



IN THE MATTER OF:

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

PROSECUTING PARTY,

v.

SEVEN HILLS, INC.,

RESPONDENT.

ARB CASE NO. 2024-0005

ALJ CASE NO. 2018-SCA-00002

ASSOCIATE CHIEF

ALJ CARRIE BLAND

DATE: January 30, 2026

Appearances:

For the Administrator, Wage and Hour Division:

**Seema Nanda, Esq., Jennifer S. Brand, Esq., Maria Van Buren, Esq.,
Jonathan T. Rees, Esq., and Priom Ahmed, Esq.; *United States
Department of Labor, Office of the Solicitor; Washington, District of
Columbia***

For the Respondent:

**Natalie Nehls, Esq. and Jonathan W. Greenbaum, Esq.; *Coburn
Greenbaum & Eisenstein PLLC; Washington, District of Columbia***

**Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN,
BURRELL, and KIKO, Administrative Appeals Judges; KAPLAN,
Dissenting**

DECISION AND ORDER

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), and its implementing regulations.¹ On September 29, 2023, a United States Department of Labor Administrative Law Judge (ALJ) held that Respondent Seven Hills, Inc., failed to establish the “unusual circumstances”

¹ 41 U.S.C. §§ 6701-6707 (2011), and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2025).

the regulations require to warrant relief from an otherwise automatic three-year debarment for their undisputed SCA violations. Respondent filed a Petition for Review challenging its debarment.

Because a preponderance of evidence supports the ALJ's culpable conduct findings, we affirm the ALJ's decision.

BACKGROUND

1. Statutory and Regulatory Framework

The SCA requires government contractors to meet minimum standards in paying prevailing wages and fringe benefits.² Every contract must include clauses setting forth the contract's SCA obligations including a wage determination issued by the Secretary of Labor through the Wage and Hour Division (WHD) establishing the minimum prevailing wage rates and fringe benefits that contractors must pay service employees.³

The SCA implementing regulations, among other things, require contractors to pay covered workers at least the "minimum compensation specified" for "each hour worked,"⁴ and provide "fringe benefits" to all covered workers for "all hours spent working."⁵ Employers must "promptly" pay the prevailing wage rate no "later than one pay period following the end of the pay period in which they are earned."⁶ In addition to creating liability for underpaid compensation, violations of these requirements result in an automatic three-year debarment unless the contractor can demonstrate that "unusual circumstances" warrant relief from debarment.⁷

Under the SCA regulations, offending contractors must satisfy each stage of a three-step process to establish unusual circumstances.⁸ Step One prohibits relief when any of the following circumstances exist: (1) the conduct causing SCA

² 41 U.S.C. §§ 6702-6703.

³ 41 U.S.C. § 6703; 29 C.F.R. §§ 4.3(a), 4.6.

⁴ 29 C.F.R. § 4.178.

⁵ *Id.* § 4.172.

⁶ *Id.* § 4.165.

⁷ 41 U.S.C. § 6706; 29 C.F.R. § 4.188(a).

⁸ 29 C.F.R. § 4.188(b)(3); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Hearn's Enters., LLC*, ARB No. 2020-0050, ALJ No. 2017-SCA-00006, slip op. at 14 (ARB Mar. 10, 2022). The convoluted test is a regulatory creation not found in the statute. "The term *unusual circumstances* is not defined in the Act." 29 C.F.R. § 4.188(b)(1). However, we are bound by the regulations.

violations was willful, deliberate, or of an aggravated nature; (2) the violations were the result of culpable conduct, including culpable neglect, culpable disregard, or culpable failure to comply with recordkeeping requirements; (3) the contractor has a history of similar violations or repeatedly violated the SCA; or (4) any previous violations were serious in nature.⁹ Therefore, the contractor must demonstrate that these circumstances were not present.

Next, Step Two requires a contractor to show “prerequisites to relief” from debarment, including: “[a] good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.”¹⁰

Finally, at Step Three, “a variety of factors must still be considered,” including: (1) “whether the contractor has previously been investigated for violations of the Act;” (2) “whether the contractor has committed recordkeeping violations which impeded the investigation;” (3) “whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty;” (4) “the contractor’s efforts to ensure compliance;” and (5) “the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.”¹¹

2. Seven Hills, SCA Covered Contract, Modifications, and Violations

A. Seven Hills, SCA Contract, and Violations

Seven Hills entered into Contract N00250-04-C-0052 (Contract) with NEXCOM to provide food services at the Pentagon from October 15, 2004, through September 24, 2019.¹² On November 21, 2014, NEXCOM issued contract modification 40 (MOD-40), which included an updated wage determination with

⁹ 29 C.F.R. § 4.188(b)(3)(i). The numbering has been added for clarity to identify our understanding of the different factors at each step—the numbers are not present in the regulation.

¹⁰ *Id.* § 4.188(b)(3)(ii).

¹¹ *Id.*

¹² Decision and Order (D. & O.) at 6, ¶¶2-3, 9. NEXCOM stands for the “Navy Exchange Service Command.” Administrator Response Brief (Adm’r Response Br.) at 3.

new applicable prevailing wages and fringe benefits as required by the SCA.¹³ On November 26, 2014, Tadavarthy (Seven Hills' President) signed MOD-40.¹⁴

In the Summer of 2016, WHD investigated Seven Hills' performance of the Contract under the SCA.¹⁵ At the conclusion of the investigation, WHD concluded that Respondent failed to pay the proper prevailing wages and fringe benefits after the rates increased under MOD-40.¹⁶ After receiving the investigation findings, Respondent paid \$193,181.45 in back wages to employees for improperly paid prevailing wages and fringe benefits.¹⁷

B. Other Relevant Violations

In 2014, the WHD investigated Respondent for prior Davis Bacon Act (DBA) violations. The investigation revealed that Respondent failed to incorporate DBA and CWHSSA clauses into a subcontract with a first-tier contractor, and then the first-tier contractor did not incorporate the clauses into a subcontract with a second-tier contractor.¹⁸ As a result, the Administrator found \$2,251.62 in back wages due to seven employees, and \$8,127.78 in unpaid fringe benefits due to eight employees.¹⁹

3. ALJ's Decisions

A. ALJ D. & O.

The ALJ held a hearing on February 27, 2019.²⁰ It was undisputed that Respondent violated the SCA by failing to pay the prevailing wage and required

¹³ D. & O. at 7, ¶16. The parties also reference a MOD-41 (dated June 1, 2015), but it is not detailed in the ALJ decision. Petition for Review (PFR) at 6; Adm'r Response Br. at 6.

¹⁴ D. & O. at 6-7, ¶¶10, 17. The D. & O. noted that Tadavarthy claimed he did not "understand the contents of MOD-40" and he "was unfamiliar with the SCA." *Id.* at 12. However, in the Joint Prehearing Statement, the parties also stipulated that "Tadavarthy was aware that the Contract was governed by the SCA and the regulations at 29 C.F.R. Part 4." *Id.* at 6, ¶12.

¹⁵ *Id.* at 2.

¹⁶ *Id.*; see also Administrator's Exhibit (AX) 1 at 5 (SCA Investigation Narrative). Respondent similarly admitted a failure to pay proper prevailing wages and fringe benefits. D. & O. at 7, ¶¶22-23.

¹⁷ D. & O. at 7, ¶28; *Id.* at 10.

¹⁸ D. & O. at 8, ¶¶ 34-35.

¹⁹ *Id.* at 8, ¶¶ 36-37.

²⁰ *Id.* at 3.

benefits.²¹ Therefore, the issue before the ALJ was whether “unusual circumstances” warranted debarment relief, and the ALJ considered the three steps of the test: Step One (whether certain factors were present that preclude relief); Step Two (whether prerequisites to relief were present); and Step Three (whether other factors demonstrated entitlement to relief).²²

The ALJ examined the factors under Step One. The ALJ concluded that Respondent did not engage in a deliberate SCA violation. However, the ALJ found the presence of other factors that precluded relief at Step One, including that Seven Hills’ violations were the result of culpable conduct (both culpable disregard and culpable neglect), Seven Hills had a history of similar violations, and Seven Hills’ violations were serious, as discussed below.

The ALJ first found that “there [was] no evidence of [a] deliberate violation of the SCA, intentional falsification of records, or other willful behavior.”²³ The ALJ further explained that “there [was] no indication that Respondent deliberately disregarded the requirements of the Contract.”²⁴

However, even though Respondent’s conduct was not deliberate or willful, the ALJ found that Seven Hills’ violations were the result of culpable conduct, including both culpable neglect and culpable disregard. The ALJ found that Respondent engaged in “culpable disregard” by failing to properly pay prevailing wages and fringe benefits after reading and signing MOD-40 in November 2014.²⁵ The ALJ rejected Respondent’s claim that relief was appropriate because Tadavarthy was unfamiliar with the SCA. The ALJ explained that “the requirements to comply” with the SCA in MOD-40 were “clear.”²⁶ MOD-40 referenced the SCA and noted how the new wage determination established the applicable minimum monetary wages and fringe benefits for “[c]ontractor service employees working” at certain concessions.²⁷ The ALJ also cited the SCA regulations to emphasize that unusual circumstances do not include “a contractor’s plea of ignorance of the [SCA’s] requirements where the obligation to comply with the [SCA] is plain from the contract.”²⁸

²¹ *Id.* at 10.

²² *Id.* at 10, 14-15.

²³ *Id.* at 12.

²⁴ *Id.*

²⁵ *Id.* at 12-13.

²⁶ *Id.* at 13.

²⁷ *Id.*

²⁸ *Id.* at 13 (citing 29 C.F.R. 4.188(b)(1)).

The ALJ found “culpable neglect” because Respondent failed to take steps to ensure SCA compliance.²⁹ The ALJ rejected Respondent’s argument that debarment relief should apply because NEXCOM had not properly explained MOD-40 or the SCA to Respondent.³⁰ The ALJ stressed that under the SCA regulations, “[a] contractor has an affirmative obligation to ensure that its pay practices are in compliance with the [SCA], and cannot [itself] resolve questions which arise, but rather must seek advice from the Department of Labor.”³¹ Thus, the ALJ explained that it was “not the responsibility of NEXCOM, as a party to the contract, to ensure that the other parties to the contract understand it.”³²

Next, the ALJ found at Step One that there was a history of similar violations because the DBA violations from a previous investigation were “substantially similar to the [SCA] violations” in this case.³³ The ALJ explained the violations were “more similar than diverse” because “both sets of violations resulted in failures to properly pay employees required prevailing wages and fringe benefits.”³⁴

Finally, the ALJ also found at Step One that the violations in the current case were “serious” because “Respondent owed a total of 178 employees an average of more than \$1,000.00 each.”³⁵

The ALJ had other findings related to Steps Two and Three of the “unusual circumstances” test, but we do not reach those issues because the Board affirms the ALJ solely on the findings related to culpable conduct at Step One.

