

U.S. Department of Labor

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Issue Date: 27 April 2020

Case No.: 2017-DBA-00021

In the Matter of:

Disputes concerning the payment of prevailing wage
Rates and overtime pay by:

JAMEK ENGINEERING SERVICES, INC.,
Subcontractor,

and

Proposed debarment for labor standards violations by:

JAMEK ENGINEERING SERVICES, INC.,
and **JAMES EKHATOR**, an individual,
Respondents.

With respect to laborers employed on Contract
Nos. CFDA 14-239 and CFDA 14-2369 for
painting and related work of Hamline Station
Apartments Project in St. Paul, Minnesota.

DECISION AND ORDER

This matter arises under the Davis-Bacon Act (“DBA”), 40 U.S.C. § 3141, *et seq.*, the Cranston-Gonzalez National Affordable Housing Act of 1990 (“NAHA”), 42 U.S.C. § 12701, *et seq.*, the Copeland Act, 18 U.S.C. § 874, the Contract Work Hours and Safety Standards Act (“CWHSSA”), 40 U.S.C. § 3701, *et seq.*, and their implementing regulations at 29 C.F.R. Parts 1, 3, and 5. This matter originated from a June 27, 2017 Order of Reference from the Midwest Regional Acting Administrator, Wage and Hour Division, Department of Labor (“Acting Administrator” or “Government”) alleging that James Ekhatore and Jamek Engineering Services, Inc. (collectively, “Respondents”) failed to pay their workers the prevailing wage, fringe benefits, and overtime for painting work performed on the Hamline Station Project in St. Paul, Minnesota. The Acting Administrator alleges that Respondents disregarded their obligations to their employees under Section 3(a) of the DBA and recommends that Respondents be debarred for three years.

PROCEDURAL HISTORY

The United States government contracted with Anderson Companies (“Prime Contractor”) to work on the Hamline Station Apartments Project (the “Project”) in St. Paul, Minnesota under Contract Nos. CFDA 14-239 and 12-2369. The Prime Contractor subcontracted with Jamek Engineering Services, Inc. (“Jamek”) to paint the interior and exterior of the apartment buildings. Following a labor standards investigation by the Wage and Hour Division, the Acting Administrator issued its findings on August 16, 2016. GX 1. The Acting Administrator found that Respondents violated the Davis-Bacon and Related Acts (“DBRA”) by failing to pay the prevailing wage to its employees, failing to pay employees for all hours worked, employing the incorrect ratio of apprentices and journeymen, employing unregistered apprentices and journeymen, and taking improper deductions from employee paychecks. *Id.* at 4. The Acting Administrator further found that Respondents violated the CWHSSA by failing to pay their employees overtime and violated 29 C.F.R. § 5.5(a)(3) by keeping incomplete records, failing to maintain basic payroll records, and submitting falsified payroll records. *Id.* The Acting Administrator concluded that Respondents owe \$41,709.06 in back wages to thirteen employees. *Id.*

Respondents disagreed with the Acting Administrator’s findings and requested a formal hearing on September 15, 2016. The Acting Administrator issued an Amended Opportunity to Request a Hearing on May 23, 2017. GX 2. The Acting Administrator maintained that Respondents owe \$41,709.06 in back wages: \$30,190.57 to twelve employees for work performed on the East Building, and \$11,518.49 to six employees for work performed on the West Building. *Id.* at 4-5. Respondents again requested a hearing on June 14, 2017. GX 3. Respondents assert that they do not owe any employees back wages because they paid the required fringe benefits and paid more than the prevailing wage to their employees. *Id.* at 1. Respondents further argue that they kept complete certified payroll records and that the journeyman/apprentice ratio issue was resolved by the local union and the City of St. Paul Compliance Officer. *Id.* at 2.

The case was referred to the Chief Administrative Law Judge on July 5, 2017, who issued an Order Finding Good Cause to Proceed to Hearing on December 18, 2017. This matter was assigned to me on January 24, 2018, and I issued a Notice of Assignment, Notice of Hearing, and Prehearing Order on January 30, 2018. Pursuant to a Supplemental Notice of Hearing, a formal hearing for this matter was held from September 10, 2018, through September 13, 2018, in Minneapolis, Minnesota. All interested parties were represented and afforded the opportunity to examine and cross-examine witnesses and present relevant and material evidence. I admitted Government’s Exhibits (“GX”) 1-52 and Respondents’ Exhibits (“RX”) 1-147, with GX 1-50 and RX 1-44 being admitted by stipulation. Tr.¹ at 15, 92, 103, 177, 385, 439, 737, 898. The Acting Administrator presented the testimony of Matthew Jones, Cole Metcalf, Jorge Arroyo Garcia, Maria Arroyo Garcia, Kristin Tout, Jason Crowson, and Alexander Dumke. Respondents presented the testimony of Kevin Italio, Francis Onu, Omotola Edison-Edebor, Francis Ikonagbon, Randall Schwake, Elia Stamboulieh, and James Ekhaton. I received the

¹ Citations to the hearing transcript are abbreviated “Tr.”

Acting Administrator's Post-Hearing Brief ("Br.") on November 26, 2018. Respondents did not file a brief.²

My decision in this matter is based upon the testimony at the hearing, all of the documentary evidence admitted into the record, and the post-hearing arguments.

