

# SCA Benchbook

Updated February 15, 2021

## McNamara-O’Hara Service Contract Act

- Enacted 1965, codified at 41 U.S.C. §§ 6701-6707 (it was formerly at 41 U.S.C. §§ 351-358)
- 29 C.F.R. Parts 4, 6

## Contract Work Hours and Safety Standards Act

- Enacted 1962, codified at 40 U.S.C. § 3701 *et seq.*
- 29 C.F.R. Parts 5, 6

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## I. [Generally](#)

### A. [Purpose](#)

In *Marlys Bear Medicine v. United States*, 47 F. Supp. 1172 (D. Mon. 1999), rev'd on other grounds, 241 F.3d 1208 (9th Cir. 2001), the court noted that the Service Contract Act was enacted in 1965 for the purpose of providing "wage and safety protection to employees working under service contracts with the United States government, where the contract amount exceeds \$2,500 and the contract is performed within the United States." See also *Alcatraz Cruises, LLC*, ARB No. 07-024 (ARB Jan. 23, 2009) (federal contractors with service contracts yielded more than \$2,500 in gross receipts must pay prevailing wages and fringe benefits determined by the Secretary of Labor or by a collective bargaining agreement); *Pony Express Courier Corp.*, 1995-SCA-45 (ALJ Feb. 29, 1996) ("[t]he SCA was specifically designed to prevent the challenging of government service contract business to those whose competition is based on paying the lowest wages. An exemption was provided to 'regulated industries' subject to published tariff rate because there did not exist the competitive situation faced in service contract cases generally").

As noted by the ARB in *James A. Machos*, ARB No. 98-117 (ARB May 31, 2001), under the SCA the "Secretary of Labor is responsible for determining the minimum hourly wage and fringe benefit rates to be paid to various classifications of service workers who may be employed on service procurement contracts in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of the service employees in the United States."

In *Russian and East European Partnerships, Inc.*, ARB No. 99-025 (ARB Oct. 15, 2001), the Board noted that the "SCA requires that every service procurement contract in excess of \$2,500 entered into by the United States, the principle purpose of which is to provide services through the use of service employees in the United States, contain a provision specifying the minimum hourly wage and fringe benefit rates payable to the various classifications of service employees working on the service contract."

In ***Administrator, Wage and Hour Div. v. MESA Mail Service, LLC***, ARB No. 2017-0071, ALJ No. 2009-SCA-00011 (ARB Sept. 30, 2020), the ARB noted that the Secretary of Labor has broad authority to enforce the SCA and to investigate alleged violations. Respondents argued that DOL had overreached, having continued to search for employees who were not paid even after it had been determined that the employee whose complaint caused the investigation to be initiated had been overpaid. The ARB was not persuaded and noted the Secretary of Labor's has broad authority to enforce the SCA and to investigate alleged violations. Further, the ARB found that the record "demonstrates WHD's investigation was entirely driven by complaints from employees, and that there is no evidence that the WHD investigator was abusive towards the Respondents, was less than courteous or was confrontational, imposed unreasonable production of documents deadlines, or otherwise ranged beyond his governmental authority under the SCA." *Id.* at 11 (footnote omitted).

#### B. Proceedings exempt from automatic stay provisions of the Bankruptcy Code

In ***Smith Real Estate Investments, Inc.***, 1998-SCA-9 (ALJ Dec. 3, 1998), the ALJ issued default judgment against the contractor for failure to pay the proper wages and fringe benefits to its employees. Previously, the ALJ issued an Order to Show Cause stating that, pursuant to 11 U.S.C. § 362(b)(4), the SCA proceeding was exempt from the automatic stay provisions of the Bankruptcy Code and the contractor was requested to state why default judgment should not be issued for its failure to comply with the ALJ's prehearing order. No response was received and, pursuant to the provisions at 29 C.F.R. § 18.6(d)(2)(v), the ALJ issued default judgment against the contractor.

In ***Johnson v. U.S. Dep't of Labor***, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (*aff'g, in relevant part, Rasputin, Inc.*, ARB No. 03-059, 1997-SCA-32 (ARB May 28, 2004)) the district court concluded that an officer of the company, who was properly deemed a "party responsible" for violations of the Act, could not seek relief from debarment based on 11 U.S.C. § 525 of the Bankruptcy Code. In essence, the officer maintained that his debarment was based, in part, on his failure to repay his wage obligations under the Service Contract Act. In this vein, the officer argued that the debt had been discharged in bankruptcy and, therefore, it should not have been used to support his debarment. The court disagreed and stated:

In this case, debarment was based upon [the officer's] failure to demonstrate 'unusual circumstances,' only one of which was the failure to repay the obligation. Even if he had repaid the obligation, because the ARB found that he engaged in culpable conduct, it would still have debarred him from further contractual proceedings for a period of three years. Thus, the decision was not based solely upon Mr. Johnson's failure to repay an obligation discharged in bankruptcy, and his claim for discrimination under 11 U.S.C. § 525 cannot stand.

In ***Rasputin, Inc.***, ARB No. 03-059, ALJ No. 1997-SCA-32 (ARB May 28, 2004), the ARB found that SCA proceedings are exempt from the automatic stay provisions at 11 U.S.C. § 362(a) because of the police powers exemption. The ARB held that the exemption enabled the determination of liability, back wage violations, and eligibility for debarment. *Id.* at 2-3. See also ***Frontline Security Services, LLC***, 2018-SCA-

00013 at 1-2 (ALJ Nov. 14, 2018) (order finding that the “police power” exception to the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(b)(4), applies).

## II. Jurisdiction

### A. Motion for Reconsideration

#### 1. By the ARB

In ***Thomas & Sons Building Contractors, Inc.***, ARB No. 98-164, 1996-DBA-33 (June 8, 2001), a case arising under the Davis-Bacon Act, the ARB held the following:

The Davis-Bacon Act has no explicit grant of authority to reconsider; therefore, if the Board has authority to reconsider, it perforce must be based on an ‘inherent authority’ theory. To determine whether the Board has such inherent authority in this debarment case, we would need to examine the statute underlying the decision to determine whether reconsideration would adversely affect its enforcement provisions or statutory purposes. Significantly, even if we were to conclude that we had reconsideration authority, any party seeking reconsideration by this Board would need to make the request within a reasonable period of time.

From this, the Board noted its concern in accepting motions for reconsideration in debarment matters because of the “possible conflicts between the Board’s authority and the responsibilities of other Federal officials such as the Comptroller General” who maintains the debarment list. The Board stated that the question of its authority in non-debarment cases “may follow a different analysis from the analysis used in debarment cases.” Nevertheless, the Board concluded that it did not have to resolve the issue because:

In this case, Thomas and Sons filed their request for reconsideration more than five months after we issued our October 1999 D&O. No new evidence or changed circumstances have been cited by Thomas and Sons in support of their request, which essentially raises the same argument that was considered and squarely rejected by this Board in our prior decision. Moreover, no good cause has been shown for the delay. We therefore find that the request is untimely.

Slip op. at 7.

#### 2. By the ALJ

In ***TDP, Inc.***, 1994-SCA-23 (ALJ Apr. 12, 1995) (Order Denying Motion for Reconsideration), the ALJ noted that, although the implementing regulations did not provide for the filing of a motion for reconsideration in a SCA or CWHSSA case, it was “well-settled that the administrative agencies have the power to reconsider their own decisions absent unreasonable passages of time or legislation to the contrary.” In support of his holding, the ALJ cited to ***Bookman v. United States***, 453 F.2d 1263, 1265 (Cl. Ct. 1972), ***Belville Mining Co. v. United States***, 763 F. Supp. 1411, 1420 (S.D. Ohio 1991), and ***Faircrest Site Opposition Committee v. Levi***, 418 F. Supp. 1099, 1105 (N.D. Ohio 1976), and Federal Rule of Civil

Procedure 59(e). The ALJ nevertheless denied Respondent's motion for reconsideration as the contractor merely argued that it did not understand the nature of the proceeding.

In *Summit Investigative Service, Inc. v. Herman*, 34 F. Supp. 2d 16, 26 (D.D.C. 1998), the district court noted the following:

[U]nlike some statutes that require as a condition precedent to seeking judicial review that a party petition for reconsideration before an agency board, see, e.g., 47 U.S.C. § 405(a), the SCA imposes no such obligation. Thus, once the ARB issues its final decision reviewing the ALJ, the agency process is complete and there exists a final agency action from which a party may seek judicial review.

#### **ARB DECLINES REVIEW OF ALJ'S DECISION IN SCA CASE WHILE A MOTION FOR RECONSIDERATION IS PENDING BEFORE THE ALJ**

In *Material Movement, LLC*, ARB No. 16-061, ALJ No. 2015-SCA-1 (ARB May 17, 2016), the ALJ granted summary decision, and the Respondents requested ARB review. In the request for review, the Respondents stated that they had requested the ALJ to reconsider his decision, and that the ALJ had not yet responded to that request. The ARB stated: "Until the ALJ issues an order in response to the request for reconsideration, the Board does not consider his decision to be final and subject to review." The ARB thus denied the petition for review, but stated that the Respondents could file a new petition within 40 days of the date on which the ALJ issues his decision on reconsideration.

#### **B. Untimely challenge**

##### **1. Administrator has discretion to waive procedural requirements in the interest of justice**

In *Amcor, Inc. v. Brock*, 780 F.2d 897 (11th Cir. 1986), the court noted that the ALJ issued a decision on December 1, 1978 requiring that the contractor repay certain back wages owed and that the contractor be placed on the debarment list. Exceptions to the decision were due by February 15 pursuant to 29 C.F.R. § 6.10(b), but the Administrator did not receive the government's exceptions until February 22. The Administrator waived the regulatory deadline for filing exceptions and concluded that the ALJ's decision was erroneous, thus modifying the amount owed by the contractor in back wages. The contractor objected to state that the Administrator was without jurisdiction to review the ALJ's decision given the untimely filing of exceptions. The court held that "the administrator was entitled to waive the filing deadline in the interest of justice," which was a procedural requirement, as long as the opposing party will not suffer prejudice. The court then summarily concluded that no prejudice was suffered by the contractor in this case.

##### **2. Appeal dismissed as untimely**

In *United Gov't Security Officers of America*, ARB Case No. 98-154 (ARB Oct. 2, 1998), the ARB dismissed a petition for review, which was filed one year after the contractor's receipt of the Administrator's ruling letter.

3. Appeal dismissed after not having received a petition for review or other communication from the Administrator for several months

In *Administrator, Wage and Hour Div., USDOL v. Southwest Security Services, Inc.*, ARB No. 12-007, ALJ No. 200-SCA-11 (ARB Feb. 4, 2013) (Order Closing Case), the ARB had granted the Administrator of the Wage and Hour Division an enlargement of time to file an appeal to the ALJ's SCA decision. Several months later, having received no petition for review or other communication from the Administrator, the ARB closed the matter.

### C. Premature challenge

## **AUTHORITY TO REVIEW SCA WAGE DETERMINATION DECISION WHILE MATTER IS STILL UNDER INVESTIGATION**

In *Veteran National Transportation, LLC*, ARB No. 17-043 (ARB June 13, 2017), the ARB dismissed the petitioner's request for review because it failed to respond to the ARB's order to show cause why the ARB should not dismiss the petition for review on the ground that the ARB lacks authority to consider an appeal in the absence of a final ALJ decision. *See* 29 C.F.R. § 8.1(b) (2016). The ARB had noted in the order to show cause that no DOL ALJ had issued a final decision for the ARB to review, apparently because DOL had not yet completed 29 C.F.R. Part 6 investigatory procedures.

### D. Petition for review not filed prior to award, exercise of option, or extension of contract

## **ARB DECLINES REVIEW OF WHD ADMINISTRATOR'S SCA WAGE DETERMINATION AND CLASSIFICATION WHERE THE PETITION FOR REVIEW WAS NOT FILED PRIOR TO ANY AWARD, EXERCISE OF OPTION, OR EXTENSION OF A CONTRACT**

In *MLB Transportation Inc.*, ARB No. 2016-0078 (ARB July 23, 2019), the ARB had docketed Petitioners' petition for review of a SCA wage determination and classification by the Administrator, Wage and Hour Division. Upon reviewing the record, however, the ARB set aside its Notice of Appeal and Order Establishing Briefing Schedule, and denied the Petition for Review because it concluded that "the Petitioners did not file their Petition for Review *prior to any 'award, exercise of option, or extension of a contract'* on any of these service contracts as they must in order for the Board to review the wage determination they seek to challenge here. 29 C.F.R. § 8.6(d). In sum, the record demonstrates no exception to the regulatory rule that the ARB will not review a wage determination after award. It follows that this case should not have been docketed for review." Slip op. at 4 (footnotes omitted) (emphasis as in original).

#### E. Unavailability of ALJ and reassignment for decision

In ***Houston Building Services, Inc.***, ARB No. 95-041A, 1991-SCA-30 (ARB Aug. 21, 1996), the ALJ who conducted the hearing retired before issuing a decision and the case was transferred to another ALJ. Since the adjudication of the case was based on legal issues and involved no credibility determinations, the respondents' objections in regard to the reassignment were "inconsequential."

#### F. Portal-to-Portal Act inapplicable

The six year statute of limitations period contained at 28 U.S.C. § 2415 governs an action by the United States government against a government contractor for the failure to pay its employees the minimum wage as required by the terms of its contract. As a result, the two year statute of limitations period under the Portal-to-Portal Act at 29 U.S.C. § 255 was inapplicable. ***United States v. Deluxe Cleaners and Laundry, Inc.***, 511 F.2d 926 (4th Cir. 1975).

In ***Administrator, Wage and Hour Div., USDOL v. Northwest Title Agency, Inc.***, ARB No. 2017-0055, ALJ No. 2014-SCA-00011 (ARB June 12, 2020) (per curiam), the ARB rejected Respondents' contention that the complaint was untimely under the two-year statute of limitations in the Portal-to-Portal Act – the ARB stating that this statute does not apply to proceedings under the SCA. The ARB also rejected Respondents' contention that a state statute of limitations should apply. In a footnote, the ARB declined to adopt the ALJ's conclusion that the six-year statute of limitations applicable to contract actions brought by the United States, 28 U.S.C. § 2415(a), applied. The ARB stated that this statute does not apply to administrative proceedings.

#### G. District court jurisdiction – no authority to remand for further proceedings absent holding that ALJ's findings were not supported by a preponderance of the evidence

In ***United States v. Todd***, 38 F.3d 277 (6th Cir. 1994), the Department of Labor pursued an enforcement action in the district court for underpayments which the ALJ determined were made to non-government service employees of the contractor. Initially, the district court denied the enforcement motion and remanded the case to the ALJ for reopening of the record to allow the contractor another opportunity to be heard. On appeal, the circuit court held that the trial judge exceeded the scope of his jurisdiction. The circuit court concluded that, in order for a remand to be upheld, the district court must have determined that the ALJ's findings were not supported by a preponderance of the evidence. Absent this finding, the district court was without authority to remand the case for reopening of the record.

#### H. The Tennessee Valley Authority covered

The Tennessee Valley Authority is covered by the SCA. **Tennessee Valley Authority**, ARB Case No. 01-024 (ARB Mar. 31, 2003).

#### I. Department of Homeland Security, Federal Protective Services covered

In **United Government Security Officers of America et al. v. Chertoff**, Civ. Act. No. 07-173 (CKK) (D.D.C. Nov. 24, 2008), the district court held that federal agency defendants (U.S. Department of Homeland Security and Federal Protective Services) was obliged to comply with ALJ Mape's Decision and Order and the Department of Labor's new wage determination for security officers by incorporating the "increased wage and benefit rates into the Service Contract with USProtect." The court noted that the regulatory provisions at 29 C.F.R. § 4.163 and 48 C.F.R. § 52.222-41(f) required that Defendants amend their service contracts to incorporate the newly issued wage determinations and that this was a "clear, non-discretionary duty" on the part of the federal government agencies. As a result, the court emphasized that the onus was not on the private contractor alone to amend the service contracts at issue.

#### J. Jurisdiction over a contract to operate a ship outside US territorial waters

In **Ocean Shipholdings, Inc.**, ARB No. 11-066, ALJ No. 2011-CBV-1 (ARB Jan. 23, 2013), the Board held that the Department of Labor lacks jurisdiction to conduct a substantial variance hearing under the Service Contract Act on a contract to operate a ship outside U.S. territorial waters. The fact that bidders had to pay at least the Wage and Hour Division's wage determination did not create jurisdiction.

The Military Sealift Command (MSC) had issued a request for proposals (RFP) for the operation and maintenance of tanker ship. The Wage and Hour received a request for a substantial variance hearing on the RFP from a union that represents mariners on U.S.-flagged vessels. MSC issued an amendment indicating that the Service Contract Act (SCA) was not applicable to the RFP because the ship was to be forward deployed for the entire contract period. MSC also announced that although SCA compliance was not applicable to the contract, RFP offerors would be required to pay at a minimum the wage and fringe benefit rates contained in the Department of Labor Wage Determinations attached to the RFP. Wage and Hour denied the union's request for a substantial variance hearing as untimely, and the union submitted a second request, which was referred to OALJ for a hearing. During a telephone conference call with the ALJ, the bidder who was awarded the contract raised the issue of the SCA's applicability and DOL's jurisdiction to conduct the substantial variance hearing. Following briefing by the parties, the ALJ concluded that the SCA did not apply to the RFP because the work under the contract would be performed outside the United States. The ARB affirmed.

The ARB cited the SCA statutory language, and the implementing regulation at 29 C.F.R. § 4.112(a). That regulation provides that "Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in this paragraph would not be services furnished 'in the United States' within the meaning of the Act." The ARB further found that the union had not adequately refuted the contractor's assertion that the SCA does not govern the RFP. The union did not contest the contractor's statements before the ALJ that the tanker in question would not be

providing services within the United States. Rather, the union relied on an argument that the SCA applied because the parties agreed to apply SCA wages to the contract. The ARB found, however, that the contractor incorporated a wage determination into the RFP to establish a minimum level of wages successful bidders would be expected to pay to workers. The ARB stated that the parties “may agree to pay SCA-level wages, but SCA coverage applies only as described in the statute (41 U.S.C.A. 6701(d)), and the implementing regulations (29 C.F.R. 4.112(a)).” USDOL/OALJ Reporter at 5 (footnote omitted). The ARB was not persuaded by the union’s arguments that the RFP was a successor contract and that the tanker in question had been within U.S. territorial waters during the performance of the contract.

#### K. ARB discretion to decide whether to review an expired contract where no practical relief is available

The ARB may dismiss an appeal where no practical relief is available, but alternatively may choose to decide a moot appeal if it presents significant issues of general applicability.

In ***National Aeronautics and Space Administration (NASA)***, ARB No. 12-027, ALJ No. 2011-CBV-3 (ARB Dec. 19, 2013), NASA sought a variance from the collectively bargained wages for custodial services at the Johnson Space Center. The contract had expired by the time the ARB issued its decision, but the ARB went ahead and decided the appeal. The ARB explained:

The ARB has held that once the contract at issue expired, the case becomes moot because the relief accorded under the SCA is prospective only. See 29 C.F.R. § 4.163(c) (“variance decisions do not have application retroactive to the commencement of the contract.”); In re Ceres Gulf Inc., ARB No. 96-192, ALJ Nos. 1993-CBV-001, 1995-CBV-001; slip op. at 2 (ARB Jan. 6, 1998). In this case, NASA’s contract with INC expired on February 28, 2013, at the end of the second, one-year option. The ARB has dismissed appeals under the SCA where no practical relief is available because review would be nothing more than an advisory opinion. In re Am-Gard, Inc., ARB Nos. 06-049, 06-050; ALJ No. 2006-CBV-001, slip op. at 4 n.14 (ARB July 31, 2008). Nonetheless, we will address the issues NASA raises, which are “significant issue[s] of general applicability.” 29 C.F.R. § 8.6(d).

USDOL/OALJ Reporter at n.2.

### III. Standard of review

In ***Dantran, Inc. v. Dep’t of Labor***, 171 F.3d 58, 71 (1st Cir. 1999), the circuit court held that fact-finding under the SCA must be performed in accordance with the preponderance of the evidence standard at 41 U.S.C. § 39. A reviewing tribunal must uphold the ALJ’s findings in the absence of “clear error.” *Id.* at 72.

The court in ***J.N. Moser Trucking, Inc. v. U.S. Dep’t of Labor***, 306 F. Supp. 2d 774 (N.D. Ill. 2004), held that it was not required to defer to the ARB’s decision where the ARB’s “sole basis for reversing the hearing officer is because it has simply come to a different conclusion as to the credibility of witnesses (person whom it has neither seen nor heard) in the absence of such other evidentiary support.” See

Groberg Trucking, Inc., ARB No. 03-137, 2001-SCA-22 (ARB Nov. 30, 2004) (the Board noted that its “general practice” is to “defer to the ALJ’s credibility findings, and accept all the ALJ’s findings of fact based on those credibility determinations.”).

See *Rasputin, Inc.*, ARB No. 03-059, 1997-SCA-32 (ARB May 28, 2004), *aff’d* in relevant part *sub nom*, *Johnson v. U.S. Dep’t of Labor*, 205 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio Aug. 16, 2005), *aff’d*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (court held that it consistently accords “substantial deference to the credibility determinations of the ALJ”).

See also *R&W Transportation, Inc.*, ARB Case No. 06-048 (ARB Feb. 28, 2008) wherein the Board noted that it would follow its general practice and “defer to the ALJ’s credibility findings, and accept all the ALJ’s findings of fact based on those credibility determinations.” With regard to a judge’s rulings on evidentiary and procedural issues, the Board held that it would utilize the “abuse of discretion standard” and determine whether the ALJ “abused the discretion vested in him to preside over the proceedings.”

See also *Fields and W/D Enterprises, Inc. v. Chao*, Case No. 6:08-cv-1119-JTM (Feb. 19, 2009), recon. Denied (D. Kan. Mar. 19, 2009) (the district court’s scope of review is limited to the legal question of whether the ALJ applied and satisfied the standard of proof required to find a violation of the SCA; the court is “bound to review the agency’s final decision under the ‘preponderance of the evidence’ standard”); 41 U.S.C. § 353 (the Secretary’s factual findings are conclusive if supported by a preponderance of the evidence).

However, in a case of first impression, the Southern District Court of New York determined that it “must undertake an independent or plenary review of the administrative record as a whole” that must be “tinged with a significant degree of deference to the agency,’ particularly where the questions implicate their expertise.” *Karawia and International Services, Inc. v. Dep’t of Labor*, Case No. 08-CV-5471 (HB) (S.D.N.Y. May 7, 2009) (unpub.). The court acknowledged that this standard “is slightly more exacting than the ‘clear error’ standard other courts have used to review DOL decisions . . . .” Moreover, the court determined that because the ARB is authorized to conduct an independent review of the record to decide mixed questions of fact and law, the court’s deference would be owed to the “ARB’s application of law to the facts” and not the ALJ.

