U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

FIVE STAR AUTOMATIC FIRE PROTECTION LLC,

RESPONDENT.

ARB CASE NO. 2023-0051

ALJ CASE NO. 2019-DBA-00004
ALJ PATRICK M. ROSENOW

DATE: August 25, 2025

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Megan E. Guenther, Esq., Jonathan T. Rees, Esq., Sarah M. Roberts, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
Robert L. Blumenfeld, Esq.; *Mendel Blumenfeld & Pulido, PLLC*; El Paso, Texas; Michael T. Milligan, Esq.; *Law Office of Mike Milligan*; El Paso, Texas

Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN, and BURRELL, Administrative Appeals Judges

DECISION AND ORDER AFFIRMING IN PART AND VACATING AND REMANDING IN PART

This matter arises under the Davis-Bacon Act (DBA),[1] the Contract Work Hours and Safety Standards Act (CWHSSA),[2] and their implementing regulations.[3] Respondent Five Star Automatic Fire Protection worked as a subcontractor installing a fire protection system in the medical clinic at Holloman Air Force Base in Otero County, New Mexico.[4] An Administrative Law Judge (ALJ) found Respondent misclassified Complainants'[5] position and failed to pay them prevailing wages and benefits in violation of the DBA, and that Respondent owed Complainants $71,285.49 in back wages.[6] The ALJ also ordered that Respondent be debarred from receiving federal contracts for three years.[7] Respondent appealed to the Administrative Review Board (Board). For the following reasons, we affirm in part and vacate and remand in part.

BACKGROUND

Respondent is a fire sprinkler installation business co-owned by Luis and Veronica Palacios.[8] Respondent has worked on DBA projects since its inception, and both Luis and Veronica have relevant experience with the DBA.[9]

Respondent has three categories of sprinkler fitting employees based on their skills and experience. These categories include laborers, who are new hires who are inexperienced and work under supervision, supervisors or journeyman sprinkler fitters, and apprentices. Respondent's system attempted to assign one laborer to each foreman so that laborers could learn about the work and perform certain tasks that apprentices also perform.[10] Foremen are responsible for teaching laborers.[11] After approximately one year, laborers may become eligible to participate in

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1 40 U.S.C. § 3141 et seq.

2 *Id.* § 3701.

3 29 C.F.R. Parts 1, 3, 5-7.

4 Decision and Order (D. & O.) at 2-4.

5 Complainants are Jesus Torres, Christopher Garcia, and Miguel Garcia.

6 *Id.* at 18.

7 *Id.*

8 *Id.* at 3.

9 *Id.*

10 *Id.* at 3-4.

11 *Id.* at 4.

Respondent's apprenticeship program.[12] After completing the program, apprentices become journey sprinkler fitters.[13]

On August 19, 2014, the United States Army Corps of Engineers awarded a prime contract to Gilbane for a replacement medical clinic at Holloman Air Force Base in Otero County, New Mexico.[14] The contract was valued at $51,958,664.00.[15] On December 22, 2014, Gilbrane contracted with Respondent to furnish, install, and complete all fire protection systems with a subcontract that was valued at $462,746.[16] The subcontract left staffing decisions up to Respondent.[17] Both the contract and subcontract were subject to the provisions of the DBA.[18]

The Wage Determination did not contain a sprinkler fitter job classification.[19] The closest classification was the pipefitter classification.[20] The Department of Labor's (DOL) Wage & Hour Division (WHD) determined that the local union prevailed regarding the pipefitter classification and wage rate, with a prevailing wage rate of $31.14 per hour and $12.42 per hour in fringe benefits.[21] The prevailing wage rate for common laborers listed in the Wage Determination was $13.61 per hour in wages and $3.89 per hour in fringe benefits.[22]

From June 5, 2016 to August 13, 2017, Respondent assigned four employees to work on the project, which included Adrian Cabral, a journeyman sprinkler fitter and foreman who was paid under the pipefitter job classification, and three general laborers: Jesus Torres, Christopher Garcia, and Miguel Garcia.[23] Respondent employed Jesus from July 2015 to March 2017, Christopher from February 2016 to

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12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* As discussed later, while the Wage Determination contained a "common laborer" position, this project was under a Collective Bargaining Agreement, which did not include a "common laborer" position. *Id.* at 4, 8-10, 16.

23 *Id.* at 5.

