U.S. Department of Labor

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Issue date: 06Feb2002

CASE NO.: 1999-SCA-10

In the Matter of

PANAMOVERS TRANSFER AND STORAGE, INC., and CAESAR A. PICCO, Individually and as Its President,

Respondents.

Appearances:

Daniel Barish, Esq.,
Office of the Solicitor, U.S. Department of Labor, Arlington, VA
For the Complainant Secretary of Labor

Cesar A. Picco, President
Panamovers Transfer and Storage, Inc. Alexandria, VA
Pro se

Joseph N. Lopez
Alexandria, VA
Lay Representative for Cesar A. Picco

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

The instant case is a proceeding brought under the provisions of the McNamara-O'Hara Service Contract Act of 1965 (hereafter "SCA"), as amended, 41 U.S.C. §351, *et seq*, and the Contract Work Hours and Safety Standards Act (hereafter "CWHSSA"), as amended, 40 U.S.C. §327, *et seq*, and regulations promulgated thereunder at 29 C.F.R. Parts 4– 6 (2001) (hereafter collectively referred to as the "Acts"). For the reasons set forth below, I find Respondents Panamovers Transfer and Storage, Inc. (hereafter "Panamovers") and Cesar A. Picco liable for the repayment of

back wages, fringe benefit violations, and overtime violations in the amount of $387,001.92; authorize the contracting agencies to release and the Department of Labor (hereafter "Department" or "Complainant") to distribute previously withheld funds up to $387,001.92 to former employees, with any excess amounts to be returned to Respondents; and find no basis for excluding both Respondents from being placed on the debarment list for three years.

PROCEDURAL AND FACTUAL BACKGROUND

The original Complaint in this matter was issued on behalf of the Complainant Secretary of Labor by the Regional Solicitor for the Department of Labor on February 26, 1999. Complainant relied upon 41 U.S.C. §§ 351(a)(1)-(2), and (b)(1), and 29 C.F.R. § 4.6, and 40 U.S.C. § 102 and 29 C.F.R. § 5.5 as authority. Specifically, Complainant asserted that Respondent, Panamovers, was engaged in business as a service personnel contractor and that Cesar A. Picco was its President; that Respondents engaged in eleven contracts with nine United States agencies for periods from January 1990 through July 1997; and that Respondents (1) failed to pay employees the minimum monetary wages in accordance with the prevailing wage rates determined by the Secretary under section 2(a)(1) of the SCA (with implementing regulations appearing at 29 C.F.R. §§ 4.6, 4.161); (2) failed to furnish their employees fringe benefits required under section 2(a)(2) of the SCA (with implementing regulations appearing at 29 C.F.R. §§ 4.6, 4.162); and (3) failed to pay employees one and one-half times the basic rate of pay for all hours worked in excess of forty hours in the workweek, as required by both the contracts themselves and section 328 of the CWHSSA (40 U.S.C. § 102) and 29 C.F.R. § 5.5.[1] Complainant asserted violations in the amount of $220,996.21 and reserved the right to "update this amount to include any additional underpayments occurring up to the date of the hearing."[2]

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[1] Complainant's Exhibits will be referenced as "C-" followed by the exhibit number and Respondents'/Defendants' Exhibits will be referenced as "D-" followed by the exhibit number, and references to the transcript of the hearing appear as "Tr." followed by the page number. For individual contracts and documents associated with each one, see Exhibits C-2 through C-29. The contracts and agencies they are with follows: (1) Department of Agriculture (C-2); (2) Department of Commerce/NOAA (Contract No. 53-DGNE-1-00027) (C-4); (3) Department of Commerce/HCHB & PTO (C-8); (4) Department of Justice/Bureau of Prisons (C-10); (5) Department of State (C-13); (6) Department of Treasury/Bureau of Alcohol, Tobacco, and Firearms (C-15); (7) Department of Treasury (C-16); (8) GSA/White House (C-20); (9) National Science Foundation (C-23); (10) Department of Commerce/NOAA (Contract No. 50-DGNC-3-00008) (C-24); and (11) Nuclear Regulatory Commission (C-29).

[2] To prevent a perpetual investigation that would result in constant updating and recalculating, I limited the investigatory period to cover only the period from March 1993 to July 1997. (Tr. at 300-02). Complainant has revised the amounts they claim Respondents owe several times during the course of these proceedings, mainly due to the fact that they estimated certain amounts owed while waiting to receive the official wage determinations for some of the contracts. (*See, e.g.*, Tr. at 18). For example, in Complainant's July 5, 2001 Prehearing Report, the Department stated that they were seeking $250,532.75 in back wages, but still needed to calculate back wages for alleged violations on contracts in force from March 1995 to July 1997. The Department later submitted a Supplemental Prehearing Report, dated June 11, 2001, seeking $419,451.74 in back wages. Finally, in their Post-hearing Brief, filed on September 25,

An Answer was filed by the Respondents on March 25, 1999, in which the Respondents admitted to entering into several contracts with government agencies, but did not admit or deny that they included the contracts listed in the Complaint due to the use of undefined abbreviations identifying the contracting agencies. Respondents denied all allegations contained in the Complaint, but stated that, in the event that some violations did occur, they were innocent and were remedied once notified of them. In addition, Respondents asserted a counterclaim against the Department in the amount of $325,000.00, which Respondents claimed was owed to them by various government agencies under several contracts, but was being withheld from them by these agencies at the direction of the Department, or, alternatively, "at least" $104,000.00, the difference between the total amount withheld and what Complainant sought. Finally, Respondents asserted that the Department's actions amounted to a constructive debarment and tortious interference with business opportunities and Respondents were entitled to "compensatory and punitive damages in excess of $300,000.00."

Complainant filed an Answer to the Counterclaim on April 29, 1999, denying all of Respondents' allegations. Specifically, the Department asserted that the $320,000.00 withheld from Respondents was done so lawfully pursuant to the SCA, citing 41 U.S.C. § 325(a) and the regulations promulgated thereunder, specifically 29 C.F.R. § 4.187(a). Complainant also asserted, as affirmative defenses, that the Office of Administrative Law Judges did not have jurisdiction to hear economic tort claims, that Respondents failed to state a cause of action upon which relief could be granted, and that the counterclaim was barred by sovereign immunity.

On May 4, 1999, Respondents requested appointment of a settlement judge. The Department did not join this request via letter filed May 24, 1999, stating that, prior to the filing of the Complaint, numerous discussions were held between the parties in an attempt to resolve this matter and further discussions would be unproductive. Also on May 4, 1999, this action was assigned to the undersigned administrative law judge, who issued a Prehearing Order. Both parties filed responses.

Respondents' counsel filed a notice of withdrawal on June 11, 1999, which was granted via the June 23, 1999 Order Permitting Withdrawal of Counsel and to Show Cause.[3] Respondents were also ordered to respond to the Department's First Request for Production of Documents, filed June 11, 1999, or to show cause why they should not be sanctioned for failure to do so. Respondents responded on July 29, 1999, but the undersigned determined that their explanation was insufficient and

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2001, the Department submitted their final calculation – $387,001.92 – which incorporated the revised computations submitted as C-58a and C-58b.

[3] Respondent, now proceeding *pro se*, was urged to obtain counsel as soon as possible, but did not do so. At trial, Mr. Picco was assisted by a lay representative, but Panamovers remained unrepresented. However, rather than enter default judgment, the Department was required to prove a *prima facie* case against Panamovers at the hearing. *See also* Order Resolving Pending Issues and Scheduling Proceedings (April 4, 2000) (permitting Mr. Picco to represent Panamovers upon proof that he is the sole shareholder and that the corporation cannot afford to retain counsel). *See generally* 29 C.F.R. § 18.34(h) (authorizing administrative law judge to require employee who appears on behalf of a party to show authority to do so.)

