

In the Matter of
PAUL A. WASHBURN,
Diann M. Washburn, and
Washburn Reforestation, Inc.,
Respondents.

Case Number 02-99
Final Order of the Commissioner
Jack Roberts
Issued October 29, 1998.

SYNOPSIS

Respondents, licensed farm/forest labor contractors, violated ORS 658.440(1)(g) by failing to execute written agreements with five workers using either Form WH-153 or an equivalent document. The Commissioner ordered Respondents to pay a \$750.00 civil penalty for each of the five violations, for a total of \$3,750.00. ORS 658.440(1)(f) and (g).

The above-entitled contested case came on regularly for hearing before Administrative Law Judge (ALJ) Warner W. Gregg. The hearing was held on September 15, 1998, in the conference room of the State of Oregon Adult and Family Services Division, 3600 East Third Street, Tillamook, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Washburn Reforestation, Inc. (Washburn Reforestation), Paul Washburn, and Diann Washburn (collectively, "Respondents") were represented

by Mark Comstock, Attorney at Law. Paul Washburn and Diann Washburn were present throughout the hearing.

The Agency called one witness: Katy Bayless, a Compliance Specialist with the Agency. Respondents called Paul Washburn and Diann Washburn as witnesses.

Administrative exhibits X-1 to X-8 were offered and received into evidence. The participants stipulated to Agency exhibits A-1 to A-6 and Respondent exhibits R-1 to R-17, and the ALJ received each of those exhibits into evidence. The record closed on September 15, 1998.

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

FINDINGS OF FACT -- PROCEDURAL

1) On June 29, 1998, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The Notice of Intent cited the following basis for the assessment: "Failure To Execute A Written Agreement Containing The Terms And Conditions Of Employment For Each Worker At The Time Of Hire Or Prior To Work Being Performed. (Five Violations) * * * CIVIL PENALTY of \$5000.00 (Five violations @ \$1,000 per violation); OAR 839-15-508(1) (h)." The Notice of Intent stated that Respondents had 20 days from the date they received the Notice to request a contested case hearing.

2) The Notice of Intent was served on all Respondents on July 2, 1998.

3) By letter dated July 21, 1998, attorney Mark B. Comstock notified the Agency that he represented all Respondents in this matter. In that letter, the Respondents each requested a hearing on the Agency's intended action. Respondents

enclosed with the letter their Answer and Affirmative Defenses. The Agency received the letter and enclosures on July 22, 1998.

4) On July 31, 1998, the Agency requested a hearing from the Hearings Unit. On August 6, 1998, the ALJ issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to Respondents a "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-050-0000 through 839-050-0440.

5) On August 27, 1998, the ALJ issued a discovery order to the participants directing them each to submit a summary of the case, including: 1) a list of the witnesses to be called; 2) the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence; and 3) a statement of any agreed or stipulated facts. The summaries were due by September 8, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency and Respondents submitted timely summaries.

6) At the start of the hearing, Respondents' attorney said he had received and read the Summary of Contested Case Rights and Procedures and had no questions about it.

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

8) At the close of the Agency's case, Respondents moved to dismiss on the ground that the Commissioner lacked jurisdiction. Respondents also moved to strike

the Agency's request for enhanced penalties. The ALJ denied both motions for reasons explained in the Opinion section of this order.

9) Pursuant to OAR 839-50-360 and the motion of Respondents' attorney, the ALJ requested written closing arguments from Respondents and the Agency, to be filed by September 25, 1998.

10) On or about September 23, 1998, the ALJ orally agreed to extend the due date for written argument until September 28, 1998, pursuant to a stipulation of counsel for Respondents and case presenter Lohr. Respondents and the Agency submitted timely written arguments.

11) On October 6, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. By the terms of the proposed order and in accordance with OAR 839-050-0380, exceptions were due by October 16, 1998, unless a request for extension of time was submitted no later than that day. OAR 839-050-0050(2). The Forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondent Washburn Reforestation, Inc., was a corporation registered in the State of Oregon. Respondent Paul Washburn was president of the corporation and was responsible for management of all its activities. Respondent Diann Washburn was the corporation's secretary and managed its payroll and accounts. Paul and Diann Washburn were the sole shareholders of Washburn Reforestation.

