



In the Matter of:

ADMINISTRATOR, WAGE  
& HOUR DIVISION, U.S.  
DEPARTMENT OF LABOR

ARB CASE NO. 2017-0055

ALJ CASE NO. 2014-SCA-00011

COMPLAINANT,

DATE: June 12, 2020

v.

JOEL HOLSTAD and WAYNE HOLSTAD,  
Individually, and NORTHWEST TITLE  
AGENCY, INC.,

RESPONDENTS.

Appearances:

*For the Administrator, Wage and Hour Division:*

Nicholas C. Geale, Esq.; Jennifer S. Brand, Esq.; William C. Lesser,  
Esq.; Jonathan T. Rees, Esq.; and Sarah J. Starrett, Esq.; U.S.  
*Department of Labor, Office of the Solicitor; Washington, District of  
Columbia*

*For Respondent Wayne Holstad:*

Frederic W. Knaak, Esq.; *Holstad and Knaak, PLC; St. Paul,  
Minnesota*

*For Respondent Northwest Title Agency, Inc.:*

Wayne B. Holstad, Esq.; *Holstad and Knaak, PLC; St. Paul, Minnesota*

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge,*  
James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

## DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C. § 6701 *et seq.* (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2018). On June 30, 2017, Northwest Title Agency, Inc. and Wayne Holstad (Respondents) filed a petition with the Administrative Review Board (ARB or Board) to review the Administrative Law Judge's (ALJ) May 23, 2017 Decision and Order (D. & O.). For the reasons set forth below, we affirm the ALJ's D. & O.

### BACKGROUND

Northwest Title is an insurance title firm that provides title searches and settlement services. Wayne Holstad purchased Northwest Title in 2006 and was, among many positions, the company's Chief Executive Officer, President, and Chairman, and was its sole shareholder. D. & O. at 22-23, 38. Joel Holstad, Wayne's brother, served as the company's Chief Operating Officer and Chief Financial Officer in 2011 and 2012. *Id.* at 5, 24.

On or about April 12, 2010, the United States Department of Housing and Urban Development (HUD) awarded Contract Number C-DEN-02375 (Contract) to Northwest Title, to "provide real estate property sales closing services for single family properties owned by" HUD. The Contract was in effect from April 19, 2010, through April 21, 2012, and stated that it was subject to the SCA and its implementing regulations. Government Exhibit (GX) 1 at 1, 3, 38.

The Contract incorporated SCA Wage Determination 2005-2287, Revision 8, which described the prevailing minimum wages and fringe benefits due under the SCA to each employee performing work on the Contract. GX 3. The Wage Determination required Northwest Title to provide three types of fringe benefits in addition to the required hourly wage: (1) health and welfare benefits of \$3.35 per hour, (2) vacation benefits of two to four weeks paid vacation, depending on length of service, and (3) at least ten paid holidays. D. & O. at 5, 9-10, citing GX 3. In March 2011, HUD incorporated an updated wage determination, which increased the applicable wage and fringe benefit rates. D. & O. at 9, citing GX 4 (SCA Wage Determination 2005-2287, Revision 10) and 5 (Amendment of Solicitation / Modification of Contract).

Valerie Ferris Jacobson, a Wage and Hour Division investigator, began investigating Northwest Title's compliance with the SCA in April 2012. During the investigation Northwest Title produced payroll records from 2010 through 2012, but those records did not contain sufficient information about employee classifications,

hours worked, and fringe benefit payments the company was required to maintain pursuant to the SCA. The company also produced health insurance invoices but those documents only showed that it had paid for insurance covering November and December 2011. Jacobson was unable to verify that Northwest Title had posted or provided to employees information about the prevailing wage and fringe benefit requirements of the SCA. D. & O. at 10-11, 13, 15, 26; GX 33 (Payroll Journal).

After completing her investigation Jacobson concluded that Northwest Title violated the SCA by failing to pay health and welfare fringe benefits, or cash payments in lieu of such benefits, and by failing to keep and make available the required records of employee wages, benefits, and hours worked. D. & O. at 8-10, 13-15, 26, 44. She calculated the amount of unpaid health and welfare benefits due to each of ten employees who performed work on the HUD contract at \$70,243.04 for the period from May 15, 2010 to May 5, 2012. That amount was later corrected to \$67,893.78 to account for the benefits of one employee not included in the Complaint. GX 9 (Summary of Unpaid Wages) and 10 (Fringe Benefits Wage Transcription and Computation Worksheet); D. & O. at 30.

