroll period
12 November 12-13, 2000, indicating Respondents' employees had been paid \$50 per
13 acre for pruning. The Agency date stamped the report January 3, 2001. Wing certified
14 that the report was "correct and complete," that the wage rates paid met the applicable
15 minimum wage standards, and that each employee had been paid all wages owed. The
16 report included the number of hours worked by each employee. (Exhibit A-7, A-8)

17 27) Respondents submitted a payroll report to the Agency for the payroll
18 period November 17, 2000, indicating Respondents' employees had been paid at
19 varying rates per acre for thinning and pruning trees on USFS contract number 43-
20 05K3-9-0078. The Agency date stamped the report January 3, 2001. The report did
21 not include the number of hours worked and was not dated or certified. (Exhibit A-8)

22 28) Respondents submitted a payroll report to the Agency that was date
23 stamped January 3, 2001, indicating Respondents' employees had been paid \$32 per
24 acre for thinning trees on a USFS contract located in "St. Helens." The payroll period
25

jointly responsible for the filing the requisite payroll reports.

1 was for December 6, 2000. The report did not include the contract number or the
2 number of hours worked by each employee and was not certified. On March 20, 2001,
3 Respondents resubmitted the payroll report, which certified Respondents' workers had
4 each worked 3.4 hours on December 6, 2000. Wing also certified that the report was
5 "correct and complete," that the wage rates paid met the applicable minimum wage
6 standards, and that each employee had been paid all wages owed. (Exhibit A-14, A-15)

7 29) During times material, the Agency's practice was to return defective
8 payroll record submissions to the farm labor contractor licensee with a cover letter and
9 checklist indicating the areas in which the payroll record needed correction. On October
10 17, 2000, the Agency returned Respondents' payroll record submission with the
11 customary checklist and cover letter stating and highlighting, in pertinent part:

12 "The enclosed certified payroll report(s) you filed with the Bureau are not
13 in compliance because they are incomplete in the areas checked below.
14 OAR 8339-15-300(2) [*sic*] requires you to submit certified payroll reports
15 **at least once every thirty five (35) days** if payroll is generated as a
16 result of reforestation work performed by Oregon workers. You must
17 **complete and resubmit** the enclosed reports to the **Portland office** no
18 later than 5 p.m. **October 30, 2000**.

19 " * * * * *

20 "**Your reports must contain all the elements listed above**, as shown on
21 Certified Payroll Report (WH-14) form, enclosed for your convenience. * *
22 * ."

23 The letter included a checkmark next to a statement indicating that Respondents
24 omitted the "total hours worked during [the applicable] pay period" from the payroll
25 records they submitted.³ (Testimony of Bayless; Exhibit R-1)

26 30) The Agency presented no evidence to show the applicable minimum wage
27 rate for tree planting, thinning, or pruning as determined by the U.S. Forest Service.
28 (Statement of ALJ; Entire Record)

29 _____
30 ³ There is no evidence in the record showing the payroll records subject to the October 2000 letter.

1 31) On May 14, 2001, Respondents applied for a farm labor contractor
2 license. At the time he filled out the application, Respondent Ochoa believed he owned
3 50 percent of OGI and he stated that on the application. When asked to list the names
4 of those who have a financial interest in the business, Respondent Ochoa responded
5 “N.A.” and indicated that “no other persons have a financial interest” in the business.
6 Respondent Ochoa also certified that there were “no judgments or administrative orders
7 of record against [Respondents].” Respondent Ochoa certified that all of the information
8 provided in the application was true and correct. (Testimony of Ochoa; Exhibit A-26)

9 32) In June 2001, in response to the Agency’s request for additional
10 information, Respondent Ochoa provided a letter to the Agency that stated, in pertinent
11 part:

12 “Ochoas Greens, Inc. does not have 20 or more employees at any one
13 given time. When Ochoas does forestry work for the state of Washington
14 we bring our employees that we have working for us at that time. We
15 have not done any Reforestation work for the past three years in Oregon.

16 “And I, Rodrigo Ochoa am 51% owner of Ochoas Greens, Inc.”

17 (Testimony of Respondent Ochoa; Exhibit A-28)

18 33) Respondent Ochoa’s testimony was not entirely credible. His memory
19 was unreliable and selective. On several disputed issues of fact, his testimony was
20 inconsistent with statements he made previously to the Agency. For instance, he
21 reported on a previous farm labor license application that his wife held a 25 percent
22 interest in the corporation they jointly own. On his pending application, he stated he
23 and his wife share “50/50” ownership of the corporation and his testimony at hearing
24 was that he always thought that division to be true. However, he also acknowledged
25 that he later told his daughter and the Agency that he was the majority shareholder,
owning 51 percent of the shares, only after he found out that the “50/50” division
imposed liabilities upon his wife. Additionally, Respondent Ochoa’s testimony

1 repeatedly shifted whenever he realized he had made a statement against his interest.
2 As an example, he was direct and appeared earnest in stating that Andre Gaspar was
3 an OGI foreman who was present at the work sites and the “guy in charge” of the cone
4 harvest. When prompted by his counsel, however, he attempted to retract his repeated
5 references to his “foreman” by stating that the workers called Gaspar “foreman” as a
6 nickname. Consequently, the forum believed Respondent Ochoa’s testimony only when
7 it was logically credible, a statement against interest, or when other credible evidence
8 supported it. (Statement of ALJ)

9 34) Wing’s testimony was not wholly credible. She had a poor memory and
10 her bias as Respondent Ochoa’s daughter was reflected in her demeanor and her
11 statements minimizing her role as the corporation’s payroll person. Despite her
12 signature on every payroll record submitted to the Agency, Wing blamed a payroll
13 company hired by Respondents for the certified payroll problems. Wing’s testimony
14 was believed only when corroborated by other credible evidence. (Statement of ALJ)

15 35) Murphy, Robertson, Boden and Bayless were credible witnesses.
16 (Statement of ALJ)

17 **ULTIMATE FINDINGS OF FACT**

18 1) During all times material herein, OGI did business in Oregon and engaged
19 the personal services of one or more employees in Oregon. Respondent Ochoa was a
20 majority shareholder and OGI’s president. Respondent Ochoa’s wife was a shareholder
21 and OGI’s corporate secretary.

22 2) Between August 1-7, 2000, Respondents employed Oregon workers to
23 perform forestation or reforestation labor on USFS contract number 43-05K3-9-0092.
24 OGI paid its employees directly and submitted to the Commissioner deficient payroll
25 records on three separate occasions.

1 3) Between July 24-28, 2000, Respondents employed Oregon workers to
2 perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078.
3 OGI paid its employees directly and submitted to the Commissioner deficient payroll
4 records on two separate occasions. Respondents filed a third payroll record that
5 contradicted the number of hours reported in the first and second submission.

6 4) Between November 12-13, 2000, Respondents employed Oregon workers
7 to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078.
8 OGI paid its employees directly and did not timely provide the Commissioner with
9 certified copies of all payroll records.

10 5) On November 17, 2000, Respondents employed Oregon workers to
11 perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078.
12 OGI paid its employees directly and submitted to the Commissioner two sets of payroll
13 records that were not timely filed, did not include the number of hours each employee
14 worked, and were not properly certified.

15 6) On June 21, 2000, Respondents employed Oregon workers to perform
16 forestation or reforestation labor on USFS contract number 43-05K3-0-0073. OGI paid
17 its employees directly and submitted to the Commissioner payroll records that were not
18 timely filed and were not properly certified.

19 7) Between July 14-22, 2000, Respondents employed Oregon workers to
20 perform forestation or reforestation labor on USFS contract number 43-05K3-0-0073.
21 OGI paid its employees directly and submitted to the Commissioner payroll records that
22 were not timely filed and were not properly certified.

23 8) On December 6, 2000, Respondents employed Oregon workers to
24 perform forestation or reforestation labor on a USFS contract in St. Helens. OGI paid its
25 employees directly and submitted to the Commissioner payroll records that did not

1 include a contract number, the number of hours each employee worked, and were not
2 properly certified.

3 9) Respondents knew or should have known that they were legally required
4 to file timely, complete, and accurate certified true copies of all payroll reports.
5 Respondents' failure to do so was willful.

6 10) The Agency did not waive or renounce its authority to bring an action
7 against Respondents for violations of ORS 658.417(3) by returning deficient payroll
8 records to Respondents for correction.

9 11) In or about April and May 2000, Respondents were not acting jointly as a
10 farm labor contractor when they deducted money from an employee's paycheck without
11 his written authorization, and were not entrusted with money by a third party for the
12 purpose of paying said employee or employees.

13 12) In May 2000, Ochoas' Greens, Inc. did not fail to comply with lawful
14 contracts in its capacity as a farm labor contractor. OGI purchased special use permits
15 from the USFS to harvest cones on federal land, but did not purchase the permits in its
16 capacity as a farm labor contractor. The USFS did not cite OGI or terminate its permits
17 for breach of the terms and conditions of the permits.

18 13) OGI employed workers to gather cones for Respondent's business from
19 May through August 2000. During that time, OGI issued 106 checks to 29 of its
20 employees and failed to supply each employee with itemized statements that showed
21 the amounts and purposes of deductions as required by statute.

22 14) OGI did not make or keep available to the Commissioner of the Bureau of
23 Labor and Industries a record containing the actual hours worked by 29 employees who
24 worked from May until August 2000.

1 15) In May 2001, Respondents applied for a farm labor contractor license and
2 made an assertion that no other person, other than Respondent Ochoa, had a financial
3 interest in OGI. That assertion was not in accord with the facts and Respondents knew
4 or should have known that Respondent Ochoa's wife, who owned shares in OGI, was a
5 person with a financial interest in the corporation. Respondents did not make the
6 assertion with the intent to mislead or deceive the Agency.

