

# ADMINISTRATIVE PROCESS

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### 1.0 JURISDICTION

Respondents argued that the ALJ lacked jurisdiction to determine whether “warranty work” on a public works was subject to the prevailing wage rate because there was no statute or regulation defining warranty work and the agency is asking the forum to engage in rulemaking process without following established rulemaking procedures.” Respondents argued that, in the absence of an existing administrative rule defining “warranty work,” the ALJ must necessarily engage in rulemaking to determine whether or not claimants’ work was “warranty work” subject to the prevailing wage rate. The forum found that respondents were correct that neither Oregon’s prevailing wage laws nor BOLI’s administrative rules defined “warranty work” in the prevailing wage context and there was no Oregon case law defining “warranty work” in this context. However, the forum concluded that the forum had jurisdiction to adjudicate whether or not claimants’ work was “warranty work” for which they were entitled to be paid the prevailing wage rate because “agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both.” ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 105-06 (2016).***

In a housing case, when the agency’s formal charges plead that a complainant’s minor daughter was an “aggrieved person” who was entitled to damages, the commissioner lacked jurisdiction to pursue the allegations related to complainant’s minor daughter because she never signed a complaint as required by the agency’s administrative rule. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 87 (2012).***

### 2.0 COMMISSIONER, ADMINISTRATIVE LAW JUDGE

#### 2.1 --- Duties and Authority

##### 2.1.1 --- Generally

Prior to hearing, the agency and respondents filed written stipulations to a number of facts. After the hearing, at the ALJ’s request for additional clarification as to the meaning and intent of the stipulations, the agency and respondents filed an addendum to their original stipulations. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 183 (2017).***

The commissioner has the authority to decide the constitutionality of statutes. In BOLI contested cases, the commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision set forth in the proposed order and subject to ratification by the commissioner in the final order. Accordingly, the ALJ had the initial authority to rule on the constitutional issues raised by respondents in their motion for summary judgment. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171 (2015), appeal pending.***

Respondents asserted that the commissioner, an attorney and member of the OSB, should be disqualified from deciding a case based on provisions in the ORPC and Code of Judicial Ethics. The forum held that the ALJ does not have the authority to enforce the ORPC or Code of Judicial Ethics, that respondents had not shown that any of the commissioner’s remarks “will have a substantial likelihood of materially prejudicing’ this contested case proceeding,” and that the Code of Judicial Ethics does not apply to the commissioner because he is not “an officer of a judicial system performing judicial functions.” ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 142-43 (2015), appeal pending.***

In construing a statute, the forum is responsible for identifying the correct interpretation, whether or not asserted by the parties. The forum is not required to consider the constitutionality of a statute, and the forum chose not to do so where constitutionality was not raised as an affirmative defense. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013), affirmed***

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***Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 2.1.2 --- Threats, Dangerous Weapons

### 2.2 --- Conflict of Interest, Bias, Prejudice

Respondents asserted that the commissioner, an attorney and member of the OSB, should be disqualified from deciding a case based on provisions in the ORPC and Code of Judicial Ethics. The forum held that the ALJ does not have the authority to enforce the ORPC or Code of Judicial Ethics, that respondents had not shown that any of the commissioner's remarks "will have a substantial likelihood of materially prejudicing" this contested case proceeding," and that the Code of Judicial Ethics does not apply to the commissioner because he is not "an officer of a judicial system performing judicial functions." ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 142-43 (2015), appeal pending.***

Respondents asserted that, under ORS chapter 244, "the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable," and alleged "multiple conflicts of interest on the part of the commissioner and BOLI" as grounds for disqualification. The forum held that respondents had not identified any actual or potential conflict of interest by the commissioner based on a pecuniary benefit or detriment that fit within the definitions of "conflict of interest" in ORS chapter 244. The forum further noted that the Oregon Government Ethics Commission, not the ALJ, is responsible for determining the commissioner's ethical obligations under ORS chapter 244. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 141-42 (2015), appeal pending.***

Respondents moved that BOLI's commissioner be disqualified from deciding the issues presented in formal charges alleging discrimination in public accommodation based on sexual orientation, alleging that he had "publicly demonstrated actual bias against respondents and others similarly situated, both as a candidate for re-election and as commissioner" and, based on that alleged actual bias, the commissioner's fulfillment of his statutory role by deciding and issuing a final order in these cases would deprive respondents of due process and other constitutional rights. To show that the commissioner was biased and had prejudged the cases, respondents provided exhibits that fell into two categories: 1) the commissioner's e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon; and (2) remarks specific to the formal charges. The forum held that the commissioner has been instructed by the legislature to raise public awareness about practices that the legislature has declared to be unlawful discrimination in ORS chapter 659A, and that all of the commissioner's remarks generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon fell within the scope of this particular job duty and did not show actual bias. The forum found that the commissioner's two quoted "second category" statements combined selected portions of remarks made at two different times and also misquoted one remark. The forum found that the accurately quoted "second category" remarks, while made in the context of respondents' alleged discriminatory actions and the complainants' complaints, were remarks reflecting the commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, showed a preconceived point of view concerning an issue of law that is not a basis for disqualification due to bias. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 135-41 (2015), appeal pending.***

Procedural due process requires a decision maker free of actual bias and respondents have the burden of showing that bias. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 136 (2015), appeal pending.***

### 2.3 --- Ex Parte Communications

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Respondents asked that the case be dismissed because the agency's compliance specialist and his supervisors and the agency prosecutor had "improper ex parte contacts" prior to the hearing and during the course of the hearing. OAR 839-050-0310(1) defines an "ex parte communication" as "an oral or written communication to an agency decision maker or the presiding officer not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts in the record." When an ex parte communication occurs, the ALJ is required to "place on the record a statement of the substance of any ex parte communication on a fact in issue made to the administrative law judge while the proceeding is pending." OAR 839-050-0310(2). As respondents did not allege the existence of any communications between the agency and the ALJ or commissioner, the ultimate agency decision maker, the communications challenged by respondents could not be considered improper ex parte contacts. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 107-08 (2016).***

### 3.0 ATTORNEYS, CASE PRESENTERS, AND AUTHORIZED REPRESENTATIVES

#### 3.1 --- Attorneys

The ALJ issued an interim order seeking clarification as to whether respondents were represented by the attorney who filed its answer and instructed the attorney to file a notice of withdrawal, if he intended to resign, so that the record was clear on this matter. The interim order further instructed respondents that, as limited liability companies, they must be represented at all stages of the proceeding either by counsel or by an authorized representative. Respondents' attorney filed a motion to withdraw as counsel that was granted and respondents' "acting president" filed a letter stating that he was the authorized representative for respondents. ---- ***In the Matter of Portland Flagging, LLC (14-14), 35 BOLI 11, 13 (2016).***

The forum denied Respondent's request, made during the hearing, to change its authorized representative. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 176 (2013).***

#### 3.2 --- Case Presenters/Authorized Representatives

When an individual and a corporation were named as respondents and the individual filed an answer for both respondents without identifying herself as the corporation's authorized representative, the ALJ issued an interim order notifying the respondent corporation that it must be represented either by an attorney or by an authorized representative at all stages of this proceeding, including the filing of an answer, and that the corporation would be held in default if it was not represented by an attorney or authorized representative. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 82-83 (2015).***

The forum denied Respondent's request, made during the hearing, to change its authorized representative. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 176 (2013).***

#### 3.3 --- Attorney's Fees & Costs

Respondents claimed reasonable attorneys' fees incurred in defending the case because the charges in the OOD were "frivolous and unreasonable and without foundation." Even if respondents' request had merit, it would be denied because the legislature has only granted authority to the commissioner to award attorney fees and costs in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 104 (2016).***

Respondents sought an order granting respondents their expenses, including attorneys' fees, incurred in connection with filing their motions for a discovery order. The ALJ ruled that the forum has no authority to make the award sought by respondents and denied the motion. ---

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**- In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 123 (2016).**

The forum denied respondents' counterclaim for attorney fees, holding that with regard to attorney fees or court costs, the legislature has only granted authority to the commissioner to award these in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421. ---- **In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 170 (2015), appeal pending.**

### **3.4 --- Legal Memorandums, Briefs**

At the conclusion of the hearing, the ALJ issued an interim order requesting the submission of briefs on specific issues and denying respondents' request to brief the topic of "consulting." The ALJ noted that respondents' "consulting" defense would "necessarily be addressed in the proposed order" and that respondents were free to address that issue by filing exceptions. ---- **In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 132 (2016).**

At the conclusion of the hearing, the agency's request to submit briefs addressing the constitutional free speech defense was granted. Respondents' objection to the agency's response, contending it contained legal argument not raised in the agency's original brief and a sur-response, was over-ruled. ---- **In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).**

At hearing, prior to opening statements, the agency requested permission to file a post-hearing brief to address the legal arguments respondents raised in their case summary. The ALJ deferred ruling on the agency's motion until the conclusion of the evidentiary portion of the hearing. At the conclusion of the evidentiary portion of the hearing, the ALJ granted the agency's motion and respondents' request to file a reply brief. The ALJ also granted the agency's and respondents' requests that closing arguments be made after the briefs were filed. ---- **In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).**

**3.5 --- Certified Law Students**

**4.0 PARTICIPANTS**

**5.0 CIVIL RIGHTS COMPLAINT**

**6.0 CIVIL RIGHTS ADMINISTRATIVE DETERMINATION**

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**7.0 CIVIL RIGHTS CONCILIATION**

**8.0 CIVIL RIGHTS FORMAL CHARGES**

**8.1 --- Generally**

**8.2 --- Relationship to Administrative Determination**

**8.3 --- Amendments**

**8.3.1 --- Prehearing Amendments**

When the agency moved to amend its formal charges to incorporate complainant's amended civil rights complaint, the ALJ granted the motion at hearing. ---- **In the Matter of Dr.**

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**Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).**

### 8.3.2 --- Amendments at Hearing

When the agency moved to amend its formal charges to incorporate complainant's amended civil rights complaint, the ALJ granted the motion at hearing. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

Two cases were consolidated for hearing and the formal charges for each case sought \$200,000 in damages for emotional distress for the same complainant. During closing argument, the agency moved to amend its formal charges to ask \$200,000 in damages for emotional distress for both cases combined. Respondent did not object and the motion was granted. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

When the agency amended its formal charges at hearing to substitute the sum "\$11,250" in lost wages for the sum "\$14,000," the forum was not limited to the amount of \$11,250 in its award for lost wages because the amendment did not delete the nonrestrictive phrase "at least" that prefaced the sum "\$14,000" in its charges. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 169 (2012).***

At hearing, prior to opening statements, the agency moved to amend its formal charges to substitute "OAR 839-005-0010(4)(c)" for "OAR 839-005-0010(4)(a) & (b)." Respondents did not object and ALJ granted the agency's motion. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

At hearing, prior to opening statements, respondents moved to amend paragraph 42 of their answer to substitute "5" for "X." The agency did not object and ALJ granted respondents' motion. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

### 8.4 --- Date of Issuance

### 8.5 --- Notice

### 8.6 --- Election of Remedies

### 8.7 --- Exhaustion of Administrative Remedies

### 8.8 --- Merger

In its formal charges, the agency alleged that respondents reduced complainant's hours of work, effectively reducing her pay, after she opposed attending a symposium based on her religious beliefs, in violation of ORS 659A.030A(1)(b). Based on the same set of facts, the agency also alleged that respondents retaliated against complainant in violation of ORS 659A.030(1)(f) and OAR 839-005-0033, the agency's rule interpreting ORS 659A.030(1)(f). At hearing, the agency presented evidence from which it argued that the alleged cut in hours was set to take place during the one-week period immediately after complainant's termination. Since the ORS 659A.030A(1)(b) claim was also founded on complainant's opposition to attending the symposium, the forum concluded that it was properly a complaint of retaliation, and that the two charges were properly merged into a single charge of retaliation. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 131-132 (2012).***

### 8.9 --- Respondents

### 8.10 --- Service

### 8.11 --- Sufficiency of Pleadings

Neither OAR 839-050-0170(1) nor OAR 839-050-0020(3) require that formal charges, filed pursuant to a commissioner's complaint under ORS 659A.825 on behalf of the Rose City T-Girls, and/or those 'similarly situated', must join as complainants the individuals for whom the formal charges seek emotional distress damages. In those circumstances, the due process requirements of OAR 839-050-0060(1) were met. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013), appeal pending.***

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The forum did not consider whether respondent's statement denying complainant's request for a service dog constituted "interference" under ORS 659A.145(8) because the formal charges did not allege that respondent "interfered" with complainant's exercise or enjoyment or her rights under ORS 659A.145(8). The forum lacks the authority to draw a legal conclusion on an allegation that is not set out in the Formal Charges. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).***

### 8.12 --- Waiver

## 9.0 ORDERS OF DETERMINATION AND NOTICES OF INTENT

### 9.1 --- Generally

Damages flowing from statutory wage violations are awarded by the forum based on the actual evidence produced at the hearing, regardless of the allegations in the OOD. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).***

### 9.2 --- Amendments

#### 9.2.1 --- Prehearing Amendments

Respondents moved to amend their answers to two different charging documents, supported by their attorney's declaration as to the reasons for the amendments. The proposed amendments included numerous defenses that respondents characterized as "affirmative." The agency did not object and the ALJ issued separate interim orders granting respondents' motions and stating that "any new facts or defenses alleged in respondents' amended answers will be deemed denied by the agency." ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116 (2016).***

The agency's motion for summary judgment, submitted prior to the filing of an amended OOD which added Portland Flagging LLC dba AD Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC as respondents, asserted that "Respondents" violated ORS 279C.800(1)(a). However, at the time the motion was filed, AD Traffic Control Services LLC was the only named respondent. When the amended OOD contained no information about these newly added respondents; the text in the body of the amended OOD only identified AD Traffic Control Services, LLC as the "employer"; there was no reference to the other three respondents and no explanation of their role in this matter; the agency's exhibits contained information suggesting a relationship between the newly added respondents and AD Traffic but failed to explain the role of those three respondents in relation to the wage claimants this matter; and there was no sworn testimony from an affidavit or declaration explaining the significance of the exhibits, the agency's motion with respect to respondents Portland Flagging LLC dba AD Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC was denied. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 248 (2016).***

The agency's original OOD asserted that claimant was employed by respondents Autoteam, Global, and Drive. Although the agency amended the OOD to assert that Global and Drive were successor employers, at hearing the agency asked that it be permitted to introduce evidence regarding Global and Drive, and their relationship with Autoteam based on the allegations in the original OOD. When a pleading is amended, it supersedes the original pleading. Because the amended OOD asserted a successor employer theory, the allegations in the original OOD asserting that Global and Drive were the actual employers of claimant were no longer at issue in this matter and the "employer" element of the agency's prima facie case was satisfied only as to respondent Autoteam. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 53 (2015).***

Although the commissioner has jurisdiction over the agency's allegations that respondents violated ORS 652.195 and OAR 839-001-0300 by issuing two dishonored checks to claimant, those charges were dismissed because OAR 839-050-0440(4) precluded the agency from amending its original OOD to add those allegations. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 268 (2014).***

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### 9.2.2 --- Amendments at Hearing

Before the evidentiary portion of the hearing concluded, respondents moved to amend their answer “to conform to the evidence that came in through [the agency compliance specialist] that [he] did not do a complete and thorough investigation and, as a consequence, wrote demands to the respondents that were higher than they should have been and so we have a small business being faced with these inflated demands that are based upon factual inaccuracies and omissions.” The agency objected on the grounds that the forum’s administrative rules contain no provision for a respondent to amend its answer after the hearing has begun except in response to an agency motion to amend. The ALJ reserved ruling for the proposed order. In the proposed order, the ALJ found that the agency compliance specialist testified at length on direct examination and cross examination, without objection, as to the methodology in his investigation, including the persons he chose to interview, the questions he asked during his interviews, the requests for information he sent to respondents, the documentary evidence he gathered, how he computed the wages allegedly due and owing to the claimants, and adjustments he made to his computations during the hearing based on the testimony of claimants and an exhibit that included relevant information he did not obtain during his investigation. The ALJ granted respondents’ motion based on the provision in OAR 839-050-01409(4) that provides “consent will be implied when there is no objection to the introduction of such issues and evidence. --- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 130-31 (2016).***

In a wage case, at hearing the agency is not allowed to amend the order of determination to change the amount due. ---- ***In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 215 (2013).***

The agency’s unopposed motion to amend the NOI to allege the prevailing wage rates that applied to the Project was granted. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., et al, 32 BOLI 185, 187 (2013).***

The agency’s unopposed motion to delete a paragraph alleging that final wages were not paid to a particular worker was granted. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 187 (2013).***

### 9.3 --- Service

ORS 652.332(1) establishes an “administrative proceeding for wage claim collection” and covers all cases in which wage claims have been filed with BOLI. Relative to service of an OOD, ORS 652.332(1) requires that service of an OOD “shall be made in the same manner as service of summons **or** by certified mail, return receipt requested.” (Emphasis added). Accordingly, sending an OOD by registered or certified mail to the correct address of the party, as provided in OAR 839-050-0030(1)(b), as the agency did in this case, is sufficient to accomplish service of an OOD. Therefore, the forum found that Sabo was properly served. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 272 (2014).***

### 9.4 --- Notice

### 9.5 --- Sufficiency of Pleadings

ORS 653.256 provides that BOLI’s commissioner may assess a civil penalty not to exceed \$1,000 against any person who *willfully* violates ORS 653.045 or any rule adopted thereunder. When the agency did not allege that respondent’s violation was “willful,” the forum had no grounds on which to assess a civil penalty. ---- ***In the Matter of X Wall Incorporated, 35 BOLI 133, 137 (2016).***

The agency filed objections to strike defenses set out in respondents’ case summary on the grounds that they were “newly raised” defenses and also affirmative defenses that were not properly raised in respondents’ original or amended answer. The forum denied the agency’s objections, finding that the subject defenses were subsets of defenses already pled by

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respondents in their amended answer and that they were not affirmative defenses. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117, 123-26 (2016).***

The forum denied the agency's motion for summary judgment as to its allegation that respondent employed a minor under 18 in hazardous and prohibited occupations because the agency's NOI failed to cite BOLI's administrative rules that make the employment of minors under 18 in hazardous and prohibited occupations unlawful. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 55 (2016), appeal pending.***

