

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

* * * * *
In the Matter of: *
*
Dispute concerning the payment of prevailing *
wage rates and overtime by: *
*
JAMEK ENGINEERING SERVICES, INC., *
Subcontractor; *
*
AND proposed debarment for labor *
standards violations by: *
*
JAMEK ENGINEERING SERVICES, INC., *
Subcontractor; and JAMES EKHATOR, *
an individual and owner; *
*
Petitioners. *
*
With respect to laborers and mechanics employed *
on Contract Nos. CFDA 14-239 and *
CFDA 14-2369, for painting and related work of *
Hamline Station Apartments Project, *
located in St. Paul, Minnesota *
* * * * *

ARB Case No. 2020-0043
ALJ Case No. 2017-DBA-0043

RESPONSE BRIEF OF THE ADMINISTRATOR

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ADMINISTRATOR’S RESPONSE BRIEF

The Administrator of the Wage and Hour Division (“Administrator”), through undersigned counsel, responds to the Petition for Review and supporting Brief filed by Jamek Engineering Services, Inc. (“Jamek”), and its Chief Executive Officer and Owner, James Ekhaton (collectively, “Petitioners”) seeking review of the April 27, 2020 Decision and Order (“Dec.”) of Administrative Law Judge (“ALJ”) Paul R. Almanza in this matter. The ALJ concluded that Jamek failed to pay prevailing wages and fringe benefits to journeyworker and apprentice spray painters it employed over the eight weeks Jamek performed work on a federally-funded construction project in St. Paul, Minnesota, that was subject to the labor standards provisions of the Davis-Bacon Act. The ALJ also concluded that Jamek failed to submit timely and accurate certified payroll records and that it unlawfully deducted union initiation fees from its employees’ paychecks. The ALJ ordered the payment of back wages and further ordered that Jamek be debarred from receiving any contracts or subcontracts subject to any of the Davis-Bacon and Related Acts for a period of three years. Jamek now asks the Administrative Review Board (“ARB” or “Board”) to overturn the Decision and Order. For the reasons that follow, the Petition for Review should be denied.

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ISSUES PRESENTED

1. Whether the ALJ correctly determined that Jamek failed to pay prevailing wages and fringe benefits to its employees and correctly calculated the back wages Jamek owes.
2. Whether the ALJ correctly determined that Jamek failed to submit timely and accurate certified payrolls.
3. Whether the ALJ correctly determined that Jamek violated the Copeland Act by deducting union initiation fees from employees' paychecks.
4. Whether the ALJ correctly concluded that Jamek should be debarred for willful violations of Davis-Bacon requirements, including failing to pay required prevailing wages and fringe benefits, submitting inaccurate and untimely payrolls, and making impermissible deductions from employee paychecks.

STATEMENT OF THE CASE

1. Statutory and Regulatory Framework

This appeal arises under the labor standards provisions of the Davis-Bacon Act ("DBA"), 40 U.S.C. 3141, et seq., the Cranston-Gonzalez National Affordable Housing Act of 1990 ("NAHA"), 42 U.S.C. 12701, et seq., the Copeland Act, 40 U.S.C. 3145, and their implementing regulations at 29 C.F.R. Parts 1, 3, and 5. Both the Copeland Act and NAHA are known as Davis-Bacon Related Acts ("DBRA"). *See* 29 C.F.R. 5.1(a). Under Davis-Bacon Related Acts such as these, the

requirements of the Davis-Bacon Act apply to construction projects that are assisted by Federal agencies through grants, loans, loan guarantees, insurance and other methods. *See* 29 C.F.R. 5.2(h), 5.5(a)(1); *see also* *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1055 (D.C. Cir. 2007); *Pythagoras Gen. Contracting Corp.*, ARB Case Nos. 08-107, 09-007, 2011 WL 1247207, at *2 (ARB Mar. 1, 2011), *aff'd*, 926 F. Supp. 2d 490 (S.D.N.Y. 2013).

The DBA requires that laborers and mechanics who work on covered construction projects be paid wages and fringe benefits at no less than the locally prevailing rates for similar work in the area where the work is to be performed. *See* 40 U.S.C. 3142. The Department of Labor's Wage and Hour Division ("WHD") determines the locally prevailing rates for job classifications used on construction projects and issues wage determinations listing rates that WHD has determined "to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the applicable area, which are incorporated into the relevant contracts. 40 U.S.C. 3142(b); 29 C.F.R. 1.2, 1.3, and 5.5(a)(1).

Contractors and subcontractors are responsible for paying their workers the appropriate prevailing wage rate and fringe benefits for the work performed and, in particular, are not permitted to pay a lower apprentice rate to workers unless they are enrolled in a registered apprenticeship program and the contractor does not

exceed the ratio of apprentices to journeyworkers permitted under the registered program. 29 C.F.R. 5.5(a)(1) and (4). Required fringe benefits may be provided through contribution to a benefit or pension fund or through payment of cash equivalents to the worker. 29 C.F.R. 5.5(a)(1). Under the DBRA, contractors also are required to keep payroll records that sufficiently and accurately demonstrate that workers were paid required prevailing wages for all compensable work and all required fringe benefits. *Pythagoras*, 2011 WL 1247207, at *2; 29 C.F.R. 5.5(a)(1)(i) and (a)(3)(i). The employer must submit these payroll records to the contracting agency on a weekly basis along with a signed statement certifying compliance with the DBRA wage requirements. 29 C.F.R. 5.5(a)(3)(ii). The DBRA regulations further require that employees must be paid the prevailing wage in full each week, without any deductions other than those specifically authorized by the regulations implementing the Copeland Act in 29 C.F.R. Part 3. 29 C.F.R. 5.5(a)(1)(i).

2. Statement of Facts and Course of Proceedings

In 2013, the City of St. Paul, Minnesota, obtained \$1.1 million in funding from the U.S. Department of Housing and Urban Development (“HUD”) for construction of the Hamline Station Apartments project (“the Project”) in St. Paul. Dec. 4. The prime contractor on the Project, Anderson Companies, engaged Jamek as a subcontractor to paint the exterior and all apartment units of the two buildings that

comprised the Project. Anderson and Jamek entered into separate painting subcontracts for each building; the total value of the two subcontracts was approximately \$166,657. *Id.* Jamek had prior experience as a subcontractor on projects subject to DBA labor standards. WHD had investigated Jamek's performance on one of those subcontracts and had found that Jamek violated applicable DBA requirements, including the requirement to pay fringe benefits. *Id.* at 17.

