

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of:

PORTLAND FLAGGING, LLC; A D
TRAFFIC CONTROL SERVICES,
LLC; TRI-STAR FLAGGING, LLC;
PORTLAND SAFETY EQUIPMENT,
LLC; PHOENIX CONSTRUCTION
GROUP, INC.; SBG
CONSTRUCTION SERVICES LLC;
GNC CONSTRUCTION SERVICES
LLC,

Respondents.

Case No. 55-15

FINDINGS OF FACT
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

Respondent Portland Flagging, LLC ("Portland Flagging") failed to pay the prevailing wage rate to two workers on a public works project when it did not make timely payments to the workers' fringe benefit accounts. The Commissioner assessed \$2000 in civil penalties against Portland Flagging for its failure to pay the prevailing wage rate.

The above-entitled case was assigned to Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by

1 administrative prosecutor Adriana Ortega, an employee of the Agency. Portland
2 Flagging was represented by its President, Evan Williams.

3 After the Agency issued a Notice of Intent (“NOI”), the Agency moved for and
4 was granted summary judgment against Portland Flagging in this case.¹

5 Having fully considered the entire record in this matter, I, Brad Avakian,
6 Commissioner of the Bureau of Labor and Industries, hereby make the following
7 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,² Conclusions
8 of Law, Opinion, and Order.

9 10 **FINDINGS OF FACT – PROCEDURAL**

11 1) On February 20, 2015, the Agency issued a Notice of Intent to Assess
12 Civil Penalties (“NOI”) in the amount of \$2000 against Respondents. Summarized, the
13 NOI alleged:

- 14 • Respondents failed to timely pay the fringe benefits portion of wage claimant Eric
15 Penn’s prevailing wages in the amount of \$2,607.65 on several public works
16 projects.
- 17 • Respondents failed to timely pay the fringe benefits portion of wage claimant
18 Starley Martell’s prevailing wages in the amount of \$2,813.25 on a public works
19 project.
- 20 • OAR 839-025-0043(1) requires that contributions made to a fringe benefit
21 program must be made on a regular basis but not less often than quarterly.
- 22 • Respondents are liable for \$2000 (\$1000 per violation) in civil penalties.

23
24 (Ex. X1a)
25

24 ¹ As explained in greater detail below, the allegations against the remainder of the Respondents were
25 bifurcated from the liability issues against Portland Flagging and then consolidated with other BOLI cases
involving similar joint liability issues against the same Respondents.

² The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the
Findings of Fact – The Merits.

1 2) Respondents timely filed an answer and request for hearing on February
2 27, 2015. In their answer, Respondents denied violating ORS 279C.840 because the
3 fringe benefit payments were ultimately paid, but admit "PORTLAND FLAGGING, LLC
4 dba A D TRAFFIC CONTROL" was "not timely" in submitting fringe benefit payments for
5 Penn and Martell. (Ex. X1b, ¶¶ 3, 5)

6 3) On March 2, BOLI's Contested Case Coordinator issued a Notice of
7 Hearing to Respondents, the Agency, and Claimant setting the time and place of
8 hearing for 9:00 a.m. on April 21, 2015, at BOLI's Portland office. Together with the
9 Notice of Hearing, the forum sent a copy of the Notice of Intent, a multi-language
10 warning notice, a document entitled "Summary of Contested Case Rights and
11 Procedures" containing the information required by ORS 183.413, a document entitled
12 "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's
13 contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a-
14 X2e)

15 4) A letter filed with the forum dated March 13, 2015, signed by "Evan
16 Williams, Managing Member," stated that Evan Williams was the authorized
17 representative for all of the Respondent companies and that he was "acting as
18 President" for the companies. (Ex. X10)

19 5) On March 17, 2015, the Agency filed a motion for summary judgment,
20 contending it was entitled to judgment as a matter of law. On March 19, 2015, the ALJ
21 issued an interim order setting a deadline of March 24, 2015, for a written response by
22 Respondents. Respondent timely filed a response on March 24, 2015. (Exs. X7, X8,
23 X12)

1 6) On March 20, 2015, the ALJ granted the Agency's unopposed motion to
2 consolidate Case Nos. 28-15 and 55-15.³ (Ex. X9)

3 7) On April 3, 2015, the ALJ issued an interim order GRANTING the
4 Agency's motion for summary judgment. The ALJ's interim order is reprinted⁴ below:

5 **"Introduction**

6
7 "On February 20, 2015, the Agency issued a Notice of Intent to Assess
8 Civil Penalties (NOI) against Respondents. Respondents timely filed an answer
9 and request for hearing on February 27, 2015. The violations alleged in the NOI
10 for 55-15 were: (1) Respondents failed to timely pay fringe benefits to wage
11 claimants Eric Penn and Starley Martell for work on prevailing wage projects in
12 violation of ORS 279C.840(1), OAR 839-025-0043 and OAR 839-025-0040; and
13 (2) Respondents are liable for civil penalties pursuant to ORS 279C.865; OAR
14 839-025-0520; *former and current* OAR 839-025-0530(3)(a); and OAR 839-025-
15 0540.