2) At all material times, Respondents were licensed as a farm/forest labor contractor in Oregon. Respondents employed between 40 and 100 persons to perform forestation and reforestation activities, including tree planting, precommercial thinning, slash burning, wildfire suppression, and chemical operations. Ninety percent of

Respondents' business involved performing forestation/reforestation contracts with private parties. Ten percent of Respondents' business involved performing state and federal contracts, including contracts with the United States Forest Service.

3) Respondents own two or three acres of land that is planted in Christmas trees. Except when they worked with those trees, Respondents' workers performed labor on land that Respondents did not own or operate. Respondents' workers always were supervised by Respondents' foremen; no other party controlled or directed their work.

4) Respondents generally expected their workers to work 40 hours per week throughout the year and did not employ workers on a limited-duration basis. Workers would move from one type of job (e.g., thinning) to another (e.g., planting) based on the time of year and the work available. The workers' hourly pay rates depended on their experience and the type of work they performed. A typical starting wage was \$7.00 per hour. Respondents did not provide workers with housing or day care services.

5) Respondents required workers to provide certain personal equipment, including boots. Respondents purchased these items in bulk and permitted (but did not require) workers to purchase them from Respondents, with payment made by payroll deduction. At material times, Respondents did not have workers sign payroll deduction authorization forms before making those deductions. By the time of the hearing, Respondents had changed their practice and required workers to sign a deduction authorization form if they wished to take payroll draws or have the cost of equipment deducted from their paychecks.

6) ORS 658.440(1)(f) requires farm/forest labor contractors to furnish each worker with a written statement that describes certain terms and conditions of

employment. ORS 658.440 (1)(g) requires farm/forest labor contractors to execute written agreements with workers containing those terms and conditions.

7) The Agency has developed forms that employers may use to fulfill the requirements of ORS 658.440(1)(f) and (g). Form WH-151 describes, in narrative form, the rights of employees of farm/forest labor contractors. Farm/forest labor contractors may use that form to satisfy the requirements of ORS 658.440(1)(f), or they may use another document that includes all required information.

8) When completed and executed by both parties, Form WH-153 is a contractual agreement between the farm/forest labor contractor and its worker. Farm/forest labor contractors may use that form to satisfy their obligations under ORS 658.440(1)(g), or they may use a different document that incorporates all elements of that form. Form WH-153 specifies, among other things: the worker's rate of pay; whether bonuses may be given; whether personal loans will be made; whether housing, health and day care services are provided; the starting and approximate ending dates of employment under the agreement; the working days and hours; whether the worker must provide necessary equipment and clothing; whether the worker may purchase any such equipment and clothing from the contractor; whether a labor dispute exists at the worksite; and the owner of the land or operation for the job. By signing Form WH-153, "[t]he parties agree that worker rights and remedies enumerated on Form WH-151 are incorporated in this agreement by reference * * *."

9) On January 13, 1997, Respondent Paul Washburn signed a certification of compliance, certifying that he had read and understood Forms WH-151 and WH-153 and would, "in accordance therewith, provide this information to all subject workers as required by law." On February 3, 1997, Respondent Diann Washburn signed a substantively identical certification. Paul Washburn signed similar certifications each

year from 1986 through 1996. Diann Washburn signed similar certifications each year from 1993 through 1996.

10) Respondents required their workers, at the time of hire, to sign form WH-151, a copy of Washburn Reforestation's early return to work policy, and a copy of Washburn Reforestation's personnel policy manual.

11) Respondents did not enter written agreements with their workers using Form WH-153. Either Paul Washburn or one of Respondents' foremen told workers their hourly pay rate when they "came on board." Workers received that information in writing only when they were paid.

12) In 1997, Washburn Reforestation employed Hector Alvarez, Benjamin Garcia, Salvador Garcia, Armando Martinez, and Victor Hernandez. At the time they were hired, each of those five workers signed English or Spanish versions of Form WH-151, Washburn Reforestation's early return to work policy, and its personnel policy manual.

13) On May 15, 1997, the Immigration and Naturalization Service ("INS") inspected Respondents' job site and detained Alvarez, Benjamin Garcia, Salvador Garcia, Martinez, and Hernandez. May 14, 1997, was the five workers' last day of employment by Washburn Reforestation.

14) In July 1997, Katy Bayless, a Compliance Specialist with the Agency, began an investigation of Washburn Reforestation because she had learned that the INS had deported some of Washburn Reforestation's workers. By letter dated July 2, 1997, Bayless asked Respondents to furnish various records, including copies of Forms WH-151 and WH-153 "for each and every employee that appears on your payroll recvords (*sic*) for contracts performed under the definition (ORS 658.440) farm/forest

labor activity." Bayless did not ask for documents that might be the equivalent of Form WH-153.