As a result of the HUD funding, the prime contract and subcontracts at issue here were subject to the labor standards requirements of the DBA and its implementing regulations at 29 C.F.R. Part 5. Dec. 4; GX 45 at 2-3.¹ Both of Jamek's subcontracts set forth Jamek's obligation to comply with Davis-Bacon labor standards and incorporated the Davis-Bacon wage determination applicable to Jamek's performance of the subcontracts. Dec. 4; GX 11 at 9; GX 12 at 9. That wage determination stipulated that the prevailing wage owed to journeyworker spray painters was \$31.89 per hour in wages and \$17.41 in fringe benefits. Dec. 4, 37.

The prime contractor on the Project and the Saint Paul Building and Construction Trades Council were parties to a Project Labor Agreement ("PLA") that applied to the Project and that incorporated the provisions of various collective

¹ References to "GX" are to the Administrator's exhibits introduced at the September 10-13, 2018 hearing before the ALJ; references to "Tr." are to the transcript of the hearing.

bargaining agreements (“CBA”) into the contract documents, including a CBA applicable to painting work on the Project. Dec. 5. On October 22, 2015, Jamek signed a Letter of Assent agreeing to be bound by the PLA. *Id.* As a result of the PLA’s incorporation of the CBA, Jamek was authorized to employ bona fide registered apprentices and compensate them at a percentage of the journeyworker rate set forth in the governing wage determination, provided that Jamek observed the ratio of apprentices to journeyworkers set forth in the CBA. Based on the journeyworker prevailing wage of \$31.89 per hour in wages and \$17.41 in fringe benefits, the wage owed to apprentice spray painters as determined by the ALJ was \$15.95 per hour in wages and \$13.06 in fringe benefits. *Id.* at 37.

Jamek began work on the Project on September 30, 2015. *Id.* at 5. It performed painting work on the contracts for approximately the next eight weeks, until November 20, 2015, when the prime contractor terminated Jamek’s subcontracts based on concerns about Jamek’s incomplete and unacceptable work. Tr. 434-435. As the ALJ found, throughout Jamek’s eight weeks of contract performance, Jamek violated applicable DBRA requirements in multiple ways. *Id.* at 53-54.

Prevailing Wage Violations

All contractors and subcontractors on projects subject to DBA labor standards are required to prepare and submit on a weekly basis accurate payroll records that reflect compliance with DBA prevailing wage and fringe benefit rates, along with a

signed statement certifying compliance with DBRA wage requirements. 29 C.F.R. 5.5(a)(1)(i) and (a)(3). In addition to maintaining certified payroll records, Jamek maintained an internal payroll journal and pay stubs that reflected different rates of pay to its workers. Specifically, the certified payrolls submitted by Jamek reflected that, for the first four weeks of Jamek's work on the Project, the journeyworker painters were paid \$33.57 in hourly wages and those that Jamek classified as apprentices were paid \$16.29. Dec. 41-42. For the last four weeks of the project, as reflected on the certified payrolls, the journeyworker painters were paid \$30.52 in hourly wages and the apprentices were paid \$14.01. *Id.* In contrast, Jamek's internal payroll journal and the employees' pay stubs reflected that, for the first four weeks, journeyworkers were paid a higher rate of \$35.62 per hour and apprentices \$17.57. *Id.* Similarly, the journal and pay stubs reflected that, for the last four weeks, journeyworker painters were paid \$32.57 and apprentices were paid \$15.29. *Id.* These different sources of pay information, and the discrepancies they reflect, affected the ALJ's back wage calculations and are particularly relevant to the extent of Jamek's back wage violations (particularly with respect to journeyworkers), as explained *infra*.

In addition to employing journeyworkers, Jamek employed four apprentice spray painters at various times throughout the project: Derick Delgado, Francis Onu, Danny Rodriguez, and Oscar Tula. Dec. 43. Under the CBA that governed Jamek's

work by virtue of the PLA, apprentice painters could be employed at a wage rate below the journeyworker rate, provided that a ratio of three journeyworkers to one apprentice was maintained at all times. *Id.* Jamek failed to observe the required three-to-one ratio for all but one of the eight weeks it worked on the Project. Dec. 34-36.

Jamek was notified by St. Paul employee Alexander Dumke of its failure to comply with the governing apprentice-to-journeyworker ratio in November, 2015, and Jamek issued restitution payments to compensate the apprentices for its out-of-ratio work. Dec. 21, 26; Tr. 577, 765-66. Jamek issued restitution checks at a rate of \$18.39 for each hour it believed the apprentice spray painters worked out of ratio: one check to Delgado for \$490.63 (31 hours), two checks to Onu for a total of \$137.93 (7.5 hours), one check to Rodriguez for \$118.78 (13 hours), and two checks to Tula for a total of \$513.21 (29 hours). Dec. 44. Matthew Jones, the WHD investigator who investigated Jamek's compliance with DBA requirements on the project, concluded that Jamek had not accounted for all of the hours that Jamek employed apprentices on an out-of-ratio basis. *Id.* at n.25.

In particular, because Jamek based its restitution payments entirely on calculations provided by Mr. Dumke, and because certain apprentices continued to work out of ratio after he prepared his calculations, *see, e.g.*, Tr. 763-66, 947-48; GX 22 at 17, the restitution payments did not fully compensate the affected workers for this violation of DBRA labor standards. Using a standard WHD approach of rotating

out-of-ratio hours between apprentices in order to ensure that each apprentice received an equitable mix of compensation at apprentice and journeyworker rates, Mr. Jones determined that the hours worked out of ratio for purposes of calculating the back wages that Jamek still owes were 70.5 for Delgado, 13 for Onu, 39 for Rodriguez, and 91.5 for Tula, Dec. 44-45; GX 39; Tr. 107.

Finally, throughout the final four weeks of Jamek's work on the Project, Jamek paid each of the four apprentices wages that were \$0.66 per hour below the applicable apprentice wage rate. Mr. Jones calculated that Delgado worked 54.5 hours as an apprentice during this period, Onu worked 62 hours, Rodriguez worked 29 hours, and Tula worked 54.5 hours. Dec. 44-45; GX 39. Petitioners do not dispute this DBRA wage violation. Pet. Br. 18.

Fringe benefits

A contractor subject to DBA labor standards is required to pay its laborers and mechanics the "full amount" of "bona fide fringe benefits (or cash equivalents thereof) . . . computed at rates not less than those contained" in the applicable wage determination. 29 C.F.R. 5.5(a)(1)(i). Pursuant to the terms of the PLA to which Jamek assented, Jamek was required to provide fringe benefits by paying the required fringe benefits amount into a fund administered by Wilson-McShane, the fringe benefit administrator for Painters and Allied Trades District Council No. 82 ("Painters Union"), whose CBA applied to the Project as a result of the PLA. Dec.