7 16) Information about whether other persons have a financial interest in a
8 license applicant's business is a substantive matter that is influential in the
9 Commissioner's decision to grant or deny a license.

10 17) In May 2001, Respondents applied for a farm labor contractor license and
11 withheld the name, address, and phone number of Respondent Ochoa's wife, who had
12 a financial interest in Respondents' business. Respondents knew Respondent Ochoa's
13 wife had a financial interest in the business and had a duty to reveal her identity.

14 18) Failure to disclose the identity of persons with a financial interest in a
15 license applicant's business is a substantive matter that is influential in the
16 Commissioner's decision to grant or deny a license.

17 19) There is no evidence showing Respondents' assertion that Respondent
18 Ochoa owns 50 percent of the corporation is incorrect as it is stated on the farm labor
19 contractor license application.

20 20) There is no evidence that disproves Respondents' assertion that
21 Respondents have no judgments against them as stated on the farm labor contractor
22 license application.

23 21) In May 2001, Respondents applied for a farm labor contractor license and
24 certified that the information contained therein was true and correct. Respondents knew
25

1 or should have known that they were not giving correct information when responding to
2 questions about the financial composition of their business.

3 22) A farm labor contractor's truthfulness is a substantive matter that is
4 influential in the Commissioner's decision to grant or deny a license.

5 23) Respondents' character, competence and reliability make them unfit to act
6 as farm labor contractors.

7 **CONCLUSIONS OF LAW**

8 1) The Commissioner of the Oregon Bureau of Labor and Industries has
9 jurisdiction over the subject matter and of the Respondents herein. ORS 658.405 to
10 658.503 and ORS 653.305 to 653.370.

11 2) ORS 658.405 provides in pertinent part:

12 "As used in ORS 658.405 to 658.503 * * * unless the context requires
13 otherwise:

14 "(1) 'Farm labor contractor' means any person who, for an agreed
15 remuneration or rate of pay, recruits, solicits, supplies or employs workers
16 to perform labor for another to work in forestation or reforestation of lands
17 * * *."

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

19 "(13) 'Forest labor contractor' means:

20 "(a) Any person who, for an agreed remuneration or rate of pay,
21 recruits, solicits, supplies or employs workers to perform labor for another
22 in the forestation or reforestation of lands; * * *

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

24 "(a) The planting, transplanting, tubing, pre-commercial thinning, and
25 thinning of trees and seedlings; * * *."

As a person acting as a farm labor contractor in Oregon with regard to the forestation or
reforestation of lands, Respondent Ochoas' Greens, Inc. was and is subject to the
provisions of ORS 658.405 to 658.503. As a majority shareholder of a corporation so
acting, Respondent Ochoa was and is subject to the provisions of ORS 658.405 to
658.503.

1 3) ORS 653.010 provides, in pertinent part:

2 “As used in ORS 653.010 to 653.261, unless the context requires
3 otherwise:

4 “ * * * * *

5 “(3) ‘Employ’ includes to suffer or permit to work; however,
6 ‘employ’ does not include voluntary or donated services performed
7 for no compensation or without expectation or contemplation of
8 compensation as the adequate consideration for the services
9 performed for a public employer * * * or a religious, charitable,
10 educational, public service or similar nonprofit corporation,
11 organization or institution for community service, religious or
12 humanitarian reasons or for services performed by general or
13 public assistance recipients as part of any work training program
14 administered under the state or federal assistance laws.

15 “(4) ‘Employer’ means any person who employs another person *
16 * * .”

17 At all times material herein, Respondent Ochoas’ Greens, Inc. was an employer and
18 employed workers in Oregon. As an Oregon employer, Respondent Ochoas’ Greens,
19 Inc. was subject to the provisions of ORS 653.305 to 653.370 and the administrative
20 rules adopted thereunder.

21 4) The actions, inaction, and statements of Respondent Ochoa, Respondent
22 Ochoas’ Greens, Inc.’s president and a majority shareholder, are properly imputed to
23 Respondent Ochoas’ Greens, Inc.

24 5) ORS 658.417 provides in pertinent part:

25 “In addition to the regulation otherwise imposed upon farm labor
26 contractors pursuant to ORS 658.405 to 658.503, a person who acts as a
27 farm labor contractor with regard to the forestation or reforestation of lands
28 shall:

29 “ * * * * *

30 “(3) Provide to the commissioner a certified true copy of all payroll records
31 for work done as a farm labor contractor when the contractor pays
32 employees directly. The records shall be submitted in such form and at
33 such times and shall contain such information as the commissioner, by
34 rule, may prescribe.”

35 839-015-0300 provides in pertinent part:

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

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

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

11 “(c) If the contract lasts more than 70 days, succeeding wage certification
12 reports must include whatever payrolls the contractor has paid out at the
13 time of the report, with the reports due at successive 35 day intervals, e.g.
14 105 days, 140 days from the time the contractor begins work on the
15 contract.

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

20 Respondents violated ORS 658.417(3) and OAR 839-015-0300 by failing to submit
21 timely, complete and accurate certified true copies of payroll reports for eight separate
22 payroll periods on four USFS contracts.

23 6) ORS 658.440(1) provides:

24 “Each person acting as a farm labor contractor shall:

25 * * * * *

“(c) Pay or distribute promptly, when due, to the individuals entitled thereto
all money or other things of value entrusted to the labor contractor by any
person for that purpose.

“(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.”

Respondents did not violate ORS 658.440(1)(c) or (d).

7) ORS 658.440(3) provides in pertinent part:

“No person acting as a farm labor contractor, or applying for a license to
act as a farm labor contractor, shall:

“(a) Make any misrepresentation, false statement or willful concealment in
the application for a license.”

1 Respondents violated ORS 658.440(3)(a) by making misrepresentations and willfully
2 concealing information on their farm labor contractor's license application.

3 8) ORS 653.045 provides, in pertinent part:

4 “(1) Every employer required by ORS 653.025 or by any rule, order or
5 permit issued under ORS 653.030 to pay a minimum wage to any of the
6 employer's employees shall make and keep available to the
7 Commissioner of the Bureau of Labor and Industries for not less than two
8 years, a record or records containing:

9 “(a) The name, address and occupation of each of the employer's
10 employees.

11 “(b) The actual hours worked each week and each pay period by each
12 employee.

13 “(c) Such other information as the commissioner prescribes by the
14 commissioner's rules if necessary or appropriate for the enforcement of
15 ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

16 “(2) Each employer shall keep the records required by subsection (1) of
17 this section open for inspection or transcription by the commissioner or the
18 commissioner's designee at any reasonable time.”

19 OAR 839-020-0080 provides, in pertinent part:

20 “(1) Every employer regulated under ORS 653.010 to 653.261 must
21 maintain and preserve payroll or other records containing the following
22 information and data with respect to each employee to whom the law
23 applies:

24 “(a) Name in full, as used for Social Security recordkeeping purposes, and
25 on the same record, the employee's identifying symbol or number if such
is used in place of name on any time, work, or payroll records;

“(b) Home address, including zip code;

“(c) Date of birth, if under 19;

“(d) Sex and occupation in which employed. (Sex may be indicated by use
of the prefixes Mr., Mrs., Miss, or Ms.);

“(e) Time of day and day of week on which the employee's workweek
begins. If the employee is part of a work force or employed in or by an
establishment all of whose workers have a workweek beginning at the
same time on the same day, a single notation of the time of the day and
beginning day of the workweek for the whole work force or establishment
will suffice;

“(f) Regular hourly rate of pay for any workweek in which overtime
compensation is due, and an explanation of the basis of pay by indicating

1 the monetary amount paid on a per hour, per day, per week, per piece,
2 commission on sales, or other basis, and the amount and nature of each
3 payment which, pursuant to ORS 653.261(1) is excluded from the "regular
rate of pay". (These records may be in the form of vouchers or other
payment data.);

4 "(g) Hours worked each workday and total hours worked each workweek
5 (for purposes of this section, a "workday" is any fixed period of 24
consecutive hours and a "workweek" is any fixed and regularly recurring
6 period of seven consecutive workdays);

7 "(h) Total daily or weekly straight-time earnings or wages due for hours
worked during the workday or workweek, exclusive of premium overtime
8 compensation;

9 "(i) Total premium pay for overtime hours. This amount excludes the
straight-time earnings for overtime hours recorded under subsection (h) of
10 this section;

11 "(j) Total additions to or deductions from wages paid each pay period
including employee purchase orders or wage assignments. Also, in
12 individual employee records, the dates, amounts, and nature of the items
which make up the total additions and deductions;

13 "(k) Total wages paid each pay period;

14 "(l) Date of payment and the pay period covered by payment."

15 Respondent Ochoas' Greens, Inc. violated ORS 653.045(1) and OAR 839-020-0080 by
16 failing to make and keep available records of the number of hours worked by 29 of its
employees.

17 9) ORS 653.045(3) provides:

18 "Every employer of one or more employees covered by ORS 653.010 to
19 653.261 shall supply each of the employer's employees with itemized
statements of amounts and purposes of deductions in the manner
20 provided in ORS 652.610."