ISSUES

At the hearing, the parties agreed that the issues for adjudication are as follows:

1. Whether Respondents failed to pay the applicable prevailing wage rates and fringe benefits to 13 of their laborers in violation of the Davis-Bacon Act, 40 U.S.C. § 3141 to 3144, the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12701, *et seq.*, and their associated implementing regulations in connection to work performed under Housing and Urban Development Number CFDA 14-239 and CFDA 14-2369;
2. Whether Respondents failed to pay their laborers for all hours worked, in violation of the National Affordable Housing Act, the Davis-Bacon Act, and their associated implementing regulations in connection to work performed under the contracts;
3. Whether Respondents failed to maintain payroll records of laborers, including names, addresses, Social Security numbers, classifications, hourly rate of wages paid, hours worked, and deductions, in violation of the National Affordable Housing Act, the Davis-Bacon Act, and their associated implementing regulations, in connection to work performed under the contracts;
4. Whether Respondents failed to pay laborers at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in the workweek, in violation of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. § 3702, for work performed under the contracts;
5. Whether Respondents unlawfully deducted union initiation fees and union membership dues from laborers' wages, in violation of the Copeland Act, 18 U.S.C. § 874 and its implementing regulations; and
6. Whether debarment of Respondents Jamek Engineering Services, Inc. and James Ekhtator, pursuant to 41 U.S.C. § 6706 and 29 C.F.R. § 5.12 is appropriate relief.

Tr. at 6-7. The parties stipulated that the Davis-Bacon and Related Acts apply to this matter, including the requirements set forth in 29 C.F.R. Parts 3 and 5. *Id.* at 15.

² The deadline to submit simultaneous closing argument briefs was originally set for November 9, 2018. Order Denying Motion for Extension of Deadlines at 1. On November 2, 2018, the Acting Administrator requested an 18-day extension due to late delivery of the hearing transcripts, to which Respondents objected. *Id.* Following a conference call with the parties on November 6, 2018, I granted the parties' agreed request to extend the deadline to November 16, 2018. *Id.* at 1-2. On November 16, 2018, Respondents requested an extension of deadlines until November 21, 2018, which I denied on November 19, 2018, given that any extension would have been prejudicial to the Acting Administrator due to Respondents having received the Acting Administrator's brief. *Id.* at 2-3.

FINDINGS OF FACT

Background on the Contracts, the Collective Bargaining Agreement, and the Wage Determination

The Housing and Redevelopment Authority of the City of Saint Paul, Minnesota, obtained funds for the Hamline Station Project from the United States Department of Housing and Urban Development (“HUD”) under the Federal HOME Act provision of the NAHA. In June 2013, The Housing and Redevelopment Authority entered into two HOME Loan Agreements with the PPL Hamline Station LLC for construction of the East and West Buildings of the Project. CFDA 14-239 covered the East Building, and CFDA 14-2369 covered the West Building. GX 6; GX 7. Each loan agreement was for \$550,000, for a total of \$1.1 million. GX 6 at 6; GX 7 at 4.

On September 18, 2014, Anderson Companies executed contracts with Hamline Station Family Housing Limited Partnership and Hamline Station Limited Partnership for the construction of the East and West Buildings of the Project. GX 9; GX 10. In June 2015, Anderson Companies subcontracted with Jamek to paint the exterior and all apartment units of both buildings. GX 11; GX 12. The subcontract for the West Building was for \$84,794, and the subcontract for the East Building was for \$81,863. GX 11 at 7; GX 12 at 7. Exhibit C to both subcontracts states that “Contractor and its Subcontractors shall comply with the wage and hour standards issued by the United States Secretary of Labor pursuant to the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act . . .” GX 11 at 9; GX 12 at 9. Exhibit C further states that “Contractor and all Subcontractors with employment hours shall submit certified payroll as directed by Owner by the 10th of each month following any month in which labor was performed.” GX 11 at 9; GX 12 at 9. Respondents admitted, in response to the Acting Administrator’s Requests for Admissions, that Jamek’s subcontracts with Anderson Companies were covered by the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act. GX 45 at 2-3.

On December 12, 2014, the Housing and Redevelopment Authority and the Hamline Station Limited Partnership entered into a development agreement, in which the Developer proposed to “redevelop an existing commercial site and acquire and construct a rental housing development . . . consisting of one building of approximately 57 total housing units. . . .” located at 1333 University Avenue W. GX 4 at 4. The first floor of this building was to consist of a commercial space and no residential units. *Id.* This contract covered the West Building of the Project. The Developer agreed “to be bound by and to cause its contractors, subcontractors, and lower-tier subcontractors to comply with all local, state, and federal labor standards” as set forth in Exhibit G to the contract. *Id.* at 20. Exhibit G states that the DBA, DBRA, Copeland Act, and CWHSSA apply to the agreement. *Id.* at 47. Exhibit G also included the applicable prevailing wage determination for spray painters in Ramsey County, the county in which St. Paul is located. *Id.* at 65. Spray painters were to be paid \$31.89 in base wages and \$17.41 in fringe benefits. *Id.*

An identical contract was entered into for the East Building of the Project, which consisted of “one building of approximately 51 total housing units. . . .” GX 5 at 4. This agreement similarly included provisions binding all contractors and subcontractors to the

applicable federal labor standards and included the same rate of pay for spray painters. *Id.* at 19, 46, 64.

