



**Issue Date: 22 May 2007**

**Case No. 2005-SCA-00015**

**In the Matter of**

**CHARLOTTE HICKEY and  
AFFORDABLE DATA SERVICES, INC.,  
individually and jointly,**

**Respondents.**

Appearances:

Amy S. Harrison, Esq., Office of the Solicitor, Dallas, TX  
For Complainant

C. Brian Meador, Esq., Pryor, Robertson, and Barry, PLLC, Fort Smith, AK  
For Respondents

Before: Pamela Lakes Wood  
Administrative Law Judge

**DECISION AND ORDER**

This case arises out of a complaint filed by the Administrator of the Wage and Hour Division ("Administrator") against Charlotte Hickey and Affordable Data Services, Inc., individually and jointly, alleging that Respondents violated certain provisions of the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. §351 *et seq.*, and the regulations under 29 C.F.R. Part 4 by failing to pay service employees Addie Atwell, Denna A. Martin, and Sandra C. Armer minimum monetary wages required under the federal contracts awarded to Respondents. The Administrator also alleges that Respondents failed to pay holiday pay to Atwell and Beau Tackett.

The Administrator requests that Respondents pay the above employees an amount totaling \$16,974.24.<sup>1</sup> The Administrator is not, however, seeking \$108.10 in health and

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<sup>1</sup> The Administrator also asked that I consider raising the amount to \$17,239.21 to include alleged violations which occurred after June 30, 2003. (Administrator's Proposed Findings of Fact, Conclusions of Law, and Supporting Brief at p. 6, note 2; p.7, note 6.) However, as the additional funds sought cover a timeframe not covered in either the amended or original complaint, I deny Administrator's request.

welfare/fringe benefits originally sought. (Tr. 16). Additionally, Administrator requests that I debar Respondents in order to prevent them from receiving further federal contracts for a period of three years pursuant to 41 U.S.C. §354.

In accordance with the provisions of the SCA and 29 C.F.R., Parts 4, 6, and 18, this case was referred to the Office of the Administrative Law Judges for a hearing. The undersigned conducted a hearing in Fort Smith, Arkansas on March 22, 2006, during which all parties were given the opportunity to call and examine witnesses and introduce pertinent exhibits. At the conclusion of the hearing, the parties agreed to submit written closing briefs. The Administrator's brief was filed with this tribunal on July 20, 2006; Respondents' brief was filed before this tribunal on July 18, 2006.

### PROCEDURAL HISTORY

The original Complaint in this matter was issued on behalf of the Complainant, the Administrator, on April 25, 2005. Administrator relied upon 41 U.S.C. §351(a)(1) and Section 4.6(b) of 29 C.F.R. Part 4 as authority. Complaint at 2-3. The Complaint alleged that Respondent Hickey was the president of Respondent Affordable Data Services, Inc., and as such, "exercised control, supervision or management over the performance of the contract(s) including the labor policies or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, caused or permitted the contracts to be breached." Comp. at 1. It further alleged that Respondents were awarded Contract(s) Number HCR 729A1 ("Contract A1") and HCR 772966 ("Contract 66"), on July 9, 1999, and July 7, 1999, respectively. Comp. at 1-2. The Complaint stated that Contract A1 was effective July 1, 1999, through June 30, 2003, and its anticipated amount was \$26,825.73 annually. Comp. at 2. Contract 66 was said to be effective July 1, 1999, through June 30, 2003, and its anticipated amount was \$24,942.58 annually. *Id.* The Complaint stated Respondents failed to pay service employees "minimum monetary wages" and fringe benefits totaling \$16,932.60. Comp. at 2-3. The Complaint did not identify the specific service employees who had not been provided full wages nor did it provide an explanation as to how the requested amount was calculated.

Respondent Hickey, proceeding *pro se*, filed an Answer on May 20, 2005, on behalf of herself and Affordable Data.<sup>2</sup> Hickey agreed that she was the president of Affordable Data, but denied breaching any contracts and maintained that she had paid all wages owed to her employees. *See generally* Answer. Although unclear at the time, it appeared that Hickey was arguing the employees were not government employees, and were therefore free to enter into a payment agreement with Hickey not set forth in either contract. *Id.*

After this matter was assigned to me, I issued a Notice of Assignment and Prehearing Order on July 19, 2005. In it, I asked Administrator to provide more specific information involving the alleged violations set forth in the Complaint (e.g., the identity of the employees, the specific amount owed to each). Notice of Assignment. Administrator filed a Prehearing Statement on August 26, 2005, setting forth the requested information. The Administrator stated employee Sandra C. Armer was due \$5,650.84 in prevailing wages and \$64.75 in fringe benefits

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<sup>2</sup> Ms. Hickey's reply was not labeled as an Answer; however, given the fact that it was obviously prepared in response to the above Complaint, I will consider it as such.

under Contract 66. Prehearing Stmt. at 1. Employee Laverne Addie Atwell was owed \$5,853.20 in prevailing wages, \$43.35 in fringe benefit pay, and \$156.31 under Contract A1. Administrator also said Respondents owed Atwell \$611.67 in prevailing wages and \$77.48 in holiday pay under Contract 66. *Id.* Administrator alleged that employee Denna A. Martin was owed \$4,400.72 in prevailing wages under Contract A1. *Id.* Finally, Administrator stated that employee Beau Tackett was due \$74.28 in holiday pay under Contract A1. *Id.* at 2.

The Administrator argued Respondents violated the prevailing wage requirements of the SCA when they required employees to drive their own personal vehicles without any reimbursement for operating expenses. *Id.* Administrator alleged that fringe pay violations occurred when Respondents did not increase the fringe benefit amount after Wage Determination No. 1977-0193 Revision No. 35 went into effect on July 1, 2003. *Id.* Finally, Complainant alleged that holiday pay violations occurred when the above named employees worked on federal holidays without holiday pay. *Id.* at 2-3. According to Complainant, these violations totaled \$16,516.43.

In a Notice of Hearing and Prehearing Order issued October 20, 2005, I scheduled a hearing on November 14, 2005, with the additional date of November 15, 2005, if necessary, and also issued a Prehearing Order. Complainant filed an unopposed motion seeking a continuance on November 1, 2005, which I granted by way of Order issued November 2, 2005. On December 29, 2005, I issued a Second Notice of Hearing and Prehearing Order moving the hearing to March 22, 2006. Counsel for Complainant filed a Notice of Appearance on February 3, 2006; Counsel for Respondents filed a Notice of Appearance on February 27, 2006.

On February 28, 2006, Complainant filed Administrator's First Amended Prehearing Statement. It alleged that Respondents continued to violate the SCA after the initial investigation, so Administrator would seek any back wages that accrued after the investigation period ended. Admin. First Amend. Stmt. at 1. Complainant also adjusted its back wage calculations to reflect the Internal Revenue Service ("IRS") standard mileage rates in effect at the pertinent time of the alleged violations and the exact mileage estimated in the contracts. *Id.* Complainant now alleged that Armer was owed \$5,616.58 in prevailing wages under Contract 66; Atwell was due \$5,883.94 in prevailing wages under Contract A1 and \$600.79 in prevailing wages under Contract 66; and Martin was due \$4,341.96 in prevailing wages under Contract A1. *Id.* at 1-2. The total amount owed was calculated to be \$16,859.44. *Id.* at 2. The fringe benefit and holiday wage calculations remained unchanged.

On March 14, 2006, Complainant filed a Motion for Leave to Amend Complaint and its Second Amended Prehearing Statement. Complainant now sought to have Respondents barred from participating in any government contracts for three years pursuant to 41 U.S.C. §354(a). It stated that debarment was not sought initially because it appeared unusual circumstances may have been present warranting relief from debarment. *Id.* at 2. However, Complainant later concluded that no unusual circumstances existed and decided debarment was necessary. *Id.* Respondents filed a response on March 17, 2006, saying that the amendment seeking debarment should be denied as it would cause Respondents to be prejudiced so close to the hearing.

On March 16, 2006, Complainant filed a Motion to Compel alleging that Respondents had inadequately answered several interrogatories and request for production of documents.

A hearing was held in Ft. Smith, Arkansas before the undersigned on March 22, 2006. Both parties were represented and given a full and fair opportunity to present evidence. The following witnesses offered testimony: Hickey (Hearing Transcript at (“Tr.”) 22-76); Atwell (Tr. 78-134); Martin (Tr. 136-154); Armer (Tr. 248-255); Wage and Hour investigator Billie Romans (Tr. 157-177); and former Wage and Hour investigator Brian Delavan (Tr. 178-244). The following Complainant’s Exhibits (“CX”) were also admitted into evidence: (CX 1) (Tr. 266); (CX 2) through (CX 7) (Tr. 69, 195, 196, 188, 40, 41); (CX 9) through (CX 13) (Tr. 91, 96, 89, 35); (CX 17) (Tr. 35); (CX 18) (Tr. 29); (CX 21) (Tr. 35); (CX 28) (Tr. 37); (CX 31) (Tr. 50); (CX 40) (Tr. 35); (CX 43) (Tr. 26); (CX 44) (Tr. 39); (CX 46) (Tr. 35); (CX 51) (Tr. 35); (CX 54) through (CX 57) (Tr. 51, 52, 73, 46); (CX 60) (Tr. 68); (CX 61) (Tr. 54); (CX 63) (Tr. 61); (CX 69) (Tr. 202); (CX 73) through (CX 75) (Tr. 94, 191, 95). Respondents Exhibits (“RX”) 1 through 5 were also admitted into evidence. (Tr. 106, 115, 147, 227, 251). Additionally, two joint exhibits were admitted into evidence (“ALJ 1” and “ALJ 2”). (Tr. 266).