May 2017, and Miguel from November 2015 to May 2017. On May 3, 2017, Respondent enrolled Christopher and Miguel in the apprenticeship program.[24]

In October 2017, the WHD began investigating Respondent for the period of June 5, 2016 to August 13, 2017.[25] On August 1, 2018, the WHD issued a Notice of Determination finding that Respondent misclassified the work that Torres and the Garcias performed and ordered Respondent to pay $71,285.49 in back wages and be debarred.[26]

Respondent objected and requested a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Law Judges (OALJ).[27] A hearing was held across the following dates: February 23-25, 2021; April 14-16, 2021; and April 30, 2021.[28] Eleven witnesses testified, and the ALJ admitted Joint Exhibits (JX) 1-74 and 76-79.[29] At the hearing, Respondent moved to admit a final as-built drawing that Respondent contended reflected any changes made to the original construction design.[30] The ALJ designated the document as JX-80 and stated that he was not going to rule on whether it was admitted or not until WHD reviewed it.[31]

On August 4, 2023, the ALJ issued a D. & O. finding that Respondent misclassified Complainants' positions and failed to pay them prevailing wages and benefits in violation of the DBA.[32] The ALJ opined that his findings were based on the testimony of the eleven witnesses and JX 1-74 and 76-79.[33]

The ALJ found that Complainants regularly unloaded pipes and other materials from trucks and placed them in staging areas, moved pipes and other materials from the first staging area and repositioned them to a different one, and moved the pipes and the materials into the needed locations; screwed escutcheons into the ceiling holes pre-cut by others; used caulking guns to seal spaces where they existed; held pipes while Cabral installed, hung, or re-cut or re-grooved them; helped prepare and install hangers by climbing a ladder and securing a metal bar

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24 *Id.*

25 *Id.* at 2.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Transcript (Tr.) at 1399-1403.

31 *Id.* at 1403-04.

32 D. & O. at 18.

33 *Id.* at 2. The ALJ did not address whether JX-80 was admitted.

with a screw, then placing a hanger on a beam and tightening a bolt; installed brackets and secured sprinkler heads by hand and snapped together flex heads; walked and looked for water dripping during pressure testing; and spent 15-20 minutes at the end of each day sweeping and cleaning up.[34] The ALJ further found that, on occasion, Complainants worked for extended periods without Cabral's direct oversight and in a different area of the project; hung lines; pressure tested pipes; and cut, grooved, and threaded pipes.[35]

Respondent had contended that some of these tasks were simple and did not require specialized talent, knowledge, or training, and thus fell under the general laborer category.[36] However, the ALJ determined that "virtually all of Complainants' work fell into the pipefitter category" and that the collective bargaining agreement (CBA) and Wage Determination provided notice that workers who performed these tasks must be paid at the pipefitter rate.[37] Thus, the ALJ concluded that Respondent misclassified Complainants' positions and ordered Respondent to pay Complainants $71,285.49 in back wages.[38]

The ALJ also ordered that Respondent be debarred for three years.[39] The ALJ found that Respondent demonstrated "at least gross negligence or willful blindness" based on the following factors: (1) Respondent's preexisting familiarity with the DBA, (2) Complainants' signing into work with the incorrect classification, and (3) Cabral's instruction to Complainants to drop their questions about their pay rate.[40]

Respondent petitioned the Board to review the D. & O.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the DBA and CWHSSA.[41] The Board's review of the ALJ's decision "is in the nature of an appellate

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34 *Id.* at 14-15.

35 *Id.* at 15.

36 *Id.* at 16.

37 *Id.*

38 *Id.* at 18.

39 *Id.*

40 *Id.*

41 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

proceeding," and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances."[42] Under this standard of review, the Board "will assess the ruling to determine whether it is consistent with the applicable statute and regulations, and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA."[43]

DISCUSSION

Upon review of the ALJ's D. & O., the parties' arguments on appeal, and the record, the Board concludes that Respondent violated the DBA by misclassifying Complainants' positions. However, the Board finds that the ALJ did not fulfill his duty of explanation in finding that Respondent acted with gross negligence that would justify a three-year debarment. Accordingly, we affirm the ALJ's D. & O. in part and vacate and remand in part for the reasons that follow.[44]

1. Respondent Violated the DBA

The Davis-Bacon Act requires the payment of locally prevailing wage rates and fringe benefits to laborers and mechanics working on Federal contracts in excess of $2,000 for the construction, alteration, or repair of public buildings and public works.[45] As the Supreme Court has recognized, the DBA is "a minimum wage law designed for the benefit of construction workers."[46]
The purpose of the DBA is "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area."[47]

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[42] 29 C.F.R. § 7.1(e); *Jamek Eng'g Servs., Inc.*, ARB No. 2020-0043, ALJ No. 2017-DBA-00021, slip op. at 7 (ARB June 23, 2021) (quoting *Terrebonne Par. Juv. Just. Ctr. Complex*, ARB No. 2017-0056, slip op. at 3 (ARB Sept. 4, 2020) (quoting 29 C.F.R. § 7.1(e))).