On October 22, 2015, Respondents signed a Letter of Assent agreeing to be bound by the Project Labor Agreement between Prime Contractor and the Saint Paul Building and Construction Trades Council. GX 8 at 13. Schedule A to the Project Labor Agreement states that “[t]he applicable Collective Bargaining Agreements for the Building Trades Unions affiliated with the Council are incorporated herein by reference.” *Id.* at 12. The applicable collective bargaining agreement is the Agreement Between Minnesota Painting and Wallcovering Employers Association and the International Union of Painters and Allied Trades District Council #82 (Locals 61 and 386) (“CBA”). GX 14. Article 10 to the CBA states that “[o]n a project where government prevailing wage and/or fringe benefit rates apply, the Employer will pay the greater of either the posted prevailing wage and fringe benefit package for the project or the applicable wage and fringe benefit package set forth in this Agreement.” *Id.* at 10. Signatories to the CBA could employ journeymen, who are experienced tradesmen, and apprentices, those who are new to the trade. The journeyman/apprentice ratio was one apprentice for every three journeymen. *Id.* at 13. A signatory could employ an apprentice on a job with only one journeyman at the discretion of the Joint Apprenticeship Committee. *Id.* The applicable wage rate under the CBA was \$33.57 in base rates and \$18.39 in fringe benefits for journeymen and \$16.29 in base rates and \$14.51 in fringe benefits for apprentices. GX 15. The federal prevailing wage in Ramsey County for spray painters was \$31.89 in base wages and \$17.41 in fringe benefits. GX 17 at 3.

Deposition

Mr. Ekhatore was deposed on July 26, 2018, in his individual capacity and as the designated corporate representative for Jamek. GX 47. In addition to being the sole owner and CEO of Jamek, Mr. Ekhatore performs painting work in his personal capacity for Iyawwe, a general contractor, Amani, and Colorful Painting. *Id.* at 23-24. Jamek previously performed painting jobs for St. Paul Public Housing but has not worked for them for a number of months. *Id.* at 25. As Jamek CEO, Mr. Ekhatore reviews construction drawings to bid on projects. *Id.* at 26. Mr. Ekhatore testified that Jamek does not currently have any contracts and has not had any employees since 2015. *Id.* at 25, 28. Jamek has not done any large projects since Hamline Station. *Id.* at 28.

Mr. Ekhatore testified that Jamek worked on the Project from September 30, 2015, until November 20, 2015, when its contracts were terminated by Prime Contractor. *Id.* at 29-30. Jamek was hired to paint the interior and exterior of East and West Buildings of the Project. *Id.* at 46. Jamek replaced 5 Way Contractors as minority contractor because Mr. Ekhatore had experience working on similar projects, such as Jackson Flats, a 35-unit apartment building, and the Abbott Housing Project, both of which were covered by the DBA. *Id.* at 31-33.

Mr. Ekhatore testified that he knew the Project was covered by the CWHSSA and that the CWHSSA required him to pay employees overtime for all hours worked over 40. *Id.* at 38-39. Mr. Ekhatore testified that he never saw the federal wage decision covering the Project; he only saw the wage decision from the union. *Id.* at 54. Mr. Ekhatore testified that after Jamek began

work on the Project, Mr. Dumke from the City of St. Paul informed Mr. Ekhaton's accountant that Jamek was supposed to pay its employees \$49.30 under the federal wage determination. *Id.* at 64-65. Mr. Ekhaton testified that he never reviewed Jamek's certified payroll records before they were submitted because his accountant handled everything. *Id.* at 91.

Jamek hired nine employees to work on the Project: Francis Ikonagbon (journeyman and supervisor), Francis Onu (apprentice), Lance Borger (journeyman), Kevin Italio (journeyman), Oscar Tula (apprentice), Elia Stamboulieh (journeyman), Derick Delgado, Randall Schwake (journeyman), and Danny Rodriguez (apprentice). *Id.* at 73-77, 82. Mr. Ekhaton did not personally perform any of the work Jamek did on the Project. *Id.* at 50.

Witness Testimony

Matthew Jones

Matthew Jones is a Wage and Hour investigator with the United States Department of Labor, and he testified on behalf of the Acting Administrator. *Tr.* at 33. Mr. Jones has been an investigator since August 2010 and has been trained on the DBA, DBRA, CWHSSA, and the Copeland Act. *Id.* at 33-35. At the time of his testimony, Mr. Jones had served as lead investigator on approximately 200 investigations and assisted on roughly 100 other investigations. *Id.* at 36. Almost all of those investigations concerned the CWHSSA and the Copeland Act; thirty involved the DBA or DBRA, with him serving as lead investigator on nineteen. *Id.* Mr. Jones testified that when a project is subject to a wage determination and a union contract rate Wage and Hour does not enforce the wages listed in the CBA, it only enforces the rate in the wage decision, even if that amount is lower than what is in the CBA. *Id.* at 43-44, 65.