Following the investigation, the Administrator filed a complaint against Northwest Title, Wayne Holstad, and Joel Holstad, alleging that they violated the SCA by failing to pay employees the minimum wages and fringe benefits required by the SCA, failing to maintain records of hours worked and wages and benefits paid to the employees, and failing to notify those employees of the compensation and fringe benefits to which they were entitled under the SCA. GX 18 (Complaint). The Complaint also requested debarment of Wayne Holstad, Joel Holstad, and Northwest Title because of their violations of the SCA. *Id.*

On July 18, 2016, Joel Holstad, in his individual capacity, entered into a settlement agreement with the Administrator. Joel Holstad agreed to pay \$40,000, which was credited toward the employees' back wages, and to forego entering into any contracts with the United States government for a period of three years. D. & O. at 4-5; *see* ALJ's Order on Claims against Respondent Joel Holstad. The agreement resolved all claims against Joel Holstad and resulted in dismissal of the back wage portion of the Complaint. D. & O. at 5. The ALJ held a hearing on the remaining claims on August 23 and 24, 2016. Wayne Holstad, Joel Holstad, Jacobson, and two former Northwest Title employees testified at the hearing.

The ALJ concluded that Northwest Title and Wayne Holstad failed to pay required fringe benefits, failed to maintain and make available required pay and time records, and failed to provide or post notices of the required compensation at the worksite, in violation of the SCA. D. & O. at 27-37. He found them liable for \$67,893.78 in unpaid health and welfare benefits, rejected their claims to various offsets, and rejected their argument that the Complaint is barred by the statute of limitations. *Id.* at 28-35. He also ordered that Northwest Title and Wayne Holstad

be debarred for three years because they were the “parties responsible” for the SCA violations and they failed to establish the “unusual circumstances” necessary to warrant relief from debarment. *Id.* at 37-45.

### **JURISDICTION AND STANDARD OF REVIEW**

The ARB has jurisdiction to hear and decide appeals from ALJ decisions and orders concerning questions of law and fact arising under the SCA. 29 C.F.R. §§ 6.20, 8.1(b)(1), (6). The Secretary of Labor has delegated to the Board authority to issue agency decisions under the SCA. 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). The ARB’s review is in the nature of an appellate proceeding. 29 C.F.R. §§ 8.1(b)(1), (6). In review of final determinations other than wage determinations, the Board may affirm, modify, or set aside, in whole or in part, the decision under review and is authorized to modify or set aside the ALJ’s findings of fact only where they are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b).

### **DISCUSSION**

The SCA requires that employees working on covered Government service contracts be paid prevailing hourly wages and fringe benefits, including holiday pay, as determined by the Secretary of Labor. 41 U.S.C. §§ 6703(1)–(2); 29 C.F.R. § 4.6(b)(1). Workers are entitled to pay at the SCA wage rate for each hour worked in the performance of an SCA-covered contract. 41 U.S.C. § 6703(1)–(2); 29 C.F.R. § 4.178. The SCA requires contractors to provide notice of the required minimum wage and fringe benefits to employees or to post such a notice in a prominent place at the worksite. 41 U.S.C. § 6703(4); 29 C.F.R. §4.6(e).

Because this entitlement to SCA compensation is based on the hours worked on a covered contract, contractors have an affirmative obligation to make and maintain accurate records of the “number of daily and weekly hours so worked by each employee.” 29 C.F.R. §§ 4.6(g)(1)(iii), 4.178, 4.185. A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the provisions of the SCA, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor. 29 C.F.R. §§ 4.188(b)(4), 4.101(g), 4.191(a). A contractor or party responsible that violates the SCA is liable for, among other things, “underpayment of compensation due any employee” who is performing work under a covered contract, 41 U.S.C. § 6705(a), and except in unusual circumstances, is subject to a three-year period of debarment. 41 U.S.C. § 6706.