Respondents were ordered to respond to Complainant's request. Respondents were again ordered to respond to Complainant's First Request for Production of Documents on April 4, 2000. The Department filed a Motion for Sanctions against Respondents on May 29, 2001 for failure to produce all documents requested by the Department in their First Request for Production of Documents, stating that they were prejudiced in preparing for trial.

A Notice of Hearing and Order was issued by the undersigned administrative law judge on May 15, 2001, noticing a hearing for June 12, 2001 in Washington, DC. The undersigned advised the parties to be prepared to address Complainant's Motion for Sanctions at the hearing in addition to the underlying allegations. Prior to trial, Complainants submitted a Prehearing Report, per request in the May 15, 2001Order; Respondents submitted nothing.

A hearing was held in this matter on June 12, 13, and 14, and July 2, 2001, in Washington, DC. At the hearing, Respondent Picco indicated an intention to represent himself as well as Panamovers. Respondent also introduced Mr. Joseph N. Lopez, who Respondent stated was present to assist him as a translator, specifically with legal terms that he was unfamiliar with. (Tr. at 5). However, as the hearing progressed, it became obvious that Mr. Lopez was acting as quasi-legal counsel as well, and was eventually formally entered into the record as Mr. Picco's lay representative. (Tr. at 228, 656). Complainant objected to Mr. Picco representing Panamovers in this action and asked that default judgment be entered against the Respondent-Corporation. This request was denied and I informed Complainant that, even though the corporation was unrepresented, Complainant would still have to make a *prima facie* case against them.[4] (Tr. at 7; *see also* Tr. at 656-57).

Next, Complainant's Motion for Sanctions was addressed. The Department argued that sanctions were appropriate in this case due to Respondents' extreme delinquency in responding to both the Department's discovery demands and the undersigned's Orders demanding compliance. Complainant further argued that, even when Respondents did respond, they only partially complied and have not submitted any meaningful responses showing the reasons for delay/non-compliance. However, Complainant admitted that Respondents did provide all of their payroll records, which Ms. Darlene Bagby, the initial investigator on this matter for the Department's Wage and Hour Division, described as very organized and well kept. It was revealed that the crux of the Department's complaint was that Respondents did not send them every wage adjustment asked for, even though they are created by the contracting agencies and Respondents assured the Department that they did not possess

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[4] Moreover, the rules of procedure governing actions in this forum do not prohibit a corporation from appearing without formal legal counsel; indeed, the opposite appears to be true. *See* 29 C.F.R. §§ 6.7(a) ("The parties may appear in person, by counsel, or otherwise."), 18.34(a) (permitting any party to appear "in person, by counsel, or by other representative . . . ."), 18.34(g)(2) (permitting non-attorneys to appear in a representational capacity upon application and permission), 18.34(g)(3) (precluding administrative law judge from denying authority to appear by any person appearing on his own behalf or on behalf of a corporation of which the person is a partner, officer or regular employee) (2001).

the wage adjustments, after a good faith effort to locate them.[5] (Tr. 8-11, 324, 553).

Despite the fact the Department did not possess some of the modifications when they made their initial calculations, the Department was still able to accurately calculate $387,001.92 in back wages. Also, the Department was able to obtain several of the contracts and applicable wage modifications from the government agencies themselves.[6] (*See*, *e.g.*, Tr. at 280, 286, 292-93, 295, 311). In light of the fact that Respondents proceeded *pro se* for much of this action and that the requested documents were equally available to the contracting agencies (and therefore could have been, and in the exercise of due diligence should have been, directly obtained from them by Complainant), I do not find that Complainant was materially prejudiced and Complainant's motion for sanctions is denied. **SO ORDERED.**

During the hearing, several of Respondents' former employees testified on behalf of the Department.[7] Each testified that while working for Panamovers, he did not receive the full amount of health and welfare benefits or appropriate compensation for overtime and holidays he was entitled to under the Acts. Mr. Mason, who was employed as a working supervisor of a labor crew at the Department of Commerce from March 1992 to April 1996 and who supervised several of the other witnesses while employed by Respondents, testified that he reported several complaints made by workers regarding the lack of benefits to Mr. Picco, but that Mr. Picco replied that "he didn't have to do that," meaning make these payments. (Tr. at 41-42, 44). However, Mr. Mason also testified that while he did not receive health and welfare benefits at first, he did receive insurance coverage from Optimum Choice "a couple of years later," towards the end of his period of employment with Respondents.[8] (Tr. at 41-43, 53). Mr. Mason also testified that when he did work on more than one contract, such as when he worked at the Patent and Trademark Office, Panamovers would pay him

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[5] The wage determination modifications in question concerned contracts in effect from March 1995 to July 1997 and were needed to accurately calculate the amount of back wages Respondents allegedly owe. In their absence, Complainant submitted calculations based on the original wages without any modifications. While Complainant stated that the applicable modifications could be estimated, I rejected that approach as being too vague. (Tr. 17).

[6] Additionally, Mr. Michael J. Costic, the current Deputy Director for facilities management for the White House Complex and the contracting officer for the GSA contract, testified that every document associated with the Panamovers contract with the White House is in their office. However, it is not immediately accessible because of a recent move from the White House to the New Executive Office Building. (Tr. at 515-16). Nevertheless, this testimony shows that Respondents did not possess the sole copies of the documents in question and that Complainant could have obtained these documents from alternative sources prior to the trial.

[7] The employees who testified were James Mason, Therman Williams, Maurice Miller, Randall Pinkney, James L. Carter, Theodore Barnes, James Watson, Darrin Martin, Reginald Gardner, Flossie McCollum, Dennis Ray, Ezra Campbell, and Tyrone Floyd.

[8] Other witnesses testified that the insurance coverage began approximately in late 1995 or 1996. (*See*, *e.g.*, Tr. at 104, 169).

straight pay for the hours worked, even if he worked a total of more than forty hours in a week, and that, to receive holiday pay, he would have to work the day before and the day after the holiday. (Tr. at 43-44). Finally, Mr. Mason acknowledged that Respondents did give him, along with two other employees, a check at one point, but he was unsure when he received it or what it was for and estimated that it was approximately $800.00 or $900.00. (Tr. at 49-51).

The other ex-employees' testimony is largely the same regarding the lack of overtime and holiday payments and periods of time where they received no insurance coverage or equivalent fringe payments, as well as the general lack of responsiveness by Mr. Picco to any complaints regarding these matters raised by the employees to him.[9] (Tr. at 56-58, 71, 73-74, 77-79, 85, 87-88, 103-08, 112-14, 116, 119, 124-27, 135, 141-42, 155-56, 161-62, 168, 170-71, 173). Several even denied that they ever received any insurance coverage (or equivalent fringe payments) and one, Mr. Williams, stated that while he did receive the insurance card, he called Optimum Choice and told them to cancel it.[10] (Tr. at 56, 79, 88, 97, 113, 128, 152). In addition, Mr. Campbell testified that Respondents offered him insurance while he worked for them, but he declined coverage because he had his own insurance. (Tr. at 161). However, Mr. Barnes testified that he was able to use the plan for a work-related hernia operation. (Tr. at 105, 109). Several of the witnesses also reported receiving various checks for small amounts in addition to their regular pay, but were unsure what these were for. (*See* Tr. at 64, 66, 118).

The Department then called Ms. Darlene Bagby, who investigated the complaints made against Respondents. Ms. Bagby is a highly qualified investigator who took meticulous care in calculating underpayments, and she was a very credible witness. The initial investigation began in October of 1994 as a result of employee complaints alleging that they did not receive health and welfare benefits, holiday pay, proper overtime, and minimum wage deficiencies. (Tr. at 190). This investigation was limited to performance under two specific contracts and the work done by a "floater," who is an individual that does work under a number of different contracts as need be rather than one contract in particular. (Tr. at 190). In the course of her investigation, Ms. Bagby reviewed Panamovers' company records and interviewed several employees, ultimately concluding that the complaints were valid. (Tr. at 190-91). When completed, this investigation covered eleven contracts in force from March 1993 to March 1995. (Tr. 192-93). Later, she conducted a second investigation at the request of the Department of Treasury (hereafter "DOT"), covering the period of March 1995 to September 1996. (Tr. at 193).