I also addressed Complainant’s Motion to Amend its Complaint and its Motion to Compel. With respect to the Motion to Amend, I stated that I would not allow Complainant to seek damages past June 30, 2003, as this was the last date provided in the original and amended complaint. (Tr. 6-8). Although the contracts were renewed after June 30, 2003, no part of the original or amended complaint mentioned that wages would be sought for periods covered by the renewal. I did allow the complaint to be amended to include the request for debarment. (Tr. 9). I informed the parties that under 29 C.F.R. §16.19(b)(2) I am required to determine whether Respondents would be ineligible to receive government contracts should I find a violation of the SCA occurred. (Tr. 8-9). Addressing the Motion to Compel, Complainant’s counsel acknowledged receipt of documents relating to the pertinent period being investigated but alleged that the subsequent period was relevant to the debarment issue. (Tr. 9-13). At the end of the hearing, I informed the parties that I would keep the record open for 60 days in order for Respondents to turn over requested documents and to allow the parties an opportunity to file written briefs.

By way of letter dated May 22, 2006, and filed May 26, 2006, counsel for Administrator submitted to this tribunal a letter including post-investigation documents which had been turned over by Respondents. The documents consisted of a payment statement from the United States Postal Service concerning Contract A1 and Hickey’s pay tables from July 1, 2003, through February 16, 2006. Having received these documents, I formally admit them into evidence as Complainant’s Exhibits 76 (the payment statement) and 77 (Hickey’s pay tables) (“CX 76” and “CX 77”), and the record is now officially closed. **SO ORDERED.**

Administrator’s [Complainant’s] Proposed Findings of Fact, Conclusions of Law, and Supporting Brief were filed on July 20, 2006 and Respondent Charlotte Hickey’s Post Trial Brief was filed on July 18, 2006.

Subsequently, it came to my attention that certain exhibits (CX 28, 60, and 69) were missing, and one was labeled incorrectly (i.e., CX 24 was labeled CX 28). By letter of January

23, 2007, I asked counsel for the Complainant to provide the missing exhibits. They were provided under cover letter of February 14, 2007, and the record is now complete.

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**Joint Stipulations**

By way of joint stipulations submitted to the undersigned at the hearing for this matter, the parties stipulated to the following:

1. Affordable Data Services, Inc., is a party to Contract Number HCR 729A1.
2. Affordable Data Services, Inc., was a party to Contract Number HCR 72966.
3. Charlotte Hickey exercised control, supervision, and/or management over the performance of Contract Numbers HCR 72966 and HCR 729A1, including handling issues such as hiring, firing, managing, and/or paying employees.
4. On July 1, 1999, the United States Postal Service, Distribution Network (Southwest Area), awarded Affordable Data Services, Inc., Contract Number HCR 729A1 to provide mail-hauling and related services from Van Buren, Arkansas, to Uniontown, Arkansas.
5. On July 1, 1999, the United States Postal Service, Distribution Network (Southwest Area), awarded Affordable Data Services, Inc., Contract Number HCR 72966 to provide mail-hauling and related services from Van Buren, Arkansas, to Beverly Hills Drive, Arkansas.
6. Contract Number HCR 729A1 was originally effective July 1, 1999, through June 30, 2003.
7. Contract Number HCR 729A1 was renewed for the period July 1, 2003, through June 30, 2007.
8. The original anticipated contract amount for Contract Number HCR 729A1 was \$26,825.73, annually.
9. The anticipated contract amount for the renewed Contract Number HCR 729A1 was \$35,528.40, annually.
10. Contract Number HCR 729A1 included Wage Determination No. 77-0193 Rev. 35, effective July 1, 2003, to June 30, 2005.
11. The renewed Contract Number HCR 729A1 included Wage Determination No. 77-0193 Rev. 35, effective July 1, 2003, to June 30, 2005.
12. The renewed Contract Number HCR 729A1 included Wage Determination No. 77-0193 Rev. 42, effective July 1, 2005.
13. Contract Number HCR 72966 was originally effective July 1, 1999, through June 30, 2003.
14. Contract Number HCR 72966 was renewed for the period July 1, 2003, through January 30, 2004.
15. The original anticipated contract for Contract Number HCR 72966 was \$24,942.58, annually.
16. The anticipated contract amount for the renewed Contract Number HCR 72966 was \$31,623.11, annually.

17. Contract Number HCR 72966 included Wage Determination No. 77-0193 Rev. 30, effective July 1, 2001, to June 30, 2003.
18. Renewed Contract Number HCR 72966 included Wage Determination No. 77-0193 Rev. 35, effective July 1, 2003, through the end of the contract period.
19. Services specified in the contracts identified above were furnished in the United States by Affordable Data Services, Inc., to the Government of the United States through the use of service employees as defined by Section 8(b) of the SCA (41 U.S.C. 357(b)).
20. Sandra C. Armer was a service employee employed in the performance of Contract No. HCR 72966.
21. Addie L. Atwell was a service employee employed in the performance of Contract No. HCR 72966.
22. Addie L. Atwell was a service employee employed in the performance of Contract No. HCR 729A1.
23. Denna A. Martin was a service employee employed in the performance of Contract No. HCR 729A1.
24. Beau Tackett was a service employee employed in the performance of Contract No. HCR 729A1.
25. Sandra C. Armer drove her personal vehicle to deliver mail while employed by Affordable Data Services, Inc.
26. Addie Atwell drove her personal vehicle to deliver mail while employed by Affordable Data Services, Inc.
27. Denna Martin drove her personal vehicle to deliver mail while employed by Affordable Data Services, Inc.
28. Exhibit C-7 reflects all compensation Sandra C. Armer received from Respondents for the time period July 1, 2001, through June 30, 2003.
29. Exhibit C-7 reflects all compensation Addie Atwell received from Respondents for the time period July 1, 2001, through June 30, 2003.
30. Exhibit C-7 reflects all compensation Denna Martin received from Respondents for the time period July 1, 2001, through June 30, 2003.
31. Beau Tackett, Addie Atwell, Sandra C. Armer, and Denna Martin have the occupation title of "Driver/Caser" for purposes of Wage Determination No. 1977-0193, Revision Nos. 30, 35, 42.

ALJ 1.

### **Findings of Fact**

Hickey is the President of Affordable Data Services, Inc. (Tr. 21). As president, Hickey has sole responsibility for determining how much her employees are paid and what routes they would drive. (Tr. 24). Hickey worked for various contractors from 1970 through 1999, when she started Affordable Data. (Tr. 23). Hickey was awarded Contracts A1 and 66 on or about July 1, 1999, by the United States Postal Office, Distribution Network. (ALJ 1, CX 18, CX 43). Hickey maintained "control, supervision, and/or management" over the performance of these contracts. (ALJ 1).

### ***Contract A1***

Contract A1 originally ran from July 1, 1999, through June 30, 2003, and its estimated annual amount was \$26,825.73. (ALJ 1). The contract was subsequently renewed for July 1, 2003, through June 30, 2007, with an estimated annual amount of \$35,528.40 annually. (ALJ 1). The contract initially contained Wage Determination(s) No. 77-0193 Rev. 30 and Rev. 35. (ALJ 1, CX 21, CX 24). Upon its renewal, the contract also included Wage Determination No. 77-0193 Rev. 42. (ALJ 1, CX 40).

Rev. 30 stated that the minimum wage which applied to Driver(s)/Caser(s) was \$11.34 an hour. (CX 12 at 1).<sup>3</sup> In addition, the employees were entitled to \$2.02 hourly for fringe benefits (health, welfare, and pension) for a total of \$13.36 hourly. *Id.* Rev. 30 also stated that all employees under the contract would receive a minimum of ten paid holidays a year. (CX 12 at 2).<sup>4</sup> Additionally, it also listed the qualifications an employee would have to fulfill in order to receive health and welfare and pension payments, as well as vacation and holiday payments. *Id.* Rev. 35 (issued May 30, 2003) raised the hourly minimum wage to \$11.99 and hourly fringe benefits to \$2.36. (CX 13). Rev. 42 raised the hourly wage to \$12.58 and hourly fringe benefits to \$2.59. (CX 17). Rev. 30 was applicable during the entire period that I have found to be pertinent, except for the debarment issue.

