

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 12 February 2009**

**CASE NO.: 2006-SCA-00009**

**In the Matter of**

**VGA INCORPORATED, d/b/a VGA, INC., and  
VINCE AKINS,  
Respondents.**

Appearances:

Emelda Medrano, Esq.; U.S. Department of Labor, Office of the Solicitor; Chicago, IL  
For the Complainant

Steven D. Campen, Esq.; Law Offices of Steven Campen; Frederick, MD  
For the 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 Vince Akins and VGA, Incorporated, d/b/a VGA, Inc., individually and jointly, alleging that Respondents violated certain provisions of the McNamara-O’Hara Service Contract Act (“SCA” or “Act”), 41 U.S.C. § 351 (2006) *et seq.*, and the implementing regulations under 29 C.F.R. Part 4. The Administrator alleges that Respondents violated the labor standards provisions of their contracts, as well as Sections 2(a)(1) and 2(a)(2) of the Act and 29 C.F.R. § 4.6 by failing to pay service employees minimum monetary wages and fringe benefits.

The Administrator alleges that Respondents underpaid 34 of their employees, who were employed pursuant to two government contracts. The Administrator alleges that these practices resulted in underpayments of SCA prevailing wages and benefits totaling \$49,467.19. (*Administrator’s Post-Hearing Brief* [“*Administrator’s Brief*”] at 2.) The Administrator acknowledges that Respondents paid the allegedly due back wages and are not seeking reimbursement for the funds. (*Id.*; see Tr. 22.)<sup>1</sup> Accordingly, the Administrator solely requests

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<sup>1</sup> Complainant Administrator’s exhibits are referenced herein as “AX” followed by the exhibit number. Respondents’ exhibits and Administrative Law Judge’s exhibits are cited as “RX” and “ALJ,” respectively, followed by the exhibit number. References to the transcript are noted as “Tr.” followed by the page number on which the cited material appears.

that Respondents be debarred and prevented 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 Detroit, Michigan, on June 5, 2008, during which all parties were given the opportunity to call and examine witnesses and introduce pertinent exhibits. Both parties briefed the pertinent issues following the hearing.

The findings of fact and conclusion of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

### **PROCEDURAL HISTORY**

The original Complaint in this matter was filed on February 22, 2006. The Complaint alleged that Respondent Vince Akins was the president of Respondent VGA, Inc. and was, “at all times, acting directly or indirectly in [VGA, Inc.’s] interest in relation to its employees and [was] responsible for the day-to-day employment policies and practices of the corporation.” (*Complaint* at 1-2). The Complaint further alleged that, beginning February 20, 2004, Respondents and the United States Government entered into two contracts – numbered V553P-9383 and V553P-9392 – in excess of \$2,500, which relied on service employees, and which were subject to the provisions of the SCA and its implementing regulations. (*Complaint* at 2). The Administrator alleged in the Complaint that, during the period of the contracts’ performance, Respondents failed to pay the service employees the minimum monetary wages as required by the contracts, Section 2(a)(1) of the SCA, and Section 4.6 of the Regulations.<sup>2</sup> *Id.* The Complaint also alleged that Respondents failed to pay their employees amounts due for fringe benefits, as required by the contracts, Section 2(a)(2) of the SCA, and Section 4.6 of the Regulations. *Id.* at 2-3.

Slevin and Hart, P.C., represented Respondents during the initial phase of the proceedings. On March 15, April 13, and May 12, 2006, Respondents moved for enlargements of time in which to file an Answer. Through counsel, Respondents averred that Vince Akins was “gravely ill,” “diagnosed as suffering from cancer,” “undergoing chemotherapy,” and unable to participate in the development of the case. All three requests were granted, and Respondents filed their Answer on September 15, 2006, in which they admitted or denied each of the allegations within the Complaint. Specifically, Respondents admitted the following: Vince

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<sup>2</sup> Section 8(b) of the Act defines “service employee” as:

[A]ny person engaged in the performance of a contract entered into by the United States and not exempted under [listed exemptions], whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity . . .); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

41 U.S.C. § 357(b) (2006).

Akins was president of VGA, Inc., acting in its interest and responsible for its day-to-day employment practices; Respondents VGA, Inc., and Vince Akins were engaged in the above-specified contracts; and the contracts were effected through the use of service employees. (*Answer* at 1). Respondents denied that they failed to pay employees the required back wages and fringe benefits. *Id.* Respondents stated in their Answer that all monies allegedly owed to the Department of Labor were paid as requested, and that unusual circumstances, as defined by 29 C.F.R. 4.188, exist and relieve Respondents from debarment. (*Answer* at 2). Attorney Thomas J. Hart appended the following cover letter to Respondents' Answer:

Pursuant to the commitment made by Respondents in their last request for an enlargement of time to file an Answer, we are timely filing the enclosed Answer to the Complaint lodged by the Regional Solicitor in the above captioned matter. However, Mr. Vince Akins, the individual respondent and principal owner of VGA, Inc. remains gravely ill. Mr. Akins has been diagnosed with, and is being treated for, a malignant brain tumor. He was, therefore, not able to assist in the preparation of the Answer . . . .

Thereafter, the case was referred to the undersigned administrative law judge, who issued a Notice of Assignment and Prehearing Order on May 29, 2007. As required by the Prehearing Order, the Administrator's Prehearing Statement (which provided specifics concerning the alleged violations and recommendations concerning the trial) was filed on July 23, 2007. The Administrator suggested that the hearing be conducted in Detroit in late October 2007.

By letter of August 9, 2007, through attorney Jeffrey S. Swyers of Slevin and Hart, P.C., Respondents sent correspondence to this tribunal, which stated in pertinent part:

As you will no doubt recall, we had previously advised you that our client, Mr. Vince Akins, the individual Respondent in this matter who owns the respondent employer VGA, Inc., has been receiving treatment for a malignant brain tumor. Last Friday, we were informed that Mr. Akins' condition has deteriorated drastically and that he now is close to death. We were further informed that Mr. Akins has returned to his native Nigeria in order to die at home.

Without access to, and the active assistance of, Mr. Akins, we are at an extreme disadvantage in representing the company (and, of course, Mr. Akins). Mr. Akins was the individual who made all decisions relevant to the company's pay practices. The company now has other managers; but, none were responsible for, or participated in, the decisions that are the basis of the Secretary's complaint. We assume, but do not yet know for certain, that the company will be sold (probably via asset sale).

On these stated bases, Respondents indicated that they were trying to work out an agreement to stay the proceeding until the immediate future of VGA, Inc. was determined and would seek a status conference following those discussions. However, as nothing further was filed, this matter was set for a hearing by a September 27, 2007, Notice of Hearing and Prehearing Order.

On October 31, 2007, Attorney Thomas J. Hart of Slevin and Hart, P.C., submitted the following:

This is to advise you and opposing counsel that Slevin & Hart, P.C. has withdrawn from representation of the Respondents in this matter. We have advised the Respondents of the scheduling order [relating to the original hearing date of December 11, 2007] issued by the Court.

By facsimile of November 8, 2007, counsel for the Administrator requested a conference call.