45; Tr. 262. At the ALJ hearing in this case, Ekhatator testified that Jamek made only one payment to the fringe benefits fund during Jamek's performance on the subcontracts. That payment, of \$199.23, covered Jamek's fringe benefit obligation for September 30, 2015, the only day in September 2015 on which Jamek performed work on the subcontracts. Dec. 45; Tr. 1040. Jamek failed to make any other fringe benefit payment during the remainder of its performance on the contract. The Painters Union eventually garnished Jamek's bank account, causing an additional \$500 to be paid on January 27, 2016, into the fringe benefit fund administered by Wilson-McShane. Dec. 11. Jamek's remaining fringe benefit liability of \$15,479.20 was not satisfied until January 11, 2017, when, prompted by mechanics lien litigation commenced by the Painters Union as a result of Jamek's non-payment of fringe benefits, the prime contractor, Anderson, paid the full fringe benefit amount. Dec. 11.

Certified payrolls

Contractors subject to DBA labor standards are required to maintain and submit complete and accurate payroll records. Among other information, DBA payroll records must reflect, for both journeyworkers and apprentices, the "hourly rate of wages paid (including . . . costs anticipated for bona fide fringe benefits . . .), daily and weekly number of hours worked, deductions made, and actual wages paid[.]"²⁹ C.F.R. 5.5(a)(3)(i). In addition, in accordance with the Copeland Act,

each payroll submitted must be accompanied by a signed “Statement of Compliance” certifying that “each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract. 29 C.F.R. 5.5(a)(3)(ii)(B).

Although Jamek did not make any fringe benefit contributions during its work on the Project except with respect to its first day of project work, as noted above, Jamek nonetheless certified on each of the certified payrolls it submitted that it had in fact made contributions to the fringe benefits fund on behalf of its employees. Dec. 47. In addition, over the eight weeks of the Project, all but two of Jamek’s weekly certified payrolls were filed late, and two of Jamek’s employees were left off the payrolls altogether for particular weeks. *Id.*

Deductions for union initiation fees

The DBA requires that contractors pay laborers and mechanics their full wages and fringe benefits “unconditionally” and “without subsequent deduction or rebate on any account.” 40 U.S.C. 3142(c)(1); 29 C.F.R. 5.5(a)(1)(i). Exceptions to this rule are set forth in the regulations implementing the Copeland Act, 29 C.F.R. 3.5(a)(1)(i), which provide, as pertinent here, that union initiation fees and membership dues may be deducted only if “a collective bargaining agreement between the contractor or subcontractor and representatives of its employees

provides for such deductions and the deductions are not otherwise prohibited by law.” 29 C.F.R. 3.5(i). In this case, Ekhaton elected to pay the applicable union initiation fees on behalf of Jamek’s employees and then deducted funds from the employees’ paychecks in order to reimburse himself for those fees. Tr. 982-83. Ekhaton stated that Jamek paid the union initiation fees as a “loan” to its non-union employees who were required to pay the fees to work on the Project because it was governed by a PLA, but who assertedly did not have the funds to pay the fees prior to starting work on the Project. *Id.* However, the CBA governing Jamek’s work did not provide for deductions for union initiation fees, but rather provided only for the deduction of regular union dues for each hour worked or paid for. GX 14. Article 6 of the CBA, to which Jamek has pointed in defense of its deductions, stated:

Every Employer signatory to this Agreement hereby agrees to check off from the wages of all Employees covered by this Agreement, during the term of this Agreement, administrative dues for Painters and Allied Trades District Council No. 82 in the amount stated in the By-Laws for each hour worked or paid for. Said sums shall be remitted to the depository in the same manner and on the same forms provided for the payment of all fringe benefit funds.

The Administrator of said Funds, upon receipt of said monies, shall remit the amount deducted by the Employers to the Painters and Allied Trades District Council No. 82. The obligations of the Employer under this section shall apply only to those Employees who have voluntarily signed authorization for dues check-off.

GX 14 at 8. This provision does not refer to union initiation fees. Indeed, the union initiation fees that Jamek deducted were flat fees that were not calculated “for each

hour worked or paid for,” *id.*, and the deductions went to Ekhaton personally and thus were not remitted to the Painters Union. Dec. 49.

* * * *

After receiving the first of two complaints that Jamek had engaged in multiple violations of DBRA labor standards during its work on the Project, WHD commenced an investigation of Jamek’s Davis-Bacon compliance in November 2015. Following WHD’s investigation, on August 16, 2016, the Regional Administrator for WHD’s Midwest Region issued findings that Jamek had violated DBA labor standards by, *inter alia*, failing to pay prevailing wages and fringe benefits, employing the incorrect ratio of apprentices and journeymen, and taking improper deductions from employee paychecks, all in violation of the DBRA. GX 1; Dec. 2. The matter subsequently was referred to the Chief Administrative Law Judge and, following discovery and a hearing, the ALJ issued his Decision and Order on April 27, 2020.

3. The ALJ’s Decision

The ALJ found that Jamek violated DBRA labor standards by failing to pay its painters the applicable prevailing wage rate and fringe benefits. Based on the rates of pay that Jamek reported in its certified payrolls, the ALJ concluded that Jamek had paid both its journeymen and apprentices less than the applicable prevailing wage rate. Dec. 41-45. The ALJ also concluded that Jamek had failed to maintain

the required three-to-one ratio of journeyworkers to apprentices during seven of the eight weeks that Jamek performed on the contract and had therefore failed to pay the prevailing wage rate to the apprentices, who, to the extent necessary to bring Jamek within ratio, were entitled to the prevailing wage for journeyworkers for each hour that Jamek was out of ratio. Dec. 34-35. The ALJ further found that Jamek's restitution payments had not covered all of the hours that the apprentices had worked out of ratio. Dec. 44-45. Thus, the ALJ determined that Jamek owed back wages to both the journeymen and apprentices. Dec. 41-45.² In reaching this conclusion, the ALJ reasoned that the appropriate journeyworker/apprentice ratio was "clearly set forth" in the terms of the CBA to which Jamek had agreed, and that while Jamek's partial restitution payments to the underpaid workers reduced its back wage liability, they did not negate Jamek's violation of DBRA labor standards. *Id.* at 35-36 (citing *Blau Mech., Inc.*, WAB No. 92-20, 1993 WL 331761, at *3 (WAB July 22, 1993)).