The agency's amended NOI requested civil penalties in the amount of \$5,000 (\$1,000) per violation, citing to "ORS 652.900, OAR 839-020-1010 and OAR 839-020-1020" to support the request. However, none of the cited authorities provide for an assessment of civil penalties for violations of ORS 652.610(3). ORS 652.900(1) references assessing civil penalties for violations of ORS 652.610(4), but does not reference violations of ORS 652.610(3), which is the statute cited in the amended NOI. OAR 839-020-1010 provides a detailed enumerated list of a number of violations which support an assessment of civil penalties, but does not refer to violations of ORS 652.610(3). OAR 839-020-1020 lists the criteria for determining the appropriate civil penalty, but does not identify the violations for which civil penalties may be assessed. The forum concluded that because none of the cited authorities provided the basis for an assessment of civil penalties for violations of ORS 652.610(3), no civil penalties could be assessed for those violations. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 36 (2016).***

The forum denied the agency's motion for summary judgment on the issue of whether respondents failed to pay the prevailing wage rate when the agency argued that that Respondents withdrew fringe benefit amounts from the paychecks of 36 workers, but failed to deposit those amounts into a fringe benefit plan and the agency's NOI did not identify the names of the 36 workers or the amounts that were allegedly withheld and not deposited into a fringe benefit plan. ---- ***In the Matter of Portland Flagging, LLC (14-14), 35 BOLI 11, 15 (2016).***

When all of the arguments in the agency's motion for summary judgment were based on the allegation that respondents withdrew fringe benefit amounts from the paychecks of "workers," but failed to deposit those amounts into a fringe benefit plan, but the NOI did not identify the names of the "workers" or the amounts that were allegedly withheld and not deposited into a fringe benefit plan, the forum held that, even if some violations could be inferred from the agency's evidence submitted in support of its motions for summary judgment, the agency could not prevail time because the violations were not identified in the NOI. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 273 (2016).***

When the formal charges alleged that respondent violated ORS 659A.112(1)(c) and OAR 839-006-0200(2)&(3)(c) by requiring complainant to submit a medical note each time he was tardy based on his disability and disciplining him, "including suspending him from work for two days, for arriving late to work on some occasions that were due to complainant's disability," the forum noted that ORS chapter 659A does not contain a statute numbered ORS 659A.112(1)(c) and that respondent cannot be found to have violated a statute that does not exist. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 36 (2014).***

When the forum inferred from testimony and exhibits that the alleged violations of prevailing wage laws arose from respondent's failure to include a \$2.50 per hour bonus in computing overtime wages due, the allegations were dismissed on account of the agency's failure to identify the violations correctly in its notice of Intent or to move to amend the NOI. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 197 (2013).***

The forum found no violation of requirements to keep or provide records under OAR 839-020-0080 or 839-020-0083 when the agency's notice of intent failed to identify any records

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that respondents were required to keep and failed to keep and no evidence was presented at the hearing to assist the forum in identifying how respondents were deficient. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198-99 (2013).***

When the allegation in the body of the NOI was that respondents filed inaccurate and incomplete certified statements for work performed on a project and failed to certify the accuracy of the payroll, and the allegation in the applicable exhibit to the NOI was that respondent failed to keep records for 11 weeks before the project had begun and make them available to BOLI, and there was no evidence of respondent's submissions of certified payroll for the listed weeks, the forum dismissed the allegation based on the agency's failures to identify the violations correctly in the exhibit or to move to amend the NOI at hearing. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

### 10.0 ANSWER

#### 10.1 --- Generally

An answer must include an admission or denial of each fact alleged in the charging document. A general denial is insufficient. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 258 (2014).***

#### 10.2 --- Evidentiary Significance (see also 20.24, 24.3)

Factual matters alleged in a charging document that are not denied in the answer are deemed admitted by the answering party. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 258 (2014).***

In the answer, respondent acknowledged and admitted that wages were due, but did not admit the amount owing. Respondent's admissions established that wages were unpaid and due. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 260 (2014).***

When the facts alleged in the second paragraph of the agency's OOD incorporated all the elements of the agency's prima facie case, respondents' admission of those facts in its answer was proof of those elements. ---- ***In the Matter of Giants, Inc., 33 BOLI 53, 56 (2014).***

#### 10.3 --- Affirmative Defense

In general, an affirmative defense is a defense setting up new matter that provides a defense against the Agency's case, assuming all the facts in the complaint to be true. A few examples of defenses previously recognized as affirmative defenses by this forum include equitable estoppel, lack of jurisdiction, waiver, statute of limitations, claim and issue preclusion, bona fide occupational requirement, undue hardship, laches, unclean hands, and unconstitutionality. Some other affirmative defenses recognized by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds. In contrast, a defense that admits or denies facts constituting elements of the agency's prima facie case that are alleged in the agency's charging document is not an affirmative defense. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 125 (2016).***

The forum denied the agency's motion to strike defenses raised in respondents' case summary that the agency characterized as "newly raised" and "affirmative" because they were all defenses denying facts that constituted elements of the agency's prima facie case or were integrally related to and subsets of affirmative defenses previously plead in respondents' amended answer. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 126 (2016).***

In a case involving discrimination in public accommodation on the basis of sexual orientation, the forum need not consider a defense of unconstitutionality when respondents did not raise that defense in their answer. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 249***

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(2013), affirmed *Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806, 359 P3d 574 (2015).

In a hostile environment sexual harassment case, the forum did not consider the affirmative defenses set out in OAR 839-005-0030(5)(b) because respondent failed to plead them in the answer. ---- *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 168 (2012).

The forum did not consider the “direct threat” exception in OAR 839-005-0220(2)(c)(C) because it is an affirmative defense that was waived by respondent’s failure to raise it in the answer. ---- *In the Matter of Kenneth Wallstrom*, 32 BOLI 63, 78 (2012).

### 11.0 NOTICE OF HEARING

### 12.0 CONSOLIDATION OF CASES

### 13.0 EXPEDITED HEARINGS

### 14.0 FILING REQUIREMENTS

Twelve days before the hearing was set to begin, respondents filed a motion to dismiss or, in the alternative, for an order that respondents’ requests for admissions were deemed to be admitted based on the agency’s alleged continuing failure to respond to respondents’ requests for admissions that were served on the agency and the agency’s failure to respond to an interrogatory. The ALJ issued an interim order denying respondents’ motion on the grounds that it was premature because respondents had not yet filed a motion for a discovery order. To expedite matters, the ALJ included a supplemental requirement that stated:

“The hearing in this case is scheduled to begin on March 22, 2016. Any participant intending to file a motion is encouraged to do so as soon as possible. In addition to the forum’s standard filing requirements of mailing or hand delivery, I am also requiring that any motions or responsive pleadings filed between now and the time of hearing be emailed in their entirety to the other participants and me on the same day that they are officially filed.”

Respondents subsequently filed a motion for a discovery order, a motion in limine to exclude evidence, and a motion for expenses. The agency filed a timely response but did not email the attachments to its response to respondents’ counsel or the ALJ. Respondents filed a motion to strike the agency’s response because the agency did not email the attachments to its response to respondents’ counsel or the ALJ as instructed in the ALJ’s interim order. The forum granted respondents’ motion to strike based on the agency’s failure to follow the ALJ’s order. ---- *In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC*, 35 BOLI 68, 116-117, 123 (2016).

The forum did not consider the arguments made in the emailed copy of respondents’ response to the motion for summary judgment because respondents did not file them with BOLI’s contested case coordinator. ---- *In the Matter of Erick Espinoza Farm Labor Contractor*, 35 BOLI 2, 9 (2016).

### 15.0 MOTIONS

#### 15.1 --- Motion to Postpone

#### 15.2 --- Motion for Summary Judgment

#### 15.3 --- Motion for Discovery Order

##### 15.3.1 --- Sanctions for Failure to Comply with Discovery Order

Respondents moved for ORCP discovery sanctions related to the agency’s failure to provide discovery subject to the ALJ’s September 25, 2014, discovery order until February 24, 2015. Respondents alleged that the agency’s untimely disclosure of these documents established bad faith on the part of the agency and/or complainants, particularly since the disclosure occurred after respondents completed their depositions of complainants, and that

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respondents were irreparably prejudiced as a result. As a prelude to ruling, the ALJ noted that the forum had no authority to impose the vast majority of sanctions sought by respondents since the forum's authority in this matter is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -0092), and the forum's own rules, OAR 839-050-000 *et seq.* In its response, the agency frankly admitted that it could not determine why the records were not produced earlier in discovery, but they were in a location unlikely to be accessed and characterized its oversight as an inadvertent error. The forum stated that participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order, and that the agency's failure to provide the subject records by October 14, 2014, as ordered by the forum, did not meet the forum's "good cause" standard. The forum noted that the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence. However, because respondents asserted that some of the subject records would potentially assist respondents' defense and explained why in their motion, the ALJ concluded that a blanket prohibition on the introduction of the subject records might prejudice respondents and prevent a "full and fair inquiry" by the forum. The ALJ ordered that the agency could not offer or otherwise utilize any of the subject documents as evidence until such time as respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) respondents, should they elect to do so, may offer or utilize the subject documents in support of their case. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 197-200 (2015), appeal pending.***

### 15.4 --- Motion for Change of Hearing Location

### 15.5 --- Motion to Dismiss

When the agency concluded its case in chief, respondents moved to dismiss the agency's OOD for lack of jurisdiction, insufficiency of process, and failure to state a claim. The ALJ denied respondents' motion. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 132 (2016).***

Respondents objected to exhibits created by the agency over the weekend between the fourth and fifth days of hearing, based on testimony given by the wage claimants, because the exhibits were not provided with the agency's case summary and because respondents did not have an adequate opportunity to prepare for cross examination due to the Agency's failure to provide the exhibits prior to the fifth day of hearing. The ALJ sustained respondents' objection on the grounds that: (1) it was unfair to respondents to continue the hearing and allow testimony about those documents when respondents' counsel had no prior opportunity to examine them; and (2) it was inefficient for the forum to adjourn the hearing to give respondents' counsel that opportunity when the agency could have given respondents and the forum notice the previous week that it intended to create these documents and the hearing could have been continued on a later date. After the ALJ sustained respondents' objection, the ALJ denied respondents' motion to dismiss based on the failure the agency's failure to timely produce the handwritten notes of the agency's compliance specialist. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 128-29 (2016).***

The forum denied respondents' motion that the case be dismissed based on "prosecutorial misconduct." ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 128 (2016).***

Respondents filed a motion to dismiss or, in the alternative, for an order that respondents' requests for admissions were deemed to be admitted based on the agency's alleged continuing failure to respond to respondents' requests for admissions that were served on the agency and the agency's failure to respond to an interrogatory. The ALJ issued an interim order denying respondents' motion on the grounds that it was premature because respondents had not yet filed a motion for a discovery order. ---- ***In the Matter of Brown's***

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***Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117 (2016).***

At the close of the agency's case-in-chief, respondent moved for a directed verdict and requested the opportunity to make an oral or written argument in support of the motion. The ALJ regarded respondent's motion as a motion to dismiss. Respondent's counsel was given several minutes to argue her motion, and the agency was given equal time to argue against the motion. After hearing the arguments, the ALJ denied respondent's motion. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 10 (2014), appeal pending.***

### **15.6 --- Motion to Strike**

The agency filed objections to strike defenses set out in respondents' case summary on the grounds that they were "newly raised" defenses and also affirmative defenses that were not properly raised in respondents' original or amended answer. The forum denied the agency's objections, finding that the subject defenses were subsets of defenses already pled by respondents in their amended answer and that they were not affirmative defenses. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117, 123-26 (2016).***

Twelve days before the hearing was set to begin, respondents filed a motion to dismiss or, in the alternative, for an order that respondents' requests for admissions were deemed to be admitted based on the agency's alleged continuing failure to respond to respondents' requests for admissions that were served on the agency and the agency's failure to respond to an interrogatory. The ALJ issued an interim order denying respondents' motion on the grounds that it was premature because respondents had not yet filed a motion for a discovery order. To expedite matters, the ALJ included a supplemental requirement that stated:

"The hearing in this case is scheduled to begin on March 22, 2016. Any participant intending to file a motion is encouraged to do so as soon as possible. In addition to the forum's standard filing requirements of mailing or hand delivery, I am also requiring that any motions or responsive pleadings filed between now and the time of hearing be emailed in their entirety to the other participants and me on the same day that they are officially filed."

Respondents subsequently filed a motion for a discovery order, a motion in limine to exclude evidence, and a motion for expenses. The agency filed a timely response but did not email the attachments to its response to respondents' counsel or the ALJ. Respondents filed a motion to strike the agency's response because the agency did not email the attachments to its response to respondents' counsel or the ALJ as instructed in the ALJ's interim order. The forum granted respondents' motion to strike based on the agency's failure to follow the ALJ's order. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117, 123 (2016).***

### **15.7 --- Motion for Telephonic Hearing**

### **15.8 --- Motion for Protective Order**

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, "in view of the national attention and attendant publicity these cases have already received and the likelihood that complainants will be questioned about the protected health information in the records produced under the protective order," the ALJ issued a protective order regarding complainants' depositions. The order prohibited the deposition transcripts or notes made of the deposition testimony from being made available to "non-qualified" persons or from being used "for any other purpose than the preparation for litigation of [the] proceeding." ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 197 (2015), appeal pending.***

The Agency moved for a protective order regarding complainants' medical records both

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informally requested by respondents and in respondents' motion for a discovery order. The agency attached five pages of medical records asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to respondents." After conducting an *in camera* review, the ALJ made minor redactions unrelated to complainant's medical diagnosis and released the records to respondents, accompanied by a protective order. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 143 (2015), appeal pending.***

Prior to hearing, the agency filed three motions for *in camera* review and corresponding protective orders related to complainant's medical records sought through informal discovery by respondent. The ALJ granted all three motions and issued appropriate protective orders. --- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

During the hearing, the ALJ required an individual respondent who was not designated as a "qualified person" under the ALJ's protective order to read the protective order and sign a statement agreeing to be bound by the terms of that order as a prerequisite to being allowed to read any of complainant's medical records proffered as evidence. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

The agency moved for a protective order regarding complainant's medical information and records in response to respondents' informal discovery request in which respondents requested complainant's medical records related to complainant's claim for damages for emotional distress or mental or physical suffering. The agency attached four pages of medical records for the ALJ's review and asked that the ALJ conduct an *in camera* review of all documents provided by the agency prior to their release to respondents to determine if the agency was required to release them to respondents. In response, the ALJ issued a protective order governing the use and disposition of complainant's medical records and testimony at hearing related to those records. Based on the submitted records' immediate proximity in time to the alleged unlawful actions and a specific reference to complainant's former employment with respondent, the ALJ found that the records likely contained information generally relevant to the issue of complainant's entitlement to damages for emotional, mental, and physical suffering. However, because the agency did not specifically ask that the ALJ release these records to respondents and respondents had not filed a motion for discovery order, the ALJ declined to release the records to respondents, finding that any such release remained within the agency's discretion. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 97 (2012).***

### 15.9 --- Motion to Consolidate

On October 21, 2015, Pacific Communities Health District ('District') filed a coverage determination request related to the proposed demolition of its existing hospital and the design and construction of a replacement structure ('subject project'). On December 7, 2015, BOLI issued a coverage determination in which it concluded that prevailing wage rate laws would not apply to the subject project. On December 23, 2015, Oregon State Building & Construction Trades Council ('OSBCTC') filed a request for hearing as an "aggrieved person" under OAR 839-050-0445. A hearing was scheduled, and then postponed to allow BOLI to review its coverage determination. On March 1, 2016, OSBCTC filed a request for a coverage determination on the subject project. On April 6, 2016, BOLI issued a coverage determination in which it again concluded that prevailing wage rate laws would not apply to the subject project. On April 7, 2016, OSBCTC filed a request for hearing based on BOLI's April 6, 2016, coverage determination. On April 21, 2016, OSBCTC and the agency requested that a prehearing conference be held to discuss whether OSBCTC should withdraw their original request for hearing or whether the new request for hearing should be consolidated with the previously scheduled hearing. On April 25, 2016, the ALJ conducted a prehearing conference with the

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agency's administrative prosecutor and OSBCTC's counsel to discuss the issue. After considerable discussion the participants agreed that the best interests of OSBCTC, the agency, and the forum would be served by consolidating the cases for hearing and the ALJ issued an interim order consolidating the cases and setting a new hearing date. ---- ***In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 277-78 (2017).***

The agency moved to consolidate two prevailing wage rate cases because they involved the same respondents and had common questions of fact and law. Respondents then filed an unopposed motion to postpone the hearing based on pending discovery issues that involved gathering relevant documents from a third party. The ALJ issued an order resetting the case that also noted that a separate proposed order would be issued for each case to avoid confusion. After the hearing, the forum issued only one proposed order after the ALJ concluded that one proposed order would provide more clarity. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 183 (2017).***

The agency filed a motion to consolidate two cases against the same respondents involving two charging documents – an OOD (#80-15) claiming unpaid wages on behalf of four claimants and an NOI (#81-15) seeking to debar respondents for not paying the four claimants the prevailing wage rate, which was the basis of the wage claims. The ALJ held a prehearing conference to resolve the consolidation issue and determine the most efficient way of moving both cases forward. Based on the information provided by the agency and respondents at the conference and agreements that were reached, the ALJ issued an interim order stating: (1) Case no. 80-15 would be heard first; (2) When the record closed related to case no. 80-15, the ALJ would issue a proposed order and the commissioner would issue a final order; (3) If the final order in case no. 80-15 concluded that the work performed by the four claimants was not subject to the prevailing wage rate, this would also resolve case no. 81-15 and there would be no need for hearing in case no. 81-15; (4) If the final order in case no. 80-15 concluded that any part of the work performed by the four wage claimants encompassed by the wage claims in case no. 80-15 was subject to the prevailing wage rate, the forum would schedule a hearing in case no. 81-15 and set a case summary due date. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117 (2016).***

The forum granted the agency's unopposed motion consolidate two cases involving a wage claim and child labor violations on the grounds that both cases involve the same respondent and presented common questions of law and fact. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 39 (2016), appeal pending.***

### 15.10 --- Motion for Extension of Time

The forum granted respondent's unopposed request for a one week extension of time to respond to the agency's motion for summary judgment. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 40 (2016), appeal pending.***

When exceptions to proposed order did not timely arrive at the office of the contested case coordinator, apparently because they were mailed to wrong address, and the mailing also had insufficient postage, the agency's motion to extend the time for filing was denied. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 189 (2013).***

### 15.11 --- Other

In conjunction with a motion for a discovery order, respondents filed a motion in limine seeking an order "precluding the agency from offering any evidence regarding matters about which it declined to respond to discovery on the basis of relevancy." The ALJ ordered that respondents' motion would be granted with respect to respondents' requests for admission if the agency failed to timely respond to the ALJ's discovery order. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 123(2016).***

In a public accommodation civil rights case, respondents moved to remove the case to circuit court, asserting that they had an "unqualified right to have these matters removed to the

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circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).” The forum held that since the case was unrelated to federal housing law or discrimination based on real property transactions and, as such, did not allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, the case was not subject to the provisions of ORS 659A.870(4)(b) and respondents had no statutory right to elect to have the matter heard in circuit court. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 134-35 (2015), appeal pending.***