²⁹ *Id.* at 13.

³⁰ *Id.* at 12-13.

³¹ *Id.* at 13 (citing 29 C.F.R. § 4.188(b)(4)).

³² *Id.* at 13.

³³ *Id.* at 14.

³⁴ *Id.*

³⁵ *Id.* As discussed in Discussion Section 3, the ALJ’s findings here were harmless error because Step One only considers “where previous violations were serious in nature,” 29 C.F.R. § 4.188(b)(3)(i), and the ALJ’s Step One analysis pertained to present SCA violations. The ALJ should have considered the seriousness of present violations at Step Three: “the nature, extent, and seriousness of any past or *present* violations.” 29 C.F.R. § 4.188(b)(3)(ii) (emphasis added).

B. ALJ FLSA Order

We also note that, on July 15, 2021, prior to issuing the D. & O., the ALJ issued an Order Denying the Admission of Prior FLSA Violations (FLSA Order).³⁶ The ALJ considered arguments from the parties regarding whether Respondent’s prior FLSA violations were relevant to SCA proceedings, including whether they could be considered in evaluating “a history of similar violations.”³⁷ The Administrator claimed that “the regulatory language under the SCA clearly contemplates similar violations under *different statutes*, otherwise the language contained in the regulation would be repetitive and unnecessarily cumulative”³⁸ and that “DOL clearly intended to address similar violations under *other laws*.”³⁹ Furthermore, the Administrator argued that “Respondent’s failure to comply with *applicable labor laws* is a pattern,” and to “ignore Respondent’s history of non-compliance of labor laws would be a violation of the purpose of the *labor regulations*.”⁴⁰

The ALJ issued an Order that thoroughly evaluated and rejected the Administrator’s rationale for its broad interpretation of the subject regulation, including the Administrator’s claim that FLSA violations could be considered as part of “history of similar violations.”⁴¹ Specifically, the ALJ explained:

I find that the language of the SCA does not support the inclusion of Respondent’s past FLSA violations. The Administrator argues that the relevant language from the regulation reads, “[R]elief from debarment cannot be in order *where a contractor* has a history of similar violations, *where a contractor* has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.” The Administrator then argues that since these items are in a list, they should be viewed independently, and must be read to mean that the first clause includes *similar violations outside of the SCA*. I do not find this argument determinative since the regulation could be read such that the relevant inquiry is whether a contractor had

³⁶ We highlight the FLSA Order because it is relevant to our consideration of a “history of similar violations” in Discussion Section 2, *infra*.

³⁷ FLSA Order at 1; Administrator’s Brief Regarding the Admissibility of Evidence of Similar FLSA Violations (Adm’r FLSA Br.) at 1-4.

³⁸ Adm’r FLSA Br. at 3 (emphasis added).

³⁹ *Id.* at 4 (emphasis added).

⁴⁰ *Id.* at 6 (emphasis added) (citation and inner quotations omitted).

⁴¹ FLSA Order at 5-6.

a history of similar violations of the SCA, whether the contractor repeatedly violated the SCA, and whether the prior violations, either similar or numerous, were serious in nature.^[42]

Accordingly, the ALJ issued an Order Denying the Admission of Prior FLSA Violations.⁴³ We agree with the ALJ’s reasoning and find it instructive as we consider the Administrator’s comparable argument on appeal that “history of similar violations” can include “violations of the SCA or another law” related to Respondent’s DBA violations, as considered below in Discussion Section 2.⁴⁴

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide appeals from ALJ decisions and orders under the SCA.⁴⁵ The Board’s review of an ALJ’s decision under the SCA is an appellate proceeding.⁴⁶ As such, the Board reviews conclusions of law de novo.⁴⁷ The Board shall modify or set aside an ALJ’s factual findings, however, only when a preponderance of evidence does not support them.⁴⁸

DISCUSSION

The SCA’s debarment provision is a “particularly unforgiving provision of a demanding statute” forcing violating contractors “to run a narrow gauntlet” to establish relief.⁴⁹ Indeed, debarment “should be the norm, not the exception” with

⁴² *Id.* at 5 (emphasis in original and emphasis added). We also note that the Administrator’s selective, implausible argument relied on the now defunct dictates of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) in claiming deference should apply to its interpretation. Adm’r FLSA Br. at 3. Of course, *Chevron* was reversed by the Supreme Court in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

⁴³ D. & O. at 3; FLSA Order at 5-6.

⁴⁴ Adm’r Response Br. at 21 (emphasis added).

⁴⁵ 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); 29 C.F.R. §§ 6.20, 8.1(b).

⁴⁶ 29 C.F.R. § 8.1(d).

⁴⁷ *Hearn’s Enters., LLC*, ARB No. 2020-0050, slip op. at 4-5 (citation omitted).

⁴⁸ 29 C.F.R. § 8.9(b).

⁴⁹ *Hearn’s Enters., LLC*, ARB No. 2020-0050, slip op. at 14 (citation omitted). As explained by the SCA regulations, “[t]he authority [to relieve from blacklisting] was intended to be used in situations where the violation was a minor one, or an inadvertent one, or one in which disbarment . . . would have been wholly disproportionate to the offense.” 29 C.F.R. § 4.188(b)(2).

“only the most compelling of justifications” relieving a “violating contractor from [the] sanction.”⁵⁰

We affirm the ALJ’s D. & O. because of the presence of certain circumstances at Step One of the “unusual circumstances” test. Namely, Respondent engaged in culpable conduct, including culpable disregard when Respondent failed to timely pay the prevailing wage and fringe benefits, despite plain obligations in the Contract to comply with SCA requirements; and culpable neglect when Respondent failed to take proper steps to ensure compliance with the SCA. Under Step One, the presence of any of the circumstances is an independent ground for debarment. Thus, the findings of culpable disregard and culpable neglect each prohibit debarment relief.

We conclude however, that the ALJ erred as a matter of law at Step One in finding a history of similar violations and in finding that the “present” violations were serious. Nonetheless, these were harmless errors because the ALJ correctly ruled regarding culpable disregard and culpable neglect, and we affirm those rulings.

Furthermore, because the culpable disregard and culpable neglect findings prohibit relief from debarment, and we affirm the D. & O. on those findings at Step One, we conclude that “unusual circumstances” do not exist to relieve Respondent from debarment. Thus, it is unnecessary to consider Step Two and Three of the “unusual circumstances” test.⁵¹

⁵⁰ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Mesa Mail Serv., LLC*, ARB No. 2017-0071, ALJ No. 2009-SCA-00011, slip op. at 8 (ARB Sept. 30, 2020) (quotations and citations omitted). In 1972, Congress amended the SCA, and the “effect of the 1972 Amendments” was “to limit the Secretary’s discretion to relieve violators from the debarred list.” 29 C.F.R. § 4.188(b)(1). In 1971, “just prior to the 1972 [SCA] amendments,” the House issued a Subcommittee report making “it plain that the limitation of the Secretary’s discretion through the *unusual circumstances* language was designed in part to prevent the Secretary from relieving a contractor from the ineligible list provisions merely because the contractor paid what he was required by his contract to pay in the first place and promised to comply with the Act in the future.” 29 C.F.R. § 4.188(b)(2) (emphasis added).

⁵¹ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Igwe*, ARB No. 2007-0120, ALJ No. 2006-SCA-00020, slip op. at 11 (ARB Nov. 25, 2009) (citation omitted) (analyzing how Step Two and Step Three are unnecessary to consider where an employer cannot satisfy Step One).

1. Step One – Culpable Conduct

While the unusual circumstances determination “must be made on a case-by-case basis in accordance with the particular facts present,”⁵² a contractor cannot receive debarment relief where its violations result from “culpable conduct,” such as “culpable disregard of whether they were in violation or not” or “culpable neglect to ascertain whether practices are in violation.”⁵³ Culpable conduct goes “beyond negligence,” but falls “short of specific intent.”⁵⁴

On appeal, Respondent disputes the ALJ’s findings that there was culpable conduct and argues that unusual circumstances apply.⁵⁵ First, Respondent contests the ALJ’s finding of culpable disregard by primarily arguing that Seven Hills was ignorant of the SCA and this was Seven Hills’ first SCA violation.⁵⁶ Next, Respondent contests the ALJ’s finding of culpable neglect, pointing out that it sought guidance from NEXCOM “with MOD 40 or the later modification,” and NEXCOM had “mentioned to [Tadavarthy] that the wage rates applied only when the employee works directly for the federal government, not with Seven Hills.”⁵⁷

We disagree with Respondent. The preponderance of the evidence supports the ALJ’s findings regarding culpable conduct.⁵⁸ We therefore affirm the ALJ that (1) Respondent engaged in culpable disregard when it failed to timely pay the prevailing wage and fringe benefits, despite plain obligations in the Contract to comply with SCA requirements; and (2) Respondent engaged in culpable neglect when it failed to take proper steps to ensure compliance with the SCA.

A. Step One – Culpable Disregard of Whether They Were in Violation or Not

There cannot be debarment relief when a contractor’s SCA violations result from “culpable disregard of whether they were in violation or not.”⁵⁹ The ALJ found that Respondent engaged in “culpable disregard” by failing to properly pay prevailing wages and fringe benefits after reading and signing MOD-40 in

⁵² 29 C.F.R. § 4.188(b)(1).

⁵³ *Id.* § 4.188(b)(3)(i).

⁵⁴ *Igwe*, ARB No. 2007-0120, slip op. at 9 (quotations and citation omitted).

⁵⁵ Respondent Opening Brief (Resp. Br.) at 6.

⁵⁶ *Id.* at 7-9.

⁵⁷ *Id.* at 7; *see also* Respondent Reply Brief (Resp. Reply Br.) at 5.

⁵⁸ 29 C.F.R. § 8.9(b) (“The Board shall modify or set aside findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.”).

⁵⁹ 29 C.F.R. § 4.188(b)(3)(i).

November 2014.⁶⁰ On appeal, Respondent “contests the ALJ’s finding that Seven Hills’ conduct constituted culpable disregard in its practices,” highlighting that Respondent was “unfamiliar with SCA” and that it was their first SCA violation.⁶¹ We disagree with Respondent. The preponderance of the evidence confirms Respondent acted with culpable conduct by failing to pay SCA-required prevailing wages and fringe benefits, despite plain obligations in the Contract to comply with SCA requirements.