The Statement of Work and Specifications applicable to Contract A1 stated that carriers were to provide mail-hauling service from Van Buren, Arkansas to Uniontown, Arkansas. (ALJ 1, CX 28 at 1). The daily mileage routes were estimated to be 52.7 miles and would cover 354 mail boxes. (CX 28 at 2). The estimated annual scheduled miles were 15,971.8 and the estimated annual scheduled hours were 1,793. *Id.* The Statement advised that the supplier (in this case Hickey) should determine the actual mileage and hours prior to submitting a proposal. *Id.*

The Statement also required the supplier to provide the vehicle(s) required by the contract. (CX 28 at 3-4). It also said that the supplier “shall establish and maintain continuously in effect a policy or policies of liability and insurance and all motor vehicles to be used under this contract...” (CX 28 at 12). Supplier was required to provide proof it had obtained insurance and a copy of the applicable policy or policies. (CX 28 at 13).

### ***Contract 66***

Contract 66 was originally effective through July 1, 1999, through June 30, 2003, and was estimated to be \$24,942.58 annually. (ALJ 1). It was subsequently renewed for July 1,

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<sup>3</sup> Rev. 30 defined a Driver/Caser as someone who “[d]rives [a] motor powered vehicle to make box delivery of mail, often along a designated route, picks up and transports collection mail left in boxes or receptacles. May also sort mail for delivery to boxes aiding the route, incidentally transport mail to or between postal or other designated facilities, make minor vehicle repairs and keep vehicle in good working order.” (CX 12 at 4).

<sup>4</sup> The holidays are New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran’s Day, Thanksgiving Day, and Christmas Day, but an employer may substitute other holidays under a plan communicated to the employees. (CX 12 at 2).

2003, through January 30, 2004, and estimated to be \$31,623.11 annually. *Id.* Rev(s). 30 and 35 were also applicable to it. (ALJ 1, CX 46, CX 51).

The Statement of Work and Specifications applicable to Contract 66 stated that carriers were to deliver mail from Van Buren, Arkansas to Beverly Hills Dr., Arkansas. (ALJ 1, CX 44 at 1). The daily mileage routes were estimated to be 33.1 miles and covered 369 mail boxes. (CX 44 at 2). The estimated annual schedule miles were 10,031.6 and the estimated annual schedule hours were 1,641. *Id.* This contract also contained the same vehicle requirements found in Contract A1. (CX 44 at 4, 14).

### ***Hickey's Acceptance and Administration of the Contracts***

Hickey personally bid on Contracts A1 and 66. (Tr. 30). Hickey testified that she considered the cost of fuel, the length of the mail route, and the roads that would be driven on when she decided how much of a bid to place on the contracts. (Tr. 31-32). Hickey was less clear on whether or not she considered the costs of obtaining insurance, but it appears that she did. (Tr. 32).<sup>5</sup> In fact, insurance was one of the items addressed on the Cost Statement for Contract A1 (dated September 8, 2001) that she prepared during the time period that the contract was in effect. (Tr. 48-49, CX 31).<sup>6</sup>

Hickey employed Martin, Armer, Atwell, and Tackett as drivers between July 2001 and July 2003. (Tr. 43, ALJ 1). All of the employees, with some exceptions discussed *infra*, drove their own personal vehicles when driving their routes. (ALJ 1, Tr. 44-45, 81, 138, 248). Hickey claimed that the employees entered into an agreement with her where they would deduct any vehicle expenses they incurred from their income taxes. (Tr. 45). However, the employees paid for their own gas, insurance, and vehicle repairs. (Tr. 46, 54, 56). At the hearing, Hickey produced a written agreement signed by her and Armer that allegedly demonstrated this agreement. (Tr. 59-61, CX 63). The relevant portion of the agreement stated that "Affordable Data Services, Inc. and [Armer] have agreed on the compensation for the use of said vehicle." (CX 63). Hickey alleged this statement reflected their agreement regarding deduction of income taxes and that Armer never asked for vehicle compensation. (Tr. 61). Armer acknowledged that she had no problem using her own vehicle and assuming the expenses but did not testify as to a formal or written agreement. (Tr. 248-49). Atwell and Martin testified that they never entered into such an agreement. (Tr. 82, 138).

Although Hickey did not compensate her employees for their fuel expenses, she nevertheless collected fuel receipts from them occasionally. (*See* Tr. 47, 53; CX 57). Hickey

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<sup>5</sup> When asked on direct examination whether she ever considered the cost of insurance, Hickey testified as follows: "Sure you do. If you're a contractor, you know this. If you work as many years as I have, you know what to put in. If somebody's out there that doesn't know that, they won't put it in." (Tr. 32).

<sup>6</sup> Some of the costs are broken down by mile while others are broken down by year. When the yearly costs are divided by the estimated miles, the estimate includes 6.2 cents per mile for vehicle costs, 6 cents per mile for operational costs, 6 cents per mile for overhead, 8.3 cents per mile for fuel, .2 cents per mile for oil, and 5 cents per mile for insurance costs, for a total of 31.7 cents per mile for estimated total vehicle/equipment costs for contract A1. (CX 31). There is no comparable Cost Statement for Contract 66 of record, aside from one that lists fuel costs alone, dated March 10, 2003; the latter document was merely a request for an adjustment to the contract based upon fuel costs. (CX 55; Tr. 51-52.)

forwarded these receipts to the Distribution Network in Dallas for purposes of obtaining an adjustment in the amount awarded in the contracts. (Tr. 47-48). She occasionally submitted fuel use certification forms listing the amount of fuel used in a 28 day period so that she could get a contract adjustment. (Tr. 50-51, CX 54). Hickey testified that whenever the contract amount went up, she never passed on any of the increase to her employees. (Tr. 48).

In addition to the receipts, other evidence and testimony at the hearing demonstrated that Hickey took into account vehicle expenses when considering the amount she would personally receive as a result of the contract. Complainant presented evidence showing Hickey took into account oil, fuel, and insurance costs when she submitted her bid on Contract A1. (Tr. 49, 50; CX 31; *see also* CX 56 (submitting bid based on fuel costs in Contract 66)). Hickey testified that she did not include these amounts in the figure slotted for contractor's wages. (Tr. 49).

Hickey's employees paid for their own vehicle insurance, despite the language in the contracts discussed above. (Tr. 54). Hickey sent copies of the insurance agreements the employees had with their insurance companies to the Distribution Network, but never received any complaints that this was improper until she was investigated by the Wage and Hour division. (Tr. 57, 72-73). She also made the employees pay for any vehicle damage they sustained while they were on the job. (Tr. 56).

### ***Employee Compensation***

#### **Addie Atwell**

Atwell was a service employee employed in the performance of Contract A1 from July 25, 2001, to July 23, 2003, and in the performance of Contract 66 from July 25, 2001, to July 3, 2002. (CX 1 at 10-11). However, Atwell worked until March 26, 2004. (Tr. 78). She drove the routes listed under both Contracts A1 and 66. (Tr. 78-81). She was initially a substitute driver from 1999 until July 2002, when she took over her own route until she quit. (Tr. 78). The total amount of compensation she received from Hickey was \$26,652.88. (CX 7).

The route Atwell took over in 2002 was the one listed under Contract A1. (Tr. 78, CX 28). She testified that she would only run the routes in the order listed on the Statement of Work and Specifications on Saturdays. (Tr. 79). On other days, at the directions of Hickey, she drove additional distances which added a little over 7 miles to her route. (Tr. 79-80). With respect to the routes listed on the Statement of Work and Specifications listed for Contract 66, Atwell testified that she drove the routes in the order listed. (Tr. 80).

Atwell testified that she drove her own vehicle to deliver the mail on these routes and, contrary to Hickey's testimony, never entered into an agreement to deduct her vehicle expenses off her income taxes. (Tr. 81-82). She paid for fuel, insurance, and any maintenance that had to be performed on her car. (Tr. 82-84). Atwell testified that various repairs were necessary to her car because most of the roads she drove on were gravel. (Tr. 84-85; *see also* CX 11 (copies of checks for vehicle maintenance)). While she was employed for Respondents, Atwell had two vehicles. She testified that her first vehicle, a Subaru station wagon, was used for business and personal reasons. (Tr. 87). Atwell purchased the second vehicle, also a Subaru station wagon,

so that she could have a vehicle to use whenever the first one had to undergo any repairs. *Id.* She did not know how much she purchased it for, but estimated it was for less than \$7,500.00. (Tr. 121). The second vehicle was used solely for delivering mail. (Tr. 87-88). She also used Hickey's vehicle to deliver mail on 16 days. (Tr. 88; *see also* CX 11).