21 OAR 839-020-0012 provides in pertinent part:

22 "(1) Except for employees who are otherwise specifically exempt under
23 ORS 653.020, employers must furnish each employee, each time the
employee receives a compensation payment from the employer, a written
itemized statement of earnings. The written itemized statement must
24 include:

25 "(a) The total gross payment being made;

"(b) The amount and a brief description of each and every deduction from
the gross payment;

1 “(c) The total number of hours worked during the time covered by the
2 gross payment;

3 “(d) The rate of pay;

4 “(e) If the worker is paid on a piece rate, the number of pieces done and
5 the rate of pay per piece done;

6 “(f) The net amount paid after any deductions;

7 “(g) The employer's name, address and telephone number;

8 “(h) The pay period for which the payment is made.

9 “(2) When a compensation payment is a draw or advance against future
10 earnings, and no deductions are being made from the payment, the
11 written itemized statement must include the information required in section
12 (1)(a), (g) and (h) of this rule. The employee must be provided with a
13 statement containing all of the information required by section (1) of this
14 rule at the employee's next regular payday, even if the employee is not
15 entitled to payment of any further wages at that time.”

16 Respondent Ochoas' Greens, Inc. violated ORS 653.045(3) and OAR 839-020-0012(1)
17 106 times by failing to provide itemized statements of deductions to 29 workers.

18 10) ORS 658.420 provides in pertinent part:

19 “(1) The Commissioner of the Bureau of Labor and Industries shall
20 conduct an investigation of each applicant's character, competence and
21 reliability, and of any other matter relating to the manner and method by
22 which the applicant proposes to conduct and has conducted operations as
23 a farm labor contractor.

24 “(2) The commissioner shall issue a license * * * if the commissioner is
25 satisfied as to the applicant's character, competence and reliability.”

OAR 839-015-0145 provides:

“The character, competence and reliability contemplated by ORS 658.405
to 658.475 and these rules not limited to, consideration of:

“(1) A person's record of conduct in relations with workers, farmers and
others with whom the person conducts business.

“ * * * * *

“(3) A person's timeliness in paying all debts owed, including advances
and wages.

“ * * * * *

“(7) Whether a person has violated any provision of ORS 658.405 to
658.503 or these rules.

“ * * * * *

1 “(10) Whether a person has failed to comply with federal, state or local
2 laws or ordinances relating to the payment of wages, income taxes, social
3 security taxes, unemployment compensation tax, or any tax, fee or
4 assessment of any sort.

5 “ * * * * *

6 “(12) Whether a person has repeatedly failed to file or furnish all forms and
7 other information required by ORS 658.405 to 658.503 and these rules.

8 “(13) Whether a person has made a willful misrepresentation, false
9 statement or concealment in the application for a license.”

10 OAR 839-015-0520 provides in pertinent part:

11 “(1) The following violations are considered to be of such magnitude and
12 seriousness that the Commissioner may propose to deny * * * a license:

13 “(a) Making a misrepresentation, false statement or certification or willfully
14 concealing information on the license application;

15 “ * * * * *

16 “(2) When the applicant for a license * * * demonstrates that the applicant's
17 * * * character, reliability or competence makes the applicant * * * unfit to
18 act as a farm or forest labor contractor, the Wage and Hour Division shall
19 propose that the license application be denied * * * .

20 “(3) The following actions of a farm or forest labor contractor license
21 applicant * * * demonstrate that the applicant's * * * character, reliability or
22 competence make the applicant * * * unfit to act as a farm or forest labor
23 contractor:

24 “(a) Violations of any section of ORS 658.405 to 658.485;

25 “ * * * * *

“(d) Failure to comply with federal, state or local laws or ordinances
relating to the payment of wages, income taxes, social security taxes,
unemployment compensation tax or any tax, fee or assessment of any
sort;

“(f) Repeated failure to file or furnish all forms and other information
required by ORS 658.405 to 658.503 or these rules;

“(h) Willful misrepresentation, false statement or concealment in the
application for a license;

“(m) A course of misconduct in relations with workers, farmers and others
with whom the person conducts business;

“(n) Failure to pay all debts owed, including advances and wages, in a
timely manner[.]”

1 Respondents' violations of ORS 658.417(3) and 658.440(3) demonstrate that
2 Respondents' character, competence, and reliability makes them unfit to act as farm
3 labor contractors.

4 11) Under the facts and circumstances of this record, and according to the
5 applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to
6 assess against Respondent Ochoas' Greens, Inc. a civil penalty for each violation of
7 ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission
8 thereunder. The civil penalties assessed in the Order herein are a proper exercise of
9 that authority. ORS 653.370.

10 12) Under the facts and circumstances of this record, and according to the
11 applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to
12 assess civil penalties against Respondents Ochoa and Ochoas' Greens, Inc. ORS
13 658.453(1)(c) and (e). With regard to the magnitude of the penalties, OAR 839-015-
14 0510 provides in pertinent part:

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

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

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

20 “(c) The magnitude and seriousness of the violation;

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

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

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

1 In this case, Respondents do not dispute that while jointly acting as a farm labor
2 contractor, they provided Oregon workers to perform forestation or reforestation on four
3 USFS contracts between June and December 2000 and paid the workers directly.
4 Evidence shows Respondents used the Agency's Form WH-141 to file certified payroll
5 reports for eight payroll periods during the contract periods, but repeatedly failed to
6 provide all of the required information. In some cases, the reports were timely filed but
7 either were not certified or lacked required information. In other cases, the reports were
8 not timely filed, not certified, and lacked required information. At no time did
9 Respondents submit timely reports that contained all of the required information.

10 Respondents argue that the Agency waived "compliance of the actions
11 complained of in the Agency's Notice of Intent" by allowing Respondents the opportunity
12 to correct deficient payroll records each time they were submitted. That argument has
13 no merit. Waiver is an intentional act that must be plainly and unequivocally manifested
14 either "in terms or by such conduct that clearly indicates an intention to renounce a
15 known privilege or power." *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 252,
16 293 (2001). There is no evidence that the Agency, explicitly or implicitly, renounced or
17 waived its authority to bring the present action against Respondents for their failure to
18 timely submit accurate and complete payroll records. To support its argument,
19 Respondents rely on a letter dated October 17, 2000, wherein the Agency requests that
20 Respondents submit corrected payroll records "no later than October 30, 2000." First,
21 in that letter the Agency does not extend the statutory deadline for submitting certified
22 true copies of all payroll records, but rather establishes a time limit for providing the
23 Agency with corrected records. Second, the Agency specifically reiterates the rule
24 governing submission deadlines and emphasizes the requirement that the "reports must
25 contain all the elements" listed in the letter, which negates any inference that the

1 Agency intended to waive its authority to pursue violations in a later action. Finally,
2 even if the letter could be construed as implied waiver, and the forum concludes it
3 cannot, there is no evidence in the record that Respondents complied with its provisos.
4 The evidence shows only that Respondents repeatedly submitted deficient payroll
5 records and submitted corrections for most of them either on November 1, 2000, or
6 March 20, 2001, well after the statutory deadline for the particular payroll periods had
7 passed. Respondents provided no evidence that it was the Agency that established
8 those dates as time limits for submitting corrected payroll records. Respondents failed
9 to prove their affirmative defense by a preponderance of the evidence.

10 Additionally, the Agency alleged that on some of the payroll reports Respondents
11 incorrectly certified that the applicable minimum wage had been paid. However, there is
12 no evidence in the record that shows what the applicable minimum wage was at the
13 time of the contracts. The Agency also alleged that the number of hours shown on one
14 of the payroll reports reflects an underpayment of wages, but there is no evidence in the
15 record that supports the Agency's allegation. The forum concludes Respondents filed
16 deficient payroll reports eight times on four separate contracts, but did not underpay
17 their workers or fail to pay the workers at the proper wage rate.

18 **B. Failure to Pay Wages When Due in Violation of ORS 658.440(1)(c)**

19 The Agency was required to prove that Respondents (1) were acting jointly as a
20 farm labor contractor in or about April and May 2000, (2) were entrusted with money for
21 the purpose of paying workers, and (3) failed to promptly pay, when due, the money to
22 which workers were entitled. OGI stipulated that \$55 was withheld from each of two
23 paychecks issued to one of its employees in May 2000 to pay for raingear purchased by
24 the employee. OGI acknowledged there is no evidence to show the employee signed
25 an authorization for the deduction. The evidence does not establish, however, that

1 Respondents were acting jointly as a farm labor contractor in April or May 2000. In the
2 absence of evidence showing a farm labor contract in effect at that time and that money
3 was entrusted to OGI for the purpose of paying employees, the forum does not find that
4 OGI violated ORS 658.440(1)(c).

5 **C. Failure to Comply with Lawful Contracts in Violation of ORS 658.440(1)(d)**

6 The Agency is required to prove that Respondents, (1) acting jointly as a farm
7 labor contractor, (2) entered into legal and valid contracts with the USFS, (3) entered
8 into the contracts in their capacity as a farm labor contractor, and (4) violated the
9 provisions of the contracts.

10 The facts establish that in May 2000, OGI obtained two permits to collect cones
11 on federal land that are characterized by a USFS representative as "special use
12 permits" and are issued to holders as a form titled "Forest Product Contract and Cash
13 Receipt." The facts also show that OGI paid workers for cones harvested between April
14 and July 2000 for use in Respondents' nursery business.

15 ORS 658.405 provides in pertinent part:

16 " * * * * *

17 "(4) 'Farm labor contractor' means any person who * * * recruits,
18 solicits, supplies or employs workers to gather evergreen boughs, yew
19 bark, bear grass, salal or ferns from public lands for sale or market prior to
20 processing or manufacture * * * "

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

20 "(8) 'Farm labor contractor' means:

21 " * * * * *

22 "(c) Any person who recruits, solicits, supplies or employs workers to
23 gather wild forest products, as that term is defined in paragraph (23) of
24 this section * * * "

24 " * * * * *

25 "(23) 'To gather wild forest products' or 'the gathering of wild forest
products' means the gathering of evergreen boughs, yew bark, bear
grass, salal or ferns, *and nothing else*, from public lands for sale or market

1 prior to processing or manufacture. This term does not include the
2 gathering of these products from private lands in any circumstance or from
3 public lands when the person gathering the products, or the person's
4 employer, does not sell the products in an unmanufactured or
5 unprocessed state.