First, as highlighted by the ALJ, the debarment regulation explicitly provides that when the contractor’s “obligation to comply with the Act is plain from the contract,” the contractor’s “plea of ignorance of the Act’s requirements” does not constitute “unusual circumstances.”⁶² Furthermore, the Board has held that when the SCA’s requirements are plain from the face of a contract, a violating contractor is “*at least culpably negligent in failing to read and perform them.*”⁶³ Here, the evidence in the record shows that the obligation to comply with the SCA was plain from the Contract. In November 2014, Tadavarthy signed contract modification MOD-40, which directly referred to the SCA and the applicable wage determination for service workers at two of Respondent’s restaurants. Specifically, MOD-40 stated:

In accordance with Section H.8, “Service Contract Act”, Wage Determination #2014-0140, Revision 1, establishes the applicable minimum monetary wages and fringe benefits to be provided to Contractor service employees at the following concessions:

- Burger King, Concourse Food Court
- Starbucks, Concourse Food Court.⁶⁴

Accordingly, because the plain terms of MOD-40 established a clear SCA obligation under the Contract, Respondent cannot rely on a plea of ignorance.⁶⁵ The failure to properly pay prevailing wages and fringe benefits, in accordance with the plain terms of the Act and the contract, establishes culpable disregard.⁶⁶

⁶⁰ D. & O. at 12-13.

⁶¹ Resp. Br. at 6-9.

⁶² 29 C.F.R. § 4.188(b)(1).

⁶³ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Integrated Res. Mgmt., Inc.*, ARB No. 1999-0119, ALJ No. 1997-SCA-00014, slip op. at 6 (ARB June 27, 2002) (emphasis added).

⁶⁴ AX 8 at 1 (MOD-40).

⁶⁵ See 29 C.F.R. § 4.188(b)(1).

⁶⁶ See *Integrated Res. Mgmt., Inc.*, ARB No. 1999-0119, slip op. at 6.

Furthermore, even if we assumed that MOD-40's terms were not plain in establishing Respondent's SCA obligations, Respondent cannot rely on a plea of ignorance because Respondent knew (or clearly should have known) about the SCA obligations under the Contract prior to MOD-40.⁶⁷ The parties stipulated that "[a]t all times relevant to the performance of the subject blanket purchase agreement, Raghu Tadavarthy was *aware that the Contract was governed by the SCA and the regulations at 29 C.F.R. Part 4.*"⁶⁸ Furthermore, Respondent had been on notice of its SCA's obligations since the start of the Contract in 2004, not just since MOD-40. The parties stipulated that the "Contract contained the representations and stipulations required by the SCA."⁶⁹ It strains credulity that Seven Hills was unaware of the SCA's obligations related to the Contract. Thus, because Respondent knew (or clearly should have known) about the SCA and the accompanying obligations, Respondent cannot rely on a plea of ignorance.

Finally, Seven Hills cites to *A to Z Maintenance Corp. v. Dole*,⁷⁰ claiming that it permits relief from debarment when a contractor is unfamiliar with the SCA and it is the contractor's first violation.⁷¹ Thus, Respondent argues its "plea of ignorance should warrant against debarment here, as this was the first time it had violated the SCA, and there was no pattern of culpable disregard for the SCA."⁷² We disagree. Here, as already discussed, the plain terms of MOD-40 established a clear SCA obligation and Respondent knew (or clearly should have known) about the SCA—therefore, Respondent cannot rely on a plea of ignorance. Furthermore, regarding relief from debarment for a first violation, *A to Z Maintenance Corp.* clearly notes that debarment is still permissible for a single violation, stating: the SCA "does not require a series of violations as a prerequisite to debarment," it "provides without qualification that 'a violation'—i.e., a single, perhaps wholly inadvertent violation—may provide grounds for debarment."⁷³ Here, even though Seven Hills had no former SCA violations, we affirm the ALJ that Respondent's failure to properly pay prevailing wages and fringe benefits, as required by the

⁶⁷ Cf. *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Coleman Constr. Co.*, ARB No. 2015-0002, ALJ No. 2013-DBA-00004, slip op. at 8 (ARB June 8, 2016) ("Coleman's only argument that Davis-Bacon shouldn't apply to it is premised on . . . feigned ignorance about the applicability of Davis-Bacon . . . ,") but "[t]he evidence establishes that Coleman Construction *knew or clearly should have known* that the subcontract was subject to Davis-Bacon Act requirements.") (emphasis added).

⁶⁸ D. & O. at 6, ¶12 (emphasis added).

⁶⁹ *Id.* at 6, ¶4.

⁷⁰ 710 F. Supp. 853 (D.D.C. 1989); Resp. Br. at 6.

⁷¹ Resp. Br. at 6-9.

⁷² *Id.* at 9.

⁷³ *A to Z Maint. Corp.*, 710 F. Supp. at 855.

plain terms of the Act and the contract, establishes culpable disregard.⁷⁴ Thus, culpable conduct is present at Step One, a finding that prohibits debarment relief.

B. Step One – Culpable Neglect to Ascertain Whether the Practices Are in Violation

Debarment relief is prohibited when a contractor’s SCA violations result from “culpable neglect to ascertain whether practices are in violation.”⁷⁵ The ALJ found Respondent engaged in “culpable neglect” because Respondent failed to take steps to ensure SCA compliance.⁷⁶ On appeal, Seven Hills claims that it did not engage in culpable neglect, pointing out that it sought guidance from NEXCOM “with MOD 40 or the later modification,” and NEXCOM had “mentioned to [Tadavarthy] that the wage rates applied only when the employee works directly for the federal government, not with Seven Hills.”⁷⁷ We disagree. The preponderance of the evidence confirms Respondent acted with culpable conduct by failing to take proper steps to ensure SCA compliance.

The SCA regulations explain that: “A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.”⁷⁸ Thus, under the regulations, Seven Hills had an obligation to seek

⁷⁴ See 29 C.F.R. § 4.188(b)(1); *Integrated Res. Mgmt., Inc.*, ARB No. 1999-0119, slip op. at 6. Respondent also attempts to contrast the circumstances here with *Vigilantes, Inc. v. Adm’r, Wage & Hour Div., U.S. Dep’t of Lab.* a case where the company’s violations demonstrated a pattern of culpable neglect. 968 F.2d 1412 (1st Cir. 1992). Seven Hills claims that the circumstances here are distinct and warrant debarment relief because, unlike the company in *Vigilantes*, Seven Hills has no prior SCA violations. Resp. Br. at 8-9. We disagree that relief is warranted. As already discussed, we affirm the ALJ that Respondent’s SCA violations constitute culpable disregard that preclude debarment relief. Respondent also highlights how “unlike the company in *Vigilantes*, Seven Hills promptly paid the monies due.” *Id.* at 8. This argument does not persuade us regarding our considerations of culpable conduct at Step One. Furthermore, it is more properly examined at Step Three, which requires consideration of “whether sums due were promptly paid.” 29 C.F.R. § 4.188(b)(3)(ii). However, as discussed elsewhere, we affirm the D. & O. on those findings at Step One, and we conclude that “unusual circumstances” do not exist to relieve Respondent from debarment. Thus, it is unnecessary to consider Step Three of the test. See *Igwe*, ARB No. 2007-0120, slip op. at 11 (analyzing how Step Two and Step Three are unnecessary to consider where an employer cannot satisfy Step One).

⁷⁵ 29 C.F.R. § 4.188(b)(3)(i).

⁷⁶ D. & O. at 13.

⁷⁷ Resp. Br. at 7; see also Resp. Reply Br. at 5.

⁷⁸ 29 C.F.R. § 4.188(b)(4).

guidance from the Department of Labor, not NEXCOM.⁷⁹ By failing to take proper steps to ensure compliance, Respondent engaged in culpable neglect. Thus, culpable conduct is again present at Step One, another finding that prohibits debarment relief.

Furthermore, while guidance from a contracting agency alone is insufficient to establish relief for debarment, the record here does not even support Respondent's claim that Seven Hills contacted NEXCOM regarding MOD-40 (or MOD-41) or that NEXCOM explained that the modifications did not apply to Respondent. In addition, Respondent's claim is implausible that NEXCOM explained to Respondent that the modified wage rates only applied to federal workers.

Respondent relies on Tadavarthy's deposition testimony as evidence that Respondent contacted NEXCOM and that NEXCOM provided guidance regarding the modification.⁸⁰ However, in Tadavarthy's deposition, he does not remember crucial details, such as the MOD he discussed with NEXCOM. In his deposition, Tadavarthy explained "I called [the] NEXCOM office. That is what I remember. Was it [MOD] 40, 41, or some other MOD? I don't remember."⁸¹

In addition to not recalling the MOD discussed, Tadavarthy also could not remember whom he spoke with at NEXCOM.⁸² Tadavarthy testified that he contacted NEXCOM when "one [of] the MODs" came in with "some wage determination papers."⁸³ He explained that "I don't remember who I talked to," but "[t]hey said this does not apply to Seven Hills," the modification only applies to "Federal Government employees that work directly [for] the government."⁸⁴

⁷⁹ Cf. 29 C.F.R. § 4.187(e)(5) ("Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act.").

⁸⁰ Resp. Br. at 7.

⁸¹ Respondent's Exhibit (RX) 13 (Tadavarthy Dep.) at 58. There are several other examples of Tadavarthy not recalling which MOD he discussed with NEXCOM. In his deposition, DOL asked Tadavarthy "[d]o you recall if for MOD 40 you had a conversation with somebody at NEXCOM?" Tadavarthy responded "I don't remember whether that is in MOD 40 or in some other MOD." *Id.* at 44. The questioning continued: "But it's possible that conversation was on a different MOD and not [MOD-40]?" Tadavarthy responded, "[y]es." *Id.* at 44-45.

⁸² *Id.* at 16.

⁸³ *Id.*

⁸⁴ *Id.* Similarly, Respondent's Accountant testified that he had heard of the SCA because "it was listed on a MOD," but he claimed he "wasn't aware it pertained to our employees." RX 12 (Joseph Palo Dep.) at 13.

Based on Tadavarthy's testimony, it is unclear whether Respondent sought guidance from NEXCOM related to MOD-40 or MOD-41.⁸⁵ However, Respondent's claim regarding NEXCOM's guidance fails on another ground. Namely, it is highly improbable that "NEXCOM mentioned to [Tadavarthy] that the wage rates applied only when the employee works *directly for the federal government*, not with Seven Hills."⁸⁶ MOD-40 states that the wage determination establishes the "minimum monetary wages and fringe benefits" for "service employees working at" Burger King and Starbucks.⁸⁷ Given the clear requirements of MOD-40 and the fact the SCA does not apply to the "U.S. Government, its agencies, and instrumentalities,"⁸⁸ it is borderline ludicrous that NEXCOM would explain that MOD-40 only applies to federal government workers at Burger King and Starbucks or that the Respondent would not have followed up on such a purported, critical clarification and requested such a clarification in writing.

Further, as discussed above, even if the evidence was clear that NEXCOM advised Respondent that MOD-40 only applied to federal government workers, guidance from a contracting agency alone is insufficient as evidence for debarment relief. The SCA regulations note that a contractor "cannot itself resolve questions which arise," but must "seek advice from the Department of Labor."⁸⁹ We are unaware of evidence that Respondent sought advice from the Department of Labor. Accordingly, based on the foregoing, we affirm the ALJ's finding that Seven Hills engaged in culpable neglect when it failed to properly take steps to ensure compliance with the SCA.