[43] *Id.* (quoting *Interstate Rock Prods., Inc.*, ARB No. 2015-0025, ALJ No. 2013-DBA-00010, slip op. at 9 (ARB Sept. 27, 2016)).

[44] In addition, Respondent contends that the ALJ admitted JX-80 but failed to address it in the D. & O. Respondent's (Resp.) Brief (Br.) at 29. Respondent contends that this exhibit demonstrates that Complainants inflated the number of arm-over devices they installed. *Id.* It is unclear from the record whether the ALJ admitted JX-80. On remand, we instruct the ALJ to determine whether JX-80 was admitted and, if so, correct the record. However, for the reasons that follow, we find that Respondent's arguments pertaining to JX-80 are not controlling.

[45] *See* 40 U.S.C. § 3142.

[46] *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954).

[47] *Dist. Council of Iron Workers of the State of Cal. v. Adm'r, Wage & Hour Div., U.S. Dep't of Lab.*, ARB No. 2020-0035, slip op. at 2 (ARB July 26, 2022) (quoting *Univs. Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981)).

To effectuate the statutory objectives of the DBA, the WHD determines the prevailing wage rates for various job classifications and publishes these rates in documents known as "wage determinations."[48] To determine the prevailing wage, the WHD conducts a prevailing wage survey program in the area in which the work is to be performed, and derives DBA prevailing wage rates from survey information voluntarily provided by responding contractors, contractors' associations, labor organizations, public officials, and other interested parties.[49] The prevailing wage rates contained in the wage determinations derive from rates prevailing in the geographic area where the work is to be performed or from rates applicable under collective bargaining agreements.[50] Those rates are based on wages paid to the majority of laborers in corresponding classifications on similar projects in the area.[51]

When, as here, an employer is alleged not to have paid employees for the hours worked, we apply a burden-shifting framework.[52] The WHD bears the initial burden of proving that employees performed work on the DBA project for which they were improperly compensated.[53] To satisfy its burden, the WHD must: (1) show that employees performed work for which they were improperly compensated and (2) produce "sufficient evidence to show that the amount and extent of that work as a matter of just and reasonable inference."[54] Once WHD has satisfied its burden, the burden shifts to the employer to demonstrate either the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the [WHD]'s evidence."[55] To satisfy its burden, the employer must submit evidence that "(1) is based on individualized records[] and (2) fully accounts for the work hours in question, consistent with the project as a whole."[56] If the employer fails to carry this burden,

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48 40 U.S.C. § 3142(b); 29 C.F.R. § 1.3.

49 *See* 29 C.F.R. §§ 1.1–1.7.

50 40 U.S.C. § 3142(b); 29 C.F.R. § 1.3.

51 *Id.* at § 1.2(a)(1).

52 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Coleman Constr. Co.*, ARB No. 2015-0002, ALJ No. 2013-DBA-0004, slip op. at 11-13 (ARB June 8, 2016) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

53 *Id.* at 11.

54 *Id.*

55 *Id.*

56 *Id.*

employees may be awarded damages, even if the amount of such damages is approximate.[57]

The ALJ found that Respondent misclassified Complainants' positions and that therefore Complainants were not properly compensated for their work.[58] The ALJ determined that there was no real dispute that the Complainants performed the following tasks:

> [U]nloaded pipes and other materials and placed them based on the numbering system as set forth in the blueprints; screwed escutcheons into the ceiling holes; used caulking guns to seal spaces; held pipes while Cabral installed, hung, or re-cut or re-grooved them; climbed ladders and secured a metal bar with a screw; placed hangers on a beam and tightened bolts; and installed brackets and secured sprinkler heads by hand and snapped together flex heads.[59]