## IV. Evidence

### A. Burden of proof

#### 1. Preponderance of the evidence

In *Dantran, Inc. v. Dep’t of Labor*, 171 F.3d 58, 71 (1st Cir. 1999), the circuit court held that fact-finding under the SCA must be performed in accordance with the preponderance of the evidence standard at 41 U.S.C. § 39. A reviewing tribunal must uphold the ALJ’s findings in the absence of “clear error.” *Id.* at 72.

## 2. Reconstruction of payroll records

In *D's Nationwide Industrial Services*, ARB Case No. 98-081, 1995-SCA-38 (ARB Nov. 24, 1999), the ARB held that, because the respondent failed to maintain records demonstrating the actual number of hours worked under a contract with the United States Postal Service, the records of the Postal Service constituted sufficient proof of the hours worked for back wage reconstruction purposes. In support of its holding, the ARB cited to *Ray v. Dep't of Labor*, 26 WH Cases 1244, 1246 (C.D. Ill. 1984).

In *Amcor, Inc. v. Brock*, 780 F.2d 897 (11th Cir. 1986), the court held that, where an employer fails to maintain work records in compliance with the regulations, the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) is useful:

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. (citation omitted).

In *Administrator, Wage and Hour Div. v. Chae S. McFarland d/b/a SK Gateway Cleaners*, ARB No. 12-046, ALJ No. 2010-SCA-23 (ARB Jan. 15, 2014), the ARB found that the ALJ properly credited the Wage and Hour investigator's calculations of back wages owed under the Service Contract Act based on the investigator's testimony and the records presented by the investigator, and the Respondent's failure to offer probative evidence to rebut the reasonableness of the investigator's calculations. The Defendant had failed to maintain accurate and complete records. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (evidentiary principles when employer's records are inaccurate or inadequate). The ARB also affirmed the ALJ's debarment order where the Respondent failed to show unusual circumstances that would relieve her company from debarment. The Respondent's owner's own testimony indicated that she had only paid the minimum wage and no fringe benefits, admitted that her payroll records were incomplete, and that she never agreed to pay any back wages owed.

### B. Limitations on evidence held to be improper

#### 1. Exclusion of evidence on remand

Despite numerous errors in excluding admissible evidence, the ARB determined that a remand for a new hearing was not required where the evidence which was admitted was sufficient to reverse the ALJ's opinion. **Summitt Investigative Service, Inc.**, ARB No. 96-111, 1994-SCA-31, slip op. at 6 (ARB Nov. 15, 1996), *aff'd*, 34 F. Supp. 2d 16 (D.D.C. 1998). If, however, the record of evidence supported the ALJ's decision, then a remand would be necessary. The ARB suggested that ALJs take disputes as to the admissibility of evidence under advisement and sift through them later, avoiding prolonged discussions on the record.

## 2. Limitation on cross-examination too arbitrary

In **Summitt Investigative Service, Inc.**, ARB No. 96-111, 1994-SCA-31, slip op. at 5-6 (ARB Nov. 15, 1996), *aff'd*, 34 F. Supp. 2d 16 (D.D.C. 1998), the ARB stated that, although there are situations in which a time limitation on the completion of cross-examination would be in order, the arbitrary placement of such a limitation by the ALJ in this case was error. Questioning on direct examination encompassed 122 pages of hearing transcript, and after sixty pages of questioning on cross-examination, the ALJ cited interminable delays between questions and granted counsel ten minutes in which to finish cross-examination. The ARB noted that half of the pages devoted to cross-examination included statements by the ALJ and opposing counsel. Thus, the short time limit imposed was in error.

### C. Testimony regarding documentation not in record

In **Hugo Reforestation, Inc.**, ARB No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001), the ARB held that it was proper for the ALJ to permit the Assistant Director of the Portland Office of the Wage and Hour Division "to testify about information contained in Wage and Hour Division records about prior investigations of, and past contacts with, Petitioners without introducing the documents themselves." Initially, the Board noted that the record did not indicate that Petitioners objected to admission of the testimony at the hearing. However, even if a timely objection had been made, the ARB stated the following:

The underlying rationale for the hearsay rule is to avoid prejudice by protecting against the admission of unreliable evidence and by insuring that an opposing party can have effective cross-examination. Had Yerger testified about meetings or events unknown to Petitioners, it could be argued that her testimony would have affected a 'substantial right' guaranteed to them. In the instant case, however, Yerger's testimony recounted the results of investigations, meetings and actions taken that were fully within Petitioner's knowledge, and thus within Petitioner's ability to effectively counter or rebut.

The ARB held that Petitioners failed to demonstrate that they were prejudiced by the testimony. Moreover, although Petitioners argued that documents underlying the testimony were requested through discovery but not produced, Yerger's testimony was not precluded. The Board noted that Petitioners failed to file a timely motion to compel and failed to request introduction of the documents at the hearing, noting that the Wage and Hour Administrator's attorney had brought the documents to the hearing.

D. ALJ assessment of statement of work versus job skills required; where collectively-bargained wage rates are not available for locality

In ***National Aeronautics and Space Administration (NASA)***, ARB No. 12-027, ALJ No. 2011-CBV-3 (ARB Dec. 19, 2013), NASA sought a variance from the collectively bargained wages for custodial services at the Johnson Space Center in a contract between Integrity National Corporation (INC) and the International Association of Machinists and Aerospace Workers, District Lodge 377, Local Lodge 1786. The positions in question were custodian/janitor service worker; custodian/janitor crew leads; recycling specialist; and warehouse clerk.

Section 4(c) of the Service Contract Act (SCA) imposes a successorship obligation: where service employees are covered by a collective bargaining agreement (CBA), a successor contractor furnishing substantially the same services at the same location ordinarily will be obligated to pay those employees no less than wages and fringe benefits required by the CBA. The SCA, however, provides for an exception where, after a hearing, it is determined that "wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character." 41 U.S.C.A. § 6707(c); 29 C.F.R. § 4.10(a). In the instant case, the ALJ denied NASA's petition for a collective bargaining variance.

On appeal, NASA first argued that that the ALJ erred because its Statement of Work (SOW) specifying the basic required services is the sole basis for comparing similar services in the locality. The ALJ had found that NASA's sole reliance on the SOW ignored significant differences required of custodial personnel at NASA as compared to other known work sites in the locality (such as, security clearances, language proficiency, reading/writing ability, educational requirements and people skills). The ARB held that "contrary to NASA's contention, the Act permits the ALJ to analyze the actual job duties and skills of custodial workers employed at NASA for purposes of determining 'services of a character similar in the locality.'" 41 U.S.C.A. § 6707(c)." USDOL/OALJ Reporter at 7 (emphasis as in original). Reviewing the evidence of record, the ARB found that a preponderance of the evidence supported "the ALJ's determination that NASA failed to compare the services of INC custodial workers at the Johnson Space Center with jobs of a similar character in the locality as required by the Act." *Id.* at 9.

NASA also argued that the ALJ erred in determining that it misapplied the wage measure charts by comparing an average of wage-based rates and surveys. NASA asserted that there is no set statutory or regulatory methodology required to prove substantial variance. The ARB held that the ALJ did not err. The ARB cited Wage and Hour Division All Agency Memorandum (AAM) No. 166, which directs parties seeking a wage variance to include information and analysis concerning the differences between the collectively-bargained rates issued and the rates contained in (1) federal wage board rates and surveys; (2) relevant BLS surveys and comparable SCA wage determinations; (3) other relevant wage data such as what other employers pay for similar services; and (4) other collectively-bargained wages and benefits in the locality. Slip op., quoting AAM No. 166 at 2-3. The ARB noted that the Department recognizes that a party seeking a variance "may not be able to submit complete data at the time the hearing request is made," but the Department expects that this information will be available prior to a decision on the variance request. Slip op., quoting AAM No. 166 at 3. The ARB noted that "Merely providing a statement that data is not available is not sufficient." Slip op., quoting AAM No. 166 at 3. "The request must

adequately demonstrate the effort made to obtain or develop such information." Slip op., quoting AAM No. 166 at 3.

In the instant case, NASA witnesses testified that NASA could not obtain any collectively-bargained wage rates in the Houston locality. Moreover, a labor economist expert testified that NASA relied on measures of central tendency to compare wage rates of custodial service employees at the Space Center with the average wage rates of custodial employees in the locality, and that this resulted in a misleading conclusion with respect to assessing a substantial variance. The expert further testified that NASA's evidence compared collectively-bargained wages at NASA with a market that is mostly non-unionized, and collectively-bargained wages are generally higher than non-collectively bargained wages. Accordingly, the ARB held that the preponderance of evidence supported the ALJ's determination that NASA relied on inadequate wage measurement charts.

**VARIANCE FROM CBA WAGES FOR TELECOMMUNICATIONS WORKERS DENIED WHERE PETITIONER FAILED TO SHOW THAT WAGE DEFERENTIALS WERE BASED ON EMPLOYEES IN THE LOCALITY PERFORMING SERVICES SIMILAR TO THOSE IN THE CBA**

In *BAE Systems*, ARB No. 12-056, ALJ No. 2012-CBV-1 (ARB May 19, 2014), the Department of the Navy sought a variance from the collectively-bargained wages for telecommunications services in a contract between BAE Systems, Incorporated (BAE), and the International Brotherhood of Electrical Workers, Local 1260 (Union). The ALJ denied the variance. The ARB affirmed the ALJ's decision, finding that "[t]he Navy advances its substantial variance argument principally on wage differentials for each of 17 CBA job classifications and very little else. A substantial variance showing requires not only evidence of a wage differential between CBA wages and other local rate wages, but also a prior showing that other employees in the locality are performing services similar in character to those in the CBA. The ALJ correctly determined in this case that the Navy's evidence falls short. While the Navy sought to advance its case at hearing and in its opening brief before the ARB that a substantial variance existed with respect to ET IIs, the Navy failed to provide any evidence (and failed to advance any argument in its brief to the ARB) that other employees in the locality were performing similar services in character for the remaining 16 CBA job categories, and thus failed to show a relevant mix of rates to determining a prevailing wage. For these reasons, the Navy failed to meet its burden under SCA section 4(a)." USDOL/OALJ Reporter at 6.

On appeal, the Navy argued that the ALJ erred in rejecting comparison of the position descriptions in the SCA and Salary.com data with position descriptions for labor classifications in the CBA. The ARB noted first that the Navy did not provide position descriptions for four of the labor classifications in the CBA, and such absence of evidence foreclosed providing a substantial variance for those positions. The Navy next argued that that workers under the CBA job classifications perform work that is the same or similar to that of other workers in the locality. The ARB noted that the Navy had only advanced that argument as to one classification, but advanced that argument solely as to one classification for an Electronics Technician II (ET II) position. The ARB found that the Navy waived the argument as to the remaining 12 classifications as it had not advanced that argument as to those positions in its brief (or even before the ALJ). The ARB further found, that even if there was no waiver, the ALJ did not find that the data presented by the Navy from Salary.com were sufficient to establish a prevailing wage rate. Citing the U.S. Department of Labor Prevailing Wage Resource Book, 4(c) Hearings, Administrative Hearings Regarding Application of Section 4(c), the ARB found that "the use of

Salary.com data would not fall within the scope of other relevant wage data anticipated under the regulations, and indeed Salary.com data has been characterized as an “informal source[] and estimate[.]” USDOL/OALJ Reporter at 8 (quoting *Beyond the Payment Fairness Act: Mandatory Wage Disclosure Laws “A Necessary Tool for Closing the Residual Gender Wage Gap,”* 50 Harv. J. on Legis. 385, 432 (Summer 2013); *see also* “Money, Sex, and Sunshine: A Market-Based Approach To Pay Discrimination,” 43 Ariz. St. L. J. 951, 990 (Fall 2011) (“Websites such as salary.com and glassdoor.com collect anonymous information about compensation and benefits from employees, but this information is incomplete and often inaccurate.”)).

Turning to the Navy’s central argument “that there is a similarity of services in the locality for ET IIs,” the ARB noted that this category of workers appeared to represent the vast majority of CBA workers at issue. The ARB found that substantial evidence supported the ALJ’s finding that ET IIs under the CBA perform duties unique to the contract.

The Navy argued that that the ALJ erred in failing to give great weight to the SCA Area Wage Data for determining the prevailing wage in the locality. The ARB found that the ALJ correctly determined that the Navy failed to demonstrate a comprehensive mix of rates that show a prevailing wage in the locality. The ARB noted that All Agency Memorandum No. 166 (Oct. 8, 1992) “does not limit a comparison to the SCA area wage data in assessing the prevailing wage in a locality for purposes of a substantial variance proceeding. Instead the DOL recognizes that the SCA is a “minimum monetary compensation required to be paid to the various employees . . . usually listed in the wage determination as hourly wage rates.” DOL Prevailing Wage Resource Book 2010 at 3.” USDOL/OALJ Reporter at 11. The ARB found that the Navy had not presented any other wage rates from CBAs or civil wage rates for similar services in the locality, but only argued that proper comparison data constituted wage data derived from the Economic Research Institute (ERI) and Salary.com. The ARB found, however, that the Navy’s appellate brief did not dispute the ALJ’s discrediting of that evidence because ERI and Salary.com processes and methodology was not established.

The Navy argued that a comparison of wage rates must include premiums to portray actual wages paid. The ARB found that while the Navy failed to show services of similar character performed in the locality, the record nonetheless supported the ALJ’s finding that a shift premium is paid to only one lead employee per shift and that 60 percent of BAE employees under the CBA do not work shifts. The ARB found therefore that the ALJ reasonably concluded that including premiums “artificially inflated” the CBA wage rate when compared with the SCA rate.

The Navy argued that a comparison of wage rates must include premiums to portray actual wages paid. The ARB found that the record supported the ALJ’s finding that a shift premium is paid to only one lead employee per shift and that 60 percent of BAE employees under the CBA do not work shifts, and that including premiums “artificially inflated” the CBA wage rate when compared with the SCA rate.

#### [E. Sequestration of funds for payment of SCA-required health and welfare benefits as evidence of SCA violations](#)

In *E&S Diversified Services, Inc.*, ARB No. 13-019, ALJ Nos. 2011-SCA-8 and 9 (ARB Mar. 20, 2015), the ARB affirmed the ALJ’s finding that the Respondent failed to timely pay health and welfare

benefits required by the SCA to their contract employees, and that the Respondent had failed to establish that "unusual circumstances" merited relief from debarment. The ARB noted that the Respondent had admitted to holding funds it would have paid to service contract employees and sequestering those funds in its payroll and general accounts. The ARB found that the Respondent therefore admitted affirmative conduct violative of the SCA's health and welfare provisions. The Respondent argued that the ALJ erred in relying on the district director's testimony about prior violations where that witness also testified that the violations were technical in nature. The ARB found that this argument ignored the fact that 29 C.F.R. § 4.188(b)(1) places the burden on the contractor of showing no evidence of prior violations.

#### F. Due process – evidentiary hearing

### **IN-PERSON, EVIDENTIARY EVIDENCE ORALLY WAIVED BY RESPONDENTS' LEGAL REPRESENTATIVE IN SCA DEBARMENT CASE; WAIVER UNENFORCEABLE BECAUSE IT WAS NOT IN WRITING AS REQUIRED BY THE THEN APPLICABLE PROCEDURAL REGULATION AND WHERE RESPONDENTS ARGUED PERSUASIVELY THAT WAIVER CAUSED THEM PREJUDICE**

In *Administrator, Wage and Hour Div., USDOL v. Mesa Mail Service, LLC*, ARB No. 14-075, ALJ No. 2009-SCA-11 (ARB Jan. 21, 2016), the ALJ decided the case on the record, without an in-person evidentiary hearing, based on the parties' oral agreement that because the dispute was primarily a legal one, the ALJ could decide the case on the written record. This oral agreement was made on behalf of the Respondents by its legal representative. On appeal to the ARB, the Respondents argued that they had clearly made it known to their legal representative and the ALJ that they wanted an in-person hearing and were entitled to such. The Respondents contended that their representative had waived the in-person hearing against the best interests of the Respondents, "and/or wrongfully induced Respondents to do so based on the alleged fact that the ALJ could properly adjudicate the case upon a paper hearing. Cf. 29 C.F.R. [§] 18.39." USDOL/OALJ Reporter at 2-3. *Id.* at 4. The Respondents alleged prejudice, asserting that they denied the opportunity to demonstrate a good faith compliance defense and "unusual circumstances" in order to avoid debarment. The ARB vacated the ALJ's decision and remanded for an evidentiary hearing "absent a valid written waiver." The ARB found that "[t]he regulation in effect when the ALJ cancelled the hearing required that a party's waiver of his or her right to present evidence at a hearing be submitted in writing. 29 C.F.R. § 18.39 (2013). Thus, absent a valid written waiver, the ALJ must hold a hearing, given the factual disputes in this matter." *Id.* at 3-4. The ARB noted that the SCA regulations entitled the Respondents to a hearing before the ALJ, stated that it was persuaded by the Respondents' argument "that being denied a hearing prejudiced their case because they were denied the opportunity to testify about circumstances that may warrant relief from any debarment order under the SCA." *Id.* at 4.

#### G. Reliance on advice from contracting agency officials not a defense against liability for SCA back wages

In *Administrator, Wage and Hour Div., USDOL v. Puget Sound Environmental*, ARB No. 14-068, ALJ No. 2012-SCA-14 (ARB May 4, 2016), the ARB affirmed the ALJ's order granting the Administrator's motion for summary decision, with relief in the form of \$1,409,409.98 in back wages and benefits for violations of the terms of contracts subject to the Service Contract Act for general housekeeping,

painting, maintenance, and health and safety services on ships and shore facilities primarily at the Puget Sound Naval Shipyard.

On appeal, the Respondents asked that the ARB consider their claim that the contracting agency—the Naval Supply Center—failed to include the proper wage determination in the contracts. The ARB construed this as an estoppel argument. The ARB was not persuaded. First, the Respondents misconstrued the Administrator’s complaint. It did not charge that the contracts failed to include an appropriate wage determination; the wage determinations were correct. The charge was that the Respondents placed employees into the wrong wage categories. Thus, the Respondent’s reliance on 29 C.F.R. § 4.5(c) was unpersuasive. Second, assuming that the Naval Supply Center made a mistake in advising the Respondents which employees belonged in which categories, the regulations explicitly state that “[r]eliance on advice from contracting agency officials . . . is not a defense against a contractor’s liability for back wages under the Act.” 29 C.F.R. § 4.187(e)(5).

#### H. Statements of former employees

### **PARTIAL RELIANCE ON STATEMENTS OF FORMER DRIVERS BY WAGE AND HOUR DIVISION DID NOT UNDERMINE ALJ’S FINDING THAT WHD CALCULATION OF BACK WAGES WAS RATIONAL**

In *Administrator, Wage and Hour Div. v. MESA Mail Service, LLC*, ARB No. 2017-0071, ALJ No. 2009-SCA-00011 (ARB Sept. 30, 2020), the ARB affirmed the ALJ’s finding that Respondents, who were mail hauler contractors for the USPS, violated the recordkeeping requirements of the SCA and failed to establish unusual circumstances to warrant relief from debarment.

The ARB found that substantial evidenced supported the ALJ’s determinations that “Respondents violated the record-keeping requirements of the SCA because they relied on the USPS contract time as the default working hours and had no system for recording the actual hours employees worked. The ALJ further opined it was clear in at least some instances that drivers worked in excess of the USPS contract time, did not always claim extra time, and Respondents had no policy that required or encouraged drivers to report extra time.” Slip op. at 5. Although Respondents contested these determinations, the ARB stated: “However, it is the employer’s responsibility to keep accurate records, not the employee’s. If an employer knows or has reason to know an employee is working, then compensation is due.” Id. at 6 (footnotes omitted).

In determining the amount of back wages owed, the Wage and Hour Division partly relied on statements by former drivers, and gave Respondents credit where it provided documentation; the ALJ determined that the WHD’s calculation was rational. On appeal, Respondents argued that the former drivers’ statements should be barred as hearsay, and should be found unreliable as being from disgruntled former employees. The ARB noted, however, that rules of evidence are relaxed in SCA administrative proceedings, and that the ALJ had acknowledged the possible propensity for bias and the fact the former workers had not been subject to cross-examination, but found the WHD’s inspector’s testimony had been very credible. The ARB dismissed Respondents’ argument that drivers were often overpaid because Respondents had no records to establish this, and because even if overpayments were made, they did not offset instances when drivers were underpaid.

## V. Discovery

### A. Interrogatories

In *U.S. Dep't of Labor v. Stewart*, 1992-SCA-49 (ALJ, July 11, 1995) (Pre-Hearing Order), the ALJ applied Federal Rule of Civil Procedure 33, which limits the number of written interrogatories allowed propounded on an opposing party to 25 without leave of the court or written stipulation. The ALJ further noted that the rule provides that a subpart is counted as a single interrogatory only when that subpart represents a discrete and separate subject matter that can stand alone.

### B. Protective order

#### 1. Informant's privilege

In *S.C. Security, Inc.*, 1998-SCA-26 (ALJ, June 29, 1999), the ALJ was confronted with a motion for a protective order, which she found was actually a motion to compel discovery:

Turning to Respondents' Motion for a Protective Order, I note that, in actuality, it is a motion to compel discovery. However, Respondents have sought for the responses to discovery for which the Department of Labor has made of claim of privilege to be provided to their counsel, who would then be bound by a Protective Order which would prevent the information and documents from being provided to Respondents. While, despite my misgivings, I might have considered such an approach if it were agreed to by both parties, I find the approach likely to be unworkable and I decline to adopt it. In this regard, the actions taken by Respondents' counsel after obtaining the requested information and documents would provide Respondents with some inkling as to the nature of the information provided, and making counsel subject to a protective order would inhibit their frank discussion of the merits of the case and litigation strategy with their clients. Accordingly, I will, instead, construe Respondents' Motion as a motion to compel.

The ALJ then noted that the Department of Labor asserted the informant's privilege, the deliberative process privilege, and the work product privilege and declined to produce documents requested by Respondents. With regard to the informant's privilege, the ALJ cited to *Roviaro v. United States*, 353 U.S. 53, 59 (1957) and stated that the privilege may be asserted by the government "to withhold the disclosure (of) the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." In this vein, the ALJ noted that the "scope of the privilege is limited by its underlying purpose" and that it is inapplicable where the informer's identity has been disclosed or when the documents sought to be produced will not reveal the informer's identity. The ALJ stated that the privilege also "must give way when essential to a fair determination of the case. Citing to *Martin v. Albany Business Journal, Inc.*, 780 F. Supp. 927 (N.D.N.Y. 1992), the ALJ found that the informant's privilege was applicable to Fair Labor Standards Act (FLSA) cases and that "FLSA cases are analogous to the instant case, with the important exception that the instant case involves claims for back wages and the employee informants have a pecuniary interest in the outcome." The ALJ analyzed the holdings in *Albany Business Journal* as well as *Brock v. Gingerbread House, Inc.*, 907 F.2d 115 (10th

Cir. 1989), *Reich v. Great Lakes Collection Bureau, Inc.*, 172 F.R.D. 58, 60 (W.D.N.Y. 1997), and *BAC Steel Products*, 312 F.2d 14, 16 (4th Cir. 1962).