After the ALJ’s opening statements and after the ALJ declared CSRT to be in default, the agency’s administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the agency’s case summary as the record of the case and issuing a Final Order on Default. This was the first case in which the agency asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the agency exhibits filed with its case summary. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 265-66 (2014).***

Respondent filed a motion to take complainant’s deposition, a motion in limine to allow and/or exclude evidence, and third motion to postpone the hearing a second time. The agency filed objections to all three motions. The ALJ denied all three of respondent’s motions. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

The ALJ denied respondent’s motion to have the hearing reported by an official court reporter and issued an order that stated, in pertinent part: “The forum’s audio recording will be the official record of the hearing and any transcript made from it will be the official transcript of the hearing. However, with three conditions, respondent is free to bring a court reporter to the hearing if it believes that an accurate and complete record cannot be otherwise obtained. First, respondent bears all responsibility for paying the court reporter. Second, the court reporter is not disruptive of the proceedings. Third, the court reporter must sign a protective agreement confirming that he or she has read the four protective orders issued by the forum and agrees to be bound by them.” ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4-5 (2014).***

### 16.0 SUMMARY JUDGMENT

#### 16.1 --- Generally

A motion for summary judgment may be granted when no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows: No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. ---- ***In the Matter of X Wall Incorporated, 35 BOLI 133, 134 (2016).*** See also *In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 41 (2016), appeal pending; In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 18 (2016); In the Matter of Erick Espinoza Farm Labor Contractor, 35 BOLI 2, 5 (2016); In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 276 (2016); In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 247 (2016); In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 4 (2014), appeal pending; In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 258 (2014); In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI Orders 209, 213 (2014); In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 179, 183 (2014); In the Matter of Diamond Concrete, Inc., 33 BOLI Orders 68, 72 (2014); In the Matter of Aaron Alexander, 33 BOLI Orders 60, 62-63 (2014); In the Matter of Giants, Inc., 33 BOLI*

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*Orders 53, 55 (2014).*

When the agency filed a motion for summary judgment, the forum issued an interim order to respondent that described the significance of a motion for summary judgment and set a deadline for a response. When the forum received no response from respondent, the forum ruled on the agency's motion based on the existing record and documents provided by the agency in support of its motion. ---- ***In the Matter of X Wall Incorporated, 35 BOLI 133, 134 (2016).***

In ruling on the agency's motion for summary judgment, the forum considered: (1) The Agency's NOI, Amended NOI, OOD, and Respondents' answers; (2) The Agency's motion, with attached exhibits; and (3) Respondents' response to the Agency's motion, with attached exhibits. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 41 (2016), appeal pending.***

The record considered by the forum in deciding this motion consists of: (1) the agency's amended notice of intent, the agency's argument made in support of its motion, and the exhibits submitted with the agency's motion; and (2) respondents' Answer, respondents' argument opposing the agency's motion, and the exhibits submitted in respondents' response to the agency's motion. ---- ***In the Matter of Portland Flagging, LLC (14-14), 35 BOLI 11, 15 (2016).***

The record considered by the forum in deciding the agency's summary judgment motion was: (1) the agency's amended NOI, the agency's argument made in support of its motions, and the exhibits submitted with the agency's motions; and (2) respondents' answer, respondents' argument opposing the agency's motions, and the exhibits submitted in respondents' response to the agency's motions. ---- ***In the Matter of Erick Espinoza Farm Labor Contractor, 35 BOLI 2, 5 (2016).*** See also *In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 276 (2016).*

In a motion for summary judgment, unless a party objects to the authenticity of an exhibit, all documents submitted by each side can be considered as part of the record. When neither the agency nor respondents submitted any affidavit, declaration or sworn testimony to authenticate their respective exhibits in conformance with ORCP 47D and did not object to the authenticity of the opposing party's exhibits, the forum considered all the submitted exhibits when ruling on the motion for summary judgment. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 250-51 (2016).***

The record considered by the forum in deciding the agency's motion for summary judgment included: (1) the agency's OOD and amended OOD, the agency's argument made in support of its motion, and the exhibits submitted with the agency's motion; and (2) respondents' answer, respondents' argument opposing the agency's motion, and the exhibits submitted in respondents' response to the agency's motion. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 248 (2016).***

The commissioner has the authority to decide the constitutionality of statutes. In BOLI contested cases, the commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision set forth in the proposed order and subject to ratification by the commissioner in the final order. Accordingly, the ALJ had the initial authority to rule on the constitutional issues raised by respondents in their motion for summary judgment. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171 (2015), appeal pending.***

After the ALJ issued his interim order denying respondent's motion for summary judgment, respondent filed a reply to the agency's response to respondent's initial motion and an additional motion asking that the ALJ reconsider the ruling. The ALJ declined to consider either motion. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 9 (2014), appeal pending.***

Motions for summary judgment are specifically authorized by the Oregon Administrative

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Rules. A motion may be made to obtain an accelerated decision as to all or part of the issues raised in the pleadings. To the extent granted, the order ruling on the motion is to be set forth in the proposed order. --- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 257 (2014).***

When respondent filed a motion for summary judgment after the hearing was concluded, the forum denied the motion, noting that although the forum's rules do not specifically state that a motion for summary judgment must be made prior to the hearing, summary judgment is intended to be a tool to shorten proceedings by eliminating the need for litigation of undisputed material facts, and in this case, respondent's motion was made after all material facts were litigated. --- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 6 (2014).***

A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. --- ***In the Matter of KC Systems, Inc., 32 BOLI 205, 206 (2013).***

No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. --- ***In the Matter of KC Systems, Inc., 32 BOLI 205, 206 (2013).***

In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the participant filing the motion for summary judgment and in favor of the participant opposing the motion. --- ***In the Matter of KC Systems, Inc., 32 BOLI 205, 207 (2013).***

### 16.2 --- Child Labor

The forum denied the agency's motion for summary judgment as to its allegation that respondent employed a minor under 18 in hazardous and prohibited occupations because the agency failed to cite BOLI's administrative rules that make the employment of minors under 18 in hazardous and prohibited occupations unlawful. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 55 (2016), appeal pending.***

The forum considers employment of a minor without first verifying the minor's age as a serious violation because the purpose of verifying a minor's age before hire is to ensure that the minor is employed under proper working conditions and with proper hours for that specific age. When an employer knows a prospective employee is a minor, employment of that minor without first verifying the minor's age is an aggravating factor. Respondent's excuse that he asked his minor employee to provide documentation and the minor employee failed to provide any is not a mitigating factor because he employed the minor employee without first obtaining any proof of age documentation. Based on the aggravating circumstances and lack of any mitigating circumstances, the forum granted the agency's motion for summary judgment for \$1,000 as a civil penalty for respondent's violation of OAR 839-021-0185. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 55 (2016), appeal pending.***

When all the aggravating factors cited by the agency, viewed in a manner most favorable to the respondents, were amply supported by evidence in the record, there was no genuine material issue of fact, and there were no mitigating factors, the forum granted the agency's summary judgment motion for the assessment of a \$1,000 civil penalty for Respondents' violation of OAR 839-021-0170. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 53 (2016), appeal pending.***

The forum considers employment of a minor without first verifying the minor's age as a serious violation because the purpose of verifying a minor's age before hire is to ensure that the minor is employed under proper working conditions and with proper hours for that specific age.

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When an employer knows a prospective employee is a minor, employment of that minor without first verifying the minor's age is an aggravating factor. Respondent's excuse that he asked his minor employee to provide documentation and the minor employee failed to provide any is not a mitigating factor because he employed the minor employee without first obtaining any proof of age documentation. Based on the aggravating circumstances and lack of any mitigating circumstances, the forum granted the agency's motion for summary judgment for \$1,000 as a civil penalty for respondent's violation of OAR 839-021-0185. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 55 (2016), appeal pending.***

"Requiring" a minor employee to produce "an acceptable proof of age document" under OAR 839-021-0185 means that a respondent employer must require the production of that document *before* employing the minor employee. On a motion for summary judgment, viewed in a manner most favorable to respondent, the forum concluded that (1) the minor employee told respondent that he was 17 years old; (2) Respondent the minor employee if he had a driver's license; (3) The minor employee said he did not, that all his records were with his mother in Washington and that he would ask her to send them to him; (4) The minor employee never provided respondent with any proof of age document; and (5) Respondent did not require the minor employee to produce any proof of age document before he started work or at any time during his employment. Based on this evidence, the forum concluded that respondent violated OAR 839-021-0185 and granted the agency's motion for summary judgment. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 54 (2016), appeal pending.***

When all the aggravating factors cited by the agency, viewed in a manner most favorable to the respondents, were amply supported by evidence in the record, there was no genuine material issue of fact, and there were no mitigating factors, the forum granted the agency's summary judgment motion for the assessment of a \$1,000 civil penalty for Respondents' violation of OAR 839-021-0170. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 53 (2016), appeal pending.***

When the only evidence of any records that respondent maintained and preserved with respect to a minor employee and his employment with respondent did not mention the minor employee's full name, his street address, or his date of birth, and respondent provided no evidence that he made any attempt to ascertain these facts, the forum granted the agency's motion for summary judgment on its allegation that respondent violated the provisions of OAR 839-021-0170. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 51-52 (2016), appeal pending.***

In his answer, respondent did not dispute the fact that claimant was 17 years of age when respondents employed him. Rather, respondent stated that both claimant and claimant's father told respondent that claimant was 17½ years old when respondents hired him. Respondent admitted not obtaining an employment certificate prior to employing claimant but asserted ignorance of the law requiring employers to obtain employment certificate before employing minors as their reason for not obtaining a certificate. Ignorance of the law is no defense and the forum granted the Agency's motion for summary judgment with respect to its allegation that respondent violated ORS 653.307(2) and OAR 839-021-0220(2). Since it was respondent's first offense, pursuant to OAR 839-01-0025(2)(a) the forum assessed the minimum civil penalty of \$100 for employing a minor without a valid employment certificate. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 49-51 (2016), appeal pending.***

The forum granted the agency's motion for summary judgment as to the agency's allegation in its NOI that two respondents were joint employers when the NOI alleged that "at all times material, respondents were employers pursuant to ORS 653.010(3) within the state of Oregon with respect to any and all employees mentioned herein," the child who was the subject of the NOI was the only employee mentioned in the NOI, and respondents did not deny this allegation in their answer. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 42-43 (2016), appeal pending.***

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The forum granted the agency's motion for summary judgment as to the agency's allegation in its NOI that respondents failed to keep, maintain and make required records available under ORS 653.045(1) when, viewed in the manner most favorable to respondents, the records provided by respondents met some, but not all the requirements of the statute. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 43-44 (2016), appeal pending.***

### 16.3 --- Civil Rights

In a public accommodation, disability case involving service animals, respondent moved for summary judgment on the grounds that complainant's dogs did not meet the definition of "service animal." Relying on the ADA's definition of service animal, the forum found that complainant's dogs were service animals and denied respondent's motion. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 9 (2014), appeal pending.***

### 16.4 --- Farm Labor Contractor

### 16.5 --- Prevailing Wage Rate

In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the party filing the motion for summary judgment and in favor of the participant opposing the motion. Given the related ownership interests and addresses of the companies and when drawing all inferences of fact in favor of the non-moving party, the forum found that there was a question of fact as to whether three named respondents had a "financial interest" in a subcontractor and declined to award summary judgment as to respondents' argument that the three respondents did not have a financial interest. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 25 (2016).***

When the fringe benefit contributions made by respondents were not in compliance with the law, the forum found it necessarily followed that respondents' certified payroll statements associated with the workers listed in the agency's amended notice of intent were inaccurate and in violation of ORS 279C.845 and OAR 839-025-0010 and granted summary judgment on that issue. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 21 (2016).***

When the fringe benefit contributions made by respondents were not in compliance with the law, the forum found it necessarily followed that respondents' certified payroll statements associated with the workers listed in the agency's amended notice of intent were inaccurate and in violation of ORS 279C.845 and OAR 839-025-0010 and granted summary judgment on that issue. The forum denied summary judgment on the agency's motion for a civil penalty of \$1,000 for each late contribution made on behalf of a worker because, viewed in the light most favorable to respondents, it appeared that respondents had "addressed at least some of the mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty." ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 21 (2016).***

The agency argued that respondents should be placed on the list of ineligible because respondents' president directed his staff to sign false statements certifying that employees' full wages were paid. Respondents argued that it was the president's intent to make the quarterly fringe benefit deposits when the weekly certified statements were completed and that the agency did not establish the element of "intent" which was necessary to place respondents on the list of ineligible. Although the forum categorized respondents' evidence as to a "good faith" intention as "weak," when viewing it in the light most favorable to respondents, the forum concluded it was unable to grant the agency's motion for summary judgment on this issue and denied the motion. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 21 (2016).***

The forum denied the agency's motion for summary judgment on the issue of whether respondents failed to pay the prevailing wage rate when the agency argued that that Respondents withdrew fringe benefit amounts from the paychecks of 36 workers, but failed to deposit those amounts into a fringe benefit plan and the agency's NOI did not identify the

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names of the 36 workers or the amounts that were allegedly withheld and not deposited into a fringe benefit plan. ---- ***In the Matter of Portland Flagging, LLC (14-14), 35 BOLI 11, 15 (2016).***

To make late contributions, employers must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. When there was no evidence that the late contributions made to the accounts of the 36 workers followed an appropriate delinquent contribution payback method and it appeared that only the amounts deducted from the wage claimants' paychecks during those time periods were deposited into the contractor's plan several months later, the forum found that the fringe benefit contributions made to the retirement accounts of the wage claimants on that date did not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a), and granted the agency's second motion for summary judgment. --- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 20 (2016).***

On the agency's motion for summary judgment, the agency argued that, pursuant to ORS 279C.860 and OAR 839-025-0010, respondents should be placed on the list of ineligible because respondent Williams directed his staff to sign false statements certifying that employees' full wages were paid. Respondents argue that it was Williams's intent to make the quarterly fringe benefit deposits when the weekly certified statements were completed and that the Agency thereby failed to establish the element of "intent" necessary to place respondents on the list of ineligible. Although the evidence submitted by respondents as to a 'good faith' intention to submit fringe benefit contributions was weak, when viewing it in the light most favorable to respondents, the forum found it was unable to grant the agency's motion on this issue and denied the motion. --- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 278 (2016).***

Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. The agency may assess a civil penalty in the amount of the unpaid wages or \$1000, whichever is lesser. On a motion for summary judgment, when the agency sought civil penalties of \$1000 for each late contribution on behalf of a wage claimant, respondents argued that this amount was "excessive and egregious due to the fact that all wages were paid." Viewing the evidence in the light most favorable to respondents, it appeared that respondents had addressed at least some of the mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty, and the agency's motion for summary judgment on this issue was denied. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277-78 (2016).***

In a prevailing wage rate case, the agency moved for summary judgment based on the allegation that respondents did not timely submit the fourth quarter 2011 contribution for Claimant Leo Montgomery. Respondents argued that the contribution made on January 31, 2012, was made on a regular basis on a date established by the contractor. For summary judgment purposes when viewing the evidence in the light most favorable to respondents, the forum held that there was an issue of fact as to whether this contribution was timely and the agency's motion on this issue was denied. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277 (2016).***

In a prevailing wage rate case, when there was no evidence that late fringe benefit contributions made to the accounts of the respondents' twelve workers for the second quarter of 2012 followed an appropriate delinquent contribution payback method, the forum held that the contributions respondents made on October 1, 2012, did not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a) and granted the agency summary judgment on that issue. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277 (2016).***

When all of the arguments in the agency's motion for summary judgment were based on the allegation that respondents withdrew fringe benefit amounts from the paychecks of

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“workers,” but failed to deposit those amounts into a fringe benefit plan, but the NOI did not identify the names of the “workers” or the amounts that were allegedly withheld and not deposited into a fringe benefit plan, the forum held that, even if some violations could be inferred from the agency’s evidence submitted in support of its motions for summary judgment, the agency could not prevail time because the violations were not identified in the NOI. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 274 (2016).***

When the agency had not yet established whether any of the respondents violated ORS 279C.840, there was a question of fact as to whether respondents were responsible for liquidated damages pursuant to ORS 279C.855(1) and the agency’s motion for summary judgment requesting liquidated damages was denied. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 254 (2016).***

The forum has previously recognized that factors such as fluctuating market conditions can account for differences between retirement account statement balances and the amounts contributed by an employer. In a prevailing wage rate case in which the agency alleged that an employer paid contributions untimely into its employee’s retirement accounts, the forum found the evidence to be unclear as to the amounts contributed and the dates on which contributions were made without sworn testimony from witnesses knowledgeable about the contributions to the employee’s retirement accounts and, viewing the evidence submitted by both sides in the light most favorable to respondents, denied summary judgment to the agency as to whether there were any unpaid wages owing to a claimant. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 253 (2016).***

The agency’s motion, submitted prior to the filing of an amended OOD which added Portland Flagging LLC dba AD Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC as respondents, asserted that “Respondents” violated ORS 279C.800(1)(a). However, at the time the motion was filed, AD Traffic Control Services LLC was the only named respondent. When the amended OOD contained no information about these newly added respondents; the text in the body of the amended OOD only identified AD Traffic Control Services, LLC as the “employer”; there was no reference to the other three respondents and no explanation of their role in this matter; the agency’s exhibits contained information suggesting a relationship between the newly added respondents and AD Traffic but failed to explain the role of those three respondents in relation to the wage claimants this matter; and there was no sworn testimony from an affidavit or declaration explaining the significance of the exhibits, the agency’s motion with respect to respondents Portland Flagging LLC dba AD Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC was denied. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 248 (2016).***

### **16.6 --- Wage Collection, Minimum Wage, Overtime, and Working Conditions**

The forum granted the agency’s motion for summary judgment, but denied the agency’s motion for summary judgment as to civil penalties, holding that ORS 653.256 provides that BOLI’s commissioner may assess a civil penalty not to exceed \$1,000 against any person who *willfully* violates ORS 653.045 or any rule adopted thereunder, but the agency’s failure to allege that respondent’s violation was “willful” foreclosed the forum from assessing a civil penalty. ---- ***In the Matter of X Wall Incorporated, 35 BOLI 133, 137 (2016).***

The agency alleged aggravating circumstances related to OAR 839-020-1020(1)(c-f) in support of both the \$1,000 civil penalties it proposed to assess for respondent’s violations of ORS 653.045(1) & (2). Included in the alleged aggravating circumstances were claims that (a) the wage claimant was underpaid by \$1,627 as a result of respondent’s failure to accurately record claimant’s hours worked. Because the agency did not seek summary judgment on those allegations, the issues of whether or not claimant was underpaid and whether respondents failed to accurately record claimant’s hours could not be resolved until those issues had been litigated at hearing. With those allegations still in dispute, the forum denied summary judgment