15) By letter dated July 8, 1997, Diann Washburn, in her capacity as corporate secretary of Washburn Reforestation, responded to Bayless's letter and enclosed some of the requested records.

16) On August 27, 1997, Bayless called Diann Washburn and left a message for her to send the WH-151 forms for the five detained employees, as well as the WH-153 forms or a statement why they were not used. On August 29, Diann Washburn responded to Bayless's request and enclosed the WH-151 forms for each of the five employees in question. Diann Washburn's letter stated that Respondents did not use Form WH-153 because it "would have to be completed with each new job, which could be a daily or weekly project with as many as 100 employees, in as many as 10 different job sites," because Respondents "do not have any seasonal positions," and because "[e]ach individual job may last anywhere from one to thirty days, depending upon the contract." Diann Washburn also asserted that Respondents paid all of their employees "well above minimum wage." During their telephone conversations, Bayless did not ask Diann Washburn to provide any documents that were equivalent to Form WH-153, and Diann Washburn did not assert that Respondents had provided the workers with any such documents. Bayless believed that, because she had asked for Form WH-153, Diann Washburn would understand that she should provide any equivalent document that existed.

17) By letter dated September 9, 1997, Bayless asked Diann Washburn to provide additional records, including payroll deduction authorizations for clothes and boots for Hector Alvarez, Salvador Garcia, and Victor Hernandez, as well as the deduction authorization for an employee loan to Victor Hernandez.

18) With her September 15, 1997, response to Bayless's letter, Diann Washburn enclosed various documents related to the payroll deductions. The documents Diann Washburn provided did not include employee authorizations of those deductions.

19) In their Answer, Respondents asserted as an affirmative defense that each of the five workers had "receive[d], acknowledged and executed a copy of the personnel handbook finding the terms and conditions of employment prior to commencing any services to respondents."

20) The introduction to Respondents' personnel policy manual states that it "is not a contractual agreement as to terms or duration of employment." (*Underscoring in original*). It also states that "Washburn Reforestation, Inc., reserves the right to make additions and deletions to this policy without prior notice to the employee." The manual further provides: "No one is authorized to make any representations concerning terms and conditions of employment with the company, unless set forth in a written document approved and signed by the company president." The Spanish-language version of the personnel policy manual is an accurate translation, although it includes some words not commonly used in migrant worker populations.

21) The personnel policy manual does not include information regarding: the name and address of the owner of all operations where a worker would be working; the workers' hourly pay rate and the method of computing the rate of compensation; the location of the job to be performed; the approximate term of the job; or a statement of the workers' rights and remedies. The manual does: state that worked time over 40 hours per week would be paid at one and one-half times the regular hourly rate; identify Washburn Reforestation as the employer; state that productivity bonuses might be paid at the employer's discretion; and identify required equipment that workers must supply.

22) At all material times, there was no wage dispute between Respondents and any of their workers. It appeared to Bayless that each of the deported workers had received his wages and had received any boots or other equipment he had purchased. She found no evidence of a loss to the workers.

23) The Agency has not previously determined that Respondents violated wage and hour laws.

24) Respondents Paul and Diann Washburn each testified that they had reviewed Oregon statutes and administrative rules relating to farm/forest labor contractors and believed the personnel policy manual, the early return to work policy, and the WH-151 form provided workers with all information required by statute. Diann Washburn has attended Agency classes on hiring/firing practices and family leave, receives and reviews Agency newsletters, and seeks advice on compliance with wage and hour rules from Associated Oregon Loggers.

25) The \$1000.00 penalty the Agency has proposed for each violation charged herein is well under the \$2,000.00 that may be assessed for each such violation pursuant to ORS 658.453(1)(c). The Agency determined that the maximum penalty was not appropriate because Bayless believed that Respondents would comply with the requirements of ORS 658.440(1)(g) in the future. Bayless recommended an enhanced penalty only because Respondents had made unauthorized deductions from workers' paychecks, not for reasons related to Respondents' failure to provide all information required by statute. The Agency, however, asserted that the minimum penalty was not appropriate "because of the magnitude and seriousness of the violations, Respondent's knowledge of all of the violations, Respondent's failure to take all necessary measures to prevent or correct violations, and the willful nature of the violations."