Mr. Jones investigated Jamek in 2015 and 2016 after the Fair Contracting Foundation filed two complaints with Wage and Hour. *Id.* at 45. Mr. Jones testified that the Fair Contracting Foundation is a watchdog group for prevailing wage rates and DBA/DBRA work performed in Minnesota. *Id.* at 46. The complaints alleged that Jamek was utilizing an incorrect journeyman/apprentice ratio, that employees were working during nights and weekends, that employees were not being recorded on certified payroll records, and employees were not being paid the prevailing wage or fringe benefits. *Id.* at 45. The first complaint was filed on November 16, 2015, and the second was filed on December 17, 2015. GX 36; GX 37. Mr. Jones testified that he first spoke to Adam Case from the Fair Contracting Foundation, who referred him to Jason Crowson. *Tr.* at 48. Mr. Jones testified that Mr. Crowson worked for the International Union of Painters and Allied Trades Local 82 ("Painters Union") and provided him with the Painters Union CBA. *Id.* at 48-49.

Mr. Jones also spoke to Alex Dumke, the City of St. Paul point of contact for DBA and DBRA related matters. *Id.* Mr. Dumke provided Mr. Jones with the development agreement, certified payroll records, and correspondence between Mr. Ekhaton and the City of St. Paul. *Id.* at 50. Mr. Jones spoke to Cole Metcalf, an auditor from Wilson-McShane, which is the fringe administrator for the Painters Union. *Id.* Mr. Metcalf provided Mr. Jones with the pension and health insurance plans for the Painters Union. *Id.*

Mr. Jones testified that he interviewed eleven of Jamek's thirteen employees during his investigation. *Id.* at 50, 186. Mr. Jones spoke to Maria Arroyo Garcia, whom he testified worked nights and weekends doing painting work for Jamek. *Id.* at 50-51. Mr. Jones testified that he spoke to Ms. Arroyo in December 2015 or January 2016, and she told him that she was paid \$9/hour for her work on the Project, and she was not paid fringe benefits. *Id.* at 52. Ms. Arroyo told Mr. Jones that she began working on the Project during the last week of September. *Id.* at 55.

Mr. Jones testified that he interviewed Jorge Arroyo Garcia twice, once in person on December 2, 2015, in New Richmond, Wisconsin, and again over the phone about a month later. *Id.* at 52, 54. Mr. Jones was accompanied by Mr. Sparza, another Wage and Hour investigator, at the December meeting. *Id.* at 52-53. Mr. Arroyo initially told Mr. Jones that he only worked for Jamek on Saturday October 17, 2015, unloading paint from a truck. *Id.* at 53-54. During the subsequent conversation, Mr. Arroyo told Mr. Jones that he actually worked nights and weekends as a spray painter for three to four weeks. *Id.* at 54. Mr. Arroyo informed Mr. Jones that he worked alongside Ms. Arroyo, Kevin Santiago, and Alexy Serilla. *Id.* at 55. Mr. Jones testified that Mr. Arroyo told him that the police showed up to the Project site on two different nights. *Id.* at 79. This prompted Mr. Jones to contact the City of St. Paul Police Officers Record Division to obtain the "False Alarm" reports from those nights. *Id.*; GX 23. Mr. Jones also spoke with Mr. Lee, who was one of the responding officers for the first incident. *Id.* at 80. The first alarm went off on October 5, 2015, between 10:16 p.m. and 11:56 p.m. *Id.* at 82. The narrative for the incident states "[w]as sent to 1309 University on an alarm triggered by a person seen on camera. K-9 searched the building and located workers on the 3rd floor of the east building. Workers claimed they were working on dry wall. Keyholder refused to respond to the scene. Workers released at the scene." GX 23 at 2. The second alarm went off on October 8, 2015, at either 10:02 p.m. or 12:03 a.m.³ Tr. at 82; GX 23 at 1. Mr. Jones testified that he believes these documents corroborate Mr. Arroyo's statements that he worked nights and weekends for Jamek beyond October 17, 2015. Tr. at 83. Mr. Jones testified that he looked at the payroll records for Painting by Nakasone, another painting subcontractor, to exclude the possibility that Mr. Arroyo, Ms. Arroyo, Mr. Santiago, and Mr. Serilla worked for that company, but he did not check to see if they appeared on the certified payroll records for any of the drywall subcontractors. *Id.* at 133. On cross-examination, Mr. Jones testified that no other Jamek employees confirmed that Mr. and Ms. Arroyo worked on the Project, nor were there any employee affidavits, audio recordings of interviews with other employees, or documents from Jamek showing that Mr. and Ms. Arroyo worked on the Project. *Id.* at 189. Mr. Jones testified that he told Mr. and Ms. Arroyo that they could possibly be owed back wages as a result of the Wage and Hour investigation. *Id.* at 190-191. However, Mr. Jones testified that he never told any workers that they were guaranteed money if they cooperated with him. *Id.* at 249.

