

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re: PAC 4 Coatings and Waterproofing,  
Inc.

Citation and Notice of Assessment No. W-  
638-14, W-639-14

OAH Docket No. 2014-LI-0187

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on May 8, 2015, having considered the petition for administrative review filed by PAC 4 Coatings and Waterproofing, Inc. (Appellant) with the Director's Office on June 8, 2015, and the briefing and record submitted to the Director's Office, issues this Director's Order.

This Order intends to resolve the contested issue of whether the Appellant failed to pay all the wages due to Jeremy Sundheim and Rob Rice in violation of the wage payment laws. **The Appellant is ordered to pay wages to Jeremy Sundheim in the amount of \$940.50. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. The Appellant is ordered to pay wages to Rob Rice in the amount of \$1,104.00. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. The Appellant is ordered to pay the Department penalties in the amount of \$2000.**

The parties in this matter are the Department of Labor & Industries and the Appellant.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

### I. FINDINGS OF FACT

1. The Office of Administrative Hearings issued and served the Initial Order on the Appellant on May 8, 2015. The 30<sup>th</sup> day after this date was June 7, 2015, which, because it was Sunday, made the appeal due June 8, 2015. On June 8, 2015, the Director's office received the Appellant's appeal as shown by the certified mail receipt.

2. The Director adopts and incorporates all the Initial Order's Findings of Fact.

3. The Director also adopts and incorporates the Initial Order's "Issue Presented" statement, the "Order Summary," and the "Hearing" summary.

### II. CONCLUSIONS OF LAW

1. Based on the Appellant's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

2. The Director adopts and incorporates the Initial Order's Conclusions of Law and Initial Order.

3. Interest Calculation: Because the Appellant failed to pay its employees full wages, the Department ordered the Appellant to pay wages owed, plus interest at one percent per month under RCW 49.48.083(2). The Appellant is ordered to pay interest on the unpaid wages in the amount of one percent per month under RCW 49.48.083(2). **The interest payment obligation is ongoing until paid in full.**

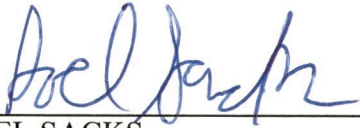
### III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment is AFFIRMED, and the Initial Order of May 8, 2015 is incorporated by reference herein.

1. Payment of wages. See Citation and Notice of Assessment (June 27, 2014) for payment information and the effect of the failure to pay wages and interest. The Appellant is ordered to pay wages to Jeremy Sundheim in the amount of \$940.50. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. The Appellant is ordered to pay wages to Rob Rice in the amount of \$1,104.00. The Appellant is also ordered to pay interest in the amount of one percent per month under RCW 49.48.083(2) for these wages. The Appellant is ordered to make these payments within thirty days of the date of service of this final Director's Order.

2. Payment of Civil Penalty: The Appellant is ordered to pay the Department penalties in the amount of \$2,000. This shall be paid to the Department within 30 days of the date of service of this final Director's Order. See Citation and Notice of Assessment (June 27, 2014) for payment information.

DATED at Tumwater this 7 day of January, 2016

  
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JOEL SACKS  
Director



## SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

## APPEAL RIGHTS

**Reconsideration.** Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

**NOTE: A petition for reconsideration is not required before seeking judicial review.** If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

**Judicial Review.** Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

**DECLARATION OF MAILING**

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 7 day of January 2016, to the following via regular and certified mail, postage prepaid.

PAC 4 Coating & Waterproofing, LLC  
James A. Oliver  
4604 E. 1<sup>st</sup> Avenue  
Spokane Valley, WA 99212

Amanda Goss  
Office of the Attorney General  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
Attorney for Department

DATED this 7 day of January, 2016, at Tumwater, Washington.

**WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRIES**

In the matter of:

Docket No. 2014-LI-0187

Pac 4 Coatings and Waterproofing, LLC,

**INITIAL ORDER**

Appellant.

Agency: Labor and Industries  
Program: Wage Payments  
Agency No. W-638-14; W-639-14

**1. ISSUES PRESENTED**

1. Whether Pac 4 Coatings and Waterproofing, LLC, violated RCW 49.48.010, RCW 49.46.130, and 49.52.050 by failing to pay final wages to Jeremy Sundheim for work at the regular agreed rate of pay and overtime hours, for total wages owed of \$940.50, plus interest, as set forth in the Department of Labor & Industries' June 27, 2014, Citation and Notice of Assessment #54433. If so, whether Pac 4 Coatings and Waterproofing, LLC, should be assessed a \$1,000 penalty as per RCW 49.48.083.
2. Whether Pac 4 Coatings and Waterproofing, LLC, violated RCW 49.46.130 and 49.52.050 by failing to pay agreed wages to Rob Rice for work at the regular agreed rate of pay and overtime hours for total wages owed of \$1,104.00, plus interest, as set forth in the Department of Labor & Industries' June 27, 2014 Citation and Notice of Assessment #54434. If so, whether Pac 4 Coatings and Waterproofing, LLC, should be assessed a \$1,000 penalty as per RCW 49.48.083.

**2. ORDER SUMMARY**

1. Pac 4 Coatings and Waterproofing, LLC, violated RCW 49.48.010, 49.46.130 and 49.52.050 by failing to pay final wages to Jeremy Sundheim for work at the regular agreed rate of pay and overtime hours for total wages owed of \$940.50, plus interest. Pac 4 Coatings and Waterproofing, LLC, should be assessed a \$1,000 penalty, and interest at the rate of 1% per month, as per RCW 49.48.083. The Department of Labor & Industries June 27, 2014 Citation and Notice of Assessment #54433 is AFFIRMED.
2. Pac 4 Coatings and Waterproofing, LLC, violated RCW 49.46.130 and 49.52.050 by failing to pay agreed wages to Rod Rice for work at the regular agreed rate of pay and overtime hours for total wages owed of \$1,104.00, plus interest. Pac 4 Coatings and Waterproofing, LLC, should be assessed a \$1,000 penalty, and interest at the rate of 1% per month, as per RCW 49.48.083. The Department of Labor & Industries June 27, 2014 Citation and Notice of Assessment #54434 is AFFIRMED.