² The ALJ also determined that Jamek had not employed "off-the-books" employees, and therefore that Jamek was not liable for most of the back wages sought by WHD. Dec. at 38-41, 47. Although the Administrator did not appeal the ALJ's determination that Jamek did not employ workers "off the books," Jamek is unjustified in suggesting that there was anything untoward about the Administrator's pursuit of claims on behalf of those workers and related withholding of contract funds. Pet. Br. at 4, 24. It was entirely proper for WHD to withhold the amounts it considered necessary to satisfy its back wage claims on behalf of the off-the-books workers. *See* 29 C.F.R. 5.5(a)(2) (authorizing withholding of "such sums "as may be considered necessary to pay laborers and mechanics") (emphasis added). And although the ALJ denied those claims based on a credibility determination, the ALJ did not question the Administrator's authority or right to assert the claims. In any event, not only are the withheld funds associated with the "off the books" workers irrelevant to the issues before the Board, but also the amount at issue (\$38,598.93) has been remitted to Jamek.

As a result of Jamek's prevailing wage violations, the ALJ ordered the payment of back wages to nine employees in the amount of \$3,110.13.

Similarly, the ALJ concluded that Jamek had violated DBRA labor standards by failing to make contributions to the fringe benefits fund. Dec. 45-46. Although Plan vesting requirements, coupled with the prime contractor's payment to the fringe benefit fund in January 2017, led the ALJ to conclude that Jamek's employees were not entitled to back wages as a result of Jamek's fringe benefits violations, the ALJ found that the prime contractor's payment did not negate Jamek's failure to make those payments when they were due. In reaching this conclusion, the ALJ further noted the hearing evidence that WHD previously had investigated Ekhaton for failing to make fringe benefit payments on a project subject to DBA labor standards, and that Ekhaton knew as a result that "a lump sum fringe benefit contribution two years after payment was due was not satisfactory under the DBA." *Id.* at 45.

The ALJ also found that Jamek had violated the Copeland Act and DBA requirements by failing to file timely and accurate certified payrolls in accordance with the requirements of 29 C.F.R. 5.5(a)(3)(i), (ii) and 29 C.F.R. 3.3(b), 3.5(a). Dec. 47. Most significantly, the ALJ determined that Jamek's certified payrolls were inaccurate because they reflected that Jamek paid fringe benefits on behalf of its employees even though, "by [Ekhaton's] own admission," Jamek only paid fringe benefits for a single day of work by its employees in September 2015. Dec. 47. The

ALJ also found that all but two of Jamek's weekly payrolls were filed late, and that two employees were left off some of the payrolls. *Id.*

The ALJ further found that Jamek had unlawfully deducted union initiation fees from its employees' paychecks. Dec. 50. The ALJ concluded that the CBA did not provide for the deduction of union initiation fees, that its silence was insufficient to permit such deductions, and that the CBA's authorization of deductions for "administrative dues" did not include initiation fees. Dec. 48-49. As a result, the ALJ reasoned, Jamek's deduction of union initiation fees from employee paychecks did not fall within any regulatory exception to the requirement that Jamek pay its employees "the full amounts" of prevailing wages and fringe benefits to which they were entitled "unconditionally" and "without subsequent deduction or rebate on any account." 29 C.F.R. 5.5(a)(1); Dec. 50. As a result, Jamek's impermissible deductions violated 29 C.F.R. 3.5 and 5.5(a)(1). The ALJ also concluded, however, that the deductions were a "technical violation" of the Copeland Act for back wage purposes and that Jamek therefore did not owe back wages for those violations. Dec. 50.

Finally, the ALJ ordered that Jamek be debarred from federal contracting in accordance with 29 C.F.R. 5.12(a)(1) for a period of three years. Dec. 54. In concluding that the applicable debarment standard had been satisfied, the ALJ determined that Petitioners had "purposefully, knowingly, and willfully falsified

their certified payroll records,” as particularly evidenced by Jamek’s certification that it was making fringe benefit contributions when Ekhaton “knew that was false,” and that Jamek also willfully took improper deductions from employee paychecks. Dec. 52; 29 C.F.R. 5.12(a)(1).³

Following the ALJ’s decision, Jamek timely filed a petition for review with the ARB on June 5, 2020.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear and decide appeals from ALJ decisions and orders concerning questions of law and fact arising under the DBRA. 29 C.F.R. 5.1, 6.34, 7.1(b); *see also* 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have had in making the initial decision except as it may limit the issues on notice or by rule.”). Because it is “an essentially appellate agency,” the Board gives “some level of deference to an ALJ’s credibility determinations based on demeanor.” *Pythagoras*, 2011 WL 1247207, at *4 (citing 29 C.F.R. 7.1(e)). With respect to the Administrator’s positions, the Board’s review consists of assessing “whether they are consistent with the statute

³ The ALJ also concluded that Jamek should be debarred under the DBA. Dec. at 52-53. As noted previously, however, the contracts at issue were not directly covered by the DBA, but rather were subject to DBA labor standards by virtue of two DBRAs, the NAHA and the Copeland Act. Although DBA labor standards apply to contracts covered by DBRAs, DBRA violations are subject to a different debarment standard than DBA violations. 29 C.F.R. 5.12(a); *see also* note 9, *infra*.

and regulations, and are a reasonable exercise of the discretion delegated to [the Administrator] to implement and enforce the Davis Bacon Act.” *Ray Wilson*, ARB Case No. 02-086, 2004 WL 384729, at *2 (ARB Feb. 27, 2004) (citing *Miami Elevator Co.*, ARB Case Nos. 98-086, 97-145, 2000 WL 562698, at *13 (ARB Apr. 25, 2000)). The Board “generally defers to the Administrator as being ‘in the best position to interpret [those] rules in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determination, the Board is reluctant to set the Administrator’s interpretation aside.’” *Id.* (quoting *Titan IV Mobile Serv. Tower*, WAB Case No. 89-14, 1991 WL 494710, at *4 (WAB May 10, 1991)).

ARGUMENT

I. AS PETITIONERS HAVE ADMITTED, JAMEK VIOLATED THE DBRA BY FAILING TO PAY PREVAILING WAGES AND FRINGE BENEFITS.

A. Jamek repeatedly failed to pay its apprentices the wages to which they were entitled.

Petitioners acknowledge that Jamek violated the DBRA when it failed to pay prevailing wages to its apprentices

The DBRA’s implementing regulations at 29 C.F.R. 5.5(a)(4) authorize apprentices to be paid less than the prevailing wage rate under certain conditions, including that the contractor has observed the ratio of apprentices to journeyworkers authorized under the relevant registered apprenticeship program. “[A]ny apprentice

performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination.” *Id.* The governing ratio in this case provided for one apprentice to three journeyworkers. GX 14 at Art. 13. The ALJ found that this ratio was “clearly set forth” in Article 13 of the CBA to which Ekhaton agreed to be bound in his capacity as CEO of Jamek, and that Jamek was out of ratio for every week but one during contract performance. Dec. 35.