16 "The NOI for 55-15 requested civil penalties in the amount of \$1000 per
17 wage claimant based on the alleged violations.

18 "The Agency filed a motion for summary judgment in Case No. 55-15 on
19 March 17, 2015, asserting that there is no genuine issue of material fact
20 regarding Respondents' failure to pay unpaid wages. Respondents timely filed a
21 response to the motion on March 24, 2015.

22 "On March 20, 2015, I granted the Agency's unopposed motion to
23 consolidate Case Nos. 28-15 and 55-15. The hearing in Case No. 28-15 began
24 on March 3, 2015, recessed on March 5, 2015, and will resume on April 8, 2015.
25 Each party has requested that I consider the evidence submitted with the
summary judgment filings and at hearing in Case No. 28-15 when ruling on the
motion for summary judgment in Case No. 55-15.

19 **"Summary Judgment Standard**

20 "A motion for summary judgment may be granted where no genuine issue
21 as to any material fact exists and a participant is entitled to a judgment as a
22 matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B).
23 The standard for determining if a genuine issue of material fact exists and the
24 evidentiary burden on the participants is as follows:
25

³ The two cases were consolidated so that the common facts could be presented in one hearing. For the sake of clarity and to assist the parties in understanding the forum's rulings, final orders will be issued separately in Case Nos. 28-15 and 55-15.

⁴ Minor editorial changes for clarification were made in two places, as reflected by brackets.

1 ‘ * * * No genuine issue as to a material fact exists if, based upon
2 the record before the court viewed in a manner most favorable to
3 the adverse party, no objectively reasonable juror could return a
4 verdict for the adverse party on the matter that is the subject of the
5 motion for summary judgment. The adverse party has the burden
6 of producing evidence on any issue raised in the motion as to which
7 the adverse party would have the burden of persuasion at
8 [hearing].’

9 “ORCP 47C.

10 “The record considered by the forum in deciding this motion consists of:
11 (1) the Agency's NOI, the Agency's argument made in support of its motion, and
12 the exhibits submitted with the Agency's motion (including exhibits incorporated
13 by reference from the summary judgment and hearing record in Case No. 28-15);
14 and (2) Respondents' Answer, Respondents' argument opposing the Agency's
15 motion, and the exhibits submitted in Respondents' response to the Agency's
16 motion (including exhibits incorporated by reference from the summary judgment
17 and hearing record in Case No. 28-15).

18 “ANALYSIS

19 “In its motion, the Agency argues that Respondents violated ORS
20 279C.840 by withholding fringe benefit amounts from the paychecks of two wage
21 claimants and then failing to deposit the withdrawn amounts into a fringe benefit
22 plan as required by ORS 279C.800(1)(a).

23 “1. Violations of ORS 279C.840

24 “It is the Agency's burden to prove that an employer did not pay all
25 deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of
26 Green Thumb Landscape and Maintenance, Inc.*, 32 BOLI 185, 198 (2013).
27 Contributions to fringe benefit plans must be made on a regular basis and not
28 less often than quarterly. OAR 839-025-0043(1).

29 “a. *Summary of the Parties' Positions*

30 “The Agency points to Respondents' Exhibit R-7 and R-8, page 2, when
31 asserting that Penn's and Martell's fringe benefits earned in 2012 were not
32 posted to their accounts until November 18, 2013.

33 “Respondents argue that they are not in violation of ORS 279C.840
34 because ‘the fringe benefit portion of these employee wages was in some cases
35 paid late but they were paid.’ Response, p. 1. Respondents further do not
36 dispute the Agency's contention that Exhibits R-7 and R-8 demonstrate that
37 fringe benefit payments for wages earned in 2012 were not posted until
38 September 30, 2013, and November 18, 2013. *Id.*

1 "At the hearing in Case No. 28-15, Agency Investigator Monique Soria-
2 Pons testified that the Agency does not consider late fringe benefit payments in
3 its calculations of unpaid prevailing wages, relying on the interpretation of the
4 United States Department of Labor ('DOL') in determining valid fringe benefit
5 contributions. In particular, Ms. Soria-Pons discussed Exhibit A-23 which states
6 that it will not credit payments made retroactively into a benefit plan because
7 those will not be credited by DOL.

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"b. *Analysis*

"Prevailing wage payments must be made to employees 'in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a).' ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the 'rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program.' It is clear that any timely (i.e. 'not less often than quarterly') contributions made to The Contractors' Plan would be valid. OAR 839-025-0043(1).

"However, 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. See, e.g., 29 CFR § 2510.3-102(d); 67 Fed. Reg. 15,051, 15,062 (March 28, 2002). There is no evidence in this case that the late contributions made to the accounts of Penn and Martell followed an appropriate delinquent contribution payback method. Rather, it appears that only the amounts deducted from the wage claimants' paychecks in 2012 were deposited into The Contractor's Plan in 2013 – much 'less often than quarterly.' Accordingly, I find that the contributions which Respondents made on September 30 and November 18, 2013, do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a).