I issued an Order on November 13, 2007, that canceled the hearing scheduled for December 11, 2007. In the same Order, I scheduled a conference call in lieu of the hearing, to be held on the same date. I accepted the October 31, 2007, Slevin and Hart correspondence as a notice of intent to withdraw, filed pursuant to 29 C.F.R. § 18.34(g)(1). I declined to grant the request at that time, however, as no explanation for the withdrawal had been offered, the circumstances of withdrawal were unclear, and Respondents had not yet obtained alternate counsel.

A conference call was held among the parties on December 11, 2007. In addition to the undersigned and her law clerk, the following individuals were parties to the call, which was transcribed by a court reporter: Emelda Medrano, counsel for the Department of Labor; Kim Parker, VGA corporate counsel; James Williford, an attorney retained by VGA, Inc. to facilitate the possible sale of corporate assets; and Jeffrey Swyers, an attorney employed by Slevin and Hart. During the conference call, Ms. Medrano indicated that Respondent Vince Akins was difficult to contact; she also recited information she received indicating that Mr. Akins may have been sentenced to prison, contrary to the representations made the Respondents and their counsel.<sup>3</sup> Considering the Respondents' lack of litigation counsel and the reticence of Respondent Akins, I issued an order on December 12, 2007, staying proceedings, establishing a date for a future conference call, and permitting the law firm of Slevin and Hart to withdraw as counsel.

Attorney Steven D. Campen filed a Precipae of Appearance, in which he notified the tribunal that he would serve as counsel for the Respondents, on February 19, 2008. In accordance with the December 12, 2007, Order, Mr. Campen, Ms. Medrano, and Ms. Parker participated in a telephonic conference call on February 20, 2008. During the call, Mr. Campen confirmed that Respondent Akins was in federal prison in Allenwood, Pennsylvania; Mr. Campen stated that Respondent Akins would not agree to debarment, as it would hamper a pending asset sale. (*Transcript of February 20, 2008, Conference Call* at 11-13). It was not

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<sup>3</sup> After it became apparent that Respondent Akins was incarcerated and not residing in Nigeria, attorneys from Slevin and Hart did not attempt to amend or correct their assertions regarding his health (which was the basis for several extensions) or his alleged return to Nigeria, nor did they provide a current address for Mr. Akins. However, I permitted Slevin and Hart to withdraw and did not pursue the matter further when advised that Mr. Akins could be served through VGA, Inc. *Transcript of December 11, 2007 Telephone Conference* at 19-20. I specifically note that Mr. Campen, Respondents' present counsel, was not yet involved with the proceedings at the time and had no part in the representations (or misrepresentations) regarding Respondent Akins' health or future plans.

clear whether Mr. Akins was, in fact, suffering from a malignant brain tumor – the basis on which Respondents were accorded numerous extensions of time during the early stages of the proceedings. *Id.* at 15-16. As memorialized in the February 20, 2008, Order Lifting Stay and Setting Conference Call, a tentative deposition schedule was agreed upon during the telephonic conference, and a future conference call date was set.

A third telephonic conference call was conducted on April 16, 2008. In light of the agreement by counsel, I scheduled a hearing for June 5, 2008, and I issued an Amended Notice of Hearing and Prehearing Order on the same day.

On May 28, 2008, this tribunal received the parties' Joint Prehearing Statement. (ALJ 1). The Statement contained a witness list, a list of exhibits to be introduced, and a series of agreed-upon stipulations. *Id.*

A hearing was held in Detroit, Michigan, before the undersigned on June 5, 2008. Investigator Angela Telang testified for the Administrator; Leon Coulbary, a manager employed by Respondent VGA, Inc., testified for the Respondents. (*See* Tr. 22, 93). At the hearing, the parties' Joint Prehearing Statement was admitted into evidence as ALJ 1. (Tr. 5-6). Administrator's Exhibits 1 through 11 were received into evidence, and Administrator's Exhibit 12 was received for impeachment purposes only. (Tr. 8-10, 29). Respondents' Exhibit 3 was received into evidence, and Respondents' Exhibits 1 and 2 were admitted for impeachment purposes only. (Tr. 10-11). At the close of the hearing, the record was kept open for the sole purpose of allowing the parties to submit briefs or written closing arguments within 60 days of receipt of the transcript. (Tr. 142).

Pursuant to two requests for extensions of time, the parties submitted their closing briefs. The Administrator's brief was filed on September 12, 2008, and the Respondents' brief was filed on September 15, 2008. On October 10, 2008, the Administrator filed its Reply to the Respondents' Post-Hearing Brief. All post-hearing submissions are accepted as timely filed, and the record is now complete.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **JOINT STIPULATIONS/ISSUES**

By way of the Joint Prehearing Statement, the parties stipulated to the following:

1. The SCA applies to this proceeding;
2. At all times relevant to these proceedings, Respondent Vince Akins owned and operated Respondent VGA, Inc.;
3. On February 20, 2004, Respondents entered into contracts with the United States Department of Veteran's (sic) Affairs for the purpose of providing non-emergent transportation;
4. Respondents entered into contracts numbered V553P-9383 and V553P-9392 ;
5. Contract V553P-9383 was for the period March 7, 2004 through March 6, 2005, with renewal periods of March 7, 2005, to March 6, 2008;

6. Contract V553P-9392 was for the period April 26, 2004, through April 25, 2005;
7. Contracts V553P-9383 and V553P-9392 contained the provisions of the SCA and the regulations issued thereunder at 29 C.F.R., Part 4;
8. Contracts V553P-9383 and V553P-9392 contained the Wage Determination Number 1994-2273, Revision number 25;
9. Wage Determination Number 1994-2273, Revision number 25 includes the hourly wage rates for Dispatchers, Shuttle Bus Drivers, and General Clerks;
10. Wage Determination Number 1994-2273, Revision number 25 includes the benefits for health and welfare and vacation and holiday pay for all SCA-covered employees;
11. On April 6, 2000, Respondent Vince Akins and VGA Enterprises were debarred from soliciting any government contracts;
12. The services specified in contracts V553P-9383 and V553P-9392 were furnished in the United States, by Respondents, to the government of the United States, through the use of service employees, as defined by Section 8(b) of the Act.

(ALJ 1).

The only issues remaining for resolution are:

- Whether Respondents violated the provisions of the SCA by failing to pay their employees minimum monetary wages and fringe benefits; and, if so,
- Whether Respondents should be debarred from soliciting any further government contracts pursuant to Section 5(a) of the Act.

## FACTS

### Contract V553P-9383

Contract V553P-9383 (“Contract 9383”) is a contract between Respondent VGA, Inc., as signed by Respondent Vince Akins, and the VA to provide non-emergent medical transportation for patients of the John D. Dingell Medical Center in Detroit, Michigan, effective for the period March 7, 2004 through March 6, 2005. (AX 7a). Contract 9383 included three pre-priced option renewal years. *Id.*

In addition to the terms of performance, the contract contained the following:

In compliance with the [SCA], and the [implementing regulations], this clause identifies the classes of service employees expected to be employed under the contract and states the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C. 5341 or 5332.

Contractors **shall** be able to pay U.S. Department of Labor Wage Rates as specified in this contract.