2. Step One – History of Similar Violations

While we affirm the ALJ's analysis and findings on "culpable conduct," including "culpable neglect" and "culpable disregard," we conclude that the ALJ erred as a matter of law in counting DBA violations as part of her finding that the employer had a "history of similar violations."⁹⁰ The error is harmless because we affirm the ALJ's culpable conduct findings, but we nonetheless here explain our reasoning to foreclose similar future efforts by the Administrator to argue that "history of similar violations" could involve violations of statutes beyond the SCA.

⁸⁵ We are also unaware of any other evidence in support, such as evidence from a NEXCOM representative. We also do not see evidence that Seven Hills followed up with NEXCOM on this obviously important issue.

⁸⁶ Resp. Br. at 7 (emphasis added).

⁸⁷ AX 8 at 1.

⁸⁸ 29 C.F.R. § 4.1a(f).

⁸⁹ *Id.* § 4.188(b)(4).

⁹⁰ D. & O. at 14.

The relevant regulatory language can be found at 29 C.F.R. § 4.188 (b)(3)(i), which states that relief from debarment is not appropriate (under the “unusual circumstances” proviso discussed above) where a “contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act [the SCA], or where previous violations were serious in nature.”

The Administrator has argued for a broad interpretation of “history of similar violations,” noting how the regulatory text expressly limits “repeated violations” to violations of the SCA, “but the ‘history of similar violations’ criterion contains no such limitation in the regulatory text and hence encompasses ‘similar violations’ whether they are violations of the SCA *or another law*.”⁹¹ As noted in the Background Section 3(B), the Administrator provided a similar rationale to the ALJ, arguing that Respondent’s FLSA violations should be considered as part of a “history of similar violations.”⁹² However, in her FLSA Order, the ALJ rejected the Administrator’s broad interpretation of the of “history of similar violations.”⁹³ The ALJ explained that the SCA “regulation could be read such that the relevant inquiry is whether a contractor had *a history of similar violations of the SCA . . .*”⁹⁴ The ALJ’s reading of the regulation in the FLSA Order is also instructive here. We disagree with the Administrator’s argument that “history of similar violations” can include “violations of the SCA *or another law*,” such as the DBA.⁹⁵

Perhaps if the Administrator had admitted to some limiting principle in defining “similar violations” (such as other “prevailing wage laws”) this might be seen as a small technical issue in the practical world of enforcement, but no limiting principle as to what “other laws” can be considered can be found in its arguments before the Board or in the briefs before the ALJ relating to the FLSA violations, discussed in Background Section 3(B). Indeed, the narrowest reading of the briefed arguments would be that, at the very least, the full panoply of employment laws could be considered by the decision maker in determining whether the employer has “a history of similar violations.” However, even this reading is charitable, as the Administrator generally puts no limitations on what violations of other laws may be included. Thus, if accepted, the Administrator’s interpretation of the words in question *would not lend itself to any limitation*.

⁹¹ Adm’r Response Br. at 21 (emphasis added) (citation omitted).

⁹² The Administrator argued “history of similar violations” includes violations of the SCA or “different statutes” or “other laws.” Adm’r FLSA Br. at 3-4 (citations omitted).

⁹³ FLSA Order at 5-6.

⁹⁴ *Id.* at 5 (emphasis added). The ALJ did not explain why this reasoning did not apply to DBA violations in its subsequent D. & O.

⁹⁵ Adm’r Response Br. at 21 (emphasis added).

Therefore, we take this opportunity to make clear, for the reasons explained below, that it is not appropriate to engraft violations from other statutes onto the SCA in order to compute penalties, including debarment.

Each statute has its own specific regime in defining what is prohibited and required by that law, and therefore what is a violation thereof; this includes its own particular enforcement mechanisms and its own appropriate penalties. Likewise, each statute has its own administrative directives, implementing regulations, case law, and nuances. To say that statutes vary widely under our nation’s employment laws alone is an understatement. Some include debarment but most do not. Some penalize violators with back pay and double loss pay. Others include penalties such as punitive and compensatory damages. Some are enforced only through agency action, others also with private causes of action, with jury trials.⁹⁶ All vary widely with regard to the underlying substantive rights. And though there may be similarities at the very general top line level, between (e.g. DBA and SCA) statutes, there is no “cookie cutter” format. This is hardly surprising since the contours of statutes are normally forged after much debate and drafting representing broad compromises between competing goals, enforcement mechanisms, and other factors.⁹⁷

These have been set by the Congress. It is not appropriate therefore for an agency to mix and match penalties from one statute with those of another, absent express Congressional authority to do so—clearly absent here where the regulations spring solely out of the statutory wording “unusual circumstances.”⁹⁸ We therefore decline to interpret the subject regulation in such a manner. Doing so would not only raise constitutional issues,⁹⁹ but more importantly for our purposes, open doors for boundless creative agency enforcement efforts which could pull from many other enforcement proceedings (where claims of alleged “violations” may be pending or finalized) under many other statutes in other forums, and inappropriately cross pollinate their requirements and penalties. This is not an apocalyptic prediction and

⁹⁶ For example, SCA has no private cause of action, while FLSA has a private cause of action (with jury trials). Furthermore, the statutes’ penalties are vastly different.

⁹⁷ See *Adm’r, Off. of Foreign Lab. Certification, Employment and Training Admin., U.S. Dep’t of Lab. v. Cent. Fla. Lab. Servs., LLC*, ARB No. 2025-0026, ALJ Nos. 2023-PED-00011, -00012, -00014, -00015, slip op. at 19 n. 92 (ARB Mar. 28, 2025) (Johnson, C.J., concurring).

⁹⁸ *Supra* note 8, “The term *unusual circumstances* is not defined in the Act.” 29 C.F.R. § 4.188(b)(1).

⁹⁹ “It is well settled that when Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken.” *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *7 (E.D. Tex. Oct. 24, 2016) (citations and quotations omitted).

indeed this path has been traveled before under past administrations. These paths were blocked either by subsequent rulemaking, the courts, or the Congressional Review Act.¹⁰⁰

Finally, we would like to emphasize that we have diligently searched the preambles to the relevant regulations and found no discussion which would lend itself to the expansive interpretation of this section advanced by the Administrator here.¹⁰¹

¹⁰⁰ President Obama issued Executive Order 13673, “Fair Pay and Safe Workplaces,” on July 31, 2014, which, with Guidance for Executive Order 13673, 81 Fed. Reg. 58654 (Aug. 25, 2016), required federal contracting officers to review prospective contractor/employers’ history of compliance with 14 federal employment laws, and “equivalent” state laws, to evaluate whether these applicants for federal contracts had a suitable record to justify being awarded a contract. In sum, those judged not to have a suitable record were barred from receiving federal contracts. Hence, the record of compliance with many laws which did not even include a penalty or sanction of debarment were carried over to use in evaluating whether contractors should be barred from receiving federal contracts. This initiative was enjoined in *Rung*, 2016 WL 8188655, at *15, and President Trump subsequently revoked Executive Order 13673. *See* Revocation of Federal Contracting Executive Orders, Exec. Order No. 13782, 82 Fed. Reg. 15607 (Mar. 27, 2017). Furthermore, a related FAR regulation, 81 Fed. Reg. 58562, was repealed by Congress under the Congressional Review Act, H.J. Res. 37, 115th Cong. (as passed by House, Feb. 2, 2017, and Senate, Mar. 6, 2017), and signed by President Trump on March 27, 2017. Pub. L. No. 115-11. The Obama initiative was preceded by a similar one under President Clinton (which included an even more expansive list of laws—tax, labor and employment, environmental, antitrust, consumer protection—to be considered for the purposes of eligibility to contract with the government). *See* 65 Fed. Reg. 80255 (Dec. 20, 2000). However, the Clinton final rule was ultimately repealed by President George W. Bush. *See* Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings-Revocation, 66 Fed. Reg. 66986 (Dec. 27, 2001). Both were very controversial on legal as well as policy grounds, and the broad coverage of both indicate the deceptive reach of the simple words “other laws” as argued by the Administrator. In all these proceedings, a pervasive issue was what level or type of violations should be considered and when can a covered “violation” be considered even if still pending and under review at some stage—agency complaint, ALJ decision, administrative appeals level, or pending before Article III courts? *See* Fair Pay and Safe Workplaces, Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014); *Rung*, 2016 WL 8188655, at *12 (“These examples of enforcement agency conduct that has later been rejected by the courts illustrate the fallacy and danger of the DOL Guidance’s definition of “violation.””). Of course, none of these important caveats would even be part of the Administrator’s sweeping position here concerning adoption of (undefined) “violations” under other laws.

¹⁰¹ *See, e.g.,* Labor Standards for Federal Service Contracts, 33 Fed. Reg. 9880 (July 10, 1968); Labor Standards for Federal Service Contracts, 48 Fed. Reg. 49736 (Oct. 27, 1983); Amendments to Federal Contract Labor Laws by The Federal Acquisition Streamlining Act of 1994, 61 Fed. Reg. 40714 (Aug. 5, 1996); Labor Standards for Federal Service Contracts; 66 Fed. Reg. 5328 (Jan. 18, 2001); Updating Regulations Issued Under Service Contract Act

Furthermore, the cases *cited in the regulation itself* do not lend themselves to this interpretation.¹⁰² We also note that, after an exhaustive search, there is virtually no case law which would support the Administrator’s interpretation.¹⁰³—even after

and Other Acts, 82 Fed. Reg. 2221 (Jan. 9, 2017). We recognize that certain parts of the SCA implementing regulations cross reference standards from other statutes and incorporate those requirements as part of those regulations. *See, e.g.*, 29 C.F.R. § 4.181 (“Overtime pay provisions of other Acts”). However, the few statutes identified are a far cry from the position advanced by the Administrator here of “other laws,” which, troublingly, admits to no limiting principle, nor does the Administrator look at these provisions to “cabin in” its broad position. Further, these provisions in our view do not authorize adopting into an SCA enforcement proceeding, to justify debarment, violations under these other statutes arising in other proceedings. They are simply part, by reference, of the SCA standards against which a contractor’s performance is to be measured in an enforcement action under the SCA.

