

PREVAILING WAGE RATE (PWR)

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14.5 --- Failure to Complete and Return PWR Survey

To prove respondent violated ORS 279C.815(3), the agency had to establish that respondent was a "person" as defined in ORS 279C.815(1); the commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the agency for the purpose of determining the prevailing wage rates; respondent received the commissioner's 2005 survey; and respondent failed to make the required reports or returns within the time prescribed by the commissioner. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 8 (2007).*

When the only disputed element was whether respondent received the commissioner's 2005 wage survey and respondent gave no plausible explanation for not receiving multiple mailings from BOLI and the Employment Department, including three 2005 prevailing wage survey packets that were properly addressed and mailed to respondent's business and were not returned to the senders as undeliverable, the forum concluded that respondent received the 2005 wage survey and took no action to respond to the survey until after a notice of intent to assess civil penalties issued. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 8-9 (2007).*

Respondent's bare contention that "something in the system hasn't worked" and the U. S. Postal Service was to blame for its failure to respond to the wage survey was not credible and failed to rebut the legal presumption that "[a] letter duly directed and mailed was received in the regular course of the mail." The forum therefore concluded that respondent failed to make the required reports or returns within the time prescribed by the commissioner in violation of ORS 279C.815(3) and liable for civil penalties. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 8 (2007).*

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14.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

14.7 --- Failure to File Certified Payroll Statements

14.8 --- Failure to Pay Fee for Costs of Administering Law

15.0 CIVIL PENALTIES

15.1 --- Generally

- In determining an appropriate penalty amount, the forum must consider the criteria set forth in OAR 839-016-0520 (renumbered to 839-025-0520), including any mitigating circumstances presented by respondent. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 9 (2007).*

15.2 --- Failure to Pay PWR

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15.4 --- Failure to Pay Fee for Costs of Administering Law

15.5 --- Failure to File Certified Payroll Statements

15.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

15.7 --- Failure to Complete and Return PWR Survey

- After considering the aggravating and mitigating circumstances, the commissioner assessed a \$1,000 civil penalty for respondent's single violation of ORS 279C.815(3). ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 8-9 (2007).*

15.8 --- Failure to Make Records Available to Wage and Hour Division

15.9 --- Penalties for Other Violations

15.10 --- Aggravating Circumstances

15.10.1 --- Response to Prior Violations of Statutes and Rules

15.10.2 --- Prior Violations of Statutes and Rules

- The agency did not controvert respondent's assertion that it had a history of cooperating with wage survey requirements and presented no evidence of prior violations and the forum concluded that respondent's violation of ORS 279C.815(3) was respondent's first. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 9 (2007).*

15.10.3 --- Opportunity and Degree of Difficulty to Comply

- The forum found that respondent had at least two reminders after the due date for filing the prevailing wage rate survey passed before the agency warned that sanctions were imminent, and even after the agency's final warning letter, respondent remained unresponsive until the agency issued its notice of

intent proposing civil penalties. The forum concluded respondent had ample opportunity to comply with the law. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 9 (2007).*

- The ALJ found it was not logically credible that respondent received the notice of intent to assess civil penalties and not the five previous mailings from two different agencies related to the same matter and mailed to the same business address. The forum concluded that given respondent's admission that it had no difficulty completing and returning the wage survey when it received a fourth wage survey packet following the notice of intent to assess civil penalties, respondent had ample opportunity and no degree of difficulty to comply with the 2005 wage survey requirement. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 9 (2007).*

15.10.4 --- Magnitude and Seriousness of Violation

- Wage surveys are the commissioner's source of relevant data and information to ensure that wage determinations accurately reflect wages paid in the community, and when respondent admitted performing non-residential work in 2005, the forum held that respondent's violation of ORS 279C.815(3) was serious because it undermined the commissioner's ability to complete his statutory duty to accurately determine the prevailing wage rates. -- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 10 (2007).*

15.10.5 --- Knowledge of Violation

- Respondent's assertion that it did not receive any of the multiple mailings sent by two state agencies related to the 2005 prevailing wage survey was not believed and the forum concluded that respondent received the mailings, including reminder notices, and through selective ignorance or inattention knew that it was violating the law when it failed to respond to the 2005 wage survey. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 10 (2007).*