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to the agency as to the agency's proposed assessment of civil penalties in the amount of \$2,000 because there was still a genuine issue of fact remaining. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 48 (2016), appeal pending.***

Respondent's 16-month delay in providing records requested by BOLI that respondents were required to maintain by ORS 653.045(1) and OAR 839-020-0083 violated the statute and rule and the agency was granted summary judgment on that issue. The forum denied the agency's motion for summary judgment regarding respondent's failure to create and provide a list instead of providing actual records, holding that the statute and rule does not require employers to create any additional records. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 45-47 (2016), appeal pending.***

In its motion for summary judgment, the agency argued that it was entitled to summary judgment on the issue of "joint employment relationship" because "respondents did not deny that they were both employers of the wage claimant, nor did either respondent independently deny that they employed the wage claimant in their separate answers and request for hearing." Although the agency's latter assertion was correct, the forum did not grant summary judgment because of the ambiguity of the agency's pleading when the first sentence in paragraph II of the NOI referencing claimant's wage claim identified respondents as the "employers," but the agency's subsequent allegations of employment relationship and liability for unpaid wages all used the singular term "employer" without specifically identifying either respondent as the "employer." The forum held that respondents were not required to jointly or separately deny a joint employment relationship to avoid summary judgment on that issue when the agency only alleged the liability of a single employer and not specified which employer. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 42 (2016), appeal pending.***

In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the participant filing the motion for summary judgment and in favor of the participant opposing the motion. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 179 (2014).*** See also *In the Matter of Aaron Alexander, 33 BOLI Orders 60, 63 (2014); Giants, Inc., 33 BOLI Orders 53, 55 (2014).*

The forum granted the agency's motion for summary judgment when respondent's answer did not dispute the agency's allegations in its OOD and raised no affirmative defenses. - ***In the Matter of Aaron Alexander, 33 BOLI 60, 63 (2014).***

The forum granted the agency's motion for summary judgment when respondent either admitted or did not address the agency's allegations in its answer and filed no response to the agency's motion for summary judgment. ---- ***In the Matter of Giants, Inc., 33 BOLI Orders 53, 57 (2014).***

Prior to the hearing, the agency submitted a motion for partial summary judgment. The forum allowed that motion in part in an interim order insofar as it sought a ruling that respondent owed wages to claimant. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 254 (2014).***

The forum granted the agency's motion for summary judgment as to a wage claimant's unpaid, due, and owing wages when respondent's answer did not dispute the agency's allegations in its OOD or contest the exhibits submitted in support of the agency's motion. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 180, 184 (2014).***

### 17.0 CLAIM AND ISSUE PRECLUSION

17.1 --- Generally

17.2 --- Claim Preclusion

17.3 --- Issue Preclusion

### 18.0 POSTPONEMENTS

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The agency moved to consolidate two prevailing wage rate cases because they involved the same respondents and had common questions of fact and law. Respondents then filed an unopposed motion to postpone the hearing based on pending discovery issues that involved gathering relevant documents from a third party. The ALJ issued an order resetting the case that also noted that a separate proposed order would be issued for each case to avoid confusion. After the hearing, the forum issued only one proposed order after the ALJ concluded that one proposed order would provide more clarity. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 183 (2017).***

Shortly after the hearing commenced on the fifth day of hearing, an individual respondent received news of a medical emergency to a member of his family. Respondents moved to adjourn the hearing so that the respondent could attend to the emergency and respondents' counsel would not be deprived of his assistance. The agency did not object and the ALJ granted the motion. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 129 (2016).***

Respondents moved for a postponement and the agency objected. When (1) respondents had no prior notice of their original counsel's withdrawal; (2) respondents immediately obtained new counsel following the withdrawal of their original counsel and that counsel immediately filed a motion for a postponement; and (3) respondents' new counsel had a pre-existing schedule conflict, the forum found that respondents have shown good cause for a postponement. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 113-116 (2016).***

Over the agency's objection, the ALJ granted respondents' motion for postponement requesting that the hearing be rescheduled because respondents' counsel had a scheduling conflict. A new hearing date was set for a date which all the parties had indicated they were available. ---- ***In the Matter of Erick Espinoza Farm Labor Contractor, 35 BOLI 2, 4 (2016).***

The forum granted the agency's motion to postpone the hearing by one day. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 273 (2016).***

The ALJ granted the agency's unopposed motion to postpone the hearing so that the agency could have additional time to review documents recently produced by respondents and set a new hearing date. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 273 (2016).***

The ALJ granted respondents' motion to postpone the hearing for a day based on respondents' prescheduled plans to be out of town the day the hearing had been reset to start. - --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 143 (2015), appeal pending.***

The ALJ issued an interim order that resetting the hearing date based on statements in a prehearing conference by the agency and respondents that the hearing might last up to a week. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 143 (2015), appeal pending.***

The forum granted respondents' motion to postpone the hearing because respondent's attorney had "pre-paid non-refundable vacation plans" during the time scheduled for hearing. --- - ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 132 (2015), appeal pending.***

At the commencement of the hearing, respondents' attorney requested a postponement of the hearing for additional time on behalf of his clients to respond to the revised allegations in the agency's amended order of determination (OOD) that named respondents Global and Drive as successor employers and to arrange for additional witnesses and exhibits to address the successor liability allegations. The agency objected to the request to postpone the hearing, but agreed that respondents were entitled to additional time to respond to the amended OOD. The

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ALJ ruled that respondents could have a seven day extension to respond to the amended OOD but denied, in part, respondents' request to postpone the hearing, and ruled that the hearing would proceed as scheduled as to the liability of respondent Autoteam. The ALJ postponed the hearing as to the successor liability allegations against the other two respondents to reconvene at a later date to address those issues. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 47 (2015).***

On June 19, 2014, respondent requested a second postponement based respondent's June 10 receipt of a summons for jury duty in Lane County Circuit Court on July 18, 2014. The agency objected to respondent's motion. On June 24, 2014, the ALJ issued an interim order that concluded "[b]efore the forum will consider granting respondent's motion to postpone the hearing, respondent must provide documentary evidence that (1) she has asked to have her jury service either deferred or excused and (2) that deferral or excuse has been denied." ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 9 (2014), appeal pending.***

On February 10, 2014, a state holiday and the day before the hearing was scheduled, respondent's authorized representative telephoned BOLI and left a message requesting a postponement due to inclement weather and her sickness. The ALJ did not learn of this phone call until 6:30 a.m. on February 11, 2014. That same day, at the time set for hearing, the ALJ held a telephone conference with respondent's authorized representative and the agency's administrative prosecutor. At the conclusion of the conference, the ALJ granted the postponement and rescheduled the hearing to begin on March 18, 2014. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 192 (2014).***

Thirteen days before the reset hearing date, an attorney filed a notice of appearance on behalf of respondent and requested a postponement of the hearing based on a previously scheduled conflict consisting of a conciliation meeting with BOLI's Civil Rights Division involving himself, his client, and an out-of-state attorney. The ALJ held a telephone conference with the attorney and administrative prosecutor, at which time the ALJ orally granted respondent's second motion for postponement and reset the hearing to begin on March 25, 2014. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 192 (2014).***

Respondent moved for a postponement based on the illness of respondent's counsel, his legal assistant, his secretary, and an automobile accident that morning involving respondent's Portland terminal manager who was scheduled to assist respondent's counsel with hearing preparation. The agency did not object and the hearing was reset. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

Respondent filed a motion to take complainant's deposition, a motion in limine to allow and/or exclude evidence, and third motion to postpone the hearing a second time. The agency filed objections to all three motions. The ALJ denied all three of respondent's motions. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

An unopposed motion to postpone hearing to complete discovery was granted and a mutually agreed-upon hearing date was set. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

An unopposed motion to postpone hearing was granted and new case summary due date was set. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 187 (2013).***

Despite respondents' claim that their attorney had not advised them of the hearing, that they had another legal hearing the same month, and that they were unaware of the hearing until a week prior, the forum denied respondent's request for postponement, finding that the notice of hearing had been mailed to respondent's correct address, and there was no evidence respondent had failed to receive the notice, or that respondent had made efforts to find another

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attorney. ---- *In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 176 (2013).*

### 19.0 INFORMAL DISPOSITIONS, SETTLEMENT

### 20.0 DISCOVERY

#### 20.1 --- Generally

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce the names and addresses of any person, media outlet, or other entity with whom complainants spoke regarding the events leading to their BOLI complaint or their complaint filed with the Department of Justice. The ALJ found that respondents' request was reasonably likely to produce information that was generally relevant to the case and granted respondents' motion. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147-48 (2015), appeal pending.*

The forum rejected the agency's argument that complainants were not subject to discovery rules under OAR 839-050-0020 because they are not "parties" and therefore are not "participants" under OAR 839-050-0200(1), citing numerous prior cases in which a respondent has been allowed to request a discovery order to obtain documents and information from a complainant through the Agency that are discoverable under OAR 839-050-0020(7). ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 144 (2015), appeal pending.*

After the agency rested its case-in-chief, respondent's attorney requested an opportunity to inspect the original investigative files in both cases. Based on discovery issues that arose during the testimony of the agency investigator, the ALJ granted the request. The agency asked that the ALJ conduct an *in camera* inspection of the files before allowing respondent's attorney to view them, a request that was granted. The ALJ inspected the files, redacting nine documents, and allowed respondent's attorney to inspect the remainder of the investigative files. ---- *In the Matter of Columbia Components, Inc., 32 BOLI 257, 261 (2013).*

When formal charges are based upon a complaint filed pursuant to ORS 659A.825, discovery is the appropriate procedure for ascertaining the identity of the aggrieved persons. ---- *In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).*

#### 20.2 --- Documents

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any receipt, invoice, contract, or other writing memorializing the purchase of the cake by complainants from respondent for the previous wedding of one complainant's mother, along with any photos, videos, or other record of that cake. The ALJ found that respondents' request was not reasonably likely to produce information generally relevant to the case and denied respondents' motion. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.*

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any social media posts, blog posts, emails, text messages, or other record or communication showing complainants' involvement with a boycott of respondents or their business. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and denied respondents' motion, noting that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34*

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### ***BOLI 102, 147-48 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring production of photos, videos, or audio recordings of complainants' wedding ceremony. The agency objected on the grounds of relevancy, further explaining that complainants were wary of turning over these materials to respondents because respondents previously posted complainants' home address on a social media site. The ALJ ruled that unless the agency was intending to offer photos, videos or audio recordings as evidence at the hearing, respondents' motion was denied. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring production of documentation and photographs of the actual wedding cake served at complainants' actual wedding ceremony. The agency objected to these requests on the basis of relevancy. The ALJ concluded that the fact that a cake was purchased from another cake baker was likely relevant and granted the motion only as to a receipt or invoice for showing the purchase of the cake and one photograph of the cake. The ALJ also ruled that the agency need not produce photographs of complainants, their families, and the actual wedding ceremony. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order for a copy of records in the agency's possession as to the state policy in January 2013 for issuing marriage licenses to same sex couples. The agency objected on the basis of relevance and also stated that such documents were not within the possession or control of the agency. Respondents claimed the documents were relevant to show whether the agency was aware that same sex marriage was not recognized in Oregon at the time of the acts in question in this case. The ALJ denied respondents' motion because (1) the agency's awareness of the status of same sex marriage in Oregon was not likely to lead to relevant evidence; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the agency indicated it had no such documents in its possession. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 146 (2015), appeal pending.***

The ALJ granted respondent's motion for a discovery order to compel the agency to: (a) supplement its answer to respondent's interrogatory inquiring about complainant's alleged emotional, mental and physical suffering; and (b) produce any documents not already produced in response to respondent's earlier informal request for production seeking "[a]ll notes, correspondence, diaries, calendars, tape recordings, or other writings of any kind with respect to complainant's employment \* \* \*." ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4-6 (2014).***

Respondent moved for a discovery order requiring, among other things, production of a number of documents and that complainant be required to confirm that, if no documents were produced in response to respondent's request for production, no such documents exist and that the agency be prohibited from introducing evidence related to documents that have not been produced. To the extent they had not been produced, the ALJ ordered the agency to produce documents responsive to a number of respondent's requests but declined to grant respondent's motion for an order that if no documents were produced in response to respondent's request for production, no such documents exist and that the agency be prohibited from introducing evidence related to documents that have not been produced, noting that the sanctions in OAR 839-050-0200(11) may apply in these circumstances. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 259-61 (2013).***

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The Agency was ordered to provide a copy of the commissioner's complaint filed pursuant to ORS 659A.825 as confirmation that the formal charges were based on a commissioner's complaint. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

When respondents moved for a discovery order seeking production of documents, the ALJ ordered the agency to produce any documents responsive to respondents' requests that appeared reasonably likely to produce information generally relevant to the case. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

When the agency alleged that respondent unlawfully discharged complainant in 2009 and respondent sought production of complainant's tax returns for 2007-2010, the forum ordered the agency to produce complainant's 2009 and 2010 tax returns and stated that the 2007-2008 returns need not be produced because they lacked potential relevance. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

### 20.3 --- Interrogatories

Respondents moved for a discovery order compelling the agency to make a full, complete, and truthful response to respondents' first request for admissions and an order compelling the agency to answer four of respondents' interrogatories. Respondents' motion included supporting documents demonstrating respondents' attempts to obtain the sought after discovery on an informal basis and the agency's responses as of the date of respondents' motion. Regarding the request for admissions, the ALJ required the agency to admit or deny requests made by respondents that were "reasonably likely to produce information that is generally relevant" and found that some answers that were already provided were adequate. Regarding the request for interrogatories, the ALJ ordered the agency to provide specific additional information to three and found that the fourth was "overly broad" and did not require an additional response. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 118-123(2016).***

Respondents filed a motion to dismiss or, in the alternative, for an order that respondents' requests for admissions were deemed to be admitted based on the agency's alleged continuing failure to respond to respondents' requests for admissions that were served on the agency and the agency's failure to respond to an interrogatory. The ALJ issued an interim order denying respondents' motion on the grounds that it was premature because respondents had not yet filed a motion for a discovery order. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117 (2016).***

In a public accommodation case, respondents issued an interrogatory requesting a detailed explanation of any involvement or communication complainants had with any group involved in boycotting respondents' business. The agency objected on the basis of relevance, over breadth, and because the requested information was outside the possession or control of the agency. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and did not require the agency to respond to the interrogatory. The ALJ noted that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 146 (2015), appeal pending.***

Respondents issued an interrogatory requesting an explanation as to the actions taken by complainants to remove their public social media profiles after they filed a complaint of discrimination with DOJ, claiming that because complainant claimed damages as a result of unwanted media attention, the removal of complainant's social media profiles was relevant to

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the assessment of damages or mitigation of damages. The agency objected on the basis of relevancy. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and did not require the agency to respond to the interrogatory. The ALJ noted that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 145-46 (2015), appeal pending.***

In an interrogatory in a civil rights case, respondents requested an explanation "in detail [of] the nature of the mental harm complainants alleged resulted from the events alleged in the complaint." The agency objected on the grounds that the request was redundant and vague, as it was unclear how the interrogatory differed from the interrogatory asking for information as to emotional harm allegedly suffered by complainants. In its response to the motion, the Agency stipulated that "emotional, mental" suffering was any suffering not attributed to physical suffering, and that information was provided in response to respondents' interrogatory no. 6. Based on the agency's stipulation that "emotional and mental" suffering were the same, the ALJ concluded that the agency's response was sufficient and denied respondents' request for additional information. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 145 (2015), appeal pending.***

When respondents requested in an interrogatory that the agency explain in detail the nature of the physical harm complainants alleged in the formal charges and the agency responded that both complainants experienced "varying physical manifestations of stress" and that "any further medical information will be provided pursuant to a protective order," the forum agreed that respondents were entitled to know more specifically what physical damages had been allegedly sustained and ordered the agency to have complainants, through the agency, to respond to respondents' interrogatory. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 144-45 (2015), appeal pending.***

The forum held that complainants were required to respond to interrogatories and sign them under oath. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 144 (2015), appeal pending.***

The ALJ granted respondent's motion for a discovery order to compel the agency to: (a) supplement its answer to respondent's interrogatory inquiring about complainant's alleged emotional, mental and physical suffering; and (b) produce any documents not already produced in response to respondent's earlier informal request for production seeking "[a]ll notes, correspondence, diaries, calendars, tape recordings, or other writings of any kind with respect to complainant's employment \* \* \*." ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4-6 (2014).***

Respondent moved for a discovery order requiring, among other things, complete and sworn responses to its interrogatories. The agency objected, contending it responded adequately to respondent's informal discovery requests and that respondent's motions were "untimely and made solely for the purposes of delay. The ALJ ordered that complainant verify that the Interrogatory responses, including the references incorporated therein, were true, and that complainant respond to a specific interrogatory request to which the agency had objected. - ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 259-60 (2013).***

The ALJ concluded that three of Respondents' interrogatories were reasonably likely to produce information generally relevant to the case and ordered the Agency to answer those interrogatories. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

When respondents moved for a discovery order seeking more complete responses to

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respondents' interrogatories, the ALJ ordered the agency to respond to some interrogatories more specifically, but found that other requests were unduly vague and did not require a response. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 97-99 (2012).***

### 20.4 --- Requests for Admissions

Respondents moved for a discovery order compelling the agency to make a full, complete, and truthful response to respondents' first request for admissions and an order compelling the agency to answer four of respondents' interrogatories. Respondents' motion included supporting documents demonstrating respondents' attempts to obtain the sought after discovery on an informal basis and the agency's responses as of the date of respondents' motion. Regarding the request for admissions, the ALJ required the agency to admit or deny requests made by respondents that were "reasonably likely to produce information that is generally relevant" and found that some answers that were already provided were adequate. Regarding the request for interrogatories, the ALJ ordered the agency to provide specific additional information to three and found that the fourth was "overly broad" and did not require an additional response. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 118-123(2016).***

Respondents filed a motion to dismiss or, in the alternative, for an order that respondents' requests for admissions were deemed to be admitted based on the agency's alleged continuing failure to respond to respondents' requests for admissions that were served on the agency and the agency's failure to respond to an interrogatory. The ALJ issued an interim order denying respondents' motion on the grounds that it was premature because respondents had not yet filed a motion for a discovery order. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117 (2016).***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order for the agency's admission that the that complainants were not issued a marriage license between January 17, 2013, and May 18, 2014. The ALJ denied respondents' motion because (1) the agency's awareness of the status of same sex marriage in Oregon was not likely to lead to relevant evidence; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the agency indicated it had no such documents in its possession. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 149 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order for the agency's admission that the that complainants did not at any time on or after January 17, 2013, delete or remove her public Facebook profile. The agency objected on the basis of relevance. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was reasonably likely to produce information generally relevant to the case and denied respondents' motion, noting that if respondents established the relevance of this request in their depositions of complainants, respondents could renew their motion for a discovery order. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 149 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order for the agency's admission that the State of Oregon did not recognize same sex marriage on or about January 17 and 18, 2013. The agency objected on the basis of relevance. The ALJ denied respondents' motion because (1) the agency's awareness of the status of same sex marriage in Oregon was not likely to lead to relevant evidence; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the agency indicated it had no such documents in its