On appeal, Jamek acknowledges that it failed to maintain the proper ratio of journeymen to apprentices required in the CBA. Pet. Br. 17. For the hours that the apprentices were out of ratio, Jamek was required to pay them at the prevailing wage rate for journeyworkers to the extent necessary to bring Jamek within ratio. 29 C.F.R. 5.5(a)(4)(i), Tr. 460-61. Its failure to do so was therefore a failure to pay the prevailing wage. Although Jamek subsequently made partial restitution payments to those apprentices, it nevertheless failed to pay them the prevailing wage on a weekly basis as required by the DBRA. *See* 29 C.F.R. 5.5(a)(1)(i); *Blau Mechanical, Inc.*, WAB Case No. 92-20, 1993 WL 331761, at *3 (WAB July 22, 1993) (recognizing that a DBA violation “is complete once there is a failure to remit wages weekly, regardless of whether the employees were later made whole.”), *cited in* Dec. 36.

Jamek contends that it worked with St. Paul employee Alexander Dumke to determine how much restitution was owed to the apprentices as a result of this

DBRA violation, but Mr. Dumke's advice that the apprentices were owed restitution only confirms that a violation occurred. Pet. Br. 20-21. Further, Jamek admits that even when it used the correct ratio, it underpaid its apprentices by 66 cents per hour for every hour they worked in ratio as apprentices over the last four weeks of the Project. Pet. Br. 18.

In calculating the back wages owed as a result of Jamek's prevailing wage violations, the ALJ should have used the wages reported in Jamek's internal payroll journal

In calculating back wages due as a result of Jamek's prevailing wage violations, the ALJ considered two seemingly contradictory sources that purported to reflect the wages actually paid to Jamek's employees: Jamek's certified payrolls and its internal journal of wages paid. The certified payrolls reflected lower wages (\$33.57 and \$30.52 for journeyworkers and \$16.29 and \$14.01 for apprentices) than did the internal journal (\$35.62 and \$32.57 for journeyworkers and \$17.57 and \$15.29 for apprentices). The ALJ determined that the certified payrolls were the accurate record, in part because the ALJ calculated that the payroll taxes withheld by Jamek were correct only if they were based on the lower wage rates reflected in the certified payrolls. Dec. 42-43. The ALJ apparently did not recognize, however, that the amount by which the rates on the certified payrolls were higher than the rates

in the journal was exactly equal to the amount that Jamek improperly deducted for union initiation fees. *See* Pet. Br. 13-17.⁴

Given the ALJ's conclusion that Jamek did not owe back wages to its employees for its unlawful deduction of union initiation fees from their paychecks—which the ALJ characterized for back wage purposes as a “technical violation” of the Copeland Act, Dec. 50—the ALJ should have used the higher wage rate reported in the journal to calculate back wages. The journal reflected the gross amount that Jamek paid to its employees before deducting the \$2.05 in union initiation fees. By using the lower figures in the certified payroll to calculate back wages, the ALJ thus acted inconsistently with his conclusion that the \$2.05 was a component of employee compensation. In other words, the ALJ appears to have effectively awarded back wages in the amount of the union initiation fees, despite holding that the employees were not entitled to such back wages.

If the higher rates in the journals are used to calculate back wages, as Jamek contends is warranted, Pet. Br. 16-17, Jamek would not owe back wages to its on-the-books journeyworker painters, who were at all times paid above the prevailing hourly wage rate (assuming that Jamek does not owe back wages for its Copeland Act violations). At the same time, it would be ironic indeed if Jamek could on the

⁴ Jamek claims that it used the post-deduction wage rate reflected on the certified payrolls to calculate payroll taxes because, it asserts, union initiation fees are “tax-exempt.” *Id.* at 13-14.

one hand successfully claim that it paid its employees the higher, pre-deduction wage rates set forth in its internal journal in order to reduce its prevailing wage obligation, and then on the other hand avoid liability for its unlawful deductions from those rates before actually paying its employees.⁵

Even using the wage rates set forth in the journal, Jamek still owes back wages to its apprentices who were paid below the applicable apprentice wage for the last four weeks of the project

Even using the higher wage rates reported in the journal, the record reflects that Jamek failed to pay its apprentice spray painters the prevailing wage. As Jamek admits, it paid an apprentice wage rate of \$15.29 per hour, which was below the applicable apprentice wage of \$15.95 per hour, for every hour they worked in ratio during the last four weeks of the project. Pet. Br. 18. As calculated below, Jamek thus owes back wages to the apprentices who worked during that period.

Similarly, Jamek also still owes back wages for the periods it was out of ratio

⁵ The Administrator contended before the ALJ that the employees were entitled to back wages for Jamek's unlawful deductions of union initiation fees. *See* Section III, *infra*. In other words, as the Administrator contended before the ALJ, the ALJ should have calculated back wages based on the wage rates in the journal while taking into account that \$2.05 per hour of those wage rates was impermissibly deducted from the employees' paychecks. Dec. at 43. On appeal, the Administrator does not concede that Jamek's Copeland Act violations were merely "technical" and did not warrant an award of back wages to the affected employees. However, particularly given the small amount of back wages at issue and the ALJ's correct conclusion that Jamek's Copeland Act violations support debarment regardless of Jamek's back wage liability for those violations, the Administrator did not petition for review of the ALJ's conclusion that the employees were not entitled to be reimbursed for Jamek's unlawful deduction of union initiation fees.

Jamek’s “restitution payments” did not account for all of the back wages it owes its apprentices for the hours worked out of ratio. Jamek argues that the back wages for the 66-cent underpayment are all it owes, because it has already paid restitution for “all hours of work performed during the first four weeks on the Project.” *Id.* at 17. But the ALJ found that Jamek’s restitution payments did not account for all of the hours that apprentices worked out of ratio—some of which occurred in the last four weeks of the project. Dec. 34-35, 44. Jamek does not challenge this finding on appeal except to state that it was told how much to pay in restitution by Dumke. Pet. Br. 21. However, it appears from the testimony that the restitution payments calculated by Dumke encompass only the out-of-ratio hours from *before* Dumke notified Jamek of its noncompliance, and the hearing testimony unequivocally reflects that Jamek only made restitution payments in the amounts and for the periods that Dumke calculated. Tr. 763-66, 947-48. Indeed, some of the restitution checks were issued prior to some of the hours worked out of ratio and could not have compensated the apprentices for those hours. *See, e.g.*, GX 22 at 17 (showing restitution check issued on November 17, 2015, two days before the last day the ALJ found Jamek failed to maintain a three-to-one ratio). In any event, even assuming *arguendo* that Dumke had confused or misled Jamek about the extent of its back wage liability, any such conduct would not estop WHD from seeking and obtaining the back wages actually owed. *See, e.g., Abhe & Svoboda*, ARB Case Nos.