15.10.6 --- Other

15.11 --- Mitigating Circumstances

- The agency did not controvert respondent's assertion that it had a history of cooperating with wage survey requirements and, absent any evidence of prior violations, the forum concluded that respondent's violation of ORS 279C.815(3) was respondent's first and therefore was a mitigating circumstance that could be weighed against the aggravating circumstances in the case. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 9 (2007).*

16.0 PLACEMENT ON INELIGIBLE LIST

16.1 --- In General

16.2 --- Intentional Failure to Pay PWR

16.3 --- Intentional Failure to Post PWR

16.4 --- Liability of Corporate Officers or

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- Agents**
- 16.5 --- Aggravating Circumstances**
- 16.6 --- Mitigating Circumstances**
- 16.7 --- Length of Debarment**
- 17.0 LIQUIDATED DAMAGES**
- 18.0 AFFIRMATIVE DEFENSES**
- 18.1 --- Equitable Estoppel (see also Ch. III, sec. 86.0)**
- 18.2 --- Ignorance of Law**
- 18.3 --- Other**
- 19.0 EXEMPTIONS**
- 20.0 PREVAILING WAGE RATE DETERMINATION**
- 20.1 --- Generally**
- When a requester contested the agency's determination on the basis that the agency failed to effectuate legislative intent by determining that requester's project was not "residential construction" of affordable housing as contemplated in ORS 279C.810(2)(d)(D), but the record showed that the agency properly ascertained the legislature's intent from the statute's text and context, and correctly concluded that requester's project, a renovation of a five-story hotel, would be subject to the prevailing wage rate laws if public funds were committed to the requester's project after July 1, 2007, the forum affirmed the agency's determination. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 110 (2008).***
 - The legislature knows how to draft a law so that it has the intended effect, and it did so when it amended the prevailing wage rate law in 2007. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 106 (2008).***
- 20.2 --- ALJ Order for Prehearing Written Statements**
- The ALJ issued an order requiring requester to submit a written statement identifying all of requester's reasons for contesting the agency's determination. The order also required the agency to submit copies of the determination, all materials requester provided to support its request for a determination, and any other materials the agency relied upon to reach its determination. ---- ***In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 75 (2010).***
 - The ALJ issued an order requiring requester to submit a written statement identifying all of requester's reasons for contesting the agency's determination. The order also required the agency to submit copies of the determination, all materials requester provided to support its request for a determination, and any other materials the agency relied upon to reach its determination. The ALJ ordered the participants to submit the statement and documents by September 12, 2008, and notified them of the possible sanctions for failure to comply with the order. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 95 (2008).***
- 20.3 --- List of Witnesses**
- Prior to hearing, the agency and requester each submitted a list of persons they intended to call as witnesses and statements describing proposed testimony. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 96 (2008).***
- 20.4 --- Effective Date of HB 2140**
- The term "public works" was redefined by the Oregon Legislature in HB 2140, effective July 1, 2007. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 100 (2008).***
- 20.5 --- Exemptions from HB 2140**
- Although requester's project met the definition of "major renovation" as defined in OAR 839-025-0004(11), it did not qualify for an exemption because it the work was to be performed on a hotel. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 106 (2008).***
 - To be exempt under ORS 279C.810(2)(d), "residential construction" must involve the construction, reconstruction, major renovation or painting of a single family house or an apartment building. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 105 (2008).***
 - In HB 2140, the legislature made it clear that the only public works projects that will be wholly exempt from application of the 2007 amendments are projects with bond issue funding when the State Treasurer issued the bonds before July 1, 2007. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 102 (2008).***
 - HB 2140 specifically exempts one type of project from the application of the PWR law amendments – those funded in whole or in part by bonds issued by the State Treasurer before July 1, 2007. When requester did not dispute and credible evidence showed that the requester's project did not contain revenue from State bond issues, the agency correctly observed during the hearing that the project was not exempt from the 2007 amendments. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 100-01 (2008).***
- 20.6 --- Agency's Duty in Making Prevailing Wage Rate Determination**
- The Agency's initial task, pursuant to ORS 279C.817, is to "make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840." ---- ***In the Matter of Central City Concern, 30 BOLI 94, 109 (2008).***
- 20.7 --- Dividing a Project**
- The agency must divide a project only if appropriate and in light of the considerations listed in ORS 279C.827(1)(c). ---- ***In the Matter of Central City Concern, 30 BOLI 94, 110 (2008).***
 - When making a prevailing wage rate determination,