The ALJ found that Great Lakes Collection Bureau, in particular, "set forth a sound analysis of the principles applicable to the informer's privilege" and she stated the following:

Applying these principles (considered along with the regulation discussed above) to the instant cases, I find that the statements of employees interviewed by Wage and Hour investigators, together with any documents that cannot have identifying information redacted, are protected by the informer's privilege and do not need to be produced at the present time. The Respondent's need for the statements at the present time in order to present its case is outweighed by the need of the Department of Labor to protect the confidentiality of the employees interviewed during the course of its investigation, to ensure that employees will not be reluctant to come forward in the future. However, the Department of Labor must identify its witnesses as ordered by the undersigned administrative law judge and, at the time each witness is called, will be required to provide the requested statements related to each such witness. Those employees who agree to testify no longer have any interest in protecting the confidentiality of their statements, but those employees who do not testify will retain their anonymity. In this regard, I note that the employees concerned here have a pecuniary interest in the outcome of this case which requires that Respondents not be hampered in cross examining them. I understand that having to wait until the time of trial to obtain these statements may put the Respondents at a disadvantage. However, I will allow the Respondents whatever additional time is necessary to combat any prejudice. Absent unfair surprise, it would appear that a brief recess some time prior to the cross examination for the purpose of allowing the Respondents an opportunity to read the subject statements would be sufficient. If necessary due to unfair prejudice, the trial could be recessed and (only if absolutely necessary) discovery could be reopened.

Slip op. at 5-6.

In *Assisted Transportation, Inc.* 2014-SCA-00010 (ALJ Aug. 12, 2015), the ALJ found that the informant's privilege was appropriately raised to protect the confidentiality of employees interviewed during the investigation. The ALJ based her ruling on the Administrator of the Wage and Hour Division's assertion that disclosure "would interfere with Wage and Hour's enforcement and undermine the agency's ability to conduct future investigations." The ALJ further found that the respondents' need for the statements to prepare its case was outweighed by the WHD's interests in "ensur[ing] that employees will not be reluctant to come forward in the future." *Id.* at 5-6.

## 2. Deliberative process privilege

In *S.C. Security, Inc.*, 1998-SCA-26 (ALJ, June 29, 1999), the ALJ was confronted with a motion for a protective order, which she found was actually a motion to compel discovery:

Turning to Respondents' Motion for a Protective Order, I note that, in actuality, it is a motion to compel discovery. However, Respondents have sought for the responses to

discovery for which the Department of Labor has made of claim of privilege to be provided to their counsel, who would then be bound by a Protective Order which would prevent the information and documents from being provided to Respondents. While, despite my misgivings, I might have considered such an approach if it were agreed to by both parties, I find the approach likely to be unworkable and I decline to adopt it. In this regard, the actions taken by Respondents' counsel after obtaining the requested information and documents would provide Respondents with some inkling as to the nature of the information provided, and making counsel subject to a protective order would inhibit their frank discussion of the merits of the case and litigation strategy with their clients. Accordingly, I will, instead, construe Respondents' Motion as a motion to compel.

The ALJ then noted that the Department of Labor asserted the informant's privilege, the deliberative process privilege, and the work product privilege and declined to produce documents requested by the Respondents. With regard to the deliberative process privilege, the ALJ cited to ***Martin v. New York City Transit Authority***, 148 F.R.D. 56, 59 (E.D.N.Y. 1993) and noted that this privilege is designed to prevent the disclosure of documents which reflect "‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" The ALJ further noted that, as with the informer's privilege, the deliberative process privilege "must be properly invoked by the head of the agency or a high level subordinate to whom the authority to assert the privilege has been delegated together with guidelines on its use." Citing to ***Ashley v. U.S. Dep't of Labor***, 589 F. Supp. 901, 907 (D.D.C. 1983), the ALJ noted that the burden of proof rests with the Department of Labor "with respect to each document or portion thereof, and reasonably segregable factual material must be provided." The ALJ further stated that "[i]t is a matter of concern where, as here, the affidavit of the high level subordinate suggests that the decision to assert the privilege was not made by agency policymakers in consideration of the agency's interest in the deliberative confidentiality but as a matter of litigation strategy."

In this vein, the ALJ noted that Ashley requires that "[a] decision on the applicability of the privilege should generally be made on the basis of specific, clear, and detailed agency affidavits rather than based on an in camera review." Based on the facts of the case before, the ALJ determined that the agency official's declaration "falls far short of the detailed discussion of specific documents . . . and it appears to have been made by DOL counsel and then ratified by (the agency official) and adopted as policy." The ALJ further found that the agency official did not produce sufficient evidence of guidelines to accompany the delegation of authority to him to assert the privilege. As a result, the ALJ ordered that for those documents which, "by virtue of their description, clearly fall within the purview of the deliberative process privilege, I will apply the privilege." The ALJ then determined that the remaining documents requested would have to be produced.

In ***Assisted Transportation, Inc.*** 2014-SCA-00010 (ALJ Aug. 12, 2015), the ALJ found that the Wage and Hour Division appropriately raised the deliberative process privilege to protect predecisional, inter- or intra-agency deliberations such as investigation reports, case diary entries, compliance action reports, case registration forms, and worksheets. The ALJ noted that the disclosure of the information "would have an inhibiting effect on the agency's decision-making processes and would affect enforcement of the SCA and the CWHSSA. *Id.* at 7-8.

### 3. Work product privilege

In *S.C. Security, Inc.*, 1998-SCA-26 (ALJ June 29, 1999), the ALJ was confronted with a motion for a protective order, which she found was actually a motion to compel discovery:

Turning to Respondents' Motion for a Protective Order, I note that, in actuality, it is a motion to compel discovery. However, Respondents have sought for the responses to discovery for which the Department of Labor has made of claim of privilege to be provided to their counsel, who would then be bound by a Protective Order which would prevent the information and documents from being provided to Respondents. While, despite my misgivings, I might have considered such an approach if it were agreed to by both parties, I find the approach likely to be unworkable and I decline to adopt it. In this regard, the actions taken by Respondents' counsel after obtaining the requested information and documents would provide Respondents with some inkling as to the nature of the information provided, and making counsel subject to a protective order would inhibit their frank discussion of the merits of the case and litigation strategy with their clients. Accordingly, I will, instead, construe Respondents' Motion as a motion to compel.

The ALJ then noted that the Department of Labor asserted the informant's privilege, the deliberative process privilege, and the work product privilege to decline to produce documents requested by the Respondents. With regard to the work product privilege, the ALJ initially noted that this privilege is part of Rule 26(b)(3) of the Federal Rules of Civil Procedure as well as the Department of Labor's procedural rules at 29 C.F.R. § 18.14(c) "which generally provides that discovery by one party of documents prepared in anticipation of or for the hearing by or for another party's representative will be allowed only upon a showing of substantial need (for preparation of the party's case) and undue hardship to obtain the substantial equivalent by other means." Citing to *Reich v. Great Lakes Collection Bureau, Inc.*, 172 F.R.D. 58, 60 (W.D.N.Y. 1997) and *Wayland v. NLRB*, 627 F. Supp. 1473 (M.D. Tenn. 1986), the ALJ noted that the work product doctrine does not apply to "all work done by the investigator after the initial employee complaint is received . . . ." The ALJ stated the following:

Mr. Clark asserts that he supervised the investigation of the Navy contract involved in the instant case, that he discussed whether a complaint should be filed with Regional Counsel Ronald Gurka on March 24, 1998, and that following this conversation, seven signed statements were taken by an unnamed Wage and Hour investigator. It is unclear what guidance was given to the unnamed investigator or by whom it was provided. Nevertheless, Mr. Clark goes on to state that the statements were 'obtained pursuant to the advice given by Mr. Gurka, and these statements (were) obtained in anticipation of litigation.' Mr. Clark's declaration falls short of establishing a basis for invocation of the work product protection for these statements.

The ALJ did state, however, that the statements may be protected by the informant's privilege to the extent previously discussed in her opinion, which is summarized *infra* in this Chapter.

#### C. Compelling electronic discovery

In *Lawn Restoration Corp.*, 2002-SCA-6 (ALJ Jan. 17, 2003), the ALJ issued an order compelling electronic discovery. The ALJ noted that "[w]hether to authorize electronic discovery requires that I balance the benefits of allowing DOL access to legitimately discoverable material against the burdens imposed on Respondents in providing access to its electronic data. These "burdens" include "the costs of hiring an expert to inspect electronic data" as well as "costs associated with the disruption of Respondents' business and the potential threat posed to materials which are legitimately covered by the attorney-client privilege." The ALJ concluded that discovery was appropriate under the facts before him. Specifically, the ALJ stated the following:

I find that ordering the electronic discovery sought by DOL in its motion to compel is appropriate in that it provides the Agency with access to specifically identified information which is relevant to the issues raised in this litigation. In addition, Respondents' incomplete, inconsistent, and delayed responses to the Agency's prior discovery requests further justify such discovery. Since I believe the financial costs associated with the Agency's utilization of a computer expert to carry out the discovery ordered herein are more appropriately assigned to DOL, there will be little or no financial burden imposed on Respondents in providing access to its electronic data.

The ALJ noted that Respondents' privacy, attorney-client privilege, and business operations would be properly protected because (1) no DOL representative, other than its computer expert, would be present; (2) the inspection would be conducted in the presence of Respondents' counsel; (3) the expert would conduct a search only for information relating to terms and conditions of employment, which was the subject of the litigation; and (4) Respondents would produce a "privilege log" with respect to any data that the contractor would be precluded from searching.

## VI. Exempt employees

### A. No coverage for certain types of employees

#### 1. Service employee defined, generally

A "service employee" is defined under the Service Contract Act as the following:

. . . any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principle purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of Title 29, Code of Federal Regulations, . . . and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

41 U.S.C. § 357(b). The regulations at 29 C.F.R. § 4.155 state, in part, the following:

Any person, [except those employed in a genuine executive, administrative or professional capacity] . . . who performs work called for by a contract or that portion of a contract subject to the Act is, per se, a service employee. Thus, for example, a person's

status as an "owner operator" or an "independent contractor" is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.

See also *KSC-Tri Systems USA, Inc.*, 2006-SCA-20 (ALJ Aug. 7, 2007).

In *D's Nationwide Industrial Services*, ARB Case No. 98-081, 1995-SCA-38 (ARB Nov. 24, 1999), the ARB held that "it is clear that it is an employee's work duties, not his or her title or status in the business, that determine whether he or she is a service employee." Slip op. at 6.

Moreover, in *Stephen W. Yates*, ARB No. 02-119, 2001-SCA-21 (ARB Sept. 30, 2003), payment of SCA prevailing wages for truck drivers was required "regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons." The Board held that United States Postal Service mail hauling contracts were subject to SCA wage requirements. Respondent, a limited liability company, failed to comply with the SCA's wage payment requirements because "the four truck drivers working on the USPS mail hauling contracts were 'members' (or 'partners') of the LLC and therefore were not service employees under the Act." Respondent maintained that the truck drivers worked under a subcontract, and not a contract directly with the postal service. The ALJ disagreed and properly cited to 41 U.S.C. § 357(b) and 29 C.F.R. § 4.155, which required payment of prevailing wages for the truck drivers. The Board noted that the relevant inquiry was "whether the drivers (came) within the SCA definition of 'service employee.'" It found that an employee's work duties, not his or her title or status in the business, determines coverage under the Act.

## 2. Certain contracts for public buildings; published tariffs; Postal Service

The exemptions at 41 U.S.C. § 356 include any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting and decorating public buildings or public works; any work to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act at 41 U.S.C. § 35 et seq.; any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect; any contract for the furnishing of services by radio, telephone, telegraph, or cable companies which are subject to the Communications Act of 1934 at 47 U.S.C. § 151 et seq.; any contract for public utility services, including electric light and power, water, steam, and gas; any employment contract providing for direct services to a Federal agency by an individual or individuals; and any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. See *Stephen W. Yates*, ARB No. 02-119, 2001-SCA-21 (ARB, Sept. 30, 2003) (truck drivers for Postal Service subcontractor were "service employees" and were not exempt from coverage under 41 U.S.C. § 357(b) or the provisions at 29 C.F.R. §§ 4.123(d) and 4.113(a)(1)); *D's Nationwide Industrial Services*, ARB Case No. 98-081, ALJ Case No. 1995-SCA-38 (ARB, Nov. 29, 1999), slip op. at 5, n.4. *But see Williams v. U.S. Dep't of Labor*, 697 F.2d 842 (8th Cir. 1983) (no coverage for carriage of freight by truck for military personnel where published tariffs were in effect).

### 3. Executive, administrative, and professional exemptions at 41 U.S.C. § 357(b)

Executive, administrative, and professional employees are exempt from coverage. The regulations at 29 C.F.R. §§ 541.1(e), 541.2(d), and 541.3(d) provide that, to qualify as an executive, administrative, or professional employee, an individual must devote at least 80 percent of his or her hours of work to executive, administrative, or managerial activities.

#### **FAILURE TO ESTABLISH EMPLOYEES' ABILITY TO HIRE OR FIRE OR TO INFLUENCE DECISIONS ABOUT HIRING AND FIRING**

In *Administrator, Wage and Hour Div., USDOL v. 5 Star Forestry, LLC*, ARB No. 14-021, ALJ No. 2013-SCA-4 (ARB June 24, 2015), the Respondents argued that the ALJ erred in finding that two employees were covered by the Service Contract Act because they were not employed in a bona fide executive capacity and therefore did not qualify as exempt "executive" employees under 29 C.F.R. § 4.156 and 541.100(a). The ARB noted that the SCA and its implementing regulations incorporate the FLSA regulation at 29 C.F.R. § 541.100, which establishes a four-factor test for determining executive employees, each of which must be met for an employee to be exempt. In the instant case, the ARB affirmed the ALJ's determination on Factor Four, which dictates that an exempt employee must have: "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 C.F.R. § 541.100. The Respondents argued that the two employees at issue were foremen in the field, whose recommendations on employees carried particular weight. The ARB noted that the courts require more than formal input, and that the Respondents had several means by which they could have shown that the employees influenced hiring and firing decisions, the regulation at 29 C.F.R. § 541.105 listing factors that aid in the determination. The ARB noted that the Respondents "did not provide job descriptions that listed the ability to hire or fire or influence the hiring or firing of others," and "did not offer evidence of specific instances when the employer consulted the employees about hiring or firing or gave their input 'particular weight.'" USDOL/OALJ Reporter at 7. The ARB thus affirmed the ALJ's determination that the Respondents failed to establish that the employees were executives exempt from SCA coverage and the requirement to pay the fringe benefits to which the ALJ held they were entitled.

#### **WHERE PRINCIPAL PURPOSE OF A COMMERCIAL SHOPPING CENTER FOR MILITARY PERSONNEL WAS TO FURNISH SERVICES, THE ADMINISTRATOR PROPERLY FOUND THAT RETAIL SUBLEASES ARE SUBCONTRACTS COVERED UNDER THE SCA**

In *Servicestar Landmark Properties-Fort Bliss LLC*, ARB No. 17-013 (ARB June 25, 2018), the ARB affirmed the Wage and Hour Division Administrator's finding that "the principal purpose of the contracts for construction and operation of 'Freedom Crossing,' a commercial shopping center on the military installation at Fort Bliss, Texas, is to furnish services through the use of service employees." The ARB also affirmed the Administrator's conclusion "that the partial exemption for Davis-Bacon covered contracts does not apply and the retail subleases are subcontracts that are covered by the SCA."

### B. Application of exemptions

1. Application proper

a. *Courier service-published tariff rates in effect*

In ***Pony Express Courier Corp.***, 1995-SCA-45 (ALJ Feb. 29, 1996), the ALJ granted summary decision for Respondent based on its contention that it was exempt from coverage under the Service Contract Act, 41 U.S.C. § 351 et seq. pursuant to Section 7(3) of the Act, 41 U.S.C. § 356(3), which provides that "any contract for the carriage of freight . . . by truck [or] express . . . where published tariff rates are in effect" is exempt. The ALJ noted that "[t]he SCA was specifically designed to prevent the challenging of government service contract business to those whose competition is based on paying the lowest wages. An exemption was provided to 'regulated industries' subject to published tariff rate because there did not exist the competitive situation faced in service contract cases generally." Slip op. at 5 (citation omitted). Respondent presented un-refuted evidence that it had a contract for the carriage of freight with a branch of the Federal Reserve Bank.

Notably, the ALJ found that Respondent was a transportation company within the meaning of the exemption, satisfying the five pronged bona fide "express service test" of ***Transportation Activities of Arrowhead Freightlines, Ltd.***, 63 M.C.C. 573, 581 (1955). Respondent further established that it provided a service to the general public, utilized a regular rate schedule, utilized a hub and spoke methods for making speedy daily deliveries throughout 37 states, and used trucks to perform its contract with the Federal Reserve Bank. Finally, Respondent established that, at all times relevant to the proceeding, it had filed, with the ICC, published interstate tariff rates applicable to its contract with the Federal Reserve Bank, and its bid for the subject contract was based on the applicable tariff rate. The ALJ rejected Complainant's assertion that Respondent was required, pursuant to 29 C.F.R. § 4.118, to produce bills of lading citing the published tariff rate in order to establish entitlement to the exemption. The ALJ noted that there was other compelling evidence of the published tariff rate, and found that bills of lading were only one method of demonstrating the use of a published tariff rate-the regulation does not, however, make bills of lading the exclusive means of evidencing entitlement to the exemption.

b. *Airline pilots*

In ***Paul v. Petroleum Equipment Tools Co.***, 708 F.2d 168 (5th Cir. 1983), *reh'g denied*, 714 F.2d 137 (5th Cir. 1983), the Fifth Circuit held that an airline pilot met the test for the "professional" exemption at 29 C.F.R. § 541.315. Given the significant level of training and experience required of Respondent's pilots, the court concluded that they fell in a special class of pilots deemed "professionals." *But see Suburban Air Freight, Inc.*, ARB Case No. 98-160 (ARB Aug. 21, 2000) (the ARB held that it would exercise non-acquiescence with regard to the Fifth Circuit's decision to hold that airline pilots are not exempt professionals within the meaning of the SCA).

2. Application improper

a. *Employee primarily performed janitorial duties*

In ***United Kleenist Organization Corp.***, 1999-SCA-18 (ALJ Jan. 10, 2000), aff'd, ARB Case No. 00-042 (ARB Jan. 25, 2002), Respondent argued that one of its employees was "exempt" from the provisions of the SCA since he was an "executive" employee. The ALJ noted that, "[t]o be employed in a 'bona fide executive capacity', a number of requirements must be met," including that "[t]he employee's primary duty must be management; he must regularly direct the work of two or more employees; he must have the authority to hire and fire; he must regularly exercise discretionary powers; and he must no devote more than 20% of his time in non-management activities." Under the facts of *United Kleenist*, the ALJ found that the employee's primary duty was performing janitorial services, "which consumed much more than 20% of his time." The ALJ further noted that the only non-janitorial duty performed by the employee was providing the contractor with the number of hours worked by employees at the job site. As a result, he was a covered employee.

b. *Airline pilots*

In ***Suburban Air Freight, Inc.***, 1997-SCA-4 (ALJ July 23, 1998), the ALJ cited to a Fifth Circuit decision in ***Paul v. Petroleum Equipment Tools Co.***, 708 F.2d 168 (5th Cir. 1983) to hold that an airline pilot met the test for the "professional" exemption at 29 C.F.R. § 541.315. The Department argued that, according to 29 C.F.R. § 4.156, pilots were intended to be considered "service employees" under the SCA. Given the significant level of training and experience required of Respondent's pilots, however, the ALJ found that they fell "in the sub-class of pilots deemed 'professionals' by the definitions in Paul." As a result, the ALJ concluded that the exemption at 29 C.F.R. § 541.315 was applicable. On appeal, in ***Suburban Air Freight, Inc.***, ARB Case No. 98-160 (ARB Aug. 21, 2000), the ARB disagreed and remanded the case to the ALJ for further proceedings. In particular, the ARB concluded that airline pilots are not "learned professionals" under Part 541 because the occupation does not meet the "'knowledge of an advanced type in a field of science and learning' requirement."

Citing to ***U.S. Postal Service ANET and WNET Contracts***, ARB Case No. 98-131 (ARB Aug. 4, 2000), the ARB set forth a three-prong "short" test for determining whether an employee is exempt from the SCA as a learned professional: (1) the worker's primary duty requires advanced knowledge which is usually "acquired by a prolonged course of specialized intellectual instruction and study"; (2) the employee's work "requires consistent exercise of discretion and judgment"; and (3) the employee is compensated at a rate of \$250 per week or more, excluding "board, lodging or other facilities." Under the facts before it, the ARB held that pilots are highly skilled, but the training required does not consist of knowledge of an advanced type in a field of science or learning. In so holding, the ARB noted its non-acquiescence with the Fifth Circuit's decision in ***Paul v. Petroleum Equipment Tools Co.***, 708 F.2d 168, *reh'g denied*, 714 F.2d 137 (5th Cir. 1983).

c. *Ownership interest in company irrelevant*

In *D's Nationwide Industrial Services*, ARB Case No. 98-081, 1995-SCA-38 (ARB Nov. 24, 1999), the ARB held that five employees of Nationwide worked as truck drivers hauling U.S. mail pursuant to a contract with the United States Postal Service and, as a result, they were entitled to payment of the SCA prevailing wage. The employees maintained that they were not paid the prevailing wage as required by the SCA. Respondent, on the other hand, argued that three of the drivers owned a one percent interest in Nationwide and, thus, were partners in the company who were not entitled to the SCA prevailing wage. The ARB disagreed. It found that Respondent "presented no evidence that the drivers in question - who worked hauling, loading, and unloading mail – spent any of their time working in an executive, administrative or professional capacity." Slip op. at 6. As a result, the ARB affirmed the finding that the truck drivers were covered the SCA and entitled to the prevailing wage rate.

*d. Contracts between federal agencies and travel agencies*

In *Ober United Travel Agency Inc. and Society of Travel Agents in Government v. United States Dep't of Labor*, Case No. 97-5046 (D.C. Cir. Feb. 13, 1998), the D.C. Circuit affirmed the determination of the ARB and the Administrator in finding that both reasonably interpreted the SCA to apply to travel management contracts between federal agencies and travel agencies. The court rejected the appellants' argument that the SCA only applies to contracts that obligate appropriated funds. Likewise, the court found that the contracts were not "contract[s] for the carriage of . . . personnel," thus, appellants' argument that the contracts were nonetheless exempt from the SCA pursuant to 41 U.S.C. § 356(3) was rejected.

*C. Contract between private individual and Native American Tribe*

In *Marlys Bear Medicine v. United States*, 47 F. Supp. 1172 (D. Mon. 1999), *rev'd on other grounds*, 241 F.3d 1208 (9th Cir. 2001) (the district court's ruling on this issue was not appealed), a worker for a logging operation on the Blackfeet reservation was injured by a falling tree and subsequently died. Representatives of his estate filed suit against the United States and alleged that the provisions of the Service Contract Act covered the logging operations such that, pursuant to 41 U.S.C. § 351(b)(1), the contractor was required to provide its employees with occupational compensation insurance and accident insurance. The court held, however, that the SCA did not apply to the timber sale contract at issue because the principle purpose of the contract was not to furnish services. The court determined that the "principal purpose of the timber sale contract in this case, was the sale of timber owned by the tribe." The court also noted that the contract was between Lone Bear and the Blackfeet Tribe and the SCA only applies to contracts executed by service contractors and the United States. In this vein, the court noted that the Bureau of Indian Affairs only approved of the contract "as trustee of the forests located on the Blackfeet Indian Reservation."

*VII. Party responsible*

*A. Party responsible*

## 1. Generally

The Service Contract Act provides, in part, the following with regard to assessment of liability for back wages and other compensation owed to employees:

Any violation of any of the contract stipulations required by section 351(a)(1) [wages] or (2) [fringe benefits] or of section 351(b) of this title shall render the party responsible therefore liable for a sum equal to any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract.

41 U.S.C. § 352(a). The regulations at 29 C.F.R. § 4.187(e)(4) further defines "party responsible" to include corporate officers or owners as well as "those individuals . . . who are found responsible for a service contractor's performance of a contract." See *Rasputin, Inc.*, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (affirming debarment of Johnson for failure to pay \$173,460.34 in back wages and fringe benefits; court held that it consistently accords "substantial deference to the credibility determinations of the ALJ").

## 2. Examples

### a. *Manager jointly and individually liable*

In *D's Nationwide Industrial Services*, ARB Case No. 98-081, 1995-SCA-38 (ARB Nov. 24, 1999), the ARB upheld the ALJ's finding that accrued payments due on Respondent's contracts with the United States Postal Service and United States Navy should be withheld for the payment of back wages owed. In this vein, the ARB noted that, when an employer fails to pay the minimum compensation due under the SCA, accrued payments due on that contract or other contracts between the company and the Federal Government may be withheld. See 41 U.S.C. § 352(a). The ARB further held that Glaude, as the "business manager who supervised the performance of the contract and directed the pay practices of the company," was liable for back wages owed both individually and jointly with the company pursuant to 29 C.F.R. § 4.187(e)(1).

In *VGA, Inc. and Vince Akins*, Case No. 2006-SCA-9 (ALJ Feb. 12, 2009), the judge concluded that Vince Akins and VGA Incorporated are "responsible parties" that are individually and jointly liable for violations of the Act. With regard to Mr. Akins, the judge noted that he:

. . . was the chief executive of VGA, Inc., at the time the violations occurred. He negotiated and signed the contracts, and he represented the company during the course of the government investigation. He was in control of VGA, Inc., and he was responsible for the organization's employment practices. In their Answer to the Administrator's Complaint, Respondents admitted that Vince Akins was at all relevant times acting in the interest of VGA, Inc., and that he was responsible for VGA's day-to-day employment practices and policies.

Slip op. at 14.

*b. Joint venture company liable*

In ***Corporate Investors Associates, Inc.***, 1995-SCA-48 (ALJ Aug. 14, 1998), the ALJ held that, when High Point entered into a joint venture with Corporate Investors Associates, "it assumed the risk of loss under the contract" such that funds could be withheld from High Point. The ALJ reasoned:

High Point knew the contract was subject to the SCA, and High Point knew or should have known of the withholding provisions of the contract. It was this contract from which funds were withheld, and this contract was with CIA, even after High Point's attempts to remove CIA's connection with it, and CIA did substantial work on the contract, the benefits of which High Point is now reaping. Thus, even if High Point was a completely unrelated party who allowed CIA to be involved in the contract merely from the goodness of its heart, High Point still assumed the risk of loss on the contract, and should have investigated CIA further to minimize its risks. Furthermore, there is a connection between High Point and CIA, as seen through some common employees and the common employment of the president of both companies, thus implying even more that High Point should have been aware of the risk it was undertaking.

*c. Individual in "de facto control" of daily operations liable*

In ***Rasputin, Inc.***, ARB Case No. 03-059, 1997-SCA-32 (ARB May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.), the Board held that Johnson, who represented to clients that he was the President of Rasputin, was properly deemed a "party responsible" under the Act. The on-site contract operations manager testified that he reported to Johnson. Further, Johnson made personnel and payroll decisions as well as decisions regarding which bills would get paid and what equipment would be at the job site. The ARB noted that Johnson misrepresented that he was president of the company when the contract was awarded and that, although Johnson was neither an officer nor a shareholder of the contractor, he had "de facto control" over its daily operations. Moreover, the fact that Johnson received no wages or other remuneration from Rasputin was immaterial. As a result, Johnson was properly considered a "party responsible" and was debarred for three years.

*d. Employer, officers, and acts of subordinate*

In ***Coast Industries, Inc.***, ARB Case No. 04-004, 2002-SCA-003 (ARB Feb. 28, 2005), the ALJ properly applied 29 C.F.R. § 4.188(b)(5) to conclude that Respondent and its officers could not evade responsibility for violating the Act by blaming the bookkeeper. Respondent argued that it had a "well-defined system for computing the hours its employees worked and that company policy was to pay its employees the proper SCA wages." From this, Respondent asserted that the actions of its bookkeeper were "aberrant." The ALJ disagreed to hold that Respondent was responsible for the acts of an employee who was acting within the scope of his or her employment.

**MEMBER OF BOARD OF DIRECTORS' VOTE TO END PARTICIPATION IN THIRD PARTY PLAN FOR PROVISION OF SCA-REQUIRED HEALTH AND WELFARE BENEFITS WAS NOT IN ITSELF SUFFICIENT TO ESTABLISH THAT THIS MEMBER WAS A "PARTY RESPONSIBLE" SUBJECT TO SCA DEBARMENT FOR FAILURE TO TIMELY PAY THE BENEFITS**

In *E&S Diversified Services, Inc.*, ARB No. 13-019, ALJ Nos. 2011-SCA-8 and 9 (ARB Mar. 20, 2015), the ARB affirmed the ALJ's finding that the Respondent failed to timely pay health and welfare benefits required by the SCA to their contract employees, and that the Respondent had failed to establish that "unusual circumstances" merited relief from debarment. The ARB noted that the Respondent had admitted to holding funds it would have paid to service contract employees and sequestering those funds in its payroll and general accounts. The ARB found that the Respondent therefore admitted affirmative conduct violative of the SCA's health and welfare provisions. The Respondent argued that the ALJ erred in relying on the district director's testimony about prior violations where that witness also testified that the violations were technical in nature. The ARB found that this argument ignored the fact that 29 C.F.R. § 4.188(b)(1) places the burden on the contractor of showing no evidence of prior violations.

The ARB, however, vacated the ALJ's determination that a member of the Respondent's Board of Directors who had joined in a unanimous vote to end the Respondent's participation in a third-party administered plan for meeting health and welfare obligations, was a "party responsible" subject to SCA debarment. The ARB found that whether or not the Respondent participated in a plan is not evidence of culpably negligent conduct, and that for the Board of Directors member at issue to be subject to debarment, the ALJ had to have found that he "'exercise[d] control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance.' 29 C.F.R. § 4.187(e)(4)." USDOL/OALJ Reporter at 8 (case citations omitted).

In *Administrator, Wage and Hour Div., USDOL v. Northwest Title Agency, Inc.*, ARB No. 2017-0055, ALJ No. 2014-SCA-00011 (ARB June 12, 2020) (per curiam), Northwest Title entered into a contract with Housing and Urban Development (HUD) to provide real estate property sales closing services for single family properties owned by HUD. The contract was subject to the SCA. After an investigation, the Administrator filed a complaint against Northwest Title, its owner (who was the company's CEO, President and sole shareholder), and the owner's brother (who was the COO and CFO). The brother, in his individual capacity, entered into a settlement agreement with the Administrator. The funds the brother paid were credited against the employees' back wages, resulting in dismissal of that portion of the complaint. A hearing proceeded against the company and its owner on the remaining claims.

On appeal, the ARB found that the record supported the ALJ's findings of fact and conclusions of law that "Respondents failed to pay the minimum hourly wages and health and welfare benefits its employees were entitled to" under the Service Contract Act (SCA); and that Respondents "failed to maintain records showing the correct work classifications, hours worked, amounts of health and welfare fringe benefits provided, or cash equivalents allegedly paid separate from and in addition to the required wages under the SCA." Slip op. at 4-5, citing ALJ D&O. Respondents raised five issues on appeal.

Respondent's owner argued that he had not personally managed the HUD contract once it was put into place, and thus was not personally liable. The ARB found this argument to be both factually and

legally incorrect. The ARB first noted the ALJ's rejection of the assertion that the owner had surrendered control. The ARB also noted that "[t]he SCA regulations require compliance not only by those who supervise employees working on the contract but also corporate officers." *Id.* at 5 (citations omitted).

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On appeal, the ARB found that the record supported the ALJ's findings of fact and conclusions of law that "Respondents failed to pay the minimum hourly wages and health and welfare benefits its employees were entitled to" under the Service Contract Act (SCA); and that Respondents "failed to maintain records showing the correct work classifications, hours worked, amounts of health and welfare fringe benefits provided, or cash equivalents allegedly paid separate from and in addition to the required wages under the SCA." Slip op. at 4-5, citing ALJ D&O.

On appeal, one of Respondent's arguments was that he had not personally managed the HUD contract once it was put into place, and thus was not personally liable. The ARB found this argument to be both factually and legally incorrect. The ARB first noted the ALJ's rejection of the assertion that the owner had surrendered control. The ARB also noted that "[t]he SCA regulations require compliance not only by those who supervise employees working on the contract but also corporate officers." *Id.* at 5 (citations omitted).

#### *e.* Owner

In *KSC-Tri Systems USA, Inc.*, 2006-SCA-20 (ALJ Aug. 7, 2007), the ALJ cited to 29 C.F.R. § 4.187(e)(4) and held:

Although there has been no argument Igwe should be a Respondent, it is clear from the evidence that Igwe is not only an owner in the contracting entities but also was the key individual responsible for the supervision and management of the employees under the four subject contracts herein. It is well settled that an individual with shared ownership who is responsible for the performance of the contract or who has overall control of the business operations is personally responsible for violations of the Act and can be debarred.

Slip op. at 33.

**OWNER OF SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS (SDVOSB) WAS NOT ABSOLVED OF LIABILITY FOR SCA BACKWAGES ACCRUED DURING PERIOD IN WHICH AN EMPLOYEE WAS MANAGING**

## THE SCA CONTRACT; CORPORATE OFFICERS WHO ARE RESPONSIBLE FOR CONTROL ARE LIABLE UNDER THE SCA, AND THE SDVOSB PROGRAM

In *Administrator, Wage and Hour Div., USDOL v. Price Gordon, LLC*, ARB No. 2019-0032, ALJ No. 2017-SCA-00008 (ARB Mar. 9, 2020) (per curiam), two individuals, Price and Beasley, formed LMC Med Transportation LLC (LMC), with Price as the owner and Beasley as his employee. LMC contracted with Veterans Affairs on May 1, 2015, to provide non-emergency medical transportation services to veteran beneficiaries. The contract required payment of SCA prevailing wages and fringe benefits for drivers and dispatchers. Beasley and other staff were delegated management responsibility on this contract. In June 2016, however, Price resumed direct management of the contract following complaints from the VA. As part of this reorganization, Beasley was ousted and the company changed its name to Price Gordon, LLC d/b/a/ Veteran National Transportation (VNT). In 2017, the WHD Administrator filed a complaint alleging that Respondent failed to pay certain service employees the SCA wages and fringe benefits required by the contract and the SCA.

Following a ruling on summary decision and a hearing, the ALJ found that the Respondents violated the terms of the SCA by not paying SCA wages and fringe benefits for all hours worked in the performance of the contract. The ALJ then examined the individual liability of Price and Beasley. Beasley failed to answer pleading or participate in the proceeding, and the ALJ found him jointly and severally liable for all violations. The ALJ found that Price was only liable for the violations occurring after he resumed control and supervision on the contract. The ALJ found “unusual circumstances” warranting relieving Price and VNT from debarment.

*Owner was not absolved of liability for back wages for period during which management had been delegated to an employee*

On appeal, the first issue was whether the ALJ erred in limiting Price’s liability to activities after he resumed control. The ARB held that the fact that management responsibilities had been delegated to Beasley at the outset of the contract did not relieve Price from liability for the entire back pay amount. The ARB wrote:

The regulations [at 29 C.F.R. §§ 4.187(e)(2),(3),(4)] provide that corporate officers who control or who are *responsible for control* of the corporate entity, and who by their action or inaction cause or permit a contract to be breached, are “parties responsible.” Price’s status as sole owner meant that he was a “party responsible” and remained responsible for control of the corporate entity at all times. We also note that Price was the service-disabled veteran who was awarded this contract based on his status as such. The rules and regulations implementing the [service-disabled veteran-owned small business] SDVOSB program require that the SDVO maintain control and day-to-day operations of the entity. 13 C.F.R. Part 25.

Slip op. at 5-6 (emphasis as in original) (footnote omitted).

### B. Successor contractor

## 1. Determination of status as successor liable for predecessor's contract

The determination of "successor contractor" is primarily factual in nature and is based on the totality of the circumstances. See *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1978) (factors to consider). One of the most significant factors is the overlap in workforces between the two entities. *Houston Building Services, Inc. and Jason Yoo*, ARB Case No. 95-041A, 1991-SCA-30, slip op. at 4 (ARB, Aug. 21, 1996) (citing *N.L.R.B. v. Houston Bldg. Service, Inc.*, 936 F.2d 178 (5th Cir. 1991)).

### a. Generally

Section 4(c) of the SCA imposes an obligatory wage and fringe benefit floor on successor contracts in the event that the predecessor contract has specified collectively bargained rates and these provisions are self-executing. 41 U.S.C. § 353(c). See also *Rasputin, Inc.*, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (the district court added that a successor company is liable even where the collective bargaining agreement did not become effective until after expiration of the predecessor's contract).

Wages paid and benefits furnished under a successor contract must be greater than or equal to those provided under the predecessor contract. When a successor contractor accepts a predecessor's employees, it automatically assents to those employees' collectively bargained benefits and their expressly calculated fringe benefits. 29 C.F.R. § 4.163(b). In *Houston Building Services, Inc. and Jason Yoo*, ARB Case No. 95-041A, 1991-SCA-30, slip op. at 4 (ARB Aug. 21, 1996), the ARB concurred with the ALJ's determination that Respondents constituted successor contractors and they were obliged to provide the employees of the predecessor contractor a severance allowance, which was required by the predecessor's contract. Slip op. at 3. Even though Respondents did not negotiate the disputed severance allowance provision, they accepted it as an express term of the contract, and their status as a successor contractor required them to stand in the shoes of the predecessor.

Under the specific facts of *Houston Building*, Respondents were successor contractors who had continued the prior workforce temporarily while awaiting required security clearances for the staff it intended to use. When Respondent replaced the prior workforce, it did so without providing severance pay as required by the workforce's contract with the predecessor. The ARB found this to be a clear violation of section 4(c) of the Service Contract Act, 41 U.S.C. § 353(c). See also *Rasputin, Inc.*, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (Section 4(c) obligations regarding a successor contractor's payment obligations are self-executing and do not have to be reflected in the wage determination to be binding).

### b. Liability not affected by successor's collective bargaining agreements

In *Secretary of Labor v. International Resources Corp.*, 1994-SCA-35 (ALJ Jan. 3, 1996), the Respondent negotiated several collective bargaining agreements (CBAs) that called for imposition of a probationary period, but were silent as to the length of that period. Respondent contended that its use

of a 90-day probationary period did not violate the SCA because that period was its standard operating practice. The ALJ held that Respondent's standard practices in this regard were irrelevant, and that the relevant practice is that of the predecessor contractor from which the successor contractor assumes the contract which, in this case, was 30-days. See 41 U.S.C. § 353(c); **Rasputin, Inc.**, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd in relevant part sub. nom.*, **Johnson v. U.S. Dep't of Labor**, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.); **Halifax Technical Services, Inc. v. United States**, 848 F. Supp. 240, 244 (D.C. Cir. 1994) (preventing "a successor from relying on its own separate collective-bargaining agreement to pay union members less . . . than its predecessor's collective- bargaining agreement called for"). See also **Vigilantes, Inc. v. U.S. Dep't of Labor**, 968 F.2d 1412 (1st Cir. 1992) (debarment required where no unusual circumstances present; minority employer had numerous deficiencies under several contracts totaling more than \$70,000, failed to meet its successor contractor responsibilities, and failed to make prompt payment of monies due).

*c. One contract period only*

In **Fort Hood Barbers Ass'n**, ARB Case No. 96-181 (ARB Nov. 12, 1996), *aff'd*, 137 F.3d 302 (5th Cir. 1998), the ARB found that, pursuant to § 4(c) of the SCA, a successor contractor is liable for the collective bargaining agreement (CBA) of a predecessor contractor for one contract period only. A multi-year contract with basic year and option periods is treated as separate contracts rather than a single contract, and a predecessor's CBA does not apply to the first option year. See **Operating Engineers**, BSCA Case No. 92-23 (BSCA, Jan. 27, 1993). Five-year service contracts are permitted if they provide for periodic adjustment of wages and fringe benefits at least once every two years during the term of the contract pursuant to Section 4(d) of the SCA. The ARB held that the CBA in Fort Hood applied to the first two years of the contract, but that at the beginning of the third year when the contractor no longer had an existing CBA, it became its own predecessor contractor.

Thus, the wage and hour revision, which did not include the collectively bargained fringe benefits, was not erroneous. See also **General Services Administration**, ARB Case No. 97-052 (ARB 1997) (§ 4(c) "attempts to strike a balance between the protection of the prevailing labor standards and the safeguarding of other legitimate Federal government interests"; there is "a direct statutory obligation (that) is self-executing such that the time limitations set forth at 29 C.F.R. § 4.55(a)(1) are not controlling"; the ARB declined to hold that the predecessor's contract was binding on the successor for a period of one month only; rather, it determined that the minimum contract period is one year); **ITT Federal Services Corp.**, ARB Case No. 95-042A (ARB, July 25, 1996) (parties did not contest that the exercise of an option year by the government constituted a new contract for purposes of the SCA; the ARB affirmed the Administrator's ruling that a collective bargaining agreement that "terminates prior to the completion of a predecessor contract cannot serve as the basis for a Section 4(c) wage determination"; substantial variance proceedings are not the exclusive remedy available to the successor contractor, collective bargaining is also an option).

*d. Minor change in job duties between predecessor and successor insufficient to avoid contract obligations*

In **General Services Administration, Region 3**, ARB Case No. 97-052 (ARB Nov. 21, 1997), the ARB compared the duties required of security guards under the predecessor and successor contracts and concluded that they were "substantially similar" and were to be performed at the same locality. As a result, the ARB held that the "predecessor/successor contract relationship" under § 4(c) should not be undermined such that the predecessor's contract was binding upon the successor. Moreover, the ARB declined to hold that the predecessor's contract was binding on the successor for a period of one month only; rather, it determined that the minimum contract period is one year.

*e. More than one predecessor collective bargaining agreement*

Under 29 C.F.R. § 4.163(g), if more than one predecessor collective bargaining agreement is at issue, then "the predecessor contract which covers the greater portion of the work in such function(s) shall be deemed to be the predecessor contract for purposes of subsection 4(c) . . . ." See **Rasputin, Inc.**, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (affirming debarment of Johnson for failure to pay \$173,460.34 in back wages and fringe benefits).

## VIII. Compensation

### A. Collateral estoppel inapplicable; no affirmative misconduct

In **Dantran, Inc. and Robert Holmes**, 1993-SCA-26 (ARB June 10, 1997), *aff'd*, 171 F.3d 58 (1st Cir. 1999), the ARB held that a legally recognizable claim of estoppel against the government must be based on affirmative misconduct of the governmental agency. In this case, the contracting officer's conduct was, at most, negligent and did not rise to the affirmative misconduct necessary for estoppel. Specifically, the contractor could not assert collateral estoppel based upon a 1989 "clean bill of health," which it received from the contracting officer years earlier. The circuit court stated, "[w]e cannot in good conscience accept a broad rule that prevents the sovereign from enforcing valid laws for no better reason than that a government official has performed his enforcement duties negligently." *Id.* at 66. See also **CACI, Inc.**, Case No. 86-SCA-OM-5 (Dep'y Sec'y, Mar. 27, 1990), slip. op. at 29; **Azizi v. Thornburgh**, 980 F.2d 1130, 1136 (2nd Cir. 1990); **Rider v. United States Postal Service**, 862 F.2d 239, 241 (9th Cir. 1988).

### B. Suspension of payment of wages or delay in increase in wages held to be improper; waiting for DOL approval or reimbursement

In **Secretary of Labor v. International Resources Corp.**, 1994-SCA-35 (ALJ Jan. 3, 1996), Respondent negotiated a *Memorandum of Agreement* with the union as to wage and benefit increases to become effective October 1, 1990. The *Agreement* provided that the increase would not be paid until

DOL approved the wage determination and Respondent received reimbursement. Because of delays by the parties and an intervening lawsuit brought by the union, Respondent did not complete paperwork on the increase until September 28, 1994. The ALJ rejected Respondent's reliance on the DOL approval/reimbursement clause of the *Memorandum of Agreement*, finding that neither the SCA nor its implementing regulations "permit an employer to temporarily suspend its obligation to its employees while waiting for reimbursement from another agency." Slip op. at 8, citing *In re Kleen-Rite, Corp.*, BSCA Case No. 92-09 (BSCA, Oct. 13, 1992). The ALJ also found persuasive DOL's contention that approval of the wage determination was implicit as it was agreed upon after arm's-length negotiations. See 41 U.S.C. § 351(a)(2).

In *Lucy E. Enobakhare a.k.a. Lulu Star*, 1996-SCA-46 (ALJ Jan. 7, 1998), the ALJ held that Respondent must pay any increase in the wage amount from the effective date of a revised wage determination, even where Respondent is waiting for the contract price increase to be processed.

### C. Where federal contract requires preliminary training

In *Administrator, Wage and Hour Div., USDOL v. Ares Group, Inc.*, ARB No. 12-023, ALJ No. 2010-SCA-6 (ARB Aug. 30, 2013), the Wage and Hour Division (WHD) filed a complaint alleging that ARES Group, Inc., a federal government contractor, failed to pay proper wages and benefits in violation of the McNamara-O'Hara Service Contract Act and the Contract Work Hours and Safety Standards Act, in regard to a contract to provide professional security services at federal buildings in Florida. The contract and Blanket Purchase Agreement specified certain preliminary training requirements for security guards and uniformed supervisors working under the BPA. The Respondent notified guards who had been employed by the predecessor contractors that it would provide free preliminary training, but would not compensate the security guards for such training prior to commencement of work on the contract, and that completing the training was not a guarantee of employment. Several guards contacted the WHD, and following an investigation, WHD determined that the Respondent was liable for compensation for the preliminary training and for certain other wage errors. A complaint was filed by the WHD, and the ALJ granted the WHD Administrator's motion for summary decision. On appeal the Respondent argued that the SCA did not require compensation to the security guards for preliminary training that was undertaken prior to commencement of the contract. The ARB rejected this contention, finding that it was undisputed that the underlying federal contract and the BPA required preliminary training for security guards, and that based on the clear regulatory language of 29 C.F.R. § 4.146, "prospective security guards that attended the training before the commencement of performance of the Contract as well as the security guards hired by ARES are 'service employees' under the Act and were rightfully entitled to compensation for training time as well as fringe benefits and the prevailing wages provided for under the Act." USDOL/OALJ Reporter at 5 (quoting ALJ's D&O).

### D. Fringe Benefits

#### 1. Not contingent on full-time status of employee

##### a. Health and welfare benefits

In *Lucy E. Enobakhare a.k.a. Lulu Star*, 1996-SCA-46 (ALJ Jan. 7, 1998), the ALJ held that the regulatory requirement of payment of health and welfare fringe benefits is not contingent upon the full-time status of the employee. 29 C.F.R. §§ 4.164(a)(2), 4.176(a), and 4.174. See also *Panamovers Transfer and Storage, Inc.*, 1999-SCA-10 (ALJ Feb. 6, 2002) (the SCA does not differentiate between full-time and part-time employees – all employees are entitled to health and welfare benefits proportionate to the work performed pursuant to 29 C.F.R. §§ 4.165(a)(2) and 4.176); *White Glove Building Maintenance, Inc. v. Hodgson*, 459 F.2d 175 (9th Cir. 1972) (finding that the "Secretary has pointed to no provision in the Act or regulations . . . which precludes a self-insurance plan from qualifying as an equivalent fringe benefit").

*b. Holiday pay*

In *Lucy E. Enobakhare a.k.a. Lulu Star*, 1996-SCA-46 (ALJ Jan. 7, 1998), the ALJ held that the regulatory requirement of payment of holiday pay is not contingent upon the full-time status of the employee. 29 C.F.R. §§ 4.164(a)(2), 4.176(a), and 4.174. See also *Hugo Reforestation, Inc.*, ARB Case No. 99-003, 1997-SCA-20 (ARB, Apr. 30, 2001); *Panamovers Transfer and Storage, Inc.*, 1999-SCA-10 (ALJ, Feb. 6, 2002).

2. Cross-crediting is permitted

In *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 63 (1st Cir. 1999), where postal employees worked under multiple contracts, the court rejected the Secretary's interpretation of the SCA regulations that "fringe benefit determinations turn not on the total number of hours worked per week, but on the number of different contracts to which an employee is assigned." To the contrary, the court found that "cross-crediting" fringe benefits was acceptable and did not violate the SCA's requirements:

To illustrate, assume that a service contractor has three separate mail-hauling contracts with the Postal Service, and that in a given week worker A spends 25 hours on contract X, 20 hours on contract Y, and 10 hours on contract Z. According to the Secretary, worker A must receive an incremental payment equal to 55 hours worth of fringe benefits, notwithstanding that worker B, who likewise toiled for 55 hours that week but spent it all in carrying out contract X, will only receive a payment equal to 40 hours worth of fringe benefits. In contrast, Dantran's interpretation is not contract-specific. On its understanding, both A and B would receive incremental payments in lieu of fringe benefits equal to the rate times 40 hours. It follows, then, that if the Secretary's reading of the regulation is correct, Dantran's use of cross-crediting constituted a violation. Giving due weight to the language and structure of the regulations, we find the Secretary's gloss insupportable.

*Id.* at 63.

3. Proper records must be maintained

In **United Kleenist Organization Corp.**, 1999-SCA-18 (ALJ Jan. 10, 2000), *aff'd*, ARB Case No. 00-042 (ARB, Jan. 25, 2002), the ALJ held that the contractor failed to fulfill its obligation to pay fringe benefits. The contractor argued that it paid employees an amount greater than the minimum wage to account for the fringe benefits. The ALJ disagreed and stated that "the employer must keep appropriate records evidencing the portion of pay intended to compensate for wages and the portion intended for fringe benefits." Because no records of fringe benefits costs were maintained by the contractor in this case, the ALJ found that it had failed to provide its employees with the requisite fringe benefits. *See also William T. Carr*, 1999-SCA-2 (ALJ Jan. 4, 2000).

#### 4. Offset wages to credit against fringe benefit violations

### **INABILITY TO PROVE PAYMENTS AS CASH EQUIVALENTS TO FRINGE BENEFITS DUE TO LACK OF COOPERATION OF FORMER EMPLOYEES DID NOT ABSOLVE RESPONDENTS**

In **Administrator, Wage and Hour Div., USDOL v. Northwest Title Agency, Inc.**, ARB No. 2017-0055, ALJ No. 2014-SCA-00011 (ARB June 12, 2020) (*per curiam*), Northwest Title entered into a contract with Housing and Urban Development (HUD) to provide real estate property sales closing services for single family properties owned by HUD. The contract was subject to the SCA. After an investigation, the Administrator filed a complaint against Northwest Title, its owner (who was the company's CEO, President and sole shareholder), and the owner's brother (who was the COO and CFO). The brother, in his individual capacity, entered into a settlement agreement with the Administrator. The funds the brother paid were credited against the employees' back wages, resulting in dismissal of that portion of the complaint. A hearing proceeded against the company and its owner on the remaining claims.

On appeal, the ARB found that the record supported the ALJ's findings of fact and conclusions of law that "Respondents failed to pay the minimum hourly wages and health and welfare benefits its employees were entitled to" under the Service Contract Act (SCA); and that Respondents "failed to maintain records showing the correct work classifications, hours worked, amounts of health and welfare fringe benefits provided, or cash equivalents allegedly paid separate from and in addition to the required wages under the SCA." Slip op. at 4-5, citing ALJ D&O. Respondents raised five issues on appeal.

Respondents argued that wages in excess of the SCA minimum wage requirement should have been considered by the ALJ as a cash equivalent to the SCA benefits requirement. The ARB acknowledged that "[a]n employer can satisfy its fringe benefit obligations by providing 'equivalent or differential payments in cash' to its employees but it must 'keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.'" Slip op. at 5 (citations omitted). Here, the ALJ found that Respondents failed to provide payroll records to support their assertion. On appeal, Respondent cited a lack of cooperation from former employees as hampering its ability to prove precisely the amount and recipient of benefits paid by the company. The ARB was not persuaded, stating that such "lack of cooperation does not absolve Respondents of their obligations under the SCA." *Id.*

However, a respondent cannot claim fringe benefit credit where it was deducted from substandard wages. In **Lawn Restoration Corp.**, 2002-SCA-6 (ALJ Jan. 27, 2003), the ALJ noted that an employer may include, as part of the minimum wage, the reasonable cost or fair value of board, lodging,

or other facilities that are (1) customarily furnished to employees, (2) for the convenience and benefit of the employer, and (3) employees have voluntarily accepted the benefit. 29 C.F.R. § 4.167. Under the facts of *Lawn Restoration*, Respondent charged rent to the H-2b employees who accepted Respondent's offer of housing. The employees were paid \$8.00 or less per hour, which did not comply with the contract wage requirements of \$9.05 per hour. From the employees' substandard wages, Respondent further improperly deducted rent for lodging. The ALJ concluded that this violated the SCA and Respondent was precluded from claiming a fringe benefit credit under these circumstances.

In ***Administrator, Wage and Hour Div., USDOL v. Northwest Title Agency, Inc.***, ARB No. 2017-0055, Respondents asserted that funds owed to them by HUD and paid the owner's brother in his settlement with the Administrator should be offsets. The ARB, however, held that Respondents could not "subtract the back wages due from [the owner's brother] from the unpaid health and welfare benefits that are the subject of the Complaint and due pursuant to the D. & O. And any monetary relief Respondents may be entitled to from other federal agencies are not relevant to this case." *Id.* at 5-6.

#### E. Credit for tips

In ***Fort Hood Barbers Association***, ARB Case No. 96-181 (ARB Nov. 12, 1996), *aff'd*, 137 F.3d 302 (5th Cir. 1998), the ARB upheld the Administrator's allowance of a tip credit under § 4.6(q) of the SCA which states, in pertinent part, that "[a]n employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips may have the amount of tips credited by the employer against the minimum wage required by . . . the Act . . ." 29 C.F.R. § 4.6(q).

#### F. Right to overtime pay cannot be waived by employee or bargained away

In ***Hugo Reforestation, Inc.***, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001), Respondent argued that it did not pay overtime compensation because it was "merely attempting to accommodate their employees' desire for long weekends." The ARB held that the argument was "legally untenable" and that "[t]he employees' right to overtime pay under the CWHSSA is mandated by statute, and as such could neither be waived by (the) employees nor otherwise bargained away."

#### G. Prevailing wage determination; challenge to

##### 1. No collective bargaining agreement

In ***Dep't of the Air Force SAF/AQCR Eastern Regional Office***, ARB Case No. 98-125 (ARB May 26, 2000), the ARB held that the SCA requires that, where there is no collective bargaining agreement in effect, prevailing wage determinations must reflect wages paid in the "locality." It noted that the term "locality" is not defined in the SCA but that, pursuant to 29 C.F.R. § 4.54(a), the Administrator has "extraordinarily broad discretion when determining the 'locality' to be used when issuing wage determinations, with great flexibility to establish different localities depending on a variety of factors." In the case before it, the Administrator used a 36-county area in southeastern North Carolina and adjacent South Carolina to determine the prevailing wage rate. The ARB held the following:

[I]t has been a longstanding practice of the Administrator to expand the geographic scope of a wage determination area when sufficient reliable data is not available covered a smaller jurisdiction. We agree with the Air Force that the 36-county southeastern North Carolina area does not manifest the kind of economic integration that typifies an urban area; however, although the wage determination applies to a large territory, we see nothing in the record in this case to suggest that the BLS wage data from the core 12-county area . . . does not reasonably reflect the general wage patterns in the overall 36-county jurisdiction. The area covered by the wage determination is substantially rural, with three small urbanized centers and no major high-wage cities or industrial areas that might otherwise skew the general survey results. The availability of data from a larger survey universe ordinarily should enhance the reliability of the wage determination process.

Based on the record before us, we are not persuaded that the southeastern North Carolina area is an impermissible 'locality for SCA purposes, and therefore affirm the Administrator's decision on this issue.

In addition, the ARB held that it was proper for the Administrator to reject the survey data compiled by state and local agencies, which was offered by the Air Force. It stated that "this Board and its predecessors similarly have considered data compiled by state and local agencies that were deemed methodologically inferior to the BLS survey, and likewise have affirmed the Administrator's denial of reconsideration based on such evidence." In this case, the ARB found multiple deficiencies in the state surveys, including that (1) the employers were permitted to classify their own employees in the survey, (2) the state survey focused on occupations by industry as opposed to the Bureau of Labor Statistics survey which "is a true cross-industry survey", and (3) jobs listed in the state's survey did not provide distinctions between different levels of function within an occupation, whereas the BLS survey provided for this type of distinction.

In *James A. Machos*, ARB Case No. 98-117 (ARB, May 31, 2001), the ARB held that the Administrator's use of "the slotting procedure" in classifying a position for prevailing wage purposes has "long been approved in SCA cases." As a result, it upheld the classification of a Flight Instructor as a GS-11 level similar to the Computer Systems Analyst II position. Moreover, the ARB dispensed with Petitioner's argument that his wage level as a Flight Instructor at Sheppard Air Force Base was lower than Flight Instructor wage rates at other air bases. The ARB emphasized that wage rates are based on locality and that these "rates may differ from the same classification of service employees depending on the locality in which the services are performed." The Board found it persuasive that the Office of Personnel Management approved of the Administrator's classification for the position at issue. However, the ARB remanded the case to the Administrator for reconsideration of a "current" wage rate for Flight Instructors at Sheppard Air Force Base. The ARB noted that there was no current Bureau of Labor Statistics data for the position and that "the fact that the Administrator lacks current particularized wage survey data (for Flight Instructors) does not justify taking no action at all under the facts of this case, in light of the clear congressional directive that the Secretary update wage determination rates on a regular basis."

## 2. Misclassification of employees

In *Melton Sales and Services, Inc.*, 1982-SCA-127 (ALJ Nov. 18, 1985), the ALJ concluded that Respondent misclassified as "helpers" employees who performed the job duties of "journeymen." In so holding, the ALJ compared the duties performed by the employees with the job descriptions for helpers and journeymen in the Dictionary of Occupational Titles. Respondent maintained that the employees "lacked the knowledge, skills, experience, and competence to perform all of the duties and complete all of the assignments which an employer might expect a seasoned journeyman to accomplish." The ALJ agreed that the record established that the employees could not perform all of the tasks expected of a journeyman but they were, however, "expected to perform many of the functions and duties of a journeyman" in addition to those duties which would qualify as "helper's" work. The ALJ noted that the key component of a "helper" is that s/he assists a tradesman. In this case, however, the ALJ found that the employees received their assignments from the job foreman, but performed the jobs "largely on their own." Moreover, they did not carry materials for tradesmen, they cleaned up after themselves, they ran no errands, and handed no tools to anyone else. As a result, the ALJ concluded that the wage rate for journeyman classification should have been employed for all hours worked in accordance with 29 C.F.R. § 4.169.

### H. Standard for determining whether hours worked are compensable – “principal activity” test

#### 1. “Bobtail” time

In *J.N. Moser Trucking, Inc. v. U.S. Dep't of Labor*, 306 F. Supp. 2d 774 (N.D. Ill. 2004) *vacating and rev'g*, ARB Case No. 01-047, 1995-SCA-26 (ARB, May 30, 2003), the district court vacated the ARB's decision and noted that the Board mischaracterized the ALJ's decision and improperly reweighed the evidence. The court stated that the ALJ properly found that "bobtailing was not integral and indispensable to Moser's principal activity of hauling mail" under the criteria set forth in *Dunlop v. City Electric Inc.*, 527 F.2d 394, 398-99 (5th Cir. 1976).

Under the facts of *Moser Trucking*, Employer failed to pay its workers for inspection time and "bobtail" time. "Bobtail" time was described as time taken by an employee to drive from one of Employer's terminals to a postal facility and pick up a trailer loaded with mail. "Bobtail" time also included time spent at the end of the employee's route after s/he disconnected the trailer at the last post office for the day and drove back to the terminal. The court further held that the ALJ properly determined that Employer did not require its drivers to bobtail, nor did it benefit economically from the practice "because it may actually have cost less for Moser to maintain parking at the postal facilities." The court did affirm the ALJ's award of back wages for "pre-trip inspections" of vehicles performed by employees for the benefit of Employer.

On remand, in *Department of Labor v. J.N. Moser Trucking, Inc.*, Case No. 1995-SCA-26 (ALJ Aug. 25, 2004), the ALJ directed that withheld funds be released to Moser and, if the affected employees had not been paid back-owed wages based on the ALJ's ruling four years earlier, then the Department of Labor would be liable for the payment of interest on the back wages owed. However, by Decision and

Order on Motion for Reconsideration dated November 5, 2004, the ALJ vacated the award of interest against the Department of Labor stating that he did not have legal authority to award interest against the government without its consent. The remainder of his August 25, 2004 decision on remand was affirmed.

## 2. Time spent waiting for mail

The Board has held that a postal contractor's time spent waiting for mail, as well as time spent loading and unloading mail, are compensable. *Eddie and Betty Jackson*, 2004-SCA-15 (ALJ May 25, 2005) (citing to *Joy R Manning d/b/a Manning Mail Service*, BSCA No. 82-SCA-136 (Sept. 28, 1990).

## 3. Rest periods compensable; meal breaks not compensable

In *Lawn Restoration Corp.*, 2002-SCA-6 (ALJ Jan. 27, 2003), the ALJ held that "rest periods running from five to approximately twenty minutes promote efficiency of employees and are customarily deemed compensable time. 29 C.F.R. § 785.18." Moreover, the ALJ stated that "[c]ompensable time of rest periods may not be offset against other working time." On the other hand, the ALJ determined that "bona fide meal breaks are not work-time and employees are not entitled to compensation for such breaks so long as certain requirements are met" pursuant to 29 C.F.R. § 785.19.

### I. Overpayments to employees cannot be used to offset back wages or fringe benefits owed

In *R&W Transportation, Inc.*, ARB Case No. 06-048 (ARB Feb. 28, 2008), the Board affirmed the ALJ's holding that "overpayments to employees for certain hours cannot offset back wages owed to employees for other hours pursuant to 29 C.F.R. § 4.166 or offset fringe benefits owed to employees pursuant to 29 C.F.R. § 4.170(a)."

### J. Substantial variance proceedings can be used both to raise or lower rates

In *Corrections Corp. of America*, ARB Nos. 2016-074, -075, ALJ No. 2015-CBV-00001 (ARB Apr. 18, 2019) (per curiam), the United Government Security Officers of America (UGSOA) sought a variance from the collectively-bargained wages for detention officers at the Elizabeth Detention Center in Elizabeth, New Jersey, in a contract between the Corrections Corporation of America (CCA) and the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE).

#### *Background*

In 2009, CCA had entered into a CBA with the detention facility employees' union at a wage rate of \$20 per hour for detention officers. In 2012, the employees elected a different union, UGSOA, as their collective bargaining representative, and a new CBA was negotiated. This CBA provided for hourly wage rates for detention officers of \$20.40 in 2013, \$20.71 in 2014 and \$21.02 in 2015. In 2014, UGSOA filed a request with the Wage and Hour Administrator for a substantial variance hearing, asserting that the CBA

wage rate was substantially below the prevailing wage for detention officers in the locality. The Administrator filed an Order of Reference with OALJ, and the ALJ conducted a hearing, after which he “concluded that, although UGSOA could utilize the substantial variance process to obtain a higher rate, the union failed to submit evidence providing the required comprehensive mix of hourly wage rates necessary to establish the prevailing wage for workers providing similar services in the same locality as the EDC and, therefore, a substantial variance.” Slip op. at 2-3 (footnote omitted).

#### *Successor contracts and substantial variance claims*

On appeal, the ARB first noted that “SCA Section 4(c), as amended, ‘imposes on successor contracts an obligatory floor for wages and fringe benefits in the event that the predecessor contract has specified collectively bargained rates.’” *Id.* at 4 (citations omitted). That obligation, however, may be suspended if it is demonstrated that a substantial variance between the wages and fringe benefits from the predecessor contract and the prevailing wages and fringe benefits in the same locality for services of a similar character. A substantive variance finding requires a “clear showing” — which means “persuasion by a substantial margin.” *Id.* DOL regulations require a showing of considerable disparity in rates.

#### *Raising of CBA negotiated rates*

CCA argued that “Section 4(c) of the SCA ‘does not permit the Department of Labor to replace the collectively-bargained wage with higher “prevailing wages.”” *Id.* at 6 (quoting CCA’s brief). The ARB, however, found no such limitation in applicability the substantial variance provision of the statute, and held that “the variance can include rates that are both higher and lower than the previously-negotiated rate.” *Id.*

### **K. Substantial variance request – burden of proof**

In ***Corrections Corp. of America***, ARB Nos. 2016-074, -075, ALJ No. 2015-CBV-00001 (ARB Apr. 18, 2019) (per curiam), the United Government Security Officers of America (UGSOA) sought a variance from the collectively-bargained wages for detention officers at the Elizabeth Detention Center in Elizabeth, New Jersey, in a contract between the Corrections Corporation of America (CCA) and the U.S. Department of Homeland Security’s Immigration and Customs Enforcement (ICE).

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### *Burden for establishing a substantial variance*

UGSOA raised five issues on appeal; however, the ARB found that the record supported the ALJ's determination that the evidence was insufficient to establish the existence of a substantial variance.

UGSOA argued that the ALJ erred by not relying on evidence relating to correctional officers at a county jail. The ARB noted, however, that the ALJ found that such evidence did not describe the county officers' job duties for the base salary or steps, and did not include any other evidence of the character of the duties performed. Thus, UGSOA did not establish that the services were similar.

UGSOA argued that the ALJ erred by identifying the hourly wages paid at another detention facility in New Jersey as probative. The ARB noted, however, that the ALJ ultimately concluded that those wage rates were largely irrelevant because UGSOA had not provided enough evidence to determine a prevailing rate regardless of whether the other detention facility's rates were considered.

UGSOA asserted that the ALJ improperly discounted evidence of a non-arm's length negotiation. The ARB found, however, that the ALJ was correct in concluding that evidence of non-arm's length bargaining was not relevant in a substantial variance proceeding unless so designated by the Administrator.

UGSOA contended that the ALJ made an incorrect legal conclusion that the relevant locality was limited to the Newark-Union (New Jersey-Pennsylvania) area, citing 29 C.F.R. § 4.54(a), which in this context indicates that "locality" is an "elastic" term. The ARB was not persuaded, noting that the regulation also says that "[l]ocality is ordinarily limited geographically to a particular county or cluster of counties," which is what the ALJ concluded in this case." *Id.* at 7-8 (quoting the regulation).

Finally, UGSOA challenged the ALJ's application of All Agency Memorandum No. 166 (Acting Administrator, Wage and Hour Division) (Oct. 8, 1992) (AAM No. 166), arguing that it only states what categories of data are probative and does not state that they are required. The ARB, however, stated that "this assertion does nothing to establish why the information the union did submit was sufficient to establish a substantial variance between [the detention center's] hourly wage rates and those prevailing for services of a similar character in [the detention center's] locality." *Id.* at 8.

### [IX. Arm's-length hearing - 29 C.F.R. § 4.11\(c\) and \(d\)](#)

#### [A. Timeliness](#)

**WHERE FACTS WERE UNDISPUTED THAT THE HEARING REQUEST WAS NOT TIMELY, AND THE ADMINISTRATOR HAD NOT MADE ANY FINDINGS IN THE ORDER OF REFERENCE CONCERNING WHETHER EXTRAORDINARY CIRCUMSTANCES EXISTED TO EXCUSE THE UNTIMELY REQUEST, THE ARB AFFIRMED THE ALJ'S DETERMINATION DISMISSING THE CLAIM**

In *Gino Morena Enterprises, LLC*, ARB Nos. 2017-0010, -0011, ALJ No. 2017-CBV-00001 (ARB Feb. 19, 2020), the Army and Air Force Exchange Service (AAFES), petitioned the Administrator. Wage and Hour Division for an inquiry into negotiations underlying a collective bargaining agreement (CBA) between Gino Morena Enterprises, LLC (GME), and Fort Bliss Barbers Association. The Administrator

granted the request and issued an Order of Reference for an arm's-length hearing pursuant to the Service Contract Act regulation at 29 C.F.R. § 4.11(c) and (d). The ALJ determined that the request for a hearing was untimely filed and that the Administrator failed to discuss or rule upon the issue of extraordinary circumstances. The ARB affirmed the ALJ's determination.

Before the ALJ, GME argued that the hearing request was untimely and that extraordinary circumstances did not exist to justify a late filing. The ALJ issued an Order to Show Cause, in response to which AAFES conceded that the request was submitted after the contract award, but argued that the Administrator had implicitly excused the untimeliness by issuing the Order of Reference, to which the ALJ should defer. AAFES also argued that it could not have timely requested a hearing because it did not have necessary information within the ten-day cut-off date of § 4.11(b)(2)(i). The Administrator agreed with AAFES. The ALJ found that the hearing request was untimely, that the Order of Reference contained no analysis on timeliness or exceptional circumstances, and that the Administrator had not made this determination. The ALJ found, in the alternative, that the unsuccessful bidder had the necessary information prior to the 10-day cut-off.

On appeal, the ARB first found it undisputed that AAFES' request for an arm's length hearing was not timely. The ARB rejected the argument that the ALJ was not permitted under the regulations at § 4.11(c) to review timeliness, finding that in context the regulation's restrictive language was only intended to restrict the ALJ from adjudicating other SCA matters unrelated to the Order of Reference, and that "[t]he express timing requirement is part and parcel of the hearing request and becomes a matter of record before the ALJ and the ARB on review." Slip op. at 8 (citations omitted). The ARB was concerned about the Administrator's lack of written explanation on timing and extraordinary circumstances, the ARB stating: "The acceptance of an untimely filing is a legal determination that is subject to legal process and appeal like any other determination of the Administrator." *Id.* at 9. The ARB noted that the regulations at 29 C.F.R. Part 6, and the Administrative Procedure Act require an administrative record on each finding, conclusion or exception presented, and stated that it found "nothing excluding timeliness rulings from the appealable content concerning arm's-length hearings." The ARB denied the Administrator request for a remand to make findings on extraordinary circumstances, finding that the Administrator's failure to do so had been fatal to the case.

## X. Relief

### A. Debarment

#### 1. Generally

Provisions related to debarment are found at 41 U.S.C. § 6706 as well as the implementing regulations at 29 C.F.R. § 4.188. Debarment is warranted in the absence of "unusual circumstances," or if it is determined that the contractor acted in "willful" or "culpable" violation of the SCA. ***Dantran, Inc. v. U.S. Dep't of Labor***, 171 F.3d 58, 68 (1st Cir. 1999) (if the contractor acted willfully or culpably, then it "cannot be saved from debarment"); ***Vigilantes, Inc. v. U.S. Dep't of Labor***, 968 F.2d 1412 (1st Cir. 1992) (debarment required where no unusual circumstances present; minority employer had numerous deficiencies under several contracts totaling more than \$70,000, failed to meet its successor contractor

responsibilities, and failed to make prompt payment of monies due); *Tri-County Contractors, Inc.*, 2008-SCA-17 (ALJ Oct. 28, 2010); *KSC-Tri Systems USA, Inc.*, 2006-SCA-20 (ALJ Aug. 7, 2007).

In *Summitt Investigative Service, Inc. v. Herman*, 34 F. Supp. 2d 16, 19 (D.D.C. 1998), the court noted that, although debarment may constitute a severe penalty, Congress intended that it be the norm for violating contractors as opposed to the exception. The court stated that "Congress recognized that employees of government-service contractors historically 'tended to be among the lowest paid people in the economy, and they tended not to be organized by trade unions.'" Upon further review of the legislative history, the court determined that "the statutory safety valve of 'unusual circumstances' was to apply only to 'situations where the violation was a minor one, or an inadvertent one' or where disbarment would be 'wholly disproportionate to the offense.'" (*id.* at 19).

**STRICTLY SPEAKING, AN ALJ DOES NOT HAVE THE AUTHORITY TO ORDER DEBARMENT; RATHER, THE ALJ'S AUTHORITY IS TO DETERMINE WHETHER THE RESPONDENT ESTABLISHED THE "UNUSUAL CIRCUMSTANCES" NECESSARY TO BE RELIEVED FROM THE INELIGIBLE LIST**

In *Administrator, Wage and Hour Div., USDOL v. Puget Sound Environmental*, ARB No. 14-068, ALJ No. 2012-SCA-14 (ARB May 4, 2016), the ALJ had ordered three Respondents debarred for three years from federal contracts for violations under the Service Contract Act. The ARB clarified:

Strictly speaking ... the ALJ does not have the authority to debar anyone for Service Contract Act violations. The Department's Service Contract Act regulations require the ALJ to "include in his/her decision an order *as to whether the respondent is to be relieved from the ineligible list*," 29 U.S.C. § 6.19(b)(2) (2015) (emphasis added), the Comptroller General's list of persons and firms who have violated the Service Contract Act, *see* 41 U.S.C. § 6706(a); the regulations do not, however, give ALJs authority to do anything more. Thus, the final full sentence in the ALJ's decision that Moreno et al. "are debarred from federal contracting for three years," ... was beyond his authority. The ALJ should have simply concluded that Moreno et al. had failed to establish the "unusual circumstances" necessary to be relieved from the "ineligible list." Formally, it is the Administrator who, on the Secretary's behalf, must forward to the Comptroller General the names of those found to be in violation of the Act. *See* 29 C.F.R. § 6.21 (a) ("Upon the final decision of the Administrative Law Judge or Administrative Review Board, as appropriate, the Administrator shall within 90 days forward to the Comptroller General the name of any respondent found in violation of the Service Contract Act, including the name of any firm, corporation, partnership, or association in which the respondent has a substantial interest, unless such decision orders relief from the ineligible list because of unusual circumstances."); 41 U.S.C. § 6706(b) ("If the Secretary does not recommend otherwise because of unusual circumstances, the Secretary shall, not later than 90 days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the person or firm found to have violated this chapter."); *see generally Admin., Wage & Hour Div. v. 5 Star Forestry*, ARB No. 14-021, ALJ No. 2013-SCA-004, slip op. at 7-8 (ARB June 24, 2015).

Slip op. at 9, n.36 (emphasis added).

## 2. Scope and consequences of debarment

In *Fields and W/D Enterprises, Inc. v. Chao*, Case No. 6:08-cv-1119-JTM (Feb. 19, 2009), recon. denied (D. Kan. Mar. 19, 2009), on reconsideration, the district court clarified the scope and consequences of debarment on a contractor. Specifically, the contractor sought clarification of: (1) whether the three-year debarment is shortened by the nearly four months in 2008 that W/D Enterprises was on the debarment list; (2) whether the W/D Enterprises is permitted to work on existing federal contracts once debarment resumes; and (3) whether debarment from federal contracts will affect W/D's ability to receive state contracts. The court accepted the Department's positions on the issues:

The defendant addressed the plaintiffs' requested clarification points as follows: 1) 'the Department will shorten W/D's debarment term to reflect the nearly four months in 2008 that the contractor was on the debarment list . . .'; 2) 'it is the Department's longstanding position that the Act does not prevent a debarred contractor from working on any federal contracts that were awarded prior to the contractor's entry onto the list. When W/D's three-year term of debarment is reinstated, therefore, the [Service Contract Act] will not bar the contractor from continuing its work on federal contracts that were awarded prior to the debarment date'; 3) 'The Department agrees that the [Service Contract Act] does not give it authority to debar federal contractors from state contracts.'

## 3. CWHSSA and SCA violations – different debarment standards

In *Hugo Reforestation, Inc.*, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001), the ARB held the following with regard to debarment under the CWHSSA and SCA:

[T]he SCA and CWHSSA impose different standards for assessing liability for debarment. Under the CWHSSA - a Davis-Bacon Related Act - the burden is on the Secretary to establish that the violations are 'aggravated or willful' such that debarment is warranted. 20 C.F.R. § 5.12(a). Under the SCA, on the other hand, debarment is presumed once violations of that Act have been found, unless the violator is able to show the existence of 'unusual circumstances' that warrant relief from SCA's debarment sanction. 29 C.F.R. § 4.188(a) and (b). *Ventilation and Cleaning Eng'rs., Inc.*, Case No. SCA-176 (Sec'y Sept. 27, 1974) Labor L. Rep. (CCH) ¶ 30,946.

The debarment sanction differs under the two Acts as well. By statute, debarment under the SCA is for three years, without modification. By comparison, under the Department's regulations and Board precedent, a contractor debarred under the Davis-Bacon Related Acts (including the CWHSSA) is placed on the ineligibility list for a period 'not to exceed' three years, 29 C.F.R. § 5.12(a)(1), from which the contractor may petition to be removed after six months. 29 C.F.R. § 5.12(c).

Accordingly, charges of CWHSSA violations (e.g., overtime under payments and recordkeeping) must be analyzed under the Davis-Bacon Related Acts applicable to the CWHSSA, while SCA violations ( e.g., fringe benefit and holiday under payments, and recordkeeping) must be analyzed under the SCA debarment standard.

Slip op. at 8-9.

#### 4. Company and individual debarment; "party responsible"

In **Nantom Services, Inc.**, 1997-SCA-35 (ALJ Dec. 22, 1998), the ALJ held that the company, as well as its President and principal stockholder, had committed willful violations of the SCA and CWHSSA, which warranted debarment of both the company and its President/stockholder. See also **Tri-County Contractors, Inc.**, 2008-SCA-17 (ALJ, Oct. 28, 2010) (company president also debarred); **International Services, Inc.**, ARB Case No. 05-136, 2003-SCA-18 (ARB, Dec. 21, 2007), *aff'd*, Case No. 08CV5471 (HB) (S.D.N.Y. May 7, 2009) (unpub.) (President and CEO of "holding company" is a "party responsible" and is subject to debarment); **Progressive Environmental, LLC**, 2005-SCA-24 (ALJ, Mar. 23, 2007); **Rasputin, Inc.**, ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (term "party responsible" includes corporate officers and owners as well as individuals "responsible for a service contractor's performance of a contract"; Johnson liable as he was in "de facto control" of day-to-day operations); **Stephen W. Yates**, ARB Case No. 02-119, 2001-SCA-21 (ARB, Sept. 30, 2003) (citing to 29 C.F.R. § 4.187(e)(1), personal liability could be imposed on the president/operating manager as "'party responsible' based on his level of overall control of the mail hauling and delivery business operations"); **SuperVan, Inc.**, ARB Case No. 00-008, Case No. 1994-SCA-47 (ARB, Sept. 30, 2002) (Respondent Rullo was president of the company and held a 95 percent interest in the company such that he was a "party responsible" and was held liable for violations of the wage payment and fringe benefits provisions of the contracts); **Hugo Reforestation, Inc.**, ARB Case No. 99-003, 1997-SCA-20 (ARB, Apr. 30, 2001) (owner and president of Respondent charged with supervision of day-to-day operations must be debarred); **Melton Sales and Services, Inc.**, 1982 SCA-127 (ALJ, Nov. 18, 1985) (two brothers shared in the business operations of Respondent that misclassified employees and failed to pay the proper wages such that they, along with the company, were debarred).

In **Lawn Restoration Corp.**, 2002-SCA-6 (ALJ Jan. 27, 2003), the ALJ granted partial summary judgment in favor of the Department and held that Jeffrey Jones, who was president, chief executive officer, and sole owner of Lawn Restoration Corporation, was a "party responsible" within the meaning of the Act and was individually and jointly liable with the company. In so holding, the ALJ cited to **Hugo Reforestation, Inc.**, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001), which set forth the criteria for individual liability under the Act:

Under the regulations it is clear that a corporate official who controls the day-to-day operations and management policy, or is responsible for the control of the corporate entity, or who actively directs and supervises contract performance, including employment policies and practices and the work of the employees working on the contract, is liable for the violations individually and jointly with the company. 29 C.F.R. § 4.187(e)(1), (2) and (3).

#### 5. Injunction against debarment not permitted

In **Federal Food Service, Inc. v. Marshall**, 481 F. Supp. 816 (D.D.C. 1979), the district court held that a federal contractor was not entitled to injunctive relief from debarment as such relief was

outweighed by public interest and conduct against the employees who were underpaid. The court noted that the SCA was designed to provide fair wage standards for employees working under federal service contracts and any decision that sets aside actions consistent with the SCA's purposes, such as debarment, could cause substantial injury to the enforcement of the SCA.

6. Violation was willful (culpable neglect or culpable disregard); debarment mandatory

a. *Established*

As previously noted, if a contractor is found to have willfully violated the provisions of the SCA, then debarment is mandated regardless of whether any "unusual circumstances" may be present. For example, in *John's Janitorial Service, Inc.*, 1994-SCA-2, slip op. at 2-3 (ARB July 30, 1996), the ALJ's discretion to consider any unusual circumstances was properly limited. The ALJ found that Respondents willfully violated the Act and had engaged in repeated violations. Because a condition precedent to relief from debarment requires that any violation not be willful, deliberate, of any aggravated nature, the ARB held that the ALJ was correctly precluded from engaging in an "unusual circumstances" analysis. *See also Groberg Trucking*, ARB Case No. 03-137 (ARB Nov. 30, 2004) (Postal contractor properly debarred for three years on grounds that it engaged in culpable and willful conduct by failing to properly record hours worked despite prior warnings and failing to pay the proper wage rate).

i. Poor business judgment; failure to pay wages

The failure to pay employees due to financial problems resulting from poor business judgment constitutes culpable neglect. *Summitt Investigative Service, Inc.*, ARB Case No. 96-111, 1994-SCA-31, slip op. at 12 (ARB Nov. 15, 1996), *aff'd*, 34 F. Supp. 2d 16, 25 (D.D.C. 1998). In affirming the ARB's holding, the district court stated that "it cannot be doubted that the impact of violations on unpaid employees . . . was severe" and the contractor's "abject failure to meet its payroll during October and November impelled its own employees to walk off the job out of understandable frustration." *Id.* at 25.

In *D's Nationwide Industrial Services*, ARB Case No. 98-081, 1995-SCA-38 (ARB Nov. 29, 1999), the ARB held that Respondent's willful violation of the SCA was sufficient to warrant debarment. It held that the contractor's failure to pay the back wages owed to its drivers and its failure to provide assurances of future compliance supported debarment.

ii. Employer's reliance on expired collective bargaining agreement

In *Commercial Laundry & Dry Cleaning, Inc.*, ARB Case No. 96-136 (ARB Nov. 13, 1996), the ARB reiterated the three part test at 29 C.F.R. § 4.188, which is employed to establish whether relief from debarment is justified. The ARB held that the ALJ erred in finding that the petitioners had addressed the first element (where the conduct causing or permitting violations of SCA is willful, deliberate, or of an

aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation). Notably, the parties' stipulations provided that the petitioners had an expired collective bargaining agreement and they erroneously relied on the belief that the collective bargaining agreement had priority over the SCA. The ARB held that such reliance was inexcusable and does not constitute unusual circumstances warranting relief from debarment under the SCA and that the expiration of the collective bargaining agreement should have put them on notice to check with the Department of Labor to ascertain whether they had a valid basis to rely on the expired agreement.

### iii. Widespread and continuing violations

In ***Federal Food Service, Inc. v. Marshall***, 481 F. Supp. 816 (D.D.C. 1979), the court held that, because of Respondent's history of repeated violations of the SCA over the years and its continuing violations, Respondent was culpable and debarment was proper. *See also Fields and W/D Enterprises, Inc. v. Chao*, Case No. 6:08-cv-1119-JTM (Feb. 19, 2009), recon. denied (D. Kan. Mar. 19, 2009) (Plaintiff continued to violate the SCA despite multiple investigations of his practices); ***Hugo Reforestation, Inc.***, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001) (Respondents were notified of the SCA pay requirements, but repeatedly violated the Act); ***A to Z Maintenance Corp. v. Dole***, 710 F. Supp. 853 (D.D.C. 1989) (contractor repeatedly violated the SCA, failed to pay individual uniform allowances as required by contract, and it failed to pay health, welfare, and pension benefits when due); ***U.S. Dep't of Labor v. Loss Prevention, Inc.***, 2003-SCA-2 (ALJ Jan. 28, 2004); ***G.A. Johnson Trucking***, 1997-SCA-37 (ALJ, Apr. 21, 1999) (Respondent consistently failed to pay proper wages and had a history of similar violations).

### iv. Failure to maintain payroll records

In ***William T. Carr***, 1999-SCA-2 (ALJ Jan. 4, 2000), the ALJ found that the contractor was aware of his obligations under the SCA as demonstrated by his testimony at the hearing, yet he failed to pay his service employees the proper wages and failed to keep and preserve adequate records for the statutory three year period. The ALJ noted that, although the contractor did not have a history of similar or repeated violations under the SCA, he had "committed culpable record keeping violations in this case," which precluded relief from debarment. *See also VGA, Inc. and Vince Akins*, Case No. 2006-SCA-9 (ALJ Feb. 12, 2009) (after commencement of the Department's investigation into the company's payment practices, "[a] preponderance of the evidence establishes that Respondents then began producing altered timesheets"); ***Coast Industries, Inc.***, ARB Case No. 04-004, 2002-SCA-3 (ARB Feb. 28, 2005) (employer debarred for deliberately falsifying payroll records); ***Groberg Trucking, Inc.***, ARB Case No. 03-137, 2001-SCA-22 (ARB Nov. 30, 2004) (employer debarred for maintaining false payroll records); ***Hugo Reforestation, Inc.***, ARB Case No. 99-003, 1997-SCA-20 (ARB Apr. 30, 2001) (failure to comply with SCA record-keeping requirements and repeated violations of the Act).

#### v.No “bona fide legal issue of doubtful certainty”

In **Summitt Investigative Service, Inc. v. Herman**, 34 F. Supp.2d 16, 25 (D.D.C. 1998), the district court found that debarment was proper due to the contractor's culpable conduct and it concluded that an analysis of any potential "unusual circumstances" was, therefore, unnecessary. Moreover, the court noted that Respondent's arguments regarding overtime and fringe benefits were clearly contrary to the law such that "no bona fide legal issue of doubtful certainty" existed under 29 C.F.R. § 4.188(b)(3)(ii) which would have warranted relief from debarment. *See also Melton Sales and Services, Inc.*, 1982 SCA-127 (ALJ, Nov. 18, 1985) (no bona fide legal issue existed where legal issues were straight-forward and Respondent was advised by the government that "[w]hen helpers are not assisting, but are instead spending substantial time performing journeyman's work on their own, they must be paid the journeyman's wage").

In **Administrator, Wage and Hour Div., USDOL v. Northwest Title Agency, Inc.**, ARB No. 2017-0055, ALJ No. 2014-SCA-00011 (ARB June 12, 2020) (per curiam), Respondents argued that their debarment was “inappropriate because the alleged violations can be attributed to a reasonable interpretation of the statute.” *Id.* at 6, quoting Respondents’ brief. The ARB, however, was not persuaded, noting that Respondents failed to pay their employees’ health and welfare fringe benefits and failed to keep and make available the required records; that they did not provide notice of the required minimum benefits to their employees or post such information; and Respondent’s owner admitted that he failed to read the Contract and made no effort to determine whether his company’s practices were in violation of the SCA. Although Respondents asserted that a WHD investigator failed to consider documents showing compliance, the ARB stated that the record indicated that those documents were accepted and rejected as insufficient to establish compliance. The ARB determined that the SCA violations had been the result of the “culpable conduct” of Respondents, and therefore debarment was appropriate.

#### vi. Failure to honor terms of predecessor’s contract

In **Houston Building Services, Inc. and Jason Yoo**, ARB Case No. 95-041A, 1991-SCA-30, slip op. at 5 (ARB Aug. 21, 1996), the ALJ determined that Respondents' voluntary hiring of the predecessor's employees, but its failure to consider the severance allowance in the predecessor's contract wage determination were circumstances under their control. Although the ALJ did not expressly consider the debarment provisions at 29 C.F.R. § 4.188(b)(3), the ARB found the ALJ's findings dispositive. Pursuant to 29 C.F.R. § 4.188(b)(4), a contractor has an affirmative obligation to ensure that its pay practices are in compliance with the SCA. The ARB found that Respondents' failure to comply with the severance obligation of its contract was either culpable neglect or exhibited a culpable disregard of its contractual responsibilities. Thus, the ARB denied relief from the debarment provisions. *See also Rasputin, Inc.*, ARB Case No. 03-059, 1997-SCA-32 (ARB May 28, 2004), *aff'd in relevant part sub. nom.*, **Johnson v. U.S. Dep't of Labor**, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (affirming debarment of Johnson for failure to pay \$173,460.34 in back wages and fringe benefits; court held that it consistently accords "substantial deference to the credibility determinations of the ALJ").

## vii. Failure to cooperate with investigation

In ***United Kleenist Organization Corp.***, 1999-SCA-18 (ALJ Jan. 10, 2000), aff'd, ARB Case No. 00-042 (ARB Jan. 25, 2002), the ALJ held that debarment was proper where the contractor failed to cooperate with the investigation of its payment practices. The DOL investigator was provided with "clearly inadequate and incomplete information" and, at times, the contractor "totally refused to furnish her with records of any kind." The ALJ concluded that the owner of the company could not "avoid debarment by having delegated authority to others" and the ALJ was not "convinced of his feigned ignorance" of the violations. See also ***William T. Carr***, 1999-SCA-2 (ALJ Jan. 4, 2000); ***Nantom Services, Inc.***, 1997-SCA-35 (ALJ Dec. 22, 1998).

In ***Administrator, Wage & Hour Div., USDOL v. Tri-County Contractors, Inc.***, ARB No. 11-014, ALJ No. 2008-SCA-17 (ARB June 29, 2012), the ARB summarily affirmed the ALJ's denial of relief from debarment under the Service Contract Act where there was overwhelming evidence supporting the ALJ's finding that the repetitive nature of the Employer's violations constituted culpable conduct, and where the Employer impeded a second investigation.

In ***Administrator, Wage and Hour Div., USDOL v. Ares Group, Inc.***, ARB No. 12-023, ALJ No. 2010-SCA-6 (ARB Aug. 30, 2013), the Respondent failed to pay proper wages and benefits in violation of the McNamara-O'Hara Service Contract Act and the Contract Work Hours and Safety Standards Act, and the Wage and Hour Division sought debarment under SCA Section 5(a). The federal contract and Blanket Purchase Agreement for professional security services at federal buildings in Florida specified certain preliminary training requirements for Security Guards and uniformed supervisors working under the BPA. The Respondent had failed to compensate prospective guards for such training time prior to commencement of the contract. The ALJ had granted summary decision in favor of the WHD Administrator on the question of debarment. The ARB applied the three part test found in 29 C.F.R. § 4.188(b), for determining when relief from debarment is appropriate, and affirmed the grant of summary decision. The ARB found that the record showed that the Respondent willingly ignored guidance WHD provided that the SCA applied to the Contract's preliminary training requirements, and that the company was required to compensate the security guards for expenses they incurred for the preliminary training. The ARB stated that because the Respondent failed to meet its burden of proof under the first part of the three-part test, it need not consider any further mitigating factors.

Nonetheless, the ARB found that the Respondent failed to meet the second part of the regulatory test, which require that the contractor demonstrate a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance. The ARB found that the Respondent had taken several months to provide requested records and documents to WHD during the course of the investigation, and did not pay the back wages owed until ten months after WHD held its final conference with the company. Moreover, WHD's investigation on this Contract determined that the Respondent failed to pay certain security guards for the Columbus Day holiday and to fully compensate some employees for health and welfare benefits at the proper rate. In addition, the ARB found that there had been two subsequent investigations concerning violations the Respondent on the same Contract.

Finally, the ARB found that given the Respondent's history of non-compliance in the Contract in dispute in this case, as well as evidence of noncompliance on other federal contracts, it failed to satisfy the third part of the "unusual circumstances" test.

One member of the ARB wrote a concurring opinion, finding that some of the matters considered by the majority could not be resolved on summary decision, but that some of the Respondent's behavior prevented it from establishing "unusual circumstances" as a matter of law.

#### viii. Ignoring the government's advice

In *Melton Sales and Services, Inc.*, 1982 SCA-127 (ALJ Nov. 18, 1985), the ALJ concluded that debarment was proper where Respondent received clear written and oral advice from the government regarding classification of workers, but ignored the advice. The ALJ noted the following:

Respondents make much of the fact that they sought advice from the Wage and Hour Division concerning the use of helpers on the job, but, as the record shows, they largely ignored it or sought to circumvent it. They were advised that when helpers performed journeymens' (sic) work they were entitled to journeymens' (sic) wages. They were told that a worker's job duties, not his skill levels, should be used to determine his classification. They were admonished that the helper classification was not a training position, and that helpers should not be trained in a craft unless registered as apprentices. Yet, none of this advice was heeded. To the contrary, employees were hired and classified based primarily on their skill and experience, irrespective of the jobs they would be required to perform. And, they were trained on the job, in the absence of an apprentice program.

Slip op. at 12-13. Consequently, the ALJ concluded that Respondents committed willful violations of the Act and debarment was warranted. *See also Rasputin, Inc.*, ARB Case No. 03-059, 1997-SCA-32 (ARB May 28, 2004), *aff'd in relevant part sub. nom., Johnson v. U.S. Dep't. of Labor*, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), *aff'd*, Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.) (individual in charge of daily operations was an experienced federal government contractor, yet he ignored government's compliance guidance and he also obtained contract under "false pretense of being (the company's) president").

#### ix. Ignorance of the law

In *Progressive Environmental, LLC*, 2005-SCA-24 (ALJ Mar. 23, 2007), the ALJ rejected Respondent's argument that its failure to pay required wages was not willful because the company "was dealing with a learning or startup period . . . (and) was learning how to set up administrative procedures to deal with requirements for governmental contracts." The ALJ found, to the contrary, that officers of the Respondent had "substantial experience in the negotiation and administration of federal contracts for forestry work." Indeed, the ALJ noted that Manager Humbert testified that "when it came to paying

employees properly, he simply didn't pay attention to the wage determinations which must be utilized in determining proper base rates and fringe benefits." The ALJ found this problematic since Manager Humbert was working with contracts that "he himself negotiated."

In *Integrated Resource Management, Inc.*, 1997-SCA-14 (ALJ Aug. 5, 1999), the ALJ held that "'culpable conduct' goes beyond mere negligence but falls short of gross carelessness or specific intent." Upon review of the record, the ALJ concluded that the contractor did not commit willful or intentional violations of the SCA; rather, the violations were inadvertent "due to his ignorance of the law." Once an employee brought the pay problem to the contractor's attention, he immediately rectified it. The ALJ stated that "although (the contractor) should have become familiar with the law and the contract at its inception, the period of his ignorance was brief and his response was prompt."

On appeal, the ARB reversed the ALJ's holding and debarred Respondent in *Integrated Resource Management, Inc.*, ARB Case No. 99-119, 1997-SCA-14 (ARB June 27, 2002). The Board noted that the "exemption from debarment where 'unusual circumstances' are demonstrated by the contractor is an extremely narrow one." Citing to 29 C.F.R. §§ 4.188(b)(3)(i) and (ii) and (b)(1), the Board noted that the regulations specifically provide that "ignorance" of the Act's requirements does not qualify as an "unusual circumstance" warranting relief from debarment. Under the facts of the case, the Board noted that Respondent Barnes, who had a college education, admitted that "he failed to read the SCA provisions of his contract," which resulted in his culpably negligent conduct. The Board found that the ALJ erred, as a matter of law, and Respondents' "failure to read and follow the plain terms of the contract was culpable conduct" such that the Board was not required to consider any other possible mitigating factors. See also *KSC-Tri Systems USA, Inc.*, 2006-SCA-20 (ALJ, Aug. 7, 2007) ("[n]either ignorance of the SCA's requirements nor negligence, e.g. failure to read and become familiar with the terms of the contract, are sufficient to demonstrate 'unusual circumstances'").

#### [x.Failure to comply with consent findings](#)

In *International Services, Inc.*, 2003-SCA-18 (ALJ July 6, 2005), aff'd, ARB Case No. 05-136 (ARB Dec. 21, 2007), aff'd, Case No. 08CV5471 (HB) (S.D.N.Y. May 7, 2009) (unpub.), Respondent had an affirmative duty, pursuant to executed consent findings, to establish a compliance program, including hiring an ombudsman. Although Respondent hired an ombudsman, it failed to meet requirements of consent findings where the ombudsman failed to respond to employees' concerns and did not maintain required records. The ALJ noted that, although Respondent's "violations of the Act were not purposeful and Respondent promptly rectified most issues after being made aware of them by DOL," the Respondent "never took adequate steps to ensure future compliance and continued violating the Act until GSA finally cancelled the contract." The ALJ concluded that "the number of compliance actions initiated against ISI alone indicates extreme irresponsibility amounting to culpable neglect" and debarment for three years was proper.

In *R&W Transportation, Inc.*, ARB Case No. 06-048 (ARB Feb. 28, 2008), the Board upheld the ALJ's order debaring Respondent based on the company's violations of an agreed consent order; namely, its failure to pay back wages and fringe benefits owed to certain employees as mandated by the consent order.

## xi. Mitigating and aggravating factors

1. Mitigating factor of payment of monies found to be owed to employees does not prevent debarment where there were other aggravating circumstances

In **VGA Inc.**, ARB No. 09-077, ALJ No. 2006-SCA-9 (ARB Sept. 29, 2011), the ARB affirmed the ALJ's finding that the Respondents violated the SCA when it underpaid its employees SCA wages and fringe benefits due them under its federal service contracts. The ARB found that a preponderance of the evidence supported the ALJ's finding that the Respondent's actions in causing the SCA violations amounted to willful or culpable conduct. Thus, the ARB affirmed the ALJ's finding that "unusual circumstances" warranting relief from the debarment sanction did not exist. Although the Respondent paid the moneys found due to its employees by the Administrator, the ARB agreed with the ALJ that mitigating factors alone do not overcome strict application of SCA debarment where, as here, there were aggravating factors (limited cooperation during the investigation; a delay in coming into compliance; a previous SCA debarment).

2. Not established

In **Elaine's Cleaning Service, Inc. v. U.S. Dep't of Labor**, 106 F.3d 726 (6th Cir. 1997), the circuit court affirmed the district judge's reversal of an ALJ's decision to debar the contractor for three years for failure to pay the proper wages owed to its service employees under a federal contract. The circuit court noted that the contractor failed to pay the proper wages on three occasions. With regard to the first time, the court noted that the contractor maintained that its failure to pay the proper fringe benefits was the result of an oversight. The second time that certain fringe benefits were not properly paid, the contractor knew of the violation but did not have the funding. Because of the unexpected increase in required payments, the contractor was not able to disburse the money to its employees until the Air Force made its payment to the contractor. The final violation of the SCA was, according to the contractor, due to its reliance on the advice of a bookkeeper regarding holiday pay. Based upon the foregoing explanations regarding its conduct, the circuit court held that the contractor did not willfully or culpably violate the SCA such that the ALJ should have determined whether unusual circumstances were present prior to finding that debarment was warranted.

In **Magic Brite Janitorial**, Case No. 2007-SCA-6 (ALJ Dec. 7, 2007), the ALJ cited to **Elaine's Cleaning Service, Inc. v. U.S. Dep't. of Labor**, 106 F.3d 726 (6th Cir. 1997), to hold that Respondent was not culpable for failing to timely pay fringe benefits where the government delayed in making payments on the contract at issue. The ALJ noted that, in this case, "Respondent was . . . hindered in its ability to make the fringe benefit contributions by delayed payments on government contracts" and the "Respondent continued to make payments as it could and has paid all such amounts to date."

## 7. “Unusual circumstances” defined

Where a contractor's violations are not willful, then the ALJ may determine whether "unusual circumstances" are present which warrant relief from debarment. In *D's Nationwide Industrial Services*, ARB Case No. 98-081, 1995-SCA-38 (ARB Nov. 24, 1999), the ARB noted that, although "unusual circumstances" are not defined in the SCA, the implementing regulations at 29 C.F.R. § 4.188(b) set forth a three-part test for determining when such circumstances exist and relief from debarment is proper: (1) whether Respondent's conduct was of a willful, deliberate, aggravated nature, or culpable conduct which, if present, would preclude relief from debarment; (2) whether Respondent had a good compliance history and cooperated in the investigation, repaid the money owed, and provided assurances of future compliance; and (3) whether monies owed were promptly paid, whether liability depended upon resolution of a bona fide legal issue of doubtful certainty, whether record-keeping violations impeded the investigation, the Respondent's efforts to ensure compliance, and the impact of violations on unpaid employees. The ARB reiterated that willful or culpable conduct on a contractor's part ends the analysis and there is no entitlement to relief from debarment. *See also Federal Food Service, Inc. v. Donovan*, 658 F.2d 830 (D.C. Cir. 1981) (Secretary has broad discretion in determining whether unusual circumstances are present but must follow regulatory guidelines); *Washington Moving & Storage Co.*, Case No. SCA-168 (Sec'y Mar. 12, 1974).

*See also Fields and W/D Enterprises, Inc. v. Chao*, Case No. 6:08-cv-1119-JTM (Feb. 19, 2009), recon. denied (D. Kan. Mar. 19, 2009) (the burden of establishing “unusual circumstances” rests with the violator).

### **ALJ DID NOT HAVE AUTHORITY TO RULE ON VALIDITY OF REGULATION AND ITS THREE-PART ANALYTIC TEST FOR “UNUSUAL CIRCUMSTANCES” SUPPORTING RELIEF FROM DEBARMENT; ALJS’ ANALYTIC APPROACH, HOWEVER, WAS HARMLESS ERROR WHERE HE NONETHELESS APPLIED THE RELEVANT FACTORS AND CONSIDERATIONS**

In *Administrator, Wage and Hour Div., USDOL v. Price Gordon, LLC*, ARB No. 2019-0032, ALJ No. 2017-SCA-00008 (ARB Mar. 9, 2020) (per curiam), an issue on appeal was whether the ALJ erred in finding “unusual circumstances” warranting relieving Price and VNT from debarment. The ALJ criticized the “three-part test” of the regulations and ARB precedent (the ALJ giving the example of *Administrator, Wage and Hour Division vs. Ares Group, Inc.*, ARB Case No. 12-023 (August 30, 2013)). On appeal, the Administrator argued that ALJ erred in finding that the respondents demonstrated “unusual circumstances” — the Administrator arguing that the ALJ erroneously applied a “totality of the evidence” and a “rule of lenity” analysis. The Administrator also asserted that the ALJ “erroneously focused on a purported ‘good faith disagreement’ or ‘bona fide legal issue of doubtful certainty’ between the parties as factors against debarment.” *Id.* at 7.

The ARB cited 29 C.F.R. § 4.188(b)(3) and *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-00020 (ARB Apr. 30, 2001), and determined that the ALJ erred in finding that the three-part test was not applicable to debarment proceedings, noting that neither the ARB nor the ALJ have the authority to rule on the validity of the regulations. The ARB concluded, however, “that the ALJ’s error is harmless because he did in fact apply the necessary factors and consider the appropriate circumstances in finding that unusual circumstances relieve Respondents from debarment.” *Id.* at 8. The ARB elaborated:

For example, the ALJ found that Respondents did not willfully intend to violate the Act and were not culpably neglectful toward their responsibilities. . . . The ALJ found that there was no evidence that Respondents previously violated the SCA. The ALJ noted that Price sought to ascertain whether its payroll practices violated the Act and that there was no evidence that Respondents misrepresented its payroll practices or falsified employment records to conceal practices. . . . Rather, Respondents and the Administrator had a “good faith” disagreement on the meaning and interpretation of the SCA’s requirements upon which Respondents litigated and ultimately prevailed in part. . . . The ALJ also found that Respondents did not fail to cooperate in the investigation and distinguished any failure to provide sufficient assurances of future compliance. The ALJ refused to interpret Respondents’ decision to litigate as evidence of contumacious noncompliance. [ALJ decision, *id.*] at 16-17 & n.75 (arguing that an employer has the ability to contest genuine, bona fide legal issues without fear of forfeiting eligibility for future government contracts). The ALJ noted that Respondents were not able to pay owed back wages in large part because of the withholding of contract payments that accompanied the Administrator’s process against Respondents. . . .

*Id.* at 8-9 (some citations to ALJ decision omitted).

*a. Established*

*i. Deficiencies corrected; debarment would cause employer's demise*

In ***United International Investigative Services, Inc.***, ARB Case No. 95-40A (ARB Jan. 10. 1997), the ARB agreed with the ALJ's determination that the purpose of the SCA would not be served by debaring Respondent when it had cured its problems and debarment would likely cause its demise. Noting case law and legislative history, the ARB stated that debarment should not be used where the violation is minor or inadvertent, or where debarment would be wholly disproportionate to the offense. Thus, where Respondent made a mistake in overbidding during his early experience with government contracting and, where the violations were not willful or culpable, the ARB affirmed relief from the debarment provisions. Debarment would not serve the purposes of the SCA given Respondents' “unflagging and, ultimately successful, drive to rectify mistakes and remain in compliance.”

*ii. De minimis violations*

In ***United International Investigative Services, Inc.***, ARB Case No. 95-40A (ARB Jan. 10. 1997), the Board found violations of the SCA involving questions of reasonable differences in interpretation of what was required of the contractor were “innocent” and “petty” and excepted them from consideration in deciding whether debarment was mandated for other violations by the contractor.

In ***Federal Food Service, Inc. v. Donovan***, 658 F.2d 830, 832 (D.C. Cir. 1981), the court held that it was error to find that the contractor willfully violated the SCA even where the ALJ noted that the its

"past history reflected violations of the Act during several years, and that there were culpable violations which proper management would have precluded." The ALJ ordered debarment of the company for three years. The court noted that a total of \$3,128.33 in back wages was owed to the employees and stated the following:

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 . . . . The ALJ found that there was no evidence that the violations were willful or deliberate and the 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 in the past were not substantial and did not result in debarment because of unusual circumstances.

*Id.* at 834. The court disagreed with the ALJ that "proper management" would have eliminated the possibility of SCA violations in view of the small ratio of violations as compared to the substantial value of the contracts. The court noted that "[l]arge under payments might be *res ipsa loquitur* of improper management" but that, on this record, there was "no testimony of management experts or of prevalent business practices to establish what practices appellants should have followed and did not." The court concluded that it is error for an ALJ to make an inference of improper management "solely on the basis of virtually *de minimus* under-payments":

[T]he Secretary must consider the particular circumstances of the business under review . . . , the actual problems it has faced, the precautions normally taken by well-managed companies in the field, the likelihood that it could have avoided its violations with proper management before implementing the severe debarment provision. If as here he relies on a history of previous violations to support debarment, he must apply the standards of reasonable management to them as well.

*Id.* at 834.

### iii. Immediate corrective action

The ARB affirmed that Respondent's conduct in ***United International Investigative Services, Inc.***, ARB Case No. 95-40A (ARB Jan. 10, 1997), was not culpable where (1) the dishonored paychecks were covered almost immediately, (2) contract payments were not posted prior to the clearance of the paychecks, and (3) the occurrences were during the period when the contractor was just beginning many of its federal contracts. The ARB declined to consider each incident as a separate violation because once the cash flow problem was cured, payment was ensured, and it emphasized that the predominant problem, created mostly by the bank's posting procedures, were remedied early in the contract and that the dishonored paychecks were covered immediately by other funds. Thus, the ARB considered the incidents to "comprise a discrete phase in [the contractors'] acclimation rather than a case of truly repetitive violations."

#### iv. Reasonable mistake in judgment; no prejudice to employees

In ***United International Investigative Services, Inc.***, ARB Case No. 95-40A (ARB Jan. 10, 1997), the ARB held that Respondent's failure to make timely payments to the health and welfare benefit funds as required did not constitute culpable conduct where (1) the Navy would not pay the increase he requested, (2) a union board member gave assurances that he would do what he could about the inability to make the payments on time in return for the contractors remaining on the job, and (3) there was no indication that any employee was harmed by the failure to make timely payments. The ARB found this to be a good and pragmatic decision. Noting that financial problems arising from poor business judgment cannot constitute unusual circumstances, the ARB stated that mere mistaken judgment does not, however, necessarily mandate debarment. A contractor's culpability should be measured by the reasons for and character of the conduct. The ARB held that the mistake in this case did not rise to the level of extremely poor business judgment in underbidding as presented in ***Summitt Investigative Services, Inc.***, ARB Case No. 96-111, 1994-SCA-31 (ARB, Nov. 15, 1996), *aff'd*, 34 F. Supp. 2d 16 (D.D.C. 1998), or gross neglect and disregard of fundamental responsibilities involved in ***Unified Services, Inc.***, BSCA Case No. 92-36 (BSCA Jan. 28, 1994). As a result, the ARB reversed the ALJ's determination that Respondent willfully violated the SCA by making misrepresentations that the benefits had been paid, when they had not. The ARB stated that a communication of this type, even if culpable, is not a violation of the SCA. The violation was the failure to make timely benefit fund payments. The ARB found that evidence that Respondent knowingly misrepresented its payment status was tenuous.

#### v. Unexpected expenses

In affirming relief from debarment in ***United International Investigative Services, Inc.***, ARB Case No. 95-40A (ARB Jan. 10, 1997), the ARB noted that the ALJ examined the contractor's "progression from a nascent contractor overwhelmed by a surfeit of contract awards to a company which appears in all respects to be a responsible and competent [contractor]," the contractors' dedication to its employees and to completion of the contracts, the unexpected expenses incurred when prior contractors walked off the job, the cooperation with investigators, and prompt payment of funds overdue.

#### vi. ALJ's decision not to interpret respondent's decision to litigate as evidence of contumacious noncompliance

In ***Administrator, Wage and Hour Div., USDOL v. Price Gordon, LLC***, ARB No. 2019-0032, ALJ No. 2017-SCA-00008 (ARB Mar. 9, 2020) (*per curiam*), the ARB found that the ALJ did not err in declining to interpret the respondents' decision to litigate as evidence of contumacious noncompliance.

#### b. *Not established*

#### i. Unexpected costs required by contract and law

The ARB rejected Respondents' argument that the contracting agency forced unforeseen costs on it that were not required by law or contract. **Summitt Investigative Service, Inc.**, ARB Case No. 96-111, 1994-SCA-31, slip op. at 9-12 (ARB Nov. 15, 1996), aff'd, 34 F. Supp. 2d 16 (D.D.C. 1998). Respondents' contention that the contract agency required it to pay time and a half for overtime on fringe benefits, which was not required by the SCA or the contract, was not supported by the record. Respondents' mistaken belief that it was required to do so was a misunderstanding, which the Administrator had no obligation to correct. In addition, providing paid vacations and uniforms approved by the contracting agency should not have been unforeseen expenses, as this was required by law and the contract.

#### ii. Difference between wage determination and bid solicitation immaterial

A respondent cannot be relieved of debarment because the contracting agency and the Administrator made it comply with the obligations for which it had contracted, even if these obligations caused a cash flow shortage. In **Summitt Investigative Service, Inc.**, ARB Case No. 96-111, 1994-SCA-31, slip op. at 8-9 (ARB Nov. 15, 1996), aff'd, 34 F. Supp. 2d 16 (D.D.C. 1998), the ARB held that a disparity between a wage determination and a statement in a bid solicitation was immaterial, as the regulations clearly provide that minimum monetary wages and fringe benefits for service employees are set forth in the wage determinations. See 29 C.F.R. § 4.3(a). Any confusion in this regard should have been raised by Respondent prior to contract award through the challenge procedures provided to bidders. Said differently, the wage determination was controlling over the bid solicitation statements.

#### iii. Discrimination against small minority-owned business untimely presented and unpersuasive

In **Summitt Investigative Service, Inc. v. Herman**, 34 F. Supp. 2d 16 (D.D.C. 1998), Respondent argued that "unusual circumstances" existed, which warranted relief from debarment. In a reconsideration petition before the court, the contractor argued that the Department of Labor violated the Fifth Amendment by selectively enforcing the SCA's debarment provisions against Summitt, a small, minority-owned business. Initially, the court noted that Respondents did not raise this constitutional argument before the ALJ and "offered no evidence in support of their constitutional attack." As a result, it determined that Respondents failed to exhaust their administrative remedies and rejected the argument on appeal.

#### iv. Proficiency in the English language

In **United Kleenist Organization Corp.**, ARB Case No. 00-042, 1999-SCA-18 (ARB Jan. 25, 2002), the ARB held that the fact that English may not be Respondent's native tongue, "this fact does not, in and of itself, establish that he lacks a proficiency in the English language or that any such lack of

proficiency materially impeded his ability to comply with the SCA." As a result, the ARB declined to find that "unusual circumstances" were established and Respondent was debarred.

[v. Multiple investigations; continuing violations; falsification of records, misleading investigators](#)

In *Fields and W/D Enterprises, Inc. v. Chao*, Case No. 6:08-cv-1119-JTM (Feb. 19, 2009), recon. denied (D. Kan. Mar. 19, 2009), the district court affirmed findings of the ALJ and ARB that Plaintiffs did not establish the presence of "unusual circumstances" warranting relief from debarment. Under the facts of the case, the court noted that Plaintiffs failed to pay proper base wages pursuant to a revised determination, failed to pay fringe benefits and benefits for holidays and vacations. Because Plaintiffs underwent three investigations, the district court agreed with the ALJ that Fields knew, or should have known, by the second and third investigations that he continued to violate the Act, especially in light of the fact that Wage and Hour provided Plaintiffs "with specific Act compliance guidance on the contract(s) at hand."

**RESPONDENTS DID NOT DEMONSTRATE "UNUSUAL CIRCUMSTANCES" THAT WOULD RELIEVE THEM FROM DEBARMENT FOR VIOLATING THE SERVICE CONTRACT ACT WHERE RESPONDENT MISLED INVESTIGATORS, FALSIFIED RECORDS, HAD PREVIOUSLY BEEN INVESTIGATED AND RECEIVED WARNING, AND WAS AWARE THAT METHOD OF PAYMENT VIOLATED EMPLOYMENT CONTRACT**

In *Administrator, Wage and Hour Div., USDOL v. Garcia Forest Service, LLC*, ARB No. 14-052, ALJ No. 2011-SCA-2 (ARB Apr. 8, 2016), an Administrative Law Judge issued a decision and order finding that the Respondents violated the minimum wage, fringe benefit, and record keeping requirements of the SCA and CWHSSA, and ordered debarment for both Garcia Forest and Mr. Garcia effective from the date of the ALJ's order. The Respondents did not challenge these findings on appeal, but argued that they had demonstrated unusual circumstances that should relieve them from the sanction of debarment. Under a regulatory standard promulgated by the Administrator, in order to show that unusual circumstances exist that would relieve a party from debarment for violating the Act, that party must (1) establish that the SCA violations were not willful, deliberate, aggravated, or the result of culpable conduct; (2) meet the listed prerequisites of a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance; and (3) address other factors such as previous violations of the SCA. 29 C.F.R. § 4.188(b)(1)(i-iii).

The Board found that the evidentiary record fully supported the ALJ's conclusion that the Respondents failed to meet their evidentiary burden of demonstrating unusual circumstances that would relieve them from debarment. The ALJ found that Garcia's foreman misled the investigators and that the investigators encountered clearly falsified hourly work records during the initial investigation. The ALJ also found that Garcia was aware that the employment contract provided for hourly pay and chose to switch the crew to a production-based pay system. The ALJ further noted that Garcia Forest had recently been investigated and warned of the need to comply with the Act's requirements. Accordingly, the Board ordered debarment of Mr. Garcia and Garcia Forest for three years.

In ***Administrator, Wage and Hour Div. v. MESA Mail Service, LLC***, ARB No. 2017-0071, ALJ No. 2009-SCA-00011 (ARB Sept. 30, 2020), although the ALJ found that Respondents, mail haulers, had not intended to defraud employees or the government and had cooperated with the investigation, they had been investigated three times previously, instructed to record actual hours of work, but failed to do so. The ARB found that this constituted a willful failure to comply with the SCA's recordkeeping requirements. The ARB discounted Respondents' reference to other mail haulers who similarly failed to pay wages and benefits. The ARB observed that regardless of what other mail haulers did, Respondents had been instructed to keep accurate timesheets and failed to do so.

vi. Respondent bears burden of proving no prior violation and not merely that prior violation was technical in nature

In ***E&S Diversified Services, Inc.***, ARB No. 13-019, ALJ Nos. 2011-SCA-8 and 9 (ARB Mar. 20, 2015), the ARB affirmed the ALJ's finding that the Respondent failed to timely pay health and welfare benefits required by the SCA to their contract employees, and that the Respondent had failed to establish that "unusual circumstances" merited relief from debarment. The ARB noted that the Respondent had admitted to holding funds it would have paid to service contract employees and sequestering those funds in its payroll and general accounts. The ARB found that the Respondent therefore admitted affirmative conduct violative of the SCA's health and welfare provisions. The Respondent argued that the ALJ erred in relying on the district director's testimony about prior violations where that witness also testified that the violations were technical in nature. The ARB found that this argument ignored the fact that 29 C.F.R. § 4.188(b)(1) places the burden on the contractor of showing no evidence of prior violations.

vii. Retirement of respondents does not make issue of debarment moot

In ***Administrator, Wage and Hour Div. v. MESA Mail Service, LLC***, ARB No. 2017-0071, ALJ No. 2009-SCA-00011 (ARB Sept. 30, 2020), the ARB affirmed the ALJ's finding that Respondents failed to establish unusual circumstances to warrant relief from debarment.

Respondents argued that the issue of debarment was moot due to their retirement. The ARB noted, however, that the Act requires debarment unless unusual circumstances are demonstrated to warrant relief from debarment.

8. Commencement of term of debarment

In ***Cimpi v. Dep't of Labor***, 739 F. Supp. 25 (D.D.C. 1990), the district court held that the period of debarment commences to run from the date of publication of the violator's name on the debarment list, not from the date on which the name was forwarded to the Comptroller General.

In ***International Services, Inc.***, 2003-SCA-18 (ALJ July 6, 2005), aff'd, ARB Case No. 05-136 (ARB Dec. 21, 2007), aff'd, Case No. 08CV5471 (HB) (S.D.N.Y. May 7, 2009) (unpub.), the ALJ held that Respondent was not entitled to a "credit" against the three year debarment period. Respondent had

argued that it lost its federal contracts two years before the hearing such that it was "de facto" debarred and should receive a "credit" for this time period. Citing to a Board of Service Contracts Appeals decision, *The Swanson Group, Inc.*, 1995 WL 843407 (L.B.S.C.A. 1995), the ALJ stated that the Act, at 41 U.S.C. § 354(a), provides that the Comptroller General publishes a list of debarred firms and the debarment period commences on the date of publication of the list.

In *Administrator, Wage and Hour Div., USDOL v. 5 Star Forestry, LLC*, ARB No. 14-021, ALJ No. 2013-SCA-4 (ARB June 24, 2015), the Respondents, joined by the Administrator, argued that the ALJ erred by ordering debarment effective from the date of the ALJ's 1st Amended D. & O., rather than from the date of publication by the Comptroller General of their names on the debarment list. The ARB agreed that the SCA, 41 U.S.C.A. 6706, expressly provides that the debarment period runs from the date of publication of the violator's name on the debarment list, and that the ALJ "exceeded his authority in ordering the debarment period in this case to begin on the date of his Order." USDOL/OALJ Reporter at 8.

#### 9. ALJ without authority to lessen three-year debarment term

In *G.A. Johnson Trucking*, 1997-SCA-37 (ALJ Apr. 21, 1999), the ALJ cited to the Davis-Bacon Act decision in *Structural Concepts*, 1994-DBA-23 (ALJ Feb. 23, 1995) to hold that he was without authority to lessen the three year term of debarment.

#### B. Withholding employee's wages by contractor improper

In *Lucy E. Enobakhare a.k.a. Lulu Star*, 1996-SCA-46 (ALJ Jan. 7, 1998), the ALJ concluded that, even had employees engaged in unauthorized use with the contractor's van, neither the contract, the statute, nor the applicable regulations permit the contractor to withhold wages.

In *International Services, Inc.*, ARB Case No. 05-136, 2003-SCA-18 (ARB Dec. 21, 2007), *aff'd*, Case No. 08CV5471 (HB) (S.D.N.Y. May 7, 2009) (unpub.), the Board held that a contractor cannot argue that "unusual circumstances" are present warranting relief from debarment on grounds that it was paid late or that funds owed were withheld by the government agency. Citing to a Board of Service Contract Appeals decision in *Kleen-Rite Corp.*, BSCA No. 92-09, slip op. at 3 (BSCA Oct. 13, 1992), the Administrative Review Board noted:

The purpose of the Act is to protect the rightful wages of service employees. There is no provision in the statute or the regulations which permits an employer to wait until being reimbursed by another party before fulfilling its obligations to its employees.

Slip op. at 9.

#### C. Unnamed employees who could not be located; award of back wages against contractor held proper

In *American Waste Removal Co. v. Donovan*, 748 F.2d 1406 (10th Cir. 1984), the court upheld an award for back wages and benefits owed against a government contractor for unnamed employees

who could not be located. The court determined that the award did not constitute a penalty or fine, but was a means of effectuating the purpose of the SCA. The award would be paid to the United States Treasury in the event that the employees could not be located.

#### D. Pre-judgment interest properly awarded

In *United States v. Powers Bldg. Maintenance Co.*, 336 F. Supp. 819 (W.D. Okla. 1972), the court held that the government was entitled to pre-judgment interest at a rate of six percent on amounts recovered as under-payments of minimum wages due to the contractor's employees. Interest accrued from the date the wages were due until the date on which they were paid. The court noted that the right to interest recovered by the United States in an action under the SCA was a question of federal law.

#### E. Liquidated damages not permitted under the CWHSSA

Pursuant to 20 C.F.R. § 6.19(b)(3), "[t]he Administrative Law Judge shall make no findings regarding liquidated damages under the Contract Work Hours and Safety Standards Act."

#### F. No interest assessment against government without its consent

In *J.N. Moser Trucking, Inc.*, 1995-SCA-26 (ALJ Nov. 5, 2004) (on recon.), the ALJ cited to *Industrial Maintenance Service, Inc.*, B.S.C.A. Case No. 92-22 (Bd. of Serv. Cont. Appeals, Apr. 5, 1986) to state that interest awards on past due back wage payments cannot be assessed against the government without its consent.

### XI. Types of dispositions

#### A. Default judgment

##### 1. Missing contractor

In *Michael Relyea, Inc.*, 1999-SCA-17 (ALJ Oct. 29, 1999), the ALJ granted default judgment against the company and its owner and directed that they be debarred for a period of three years. The ALJ further ordered the respondents to repay employees in accordance with the Summary of Unpaid Wages submitted by the DOL in its prehearing exchange. Under the facts of the case, the respondents' counsel originally stated that consent findings and a formal settlement agreement appeared to be "imminent." However, he later lost contact with his client and was unable to obtain his consent to the proposed findings or to determine the contractor's whereabouts.

##### 2. Uncooperative contractor

In *Supervan, Inc.*, 1994-SCA-47 (ALJ Aug. 18, 1999), the ALJ entered an order of default judgment based upon Respondents' failure to cooperate with any of his pre-hearing orders. Although Respondents argued that the documents requested during discovery were not within their custody, possession, or control, the ALJ found differently. Specifically, the ALJ stated:

The Service Contract Act imposes record keeping requirements on contractors and subcontractors pertaining to the employment of employees subject to the Act. (citation omitted). The Act further provides that a corporate officer who actively directs and supervises the contract's performance shall be held personally liable for violations of the Act. (citations omitted).

It is uncontroverted that Mr. Rullo has failed to furnish supporting documentation for SuperVan, Inc. Nevertheless, Mr. Rullo has previously contended that said documents are not currently in his custody, possession, or control. He further asserted that Mario Mendiola was responsible for and managed the day to day operations of SuperVan, Inc. However, the record reveals that Mr. Rullo had a duty to comply with the production orders. Mr. Rullo concedes that he was president of SuperVan, Inc., and that he held a 95 percent interest in the company. The record also reveals that Mr. Rullo signed the Concessionaire Contract and controlled corporate policy. Although Mr. Mendiola was vice president, the record indicates that Mr. Mendiola managed the company under the direction and control of Mr. Rullo. Finally, I note that the record is void of any evidence indicating that Mr. Rullo has made a good faith effort to secure the requested records.

Slip op. at 3-4. The ALJ further stated that presentation of the Department's case was seriously prejudiced by the Respondents' failure to produce the requested documents and default judgment was entered. The ALJ subsequently issued an Order Denying Motion for Reconsideration, *SuperVan, Inc.*, 1994-SCA-47 (ALJ, Oct. 12, 1999). In *SuperVan, Inc.*, ARB Case No. 00-008, 1994-SCA-47 (ARB, Sept. 30, 2002), the ARB determined that the ALJ "acted within his discretion" and affirmed his default judgment orders. The ARB then ordered that Respondents' names be placed on the debarment list for three years.

See also *Coleman M. Wilbanks*, 1998-SCA-14 (ALJ Dec. 3, 1998) (the ALJ issued a default judgment ordering the payment of back wages owed and debarment for three years based upon the contractor's failure to file an answer to the government's complaint. The contractor also failed to respond to the show cause order). See 29 C.F.R. § 6.16.

### 3. Unnamed employees who could not be located; award of back wages against contractor held proper

In *American Waste Removal Co. v. Donovan*, 748 F.2d 1406 (10th Cir. 1984), the court upheld an award for back wages and benefits owed against a government contractor for unnamed employees who could not be located. The court determined that the award did not constitute a penalty or fine, but was a means of effectuating the purpose of the SCA. The award would be paid to the United States Treasury in the event that the employees could not be located.

#### 4. Unrepresented party; special considerations

In *Mitchem Transports, Inc.*, ARB No. 03-115, Case No. 2002-SCA-16 (ARB June 30, 2004), the Board held that, where a pro se party filed a general answer to the SCA complaint submitted by the Department then the ALJ exceeded his authority in waiving the hearing and entering default judgment under § 6.16(c) of the regulations. The Board noted that, giving a "liberal construction" to Respondent's responses to the complaint, Respondent had generally denied the charges against it and admitted that it had contracts with the Veterans Administration and Post Office. The Board concluded that Respondent had filed an "answer" sufficient to survive default judgment. The Board concluded that, in the case of a pro se party, the ALJ may issue default judgment under § 6.16(c) only when "no answer is filed to an SCA complaint." See also *Charles D. Canterbury*, 2002-SCA-11 (ALJ, July 8, 2003), aff'd, ARB Case No. 03-135 (ARB, Dec. 29, 2004) ("although a certain degree of latitude" should be afforded the unrepresented party, the ALJ properly entered summary judgment against Respondent based on its repeated non-compliance with discovery requests and orders).

#### **ALJ'S NEED TO BALANCE LEEWAY TO UNREPRESENTED LITIGANTS AGAINST DUTY OF IMPARTIALITY**

In *Administrator, Wage and Hour Div., USDOL v. Puget Sound Environmental*, ARB No. 14-068, ALJ No. 2012-SCA-14 (ARB May 4, 2016), the ARB affirmed the ALJ's order granting the Administrator's motion for summary decision, with relief in the form of \$1,409,409.98 in back wages and benefits for violations of the terms of contracts subject to the Service Contract Act for general housekeeping, painting, maintenance, and health and safety services on ships and shore facilities primarily at the Puget Sound Naval Shipyard.

On appeal, the ARB addressed the question of whether the ALJ should have given more leeway to the Respondents because they did not have a lawyer, even though the question had not been explicitly raised by the Respondents. The ARB recited several things the ALJ perhaps could have done to have cut more slack to the Respondents in view of their lack of representation, but found that a reversal and/or remand was not warranted. The ARB wrote in regard to the ALJ's prehearing conference call with the parties in which the Administrator's motion for summary decision was discussed:

First, the ALJ had a fine line to walk: while an ALJ does have some role in assisting an unrepresented party, "he also has a duty of impartiality. A judge must refrain from becoming an advocate for the [unrepresented] litigant." While the ALJ would have been within his discretion to explain in more detail what he meant when he said to Moreno, "you'll have to have some sort of proof in the answer to the motion. Just saying that you deny it will not be enough," the ALJ was within his discretion not to have done more than he did.

Slip op. at 11-12 (footnotes omitted). The ARB next noted that the case involved multimillion dollar contracts and that the Administrator's complaint included a prayer for over \$1.4 million dollars in back pay and benefits. The ARB observed that there was a lot of money at stake, and opined that the Respondents should have hired a lawyer as they had the right to do under the regulations. The ARB expressed some skepticism about the Respondents' claim of inability to afford a lawyer, but stated that even if it was true the ALJ was not required to let the owner "off the hook, given the vast sums of money that the government has awarded" to his companies. *Id.* at 12-13.

Editor's note: One member of the ARB indicated that he concurred only with the majority's holding that the Administrator was entitled to summary decision.

## 5. Failure of Respondent to timely file an answer

In *James E. Baker*, Case No. 2002-SCA-13 (ALJ, Feb. 18, 2003), aff'd, 2006 WL 1806485, No. 1:05-CV-685 (W.D. Mich. June 29, 2006), the ALJ entered an order of default judgment on grounds that Respondent failed to file an answer to the complaint within 30 days as required by 29 C.F.R. § 18.5(a). Moreover, default judgment was proper based on Respondent's failure to comply with the ALJ's pre-hearing order requiring the submission of certain information. In his default judgment order, the ALJ directed that Respondent pay the Department of Labor a total of \$21,907.90 in back wages owed. The U.S. Postal Service was ordered to release \$3,008.55 in withheld funds to the Department of Labor for disbursement to Respondent's employees. Finally, as Respondent failed to demonstrate the presence of "unusual circumstances," the ALJ ordered debarment for a period of three years.

### B. Consent findings

The regulations at 29 C.F.R. § 6.18 permit adjudication of Service Contract Act and related Contract Work Hours and Safety Standards Act cases on the basis of consent findings. See *Professional Services Unified*, 1999-SCA-13 (ALJ Feb. 3, 2000); *VA Transport, Inc.*, 1998-SCA-4 (ALJ May 13, 1999) (issuance of decision and order approving consent findings). See also 29 C.F.R. § 6.43 (disposition by consent findings in substantial interest cases).

Notably, in *International Services, Inc.*, ARB Case No. 05-136, 2003-SCA-018 (ARB Dec. 21, 2007), aff'd, Case No. 08CV5471 (HB) (S.D.N.Y. May 7, 2009) (unpub.), the Board held that "the SCA's debarment sanction does not apply to those who violate consent decrees"; rather, "[i]t applies only to persons or firms 'found to have violated this chapter.'" The Board concluded, however, that the record contained ample evidence that Respondent had underpaid \$631,081.07 in wages and fringe benefits to 1,943 contract employees and was, therefore, subject to debarment.

### C. Summary decision

In *Bankal Enterprises and Walter Smith*, 2002-SCA-4 (ALJ July 17, 2003), the ALJ issued summary judgment pursuant to 29 C.F.R. § 18.40(d) on motion of the Administrator. In particular, the ALJ was advised by the parties that a settlement agreement had been reached, but Respondents later failed to return the proposed Consent Decree to the Administrator. The ALJ determined that the undisputed facts supported summary judgment debarring Respondents for failure to pay the prevailing wage rate, and failure to "keep and preserve adequate records of Respondents' employees and of the hours worked and other conditions of employment."

In *Charles D. Canterbury*, 2002-SCA-11 (ALJ, July 8, 2003), aff'd, ARB Case No. 03-135 (ARB Dec. 29, 2004), the ALJ granted summary judgment and ordered sanctions against Respondent for failure to respond to the Department's Request for Admissions, Interrogatories, and Requests for Production of Documents. The ALJ held that all "matters contained in (the Department's) Request for Admissions are deemed admitted, (and) the facts are undisputed in this case." As a result, the ALJ concluded that Respondent breached its contracts with the United States Postal Service "when he failed to pay the employees the proper hourly wage, fringe benefits, and holiday pay." The ALJ, therefore, entered the following orders: (1) the Department's First Request for Admissions were deemed admitted; (2) there shall be an inference that responses to the Department's discovery requests would have been adverse to Respondent; (3) Respondent is prohibited from offering into the record any evidence or testimony regarding any matter that would have been identified in responses to the Department's discovery requests; and (4) Respondent is prohibited from raising any objection to any secondary evidence offered by the Department to show that the withheld responses to its discovery requests would have been shown. The ALJ determined that Respondent was personally liable for payment of \$15,005.32 in back wages owed to employees. The ARB agreed and held that, although "a certain degree of latitude" should be afforded unrepresented parties, the ALJ properly entered summary judgment against Respondent based on its repeated non-compliance with discovery requests and orders.

**GENERAL DENIAL IN THE ABSTRACT IS NOT SUFFICIENT TO "DISPUTE" THAT FACT IN A LEGAL PROCEEDING; WHERE MOVING PARTY SUPPORTS A MOTION FOR SUMMARY DECISION WITH SPECIFIC EVIDENCE, THE OPPOSING PARTY MUST PRODUCE ADMISSIBLE EVIDENCE TO RAISE A DISPUTED ISSUE OF MATERIAL FACT**

In *Administrator, Wage and Hour Div., USDOL v. Puget Sound Environmental*, ARB No. 14-068, ALJ No. 2012-SCA-14 (ARB May 4, 2016), the ARB affirmed the ALJ's order granting the Administrator's motion for summary decision, with relief in the form of \$1,409,409.98 in back wages and benefits for violations of the terms of contracts subject to the Service Contract Act for general housekeeping, painting, maintenance, and health and safety services on ships and shore facilities primarily at the Puget Sound Naval Shipyard. On appeal, the contractor challenged the ALJ's findings of undisputed facts on the ground that he had continually denied some of those facts. The ARB was not persuaded by this challenge, and explained that the contractor's general denials were insufficient to withstand the Administrator's motion for summary decision:

But, Moreno et al. misunderstand what "undisputed" means in this context. Just because Moreno et al. might *disagree with, or deny*, some of the facts does not make those facts "disputed." Where the moving party—here, the Administrator—has supported the motion for summary decision with specific evidence, the opposing party's—here, Moreno et al.'s unsupported disagreement with, or denial of, those facts is not enough. When we (and the ALJ) refer to there not being a "genuine issue of material fact," this means simply that, *given the rules of evidence and procedure in matters before the ALJ*, there are no disputed material facts. This is not the same thing as there being no disputed material facts in the abstract. To deny a fact is not the same as to "dispute" that fact in a legal proceeding. To make a fact "disputed" in a legal proceeding, Moreno et al. must provide the judge with *admissible evidence* relevant to that fact. Without such admissible evidence, neither the ALJ nor we have any authority to rely on Moreno et al.'s denials. Here, what Moreno et al. provided to the ALJ was not admissible evidence: none of the

documents they submitted with their response to the Administrator's motion for summary decision were authenticated, and none of their claims and/or denials were supported even by a declaration. Since Moreno et al. did not provide the ALJ with any admissible evidence, Moreno et al.'s denial of certain facts does not undermine our conclusion that there are no disputed material facts.

Slip op. at 10-11 (footnotes omitted) (emphasis as in original).