¹⁰² 29 C.F.R. § 4.188(b)(3)(i) cites decisions as examples of the criteria developed by the Department “for determining when there are unusual circumstances within the meaning of the [SCA].” *Wash. Moving & Storage Co.*, SCA No. 168 (Aug. 16, 1973) (Decision of the Assistant Secretary); *Wash. Moving & Storage Co.*, SCA No. 168 (Mar. 12, 1974) (Decision of the Secretary); *Quality Maint. Co., Inc.*, SCA No. 119 (Jan. 11, 1974) (Decision of the Assistant Secretary). Paper copies of these decisions and those cited in them were retrieved from the Wirtz Labor Library. None of the cases expressly define “a history of similar violations,” but they discuss recurrent violations and their impact on whether a finding of unusual circumstances is warranted: “It is also clear that a history of recurrent violations of identical nature, such as repeated violations of identical minimum wage or recordkeeping provisions does not permit a finding of ‘unusual circumstances.’ On the other hand, where a bona fide legal question of doubtful certainty exists, and an employer reasonably chooses to litigate such question in order to resolve it, this should not prevent a finding of ‘unusual circumstances.’” *Quality Maint. Co.*, SCA No. 119, slip op. at 19 (citing *Wash. Moving & Storage Co.*, SCA No. 168, slip op. at 10 (Aug. 16, 1973)). *Quality Maint. Co.* also refers to supplemental ALJ decisions in the following cases: *Emerald Maint., Inc.* SCA No. 153 (Apr. 5, 1973); *Burns Sec. Sys., Inc.*, SCA No. 150 (Apr. 30, 1973); *Kelly Cab Co., Inc.*, SCA No. 146 (Mar. 22, 1973); *Foreman’s Sec. Serv., Inc.*, SCA No. 167 (Mar. 14, 1973); *Bouchet*, SCA No. 165 (Jan. 23, 1973). Some of these decisions noted how there was no history of previous violations of the SCA, but they did not find a history of similar violations of other statutes as argued by the Administrator.

¹⁰³ Our research did not yield recent federal, ARB, or Secretarial decisions defining “a history of similar violations” as used in 29 C.F.R. § 4.188(b)(3)(i). One ALJ decision was found which supports the Administrator’s position, although it was not cited by the Administrator. *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Davis-Paige Mgmt. Sys., LLC*, ALJ No. 2019-SCA-00003 (ALJ Jan. 29, 2024). In *Davis-Paige Mgmt. Sys.*, the ALJ determined that an ERISA default judgment amounted to a “history of similar of violations,” illustrating the Administrator’s unbridled interpretation. *Id.* at 27. ERISA is an extremely complicated statute far removed from the SCA. Notably, the appeal of the ALJ’s decision was administratively closed by the Board. *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Davis-Paige Mgmt. Sys., LLC*, ARB No. 2024-0053, ALJ No. 2019-SCA-00003 (ARB

decades of enforcement under the SCA.¹⁰⁴ We therefore conclude that the regulatory language can only logically be interpreted to allow the inclusion of “violations” under the Service Contract Act, and not that of other laws, in evaluating a “history of similar violations.”

3. Step One – Previous Violations Serious in Nature

The ALJ erred in finding at Step One that Seven Hills’ SCA violations “found under the instant investigation” were serious.¹⁰⁵ Step One prohibits debarment relief “where *previous* violations were serious in nature.”¹⁰⁶ However, the ALJ’s Step One analysis pertained to the SCA violations “found under the instant investigation,” not “previous” violations. Step Three allows for consideration of the seriousness of “present” violations: “the nature, extent, and seriousness of any past or *present* violations.”¹⁰⁷ Thus, the ALJ should have considered the seriousness of the “present” SCA violations (those “found under the instant investigation”) at Step Three. The ALJ’s error is harmless though because the ALJ correctly ruled regarding culpable conduct and we affirm that ruling—therefore, Respondent still

Sept. 4, 2024) (Order of Administrative Closure). We also note that the Administrator, in its FLSA brief before the ALJ in this case, cited to the ARB’s decision in *Hugo Reforestation, Inc.*, ARB No. 1999-0003, ALJ No. 1997-SCA-00020 (ARB Apr. 30, 2001), but the Administrator referred to how the ALJ ruled in *Hugo*, not how the ARB ruled, noting that the ALJ found it appropriate to consider “different statutes” related to “history of violations.” Adm’r FLSA Br. at 5. In the FLSA Order, the ALJ in this case disagreed with the Administrator, noting that in *Hugo*, “it is clear that the ARB determined the inclusion of respondent’s prior FLSA violations to be irrelevant to the analysis of whether or not respondent had a history of violating the SCA.” FLSA Order at 6. We agree with the ALJ in the FLSA Order. *See also Hugo Reforestation, Inc.*, ARB No. 1999-0003, slip op. at 4 n.3. The *Davis-Paige Mgmt. Sys.* and *Hugo Reforestation* ALJ decisions thus lack broad or controlling authority.

¹⁰⁴ Similarly, under other statutes, expansive interpretations have been critiqued when the interpretation is inconsistent with historical practice. *Cent. Fla. Lab. Servs., LLC.*, ARB No. 2025-0026, slip op. at 18-19 (Johnson, C.J., concurring) (“Stated simply, given this is the first time this issue has arisen in the many years the H-2A program has operated, it begs credulity that debarment at the pre-certification stage is needed for effective enforcement,” and it is “perplexing the Administrator has not pointed to any instances in which it has utilized this purported power in the past.”); *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 722 (5th Cir. 2025) (“Ninety years after Congress created the National Labor Relations Board (“NLRB”), the NLRB claimed for the first time the ability to award full compensatory damages in its enforcement proceedings. . . . We hold that the NLRB lacks statutory authority to award full compensatory damages.”).

¹⁰⁵ D. & O. at 14.

¹⁰⁶ 29 C.F.R. § 4.188(b)(3)(i) (emphasis added).

¹⁰⁷ *Id.* § 4.188(b)(3)(ii) (emphasis added). The Administrator also considers seriousness of present violations under Step Three in their brief. Adm’r Response Br. at 24-28.

fails Step One of the “unusual circumstances” test, such that there can be no debarment relief.¹⁰⁸ Because we affirm the ALJ’s culpable conduct findings—findings that prohibit debarment relief—we do not need to proceed to Step Three of the test.

4. Respondent’s Other Argument on Appeal

Seven Hills also argues that they have been prejudiced by undue delay, noting that the WHD investigation began in 2016 and that the period of debarment for SCA violations is three years.¹⁰⁹ Seven Hills cites to 29 C.F.R. § 6.19(b), which states that the ALJ “shall make” a decision “[w]ithin a reasonable time.” Seven Hills claims it has not bid on a contract in several years and ended its contract at the Pentagon in 2021.¹¹⁰ Seven Hills also notes that the ALJ erred in ordering debarment from the effective date of the D. & O., and that subsequently, the Administrator contacted the Comptroller General, stating that Seven Hills and its owners “are ineligible from bidding on government contracts.”¹¹¹ As a result, Seven Hills was improperly (and briefly) added to the ineligibility list.¹¹² However, Respondent was notified that due to their appeal to the Board, they were removed from the ineligibility list.¹¹³

We are sympathetic to the delays and the errors that resulted in Seven Hills temporarily being listed on the ineligibility list. However, these arguments are not relevant to the examination of “unusual circumstances.” In addition, Seven Hills decided to end its contracts and not pursue additional contracts—they were not required to take those actions.

¹⁰⁸ Even though the ALJ analyzed the “present” violations at the wrong step, the ALJ’s analysis would be relevant to Step Three. The ALJ found that that Respondent’s violations “under the instant investigation” were serious because “Respondent owed a total of 178 employees an average of more than \$1,000 each.” D. & O. at 14. We do not reach Step Three, but we agree with the ALJ’s analysis.

¹⁰⁹ PFR at 11-12.

¹¹⁰ *Id.* at 12.

¹¹¹ Resp. Reply Br. at 9.

¹¹² *Id.*

¹¹³ *Id.*, Attachment 1.

CONCLUSION

We **AFFIRM** the ALJ's findings that "unusual circumstances" do not exist to relieve Respondent from debarment. As a result, we **AFFIRM** the ALJ's order that the Respondent shall not be awarded United States government contracts for three years.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

Judge Kaplan, Dissenting:

With some reluctance, I respectfully dissent from the majority’s affirmance of the ALJ’s D. & O. Because of insufficient findings of fact and conclusions of law, the preponderance of the evidence does not support her findings, and the “unusual circumstances” test could result in findings of fact and conclusions of law that show that debarment relief is not appropriate.¹¹⁴ Therefore, I cannot support the majority’s analysis,¹¹⁵ and I would reverse and remand the case to the ALJ for further findings of fact and conclusions of law.¹¹⁶

I take issue with my learned colleagues on the majority reaching their own conclusions on the facts in reliance on the testimony. Had the ALJ relied on the same evidence as the majority for her findings of fact and articulated the same conclusions, I would not be writing this dissent. However, judges rely on intuition, context, and demeanor to assess credibility. None of these non-verbal communications exist on a transcript, therefore it is improper for an appellate court to review testimony and reach its own conclusions because the reader lacks the ability to read the witness; there are no voice inflections, facial expressions, or evidence of the litigation drama that combined can be the best evidence of the truth.

¹¹⁴ “The Board shall modify or set aside an ALJ’s factual findings . . . when a preponderance of evidence does not support them.” 29 C.F.R. § 8.9(b).

¹¹⁵ Except as noted later in the dissent.

¹¹⁶ An ALJ must “adequately explain why he credited certain evidence and discredited other evidence.” *Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (citations omitted). And although an ALJ “need not address every aspect of [a party’s claim] at length and in detail,” the findings “must provide enough information to ensure the Court that he properly considered the relevant evidence underlying [the party’s] request.” *Mori v. Dep’t of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013) (citations omitted). The failure to address evidence or resolve conflicts in the evidence thus requires remand; ultimately, a reviewing court must be able to “discern what the ALJ did and why he did it.” *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 30 (ARB Dec. 15, 2023) (citation omitted).

When an ALJ fails to ground a decision in findings of fact and conclusions of law, the decision ceases to be an act of law and becomes an exercise of discretionary judgment, untethered from constitutional limits. *See* GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* (University of Chicago Press 1982). In Professor McDowell’s comprehensive treatise on equity, he draws a sharp distinction between law as a rule and equity as discretionary judgment. His core concern is that when decision-makers (including administrative actors) fail to anchor decisions in findings of fact and conclusions of law, they cease to be bound by constitutional legal constraints and instead exercise personal judgment under the guise of fairness. For McDowell, this is dangerous not because “fairness” is bad per se, but because equity untethered from law becomes arbitrary power—the very thing the Constitution was designed to restrain.

Those signals and nuances do not exist on a page of transcript.¹¹⁷ That is the wisdom reflected in *Dantran*.¹¹⁸

DISCUSSION

The stated purpose underlying debarment is not to punish but rather to protect the government from the potential consequences of contracting with non-responsible contractors.¹¹⁹ The case for debarment must be established by a preponderance of the evidence,¹²⁰ therefore to support debarment the evidence must establish a level of culpability beyond negligence.¹²¹ Disregard of obligations must involve “some element of intent.”¹²² Intentional failure to look at the law is also sufficient.¹²³

In the words of Supreme Court Chief Justice Burger, then a Circuit Judge, “[t]he governmental power must be exercised in accordance with accepted basic legal norms. **Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will . . . culminate[] in administrative findings and conclusions, based upon the record so made.**”¹²⁴

Under the SCA, an employer must establish “unusual circumstances” to warrant relief from debarment for SCA violations.¹²⁵ “Unusual circumstances” must be determined “on a case-by-case basis in accordance with the particular facts present.”¹²⁶ Furthermore, as the majority explains, the SCA regulations outline a

¹¹⁷ See Puddifoot K., *Re-Evaluating the Credibility of Eyewitness Testimony*, Vol 17-2 EPISTEME 255 (2020).