01-063, 01-068, 01-069, 01-070, 2004 WL 1739870, at *23 (ARB July 30, 2004) (citing *L.T.G. Constr. Co.*, WAB No. 93-15, 1994 WL 764105, at *4 (WAB Dec. 30, 1994)).

Similarly, Petitioners cannot reduce their back wage liability by claiming that alleged payments above the prevailing wage rate in some weeks can be used to offset their liability in other weeks. Pet. Br. 18. The requirement to pay Davis-Bacon prevailing wage rates is a weekly obligation. 40 U.S.C. 3143(c)(1), 3145; 29 C.F.R. 5.5(a)(1). It is therefore axiomatic that Petitioners cannot avoid liability in particular weeks by claiming that they overpaid in others. Moreover, Petitioners raise this argument for the first time on appeal. The Board is an “essentially appellate agency,” and it “will not hear matters de novo except upon a showing of extraordinary circumstances.” 29 C.F.R. 7.1(e). Petitioners have not even attempted to demonstrate such extraordinary circumstances.⁶

In summary, even if Jamek does not owe back wages for the union initiation fee deductions, Jamek owes back wages to the apprentices in the amount of \$16.60 for each unaccounted-for hour worked out of ratio (the difference between the prevailing journeyworker wage and the apprentice wage paid) and \$0.66 for each

⁶ Petitioners’ suggestion that they might receive credit for employee lunch breaks, which they allege were counted as hours worked (Pet. Br. at 20), is untimely for the same reason. In any event, Jamek must pay prevailing wages for all reported hours worked and cannot amend its report of hours worked years after the fact, with no actual record of time spent on lunch breaks.

hour worked in ratio at the rate of \$15.29 (the difference between that wage and the required apprentice wage), minus credit for restitution already paid. Jamek thus owes a minimum of \$2,423.85 in back wages to the following apprentices:

	Total hours worked out of ratio	Regular hours worked at \$15.29/hour	Total back wages owed	Restitution already paid	Back wages still owed ⁷
Delgado	70.5	54.5	\$1,206.27	\$490.63	\$715.64
Rodriguez	39	29	\$666.54	\$118.78	\$547.76
Onu	13	62	\$256.72	\$137.93	\$118.79
Tula	91.5	54.5	\$1,554.87	\$513.21	\$1,041.66

The Board should either remand this case to the ALJ to recalculate the back wages owed or, at a minimum, determine that Petitioners are liable for the back wages set forth in the table above. *See Pythagoras*, 2011 WL 1247207, at *22 (modifying ALJ’s back wage award in a manner consistent with the ARB’s conclusions).

B. Jamek admits that it violated the DBRA by failing to pay fringe benefits.

In addition to establishing a prevailing hourly wage rate, a DBRA wage determination typically establishes a rate at which fringe benefits must be paid. 29

⁷ Back wages calculated according to the formula: ((Out-of-ratio hours x \$16.60) + (Regular hours x \$0.66)) – (Restitution already paid).

C.F.R. 5.5(a)(1)(i). The DBRA allow employers to pay fringe benefits by contributing to a benefits fund, so long as such contributions are made at least quarterly. *Id.*

The ALJ correctly found that Jamek violated the DBRA by failing to make regular fringe benefit payments. Dec. 45. Jamek does not dispute that it did not make regular fringe benefit payments. Instead, Jamek states that it paid its third quarter fringe benefits obligation (i.e., it satisfied its fringe benefits obligation for a single day, September 30, 2015), and that Jamek was “attempting” to comply with its fringe benefit obligation for the remainder of its contract when the prime contractor terminated Jamek’s subcontract and froze payments to Jamek. Pet. Br. 23-24. Jamek claims that it was “unable” to make the fringe benefit contributions it owed for work performed in October and November because these funds were withheld. *Id.* Though Jamek offers these excuses in an attempt to explain why it failed to make the required fringe benefit payments, its various assertions amount to an admission that it did not make those payments.

Jamek cites no authority suggesting that it was excused from its obligation to make timely contributions to the Painters Fund. To the contrary, as the ALJ correctly concluded, Jamek’s failure to pay almost \$16,000 in fringe benefits was a clear violation of the DBRA. As set forth in Jamek’s subcontract, Jamek was legally bound and contractually obligated to make timely and complete fringe benefit

contributions to the Painters Fund. Indeed, the Davis-Bacon contract clause set forth in the DBRA's implementing regulations and incorporated into Jamek's subcontract obligated Jamek to pay its employees "unconditionally and not less often than once a week . . . the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment," with monthly or quarterly fringe benefit contributions "deemed to be constructively made or incurred during such weekly period." 29 C.F.R. 5.5(a)(1); GX 11 at 9, GX 12 at 9; *see also* GX4 at 50. Jamek's disputes with the prime contractor did not operate to relieve it of its obligation to make timely and complete fringe benefit payments to its workers. Rather, Jamek had an explicit statutory, regulatory and contractual obligation to pay fringe benefits to its workers and thus was not permitted to deprive workers of wages to which they were entitled based on its disputes with the prime contractor. As the ALJ found, Petitioners well knew that "a lump sum fringe benefit contribution two years after payment was due was not satisfactory under the DBA." Dec. 45.

II. THE ALJ CORRECTLY DETERMINED THAT JAMEK FAILED TO SUBMIT TIMELY AND ACCURATE CERTIFIED PAYROLLS.

The DBRA require the maintenance of complete and accurate payroll records, which must be certified by the contractor. Specifically, the contractor must certify: (1) the payroll contains all of the required information; (2) each laborer and mechanic has been paid the full wages earned without any impermissible deductions;

and (3) each laborer and mechanic has not been paid less than the applicable wage rate and fringe benefits or cash equivalent for the contract. 29 C.F.R. 5.5(a)(3)(ii)(B). The Copeland Act requires that these payrolls be submitted to the government within seven days of the regular payment date. 29 C.F.R. 3.5(a).

The ALJ determined that Jamek failed to meet these payroll obligations in multiple ways. First, the ALJ found that Jamek was late in submitting all but two of its certified payrolls. Dec. 47. Although Jamek attempts to blame its delay on a software issue that the City of St. Paul allegedly did not fix until Mr. Dumke returned from a vacation, Jamek still was late in submitting at least one certified payroll after the software issue was resolved, as the ALJ recognized and as Petitioners concede. Dec. 47; Pet. Br. 25.

Moreover, Jamek's payroll submissions were not only late—they were also inaccurate. It is undisputed, for example, that Jamek failed to include two of its employees on at least one certified payroll even though their work during the relevant weeks was reflected on internal timesheets and paystubs. Dec. 47; Pet. Br. 22. More significantly, even though Jamek certified that its employees were paid the prevailing wage rate and fringe benefits, Jamek failed to pay the applicable wage rate as described above, and Ekhaton admitted that he only paid the fringe benefits for one day in September 2015. *Id.* As the ALJ found, the payrolls that Jamek certified and submitted for October and November 2015 were not accurate. *Id.* The

ALJ thus correctly concluded that Jamek violated its duties under the DBA and Copeland Act to file timely, accurate payrolls.