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[9] Some of the testimony from the various witnesses differed, such as when Mr. Barnes testified that he did receive the correct overtime wage rate when he work more than forty hours at one location. (Tr. at 107; *see also* Tr. at 119, 129, 136, 157, 165). However, the discrepancy can be attributed to Respondents' policy of only paying one and one-half times the normal rate of pay if more than forty hours were worked at a single site. (Tr. at 637-38). Also, Mr. Gardner testified that while he was paid for holidays, he was required to work the day before and after the holiday in order to receive holiday pay, per Panamover's policy. (Tr. at 135-36).

[10] However, despite their testimony, it appears that several of these employees were covered, based on Panamovers' insurance records. (C-34, C-34A, D-4, D-5 (listing all but Randall Pinkney, Flossie McCollum, and Dennis Ray as covered).

After the investigations, Ms. Bagby concluded that Respondents committed several violations. (Tr. at 565). Ms. Bagby found that there were prevailing wage violations under several, but not all, of the contracts. (Tr. at 195-96). She also found that although Respondents had an insurance policy that covered a "small number" of employees for the original two year period, apparently beginning in 1993, they neither provided these benefits to a large majority of their workers nor met the minimum level of coverage called for in the wage determination governing the particular contract, and the covered employees did not receive any payments to account for the difference. (Tr. at 196-200, 666). She also found that many of the employees were not paid for holidays unless they worked the day before and after the specific holiday, a violation of the literal terms of the SCA. (Tr. at 201-02). Finally, Ms. Bagby's investigation revealed to her that Respondents did not pay proper overtime wages on numerous occasions in violation of the CWHSSA. (Tr. at 202).[11]

Ms. Bagby then explained that wage determinations are documents produced by the Department setting forth the applicable prevailing wages and fringe benefits that an employer must pay. (Tr. at 204, 273).[12] The rates vary depending on the category of employment the worker falls into as well as the specific geographic location of the contract. (Tr. at 204). Ms. Bagby explained that her initial investigation was limited to alleged violations occurring between March 1993 and March 1995 on eleven contracts in force during that period and she explained that she reviewed Panamovers' payroll records to determine the number of hours each employee worked and the rate of pay each received. (Tr. at 322-23). She then compared the rates to those set forth in the contracts and applicable modifications, which revealed a total of $191,767.08 in violations under the SCA and CWHSSA. (Tr. 298, 321-22; C-31, C-33). Ms. Bagby also performed a second audit on the Department of Treasury contract, examining the period from October 1995 to September 1996 and found violations similar to those revealed by the initial investigation.[13] (Tr. at 368-73, 416; C-35, C-36, C-37). Finally, Ms. Bagby used the same methodology to compute all back wages violations committed by Respondents from March 1995 to August 1997.[14] (Tr. at 379, 385, 426-27, 431, 440, 443-51, 455).

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[11] Ms. Bagby testified that in some instances, there were simultaneous overtime and prevailing wage violations. This occurred when an employee was not paid the proper prevailing wage, but Respondents did pay him time and one-half for overtime. This is a violation because the overtime rate would be based on an substandard hourly rate. (*See* Tr. at 203).

[12] Typically, the issuance of new wage modifications also coincides with the renewal of the contact. (Tr. at 278). However, not every contract automatically incorporates the new wage modifications when they are issued; it must be specifically incorporated into the contract. (*See, e.g.*, Tr. at 280-81). Nevertheless, once the rates are set, the contracting company is obligated to meet them, although the employer is permitted to exceed the rates. (Tr. at 204, 332).

[13] There were some variations. For instance, Ms. Bagby testified that she did not find any overtime violations for the DOA contract and did not check for holiday violations on the same contract. (Tr. at 427). For the updates concerning the March 1995 to July 1997 period, she did not calculate overtime violations. (Tr. at 468).

[14] Additional investigations focused on the contracts listed in footnote 1 that were in effect during this time period. For all of these contracts, Ms. Bagby used the original wage determinations for her

Ms. Bagby testified in great detail about the methodology she used in calculating her figures, noting that on numerous times when she was unsure which rate applied or whether a particular employee was covered under the insurance plan, she would use the rate/information most favorable to Respondent. (C-32 (showing the calculations made by Ms. Bagby for each individual employee; Tr. at 327, 341-42, 347-48, 367-68, 390, 439; *see generally* Tr. at 329-56; *see also* Tr. at 808-10). While Respondents eventually provided all employees with insurance in 1997, the coverage did not meet the minimum rate due under the regulations. (*See, e.g.*, Tr. at 343-46, 390). While Respondents were credited for the payments made, they were still liable for the difference between the cost of the coverage they actually provided and that called for in the regulations. (Tr. at 344, 367-68). Ms. Bagby credited Respondents for miscellaneous payments for back wages amounting to $5,150.10, later increased to $8,372.27. (Tr. at 375; C-38; Dep't of Labor's Post-hearing Brief, at 3).

After the initial investigation, Ms. Bagby met with Mr. Picco in June and July, 1996 to discuss her findings with him. (Tr. at 458, 480). Ms. Bagby explained that she found violations and what they were, as well as a payment schedule for Respondents to follow. (Tr. at 459-61, 552). Mr. Picco was very apologetic and agreed to rectify the situation immediately and comply with the Acts in the future. (Tr. at 460-61). However, Mr. Picco eventually returned to Ms. Bagby's office in November 1996, accompanied by Mr. Lopez, and informed her that Respondents would not be able to pay the first installment, scheduled for later that month, until they made their own investigation, and that they wanted a written summary of the investigation results; she denied both requests. (Tr. at 462-63, 471). When the first payment was not made, she then forwarded the case for further action. Ms. Bagby further testified that while Respondents appeared to comply with the SCA in March of 1997 with respect to health and welfare benefits, she was uncertain regarding the other violations because she did not have the applicable wage determinations during her investigation.[15] (Tr. at 554). Finally, Ms. Bagby also recommended that Respondents be debarred based, in part, on their refusal to pay. (Tr. at 552). She also felt that Respondents did not promptly comply with the Acts once notified of their violations. (Tr. at 558).

Following Ms. Bagby, the Department called Mr. Picco to the stand. Mr. Picco was born in Brazil and lived in several South American countries before immigrating to the United States in 1972. (Tr. at 584). At all times, Mr. Picco was employed in the moving business in various capacities, although he did not operate any companies prior to his immigration. (Tr. at 584-85). Mr. Picco, the sole officer and shareholder of Panamovers, incorporated the company in 1992 and, at its peak, employed over two hundred people full-time.[16] (Tr. at 583-85, 649). He testified that while he received training and education in several areas related to general business matters, no one ever

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calculations, unless she actually received updated ones that were incorporated into the contract.

[15] Ms. Bagby explained that, even though Respondents began to provide insurance coverage and made cash equivalent payments beginning in March of 1997, she was uncertain whether the amounts met those called for in the wage determinations but assumed they did absent definitive proof. (Tr. at 556-59).

[16] At one point, Mr. Picco testified that he began Panamovers in 1982, and that, at its peak, the company employed about ninety employees and handled over $3,500,000.00 in business. (Tr. at 742-43).

explained any areas of labor or employment law to him. (Tr. at 592-92). However, Mr. Picco did testify that he was familiar with wage determinations and how they affect the rates set forth in the contracts, although he was unsure whether he personally (or Panamovers) received every modification at issue here and, even if he did, he may have not read all of them, as another employee usually handled this task. (Tr. at 606-08, 660-61, 665, 712).