6 "Example: A nursery uses its own employees to gather evergreen boughs,
7 which it uses in the manufacture of Christmas wreaths. The nursery is not
8 engaged in farm labor contracting activity and therefore would not be
9 required to obtain a license." (Emphasis added)

10 A plain reading of the applicable statute and rule indicates that, in this case,
11 Respondents were not acting in their capacity as a farm labor contractor when OGI
12 agreed to "purchase" cones from the USFS. The USFS representative testified that no
13 license was necessary to obtain a special use permit for cone collecting, and there is no
14 evidence that shows OGI gathered any other wild forest products in May 2000. The
15 forum concludes from these facts that cone collecting is not a regulated activity
16 requiring a farm labor contractor license. There being no evidence that Respondents
17 acted in their capacity as a farm labor contractor in May 2000 when OGI obtained cone
18 collecting permits from the USFS, the forum finds Respondents did not violate ORS
19 658.440(1)(d).

20 **D. Failure to Provide Itemized Statements to Employees in Violation of ORS**
21 **653.045(3)**

22 ORS 653.045 provides in pertinent part:

23 "(3) Every employer of one or more employees covered by ORS 653.010
24 to 653.261 shall supply each of the employer's employees with itemized
25 statements of amounts and purposes of deductions in the manner
provided in ORS 652.610."

ORS chapter 653 does not include an express definition of "employee." However, by
contextual implication and for purposes of chapter 653, a person is an "employee" of
another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. ORS
653.010(3)&(4); *In the Matter of Barbara Coleman*, 19 BOLI 230, 264 (2000), *citing*

1 *State ex rel Roberts v. Bomareto Ent., Inc.*, 153 Or App 183, 188, 956 P2d 254 (1997),
2 *rev den* 327 Or 192 (1998).⁴

3 Accordingly, the Agency must establish that Respondent OGI (1) employed
4 workers between May and August 2000 and (2) issued paychecks to those workers that
5 did not include itemized statements containing required information. Respondent OGI
6 agrees it did not provide its workers with the requisite statements. The only disputed
7 issue is whether OGI employed workers as contemplated in ORS chapter 653.

8 1. Employment Relationship

9 To interpret “suffer or permit to work” and to determine what is required to prove
10 employment under ORS chapter 653, the forum first looks to the statute’s text and
11 context. *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or
12 606, 859 P2d 1142 (1993).

13 While the plain meaning of “to permit” requires a more positive action than “to
14 suffer,” both terms imply much less positive action than required by the common law
15 test for determining an employment relationship. To “permit” something to happen does
16 not require an affirmative act, but only a decision to allow it to happen.⁵ To “suffer”
17 something to happen is even broader and means to tolerate or fail to prevent it from
18 happening.⁶ Thus, a business may be liable under the provisions of ORS chapter 653 if
19 it knows or has reason to know a worker was performing work in that business and
20 could have prevented it from occurring or continuing.⁷

21
22 ⁴ There are some statutory exceptions to this definition of employee, including those set forth in ORS
23 653.020, but Respondents did not assert any of those exceptions.

24 ⁵ See Webster’s Third New International Dictionary 1683 (unabridged ed 1999) (“permit” defined as “[t]o
25 consent to expressly or formally * * * grant leave for or the privilege of * * * ALLOW, PERMIT * * * to give
(a person) leave * * * AUTHORIZE.”

⁶ See Webster’s Third New International Dictionary 2284 (unabridged ed 1999) (“suffer” defined as “not to
forbid or hinder * * * ALLOW, PERMIT * * * to put up with * * * TOLERATE.”

⁷ Of course, if the facts in a case show an employment relationship under common law, a worker is
automatically covered under the broader definition of ORS 653.010(4).

1 The traditional common law test for employment, based on concepts of the right
2 to control means and manner of work and on agency principles, is very narrow and
3 different from the meaning of the definitions under ORS chapter 653. The broader
4 definition of “employ” at chapter 653 is identical to and patterned after the federal Fair
5 Labor Standards Act (“FLSA”), enacted in 1938. The Court of Appeals noted this in
6 *State v. Acropolis McLoughlin, Inc.*, 149 Or App 220, 942 P2d 829 (1997) (citing 29
7 U.S.C. § 203(e)(1), “under which the term ‘employee’ is defined as ‘any individual
8 employed by an employer,’ and employer is defined as ‘any person acting directly or
9 indirectly in the interest of an employer in relation to an employee.’ 29 U.S.C. § 203(d).
10 ‘Employ’ is defined as including ‘to suffer or permit to work.’ 29 U.S.C. § 203(g)”).

11 Moreover, the U.S. Supreme Court has repeatedly recognized the “striking
12 breadth” of the FLSA definition of “to employ” and the remedial nature of FLSA
13 provisions. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 381, 326 (1992); *Rutherford*
14 *Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947)(“[the FLSA] contains its own
15 definitions, comprehensive enough to require its application to many persons and
16 working relationships, which prior to [the FLSA], were not deemed to fall within an
17 employer-employee category * * * [w]e have said that the [FLSA] included those who
18 are compensated on a piece rate basis”). (Citations omitted)

19 Oregon courts and this forum have consistently relied upon the FLSA and federal
20 courts to interpret the identical provisions contained within ORS chapter 653. See *In*
21 *the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 163 (1996), citing *Circle C*
22 *Investments, Inc.*, 998 F2d 324 (5th Cir 1993) (“relevant definitions of ‘employer’ and
23 ‘employ’ in ORS chapter 653 were taken from the FLSA * * * [f]ederal courts have
24 adopted an expansive interpretation of the definition of ‘employer’ under the FLSA in
25

1 order to effectuate ‘its broad remedial purposes’); see also *In the Matter of Barbara*
2 *Coleman*, 19 BOLI at 264.

3 Federal and state case law does not provide specific guidance for applying the
4 broad definition of “to employ.”⁸ The forum, however, has adopted an approach
5 suggested by the authors of an article examining the history of the FLSA’s suffer or
6 permit to work standard which is to apply the definitions directly and determine first if the
7 work is encompassed within the overall business of the supposed employer. If so, the
8 work is suffered or permitted by the employer unless it is so highly skilled and capital
9 intensive that it forms a completely separate business. Where the business owner
10 supplies the capital and the work is unskilled, a business would be determined to have
11 suffered or permitted the work within the meaning of the definition. See *Enforcing Fair*
12 *Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory*
13 *Definition of Employment*, 46 UCLA L. Rev. 983 (1999). In this case, the Agency
14 proved by a preponderance of the evidence that Respondent OGI’s workers performed
15 work encompassed within OGI’s overall business that was unskilled and required no
16 capital on the part of the workers. Indeed, most of the workers were already on OGI’s
17 payroll as hourly or piece rate workers, agreed to harvest cones for use in OGI’s
18 business to avoid a summer lay-off, and were expected to return to the nursery
19 following the cone harvest.

20 Where an employment relationship has been previously established, as it was in
21 this case, the burden is on the employer to prove a change in status. *In the Matter of*
22 *Superior Forest Products*, 4 BOLI 223 (1984). Undisputed evidence shows that

24 ⁸ However, in the leading *Rutherford Food Corp.* case, the U.S. Supreme Court disregarded isolated
25 factors in determining the employment relationship by viewing the “circumstances of the whole activity”
performed, and concluded that “where the work done, in its essence, follows the usual path of an
employee, putting on [a] label does not take the worker from the protection of the [FLSA].” *Rutherford*,
331 U.S. at 729.

1 Respondent OGI's workers were regular employees prior to the cone harvest.
2 Respondent OGI offered no evidence that explains by what agreement its "regular crew"
3 changed their working relationship with OGI. Respondent Ochoa's only explanation for
4 the change in status during the cone harvest season is that "[I]t wouldn't make any
5 sense [to hire employees]. It's far too – you'd waste a lot of time keeping track of your
6 crew. You know, if you're paying them by the hour, who's working, who's not working.
7 A lot of – it would have a lot of headaches. That's why we buy products instead of hire
8 crew and pay them by the hour."⁹ Essentially, OGI argues that it is too cumbersome to
9 track workers' hours during the cone harvest season and, in order to bypass that
10 requirement, OGI purchases "product" by the piece from its own crew.

11 Other than Respondent Ochoa's self-serving testimony, there is no evidence in
12 the record that the workers were in the "cone selling" business, as a group or as
13 individual entrepreneurs. There is no worker testimony in the record to support
14 Respondent OGI's contention and no other evidence whatsoever that any of
15 Respondent OGI's regular crew or other temporary workers ever "sold" cones to any
16 purchasers during the harvest season of May-August 2000. Instead, the forum infers
17 from Respondent Ochoa's testimony that OGI wanted to avoid the record keeping
18 requirements of ORS chapter 653 and believed it could do so by labeling its regular
19 employees and temporary workers as "cone sellers" during the harvest months.

20 Absent evidence of a specific agreement with the workers to change the nature
21 of their working relationship with Respondent OGI, the forum finds Respondent OGI
22 failed its burden of showing a change of status in the employment relationship
23 established in the record. The forum concludes that the Agency established by a

24 _____

25 ⁹ Respondent OGI also contends it considered the workers to be "independent contractors," which is a slightly different issue than whether OGI simply purchased cones from particular sellers. The independent contractor issue is discussed elsewhere in this Opinion.