The ALJ found that, while some or all of these tasks may be simple and did not require specialized knowledge or training, "virtually all of Complainants' work fell into the pipefitter category."[60] The ALJ also found that the record clearly demonstrated that the CBA and Wage Determination gave Respondent notice that workers who performed these tasks must be paid at the pipefitter rate.[61] The ALJ further found that the existence of the "utility worker" category in the CBA, along with the fact that it was highly limited and seldom used, was consistent with the intention of the CBA that workers who performed the tasks Complainants did were to be paid as pipefitters.[62] Thus, the ALJ concluded that Respondent violated the DBA by misclassifying Complainants.[63] The ALJ found WHD's calculations of underpayment to be reasonable and ordered Respondent to pay $71,285.49 in back wages.[64]

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57 *Id.*

58 D. & O. at 16.

59 *Id.*

60 *Id.*

61 *Id.* Because the Wage Determination did not contain a "sprinkler fitter" job classification, the ALJ determined that "pipefitter" was the appropriate classification because it was the closest job classification to a sprinkler fitter. *Id.* at 4.

62 *Id.* at 16.

63 *Id.*

64 *Id.* at 16, 18.

Respondent contends that the ALJ erred in finding that the work Complainants performed fell under the pipefitter classification instead of the general laborer classification.[65] Respondent contends that the ALJ erred in relying on testimony of business agents, rather than industry experts' testimony on established construction industry practices.[66] Respondent also contends that the ALJ's findings are contrary to the DOL's definitions of the tasks performed.[67] Respondent asserts that the tasks Complainants performed fall under the "laborer" or "helper" classification, not the "pipefitter" classification.[68]

We find that Respondent misclassified the Complainants' positions. The purpose of the DBA is to ensure that contractors pay locally accepted wages.[69] The project at issue was covered by a CBA.[70] Although the Wage Determination included a general laborer position, the CBA did not.[71] Rather, the CBA included "utility worker" and "pipefitter" classifications.[72] Notably, the "utility worker" position is limited to a period of six months, may not include employees who are learning a trade, and is limited to only general tasks related to the pipe trade, such as truck driving, picking up and delivering materials, and removing scrap pipe.[73] Utility workers also could not be used to replace apprentices.[74] In contrast, the CBA's "pipefitter" classification covers both journeymen and apprentices who perform the following tasks: "unloading, carrying, and organizing pipes and materials; using blueprints or plans; preparing and installing hangers; installing pipe; using a power machine; cutting, grooving pipe, and threading pipe; installing brackets for sprinkler heads and sprinkler heads; hydrostatic testing; caulking; installing escutcheons; and cleaning."[75] After a thorough review of the record, we agree with the ALJ that the work the Complainants performed fell into the "pipefitter" classification. As the ALJ found, the Wage Determination did not contain a "sprinkler fitter" job classification and we agree that the "pipefitter" classification is the most similar job classification.

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65 Resp. Br. at 33.

66 *Id.*

67 *Id.* at 37.

68 *Id.* at 36.

69 *See* 40 U.S.C. § 3142.

70 D. & O. at 8.

71 *Id.*

72 *Id.*

73 *Id.* at 9.

74 *Id.*

75 *Id.* at 8.

Thus, we find that the WHD met its burden by establishing that the Complainants were misclassified and paid the incorrect wage rate. As such, the burden shifted to Respondent to demonstrate either the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the [WHD]'s evidence."[76] Respondent has not challenged the calculation of back wages.[77] We find that WHD's calculation is reasonable and affirm the ALJ's order that Respondent pay Complainants $71,285.49 in back wages.

2. The ALJ did not fulfill his duty of explanation in finding that Respondent acted in gross negligence to justify a three-year debarment

Contracting with the government is a privilege, not a legal right. In this matter the government contract requires the contractor to pay employees according to the DBA and CWHSSA, their implementing regulations, and the Wage Determination made by the Secretary of Labor. Whenever a contractor or subcontractor is found to have "disregarded their obligations" to workers or subcontractors under the Wage Determination, such contractor, subcontractor, or responsible officer will be debarred for a period of three years.[78] Once grounds for debarment have been established, the three-year period is mandatory, "without consideration of mitigating factors or extraordinary circumstances."[79]

The recognized purpose underlying the device of debarment is to be a remedial measure rather than a punitive one "so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act."[80] While effective, the courts have recognized that debarment can have drastic results for the contractor including a "sudden contraction of bank credit, adverse impact on market price or share of listed stock, if any and critical uneasiness of creditors generally to say nothing of

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76 *Coleman Constr. Co.*, ARB No. 2015-0002, slip op. at 11 (quoting *Mt. Clemens Pottery*, 328 U.S. at 688).

77 *See* Resp. Br., Resp. Reply Br.

78 29 C.F.R. § 5.12(a).

