ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of: ADMINISTRATOR, WAGE & HOUR DIVISION, U.S. DEPARTMENT OF LABOR, Prosecuting Party, v. PRICE GORDON, LLC d/b/a VETERAN NATIONAL TRANSPORTATION, LLC d/b/a VNT; LMC MED TRANSPORTATION, LLC; NICHOLAS PRICE, an individual; TRACY BEASLEY, an individual, Respondents.	**ARB Case No. 2019-032** **ALJ Case No. 2017-SCA-00008**

ADMINISTRATOR'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

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ADMINISTRATOR'S REPLY BRIEF

In the opening brief, the Administrator of the Wage and Hour Division ("WHD") explained that the Administrative Law Judge ("ALJ") erred when he limited the back wage liability of Respondents Price Gordon, LLC d/b/a Veteran National Transportation ("VNT"), and Nicholas Price[1] to the latter half of the contract period and determined that "unusual circumstances" warranted a reprieve from debarment. Respondents' opposition brief does not

[1] As noted in the opening brief, prior to a corporate name change in June 2016, the contractor VNT was known as LMC Med Transportation ("LMC"). VNT and LMC are therefore referred to collectively in this brief as "the company." Adm'r's Opening Br. 1 n.1, 6 & n.5.

Respondent Tracy Beasley has not participated in these administrative proceedings. Accordingly, the ALJ entered a default judgment against Mr. Beasley. *Id.* at 13 n.11.

alter the conclusion that the ALJ committed reversible legal error,[2] but instead resorts to unsupported assertions, misstatements of law, and bald allegations of misconduct on the part of the Administrator, the majority of which do not warrant the attention of the Administrative Review Board ("ARB" or "Board"). *See, e.g.*, *Powers v. Pinnacle Airlines, Inc.*, No. 04-035, 2004 WL 2205237, at *3 (ARB Sept. 28, 2004) (noting that requiring a party to respond to opponent's unsubstantiated allegations "would not facilitate clarification or resolution of the issues and would further waste the resources of this Board"); *see also Jin Chun Lin v. Holder*, 430 Fed. App'x 54, 56 (2d Cir. 2011) ("[U]nsupported assertions in a brief do not constitute evidence." (citing *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984)). Nevertheless, the Administrator provides the following specific points of rebuttal and clarification.

1. As the Administrator explained in the opening brief, VNT was the contractor for the entirety of the contract period and therefore is responsible for the violations at issue for the entire contract period. Adm'r's Opening Br. 14-16. In an attempt to create an *ex post facto* justification for the ALJ's unexplained decision to limit VNT's liability to the latter half of the contract period, Respondents now argue that the mid-contract change in company name – from LMC to VNT – and a "subsequent novation" by the U.S. Department of Veterans Affairs ("VA"), "combined with the basic tenants [sic] of contract law," relieve the company of liability

[2] The issues raised by the Administrator on appeal are primarily legal in nature in that they turn on the correct interpretation of the statutory terms "party responsible" and "unusual circumstances," as well as the meaning of a "bona fide legal issue of doubtful certainty." The Board reviews such issues of law *de novo*. *Hugo Reforestation, Inc.*, No. 99-003, 2001 WL 487727, at *4 (ARB Apr. 30, 2001) (citing 5 U.S.C. § 557(b)). Instead of directly addressing the Administrator's legal arguments, Respondents inaccurately reframe these as factual disputes governed by a preponderance of the evidence standard. *See generally* Resp'ts' Br.

accrued before the name change. Resp'ts' Br. 12. Respondents cite no legal authority in support of this argument, *id.*, which is both factually inaccurate and inconsistent with governing law.

Modification of the subject contract to reflect a change in company name or transfer of company assets – via a change-of-name agreement or novation, respectively – is governed by subpart 42.12 of the Federal Acquisition Regulation ("FAR"). JX 1 at 17; 48 CFR subpart 42.12. Respondents allege that the contract at issue was modified by "novation," suggesting a significant change in company form. Resp'ts' Br. 12; *see* 48 CFR 42.1204 (novation agreements permit the government to recognize third-party successors-in-interest to government contracts). However, the VA recognized the company's change in name through a change-of-name agreement, not a novation. Declaration of Counsel ("Decl."), Ex. 1, at 1, 6-7.[3] Consistent with the governing regulations, this agreement provided that it "accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change." Decl., Ex. 1, at 6; *accord* 48 CFR 42.1205. Therefore, the change in company name and subsequent contract modification, Decl., Ex. 2, *do not* alter VNT's liability for back wages that accrued prior to the name change.[4]