The record supports the ALJ’s findings of fact and conclusions of law. Respondents failed to pay the minimum hourly wages and health and welfare benefits its employees were entitled to under the SCA. D. & O. at 35. They also

failed to maintain records showing the correct work classifications, hours worked, amounts of health and welfare fringe benefits provided, or cash equivalents allegedly paid separate from and in addition to the required wages under the SCA. *Id.* at 36. Respondents raise five issues on appeal, none of which compels us to reverse the ALJ's rulings.

First, they argue that the ALJ erred by refusing to consider “wages paid in excess of the Service Contract Act minimum wage requirement as a ‘cash equivalent’ to satisfy the benefits requirement” of the SCA. Petitioner’s Brief at 5. An employer can satisfy its fringe benefit obligations by providing “equivalent or differential payments in cash” to its employees but it must “keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.” 29 C.F.R. §§ 4.170(a), 4.177(a); *see, e.g., United Kleenist Organization Corp.*, ARB No. 2000-0042, ALJ No. 1999-SCA-00018, slip op. at 6-8 (ARB Jan. 25, 2002). The ALJ considered the evidence and found that Respondents failed to provide payroll records to support their assertion that the fringe benefits were included in employee wages. D. & O. at 32-33. Respondents contend that a “[l]ack of cooperation from former employees and lack of records due to the same reason hampered [Respondents] from proving precisely the amount and recipient of benefits paid by the company.” Petitioner’s Brief at 6. But that lack of cooperation does not absolve Respondents of their obligations under the SCA.

Second, Wayne Holstad argues that he did not “manage[] the HUD contract once it was put into place” and therefore is “not personally liable as a ‘responsible person’ under any applicable federal or state court precedent.” Petitioner’s Brief at 10, 13. This is factually and legally incorrect. The ALJ did not accept Wayne Holstad’s assertion that he surrendered control of the company to Joel Holstad but instead found that Wayne Holstad directed and supervised Northwest Title’s performance under the HUD contract, including the labor and employment policies, and maintained sufficient control over the company and its operations. D. & O. at 38-42. The SCA regulations require compliance not only by those who supervise employees working on the contract but also corporate officers. 29 C.F.R. §4.187(e)(1) (“The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty.”); *see, e.g., Adm’r, Wage and Hour Div. v. Puget Sound Envtl.*, ARB No. 2014-0068, ALJ No. 2012-SCA-00014, slip op. at 9 n.32 (ARB May 4, 2016). We reject Respondent’s assertions that the ALJ’s findings regarding Wayne Holstad’s liability were based on hearsay testimony and inapplicable to this case under Minnesota law prohibiting “piercing the corporate veil.” *See* Petitioner’s Brief at 10-12.

Third, Respondents assert that funds owed to them by HUD and paid by Joel Holstad pursuant to his settlement agreement should be “offset against” the award to the employees. *Id.* at 15-16. But Respondents cannot subtract the back wages due

from Joel Holstad from the unpaid health and welfare benefits that are the subject of the Complaint and due pursuant to the D. & O. And any monetary relief Respondents may be entitled to from other federal agencies are not relevant to this case.

Fourth, Respondents contend that the Complaint is untimely because the two-year statute of limitations in the Portal-to-Portal Act, 29 U.S.C. § 255, is applicable to this case. *Id.* at 16. However, that statute does not apply to proceedings under the SCA. *See, e.g., Cody-Zeigler Inc. v. Adm’r, Wage and Hour Div.*, ARB Nos. 2001-0014, -0015, ALJ No. 1997-DBA-00017, slip op. at 32-34 (ARB Dec. 19, 2003). Respondents also contend that a Minnesota state statute of limitations should apply, but the cases they cite do not establish that Minnesota law is controlling in this case. *See* Petitioner’s Brief at 16-21 (and cases cited therein).<sup>1</sup>

Finally, Respondents argue that their debarment “is inappropriate because the alleged violations can be attributed to a reasonable interpretation of the statute.” Petitioner’s Brief at 21. Debarment is presumed once violations of the SCA have been found, unless the violator is able to show the existence of “unusual circumstances” that warrant relief from SCA’s debarment sanction. 41 U.S.C. § 6706; 29 C.F.R. § 4.188; *see, e.g., Hugo Reforestation, Inc.*, ARB No. 1999-0003, ALJ No. 1997-SCA-00020, slip op. at 11-13 (ARB Apr. 30, 2001).

