

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of:

X WALL INCORPORATED,

Respondents.

Case No. **42-16**

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

Respondent violated ORS 653.045(2) and OAR 839-020-0083 by failing to provide records requested by the Agency that were related to the employment of two workers. No civil penalties were assessed because the Agency did not allege that the violation was "willful."

The above-entitled case was assigned for hearing to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. Prior to the scheduled date for hearing, the case was resolved by the ALJ's ruling on the Agency's motion for summary judgment. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Respondent was represented by Douglas Johnsen, its authorized representative.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following

1 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,¹ Conclusions
2 of Law, Opinion, and Order.

3 **FINDINGS OF FACT – PROCEDURAL**

4 1) On May 6, 2016, the Agency issued a Notice of Intent to Assess Civil
5 Penalties (“NOI”) in which it proposed to assess \$3,000 in civil penalties against
6 Respondent based on Respondent's failure to make required records available in
7 violation of ORS 653.045(2) and OAR 839-020-0083.

8 2) On May 25, 2016, Respondent, through its authorized representative
9 Douglas Johnsen, filed an answer and request for hearing.

10 3) On June 17, 2016, the forum issued a Notice of Hearing to Respondent
11 and the Agency setting the time and place of hearing for 9:30 a.m. on August 30, 2016,
12 at BOLI's Eugene office. Together with the Notice of Hearing, the forum sent a copy of
13 the NOI, a document entitled “Summary of Contested Case Rights and Procedures”
14 containing the information required by ORS 183.413, a document entitled
15 “Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's
16 contested case hearings rules, OAR 839-050-000 to 839-050-0445.

17 4) On August 1, 2016, the Agency filed a motion for summary judgment. On
18 August 2, 2016, the ALJ issued an order entitled “Interim Order – Requiring
19 Respondents' Written Response to Motion for Summary Judgment” that explained the
20 significance of summary judgment in the proceeding and set a deadline for
21 Respondent's response. Respondent did not file a response.

22
23
24
25 ¹ The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact – The Merits.

1 5) On August 12, 2016, the ALJ issued an interim order in which the ALJ
2 **GRANTED** the Agency's motion in part and **DENIED** it in part. That interim order is
3 reprinted in its entirety below.

4 "On August 1, 2016, the Agency filed a motion for summary judgment as to all
5 the allegations in its Notice of Intent ('NOI') pursuant to OAR 839-050-0150(4).
6 On August 2, 2016, the forum issued an interim order to Respondent that
7 described the significance of a motion for summary judgment and set August 9,
8 2016, as Respondent's deadline for responding. As of today, the forum has
9 received no response from Respondent. Accordingly, the forum rules on the
10 Agency's motion based on the existing record and documents provided by the
11 Agency in support of its motion.

9 **"Summary Judgment Standard**

10 "A motion for summary judgment may be granted where no genuine issue
11 as to any material fact exists and a participant is entitled to a judgment as a
12 matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B).
13 The standard for determining if a genuine issue of material fact exists follows:

14 ' * * * No genuine issue as to a material fact exists if, based upon the
15 record before the court viewed in a manner most favorable to the adverse
16 party, no objectively reasonable juror could return a verdict for the adverse
17 party on the matter that is the subject of the motion for summary
18 judgment. The adverse party has the burden of producing evidence on
19 any issue raised in the motion as to which the adverse party would have
20 the burden of persuasion at [hearing].' ORCP 47C.

17 **"The Agency's NOI**

18 "The Agency issued its NOI on May 5, 2016, and alleged the following:

19 'Respondent failed to make records required to be kept and maintained
20 under ORS 653.045(1) and OAR 839-020-0080 available for inspection as
21 required by ORS 653.045(2) and OAR 839-020-0083. On November 17,
22 2015, that Wage and Hour Division requested from Respondent, through
23 its attorney, the following records: (1) Pertaining to employee "Oscar" --
24 Oscar's full name, job title/functions, first day of work and, if no longer
25 employed, last date of work; (2) Pertaining to employee Ulysses Diaz --
Ulysses Diaz's full name, job title/functions, first day of work and, if no
longer employed, last date of work; (3) Pertaining to employee Daniel Diaz --
Daniel Diaz's full name, job title/functions, first day of work and, if no
longer employed, last date of work.'

1 The Agency seeks a \$3,000 civil penalty for three violations, calculated at \$1,000
2 per violation. The Agency further alleges that the violations were aggravated by
the following circumstances:

3 '(1) These violations are serious because the requirement to produce
4 records upon request frustrates the Agency's mission and makes
5 investigating potential violations of wage and hour laws difficult; the
6 magnitude of the violation is that Respondent failed to produce any the
7 records requested by the division; (2) Respondent knew or should have
8 known that it was required to produce certain records upon request; and
9 (3) Complying with the record request should not have been difficult for
Respondent. Respondent's counsel confirmed having received the
request, Respondent was given several opportunities to comply with the
specific records request, and during the course of the investigation,
Respondent provided its own "random sampling" of other payroll records
that were not responsive to this request.'

10 Respondent, through its authorized representative Douglas Johnsen, filed an
11 answer and request for hearing on May 25, 2016, in which it denied all the
alleged violations.