¹¹⁸ *Dantran, Inc. v. U.S. Dep’t of Lab.*, 171 F.3d 58, 72 (1st Cir. 1999), in which the First Circuit reversed the ARB’s decision (which had in turn reversed the ALJ’s decision) in part because “the ALJ, not the ARB, had the opportunity to observe the witnesses’ demeanor at first hand.”).

¹¹⁹ 48 FAR 9.402(b).

¹²⁰ 48 FAR 9.406-2.

¹²¹ *Dantran*, 171 F.3d at 68.

¹²² *NCC Elec. Servs., Inc.*, ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 8 (ARB Sept. 30, 2015). In addition, an employer’s bad faith and/or gross negligence regarding compliance have also been found to constitute disregard of statutory obligations. *Id.*

¹²³ *Id.* at 9.

¹²⁴ *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964) (emphasis added).

¹²⁵ 41 U.S.C. § 6706; 29 C.F.R. § 4.188(a).

¹²⁶ 29 C.F.R. § 4.188(b)(1).

three-step process to establish “unusual circumstances.”¹²⁷ Here, the preponderance of the evidence may not support the ALJ’s findings related to “unusual circumstances,”¹²⁸ because the ALJ did not make sufficient findings of fact and conclusions of law to support her muddled conclusion that Respondent failed to show unusual circumstances. Although I support remand for further findings of fact and conclusions of law, I set forth my analysis of the unusual circumstances test on the facts as they exist below, which favor reversal.

1. Unusual Circumstances Test, Step One

Under 29 C.F.R. § 4.188(b)(3)(i), Step One of the “unusual circumstances” Test prohibits relief when any of the following circumstances exist: (1) the conduct causing SCA violations was willful, deliberate, or of an aggravated nature; (2) the violations were the result of culpable conduct, including culpable neglect, culpable disregard, or culpable failure to comply with recordkeeping requirements; (3) the contractor has a history of similar violations or repeatedly violated the SCA;

¹²⁷ *Id.* § 4.188(b)(3). The full “unusual circumstances” test is detailed on page 2-3 of the majority opinion. The Board is bound to the regulations. *See* Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (March 6, 2020) at (5)(a)(4)(b)(69): “The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.” However, I take this opportunity to note that the SCA “unusual circumstances” test is unnecessarily complex and unduly burdensome on employers. The statute only uses the term “unusual circumstances,” yet the regulatory test interpreting those words is immensely complicated and provides hurdles that are nearly insurmountable. *See* 29 C.F.R. § 4.188(b)(1) (“The term unusual circumstances is not defined in the Act.”). Justice Joseph Story pointed out the difficulty in assuming that one could properly codify a comprehensive legal code, noting that it requires one “to suppose that [the legislator] is capable of all this, is to suppose that he is omniscient, all-wise, and all-powerful; that he is perfect, or that he can attain perfection; that he can see all the future in the past, and that the past is present to him in all its relations.” JOSEPH STORY, “LAW, LEGISLATION, AND CODES,” *ENCYCLOPEDIA AMERICANA*, at 587. The deficiencies of the SCA test highlight the limitations. Furthermore, as Alexander Hamilton noted: “In Law as in Religion the Letter Kills What the Spirit Makes Alive.” Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 2 vols. (New York: Columbia University Press, 1964), p. 391. Furthermore, a judge is not a traffic cop and “is more than a moderator or umpire,” “[h]e has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies.” *Smith v. United States*, 305 F.2d 197, 205 (9th Cir. 1962).

¹²⁸ However, there were certain components of the ALJ’s D. & O. that I would affirm, all noted below. For example, I would affirm the ALJ’s findings related to Step One, Factor One. Namely, that Respondent did not engage in deliberate conduct. Nonetheless, I would not affirm the ALJ’s ruling.

or (4) any previous violations were serious in nature.¹²⁹ Therefore, the contractor must demonstrate that these circumstances were not present. I consider the Step One factors below, and after review, I would find that the preponderance of the evidence does not support the ALJ's conclusions—the evidence shows Respondent met its burden.

“There must be affirmative evidence of culpable conduct”¹³⁰ which the ALJ has failed to articulate. “There are no facts in the record to refute the judicial belief that no rational precautions could reduce violations to absolute zero . . . Certainly, contractors could hire an army of bookkeepers, accountants and supervisors to ensure no underpayments would occur, and perhaps most needful to all, lawyers at each location. Such a practice, however, would elevate the cost of operation to a level to endanger the future of appellants' type of business as a source of employment.”¹³¹ Tadavarthy testified that when he received the contract modification he called NEXCOM and was told it only applied to government employees, not his. However, at no time does the ALJ explain that she does not believe Tadavarthy's testimony, but instead explains her reasoning stating, “[i]t is not the responsibility of NEXCOM, as a party to the contract, to ensure that other parties to the contract understand it.”¹³² That is true, but a long way from imputing his culpability. **The ALJ is in the best position to evaluate the credibility of a witness and must state the reasons for those conclusions.** Tadavarthy may have used poor judgment, but he testified he had always called NEXCOM whenever he received a Wage and Hour modification over the 13 years he was a contractor to

¹²⁹ 29 C.F.R. § 4.188(b)(3)(i). The SCA “unusual circumstances” test, as articulated in the regulations, is convoluted and unnecessarily complex. For clarity, Step One of the test has been presented here with numbering to identify the different factors—the numbers are not present in the regulation.

¹³⁰ *Dantran*, 171 F.3d at 69.

¹³¹ *Fed. Food Serv., Inc. v. Donovan*, 658 F.2d 830, 834 (D.C. Cir. 1981).

¹³² D. & O. at 13.

the government if he had a question about the MOD.¹³³ **There is no question that he should have called the Department of Labor, but considering that Tadavarthy had a clean heart but an empty head, he should not be found to have been culpable. Unless the ALJ found him to be deceitful or dishonest, he should not have been found to have failed the test at this Step, because deceit and dishonesty is what the Act is trying to manage.**

I do not believe you can declare the debarment death sentence without clear and concise findings of fact to overcome Respondent's 13-year practice of asking NEXCOM if MODs related to him. Additionally, debarment should not be imposed without a clear articulation of the facts that support the ALJ's conclusions. Finally, the additional criteria under § 4.188 must be considered. Moreover, why did the ALJ continue with her analysis under Step Two, after she found that there were no unusual circumstances at Step One? Was it a flip of a coin or is it that the ALJ did not understand the criteria for ineligibility for further contracts when violations occur because she went on to analyze issues that are irrelevant once culpable conduct is found? Certainly, it is evidence of arbitrary or perhaps muddled judgment.¹³⁴

A. Willful Conduct

Notably, in considering the first factor, the ALJ *did not find* "that Respondent willfully or deliberately violated the SCA in relation to the Contract."¹³⁵ The ALJ further explained that "there [was] no indication that Respondent deliberately disregarded the requirements of the Contract."¹³⁶ I would affirm these findings.

¹³³ The majority states "[b]ased on Tadavarthy's testimony, it is unclear whether Respondent sought guidance from NEXCOM related to MOD-40 or MOD-41. However, Respondent's claim regarding NEXCOM's guidance fails on another ground. Namely, it is highly improbable that 'NEXCOM mentioned to [Tadavarthy] that the wage rates applied only when the employee works directly for the federal government, not with Seven Hills.'" Majority Op. at 15. Further "[w]e are also unaware of any other evidence in support, such as evidence from a NEXCOM representative. We also do not see evidence that Seven Hills followed up with NEXCOM on this obviously important issue." Majority Op. at 15 n.85. Tadavarthy testified that MODs came often and that he called NEXCOM but could not remember who he had spoken to years before. Yet based on these statements, the majority reaches the bold conclusion that this is evidence of culpable neglect in spite of there being no evidence in the record to support such a conclusion and the ALJ did not find Tadavarthy to be dishonest. This is an insurmountable problem with the findings of facts and conclusions of law in this case.

¹³⁴ *Supra*, Dissent note 116.

¹³⁵ D. & O. at 11.

¹³⁶ *Id.* at 12.

B. Culpable Conduct

Regarding the second factor, the SCA regulations do not allow relief for debarment “where the violations are the result of *culpable conduct* such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records).”¹³⁷

The ALJ made two findings related to culpable conduct: (1) Respondent engaged in “culpable disregard” by failing to properly pay prevailing wages and fringe benefits after reading and signing MOD-40 in November 2014;¹³⁸ and (2) Respondent engaged in “culpable neglect” because Respondent failed to take steps to ensure SCA compliance.¹³⁹ As explained below, I disagree with these findings of culpability because the evidence shows Respondent did not understand the modification as it was not obvious on its face, Respondent regularly sought guidance from NEXCOM, and Respondent did not have a history of prior SCA violations. Accordingly, Respondent should not be debarred under these circumstances because its actions do not amount to culpable conduct. The preponderance of the evidence does not support the ALJ’s findings—they should be reversed, or we should remand for additional findings.

The second factor hinges on how to understand “culpable” in the SCA regulations. The First Circuit decision in *Dantran, Inc. v. U.S. Department of Labor* is instructive:

What the regulations mean by the term “culpable” is not spelled out, except to stipulate that “falsification of records” (an evil not present in this case) qualifies as “culpable failure to comply with recordkeeping requirements.” If this latter example is intended to serve as a guide, *culpability must require more than simple negligence or a mere failure to ascertain whether one’s practices coincide with the law’s demands.*^[140]

Furthermore, the *Dantran* Court also noted: “There must be affirmative evidence of culpable conduct.”¹⁴¹ Here, the ALJ’s findings were insufficient and did not amount to affirmative evidence of culpable conduct. Furthermore, consistent

¹³⁷ 29 C.F.R. § 4.188(b)(3)(i) (emphasis added).

¹³⁸ D. & O. at 13.

¹³⁹ *Id.*

¹⁴⁰ 171 F.3d 58, 68 (1st Cir. 1999) (citation omitted and emphasis added).