### 3. HEARING

1. Hearing Date: April 22-23, 2015
2. Administrative Law Judge: Courtney Beebe
3. Wage Claimants: Jeremy Sundheim and Rod Rice
4. Appellant: Pac4 Coating and Waterproofing, LLC  
Representative: James Oliver, Owner
5. Agency: Labor and Industries  
Representative: Jacquelyn Findley, Assistant Attorney General
6. Exhibits: The Administrative Law Judge admitted Department's Exhibits 1 through 34. The Appellant did not offer any exhibits for admission into the record.
7. Department's Witnesses: Rod Rice, Wage Claimant; Jeremy Sundheim, Wage Claimant; John Edmunds, former employee of Appellant; Dennis Thayer, witness to events of November 1-4, 2013; Curtis Price, former employee of Appellant; David Speer, Industrial Relations Agent 2; Yesenia Sabedra, Industrial Relations Agent; Pamela Demarkus, former office manager for Appellant.
8. Appellant's Witnesses: Marion Wilson, current employee of Appellant; Jacob Birr, current employee of Appellant; Steven Dehart, current employee of Appellant. Cecile Oliver, owner, observed and was present throughout the proceedings.
9. Record Closure: The record closed at conclusion of the hearing April 23, 2015.

### 4. FINDINGS OF FACT

The Administrative Law Judges finds the following facts by a preponderance of the evidence:

1. Pac 4 Coating and Waterproofing, LLC ("Appellant") is a painting and coating company owned by James and Cecile Oliver that performs work on residential, commercial and industrial projects and structures. The company was formed in 2011. (Exhibit 6.)
2. Appellant pays employees on the 20<sup>th</sup> of the month for the pay period of the 1<sup>st</sup> to 15<sup>th</sup> of the month. Appellant pays employees on the 5<sup>th</sup> of the month for the pay period of the 16<sup>th</sup> to the 31<sup>st</sup> of the month. Appellant has a regular practice of

accounting for pay advances, and repayment of the advances, on employee pay stubs. (Exhibit 31, p.3.)

3. Jeremy Sundheim ("Sundheim") began working for Appellant in 2012 as a painter, but became a foreman during the summer of 2013 and earned a regular pay rate of \$22.00 per hour. (Exhibits 22 and 31.)
4. Rod Rice ("Rice") began working on Mr. Oliver's residence during the summer of 2013. Appellant thereafter hired Rice to work for Appellant in September 2013.

### ***Sundheim Work Performed and Pay Rate***

5. On Monday, September 9, 2013, Sundheim met with Mr. Oliver at Mr. Oliver's home. Sundheim had been arrested for a DUI and asked Mr. Oliver to loan him \$1,000.00 for an attorney. Mr. Oliver verbally agreed to loan Sundheim the funds and gave Sundheim a personal check drawn on Mr. and Mrs. Oliver's personal account from a Texas bank in the amount of \$200.00. Mr. Oliver also gave Sundheim \$800.00 cash. Sundheim stated he would repay the \$1,000.00 and would give Mr. Oliver Sundheim's Titan 740 ix spray pump to hold as collateral until the loan was repaid. Mr. Oliver and Sundheim did not agree on any further loan repayment terms, though Sundheim offered an arrangement whereby Mr. Oliver would withhold \$50.00 from Sundheim's paycheck to repay the loan. Mr. Oliver did not agree to this repayment plan.
6. Sundheim transferred the Titan 740 ix spray pump to Mr. Oliver's personal shop on his residential property a few days after September 9, 2013. Mr. Oliver remained in possession of the Titan 740 ix spray pump as of the date of the hearing but would allow Sundheim to retrieve the Titan 740 ix spray pump at any time because Mr. Oliver did not consider it collateral for the \$1,000.00 loan. Sundheim has not paid back any portion of the \$1,000.00 loan.
7. There is no evidence that Mr. Oliver paid Sundheim \$1,000.00 from any of Appellant's accounts or a record of a payroll advance from Appellant to Sundheim in any amount. There is no evidence that Appellant withheld \$50.00 from Sundheim's paychecks issued on September 20, 2013 or October 5, 2013. However, Appellant had accounted for an advance in pay and repayment on Sundheim's pay stubs during July and August 2013, prior to the loan made on September 9, 2013. (Exhibit 31, p.3.)
8. During the week of September 23, 2013, Appellant met with Sundheim and other employees and offered them the opportunity to travel to Bainville, Montana to perform a watercoating job for a silo owner. Appellant agreed to pay the employees \$25.00 per hour for work performed. However, Appellant agreed to pay Sundheim a wage of \$32.00 per hour as he would perform foreman duties. The job was to paint watercoating on 80-foot silos.