Mr. Jones testified that he spoke with Mr. Ekhatior approximately five times during his investigation, who provided him with a variety of documents including payroll journals, time

³ The "date and time of report" are listed as 10/8/2015 22:02:00 in the top right corner of the report. However, the narrative section states "[o]n 10-8-2015 at approximately 0003 hours squad 178 responded to a video alarm at Anderson Co. 1309 University Ave W covering middle east building. Security stated they observed approximately 6 males inside the building. Upon arrival we cleared East and East middle buildings with K9 and found now intruders." GX 23 at 1. Mr. Jones testified that he does not know why two different times are listed. Tr. at 82-83.

sheets, apprentice information, contracts with Anderson Companies, and certified payroll documents. *Id.* at 56, 196. Mr. Jones stated that the difference between a payroll journal and certified payroll record is that the former is a company's internal payroll information whereas the latter contains a stipulation that the hours worked on a contract are accurate. *Id.* at 69. Mr. Jones testified that during his initial conference with Mr. Ekhaton in December 2015, Mr. Ekhaton represented that his certified payroll records were correct, that all workers he employed on the Project were listed on the certified payrolls, and that the hours and pay listed were correct. *Id.* at 68. Mr. Jones also testified that he asked Mr. Ekhaton about four workers who were found on the Project site on Saturday October 17, 2015. *Id.* at 73-74. Mr. Ekhaton stated that those individuals only worked for him that day to unload a paint delivery from Sherwin Williams. *Id.* at 74. Mr. Jones later received copies of paychecks submitted by Mr. Dumke and Mr. Ekhaton showing that Ms. Arroyo, Mr. Arroyo, Mr. Santiago, and Mr. Serilla were each paid \$225 for unloading paint on October 17. *Id.* at 75-76; GX 25. Mr. Jones testified that he credited Respondents for those payments in his calculation of back wages. *Tr.* at 75. Mr. Jones testified that he did not know whether those four individuals actually painted anything that day but that under the CBA, "painting work" includes assisting and helping, which would encompass moving painting materials. *Id.* at 141-142.

Mr. Jones ultimately concluded that Respondents violated the DBA, CWHSSA, and the Copeland Act during their work on the Project. *Id.* at 56. Based on employee interviews, the certified payroll records, and payroll journals, Mr. Jones found that Jamek did not initially report all employees who worked on the Project. *Id.* at 70. Respondents later submitted an addendum to their certified payroll records to include the hours Mr. Arroyo, Ms. Arroyo, Mr. Santiago, and Mr. Serilla spent unloading paint on October 17, 2015, which were not initially reported on the records submitted to the City of St. Paul. *Id.* at 70-71; 76. Mr. Jones testified that under the DBA and DBRA, Respondents were required to pay fringe benefits on the Project at least quarterly. *Id.* at 83. Under the CBA, the benefits were to be paid monthly to Wilson-McShane. *Id.* Mr. Jones found that Respondents paid less than \$200 in fringe benefits for all workers for the duration of the Project. *Id.* at 84.⁴ Mr. Jones testified that he credited Respondents for that payment in his calculation of back wages. *Tr.* at 86.

Mr. Jones found that Respondents did not pay their employees in accordance with the 3:1 journeyman/apprentice ratio set forth in the CBA. *Id.* at 87-88. Mr. Jones testified that he used the payroll journals and certified payroll records to determine which workers were classified as journeymen and apprentices and the dates and times they worked. *Id.* at 88. Mr. Jones determined that there were four workers classified as apprentices on the Project: Francis Onu, Derrick Delgado, Danny Rodriguez, and Oscar Tula. *Id.* at 89. Mr. Jones testified that at his initial conference and final meeting with Mr. Ekhaton, Mr. Ekhaton asserted that he was in ratio for most of the Project and the few times he was not he made restitution payments to the affected workers. *Id.* at 90. Mr. Jones testified that Mr. Ekhaton believed he could use three additional workers employed by Painting by Nakasone in his compliance with the journeyman/apprentice ratio, which Mr. Jones stated is not permissible under the DBRA. *Id.* at 90-91. Mr. Jones testified that he received copies of two restitution checks Respondents paid to Mr. Tula and Mr.

⁴ On October 20, 2015, Respondents made a \$199.23 fringe benefit payment to the Painters and Allied Trades. GX 34 at 1.

Onu to correct for being out of ratio, for which he credited Respondents in his back wage calculations. *Id.* at 154, 222.

Mr. Jones determined that Respondents owe \$35,895.01 in back wages to their employees.⁵ *Id.* at 149; GX 38. Mr. Jones testified that he created spreadsheets for each worker and used the same method to calculate the wages owed to three groups of workers: four apprentices, five journeymen, and four “off-the-book” workers. *Id.* at 93-94. For the off-the-book workers—Mr. Arroyo, Ms. Arroyo, Mr. Santiago, and Mr. Serilla—Mr. Jones used payroll journals and certified payroll records to find the applicable workweeks then used worker interviews to determine the number of hours worked. The rate of pay, the number of days where over 40 hours were worked, and the number of hours worked over 40 were also derived from worker interviews. The prevailing wage and fringe rate were taken from the wage determination. *Id.* at 95-97; GX 39 at 1-5. Mr. Jones used these values to calculate the prevailing wage due under the DBA, fringe benefits due under the DBA, and the overtime and liquidated damages due to each worker under CWHSSA.⁶ Tr. at 97-98; GX 39 at 1-5. Mr. Jones subtracted the \$225 each worker was paid for unloading paint on October 17, 2015, from the amount of prevailing wages due. Tr. at 98; GX 39 at 1-5. Adding these values together, Mr. Jones concluded that Mr. Arroyo is owed \$5,002.20 in back wages, Mr. Santiago is owed \$5,002.20, Mr. Serilla is owed \$1,464.90, and Ms. Arroyo is owed \$6,202.85. GX 39 at 1-5.