The SCA does not define the term “unusual circumstances,” but the regulation at 29 C.F.R. § 4.188(b)(3) sets forth a three-part test to determine when “unusual circumstances” exist to relieve a contractor from the norm of imposing the sanction of debarment. Those factors include the absence of aggravated, willful or culpable conduct; the presence of certain mitigating factors; and assuming those requirements are both met, then the consideration of other enumerated factors. It is the Respondents’ burden to show unusual circumstances. *Vigilantes, Inc. v. Adm’r, Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992). In *Hugo Reforestation*, the ARB summarized the regulatory three-part test:

Under Part I of this test, the contractor must establish that the conduct giving rise to the SCA violations was neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result of “culpable conduct.” Moreover, the contractor must demonstrate an absence of

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<sup>1</sup> We do not adopt the ALJ’s conclusion that the six-year statute of limitations applicable to contract actions brought by the United States, 28 U.S.C. § 2415(a), applies in this case. That statute does not apply to administrative proceedings. *See, e.g., BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (interpreting “action” in 28 U.S.C. § 2415(a) to refer solely to court, not administrative, proceedings).

a history of similar violations, an absence of repeat violations of the SCA and, to the extent that the contractor has violated the SCA in the past, that such violation was not serious in nature. Under Part II of the test assuming none of the aggravated circumstances of Part I are found to exist there must be established on the part of the contractor, as prerequisites for relief, “a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances [by the contractor] of future compliance.”

Finally, assuming the first two parts of the regulatory test are met, under Part III a variety of additional factors bearing on the contractor’s good faith must be considered before relief from debarment will be granted including, inter alia, whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed record-keeping violations which impeded the Department’s investigation, and whether the determination of liability under the Act was dependent upon resolution of bona fide legal issues of doubtful certainty.

*Hugo Reforestation, Inc.*, ARB No. 1999-0003, slip op. at 12–13 (citations and footnotes omitted); see also *Admin., Wage & Hour Div. v. Price Gordon, LLC*, ARB No. 2019-0032, ALJ No. 2017-SCA-00008 (ARB Mar. 9, 2020).

Respondents in this case failed to pay their employees’ health and welfare fringe benefits and failed to keep and make available the required records of employee wages, benefits, and hours worked. They did not provide notice of the required minimum benefits to their employees or post such information, and Wayne Holstad admitted that he failed to read the Contract and made no effort to determine whether his company’s practices were in violation of the SCA. D. & O. at 24, 44; Transcript (Tr.) at 308, 327. On appeal, Respondents assert that Jacobson failed to consider documents showing compliance, but the record indicates that those documents were accepted and rejected as insufficient to establish compliance. D. & O. at 17-18; Tr. at 211-12. In sum, the SCA violations in this case were the result of the “culpable conduct” of Respondents, and debarment is appropriate.

## CONCLUSION

For the reasons stated above, the ALJ’s D. & O is **AFFIRMED**. Respondents Northwest Title Agency, Inc. and Wayne Holstad shall pay the Wage and Hour Division \$67,893.78 in unpaid health and welfare benefits, which shall be

distributed as follows to the ten employees identified in the Complaint: (1) \$841.75 to Timothy Bohl; (2) \$2,391.19 to Jennifer Christensen; (3) \$12,113.74 to Karla Cochran; (4) \$6,864.38 to Kelsey Cochran; (5) \$11,870.07 to Theresa Eaton; (6) \$7,107.35 to Lisa Erickson; (7) \$14,549.83 to Cynthia Orloff; (8) \$5,871.49 to Barbara Smith; (9) \$5,256.73 to Lisa Rausch (formerly Lisa Stolp); and (10) \$1,027.25 to Gilbert Wenzel.

Pursuant to 41 U.S.C. § 6706, the Secretary is directed to forward the names of Northwest Title Agency, Inc. and Wayne Holstad to the Comptroller General of the United States to be placed on the list of persons or firms that have violated the SCA and are therefore ineligible, for a period of three years, for the award of any contract with the United States.

**SO ORDERED.**