[3] In addition, Respondents suggest that the contract modification was undertaken to reflect Tracey Beasley's removal as a managing member. Resp'ts' Br. 12. However, neither the contract modification nor the underlying certification of amendment filed with the Texas Secretary of State indicate such a change. Decl., Ex. 2; RX B at 1-4. In fact, the evidence indicates that Beasley was removed as a managing member several years earlier so that the company would be eligible for contracts set aside for service-disabled veteran-owned small businesses. Adm'r's Opening Br. 4 n.3; Tr. 431-33; JX 13 at 25-27; RX B at 6 (noting that, in a 2013 meeting, "Nicholas was named as the Sole Managing Member of LMC Med Transportation, LLC").

[4] Even a novation agreement, had one been executed, would not automatically relieve a contractor of liabilities incurred prior to the change in company form or sale of assets. The standard novation agreement requires the successor-in-interest to a government contract to

Consistent with governing law, the Board should hold VNT jointly and severally liable for the entirety of the back wages, $715,599.02, owed to its employees. *See* 41 U.S.C. § 6705; *Puget Sound Envtl.*, No. 14-068, 2016 WL 3135580, at *6 (ARB May 4, 2016).

2. Respondents fail to address the crux of the Administrator's argument that Price was a "party responsible" for the duration of the contract period and should likewise be held jointly and severally liable for the entirety of back wages. *See* 41 U.S.C. § 6705(a). As explained in the opening brief, liability for SCA violations is not limited to corporate officers "who actively direct[] and supervise[] the contract performance," *see* D&O 8 (citing 29 CFR 4.187(e)(1) and (3)), but extends to all "corporate officers who control, *or are responsible for control* of, the corporate entity" and "who by action *or inaction*, cause or permit a contract to be breached," 29 CFR 4.187(e)(2) and (4) (emphasis added). Adm'r's Opening Br. 15-17; *see also Int'l Servs., Inc.*, No. 05-136, 2007 WL 4623497, at *5 (ARB Dec. 21, 2007) (rejecting argument that company president is not a "party responsible" because responsibility lies with subordinate employees), *aff'd sub. nom., Karawia v. U.S. Dep't of Labor*, 627 F. Supp. 2d 137 (S.D.N.Y. 2009). As the service-disabled veteran anchoring the company's eligibility for set-aside contracts, Price was legally responsible for the company's performance for the entire contract period. Adm'r's Opening Br. 16-17 (citing 13 CFR 125.13, which requires the service-disabled veteran to exercise "day-to-day management" and "ultimate managerial and supervisory

"assume[] all obligations and liabilities" of the original contractor. 48 CFR 42.1204 (novation agreement § (b)(2)). Any other agreement as to the assumption of liabilities must be referenced specifically in the novation agreement. *Id.* at 42.1203(e).

control"). This responsibility, *regardless of whether or how Price exercised it*, renders him a "party responsible" under the plain language of the regulation. 29 CFR 4.187(e)(2).

Rather than directly address Price's level of responsibility within the meaning of 29 CFR 4.187(e)(2), Respondents cherry-pick portions of the relevant regulation thus advancing a narrower meaning of the term "party responsible" than that contained in the regulation and underlying case law. Resp'ts' Br. 9-10 (citing 29 CFR 4.187(e)(1), (3), and (4), but omitting subsection (e)(2)). Respondents then misconstrue the Administrator's argument by suggesting that it impermissibly relies on Small Business Administration ("SBA") regulations to define a "party responsible." *See id.* at 12-13. This is not the case. The SBA regulations, namely 13 CFR 125.13, are relevant in that these establish the level of responsibility that Price was legally required to exercise with respect to the subject contract. Adm'r's Opening Br. 4-5, 16; 13 CFR 125.13. The Administrator does not argue that Price necessarily exercised this requisite level of management and control at all relevant times, but instead argues that this legal responsibility renders Price a "party responsible" under the plain meaning of the relevant SCA regulation. 29 CFR 4.187(e)(2) (a corporate officer "responsible for control of" the corporate entity is a "party responsible"); *see also* Adm'r's Opening Br. 16-17. Therefore, assertions that Price failed to exercise daily management and supervisory control and was "clueless to what was going on" during the first year of the contract[5] do not excuse him from SCA liability. 29 CFR 4.187(e)(2) and (4); *see also Int'l Servs.*, 2007 WL 4623497, at *5.