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nothing in ORS 279C.840 requires the agency to address whether a project should be divided. ---- *In the Matter of Central City Concern, 30 BOLI 94, 109-10 (2008).*

20.8 --- Definitions

20.8.1 --- "Apartment Building"

□ Using the methodology set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), the commissioner relied on *Webster's Third New Int'l Dictionary* to define "apartment building" as a "building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common." The commissioner further determined that it was necessary to ascertain the meaning of the word "separate" before applying *Webster's* definition of "apartment building" to requester's project. The commissioner found that, in order for residential units to be "separate," they must be "autonomous and independent" and this was impossible without kitchens and bathrooms, which requester's project lacked. Consequently, the commissioner concluded that requester's project does not fall within the definition of "apartment building" and is not a court residential construction" under ORS 279C.810(2)(d)(D). ---- *In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 87-88 (2010).*

□ The forum relied on *Webster's Third New Int'l Dictionary* to determine that the term "apartment building," when given its plain, ordinary meaning, establishes that requester's project was neither a single family home nor an apartment building. Specifically, the forum found that "apartment building" is commonly defined as a "building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common." In contrast, in this case the agency and requester stipulated that the project was for the purchase and remodel of a former Ramada Inn hotel, which is not an apartment building. ---- *In the Matter of Central City Concern, 30 BOLI 94, 105 (2008).*

20.8.2 --- "Construction"

□ The term "construction" is defined in OAR 839-025-0004(5) as meaning " * * * the initial construction of buildings and other structures, or additions thereto * * *." Because the requester's project involved the remodel of an existing hotel, it could not be characterized as "construction." ---- *In the Matter of Central City Concern, 30 BOLI 94, 105-06 (2008).*

20.8.3 --- "Dormitory"

□ Among the multitude of structures listed under the categories of "BUILDING CONSTRUCTION" and "RESIDENTIAL CONSTRUCTION" in AAM 130, none exactly described requester's project. In terms of similarity, the label "dormitory," listed as an example under "BUILDING CONSTRUCTION," came closest. Like "apartment building," the word "dormitory" is not defined by statute or

administrative rule and is an inexact term, and the forum relied on *Webster's Dictionary* to determine its meaning. *Webster's* defines "dormitory" as "a residence hall providing separate rooms or suites for individuals or for groups of two, three, or four with common toilet and bathroom facilities but usually without housekeeping facilities." Although not an exact fit, it is a fairly good match for the transitional housing part of requester's project and is the closest match to any of the structures listed in AAM 130 under the categories of "BUILDING CONSTRUCTION" and "RESIDENTIAL CONSTRUCTION" and the commissioner determined the requester's project was a "dormitory." ---- *In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 85 (2010).*

20.8.4 --- "Major Renovation"

□ "Major renovation" is defined in OAR 839-025-0004(11) as "the remodeling or alteration of building and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000." ---- *In the Matter of Central City Concern, 30 BOLI 94, 106 (2008).*

20.8.5 --- "Public Contract"

□ When requester argued that agreements executed prior to July 1, 2007, are "public contracts" based on the plain, ordinary meaning of the term; therefore, pursuant to HB 2140, the 2007 statute cannot apply to those agreements. Citing *Merriam-Webster's Dictionary*, requester maintained that by considering the definitions of "public" and "contract," one could reasonably conclude "that an agreement between two parties, one of which being the government or a relation thereto, is a 'public contract.'" The forum held that, while that definition is consistent with requester's theory, resort to dictionary definition to ascertain legislative intent was not necessary in this case for the reason that the applicable definition "public contract" is set out in ORS 279A.010(1)(z). -- -- *In the Matter of Central City Concern, 30 BOLI 94, 101 (2008).*

20.8.6 --- "Public Works"

□ Under ORS 279C.800(6)(a)(B), a term "public works" includes "[a] project for the construction * * * of a privately owned building * * * that uses funds of a private entity and \$750,000 or more of funds of a public agency * * *." When the participants stipulated that requester's project would be privately owned and that it will use more than \$750,000 in funds from a public agency, the form concluded that the project was a "public works." ---- *In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 85 (2010).*