1 preponderance of evidence that the workers were employees for the purpose of ORS
2 chapter 653.

3 2. Independent Contractor Issue

4 Respondents moved to amend their answer to include an additional issue at the
5 close of hearing. The motion was initially denied, but upon review of the record, the
6 forum reversed its ruling and the issue Respondents raised is addressed below.¹⁰

7 Respondent Ochoa testified that OGI “treated the cone pickers as independent
8 contractors” because “in our slow time of year in the nursery, which is May, June, July,
9 instead of laying off the regular employees that we had, we would need them again in
10 November, December, so instead of laying them off, there would be opportunity for
11 them to – instead of going south, they stay in the state and work. So we were – I would
12 scout for an area for pinecones and then show the – show the – my employees at the
13 nursery, and they were interested, and then we’d bring them to the – I show them the
14 area and then they’d go pick cones.” As noted elsewhere herein, he later explained that
15 the recordkeeping required for using “employees” as cone harvesters was too
16 cumbersome – “you’d waste a lot of time keeping track of your crew” – hence, the
17 “independent contractor” designation during the cone harvest. The forum finds that
18 Respondents’ reasoning is indicative of its intention to avoid the law rather than the true
19 nature of OGI’s relationship with its workers.

20 In 1996, the forum adopted the FLSA’s test for distinguishing employees from
21 independent contractors, which requires a full inquiry into the true “economic reality” of
22 the employment relationship based on a particularized inquiry into the facts of each
23 case. *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (relying on
24 *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)); see also *Rutherford Food Corp.*

25 _____
¹⁰ See Ruling on Respondent’s Motion to Amend Answer elsewhere herein.

1 *v. McComb*, 331 U.S. 722 (1947) (employee status under FLSA depends not on
2 isolated factors but on the circumstances of the whole activity). Since then, this forum
3 has consistently applied the “economic reality” test to distinguish an employee from an
4 independent contractor under Oregon’s minimum wage and wage collection laws. See
5 *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999); *In the Matter of Frances*
6 *Bristow*, 16 BOLI 28, 37 (1997).

7 The test is a series of factors that depend on the facts in each case and no one
8 factor is dispositive. In this case, a preponderance of credible evidence in the record
9 establishes the following:

10 **a. The degree of control exercised by the alleged employer**

11 Several unique circumstances in this case suggest that Respondent OGI
12 retained or exercised considerable control over the workers who harvested cones for its
13 business. OGI did not need nor did it seek out persons with specialized skills to harvest
14 cones. Instead, it needed unskilled labor to harvest a product necessary to its annual
15 production of wreaths. Because work in the nursery was slow from May through July,
16 OGI offered its regular employees an alternative to lay-off by paying them to harvest
17 cones for OGI’s use in the nursery, *i.e.*, a choice between continuing to receive a pay
18 check or not. Additionally, Respondent OGI determined the compensation method,
19 negotiated with private land owners for sites to harvest cones, and purchased the
20 permits necessary to harvest cones on federal land. All the workers had to do was
21 show up at the predetermined sites and even that was orchestrated by Respondent
22 OGI. Because OGI’s workers did not own automobiles, OGI provided round trip
23 transportation from Washington County to the Deschutes National Forest and provided
24 free lodging for the workers at the work sites. None of the workers spoke English and
25 because they were out in the forest, approximately 140 miles from Bend, the nearest

1 city, the forum infers they were even more dependent upon OGI's control than workers
2 who speak English. Respondent Ochoa's testimony, albeit contradictory, described
3 Andre Gaspar as an OGI foreman and "the guy in charge." Although Ochoa's testimony
4 fell short of characterizing Gaspar as the workers' supervisor, the record is replete with
5 references to the "foreman" Gaspar who tracked and reported, if Ochoa asked, the
6 number of bushels harvested, and who monitored the quality of cones collected by the
7 workers. According to Ochoa, the foreman determined which cones made a "good
8 crop" and rejected those that did not meet OGI's specifications. The forum infers from
9 the record that the manner and means of cone harvesting is not particularly complex
10 and may not require close supervision. However, based on the totality of the foregoing
11 circumstances, the forum concludes that OGI controlled the workers' presence on the
12 work site, the workers' payroll, and the daily working conditions, *i.e.*, lodging and
13 transportation, to an extent indicative of an employer-employee relationship.

14 **b. The extent of the relative investments of the worker and the alleged**
15 **employer**

16 The workers had no investment in OGI's nursery business other than their
17 physical presence in Central Oregon, courtesy of Respondents, and the time they
18 expended gathering cones. Respondents, on the other hand, invested in vehicles to
19 transport the workers to Central Oregon, invested in camping trailers to house the
20 workers for the duration of their stay, and furnished the \$2,500 permits (without which
21 none of the workers could have collected the cones) and equipment the workers used to
22 gather cones. The workers' investment was nil compared to OGI's and is indicative of
23 an employment relationship. The forum finds that the workers could not have
24 performed the work they did for Respondent OGI without OGI's vastly greater
25 investment in the business.

1 **c. The degree to which the worker’s opportunity for profit and loss is**
2 **determined by the alleged employer**

3 Since the workers had no investment in Respondent OGI’s business, they could
4 earn no profit and suffer no loss. Respondent determined and exclusively controlled the
5 amount of the workers’ piece rate and the forum can conclude from the facts that the
6 workers were “wage earners toiling for a living, [rather] than independent entrepreneurs
7 seeking a return on their risky capital investments.” See *Reich v. Circle C. Investments,*
8 *Inc.*, 998 F2d 324, at 328 (5th Cir 1993), citing *Brock v. Mr. W. Fireworks, Inc.*, 814 F2d
9 1042 at 1051 (5th Cir), cert. denied, 484 US 924 (1987). While it is true that the workers
10 in this case had some degree of influence over the amount of money they earned
11 harvesting cones, it was no more than they would have had performing any other
12 piecework. Respondent OGI determined the piece rate and, therefore, ultimately
13 determined the workers’ opportunity for income.

14 OGI argues, however, that the workers were permitted to sell cones to other
15 buyers if they chose to do so and therefore were not dependent upon OGI’s business.
16 The forum finds Respondent Ochoa’s testimony on that point dubious at best. First, he
17 qualified his statement about selling cones to others by stating that the workers were
18 actually obliged to harvest cones only for OGI because OGI provided free lodging on
19 site for the duration of the season. Second, evidence shows that a permit is required
20 before cones may be harvested on federal land and there is no credible evidence that
21 each cone picker, or purported “independent contractor,” had the means or capability of
22 obtaining one, let alone possessed one during the cone harvest. In fact, Respondent
23 OGI purchased the permits that the workers worked under and it defies common sense
24 to suggest that the workers, none of whom spoke English, had the ability or opportunity
25 for entrepreneurship in the middle of the vast Deschutes National Forest. Finally, not

1 one witness testified that any of the workers actually sold cones to other cone
2 purchasers during the season. There is simply no evidence that the workers were
3 anything but economically dependent upon Respondent OGI's business. Contrary to
4 Respondents' contention, compensation by piece rate¹¹ is not independently indicative
5 of independent contractor status. Except for the exclusion set forth in ORS 653.020(1),
6 employees who receive a piece rate must still earn at least the minimum wage for every
7 hour worked. Respondent asserted no such exclusion. The aforementioned facts
8 portend an employer-employee relationship.

9 **d. The degree of skill and initiative required to perform the work**

10 While the amount of money the workers earned somewhat depended upon the
11 efficiency of their work, the skill required was limited to their ability to bend over and pick
12 up cones. Moreover, the initiative required for picking cones is no more than that
13 required of any other piecework, and, in any event, does not reach the level of an
14 enterprise for which success depends on the initiative, judgment or foresight of the
15 typical independent contractor.

16 **e. The permanency of the relationship**

17 With few exceptions, the workers were Respondent OGI's "regular" nursery crew
18 who had worked for OGI prior to the cone harvest and who returned to the nursery after
19 the cones were harvested. Except for the summer months, the crew was on OGI's
20 regular payroll and OGI treated them as employees. As noted earlier herein, OGI
21 proffered no evidence that explains the temporary change in its relationship with its
22 workers, other than OGI's acknowledgement, through its president, that maintaining
23 records for workers out in the field would "cause a lot of headaches." By merely
24 designating its workers "cone sellers" or "independent contractors," Respondent OGI

25 _____
¹¹ ORS 653.010(9) defines "piece-rate" as "a rate of pay calculated on the basis of quantity of the crop

1 cannot change the true nature of its relationship with the workers. The preponderance
2 of evidence in the record shows that most of the workers were not hired for a temporary,
3 limited period for their unique skill and expertise, but were regular employees for an
4 indefinite period whose designation only changed temporarily for the convenience of
5 Respondent OGI.

6 **Conclusion**

7 For the above reasons, the forum finds the workers were economically
8 dependent upon Respondent OGI's business. The "economic reality" in this case is that
9 the cone harvest is an integrated unit of Respondent OGI's production and that the work
10 involved is neither highly skilled nor capital intensive so as to constitute a completely
11 separate business.

12 Respondents believe that the independent contractor issue is a defense and that,
13 consequently, the Agency bears the burden to disprove Respondents' allegation that
14 the workers were independent contractors. The forum need not decide here whether
15 Respondents' allegations of independent contractor status raise a defense or instead an
16 affirmative defense on which Respondents would bear the burden of proof. The forum
17 finds that, even if the burden of proof rested on the Agency, the Agency satisfied that
18 burden.