ULTIMATE FINDINGS OF FACT

1) During all material times, Respondents were farm/forest labor contractors, as defined by ORS 658.405(1), doing business in the State of Oregon.

2) With regard to each of the five workers, Respondents failed to execute Form WH-153 (Agreement Between Contractor and Workers), or any written agreement incorporating the statutorily required information, at the time of hiring and prior to the worker performing work for Respondents.

3) Respondents knew or should have known that they were legally required to execute written agreements with their workers. Their failure to execute the agreements was willful.

4) Respondents cooperated with the Agency's investigation and intend to comply with the requirements of ORS 658.440(1)(g) and OAR 839-015-360 in the future.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over this matter and Respondents pursuant to ORS 658.407.

2) As licensed farm/forest labor contractors, Respondents were and are subject to the provisions of ORS 658.405 to 658.503 and ORS 658.830.

3) The actions, inactions, and statements of Respondents Paul Washburn and Diann Washburn properly are imputed to Respondent Washburn Reforestation because they were made within the course and scope of the Washburns' roles as Washburn Reforestation's president and secretary.

4) ORS 658.440(1) provides, in relevant part:
"Each person acting as a farm labor contractor shall:

* * *

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English

language and any other language used by the farm labor contractor to communicate with the workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and child care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

OAR 839-015-310 provides:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever occurs first.

"(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

OAR 839-015-360 provides:

"(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers."

Respondent violated ORS 658.440 (1)(g) and OAR 839-015-360(4) by failing to execute written agreements with any of the five workers at the time of hiring and prior to the workers performing work on Respondents' contracts. Respondents' personnel manual does not satisfy the requirements of ORS 658.440(1)(g) both because it is not a written

agreement contractually binding on Respondents and because it does not include all the required elements.

5) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. ORS 658.453(1)(c); OAR 839-015-508(1)(h). With regard to the magnitude of the penalties, OAR 839-015-0510 provides:

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

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

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

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

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

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

"(3) In arriving at the actual amount of the civil penalty, the commissioner 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.

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

The assessment of the civil penalty specified in the Order below is an appropriate exercise of the commissioner's authority.

OPINION

Jurisdiction

ORS 658.407 establishes the scope of the Commissioner's jurisdiction with regard to matters involving farm/forest labor contractors, and provides:

"The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.830, and in so doing shall:

"(1) Investigate and attempt to adjust equitably controversies between farm labor contractors and their workers with respect to claims arising under ORS 658.415(3).

"(2) Take appropriate action to establish the liability or lack thereof of the farm labor contractor for wages of the employees of the farm labor contractor and if appropriate proof exists of liability for wages the commissioner shall pay the same or such part thereof as the commissioner has funds on deposit or cause the surety company to forthwith pay the entire liability or such part thereof as the sums due under the bond will permit.

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

Respondents assert, as an affirmative defense, that the Commissioner lacks jurisdiction over this matter because none of the three subsections of ORS 658.407 specifically authorizes the Commissioner to enforce farm/forest labor contractors' duty to provide their workers with written agreements, pursuant to ORS 658.440(1)(g). According to Respondents, subsections (1) through (3) of ORS 658.407 delineate the entirety of the Commissioner's jurisdiction with regard to farm/forest labor contractors.

Respondents' narrow reading of ORS 658.407 is supported neither by the plain language of the statute nor by its context. *See generally PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) (setting forth method of statutory analysis). ORS 658.407 first states broadly that the Commissioner has authority to "administer and enforce ORS 658.405 to 658.503 and 658.830" -- the Oregon laws that govern farm/forest labor contractors, including ORS 658.440, the provision at issue here. The statute then instructs the Commissioner that, "in so doing," he or she must

conduct the specific activities set forth in subsections (1) through (3). Those subsections do not limit the Commissioner's jurisdiction; they merely direct the Commissioner to take certain actions in the course of exercising a broad grant of authority.

The context of ORS 658.407 confirms that the statute gives the Commissioner jurisdiction to enforce *all* of the statutes relating to farm/forest labor contractors. First, the statutes require farm/forest labor contractors to take certain actions (such as providing workers with written agreements -- ORS 658.440(1)(g)) and not to take others (such as making misrepresentations in a license application -- ORS 658.440 (3)(a)). These statutes would have no meaningful effect if the Commissioner lacked jurisdiction to enforce them. Surely the legislature did not intend the statutes to serve as mere recommendations of appropriate behavior for farm/forest labor contractors. Second, ORS 658.453(1)(c) gives the Commissioner explicit authority to assess civil penalties for violations of ORS 658.440(1). It would be odd for the legislature to give the Commissioner authority to assess civil penalties for violations of that statute without also giving the Commissioner jurisdiction to enforce it. Respondents' argument that the Commissioner lacks jurisdiction over this matter has no merit.