Wage Determination No.: 1994-2273  
Revision No.: 25  
Date of Last Revision: 06/05/2003

Dispatcher, Motor Vehicle  
Shuttle Bus Driver

*Id.* (emphasis in original).

The portion of the contract incorporating Wage Determination No. 1994-2273 (Rev. 25) states that a motor vehicle dispatcher's minimum hourly wage rate is \$16.15 and the minimum hourly wage rate for a shuttle bus driver is listed as \$15.71.<sup>4</sup> *Id.* Further, it dictates that:

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING  
BENEFITS:

HEALTH & WELFARE: \$2.36 an hour or \$94.90 a week or \$409.07 a month[.]

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year . . . .

*Id.* (emphasis in original).

### **Contract V553P-9392**

Contract V553P-9392 ("Contract 9392") is also a contract between Respondent VGA, Inc., as signed by Respondent Vince Akins, and the VA to provide non-emergent medical transportation for patients of the John D. Dingell Medical Center in Detroit, Michigan, effective for the period April 26, 2004, through April 25, 2005. (AX 7b). Contract 9392 contained terms for one pre-priced option renewal year. *Id.* Contract 9392 contains the same SCA wage determination, health and welfare, and benefits provisions that are contained in Contract 9383, quoted above. *See id.*

### **Testimony of Angela Telang**

Angela Telang, an investigator for the United States Department of Labor ("DOL"), Wage and Hour Division, was called as the Administrator's first and only witness to testify at the

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<sup>4</sup> Although the wage determination itself merely lists "16.15" and "15.71" as the wage rates without respect to a unit of time, the regulations make clear that "[t]he standard by which monetary wage payments are measured under the Act is the wage rate per hour." 29 C.F.R. § 4.166.

hearing. (Tr. 22). At the time of the hearing, Ms. Telang had served as an investigator for approximately 10 years and received training relating to the investigation of government contract compliance. (Tr. 23). Ms. Telang investigated Respondents from March 2004 to January 2005, ultimately generating a “narrative report,” which she provided to Respondents on March 31, 2005. (Tr. 26). During the course of her investigation, she conducted interviews and reviewed documentation including payroll records, timecards, timesheets, and contract documents, all of which were provided by Respondents. (Tr. 26-27). Some of the documentation provided by Respondents was incomplete, most notably, the tendered copy of the applicable contracts. (*See* Tr. 27; AX 7; AX 7a; AX 7b). At the time the documents were submitted to Investigator Telang, Respondents did not question their accuracy or authenticity. (Tr. 27).

Under the contracts, Respondents were hired to provide non-emergent patient transportation services for the VA Medical Center in Detroit, Michigan. (Tr. 29; AX 7a; AX 7b). Respondents’ contracts with the VA contained wage determinations, and Ms. Telang used the documents provided by Respondents as means of establishing the wages and benefits Respondents were actually paying their employees vis-à-vis the wage and benefit requirements stated in the contract. (Tr. 31). Upon their arrival and departure from work, employees would “punch in” and record their hours via timecard. (Tr. 32-33). Ms. Telang stated that, until her August 2004 interview with Respondent Akins, Respondents had been paying their employees “straight-time” for all hours worked (i.e. base pay with no adjustment for overtime). (Tr. 33). Investigator Telang instructed Respondent Akins that the employees must be paid overtime wages for hours worked in excess of 80 hours per two-week pay period. (Tr. 33-34). According to Investigator Telang, at this point, the work hours indicated on the employees’ time cards matched those which were being summarized in the Respondents’ payroll records. However, Ms. Telang testified that, after her initial interview with Respondent Akins and subsequent to her instructions, “the employees ended up still working the same amount of hours, but now [Respondents] were only submitting, you know 80 or 85 hours a pay period . . . for processing.” *Id.* That is, although some employees recorded an excess of 85 hours of work per 80-hour pay period, Respondents would only report 80 to 85 hours, and the employees would only be compensated for 80 to 85 hours of work. *See id.* Respondents did not adhere to a uniform 80-hour, 10-day pay period. Respondents sporadically recorded pay periods as short as seven work days (i.e. 56 work hours), or as long as 12 work days (i.e. 96 work hours).<sup>5</sup> (Tr. 43, 70-71).

After conducting a review of Respondents’ payroll records, Investigator Telang produced a detailed report that sets forth the back wages and benefits due to each of Respondents’ employees. (Tr. 40-49; *see* AX 10). Ms. Telang found that Respondents owed \$87,095.58 for 36 employees’ unpaid wages and benefits, a finding she reported to Respondents in a March 8, 2005, letter.<sup>6</sup> (Tr. 51; *see* AX 11). This amount was paid by Respondents and distributed to the employees. (Tr. 52).

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<sup>5</sup> Initially, Respondents paid their employees based upon semi-monthly pay periods, so the straight-time hours could be 80, 88 or 96 depending upon the number of work days in the pay period. (RX 3). Subsequently, Respondents transitioned to weekly pay periods of 40 hours each. (AX 10).

<sup>6</sup> The \$87,095.58 sum included overtime wages due under the Fair Labor Standards Act, in addition to those wages which were required under the SCA. (Tr. 51-52; RX 3).

Ms. Telang indicated that Respondent Akins, in his capacity as chief executive of Respondent VGA, Inc., was dilatory and combative throughout the investigation process but ultimately provided the requested information. (Tr. 54-55). She testified that Respondent Akins stated “it was [unfair] that he should have to pay holiday pay to the employees, because the VA was not paying it to him in his contract, therefore, he couldn’t afford it.” (Tr. 53). Similarly, according to the investigator’s testimony, Respondent Akins stated in an interview that he should not have pay employees for vacation time accrued with the predecessor contractor. *Id.*

On cross-examination, Investigator Telang stated that she based her conclusions on the records provided to her by Respondent Akins. (Tr. 56). She observed some employees using the time card system, and she stated that she concluded the records were accurate. *Id.* She stated that Mr. Darrel Amore, one of Respondents’ employees, alerted her to the discrepancies between the hours that the employees were actually working and the hours being reported for payroll purposes.<sup>7</sup> (Tr. 62). Ms. Telang concluded that dispatchers who were listed as “salaried” employees should be paid at an hourly rate, but she conceded that two dispatchers did not record work hours. (Tr. 65, 83). Ms. Telang attempted to reconstruct the missing work-hours based on interviews with the dispatchers. *Id.* Likewise, another employee’s work hours were calculated pursuant to his statement that he was required to attend ten to fifteen two-and-a-half-hour meetings. (Tr. 67-68). At the hearing, Investigator Telang was not certain whether she relied on interviews or documentation to determine when employees began working for Respondents’ predecessor company. (Tr. 73).

Ms. Telang acknowledged that, for purposes of her computations, she calculated each pay period individually, and she did not afford “credit” for employees’ additional work hours Employer reported in later pay periods. (Tr. 81).

Ms. Telang testified that, to her knowledge, no SCA-related complaints had been brought against Employer since January 2005, when her investigation ended. (Tr. 84).