19 The forum concludes, therefore, that OGI suffered or permitted workers to
20 perform work for OGI, and the corporation is liable for any violations found. ORS
21 653.010(3) & (4). OGI was an employer subject to ORS chapter 653 and despite the
22 lack of testimony from OGI workers, there is sufficient evidence to conclude the workers
23 were OGI's employees. OGI and its corporate president admit the workers were not
24

25 _____
harvested."

1 given pay stubs with each paycheck and the forum concludes that OGI is liable for the
2 failure to do so.

3 **E. Failure to Make and Keep Available Required Records in Violation of ORS**
4 **653.045(1)**

5 In order to prevail, the Agency must establish that Respondents (1) employed
6 workers and (2) failed to make and keep available required records. The forum has
7 already found herein that Respondent Ochoas' Greens, Inc. employed 29 workers
8 between April and August 2000 and was subject to Oregon wage and hour laws.
9 Respondents admit that other than the corporate "Account Quick Report" the
10 corporation maintained during the applicable time period, the corporation did not make
11 and keep records in accordance with ORS 653.045(1). The forum concludes, therefore,
12 that OGI is liable for 29 violations of ORS 653.045(1).

13 **F. Misrepresentations, False Statements/Certifications and Willful**
14 **Concealment on the License Application in Violation of ORS 658.440(3)(a)**

15 *Misrepresentation*

16 A misrepresentation, for the purpose of ORS 658.440(3)(a), is "an assertion
17 made by a license applicant which is not in accord with the facts, where the applicant
18 knew or should have known the truth of the matter asserted, and where the assertion is
19 of a substantive fact which is influential in the [Commissioner's decision] to grant or
20 deny a license." *In the Matter of Alejandro Lumbreras*, 12 BOLI 117, 125 (1993).
21 Although the Agency's substantive allegation refers to "intentional" misrepresentations,
22 this forum has previously held that the Legislature did not intend misrepresentation to
23 include an intention to deceive or mislead because of its "omission of any word next to
24 'misrepresentation' showing an element of intent." *See In the Matter of Raul Mendoza*,
25 7 BOLI 77, 82-83 (1988). The forum also observed that the Legislature did not intend
that a false assertion, such as an erroneous zip code on a license application, would be

1 grounds for license denial; hence, the requirement that a misrepresentation be of a
2 substantive fact that is influential in the decision whether to grant or deny a license. *Id.*
3 at 82.

4 *False Statement*

5 A false statement, for the purpose of ORS 658.440(3)(a), is “an incorrect
6 statement made with knowledge of the incorrectness or with reckless indifference to the
7 actual facts, and with the intention to mislead or deceive.” As with a misrepresentation,
8 the false statement must also be about a substantive matter that is influential in the
9 decision to grant or deny a license. *Id.* at 83.

10 *Willful Concealment*

11 Willful concealment means, for the purpose of ORS 658.440(3)(a), “withholding
12 something which an applicant knows and which the applicant, in duty, is bound to
13 reveal, said withholding must be done knowingly, intentionally, and with free will * * *
14 and must be of a substantive matter which is influential in the [Commissioner’s decision]
15 to grant or deny a license.” *Id.* at 84.

16 *Standard of Proof*

17 This forum has previously held that in the case of a license disciplinary action
18 based upon misrepresentation, false statement or willful concealment, the forum
19 employs clear and convincing evidence as the standard of proof. *In the Matter of*
20 *Rogelio Loa*, 9 BOLI 139, 146 (1990). Such evidence is defined as “evidence that is
21 free from confusion, fully intelligible and distinct and for which the truth of the facts
22 asserted is highly probable.” *Id.* at 146, *quoting Riley Hill General Contractor v. Tandy*
23 *Corp.*, 303 Or 390 (1987).

24 Accordingly, the forum has applied the clear and convincing evidence standard to
25 the Agency’s five allegations that Respondents made misrepresentations, false

1 statements, and willfully concealed information on their joint farm labor license
2 application.

3 **Respondents' statements and certifications**

4 (a) The Agency alleges that Respondents' statement and certification that
5 Respondent Ochoa owns 50 percent of Respondent Ochoas' Greens, Inc. constitutes a
6 misrepresentation or a false statement. The forum finds neither applies in this case. No
7 evidence was offered to show that Respondents' assertion was incorrect or not in
8 accord with the facts at the time the assertion was made on the application.
9 Respondent Ochoa had no inkling at the hearing whether he owned 50 or 51 percent of
10 the corporation. He testified that he had always believed he and his wife owned the
11 business "50/50," but agreed he told his daughter, and reported to BOLI, that he owned
12 51 percent in response to BOLI's subsequent inquiry about the ownership. Since the
13 statement Respondents made on the application is a statement against interest, *i.e.*,
14 imposes duties and liabilities on the other majority shareholder, the forum finds it is
15 more likely than not that the assertion on the application is true. In the absence of clear
16 and convincing evidence to the contrary, the forum concludes that Respondents did not
17 make a misrepresentation or false statement when stating and certifying that
18 Respondent Ochoa owns 50 percent of the corporation.

19 (b) The forum finds the Agency established by clear and convincing evidence
20 that Respondents' statement and certification that no other person, other than
21 Respondent Ochoa, has a financial interest in Respondent Ochoas' Greens, Inc. is a
22 misrepresentation. Respondents acknowledge that Respondent Ochoa's wife is a co-
23 owner of the family business. Respondents, therefore, knew or should have known that
24 Respondent Ochoa was not the only one with a financial interest in the business.
25 Respondents' argument that Respondent Ochoa did not understand the question, does

1 not understand the term “shareholder,” and believed the inquiry referred to financially
2 interested persons outside the family business, is not believable. The facts establish
3 that the business has been incorporated since 1994, and on a license application
4 Respondents submitted in 1997, Ochoa listed his wife as a financially interested person
5 with a 25 percent interest in the corporation. Given that Respondent Ochoa indicated
6 on the pending application that he owned 50 percent of the business, the forum
7 concludes that Respondent Ochoa knew his statement that “no other persons have a
8 financial interest” in the business was incorrect. Additionally, the disclosure of those
9 financially interested in Respondents’ proposed operations is clearly a substantive
10 matter, influential in the decision to grant or deny a license, because in order to properly
11 enforce the farm labor contractor laws, the Commissioner must know to whom he is
12 licensing. There is no clear and convincing evidence that Respondent Ochoa’s
13 statement was made with the intention to mislead or deceive the Agency. The forum
14 finds, however, that Respondents misrepresented the number of persons financially
15 involved in Respondents’ business, in violation of ORS 658.440(3)(a).

16 (c) The Agency further alleges that Respondents willfully concealed “the
17 name, address and telephone numbers of all persons financially interested in
18 Respondent Ochoas’ Greens, Inc. other than Respondent Ochoa.” OAR 839-015-
19 0505(1) defines “knowingly” or “willfully” as:

20 “action undertaken with actual knowledge of a thing to be done or omitted
21 or action undertaken by a person who should have known the thing to be
22 done or omitted. A person ‘should have known the thing to be done or
23 omitted’ if the person has knowledge of facts or circumstances which, with
24 reasonably diligent inquiry, would place the person on notice of the thing
25 to be done or omitted to be done. A person acts knowingly or willfully if
the person has the means to inform himself or herself but elects not to do
so. For purposes of this rule, the farm labor contractor * * * is presumed to
know the affairs of their business operations relating to farm * * * labor
contracting.”

1 Here, Respondents had a duty to reveal to the Agency the identity of all persons
2 financially interested in the business. The facts establish that Respondents had actual
3 knowledge of at least one other person’s financial interest in the business, and failed to
4 disclose her identity and other pertinent information about her on the license application.
5 Such data is a substantive matter influential in the commissioner’s decision to grant or
6 deny a license. The forum concludes that Respondents withheld that information
7 knowingly, intentionally, and with free will, in violation of ORS 658.440(3)(a).

8 (d) The Agency alleges Respondents made a misrepresentation or false
9 statement when Respondents certified that there are no judgments or administrative
10 orders of record against Respondents. The facts establish that Respondent Ochoa
11 entered into a consent judgment in U.S. District Court in 1994, and that both
12 Respondents entered into a stipulated consent order with BOLI in 1999. Both
13 documents are consent judgments, “the provisions of which are settled and agreed to
14 by the parties to the action,” *i.e.*, settlement agreements. See Black’s Law Dictionary
15 842 (6th ed. 1990). The Agency has not alleged Respondents breached either
16 agreement. Nor is there evidence that the agreements remain recorded or docketed in
17 a court or with the Agency. While each document constitutes a record, the term “of
18 record” as it is used in the contractor license application is defined as follows:

19 “Recorded; entered on the records; existing and remaining in or upon the
20 appropriate records * * *.”

21 *Id.* at 1085. Although the license application does not denote a specific type of
22 judgment or administrative order, the forum infers from the language that the Agency’s
23 intent is to establish whether a contractor has judgment liens pending that could affect
24 the contractor’s competence to hold a license, *i.e.*, the ability to pay debts incurred or
25

1 wages earned while performing a farm labor contract.¹² In this case, there is no
2 evidence that Respondents had judgment liens or a final administrative judgment
3 pending against them and the forum therefore concludes that Respondents did not
4 make a misrepresentation or false statement when they denied having such on their
5 joint license application.