Mr. Jones testified that Respondents employed five journeymen on the Project: Kevin Italio, Francis Ikonagbon, Randall Schwake, Lance Borger, and Elia Stamboulieh. Tr. at 99-100. Mr. Jones utilized the same method to calculate the back wages owed to the journeymen as he did for the off-the-book workers, but he also had to account for deductions taken from some of their paychecks. *Id.* at 100. Mr. Ekhtator paid the union initiation fees for Mr. Italio and Mr. Stamboulieh then subsequently deducted the amount from their checks as repayment. *Id.* at 101; GX 39 at 6, 18. Mr. Jones testified that the deductions for union initiation fees were not provided for in the CBA and therefore violated Part 3 of the Copeland Act. Tr. at 155-157. Mr. Jones testified that even if the employees authorized the deductions, they were impermissible because they were not provided for in the CBA. *Id.* at 247. All of the journeymen have some negative values in their “prevailing wage due” column, which indicates that they were paid more than the prevailing wage; Respondents were credited for any overpayment. *Id.* at 104-105; GX 39 at 6, 15, 17, 18, 19. Mr. Jones concluded that Mr. Italio is owed \$1,095.61, Mr. Ikonagbon is owed \$3,511.76, Mr. Borger is owed \$1,157.04, and Mr. Stamboulieh is owed \$1,660.32, and Mr. Schwake is owed \$75.29. GX 39 at 6, 15, 17, 18, 19.

Mr. Jones testified that Respondents employed four apprentices: Danny Rodriguez, Oscar Tula, Derrick Delgado, and Francis Onu. Tr. at 105. The spreadsheets for the apprentices are similar to the off-the-book workers and journeymen except there is a “Not Listed on Payroll” column, which indicates whether the apprentice was included on the certified payroll record for

⁵ The amount owed was originally calculated to be \$41,709.06, \$15,000 of which was for fringe benefits. GX 38A; *see* Tr. at 116-124, 160. Mr. Jones testified that he does not know how much of the reduction from \$41,709.06 to \$35,895.01 was for fringe benefits. Tr. at 159.

⁶ Under the CWHSSA, employers are required to pay their workers time and a half for any hours worked over 40 in a workweek. The CWHSSA also mandates liquidated damages to be calculated by multiplying the number of days of overtime worked (*i.e.*, the number of days an employee worked more than 40 hours) by 10. Tr. at 98.

that week. *Id.* at 105-106. There is also a “Hamline Station Hours Out of Ratio” column, which indicates the hours the apprentice worked on the Project when Respondents were out of compliance with the journeyman/apprentice ratio. *Id.* at 106-107. Mr. Jones testified that he rotated throughout the apprentices to determine who was in and out of ratio for a particular week, per internal guidance. *Id.* at 107. Mr. Jones calculated the apprentice prevailing wage by multiplying the journeyman prevailing rate by 50%, which is the rate provided for in the Painters Union CBA. *Id.* at 108. The apprentice fringe rate was determined by calculating the ratio between the journeymen and apprentice prevailing wage rate then multiplying that by the journeymen fringe rate. *Id.* at 110. To calculate the apprentice fringe rate due, Mr. Jones testified that if an apprentice was out of ratio, he subtracted the journeyman and apprentice fringe rate then multiplied that by the number of hours. *Id.* Mr. Jones used the same calculation to determine the prevailing wage due to apprentices when they worked out of ratio. *Id.* at 111. Mr. Jones concluded that Mr. Onu is owed \$1,299.77, Mr. Tula is owed \$3,886.94, Mr. Delgado is owed \$3,247.45, and Mr. Rodriguez is owed \$1,826.27. GX 39 at 7, 9, 11, 13.

Mr. Jones testified that he recommended Respondents be debarred because Respondents employed off-the-book employees; Respondents failed to record the off-the-book employees on their certified payroll records, in violation of the Copeland Act and the DBRA; Respondents failed to pay the prevailing wage and fringe benefits to their workers; Respondents violated the journeyman/apprentice ratio after they were warned about allowing employees to work nights and weekends; and Respondents were previously subject to a Wage and Hour investigation that concluded Respondents committed some of the same violations at issue in this case. Tr. at 113-114. Mr. Jones testified that he believed Mr. Ekhatore lied to him during his investigation regarding off-the-book employees working on nights and weekends. *Id.* at 210. Mr. Jones testified that he asked Mr. Ekhatore if he paid fringe benefits to the Painters Union, and Mr. Ekhatore responded that he paid one check. *Id.* at 249. Mr. Jones also testified that when he specifically asked Mr. Ekhatore about the November 2015 fringe benefit payment, Mr. Ekhatore gave no indication that he planned to make the payment, and Mr. Jones believed “[i]t was clear he wasn’t going to pay.” *Id.*

Cole Metcalf

Cole Metcalf is a fund administrator for Wilson-McShane and also works in their Audit and Collections Department. Mr. Metcalf testified on behalf of the Acting Administrator. *Id.* at 258. Wilson-McShane is a third-party administrator for Taft-Hartley fringe funds, which Mr. Metcalf testified are multi-employer plans that are managed by a board of trustees. *Id.* at 259. As a third-party administrator, Wilson-McShane manages funds, monitors federal regulations, pays benefits, and performs compliance audits. *Id.* During an audit, Wilson-McShane reviews certain records, such as payroll and tax documents, to ensure an employer’s contributions to the fund are accurate. *Id.* at 260. Mr. Metcalf has worked at Wilson-McShane since 2012 and testified that as a fund administrator he reports the financial status of the firm’s funds to the board of trustees, and he monitors federal regulations to verify the funds are in compliance. *Id.* at 261. In the Audit and Collections Department, Mr. Metcalf conducts audits and oversees auditors. *Id.*