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possession. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 149 (2015), appeal pending.***

### 20.5 --- Depositions

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, "in view of the national attention and attendant publicity these cases have already received and the likelihood that complainants will be questioned about the protected health information in the records produced under the protective order," the ALJ issued a protective order regarding complainants' depositions. The order prohibited the deposition transcripts or notes made of the deposition testimony from being made available to "non-qualified" persons or from being used "for any other purpose than the preparation for litigation of [the] proceeding." --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 197 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents filed a renewed motion to depose complainants. The agency timely filed objections. Respondents' motion was based on part on their assertion that (1) the 25 additional interrogatories they were allowed to serve on the agency pursuant to the ALJ's interim order that allowed respondents to serve additional interrogatories as a potential means of eliminating the need for a deposition, (2) coupled with the agency's responses to respondents' prior interrogatories and the agency's answers to the 25 additional interrogatories, (3) were inadequate to address complainants' damages, leaving respondents substantially prejudiced as a result. After reviewing prior BOLI final orders, the ALJ concluded that this case stood "well apart from all its predecessors in the exhaustive list of harms alleged by complainants for whom the agency seeks damages. No other case comes even remotely close." The ALJ stated that respondents have a right to inquire into each type of harm alleged by complainants to determine the extent of the harm and whether complainants' physical, mental, and emotional suffering was caused, at least in part, if not in whole, by events and circumstances that were unrelated to one respondent's ORS 659A.403 violation and that, based on the sheer number and variety of types of alleged harm, there is no practical way respondents could accomplish an effective inquiry using interrogatories. The ALJ ruled that respondents would be substantially prejudiced if they are not allowed to depose complainants and granted respondents' motion to depose complainants, with specified limitations. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 193-96 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved to depose one complainant's mother who was a material witness to the alleged discrimination. Respondents argued that they strongly dispute some of the factual claims made by the complainants and needed to know "whether [the witness] would validate complainant's testimony under oath before the hearing," adding that "in this case, multiple parties to the same conversations recall substantially different events, and subtle differences in retelling will substantially affect a credibility determination that ALJ must make and without being able to compare such testimony prior to hearing, the respondents are substantially prejudiced." The ALJ denied respondents' motion, finding that respondents had not demonstrated the need to depose the witness, and noting that "respondents are typically provided with notes from investigative interviews of witnesses. Neither the agency nor respondents have provided information as to whether that occurred in this case. However, unless respondents did not receive the usual investigative notes of the agency's interview with [the witness] or no such notes exist because [the witness] was never interviewed, respondents' motion would be denied. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 151 (2015), appeal pending.***

Respondents moved to depose both complainants in a public accommodation case

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involving respondents' refusal to provide a wedding cake for complainants' same sex wedding. The ALJ concluded that the case posed two "unique circumstances" – (1) the ALJ's inability to determine whether or not information and documents sought in response to respondents' interrogatories and requests for production were reasonably likely to produce information that is generally relevant to the case and conclusion that if they were relevant, they might result in the production of evidence that bore a significant relationship to complainants' alleged damages, and (2) complainants' damages claim for reimbursement of expenses for out-of-town trips to Seattle, Tacoma (two trips), and Lincoln City, with expenses for lodging, gas, and food at a number of establishments that gave rise to too many possibilities to adequately investigate with 25 interrogatories. The ALJ concluded that respondents should be permitted to briefly depose complainants, with the scope of the depositions limited to complainants' claim for damages and further stating that unless unexpected circumstances arose that required an ALJ's intervention, the depositions should take no longer than 90 minutes per complainant. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 150 (2015), appeal pending.***

Respondent filed a motion to take complainant's deposition, a motion in limine to allow and/or exclude evidence, and third motion to postpone the hearing a second time. The agency filed objections to all three motions. The ALJ denied all three of respondent's motions. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

When it became clear to the ALJ during a hearing that complainant possessed documents either requested by respondent and/or set out in the ALJ's discovery order that complainant did not provide until respondent was able to ascertain existence of those documents during complainant's testimony and that complainant had not been forthcoming with regard to the existence of those documents, the ALJ adjourned the hearing to allow respondent to take complainant's deposition. The ALJ's order provided that: (1) if respondent did not take the opportunity to take complainant's deposition, respondent would not be allowed to ask any further questions of complainant or her husband at hearing related to the existence and production or non-production of any documents or records sought in respondent's request for production of documents; (2) that respondent was allowed to depose complainant for the sole purpose of ascertaining what records complainant had in her control or possession that were within the scope of the ALJ's discovery order or made relevant by the previous seven days of hearing; (3) the scope of the deposition did not extend to seeking answers to respondent's interrogatories, except as directly related to respondent's request for production of documents; (4) respondent could use the deposition, if necessary, in support of a motion for a discovery order to require production of any newly-ascertained records relevant to respondent's requests for production but not otherwise use the deposition as evidence at the hearing; and (5) respondent was responsible for any costs associated with conducting the deposition, but respondent and agency must each pay for their own copy of the transcript if a transcript was prepared. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 263-64 (2013).***

Respondent moved for a discovery order requiring, among other things, that respondent be allowed to depose complainant based on the agency's inadequate response to respondent's request for production of documents and complainant's failure to satisfactorily answer interrogatories. The ALJ denied Respondent's motion to depose complainant but ordered the agency to produce additional documents and ordered complainant to answer an additional interrogatory and verify the truth of all her interrogatory answers. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 259-61 (2013).***

When respondents failed to demonstrate that other methods of discovery, including interrogatories, were so inadequate that respondents would be substantially prejudiced by the denial of its motion to depose [the aggrieved persons], the motion was denied. Respondents must first attempt to gain the information via sworn statements through interrogatories. If the agency is uncooperative, or if respondents can demonstrate that the information it has obtained

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from the interrogatories will substantially prejudice respondents in the absence of a deposition, respondents may renew their motion to depose witnesses. --- *In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).*

### 20.6 --- Public Records

### 20.7 --- Failure to Produce/Sanctions

Respondents moved for ORCP discovery sanctions related to the agency's failure to provide discovery subject to the ALJ's September 25, 2014, discovery order until February 24, 2015. Respondents alleged that the agency's untimely disclosure of these documents established bad faith on the part of the agency and/or complainants, particularly since the disclosure occurred after respondents completed their depositions of complainants, and that respondents were irreparably prejudiced as a result. As a prelude to ruling, the ALJ noted that the forum had no authority to impose the vast majority of sanctions sought by respondents since the forum's authority in this matter is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -0092), and the forum's own rules, OAR 839-050-000 *et seq.* In its response, the agency frankly admitted that it could not determine why the records were not produced earlier in discovery, but they were in a location unlikely to be accessed and characterized its oversight as an inadvertent error. The forum stated that participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order, and that the agency's failure to provide the subject records by October 14, 2014, as ordered by the forum, did not meet the forum's "good cause" standard. The forum noted that the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence. However, because respondents asserted that some of the subject records would potentially assist respondents' defense and explained why in their motion, the ALJ concluded that a blanket prohibition on the introduction of the subject records might prejudice respondents and prevent a "full and fair inquiry" by the forum. The ALJ ordered that the agency could not offer or otherwise utilize any of the subject documents as evidence until such time as respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) respondents, should they elect to do so, may offer or utilize the subject documents in support of their case. --- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 197-200 (2015), appeal pending.*

In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed for two reasons. First, because there was no evidence that respondent "willfully suppressed" the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to respondent. Second, it was the agency's burden to prove that respondent's defense was pretextual. If the agency believed that respondent's defense was a pretext, it could have sought these records through discovery and offered them as impeachment or rebuttal evidence or called respondent's replacement tenants as witnesses. Nothing in the record suggested that the agency made any attempt to obtain the records and the agency did not call either replacement tenant as a witness. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85-86 (2012).*

Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery

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order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

### 20.8 --- Subpoenas

When a hearing was adjourned before completed due to the medical emergency of a respondent's family member, the ALJ issued an interim order requiring persons already served with subpoenas requiring their appearance to honor that subpoena when the hearing reconvened. The ALJ additionally ordered that "notice of the duty of each witness to comply with the modified time of reporting on the previously served subpoena shall be given to each witness by means of respondents and the agency sending a copy of this ruling by regular mail to the witness's mailing address." ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 129 (2016).***

### 20.9 --- Case Summaries

Respondents objected to exhibits created by the agency over the weekend between the fourth and fifth days of hearing, based on testimony given by the wage claimants, because the exhibits were not provided with the agency's case summary and because respondents did not have an adequate opportunity to prepare for cross examination due to the Agency's failure to provide the exhibits prior to the fifth day of hearing. The ALJ sustained respondents' objection on the grounds that: (1) it was unfair to respondents to continue the hearing and allow testimony about those documents when respondents' counsel had no prior opportunity to examine them; and (2) it was inefficient for the forum to adjourn the hearing to give respondents' counsel that opportunity when the agency could have given respondents and the forum notice the previous week that it intended to create these documents and the hearing could have been continued on a later date. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 128-29 (2016).***

At the conclusion of respondents' cross examination of a wage claimant called as an agency witness, respondents moved to amend their case summary to list all four wage claimants as witnesses. The agency objected and the ALJ denied respondents' motion. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 127 (2016).***

The agency filed objections to strike defenses set out in respondents' case summary on the grounds that they were "newly raised" defenses and also affirmative defenses that were not properly raised in respondents' original or amended answer. The forum denied the agency's objections, finding that the subject defenses were subsets of defenses already pled by respondents in their amended answer and that they were not affirmative defenses. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 116-117, 123-26 (2016).***

On January 19, 2015, after the hearing concluded, respondents filed an amended case summary listing additional witnesses. The amended case summary also included a "Legal Memo" arguing that the agency's failure to produce claimant to testify and be cross-examined under oath or affirmation, should be absolutely fatal to its case against the employer. The agency filed a motion to disregard respondent's amended case summary, stating that it was untimely because the ALJ's case summary order required case summaries to be filed no later than December 30, 2014. The ALJ issued denied respondents' motion with respect to the "Legal Memo" liability argument, and denying the agency's motion to the extent the amended case summary listed new witnesses to discuss the successor in interest theory raised in the agency's amended order of determination. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 47 (2015).***

Two months after case summaries were due, respondent's authorized representative

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Schoene filed a case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the agency filed a motion to exclude evidence "untimely filed in respondent's case summary." In response, Schoene sent an email to BOLI contested case coordinator in which she explained in detail the reasons why respondent had not file a case summary earlier. The ALJ instructed BOLI's contested case coordinator to contact Schoene and tell her that she would need to ask permission to file a response to the agency's motion by email. Schoene filed such a request, and the ALJ granted her request and retroactively received her e-mailed explanation, then held a prehearing conference and informed the participants that he would rule on the admissibility of respondent's case summary at the start of the hearing. Before opening statements, the ALJ gave Schoene an opportunity to explain why respondent had not timely filed a case summary. After listening to Schoene's numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness respondent listed in her case summary, as well as the 21 exhibits provided with respondent's case summary, would not violate the ALJ's duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that respondent's case summary would not be received, noting that respondent's exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness because she was not a named respondent and, even if respondent's case summary had been admitted, she was not listed on it as a witness. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 193 (2014).***

The agency filed a motion objecting to the admission of any evidence offered by respondents because respondents Bassett did not file case summaries and because respondents MBI and H. Maltby untimely filed their case summary. At hearing, the ALJ found that respondents MBI and H. Maltby provided a satisfactory reason for filing a case summary one day late and ruled that copies of exhibits filed with their case summary could be offered as evidence at hearing. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 129 (2014).***

At hearing, respondent's representative asked to make a statement, including sworn testimonial evidence. Respondent had not submitted a case summary designating the representative as a witness. The forum allowed the representative to make his statement, reserving its ruling on whether the statement would be allowed as evidence. He stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the case summary, and that he had experienced personal problems during the past week. After his statement, the agency's administrative prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to admit his statement into evidence. ---- ***In the Matter of Zoom Contracting, LLC, 33 BOLI 111, 112 (2014).***

During the hearing, both the agency and respondents moved to offer documents in evidence that should have been included with their case summaries. Neither participant objected and the ALJ received those documents. ---- ***In the Matter of High Mountain Plumbing Company and Diana Marie Cina, 33 BOLI 40, 41-42 (2014).***

The agency's objection, on basis of untimeliness, to respondent's filing of amended case summary on the second day of hearing was sustained. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 188 (2013).***

At hearing, the agency sought to introduce into evidence three letters to complainant from a housing agency describing the respective amounts of rent complainant and the housing agency would pay and HACSA would pay. Respondent objected on the grounds that the agency had not submitted it with the agency's case summary. The ALJ did not receive the exhibit because the agency failed to offer a satisfactory reason for not providing them with the

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agency's case summary and excluding it would not violate the ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). The ALJ reserved ruling on the admissibility of A-19 until issuance of the Proposed Order. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

At hearing, the agency sought to introduce into evidence 10 pages of "Progress Note[s]" notes made by complainant's therapist. Respondent objected on the grounds that the agency had not submitted the notes with the agency's case summary. Statements by the agency case presenter and therapist established that: (1) The agency served a subpoena on the therapist for the records two weeks before the hearing; (2) The therapist faxed the records the case presenter seven days before the hearing; (3) Because of a malfunction in the therapist's fax machine, the records were not transmitted to the case presenter; (4) The case presenter first acquired the documents late in the afternoon the day before hearing; and (5) The therapist had little independent recollection of what was specifically discussed in her therapy sessions with complainant. Under these circumstances, the forum finds that the agency has provided a satisfactory reason for not submitting the records with its case summary and that excluding them would violate the ALJ's duty to conduct a full and fair inquiry. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

Respondent, an attorney, did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The agency objected to respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the agency's objection on the grounds that respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). ----- ***In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

On her case summary, respondent listed Dirk Sharp as a witness. Based on the agency's objection and respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify. ----- ***In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

### 20.10 --- Social Media

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any recording or documents showing that complainants ever removed any public social media profiles or caused to be hidden from public view. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was reasonably likely to produce information generally relevant to the case and denied respondents' motion, noting that if respondents established the relevance of this request in their depositions of complainants, respondents could renew their motion for a discovery order. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce all postings by complainants and a witness to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present. The ALJ found that this request, with respect to complainants, was reasonably likely to produce information that is generally relevant to the case and ordered complainants to provide postings that contain comments about the facts of this case, comments about respondents, or comments that relate to their alleged damages.

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Respondents' request for the witness's social media was denied on grounds of relevance. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any social media posts, blog posts, emails, text messages, or other record or communication showing complainants' involvement with a boycott of respondents or their business. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and denied respondents' motion, noting that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147-48 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring production of all communications made by complainants to the media or on social media sites "relating to respondents and the events leading to the filing of formal charges against respondents." The ALJ granted respondents' motion, finding it was reasonably likely to produce information that is generally relevant to the case. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147 (2015), appeal pending.***

Respondents issued an interrogatory requesting an explanation as to the actions taken by complainants to remove their public social media profiles after they filed a complaint of discrimination with DOJ, claiming that because complainant claimed damages as a result of unwanted media attention, the removal of complainant's social media profiles was relevant to the assessment of damages or mitigation of damages. The agency objected on the basis of relevancy. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and did not require the agency to respond to the interrogatory. The ALJ noted that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 145-46 (2015), appeal pending.***

### 20.11 --- Medical Records

The forum granted respondents' motion for a discovery order requiring the agency to produce medical records for any medical visits relating to complainants' request for emotional, mental or physical damages. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 146 (2015), appeal pending.***

The agency moved for a protective order regarding complainants' medical records both informally requested by respondents and in respondents' motion for a discovery order. The agency attached five pages of medical records asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to respondents." After conducting an *in camera* review, the ALJ made minor redactions unrelated to complainant's medical diagnosis and released the records to respondents, accompanied by a protective order. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 143 (2015), appeal pending.***

Prior to hearing, the agency filed three motions for *in camera* review and corresponding protective orders related to complainant's medical records sought through informal discovery by respondent. The ALJ granted all three motions and issued appropriate protective orders. --- ***In***

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***the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

The ALJ issued protective orders related to the release of aggrieved persons' medical records by the agency to respondents. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 225 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

When the agency alleged that respondent unlawfully discharged complainant in 2009 and respondent sought production of complainant's medical records from 2004 through December 2011, the ALJ ordered the agency and complainant to produce all medical records from January 1, 2007, to the present that reflected any treatment for any condition similar to or the same as the specific emotional, mental and physical distress complainant alleges she experienced as a result of respondents' alleged unlawful conduct, including the medical records earlier provided to the forum by the agency for an *in camera* inspection pursuant to its motion for a protective order. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

### **20.12 --- Protective Order**

Prior to hearing, the agency filed three motions for *in camera* review and corresponding protective orders related to complainant's medical records sought through informal discovery by respondent. The ALJ granted all three motions and issued appropriate protective orders. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 4 (2014).***

In a civil rights case, the ALJ issued a protective order that allowed respondents' attorney to have the legal names of all the aggrieved persons, but prohibited respondents' attorney from disseminating those legal names except under specific conditions set out in the protective order. To a limited extent, the order also restricted the conditions under which the five legal names of aggrieved persons that had already been disclosed could be used in discovery. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

## **21.0 EVIDENCE**

### **21.1 --- Generally**

Allegations that were not supported by any evidence were dismissed. ---- ***In the Matter of Green Thumb Landscape and Maintenance, 32 BOLI 185, 196 (2013).***

Defenses supported by no credible evidence at hearing were rejected by the forum. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 181 (2013).***

### **21.2 --- Admissibility**

On redirect examination of an agency witness, the administrative prosecutor began asking questions about whether certain specific jobs that the witness had testified he performed were "related to the job duties he was assigned to perform." Respondents' attorney objected on the grounds that the questions called for a legal conclusion. The agency's administrative prosecutor responded that she asked the question because work related to job duties subject to prevailing wage must also be paid the prevailing wage. The ALJ sustained the objection and allowed the agency to ask questions as an offer of proof. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 128 (2016).***