6 (e) The Agency further alleges, and the forum finds by clear and convincing
7 evidence, that Respondents made a misrepresentation when they certified all of the
8 information on the license application was true and correct. Respondents knew or
9 should have known they were not giving correct information when responding to
10 questions about the financial composition of their business. A contractor's truthfulness
11 is a substantive matter that directly influences the Agency's decision to grant or deny a
12 license and is the core of the contractor's character, competence and reliability,
13 particularly with respect to certifying payroll records during the course of forestation or
14 reforestation contracts. In this case, Respondents misrepresented the truthfulness and
15 accuracy of the information they provided the Agency on their license application and
16 the forum finds Respondents violated ORS 658.440(3)(a).

17 **RESPONDENT'S CHARACTER, COMPETENCE AND RELIABILITY**

18 The Agency proposes to deny a farm labor contractor license to Respondents
19 based on their multiple violations of ORS chapter 658 and ORS chapter 653, which
20 violations demonstrate that their character, competence, and reliability make them unfit
21 to act as a farm labor contractor.

22 ORS 658.420 provides that the Commissioner shall investigate each applicant's
23 character, competence and reliability and any other matter relating to the manner and
24

25 ¹² The question on the application is: "Are there any judgments or administrative orders of record against you?"

1 method by which the applicant proposes to conduct and has conducted operations as a
2 farm labor contractor. The Commissioner shall issue a license only if satisfied as to the
3 applicant's character, competence, and reliability.

4 In making the determination, the Commissioner must consider whether an
5 applicant has violated any provision of ORS 658.405 to 658.503 or the applicable rules.
6 See OAR 839-015-0145(7), 839-015-0520(3)(a). Here, the Agency established that
7 Respondents, while previously licensed, repeatedly failed to timely file certified true and
8 accurate copies of payroll reports in accordance with ORS 658.417(3). Evidence shows
9 that more recently on four contracts Respondents failed to submit a single timely and
10 accurate certified payroll record and instead submitted uncertified payroll records late
11 six times. On all of the contracts the first submission was defective, and on several
12 submissions Respondents failed to report the number of hours each employee worked.
13 Such actions demonstrate Respondents do not have the requisite character,
14 competence and reliability to act as farm labor contractors.¹³

15 Moreover, where an applicant has made a misrepresentation, false statement, or
16 willful concealment on a license application, or has failed to comply with federal, state,
17 or local laws relating to the payment of wages, such violations are considered to be of
18 such magnitude and seriousness that the Commissioner may propose to deny the
19 license application. OAR 839-015-0520(1). In this case, the Agency established that
20 Respondents willfully concealed information and made two misrepresentations on their
21 license application and failed on two occasions to comply with state wage and hour
22 laws. Each of these is of such magnitude or seriousness that Respondents may be

23
24 ¹³ See, e.g., *In the Matter of John Mallon*, 12 BOLI 92, 101-102 (1993) (the forum found that where a
25 contractor repeatedly submitted untimely and inaccurate certified payroll reports, such actions
demonstrated that the contractor's character, competence, and reliability make him unfit to act as a farm
labor contractor); *In the Matter Alvaro Linan*, 9 BOLI 44, 48 (1990) (the forum found that a contractor who

1 denied a farm labor contractor license. Having found multiple violations that
2 demonstrate Respondents lack the character, competence, and reliability to act as a
3 farm labor contractor, the forum denies their joint application for a farm labor contractor
4 license for a period of three years, effective the date the Final Order in this matter
5 issues.

6 **CIVIL PENALTIES**

7 The Agency proposed civil penalties for (1) Respondents' failure to timely file
8 accurate certified payroll reports (8 violations), in violation of ORS 658.417(3); (2)
9 Respondents' failure to provide itemized statements of deductions to employees (106
10 violations), in violation of ORS 653.045(3); (3) Respondents' failure to make and retain
11 required employment records (30 violations), in violation of ORS 653.045(1); and (4)
12 Respondents' misrepresentations, false statements, and willful concealment on
13 Respondents' farm labor contractor license application (1 violation), in violation of ORS
14 658.440(3)(a).¹⁴

15 The Commissioner may assess a civil penalty not to exceed \$2,000 for each of
16 the farm labor violations found herein. ORS 658.453(1)(c) and (e); OAR 839-015-
17 0508(1)(e), (f), (j), and (2)(b). The Commissioner may consider aggravating and
18 mitigating circumstances when determining the amount of civil penalty to impose. OAR
19 839-015-0510(1). It shall be the responsibility of the Respondents to provide the
20 Commissioner with any mitigating evidence. OAR 839-015-0510(2).

21 The Commissioner may also assess a civil penalty not to exceed \$1000 for each
22 willful violation of ORS 653.045. ORS 653.256; OAR 839-020-1000; 839-020-1010.
23 Willfully means knowingly, and is described as follows in OAR 839-020-0004(33):
24

25 repeatedly fails to observe agency rules by failing to file certified payroll records is unreliable and the
agency should deny the contractor a license).

1 “An action is done knowingly when it is undertaken by a person with actual
2 knowledge of a thing to be done or omitted or action undertaken by a
3 person who should have known the thing to be done or omitted. A person
4 ‘should have known the thing to be done or omitted’ if the person has
5 knowledge of facts or circumstances which, with reasonably diligent
6 inquiry, would place the person on notice of the thing to be done or
7 omitted to be done. A person acts willfully if the person has the means to
8 inform himself or herself but elects not to do so. For purposes of these
9 rules, the employer is presumed to know the requirements of ORS
10 653.010 to 653.261 and these rules.”

11 As with farm labor violations, the Commissioner may consider aggravating and
12 mitigating circumstances when determining the amount of civil penalty to impose for
13 wage and hour violations and it is the responsibility of Respondents to provide the
14 Commissioner with any mitigating evidence. OAR 839-020-1020(1) and (2).

15 **FAILURE TO FILE COMPLETE AND ACCURATE CERTIFIED PAYROLL RECORDS**

16 Respondents knew of their obligation to submit accurate and complete certified
17 payroll records and failed to do so multiple times on multiple USFS contracts. The
18 violations are aggravated by Respondents’ recent history of failing to file complete,
19 accurate, and certified records that resulted in a written consent order that was signed
20 by Respondents in February 1999, which included a \$4,000 penalty. Respondents’
21 assurances at hearing of future compliance by improving and monitoring their
22 bookkeeping system ring hollow in view of the 1999 consent agreement wherein
23 Respondents acknowledged their previous failure to comply with the certified payroll
24 report requirements. The violations are only somewhat mitigated by the absence of any
25 evidence showing Respondents’ workers were not paid appropriately by Respondents.
Having considered the aggravating and mitigating circumstances, and in light of recent
orders related to violations of ORS 658.317(3), the forum finds the following penalties
more appropriate than the \$2,000 per violation requested by the Agency:

¹⁴ The Agency also sought civil penalties for alleged violations of ORS 658.440(1)(c) and (d). Elsewhere

1 \$1,000 for deficient records filed on USFS contract #0092 (\$1,000 for one
2 violation).

3 \$4,000 for untimely, uncertified, and deficient records filed on USFS
4 contract #0078 (\$1,000 for each of four violations).

5 \$2,000 for untimely and uncertified records filed on USFS contract #0073
6 (\$1,000 for each of two violations).

7 \$1,000 for defective records filed on the St. Helens USFS contract (\$1,000
8 for one violation).

9 The forum finds Respondents Ochoa and Ochoas' Greens, Inc. jointly and severally
10 liable for \$8,000 assessed as civil penalties for the eight violations found herein.

11 **FAILURE TO PROVIDE EMPLOYEES WITH ITEMIZED STATEMENTS OF EARNINGS**

12 The forum found that Respondent Ochoas' Greens, Inc. employed 29 workers
13 between May and August 2000 to harvest cones in Central Oregon and failed to provide
14 them with written itemized statements of earnings each time they were paid for work
15 performed. Evidence shows that 106 paychecks were issued to OGI's workers,
16 constituting a separate and distinct violation each time a check issued to an employee.
17 OAR 839-020-1000. One of the purposes of the statute is to afford workers an
18 opportunity to verify that they have been correctly paid for all of the hours they worked.
19 *In the Matter of Labor Ready*, 22 BOLI 245, 289 (2001). In this particular case, although
20 evidence shows the workers were paid on a piece rate basis and knew how much they
21 earned for each bag of cones harvested, they had no way of knowing whether they
22 were paid at least minimum wage for the hours they worked because OGI did not
23 provide them with the information. Accordingly, the forum finds the violations serious
24 because they potentially affect the substantive rights of workers. The Agency seeks
25 \$150 for each violation. ORS 653.256 allows the commissioner to assess a maximum
\$1,000 civil penalty for each violation of ORS 653.045. Having considered the
aggravating and mitigating circumstances, the forum finds the Agency's proposed \$150

herein, the forum dismissed those allegations for lack of evidence.

1 per violation an appropriate penalty. Therefore, the forum finds Respondent Ochoas'
2 Greens, Inc. liable for \$15,900 in civil penalties for 106 violations of ORS 653.045(3).

3 **FAILURE TO MAKE AND KEEP AVAILABLE PAYROLL RECORDS**

4 The Agency seeks \$200 for each of 29 violations of ORS 653.045(1). The
5 violations are serious because failure to make and keep available payroll records
6 significantly impedes the commissioner's ability to determine whether employees are
7 properly compensated, which potentially affects the substantive rights of the workers.
8 The forum finds that given the seriousness of the violation, and that OGI knew or should
9 have known it was required to keep records for its employees, \$200 per violation is
10 reasonable. There is no evidence of mitigation on the part of Respondents. Therefore,
11 the forum finds Respondent Ochoas' Greens, Inc. liable for \$5,800 in civil penalties for
12 29 violations of ORS 653.045(1).