Mr. Metcalf testified that he works with the Painters Union on compliance audits. *Id.* at 261-262. Wilson-McShane administers the fringe benefit fund for the Painters Union, and Mr. Metcalf is directly involved in the administration of the fund. *Id.* at 262. Mr. Metcalf testified that in administering the fringe benefit fund, Wilson-McShane receives monthly contributions from employers and verifies their accuracy. *Id.* Rate schedules determine the contributions each employer must make, depending on how many employees work per month. *Id.* at 263. Employers are required to pay their contributions by the 15th of the month following the month in which the hours were worked. *Id.* at 263-264. Mr. Metcalf testified that the contributions to the fund do not vest until an employee works at least 1,000 hours in twelve months. If an employee does not hit the 1,000 hour mark in that time period the contributions become assets of the fund. *Id.* at 265-268.

Mr. Metcalf testified that the Painters Union requested that Jamek be audited due to concerns that it was not making timely contributions to the fund. *Id.* at 271. Mr. Metcalf conducted the audit from October 2015 to November 2015. *Id.* at 273. Mr. Metcalf checked the contribution reports from Jamek and found that Wilson-McShane had received one check from Jamek for approximately \$200. *Id.* at 272. Contribution reports, or monthly remittance reports, are filled out by employers and sent back to Wilson-McShane to track their contributions. *Id.* at 273. Mr. Metcalf testified that these reports are completed on a trust basis and include the hours that employees worked that month and the employer's contribution amount. *Id.* The contribution amount is calculated by multiplying the contribution rate (\$20.50) by the number of hours worked for each classification of worker (apprentice or journeyman). *Id.* at 274. This total is the hourly amount, which goes to the fringe benefit funds. *Id.* at 276. The hourly amount is added to the working dues, which is based on the CBA and paid by the employee deduction but does not go to the fringe benefit fund. *Id.* at 274-275. This equals the invoice subtotal. *Id.* at 275. The invoice subtotal is multiplied by a 10% bond assessment, and that amount is added to the invoice subtotal, which equals the total remittance amount. *Id.* Jamek submitted a monthly remittance report for September 2015 reflecting a contribution amount of \$199.23. GX 35.

Mr. Metcalf testified that at the conclusion of his audit he determined that Jamek owed approximately \$20,000 to the fringe benefit fund. *Id.* at 277. In the course of the audit, Wilson-McShane acted as the administrator when the Painters Union garnished Jamek's bank account, which resulted in a \$500 payment from Jamek to the Painters Union on January 27, 2016. *Id.* at 279; GX 34 at 2. The Painters Union, through the law firm McGrann Shea, filed a mechanic's lien against the Prime Contractor, which resulted in the Prime Contractor paying \$14,487.36 to the Painters Union on January 11, 2017. Tr. at 280-281; GX 34 at 3. Mr. Metcalf testified that the remaining \$5,000 of the \$20,000 due to the fringe benefit fund were liquidated damages assessed in the course of the audit. *Id.* at 282. Wilson-McShane waived the liquidated damages and bond assessment as part of the resolution of the fringe benefit fund claims. *Id.* at 291. Mr. Metcalf testified that after October 10, 2015, Jamek did not directly pay any money to the fringe benefit fund, nor did any entity submit a payment on Jamek's behalf between October 10, 2015, and January 11, 2017. *Id.* at 284. There was a \$991.84 payment to the Painters Union General Industry Fund, of which Mr. Metcalf testified he was not aware. *Id.* at 281. Adding this amount to the \$14,487.36, Mr. Metcalf testified that the \$15,479.20 that Wilson-McShane received fully satisfied the amount due to the fringe benefit fund. *Id.* at 291.

Jorge Arroyo Garcia

Jorge Arroyo Garcia is a spray painter, and he testified on behalf of the Acting Administrator. *Id.* at 317.⁷ Mr. Arroyo testified that he worked for Jamek for three or four weeks laying tarp, filling the spray painter, taping windows, and spray painting. *Id.* at 318. Mr. Arroyo testified that he had roughly six months of experience spray painting before working on the Project, and he started working for Jamek through Juan Valladares. *Id.* at 319. Mr. Arroyo testified that Mr. Valladares was previously his boss, and Mr. Valladares worked for Francis Onu, who is friends with Mr. Ekhaton. *Id.* Mr. Arroyo testified that he met with Mr. Valladares, Mr. Ekhaton, Mr. Onu, and other Francis whose last name Mr. Arroyo does not know before starting on the Project. *Id.* at 320, 323. Mr. Arroyo testified that at the meeting they discussed when he and the other workers could start, what times they could work, how many people could work on the Project, and what they were to do if they were ever caught working. *Id.* at 320. Mr. Ekhaton reportedly told Mr. Valladares and Mr. Arroyo that the potential employees could only work certain hours, and they discussed how much the workers would be paid. *Id.* at 321. Mr. Arroyo testified that this meeting occurred sometime around the end of September or beginning of October in front of the Project, near a coffee shop and a Target. *Id.* at 320. Mr. Arroyo testified that he attended the meeting to interpret for Mr. Valladares because Mr. Valladares speaks Spanish and very little English. *Id.* Mr. Arroyo testified that sprayers were to be paid \$20/hour, and preppers, who do not do any painting, were to be paid \$15/hour. However, when work began the sprayers were paid \$15/hour and preppers were paid \$10-\$11/hour. *Id.* at 322, 326. Mr. Arroyo testified that Mr. Valladares took part of the workers' pay for connecting them to Mr. Ekhaton so that Mr. Arroyo and the other sprayers were actually paid \$13/hour. *Id.* at 322-323.