[5] Resp'ts' Br. 14. In fact the record belies the assertion that Price had only limited control over contract management prior to June 2016, instead demonstrating that he was involved in preparing the contract bid, making site visits during the summer of 2015, and hiring key

The ALJ erred in not considering Price's responsibility to maintain daily management and supervisory control over contract performance when evaluating whether he was a "party responsible" for the duration of the contract period. Accordingly, the Board should also hold Price jointly and severally liable for the entirety of the back wages.[6]

3. In failing to correctly apply the SCA debarment standard and focusing almost exclusively on a purported "good faith disagreement" between the parties, the ALJ disregarded the regulatory text and controlling Board precedent. In arguing to the contrary, Respondents distort the ALJ's ruling.

The SCA's debarment provision provides that violators are ineligible to receive federal contracts for a period of three years, unless they can show "unusual circumstances" warranting relief from debarment. 41 U.S.C. § 6706; 29 CFR 4.188(a); *Summitt Investigative Serv., Inc. v. Herman*, 34 F. Supp. 2d 16, 19-20 (D.D.C. 1998) (Congress intended SCA debarment to be "virtually automatic" and "expeditiously and rigorously applied" (citation omitted)). Adopting the analysis articulated in *Washington Moving & Storage Co.*, No. SCA-168, at *3-4 (Sec'y of Labor Mar. 12, 1974), the Department has set forth its criteria for determining when there are "unusual circumstances" as a three-part test, which has been consistently applied by the Board

personnel to manage contract performance, including his cousin Beasley. Tr. 343-44; JX 13 at 51-54; *see also* Adm'r's Opening Br. 6, 17.

[6] In noting the ALJ's finding that Respondent Beasley exercised control and supervision during the first year of the contract, Respondents suggest that this precludes Respondents VNT and Price from also being responsible parties jointly and severally liable for violations that occurred during this period. Resp'ts' Br. 11. This is not the case. *See, e.g., E&S Diversified Servs., Inc.*, No. 13-019, 2015 WL 1519811, at *4 (ARB Mar. 20, 2015) (affirming determination that three individuals, in addition to corporate contractor, were responsible parties).

and the federal courts. 29 CFR 4.188(b)(3); *Hugo Reforestation*, 2001 WL 487727, at *9; Adm'r's Opening Br. 18-19 (listing cases).

This is a structured framework, rather than a "totality of the circumstances" test. *M.E.S. Servs., Inc.*, No. 86-SCA-65, 1989 WL 549936, at *2 (Dep. Sec'y of Labor July 28, 1989) (holding that it was "error for the ALJ to ignore the properly promulgated regulation which was developed for determining the existence of 'unusual circumstances' . . . [and] sets out a three-part test" and rejecting the ALJ's determination that under the "totality of the circumstances" debarment was unwarranted). Rather than following this framework, the ALJ conducted a "totality of the evidence" analysis and applied a "rule of lenity" to support his conclusion that "usual circumstances" warranted relief from debarment. D&O 15-18. Doing so enabled him to place undue weight on one of the factors enumerated in the third part of the test – the assertion of a "bona fide legal issue of doubtful certainty." Adm'r's Opening Br. 19-20; *Ed Bird*, No. 82-SCA-144, 1987 WL 383139, at *3 (Dep. Sec'y of Labor Apr. 20, 1987) (rejecting the ALJ's decision "weighing the factors" and recommending an exception to debarment).[7] Moreover, the ALJ's express adoption of a "rule of lenity" is at odds with the "rigorous" and "virtually automatic" standard intended by Congress. *See Summitt Investigative Serv.*, 34 F. Supp. 2d at 19-20. Respondents' assertion that the ALJ's debarment analysis followed "a strict reading of

[7] Respondents' attempts to distinguish *M.E.S. Servs.* and *Ed Bird*, *see* Resp'ts' Br. 17-18, are unavailing as both overturned decisions in which an ALJ, in evaluating the existence of "unusual circumstances," considered the correct factors, but did so in a way that was inconsistent with the test articulated in 29 CFR 4.188(b)(3), *M.E.S. Servs.*, 1989 WL 549936, at *2; *Ed Bird*, 1987 WL 383139, at *3. The ALJ repeated this mistake in the present case. *See* D&O 15-18.

the plain language of the regulatory text," Resp'ts' Br. 17, ignores these deviations from controlling precedent and legislative intent.