Mr. Picco then testified that Respondents performed a self audit in connection with the initial investigation and calculated $64,264.03 in back wages owed for all violations. (Tr. at 620-21, 697; C-1, at 66-72). Mr. Picco stated that this amount included the back wages owed, covering health and welfare benefits, holiday pay, and overtime owed, and that a check from Panamovers was sent to each employee to reimburse them for these deficiencies. (Tr. at 623-26, 666, 699-700, 713; *see* D-3 (listing all the employees whom Respondents sent checks to)). However, only twenty eight of the one hundred thirty two checks sent were actually cashed, with the rest returned to Respondents for various reasons, such as incorrect addresses.[17] (Tr. at 626-27, 700; D-10A). He could not explain the approximately $126,000 discrepancy between the Department's and Respondents' calculations, stating that he would need to see the Departments' "findings" to do so.[18] (Tr. at 629).

Regarding the actual calculations, Mr. Picco explained that, he would take the figure on the wage determination and multiply it by the number of hours a particular employee worked, up to forty hours in the week, to calculate the amount of health and welfare benefits owed. (Tr. at 636). As for holiday pay, Mr. Picco stated that company policy was to not pay employees for holidays unless they worked the day before and after the holiday.[19] (Tr. at 637-38, 691). Also, regarding insurance coverage, Mr. Picco stated that, prior to March of 1997, only full-time employees were covered, not floaters; afterwards, all employees were either covered or supplemental payments were made to bring Respondents into compliance.[20] (Tr. at 638, 640-41, 671-72, 683, 767). Regarding the overtime violations, Mr. Picco said that his employees who worked on more than one contract "accepted to go

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[17] At trial, Mr. Picco only produced thirty nine of the returned checks; the others are unaccounted for. (Tr. at 701, 781).

[18] Approximately half of Respondents' figure accounts for health and welfare benefit payments owed to the uncovered floaters. (Tr. at 643). Mr. Picco could not explain what violations comprised the remaining amount nor could he explain the computation methodology used. (Tr. at 644-47, 699).

[19] Additionally, if a floater worked the day before and after a holiday, but at different sites under different contracts, he did not receive holiday pay. (Tr. at 692).

[20] While Mr. Picco's testimony is not entirely clear, he mentioned that he often was forced to pay twice for insurance coverage. Apparently, he meant that when a regular full-time employee, who was covered, was absent, he would have to hire a replacement, for whom he would have to make monetary payments for health and welfare benefits. Thus, he claims that he was paying twice, once on the insurance premium and again for the replacement worker. (Tr. at 638-39, 684). Additionally, Respondents never classified floaters, who were often used as replacement workers, as full-time employees, even if they worked forty or more hours in a given week. (Tr. at 685-86).

and work at regular time" and, thus, were not paid the proper overtime rate. (Tr. at 644). He further explained Panamovers' overtime policy: "Overtime was paid time and a half for the people that worked in the same agency more than 40 hours." (Tr. at 690). Mr. Picco was very clear in stating that if an employee did not work more than forty hours for one agency, that employee never received overtime. (Tr. at 690).

Mr. Picco testified that in late 1993, he met with several employees, who explained to him the purpose of the wage determinations and the rates that he needed to follow. (Tr. at 667). Afterwards, he sent each of these particular employees checks to correct the situation and, later, began to provide insurance through Optimum Choice to the full-time employees only.[21] (Tr. at 667, 670-71, 683). However, only those employees who filled out the insurance applications received coverage; those who did not received nothing. (Tr. at 672). It was not until March of 1997 that Respondents began to make supplemental payments for health and welfare benefits. (Tr. at 676).

Following the hearing, under cover letter of August 1, 2001, as ordered at the hearing (Tr. at 848-49), Complainant submitted Ms. Bagby's revised computations of back wages for the Bureau of Prisons contract, which were marked as C-58a, and revised computations of back wages for the two NOAA contracts, which were marked as C-58b. Although given the opportunity to do so (Tr. at 849-50), Respondents did not file any response to the supplemental calculations, nor did Respondents file a brief or written closing argument.. Complainant filed a post hearing brief, which included the updated calculations, on September25, 2001. Complainant's Exhibits C-58a and C-58b are now admitted into evidence, and the record is closed. **SO ORDERED.**

DISCUSSION

After reviewing all the documentary and testimonial evidence presented by both parties in this action, I find that the Department has met its burden in proving that Respondents violated both the SCA and the CWHSSA, with all violations totaling $387,001.92. In light of these monetary violations and Respondents' failure to establish unusual circumstances, I also find that both Panamovers and Mr. Picco have failed to establish a basis for the Secretary to recommend against their debarment for the next three years. Finally, Respondents' counterclaim is dismissed in all respects.

I. Monetary Violations

A. Service Contract Act Violations

After reviewing the record *in toto*, I find that Respondents committed numerous SCA violations. The SCA establishes standards for minimum compensation and safety and health protection of employees performing work for contractors and subcontractors on service contracts entered into

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[21] Again, while the testimony is unclear, it appears that these are the payments and checks referenced in the testimony of several of the former employees. It also appears that these are the checks referred to in D-3 and included in D-10A.

with the Federal Government and the District of Columbia.[22] 29 C.F.R. § 4.103. Under section 2(a)(1) of the SCA, codified at 41 U.S.C. § 351(a)(1), all service contracts covered by the Act are required to contain a provision specifying the "minimum monetary wages to be paid the various classes of service employees in the performance of the contract," as determined by the Secretary of Labor. Section 2(a)(2) (41 U.S.C. § 351(a)(2)) provides that such contracts must contain a provision specifying the fringe benefits, which includes health and welfare benefits as well as holiday pay, to be furnished to the various classes of service employees, as determined by the Secretary. Any violation of the contract stipulations required by sections 2(a)(1) and 2(a)(2) results in the responsible party being liable for the amount of underpayment (or nonpayment) of compensation due to any employee engaged in performance of the contract, under section 3(a) of the Act. 41 U.S.C. § 352(a); 29 C.F.R. § 4.187(a); *see also* 29 C.F.R. §§ 4.6, 4.104, 4.161, 4.162, 4.165, 4.187. Any funds withheld by the contracting officer or agency are to be transferred to the Department of Labor for disbursement to the underpaid employees by order of the Secretary, an administrative law judge, or the Administrative Review Board. 29 C.F.R. § 4.187(a). Under section 5 of the Act, any person or firm found to have violated the Act is ineligible for further contracts for a three-year period unless the Secretary recommends otherwise due to the presence of "unusual circumstances," a determination that must be made on a case-by-case basis. 41 U.S.C. § 354; 29 C.F.R. § 4.188.

1. Health and Welfare Benefits Violations

Respondents failed to pay a majority of their employees contractually mandated health and welfare benefits. A contractor has an affirmative obligation to provide its employees with health and welfare benefits under the SCA and can meet this obligation by providing a "*bona fide*" plan (as defined in section 4.171), equivalent cash compensation, or a combination of the two. 29 C.F.R. § 4.170(a)-(b) (2001). In particular, section 4.172 states that "[i]f prevailing fringe benefits for insurance . . . are determined in a stated amount, and the employer provides such benefits through contribution in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides." The regulations further state that all employees who work under a contract are entitled to receive benefits for all hours they work "up to a maximum of 40 hours a week." *Id.* § 4.172.

Each of the eleven contracts subject to this action required Respondents to provide employees with health and welfare benefits and they attempted to do so through an insurance policy with Optimum Choice. (C-34A). However, there are two major problems with Respondents' actions regarding these benefits.

First, Respondents initially provided insurance to only fifty-two employees, leaving a substantial number of their employees unprotected. (C-34A (listing all employees of record who received insurance between March 1993 and March 1995), C-1, Attachment A, D-4, D-5). Mr. Picco

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[22] It should be noted that, although there has been no stipulation to that effect, there is no question that the eleven contracts at issue here are governed by the SCA. (*See also* Tr. at 195 (testimony of Ms. Bagby explaining why the Acts cover the contract)). See also footnote 25 below.

repeatedly stated that company policy was to only provide insurance to full-time employees and, although he also testified that some of the "floaters" received benefits, it appears that this was true only when they became full-time employees. (Tr. at 670, 672). This company policy violates the Act because the SCA makes no distinction between full-time and part-time employees; it simply states that all employees must be provided with health and welfare benefits (although, under the regulations, fringe benefits are proportionate to the work performed). *See* 29 C.F.R. §§ 4.165(a)(2); 4.176.

Second, even if all employees were furnished with this insurance, the policy did not meet the minimum amount called for in the contract. Respondents could have still met their statutory duty by providing the covered employees with supplemental payments that, when added to the insurance premium they paid ($101.66 per month), equaled the amount of fringe benefits called for in the contract, and by simply making full supplemental payments to those not covered by the policy at all.[23] However, Respondents failed to take either course of action until March 23, 1997, where they began to make supplemental payments to their employees. (C-39, at 387-427; Tr. at 640; *see generally* Tr. at 196-201 (summarizing the health and welfare benefits violations)). The record amply shows that Respondents provided benefits costing a lesser amount than required and failed to provide their employees the difference.

Respondents' only purported justification is that the insurance policy they provided was the best coverage available to them and, even though the premium payments were less than the amount called for in the contracts, they should be given full credit based upon the policy value to the employees and, thus, no violation should be found. (Tr. at 746-48). However, the regulations do not consider the quality of a plan when determining if a contractor is in compliance. Rather than adopt such a subjective approach, the dollar amount being spent is the controlling factor and, if it is lower than what is called for, the contractor is responsible for providing the employee with the difference, either though supplemental payments or, presumably, additional coverage. 29 C.F.R. § 4.172 (2001). During the periods of investigation, Respondents did neither. Thus, I reject Respondents' argument and find that they violated the SCA by not providing their employees with appropriate health and welfare benefits.

2. Holiday Pay Violations

Respondents are responsible for holiday pay violations based upon their failure to pay employees for each holiday specified in the contract. When a contract lists specific holidays that employees will be paid for, "an employee who performs any work during the workweek in which a named holiday occurs is entitled to the holiday benefits," unless an applicable wage determination says otherwise. 29 C.F.R. § 4.174(a)(1) (2001). Absent a contrary agreement, the parties are required to comply with this rule. Furthermore, the regulations explicitly state that "holiday benefits cannot be denied because . . . the employee did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination." *Id.* Thus, employees are entitled to holiday

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[23] The amount due to the employees differed according to what contract they were working under, which wage determination was in force, and their employment classification (usually either a laborer or driver).

pay unless they performed absolutely no work during the week in which the named holiday falls.[24] *Id.* § 4.174(a)(2).

None of the contracts here contain provisions modifying any of the default rules regarding holiday pay. *See, e.g.*, C-3. Thus, each employee who was entered into the payroll records (C-32, C-39) as having worked during a week in which a holiday occurred was entitled to receive holiday pay. Ms. Bagby's investigation confirmed violations of this requirement, as it revealed that several employees were not paid for holidays if they did not work the day before and day after the holiday. (Tr. at 201-02, 330-31). Testimony by Mr. Picco cemented the fact that Panamovers' implemented this policy. (*See, e.g.*, Tr. at 638-39, 671). In light of such evidence, I find that Panamovers' policy clearly circumvented the holiday pay provisions of the SCA and Respondents have not presented any evidence to the contrary. The only justification offered by Respondents is that they complied with industry practice (*see* D-6, United Van Lines Employee Handbook), a matter which is not relevant on the issue of whether there was a violation under the SCA and the contract. Thus, I find that Respondents failed to meet their burden here and have violated the SCA holiday pay requirement.

3. Minimum Prevailing Wages Violations

Similarly, I find that Respondents violated the SCA by failing to pay their employees the minimum prevailing wages in some instances. Twenty-nine C.F.R. § 4.165(a)(1)-(2) governs minimum wage payment requirements, stating that the contractor must pay the minimum hourly wage set forth in the wage determinations to all employees engaged in work covered by the SCA, absent an "express limitation" that says otherwise. Furthermore, the aforementioned hourly wage is only a minimum and the contractor is free to pay more than this rate. 29 C.F.R. § 4.165(c) (2001).

Both the testimony and payroll records show that, for many employees, Respondents paid more than the hourly rate specified by the wage determinations. (*See, e.g.*, Tr. at 332; C-32, C-39). However, there are some instances when Respondents completely failed to pay the minimum prevailing wage. (*See, e.g.*, Tr. at 337-39).

Respondents assert that not only did they pay the minimum prevailing wages at all times to all employees, but that they paid more the minimum and that they should be credited for these "extra" amounts towards any fringe benefit violations they made. I reject Respondents' argument for two reasons. First, the payroll records they produced clearly show that they did not pay the minimum wages due to every single employee at all times, as Ms. Bagby also explained in her testimony. Second, the regulations expressly prohibit the sort of credit arrangement Respondents are now asking for. 29 C.F.R. § 4.170(a) (2001) ("An employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act . . . ."); *see also Summitt Invest. Serv., Inc. v. Herman*, 34 F. Supp. 2d 16, 21

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[24] There are other exceptions to this rule and the regulations continue to further explain how contractors may meet their holiday pay obligations. 29 C.F.R. § 4.174(b)-(c) (2001). However, all of these provisions are inapplicable to the case at hand.

(D.D.C. 1981). As the evidence shows that Respondents failed to pay the minimum wages due to their employees in all instances, I find that they violated these provisions of the SCA as well.

B. Contract Work Hours and Safety Standards Act Violations

In addition to the SCA violations, I find that Respondents violated applicable provisions of the CWHSSA. The CWHSSA governs the rate of pay for all overtime hours worked by laborers.[25] 40 U.S.C. § 328(a). It requires government contractors to pay their employees "one and one-half times the basic rate of pay for all hour worked in excess of forty hours in the workweek." *Id.*; *see also* 29 C.F.R. § 5.5(b)(1). If a contractor fails to do so, then it is liable for not only the wages due, but for liquidated damages as well, which are paid to "the United States, any territory, or the District of Columbia." 40 U.S.C. § 328(b)(2); 29 C.F.R. § 5.5(b)(2). Like the SCA, the CWHSSA contains record-keeping, withholding, and debarment provisions. 40 U.S.C. § 333(d)(2); 29 C.F.R. § 5.5(b)(3), (c).

The record is rife with instances where Respondents failed to pay the appropriate rates for overtime. (*See, e.g.*, Tr. at 351-52; C-31, C-33). While Respondents did pay the proper overtime rates to many employees, most of the violations occurred when an employee worked more than forty hours in a week, but on more than one contract, *i.e.* the employee was a floater. When questioned about this, Mr. Picco testified that company policy was to pay overtime only when an individual worked more than forty hours in a week at one agency. (Tr. at 690). Again, the Act and implementing regulations do not make such a distinction. *See* 29 C.F.R. § 5.5(b)(1) (2001). Like the SCA, the CWHSSA makes no distinctions between full-time and part-time employees; it simply states that if a laborer or mechanic works in excess of forty hours during a week, the contractor must pay the employee the proper overtime rate. Mr. Picco also testified that employees were not always paid overtime because they "accepted to go and work at regular time." (Tr. at 644). Even if this assertion were true, "[t]he . . . 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." *In re Hugo Reforestation, Inc.*, ARB Case No. 99-3, 1997-SCA-20, 2001 WL 487727, *5 (ARB Apr. 20, 2001) (citations omitted). Respondents have not presented any compelling evidence against this charge and I find that, by not paying their employees the proper overtime rates when called for, they have violated the CWHSSA.