### **Testimony of Leon Coulbary**

Respondents’ sole witness was Leon Coulbary, employed by VGA, Inc., as a manager. (Tr. 94). Mr. Coulbary testified that Respondents’ predecessor, Majestic Noble Transportation, abandoned the contract and did not assist Respondents during the contract’s transition. (Tr. 95). Mr. Coulbary testified that Respondents hired many of Majestic Noble’s employees because “we just didn’t have the time to do our proper hiring . . . because they abandoned the contract.” (Tr. 96). Messrs. Clarence Sims and Darrel Amore were among the managing employees Respondent hired. (Tr. 97-98).

Mr. Coulbary testified to widespread employee misfeasance. Specifically, he stated that employees were “clocking in for other people” and fraudulently reporting work hours. (Tr. 99). According to Mr. Coulbary, one employee would report in to work, work for a brief time, and then “hide” under an overpass or elsewhere for two or three hours prior to resuming work duties. (Tr. 100-01). He testified that another employee frequently recorded hours that he simply had

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<sup>7</sup> Although appearing in the transcript as “Amore,” the employee’s name was listed as “Amour” in Ms. Telang’s investigative report, RX 3.

not worked (Tr. 101-05). According to his testimony, two employees – who were listed by Investigator Telang as being owed back wages – were caught at home during times they later reported as work hours. (Tr. 106). Further, he testified that some employees were collecting unemployment benefits while on Respondents’ payroll. (Tr. 111).

Mr. Coulbary testified that in December 2004, Respondents began re-interviewing and rehiring employees. (Tr. 109). He stated that, during the rehiring process, Respondents discovered that Mr. Amore was falsifying his work-related timekeeping, and that he was operating a bounty-hunting business during work-hours that were later billed to Respondents. *Id.* According to Mr. Coulbary, Mr. Amore would use company vehicle for non-company purposes. *Id.* Mr. Coulbary said that the Mr. Amore would recruit other employees and pay them through Respondent VGA, Inc. (Tr. 110).

Respondents implemented a tracking system four months into the contract (i.e. approximately July 2004) and installed cameras observing the time clocks nine months into the contract (in approximately December 2004). (Tr. 115). As a result of these efforts and the rehiring initiative, several employees were reprimanded or terminated. (Tr. 115-16). Of the 36 employees listed as being owed back wages in Administrator’s Exhibit 11, only five remain employed by VGA, Inc. (Tr. 116). Mr. Coulbary testified that Respondents’ predecessor provided Respondents with no documentation or employee records and that “[t]here’s no way of really telling” which, if any, of the records provided by Respondents to investigator Telang were accurate representations of the employees’ work. (Tr. 116). He stated that Investigator Telang did not attempt to contact him during the course of her investigation. (Tr. 118).

On cross-examination, Mr. Coulbary acknowledged that payroll records were not within his purview, but that they were kept by the Maryland office, where Respondent Akins was based. (Tr. 121). Mr. Coulbary stated that, at the time of investigation, Respondent Akins served as the company’s representative and that, at the time of hearing, Respondent Akins was incarcerated. (Tr. 122). He clarified that some of the employee malfeasance to which he had previously testified took place after the close of the investigation. (Tr. 122-23). Further, Respondent Akins never spoke with Mr. Coulbary regarding the veracity of the employee timecards. (Tr. 128). Mr. Coulbary stated that he understood VGA, Inc., to be the successor in contract to Majestic Noble, and that he was not aware of any efforts on the part of VGA, Inc., to determine the employees’ dates of employment with Majestic Noble. (Tr. 128-29).

### **Employment Records and Investigation Data**

The record contains nearly 500 pages of payroll records given to Investigator Telang by Respondents during the course of the investigation. (AX 8). These records contain an individualized payroll summary for each of Respondents’ employees, covering late 2004 and early 2005. *See id.* The Administrator has also submitted copies of the employee timecards Ms. Telang referenced when conducting her investigation and copies of the wage and hour timesheets reported by Respondents for payroll processing. (AX 9).

The Administrator has also submitted Investigator Telang’s detailed wage computations for each of Respondents’ employees. (AX 10). As explained by Ms. Telang, the calculations

were subdivided into the following four areas of wage analysis: (a) hourly employees who were due overtime pay for the period of March 8 through July 16, 2004; (b) hourly employees who were due additional pay for unpaid hours, overtime, and fringe benefits for the period of July 17 to September 30, 2004; (c) salaried, non-exempt employees for the period of March 8 through September 30, 2004; and (d) all employees who were due unpaid hours and fringe benefits from October 1, 2004 to January 29, 2005. *Id.* The Administrator calculated the wages owed to each employee for unpaid prevailing wages, health and welfare benefits, holidays, and vacation days.

Investigator Telang also prepared a summary of the unpaid wages owed to each of 36 employees. (AX 11). The summary lists the name of each employee who is owed wages, the employee's address, the period for which the employee is owed wages, and the gross amount the employee is owed. *Id.* In total, the summary states that Respondents owed \$87,095.58 in unpaid wages and benefits. *Id.*

### **Investigator Telang's "Narrative Report"**

Respondents submitted a copy of the "narrative report" of the Wage and Hour investigation, as prepared by Investigator Telang on March 31, 2005 relating to Respondent VGA, Inc.; the copy provided was redacted to exclude the names of certain individuals and the recommendations made. (RX 3). The report states that Respondent VGA, Inc. had been previously investigated for SCA violations. *Id.* According to the report's description, Respondent was previously investigated four times – of those investigations, two resulted in findings that the SCA had been violated, two did not. *See id.* The report lists the executives employed by Respondent VGA, Inc.; states that Vince Akins is the firm's owner and operator, as well as its president; summarizes the terms of the applicable contracts; and identifies four other SCA contracts Respondent VGA, Inc., currently administers. *Id.*

Investigator Telang's narrative report identifies several violations of the SCA. First, it states that "[t]he firm failed to pay for all hours worked, paid 4 non-exempt [d]ispatchers a salary that did not [compensate] them for all hours worked, and paid 2 [d]ispatchers a 'training wage' that was less than the required prevailing wage for that job classification." *Id.* Specifically, it states that Employer failed to pay \$23,263.36 in SCA prevailing wages to 34 employees. *Id.* The report also reiterated Ms. Telang's conclusion that Respondents failed to pay \$26,203.83 in fringe benefits (health and welfare pay, holiday pay, and vacation pay).<sup>8</sup>

In addition to the narrative findings, the report contained the following chart:

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<sup>8</sup> The report also indicated that Respondents failed to pay their employees \$37,628.37 for overtime under the Fair Labor Standards Act, but that matter is not currently before me.

Period of Investigation	SCA – [prevailing wage] <sup>9</sup>	SCA – [health & welfare]	SCA – Holiday	SCA – Vacation	FLSA Overtime	Total
3/7/04 – 9/30/04	\$17,738.76	\$1,174.10	\$ 6,979.74	\$1,256.80	\$35,252.45	\$62,401.85
10/1/04 – 1/29/05	\$ 5,524.57	\$1,014.80	\$13,264.79	\$2,513.60	\$ 2,375.92	\$24,693.68
	\$23,263.36	\$2,188.90	\$20,244.53	\$3,770.40	\$37,628.37	\$87,095.56
	(sic)					
<b>3/7/04 – 1/29/05</b>	<b>\$23,263.36</b>	<b>\$2,188.90</b>	<b>\$20,244.53</b>	<b>\$3,770.40</b>	<b>\$37,628.37</b>	<b>\$87,095.56</b>
	----- <b>(All SCA back wages = \$49,467.19)</b> -----					

(RX 3).