13 **MAKING MISREPRESENTATIONS, FALSE STATEMENTS, AND WILLFUL**
14 **CONCEALMENTS ON FARM LABOR LICENSE APPLICATION.**

15 Although each violation is separate and distinct,¹⁵ the Agency only seeks the
16 maximum civil penalty of \$2,000 for Respondents' two misrepresentations and willful
17 concealment of information on the farm labor license application. Based on
18 Respondents' history of farm labor violations, the fact that Respondents had actual
19 knowledge of information that was either misrepresented or not disclosed, and
20 Respondents' failure to establish any mitigation, the forum finds \$2,000 an appropriate
21 penalty. Respondents Ochoa and Ochoas' Greens, Inc. are jointly and severally liable
22 for \$2,000 in civil penalties for their multiple violations of ORS 658.440(3).

23
24
25 _____
¹⁵ See OAR 839-015-0507.

1 **RESPONDENTS' EXCEPTIONS**

2 Respondents filed exceptions to the ruling on Respondents' motion to amend its
3 answer, the proposed ultimate findings of fact, the proposed conclusions of law, the
4 proposed opinion, the proposed denial of license, and the proposed civil penalties in the
5 proposed order. The forum changed portions of the order in response to some of the
6 exceptions and denied the remainder of the exceptions as discussed below.

7 **A. Exception 1 – Ruling on Motion**

8 Respondents object to the forum's denial of Respondents' motion to amend its
9 answer to conform to the evidence presented at hearing. The forum has reconsidered
10 the motion and for reasons stated elsewhere herein, Respondents' motion to amend
11 their answer is granted and the "independent contractor" issue raised in the amendment
12 is addressed in the Opinion section of this Order.

13 **B. Exception 2 – Proposed Ultimate Findings of Fact**

14 (1) Respondents correctly assert that the forum failed to address or consider
15 Respondents' affirmative defense of waiver. The forum revised applicable sections of
16 the order to cure the omission.

17 (2) Respondents' exception to the ultimate finding that Respondents willfully
18 failed to file timely, accurate and complete payroll records is denied. The
19 preponderance of the credible evidence on the whole record supports the conclusion
20 contained therein.

21 (3) Respondents' objection to the ultimate finding that characterizes "cone
22 pickers" as "employees" is denied. In the ultimate findings, the forum found that
23 Respondent OGI employed workers to gather cones, hence the term "employees" to
24 characterize the workers.

1 (4) Respondents agree with the ultimate finding that failure to disclose the
2 identity of persons with a financial interest in an applicant's business is a substantive
3 matter. Respondents object, however, to its application to Respondent Ochoa's wife,
4 because "virtually every married couple in the State of Oregon has a financial interest in
5 one or the other's business operations" and that in this particular case "the failure to list
6 ones wife as having a financial interest is insubstantial and irrelevant in a license
7 application." Respondents miss the point. Evidence shows Respondent Ochoa's wife
8 is a substantial stakeholder in the business as the corporate secretary and only other
9 shareholder. Respondents' failure to disclose the wife's financial interest impedes the
10 Commissioner's ability to know whom he is licensing and hinders enforcement of ORS
11 chapter 658. Accordingly, the disclosure of who is financially interested in an
12 applicant's proposed operations is a substantive matter, influential in the decision to
13 grant or deny a license. ORS 658.415(1)(d) makes that information a necessary part of
14 the application and does not qualify the question by excluding an applicant's spouse.
15 Respondents' exception is denied.

16 **C. Exception 3 – Proposed Conclusions of Law**

17 1. Proposed Conclusion of Law 5

18 As noted elsewhere herein, Respondents take exception to the lack of discussion
19 regarding their waiver defense. In response, the forum has addressed Respondents'
20 defense in the opinion section of this Order.

21 2. Proposed Conclusion of Law 7

22 In this exception, Respondents point out that the forum failed to conclude that
23 Respondents' misrepresentations or willful concealment were of a substantive matter
24 that is influential in the in the decision to grant or deny a farm labor contractor license.
25 The forum has clarified Conclusion of Law 7 to reflect Respondents' exception.

1 3. Proposed Conclusions of Law 8, 9, and 10

2 All three conclusions are based on the preponderance of credible evidence in the
3 whole record. Thus, Respondents' exceptions are denied.

4 **D. Exception 4 – Proposed Opinion**

5 For the reasons set forth above, and except for the changes noted herein,
6 Respondents' exception to the proposed opinion is denied.

7 **E. Exception 5 – Proposed Denial of License**

8 Respondents except to the proposed denial of a farm labor contractor license on
9 four grounds. First, Respondents contend that none of the violations for failure to timely
10 file accurate and complete certified payroll records were of a substantive nature.
11 Notwithstanding Respondents' other violations that demonstrate their lack of character,
12 competence and reliability to hold a license, a preponderance of the credible evidence
13 on the whole record supports the conclusion that Respondents filed several payroll
14 records that were not certified, did not include the number of hours worked by each
15 employee, and, in one case, did not provide a contract number. Each of those
16 omissions is substantive and is a repeat violation. Respondents' exception on that
17 ground is denied. Second, Respondents contend that their prior violations were more
18 substantive in nature and in the present case the violations are primarily "clerical
19 errors." The evidence shows otherwise. Respondents' repeated failure to certify their
20 payroll records and to report required information on several contracts is substantive in
21 nature and demonstrates Respondents' lack of competence to handle the paperwork
22 required of a farm labor contractor. Third, Respondents point out that the forum's
23 conclusion that Respondents failed to report the number of hours each employee
24 worked on every submission is incorrect. The forum has modified the opinion section of
25 the order to reflect the factual findings. Finally, Respondents' assertion that the only

1 evidence of misrepresentation on Respondents' license application is Respondents'
2 "uncertainty as to Respondent's wife's financial interest in the corporation" is erroneous.
3 The preponderance of evidence on the whole record establishes that Respondents
4 misrepresented the number of persons financially interested in the corporation and
5 willfully concealed information they were required to disclose. Both are substantive
6 matters that influence the Commissioner's decision to issue a license. Except for the
7 modification to the opinion section noted herein, Respondents' exception is denied.

8 **F. Proposed Civil Penalties**

9 Respondents challenge the proposed civil penalties as excessive and not
10 warranted by the facts in the record. The penalties for each violation established are
11 supported by the preponderance of evidence on the whole record and warranted by the
12 aggravating factors established in the record. Respondents' exception is denied.

13 **ORDER**

14 NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the
15 penalties assessed for violations of ORS 658.417(3), ORS 658.440(1)(d) and (e), and
16 ORS 658.440(3)(a), the Commissioner of the Bureau of Labor and Industries hereby
17 orders **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** to deliver to the Fiscal
18 Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland,
19 Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in
20 the amount of TEN THOUSAND DOLLARS (\$10,000), plus any interest thereon that
21 accrues at the legal rate between the date the Final Order issued, September 6, 2002,
22 until Respondents comply with this Final Order on Reconsideration;

23 FURTHERMORE, as authorized by ORS 653.256, and as payment of the
24 penalties assessed for violations of ORS 653.045(1) and (3), the Commissioner of the
25 Bureau of Labor and Industries hereby orders **Ochoas' Greens, Inc.** to deliver to the
Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street,

1 Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and
2 Industries in the amount of TWENTY ONE THOUSAND SEVEN HUNDRED DOLLARS
3 (\$21,700), plus any interest thereon that accrues at the legal rate between the date the
4 Final Order issued, September 6, 2002, until Respondents comply with this Final Order
5 on Reconsideration;

6 FURTHERMORE, the Commissioner of the Bureau of Labor and Industries
7 hereby denies **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** each a license to act
8 as a farm labor contractor, effective on the date of the Final Order. **Ochoas' Greens,**
9 **Inc.** and **Rodrigo Ayala Ochoa** are each prevented from reapplying for a license for
10 three years from the date of this denial, in accordance with ORS 658.415(1)(c) and
11 OAR 839-015-0520.

12
13 DATED this _____ day of _____, 2003.
14
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18 _____
19 Dan Gardner, Commissioner
20 Bureau of Labor and Industries
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1 **JUDICIAL REVIEW NOTICE**

2 Pursuant to ORS 183.482, you are entitled to judicial review of this Final Order
3 on Reconsideration. To obtain judicial review, you must file an Amended Petition for
4 Judicial Review with the Court of Appeals in Salem, Oregon, within sixty (60) days of
5 service of this Final Order on Reconsideration.

6 If you file an Amended Petition for Judicial Review, you must also serve a copy of
7 the Amended Petition on the BUREAU OF LABOR AND INDUSTRIES and the
8 DEPARTMENT OF JUSTICE -- APPELLATE DIVISION at the following addresses:

9 BUREAU OF LABOR AND INDUSTRIES
10 HEARINGS UNIT
11 1025 STATE OFFICE BUILDING
12 800 NE OREGON STREET # 32
13 PORTLAND, OREGON 97232-2162

14 DEPARTMENT OF JUSTICE
15 APPELLATE DIVISION
16 400 JUSTICE BUILDING
17 SALEM, OREGON 97310

18 If you file an Amended Petition for Judicial Review and if you wish to stay the
19 enforcement of this Final Order on Reconsideration pending judicial review, you must
20 file a request with the Bureau of Labor and Industries, at the address above. Your
21 request must contain the information described in ORS 183.482(3) and OAR 137-003-
22 0090 to OAR 137-003-0092.

23 CERTIFIED TO BE A TRUE AND
24 CORRECT COPY OF THE ORIGINAL
25 AND THE WHOLE THEREOF.

OchoasGreens Revised Order on Reconsideration