Failure to Execute Written Agreements with Workers

Respondents acknowledge that they did not provide the five workers with written agreements prepared using Form WH-153. Nonetheless, Respondents insist they substantially complied with ORS 658.440(1)(g) by having workers sign Form WH-151 and copies of Respondents' personnel policy manual. Respondents argue vigorously that those documents include all the information required by ORS 658.550(1)(f). That assertion, however, misses the point. Respondents are not charged with violating ORS 658.550(1)(f), which requires that workers be provided with certain information. Rather,

Respondents are charged with violating ORS 658.550(1)(g), which requires farm/ forest labor contractors to enter *written agreements* with their workers.

The requirements of subsections (f) and (g) are distinct and serve different purposes. Subsection (f) ensures that workers will learn the terms and conditions of any prospective employment at the time they are recruited, solicited, hired or supplied, whichever happens first. Workers then may evaluate that information to determine whether they wish to accept the proposed employment. The requirements of subsection (g) are triggered only when a worker actually is hired. At that point, the farm/forest labor contractor is required to enter a binding written agreement with the worker that spells out the terms and conditions of employment. That agreement protects the worker by providing concrete evidence of the terms and conditions of employment -- including the hourly wage rate -- to which the farm/forest labor contractor has bound itself. Subsection (g) does more than ensure that workers are provided with information -- it requires the farm/forest labor contractor to enter legally enforceable agreements with them. By executing written agreements with their workers, farm/forest labor contractors also provide themselves with a means of defending against false wage claims. *Cf. In the Matter of Clara Perez*, 11 BOLI 181 (1993) ("One purpose of the WH-153 form is to eliminate any confusion or misunderstandings about the agreed pay rate").

By its own terms, Respondents' personnel manual is not "a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of [ORS 658.440]." ORS 658.440(1)(g). The personnel manual states that it "is not a contractual agreement as to terms or duration of employment" and that "Washburn Reforestation, Inc., reserves the right to make additions and deletions to this policy without prior notice to the employee." Moreover,

although each worker signed the manual, that document was not executed by Respondents. Because the personnel manual did not constitute a binding contractual agreement between Respondents and their workers, its use could not fulfill the requirements of ORS 658.440(1)(g). The Forum finds that Respondents committed five violations of ORS 658.440(1)(g) by failing to provide each of the five workers with a written agreement regarding the terms and conditions of employment.

It is worth noting that, even if the personnel manual had been a "written agreement," its use would not have fulfilled the requirements of ORS 658.440(1)(g) because it did not include all the information required by ORS 658.440(1)(f)(A) - (I). First, the personnel manual did not describe "[t]he method of computing the rate of compensation," in that it did not specify the hourly rate a worker would earn by performing any given job. Respondents acknowledge that the personnel manual did not inform workers of their hourly pay rates, but argue that it adequately described "[t]he method of computing the rate of compensation" by stating that workers would be paid one and one-half times their regular hourly rate for hours worked in excess of 40 per week. The Forum rejects Respondents' reading of ORS 658.440(1)(f)(A). One cannot reasonably describe a method for computing the rate of compensation without also specifying the base pay rate. See *also* Form WH-153, which requires farm/forest labor contractors to specify the rate at which workers will be paid; OAR 839-015-360(4), written agreements "must provide for all the elements contained in Form WH-153". The personnel manual did not provide the information required by ORS 658.440(1)(f)(A).

Pursuant to ORS 658.440(1)(f)(E), the written agreement also must describe "the approximate length of season or period of employment and the approximate starting and ending dates thereof." Respondents argue that their personnel manual satisfied this requirement by stating that employment was from the date of hire until terminated,

which is a correct description of Respondents' at-will employment of the workers. The statute, however, does not require the agreement to describe the length of time a worker will be employed by a particular farm/forest labor contractor. Rather, the agreement must include information regarding the approximate length of time the worker will be performing a particular job for that contractor -- a job that involves a specific type of work, has a given rate of pay, and occurs at a specific location. Respondents' personnel manual did not provide their workers with that information.