Investigator Telang also described recordkeeping violations in the report. She noted that Respondent VGA, Inc. failed to record the hours worked by salaried non-exempt dispatchers, failed to record time taken for half-hour unpaid lunch breaks, and failed to maintain employment dates for purposes of holiday and vacation pay. *Id.* Additionally, she noted:

[Respondent] had 2 sets of hours worked records: time cards with punches from an actual time clock and time sheets that were completed by the Operations Manager, Mr. Amour (sic). Initially, while [Respondent] was simply paying straight-time for all hours, the time cards and the time sheets were both correct as to the hours worked. Then, once [Respondent] made attempts to reduce the overtime hours, the time sheets were no longer correct. At this point, the employees were still punching in on the time clock and the time cards reflected an accurate account of the hours worked. However, the Operations Manager was instructed to keep hours at 85 per pay period and he started to reduce the hours worked that he reported on the time sheets that were sent to [Respondent’s headquarters in] Maryland for payroll processing.

*Id.*

### Previous Debarment

The parties stipulated that, on April 6, 2000, Respondent Akins was debarred from soliciting any government contracts. (ALJ 1). They have also stipulated that a company called “VGA Enterprises” was debarred on the same day. *Id.*

The Administrator has submitted an administrative law judge’s Decision and Order dated April 6, 2000, debarring Respondent Akins and VGA Enterprises for violations of the SCA.<sup>10</sup>

<sup>9</sup> Bracketed text indicates the expanded form of abbreviations used by Investigator Telang when compiling her table. The amount of unpaid SCA prevailing wages set forth on the table totals \$23,263.38, not \$23,263.36 (and the Total should have been \$87,095.53, not \$87,095.56). Additionally, based on the figures in Administrator’s Exhibit 10, the total amount is a few cents off and differs from the above. This typographical/transcription error is *de minimis*, however, and because Respondents have already disbursed the full amount of back wages pursuant to Ms. Telang’s notice, it does not substantively factor into my decision regarding whether or not Respondents violated the SCA.

<sup>10</sup> That Order was amended on May 9, 2000, to reflect that Respondent Akins and VGA Enterprises had partially paid the disputed wages. (AX 4).

(AX 4). Additionally, the Administrator has produced a bid for government contracts, signed by Respondent Akins on VGA Enterprises' behalf, dated October 1, 2001. (AX 6).

## **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. The Act provides:

Every contract . . . entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in Section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality . . . . In no case shall such wages be lower than [the "minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended . . . ."].

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality . . . . Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor . . . .

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

41 U.S.C. § 351(a)(1)-(2); 41 U.S.C. § 352(a).

Section 5(a) of the Act deals with debarment resulting from its violation:

The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act.

41 U.S.C. § 354(a).

### **Respondents as Responsible Parties**

As a threshold matter, I find that each respondent, Vince Akins and VGA, Inc., constitutes an individually and jointly liable “responsible party” for violations of the Act.

“An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations [of the SCA], individually and jointly with the company . . . .” 29 C.F.R. § 4.187(e)(1). The regulations note that the Act imposes personal liability for violations of “any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts.” 29 C.F.R. § 4.187(e)(2).

The evidence and the parties’ stipulations demonstrate that Vince Akins was the chief executive of VGA, Inc., at the time the violations occurred. He negotiated and signed the contracts, and he represented the company during the course of the government investigation. He was in control of VGA, Inc., and he was responsible for the organization’s employment practices. In their Answer to the Administrator’s Complaint, Respondents admitted that Vince Akins was at all relevant times acting in the interest of VGA, Inc., and that he was responsible for VGA’s day-to-day employment practices and policies. (*Answer* at 1-2). Accordingly, I find that each Respondent, Vince Akins and VGA, Inc., jointly and individually, is a “responsible party” within the meaning of the Act and regulations.

### **Violations of the Act**

The Administrator has established that Respondents failed to pay their employees the minimum wages as required by the contracts and the SCA. When Ms. Telang first commenced her investigation, her analysis revealed that employees were not being paid the mandatory “time-and-a-half” pay for work in excess of 80 hours per pay period, as required by the Fair Labor

Standards Act [“FLSA”]. (Tr. 26). Nevertheless, at the time, the employees’ reported work hours were accurately reflected in the Respondents’ payroll summary. (Tr. 32-33). After Investigator Telang’s August 2004 interview, however, Respondents’ payroll practices changed.

Through meticulous examination of Employee timecards, review of payroll records, and, in some cases, employee interviews, Investigator Telang was able to reconstruct the hours each employee worked and compare them to the hours for which they were compensated. (Tr. 27, 31-34; AX 8; AX 9; AX 10). Ms. Telang first reviewed the timecard documentation, and she recorded each of Respondents’ employees’ daily work hours on the standardized Department of Labor Wage Transcription and Computation Sheet. (AX 9). Based on those figures, she compiled a summary of each employee’s weekly work hours. *Id.* By comparing the work hours she had tabulated to the time listed on the timesheets (i.e. the time for which the employees were compensated), she discovered that Respondents were paying their employees for less time than the employees had actually worked.<sup>11</sup> Briefly put, they were reporting 80 to 85 hours per pay period for each hourly employee, regardless of the actual amount of time the employee had worked. Respondents did not pay their employees for the additional, non-reported hours.

The timecards and payroll information substantiate Investigator Telang’s computations. Considering only the unpaid prevailing wages under the SCA, 34 employees were owed a total of \$23,263.38 in unpaid SCA prevailing wages, as specified in the contracts. (See AX 10, AX 11). Respondents correctly note that, of those 34 employees, four dispatchers were paid a salary rather than a fixed hourly wage and did not utilize timecards. (Tr. 63-64; *Respondent’s Trial Memorandum of Points and Authorities [“Respondent’s Brief”]* at 6-8). Ms. Telang determined that these employees could properly be considered under the “Dispatcher, Motor Vehicle” prevailing wage determination, and in light of the absence of timecards, she calculated weekly hours based on estimations supported by interviews with the salaried employees. (Tr. 63-66). Respondents question the veracity of the employees’ representations and note that the investigator’s computations of these four employees’ work hours were based on estimations rather than documentary evidence. (See *id.*; *Respondent’s Brief* at 6-8). However, the dispatchers’ unpaid non-overtime base wages total only \$8,295.57. (AX 10). Even assuming *arguendo* that these four employees’ work hours were improperly calculated, 30 employees were still owed \$14,967.81 in SCA-related prevailing wages alone. Respondents’ failure to compensate these employees according to the terms of the wage determination contained in the contract constitutes a violation of the Act.