Atwell never complained to Hickey about having to use her vehicle to deliver the mail, but her husband did. (Tr. 89-90). After the Wage and Hour investigation, Atwell received an increase in her check, but testified that it was not enough to cover her expenses. (Tr. 90). Atwell quit, citing her inability to pay for the vehicle expenses she was incurring as one of her reasons. (Tr. 96; *see also* CX 10). Although she stated she was earning very little from Respondents after taking into account all of her vehicle expenses, she could not state an exact amount. (Tr. 103). In 2001, she claimed \$2,703 in car and truck expenses on her income tax for both of her businesses (Tr. 109; RX 2), and had a net profit of \$4,201. (Tr. 118; RX 2). She claimed \$5,941 in car and truck expenses from both of her jobs in 2002, and made a net profit of \$7,298. (Tr. 117; RX 2). Finally, in 2003, Atwell stated she made \$12,076 in net profit solely as a result of her carrier work, although she deducted \$7,800 for travels, meals, and entertainment. (Tr. 115-117; RX 2).

#### Denna Martin

Denna Martin worked as a carrier for Respondents from July 1999 through July 2002. (Tr. 136). She was employed in the service of driving the routes set forth in Contract A1. (ALJ 1; Tr. 136). Her employment relationship with Respondents ended in 2002 when she quit. (Tr. 136). The total amount of compensation she received from Respondents was \$18,138.25. (CX 7).

Martin testified that she drove the roads listed in the Statement of Work Specification for Contract A1. (Tr. 137). However, she testified that she did not drive the roads in the order listed on the form. *Id.* At the directions of Hickey, Martin drove from Van Buren to Macedonia Road, then to Shiloh Road, then back to Uniontown finally returning to Van Buren. *Id.* According to Martin, this added to the amount of miles listed in the Statement. *Id.* She described the roads she drove on as consisting mostly of gravel. (Tr. 138).

Martin testified that she drove her own vehicle when she delivered mail, but not at her own request. *Id.* She also said that she never had any kind of agreement with Respondents about using her car to deliver mail and receiving any sort of compensation for it. *Id.* She testified that she used two trucks throughout her time working for Respondents. (Tr. 139-140). Her first vehicle was a full-sized truck, which she eventually replaced with a smaller-sized truck that had better gas-mileage. (Tr. 139-140). She also obtained an extended warranty for the second truck because of her job. (Tr. 140). Martin estimated that 20% of the vehicles' usage was for personal reasons. (Tr. 141).

Despite the fact that Martin had to pay for her own fuel, Hickey asked her for gasoline receipts. (Tr. 141). Martin never received any reimbursements for these. *Id.* Hickey also instructed her to obtain extra insurance coverage for the vehicle(s) she used to deliver mail. (Tr. 141-42; *see also* (CX 56)). This raised her premium by roughly \$100, but she was never

reimbursed. (Tr. 142). She also had maintenance costs, which she covered herself, for things such as damage caused by gravel, brake damage, and frequent oil changes. (Tr. 142-43). She testified that these expenses played a role in her decision to quit. (Tr. 143).

Martin testified that she deducted the miles she drove from her income taxes by multiplying the miles she drove by the IRS standard business mileage rate. (Tr. 145). Her 2001 returns state she deducted \$9,903 in car and truck expenses and made a net profit of \$4,536. (RX 3). In 2002, she deducted \$6,112 in car and truck expenses and listed a net profit of \$1,170. *Id.*

### Sandra Armer

Sandra Armer was employed by Respondents as a mail carrier in service of Contract 66. (Tr. 248; ALJ 1). She drove her own personal vehicle to deliver the mail and covered all the associated costs herself. (Tr. 248-49; ALJ 1). Although she did not testify that she had any kind of agreement with Respondents, she said that she had no problem with driving her own vehicle and assuming the related expenses. (Tr. 249). Although she did not testify as to her length of employment, the exhibits of record demonstrate she worked for Respondents from July 2001 through July 2003. (CX 5, CX 7). The compensation she received from Respondents totaled \$35,419.60. (CX 5).

In 2001, Armer deducted \$7,176 in car and truck expenses and claimed a net profit of \$9,423. (RX 5). She deducted \$8,399 in car and truck expenses in 2002 and claimed a net profit of \$7,847. *Id.* Finally, in 2003, she deducted \$8,399 in car and truck expenses and claimed a net profit of \$10,533. *Id.*

### Beau Tackett

Beau Tackett did not testify, and only holiday pay is being sought for him by the Administrator. Specifically, pay for six holidays is being sought. (CX 5-14). He was also employed in the service of Contract A1. (ALJ 1). Tackett was paid \$5,677.21 during the investigation period. (CX 7). No additional pay aside from the holiday pay is being sought for Tackett.

### ***Wage and Hour Investigation***

Sometime in July 2003, Atwell contacted the Administrator to complain of reduced wages resulting from use of her private vehicle to deliver mail. *See* (RX 1). Billie Romans handled the investigation initially, and gathered oral statements from Atwell and Martin. (RX 1, RX 3). She eventually interviewed all four employees. (Tr. 160). Based upon what she learned, Romans concluded that the employees were suffering a wage reduction because they were incurring out-of-pocket expenses while driving their vehicles for Respondents' benefit. *Id.*

Romans spoke with Hickey by telephone, and informed her that the above situation placed her in violation of the SCA and she would need to reimburse the employees for their out-of-pocket expenses to come into compliance. (Tr. 162). Romans testified that Hickey stated the employees were responsible for their own vehicle expenses. *Id.* Romans informed Hickey she

could come into compliance by either paying the employees for their actual costs or paying them mileage based on the IRS standard business mileage rate. (Tr. 163). Romans believed that this conversation was sufficient enough to allow Hickey to come into compliance with the SCA. (Tr. 169).

After Romans transferred from the Little Rock office, Brian Delavan took over the investigation. (Tr. 179). Like Romans, Delavan concluded Respondents violated the SCA by not paying prevailing wages and also for not paying holiday pay. (Tr. 180). Delavan calculated the back wages Respondents owed. (Tr. 181). To reach his final calculations, Delavan reviewed the following documents:

1. Rev. Number 30 (CX 12).
2. Rev. Number 35 (CX 13).
3. Employee sign-in and sign-out sheets (CX 6).
4. The pay table provided by Hickey (CX 7).
5. The Statement of Contract Specifications for Contract A1 (CX 28).
6. The Statement of Contract Specifications for Contract 66 (CX 44).

(Tr. 181-186). His results were prepared in a table format. (CX 5).

In order to determine the out-of-pocket expenses each employee was owed for using that employee's own personal vehicle(s), Delavan multiplied the days driven by each employee, times the miles driven by each employee, times the IRS standard business mileage rate. (Tr. 188). The days driven were ascertained from the sign-in sheets; the miles driven by each employee were gathered from the contract specifications. (Tr. 187). Initially, under Contract 66, Delavan listed the mileage as 33.2 (*see, e.g.* CX 5 at 1); while under Contract A1, he listed the mileage as 52.7. (*See, e.g.*, CX-5 at 7). After making revisions, discussed in more detail below, he listed the mileage under Contract 66 as 33.1 (*see, e.g.*, CX 74 at 1), and the mileage under Contract A1 as 58.7. (*See, e.g.*, CX 74 at 4). Additionally, he also listed Saturday routes for Atwell under Contract A1 at 52.7 miles. (CX 74 at 4-5). The prevailing-wage issue was determined on a week-to-week basis. *Id.* Initially, he used an IRS rate of 36 cents per mile. (Tr. 188). He later used the appropriate rate for each year, instead of just 36 cents. (Tr. 191-92; *see also* (CX 74)).

Examining the pay tables Hickey provided, Delavan determined that Respondents had paid in excess of the prevailing wage and, in the column labeled "Miscellaneous," he included extra payments the employees received from Respondents. (Tr. 189). He took the amount of overpayment and divided it by the hours each employed worked during the pay period, and determined this equaled 14 cents. *Id.*<sup>7</sup> Delavan then multiplied this 14 cents credit by the hours worked in each work week, and subtracted this amount from the gross back wage calculations. *Id.* This led to the determination of what wages were owed for each workweek. *Id.*

Delavan's calculations were subsequently modified after he acquired more information. (Tr. 190). The modifications reflected the variation of the route listed under Contract A1 into the

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<sup>7</sup> The figure of 14 cents appears to be the average, as some of the figures come out to less than 14 cents. Since the parties have stipulated to Delavan's calculations, I will accept them.

miles driven, the use of the actual IRS standard business rate for each year versus a flat rate of 36 cents, and the 16 days Atwell drove Hickey's vehicle. (Tr. 192). The purpose of these modifications was to make his calculations more accurate and fair. (Tr. 191).

Delavan testified that he used the standard business rate because it took into consideration depreciation, oil, gas, and other things. (Tr. 189-90). He also testified that this rate was likely conservative given the employees' driving conditions and the constant start and stop that the vehicles went through in delivering the mail. (Tr. 190). Delavan said that it was common to use the IRS rate whenever an employer failed to compensate an employee for vehicle usage for the employer's benefit. *Id.* However, on cross-examination, he admitted that he could not personally think of any specific cases by name where this method had been utilized. (Tr. 215). Although the IRS rate charitable rate takes into account actual expenses<sup>8</sup>, Delavan testified it was inappropriate to apply that rate because the work was not performed in the service of charity. (Tr. 212). He was also unaware of any investigations where the charitable rate was used. (Tr. 239).