20.8.7 --- "Reconstruction" or "Restoration"

□ The term "reconstruction" is defined in OAR 839-025-0004(22) to mean " * * * highway and road resurfacing and rebuilding, the restoration of existing highways and road, and the restoration of buildings and other structures." The term

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“restoration” means “bringing back to or putting back into a former position or condition.” Because requester’s project would convert an existing hotel building into a mixed-use structure comprised of both commercial space and apartments, requester’s project could not be considered a restoration. Because the project’s proposed conversion would change the entire character of the building, it did not meet the definition of residential construction under the “reconstruction” component. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 106 (2008).***

20.8.8 --- "Residential Construction"

- Using the methodology set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), the commissioner relied on *Webster’s Third New Int’l Dictionary* to define “apartment building” as a “building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common.” The commissioner further determined that it was necessary to ascertain the meaning of the word “separate” before applying *Webster’s* definition of “apartment building” to requester’s project. The commissioner found that, in order for residential units to be “separate,” they must be “autonomous and independent” and this was impossible without kitchens and bathrooms, which requester’s project lacked. Consequently, the commissioner concluded that requester’s project does not fall within the definition of “apartment building” and is not a court residential construction” under ORS 279C.810(2)(d)(D). ---- ***In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 87-88 (2010).***
 - Under ORS 279C.810(1)(d), which defines “residential construction,” identifies two specific structures as “residential construction” – single-family houses and apartment buildings less than five stories in height-and refers the Commissioner to the United States Department of Labor’s All Agency Memorandum No. 130 for guidance. It also gives Commissioner’s discretion to consider different definitions contained in local ordinances or codes. -- ***In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 85-86 (2010).***
 - The term “residential construction” does not lend itself to more than one reasonable interpretation in this context. Based on a plain reading of the statute, residential construction does not include construction, reconstruction, major renovation or painting of hotels and even if it did, it does not include structures more than four stories in height. -- ***In the Matter of Central City Concern, 30 BOLI 94, 108-09 (2008).***
 - Based on the text and context of ORS 279C.810(2)(d)(D), the forum determined that the definition of “residential construction” does not include the major renovation of a five-story hotel into a mixed-use building with apartments and commercial space. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 108 (2008).***
 - In seeking to have its project defined as “residential construction,” a requester sought to have the forum consider the Portland City Code provisions that provide for wood frame construction designed for apartment occupancies. The forum rejected this argument because those provisions do not define “residential construction,” nor is the use of wood framing in new construction relevant to the renovation of an existing hotel constructed of concrete. The agency’s discretion to consider different definitions of residential construction is limited to definitions of “residential construction,” and the Portland City Code contains no such definition. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 108 (2008).***
 - Under the statutory definition of “residential construction” definition, the agency is authorized to consider different definitions of “residential construction” in determining whether a project is residential construction. However, the agency’s discretion is limited to what the legislature has identified as the type of different definitions that may be considered. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 107-08 (2008).***
 - The Agency correctly concluded that requester’s project was not “residential construction.” The meaning of the phrase “not more than four stories in height” in ORS 279C.810(2)(d) is exact. Request’s project involved a building five stories in height, exceeding the height limitation in ORS 279C.810(2)(d) by one story. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 104-05 (2008).***
 - “Residential construction,” as defined in ORS 279C.810(2)(d), is an inexact term. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 103 (2008).***
- ### 20.9 --- Local Ordinances and Codes
- When the requester did not identify any definition of “residential construction” in a local ordinance or code, the Commissioner relied exclusively on the definition of “residential construction” contained in the first sentence of ORS 279C.810(1)(d)(D) to resolve this case and did not consider requester’s argument that it’s project, under the City of Portland’s building code, is a “residential structure” containing single room occupancy (“SRO”) housing, thereby meeting the residential construction requirement in ORS 279C.810(2)(d)(D)(i). ---- ***In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 86 (2010).***
 - In seeking to have its project defined as “residential construction,” a requester sought to have the forum consider the Portland City Code provisions that provide for wood frame construction designed for apartment occupancies. The forum rejected this argument because those provisions do not define “residential construction,” nor is the use of wood framing in new construction relevant to the renovation of an existing hotel constructed of concrete. The agency’s discretion to consider different definitions of residential construction is limited to definitions of “residential construction,” and the Portland City Code contains no such