¹⁴¹ *Id.* at 69.

with *Dantran*, the evidence shows Respondent’s actions do not rise to culpable conduct because Respondent merely failed “to ascertain whether [its] practices coincide[d] with the law’s demands.”¹⁴²

First, the ALJ found that the “the requirements to comply [were] clear even in the brief contract modification”¹⁴³ I disagree. The debarment regulation provides that when the contractor’s “obligation to comply with the Act is *plain* from the contract,” the contractor’s “plea of ignorance of the Act’s requirements” does not constitute “unusual circumstances.”¹⁴⁴ However, *Dantran* notes that “this language contemplates an automatic finding of culpability only when the law’s requirements are *obvious on the face of the contract*.”¹⁴⁵ In accordance with *Dantran*, I examine MOD-40 to determine whether the requirements were “obvious on the face of the contract.” MOD-40 stated:

In accordance with Section H.8, “Service Contract Act”, Wage Determination #2014-0140, Revision 1, establishes the applicable monetary wages and fringe benefits to be provided to Contractor service employees at the following concessions:

- Burger King, Concourse Food Court
- Starbucks, Concourse Food Court.^[146]

Upon review, it is not abundantly clear that the obligations were *obvious on the face of the contract*.¹⁴⁷ In fact, when I first read MOD-40, the obligations were not obvious on the face of the contract to me. Notably, the relevant provision highlighted above is listed in between several other provisions in MOD-40. Despite including such a significant obligation, MOD-40 does not clearly highlight the new requirement.

Second, the majority makes findings of facts and conclusions of law that are not in the record regarding Tadavarthy’s truthfulness when they state:

“Respondent cannot rely on a plea of ignorance because Respondent knew (or clearly should have known) about the SCA obligations under the contract prior to MOD-40”

¹⁴² *Id.* at 68.

¹⁴³ D. & O. at 13.

¹⁴⁴ 29 C.F.R. § 4.188(b)(3)(i) (emphasis added)

¹⁴⁵ *Dantran*, 171 F.3d at 69 (emphasis in original and added).

¹⁴⁶ AX 8 at 1 (MOD-40).

¹⁴⁷ *See Dantran*, 171 F.3d at 69.

The parties stipulated that “[a]t times relevant to the performance of the subject blanket purchase agreement, Raghu Tadavarthy was *aware that the Contract was governed by the SCA and the regulations at 29 C.F.R. Part 4 . . .* It strains credulity that Seven Hills was unaware of the SCA’s obligations related to the Contract. Thus, because Respondent knew (or clearly should have known) about the SCA and the accompanying obligations, Respondent cannot rely on a plea of ignorance.”^[148]

However, the plain language of the regulation does not present a question of whether Tadavarthy should have known, but rather the question of whether he *understood* the MOD. Subjective evidence is information rooted in an individual’s personal perception, opinion, belief, or internal experience rather than verifiable external facts. It reflects what a person genuinely knew, thought, or intended at a specific time and often involves a person’s state of mind or their interpretation of events, which cannot be directly proven by external means. When the majority concludes that “*ijt strains credulity,*” they are making a finding of fact that is beyond their capability because they are independently reviewing testimony and reaching their own conclusions. This task is beyond the majority’s capability because they lack the ability to read the witness; there are no voice inflections, facial expressions, or evidence of the litigation drama that combined can be the best evidence of the truth of the statement. As earlier stated, those signals and nuances do not exist on a page of transcript.¹⁴⁹ Again, that is the wisdom stated in *Dantran*.¹⁵⁰

Further, I take issue with the majority’s use of an objective analysis to reach their conclusion that “Respondent knew (or clearly should have known) about the SCA and the accompanying obligations.”¹⁵¹ Rather, the analysis should focus on Tadavarthy’s subjective or good faith belief as to whether the SCA obligations applied. The majority’s conclusion does not disprove or modify Tadavarthy’s testimony that he was unaware that the SCA governed the relevant contracts:

Q. So when you entered into these government contracts you’ve mentioned, Pentagon, Norfolk, Little Creek, and Jacksonville, were you aware that you – that they would be subject to the Service Contract Act?

¹⁴⁸ Majority Op. at 12 (citations omitted).

¹⁴⁹ *Supra*, Dissent note 117.

¹⁵⁰ *Dantran*, 171 F.3d at 72.

¹⁵¹ Majority Op. at 12.

A. No, ma'am.^[152]

The ALJ never stated in the D. & O. whether she believed Tadavarthy knew or believed in good faith that he had SCA obligations to fulfill.

Next, the majority argues Tadavarthy knew (or should have known) about the SCA obligations because “the parties stipulated that [a]t all times relevant to the performance agreement, Raghu Tadavarthy was aware that the Contract was governed by the SCA and the regulations at 29 C.F.R. Part 4.”¹⁵³ In my experience, attorneys prepare stipulations and rarely would a client review them because the client cannot typically appreciate their significance. Additionally, stipulations are not evidence that disproves a client’s testimony. For this reason, this is another objective conclusion of the majority—**the ALJ did not find Tadavarthy to be dishonest, mendacious, or deceptive in her findings of fact and conclusions of law**, and thus, the majority’s conclusion on what he should have known is wrong in all respects.¹⁵⁴

Accordingly, I would find that Respondent’s actions were not culpable conduct and only amount to “*mere failure to ascertain whether one’s practices [of thirteen years] coincide with laws demands*,”¹⁵⁵ which is consistent with §4.188(b)(2) “The authority [to relieve from blacklisting] was intended to be used in situations where the violation was a minor one, **or an inadvertent one**, or one in which disbarment . . . would have been wholly disproportionate to the offense.”¹⁵⁶

Next, the ALJ found that Respondent “has offered no evidence to suggest he sought guidance from the Department of Labor regarding the requirements of the contract modification or the SCA.”¹⁵⁷ The SCA regulations explain that: “A contractor has an affirmative obligation to ensure that its pay practices are in

¹⁵² Tadavarthy Dep. at 15

¹⁵³ Majority Op. at 12 (citing D. & O. at 6, ¶12).

¹⁵⁴ It is interesting to note that the majority quotes 29 C.F.R. § 8.9(b) (“The Board shall modify or set aside findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.”). Preponderance means in a legal context it is more likely than not (greater than 50% chance). The conclusions of the majority interpreting the testimony and calling those conclusions evidence are arbitrary and not evidence because they were not the conclusions of the trier of fact, and therefore they are untethered from the law and not evidence at all.

¹⁵⁵ *Dantran*, 171 F.3d at 68.

¹⁵⁶ 29 C.F.R. § 4.188(b)(2) (emphasis added) (citing *Hearings on H.R. 6244 and H.R. 6245 Before the Special Subcomm. on Labor of the H. Comm. on Ed. and Lab.*, 92d Cong. (1971)).

¹⁵⁷ D. & O. at 12.

compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.”¹⁵⁸ Therefore, in accordance with the SCA regulation, Respondent *should have* sought DOL guidance to resolve questions it had related to MOD-40. However, the regulation does not indicate that a failure to reach out to the DOL constitutes culpable conduct, and Respondent’s actions do not indicate culpability.

Respondent had maintained a practice of reaching out to NEXCOM for guidance. Tadavarthy could not recall whether he sought guidance related to MOD-40, or a different MOD, but he indicated in testimony that he regularly contacted NEXCOM for guidance. For example, Tadavarthy testified that “I do talk to [the] NEXCOM office quite often at Norfolk”¹⁵⁹ and “I did make so many calls to NEXCOM,” but for “[w]hich modification, I don’t recall.”¹⁶⁰ Furthermore, Tadavarthy testified that “there was a time when a modification came in,” and he cannot remember the specific MOD, but he “called NEXCOM,” [and t]hey said that [MOD] applies only to federal government, not for” Seven Hills.¹⁶¹ The ALJ found “it is not the responsibility of NEXCOM, as a party to a contract, to ensure that the other parties to the contract understand it.”¹⁶² I agree that it was Seven Hills’ responsibility, but I still find Respondent’s **efforts** to comply, including reaching out to NEXCOM, were reflective of “*mere failure to ascertain whether one’s practices coincide with the law’s demands*,”¹⁶³ not “culpable neglect to ascertain whether practices are in violation.”¹⁶⁴ The difference being that Seven Hills’ actions do not rise to the level of culpable conduct.

It is also noteworthy that Respondent does not have any prior SCA violations. In *Karawia v. U.S. Department of Labor*,¹⁶⁵ the District Court found that the company’s “numerous and repeated violations of the SCA, particularly after being put on notice as to the statute’s requirement, constitute culpable neglect.”¹⁶⁶ The circumstances are distinct here, and I consider the lack of prior SCA violations as weighing against culpable conduct.

¹⁵⁸ 29 C.F.R. § 4.188(b)(4).

¹⁵⁹ Tadavarthy Dep. at 16.

¹⁶⁰ Hearing Transcript at 180.

¹⁶¹ *Id.* at 181.

¹⁶² D. & O. at 13.

¹⁶³ *See Dantran*, 171 F.3d at 68 (citation omitted and emphasis added).

¹⁶⁴ 29 C.F.R. § 4.188(b)(3)(i).

¹⁶⁵ 627 F.Supp.2d 137 (S.D.N.Y 2009).

¹⁶⁶ *Id.* at 150.

Here, Tadavarthy did not understand the modification because to him it was not obvious on its face, Tadavarthy regularly sought guidance from NEXCOM, and Respondent did not have a history of prior SCA violations. Accordingly, Respondent demonstrated that its actions did not amount to culpable conduct. Because the preponderance of the evidence does not support the ALJ's findings, I would reverse or remand for further findings.

C. History of Similar Violations and Previous Serious Violations

Regarding factors three and four, the SCA regulations note how “relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.”¹⁶⁷ Because Respondent does not have any prior SCA violations,¹⁶⁸ the ALJ clearly erred in her findings related to these factors.¹⁶⁹ I generally agree with the majority’s analysis related to “history of similar violations” and “previous violations of a serious nature,”¹⁷⁰ except I disagree with the majority’s ruling that these ALJ findings were harmless error.¹⁷¹ I would reverse the ALJ’s D. & O., or at least remand for further consideration because the ALJ’s errors are not harmless.¹⁷²

2. Unusual Circumstances Test, Step Two

The ALJ found that Respondent met all of the Step Two, “unusual circumstances” requirements for relief: “the prerequisites to relief (good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient

¹⁶⁷ 29 C.F.R. § 4.188(b)(3)(i).

¹⁶⁸ The ALJ found that “there is no evidence in the record of prior SCA violations by Employer.” D. & O. at 15.

¹⁶⁹ D. & O. at 14.

¹⁷⁰ *Supra*, Discussion Sections 2 and 3 of majority opinion.

¹⁷¹ I also agree with the majority that the ALJ analyzed “present” violations at the wrong step, and she should have considered “present” violations at Step Three. Majority Op. at 21 n.108. However, I disagree with the majority’s agreement “with the ALJ’s analysis” regarding serious violations. *See Infra*, Dissent, Section 3(E) (disagreeing with ALJ’s analysis).

¹⁷² It is noteworthy that the ALJ has made more legal errors in her D. & O. than Seven Hills made in thirteen years of government service. However, the majority found this error to be harmless error. Judging is difficult and the law (especially debarment) is complicated and can result in unusual circumstances. Findings of Facts and Conclusions of Law are as important to a decision as the law. It is also instructive to note that had the ALJ made thorough findings of fact and conclusions of law she may have recognized her errors and likely reached another conclusion more in line with this dissent.

assurances of future requirements) were met.”¹⁷³ I would affirm the ALJ’s findings related to Step Two.