In a motion for summary judgment, unless a party objects to the authenticity of an exhibit, all documents submitted by each side can be considered as part of the record. When neither the agency nor respondents submitted any affidavit, declaration or sworn testimony to authenticate their respective exhibits in conformance with ORCP 47D and did not object to the authenticity of the opposing party's exhibits, the forum considered all the submitted exhibits when ruling on the motion for summary judgment. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 250-51 (2016).***

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An alleged settlement offer discussed is not admissible as evidence under Oregon's Evidence Code. ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 66 (2015).***

As an offer of proof against the agency's objection, respondent elicited testimony from complainant concerning a claim against Tyson Construction, a company formerly owned by complainant, to show that complainant had previously committed fraud. The agency's objection was sustained on the grounds that, in the case at hand any evidence of past fraud constituted inadmissible character evidence. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 266 (2013).***

When respondent moved to admit a copy of handwritten notes made by the agency case presenter initially assigned to the case while interviewing complainant, a document that was inadvertently provided to respondent in response to respondent's interrogatories, the forum found that the agency did not waive its work product privilege and that the notes were inadmissible. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

### 21.3 --- Admissions

Respondent's failure to deny the allegation that claimant's hourly wage was \$14.00 per hour constituted an admission of that fact. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 185 (2014).***

Respondent's failure to address the written notice component concerning penalty wages in the agency's OOD was an admission that the written notice was in fact submitted as alleged. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 181, 185 (2014).***

When respondent's answer did not dispute the agency's allegations in its OOD or contest the exhibits submitted in support of the agency's motion, the forum viewed respondent's non-denial as an admission of the allegations in the OOD. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 180 (2014).***

When the facts alleged in the second paragraph of the agency's OOD incorporated all the elements of the agency's prima facie case, respondents' admission of those facts in its answer was proof of those elements. ---- ***In the Matter of Giants, Inc., 33 BOLI 53, 56 (2014).***

An employee's two time cards showing work for 6.5 hours and "no lunch", together with WH-38s showing payment to that employee for 6.5 hours on each occasion constitutes a tacit admission the employee worked without the meal period required by OAR 839-020-0050, and the forum found two violations. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

When respondent admitted underpaying its workers on a project over several weekly pay periods, and its records listed four of the claimants as having worked on the project during those pay periods, the forum found four violations of prevailing wage laws. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).***

In its order of determination, the agency alleged that respondent employed claimant. Respondent did not deny this in its answer and the agency's allegation was therefore deemed admitted. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

### 21.4 --- Affidavits

### 21.5 --- Confidential Business Records

### 21.6 --- Credibility

Anomalies within exhibits and between exhibits and testimony raise questions as to reliability. ---- ***In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 214-16 (2013)***

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A claim supported by testimony that was disjointed, confusing, contradictory and at times, simply unbelievable, was dismissed by the forum. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 182 (2013).***

### 21.7 --- Cross Examination

### 21.8 --- Direct Evidence

Direct evidence is evidence that proves a fact in dispute directly, without any inferences or presumptions, and which in itself, if true, conclusively establishes the fact. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012).***

### 21.9 --- Exclusion

In conjunction with a motion for a discovery order, respondents filed a motion in limine seeking an order “precluding the agency from offering any evidence regarding matters about which it declined to respond to discovery on the basis of relevancy.” The ALJ ordered that respondents’ motion would be granted with respect to respondents’ requests for admission if the agency failed to timely respond to the ALJ’s discovery order. ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 123 (2016).***

An alleged settlement offer discussed is not admissible as evidence under Oregon’s Evidence Code. ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 66 (2015).***

On January 19, 2015, after the hearing concluded, respondents filed an amended case summary listing additional witnesses. The amended case summary also included a “Legal Memo” arguing that the agency’s failure to produce claimant to testify and be cross-examined under oath or affirmation, should be absolutely fatal to its case against the employer. The agency filed a motion to disregard respondent’s amended case summary, stating that it was untimely because the ALJ’s case summary order required case summaries to be filed no later than December 30, 2014. The ALJ issued denied respondents’ motion with respect to the “Legal Memo” liability argument, and denying the agency’s motion to the extent the amended case summary listed new witnesses to discuss the successor in interest theory raised in the agency’s amended order of determination. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 47 (2015).***

Two months after case summaries were due, respondent’s authorized representative Schoene filed a case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the agency filed a motion to exclude evidence “untimely filed in respondent’s case summary.” In response, Schoene sent an email to BOLI contested case coordinator in which she explained in detail the reasons why respondent had not file a case summary earlier. The ALJ instructed BOLI’s contested case coordinator to contact Schoene and tell her that she would need to ask permission to file a response to the agency’s motion by email. Schoene filed such a request, and the ALJ granted her request and retroactively received her e-mailed explanation, then held a prehearing conference and informed the participants that he would rule on the admissibility of respondent’s case summary at the start of the hearing. Before opening statements, the ALJ gave Schoene an opportunity to explain why respondent had not timely filed a case summary. After listening to Schoene’s numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness respondent listed in her case summary, as well as the 21 exhibits provided with respondent’s case summary, would not violate the ALJ’s duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that respondent’s case summary would not be received, noting that respondent’s exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness because she was not a named respondent and, even if respondent’s case summary had been admitted, she was not listed on it as a witness. ---- ***In the Matter of Hey***

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### ***Beautiful Enterprises, Ltd., 33 BOLI 189, 193 (2014).***

When respondent moved to admit a copy of handwritten notes made by the agency case presenter initially assigned to the case while interviewing complainant, a document that was inadvertently provided to respondent in response to respondent's interrogatories, the forum found that the agency did not waive its work product privilege and that the notes were inadmissible. ----- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

At hearing, the agency sought to introduce into evidence three letters to complainant from a housing agency describing the respective amounts of rent complainant and the housing agency would pay and HACSA would pay. Respondent objected on the grounds that the agency had not submitted it with the agency's case summary. The ALJ did not receive the exhibit because the agency failed to offer a satisfactory reason for not providing them with the agency's case summary and excluding it would not violate the ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). The agency also offered exhibits A-19 and A-20 as part of its case in chief. Respondent objected to their admission on the grounds that neither had been submitted with the agency's case summary. The ALJ reserved ruling on the admissibility of A-19 until issuance of the proposed order. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

At hearing, the agency sought to introduce into evidence 10 pages of "Progress Note[s]" notes made by complainant's therapist. Respondent objected on the grounds that the agency had not submitted the notes with the agency's case summary. Statements by the agency case presenter and therapist established that: (1) The agency served a subpoena on the therapist for the records two weeks before the hearing; (2) The therapist faxed the records the case presenter seven days before the hearing; (3) Because of a malfunction in the therapist's fax machine, the records were not transmitted to the case presenter; (4) The case presenter first acquired the documents late in the afternoon the day before hearing; and (5) The therapist had little independent recollection of what was specifically discussed in her therapy sessions with complainant. Under these circumstances, the forum finds that the agency has provided a satisfactory reason for not submitting the records with its case summary and that excluding them would violate the ALJ's duty to conduct a full and fair inquiry. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

Respondent, an attorney, did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The agency objected to respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the agency's objection on the grounds that respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). ----- ***In the Matter of Susan C. Steves, 32 BOLI 46, 49-50 (2012).***

On her case summary, respondent listed Dirk Sharp as a witness. Based on the agency's objection and respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify. ----- ***In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

### **21.10 --- Failure to Produce**

In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed for two reasons. First,

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because there was no evidence that respondent “willfully suppressed” the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to respondent. Second, it was the agency’s burden to prove that respondent’s defense was pretextual. If the agency believed that respondent’s defense was a pretext, it could have sought these records through discovery and offered them as impeachment or rebuttal evidence or called respondent’s replacement tenants as witnesses. Nothing in the record suggested that the agency made any attempt to obtain the records and the agency did not call either replacement tenant as a witness. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85-86 (2012).***

Respondent argued that the agency’s failure to offer complainant’s tax returns as evidence should lead to an inference that complainant’s claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant’s tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant’s tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

### 21.11 --- Habit, Routine Practice

### 21.12 --- Hearsay

An exhibit that was offered by the agency and received at hearing contained a self-authenticated statement made by respondent’s manager to the Employment Department in connection with complainant’s claim for unemployment benefits that complainant was discharged for “bad mouthing” respondent to customers. The forum held that these notes constituted double hearsay and gave them no weight. ---- ***In the Matter of Leo Thomas Ryder dba Leo’s BBQ Bar & Grill, 34 BOLI 67, 75 (2015).***

### 21.13 --- Inferences

Complainant’s mitigation testimony in support of her claim for back wages was the following: “I’m sure interviews did not go well, being stressed out and all of the stuff that was happening. My face was completely broken out \* \* \* from all this stuff happening. You know, when you’re going in looking for job where you’re an esthetician \* \* \* people look at your skin. So I have a feeling that hindered me.” With no other supporting evidence, the agency asked the forum to infer from that testimony that complainant went on “at least two or more interviews for employment.” The forum declined to infer from that testimony that complainant actively sought work or had any actual job interviews, stating that there was no evidence in the record as to any memory issues or other problems on complainant’s part that prevented her from giving any specific testimony as to her job search, and the facts lent equal credence to an inference that complainant did not actively seek work. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 99 (2015).***

When the law imposes on the employer the burden of keeping track of what work was performed for what periods of time and by which employees and when the evidence is that the employer has not met this obligation, the fact-finder can draw reasonable inferences about the work performed, including the hours spent performing various tasks. Making such an inference is not, as respondent asserted, pure speculation. This has long been the law. ---- ***In the Matter of Hard Rock Concrete, Inc., 33 BOLI 77, 108 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant’s expulsion from respondent’s rental. Since those records were arguably within the power of respondent to produce and would support respondent’s defense, the agency argued that respondent’s failure to produce them created an inference that

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respondent's version of the facts was untrue. The forum disagreed for two reasons. First, because there was no evidence that respondent "willfully suppressed" the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to respondent. Second, it was the agency's burden to prove that respondent's defense was pretextual. If the agency believed that respondent's defense was a pretext, it could have sought these records through discovery and offered them as impeachment or rebuttal evidence or called respondent's replacement tenants as witnesses. Nothing in the record suggested that the agency made any attempt to obtain the records and the agency did not call either replacement tenant as a witness. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85-86 (2012).***

In a housing case, the agency established that respondent's intent was that he did not want to let complainant have a dog. Complainant reacted by becoming upset and having trouble sleeping for a night and testified that she took respondent's denial of her request for a dog "as a threat," but did not testify as to why she took it as a threat, as opposed to a mere denial of her request to have a dog. There was no evidence concerning respondent's body language or manner of speech when he denied complainant's request that could indicate the words were intended to coerce, intimidate, or threaten complainant and no testimony that respondent took any action related to his statement, or that complainant refrained from getting a dog because she feared repercussions from respondent. Although the fact that complainant did not get a dog while she continued to live in the subject property leads to a possible inference that she did not do so because of respondent's statement and her resultant fear, the forum declined to draw that inference because of the lack of other supporting evidence. Based on the above, the forum concluded that the evidence is insufficient to show that respondent's statement violated ORS 659A.145(8). ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81 (2012).***

Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

### **21.14 --- Inspection of Documents Referred to During Testimony**

### **21.15 --- Judicial & Official Notice**

In a prevailing wage case in which the agency sought civil penalties for respondents' failure to pay the prevailing wage rate, the forum took official notice of respondents' previous violations of the prevailing wage statutes, respondents' knowledge of the violations, and that, at times, respondents did not respond to the agency's requests in 2011 or early 2012. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 32 (2016).***

The forum took official notice of the fact that the commissioner previously held that Portland Flagging and A D Traffic operated as joint employers during 2011 and 2012 when (1) Portland Flagging operated under the assumed business name of "A D Traffic;" (2) time sheets, payroll records and retirement plan contribution statements for two workers during 2011 and 2013 all used some form of the name "A D Traffic"; (3) the statement for a workers' account with respondents' fringe benefit plan was addressed to "A D Traffic Control Services, LLC;" and (4) Portland Flagging and A D Traffic shared the same business address. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 30 (2016).***

The forum took official notice that the agency issued its formal charges on January 23, 2015, and of the contents of the cover page affixed to the formal charges. ---- ***In the Matter of***

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### ***Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 69 (2015).***

Respondent filed a motion requesting the forum to take official notice of an ongoing federal district court proceeding "addressing the lawfulness of [respondent's] medical note procedure" and a "filing by complainant \* \* \* in that federal court proceeding." The agency filed a response to respondent's motion in which it attached additional documents related to the federal court proceeding "in order for the forum to have a complete record." The forum granted respondent's motion and also took official notice of the documents filed by the agency. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 6 (2014).***

The Forum took judicial notice of a standard calendar for the years 2011 and 2012. ---- ***In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 211 (2013).***

The forum took official notice of the massive stock market crash in 2008-2009. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198 (2013).***

### **21.16 --- Legal Argument**

In a case involving a determination as to whether work performed by wage claimants was on a public works, respondents objected to testimony by Susan Wooley, BOLI Technical Assistance Prevailing Wage Rate Coordinator, concerning "warranty" work on public works on the grounds that it constituted legal argument. The ALJ sustained respondents' objection, but allowed the agency to make an offer of proof through Wooley's testimony. As part of the offer of proof, respondents were allowed to cross examine Wooley and the ALJ also asked Wooley some questions related to BOLI's position on warranty work. After the conclusion of the hearing, the ALJ issued an interim order in which he reversed his ruling on Wooley's testimony and concluded the ruling was in error for two reasons. First, OAR 839-050-0210(1)(f), OAR 839-050-0360(3), and OAR 839-050-0400 give the ALJ the authority to request a statement indicating the "agency's policy with regard to any statute or administrative rule at issue in the case." That rule presupposes that the agency is entitled to state its policy when the ALJ believes it may be helpful to the forum's understanding of the law. The purpose of Wooley's testimony was to state "the agency's policies and practices as to warranty work." Wooley, as the agency expert with regard to Oregon's prevailing wage rate laws and lead worker to the agency's prevailing wage rate compliance specialists, is eminently qualified to state the agency's policies and practices. Second, Wooley's testimony was not legal argument and is highly relevant to the agency's allegations concerning claimants' work on one of the subject projects; she specifically testified that there is no statute or administrative rule in Oregon that defines "warranty work" in the context of Oregon's prevailing wage rate laws; and her testimony was limited to the agency's current practice and policies. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 130 (2016).***

### **21.17 --- Objections**

When respondent moved to admit a copy of handwritten notes made by the agency case presenter initially assigned to the case while interviewing complainant, a document that was inadvertently provided to respondent in response to respondent's interrogatories, the forum found that the agency did not waive its work product privilege and that the notes were inadmissible. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

### **21.18 --- On-site visits by ALJ**

The ALJ made an onsite visit to Duck Stop Market, respondent's business, and observed Duck Stop Market's premises and the surrounding environment, measured the distance from Eugene Mobile Village RV to Duck Stop Market, and took photographs to document the visit. The ALJ also noted that there was a white Lexus SUV with Oregon license plate "911FXN" parked outside Duck Stop Market during the visit. Those photographs were included in the record as an exhibit, together with a description of their contents. When the

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hearing reconvened, the ALJ summarized the observations he made during the onsite visit on the record and gave the participants an opportunity to comment on the accuracy of his observations. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 9-10 (2014), appeal pending.***

The ALJ temporarily adjourned the hearing to visit the ranch where six complainants had been employed and where the alleged discrimination had occurred, accompanied by all respondents, respondents' counsel, the agency administrative prosecutor, the Oregon state trooper assigned to provide security at the hearing, and the forum's two interpreters. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 130 (2014).***

### 21.19 --- Photographs

When exhibits in the agency's case summary that were black and white copies of color photographs taken by the complainant in respondents' office contained partially illegible text, the ALJ requested the agency to provide the original color photographs on which the text could clearly be read. The ALJ ordered the agency to either substitute the original photographs for the copies provided in its case summary or to provide equally legible color copies. The agency chose the latter option and the ALJ substituted the color copies for the black and white copies provided in the agency's case summary. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

### 21.20 --- Presumptions

If records of the Secretary of State had been offered into evidence by way of a certification from the Secretary of State, ORS 56.110 would require the forum to find them to constitute prima facie evidence of the fact that anything done by Zoom Garage Door can be attributed to respondent. As prima facie evidence, that fact would be entitled to a presumption that it is true. ORS 40.135(2). When there was no evidence produced casting any doubt whatsoever on the authenticity of the records from the secretary of state' office, the forum accepted those records as establishing the prima facie case -- the presumption that Zoom Garage Door was, at the times material to this case, the business name of Zoom Contracting, LLC, and that Zoom Contracting, LLC was therefore legally responsible for any violations of the prevailing wage laws by Zoom Garage Door. ---- ***In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 118 (2014).***

In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed, in part because there was no evidence that respondent "willfully suppressed" the records so as to create a presumption under OEC 311(1)(a) that the records would have been adverse to respondent. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85 (2012).***

### 21.21 --- Privileges

### 21.22 --- Rebuttal and Impeachment

As "impeachment" evidence, respondent offered an exhibit that it did not provide with its case summary that showed complainant used the e-mail signature of [dee@columbiacomponents.com](mailto:dee@columbiacomponents.com) during her employment with respondent. The agency objected on the grounds that the exhibit was not provided with respondent's case summary and that it was not impeachment evidence. The agency's objection was sustained on both grounds. Earlier in the hearing, complainant testified during respondent's cross examination that she created and used that e-mail address, so the exhibit impeached nothing but merely affirmed what complainant previously testified to. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

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### 21.23 --- Relevancy

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any recording or documents showing that complainants ever removed any public social media profiles or caused to be hidden from public view. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was reasonably likely to produce information generally relevant to the case and denied respondents' motion, noting that if respondents established the relevance of this request in their depositions of complainants, respondents could renew their motion for a discovery order. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce all posting by complainants and a witness to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present. The ALJ found that this request, with respect to complainants, was reasonably likely to produce information that is generally relevant to the case and ordered complainants to provide postings that contain comments about the facts of this case, comments about respondents, or comments that relate to their alleged damages. Respondents' request for the witness's social media was denied on grounds of relevance. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any receipt, invoice, contract, or other writing memorializing the purchase of the cake by complainants from respondent for the previous wedding of one complainant's mother, along with any photos, videos, or other record of that cake. The ALJ found that respondents' request was not reasonably likely to produce information generally relevant to the case and denied respondents' motion. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce the names and addresses of any person, media outlet, or other entity with whom complainants spoke regarding the events leading to their BOLI complaint or their complaint filed with the Department of Justice. The ALJ found that respondents' request was reasonably likely to produce information that was generally relevant to the case and granted respondents' motion. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 148 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring the agency to produce any social media posts, blog posts, emails, text messages, or other record or communication showing complainants' involvement with a boycott of respondents or their business. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and denied respondents' motion, noting that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147-48 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding

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cake for complainants' same sex wedding, respondents moved for a discovery order requiring production of all communications made by complainants to the media or on social media sites "relating to respondents and the events leading to the filing of formal charges against respondents." The ALJ granted respondents' motion, finding it was reasonably likely to produce information that is generally relevant to the case. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring production of photos, videos, or audio recordings of complainants' wedding ceremony. The agency objected on the grounds of relevancy, further explaining that complainants were wary of turning over these materials to respondents because respondents previously posted complainants' home address on a social media site. The ALJ ruled that unless the agency was intending to offer photos, videos or audio recordings as evidence at the hearing, respondents' motion was denied. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147 (2015), appeal pending.***

In a public accommodation case involving respondents' refusal to provide a wedding cake for complainants' same sex wedding, respondents moved for a discovery order requiring production of documentation and photographs of the actual wedding cake served at complainants' actual wedding ceremony. The agency objected to these requests on the basis of relevancy. The ALJ concluded that the fact that a cake was purchased from another cake baker was likely relevant and granted the motion only as to a receipt or invoice for showing the purchase of the cake and one photograph of the cake. The ALJ also ruled that the agency need not produce photographs of complainants, their families, and the actual wedding ceremony. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 147 (2015), appeal pending.***

In a public accommodation case, respondents moved for a discovery order for a copy of records in the agency's possession as to the state policy in January 2013 for issuing marriage licenses to same sex couples. The agency objected on the basis of relevance and also stated that such documents were not within the possession or control of the agency. Respondents claimed the documents were relevant to show whether the agency was aware that same sex marriage was not recognized in Oregon at the time of the acts in question in this case. The ALJ denied respondents' motion because (1) the agency's awareness of the status of same sex marriage in Oregon was not likely to lead to relevant evidence; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the agency indicated it had no such documents in its possession. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 146 (2015), appeal pending.***

In a public accommodation case, respondents issued an interrogatory requesting a detailed explanation of any involvement or communication complainants had with any group involved in boycotting respondents' business. The agency objected on the basis of relevance, over breadth, and because the requested information was outside the possession or control of the agency. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and did not require the agency to respond to the interrogatory. The ALJ noted that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 146 (2015), appeal pending.***

Respondents issued an interrogatory requesting an explanation as to the actions taken by complainants to remove their public social media profiles after they filed a complaint of discrimination with DOJ, claiming that because complainant claimed damages as a result of

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unwanted media attention, the removal of complainant's social media profiles was relevant to the assessment of damages or mitigation of damages. The agency objected on the basis of relevancy. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and did not require the agency to respond to the interrogatory. The ALJ noted that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for a discovery order regarding the interrogatory. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 145-46 (2015), appeal pending.***

When respondents requested that the agency explain in detail the nature of the physical harm complainants alleged in the formal charges and the agency responded that both complainants experienced "varying physical manifestations of stress" and that "any further medical information will be provided pursuant to a protective order," the forum agreed that respondents were entitled to know more specifically what physical damages had been allegedly sustained and ordered the agency to have complainants, through the agency, to respond to respondents' interrogatory. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 144-45 (2015), appeal pending.***

The agency's objection to testimony concerning whether the witness had ever observed respondent exhibiting bias towards people in the "LGBT community" was sustained after an offer of proof, on the grounds that it was character evidence. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 21.24 --- Reliability

### 21.25 --- Rule of Completeness

One of the agency's exhibits was a five-page document containing chronologically organized interviews conducted by the agency's compliance specialist who investigated wage claims being litigated at the hearing. It contained interviews with all four wage claimants, as well as interviews with an individual respondent and respondents' counsel, each contained within a separate text box. The agency offered portions of the exhibit on a piecemeal basis corresponding with its direct examination of all four wage claimants. Respondents objected to its admission on a piecemeal basis because it was hearsay and based on Rule 106 of the Oregon Evidence Code. The ALJ overruled respondents' objections on the grounds that OEC 106, while allowing admission into evidence of the part of a writing not offered "which is necessary to make the part offered understood," did not apply to the agency's exhibit because (a) the interview notes, although all part of one exhibit, reflected separate, individual interviews that took place on different days, and (b) since each interview was a separate event, admitting each separate interview was unnecessary to make the other interviews understood. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 127-28 (2016).***

### 21.26 --- Social Media

Respondents issued an interrogatory requesting an explanation as to the actions taken by complainants to remove their public social media profiles after they filed a complaint of discrimination with DOJ, claiming that because complainant claimed damages as a result of unwanted media attention, the removal of complainant's social media profiles was relevant to the assessment of damages or mitigation of damages. The agency objected on the basis of relevancy. The ALJ concluded that, based on the information and representations before him, he was unable to determine at this time if respondents' interrogatory was "reasonably likely to produce information that is generally relevant to the case" and did not require the agency to respond to the interrogatory. The ALJ noted that if respondents established the relevance of this interrogatory in their depositions of complainants, respondents could renew their motion for

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a discovery order regarding the interrogatory. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 145-46 (2015), appeal pending.*

### 21.27 --- Stipulations

The parties' stipulation regarding a question of fact is binding. ---- *In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 58 (2015).*

### 21.28 --- Sufficiency

Testimony of each claimant that he was employed, corroborated by exhibits and by respondent's failure to dispute the employment, despite making other responses to the wage claims, were sufficient to establish employment relationship, and rate of pay. ---- *In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 214 (2013).*

When respondent admitted underpaying its workers on a project over several weekly pay periods, and its records listed four of the claimants as having worked on the project during those pay periods, the forum found four violations of prevailing wage laws. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).*

When respondent admitted underpaying its workers on a project over several weekly pay periods, but there was no evidence that the first worker was employed on the project during the applicable pay periods, and the only evidence of the second worker's employment was a statement to that effect in a letter from the agency's compliance specialist to the respondent together with the respondent's subsequent payment to that worker of \$22.40, the forum did not find any violations regarding payment of prevailing wages to either of the two workers. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).*

Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ---- *In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).*

### 21.29 --- Witnesses

At hearing, respondent's representative asked to make a statement, including sworn testimonial evidence. Respondent had not submitted a case summary designating the representative as a witness. The forum allowed the representative to make his statement, reserving its ruling on whether the statement would be allowed as evidence. He stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the case summary, and that he had experienced personal problems during the past week. After his statement, the agency's administrative prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to admit his statement into evidence. ---- *In the Matter of Zoom Contracting, LLC, 33 BOLI 111, 112 (2014).*

### 21.30 --- Unsworn Statements

### 21.31 --- Evidence Requested by Forum

Prior to hearing, the agency and respondents filed written stipulations to a number of facts. After the hearing, at the ALJ's request for additional clarification as to the meaning and intent of the stipulations, the agency and respondents filed an addendum to their original stipulations. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 183 (2017).*

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After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the Agency's case summary as the record of the case and issuing a final order on default. This was the first case in which the agency had asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the agency exhibits filed with its case summary. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 265-66 (2014).***

After the hearing, the ALJ re-opened the record on his own motion to obtain a copy of claimant's original 2009-2010 nail salon appointment books for inspection. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the claimant's 2009-2010 calendars received at hearing and marked and received them into the record. Copies were provided to both participants and the original books mailed back to the claimant, with instructions to claimant to retain them until such time as the case was completely resolved and all appeal rights had expired. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 48-49 (2012).***

After the hearing, the ALJ issued an interim order reopening the record and requiring respondents to provide copies of time records for respondent's employees that were not offered at hearing. Respondents filed a motion for clarification of the reason for the ALJ's interim order, arguing that it was improper under OAR 839-050-0410 for the ALJ to reopen the record to obtain this evidence if the purpose was to allow additional evidence relating to complainant's lost income because it was the agency's burden to establish complainant's damages at hearing, the agency could have requested these time records from respondent and offered them at hearing, and the agency did not do so. In response, the ALJ issued an interim order retracting the order. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 14 (2012).***

### 22.0 PROOF

#### 22.1 --- Generally

The forum found no violation of requirements to keep or provide records under OAR 839-020-0080 or 839-020-0083, when the agency's notice of intent failed to identify any records that respondents were required to keep and failed to keep, and no evidence was presented at the hearing to assist the forum in identifying how respondents were deficient. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198-99 (2013).***

#### 22.2 --- Standard of Proof

The agency has the burden of proof to establish the causal link in a civil rights case and the standard of proof is a preponderance of the evidence. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 82-83 (2012).***

#### 22.3 --- Burden of Proof

##### 22.3.1 --- Generally

##### 22.3.2 --- Wage & Hour Cases

In a prevailing wage rate case, it is the agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 15 (2016).*** See also *In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 276 (2016).*

In a prevailing wage rate case, it is the agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 248 (2016).***

The agency has the burden of proving that respondents are employers and that claimant was an employee. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive***

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### ***Credit, LLC, 34 BOLI 44, 53 (2015).***

In a wage claim default case, the agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. The elements of the agency's prima facie case were: 1) Respondent employed claimant; 2) The pay rate upon which respondent and claimant agreed, if other than the minimum wage; 3) The amount and extent of work claimant performed for respondent; and 4) Claimant performed work for which she was not properly compensated. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 260 (2014).*** See also *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 268 (2014).*

In a wage case, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. ---- ***In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 215 (2013).***

### **22.3.3 --- Civil Rights Cases**

The agency has the burden of proof to establish the causal link in a civil rights case and the standard of proof is a preponderance of the evidence. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 82-83 (2012).***

### **22.3.3 --- Prevailing Wage Cases**

In a prevailing wage case, when the evidence was that the employer paid an ascertained amount of money to a 401(k) plan, the stock market had crashed while the claimant's funds were invested in the account, the crash was of a severity that could explain the difference between the amount paid in and the ultimate payout, and neither the agency nor the employer could demonstrate what happened to the particular funds credited to the claimant's account, the agency failed to satisfy its burden to prove that the employer did not pay all of the claimant's deducted fringe benefits into the 401(k) plan. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198 (2013).***

### **22.4 --- Burden of Production**

### **22.5 --- Mitigation**

### **22.6 --- Civil Rights Cases, Generally**

### **22.7 --- Wage & Hour Cases, Generally**

### **22.8 --- Affirmative Defenses**

#### **22.8.1 --- Generally**

The words, "the employer has the burden to show", in OAR 839-020-0050(3), make it clear that respondent has the burden to prove the applicability of any exceptions to the requirement to provide a meal period. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

In a civil rights case, a respondent has the burden of proving that a complainant failed to mitigate his or her damages. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 39 (2012).***

#### **22.8.2 --- Financial Inability to Pay Wages**

#### **22.8.3 --- Civil Rights Cases**

### **22.9 --- Offers of Proof**

In a case involving a determination as to whether work performed by wage claimants was on a public works, respondents objected to testimony by Susan Wooley, BOLI Technical Assistance Prevailing Wage Rate Coordinator, concerning "warranty" work on public works on

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the grounds that it constituted legal argument. The ALJ sustained respondents' objection, but allowed the agency to make an offer of proof through Wooley's testimony. As part of the offer of proof, respondents were allowed to cross examine Wooley and the ALJ also asked Wooley some questions related to BOLI's position on warranty work. After the conclusion of the hearing, the ALJ issued an interim order in which he reversed his ruling on Wooley's testimony and concluded the ruling was in error for two reasons. First, OAR 839-050-0210(1)(f), OAR 839-050-0360(3), and OAR 839-050-0400 give the ALJ the authority to request a statement indicating the "agency's policy with regard to any statute or administrative rule at issue in the case." That rule presupposes that the agency is entitled to state its policy when the ALJ believes it may be helpful to the forum's understanding of the law. The purpose of Wooley's testimony was to state "the agency's policies and practices as to warranty work." Wooley, as the agency expert with regard to Oregon's prevailing wage rate laws and lead worker to the agency's prevailing wage rate compliance specialists, is eminently qualified to state the agency's policies and practices. Second, Wooley's testimony was not legal argument and is highly relevant to the agency's allegations concerning claimants' work on one of the subject projects; she specifically testified that there is no statute or administrative rule in Oregon that defines "warranty work" in the context of Oregon's prevailing wage rate laws; and her testimony was limited to the agency's current practice and policies. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 130 (2016).***

On redirect examination of an agency witness, the administrative prosecutor began asking questions about whether certain specific jobs that the witness had testified he performed were "related to the job duties he was assigned to perform." Respondents' attorney objected on the grounds that the questions called for a legal conclusion. The agency's administrative prosecutor responded that she asked the question because work related to job duties subject to prevailing wage must also be paid the prevailing wage. The ALJ sustained the objection and allowed the agency to ask questions as an offer of proof. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 128 (2016).***

After the agency conducted redirect examination of a witness, the ALJ asked the witness follow-up questions. Respondents' counsel asked permission to ask the witness additional questions that the ALJ determined were beyond the scope of his questions. The agency objected and the ALJ sustained the agency's objection but allowed respondents' counsel to ask the witness questions as an offer of proof. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 127 (2016).***

Respondents were permitted to make an offer of proof regarding the testimony of witnesses who were not permitted to testify because they were not listed as witnesses on respondents' case summary. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 279 (2016).***

As an offer of proof against the agency's objection, respondent elicited testimony from complainant concerning a claim against Tyson Construction, a company formerly owned by complainant, to show that complainant had previously committed fraud. The agency's objection was sustained on the grounds that, in the case at hand any evidence of past fraud constituted inadmissible character evidence. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 266 (2013).***

On her case summary, respondent listed Dirk Sharp as a witness. Based on the agency's objection and respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

### 23.0 WITNESSES

#### 23.1 --- Generally

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### 23.2 --- Credibility

St. Peter and Murlin were called as expert witnesses by respondent and the agency, respectively, to testify about the training given to Contessa, complainant's service dog. The forum gave Murlin's testimony about Contessa's training more weight because Murlin was directly involved in Contessa's training and observed Contessa with Complainant on numerous occasions, whereas St. Peter never observed Contessa and only testified in reference to the "training standards" that her company follows and industry standards in general. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 26-27 (2014), appeal pending.***

When a witness's recollection as suspect, the forum gave his testimony no weight except when it was undisputed or corroborated by other credible evidence. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 26 (2014), appeal pending.***

Although a witness's recollection of dates was not perfect, her testimony as to her observations was credible and the forum credited her testimony of those observations in its entirety. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 25 (2014), appeal pending.***

In a civil rights case, when all the aggrieved persons listened to the voice mails that formed the basis of the violations, their testimony concerning why they felt excluded from the respondents' business was based primarily on their reaction to those voice mails, even though they may have been previously exposed to the thoughts and interpretation of the voice-mails by one of the aggrieved persons. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 255 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

#### 23.2.1 --- Generally

A claim supported by testimony that was disjointed, confusing, contradictory and at times, simply unbelievable, was dismissed by the forum. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 182 (2013).***

#### 23.2.2 --- ALJ's Credibility Findings

#### 23.2.3 --- Prior Convictions

#### 23.3 --- Cross-Examination

#### 23.4 --- Exclusion

On January 19, 2015, after the hearing concluded, respondents filed an amended case summary listing additional witnesses. The amended case summary also included a "Legal Memo" arguing that the agency's failure to produce claimant to testify and be cross-examined under oath or affirmation, should be absolutely fatal to its case against the employer. The agency filed a motion to disregard respondent's amended case summary, stating that it was untimely because the ALJ's case summary order required case summaries to be filed no later than December 30, 2014. The ALJ issued denied respondents' motion with respect to the "Legal Memo" liability argument, and denying the agency's motion to the extent the amended case summary listed new witnesses to discuss the successor in interest theory raised in the agency's amended order of determination. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 47 (2015).***

Two months after case summaries were due, respondent's authorized representative Schoene filed a case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the agency filed a motion to exclude evidence "untimely filed in respondent's case summary." In response, Schoene sent an email to BOLI contested case coordinator in which she explained in detail the reasons why respondent had not file a case summary earlier. The ALJ instructed BOLI's contested case coordinator to contact Schoene and tell her that she would need to ask permission to file a response to the agency's motion by

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email. Schoene filed such a request, and the ALJ granted her request and retroactively received her e-mailed explanation, then held a prehearing conference and informed the participants that he would rule on the admissibility of respondent's case summary at the start of the hearing. Before opening statements, the ALJ gave Schoene an opportunity to explain why respondent had not timely filed a case summary. After listening to Schoene's numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness respondent listed in her case summary, as well as the 21 exhibits provided with respondent's case summary, would not violate the ALJ's duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that respondent's case summary would not be received, noting that respondent's exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness because she was not a named respondent and, even if respondent's case summary had been admitted, she was not listed on it as a witness. --- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 193 (2014).***

At hearing, respondent's representative asked to make a statement, including sworn testimonial evidence. Respondent had not submitted a case summary designating the representative as a witness. The forum allowed the representative to make his statement, reserving its ruling on whether the statement would be allowed as evidence. He stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the case summary, and that he had experienced personal problems during the past week. After his statement, the agency's administrative prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to admit his statement into evidence. ---- ***In the Matter of Zoom Contracting, LLC, 33 BOLI 111, 112 (2014).***

In a civil rights case, the ALJ ordered that all witnesses, including aggrieved persons, but not including a respondent and the commissioner, would be excluded from the hearing except while testifying. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 225 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 23.5 --- Expert Witnesses

During the hearing, the agency objected to respondent's calling an expert witness after the witness stated his qualifications to testify as an expert witness, contending that the witness was not qualified as an expert witness. The forum granted the agency's objection and the witness was not allowed to testify. Respondent's counsel was given an opportunity to make an oral offer of proof concerning what the witness's testimony would be if he had been allowed to testify. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 10 (2014), appeal pending.***

In a civil rights case, an expert was allowed to testify as to the difficulties experienced by lesbian, gay, bisexual, and transgender people gathering safely in public places and the physical and emotional damages that lesbian, gay, bisexual and transgender people generally experience, based on the ALJ's determination that such testimony might help the ALJ understand the evidence. Respondents objected to the testimony and were granted a continuing objection. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

In a civil rights case, an expert's testimony was allowed because it was relevant and helpful to the forum to provide context for the issues transgendered persons face in today's society. Moreover, the expert's testimony was not unfairly prejudicial because the forum did not rely on it in making a determination that Respondents engaged in an unlawful practice or in assessing damages. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 255 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

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23.6 --- Failure to Testify

23.7 --- Interpreters

23.8 --- Witness Tampering

23.9 --- Telephone Witnesses

23.10 --- Confidentiality

23.11 --- Other

24.0 INTERPRETERS

25.0 DEFAULTS

25.1 --- Generally

The forum granted the agency's motion for an order of default against a respondent corporation when the respondent corporation was properly served and failed to file an answer by the deadline set in the notice of hearing. ---- *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 83-85 (2015).*