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definition. ---- *In the Matter of Central City Concern, 30 BOLI 94, 108 (2008).*

20.9 --- All Agency Memorandum No. 130

- AAM 130 was adopted by the U.S. Department of Labor in 1978 to assist contracting agencies in determining the appropriate wage rate schedule for public works, not as a guide to be used in determining whether a project is in fact a public works. It contains general definitions of four categories of construction -- building, residential, heavy, and highway -- and lists, but does not define, examples of projects included in each category. ---- *In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 86 (2010).*
- Under ORS 279C.810(1)(d), which defines "residential construction," identifies two specific structures as "residential construction" -- single-family houses and apartment buildings less than five stories in height--and refers the Commissioner to the United States Department of Labor's All Agency Memorandum No. 130 for guidance. It also gives Commissioner's discretion to consider different definitions contained in local ordinances or codes. -- *In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 85-86 (2010).*

21.0 STATUTORY INTERPRETATION

- The forum found a requester's attempt to provide declarations of witnesses who collaborated with the agency prior to the passage of HB 2140 as purported evidence of legislative intent as misguided because of PGE and its progeny, which have held that the best evidence of legislative intent is the statute itself. ---- *In the Matter of Central City Concern, 30 BOLI 94, 109 (2008).*
- Absent any apparent ambiguity in statutory terms, there is no need to examine legislative history. When the legislature's intent is clear from the text and context, further inquiry is unnecessary. ---- *In the Matter of Central City Concern, 30 BOLI 94, 109 (2008).*
- The term "residential construction" does not lend itself to more than one reasonable interpretation in this context. Based on a plain reading of the statute, residential construction does not include construction, reconstruction, major renovation or painting of hotels and even if it did, it does not include structures more than four stories in height. -- *In the Matter of Central City Concern, 30 BOLI 94, 108-09 (2008).*
- For a statute to be ambiguous there must be at least two reasonable interpretations of the disputed statutory terms. A reasonable interpretation refers to an interpretation that is "not wholly implausible." -- *In the Matter of Central City Concern, 30 BOLI 94, 108 (2008).*
- When interpreting statutory language, the agency and the forum are prohibited from inserting language that the legislature has omitted. ---- *In the Matter of Central City Concern, 30 BOLI 94, 106-07 (2008).*

- The legislature knows how to draft a law so that it has the intended effect, and it did so when it amended the prevailing wage rate law in 2007. ---- *In the Matter of Central City Concern, 30 BOLI 94, 106 (2008).*
- The PGE analysis begins by examining the text and context, applying statutory and judicially developed rules of construction that bear directly on how to read the text, such as to give words of common usage "their plain, natural, and ordinary meaning." If more than one meaning is possible after examining the text and context, then legislative history must be examined to determine legislative intent. If the legislative history does not clarify the meaning of the statute, then general maxims of statutory construction are considered. ---- *In the Matter of Central City Concern, 30 BOLI 94, 104 (2008).*
- In order to effectuate the complete policy judgment that particular statutory terms represent, determining the general policy of a statute is a matter of statutory construction controlled by the PGE framework. ---- *In the Matter of Central City Concern, 30 BOLI 94, 104 (2008).*
- The forum held that interpretation of inexact or delegative terms is a matter of statutory construction controlled by the PGE framework and that the agency correctly applied the PGE methodology to interpret the meaning of the affordable housing exemption. ---- *In the Matter of Central City Concern, 30 BOLI 94, 104 (2008).*
- The forum rejected a requester's argument that the agency, because of its assistance in drafting and pushing HB 2140 through the legislature, was obliged to use its own "intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase" in determining the meaning of "residential construction" contained in ORS 279C.810(2)(d). ---- *In the Matter of Central City Concern, 30 BOLI 94, 104 (2008).*
- "Residential construction," as defined in ORS 279C.810(2)(d), is an inexact term. ---- *In the Matter of Central City Concern, 30 BOLI 94, 103 (2008).*

22.0 AGENCY RULE INTERPRETATION