3. Unusual Circumstances Test, Step Three

At Step Three of the “unusual circumstances” test, “a variety of other factors must still be considered,” including: (1) “whether the contractor has previously been investigated for violations of the Act;” (2) “whether the contractor has committed recordkeeping violations which impeded the investigation;” (3) “whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty;” (4) “the contractor’s efforts to ensure compliance;” and (5) “the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether sums due were promptly paid.”¹⁷⁴

Step One of the test requires the absence of the factors to proceed (presence of a factor bars debarment relief) and Step Two requires the presence of the factors to proceed (absence of a factor bars debarment relief).¹⁷⁵ Unlike Step One and Step Two of the test, “a variety of factors must still be considered” at Step Three, but the regulation does not indicate that the presence (or absence) of any of the Step Three factors precludes relief from debarment. Thus, I examine each factor below and consider the totality of the Step Three factors. Based on a review of all the factors and the current record, I would find that if Respondent has met its burden for Step Three, it should be afforded relief from debarment. But because the preponderance of the evidence does not support the ALJ’s findings, I would reverse or remand for further findings.

A. *Prior SCA Violations*

The ALJ found “[t]here is no evidence in the record of prior SCA violations by Employer.”¹⁷⁶ I agree and would affirm the finding—it weighs in favor of debarment relief.

¹⁷³ D. & O. at 14-15.

¹⁷⁴ 29 C.F.R. § 4.188(b)(3)(ii).

¹⁷⁵ See 29 C.F.R. § 4.188(b)(3)(i)-(ii) (“Where these prerequisites are present [Step Two factors] and none of the aggravated circumstances [Step One factors] in the preceding paragraph exist, a variety of factors [Step Three factors] must still be considered”). 29 C.F.R. § 4.188(b)(3)(ii).

¹⁷⁶ D. & O. at 15.

B. Recordkeeping Violations

The ALJ found that Respondent’s failure to “keep appropriate records as required by 29 C.F.R. § 4.6(g) impeded the investigation, potentially preventing investigators from identifying employees who were paid improperly.”¹⁷⁷ The ALJ cited to the SCA narrative that noted: “due to the high turnover of employees working on this contract and the firm’s lack of records to properly identify all of the Fast-Food Shift Leaders who worked on this contract, the writer was only able to compute back wages or the shift leaders identified[.]”¹⁷⁸ Seven Hills claims that the “recordkeeping” violations cited by the ALJ in the D. & O. were not raised in the SCA Complaint and the SCA investigation did not note any “recordkeeping” violations.¹⁷⁹ I agree with Seven Hills—therefore, I do not find that this factor weighs against Seven Hills. Alternatively, if the ALJ properly found that there were recordkeeping violations, then this factor weighs against Seven Hills. Nonetheless, I would still find that Respondent met its burden at Step Three, based on the totality of the Step Three factors.

C. Bona Fide Legal Dispute

The ALJ found “[t]here is no evidence that there was a *bona fide* legal dispute regarding Respondent’s commission of violations.”¹⁸⁰ The ALJ notes there was a dispute between Respondent and the Administrator, but they resolved the issue.¹⁸¹ I would affirm the ALJ’s findings, which do not weigh for or against debarment relief.

D. Efforts to Comply

The ALJ found that Respondent paid the back wages, but after it paid the back wages, “the Administrator filed evidence regarding Respondent’s continued failure to timely pay fringe benefits to at least one employee, Maria Cruz.”¹⁸² The paystubs “show that during three pay periods, Ms. Cruz was paid for hourly wages and overtime, but not fringe benefits.”¹⁸³ Upon notice by Ms. Cruz, Respondent “mailed a check for benefits at a later date.”¹⁸⁴ Seven Hills notes that

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (citation omitted).

¹⁷⁹ Reply Br. at 2, 7.

¹⁸⁰ D. & O. at 15.

¹⁸¹ *Id.* at 15-16.

¹⁸² *Id.* at 16.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

this was a payroll glitch, and Seven Hills replaced the payroll system with a new system that resolved the glitch.¹⁸⁵

I disagree with the ALJ—I would find that Seven Hills made efforts to comply with the Act. Here, Respondent made a small mistake, quickly resolved it, and took steps to ensure future compliance by replacing the payroll system. Moreover, the SCA regulations note: “The authority to [relieve from blacklisting] was intended to be used in situations where the violation was a *minor* one, or an *inadvertent* one, or one in which disbarment . . . would have been *wholly disproportionate to the offense*.”¹⁸⁶ Here, we have a “minor” violation that was “inadvertent” from a company that had no prior SCA violations. Similar to the regulations, I caution against debarment in such circumstances. It is nearly impossible, or at least cost prohibitive, to prevent **all** “minor” and “inadvertent” violations. The D.C. Circuit Court noted the difficulty of preventing all violations:

Certainly, contractors could hire an army of bookkeepers, accountants, and supervisors to ensure no underpayments would occur, and perhaps most needful to all, lawyers at each location. Such a practice, however would elevate the cost of operation to a level to endanger the future appellants’ type of business as a source of employment.^[187]

I would find that Seven Hills made efforts to comply with the SCA, and this factor weighs in favor of Seven Hills.

E. Seriousness of Violations

As noted elsewhere,¹⁸⁸ the ALJ improperly considered present serious violations at Step One. Step One requires consideration “where *previous* violations were serious in nature,”¹⁸⁹ while Step Three requires consideration of the “nature, extent, and *seriousness of any past or present violations*, including the impact of violations on unpaid employees, and whether sums due were promptly paid.”¹⁹⁰ Accordingly, I consider the ALJ’s examination of the “serious violations” here.

¹⁸⁵ PFR at 10-11.

¹⁸⁶ 29 C.F.R. § 4.188(b)(2) (emphasis added).

¹⁸⁷ *Fed. Food Serv., Inc.*, 658 F.2d at 834.

¹⁸⁸ *Supra*, Dissent note 171.

¹⁸⁹ 29 C.F.R. § 4.188(b)(3)(i).

¹⁹⁰ *Id.* § 4.188(b)(3)(ii) (emphasis added).

The ALJ found that Respondent’s “violations found under the instant investigation to be serious ones.”¹⁹¹ In support, the ALJ explained that “Respondent owed a total of 178 employees an average of more than \$1,000.00 each.”¹⁹² I disagree.

According to the ALJ, the underpayments occurred from July 15, 2014, through August 1, 2016—a period of about two years.¹⁹³ The D. & O. also noted that for one year, from February 2015 to February 2016, “Seven Hills, Inc. had approximately \$5,000,000.00 in gross annual sales from the food services at the Pentagon.”¹⁹⁴ By my calculations, the underpayment is 3.86% of the annual gross sales for the year ending in February 2016.¹⁹⁵ (part of the time frame being investigated). Moreover, if you look at the combined gross revenues from 2013 to 2016 of over sixty-six million dollars¹⁹⁶ the percentage of gross sales is .0027%. Neither 3.86 nor .0027 percent are sufficient to demonstrate any nefarious efforts on the part of Respondent and can be viewed as supportive of Tadavarthy’s assertion that he did not know that he was not paying the correct amount.¹⁹⁷ Given these numbers, it is clear that the underpayments were a very small percentage of gross sales, which makes it unlikely that the underpayments resulted from nefarious efforts by Respondent. It also supports the view that Respondent thought it was paying the correct amount. While \$1,000 over that timeframe is significant for an employee, the factor also requires consideration of “whether the sums due were promptly paid.”¹⁹⁸ Here, the Respondent promptly paid. The ALJ noted that: “At the completion of the Department of Labor’s 2016 SCA investigation of Respondent, Wage and Hour informed Respondent of the findings of the

¹⁹¹ D. & O. at 14.

¹⁹² *Id.*

¹⁹³ *Id.* at 7, ¶¶20-23.

¹⁹⁴ *Id.* at 6, ¶8.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* (I reached this figure by adding \$23,455,000.00 in 2015, \$22,430,000.00 in 2014, and \$20,598,000.00 in 2013).

¹⁹⁷ *See Fed. Food Serv., Inc.*, 658 F.2d at 834 (“In the instant case, after finding appellants were responsible for a deficiency of \$3,328.35 an amount less than one-fifth of 1 percent of the contract values and in a labor-intensive business, no doubt almost as low a ratio compared to total payrolls the ALJ ostensibly applied the Washington Moving guidelines. The ALJ found that there was no evidence the violations were willful or deliberate and that appellants cooperated with the extensive and complex investigation of the case except for one unexplained instance at the Norfolk location. Payments were made fully and promptly even though substantial amounts had to be estimated through no fault of appellants. Previous violations were not substantial and did not result in debarment because of unusual circumstances.”).

¹⁹⁸ 29 C.F.R. § 4.188(b)(3)(ii).

investigation, and Respondent agreed to pay the prevailing wages found to be due.”¹⁹⁹ I disagree with the ALJ, and I would find that this factor weighs in favor of Respondent.

CONCLUSION

I respectfully dissent from the majority’s affirmance of the ALJ’s D. & O. Seven Hills performed so well for the Defense Department that they chose Seven Hills to fulfill other food service contracts at other facilities and the Pentagon for over 13 years. Tadavarthy took responsibility when the Administrator informed him of the error and fulfilled his obligations under the contract even though he had to borrow the money personally.²⁰⁰ Contractors make innocent mistakes with no intent to hurt the government, employees, or creditors, and in this matter, there has never been any suggestion by the ALJ or the Administrator that Seven Hills attempted to enrich themselves at the expense of their employees or the government. Debarment is a drastic result for a contractor akin to a “death penalty.”²⁰¹ I would reverse the ALJ’s ruling because the preponderance of the evidence does not support her findings, and the “unusual circumstances” test shows that debarment relief is appropriate. Alternatively, I would remand this matter to the ALJ for further findings of fact and conclusions of law citing to the record or instruct her to make an entry of an appropriate judgment based on our consideration of the debarment scheme and history.²⁰²

ELLIOT M. KAPLAN
Administrative Appeals Judge

¹⁹⁹ D. & O. at 7, ¶26.

²⁰⁰ It is notable that Tadavarthy’s efforts to comply promptly required him to borrow money, creating personal liability for himself rather than borrowing through the company.

²⁰¹ *Cf. Five Star Automatic Fire Prot., LLC*, ARB No. 2023-0051, ALJ No. 2019-DBA-00004, slip op. at 11 (ARB Aug. 25, 2025) (citation omitted) (“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. Given the severe impact of debarment, it is appropriate that agency impositions of debarments as a penalty be carefully reviewed.”).

²⁰² The Board shall modify or set aside an ALJ’s factual findings, however, only . . . when a preponderance of evidence does not support them. 29 C.F.R. § 8.9(b).