Similarly, Respondents argue that the manual satisfied ORS 658.440 (1)(f)(G) by stating that Washburn Reforestation, Inc. is the owner of the operations where the workers would be working. Respondents' argument appears to be that, where the farm/forest labor contractor employs the workers itself and uses them to perform a contract on another party's land, the contractor is "the owner of all operations." Again, Respondents' argument misses the point. ORS 658.440(1)(f)(G) requires the written agreement to state "[t]he name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied *or employed* by the farm labor contractor." (*Emphasis added*). If the phrase "owner of all operations" meant nothing more than "the farm labor contractor" in cases where the contractor employed the workers, the emphasized portion of the statute would be superfluous. This Forum will not interpret a statute in a way that renders part of it meaningless. The only way to give effect to the entire statute is to give the phrase "owner of all operations" its plain meaning -- the owner of the land on which the forestation or reforestation work is taking place. In short, the statute ensures that workers will be told who owns the land on which they perform their labor. The personnel manual, even if it was a written agreement, does not include that information and, therefore, could not fulfill the requirements of ORS 658.440(1)(f)(G) and ORS 658.440 (1)(g).

Finally, the personnel manual does not include a statement incorporating the workers' rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.603 and 658.830, and the Service Contract Act. The fact that the workers signed and received copies of Form WH-151, which includes a description of those rights and remedies, is not relevant to Respondents' failure to comply with ORS 658.440 (1)(g). As explained above, Form WH-151 merely explains workers' rights and remedies; it does not incorporate them into a binding contract between the farm/forest labor contractor and the worker. That must be accomplished in a written agreement using Form WH-153 or some other form that explicitly incorporates the provisions of Form WH-151.

In sum, Respondents committed five violations of ORS 658.440(1)(g) by failing to provide any of the five workers with a written agreement that included the terms and conditions of employment. For that failure, the Forum has imposed the civil penalty described below. Even if the personnel manual and Form WH-151 did constitute a "written agreement," however, this Forum would impose the same civil penalty because those documents did not include all the information required by statute.

Civil Penalty

In determining the appropriate amount of a civil penalty, this Forum may consider the seriousness and magnitude of the violation. The Forum finds Respondents' violation of ORS 658.440(1)(g) not only serious, but grave. See OAR 839-015-0510(1)(c) (seriousness of violation is a factor to be considered in determining penalty). Respondents did not give their workers *any* document constituting a binding written agreement. The violation goes to "the heart of farm labor contractor statutes" because it denies workers the ability to protect themselves in the event of a dispute. *In the Matter of Andres Bermudez*, 16 BOLI 229, 244 (1998). Moreover, the absence of

statutorily required information in the personnel manual would render the violation serious even if the manual was a "written agreement." The seriousness of the violations weighs in favor of a heavy civil penalty.

The Forum also has found that Respondents knew or should have known of the violations. See OAR 839-015- 0510(1)(d). Paul and Diann Washburn both testified that they had reviewed the statutes, rules, and forms, which state plainly that workers must be provided with written agreements containing the terms and conditions of employment. In addition, Paul and Diann Washburn certified repeatedly that they had reviewed Form WH-153 and would, "in accordance therewith," provide their workers with required information. Diann Washburn, particularly, knew or should have known that Respondents were violating ORS 658.440(1)(g) -- she admitted that Respondents did not provide their workers with agreements using Form WH-153 because they believed the paperwork would be too burdensome. The fact that Respondents knew or should have known of the violations also weighs in favor of a heavy penalty.¹

There also are mitigating factors in this case. Respondents cooperated with the Agency's investigation, they have no prior violations on their record, and they intend to comply with the requirements of ORS 658.440 in the future. In addition, the Agency produced no evidence that any worker had suffered a loss of wages as a result of the violations. After considering both the aggravating and the mitigating factors, the Forum has determined that an appropriate penalty is \$750.00 for each of the five violations, for a total of \$3,750.00.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as a result of Respondents' five violations of ORS 658.440(1)(g), Respondents WASHBURN REFORESTATION, INC., PAUL A. WASHBURN, AND DIANN M. WASHBURN are

hereby ORDERED to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS (\$3,750.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondents comply with the Final Order. This assessment is made as civil penalty against Respondents as follows: \$750.00 for each of five violations of ORS 658.440(1)(g).

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¹The existence of these aggravating factors is fatal to Respondents' motion to strike enhanced penalties.