The Administrator also substantiated the claim that Respondents failed to pay their employees the mandatory “health and welfare” benefits owed under the terms of the contracts. Specifically, Respondents were obligated to pay “\$2.36 an hour or \$94.40 a week or \$409.07 a month” in health and welfare pay. (AX 7a; AX 7b). Respondents are not liable for fringe benefits relating to overtime hours; they are only obliged to pay health and welfare benefits for up to a maximum of 40 work hours per week. See 29 C.F.R. §§ 4.172, 4.175(a). At the outset of

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<sup>11</sup> Most frequently, Respondents would compensate their employees for 80 to 85 hours worked in a two-week pay period, despite the fact that many employees worked more than 80 to 85 hours. However, after October 1, 2004, Respondents began paying employees at varied intervals: pay periods ranged from one to two weeks as they transitioned to one-week pay periods. (See footnote 5 above.) Investigator Telang’s notations and computations reflect this consideration. (See AX 8; AX 9; AX 10).

the investigation, during the period of early March to late September 2004 when the time cards matched the hours reported by VGA, Inc., Respondents paid appropriate health and welfare benefits to their employees. (See Tr. 68-69; AX 10). However, Investigator Telang's testimony and the documentary evidence of record establish that, thereafter, Respondents sporadically varied the length of the employee pay periods, which ranged from seven to twelve work days (i.e. 56 to 96 work hours). (Tr. 43, 70-71; see AX 8). In a normal, ten-work-day pay period, an employee's work time in excess of 80 hours would also exceed the 40 weekly hours for which Respondents must pay associated health and welfare benefits. During the extended pay periods, however, it was possible for employees to work in excess of 80 "straight-time" hours, as some pay periods were up to 12 work days (i.e. 96 hours) long. Because these irregular pay period encompassed more than ten eight-hour days, such work was not overtime in excess of 40 hours per week, and Respondents were responsible for paying the related health and welfare benefits. By failing to report the additional employee straight-time hours during the extended pay periods, as described *supra*, Respondents not only deprived their employees of the associated base prevailing wage, but also deprived them of the correlated health and welfare benefits payments.<sup>12</sup>

Respondents largely failed to abide by the contractual requirement that they allow their employees a minimum number of paid holidays as a fringe benefit. The SCA and the terms of the contracts required Respondents to provide their employees ten specified paid holidays per year and to allow at least two weeks of vacation per year, which increased with the employees' length of prior service. (AX 7a; AX 7b). "A full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours unless a different standard is used in the fringe benefit determination . . . ." 29 C.F.R. § 4.174(c)(1). The record establishes that Respondents did not accord their employees holiday pay for the nine holidays that occurred during the course of Ms. Telang's investigation. Holidays appearing on the timesheets transmitted to Respondents' Maryland office for payroll processing are conspicuously marked as "**HOLIDAY**," and the holiday hours are not included in Respondents' payroll computations. (AX 9) (emphasis in the originals). Further, Respondent Akins stated during the course of the interview that "he didn't feel he, it was fair that he should have to pay holiday pay to the employees, because the VA was not paying it to him in his contract, therefore, he couldn't afford it." (Tr. 53). Indeed, Investigator Telang's investigation revealed that, "if you did not work during the holiday, you were not paid at all."<sup>13</sup> (RX 3). During the first phase of the investigation, in mid-2004, Respondents were advised of their obligation to accord holiday pay to their employees, but even after such notice, they failed to comply. *Id.* Although Respondents could have substituted any of the specified holidays with "another day off with pay in accordance with a plan communicated to the employees involved," there is no evidence of such a

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<sup>12</sup> Respondents point out, and Investigator Telang admitted, that in some instances, some employees were paid health and welfare benefits relating to overtime hours, resulting in overpayments. (Tr. 68-69); *Respondents' Brief* at 7. Respondents paid fringe benefits on an hourly basis, computed at the end of each pay period. (See AX 8). Even if Respondents were provided a credit for these overpaid health and welfare benefits, there has been no showing that there would be no underpayments overall with respect to this category of violations.

<sup>13</sup> Respondents also violated the implementing regulations of the SCA by only paying their employees straight-time wages for work done on contractually specified holidays. The regulations clearly state that "[u]nless a different standard is used in the wage determination, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours or be furnished with another day off without pay." 29 C.F.R. § 4.174(c)(2).

plan in the record. (AX 7a; AX 7b). Respondent's failure to afford employees specified paid holidays is a violation of the terms of the contract and a violation of the Act.

Finally, the Administrator alleges that Respondents violated the Act by failing to provide additional paid vacation time to employees who had more than one year of continuous service under the contracts. The wage determination provisions of the contracts state that Respondents' employees were to be awarded "2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 weeks after 15 years." (AX 7a; AX 7b). In this context, "[l]ength of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility." (AX 7a; AX 7b). In addition to the language set forth in the wage determination, the regulations explicitly contemplate Respondents' obligations:

Unless specified otherwise in an applicable fringe benefit determination, an employer must take the following two factors into consideration in determining when an employee has completed the required length of service to be eligible for vacation benefits:

- (i) The total length of time spent by an employee in any capacity in the continuous service of the present (successor) contractor, including both the time spent in performing on regular commercial work and the time spent in performing on the Government contract itself, and
- (ii) Where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same Federal facility.

29 C.F.R. § 4.173(a)(i)-(ii). Thus, employees who had engaged in more than one year of continuous service under the contract – including time spent with Respondents' predecessor company, Majestic Noble – were due at least two weeks of paid vacation. Based on data collected from Majestic Noble and on employee interviews, Investigator Telang concluded that three employees were improperly denied vacation days and were due \$3,770.40 in resulting compensation. (AX 10; RX 3). Investigator Telang's unrefuted testimony establishes that Respondents failed to provide some of their employees paid vacation as required by the terms of the contracts.<sup>14</sup> Such a failure constitutes a violation of the terms of the contracts and a violation of the SCA.

Respondents argue that the Administrator has not proved violations of the SCA by a preponderance of the evidence. (*Respondents' Brief* at 6). I disagree.

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<sup>14</sup> I note that, while the documentary evidence supporting the investigator's conclusions regarding vacation pay is weaker than that which supports her conclusions regarding other violations, Respondents have offered no evidence directly refuting her testimony. Indeed, even if I were to assume that Ms. Telang's computations of vacation time were incorrect, it would not meaningfully impact this decision: the only issues before me are whether Respondents violated the SCA and, if so, whether they should be debarred. Other violations of the SCA have already been established, payments for the unpaid vacation time have already been made, and Respondents are not seeking reimbursement for those payments. (*See Tr.* 22).

First, they argue that Ms. Telang “did not investigate the methods used by Respondents to record the employees’ hours or whether those methods were reliable. She simply relied on the accuracy of said records. She admitted if she received false information in the form of the records, the conclusions would be questionable.” *Id.* (internal citations omitted). Respondents appear to be suggesting that, because they themselves may have provided a government investigator false or inaccurate information regarding their pay practices, their violations of the SCA should be excused. I flatly reject this contention, specifically noting Respondents’ regulatory obligation to maintain and make available accurate employment records that track employees’ rates, benefits, hours, and total wages. 29 C.F.R. § 4.6(g)(1). Failure to do so is a violation of the contract and of the regulations implementing the SCA. 29 C.F.R. § 4.6(g)(3); *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-00020 (Apr. 30, 2001).