In addition to the prevailing wage violations, Delavan also concluded that Atwell and Tackett were also owed holiday pay by Respondents, despite the fact that they were both part-time employees at the time of this violation. (Tr. 193). However, he took into consideration the employees' shorter hours when he calculated the wages owed to them. *Id.* Specifically, he compared their hours to an employee who worked longer hours and developed a ratio. (Tr. 193-194, CX 5 at 9, 10, 14). Using this formula, he determined the amount of holiday pay owed to Atwell and Tackett.

After his initial investigation ended, Delavan concluded that Respondents continued to pay improper wages. (Tr. 197). He stated that based on records Atwell provided to him after his initial investigation, Hickey had yet to come into compliance with the requirements of the Act. (Tr. 197-200).<sup>9</sup> Delavan took the number of hours worked from Atwell's records, and multiplied it by the applicable prevailing wage. (Tr. 197). He then saw how much the employees were being paid by Respondents, and apparently compared it to the days they drove, the miles they drove, and the routes they drove. *Id.* He admitted that these documents were not sufficient for purposes of calculating back wages. (Tr. 198).

Delavan had a final conference with Hickey to discuss his findings and conclusions. (Tr. 200). He explained to her how he arrived at the amount of back wages owed through the use of the IRS rate. *Id.* He also explained her obligations to pay holiday pay regardless of whether the employee was full or part-time. (Tr. 200-01). He testified that Respondents were receiving an indirect kick back because the employee's wages were reduced by vehicle expenses on vehicles used for Respondents' benefit. (Tr. 236).

Delavan testified that debarment was appropriate under the circumstances presented in this case. (Tr. 203). According to him, debarment is appropriate in any case involving a

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<sup>8</sup> According to IRS publications, the rate may be used in charitable work when someone cannot determine the actual costs they incurred. *See, e.g.*, Rev. Proc. 2000-48 at 11 (year 2001); Rev. Proc. 2001-54 at 10 (year 2002) (both available at <http://www.irs.gov/taxpros/article/0..id=156624.00.html>).

<sup>9</sup> The documents Delavan examined are Complainant's Exhibits 9, 73, and 75. (Tr. 197-200).

violation of the SCA unless unusual circumstances are present, and even then, it may still be warranted if there is “culpable conduct on behalf of the employer or a willful violator.” *Id.* Delavan said he reviewed information showing Hickey received money for gas, oil, and insurance but never gave any to her employees. *Id.* Furthermore, he also believed Respondents’ conduct was willful because of the gas receipts produced by employees showing they had purchased gas, but were never reimbursed. *Id.* Finally, he also believed debarment was necessary because Respondents failed to come into compliance despite understanding what was required of them to do so. (Tr. 204).

## **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 the SCA, with all violations totaling \$16,974.24. Although I find that Respondents have violated the SCA, I also conclude that they have met their burden and established unusual circumstances were present which would prevent their debarment.

### ***Respondents as Responsible Parties***

Administrator argues that Respondents are responsible parties within the meaning of the Act. *See* 29 C.F.R. §4.187(e)(1) (defining responsible parties). Respondents do not contest that they are responsible parties for purposes of the Act. Hickey testified that she is president of Affordable Data Services, Inc. and was responsible for hiring, firing and managing employees. (Tr. 24); *see also* (ALJ 1). I find that Respondents are responsible parties within the meaning of the Act.

### ***Service Contract Act Violation***

After reviewing the record *in toto*, I find that Respondents violated the SCA by failing to pay prevailing wages and holiday pay. 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 with the Federal Government and the District of Columbia. 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.

### **Prevailing Wage Violations**

I find that Respondents violated the SCA by failing to pay their employees the minimum prevailing wages during the time period covered by the Wage and Hour investigation. Twenty-nine C.F.R. § 4.165(a)(1)-(2) governs minimum wage payment requirements, and states 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).

Administrator alleges that Respondents violated the SCA by failing to pay Atwell, Martin, and Armer their prevailing wages because they had to use their own vehicles to deliver mail, but were never reimbursed for their vehicle expenses. Administrator has cited no specific statutory or regulatory provision directly addressing this situation. However, he relies upon the portion of 29 C.F.R. §4.168(a) which provides that wage requirements “will not be met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts” or “where the employee fails to receive such amounts free and clear because he ‘kicks back’ directly or indirectly to the employer or to another person for the employer’s benefit the whole or part of the wage.” *See* Administrator’s Proposed Findings of Fact, Conclusions of Law, and Supporting Brief (“Administrator’s Supporting Brief”) at 8-9.

Administrator argues that Respondents’ practice of making the employees pay for their own vehicle expenses served as an indirect kick back of their wages. Respondents counter that the employees received their wages free and clear, and that in any event, they had an agreement with Respondents concerning vehicle expenses. Additionally, Respondents point out that their employees were receiving \$14 an hour in wages, which was 64 cents more than what was required by the wage determinations incorporated into the contracts; this, Respondents argue, was sufficient to cover vehicle expenses. *See* Respondent Charlotte Hickey’s Post Trial Brief (“Respondent’s Post Trial Brief”) at 1-2.

I find that the Respondents’ practices effectively reduced the wages paid to the employees. Respondents correctly point out that the employees received more than the hourly rate that the contracts required (i.e. \$14 instead of \$13.36). However, the employees then had to turn around and spend a portion of this money on expenses for vehicles used for Respondents’ contractual obligations. In turn, Respondents had to pay nothing for equipment that was being used for their benefit, apart from the small addition to the hourly wages paid. Such a scenario was clearly not envisioned under the contracts, as the Statements of Specifications mandated that Respondents “provide” the vehicles to be used. (CX 28). As such, there was an indirect kick back of wages because the employees’ wages were diminished by vehicle costs, while Respondents received the use of vehicles at little or no cost to them.

I reject Respondents' arguments that an agreement existed concerning vehicle expenses. Hickey was the only witness to testify that an actual agreement existed. The only evidence she presented of the agreement was a letter signed by her and Armer saying that they had reached an agreement concerning vehicle compensation, which apparently memorialized a verbal agreement. (CX 63). The letter indicated that the vehicle owner, Armer, warranted that her vehicle was in sound condition and she would fully indemnify for any loss or damage to the vehicle, apparently through the provision of insurance, but the letter did not state any specifics as to the compensation to be paid. (See CX 63). While Armer did not dispute the existence of this agreement, she did not elaborate upon its terms, other than to acknowledge that she (like Atwell and Martin) deducted mileage expenses from her income tax, thereby saving on her taxes. (Tr. 250-53). Atwell and Martin not only testified that no such agreement was in place, but that vehicle expenses also played a role in their decision to quit. (Tr. 43, 96; see also CX 10). I conclude that there was no formal agreement in place wherein the employees would be permitted to deduct vehicle expenses off their income taxes in lieu of receiving compensation. While Armer may have reached an agreement with Respondents, the terms of that agreement are unclear.

Even assuming *arguendo* that Respondents had an agreement with employees as Respondents allege, my decision to hold Respondents liable would not change. Respondents have not cited any authority that would permit a reduction of wages in exchange for an employee being able to deduct vehicle expenses off of their income taxes. Additionally, the Act specifically prohibits any contractor from paying less than the wages (and fringe benefits) owed them. See 41 U.S.C. §353(c); see also 29 C.F.R. §§ 4.159, 4.163. An employee's agreement to take lesser wages would not alter that provision. Thus, Respondents would not be permitted to enter into this type of agreement if it resulted in a reduction in the employees' wages.

I also reject Respondents' contention that the extra money they paid the employees was adequate compensation. Respondents contend that the employees were paid \$14 an hour, 64 cents more than what was required by the contracts during the pertinent period. Respondent's Post Trial Brief at 1-2. However, examining the pay tables provided by Hickey herself demonstrates that they were not being paid this much. To the contrary, while still being paid more than what was required by the applicable wage determinations, they were actually receiving around \$13.50 an hour. (See CX 7).<sup>10</sup> Both Romans and Delavan testified that this extra money was insufficient to compensate the employees for their "out of pocket" expenses. As discussed below, I have accepted the Administrator's back-wage calculations method. Therefore, using his method, I find the extra amount the employees received did not constitute adequate compensation under the subject contracts.