"2. Amount of Civil Penalties

"Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ORS 279C.865; OAR 839-025-0530(3)(a). The Agency may assess a civil penalty in the amount of the unpaid wages or \$1000, whichever is lesser. OAR 839-025-0540. In this case, the Agency seeks civil penalties of \$1000 for each wage claimant. Given that the amount of fringe benefit payments owed to each wage claimant exceeds \$1000, I hereby assess civil penalties in the amount of \$1000 each [for the violations against] Penn and Martell [for a total of \$2000].

"3. Analysis of Liability of the Multiple Respondents

Respondents admit that Portland Flagging LLC dba AD Traffic Control was not timely in submitting the fringe benefit payments of Penn and Martell. Answer, ¶ 3, ¶ 5]. Respondents deny the liability of the remaining Respondents. *Id.* Since the record at this time does not demonstrate the liability of the

1 remaining Respondents, I find that only Portland Flagging LLC dba AD Traffic
2 Control is liable for civil penalties. Liability as to the remaining Respondents will
3 be addressed in the Proposed Order at the conclusion of the hearing in these
4 matters.

5 **“CONCLUSION**

6 “The Agency's motion in Case No. 55-15 is **GRANTED** in part as to the
7 civil penalties requested against Portland Flagging LLC dba AD Traffic Control,
8 and is **DENIED** as to the remainder of the Respondents. The hearing will
9 resume as scheduled at 9:00 a.m. on April 8, 2015.”

10 (Ex. X15)

11 8) The ALJ's ruling on the Agency's motion for summary judgment against
12 Portland Flagging is hereby **AFFIRMED**.⁵ Because the parties requested that the ALJ
13 consider evidence in Case No. 28-15, the ALJ marked the following documents
14 referenced in the ALJ's summary judgment ruling as exhibits in this case:

- 15 • A copy of the digital recording of the hearing for Case No. 28-15 has been
16 marked as Ex. X20.
- 17 • A copy of Ex. A-23 from Case No. 28-15 has been marked as Ex. X21.
- 18 • A copy of Ex. R-7 from Case No. 28-15 has been marked as Ex. X22.
- 19 • A copy of Ex. R-8 from Case No. 28-15 has been marked as Ex. X23.

20 9) On April 10, 2015, the issue of the liability of the remainder of the
21 Respondents was bifurcated from the claims against Portland Flagging, and then
22 consolidated with Case Nos. 28-15, 37-13 and 14-14. The hearing for those
23 consolidated matters has been postponed until pending default issues are fully resolved
24 in related cases involving all Respondents. In the event the liability of the remaining

25 ⁵ The liability of the remaining Respondents has been separated from this case, as explained in Finding of
Fact - Procedural No. 9 below.

1 Respondents proceeds to hearing, a separate Final Order will be issued addressing the
2 joint liability allegations in all of those consolidated cases. (Ex. X22)

3 10) The ALJ issued a proposed order on August 18, 2015, that notified the
4 participants they were entitled to file exceptions to the proposed order within ten days of
5 its issuance. Neither the Agency nor Respondents filed any exceptions.

6 FINDINGS OF FACT – THE MERITS

7 1) Portland Flagging employed wage claimants Penn and Martell on various
8 public works projects. (Exs. X1a, X-1b)

9 2) Portland Flagging used the assumed business name “A D Traffic Control.”
10 (Ex. X1b, ¶2)

11 3) In the year 2012, Portland Flagging withheld fringe benefit payments from
12 the wages paid to Penn and Martell in excess of \$1000 per worker. (Ex. X1a, X1b, ¶¶
13 3, 5)

14 4) The funds Portland Flagging withheld from the paychecks of Penn and
15 Martell in 2012 were not deposited into a fringe benefit plan until September 30, 2013,
16 and November 18, 2013. (Ex. X22, X23)

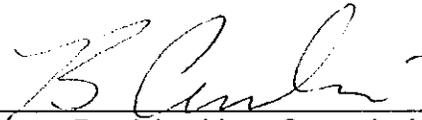
17 CONCLUSIONS OF LAW

18 1) The Commissioner of the Bureau of Labor and Industries has the authority
19 to assess civil penalties for violation of ORS 279C.840(1) and ORS 279C.800(1)(a).
20 ORS 279C.865.

21 2) Prevailing wage benefit payments must be made on a regular basis and
22 not less often than quarterly. OAR 839-025-0043(1).
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1 A certified check payable to the Bureau of Labor and Industries in the
2 amount of **TWO THOUSAND DOLLARS (\$2000.00)**, plus interest at the
3 legal rate on that sum between a date ten days after the issuance of the
4 final order and the date Respondent Portland Flagging LLC dba AD Traffic
5 Control complies with the Final Order.

6 DATED this 9 day of September, 2015.

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9 _____
10 Brad Avakian, Commissioner
11 Bureau of Labor and Industries

12 ISSUED ON September 10, 2015
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