III. THE ALJ CORRECTLY DETERMINED THAT JAMEK'S DEDUCTING UNION DUES FROM EMPLOYEES' PAYCHECKS VIOLATED THE COPELAND ACT.

The DBA requires that contractors pay laborers and mechanics their full wages and fringe benefits “unconditionally” and “without subsequent deduction or rebate on any account,” “regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.” 40 U.S.C. 3142(c)(1); 29 C.F.R. 5.5(a)(1)(i). Exceptions to this rule are set forth in the regulations implementing the Copeland Act. 29 C.F.R. 3.5(a)(1)(i). *Id.* Specifically, under those regulations, union initiation fees and membership dues may be deducted *only if* “a collective bargaining agreement between the contractor or subcontractor and representatives of its employees *provides for* such deductions and the deductions are not otherwise prohibited by law.” 29 C.F.R. 3.5(i) (emphasis added).

Contrary to Jamek’s arguments, its deductions for union initiation fees were not permissible because, as the ALJ found, the relevant CBA plainly did not provide for such deductions. Jamek first argues that the employees themselves authorized the deductions. Pet. Br. 26. The regulations implementing the Copeland Act, however, make clear that individual employee authorization is insufficient to make

a deduction permissible; rather, the operative CBA must affirmatively authorize a deduction of union initiation fees. 29 C.F.R. 3.5(i). Jamek then argues that the CBA's *silence* regarding such deductions renders them permissible under the Copeland Act. Pet. Br. 26. But the regulations implementing the Copeland Act clearly require that the CBA must "provide for" deductions for union fees. 29 C.F.R. 3.5(i). The permissible deductions listed in section 3.5 of the Copeland Act's regulations are exceptions to the general prohibition on deductions. If the absence of a prohibition on a deduction were enough, as Jamek appears to suggest, the default rule would be that union fees may be deducted—the opposite of the DBA's and Copeland Act's provisions, and contrary to the plain language of the controlling regulation.

Jamek also suggests that the CBA authorizes deducting initiation fees because it authorizes the deduction of "administrative dues." Pet. Br. 26. But the CBA's text actually authorizes the deduction of "administrative dues for Painters and Allied Trades District Council No. 82 in the amount stated in the By-Laws *for each hour worked or paid for.*" GX 14 at 8 (emphasis added). As the ALJ explained, the administrative dues described in the CBA are paid at an hourly rate, as opposed to the flat initiation fee that Jamek deducted from employees' paychecks. Dec. 49. Thus, as the ALJ correctly determined, the CBA provision authorizing deduction of "administrative dues" paid at an hourly rate could not reasonably be construed to

encompass a flat-rate union initiation fee. *Id.* Jamek’s deductions of union initiation fees therefore constituted a clear-cut DBA and Copeland Act violation.⁸

IV. JAMEK WAS PROPERLY DEBARRED FOR ITS AGGRAVATED AND WILLFUL VIOLATIONS OF THE DBRA.

The regulations implementing the DBRA provide that “aggravated or willful” violations of DBRA labor standards require debarment of a contractor or subcontractor “for a period not to exceed three years.” 29 C.F.R. 5.12(a)(1); *Abhe & Svoboda*, ARB Case No. 01-063, 2004 WL 1739870, at *28; *A. Vento Constr.*, WAB Case No. 87-51, 1990 WL 484312, at *3 (WAB Oct. 17, 1990).

An employer’s actions are deemed “willful” where the employer is not “merely inadvertent or negligent,” but rather engages in “intentional, deliberate, knowing violations of the labor standards provisions of the [DBRA].” *A. Vento Constr.*, 1990 WL 484312, at *3; *see also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (defining “willfulness” as meaning “that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute”). As the ARB has explained:

Under established law, a “willful” violation encompass[es] intentional disregard, or plain indifference to the statutory requirements. . . . Although mere inadvertent or negligent conduct would not warrant debarment, conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility does. Blissful ignorance is no defense to debarment.

⁸ The Administrator did not appeal, but does not concede, the ALJ’s determination that Jamek’s violation does not entitle the employees to back wages. *See supra* n.5.

Cody-Zeigler, ARB Case Nos. 01-014, 01-015, 2003 WL 23114278, at *24 (WAB Dec. 19, 2003) (quoting *L.T.G. Constr. Co.*, slip op. at 7); see also *Fontaine Bros., Inc.*, ARB No. 96-162, 1997 WL 578333, at *3 (ARB Sept. 16, 1997). Violations of the Copeland Anti-Kickback Act are also prima facie evidence of aggravated or willful violations of the DBRA. *A. Vento Constr.*, 1990 WL 484312, at *3 n.4; *Killeen Electric Co., Inc.*, WAB Case No. 87-49, 1991 WL 494685 (WAB Mar. 21, 1991).

This Board defers to an ALJ's determination that a violation is willful unless it is clearly erroneous. *Fontaine Bros.*, 1997 WL 578333, at *3 (citation omitted). Here, the ALJ correctly concluded that Jamek's DBRA violations were willful and warranted debarment for three years.⁹

In particular, the ALJ properly found that Ekhaton knew that Jamek was not paying fringe benefits as required but nevertheless filed certified payrolls that inaccurately reported fringe benefit payments. Dec. 52. Indeed, even though Dumke

⁹ As noted previously, the ALJ also concluded that Jamek should be debarred under the DBA, Dec. at 52-53, but debarment under the DBA is not warranted because the contracts at issue were subject to two DBRA (the NAHA and the Copeland Act), not the DBA. Whereas debarment under the DBRA is warranted for "aggravated or willful" violations of DBA labor standards, debarment under the DBA is evaluated under a distinct standard that considers whether a contractor has "disregarded [its] obligations" to employees. See 29 C.F.R. 5.12(a)(2); see also *Interstate Rock Prods.*, No. 15-024, 2016 WL 5868562, at *3-5 (ARB Sept. 27, 2016) (discussing differences between DBA and DBRA debarment standards). Given that the ALJ thoroughly evaluated the debarment issue under the correct "aggravated or willful" standard, the ALJ's entirely separate consideration of the "disregard of obligations" standard is of no moment. The ALJ's determination that Jamek's conduct met the DBRA standard is sufficient to support its debarment.

had informed Jamek that the fringe benefit information in Jamek's certified payrolls was inaccurate, Jamek failed to correct the errors and continued to submit inaccurate payrolls. *Id.* It is indisputable that Ekhaton knew Jamek was required to pay fringe benefits, failed to do so, and falsely certified that it had done so. As the ALJ explained, Ekhaton knew "that the payroll records required accurate fringe benefit information," yet "he continued to certify that he was making fringe benefit contributions when he knew he was not." *Id.* Jamek's failure to pay over \$15,000 in fringe benefits, coupled with the false certification that Jamek had paid those fringe benefits to its employees, plainly constituted intentional, deliberate, and knowing violations of the DBRA. *See, e.g., Cody-Zeigler*, 2003 WL 23114278, at *24; *A. Vento Constr.*, 1990 WL 484312, at *3. As Mr. Dumke testified, Jamek "displayed a contempt for the process [and the DBRA] requirements." Tr. 587.