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<sup>10</sup> Respondents' brief says that the employees received \$14 an hour, which would be 64 cents more than what was required under the wage determinations. (CX 12). Applying this information to Hickey's pay tables demonstrates they were not actually paid \$14 an hour. For example, looking at Atwell's compensation for the pay period beginning on June 14, 2002 (CX 7 at 1), shows that the "Miscellaneous" column amount is \$7.95. However, if Atwell's hours for this pay-period, 56.1, are multiplied by 64 cents, the result is \$35.90. Indeed, dividing the "Miscellaneous" column by the hours worked for Atwell equals 14 cents. This demonstrates that Atwell was actually paid \$13.50 an hour for this pay period, which is still above the wage requirements, but not \$14 as Respondents claim. Similar results are produced with the other employees' pay during the other pay periods as well.

### Calculation of Back Wages

Having determined that Respondents violated the SCA, I am left with determining how the back-wages should be calculated. Although the parties stipulated that Delavan's calculations were correct (Tr. 185), Respondents did not stipulate that it was proper for him to use the IRS standard business mileage rate to make these calculations. Based upon the evidence presented, and my own research, I conclude that the standard business mileage rate may be used to calculate back wages owed to the employees when actual expense records are unavailable.

Administrator argues that the business mileage rate is appropriate to use because it takes into consideration such things as gas, oil, insurance, and depreciation. Administrator's Supporting Brief at 13. He also argues that if anything, this rate is actually a conservative estimate given the driving conditions involved. *Id.* at 14. Delavan testified that this rate was regularly used in Wage and Hour investigations to calculate vehicle expenses. (Tr. 190). In his post-hearing brief, Administrator cited a portion of Wage and Hour's Field Operations Handbook, which states:

(a) *As an enforcement policy, the Internal Revenue Service (IRS) standard business mileage rate...may be used (in lieu of actual costs and associated recordkeeping) to determine or evaluate the employer's wage payment practices for FLSA purposes. The IRS standard business mileage rate...represents depreciation, maintenance and repairs, gasoline (including taxes), oil, insurance, and vehicle registration fees. In situations where the IRS rate changes during the investigation period, the applicable rates should be applied on a pro-rata basis.*

(b) *The IRS standard business mileage rate may be used in lieu of actual costs for FLSA purposes whether or not the employee will be able to take a deduction on his or her tax return for the business use of the employee's car.*

Administrator's Supporting Brief at 12 (citing Field Operations Handbook, Rev. 641, 30c15 (June 30, 2000) (emphasis in original)).<sup>11</sup> Although the above excerpt concerns the Fair Labor Standards Act ("FLSA"), Administrator cites regulations under the Service Contract Act indicating provisions of the FLSA may be used to interpret cases arising under the Act. Administrator's Supporting Brief at 12, n.9 (citing 29 C.F.R. §4.168, 29 C.F.R. §4.101(c)). Administrator also argues this interpretation is entitled deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Administrator's Supporting Brief at 12.

Respondents argue that the standard business rate is inappropriate because it does not take into account actual costs. As such, Respondents could actually have to pay more than they should be required to. In fact, in their post-hearing brief, Respondents demonstrates how the application of the standard business rate would force Respondents to pay less than what the applicable wage determinations require, even if they were to make no profit on the subject contracts. Respondent's Post Trial Brief at 2-3. For example, under Contract 66, Respondent

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<sup>11</sup> Chapter 30 of the handbook is available at [http://www.dol.gov/esa/whd/FOH/FOH\\_Ch30.pdf](http://www.dol.gov/esa/whd/FOH/FOH_Ch30.pdf).

showed that when the miles listed under the contract (10,031 per year) are multiplied by the standard business rate for 2001 (34.5 cents), Respondents would have to pay \$3,460.70 in mileage. Respondent's Post Trial Brief at 2. Subtracting this amount from the total amount awarded under the contract (\$24,942.58) leaves \$21,481.30. Dividing this number by the hours it would take to run the route (1,641) results in an hourly rate of \$13.09. *Id.* Of course, the applicable wage determination requires that the employees be paid \$13.36 an hour. Romans agreed that if Respondents had paid her employees \$13.09 an hour, they would have violated the SCA. (Tr. 175). Using the same formula for Contract A1 results in the employees being paid \$11.89 an hour (\$26,825 contract amount, 15,972 miles, and 1,793 hours).<sup>12</sup> *Id.* at 3.

Respondents argue that a lower rate, such as the IRS charitable rate, should be used to calculate the wages.<sup>13</sup> Tying into their argument that the charitable rate should be used,<sup>14</sup> Respondents also contend that the Administrator should only seek costs which he or Respondents' employees can actually prove. They argue that the burden should be on the Administrator or the employees to prove actual costs, and not on Respondents to produce records of actual costs. Respondent's Post Trial Brief at 4-5. Absent proof of higher actual costs, they argue that the charitable rate would be a better estimate of the actual cost incurred by the employees in connection with the business use of their vehicles.

Although at first blush Respondent's argument is compelling, I find that the standard business rate is the appropriate rate to apply for two related reasons.

The first reason is that some deference is due to the Administrator's position taken in the Field Manual; however, the Administrator's reliance on *Chevron* is misplaced. Under *Chevron*, a tribunal may not substitute its own judgment for a reasonable interpretation of a statute made by the agency charged with administering the statute. *Chevron*, 467 U.S. at 844. In order for *Chevron* deference to be applicable, it must be shown that the agency in question was granted rulemaking authority by Congress and the rule at issue was promulgated pursuant to that authority. *United States v. Mead Corp.*, 535 U.S. 218, 226-27 (2001). Where a rule fails to meet this standard, it may nevertheless be accorded some weight, whatever its form, because of the expertise of the agency in administering the statute. *Id.* at 234 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

Administrator has pointed to nothing suggesting that the above portion of the Field Manual was promulgated pursuant to any kind of rulemaking authority.<sup>15</sup> Further, unlike the regulations relating to the SCA appearing in title 29 of the Code of Federal Regulations, the Manual was adopted without notice and comment rulemaking. As such, it is not entitled to the higher deference in accordance with *Chevron*. Nevertheless, given that the Administrator is responsible for enforcing the FLSA and the SCA, the views expressed in the Field Manual are entitled the lesser *Skidmore* level of deference. Therefore, I find the Administrator's reliance

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<sup>12</sup> As noted above, when Respondent Hicks submitted a Cost Estimate on Contract A1, she sought specific reimbursement for vehicle costs as well as employment costs. After adding total vehicle costs of \$5087.70, employment costs of \$27,314.64, and contractor wages of \$1,101.04, the total amount was \$33,503.38.

<sup>13</sup> The charitable rate is set at a fixed rate of 14 cents per mile. 26 U.S.C. §170(i).

<sup>14</sup> See footnote 8, *supra*, for information regarding charitable rates.

<sup>15</sup> I note that the Secretary of Labor has rulemaking authority under the SCA, 31 U.S.C. §353(a), and the Walsh-Healy Public Contracts Act, 31 U.S.C. §§ 38, 39.

upon the business standard rate in enforcement of FLSA claims, and by proxy SCA claims, to be somewhat persuasive.

In addition to the deference accorded to the Administrator's position, I also note that Wage and Hour investigations appear to have used this rate for some time. Delavan testified that it was common for Wage and Hour investigators to use the rate in their calculations. (Tr. 190). Additionally, my research has uncovered at least one SCA decision where the standard business rate was utilized in calculating back wages. *See In the Matter of Carr*, 1999-SCA-2, slip op. at 5-6 (ALJ Jan. 4, 2000). *Carr* is of limited authoritative value since it is a decision of another administrative law judge and the holding at issue has not been supported by any reasoning or analysis. Additionally, the only defense that the Respondent in *Carr* raised was that he was released from his obligations under the contract because he subcontracted it to someone else. *Id.* at 6. This argument was rejected. *Id.* Nevertheless, this decision substantiates Delavan's assertions that this method has previously been used in Wage and Hour investigations.

Although records of actual costs would be ideal (and preferable), such records were simply not available. Respondents erroneously contend that Administrator should have the burden of producing the records. In *Ancor, Inc. v. Brock*, 780 F.2d 897, 900 (11th Cir. 1986), a decision involving the SCA, the U.S. Court of Appeals for the Eleventh Circuit relied upon the Supreme Court's decision in a FLSA action wherein the Court held that the employee merely had to demonstrate that he worked for, and how much he worked for, the employer and was improperly compensated (*quoting Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The burden would then shift to the employer to produce evidence showing the precise amount of work performed or evidence that would defeat a reasonable inference as to the amount of work performed by the employees. *Id.* To hold otherwise would penalize the employees and permit the employer to subvert its statutory duty to maintain records. *Id.* Applying this logic, the *Brock* court upheld the Administrator's determination of the amount owed by an employer in violation of the SCA. *Id.* at 901. I find this decision persuasive in the instant context and reject Respondents' contention that it was Administrator's duty to produce the employees' records.

Having considered all the arguments made by the parties, I find that it was appropriate for the Administrator to apply the IRS standard business mileage rate for purposes of determining the amount of back wages owed by Respondents. I therefore find that Respondents owe a total of \$16,666.17 in out of pocket expenses to their employees.