C. Total Amount of Back-Pay Owed

As the investigation revealed and, as determined above, Respondents failed to provide their employees the minimum monetary wages, health and welfare benefits, and holiday pay, required to be

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[25] Like the SCA, the CWHSSA does not govern every single contract entered into between the government and a contractor or subcontractor. Both the requirements for contracts that are governed by this Act and applicable exceptions are set forth in 40 U.S.C. § 329(a)-(c). While the parties did not stipulate to coverage, it is clear that none of the exceptions (relating to the nature or amount of the contract) apply and the contracts fit squarely within the purview of the CWHSSA. (*See also* Tr. at 195).

paid under the contracts, as well as pay the proper overtime rates when the employees worked over forty hours in a given week. Ms. Bagby's calculations, which are very detailed and clear, show the deficiencies owed by Respondents to each employee that they underpaid. The Department calculated Respondents' deficiencies to total $387,001.92, which includes both SCA and CWHSSA violations. This total is based on the wage determinations in effect for the periods investigated, or the original contract rates when updated rates could not be accurately established, and the payroll records provided to Ms. Bagby by Respondents. In addition, as Ms. Bagby explained and her worksheets show, she has taken into account all payments made to the employees when appropriate. (C-37, C-39, C-41, C-44 to C-53, C-58a, C-58b; Dep't of Labor's Post-Hearing Brief, at 1-3; *see generally* Tr. 320-475 (testimony of Ms. Bagby explaining her calculations.)).

Respondents have not truly disputed the fact that they violated the Acts, apart from the justifications and defenses discussed above, all of which I have rejected.[26] Instead, it appears that Respondents' main contention is that they owe significantly less then Ms. Bagby's investigation revealed – nearly $320,000.00 less. However, when asked how Respondents calculated this number, Mr. Picco was unable to explain the methodology used or why there is such a large gap between the two figures. Respondents have not presented any credible evidence that would cause me to question the figures presented by the Department and I conclude that these amounts are accurate as to what Respondents owe.[27] Accordingly, the amounts withheld under these contracts should be released by the contracting agencies and forwarded to the Department of Labor for disbursement to the underpaid employees, with any excess to be payable to Respondents.[28]

Respondent Picco has also argued that all of Respondents' actions were taken in good faith, a matter that I do not dispute. The facts before me do not show any attempts by Respondents to intentionally violate the Acts – they have not intentionally falsified their records and there is no history of similar violations. The record shows that many of the overtime violations affected the "floater" employees, who worked on several contracts in a given week. Mr. Picco testified that this was due to his misunderstanding of the proper basis for calculation overtime, *i.e.*, that it was the total number of hours each employee worked, not the number of hours worked on a particular contract, that the

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[26] The record seems to indicate that Respondents do in fact dispute the Department's contention that they failed to pay some employees the prevailing minimum wage. However, the payroll records as well as Ms. Bagby's investigation results clearly show that, in some instances, they did not do so.

[27] The Department's number is, in all likelihood, a bit less than what Respondents owe, as Ms. Bagby testified that she did not look for overtime violations when readjusting the figures the second time. In addition, as noted above, I directed that the original wage determinations be used by Ms. Bagby in her supplemental calculations, if the contract modifications could not be documented. Liquidated damages in the amount of $3,720.00 based upon the CWHSSA and 29 C.F.R. §5.8(a) were also calculated by Ms. Bagby. However, the regulations preclude administrative law judges from making any findings on the issue of liquidated damages, 29 C.F.R. § 6.19(b)(3).

[28] *See also* 40 U.S.C. § 330(b); 41 U.S.C. § 354(b) (allowing actions against contractors for recovery of underpayments if amounts withheld are insufficient.)

employee's wages were based on. (Tr. at 557-58, 684-87, 748). Finally, once notified of the overtime violations, Mr. Picco testified that he reformed his pay policy to comply with the CWHSSA and this has not been disputed or contradicted by the Department.[29] (Tr. at 748). However, these matters (while relevant to the issue of debarment, discussed below) do not have any impact upon the calculation of underpayments.

II. Debarment

Regarding debarment, I find no basis for exempting Respondents from debarment under the SCA.[30] Forty-one U.S.C. § 354(a) mandates that any person or firm found to have violated the SCA be ineligible for further contracts for a period of three years absent the Secretary's recommendation based upon a finding of "unusual circumstances." *See also* 29 C.F.R. § 4.188(a) (2001). While the term "unusual circumstances" is not a defined term, the interpretive regulations appearing at 29 C.F.R. § 4.188(b) set forth a three-part analysis used to determine if such circumstances exist. *See In re Commercial Laundry & Dry Cleaning, Inc.*, ARB No. 96-136, 1994-SCA-46 (ARB Nov. 13, 1996); *In re John's Janitorial Serv., Inc.*, 1994-SCA-2 (ARB July 30, 1996). The first part of the test ("aggravating factors") generally requires a showing that the contractor's conduct was not willful, deliberate, or of an aggravated nature; that it was not the result of "culpable conduct" (including culpable neglect or disregard of whether violations have occurred or culpable failure to comply with recordkeeping requirements); and that the contractor does not have a history of violations. 29 C.F.R. § 4.188(b)(3)(i); *In re John's Janitorial Serv., Inc.*, 1994-SCA-2 (ARB July 30, 1996). Existence of any of these circumstances precludes relief from debarment. 29 C.F.R. § 4.1888(b)(3)(i); *Summitt Investigative Serv., Inc. v. Herman*, 34 F. Supp. 2d 16, 20 (D.D.C. 1998); *Colo. Sec. Agency, Inc. v. United States*, 123 Lab. Cas.(CCH) ¶ 35,735, 1 Wage & Hour Cas. (BNA) 491, 1992 WL 415388, at *5 (D.D.C. 1992). If the respondent successfully shows that no aggravated circumstances exist, the second part of the test ("mitigating circumstances") requires "good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance" as prerequisites for relief. 29 C.F.R. § 4.188(b)(3)(ii). Part three of the test ("other factors") states that "[w]here these prerequisites are present and none of the aggravated circumstances

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[29] It should be noted that, due to time constraints imposed by the trial, Ms. Bagby did not cross-reference the contracts to check for overtime violations when she made her updates. (*See, e.g.*, Tr. at 399). Nevertheless, the Department failed to identify any more overtime violations in the Post-Hearing Brief, submitted on September 25, 2001.

[30] Both Acts and their implementing regulations contain debarment provisions. However, the standards governing debarment under each differ. *In re Hugo Reforestation, Inc.* ARB Case No. 99-003, 1997-SCA-20, 2001 WL 487727 (ARB, Apr. 30, 2001). With respect to the CWHSSA, the standards are much more lenient than the harsh and "particularly unforgiving" SCA provisions. *A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 855 (D.D.C. 1989). Furthermore, under the SCA, once placed on the list of debarred contractors, removal prior to the expiration of the three-year period is not possible. 29 C.F.R. § 4.188(a) (2001). Thus, if debarment is proper under the SCA (as I have found, *infra*) debarment under the CWHSSA becomes moot.

. . . exist, a variety of factors must still be considered."[31] *Id.* At all stages in the analysis, the burden lies with the respondent to prove, by a preponderance of the evidence, that relief is warranted. *Id.* § 4.188(b)(1); *Summitt*, 34 F. Supp. 2d at 20; *A to Z Maint. Corp.*, 710 F. Supp. at 856; *Hugo Reforestation*, 2001 WL 487727, at *9. Finally, as the United States District Court for the District of Columbia noted in *Summitt*, the "statutory safety valve of unusual circumstances" is limited to minor, inadvertent, or *de minimis* violations. 34 F. Supp. 2d at 20 (citing congressional history and *Fed. Food Serv., Inc. v. Donovan*, 658 F.2d 830, 834 (D.D.C. 1981)). Although Respondents have successfully shown that aggravating factors do not exist, they have failed to prove the presence of unusual circumstances, and, thus, have not proven that they should be relieved from being placed on the list of debarred individuals. I therefore recommend debarment.

A. Aggravating Factors/Culpable Conduct

Respondents have successfully shown that aggravating factors do not exist. As mentioned above, if a contractor cannot pass the first prong of the unusual circumstances test, debarment is mandated under the Act. *In re John's Janitorial Serv.*, 1994-SCA-2 (ARB, July 30, 1996).