In one of its many attempts to deflect attention from their own violations, Jamek argues that Ekhaton was unfamiliar with accounting requirements and relied on Jamek's accountant to file accurate certified payrolls. Pet. Br. 23. Ekhaton's contention that he was unfamiliar with DBRA fringe benefit obligations notwithstanding his history of fringe benefit violations and his obligation to understand applicable legal requirements, coupled with Ekhaton's admission that he entrusted preparation of certified payrolls to someone with no experience whatsoever with certified payrolls or the Copeland Act, *see id.*, reflects the type of

“purposeful lack of attention to a statutory responsibility” that warrants debarment under the “aggravated or willful” standard. *Cody-Zeigler*, 2003 WL 23114278, at *24 (quoting *L.T.G. Constr. Co.*, slip op. at 7). Moreover, Jamek cannot avoid debarment simply by blaming its agent. *See, e.g., P.B.M.C., Inc.*, WAB Case No. 87-57, 1991 WL 494688, at *7 (WAB Feb. 8, 1991) (“Board precedent does not permit a responsible official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm.”); *Camilo A. Padreda Gen. Contractor, Inc.*, WAB Case No. 87-01, 1987 WL 247050, at *2 (WAB Aug. 3, 1987) (“a partner cannot take cover behind the actions of his partners, agents or employees.”).

The ALJ also plainly was correct in concluding that Jamek willfully violated the Copeland Act by deducting union dues from employees’ paychecks. The ALJ found that Jamek was at least made aware of the problems with the deductions on October 17, 2015, but that it continued to make the deductions thereafter. Dec. 52. This violation is yet another instance in which Jamek was specifically informed of its obligations under the DBRA but intentionally refused to comply with them. Jamek attempts to excuse the violation by arguing that the deductions were actually an “advance” and that “the CBA gave no indication that employees were not allowed to advance Union initiation fees to their employees.” Pet. Br. 28. However, as the ALJ found, the fact that the CBA did not prohibit deductions for union initiation fees

“has no bearing” on whether the Copeland Act authorized them. Dec. 52. It is beyond serious dispute that the deductions at issue, far from being authorized, were prohibited under the Copeland Act’s implementing regulations. Nonetheless, as the ALJ observed, Ekhaton continued to deduct union initiation fees from employee paychecks even after he clearly knew that such deductions were not permitted. *Id.* Jamek’s attempts to make excuses for their intentional conduct only serves to underscore that the ALJ was entirely correct in finding that Jamek’s violations of the Copeland Act were willful and accordingly warranted debarment.¹⁰

Finally, Jamek’s argument that it has been “functionally debarred” during the administrative process in this case, Pet. Br. 30-31, is both inaccurate and wholly irrelevant to this Board’s review of the ALJ’s debarment determination. Jamek’s voluntary decision not to work on federal contracts for the past several years is immaterial to whether their actions were aggravated or willful and warrant debarment. The Board has generally rejected “de facto debarment” arguments of the

¹⁰ Although the ALJ focused on Jamek’s knowingly false certified payrolls and willful violations of the Copeland Act in his discussion of debarment, it is nonetheless worth noting that Jamek’s other DBRA violations plainly were willful, as well. For example, not only was Jamek fully aware that it was required to pay prevailing wages, Dec. at 4-5, 29; Tr. 1004-1006, it offers no explanation for its decision to pay apprentices at a lower rate over the last four weeks of the project. *See, e.g.*, Pet. Br. at 18. Through that decision, Jamek intentionally and deliberately reduced its workers’ pay to a rate below the prevailing wage. Further, although Jamek claims that it was unaware of its obligation to maintain a 3-to-1 ratio of journeymen to apprentices at the beginning of the project (a highly dubious assertion given that the ratio was “clearly set forth in Article 13 of the CBA” that Ekhaton signed in June 2015, Dec. at 35), Jamek admits that it was made aware of this obligation in the beginning of November, 2015, but nonetheless continued to have its apprentices work out of ratio without receiving journeyman pay rates. Dec. 35. Jamek thus knew that it was violating the DBRA by having its apprentices work out of ratio.

type raised by Jamek. *See, e.g., Marc S. Harris*, WAB Case No. 88-40, slip op. at 3 (WAB Mar. 28, 1991) (ordering three year debarment for DBRA violations despite argument that a three-year penalty in related criminal case constituted de facto debarment); *Camilo A. Padreda Gen. Contractor, Inc.*, WAB Case No. 87-01, 1987 WL 247050 (WAB Aug. 3, 1987) (two-year delay in instituting DBRA proceedings was not grounds to lessen debarment period, although shorter period ordered on other grounds); see also *Swanson Grp., Inc.*, BSCA Case No. 94-05, 1995 WL 843407 (BSCA May 31, 1995) (rejecting argument that contractor should be given “credit” for two month period between consent order approving SCA settlement and effectuation of debarment and finding this two month period reasonable); *Phoenix Paint Co.*, B-242728, 1992 WL 5591 (Comp. Gen. Jan. 2, 1992) (rejecting argument that contractor had experienced de facto debarment for six years during DBA investigation and proceedings and observing that “[t]he contractor has been free to bid on and receive government contracts during the entire period since the issue of [DBA violations] was first raised. That it has voluntarily refrained from doing so does not equate, as it suggests, to a ‘de facto debarment’”).

CONCLUSION

For the foregoing reasons, the Board should affirm the ALJ’s conclusions that Jamek violated DBRA labor standards by failing to pay prevailing wages and fringe

benefits, and the Board should either modify the ALJ's back wage award or remand this matter to the ALJ for a proper calculation of back wages owed. The Board also should affirm the ALJ's conclusion that Jamek violated the Copeland Act by failing to file timely, accurate payrolls and by deducting union initiation fees from employees' paychecks. Finally, the Board should affirm the ALJ's determination that Jamek's violations warrant a three-year debarment under 29 C.F.R. 5.12(a)(1).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This document complies with the word limit of FRAP 32(a)(7)(B)(i) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 10,260 words.

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