12 **"Discussion**

13 "ORS 653.045(1) and (2) provide:

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

17 "(a) The name, address and occupation of each of the employer's
18 employees.

19 "(b) The actual hours worked each week and each pay period by
each employee.

20 "(c) Such other information as the commissioner prescribes by the
21 commissioner's rules if necessary or appropriate for the
22 enforcement of ORS 653.010 to 653.261 or of the rules and orders
issued thereunder.

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

25 OAR 839-020-0083, which interprets ORS 653.045(1) and (2), provides:

1 (1) All records required to be preserved and maintained by these rules
2 shall be preserved and maintained for a period of at least two years.

3 (2) All employers shall keep such records in a safe and accessible place.

4 (3) All records required to be preserved and maintained by these rules
5 shall be made available for inspections and transcription by the
6 Commissioner or duly authorized representative of the Commissioner.”

7 “In support of its motion, the Agency provided the following:

- 8 • A Consent Order signed by Respondent on 5/21/15 relating to an
9 Order of Determination ('OOD') and NOI issued against
10 Respondent in 2014 and 2015 based on two wage claims,
11 recordkeeping violations, and employment of minors;
- 12 • A series of November and December 2015 emails from Bernadette
13 Yap-Sam, BOLI Compliance Specialist, to Respondent's attorney
14 requesting that Respondent provide the full name, job
15 title/functions, first day of work and, if no longer employed, last date
16 of work for 'Oscar,' a statement as to whether Respondent had ever
17 employed Ulysses and Daniel Diaz, and if so, the same information
18 as requested for 'Oscar.'
- 19 • An affidavit from Yap-Sam stating that Respondent's attorney had
20 not responded to her record request or followed up with a
21 statement that Respondent had or had not employed Ulysses and
22 Daniel Diaz.
- 23 • An investigative contact report by BOLI Compliance Specialist Stan
24 Wojtyla regarding his interviews of Daniel Diaz in which Diaz
25 confirms that he and his brother Ulysses were both working for
Respondent in Eugene in August 2015, that his supervisor 'is Saul
who works for X Wall Inc.' and that 'He rarely sees Saul [and] more
often he deals with Oscar.'

19 “The records requested by Yap-Sam are records that fall squarely within the
20 provisions of ORS 653.045(1). Yap-Sam's request that Respondent provide
21 those records was a request that those records 'be made available for
22 inspections and transcription by [a] duly authorized representative of the
23 Commissioner.' Wojtyla's interview of Daniel Diaz constitutes credible,
24 un rebutted evidence that Daniel and Ulysses Diaz were employed by
25 Respondent in Oregon in 2015. Under ORS 653.045(2), the Agency was
authorized to request that records of their employment be made available.
Respondent's failure to provide those records violated ORS 653.045(2) and OAR
839-020-0083(3). However, the cryptic note related to 'Oscar' is insufficient
evidence to establish that Respondent actually employed an 'Oscar' in Oregon.
Respondent cannot be held accountable for failing to provide records associated
with 'Oscar' when the Agency has not met its burden of proof of showing that

1 Respondent actually employed such an individual. In conclusion, the forum finds
2 that Respondent violated ORS 653.045(2) and OAR 839-020-0083(3) by failing
3 to provide the records requested by the Agency related to Respondent's
4 employment of the Diaz brothers.

5 "ORS 653.256 provides that 'the Commissioner of the Bureau of Labor
6 and Industries may assess a civil penalty not to exceed \$1,000 against any
7 person who *willfully* violates * * * ORS 653.045 * * * or any rule adopted
8 thereunder' (*emphasis added*). In this case, the Agency did not allege that
9 Respondent's violation was 'willful.' Without that allegation, the forum has no
10 grounds on which to assess a civil penalty.²

11 "Conclusion

12 "The Agency's motion for summary judgment is **GRANTED** with respect to
13 its allegation that Respondent violated ORS 653.045(2) and OAR 839-020-
14 0083(3) by failure to provide the records requested by the Agency related to
15 Respondent's employment of Daniel and Ulysses Diaz brothers.

16 "The Agency's motion for summary judgment for \$3,000 in civil penalties
17 based on Respondent's violation of ORS 653.045(2) and OAR 839-020-0083(3)
18 is **DENIED** because of the Agency's failure to allege that Respondent's violation
19 was 'willful.'

20 "Case Status

21 "Should the Agency choose to amend its NOI to allege that Respondent's
22 violation of ORS 653.045(2) and OAR 839-020-0083(3) was 'willful,' the hearing
23 will commence as scheduled at 9:30 a.m. on August 30, 2016. If the Agency
24 chooses not to amend its NOI, it is instructed to inform the forum of this decision
25 as soon as possible. If there is no amendment, the forum will cancel the hearing
and issue a proposed order that incorporates this ruling. Case summaries
remain due on August 16, 2016.

"IT IS SO ORDERED"

6) On August 18, 2016, the Agency notified the forum that it would not be
amending its NOI. That same day, the forum issued an interim order cancelling the
hearing.

² Compare *In the Matter of Abdul Rahim Ghaffari*, 35 BOLI 37 (2016), in which the forum assessed a recordkeeping civil penalty based on Respondent's alleged "willful" failure to keep and maintain records required by ORS 653.045.