Respondents have also attempted to excuse themselves of liability by alleging that their employees were malfeasant and dishonest throughout the course of the investigation. (*See Respondents’ Brief* at 6-8). In support, Respondents rely on the testimony of Mr. Leon Coulbary, a manager at VGA, Inc. Mr. Coulbary stated that Respondents’ employees were engaging in personal business using company resources and time, falsifying time cards, and reporting work hours during which they were actually at home. (Tr. 100-08). At the outset, I take note that Mr. Coulbary appeared to be a credible witness who testified in good faith regarding egregious employee misconduct. Mr. Coulbary specifically identified 13 individuals who were either reporting hours they did not actually work or engaging in substantial personal business using company resources and time. (*See* Tr. 97-112). Respondents were found to owe SCA-related back wages to 34 employees, however, and despite his credibility, Mr. Coulbary’s testimony provides no basis to discount the residual wages owed to the remaining 21 employees. More to the point, while Respondents rely solely on Mr. Coulbary’s testimony, the Administrator has substantiated Ms. Telang’s conclusions by offering detailed copies of her calculations and the documentary evidence on which they are based. Even if fully credited, Mr. Coulbary’s testimony is too vague to alter the calculations made by Ms. Telang and would only would impact a small portion of the violations claimed.<sup>15</sup> I find that Respondents’ mere allegations of employee misconduct do not outweigh the Administrator’s testimonial and documentary evidence that Respondents’ pay practices were in violation of the SCA, and they do not address the full extent of Respondents’ improper pay practices.

The Administrator has proven that Respondents violated the provisions of the SCA. Specifically, a preponderance of the evidence of record establishes that Respondents failed to abide by the statutorily mandated contract terms requiring them to: pay the prevailing wage in

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<sup>15</sup> Mr. Coulbary readily admitted that he was unable to provide any alternative computations:

Q. Mr. Coulbary as we, as we sit here today, you’ve heard Ms. Telang testify about the, the time records and the employee timesheets, is there any way that you can tell, as we sit here today, over that nine, 10 month period, from March, whether which records were accurate, which weren’t and what actual hours those folks were, were working?

A. There’s no way of really telling right now.

(Tr. 116). Mr. Coulbary went on to state that the payment by VGA of the alleged underpayments was a business decision, not an admission of wrong doing. (Tr. 116-117).

accordance with the wage determination appended to the contracts, pay all necessary health and welfare benefits, and afford their employees the requisite number of paid holidays. Based upon the available evidence, it also appears that Respondents failed to furnish paid vacation days to employees whose continuous service merited them under the terms of the contract. In view of my determination that Respondents have violated the SCA, the only issue remaining is whether or not Respondents should be debarred pursuant to Section 5(a) of the Act.

## Debarment

Any person or company found to have violated the SCA shall be declared ineligible to receive further federal contracts unless the Secretary of Labor recommends otherwise because of “unusual circumstances.” 41 U.S.C. § 354(a). Absent a showing of unusual circumstances, debarment is presumed under Section 5(a) when a contractor has violated the terms of the Act. *See Fields and W/D Enterprise, Inc.*, ARB No. 06-018, ALJ No. 2004-SCA-5 (Jan. 31, 2008) (“Debarment is presumed once violations of the Act have been found, unless the violator is able to show that ‘unusual circumstances’ exist.”); *Hugo Reforestation, supra*. The Secretary’s discretion to relieve a violator from debarment is limited. *Hugo Reforestation, supra*. The Administrative Review Board has noted that “Section 5(a) is a particularly unforgiving provision of a demanding statute. A contractor seeking an ‘unusual circumstances’ exemption from debarment, must, therefore, run a narrow gauntlet.” *E.g., International Services, Inc.*, ARB No. 05-136, ALJ No. 2003-SCA-18 (Dec. 21, 2007) [citations omitted]. The unusual circumstances exception applies only to situations where the violation was minor or inadvertent, or where debarment would be wholly disproportionate to the offense. *Summitt Investigative Service, Inc. v. Herman*, 34 F.Supp. 2d 16, 19 (D.D.C. 1998). It is well-established that the contractor bears the burden of proving that “unusual circumstances” exist. *Hugo Reforestation, supra*.

Consistent with the regulatory requirements, the Board has established a three-part test for evaluating the existence of “unusual circumstances” that merit relief from debarment. *See Ray’s Lawn & Cleaning Svcs., Inc.*, ARB No. 06-112, ALJ No. 2005-SCA-7 (Aug. 29, 2008); *Hugo Reforestation, supra*; 29 C.F.R. § 4.188(b)(3)(i)-(ii). First, relief from debarment is unavailable if the conduct giving rise to the SCA violations “is willful, deliberate or of an aggravated nature” or “the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records). . . .”<sup>16</sup> 29 C.F.R. § 4.188(b)(3)(i). Furthermore, relief from debarment is not warranted when a contractor has a history of similar violations, the contractor has repeatedly violated the Act, or the previous violations were serious in nature. *Id.* If any of these aggravating factors are present, relief from debarment cannot be granted. *See id.* Second, assuming none of the above-mentioned aggravating circumstances are found to exist, the contractor must establish affirmative mitigating factors, including “a good compliance history, cooperation in the investigation,

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<sup>16</sup> Culpable conduct has been defined as conduct beyond acting in a negligent manner or failing to exercise due care, but falling short of specific intent or gross negligence, and includes “a culpable want of watchfulness and diligence.” *See Hugo Reforestation, supra*, at n. 10, citing *J & J Merrick’s Enterprises, Inc.*, BSCA No. 94-09, slip op. at 5 (Oct. 27, 1994), citing *Cass v. Ray*, 556 A.2d 1180, 1181-2 (N.H. 1989). “[T]he most uniform interpretation of culpability includes an element of reckless disregard or willful blindness.” *Elaine’s Cleaning Service, Inc., v. U.S. Dept. of Labor*, 106 F.3d 726 (6th Cir. 1997).

repayment of monies due, and sufficient assurances of future compliances . . .” as general prerequisites to relief. 29 C.F.R. § 4.188(b)(3)(ii). Finally, assuming the first two elements are met, the tribunal must consider a variety of other factors before granting relief from debarment, including: whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability depended upon resolution of disputed legal issues, the impact of violations on unpaid employees, and whether the sums due were promptly paid. *Id.* The list is not exhaustive. *A to Z Maintenance Corp. v. Dole*, 710 F.Supp. 853, 855 (D.D.C. 1989).

Relating to the first prong of the “unusual circumstances” test, I find that Respondents are not entitled to relief from debarment due to aggravating circumstances.<sup>17</sup> At the beginning of the investigation, Investigator Telang informed Respondents that they were not paying the requisite amount for the overtime hours that employees were reporting, which were – at the time – accurately reflected in Respondents’ payroll records. A preponderance of the evidence establishes that Respondents then began producing altered timesheets that did not contain significant overtime hours and that did not reflect the hours recorded on the employee timecards. As a result of Respondents’ alterations, Employees were clocked in for work hours that regularly exceeded those for which they were being compensated.