Further, as discussed in more depth in the opening brief, the ALJ's emphasis on the existence of a "bona fide legal issue of doubtful certainty" was misplaced since Respondents' insistence that its employees were only working "in performance of the contract" when driving with a patient in the vehicle was not objectively reasonable. *See* Adm'r's Opening Br. 20-23. Respondents' position is simply inconsistent with the SCA's implementing regulations, governing precedent, and the plain language of the contract. *Id.* at 21-22; *Summitt Investigative Serv.*, 34 F. Supp. 2d at 23-25; *Menlo Serv. Corp.*, No. SCA-876-883, 1983 WL 189815, at *2 (Sec'y of Labor Mar. 9, 1983) ("Menlo had no reasonable basis to conclude that its [employees] were not covered by the SCA . . . . [Its] failure to comply with the law was not related to the existence of legal questions . . . . [T]herefore, . . . there are no 'unusual circumstances' in this case."), *aff'd*, 765 F.2d 805 (9th Cir. 1985). This position is also inconsistent with the company's own bid, which estimated that drivers and dispatchers working in performance of the contract would be paid the applicable SCA prevailing wage rates on a full-time basis. Adm'r's Opening Br. 5-6, 22; JX 13 at 311-12. Respondents now attempt to bolster the gravity of this disagreement by re-characterizing it as legal dispute between the parties as to the treatment of time drivers spent waiting for dispatch (and, strangely, by asserting that the Administrator is attempting to re-litigate this issue, decided based on long-settled principles). Resp'ts' Br. 25-26. While the parties disagreed as to the compensability of such wait time, that involved a factual dispute resolved after consideration of the parties' evidence and does not constitute a bona fide legal dispute. D&O 9-11.

In the ALJ's focus on a purported "bona fide legal issue," he neglected to adequately consider whether Respondents had met their burden of establishing several required elements of the "unusual circumstances" test. *See* Adm'r's Opening Br. 23-28. Particularly significant are Respondents' failure to ascertain whether their pay practices were in compliance with the Act, including seeking any necessary advice from the Department of Labor, *id.* at 23-24 (constituting culpable conduct); Respondent Price's failure to adequately supervise subordinate employees, *id.* at 25 (culpable neglect); Respondents' failure to maintain basic payroll records, which impeded the investigation, *id.* at 26 (citing ALJ's determination, D&O 11-13, that Respondents' records were "legally insufficient"); and the severity of the violations at issue, *id.* at 27-28 (back wages totaling $715,599.02). Accordingly, the Board should reverse the ALJ's decision and hold that Respondents have failed to meet their burden of demonstrating "unusual circumstances" warranting relief from debarment.

4. Rather than credibly address the Administrator's legal arguments, Respondents spend a considerable portion of their brief spinning a largely unsupported and self-serving narrative, which baldly alleges misconduct on the part of the Administrator and third-parties. *See, e.g.*, Resp'ts' Br. 26-30. For instance, in an attempt to deflect attention from their own violations, Respondents suggest that WHD should have done more to accommodate their objectively unreasonable interpretation of the governing law before withholding contract funds. *See id.* at 20-21, 24, 28; *see supra* 8. However, such allegations do not relieve Respondents of liability for back wages or from debarment. *See Summitt Investigative Serv.*, 34 F. Supp. 2d at 21 (rejecting efforts to "scapegoat" the Department by arguing that it "so contributed to [contractors'] financial plight as to relieve them from debarment").

CONCLUSION

For the reasons stated above and in the opening brief, the Administrator respectfully requests that the Board reverse the ALJ's decision with respect to Respondents VNT and Price and hold (1) that VNT and Price are "parties responsible" who are jointly and severally liable for back wages in the amount of $715,599.02, covering the entire contract period; and (2) that VNT and Price are subject to debarment because they failed to demonstrate the existence of "unusual circumstances" warranting relief from debarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 13th day of May 2019, a copy of the Administrator's Reply Brief was sent by first class United States mail to:

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