The Department asserts that Respondents should be subject to mandatory debarment under the first prong because Respondents' actions amount to "culpable conduct" as contemplated by 29 C.F.R. § 4.188(b)(3)(i). Unfortunately, the SCA does not define "culpable conduct," although it does provide some examples of such conduct, which are mentioned above. Additionally, the phrase has been addressed by several courts. The District Court for the District of Columbia has stated that "culpable conduct" can be inferred from a respondent's "willful, deliberate actions or neglect." *Colorado Sec.*, 1992 WL 415388, at *4. The United States Court of Appeals for the Sixth Circuit notes that "the most uniform interpretation of culpability includes an element of reckless disregard or wilful blindness" in addressing what constitutes "culpable conduct." *Elaine's Cleaning Serv., Inc. v. U.S. Dep't of Labor*, 106 F.3d 726, 729 (1997). The most recent, and most exhaustive, example of a court grappling with this issue occurs in *Dantran, Inc. v. United States Department of Labor*, 171 F.3d 58 (1st Cir. 1999), where the United States Court of Appeals for the First Circuit reviewed a finding by the Administrative Review Board (hereafter "ARB") that debarment was proper due to the existence of aggravating factors, namely culpable conduct. The court notes that "[w]hat the regulations mean by the term 'culpable' is not spelled out, " but that "culpability must require more than simple negligence or a mere failure to ascertain whether one's practices coincide with the law's demands." *Id.* at 68. The court further required "affirmative evidence" to be present to support a finding of culpable conduct,

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[31] The other factors enumerated in the SCA are the following: (1) Whether the contractor has previously been investigated for violations of the SCA; (2) Whether the contractor committed record-keeping violations that impeded the investigation; (3) Whether liability was dependent upon resolution of a *bona fide* legal issue of doubtful certainty; (4) The contractor's efforts to ensure compliance; (5) The nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees; and (6) Whether the sums due were promptly paid. 29 C.F.R. § 4.188(b)(3)(ii) (2001). Note also that this list is not exhaustive and that, even if all of the factors are present, "[a] finding of 'unusual circumstances' is never mandatory," as the Secretary of Labor has ultimate discretion on this issue. *A to Z Maint. Corp.*, 710 F. Supp. at 855-56.

such as a contractor's disregard of legal requirements contained on the face of the contract. *Id.* at 69.

Even without defining this particular phrase, several courts as well as the ARB have found culpable conduct in a myriad of circumstances, including those involving neglect. *See, e.g., Summitt*, 44 F. Supp. 2d at 25 (approving ARB determination that "failure to pay employees because of financial problems resulting from poor business judgment constitutes culpable neglect" where respondents were inexperienced contractors) (citations and internal quotation marks omitted); *Vigilantes, Inc. v. Adm'r of Wage & Hour Div*., 968 F.2d 1412, 1418-19 (1st Cir. 1992) (finding culpable neglect where respondents were investigated and apprised of overtime, holiday pay, and fringe benefit violations, but failed to remedy them in a timely manner). The ARB found debarment proper in *Hugo Reforestation* for "culpable disregard" of SCA contract requirements where respondent, much like the scenario in *Vigilantes*, was put on specific notice of existing violations, yet did nothing to remedy this situation.[32] 2001 WL 487727, at *8-*11 (citing *In re Nationwide Bldg. Maint*., BSCA No. 92-04 (Oct. 30, 1992)). Culpable neglect was also found to exist by the ARB in *In re Sharipoff*, Case No. 1988-SCA-32 (ARB, Sept. 20, 1991). In *Sharipoff*, respondent failed to pay minimum monetary wages, fringe benefits, holiday pay, and overtime as required by the contract and SCA and CWHSSA. *Id.* These violations amounted to $16,941.67 in underpayments, which was fifty-two percent of the employees' total pay. *Id.* The ALJ characterized this situation as "outrageous" and "egregious" and one that "[rose] to the aggravated level," and the ARB agreed. The ARB also specifically rejected respondent's purported defenses of simple negligence, good-faith compliance, and "confusion and misunderstanding" of the SCA. *Id.* While the SCA explicitly states that the existence of unusual (and presumably aggravated) circumstances must be made on a case-by-case basis, the decisions discussed above serve as good illustrations of what type of circumstances generally call for debarment under this prong.

In analyzing the case at hand, I do not find Respondents' actions to warrant debarment based on the existence of aggravating factors alone. To support such a finding, there should be affirmative proof that Respondents acted in a deliberate and calculated fashion, intending to violate the provisions of the contract or the SCA. While Respondents violated numerous provisions of the SCA, they did not do so willfully, as contemplated by section 4.188. Section 4.188 uses, as an example of culpable conduct, the falsification of records, indicating that a violator must act in a deliberate fashion. Clearly, Respondents' actions did not rise to such an egregious level. *But see In re Glaude d/b/a D's Nationwide Indus. Servs.*, ARB No. 98-81, 1995-SCA-38 (ARB, Nov. 24, 1999) (failure to seek advice from Labor Dept. to ensure pay practices are in compliance with SCA deemed to be culpable conduct). On the other hand, Respondents began to make corrections and ultimately came into compliance regarding the fringe benefit violations once notified of them, distinguishing their situation from that in *Vigilantes* and *Hugo Reforestation*. *Summitt* is also distinguishable, as there the monetary impact on the employees was much greater than that here, and several employees in *Summitt* were paid nothing as a result of the employer's violations – a matter which reflects willful intent on the part of the employer. 34 F. Supp. 2d at 18-19, 25. Here, Respondents have not been accused of

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[32] Respondent in *Hugo Reforestation* also had a long history of violations, a factor not present in the case at hand.

absolutely failing to pay their employees, and there has been no showing of bad faith. In light of the particular facts of this case and even though Respondents clearly violated the Acts, I do not find they did so with culpable intent nor was the ultimate economic impact on the employees so egregious as to constitute aggravating circumstances. Thus, Respondents have met their burden regarding the first part of the test.

B. Mitigating Circumstances

As discussed above, even in the absence of aggravating factors, a respondent must show that mitigating circumstances exist to warrant relief from debarment. Initially, Respondents must show that they have a good compliance history, that they cooperated during the investigation, that the money due has been repaid, and that they have provided "sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii) (2001). These prerequisites have arguably been shown at least in part, as there were no previous allegations of noncompliance, Ms. Bagby attested to Mr. Picco's cooperation during the initial investigation, most (if not all) of the monies due have been withheld and some small sums have been repaid, and compliance in the future is likely, now that Respondents are aware of the statutory and regulatory requirements.[33]

C. Other Factors

Finally, even if none of the aggravating factors and all of the prerequisites are present, a number of other factors will be considered before relief will be recommended.[34] After analyzing the record as a whole, I find that almost all of the additional factors enumerated in section 4.188(b)(3)(ii) weigh against Respondent and dictate a recommendation favoring debarment. Preliminarily, considering the first of these factors (Prior Violations), it is undisputed that Respondents have never been investigated before for alleged violations of either Act. Unfortunately, this is the only factor that undisputably weighs in favor of Respondents. Each additional factor will be addressed separately.

1. Recordkeeping Violations

Respondents have committed several recordkeeping violations due to their failure to maintain copies of the contracts for the statutorily prescribed period of time. The regulations require all government contractors to maintain certain records, specified in 29 C.F.R. § 4.6(g), for a minimum of three years from the completion of the work. 29 C.F.R. § 4.185 (2001). The records must be made

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[33] Whether or not the prerequisites to relief identified in the second part of the test are present is debatable, especially the repayment of monies due factor, as it is not certain whether Respondents' belated attempts to pay a portion of the amounts due are sufficient to meet this element of the test. The standards governing this prong have not been made clear by either the ARB or the courts. However, extended discussion of the second prong is unnecessary. Rather, I choose to analyze the factors from the third prong, for they provide the clearest indicators as to why relief from debarment should not be granted.