Respondents allege that the violations were neither intentional nor the product of culpable neglect. (*Respondents’ Brief* at 10). I disagree. It is clear that the violations were either a result of intentional conduct or reflective of culpable neglect with respect to record keeping. In this regard, Respondents’ violations resulted from the discrepancies between the employee work hours recorded on timecards and the hours that were reported to the payroll office for employee compensation. Respondents neither ascertained the exact hours that the employees worked nor accepted the hours reflected by the timecards, and the hours reported to the payroll office (for payment of wages) were false. Even if Respondents’ false reports were the product of poor record-keeping and not of a conscious effort to obfuscate employee hours, they are still culpable. *See, e.g., Administrator v. Groberg Trucking, Inc.*, ARB No. 03-137, ALJ No. 2001-SCA-22 (ARB, Nov. 30, 2004) (when contractor kept inaccurate records of hours worked that masked its violations, its actions constituted culpable and willful conduct). The violations here were, at best, the result of Respondents’ failure to make and maintain an accurate accounting of the wages, rates, and hours of their employees, as they were required to do under the contracts. Such conduct would constitute a willful and deliberate disregard of the requirements under the SCA concerning wages and recordkeeping. *See Groberg, supra.* At worst, the violations are the product of a deliberate and willful falsification of records. Inasmuch as either alternative serves as an aggravating factor to Respondents’ violations of the Act – culpable failure to comply with recordkeeping requirements or a willful fabrication of employee hours and rates – either alternative serves as a bar to relief from debarment. 29 C.F.R. § 4.188(b)(3)(i).

Respondents also point to widespread employee malfeasance, arguing that any violations were the result of employees “who pulled the wool over the eyes of VGA’s superiors. . . .” (*Respondents’ Brief* at 10). Although Respondents’ employees may have been engaged in misconduct, the ARB has reaffirmed the regulations’ explicit statement that “a contractor cannot

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<sup>17</sup> My finding of aggravating circumstances does not include any violations based upon failure to furnish paid vacation days to employees whose continuous service merited them under the terms of the contract.

be relieved from debarment by attempting to shift his/her responsibility to subordinate employees.” 29 C.F.R. § 4.188(b)(5); see *International Services, Inc.*, *supra*. Even considering the severity of the employees’ alleged misbehavior, “[w]illful and malicious acts of the employee are imputable to the employer under the doctrine of respondeat superior although they might not have been consented to or expressly authorized or ratified by the employer.” 29 C.F.R. § 4.188(b)(5). If Respondents had questions about the Act’s coverage of their employees in light of the alleged misbehavior, they should not have unilaterally altered the employees’ reported work hours to reduce pay; rather, they should have contacted the Department of Labor to seek advice: “A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.” 29 C.F.R. § 4.188(b)(4). See also *Glaude dba D’s Nationwide Industrial Services*, ARB No. 98-81, 1995-SCA-38 (ARB, Nov. 24, 1999) (failure to seek advice from Labor Dept. to ensure pay practices are in compliance with SCA deemed to be culpable conduct.) In short, the conduct of the employees is not at issue in this proceeding; rather, the present inquiry only extends to Respondents and their compliance with the SCA-related terms of the contract.

Additional aggravating factors exist relating to Respondent Akins’ earlier violations of the Act, which may extend to VGA, Inc. as well. The parties stipulated that, on April 6, 2000, Respondent Akins and VGA Enterprises were debarred from soliciting government contracts for a period of three years. (ALJ 1; AX 4). However, on October 1, 2001, Respondent Akins submitted a bid for a federal contract, which included a certified statement that he was not presently debarred. (AX 4). Respondents have alleged that VGA Enterprises and VGA, Inc. are different entities and notes that there is no evidence that VGA, Inc. was ever debarred or even previously investigated. (*Respondents’ Brief* at 10). The record is incomplete relating to the relationship between VGA Enterprises and Respondent VGA, Inc.; however, Respondent Akins’s history of impermissibly bidding for contracts and falsely certifying his eligibility is a serious aggravating consideration that precludes relief from his debarment in the instant case. As the record establishes other aggravating factors for which each Respondent is jointly and severally liable, it is unnecessary to divine the relationship between VGA Enterprises and Respondent VGA, Inc. or to determine whether VGA, Inc. may be deemed to have had a history of previous violations.

In view of the existence of aggravating factors, it is unnecessary to consider whether there were mitigating factors, as debarment is automatic. Clearly, Respondents’ having voluntarily paid the back wages and benefits owed to their employees is a substantial mitigating factor. See 29 C.F.R. § 4.188(b)(3)(ii). Respondents are to be commended for their willingness to compensate their affected workforce and for the remedial efforts they have taken that would bear upon future compliance.<sup>18</sup> On the other hand, there are mitigating factors that are not present here, in that there was only limited cooperation in the investigation and a delay before

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<sup>18</sup> Mr. Coulbary testified that, because of concerns as to the hours the employees were actually working, Respondents incorporated vehicle tracking devices and reassessed the employability of each employee; those found to be engaged in inappropriate conduct were reprimanded or terminated. (Tr. 115-16). These efforts began several months into the contract, as discussed above.

Respondents came into compliance.<sup>19</sup> Regardless, mitigating factors alone are not enough to overcome the very strict application of debarment under the SCA where, as here, there are aggravating factors. Under the second prong of the “unusual circumstances” test: “Where these [mitigating] prerequisites are present *and none of the aggravated circumstances* [listed above] *exist*, a variety of factors must still be considered . . .” prior to granting relief from debarment. With respect to the other factors (listed above), I am inclined to agree with the Administrator that most of them tend to support debarment, despite Respondents’ argument to the contrary. (*Administrator’s Brief* at 11-17; *Respondents’ Brief* at 11). However, for the same reason that I need not consider the mitigating factors, I do not need to reach that issue either. In this instance, a preponderance of the evidence establishes that aggravating factors do exist, and, consequently, relief from debarment cannot be ordered.

### CONCLUSION

In view of the above, I find that Respondents VGA, Inc., and Vince Akins have violated the SCA and the terms of contracts V553P-9383 and V553P-9392 by failing to pay the prevailing wage in accordance with the SCA wage determination appended to the contracts, failing to pay all necessary health and welfare benefits, and not affording their employees the requisite number of paid holidays; it also appears that Respondents failed to furnish paid vacation days to employees whose continuous service merited them under the terms of the contract. Because the violations involve significant aggravating factors listed in 29 C.F.R. § 4.188(b)(3)(i), I further find that “unusual circumstances” meriting relief from debarment do not exist. As each Respondent is a “responsible party” jointly and individually liable for the violations of the SCA under 29 C.F.R. § 4.187(e)(1)-(2), I further find that each Respondent should be debarred. Accordingly,

### ORDER

**IT IS HEREBY ORDERED** that, pursuant to Section 5(a) of the McNamara-O’Hara Service Contract Act, Respondents Vince Akins and VGA, Inc., are debarred and declared ineligible to receive any contracts or subcontracts with the United States for a period of three years, commencing on the date of publication by the Comptroller General of their names on the ineligibility list.

**A**

PAMELA LAKES WOOD  
Administrative Law Judge

Washington, D.C.

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<sup>19</sup> Investigator Telang testified that Respondent Akins provided the needed documentation only after multiple requests, occasionally provided incomplete documentation, and was prone to yelling at the investigator. (Tr. 54-55; *see* AX 7 (incomplete contract provided to the investigator by the Respondents)). Also, he did not adjust his pay practices to come into compliance during the initial investigation period. (Tr. 52).

**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  
Suite S-5220  
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. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

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).