When the agency has issued formal charges and the respondent defaults, the agency needs only to establish a prima facie case to support the allegations of its charging document in order to prevail. ---- *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 74 (2015).*

The forum granted the agency's motion for an order of default based on respondent's failure to file an answer in the time set out in the notice of hearing. ---- *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 69 (2015).*

At the hearing, the agency moved for an order finding respondent to be in default. Because respondent never appeared at the hearing, she was found to be in default. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 254 (2014).*

At the time set for hearing, neither Respondent CSRT nor Respondent Sabo had made an appearance. The ALJ went on the record and stated that Respondents would be held in default if they did not make an appearance within 30 minutes. By 10 a.m., neither Respondent CSRT nor Respondent Sabo had appeared, and the ALJ commenced the hearing by declaring CSRT in default and explaining the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing. ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 265 (2014).*

After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the agency's case summary as the record of the case and issuing a Final Order on Default. This was the first case in which the agency has asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the agency exhibits filed with its case summary. ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 265-66 (2014).*

The agency filed a motion for default against respondent L. Bassett on the grounds that his answer did not include an admission or denial of the factual matters alleged in the agency's formal charges and did not state a relevant defense to the allegations. The forum denied the agency's motion, stating that "although L. Bassett's answer may not appear in 'pleading format,' it is clear that a number of his responses, whether denial of the facts, denial of knowledge of the circumstances described by the allegation, or explanation, are tailored to specific paragraphs in the formal charges and are intended as a response to the specific allegations in those paragraphs. Other statements included in his narrative response respond specifically or generally to allegations in the formal charges without numeric reference to a specific paragraph in the formal charges. Although L. Bassett's answer may not have responded to all the

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allegations in the formal charges, OAR 839-050-0130(2) & (3), when read together, make it clear that an answer may be adequate to avoid default even if it does not respond to all the allegations in the charging document, with the caveat that 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted.'" ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 124-25 (2014).***

The agency filed a motion for default against respondent J. Bassett related to one set of formal charges on the grounds that his answer was untimely and was insufficient. The forum denied the agency's motion because the agency provided no evidence that J. Bassett was actually served with the formal charges. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 125-27 (2014).***

The agency filed a motion for default against respondent J. Bassett related to a second set of formal charges on the grounds that his answer was untimely and insufficient. The forum denied the agency's motion because the agency provided no evidence of the date that J. Bassett was actually served with the formal charges and because his answer when read together with the formal charges, make it clear that an answer may be adequate to avoid default even if it does not respond to all the allegations in the charging document, with the caveat that 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted.'" ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 128 (2014).***

When neither respondent nor any representative of his company appeared at the hearing, the forum delayed the commencement of the hearing for 30 minutes to account for any unexpected event that may have delayed the respondent's appearance, but no appearance was ever made by the respondent or any other person on his behalf, nor was any notice given to the forum explaining his failure to appear, respondent was found in default for failing to appear at the hearing. ---- ***In the Matter of Diamond Concrete, Inc., 33 BOLI 68, 69 (2014).***

When neither respondent nor any representative of his company appeared at the hearing, the forum delayed the commencement of the hearing for 30 minutes to account for any unexpected event that may have delayed the respondent's appearance, but no appearance was ever made by the respondent or any other person on his behalf, nor was any notice given to the forum explaining his failure to appear, respondent was found in default for failing to appear at the hearing. ---- ***In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 210 (2013).***

When Respondents were properly served and defaulted in a civil rights case by not filing an answer, the forum granted the agency's motion for an order holding respondents in default. -- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 147 (2012).***

When Respondents defaulted by not filing an answer, the forum's task was to determine if the agency presented a prima facie case on the record to support the agency's allegations. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 161 (2012).***

In a wage claim default case, the agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

When respondent filed an answer and request for hearing, but did not make an appearance at the hearing, respondent was held in default and the hearing commenced. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 60, 57 (2012).***

### 25.2 --- Amendments

### 25.3 --- Answer as Evidence

In a default case, the forum may consider any unsworn and unsubstantiated assertions

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contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

**25.4 --- Forum's Responsibility**

**25.5 --- Limits on Damages/Relief**

**25.6 --- Representation by Counsel (see also 3.0, 10.0)**

**25.7 --- Relief from Default**

**26.0 RECORD OF HEARING**

**26.1 --- Reopening the Record**

Respondents filed a motion to reopen the contested case record predicated on their argument that the commissioner's alleged bias "had effectively precluded respondents from receiving due process." The forum found that respondents had not shown good cause for reopening the record and denied respondents' motion based on Oregon case law, holding that, to show bias that required disqualification of the commissioner, respondents must show: (1) the scope of the "matter" and "question at issue" was limited to the specific decision before the commissioner; (2) the commissioner's bias was actual, not merely apparent; and (3) the commissioner had so prejudged the case as to be incapable of determining its merits on the basis of the evidence and arguments presented. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 201-07 (2015), appeal pending.***

After the hearing, the ALJ re-opened the record on his own motion to obtain a copy of claimant's original 2009-2010 nail salon appointment books for inspection. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the Claimant's 2009-2010 calendars received at hearing and marked and received them into the record. Copies were provided to both participants and the original books mailed back to the claimant, with instructions to claimant to retain them until such time as the case was completely resolved and all appeal rights had expired. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 48-49 (2012).***

After the hearing, the ALJ issued an interim order reopening the record and requiring respondents to provide copies of time records for respondent's employees that were not offered at hearing. Respondents filed a motion for clarification of the reason for the ALJ's interim order, arguing that it was improper under OAR 839-050-0410 for the ALJ to reopen the record to obtain this evidence if the purpose was to allow additional evidence relating to complainant's lost income because it was the agency's burden to establish complainant's damages at hearing, the agency could have requested these time records from respondent and offered them at hearing, and the agency did not do so. In response, the ALJ issued an interim order retracting the order. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 14 (2012).***

In a child labor case which the ALJ proposed a civil penalty of \$1,000 based on respondent's failure to obtain an employment certificate for a minor who sustained a "serious" injury while in respondent's employ, respondent excepted to the amount of the civil penalty, arguing that it was excessive and should be reduced to \$100 because the minor's injury was "non-serious" and was respondent's first offense. Respondent attached an exhibit to its exceptions that was not offered at the hearing and requested that it be considered as evidence. The exhibit was the USDOL's "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act" that advised respondent that USDOL's had determined that the minor had been employed by respondent to operate a band saw and had sustained a "nonserious" injury "in illegal employment." Respondent gave no reason for not offering this exhibit at hearing and the forum declined to reopen the record to consider it. The forum further stated that, even if the record was reopened to consider the exhibit, the USDOL's conclusion that the minor sustained a "nonserious" injury would not be binding on the forum. For the reasons stated in the

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proposed order, the forum stands by its conclusion that Weller's injury was "serious" as defined by OAR 839-019-0025(4). ----- *In the Matter of Schultz Mfg., Inc., 32 BOLI 1, 10 (2012)*.

### 26.2 --- Reconvenement

### 26.3 --- Settlement

### 26.4 --- Transcription

### 26.5 --- Leaving the Record Open

### 26.6 --- Other

## 27.0 LEGAL MEMORANDA, BRIEFS, STATEMENTS OF AGENCY POLICY

### 27.1 --- Briefs and Memoranda

At the conclusion of the hearing, the ALJ issued an interim order requesting the submission of briefs on specific issues and denying respondents' request to brief the topic of "consulting." The ALJ noted that respondents' "consulting" defense would "necessarily be addressed in the proposed order" and that respondents were free to address that issue by filing exceptions. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 132 (2016)*.

At the conclusion of the hearing, the agency's request to submit briefs addressing the constitutional free speech defense was granted. Respondents' objection to the agency's response, contending it contained legal argument not raised in the agency's original brief and a sur-response, was over-ruled. ---- *In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015)*.

At hearing, prior to opening statements, the agency requested permission to file a post-hearing brief to address the legal arguments respondents raised in their case summary. The ALJ deferred ruling on the agency's motion until the conclusion of the evidentiary portion of the hearing. At the conclusion of the evidentiary portion of the hearing, the ALJ granted the agency's motion and respondents' request to file a reply brief. The ALJ also granted the agency's and respondents' requests that closing arguments be made after the briefs were filed. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012)*.

### 27.2 --- Statements of Agency Policy

### 27.3 --- Written Closing Arguments

## 28.0 FULL AND FAIR INQUIRY

## 29.0 PROPOSED ORDERS

### 29.1 --- Generally

BOLI final orders may be relied upon by the commissioner as precedent until reversed or modified by an appellate court decision; or the commissioner or an appellate court overrules a point of law contained in a final order. ----- *In the Matter of Blachana, LLC, 32 BOLI 220, 254 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015)*.

### 29.2 --- Exceptions

Respondents did not file exceptions to the ALJ's proposed order, but filed a motion for leave to file a response to the agency's exceptions. The agency filed objections to respondents' motion and respondents filed a response to the agency's exceptions on the same day. The ALJ denied respondents' motion, adding that respondents' response to the agency's exceptions would not be considered. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 132 (2016)*.

When respondent raised no issues in his exceptions that he did not argue at hearing and were not already considered by the ALJ in the proposed order and his primary argument was

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that claimant and his parents were not credible witnesses, the forum concluded that there was no evidence in the record that causes the forum to alter its conclusion and rejected respondent's exceptions. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 66 (2016), appeal pending.***

The forum rejected respondents' exceptions because they were not timely filed. The proposed order was issued on April 15, 2015. Any exceptions to the proposed order were due 10 days later. Since the tenth day, April 25, 2015, fell on a Saturday, respondents had until Monday, April 27, 2015, to file any exceptions. The exceptions were filed one day later on April 28, 2015. Respondents did not file a motion prior to that date seeking an extension. Moreover, although Respondents asserted that it was difficult to "get up here" (from their home in Salem to Portland), the exceptions could have been filed by mail. Thus, there was no demonstration of "good cause" for an extension of time. ----- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 65 (2015).***

The ALJ refused to consider the merits of respondents' written argument that the agency's exceptions should be rejected, on the basis that the forum did not request such a response and there is no procedure in the administrative rules for filing responses to exceptions. ----- ***In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

Respondent filed exceptions focusing on two issues – the ALJ's credibility findings, and the amount of damages in the proposed award to complainant. Respondent's exceptions were denied because the ALJ's credibility findings and the proposed award of \$10,000 in damages for emotional suffering were supported by substantial evidence in the record. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 92-93 (2012).***

In a child labor case which the ALJ proposed a civil penalty of \$1,000 based on respondent's failure to obtain an employment certificate for a minor who sustained a "serious" injury while in respondent's employ, respondent excepted to the amount of the civil penalty, arguing that it was excessive and should be reduced to \$100 because the minor's injury was "non-serious" and was respondent's first offense. Respondent attached an exhibit to its exceptions that was not offered at the hearing and requested that it be considered as evidence. The exhibit was the USDOL's "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act" that advised respondent that USDOL's had determined that the minor had been employed by respondent to operate a band saw and had sustained a "nonserious" injury "in illegal employment." Respondent gave no reason for not offering this exhibit at hearing and the forum declined to reopen the record to consider it. The forum further stated that, even if the record was reopened to consider the exhibit, the USDOL's conclusion that the minor sustained a "nonserious" injury would not be binding on the forum. For the reasons stated in the proposed order, the forum stands by its conclusion that Weller's injury was "serious" as defined by OAR 839-019-0025(4). ----- ***In the Matter of Schultz Mfg., Inc., 32 BOLI 1, 10 (2012).***

In a child labor case which the ALJ proposed a civil penalty of \$1,000 based on respondent's failure to obtain an employment certificate for a minor who sustained a "serious" injury while in respondent's employ, respondent excepted to the amount of the civil penalty, arguing that it was excessive and should be reduced to \$100 because the USDOL had already assessed a penalty based on similar facts. The forum rejected respondent's exception because the penalty assessed by the forum was based on respondent's failure to obtain an employment certificate, not the minor's injury. The forum noted that the injury was relevant to the amount of penalty assessed but was not the reason a penalty was assessed. In contrast, according to respondent's statement, the USDOL's penalty was assessed based on the fact that the minor suffered an injury. ----- ***In the Matter of Schultz Mfg., Inc., 32 BOLI 1, 10 (2012).***

### 30.0 CONSTITUTIONALITY

Respondents argued that they were denied due process by the agency's "numerous

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procedural and discovery abuses,” addition of new exhibits during the hearing, and claim of what classification of prevailing wage should be assigned to the work involved in the wage claims. After the agency’s failure to adequately respond to respondents’ informal discovery requests, respondents sought and were granted a discovery order, which the agency responded to in a timely manner. At hearing, respondents made much of the administrative prosecutor not having provided a copy of their informal discovery request for documents to the agency investigator who gathered the information on which the charging document was based and actually drafted the charging document. Neither the APA nor contested case rules govern an agency’s internal processes in this regard. The agency did produce new exhibits during the hearing to which respondents objected, but then ultimately offered as their own exhibits after being given an opportunity to review them. The agency also revised its estimate of the wages due to claimants based on claimants’ testimony at hearing that some of their work involved travel or work that did not involve manual or physical labor. The forum found that none of these actions constitute a violation of respondents’ due process rights under the Oregon APA. --- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 107-08 (2016).***

Respondents argued that they were not given an adequate opportunity to respond to the agency’s demands, characterizing them as “inflated and in part based on erroneous facts,” prior to the agency’s issuance of its OOD. The forum rejected respondents’ argument, stating that the only deadline applicable to the hearing regarding Respondents’ time to respond was the 20-day deadline for a response to an OOD under ORS 652.332(1)(d) and that the APA does not apply until such time as a charging document is issued. --- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 107-08 (2016).***

Respondents argued that the agency “failed to consider all relevant factors and assumed facts that have proven to be erroneous.” The forum rejected respondent’s due process argument, stating that due process does not require that an agency’s investigation be perfect in the eyes of a respondent. The APA provides for contested case hearings so that respondents who are served with a charging document and believe that the allegations in that document are untrue can challenge the agency’s proposed action before it takes effect. Respondents did so and were not been of due process based on the agency’s investigation. --- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 107-08 (2016).***

The forum analyzed whether respondents’ actions violated the applicable public accommodation statutes before moving on to a determination of whether respondents had established one or more of their affirmative defenses that relied on the Oregon and U.S. Constitution. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 159 (2015), appeal pending.***

Respondents moved that BOLI’s commissioner be disqualified from deciding the issues presented in formal charges alleging discrimination in public accommodation based on sexual orientation, alleging that he had “publicly demonstrated actual bias against respondents and others similarly situated, both as a candidate for re-election and as commissioner” and, based on that alleged actual bias, the commissioner’s fulfillment of his statutory role by deciding and issuing a final order in these cases would deprive respondents of due process and other constitutional rights. To show that the commissioner was biased and had prejudged the cases, respondents provided exhibits that fell into two categories: 1) the commissioner’s e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon; and (2) remarks specific to the formal charges. The forum held that the commissioner has been instructed by the legislature to raise public awareness about practices that the legislature has declared to be unlawful discrimination in

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ORS chapter 659A, and that all of the commissioner's remarks generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon fell within the scope of this particular job duty and did not show actual bias. The forum found that the commissioner's two quoted "second category" statements combined selected portions of remarks made at two different times and also misquoted one remark. The forum found that the accurately quoted "second category" remarks, while made in the context of respondents' alleged discriminatory actions and the complainants' complaints, were remarks reflecting the commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, showed a preconceived point of view concerning an issue of law that is not a basis for disqualification due to bias. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 135-41 (2015), appeal pending.***

Procedural due process requires a decision maker free of actual bias and respondents have the burden of showing that bias. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 136 (2015), appeal pending.***

In a case involving discrimination in public accommodation on the basis of sexual orientation, the forum need not consider a defense of unconstitutionality where respondents did not raise that defense in their answer. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 31.0 CONDUCT OF HEARING

#### 31.1 --- Generally

When a hearing was adjourned before completed due to the medical emergency of a respondent's family member, the ALJ issued an interim order requiring persons already served with subpoenas requiring their appearance to honor that subpoena when the hearing reconvened. The ALJ additionally ordered that "notice of the duty of each witness to comply with the modified time of reporting on the previously served subpoena shall be given to each witness by means of respondents and the agency sending a copy of this ruling by regular mail to the witness's mailing address." --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 129 (2016).***

Respondents objected to exhibits created by the agency over the weekend between the fourth and fifth days of hearing, based on testimony given by the wage claimants, because the exhibits were not provided with the agency's case summary and because respondents did not have an adequate opportunity to prepare for cross examination due to the Agency's failure to provide the exhibits prior to the fifth day of hearing. The ALJ sustained respondents' objection on the grounds that: (1) it was unfair to respondents to continue the hearing and allow testimony about those documents when respondents' counsel had no prior opportunity to examine them; and (2) it was inefficient for the forum to adjourn the hearing to give respondents' counsel that opportunity when the agency could have given respondents and the forum notice the previous week that it intended to create these documents and the hearing could have been continued on a later date. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 128-29 (2016).***

On the third day of the hearing, a witness who had testified by phone the previous day appeared in person to resume his direct examination by the agency and brought 48 pages of documents related to his wage claim, saying that he thought they were lost and his wife had just found them the previous evening. The agency asked to offer them as part of its case in chief. Respondents objected, then offered to drop their objection in exchange for the hearing being adjourned until the next day to give respondents an opportunity to review the documents and being able to call the four wage claimants as witnesses. The agency objected to this proposal. After a brief examination of the 48 pages, respondents' counsel determined that some of the documents might help respondents' case. The ALJ granted respondents' request for an

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adjournment to review the documents but denied respondents' request to call claimants as respondents' witnesses. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 127 (2016).***

At different times during a hearing, four different persons were designated as a disabled complainant's "caregiver." ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 10 (2014), appeal pending.***

At different times during a hearing, four different persons were designated as a disabled complainant's "caregiver." ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 10 (2014), appeal pending.***

### 31.2 --- Security

Prior to hearing, the agency filed a letter with notice that it was arranging for security to be present at the hearing due to safety concerns. At the hearing, an Oregon State police trooper was present. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 16 (2016).*** See also ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 275 (2016).***

After the hearing was recessed, the agency filed a letter with notice that it was arranging for security to be present when the hearing resumed due to safety concerns. Respondents objected to the need for security, and the parties were permitted to state their positions regarding the need for security when the hearing reconvened. The agency referenced comments made by a respondent and presented documentation of his criminal history. Respondents disagreed that the criminal history was relevant, but the ALJ overruled respondents' objections and an Oregon State Police Trooper was present for all remaining proceedings. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 256 (2016).***

### 32.0 EFFECT OF ARBITRATION AGREEMENT

### 33.0 DECLARATORY JUDGMENT