79 *Interstate Rock Prod., Inc.,* ARB No. 2015-0024, ALJ No. 2013-DBA-00010, slip op. at 4 (ARB Sept. 27, 2016) (quoting *In re Thomas & Sons Bldg. Contractors*, ARB No. 2000-0050, ALJ No. 1996-DBA-00037, slip op. at 4 (ARB Aug. 27, 2001)).

80 *Id.* at 10 (quotation omitted).

'loss of face' in the business community."[81] Debarment has long been considered the "death penalty" of procurement law as it can cut off the lifeblood of an employer or contractor's business.[82] Given the severe impact of debarment, it is appropriate that agency impositions of debarments as a penalty be carefully reviewed.

Violations of the DBA by themselves do not constitute disregard of an employer's obligations within the meaning of the law.[83] To support debarment, the evidence must establish a level of culpability beyond negligence.[84] Disregard of DBA obligations must involve "some element of intent."[85] The underpayment of prevailing wages, coupled with the falsification of certified payrolls, have constituted disregard of a contractor's obligations to employees and, therefore, are sufficient to establish "intent" under the DBA debarment provisions.[86] In addition, an employer's bad faith and an employer's gross negligence regarding compliance have also been found to constitute disregard of DBA obligations.[87] Intentional failure to look at the law is also sufficient.[88]

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81 *See Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Chief Judge Warren Burger, then a judge for the D.C. Circuit, first set the judicial stage for the propriety of debarment by recognizing that *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), held that "no citizen has a 'right,'" in the sense of a legal right, to do business with the government. However, the court found "that cannot mean that the government can act arbitrarily either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts." *Gonzales*, 334 F.2d at 574.

82 *See* Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547 (2009); Daniel E. Schoeni, *Personal Debarment for Non-Distributive Corporate Misconduct: On the Efficacy of Debarring the Individuals from Government Contracts for Collective Wrongdoing*. 46 PUB. CONT. L.J. 51 (2016).

83 *Interstate Rock Prods., Inc.*, ARB No. 2015-0024, slip op. at 4, 4 n.9 ("DBA violations do not, by themselves, constitute a disregard of an employer's obligations within the meaning of the law- to support debarment, the evidence must establish a level of culpability beyond negligence.") (citing *NCC Elec. Servs., Inc.,* ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 8 (ARB Sept. 30, 2015) ("[a]n innocuous mistake may trigger a violation of the DBA, but such mistakes, especially those that do not result in harm to employees, do not necessarily evidence an employer's disregard of its DBA obligations").

84 *Id.*

85 *Id.* at 4-5 (citation omitted).

86 *Id.* at 5.

87 *Id.*

88 *Id.*

The ALJ acknowledged that Respondent had a clean history and cooperated in the investigation.[89] However, the ALJ found these were "matters in extenuation and mitigation rather than relevant to the level of negligence related to the misclassification."[90] The ALJ concluded that three factors supported "at least gross negligence or willful blindness" that justified debarment: (1) Respondent's preexisting familiarity with the DBA, (2) Complainants' signing into work with the incorrect classification, and (3) Cabral's instruction to Complainants to drop their questions about their pay rate.[91]

Respondent contends that the ALJ erred in ordering that Respondent should be debarred for three years.[92] Respondent asserts that debarment is not a strict liability result of any finding of a DBA violation but rather depends upon an employer's intent and must rise to a level of culpability beyond negligence.[93] Respondent contends that the factors the ALJ relied on in finding gross negligence do not justify a three-year debarment.[94]

We agree and find that the ALJ did not fulfill his duty of explanation in finding that Respondent acted in gross negligence to justify a three-year debarment.

An ALJ has a duty to adequately explain why he credited certain evidence and discredited other evidence.[95] An ALJ "need not address every aspect of [a party's claim] at length and in detail," but the findings "must provide enough information to [assure] the Court that he properly considered the relevant evidence underlying [the party's] request."[96] The ALJ must explain the relevant evidence in a manner that allows the Board to understand "what the ALJ did and why he did it."[97]

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89 D. & O. at 18.

90 *Id.*

91 *Id.*

92 Resp. Br. at 37.

93 *Id.* at 40.

94 *Id.*

95 5 U.S.C. § 557(c)(3)(A). Specifically, the ALJ must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Id.*

96 *Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 10-11 (ARB June 18, 2024) (quoting *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013)).

97 *Id.* at 28 (quoting *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 30 (ARB Dec. 15, 2023)).