9. At 8:00 a.m. on September 26, 2013, Mr. Oliver and employees Rice, Sundheim, John Edmunds, Harry (Jiff) Johnson, and Nick Schwartz, left Spokane and drove in two vehicles (Appellant's vehicle and Edmunds' personal vehicle) to Williston, North Dakota, which is located approximately thirty-eight miles from Bainville, Montana. Sundheim rode with Edmunds, and Mr. Oliver, Rice, Johnston, and Schwartz rode together. Appellant's vehicle towed a trailer carrying supplies and Appellant's equipment needed for the job. The men arrived in Williston, North Dakota at approximately 2:30 a.m. on September 27, 2014. After waiting some hours to obtain lodging, the men then slept and then performed a walk through of the work location in Bainville on September 27, 2014.
10. It was determined that the job required Appellant's employees to climb an 80 foot ladder up the side of a silo and to use a winch system to lift materials and gear to the top of the silo. Initially, all of the employees except Sundheim were able to climb the ladder to the top of the silo to perform the necessary work. However, Sundheim was instructed by Appellant to stay on the ground and assist with the winch system and preparation work because Sundheim had difficulty climbing the ladder. Appellant also verbally informed Sundheim that his pay rate would be reduced to the regular pay rate of \$22.00 per hour from \$32.00 per hour for the days he spent working on the ground.
11. Sundheim worked on the ground without scaling the silos on September 28 and again for part of the day on September 29, 2013. The other employees worked on the silos performing watercoating work.
12. Initially, it appeared that the job required only that watercoating be applied to seams and flanges. However, after further assessment, it became clear that it was necessary to apply butyl tape to the seams and flanges prior to applying the watercoating. The employees began to apply the tape prior to application of the watercoating.
13. On September 29, 2013, Appellant obtained a lift for use by the employees so that the employees could perform watercoating work on the silos. Sundheim and other employees worked from the lift performing watercoating work from the time that the lift was rented and usable at the job site on September 29, 2013 until October 6, 2013.
14. On October 4, 2013, the Appellant and employees could not work due to rain. The employees began to question Sundheim about whether they would be paid for the time traveling to and from Williston. Appellant had paid for meals and alcohol for the employees during the trip. Sundheim inquired about travel pay and Mr. Oliver informed Sundheim that Appellant would not pay the employees for travel time. Sundheim then contacted the Department of Labor and Industries ("Department") and asked if the employees were entitled to pay for travel time. Sundheim believed, based on the information received from the Department, that

the employees were entitled to pay for travel time. Sundheim informed Mr. Oliver, and Mr. Oliver again stated that he would not pay the employees for travel time. Sundheim and Mr. Oliver argued, and their friendship and employment relationship deteriorated over the next three days.

15. Mr. Oliver and the employees left Bainville on October 7, 2013, and returned to Spokane in one vehicle towing the Appellant's trailer containing Appellant's equipment. Mr. Edmunds had left the work location on or about October 1, 2013, in his personal vehicle to join his family in California.
16. On October 8, 2013, Sundheim obtained his pay check from employer. The paycheck was for the pay period of September 15, 2013 through September 30, 2013, and it included payment at a rate of \$22.00 per hour for the hours worked on September 27, 28, 29, and 30, 2013, in Bainville. The pay check also included travel time pay for ten hours at a rate of \$12.00 per hour, totaling \$120.00.
17. On or about October 8, 2013, Appellant terminated Sundheim's employment via text message. Appellant thereafter cut off all contact with Sundheim and refused to take his phone calls or see him at the Appellant's office location in Spokane.
18. Sundheim wrote his hours worked on two sheets of paper while in Bainville, Willison job site. (Exhibit 31, pp. 5-6.) Sundheim then transcribed the hours worked to Appellant's form timesheet and submitted the timesheet to Appellant. (Exhibit 31, p.4.) Sundheim reported that he worked the following hours:

Oct. 1, 2013	Tuesday	7:00 a.m.-1:00 p.m.	No Lunch	6 hours
Oct. 2, 2013	Wednesday	6:30 a.m.-3:30 p.m.	1 hour lunch	8 hours
Oct. 3, 2013	Thursday	6:30 a.m.-3:30 p.m.	1 hour lunch	8 hours
Oct. 4, 2013	Friday	Rain / No Work		No Work
Oct. 5, 2013	Saturday	9:30 a.m.-6:30 p.m.	½ hour lunch	8.5 hours
Oct. 6, 2013	Sunday	8:00 a.m.-5:30 p.m.	½ hour lunch	9 hours

19. Sundheim attempted to contact Appellant on October 21, 2013 to obtain Appellant's final check dated October 20, 2013 for the pay period of October 1, 2013 through October 15, 2013. Sundheim was informed that he would not be paid for the hours worked during this period because Mr. Oliver considered the September 9, 2013, \$1,000.00 loan to Sundheim to be an "advance" of Sundheim's pay and Mr. Oliver would retain Sundheim's final paycheck to cover the pay advance.

### ***Sundheim Wage Complaint***

20. On November 12, 2013, Sundheim filed a Worker's Rights Complaint ("Complaint") with the Department stating that the Appellant failed to pay him "final wages" of \$1,169.50 for the period of October 1, 2013 through October 6, 2013. Sundheim set forth his regular rate of pay as \$22.00 per hour, but claimed

wages for the period at issue at a rate of \$32.00 per hour. (Exhibit 7.) Sundheim included a pay stub dated October 5, 2013, for the previous pay period of September 15, 2013 to September 30, 2013, showing his regular rate of pay was \$22.00 per hour. Sundheim stated in the Complaint that he asked Appellant for his final wages on October 21, 2013, October 24, 2013, October 25, 2013, October 31, 2013, November 1, 2013, November 4, 2013, and November 11, 2013. Sundheim also informed the Department that he worked the following hours on the following days:

Oct. 1, 2013	Tuesday	7:00 a.m.-1:00 p.m.	No Lunch	6 hours
Oct. 2, 2013	Wednesday	6:30 a.m.-3:30 p.m.	1 hour lunch	8 hours
Oct. 3, 2013	Thursday	6:30 a.m.-3:30 p.m.	1 hour lunch	8 hours
Oct. 4, 2013	Friday	Rain / No Work		No Work
Oct. 5, 2013	Saturday	9:30 a.m.-6:30 p.m.	½ hour lunch	8.5 hours
Oct. 6, 2013	Sunday	8:00 a.m.-5:30 p.m.	½ hour lunch	9 hours

21. Sundheim also stated in the written attachment to the complaint that a “[p]ersonal arrangement was made verbally. I borrowed \$1,000 from Jim Oliver and he holds my Titan 740 ix spray pump that I purchased for \$1,800.00. This was a verbal agreement made on September 9, 2013.”

***Rice Work Performed and Pay Rate***

22. Rice continued to work for Appellant after October 7, 2013. In late October 2013, Appellant was notified by the silo owner in Bainville that the work performed by Appellant’s employees from September 27, 2013 through October 6, 2013 was incomplete. The silo owner requested that Appellant complete the job to the satisfaction of the silo owner. Appellant agreed to send an employee to the Bainville job site to complete the work as requested. The silo owner did not email or otherwise communicate a “punch list,” a list of tasks to be completed at the job site, but informed Appellant that a supervisor would provide Appellant’s employee with the punch list at the job site. The silo owner did provide Appellant with some photographs of the incomplete work, but this communication was not a complete list of the tasks to be performed.
23. Rice was working for Appellant in Walla Walla, WA at a job that paid a prevailing wage of \$18.69 per hour, but he had completed the job and was available to return to Bainville to perform the required work for Appellant. Rice agreed to travel to Bainville on November 1, 2013, to perform the work as requested by the silo owner along with Dennis Thayer (“Thayer”), a friend located in Williston. Appellant and Rice estimated that it would take 1-2 days for Rice to perform the work, and that Rice would return to Spokane, Washington on November 4, 2013. Appellant communicated a few specific tasks to be performed, but did not provide Rice with a punch list or photographs of the work to be performed.

24. Rice and Appellant agreed that the travel and work would equal forty hours and that Rice would be paid \$25.00 per hour. Rice and Appellant agreed that Rice would receive \$1,000.00 for the travel and work performed.
25. Appellant purchased a train ticket for Rice to travel from Spokane to Williston with a departure date of Friday, November 1, 2013 at 1:30 p.m. (Exhibits 22 and 33.) Rice boarded the train and arrived in Williston Montana on Saturday, November 2, 2013 at approximately 4:30 a.m. Rice took with him a safety harness provided by Appellant and a tool Rice manufactured to use on the sides of the silo. Rice stayed with Dennis Thayer in Williston, North Dakota.
26. At 8:00 a.m. on Saturday, November 2, 2013, Rice and Thayer traveled from Willison to Bainville and picked up supplies at 9:00 a.m. Rice and Thayer then went to the job site. The silo owner had stationed two men at the job site, but neither of the men were aware that Rice would be performing work at the job site that day and neither man had a punch list available for Rice.
27. Regardless, Rice and Thayer proceeded to climb the 80-foot silo ladder and used the winch to elevate their equipment and materials. Rice and Thayer then worked until approximately 3:30 p.m. The work included finding flanges and seams that had not been butyl taped and watercoated properly by Appellant's employees between September 27, 2013 and October 6, 2013. Rice and Thayer took multiple photographs of the state of the flanges and seams using Rice's Samsung cell phone. (Exhibit 34, photos dated 11/2/13 between 12:39 p.m. and 2:55 p.m.) The photographs show flanges and seams before and after Rice and Thayer performed work on November 2, 2013.
28. Rice and Thayer then returned to Williston, North Dakota at approximately 4:30 p.m. and stayed at Thayer's home for the night. Thayer then took Rice to the train station on November 3, 2013 and Rice boarded the train at 11:07 a.m.<sup>1</sup> (Exhibits 22 and 33.) Rice returned to Spokane on November 4, 2013 at approximately 3:30 a.m. Rice emailed the photographs he had taken at the job site to Appellant on November 5, 2013. (Exhibit 30.)
29. On November 14, 2015, the silo owner in Bainville, Montana notified Appellant that the watercoating work was not completed to the silo owner's satisfaction. The silo owner emailed Appellant six photos of the unfinished work. (Exhibit 34, photographs marked 908 A, 908B, 910, 911, 912 and 913.) The photographs show that portions of the seams on the sides silos were watercoated, but not taped.

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<sup>1</sup> The train ticket originally purchased by Appellant scheduled Rice to return to Spokane, Washington from Williston, North Dakota on Monday, November 4, 2013 at 11:07 a.m. However, there is evidence that the train ticket was changed to allow Rice to return on November 3, 2013. The Administrative Law Judge makes no findings regarding who changed the train ticket, when it was changed, or who paid for the exchange fee.

30. Rice thereafter continued to work for Appellant at the Super-1 job site in Rathdrum, Idaho earning \$18.00 per hour. Rice worked from November 5, 2013 through November 13, 2013.
31. According to Rice's time sheet as supplied to Appellant on Appellant's form, Rice claimed he worked the following hours between November 1, 2013 and November 15, 2013:

11-1	Bainville, MT	10 hours
11-2	Bainville, MT	10 hours
11-3	Bainville, MT	10 hours
11-4	Bainville, MT	10 hours
11-5	Super 1	8 hours
11-6	Super 1	8 hours
11-7	Super 1	6 hours
11-8	Super 1	8 hours
11-11	Super 1	8 hours
11-12	Super 1	8 hours
11-13	Super 1	10 ½ hours

(Exhibit 22, p.4.)

32. On November 20, 2013, Rice picked up his pay check for the pay period of November 1, 2013 through November 15, 2013. The pay check amounted to \$1,017.00 and only included payment for the 56.30 hours worked at the Super-1 job in Rathdrum, Idaho at a pay rate of \$18.00 per hour. Appellant did not pay Rice for the hours traveling to and working at the Bainville job site between November 1, 2014 and November 4, 2014.
33. The same day, November 20, 2013, Rice demanded that Appellant's employee Marion Wilson, who was present at Appellant's place of business, pay him \$1,000.00, or \$25.00 per hour for forty hours traveling to and working at the Bainville job site between November 1 and November 4, 2013.
34. Rice terminated the employment relationship with Appellant.

***Rice Wage Complaint***

35. On November 27, 2013, Rice filed a Worker's Rights Complaint ("Complaint") with the Department stating that Appellant failed to pay him for 40 hours worked at a wage of \$25.00 per hour during the period of November 1, 2013 through November 4, 2013. (Exhibit 22.) Rice stated that he requested the payment on November 20, 2013. Rice included a time sheet for the period of November 1, 2013, through November 15, 2013, which shows Rice claimed ten hours per day each day for November 1, November 2, November, 3, and November 4, 2013, for working in Bainville. (Exhibit 22, p.4.) Rice also included a pay stub dated



November 20, 2013, showing that he received a regular rate of pay of \$18.00 per hour for working the Super-1 job in Rathdrum, Idaho between November 5 and November 13, 2013. (Exhibit 22, p.5.) Rice noted on the pay stub that he was to receive "40 hours \$1,000.00 before taxes" in the check. (Id.) Rice also included a copy of the Amtrak Train receipt for travel to Williston, North Dakota from November 1, 2013 through November 4, 2013. (Exhibit 22, p. 6.)

### ***Investigation of Sundheim and Rice Wage Complaints***

36. The Sundheim Complaint was assigned to Industrial Relations Agent Yesenia Sebedra on November 13, 2013. Ms. Sebedra contacted Sundheim to verify claim information on January 31, 2014, and confirmed that Sundheim's regular rate of pay was \$22.00 per hour, not \$32.00 per hour, and that the total amount of the wages claimed was \$940.50.
37. The Rice Complaint was assigned to Industrial Relations Agent Yesenia Sebedra on November 27, 2013. Ms. Sebedra took no action on the Rice Complaint.
38. On January 7, 2014, Ms. Sebedra issued the Appellant a letter notifying Appellant of Sundheim's Complaint. (Exhibit 13.) On January 8, 2014, Ms. Sebedra issued the Appellant a letter notifying Appellant of Rice's Complaint. (Exhibit 24.) These letters state: "If you do not agree you owe these wages: Send me a written response and any documentation you have that will help us understand your side of this dispute . . . Please send the payment and/or records to my attention at the above address no later than January 28, 2014." The letter further states: "If you do not agree to pay the wages, L&I will issue a Citation and Notice of Assessment that orders you to pay wages found owed plus interest at 1% per month since the date the wages were originally owed. In certain cases, a penalty may also be assessed."
39. On January 28, 2014, Mr. Oliver contacted Ms. Sebedra and asked to meet with Ms. Sebedra about the Complaints. Ms. Sebedra scheduled an appointment with Mr. Oliver for February 11, 2014 at 1:00 p.m.
40. On January 31, 2014, the Sundheim Complaint and the Rice Complaint were reassigned to David Speer, Industrial Relations Agent 2, and Ms. Sebedra issued two letters to Appellant notifying Appellant of the reassignment. (Exhibits 10 and 25.) Ms. Sebedra also contacted Mr. Oliver and left him a message canceling the February 11, 2014, appointment and asked him to call her back. Mr. Oliver did not return Ms. Sebedra's phone call.
41. On March 5, 2014, Mr. Speer issued a second letter to Appellant notifying Appellant of the Rice Complaint. (Exhibit 26.) This letter included the same notification to Appellant as the January 8, 2014 letter (Exhibit 24).

42. Also on March 5, 2014, Mr. Speer performed a Payroll Summary Calculation of Unpaid Wages (Exhibits 16 and 14) for the Sundheim Complaint. Mr. Speer relied only on the information provided by Sundheim that he earned \$22.00 per hour for a regular rate of pay because Appellant had not provided the Department with any additional documentation or information. Mr. Speer determined that the overtime rate of pay was \$11.00 per hour. Mr. Speer calculated that Sundheim worked a total of 55.5 hours during the period of September 29, 2013 through October 15, 2013, and that 6.5 hours of the time worked qualified as overtime hours. Mr. Speer concluded that Sundheim earned \$940.50 in unpaid wages for the period of October 1, 2013 through October 6, 2013.
43. On March 5, 2014, Mr. Speer performed a Payroll Summary Calculation of Unpaid Waged (Exhibits 28 and 29) for the Rice Complaint. Mr. Speer relied only on the information provided by Rice that he earned \$25.00 per hour for a regular rate of pay for work performed for Appellant in Baineville and \$18.00 per hour for a regular rate of pay for work performed for Appellant in Idaho. Mr. Speer determined that the over time rate of pay was \$10.40 per hour by averaging the regular rates of pay and dividing the average by half. Mr. Speer calculated that Rice worked a total of 96.5 hours between November 1, 2013, and November 5, 2013, at the Bainville job and the Super-1 job in Rathdrum, for total wages earned of \$2,121.00. Because Rice had been paid \$1,017.00 on November 20, 2013, the balance of the unpaid wages owed to Rice was \$1,104.00.
44. On March 10, 2014, the Department issued a letter to Appellant, notifying Appellant that the investigation of the Sundheim Complaint was complete and demanding payment of \$940.50 by March 20, 2014. (Exhibit 15.) The letter also notified Appellant that Appellant could provide the Department with additional documentation or explanation by March 20, 2014. The Appellant did not respond to the Department's letter.
45. On April 17, 2014, the Department issued a letter to Appellant, notifying Appellant that the investigation of the Rice Complaint was complete and demanding payment of \$1,104.00 by April 26, 2014. (Exhibit 27.) The letter also notified Appellant that Appellant could provide the Department with additional documentation or explanation by April 26, 2014. The Appellant did not respond to the Department's letter.

### ***Jurisdiction***

46. On June 27, 2014, the Department issued Citation and Notice of Assessment Nos. #54433 and 54434 ("Citations") to Appellant. Citation #54433 assessed Appellant \$940.50 in unpaid wages owed to Sundheim and \$78.47 in interest, as well as a \$1,000.00 penalty. Citation #54434 assessed Appellant \$1,104.00 in unpaid wages owed to Rice and \$80.44 in interest, as well as a \$1,000.00

penalty. The Citations were served on James Oliver by certified mail and provided that an appeal may be filed by Appellant by July 27, 2014.

47. Appellant mailed a letter of appeal on July 14, 2014, which the Department received on July 18, 2014.

### ***Credibility Determination***

48. The testimony of the parties conflicted on material points. Based upon the evidence presented, and having carefully considered and weighed all the evidence, including the demeanor and motivations of the parties, the reasonableness of the testimony and the totality of the circumstances presented, the Administrative Law Judge finds Mr. Oliver's testimony not credible that he intended the September 9, 2013, \$1,000.00 cash / check transfer of funds to Sundheim to be a payroll advance.
49. The Administrative Law Judge makes this finding based on several observations: Mr. Oliver presented no documentary evidence that Appellant paid the cash or check from one of Appellant's accounts and there is no paystub accounting for the advance of funds to Sundheim like the prior method used for accounting for pay advances and repayment (Exhibit 31, p.3.) Further, Mr. Oliver rejected Sundheim's offer to have \$50.00 per month taken from Sundheim's paycheck to repay the \$1,000.00 and no money was taken from Sundheim's September 20, 2013 or October 5, 2013 pay checks to repay the funds. Moreover, Sundheim presented credible testimony that he received a personal check from an account listing Mr. and Mrs. Oliver as the account holders, and cash.
50. The Administrative Law Judge also finds Mr. Oliver's testimony not credible that Rice was provided a complete punch list of tasks to complete during the period of November 1, 2013 and November 4, 2013. The Administrative Law Judge makes this finding based on the following: Mr. Oliver produced a punch list and photographs received November 14, 2013, after Rice's return from Bainville, but Mr. Oliver provided no documentation that Rice received a punch list or instructions on the specific tasks to be performed prior to leaving for Bainville or that the silo owner provided Rice with a punch list at the job site.
51. The Administrative Law Judge also finds Mr. Oliver's testimony not credible that Rice was not located at the job site in Bainville on the dates and times that Rice claimed he was at the job site. The Administrative Law Judge makes this finding based on the photographs and emails provided by Rice (Exhibits 30 and 34), the train ticket copies (Exhibits 22, and 33) and the testimony of Dennis Thayer who worked with Rice at the job site.
52. In entering these findings, the Administrative Law Judge need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the

persuasive evidence be clear, cogent and convincing. The trier of fact need only determine what most likely happened based on the evidence presented.

## 5. CONCLUSIONS OF LAW

Based on the facts above, the Administrative Law Judge makes the following conclusions:

### ***Jurisdiction***

1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW 49.48.084.

### ***Applicable Law***

2. The Fair Labor Standards Act of 1938 ("FLSA") deals with overtime and minimum wage requirements for employees. The Washington Minimum Wage Act ("WMWA"), RCW 49.46 and the Wage Payment Act, RCW 49.48 ("WPA") are based on the FLSA, but not identical.
3. Wage Payment Act, RCW 49.48 (WPA) authorizes administrative enforcement of wage payment requirements. Upon receipt of a wage complaint that alleges a violation of a wage payment requirement, the Department "shall investigate" and, unless otherwise resolved, "shall" issue either a citation (when finding a wage law violation) or a determination of compliance (when finding no violation) within sixty days. RCW 49.48.083. The Department may extend the time period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the time period. (Id.)
4. Here, the Department did not issue the Citations within sixty days as required, but the Department did extend the time period for good cause and notified the Appellant as required. The Department then issued the Citations within the time period allotted.
5. Wage payment requirements are those "set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules adopted by the department." RCW 49.48.082(10). These wage payment requirements include, but are not limited to, requirements to pay minimum wages, overtime wages, agreed wages, and wages for final pay periods. RCW 49.48.082(12).
6. RCW 49.52.050(2) provides that it is unlawful to willfully withhold an agreed wage, which includes any wage an "employer is obligated to pay such employee by any statute, ordinance, or contract." The provisions of RCW 49.52.050(2)

include oral or written agreements for hourly wages in excess of the minimum wage.

7. Under the WPA, the Department has the initial burden of showing *prima facie* evidence of a wage payment law violation. See, *Anderson v. Mt. Clemens Pottery Co.*, 328 US. 680, 687-688, S.Ct. 1187, 90 L.Ed. 1515 (1946) (federal minimum wage law under Fair Labor & Standards Act); *MacSuga v. County of Spokane*, 97 Wn.App. 435, 445-446, 983 P.2d 1167 (1999). The *prima facie* showing must be supported by a preponderance of the evidence. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915).

8. The burden of proof shifts to the Appellant to prove otherwise after the Department establishes a *prima facie* case. See, *MacSuga, supra*, at 445-446.

9. RCW 49.46.010(7) defines "wage" as:

[C]ompensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules by director.

RCW 49.46.010(7).

10. When any employee shall cease to work for an employer, by discharge or by voluntary withdrawal, the wages due him or her on account of his or her employment shall be paid to him or her at the end of the established pay period. RCW 49.48.010. It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:

- (1) Required by state or federal law; or
- (2) Specifically agreed upon orally or in writing by the employee and employer; or
- (3) For medical, surgical, or hospital care or service, pursuant to any rule or regulation: PROVIDED HOWEVER, That the deduction is openly, clearly, and in due course recorded in the employer's books and records.

Paragraph three of this section shall not be construed to affect the right of any employer or former employer to sue upon or collect any debt owed to the said employer or former employer by his or her employees or former employees.

(Id.)



11. An employer is required to pay overtime when an employee works over 40 hours in a work week. RCW 49.46.130(1). The overtime rate is not less than one and a half times the regular rate at which the worker is employed. *Id.*
12. Hours worked means all hours which the worker is authorized or required by the business to be on the premises or at a prescribed work place. This could include travel time, training, and meeting time, wait time, on-call time, and time for putting on and taking off uniforms and also may include meal periods. RCW 49.48 and 49.46 and 49.52.

### ***Conclusion Regarding Wages Owed to Sundheim***

13. The Department has shown that Appellant violated RCW 49.48.010, RCW 49.46.130 and 49.52.050 when it withheld the final wages due to Sundheim. The Department has carried its burden and has shown that Sundheim worked 33 regular hours and 6.50 overtime hours at a pay rate of \$22.00 per hour between October 1, 2013 and October 6, 2013, for a total amount of \$940.50. Appellant pays its employees on the 20<sup>th</sup> of the month for the pay period of the 1<sup>st</sup> through the 15<sup>th</sup> of the month, and therefore Sundheim was owed the wages on October 20, 2013, the end of the established pay period.
14. There is no evidence that Appellant and Sundheim ever agreed that the final wages would be anything but paid to Sundheim either before or after termination of Sundheim's employment.
15. The Appellant presented no evidence that Sundheim did not work the hours Sundheim claimed he worked during the period at issue, and the Appellant presented no evidence that Sundheim's regular rate of pay was anything but \$22.00 per hour as set forth in the pay stubs dated September 20, 2013 and October 5, 2013.
16. While Mr. Oliver asserts that the \$1,000.00 he loaned to Sundheim on September 9, 2013 was an advance on wages, Mr. Oliver as representative of the Appellant provided no evidence that Appellant paid Sundheim the \$1,000.00 from Appellant's payroll accounts as part of a regularly scheduled pay period. Also, the cash and check payment of \$1,000.00 are not identified as advances on Sundheim's pay stubs for September 20, 2013 or October 5, 2013 as is Appellant's regular practice. Finally, Mr. Oliver admitted that he and Sundheim did not agree on any repayment terms for the \$1,000.00 loan that involved Sundheim's wages.
17. Given the lack of any evidence to the contrary, then, the Administrative Law Judge concludes that the Department's Citation and Notice of Assessment must be affirmed and Appellant must pay Sundheim final wages including overtime in the amount of \$940.50.

### ***Conclusion Regarding Wages Owed to Rice***

18. The Department has shown that Appellant violated RCW 49.46.130 and 49.52.050 by withholding wages due to Rice. The Department has carried its burden and shown that Rice worked 86.50 regular hours and 10.0 overtime hours during the period of November 1, 2013 and November 15, 2013, for a total of \$2121.00 in wages, but that Rice received only \$1,107.00 for 56.50 hours of work at the Super-1 job site at Rathdrum, Idaho between November 5, 2013 and November 15, 2013.
19. The Department has shown that Rice began working for Appellant on November 1, 2013 at 1:30 p.m. when he boarded the train to Williston with supplies from employer, and traveled for a period of 15 hours. The Department has shown that Rice began working on November 2, 2013 at 8:00 a.m. when he left Williston to drive to Bainsville, purchased materials for the job, and that he worked until 3:30 p.m. on November 2, 2013, and returned to Williston for a total of 8.5 hours. The Department has shown that Rice then boarded the train in Williston at 11:07 a.m. and returned to Spokane at 3:30 a.m. on November 4, 2013, for a total of 16.5 hours.
20. The Appellant does not dispute that it agreed to pay Rice \$25.00 per hour for work, including travel, performed between November 1, 2013 and November 4, 2013.
21. The Appellant attempted to show that Rice failed to complete the job in Bainsville based on the photographs provided by the silo owners on November 14, 2013, and therefore Appellant was not required to pay Rice. However, neither the Appellant nor the silo owners provided Rice with a punch list or a complete list of specific tasks to perform, and the Appellant did not produce evidence showing that Rice had in fact failed to perform all necessary watercoating tasks he was expected to perform on that trip. Regardless, as the testimony of Rice, Thayer and the photographs that comprise Exhibit 34 show, Rice did in fact perform work at the job site during the hours he claimed over the period agreed.
22. The Appellant also questioned whether Rice worked forty hours during the period in question, however as found above and shown by the testimony of Rice and Thayer, Rice traveled and worked a total of forty hours during the period at issue. The Appellant has failed to show otherwise.
23. Given the lack of any evidence presented by the Appellant, and the credible testimony and photographic evidence presented by the Department, the Administrative Law Judge concludes that the Department's Citation and Notice of Assessment must be affirmed and the Appellant must pay Rice a total of \$1,104.00 in wages for the period of November 1, 2013 through November 4, 2013.

## **Penalties**

24. The Department has the authority to issue a civil penalty to employers who unlawfully withhold an employee's wages. RCW 49.48.083(3)(a). The statute provides:
- (3) If the department determines that the violation of the wage payment requirement was a willful violation, the department also may order the employer to pay the department a civil penalty as specified in (a) of this subsection.
- (a) A civil penalty for a willful violation of a wage payment requirement shall be not less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. The maximum civil penalty for a willful violation of a wage payment requirement shall be twenty thousand dollars.
25. A willful violation is defined in RCW 49.48.082(13) as a "knowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under the standards applicable to wage payment violations under RCW 49.53.050(2)." RCW 49.48.082(13).
26. The evidence presented shows that Appellant knowingly and intentionally decided to withhold Sundheim's final check. Appellant admitted that it did not produce a check for Sundheim on October 20, 2013, after terminating his employment on October 8, 2013. Appellant admits that Sundheim worked the hours he claimed and that his regular rate of pay was \$22.00 per hour. Appellant claims that the act of withholding the final check was the result of a bona fide dispute between Mr. Oliver and Sundheim regarding the \$1,000.00 Mr. Oliver loaned to Sundheim. However, as found and concluded above the loan was a personal transaction between Mr. Oliver and Sundheim which did not implicate Sundheim's wages from Appellant.
27. Appellant, then, is liable for \$1,000.00 in penalties as per RCW 49.53.050(2), for failing to pay Sundheim final wages on October 20, 2013. The Department's Citation #54433 is affirmed as to the penalty assessment.
28. The evidence presented also shows that Appellant knowingly and intentionally decided to withhold wages and overtime due to Rice. Appellant received the photographs of work performed by Rice by November 5, 2014, and Appellant admitted that he had a verbal agreement to pay Rice \$1,000.00, or \$25.00 per hour for 40 hours of work. While Appellant claims that the act of withholding the wages was the result of a bona fide dispute between Appellant and Rice regarding the completeness of the work performed, as found and concluded above, Rice performed the work and travel as during the hours he claimed he performed the work and travel. The completeness of the job does not implicate the requirement that the Appellant must pay Rice for the work and travel actually

performed.

29. Appellant, then, is liable for \$1,000.00 in penalties as per RCW 49.53.050(2), for failing to pay Rice overtime and wages on November 20, 2013. The Departments' Citation #54434 is affirmed as to the penalty assessment.

### ***Interest on Unpaid Wages***

30. Unpaid wages may accrue interest at the rate of 1% of the unpaid wage amount until payment is received by the Department, calculated from the first date wages were owed to the employee. RCW 49.48.083.
31. The final wages were owed to Sundheim as of October 20, 2013. The Appellant is liable for interest at a rate of 1% of the unpaid wage amount until payment is received by the Department, calculated from October 20, 2013.
32. The wages and overtime were owed to Rice as of November 20, 2013. The Appellant is liable for interest at a rate of 1% of the unpaid wage amount until payment is received by the Department, calculated from November 20, 2013.

## **6. INITIAL ORDER**

1. The Department of Labor & Industries' June 27, 2014 Citation and Notice of Assessment #54433 is AFFIRMED. Pac 4 Coatings and Waterproofing, LLC, violated RCW 49.48.010, RCW 49.46.130 and RCW 49.52.050 and must pay final wages to Jeremy Sundheim in the amount of \$940.50. Pac 4 Coatings and Waterproofing, LLC, is liable for a \$1,000 penalty as per RCW 49.48.083. Pac 4 Coatings is liable for interest on the final wages owed beginning October 20, 2013 at a rate of 1% per month as per RCW 49.48.083.
2. The Department of Labor & Industries' June 27, 2014 Citation and Notice of Assessment #54434 is AFFIRMED. Pac 4 Coatings and Waterproofing, LLC, violated RCW 49.46.130 and RCW 49.52.050 and must pay wages and overtime to Rod Rice in the amount of \$1,104.00. Pac 4 Coatings and Waterproofing, LLC, should be assessed a \$1,000 penalty as per RCW 49.48.083. Pac 4 Coatings is liable for interest on the final wages owed beginning November 20, 2013 at a rate of 1% per month as per RCW 49.48.083.

Dated the Date of Mailing.



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Courtney Beebe  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE OF APPEAL RIGHTS

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.<sup>2</sup> A Petition for Administrative Review may be mailed to the Director or delivered to the Director at the Department's physical address listed below.

Mailing Address:

Director  
Department of Labor and Industries  
PO Box 44001  
Olympia, WA 98504-4001

Physical Address:

Director  
Department of Labor and Industries  
7273 Linderson Way SW  
Tumwater, WA 98501

Whether you mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. Part of filing a Petition is providing copies to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.<sup>3</sup>

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

## CERTIFICATE OF MAILING IS ATTACHED

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<sup>2</sup> RCW 49.48.084 and RCW 34.05.464.

<sup>3</sup> RCW 49.48.084 and Chapter 34.05 RCW.



**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2014-LI-0187**

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>James A Oliver Pac 4 Coating &amp; Waterproofing LLC 910 N Lake Road Spokane Valley, WA 99212</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Department of Labor and Industries Jacquelyn Findley, AAG W. 1116 Riverside Avenue Spokane, WA 99201</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Rod Rice 11212 E 31<sup>st</sup> Ave Spokane Valley, WA 99206</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Jeremy M. Sundheim 11921 E. Mansfield #32 Spokane Valley, WA 99206</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Friday, May 08, 2015

OFFICE OF ADMINISTRATIVE HEARINGS

*Julie Wescott*

Julie Wescott  
Legal Secretary