[34] See footnote 31 for these factors.

available for "inspection and transcription" by appropriate authorities. *Id.* §§ 4.6(g)(1) and 4.185. Failure to do so is a violation of the SCA. *Id.* § 4.6(g)(3). In addition to these provisions, section 4.188(b)(3)(ii) states that recordkeeping violations are only considered if they impede the investigation in some way. It is clear from the record that Respondents failed to maintain copies of all contracts and applicable wage modifications, an express violation of the SCA that cannot be overlooked. While I do not believe that Respondents' actions rise to a level for which sanctions are appropriate, as discussed above, Respondents' failure to maintain these records did impede the Department's investigation to a certain extent, as they were forced to turn to alternative sources for copies of records that Respondents not only should have possessed, but were required by law to retain. This violation not only resulted in a waste of resources, but also forced the Department's representatives to amend their calculations several times before, after, and even during the trial. Thus, I find that Respondents violated the recordkeeping provisions of the Act.

2. Resolution of a *Bona Fide* Legal Issue of Doubtful Uncertainty

Respondents have not presented any *bona fide* legal issues to defend their non-compliance with the SCA. Additionally, even if the issues they raise are construed as legal issues, none of them are "of doubtful certainty," as required by section 4.188(b)(3)(ii). Many, if not all of, Respondents' defenses/claims are factual issues which are neither *bona fide* nor "of doubtful certainty"; in fact, several of their practices directly contravene the exact wording of the regulations. Respondents have failed to articulate any debatable legal issues, even after a very liberal and generous reading of their submissions and testimony afforded to them because they have proceeded *pro se* for most of these proceedings. Thus, I find that Respondents have not met their burden regarding this element.

3. Respondents' Efforts to Ensure Compliance

Respondents have not sufficiently shown that they have diligently ensured compliance with the SCA prior to being investigated, although steps have been made after the investigation to remedy some of the violations. Under the Act, "[a] contractor has an <u>affirmative</u> <u>obligation</u> to ensure that its pay practices are in compliance with the Act" by directing inquiries to the Department of Labor. 29 C.F.R. § 4.188(b)(4) (2001) (emphasis added). Respondents simply have not presented any evidence of their attempts to seek clarification from the Department concerning their pay policies prior to being notified of the violations. While I find that Respondents' inaction is a clear violation of this duty of inquiry, I must again note that, in many cases, the actual policies implemented by Respondents are so contrary to the SCA that a simple reading of the regulations would have placed them on notice that they were in violation of the Act. For example, Mr. Picco stated several times during his testimony that company policy was to only pay employees for holidays if they worked both the day before and the day after. (*See, e.g.*, Tr. at 638-39, 671). Section 4.178(a)(1) states that "holiday benefits cannot be denied because the employee . . . did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination." None of the wage determinations of relevance to this action contain provisions modifying default policy and, thus, Mr. Picco should have been aware that his policy violated the SCA.

Another example is Respondents' contention that they believed that they met the health and welfare benefits requirements by purchasing an insurance policy that provided the best coverage available for the price, even though the monthly premium payments were less than the amounts due under the contract. Again, the regulations are clear on this point. While Respondents' policy is not clearly at odds with the Act's actual language, if Respondents had sought the Department's advice (which not only was required by the regulations but was advisable given the number of complaints made by their employees), there is no question that the violation would have been detected.[35] While Respondents did eventually take steps to come into compliance with the health and welfare benefit requirements, these measures came several months after being notified of the violations. Additionally, while Respondents showed that they sent some back pay checks to employees, these amounts and their efforts to repay these employees are woefully inadequate, as only a fraction of the checks sent were cashed and, when the other checks were returned, Respondents made absolutely no effort to locate the employees or update their addresses. Such inaction cannot be overlooked and, as a result, Respondents cannot show that this factor weighs in their favor.

4. Prompt Payment

For the same reason, the Prompt Payment factor cannot be satisfied. Apart from the contract funds withheld, the payments undertaken by Respondents to rectify the underpayments can only be described as too little, too late.

5. Nature, Extent, and Seriousness of Past and Present Violations

The only violations the seriousness of which must be assessed are the present violations, and the violations concerned here are not unusual in terms of their nature. However, the extent and seriousness of these violations is significant. In this regard, it is worth noting that the amount of the violations is $387,001.92 on contracts worth approximately $4,163,377.00. Not only is this a staggering amount by itself, but it is even more significant considering that this is about 9.3 percent of the total value of all eleven contracts and that most of these employees were only making between $6.00 and $9.00 an hour. These are not *de minimis* violations to say the least, and they had a significant impact upon the wages of the underpaid workers.

Further discussion is unnecessary as it is evident that unusual circumstances do not exist upon consideration of the third prong, even if the first two prongs are conceded. When looked at in total, Respondents have not presented credible evidence that would establish unusual circumstances. Accordingly, I recommend that both the corporate respondent, Panamovers and Mr. Picco,

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[35] The facts show that not only was Mr. Picco placed on notice of the violations by Ms. Bagby after her initial investigation, but several employees raised these issues directly to him. (*See, e.g.*, Tr. at 41-42, 44). Nevertheless, Respondents did not investigate whether the concerns raised by the employees were valid.

individually, be debarred.[36]

III. Respondents' Counterclaim

Respondents' counterclaims are dismissed in all respects. In Respondents' original Answer, filed March 25, 1999, Respondents claimed that the Department illegally withheld money due to Panamovers and that the total amount should be released to them immediately. Alternatively, in the event that the withholding was lawful, Respondents asserted that the Department caused an excess amount to be withheld and that this portion should be returned immediately. Finally, Respondents claimed to have suffered a "constructive debarment" due to the Department's actions, actions which they claim violated their due process rights and amounted to tortious interference with business opportunity. As a result, Respondents claimed they should be awarded compensatory and punitive damages.

Respondents have not submitted any evidence or documentation supporting these claims. As such, I consider them abandoned. Furthermore, regarding the Department's withholding of funds, not only is this permitted by the Acts themselves, but the amount withheld may be less than that owed. Thus, this portion of Respondents' claim is moot. Finally, Respondent' have not identified any cause of action upon which relief can be based. Furthermore, Respondents have asserted no jurisdictional basis for this tribunal to award them compensatory and punitive damages. In sum, Respondents' counterclaim fails in all respects.

ORDER

IT IS ORDERED that the contracting agencies shall release the monies currently being withheld under the contracts listed above and such funds shall be disbursed to the underpaid employees in accordance with Departmental regulations, and, if applicable, any amounts in excess of $287,001.92 withheld by the contracting agencies shall be remitted to Respondents;

IT IS FURTHER ORDERED that there is no basis for recommending that the Secretary exclude Respondents from the ineligibility list under section 5(a) of the Act; and

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[36] Debarment of Mr. Picco is supported by 29 C.F.R. § 4.187(e)(1), which notes that the term "party responsible" includes corporate officers who exercise control over the day-to-day business operations. Moreover, both Acts and the cases brought under them, some of which are referenced in this decision, undisputedly establish that an individual owner/officer can and should be debarred if found to be responsible for violations. *See, e.g.*, 29 C.F.R. § 4.187(e); *Hugo, supra*.

IT IS FURTHER ORDERED that Respondents' counterclaims are **DISMISSED**.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Any aggrieved party who desires review of the foregoing Decision and Order may file a petition for review with supporting reasons (in compliance with the requirements of 29 C.F.R. § 6.20) with the Executive Director, Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. To be timely filed, a petition for review must be filed **within forty (40) days** of the date of this Decision and Order, unless additional time is granted by the Administrative Review Board. *See* 29 C.F.R. § 6.20 and Part 8. A copy of any such petition must also be provided, *inter alia*, to the Chief Administrative Law Judge, Office of Administrative Law Judges, Suite 400, 800 K Street, N.W., Washington, D.C. 20001-8002.