### **Holiday Pay Violations**

In addition to seeking back wages, the Administrator has sought recovery of \$308.07 in holiday pay. The specific breakdown is as follows: \$156.31 under Contract A1 to Atwell; \$77.48 to Atwell under Contract 66; and, \$74.28 under Contract A1 to Tackett. (CX 5 at 9, 10, 14; Tr. 192). Hickey testified that someone had informed her she did not have to pay Tackett, a part-time employee, any holiday pay. (Tr. 66). Additionally, Hickey testified that she did not pay Atwell holiday pay when she was a substitute driver, as she was only working two days a week during that time period. (Tr. 64-65). Thus, Respondents' failure to pay Atwell holiday pay was based on the same rationale used to deny Tackett holiday pay, i.e., part-time status. That rationale is untenable.

Under the provisions of the SCA, no distinction is to be made between full-time and part-time employees for purposes of compensation, including wage and fringe benefit determinations, in the absence of an express limitation. *See* 29 C.F.R. §4.165(a)(2); *see also* 29 C.F.R. §4.176(a); *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). However, a part-time employee is only entitled to fringe benefits in an amount which is proportionate to the amount of time spent in the covered work. *See* 29 C.F.R. §4.176(a). For holiday pay, a part-time employee working a regularly scheduled workweek of 16 hours would be entitled to 2/5 of the holiday pay due a full-time employee. 29 C.F.R. §4.176(a)(2). The regulations also provide that a part-time employee's holiday pay *may* be discharged by examining how many hours he worked the week preceding the holiday, and paying that employee in proportion to what a full-time employee would make. 29 C.F.R. §4.176(a)(3). No other methods of calculating holiday pay for part-time employees is presented, but the "may" language in the regulation suggests that other methods may be used for calculation purposes.

Delavan determined a "ratio" after comparing the hours worked by each part-time employee versus an employee who worked longer hours. (Tr. 193-94). In his calculations, Delavan appears to have taken the hours the part-time employee worked during each holiday period, and divided them by hours that was worked by an employee who worked longer hours during the same period.<sup>16</sup> (*See* CX 5 at 9, 10, 14). He then multiplied that result by 4. After doing this for every holiday worked, he added the results and multiplied it by the wage, \$13.36, to determine how much holiday pay was owed to the employee.

Delavan did not explain the origin of the 4 multiplier used in each holiday pay violation calculation. However, it appears that 4 is meant to represent the hours of holiday pay to which the "full-time" (longer-hour) workers were entitled.<sup>17</sup> It appears that Delavan used the hours each part-time employee actually worked during the holiday week, using a variant of the method suggested in 29 C.F.R. §4.176(a)(3).<sup>18</sup> He testified that he "compared their hours they would work, their shorter hours, to an employee who worked longer hours." (Tr. 192-93).<sup>19</sup> Some of the figures are difficult to interpret. Although Respondents stipulated to the back-wage calculations (but not gross amounts due), it is unclear whether they stipulated to holiday pay calculations as well. (*See* Tr. 185, 194). However, I find that the method used by Delavan is consistent with the regulations and there has been no showing that any omissions were material.

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<sup>16</sup> None of the employees worked eight-hour days or forty hour work weeks. The regular or "full time" employees, actually worked varying schedules that included in the neighborhood of four or five hours per day, four to six days per week.

<sup>17</sup> The attendance sheets indicate 4 hours holiday pay for the regular ("full time") employees. (CX 6). However, the pay sheets indicate that the employees actually received \$52 for each holiday, which works out to slightly less than four hours (when hourly basic pay and hourly fringe benefits are included).

<sup>18</sup> The pay tables provided by Hickey break down the hours worked by each employee on a monthly basis. (CX 7). Employee work sheets (indicating time of departure and arrival) were also provided as evidence; they are annotated with the first name or initials of the employee. (CX 6).

<sup>19</sup> For example, in calculating the amount of holiday pay to which Beau Tackett was entitled for Christmas 2002 (pay period ending December 26, 2002), Delavan compared the 5.3 hours Tackett worked during that week with the 19.91 hours worked by "AA" (Addie Atwell), who was then working "full time," and found Tackett entitled to 1.04 hours (.26 x 4) of holiday pay. (CX 5, p. 8, 14; CX 6). However, the derivation of some of the other figures is unclear.

As such, I find that Atwell is owed \$156.31 under Contract A1 and \$77.48 under Contract 66; \$74.28 is owed under Contract A1 to Tackett.

### ***Debarment***

Having determined that Respondents are in violation of the SCA, I must now address whether they should be debarred from receiving government contracts for three years. While not entirely clear, the Administrator seeks to debar Respondents because of their pre- and post-investigation behavior. For the reasons set forth below, I find that debarment is not warranted in the instant case.

Forty-one U.S.C. § 354(a) mandates that any person or firm found to have violated the SCA be ineligible from receiving 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. § 4.188(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 . . . exist, a variety of factors must still be considered."<sup>20</sup> *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

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<sup>20</sup> 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.

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)).

### **Aggravating Factors/Culpable Conduct**

The Department asserts that Respondents should be subject to mandatory debarment under the first prong because Respondents engaged in conduct of a “deliberate, culpable, and aggravated nature.” Administrator’s Supporting Brief at 5. Thus, it appears that the Administrator is arguing that Respondents conduct could be classified as either a willful violation of the SCA or as culpable conduct.

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 willful blindness” in addressing what constitutes “culpable conduct.” *Elaine’s Cleaning Serv., Inc. v. U.S. Dept. 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 noted 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, 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.<sup>21</sup> 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

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<sup>21</sup> Respondent in *Hugo Reforestation* also had a long history of violations, a factor not present in the case at hand.

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.

I first address the Administrator's contention that Respondents behavior was willful or deliberate. With respect to Hickey's pre-investigation conduct, Administrator points to Hickey's testimony wherein, inter alia, she considered vehicle expenses when she placed her bid on the contracts, Administrator's Supporting Brief at 18 (*citing* Tr. 30-32); wherein she recognized she was required to provide vehicles and insurance, *id.* (*citing* Tr. 44, 54-55; CX 28); and wherein she obtained gasoline receipts from employees, but never reimbursed them. *Id.* (*citing* Tr. 47-48; CX 57). Administrator also places great emphasis on a letter Hickey sent to the United States Postal Service Distribution Networks Office stating that she was paying her employees wages required under the wage determinations "in addition to vehicle compensation." (CX 60).

Administrator next focuses on Hickey's post-investigation behavior, specifically, her failure to come into compliance. Administrator argues that Respondents, after being informed of her violations by Romans and Delavan, failed to properly reimburse employees for their vehicle expenses using either the IRS standard business rate or actual expenses. Administrator's Supporting Brief at 19. Hickey testified she began paying her employees (and specifically, Atwell) \$7 a day in vehicles costs after the investigation. (Tr. 74).<sup>22</sup> Administrator contends that this is too insufficient to reimburse the employees for their expenses. Administrator's Supporting Brief at 19. Administrator also notes that Hickey never paid Tackett or Atwell the holiday pay I have already determined they are owed, even after being told she had to. *Id.*

Given the circumstances surrounding this matter, there has been no showing that Hickey willfully or deliberately sought to violate the SCA. According to Hickey's testimony, her local distribution network accepted copies of insurance agreements that her employees had entered into with their own insurance companies. (Tr. 57-58). Prior to the investigation, Hickey never received word from the distribution center that her behavior was improper, nor was she advised that she needed to pay a specific mileage rate to her employees. (Tr. 72-73). Hickey also testified that she was aware of other local contractor employees who used their own vehicles. These circumstances negate the element of intent because they led her to conclude that these actions were acceptable within the confines of the SCA.

Nor does the amount of compensation Respondents paid their employees demonstrate willful or deliberate conduct. Prior to the investigation, Hickey not only paid her employees the minimum amount required under the wage determinations, she also paid them in excess of the determinations. (*See, e.g.,* CX 7). Nothing in the wage determinations mentioned the proper

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<sup>22</sup> This statement is slightly self-contradictory as she also testified that Armer only received an additional \$1.15 above the wage-determinations after the investigation. (Tr. 74).

amount of compensation for vehicle expenses and, as noted above, the distribution center did not advise her of the amount required. The fact that she was paying more than what was required of her demonstrates a lack of intentional or deliberate behavior. Hickey's post-investigation behavior does not indicate intentional or deliberate behavior, because although she disagreed with the investigators' assessment that she should pay actual costs or the IRS business rate, she nevertheless increased the amount of pay her employees received and paid them \$7 daily for vehicle expenses. This was true even though legal questions concerning whether she actually violated the SCA remained unresolved.

Finally, the existence of unresolved legal questions, and the fact that Respondents took action based upon a claim of right, also negates a finding that the violations constituted willful or deliberate conduct. That conclusion is particularly applicable to the post-investigation period. While Respondents' legal defenses to the holiday pay issue are less clear, the amounts involved are relatively small and are not a basis for changing my overall analysis.