The ALJ's first factor supporting debarment is Respondent's familiarity with the DBA. However, the ALJ failed to connect Respondent's familiarity with the DBA with gross negligence or willful blindness. As the ALJ found, Respondent has worked on DBA projects since its inception, and both of its owners, Luis and Veronica Palacios, have relevant experience with the DBA.[98] An intentional failure to look at the law could support a finding of gross negligence or willful blindness.[99] However, the ALJ has not specifically found an intentional failure to look at the law or the CBA. Without a more thorough analysis regarding Respondent's DBA history, we find that the ALJ's analysis is insufficient to support a finding of gross negligence or willful blindness.

Next, the ALJ noted that WHD stated that Respondent directed Complainants to sign-in as apprentices and later found that Complainants signing into work under the wrong classification demonstrated at least gross negligence.[100] However, the ALJ did not indicate whether he found that Respondent directed the workers to sign-in as apprentices, and the record contains conflicting evidence.

The record shows that Jesus Torres, Christopher Garcia, and Miguel Garcia signed-in as "apprentice."[101] However, the record contains conflicting evidence as to whether Respondent directed them to sign-in as apprentices, or whether they did that of their own volition. Christopher Garcia testified that Adrian Cabral, a journeyman, told him to sign-in as an apprentice.[102] Similarly, Miguel Garcia testified that Cabral and Jorge Cobian, a Five Star superintendent, directed them to sign-in as apprentices.[103] However, Jesus Torres's testimony contradicts the Garcia brothers. Torres testified that, while Cabral and Cobian called him an "apprentice," he thought it was because it was a more professional way of referring to him.[104] He further stated that he switched from signing-in as "sprinkler" to "apprentice" on his own, and that the Garcias followed after him.[105] In addition, Cabral testified that he denied instructing any of the three laborers to sign in as apprentices.[106] When Cabral was questioned whether he signed Miguel Garcia in as an apprentice one day when Miguel was unable to sign-in, Cabral stated that he did

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98 D. & O. at 3.

99 *Interstate Rock Prods., Inc.*, ARB No. 2015-0024, slip op. at 5.

100 *Id.* at 17-18.

101 JX 23 at DOL 341, 2254, 2307, 2575, 2663, 2734, 2834.

102 Tr. at 183.

103 *Id.* at 440-41.

104 *Id.* at 566-70.

105 *Id.*

106 *Id.* at 300.

not read it as "apprentice," but rather as "ayudante," or "helper."[107] The ALJ has not resolved this conflicting evidence. Based on this discrepancy and the ALJ's lack of analysis, it is unclear what Respondent's intent was and whether Complainants signing-in as apprentices rises to the level of gross negligence or willful blindness.

Lastly, the ALJ also noted that WHD argued that Cabral's testimony that he warned the Garcias that taking the matter of their pay rates to Cobian could get them taken off the job supported debarment.[108] The ALJ then found that this instruction demonstrated gross negligence.[109] However, the ALJ neither discussed the factual circumstances surrounding this claim, nor indicated what evidence he considered when reaching this conclusion apart from citing WHD's assertion.

In WHD's post-hearing brief before OALJ, WHD contended that Cabral testified that he told the Garcia brothers not to discuss their pay rate with Cobian or else they would be pulled from the job.[110] Both Garcia brothers testified that they approached Cabral about their pay and that he instructed them not to raise the issue with Cobian or he would pull them from the job.[111] However, WHD's third transcript citation does not pertain to this issue.[112] On the contrary, Cabral testified that neither Torres nor the Garcia brothers raised the issue of their pay with him.[113] The ALJ also failed to resolve this discrepancy, and thus it is unclear what Respondent's intent was and whether this rose to gross negligence or willful blindness.

Thus, we find that the ALJ did not fulfill his duty of explanation in finding that Respondent acted in gross negligence or willful blindness.

Accordingly, we **AFFIRM** the ALJ's finding that Respondent violated the DBA by misclassifying Complainants and owes Complainants $71,285.49 in back wages, **VACATE** the ALJ's order that Respondent be debarred for three years, and **REMAND** for further consideration consistent with this opinion.

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107 *Id.* at 115-16.

108 D. & O. at 18.

109 *Id.*

110 Administrator's Post-Hearing Brief at 37.

111 Tr. at 187-88, 451-53.

112 *Id.* at 1173.

113 *Id.* at 298.

SO ORDERED.

ELLIOT M. KAPLAN
Administrative Appeals Judge

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge