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Judges' Deskbook for the Davis-Bacon Act (DBA), the McNamara-O'Hara Service Contract Act (SCA), the Contract Work Hours and Safety Standards Act (CWHSSA), and Executive Order 12933-Non-displacement of qualified workers

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These enactments operate to ensure the payment of proper wages, fringe benefits, and overtime. The Davis Bacon Act is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect the employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources. ***United States v. Binghamton Construction Co.***, 347 U.S. 171, *reh'g. denied*, 347 U.S. 940 (1954). 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." ***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); 41 U.S.C. § 353(b). Upon issuance of a decision and order or other final order by the administrative law judge, the aggrieved party has the right to appeal to the Administrative Review Board ("ARB" or "Board").

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STATUTORY AND REGULATORY AUTHORITY

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2. 29 C.F.R. Parts 1, 5, 6 and 7.

B. McNamara-O'Hara Service Contract Act

1. Enacted in 1965 and codified at 41 U.S.C. § 351 *et seq.*
2. 29 C.F.R. Parts 4, 6 and 8.

C. Contract Work Hours and Safety Standards Act

1. Enacted in 1962 and codified at 40 U.S.C. § 327 *et seq.*
2. 29 C.F.R. Parts 5, 6, and 7.

D. Non-displacement of qualified workers-Executive Order 12933

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3. Executive Order 12933 was rescinded by Executive Order 13204 on February 17, 2001.

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The Davis-Bacon Act

I. Generally

A. Purpose

The dual purposes of the Davis-Bacon Act are to: (1) give local laborers and contractors a fair opportunity to participate in building programs when federal money is involved; and (2) protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the locality. ***L.P. Cavett Co. v. U.S. Dep't of Labor***, 101F.3d 1111 (6th Cir. 1996).

B. Contractor liable regardless of existence of contractual relationship

In ***Arliss D. Merrell, Inc.***, 1994-DBA-41 (ALJ Oct. 26, 1995), the ALJ observed that it was well-settled that a prime contractor is responsible for the back wages due employees of its subcontractor under the Davis-Bacon Act, and is responsible for ensuring that all persons engaged in performing the duties of a laborer or mechanic on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. 29 C.F.R. §§ 5.2(o), 5.2(i), 5.5(a)(2), and 5.5(a)(6). *See also* ***Palisades Urban Renewal Enterprises, LLP***, 2006-DBA-1 (ALJ, Aug. 3, 2007) (on appeal to the ARB, Case No. 07-124); ***Dumarc Corp.***, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006) (prime contractor is responsible for the payment of back wages owed to employees of its subcontractor, and contract funds may be properly withheld from the prime contractor to satisfy the violations of the subcontractor under 40 U.S.C. § 3142(c)(3) and 29 C.F.R. § 5.5(a)(2)).

1. Traditional employer/employee relationship not required

ERMG, Inc., 2004-DBA-5 (ALJ, June 5, 2007); ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) ("partnership" agreement irrelevant); ***Superior Paving and Materials, Inc.***, ARB Case No. 99-065, 1998-DBA-11 (ARB, June 12, 2002); ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001); ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000) (lack of a traditional employer/employee relationship between Star Brite and its workers did not absolve Star Brite from the responsibility to insure that they were

compensated in accordance with the requirements of the Act); ***All Phase Electric Co.***, WAB Case No. 85-18 (WAB, June 18, 1986); ***Tap Electrical Contracting, Inc.***, WAB Case No. 84-1 (WAB Mar. 4, 1985) (the prime contractor is not relieved of its obligations under the Davis-Bacon Act and the CWHSSA merely because it did not know about the violations of the subcontractor until after they occurred). Further, a subcontractor is also responsible for the violations of a lower tier subcontractor. 29 C.F.R. § 5.5(a)(6).

2. Prime contractor liable for lower tier contractor

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the Board held that the prime contractor "is ultimately liable for (the subcontractor's) failure to ensure its own lower-tier subcontractor's DBA compliance." *See also* ***Palisades Urban Renewal Enterprises, LLP***, 2006-DBA-1 (ALJ, Aug. 3, 2007) (prime contractor responsible for back wages due employees of subcontractor, but subcontractor is also responsible for failing to pay prevailing wage rate to its employees) (on appeal to the ARB, Case No. 07-124).

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II. Jurisdiction

A. Administrative delay; laches

1. Actual prejudice required for dismissal of complaint

In ***Bill J. Copeland,*** 1996-DBA-18 (ALJ, Jan. 28, 1997), Respondent moved that the case be dismissed because of the delay by the Wage and Hour Administration in investigating and referring the case to the Office of Administration Law Judges after Respondent's request for a hearing. The ALJ noted that the four factors to consider when assessing whether there had been a denial of procedural due process in a case affected by administrative delay are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his/her rights; and (4) prejudice to the defendant.

In this case, the formal charges were not issued until two and one-half years after the investigation was initiated and more than two years after the initial withholding of funds. In addition, over a year passed between Respondent's initial request for a hearing and the Order of Reference. After assignment to an administrative law judge for hearing, counsel for the Administrator indicated that he would not be able to proceed to trial before an additional six months. The ALJ noted that, as a result, the hearing would be five years after the initial investigation and withholding of funds, and he classified this as excessive administrative delay.

The Administrator's reasons for the delay involved a variety of delays in the investigatory process, several due to the actions of Respondent. The ALJ found that most of the excuses failed to adequately explain the delay and that the Administrator's assertion that the delays were attributable to Respondent was incorrect. Specifically, the ALJ concluded that Respondent's efforts at conciliation could not be interpreted as a waiver of due process rights. The Administrator cites Respondent's petition to the Wage Appeals Board requesting an Order of Reference as one reason for delay. The ALJ disagreed, stating that the Administrator should have anticipated the dismissal of the petition as filed in the wrong forum and that he should have followed the Board's urging by filing the Order of Reference. The ALJ found this delay "almost completely unexplained."

The ALJ stated that Respondent repeatedly asserted his rights by requesting hearings, requesting referral to the OALJ, and objecting to continuances. As for the element of prejudice to Respondent, the ALJ decided that Respondent had demonstrated that he had been prejudiced where (1) his chief witness passed away, (2) other witnesses had moved and were unavailable, and (3) he was unable to secure documents from an employer that went out of business. Thus, the ALJ dismissed the matter, ordered that monies withheld be returned to Respondent, and denied the request for interest.

On appeal, in ***Bill J. Copeland***, ARB Case No. 97-064, 1996-DBA-18 (ARB, Oct. 31, 1997), the ARB reversed, in part, the ALJ's dismissal with prejudice based on the Administrator's various and inexcusable delays in processing the complaint and bringing it to hearing. The ARB remanded the case for a determination on the merits or a showing of "actual prejudice" as a result of the administrative delays. The ARB took the position that a dismissal without a determination on the merits of the action is detrimental to the rights of employees who may have been wrongfully underpaid pursuant to the DBA and the CWHSSA. The ARB found that the rights of the parties need to be balanced and mere allegations of prejudice due to delay are insufficient to warrant a dismissalBthere must be actual prejudice. In reversing the ALJ's dismissal without a hearing or determination on the merits, the ARB cited ***Slotnick Co.***, WAB Case No. 80-05 (WAB, Mar. 22, 1983); ***Gemini Construction Co.***, WAB Case No. 91-23 (WAB, Sept. 12, 1991); ***Tom Rob***, WAB Case No. 94-03 (WAB, June 21, 1994); ***Barker v. Wingo***, 409 U.S. 514 (1927); ***Public Developers***

Corp. (PDC), WAB Case No. 94-02 (WAB, July 29, 1994). *See also* ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004).

In ***Public Developers Corp.***, 1992-DBA-36, *aff'd. in part,* WAB Case No. 94-02 (WAB, July 29, 1994), the Wage Appeals Board addressed the issue of whether the ALJ properly dismissed a case based on laches. Laches is the principle that a party who delays doing a thing at the proper time is barred from bringing a legal proceeding. The defense of laches may be brought against the federal government upon a showing that the government's actions were dilatory and resulted in actual prejudice against the asserting party. Citing ***Barker v. Wingo***, 407 US 514 (1927), the Board held that administrative delay must be examined in light of four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his/her rights to a hearing; and (4) prejudice to the defendant. The Board held that, in the case before it, the ALJ erred both by failing to make findings or conclusions on the merits of the case and by failing to make specific findings of fact to support the conclusion that Respondent was prejudiced in its ability to present a defense. The laches defense required Respondent to demonstrate that it was "actually prejudiced" in its ability to present a defense. The presumption of prejudice may only be used in the most extreme circumstances where the defense may be utilized with or without demonstrating palpable injury.

By decision on remand in ***Public Developers Corp.***, 1992-DBA-36 (ALJ, Sept. 19, 1994), the ALJ held a party asserting "laches" or administrative delay has the burden of proving all elements of the defense. The party asserting the defense of laches must prove actual prejudice. Actual prejudice may be either evidentiary or economic. Evidentiary prejudice occurs when a respondent's inability to present a full and fair defense on the merits is due to the loss of records, the unavailability of witnesses, or the unreliability of memories of past events, thereby undermining the court's ability to judge the facts. Economic prejudice may occur where a respondent suffers the loss of monetary investments or incur damages which would have been prevented by earlier resolution of the matter. Upon review of these factors, the ALJ concluded that the extreme delay cause by DOL prejudiced Respondent both economically and evidentially.

2. Laches not applicable

[a] Delay from date of hearing request and referral

The doctrine of laches was not applicable where a hearing was requested in January of 1992, but the case was not referred to OALJ until September 1994. There had been no

delay in charging Respondent with the alleged violations, and Respondent did not demonstrate that its defense was impaired by the passage of time. Specifically, Respondent's contention that witnesses were unable to remember details, such as employees who were allegedly mis-classified and underpaid, was not material as these details would not have bolstered Respondent's defense. The ARB further held that Respondent actually benefitted from the delay by having the opportunity to continue to secure government contracts in the interim. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996).

[b] Delay from commencement of investigation and notice of alleged violations

In ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000), the ARB held that a three year delay between the beginning of the investigation and the official notice of alleged violations did not result in injury or prejudice to the company such that the doctrine of laches was inapplicable. The ARB cited to the following four factors in determining whether to apply the doctrine: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his or her rights; and (4) prejudice to the defendants. The ARB noted that the company argued that passage of time "blurred the memories" of the Administrator's witnesses. However, this did not support the application of laches according to the ARB, where witness testimony at the hearing was consistent and the ALJ specifically found it to be credible. The ARB further noted that findings of fact turned on key pieces of documentary evidence, *i.e.*, the company's certified payroll records which were inconsistent with its own internal payroll information. The ARB noted that "Star Brite itself controlled this information at one time or another and the mere passage of time could not prejudice the defense." As a result, the ARB concluded that general allegations of prejudice were insufficient to support dismissal under the doctrine of laches.

In ***KP & L Electrical Contractors, Inc.***, ARB Case No. 99-039, 1996-DBA-34 (ARB, May 31, 2000), Respondent argued that a three year and seven month span of time between issuance of the Wage and Hour Division's "notice of issues" and its subsequent issuance of the Order of Reference to the Office of Administrative Law Judges had prejudiced Respondent in its defense of the charges. Respondent maintained that "the employee witnesses' memories had faded and their testimony at the hearing in 1997 conflicted with written statements they gave in 1992 soon after the events at issue in this case." The ARB pointed to four factors in determining whether a contractor's rights had been violated by reason of delay: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a hearing; and (4) prejudice to the defendant. In this vein, the ARB noted that KP&L "ha(d) not pointed out any particular instances in the record to support its contention that employee witnesses contradicted their own prior written statements (which were in the record for the ALJ to examine), or refused to testify

because of lost memory." The ARB further noted that KP&L did not allege, or demonstrate, that any "critical witnesses were made unavailable because of the passage of time." The ARB then concluded that Respondent failed to make a showing of actual prejudice and the ALJ's decision, finding it in violation of the Davis-Bacon Act, was affirmed.

[c] Delay in scheduling hearing

In ***Peabody Construction Co.***, ARB Case No. 04-070, 1994-DBA-45 (ARB, Aug. 31, 2005), the Board upheld the ALJ's order that funds be disbursed to ten underpaid workers. In so holding, the Board rejected Respondent's argument that it suffered prejudice from the delay between its August 3, 1993 hearing request and the ALJ's denial of the hearing request on February 4, 2004. In support of this holding, the Board noted that 29 C.F.R. § 5.11 "does not specify a time limit for when the hearing must be scheduled or conducted." As a result, the Board denied Respondent's petition for review.

B. Motion for reconsideration

In ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 98-164, 1996-DBA-33 (June 8, 2001), 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. *See also* ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 00-050, 1996-DBA-37 (ARB, Dec. 6, 2001).

C. Untimely petition for review; appeal period not jurisdictional

In ***Superior Paving & Materials, Inc.***, ARB Case No. 99-065, 1998-DBA-11 (ARB, Sept. 7, 1999), the ARB accepted an untimely petition for review and held that the 40 day appeal period was not jurisdictional; rather, it could be tolled based upon equitable grounds. Under the facts of the case before it, the ARB found that the government failed to establish that the contractor "'slept on its rights'" or that the claim presented was stale. The contractor filed its appeal with the ARB three days late because it misinterpreted the appeal regulations and initially filed the appeal with the Chief Docket Clerk of the Office of Administrative Law Judges within the time limits.

D. Portal-to-Portal Act is inapplicable

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ cited to ***Progressive Design & Build, Inc.***, WAB Case No. 87-31 (WAB, Feb. 21, 1990) to hold that the Portal-to-Portal Act at 29 U.S.C. § 255 is inapplicable to Davis-Bacon Act or Related Act proceedings. *See also* ***KP & L Electrical Contractors, Inc.***, ARB Case No. 99-039, 1996-DBA-34 (ARB, May 31, 2000); ***Glenn Electric Co. v. Donovan***, 755 F.2d 1028 (3d Cir. 1985).

E. Enforcement action not barred by statute of limitations

In ***Irwin Co. v. 3525 Sage Street Associates, Ltd.***, 826 F. Supp. 1067 (S.D. Tex. 1992), the ALJ issued a decision on November 1, 1990 finding that the contractor was liable for $136,024.72 in back wages due to 45 employees based upon its failure to pay the prevailing wage rate. The decision was not appealed and, therefore, it became final pursuant to 29 C.F.R. § 6.34. The contractor argued that the subcontractor's collection suit was time-barred but, as the entitlement issue was timely litigated and resolved by the ALJ's decision, the court held that "[t]his suit is simply a collection suit based on the violations previously found" and, as a result, it was not time-barred.

F. Interplay with the Contract Disputes Act

In ***Herman B. Taylor Const. Co. v. Barram***, 203 F.3d 808 (Fed. Cir. 2000), the circuit court held that disputes over labor standards in federal contracts must be resolved through the provisions of the Davis Bacon and Related Acts:

> ###Under the Federal Acquisition Regulations specifying the labor provisions that certain federal procurement contracts must include, disputes arising out of the labor standards provisions of the contracts are not to be subject to the Contract Disputes Act, but are to be resolved in accordance with the procedures of the Department of Labor (which clearly means by the department). ***Emerald Maintenance v. United States***, 925 F.2d 1425, 1428 (Fed. Cir. 1991). A board of contact appeals must accept the Labor Department's adjudication of such a dispute, the Board has no jurisdiction itself to determine a labor provisions dispute or to review the labor Department's ruling on that issue (citations omitted).$$$

The court further stated, however, that it must be "clear and beyond question that the Labor Department in fact has found under its established procedures that the contractor has committed such a violation." Under the facts of the case before it, the court held that, because the parties terminated the hearing process and settled the case, there was no clear adjudication that the contractor violated the labor provisions of the contract. Specifically, the court reviewed the terms of the agreement and the contractor did not concede any violation of the labor laws.

G. ARB lacks authority to intervene in Administrator's discretionary duties

In ***Greater Kansas City Automatic Sprinkler Contractors Ass'n.***, ARB Case No. 97-107 (ARB, Sept. 30, 1997), the ARB dismissed an appeal on grounds that it lacked authority to order the Administrator to initiate a prevailing wage rate survey for sprinkler fitters in the Kansas City area. The ARB stated that it has "routinely declined to intervene in matters pertaining to the Administrator's discretionary administrative management of the Wage and Hour Division." The ARB cited to ***Veterans Canteen Service***, ARB Case No. 96-115 (ARB, Oct. 25, 1996)(Administrator's decision not to enforce the Davis Bacon Act); ***W.J. Menefee Constr. Co.***, WAB Case No. 90-15 (ARB, Oct. 25, 1993) (Administrator's decision not to seek back wages); ***Ames Constr., Inc.***, WAB Case No. 91-02 (ARB, Feb. 3, 1993) (Administrator's decision to release withheld funds).

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III. Standard of Review

A. By the ALJ

Pursuant to 29 C.F.R. § 6.19(b)(2), the ALJ conducts a *de novo* review of the record. The regulation provides, in part, the following:

> ###The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. The decision of the Administrative Law

Judge shall be based upon a consideration of the whole record, including any admissions made under §§ 6.16, 6.17 and 6.18 of this title. It shall also be supported by reliable and probative evidence.$$$

29 C.F.R. § 6.19(b)(2).

Adoption of a party's brief

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.,* 508 F.3d 1052 (D.C. Cir. 2007), the ARB cautioned that, although "wholesale adoption of the prevailing party's brief is to be discouraged, an ALJ's findings of fact will not be set aside if the evidence supports them."

B. By the ARB

In ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000), the ARB held that it reviews the ALJ's findings *de novo*. Credibility determinations, on the other hand, will be upheld absent "clear error." *See also* ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004); ***Thomas and Sons Building Contractors, Inc.***, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001).

With regard to an Administrator's decision, in ***Phoenix Field Office, Bureau of Land Management***, ARB Case No. 01-010 (ARB, June 29, 2001) the ARB cited to 29 C.F.R. § 7.1(e) and held that Areview of decisions issued by the Administrator is in the nature of an appellate proceeding, and the Board "'will not hear matters de novo except upon a showing of extraordinary circumstances.'"

C. By the circuit court

In ***L.P. Cavett Co. v. U.S. Dep't of Labor***, 101 F.3d 1111 (6th Cir. 1996), the circuit court held that the proper standard of review of a decision by the Wage Appeals Board was limited to the question of whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); ***Communities, Inc. v. Busey***, 956 F.2d 619, 623 (6th Cir.), *cert. denied*, 113 S. Ct. 408 (1992).

D. Statutory construction, generally

In interpreting statutory language, the court in ***L.P. Cavett Co. v. U.S. Dep't of Labor***, 101 F.3d 1111 (6th Cir. 1996) (*citing* ***Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837, 842-43 (1984)), held that the first issue is whether Congress has clearly spoken on the precise question at issue. Under the facts of the case, the DOL asserted that truck drivers were covered by the DBA prevailing wage rates as the "site of the work" at 29 C.F.R. § 5.2(l) included "both a batch plant located at a quarry more than three miles away from the highway construction project and the Indiana highway system that was used to transport materials from the batch plant to the construction project." The circuit court held the language of the DBA was clear and that 29 C.F.R. § 5.2(l) was inconsistent with the statute, which requires the payment of prevailing wage rates for "employees working directly on the physical site of the public work under construction . . .."

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IV. Evidence

A. Burdens of proof

1. Generally

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ held that the proponent of the

Order of Reference in a Davis-Bacon Act case bears the initial burden of going forward with the evidence and establishing a *prima facie* claim. Then the burden shifts to the opposing party who bears the ultimate burden of proof by a preponderance of the evidence. *See also* ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) (Respondent has the burden to rebut Department's proof of extent and amount of violations); ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001) (Athe Administrator has the burden of establishing that the employees performed work for which they were improperly compensated).

2. Establishing back wages owed

In ***Thomas & Sons Building Contractors, Inc.***, 1996-DBA-37 (ALJ, Feb. 17, 2000), *aff'd.*, ARB Case No. 00-050 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001), the ALJ cited to the Fair Labor Standards Act case of ***Anderson v. Mt. Clemens Pottery Co.***, 328 U.S. 680 (1946), which was applied to Davis-Bacon Act cases by ***Trataros Construction Corp.***, WAB Case No. 92-03 (WAB, Apr. 28, 1993), to set forth the parties' burdens in a case involving recovery of unpaid wages. The ALJ determined that the employee has the initial burden "of proving that he performed work for which he was not properly compensated." The ALJ further held, however, that the employee is not required to establish the "the precise extent of uncompensated work." Rather, the employee's burden is met "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." Once the employee's burden is carried, then it is the employer's burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the employee's evidence." If the employer fails to carry this burden, then damages may be awarded to the employee, even if the amount of such damages is approximate. Moreover, the ALJ noted that, where the DOL reconstructs an employer's payroll, the burden is on the employer to present evidence which is sufficiently precise to contradict the reconstructed payroll. *See also* ***Dumarc Corp.***, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006); ***Northeast Energy Services, Inc. (NORESCO)***, Case No. 2000-DBA-3 (ALJ, Feb. 12, 2002); ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Sept. 18, 2000) (the ALJ concluded that the employer failed to sustain its burden in challenging the Department's calculations of back wages due its employees); ***Peabody Construction Co.***, 1996-DBA-20 (ALJ, Apr. 18, 2000); ***Arliss D. Merrill, Inc.***, 1994-DBA-41 (ALJ, Oct. 26, 1995); ***Superior Masonry, Inc.***, 1994-DBA-19 (ALJ, Oct. 13, 1994) (failure to maintain proper records of overtime wages paid).

The employer filed for reconsideration with the ARB and argued that, because its employees did not have written documentation that they were underpaid, then the burden of proof set forth in ***Anderson*** had not been satisfied. ***Thomas & Sons Building***

Contractors, Inc., ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Dec. 6, 2001) (on reconsideration). The ARB noted two "fundamental errors" in the employer's position:

> ###First, this enforcement case was initiated by the Wage and Hour Administrator. As the party who brought the case, the initial burden of proof falls on the Administrator – *not* the workers.$$$
>
> . . .
>
> ###The Zagari employees participated in this case only as witnesses, not as parties, and therefore did not personally bear any proof burden. This is in contrast to *Anderson*Ba case under the Fair Labor Standards ActBwhich was brought directly by the employees, and in which the employees therefore assumed the initial burden of proof.$$$
>
> ###Second, nothing in the *Anderson* methodology requires that any plaintiff or prosecuting party present 'written documentation' of wage underpayment. All that is required is *evidence* sufficient to show that the employees 'in fact performed work for which [they were] improperly compensated[,]' and also sufficient. . . to show the amount and extent of that work as a matter of just and reasonable inference.'$$$

Slip op. at 2.

It is noted that, in ***Anderson v. Mt. Clemens Pottery Co.***, 328 U.S. 680, 687-88 (1946), the Supreme Court held the following in a Fair Labor Standards Act case:

###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 of the precise amount of work performed or 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).$$$

B. Use of payroll records to demonstrate disregard for classification; business records exception to hearsay

In ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996), the payroll records did not reflect an effort by Respondent to properly compensate the laborers for the sheet metal work they had performed and which had been observed by the Wage and Hour investigator. In particular, the ARB noted that after the meeting with the DOL investigator, Respondent should have ensured that the sheet metal foreman was providing accurate payroll information reflecting the sheet metal mechanics' work being done by employees classified only as laborers. *See also* ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000) (given Respondent's lack of records, it was proper for the ALJ to rely on the testimony of witnesses).

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the Board held that, despite their hearsay character, certified payroll records are properly admitted as evidence under the hearsay exception of allowing "[r]ecords of regularly conducted activity." 29 C.F.R. § 18.803(a)(6).

C. Terms of contract to pay prevailing wage controlling

Even if a contractor or developer is not required by force of statute to pay Davis-Bacon wages, it may elect to pay prevailing wages by contract. ***Vulcan Arbor Hill Corp. v. Reich***, 81 F.3d 1110 (D.C. Cir. 1996), previously 87-WAB-04. In ***Vulcan***, the contractor entered into an agreement with the Department of Housing and Urban Development (HUD) in which it agreed to pay locally prevailing wages under the Davis-Bacon Act. Vulcan later disputed that the DBA applied, and HUD agreed that the wage determinations should not apply to the project due to an exemption. The court held that the contractor was liable for payment of the prevailing wage rates because it had contracted to pay such wages. The court noted that "[n]othing in the Davis-Bacon Act precludes the parties from contracting with reference to it, even if by proper interpretation its requirements may not have been applicable by force of law to the project in question." The court found the language of the contract unambiguous and declined to look at extrinsic material.

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), the ALJ held that, where the contract stated that work would be performed in Franklin County and it was actually performed in Delaware County (where the prevailing wage rate was higher) it was too late to modify the contract to reflect the higher wage rate. Citing to 29 C.F.R. § 1.6(c)(2)(ii) and ***M.A. Mortenson Dairy Development Ltd.***, WAB Case No. 88-35 (WAB, Aug. 24, 1990), the ALJ determined that "changing the wage requirement from the Franklin County rate to the Delaware County rate would constitute an impermissible modification to the project wage determination after the contract award." The ALJ noted that Employer based its bid and performed work on the contract based on representations of the Postal Service that the project was located in Franklin County.

D. Testimony demonstrates lack of compliance with classification requirements

Employer's superintendent testified that the foremen were instructed to tell the laborers not to use sheet metal tools unless instructed by the foreman because the foreman could split the hours. The ARB held that this indicated an improper practice of utilizing employees who are otherwise classified as laborers to perform the work of sheet metal mechanics because it reflected a practice of segregating workers' hours for the different classifications in which work was performed. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996).

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the Board upheld the ALJ's use of testimony by workers "in the absence of accurate employer records" from either the contractor or the subcontractor.

E. Contemporaneous calendar maintained by employee; business records exception to hearsay

In ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000), the foreman maintained a calendar for Respondent, which set forth the hours worked by employees on any given day. The company argued that it was prejudiced by the government's failure to provide it with a copy of the calendar prior to the hearing. The ARB disagreed and stated that "[t]he calendar was, in the first place, Star Brite's own business record" which was maintained by its foreman and used to report the hours worked. Moreover, the ARB held that the calendar qualified for the business records exception to the hearsay rule as provided at 29 C.F.R. § 18.803(6).

F. Stipulations

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the Board held that a "trier of fact may properly reject a stipulation made by counsel or a party in the course of hearing if the stipulation does not conform to the evidence of record."

G. Challenge to wage determination after contract issued held improper

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.,* 508 F.3d 1052 (D.C. Cir. 2007), the Board held that, "[i]f contractors wish to protest the use of union wage rates as prevailing, it must be at the wage determination stage, before the award of the contract, and not at the enforcement stage."

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V. Discovery

A. Failure to comply with discovery orders

1. Summary decision proper

In ***Tri-Gem's Builders, Inc.***, 1998-DBA-17 (ALJ, July 14, 1999), the ALJ adopted the Acting Administrator's findings of fact and issued a summary decision against Tri-Gems Builder. The ALJ found that the contractor was afforded multiple opportunities to comply with the Administrator's discovery requests, but failed to do so. The ALJ concluded that summary judgment was proper under 29 C.F.R. § 18.6(d)(2)(v) "because the requested discovery encompassed all of the underlying facts and issues and because the Respondent's repeated and unjustified failures to cooperate in discovery either voluntarily or in response to Judge Donnelly's orders clearly established that compliance could not be achieved by less drastic sanctions." As a result, the ALJ ordered the payment of back wages owed and debarment as requested by the Acting Administrator. The Respondents appealed, but their appeal was dismissed by the ARB for failure to prosecute the case. ***Tri-Gem's Builders, Inc.***, 1998-DBA-17 (ARB, Feb. 25, 2000) (Order of Dismissal).

2. Ruling against interests

By supplemental order in ***Cody Zeigler Inc.***, 1997-DBA-17 (ALJ, June 14, 2000), the ALJ issued a ruling against the Department's interests for its failure to comply with his order directing disclosure of the witness statements. Specifically, the ALJ concluded that the contractor did not mis-classify its employees and, therefore, it did not owe $13,584.99 in back wages. The ALJ further directed that the contractor submit an itemized statement of costs and attorney fees "directly attributable to the defense of (the Department's) claim of the informer's privilege." Slip op. at 1. With regard to an award of fees and costs, the ALJ initially noted that the Equal Access to Justice Act (EAJA) "clearly applies to administrative proceedings." However, in light of the regulatory provisions at 29 C.F.R. § 6.6(a), he found that EAJA's applicability in a Davis Bacon Act claim would appear to be precluded. The ALJ then cited to 5 U.S.C. § 504(a)(1) of the Administrative Procedure Act which he stated "provides direct authority for the payment of costs and fees by the United States in an adversary adjudication to the prevailing party unless it is determined that the position of the agency was substantially justified." Slip op. at 3. The ALJ noted that the OALJ's procedural rules at 29 C.F.R. §§ 18.1(a), 18.29(a)(6), and 18.29(a)(8) permit resort to the Federal Rules of Civil Procedure (FRCP). Turning to FRCP 37(a)(4) and 37(b)(2), the ALJ found that these rules "authorize sanction under circumstances where a party to the proceeding fails to make disclosure or cooperate in discovery, or comply with an order of the Administrative Law Judge." Slip op. at 4. Upon review of the record before him, the ALJ determined that the Department did not present any substantial justification for its

refusal to produce the witness statements. As a result, the ALJ found that the Department was liable for a total of $1,856.25 in attorney's fees.

B. Privileges

1. Informants' privilege

[a] Upheld

By discovery order in ***Thomas & Sons Building Contractors, Inc.***, 1996-DBA-33 (ALJ, Nov. 10, 1987), the ALJ noted that the provisions at 29 C.F.R. § 6.5 prohibited disclosure of the identity of any employee who makes a written or oral statement during an investigation under the Davis-Bacon Act without the prior consent of the employee. The ALJ further determined that the FOIA provisions at 5 U.S.C. § 552a(b)(7)(D) exempts from public disclosure matters which are part of "investigatory records" to the extent that such disclosure of a confidential source is at issue. The ALJ also stated that FRCP 26(b)(1) provides for discovery of all relevant information which is not privileged. From these rules and regulations, the ALJ concluded that the contractor was not entitled to obtain the names of those employees who made statements during the investigation. Rather, the ALJ held that redacted versions of their statements sufficiently protected the due process rights of the contractor. *See also* ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000) (in response to the company's allegations that it was prejudiced by the interview statement of one of its employees which was not provided before the hearing, the ARB noted that the ALJ relied upon the employee's testimony at the hearing which paralleled his interview statement; the interview statement was not relied upon in the ALJ's decision; and the ARB stated in a footnote that, pursuant to 29 C.F.R. § 6.5, "it is not likely that (the employee's) interview statement could have legally been disclosed prior to the hearing").

In ***Woodside Village v. Secretary of Labor***, 611 F.2d 312 (9th Cir. 1980), the court affirmed the ALJ's application of the informant's privilege to protect the names of persons making statements to the government as well as the statements where the action was brought on behalf of the government.

[b] Denied

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), the ALJ ordered that counsel for the DOL produce copies of all witness statements to Respondents where the DOL investigator testified that she relied, in part, upon the statements to determine the proper classification of the employees' jobs. Citing to 29 C.F.R. §§ 5.6(a)(5) and 6.5 and invoking the informant's privilege, counsel for DOL argued that such statements would not be released unless the informants were called to testify. The ALJ acknowledged the validity of the informant's privilege, citing to ***Roviaro v. United States***, 353 U.S. 53 (1957) which upheld the existence of such a privilege as a qualified, not absolute, one. The ALJ further noted that, on January 2, 1997, the DOL issued *Secretary's Order 5-96* which "delegates from the Secretary authority for the Assistant Secretary for Employment Standards to carry out the functions to be performed by the Secretary of Labor under a variety of statutes including the Davis Bacon Act." Slip op. at 28. The ALJ stated that this delegation of authority specifically encompassed invocation of "all appropriate claims of privilege." Slip op. at 28. The ALJ determined that the interests of each of the parties to the case were compelling and he stated that "the reoccurring problem concerning production of witness statements in these proceedings is caused by a conflict in the government's interest in enforcing the Act, the informer's right to be protected against possible retaliation and also in the Respondents' need to prepare for trial." The ALJ concluded that the regulatory provision at § 6.5 "does not address the question of non-testifying potential witnesses." He further stated that, pursuant to the *Secretary's Order 5-96*, the Wage and Hour Administrator must "personally" review the materials sought to be covered by the privilege and the privilege must be invoked in writing. In finding that the privilege was not properly invoked, the ALJ found that "[t]his case record includes no evidence of an Administrator affidavit claiming the privilege nor of any document review by the Acting Administrator." Given the government's failure to comply with the ALJ's discovery order, the ALJ concluded that the classification issue would be decided in favor of the Respondents pursuant to 29 C.F.R. § 18.6(d)(2)(ii). The ALJ further requested that Respondents submit an itemized statement of requested attorneys' fees and costs expended in defense of that part of the case directly attributable to the DOL's claim of informer's privilege.

C. Validity of prevailing wage determination; discovery not permitted

In ***Thomas & Sons Building Contractors, Inc.***, 1996-DBA-33 (ALJ, Nov. 10, 1997), the ALJ denied the contractor's request for discovery related to challenging the validity of the wage determination. The ALJ concluded that the proceedings before him were limited to proper classification of employees and the payment of wages owed. He noted that the Federal Acquisition Regulations contain the procedures which a contractor must use to challenge the validity of a wage determination.

D. Protective order

In ***Northeast Energy Services, Inc. (NORESCO)***, 2000-DBA-3 (ARB, Apr. 20, 2001), the ALJ issued an order to protect the identity of informants and "the information provided to the Department by them" pursuant to 29 C.F.R. §§ 6.5, 18.14, and 18.15. The ALJ held that it was proper to protect the informant's identity and the information s/he provided to the government but, citing to ***Jencks v. United States***, 353 U.S. 657 (1957), once the informant is called to testify for the government, then his or her statement must be made available to the opposing party. The ALJ stated the following:

> ###I find that neither the Department nor (subcontractor) Brilliant has standing to object from (contractor) Taj obtaining from Brilliant communications to the latter from any other party, so long as such communication does not reveal the identity of the Department's informants, statements of the informants to the Department, or the mental impressions, conclusions, opinions, legal theories, or work product of Brilliant's own counsel.$$$

Slip op. at 4.

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VI. Classification of employees

A. Disregard for classification established by payroll records

The payroll records did not reflect an effort by Respondent to properly compensate the laborers for the sheet metal work they had performed and which had been observed by the Wage and Hour investigator. Respondent only took steps to ensure that laborers would not be using sheet metal tools in the future. The ARB found that, after the meeting with the DOL investigator, Respondent should have ensured that the sheet metal foreman was providing accurate payroll information reflecting the sheet metal mechanics' work being done by employees classified as laborers. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996).

B. Determined solely by Secretary; cannot be determined by employer

It is noted that the Administrator's prevailing wage determinations, as well as his or her decisions whether to add classifications, must be directly appealed to the ARB. ***American Building Automation, Inc.***, ARB Case No. 00-067 (ARB, Mar. 30, 2001).

The ALJ is without discretion to adjudicate the propriety of a prevailing wage determination. 29 C.F.R. §§ 1.8 and 1.9 (2000). The ALJ may, on the other hand, determine whether an employee is properly classified for purposes of determining the appropriate prevailing wage rate.

In ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 98-164, 1996-DBA-23 (ARB, Oct. 19, 1999), *recon. denied* (ARB, June 8, 2001), the ARB cited to ***United States v. Binghamton Construction Co.***, 347 U.S. 171, 177 (1954) as support for its holding that the Secretary has sole authority to issue prevailing wage determinations under the Act, the propriety of which are not subject to review. With regard to job classifications, however, the ARB held the following:

> ###In short, relevant precedent plainly affirms the Secretary's (and the ALJ's) authority to determine the correct trade classifications for Thomas and Sons' employees on the Naval Reserve and Air National Guard contracts.$$$

The contractor challenged the ALJ's determination that it be debarred because it mis-classified and underpaid its workers. The government maintained that it was improper to pay workers performing roofers' duties at the laborers' rate. The ARB held that an employer cannot unilaterally establish a classification for "sheet metal mechanics' helpers" by using semi-skilled laborers in a capacity that required them to use sheet metal tools with a pay rate less than that required by the relevant wage determination. The record provided no basis from which to conclude that the position of helper to a sheet metal mechanic would meet the requirements for a helper position under the pertinent guidelines. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). *See also* ***Actus Corp.***, 1996-DBA-1 (ALJ, Jan. 29, 1999) (the Administrator has the right to rely upon the statement of employees to determine their proper classification and area collective bargaining agreements are properly considered in determining whether employees have been mis-classified); ***Berbice Corp.***, 1998-DBA-9 (ALJ, Apr. 16, 1999) (a company cannot rely on a contracting officer's advice; the Secretary or Secretary's designee determines the classification of employees; reliance on classification of a prior contract is improper). *See also* ***Dumarc Corp.***, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006) (the ALJ is authorized to determine an employee's classification for purposes of determining the appropriate prevailing wage rate; a "worker's classification depends upon the tasks he performs and the tools he uses"); ***Thomas and Sons Building Contractors, Inc.***, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) (Respondent's argument, that the Administrator's prevailing wage determination was incorrectly based on union wages in the area rather than the wage survey, amounted to a request for review of the wage determination which must be made prior to the contract award and must be timely filed directly with the ARB).

Cases involving the Department's conformance regulations at 29 C.F.R. § 5.5(a)(1)(ii)(A), which explain how the Secretary determines the wages for a type of job that is left out of the Department's pre-bid wage decision, but that a contractor subsequently requires for a project, are appealed directly from the Administrator to the Administrative Review Board. *See* ***Mistick PBT v. Chao***, 440 F.3d 503 (D.C. Cir. 2006). For a discussion of an Administrator's obligations in conducting prevailing wage surveys, particularly with regard to considering collective bargaining agreements, *see* ***Mistick Construction***, ARB Case No. 04-051 (ARB, Mar. 31, 2006).

In ***Cox v. Bland***, 2006 WL 3059988, Civil No. 3:00 CV 311 (CFD) (D. Conn. Oct. 27, 2006), the district court summarily denied an employer's challenge to the Davis-Bacon wage rates for a new classification of asbestos removal workers. The court determined that the contractor failed to exhaust its administrative remedies where "the U.S. Department of Labor . . . must hear most matters related to the Davis-Bacon wage rates in the first instance" as required by 29 C.F.R. §§ 5.5(a)(9), 5.11, and 5.13. Notably, the court stated that challenges to wage determinations must be first lodged with the Administrator. It noted that "[t]he DOL's wage rate decisions are final and a contractor's reliance on even incorrect wage rates which are later changed is not actionable by the contractor." In dicta,

the court held that the Administrator's decision could be appealed to the administrative law judge and ultimately, to the Administrative Review Board.1

C. False Claims Act

1. Held applicable

In ***United States v. C.W. Roen Const. Co.***, 183 F.3d 1088 (9th Cir. 1999), the circuit court held that, where a contractor falsely certified to the government that its workers received the prevailing wage rate in a worker classification dispute, the contractor could be held liable under the False Claims Act.

2. Held inapplicable

In ***United States v. DynCorp, Inc.***, 895 F. Supp. 844 (E.D. Va. 1995), the court held that the provisions of the False Claims Act, at 31 U.S.C. §§ 3729-3733, are designed to prevent federal contractors from defrauding the government in obtaining, concealing, or reducing federal monies to which the contractor was not entitled. In this vein, the court concluded that a worker classification dispute does not, in and of itself, support a claim under the False Claims Act. Rather, such a dispute must be resolved by the Department of Labor under the provisions of the Davis Bacon Act.

D. Sporadic nature of work irrelevant to classification determination

An employer who utilizes employees in more than one classification must ensure that those employees are properly paid for the various types of work performed and for the hours such work was performed. The ALJ erred in relying on the sporadic nature of the mechanics' work that was performed by the laborers; that some of Employer's laborers were underpaid on an intermittent, rather than a continuous, basis did not negate the

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1 Case law of the Administrative Review Board, however, provides that the Administrator's decisions in these matters are directly appealable to the Board and not the administrative law judge.

finding that they were underpaid because they were mis-classified. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996).

E. Unforeseen circumstances; wage determination cannot be rescinded

For a Coast Guard construction project described as "New Family Housing," the ARB in ***Joe E. Woods, Inc.***, ARB Case No. 96-127 (ARB, Nov. 19, 1996), held that Wage and Hour correctly characterized the project as "residential" where the All Agency Memorandum 130 provided that residential construction projects were "those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height." Woods argued, however, that the Coast Guard's description of the project was so inadequate that imposition of relief was justified pursuant to 29 C.F.R. § 1.6(f). The ARB disagreed, stating that the description submitted by the Coast Guard was sufficiently clear and unambiguous such that only the residential construction category clearly applied. The ARB also rejected Woods argument that it was forced to pay higher wage rates that those contained in the wage determination due to the complexity of the siting, terrain, and location in the Seismic 3 zone. The ARB responded that the wage determinations merely establish the *minimum* wages and fringe benefits that must be provided. There is no guarantee that the minimum wages contained in a wage determination will be the wages required to actually be paid to perform the contract. Unforeseen circumstances do not constitute a legal basis for rescinding the application of the wage determination.

F. Collateral estoppel

Held inapplicable

[a] Work performed at “dedicated” plant

In ***Lloyd T. Griffin, Jr.***, 1991-DBA-92 (ALJ, 1999), *rev'd.* ARB Case Nos. 00-032 and 00-033 (ARB, May 30, 2003), the ALJ reconsidered his holdings in light of the remand issued by the United States District Court in ***Griffin v. Reich***, 956 F. Supp. 98 (D.R.I. 1997). On remand, the ALJ was confronted with whether equitable estoppel should be applied against the Department of Housing and Urban Development (HUD) to preclude

recovery of back wages owed from the contractor. Based on the evidence before him, the ALJ concluded that, if the contractor had not received erroneous advice from HUD, he would have abandoned the project or "handled labor matters differently." Under the final element of equitable estoppel as set forth by the district court, the ALJ found that the contractor complied with HUD's advice and policies on the project. Consequently, it was determined that the contractor was entitled to equitable estoppel relief for work performed at the Veazie Street plant and the DOL was precluded from recovering back wages owed to the Veazie Street plant workers.

By decision dated May 30, 2003, however, the Board reversed the ALJ's holding and concluded that collateral estoppel did not apply to the Veazie Street plant workers. In support of this holding, the Board cited to 29 C.F.R. § 5.2(l)(2) (1993) which provides, *inter alia*, that "an off-site fabrication facility like the Veazie Street plant would be covered by the prevailing wage regulation as long as its production was covered by the Davis-Bacon-covered project it was serving." Respondent again appealed to the district court and, by decision in ***Phoenix-Griffin Group II, Ltd. v. Chao***, 376 F.Supp.2d 234, (D.R.I. 2005), the court affirmed the Board's conclusion that the contractor was not entitled to application of collateral estoppel with regard to wages owed to the Veazie Street plant workers. In this vein, the court noted its agreement with the Board that, because the prefabricated materials generated at the Veazie Street were for the sole purpose of DBA-covered construction sites, "[t]his single finding of fact alone should have served as an absolute bar" to use of collateral estoppel.

[b] DOL debarment proceeding distinct from HUD criminal proceeding

In ***Facchiano Const. Co. v. U.S. Dep't. of Labor***, 987 F.2d 206 (3d Cir. 1993), the court held that collateral estoppel did not preclude the DOL from seeking debarment of the contractor, even when HUD already obtained debarment. The court reasoned that, by its regulatory authority, HUD only has authority to debar contractors from participation in HUD programs for a specific period of time. The DOL, on the other hand, has authority to debar a contractor from *any and all* federal contracts under 29 C.F.R. § 5.12(a)(1). The court further noted that the standard for obtaining debarment under HUD is different than that required for DOL debarment:

> ###Not only are the parties different, but the two violations do not constitute the same cause of action. Although the HUD violation involved the same underlying wrongful conduct, the two debarment proceedings arose from different statutes and different evidence. What was material to the HUD proceeding was the criminal conviction and mitigating factors that would demonstrate that the Company was now a 'responsible' party that could again be entrusted with HUD contracts. The facts material to the DOL proceeding were actual evidence of the violations, the extent

> and nature of the mis-classification and under payments, evidence of previous violations and falsification of the certified payrolls. Finally, the demand for recovery in each of these proceedings was different. DOL demanded a three year, government-wide debarment for willful and aggravated violation of Davis-Bacon Related Acts. HUD demanded a debarment from HUD programs only, for a period of up to three years.$$$

Id. at 213. *See also* ***Actus Corp.***, 1996-DBA-1 (ALJ, Jan. 29, 1999).

G. Contractual relationship between contractor and employees irrelevant

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), Respondent argued that certain workers were not covered employees because they were partners or owner-operators of the company. The ARB disagreed and noted that the Act required payment of the prevailing wage to all workers performing construction activity on a covered project "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics." 40 U.S.C. § 3142(c); 29 C.F.R. § 5.2(o). *See also* ***EMRG, Inc.***, 2004-DBA-5 (ALJ, June 5, 2007).

H. Classification based on area of practice by unions and signatory contractors

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007), the Board held the following:

> ###[T]he contractors had to pay prevailing wages in accordance with the way local unions classified the work. Where, as in this case, previous wage rates are based upon a collective bargaining agreement, proper classification of duties under the Wage Determination must be determined by the area of practice of the unions that are parties to the agreement.$$$

The Board further held that, in a Davis-Bacon Related case, "the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of what tools the workers use." Thus, under the facts of ***Abhe & Svoboda***, the Board noted

that "[t]he industry paid painters' wage rates contained in the Connecticut Statewide Bridge Agreement for all tasks associated with bridge painting, including construction of scaffolds and containment structures, and cleanup of lead waste." In this vein, the Board held that it was improper for the contractors to make their classifications of workers "based on the tools of the trade" analysis where one worker using a blasting hose or spray gun would be paid as a painter and another worker using a screw gun and wood would be paid as a carpenter. *See also* ***William J. Lang Land Clearing, Inc.***, ARB Case Nos. 01-072 to 01-079 (ARB, Sept. 28, 2004).

I. "Side bar" agreements unenforceable

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007), the Board held that a "side bar" agreement between the contractor and local union for new classifications of employees, that were not in the wage determination, was unenforceable as a matter of law. *See also* ***EMRG, Inc.***, 2004-DBA-5 (ALJ, June 5, 2007) (alleged agreement between Respondent and worker that worker would accept substandard rate irrelevant; statutory requirements control).

J. No estoppel based on actions of contracting agency

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007), the Board held that "[t]he Department of Labor cannot be estopped by the actions of a contracting agency." Citing to ***L.T.G. Construction Co.***, WAB Case No. 93-15 (WAB, Dec. 30, 1994), the ARB noted that "mistakes of one agency cannot be used to estop another agency from carrying out its statutory responsibilities." As a result, the Board held that acquiescence or erroneous advice from the state's contract administrator with regard to classification and payment of employees on a Davis-Bacon Related Act job site was not binding on the Department of Labor.

K. Exempt employees

Under the Davis-Bacon Act, the term laborer or mechanic does not apply to workers whose duties are primarily administrative, executive, or clerical. The regulations at 29 C.F.R. § 5.2(m) provide that persons in a *bona fide* executive, administrative, or professional capacity "as defined in part 541 of this title are not deemed to be laborers or mechanics."

Executive employee

Under 29 C.F.R. § 541.1, an employee is considered to be "employed in a bona fide executive capacity" and exempt from coverage under the Act if his or her primary functions are executive in nature and s/he spends less than 20 percent of the work hours doing activities that are not directly and closely related to the performance of executive functions.

In ***Dumarc Corp.***, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006), the ALJ found that, although one employee "did act as a foreman or manager" of Respondent, "he spent the vast majority of his time working as a fire sprinkler fitter along with the other employees" and, thus, was covered by the Act.

Ownership interest and/or control

Under 29 C.F.R. § 541.1(e), an employee may be exempt from coverage under the Act if s/he "is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed."

In ***Dumarc Corp.***, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006), the ALJ noted that Respondent was legally owned by Mr. Hannan, who was involved with the company's operations as much as his illness would permit. The evidence of record established that Mr. White "ran the company, made the payroll, and controlled company cash" and otherwise helped Mr. Hannan's wife keep the business operating after Mr. Hannan became ill. However, in determining whether Mr. White was exempt from the Act's coverage, the ALJ found that there was sufficient evidence that Mr. Hannan, his wife, Mr. White, and another employee of Respondent shared management of company such that Mr. White was not "in sole charge" of the business and he was not exempt from coverage under the Act.

L. Contractor presumed to know the *Frye Brothers* rule

In ***Frye Brothers***, 1977 WL 24823 (W.A.B. 1977), a contractor is on notice under the Davis-Bacon Act that it must pay employees according to locally prevailing practices.

In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006)), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007), the District Court of the District of Columbia held that the employer "may indeed have been *unaware* of the rule announced in *Frye Brothers*, but it is not unreasonable to hold plaintiff responsible for knowing the rule" (italics in original). The D.C. Circuit Court of Appeals agreed that the contractor had adequate notice of the ***Frye Brothers*** rule. In particular, the court noted that, while the case was not officially published, "its inclusion in a commercial reporter and its treatment in subsequent judicial and administrative cases provide adequate notice that contractors must use the job classifications of signatory unions when wage determinations are based on collective bargaining agreements." The circuit court further noted that the Davis-Bacon Act "also should have alerted the company to the fact that it could not apply its own methodology of classifying jobs" because "[f]rom start to finish, the focus of the Act is on local practice."

In ***George Campbell Painting Corp. v. Chao***, 463 F.Supp.2d 184 (D. Conn. 2006), the district court agreed with the decision in ***Abhe & Svogoda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C., Aug. 25, 2006) and held that, "since the leading decision in ***Fry Brothers Corp.***, 1977 WL 24823 (DOL W.A.B. 1977), contractors have been on notice under the DBA that they have to pay employees according to locally prevailing practices." The court held that, because DBA wage determinations only list job classifications and minimum wages without containing job descriptions, the contractor must turn to "locally prevailing practices, and that, where union rates prevail, the proper classification of duties under the wage determination is established by the area practice of union contractors signatory to the relevant collective bargaining agreement. Further, the court cited to 29 C.F.R. § 5.13 to hold that it was incumbent upon Respondent to obtain clarification of any questions or concerns from the Wage and Hour Administrator."

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VII. "Site of work" determinations

A. Controlling law

The Davis-Bacon Act, 40 U.S.C. § 276a, provides that for all contracts involving the federal construction projects, mechanics and laborers employed directly on the site of the work shall be paid local prevailing wage rates as determined by the Secretary of Labor. Twenty-nine C.F.R. § 5.2(l) was amended in November and December 2000 and states:

> ###(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;$$$
>
> ###(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (1)(l) of this section;$$$
>
> ###(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, and tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of work as stated in paragraph (1)(l) of this section, are not included in the site of the work. Such permanent, previously established facilities are not a part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so to the performance of a contract.$$$

29 C.F.R. § 5.2(l) (2000).

B. Scope of definition limited

In general, the courts have held that the statute requires the payment of prevailing wages for those workers "employed directly upon the site of the work" such that, in some cases, the courts have found the language at 29 C.F.R. § 5.2(l)(2) to be inconsistent with the plain, unambiguous language of the statute. In ***L.P. Cavett Co. v. U.S. Dep't of***

Labor, 101 F.3d 1111 (6th Cir. 1996), the Department asserted that the Secretary was not precluded from applying the broader definition of the phrase "site of the work," as encompassed in 29 C.F.R. § 5.2(l), than that permitted by the Davis-Bacon Act because the Federal-Aid Highway Act, which also applied, did not limit its scope to employees working directly at the site of the work. The court rejected this argument, noting that the Federal-Aid Highway Act, 23 U.S.C. § 113(a), provided that employees "shall be paid wages at the rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the . . . Davis-Bacon Act. . . .." (emphasis added). Thus, the court held that the Federal-Aid Highways Act incorporated from the Davis-Bacon Act not only its method of determining prevailing wage rates, but also its method of determining prevailing wage coverage. Accordingly, because the Department's interpretation of 29 C.F.R. § 5.2(l) was inconsistent with the Davis-Bacon Act, it was inconsistent with the Federal-Aid Highways Act. In addition, the court noted that if the Department of Labor truly believed that the Federal-Aid Highways Act dictated a more expansive prevailing wage coverage than the Davis-Bacon Act, it would not have enacted only one set of implementing regulations for both statutes. *See also* ***Cody Zeigler, Inc. v. Administrator, Wage & Hour Division***, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003) (although prequalification and solicitation materials stated that project located in Franklin County, Ohio, work was performed in Delaware County, Ohio and workers were entitled to higher prevailing wage rate for that location).

C. Sites which are not covered

1. Batch plants - truck drivers hauling asphalt from batch plant to site

In ***L.P. Cavett Co. v. U.S. Dep't of Labor***, 101 F.3d 1111 (6th Cir. 1996), Cavett was awarded a contract to resurface ten miles of Indiana road. The contract specified that Cavett would perform surface and shoulder removal, widening of the highway, and then resurfacing with a bituminous mix. The parties decided that a bituminous plant would be established approximately three miles from the midpoint of the highway to be reconstructed. Cavett obtained a subcontractor to haul materials, supplies, and equipment from the bituminous batch plant to the highway. This subcontract did not contain a Davis-Bacon prevailing wage standard. The DOL determined that the truck drivers hauling asphalt from the batch plant to the highway site should have been paid at the prevailing wage rate because the batch plant could be considered as part of the "site of the work" and assessed $11,202 in back wages against Cavett. The Wage Appeals Board and magistrate upheld this determination.

The Sixth Circuit Court of Appeals held that the phrase "directly upon the site of the work" in the statute is not ambiguous, and it followed the D.C. Circuit which had ruled that the provisions in the Davis-Bacon Act were unambiguously intended to apply only to workers on the actual physical site of the public work. ***Ball, Ball & Brosamer, Inc. v. Reich***, 24 F.3d 1447 (D.C. Cir. 1994); ***Building & Construction Trades Dep't. AFL-CIO v. U.S. Dep't. of Labor Wage Appeals Bd.***, 932 F.2d 985 (D.C. Cir. 1991)("Midway" case). In ***Ball***, subcontractors transporting sand and gravel from a batch pit two miles from the nearest point of the construction site were not covered. In ***Midway***, the court found that the phrase "mechanics and laborers employed directly on the site of the work" restricted the coverage to employees working directly on the physical site of the building." Thus, stating that it was not unreasonable to conclude that a facility located three miles from the site was not considered a part of that site, the court in ***L.P. Cavett Co. v. U.S. Dep't of Labor***, 101 F.3d 1111 (6th Cir. 1996), ruled that the employees at issue were not working directly at the site of the work and, therefore, Cavett was not responsible for payment of the prevailing wage rate.

2. Batch plant up to one-half a mile from construction site

In ***Bechtel Constructors Corp.***, 1991-DBA-3 (ALJ, Aug. 21, 1997) (remand from ARB Case No. 95-045A), the ALJ held that batch plants located 2 to less than 1/4 miles from the construction site were not on the "site of the work" pursuant to the regulation at 29 C.F.R. § 5.2(l). *See* ***Building and Const. Trades Dep't, AFL-CIO v. U.S. Dep't. of Labor Wage Appeals Board (Midway)***, 932 F.2d 985 (D.C. Cir. 1991).

3. Transportation to and from dedicated borrow pit

In ***Les Calkins Trucking,*** 1990- DBA-65 (ALJ, July 13, 1995), the ALJ cited to ***Ball, Ball & Brosamer, Inc. v. Reich***, 24 F.3d 1447 (D.C. Cir. 1994) and held that the statutory phrase "employed directly upon the site of work," means "employed directly upon the site of work." Consequently, laborers who fit that description are covered by the statute. *Id.* at 1452-53. On the other hand, those workers who are not employed directly upon the site of work are not covered by the DBA. *Id.* at 1453. Based on the facts before him, the ALJ concluded that employees engaged in the transporting of materials from a dedicated borrow pit to the actual construction site were not entitled to the prevailing wage rate under the Davis-Bacon Act.

4. Tow truck operators assisting motorists on public highways

In ***Aetna Bridge Holding Co. v. Coletta's Downtown Auto Services, Inc.***, ARB Case No. 97-095, 1994-DBA-54, slip op. at 2 (ARB, Oct. 29, 1996), the ARB held that tow truck drivers who assist motorists and tow disabled vehicles from travel lanes on a bridge undergoing repair are not "laborers" or "mechanics" performing "construction" within the meaning of the DBA and its related Acts, specifically the Federal-Aid Highway Act, 23 U.S.C. § 113. The applicable wage determination did not contain a wage for tow truck drivers, but the Wage and Hour Administration argued that the tow trucker drivers should have been paid the wages provided in the wage determination for two-axle heavy or highway construction vehicles. The ALJ determined that the tow truck drivers performed work on the site of the construction, as required by the DBA, because they were located in actual or virtual adjacency to the construction site. He also found that the drivers are analogous to employees of traffic service companies who set up and service traffic control devices and are specifically covered by the DBA. The ARB disagreed, stating that the tow truck drivers were clearly not part of a construction crew and that their service was provided as a convenience to the public. Slip op. at 2-3. The tow truck operators performed no work that facilitated the completion of the construction project, and the ARB held that, under these facts, the work performed was too removed and weakly connected with actual construction work for the tow truck operators to be considered "laborers" or "mechanics" under the DBA and related Acts. *See also* ***Aleutian Constructors and Universal Services, Inc.***, WAB Case No. 90-11 (WAB, Sept. 27, 1991) (holding that food service workers and janitors were too indirectly tied to the construction project to be covered).

D. Sites that are covered

1. Batch plant employee-site was integral and adjacent to work area for long, continuous project ("dedicated" plant)

In ***Bechtel Constructors, Corp.***, ARB Case No. 95-045A (ARB, July 15, 1996), Respondents were engaged in a massive construction project consisting of 330 miles of aqueduct and pumping plants. Batch plants were constructed near each of the pumping stations under construction, but were also used to supply concrete for the aqueduct construction. The issue was whether employees at the temporary batch plants were employed on the "site of work" and consequently covered by the DBA. *See* 29 C.F.R. § 5.2(l)(1). The ARB interpreted the decision of the D.C. Circuit in ***Ball, Ball & Brosamer, Inc. v. Reich***, 24 F.3d 1447 (D.C. Cir. 1994), to permit coverage of workers working at "temporary batch plants on land integrated into the work area adjacent to the pumping plants." The Board also held that in work of the kind involved in the case before it, where the project consistent of miles of narrow aqueduct, "work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project." The ARB thereby rejected an interpretation that the ***Ball*** decision requires that the statutory phrase "directly upon the site of the work" limits the wage standards of the DBA to the "physical space defined by contours of the permanent structures that will

remain at the close of work." The ARB noted that one Respondent argued that because "it supplied concrete to more than one contractor on the project, its temporary batch plants were not dedicated exclusively to one contract and therefore the functional test was not satisfied which the regulations and our predecessor, the Wage Appeals Board applied in determining whether work was performed on site. ***United Construction Co.***, WAB Case No. 82-10, January 14, 1983." The Board found, however, that "the applicable section of the regulations, Section 5.2(l)(1) does not explicitly contain a functional test" and that "to the extent that a functional test is read into Section 5.2(l)(1), the Board refuses to draw an artificial distinction between one portion of the project that is let under one contract and another portion of the same project that is let under a separate contract." (footnote omitted). *See also* ***Phoenix-Griffin Group II, Ltd. V. Chao***, 376 F.Supp.2d 234 (D.R.I. 2005) (workers at a pre-fabrication facility "dedicated" to producing material for a Davis-Bacon-covered worksite are covered); ***Winzler Excavating Co.***, 1987-DBA-3 (ALJ, Feb. 17, 1988), *aff'd.*, WAB Case No. 91-02 (WAB, Feb. 23, 1993) (a borrow pit located 12 miles from the sewer construction site was covered); ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007).

2. Off duty police officers directing traffic

In ***Superior Paving & Materials, Inc.***, 1998-DBA-11 (ALJ, Feb. 19, 1999), *aff'd in relevant part*, ARB Case No. 99-065 (ARB, June 12, 2002)[2], the ALJ held that off duty police officers, who directed traffic around a federal highway construction site, were entitled to the prevailing wage rate as flaggers. The company argued that the police officers were independent contractors. Citing to ***N.B.A. Enterprises, Ltd.***, CCH Lab. Cas. Admin. Rulings p. 32,068 (WAB 1991), the ALJ held that "if a person works on a job site covered by the Davis-Bacon Act, that person is an employee within the meaning of the Act regardless of the contractor. Congress clearly intended covering such workers regardless of the attempts of the contractor to distance itself from Davis-Bacon obligations." In affirming the ALJs decision, the Board noted that the police officers "performed the manual and physical work

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[2] The only modification made by the ARB to the ALJ's decision was that Officer Williams was not a "flagger" and "laborer" under the Act and could not be awarded restitution like the other police officers. The Board reasoned that Officer Williams had "fundamentally different" duties than the other officers because he did not use a stop sign for signaling traffic, did not move traffic barrels or cones, and was never relieved by construction crew members. Officer Williams also had a police cruiser throughout the time that he directed traffic. As a result, he was not entitled to back wages under the Act.

of ‘flaggers'" and they were, therefore, "laborers" under the Act. The Board stated that the terms "laborer" and "mechanic" are defined as follows in the regulations:

> ###The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), s distinguished from mental or managerial . . .. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual.$$$

29 C.F.R. § 5.2(m) (2001). *See also* ***Arliss D. Merrell, Inc.***, 1994-DBA-41 (ALJ, Oct. 26, 1995).

3. Warehouse workers

Dworshak Dam, Idaho, WAB Case No. 72-04 (WAB, June 1, 1973) (holding that duties of warehouse workers were directly related to the completion of the project such that they were covered).

4. Lease for construction of federal facility

In ***Phoenix Field Office, Bureau of Land Management***, ARB Case No. 01-010 (ARB, June 29, 2001), the ARB held that the Bureau of Land Management's (BLM) "lease" contract for construction of a field office building in Phoenix was subject to the DBA's prevailing wage requirements. In so holding, the ARB stated that "Davis-Bacon coverage does not depend on the contracting agency exercising complete authority over the building that will be leased" and it cited to ***Military Housing, Ft. Drum, New York***, WAB Case No. 85-16 (Aug. 23, 1985) wherein the Wage Appeals Board held that the DBA applies to "a lease construction contract even while explicitly recognizing that the developers had some flexibility with regard to building design, materials, and equipment."

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VIII. Compensation

A. Constitutes part of prevailing wage rate; properly deemed a fringe benefit

Of central importance in determining whether certain fringe benefits are properly credited against a worker's prevailing wage rate is whether the fringe benefit is "vested." In ***Cody Zeigler, Inc.***, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the Board held that "pension or other fringe benefit plans which provide for immediate vesting are similar to deferred cash payments, whereas a fringe benefit plan that does not provide for immediate vesting is not the functional equivalent of a deferred cash payment that is creditable for DBA purposes."

Moreover, citing to 40 U.S.C. § 3142(2)(B) and 29 C.F.R. § 5.29(c) and (d), the Board noted that "a particular fringe benefit need not be recognized beyond a particular area for the Secretary to find it prevailing in that area; but in the ordinary case a fringe benefit will be considered *bona fide* only if it is common in the construction industry." ***William J. Lang Land Clearing, Inc.***, ARB Nos. 01-072 to 01-079 1998-DBA-6 (ARB, Sept. 28, 2004).

Contributions to employee pension plans

In ***Cody Zeigler, Inc.***, ARB Case Nos. 01-014 and 01-015, 1997-DBA-17 (ARB, Dec. 19, 2003), the Board held that "only the proportion of the pension fund contributions attributable to Davis-Bacon work is credited toward the prevailing wage requirement." The Board noted that Employer contributed to the pension fund at a rate that varied depending on an employee's job classification while working on a Davis-Bacon contract. Employer also contributed "at a lower flat rate for all employees when working on a private, non-Davis-Bacon project." Employer was not permitted to take a credit for pension plan contributions based on non-Davis-Bacon work. *But see* ***Mistick v. Reich***, 54 F.3d 900 (D.C. Cir. 1995) (pension plan contributions not required to be annualized as the Department "presented no evidence that Employer (was) funding its private pension fund contributions with Davis-Bacon Act work" and the plan was vested).

B. Does not constitute part of prevailing wage rate

1. Bonuses

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd. in relevant part,* ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ disallowed Respondents' Christmas bonus as a fringe benefit. Citing to ***Cody-Zeigler, Inc.***, WAB Case No. 89-19 (WAB, Apr. 30, 1991), the ALJ held that bonuses do not constitute *bona fide* fringe benefits or wages under the Davis-Bacon Act.

In ***William J. Lang Land Clearing, Inc.***, 1998-DBA-1 (ALJ, Feb. 22, 2001), *aff'd. in relevant part,* ARB Case Nos. 01-072 to 01-079 (ARB, Sept. 28, 2004), the ARB upheld the ALJ's finding that "the irregularly made cash payments to employees were not bona fide vacation fringe benefits"; rather, they constituted "bonus" payments that could not be considered fringe benefits under the Act. The Board cited to testimony of the employees and pre-hearing deposition testimony in support of finding that the irregular cash payments were "bonuses."

2. Employer's administrative costs

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd. in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ cited to ***Collinson Construction Co.***, WAB Case No. 76-09 (WAB, Apr. 20, 1997) and held that Employer improperly sought to claim its administrative costs in providing employee benefits as a fringe benefit. Employer argued that 29 C.F.R. § 5.5(a)(1) provided for a deduction for such costs. However, the ALJ noted that Employer was required to obtain approval from the Secretary of Labor before making these payments to a third party to administer the employees' benefits which it failed to do.

3. Vacation and holiday benefits, unfunded plans

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd. in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ noted that vacation plans are among the enumerated fringe benefits at 29 C.F.R. § 5.29. However, he found that Employer's plan was unfunded "as there (was) no evidence that Employer relinquished control over the fringe benefit funds involved." As an unfunded plan, the ALJ noted that it

did not comply with the requirements of 29 C.F.R. § 5.28(b). He stated that there was no evidence that Employer "had provided a written explanation of the vacation plan to its employees or that it even had a written plan." Slip op. at 37. Moreover, the ALJ found that employees were not eligible for the vacation plan until they had worked for the company for one year such that those working for Employer less than a year "clearly could not legally enforce their rights pursuant to § 5.27(b)(2) to the amount deducted from their prevailing wage for this claimed benefit." As a result, the ALJ ordered Employer to pay back wages to those employees ineligible for vacation or who did not receive their vacation. *See also* ***William J. Lang Land Clearing, Inc.***, 1998-DBA-1 (ALJ, Feb. 22, 2001), *aff'd. in relevant part*, ARB Case Nos. 01-072 to 01-079 (ARB, Sept. 28, 2004) (vacation payments did not qualify as fringe benefits under 29 C.F.R. § 5.5(a)(1)(i) because they were not paid on a regular basis*i.e.*, at least quarterly).

4. Apprentice training program; no "reasonable relationship" established

In ***Royal Roofing Co.***, 1999-DBA-29 (ALJ, June 11, 2003), *aff'd.*, ARB Case No. 03-127 (ARB, Nov. 30, 2004), the ALJ held that, pursuant to ***Miree Const. Corp. v. Dole***, 930 F.2d 1526 (11th Cir. 1991), Respondent violated the Act by taking "credit for excessive training contributions it made to . . . (the) apprenticeship training program" and the amount claimed by Respondent did "not bear a reasonable relationship to the actual benefit received by Royal Roofing employees." The ALJ noted that "contributions were taken from employees' paychecks without their knowledge and without any tangible benefit to the employees." Further, Respondent "failed to offer a reasonable explanation for the high administrative and legal expenses other than apparently as start-up costs either predating or postdating the period at issue . . .." The ALJ noted that Respondent deducted hourly contributions in the amounts of $0 to $6.99 from employees who were making the same wages. Moreover, Respondent admitted that $.20 per hour per employee was sufficient to meet training expenses. The ALJ found that the "unreasonableness of the excess contributions" was buttressed by the "erratic and disorganized manner in which employees were charged with fringe benefit contributions . . .." Specifically, the ALJ noted that fringe benefits payments to apprenticeship programs were charged "against both apprentices and journeymen despite journeymen lacking a direct benefit." Finally, the ALJ found the contributions were unreasonable because of Respondent's failure to place the contributions in a fund managed by a trustee or third person as required by 40 U.S.C. § 276a(b) and 29 C.F.R. § 5.26.

The ALJ concluded that "[u]sing funds contributed on behalf of Royal Roofing's employees to defend a case against these employees does not benefit these employees" and "[c]learly, this is not a 'fringe benefit' for these employees."

The ALJ also noted that Respondents failed to notify employees, in writing, of the fringe benefit contributions as required by § 276a of the Act. Finally, the ALJ held that Respondent must apply the "annualization principle" to determine proper fringe benefit contributions per Davis-Bacon Act employee "when the actual contributions are not reasonably related to training":

> ###[T]he IRCC plan contemplates year round training and thus year-long benefits to the apprentices enrolled therein. Since Royal Roofing contributed only to the IRCC plan during Davis-Bacon projects and the IRCC plan contemplates year-round benefits for its apprentices, Royal Roofing's contributions must be annualized.$$$

In this vein, the ALJ held that dividing Royal Roofing's total contribution into the IRCC plan in 1996 by the total number of hours working by Royal Roofing employees on all projects in 1996 in order to yield an annualized credit amount of $.50 per hour for apprentice training for each Davis-Bacon employee.

As previously noted, the ALJ's decision was subsequently affirmed by the Board in ***Royal Roofing, Inc. v. Administrator, Wage & Hour Division***, ARB No. 03-127 (ARB, Nov. 30, 1994). Notably, a federal district court also affirmed the ALJ's decision in ***Independent Roofing Contractors Council Apprentice Training Trust Fund ex rel, Royal Roofing, Inc. v. Chao***, Case No. 5:05-CV-03603 JW (N.D. Ca. Sept. 18, 2006).

5. Profit-sharing plans

In ***Cody Zeigler, Inc. v. Administrator, Wage & Hour Division***, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the Board affirmed disallowance of Employer's claim for credit for contributions to a profit-sharing plan as a fringe benefit credit against the prevailing wage rate. *See* 29 C.F.R. § 5.28(b)(4).

6. Health insurance

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd. in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ held that health insurance constitutes a *bona fide* fringe benefit which justifies a credit towards the prevailing wage determination. However, the ALJ found that the employer failed to properly account for co-

pays and it used a "blended rate for family and individual health coverage rather than determining the benefit to each employee based on his or her type of coverage" such that back wages were due for these violations. Moreover, the ALJ held that it was improper for the employer to seek a "deduction for benefits that employees were ineligible to receive" because they were on a union plan with a waiting period. *See also* ***William J. Lang Land Clearing, Inc.***, 1998-DBA-1 (ALJ, Feb. 22, 2001), *aff'd. in relevant part*, ARB Nos. 01-072 to 01-079 (ARB, Sept. 28, 2004) (it was improper to take a prevailing wage credit by averaging more expensive family premiums with less expensive individual premiums).

7. Meals and lodging

In ***William J. Lang Land Clearing, Inc.***, ARB Case Nos. 01-072 to 01-079, 1998-DBA-1 (ARB, Sept. 28, 2004), the ARB noted that the provisions at 40 U.S.C. § 276(b)(2)(B) provide for a number of fringe benefits which may be credited towards the prevailing wage rate, but the provisions do not specifically mention meals and lodging. The ARB further concluded that meals and lodging do not constitute "other *bona fide* fringe benefits" that are creditable against the prevailing wage rate. In disallowing meals and lodging paid by Respondent for long-distance Davis-Bacon contracts, the Board reasoned:

> ###The employee lodging and food expenses in this case were clearly undertaken for Lang's primary benefit. Lang could only perform its far distant DBA contracts (and benefit thereby) if its employees incurred the substantial detriment of traveling to locales far from their homes for most of every work week. Lang's employee travel to the 'special' out-of-area jobs served the primary purpose and benefit of the employer. Lang required employees to travel to the 'special' jobs as a condition of their employment. The employees had no choice but to travel on Lang's business in order to get and keep their jobs. (citations omitted). We accordingly conclude Lang's subsistence payments for its employees meals and lodging were for the primary purpose of furthering the employer's business and not for the primary benefit of the employees. These subsistence payments cannot be credited as acceptable DBA cash payments in lieu of fringe benefits.$$$

Slip op. at 18. *See also* ***Matter of Calculus, Inc.***, 1993 WL 537381, WAB Case No. 93-06 (WAB, Oct. 29, 1993).

C. Overtime wages cannot be reduced by fringe benefits

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), *aff'd. in relevant part*, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003), the ALJ held that the regulations at 29 C.F.R. §§ 5.32(a) and 5.32(c)(2) prohibit the reduction of overtime rates based on Davis Bacon fringe benefit contributions. He cited to ***Delta Construction***, WAB Case No. 81-15 (WAB, Sept. 20, 1983) and held that "[c]ash wages may not be reduced when determining overtime wages."

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IX. Relief

A. Debarment

1. Generally

[a] Debarment is remedial, not punitive

In finding that Respondent failed to pay the prevailing wage and fringe benefits and misrepresented that rates paid to the contracting agency, the ALJ, in ***Minor Construction Co.***, 1995-DBA-42 (ALJ, June 12, 1997), held that debarment for three years was a remedial measure, rather than a punishment. *See also* ***Palisades Urban Renewal Enterprises, LLP***, 2006-DBA-1 (ALJ, Aug. 3, 2007) (debarment is intended to be "remedial" in nature; violations of the Act "do not *per se* result in debarment") (on appeal to the ARB, Case No. 07-124); ***S.A. Healy Co. v. Occupational Safety & Health Review Comm'n***, 96 F.3d 906, 911 (7th Cir. 1996); ***United States v. Bizzell***, 921 F.2d 263, 267 (10th Cir. 1990); ***Bae v. Shalala***, 44 F.3d 489, 493 (7th Cir. 1995).

[b] Intent to violate required

In ***Sundex, Ltd.***, ARB Case No. 98-130, 1994-DBA-58 (ARB, Dec. 30, 1999), the ARB declined to disturb the ALJ's findings that the contractor's owner was not a credible witness and violations of the Davis-Bacon Act and the CWHSSA were committed. The ARB noted that the ALJ's findings were based upon his first-hand observations of the witness' demeanor on the stand. Turning to the issue of debarment, the ARB found that establishment of a "level of culpability beyond mere negligence, involving some element of intent" was required. Citing to ***G&O General Contractors, Inc.***, WAB Case No. 90-35 (WAB, Feb. 19, 1991), the ARB stated that, once an intentional violation is established, "the standard for debarment is a 'bright-line' test, *i.e.* a 3-year debarment period is mandatory,

without consideration of mitigating factors or extraordinary circumstances." The ARB noted that, while there is a statutory debarment provision under the Davis-Bacon Act, the DOL's regulations also provide for debarment for violations of "related acts," including the CWHSSA. Therefore, where the contractor intentionally failed to pay proper overtime as required by the CWHSSA, the ALJ properly entered an order of debarment.

For additional cases, see ***Cody Zeigler, Inc. v. Administrator, Wage & Hour Division***, ARB Case Nos. 01-014 and 01-015 (ARB, Dec. 19, 2003) (Employer was on notice that certain fringe benefit costs could not be credited against the prevailing wage rate and fact that Employer still claimed a credit constituted a "willful" violation); ***Thomas and Sons Building Contractors, Inc.***, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) ("disregard for obligations" under the Act means a level of culpability beyond mere negligence, involving some element of intent; "once a violation is established, the standard for debarment is a 'bright line' test, *i.e.*, a three-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances"); ***Berbice Corp.***, 1998-DBA-9 (ALJ, Apr. 16, 1999) (evidence must establish a level of culpability beyond mere negligence).

[c] Authority to lessen three year period of debarment

i. ALJ without authority

In ***Structural Concepts, Inc.***, 1994-DBA-23 (ALJ, Feb. 23, 1995), the ALJ held that while mitigating factors may affect debarment under labor standards regulations, they do not have an impact on the debarment issue under the Davis-Bacon Act. 29 C.F.R. § 512(a)(1). Additionally, it was held that an ALJ lacks the discretion to lessen the three year period of debarment as contained in 40 U.S.C. § 276(a)(2).

ii. Administrator has authority

Abuse of authority

In ***Bhatt Contracting Co.***, ARB Case No. 97-068, 1993-DBA-124 (ARB, Jan. 26, 1998), the ARB rejected the "untimely decision" of the Administrator who denied the contractor relief from debarment. The ARB noted that the Acting Administrator "breached a

material term of the consent decree by not placing Bhatt on the ineligible list for nine months." Moreover, the ARB stated that the Acting Administrator "failed to take advantage of the remedial nature of our prior ruling by not 'immediately' issued a decision regarding Bhatt's renewed request for relief." Rather, the ARB noted that it took the Acting Administrator 78 days to issue its denial of the contractor's request for relief from debarment pursuant to 29 C.F.R. § 5.12(c) (a contractor may request removal from the debarment list after six months). As a result, the ARB rejected the Acting Administrator's decision and determined that the contractor's petition set forth sufficient facts under § 5.12(c) to support relief from debarment.

[d] Debarment of individuals, as well as company, authorized

In ***Facchiano Const. Co. v. U.S. Dep't. of Labor***, 987 F.2d 206 (3d Cir. 1993), the circuit court held that, pursuant to 29 C.F.R. § 5.12(a)(1), it was proper to debar responsible corporate officers, in addition to the company, for a period three years. However, the court declined to assess liability against corporate officers unless they had knowledge of the violations committed by their subordinates, *i.e.* their conduct was "willful or aggravated." *See also* In ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007); ***Ray Wilson Co.***, ARB Case Nos. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) (debarment of subcontractor and its president and vice president was proper because of disregard to employees); ***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 for CWHSSA and SCA violations)**;** ***Berbice Corp.***, 1998-DBA-9 (ALJ, Apr. 16, 1999); ***Superior Masonry, Inc.***, 1994-DBA-19 (ALJ, Oct. 13, 1994) (president and owner of company was debarred; he controlled and managed company operations and directed falsification of the payroll records).

[e] 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.

2. Debarment not proper

[a] Unsuccessful attempts to pay required wages established

In ***Mr. Paint, Inc.***, 1992-DBA-27 (ALJ, Mar. 31, 1995), the ALJ examined what constitutes a disregard of obligation necessary to debar a respondent under the Davis-Bacon Act. The ALJ noted that a respondent's failure to pay the required wages to its employees alone does not equate to a disregard of obligation in support of debarment. When a respondent makes valiant efforts to pay employees, it has not disregarded its obligations under the Act.

[b] No evidence of fraud; consistent payment practices

In ***Cody Zeigler, Inc.***, 1997-DBA-17 (ALJ, Apr. 7, 2000), the ALJ held that debarment was not warranted where there was "no evidence of altered records, fraud, deceit or any of the other telltale signs of knowing violation of the law." Slip op. at 40. The

ALJ noted that the issues presented in the case were "highly technical" and Employer's "methods were consistent" and were unquestioned during prior audits.

3. Debarment proper

[a] Falsification of payroll records

In ***P & L Fire Protection, Inc.***, 1994-DBA-66 (ALJ, May 15, 1997), the ALJ determined that debarment is warranted where a respondent has "disregarded its obligations to employees." Falsifying payroll records and certified payrolls constitutes a sufficient basis for debarment. *See also* ***Dumarc Corp.***, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006); ***Abhe & Svoboda, Inc.***, ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004), *recon. denied* (ARB, Oct. 15, 2004), *aff'd.*, ***Abhe & Svoboda, Inc. v. Chao***, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), *aff'd.*, 508 F.3d 1052 (D.C. Cir. 2007) (the Board held that underpayment of prevailing wages and submission of falsified payrolls "that masks the underpayments" constitute a willful violation of the DBRA and warrants debarment); ***Commonwealth of Massachusetts v. U.S. Dep't. of Labor***, Case No. 1998-JTP-6 (ALJ, Oct. 29, 2001); ***Star Brite Construction Co.***, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000); ***KP&L Electrical Contractors, Inc.***, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000) (failure to pay prevailing wages and failure to submit accurate certified payroll records in compliance with the Copeland Act constitutes grounds for debarment); ***Fred Wiggins***, 1999-DBA-30 (ALJ, Mar. 3, 2000); ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 00-050, 1996-DBA-37 (ARB, Aug. 27, 2001), *order denying reconsideration* (ARB, Dec. 6, 2001) (Employer's "failure to offer any verifiable explanation of the discrepancies between the certified and home payroll records"); ***Sundex, Ltd.***, 1994-DBA-58 (ARB, Dec. 30, 1999) (significant discrepancies between the employee's paychecks and certified payrolls constituted violations of the Davis-Bacon Act and CWHSSA sufficient to warrant debarment); ***Superior Masonry, Inc.***, 1994-DBA-19 (ALJ, Oct. 13, 1994) (debarment proper where Contractor falsified payroll records to simulate prevailing wage compliance); ***Trataros Construction Corp.***, WAB Case No. 92-03 (WAB, Apr. 28, 1993); ***Ace Contracting Co.,*** WAB 76-23 (WAB, May 30, 1980); ***Thomas L. Moore, T.A.M., Inc.***, WAB 79-5 (WAB, Aug. 16, 1979).

Although the evidence in ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996) did not demonstrate flagrant, intentional payroll falsification, the circumstances clearly demonstrated that Respondent's mis-classification of laborers, especially after the meeting with the Wage and Hour investigator, was more than merely negligent. Having been reminded of its obligations

under the DBA and advised of its failure to fulfill those obligations by mis-classifying and underpaying employees, Respondent was responsible for policing the supervision of such employees to ensure compliance with DBA requirements. Conduct which evidences an intent to evade its DBA obligations, and a purposeful lack of attention to statutory responsibilities, support debarment. The ARB held that "blissful ignorance" is no defense to debarment. Consequently, rather than simply relaying the direction to the sheet metal foreman on site, Respondent's managers should have taken steps such as regularly visiting the site, observing the work being done, and reviewing payroll records, to ensure that the employees, who were actually performing the work of sheet metal mechanics, were being paid the proper hourly rate.

[b] Actual or constructive knowledge of mis-classification

The ALJ improperly required evidence that Respondent's officers had direct, certain knowledge that employees classified as laborers were performing the work of sheet metal mechanics. An earlier meeting with a Wage and Hour investigator put Respondent on notice regarding the mis-classification of laborers who were, during some periods, performing the work of sheet metal mechanics. Allowing the violations to persist demonstrated a "reckless disregard" for Respondent's obligations to pay its employees in accordance with the wage determination. ***P&N, Inc./Thermodyn Mechanical Contractors, Inc.***, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). *See also* ***KP&L Electrical Contractors, Inc.***, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000) (the ALJ held that Respondent mis-classified employees as laborers when they actually performed the work of electricians or carpenters).

[c] Failure to pay prevailing wages

In ***Lloyd T. Griffin, Jr.***, 1991-DBA-94 (ALJ, Dec. 12, 1999), the ALJ noted on remand that the violation of a prevailing wage statute does not, in and of itself, constitute a *per se* aggravated or willful violation warranting debarment. Citing to ***Miller Insulation Co.***, WAB Case No. 91-38 (WAB, Dec. 30, 1992), slip op. at 10-11, the ALJ stated that finding hat "reckless disregard" satisfies the standard for debarment and there is no *de minimus* principle to avoid debarment where the violation is aggravated or willful. The ALJ noted that, in ***Miller Insulation***, the contractor falsified payroll records to conceal its failure to pay overtime and the violation was no less willful or aggravated where only three employees on one contract were affected. The ALJ found, in the case before him, that the contractor engaged in multiple schemes to avoid payment of prevailing wages to its workers including:

###. . . failing to pay its own employees . . . for hours worked on the project laying linoleum; failing to pay employees prevailing wage rates for hours worked on the project at the housing sites; using LTGs Veazie Street employees to lay linoleum, treating these workers as ‘independent contractors' and failing to pay them the prevailing wage for such work; failing to keep accurate certified payroll records and encouraging falsification of payroll records; failing to pay the workers hired by Gatsby, and affiliated corporation, the prevailing wage for cleaning work done at the housing sites . . ..$$$

Slip op. at 29. As a result, the ALJ concluded that debarment for three years was proper. However, on appeal, in ***Phoenix-Griffin Group II, Ltd.***, ARB Case Nos. 00-032 and 00-033, 1991-DBA-94 (ARB, May 30, 2003), *aff'd.*, ***Phoenix-Griffin Group II, Ltd. v. Chao***, 376 F.Supp.2d 234 (D.R.I. 2005), the Board was notified that Lloyd Griffin had died. Because all of the Respondent corporations served as his "alter egos," the Administrator dropped its claim for debarment and the Board vacated the previous debarment orders.

See also ***LTG Const. Co. v. Reich***, 956 F. Supp. 98 (D.R.I. 1997); ***KP&L Electrical Contractors, Inc.***, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000) (the ALJ found that employees work with Respondent predated their "appearance on the company's payrolls"; Respondent failed to pay hotel expenses for employees who traveled two hours to job site and stayed during the week to perform workBthese expenses are not considered fringe benefits, but were part of expenses to be reimbursed by the employer because they were for the employer's benefit; and Respondent accepted a kickback of back owed wages from the employees). *See also* ***Thomas & Sons Building Contractors, Inc.***, ARB Case No. 00-050, Case No. 1996-DBA-37 (ARB, Aug. 27, 2001)*, order denying reconsideration* (ARB, Dec. 6, 2001).

[d] Destruction of time cards

In ***Fred Wiggins***, 1999-DBA-30 (ALJ, Mar. 3, 2000), the ALJ found that the contractor destroyed relevant time cards which constituted a "clear cut, willful violation of the record keeping requirements of the Act and were part of Respondent's pattern of business practice on this project which violated the provisions of the Act." Consequently, the ALJ ordered that the Respondent be debarred.

[e] Receipt of kickback of back owed wages

In ***KP&L Electrical Contractors, Inc.***, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000), the ALJ found that the Respondent violated the Davis-Bacon Act based upon the testimony of four employees who stated that Respondent requested that they cash checks received for back wages owed and return the money to him. As a result, the ALJ directed that Respondent repay the back wages to the employees as they were entitled to these monies. The ALJ described Respondent's conduct as "a blatant attempt to undermine the administration and enforcement of the Federal employment laws."

[f] Overtime violations; liquidated damages

In ***KP&L Electrical Contractors, Inc.***, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000), the ALJ found that Respondent committed violations of the CWHSSA warranting debarment where it failed to pay its employees for work performed in excess of 40 hours per week. The ALJ then concluded that Respondent was liable for liquidated damages in the amount of $160.00 to account for each calendar day on which an employee was required or permitted to work overtime without compensation. *See* 29 C.F.R. §§ 5.5(b)(2) and 5.8.

In ***Hugo Reforestation, Inc.***, ARB Case No. 99-003, 1997-SCA-20 (ARB, Apr. 30, 2001), a case involving Respondents' failure to pay overtime compensation, the ARB held that the "aggravated or willful" standard requiring debarment has been strictly applied. The Board cited to the "seminal case" of ***A. Vento Constr.***, WAB Case No. 87-51 (Oct. 17, 1990) to state that "'aggravated or willful' has not been expanded to encompass merely inadvertent or negligent behavior." Rather, the ARB applied the Supreme Court's standard for establishing wilful conduct under the Fair Labor Standards Act (FLSA) in ***McLaughlin v. Richland Shoe Co.***, 486 U.S. 128, 133 (1988) which requires establishing that "the employer know or showed reckless disregard for the matter of whether its conduct was prohibited by statute." The Board also cited to the First Circuit's decision in ***Baystate Alternative Staffing v. Herman***, 163 F.2d 668 (1998), which rejected the negligence standard of liability in line with the Supreme Court's ***Richland Shoe*** decision to hold that an employer does not act willfully "'even if it acts unreasonably in determining whether it is in compliance with the FLSA.'" Applying this standard to the facts before it, the ARB concluded that Respondents willfully violated the overtime pay requirements of the CWHSSA. In this vein, the Board noted that Respondents were on notice of the overtime requirements which were incorporated by reference in their procurement contract. Moreover, the records established that Wage and Hour Division officials as well as officials from the Bureau of Land Management notified Respondents on "numerous occasions" of the overtime pay requirements. Finally, the ARB found that Respondents falsified their payroll records in order to simulate compliance with the CWHSSA. Citing to ***Miller Insulation***, WAB No. 91-38 (WAB, Dec. 30, 1992), the Board held that it is Awell-established that 'failure to pay employees the appropriate wage rate or overtime compensation, accompanied by falsifying certified records in an effort to conceal Related Acts violations, warrants debarment' under the CWHSSA." In a footnote, the ARB indicated that falsifying payroll records to simulate compliance or conceal violations "may of itself constitute willful violation of the Related Acts."

[g] Ignorance

In ***Berbice Corp.***, 1998-DBA-9 (ALJ, Apr. 16, 1999), the ALJ held that "[b]lissfully ignorant is no way to operate a business and is certainly no defense to debarment under the DBA." The ALJ cited to the company's long history of performing federal government contract work. He found that, where the company's officers allowed the violations to persist (such as mis-classification of workers), there is "evidence of an intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment." The ALJ found that the company's owner continued to misclassify and underpay his employees after being informed of the DBA violations by a government investigator. As a result, the ALJ concluded that the contractor's actions were "willful" and debarment was proper.

[h] Experienced Federal government contractor; presumption of knowledge

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the ALJ properly debarred a subcontractor and its officers, who had ten years of federal contracting experience such that they were likely aware that the prevailing wage requirements applied despite a "partnership agreement" its subcontractor had with workers on the job. The Board held the following:

> ###When the government awards a contract, or when a portion of the work is subcontracted, 'there has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government . . .. (citation omitted).$$$

Slip op. at 12.

[i] Failure to read contract requirements

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the Board held debarment was proper where the contractor admitted that it did not read the requirements of its federal contract.

4. Early removal from debarment list under 29 C.F.R. § 5.12(c)

[a] Administrator entitled to presumption that factors properly considered in denying early removal

In ***IBEW, Local No. 103***, ARB Case No. 96-123 (ARB, Nov. 12, 1996), the union sought review of the Deputy Assistant Administrator's decision to remove Wayne J. Griffin Electric, Incorporated from the three year debarment list for violations of Davis-Bacon Related Acts. *See* ***Wayne J. Griffin Electric, Inc.***, WAB Case No. 93-05 (WAB, Oct. 23, 1993). IBEW argued that the Administrator did not consider all of the factors contained in 29 C.F.R. § 5.12 in determining that it was appropriate to remove the company from the debarment list after ten months. Not only does 29 C.F.R. § 5.12 require that the petitioner be in full compliance with the labor standards and that full restitution be made for the past

violations, but it also provides that the Administrator should consider factors such as the severity of the violations, the contractor's attitude towards compliance, and the past compliance history of the firm. The ARB stated that the record demonstrated that the Administrator considered all of these factors, and had even stated so in the letter granting the company's request, and that the Wage and Hour Division is entitled to a presumption that the Administrator properly carried out his administrative responsibilities.

[b] Administrator's decision reviewed by the ARB

In ***IBEW, Local No. 103***, ARB Case No. 96-123 (ARB, Nov. 12, 1996), the ARB held that it has the authority to review the decision of the Wage and Hour Division's granting a request for early removal from the debarment list. Although 29 C.F.R. § 5.12(c) only refers to the right to appeal from a denial of a request for removal, the ARB noted that the general regulatory provision dealing with debarment includes a right to petition for review of a "final decision in any agency action." 29 C.F.R. § 7.9(a). Because a decision by the Administrator to remove an employer from the debarment list is a "final decision," the ARB ruled that it had jurisdiction to decide a petition for review of such a decision.

[c] Abuse of authority

In ***Bhatt Contracting Co.***, ARB Case No. 97-068, 1993-DBA-124 (ARB, Jan. 26, 1998), the ARB rejected the "untimely decision" of the Administrator who denied the contractor relief from debarment. The ARB noted that the Acting Administrator "breached a material term of the consent decree by not placing Bhatt on the ineligible list for nine months." Moreover, the ARB stated that the Acting Administrator "failed to take advantage of the remedial nature of our prior ruling by not 'immediately' issued a decision regarding Bhatt's renewed request for relief." Rather, the ARB noted that it took the Acting Administrator 78 days to issued its denial of the contractor's request for relief from debarment pursuant to 29 C.F.R. § 5.12(c) (a contractor may request removal from the debarment list after six months). As a result, the ARB rejected the Acting Administrator's decision and determined that the contractor's petition set forth sufficient facts under ' 5.12(c) to support relief from debarment.

B. Pre-judgment interest against government disallowed

In ***Aetna Bridge Holding Co.***, ARB Case No. 97-095 (ARB, Sept. 9, 1997), a contractor whose employees had been found in an earlier decision not to be laborers or mechanics covered by the DBA or the FHWA, sought an award of prejudgment interest on progress payment funds withheld in 1993 by the state transportation department at the request of the Wage and Hour Administrator. The ARB held that it did not have ". . . statutory authority to waive sovereign immunity and award interest." *See* ***Mast Construction, Inc.***, WAB Case No. 84-22 (WAB, Mar. 14, 1986); ***Library of Congress v. Shaw***, 478 U.S. 310, 314-15 (1986).

C. Withheld funds

1. Department's claim superior to surety

By *Amended Decision and Order Approving Partial Consent Findings and Decision and Order*, ***Liberty Mutual Ins. Co.***, 1999-DBA-11 (ALJ, Nov. 4, 1999), *aff'd*., ARB Case No. 00-018 (ARB. June 20, 2003), the ALJ held that, because the surety did not pay fringe benefits due the employees under its contract, it did not have a right to withheld funds over the right asserted by the Secretary of Labor. The ARB agreed and concluded as follows:

> ###Liberty Mutual was obligated to complete the entire Coast Guard contract, including the responsibility to ensure the payment of prevailing wages. And although Liberty did not violate the Act, nevertheless as the completing surety here, it is also the 'contractor' from whom 'accrued payments' may be withheld. Therefore, whether the funds are deemed 'accrued' or 'unaccrued,' and notwithstanding the terms of the takeover agreement to the contrary, the Administrator properly withheld contract monies from Liberty to pay prevailing back wages to the Brunoli laborers and mechanics. Moreover, the Administrator may also rely on recoupment or setoff to claim the funds on behalf of the Brunoli employees.$$$

Slip op. at 14.

2. Due process rights of Respondent

In ***Ray Wilson Co.***, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the Board held that a prime and subcontractor's due process rights were not violated with regard to withheld contract funds. The Davis Bacon regulations provided for an administrative hearing and appellate process to determine Respondent's rights to the funds. As a result, neither the prime nor subcontractor had any "present entitlement" rights to the withheld funds. The Board cited to 29 C.F.R. § 5.5(a)(2) to state that Respondent had notice on its contract of the government's right to withhold funds in the event of underpayment allegations. *See also* ***Lujan v. G & G Fire Sprinklers, Inc.***, 532 U.S. 189 (2001).

D. Sanctions and attorney's fees; Equal Access to Justice Act inapplicable

In ***Cody Zeigler, Inc. v. Administrator, Wage & Hour Division***, ARB Case Nos. 01-014 and -1-015 (ARB, Dec. 19, 2003), *aff'g. in part, vacating and rev'g in part*, 1999-DBA-17 (ALJ, June 14, 2000), the Board vacated the ALJ's award of fees under the Equal Access to Justice Act holding that "administrative proceedings under the DBA and Related Acts are not subject to the attorney's fee and costs provisions of the EAJA, 5 U.S.C. § 504, as they are not 'adversarial adjudications' within the meaning of the EAJA, because there is no statutory requirement for an administrative proceeding conducted pursuant to the APA and as DBA proceedings are not listed in the enumerated types of DOL administrative proceedings subject to the EAJA, *see* 29 C.F.R. § 16.104." *See also* 29 C.F.R. § 6.6(a).

In ***Bhatt Contracting Co.***, ARB Case No. 98-097, 1993-DBA-65 (ARB, May 19, 1998), the ARB declined to award attorney's fees and costs under EAJA. It stated that it previously ruled that "DBA administrative proceedings are not 'adversarial adjudications' within the meaning of the EAJA, because there is no statutory requirement for an administrative proceeding conducted pursuant to the Administrative Procedure Act." Moreover, the ARB noted that DBA proceedings are not listed at 29 C.F.R. § 16.104 as proceedings which are subject to EAJA and 29 C.F.R. § 6.6(a) specifically excludes DBA proceedings from coverage by EAJA.

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."

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X. Types of dispositions

A. Stipulations and withdrawal there from

In ***Bechtel Constructors Corp.***, ARB Case No. 95-045A (ARB, July 15, 1996), the primary issue concerned whether workers were employed at the "site of work." Prior to the hearing, the Administrator entered into a stipulation that the concrete batch plants at issue were located from one-half to fifteen miles from the physical locations of the construction. After the close of the hearing, but prior to issuance of the ALJ's decision, the D.C. Circuit issued ***Ball, Ball & Brosamer, Inc. v. Reich***, 24 F.3d 1447 (D.C. Cir. 1994). The effect of this case was to reverse prior decisions that indicated that any batch plant within fifteen miles of the work site was sufficient geographic proximity. The record at the hearing also indicated that, in fact, the minimum one-half mile stipulation was falseBthe sites were closer. The ALJ did not permit the Administrator to withdraw from the stipulation. The Board found that this was an abuse of discretion because the Administrator had entered into the stipulation "unable to appreciate the effect that a subsequent change in the case law would give to the stipulation."

B. Consent findings

The regulations at 29 C.F.R. § 6.32 provide that the parties in Davis-Bacon Act and Contract Work Hours and Safety Standards Act (unrelated to the Service Contract Act) proceedings may enter into consent findings which dispose of the case in whole or in part. *See* ***Western Pacific Roofing Corp.***, 1999-DBA-13 (ALJ, Jan. 19, 2000) (decision and order approving consent findings); ***Yeroush Corp.***, 1999-DBA-18 (ALJ, Nov. 18, 1999) (ALJ approved consent findings in case involving Davis-Bacon Act and CWHSSA claims). Also, in ***John J. Kugali***, 1999-DBA-9 (ALJ, Jan. 13, 2000), the ALJ issued an *Order Granting Assented to Motion to Dismiss* and dismissed the Davis-Bacon Act case based upon settlement by the parties which was not submitted to the judge for review. *See also* 29 C.F.R. § 6.43 (permitting disposal by consent findings in substantial interest cases).

C. Settlements

In ***Black Star Drywall, Inc.***, 1999-DBA-3 and 1999-DBA-5 (ALJ, Feb. 29, 2000), the parties requested that the cases be referred to a settlement judge. An agreement was executed by the parties to settle claims under the Reorganization Plan No. 14 of 1950 and the CWHSSA. The ALJ accepted and approved of the agreement pursuant to 29 C.F.R. §§ 5.11, 5.12(b), and 6.32. *See also* ***D&R Building and Remodeling***, 1999-DBA-4 (ALJ, Apr. 14, 2000); ***Sharp Construction Co.***, 1997-DBA-15 (ALJ, Nov. 29, 1999) (settlement regarding violations of the Reorganization Plan No. 14 of 1950, the Davis-Bacon Act, and the CWHSSA).

D. Dismissal

1. Untimely challenge to wage determination

In ***Joe E. Woods, Inc.***, ARB Case No. 96-127 (ARB, Nov. 19, 1996), the ARB held that the contractor's failure to raise a challenge until well after the contract award rendered the request for the application of residential rates to the contract untimely. Citing ***Dairy Development, Ltd.***, WAB Case No. 88-35 (WAB, Aug. 24, 1990), *aff'd sub nom.* ***Dairy Development v. Pierce***, Civ-86-1353-R (W.D. Okla. 1991), the ARB explained the policy behind this rule: that manifest injustice would result to bidders if the successful bidder could challenge the contract wage determination rates after all other competitors were excluded from participation. Other concerns noted by the ARB were ensuring certainty of the procurement processes of the government and protection of wage standards for employees by providing a floor for wages of which all potential bidders were aware. The ARB stated that an appeal of a wage determination must be made before the contract is awarded and modifications to wage determinations are applicable to a project only if they are published before the contract award or start of construction where there is no contract award. 29 C.F.R. §§ 1.6(c)(ii) and 1.6(c)(2).

2. For lack of prosecution

In ***Tri-Gems Builders, Inc.***, ARB Case No. 99-117, 1998-DBA-17 (ARB, Feb. 25, 2000), the ARB dismissed an appeal by the contractor for failure to prosecute. In so holding, the ARB stated that "[c]ourts possess the 'inherent power' to dismiss a case for lack of prosecution." The ARB further noted that the power is not governed by statutory or

regulatory provisions "'but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"

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XI. FOIA requirements regarding issued decisions

In ***Bechtel Constructors Corp.***, ARB Case No. 95-045A, 1991-DBA-3 (ARB, July 15, 1996), one Respondent argued that the Administrator unlawfully relied upon Wage Appeals Board decisions that have not been indexed and appropriately made available pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552(a)(2). The Board found this argument to be without merit. It cited to the Department of Labor's notice to the public, through the "Guide to Freedom of Information Indexes," published in the *Federal Register,* of the availability of an index and digest for Wage Appeals Board decisions. Moreover, the Board noted that the full text of Wage Appeals Board decisions was also available through a computer bulletin board. The Board found that the decisions cited only served to highlight the Department's regulation 29 C.F.R. § 5.2(l)(1), which constituted the basis for the reversal of the ALJ's decision in this matter.

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The McNamara-O'Hara Service Contract Act

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* ***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 Case 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 principle purpose of which is to provide services through the use of service employees in the United States."

In ***Russian and East European Partnerships, Inc.***, ARB Case 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."

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 pre-hearing 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 Case 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.$$$

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II. Jurisdiction

A. Motion for reconsideration

1. By the ARB

In ***Thomas & Sons Building Contractors, Inc.***, ARB Case 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, April, 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 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 Fed.R.Civ.P. 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 ***Summitt Investigative Service, Inc. v. Herman***, 34 F. Supp.2d 16, 26 (D.D.C. 1998), the district court noted that 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.$$$

3. By the Administrator

Review of wage determination

In ***William Lathan***, ARB Case No. 00-054 (ARB, June 26, 2000), the ARB dismissed the appeal without prejudice pursuant to 29 C.F.R. § 1.9 which directs that "before a petitioner may obtain review of the wage determination by the Board, the petitioner must first request the Administrator to reconsider the wage determination and the Administrator must, in turn, act upon the request." *See also* ***Favata's Bakery, Inc.***, ARB Case No. 99-026 (ARB, Jan. 27, 1999).

B. Untimely challenge

1. Wage determination; not permitted after close of contract

In ***Fort Hood Barbers Ass'n.***, ARB Case No. 96-181 (ARB, Nov. 12, 1996), *aff'd.*, 137 F.3d 302 (5th Cir. 1998), where the contractor did not challenge a wage determination until three years after the determination was issued and after completion of the affected contract, the ARB held that it lacked authority to amend the determination and award relief. The regulatory provisions at 29 C.F.R. § 8.6(d) provide that the decision by the ARB shall not affect the contract after award, exercise of option, or extension. Thus, the contractor could not request retroactive relief on a concluded matter.

2. 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.

3. 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.

C. Unavailability of ALJ and reassignment for decision

In ***Houston Building Services, Inc***., ARB Case 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 adjudication of the case was based on legal issues and involved no credibility determinations, Respondents' objections in regard to the reassignment were "inconsequential."

D. 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).

E. District court jurisdiction

1. May consider propriety of debarment

In ***Midwest Maintenance & Const. Co. v. Vela***, 621 F.2d 1046 (10th Cir. 1980), the Tenth Circuit held that the district court had jurisdiction to consider the propriety of the Secretary's debarment of a government contractor for a period of three years for violations of the SCA.

2. No authority to remand for further proceedings absent holding that ALJ's findings 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 under payments 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.

F. 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).

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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.

In ***Stephen W. Yates***, ARB No. 02-119, 2001-SCA-21 (ARB, Sept. 30, 2003), the Board held that its "review of an ALJ's decision is in the nature of an appellate proceeding." In particular, under 29 C.F.R. § 8.1(d), "the Board shall modify and set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence."

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 (persons whom it has neither seen nor heard) in the absence of such other evidentiary support." *See* ***Groberg Trucking, Inc.***, ARB Case 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").

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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. *See also* ***J.N. Moser Trucking, Inc.***, ARB Case No. 01-047, 1995-SCA-26 (ARB, May 30, 2003).

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 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 of the precise amount of work performed or 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).$$$

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 Case 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 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 Petitioners' 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.

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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 Fed.R.Civ.P. 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), to state 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 informers 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 Amust 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.

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 an 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.

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 at subsection [a] above.

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.

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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; ***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 also 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.[3]

B. Application of exemptions

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[3] Note that the Fair Labor Standards Act at 29 U.S.C. § 213 contains similar provisions.

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.

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 rateBthe 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).

3. 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)4, the ARB

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4 Notably, in Kitty Hawk Cargo, Inc. v. Chao, Civil Action No. 3:01-CV-1356K (N.D. Tex., Jan. 26, 2004), the district court disagreed with an ALJ's finding that pilots were not

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

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exempt from the SCA's requirements. The district court held, to the contrary, that pilots were required to "make in-flight decisions and independently select courses of action," which demonstrated that they "exercise discretion and judgment while performing their work." Moreover, the court found that the pilots made more than $250.00 per week, thus satisfying the minimum salary test. Because the pilots satisfied these two criteria, the district court concluded that they were exempt from the Act's requirements as "professional" employees at 29 C.F.R. §§ 541.3, 541.301, and 541.315. The district court cited to the Fifth Circuit's holding in Paul v. Petroleum Equipment Tools Co., 708 F.2d 168 (5th Cir. 1983) in support of its holding. The Secretary of Labor appealed and, in Kitty Hawk Aircargo, Inc. v. Chao, 418 F.3d 453 (5th Cir. 2005), the circuit court vacated the district court's decision on grounds that Intervenor Kitty Hawk lacked standing to appeal the ARB's decision. Specifically, the Fifth Circuit noted that, by the time of Kitty Hawk's appeal to the district court, its contracts with USPS had been terminated. The circuit court noted that Kitty Hawk had not established that it suffered an injury in fact to support its standing as an intervenor.

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."

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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).

[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 stated the following:

> ###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 renumeration from Rasputin was immaterial. As a result, Johnson was properly considered a "party responsible" and was debarred for three years.

[d] Employer and its officers liable for 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.

[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.

B. Successor contractor

1. Determination of status as

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)).

2. Successor is liable for predecessor's contract

[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 a successor contractor 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 prior contract. 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 does 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 that 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 that $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 a period of 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 § 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" and it "imposes a direct statutory obligation and 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 Asubstantially 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) would 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; court held that it consistently accords "substantial deference to the credibility determinations of the ALJ").

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VIII. Compensation

A. Collateral estoppels

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:

> ###We 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. 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 contract, 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. Cannot offset wages to credit against fringe benefit violations

In ***Panamovers Transfer and Storage, Inc.***, 1999-SCA-10 (ALJ, Feb. 6, 2002), the ALJ held that the regulations at 29 C.F.R. § 4.170 prohibited the contractor from crediting wages paid in excess of the minimum required against "any fringe benefit violations" it made.

5. Cannot claim fringe benefit credit where 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.

D. 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).

E. 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."

F. 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 date 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. Mis-classification of employees

In ***Melton Sales and Services, Inc.***, 1982-SCA-127 (ALJ, Nov. 18, 1985), the ALJ concluded that Respondent mis-classified 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.

G. Standard for determining whether hours worked are compensable—"principal activity" test

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 the case, 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 backwages 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.

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).

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 paid as 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.

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IX. Relief

A. Debarment

Provisions related to debarment are found at 41 U.S.C. § 354 as well as the implementing regulations at 29 C.F.R. § 4.188.

1. Generally

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 that $70,000, failed to meet its successor contractor responsibilities, and failed to make prompt payment of monies due); ***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 ACongress 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.'" (citation omitted). *Id*. at 19.

2. 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.

3. 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 wilful violations of the SCA and CWHSSA which warranted debarment of both the company and its President/stockholder. *See also* ***International Services, Inc.***, ARB Case No. 05-136, 2003-SCA-18 (ARB, Dec. 21, 2007) (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 which mis-classified

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).$$$

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

5. 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 that 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) where the parties' stipulations provided that the petitioners had an expired collective bargaining agreement and that they 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 priority of the expired agreement.

iii. Widespread and continuing violations

In ***Federal Food Service, Inc. v. Marshall***, 481 F. Supp. 816 (D.C.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* ***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 he 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* ***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 noted that an analysis of any potential "unusual circumstances" was, therefore, unnecessary. However, 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").

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 and their 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).

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 offices 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), 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.

[b] 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 failint 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."

6. "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. Donovon***, 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).

[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 debarring 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 minimus* 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." As a result, 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 cause 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 contractors' "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 of the job, the cooperation with investigators, and prompt payment of funds overdue.

[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 petition for reconsideration 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.

7. 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), 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.

8. 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), 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. Donovon***, 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.

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X. 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 Respondents to repay employees in accordance with the *Summary of Unpaid Wages* submitted by the DOL in its pre-hearing exchange. Under the facts of the case, 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.[5] 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:

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[5] On April 29, 1999, he also issued a Decision and Order Granting Partial Default Judgment against SuperVan, Inc.

###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. Donovon***, 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."

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), 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 judgment

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 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.

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NON-DISPLACEMENT of QUALIFIED WORKERS-EXECUTIVE ORDER 12933

The ARB accepted review of the ALJ's January 9, 2001 decision in ***LB&B Associates, Inc.***, ARB Case No. 01-031, 2000-NQW-1. The ALJ dismissed the workers' complaint against LB&B Associates, Incorporated after finding no violations of Executive Order 12933. In a *Supplemental Briefing Order* dated May 23, 2001, the ARB noted that Executive Order 12933 was rescinded on February 17, 2001 by Executive Order 13204 which required that the Secretary of Labor "promptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12933 of October 20, 1994, to the extent consistent with law." Moreover, the ARB noted that the Secretary was directed to "terminate, effective today, any investigations or other compliance actions based on Executive Order 12933[.]" As a result, the ARB requested that the parties submit their positions on the issue of whether rescission of Executive Order 12933 has rendered the appeal moot. In ***LB&B Associates, Inc.***, ARB Case Nos. 01-131 and 01-086 (ARB, Aug. 8, 2001), the ARB stated that Executive Order 13204 repealed Executive Order 12933 and it "included no savings clause suggesting that cases pending at the time the Order was issued could be litigated further." As a result, the ARB concluded that it no longer had jurisdiction to decide the case and the Acting Administrator withdrew the appeal.