Having addressed allegations that Respondents' violation of the SCA was willful or deliberate, I next address whether their conduct could be considered culpable. Although not entirely clear, in assessing whether Respondents' behavior was culpable conduct, Administrator appears to rely upon the same behavior he used to argue their behavior was willful or deliberate. As my discussion above makes clear, more than negligence is required to show culpable conduct. For the same reasons that I concluded Hickey's behavior was not willful, I conclude her behavior did not amount to culpable conduct.

This first prong also requires that I examine any past SCA violations Respondents may have committed. Nothing in the record indicates Respondents have past violations.

### **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).

Administrator argues that Respondent Hickey's actions after her interview with Romans and Delavan demonstrated her unwillingness to come into compliance with what they stated was required of her. Specifically, Administrator relies on the fact that Hickey, after her conference, did not pay her employees the standard business rate or actual expenses; rather, she paid them \$7 a day. According to the Administrator, this is insufficient to cover the employees' daily vehicle expenses.<sup>23</sup> Administrator's Supporting Brief at 19-20. Additionally, Administrator argues that Respondents failed to cooperate in the investigation because she did not initially turn over records concerning the post-investigation period. *Id.* at 20. Hickey did eventually (on April 28,

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<sup>23</sup> Assuming the employee drove the 52.7 mile (Contract A1) route, the daily payment of \$7 would amount to 13 cents per mile; for the 33.2 mile (Contract 66) route, it would amount to 21 cents per mile.

2006) turn over these requested records to Administrator, who in turn produced the records for this tribunal by way of letter dated May 22, 2006.<sup>24</sup> (CX 76, 77).

With respect to arguments concerning Respondents failure to pay the amount due, there was a genuine issue of law concerning whether Respondents actually violated the SCA, and therefore owed back wages. Nothing in the contract suggests that Hickey was prohibited from allowing the employees to drive their own vehicles and receive extra compensation in lieu of receiving compensation for vehicle expenses. Neither party, nor my research, has produced any authority directly addressing this situation. Thus, until my decision outlined above, it was entirely reasonable for Respondents to believe the Administrator's position was incorrect.

Another mitigating factor in Respondents' favor is the uncertainty concerning the use of the IRS standard business rate for purposes of calculating back wages, which Respondents argued was improper. Romans and Delavan testified that this rate was proper to use largely because it was impossible to determine what actual costs were, which they would have accepted. As noted above, Respondents have suggested that the IRS charitable rate would better represent actual costs than the IRS business rate. In her Post Trial Brief (at pages 3 to 6), Respondent Hickey argues that the proper rate would be actual costs, but whatever rate is used, it cannot be the IRS business rate. As mentioned above, the charitable rate is used in charitable work for purposes of reimbursement when actual costs cannot be determined. However, it does not take into consideration depreciation and insurance, two things the standard business rate does.<sup>25</sup> Despite the fact I have rejected the charitable rate's use, nevertheless, in light of the fact actual costs would have been accepted by the investigators, it was an entirely plausible argument, as was Respondent's argument that the IRS business rate was not an appropriate rate under the circumstances of this case. This is especially true since the only apparent legal authority supporting the Administrator's positions is a page from their Field Manual and a single ALJ decision, which I have already noted is of little precedential value.

In addition to legal questions, there was also a practical one. As discussed above, the Respondents demonstrated how the application of the standard business rate would have resulted in a reduction of the amount of minimum wages required under the wage determinations. Thus, even had Respondents utilized the standard business rate, they would not have been in compliance with the SCA because they would have been incapable of paying the proper minimum wage due under the contracts. As such, compliance was impossible under either method unless Respondents were to use their own funds for contract costs.

Administrator also argues that Respondents' failure to produced post-investigation records, i.e., after June 30, 2003, shows their failure to cooperate with the investigation.<sup>26</sup> Additionally, Administrator also argues the post-investigation records Respondents produced did not allow them to conclude whether employees were reimbursed for vehicle expenses.

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<sup>24</sup> The records consist of: (1) a document detailing a check payment from the United States Postal Service for what appears to be Contract A1; and (2) pay tables detailing payment to Respondents' employees from July 1, 2003, to February 15, 2006.

<sup>25</sup> As outlined above, Respondents included these items in their cost estimates.

<sup>26</sup> Counsel from the Solicitor's office admitted at the hearing that she had received sufficient documents for the actual investigation period. (Tr. 10).

Administrator's Supporting Brief at 20. This statement is somewhat puzzling given Delavan's testimony that he was able to determine that Respondents had failed to come into compliance post-investigation. (Tr. 204). In any event, since there was a clear question as to whether or not Respondents actually violated the SCA, they were within their right to question the relevance of documents that went to the issue of debarment. Additionally, the Administrator also initially sought post-investigation records for purposes of calculating wages owed after the investigations period. (Tr. 9-10). However, as I explained above, I would not permit evidence on this issue. Not turning over records for a transgression not even listed in either the original or amended complaint was certainly permissible. Since the Wage and Hour investigators were able to conclude that Hickey had not come into compliance after the investigation, I find that the records she produced after the investigation were sufficient.

### **Other Factors**

Having determined that Respondents satisfy the first two prongs of the unusual circumstances test, I must determine whether other factors were present which would support a finding against debarment.<sup>27</sup> For reasons set forth below, I find other factors were present which lead me to conclude debarment is unwarranted.

First, no evidence was ever produced that Respondents have been investigated for other violations of the SCA up until the instant litigation. This is particularly noteworthy given Hickey's thirty-year history with government contracts. (Tr. 23).

Second, Respondents did not impede the investigation through the withholding of records. As I discussed in greater detail above, Respondents raised legitimate concerns involving the records that were requested of them; and they promptly turned the records over after being ordered to do so. Furthermore, Administrator's investigation was obviously not impeded since the Wage and Hour investigators were able to conclude Respondents were not in compliance post-investigation with the records provided to them.

Third, there was clearly a *bona fide* legal issue of doubtful certainty in the instant case; in fact, there were several of them. The central issue was whether Respondents' practice even violated the SCA as there was no language in the contracts prohibiting an arrangement whereby employees would receive some form of compensation for using their own vehicles (here, an average of 14 cents an hour). Further, a legal question existed as to whether or not the IRS standard business rate was appropriate to use for purposes of calculating back wages. This was only compounded by the investigators' admissions that actual costs would have been appropriate, and the IRS charitable rate may be used in lieu of actual costs.

Addressing the fourth consideration under this prong, I conclude Respondents did their best to ensure compliance given the numerous unsettled legal issues present in this case. Not only did they pay employees more than what was required under the wage requirement prior to the investigation, Hickey also increased the amount she paid her employees after the investigation. No guidance was given to her when she entered into the contracts, and the guidance given to her during the investigation was largely unsupported by any legal authority.

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<sup>27</sup> These other factors are listed in footnote 20.

The fifth factor, the extent of the impact on any employees of any past or present violations, also weighs against debarment. Although this is a closer question than the other factors to consider under the third prong, I note that Respondents produced evidence that the employees were still receiving a yearly net profit after they deducted vehicle expenses associated with this job. That does not, of course, change my holding that the employees should be compensated for costs associated with their vehicles and their holiday pay.

The last factor to consider under this prong, whether the sums due were promptly paid, also weighs against debarment. Given the legal issues present in this case, it cannot easily be said that there were sums actually due until my adjudication of the issue. Due to the uncertainty of the issues involved, the Administrator could have simply waited until this matter had been adjudicated before requiring Respondents to pay back wages. As I noted above, there were some compelling arguments presented which could have feasibly led me to rule in Respondents favor, which meant the Respondents would not have had to pay the employees more than what had already been paid to them. As for the holiday pay violations, given their small amount in comparison to the amount of back wages sought, I conclude these violations were *de minimis*. This of course does not change my ruling that the violations were improper.

Because Respondents have met their burden in proving unusual circumstances were present, I conclude that debarment is unwarranted.

### CONCLUSION

I find that Respondents have violated the provisions of the SCA with respect to the employees' primary wage and holiday pay owed to them and I adopt the Complainant's calculations of the amounts due. However, I find unusual circumstances were present which prevent me from finding that Respondents should be debarred.

### ORDER

**IT IS HEREBY ORDERED** that Respondents will transfer to the Department of Labor for purposes of disbursement \$16,974.24 for violations of the Service Contract Act; and

**IT IS FURTHER ORDERED** that Respondents shall not be debarred from accepting government contracts based upon the above violations.

**A**  
PAMELA LAKES WOOD  
Administrative Law Judge

Washington, D.C.

**NOTICE:** To appeal, you must file a written petition for review with the Administrative Review Board (“ARB”) within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). *See* 29 C.F.R. § 6.20. The Board’s address is:

Administrative Review Board  
United States Department of Labor  
Room S-4309  
200 Constitution Avenue, NW  
Washington, DC 20210

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue.

The ARB’s Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b). Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).