Mr. Arroyo testified that during weekdays he was permitted to start working between 4:00 and 6:00 p.m. and end between 1:00 a.m. and 2:00 a.m. *Id.* at 323. On the weekends, Mr. Arroyo stated he could work a 12-hour shift from 7:00 a.m. to 7:00 p.m. *Id.* at 323-324. Mr. Arroyo testified that Mr. Ekhaton set these working hours because the Project was a union job and because he and the other workers were not members they could be fired or not be paid for their work. *Id.* at 324. Mr. Arroyo testified that if anyone ever caught him working on the Project he was told "to deny everything," and say he was there for a visit or about to leave. *Id.* at 325. Mr. Arroyo testified that the hours he actually worked on the weekdays were 5:00 or 6:00 p.m. to 1:00 or 2:00 a.m., on Saturdays he worked 7:00 a.m. to 7:00 p.m., and on Sundays he worked 7:00 a.m. to 2:00 or 3:00 p.m. *Id.* at 325-326. Mr. Arroyo stated that he was paid in cash every weekend by Mr. Valladares; he did not sign any timesheets but Francis would keep track of his hours. *Id.* at 326-328. Mr. Arroyo testified that he did not receive health insurance, pension, or any other benefits while working for Jamek. *Id.* at 327. Mr. Arroyo stated that he worked with Francis, Mr. Serilla, Mr. Santiago, and Ms. Arroyo, his sister, during nights and weekends, with Francis being in charge. *Id.* at 328-329. Mr. Arroyo testified that he drove everyone to the Project, and they would enter the worksite by slipping through a gate or, if Francis or Mr. Ekhaton were already there, they would open the gate for the workers. *Id.* at 336. Ms. Arroyo, Mr. Serilla, and Mr. Santiago were preppers, while Mr. Arroyo was a sprayer. *Id.* at 331. Mr. Arroyo testified that there was another sprayer, Oscar Tula, but he did not work at the

⁷ Mr. Arroyo testified that he uses the last name "Arroyo" rather than "Arroyo Garcia," so I will refer to him as Mr. Arroyo. Tr. at 317.

Project as long as the others. *Id.* Mr. Arroyo stated that Ms. Arroyo was paid \$10/hour and Mr. Santiago was paid \$11 or \$12/hour. *Id.* at 330-331. Mr. Arroyo testified that he, Mr. Santiago, and Mr. Serilla began working on the Project at the end of September or beginning of October, and Ms. Arroyo began the following week. *Id.* at 329. Mr. Arroyo testified that he took directions from Francis and Mr. Ekhatior. *Id.* at 330. Mr. Arroyo stated that Francis was on the worksite every time he was there and Mr. Ekhatior appeared three times, including the day the union showed up. *Id.* at 334. Mr. Arroyo testified that at no point was he told that his work on the Project was covered by the DBRA, the Copeland Act, or the CWHSSA. *Id.* at 332. Mr. Arroyo testified that he was never told there was a minimum wage he was to be paid or that he was to be paid fringe benefits. *Id.* at 333.

Mr. Arroyo testified that he painted both the hallways and inside the units; he only worked in one of the buildings, though he was not sure if it was the East Building or the West Building. *Id.* at 334-335, 363.⁸ Mr. Arroyo described the units as two or three bedrooms with a kitchen connected to the living room. *Id.* at 335. Mr. Arroyo testified that he used a semi-gloss paint on the walls in the kitchen and an eggshell paint on the rest of the walls in the units. *Id.* Mr. Arroyo testified that the buildings had four or five floors, and he began working on the second floor from the top. *Id.* at 336. Mr. Arroyo stated that there were probably ten or eleven units per floor but he could not remember exactly. *Id.* at 364.

Mr. Arroyo testified that the first sprayer Jamek had was blue, though he did not know by whom it was manufactured. *Id.* at 368. That sprayer “got ruined,” so Jamek replaced it with a red sprayer; Mr. Arroyo did not know the manufacturer of that sprayer, either. *Id.* Mr. Arroyo stated that he wore a white face mask while he was spraying. *Id.* at 369.

Mr. Arroyo testified that he also worked as a sprayer in Wisconsin for 5 Way Contractors, a painting company owned by Francis Onu, at the same time he was working for Jamek. *Id.* at 337. Approximately one week after he and the other workers began working for Jamek, Mr. Arroyo, Mr. Valladares, Mr. Onu, and Mr. Ekhatior met at the Five Way job site. *Id.* Mr. Arroyo testified that at this meeting, Mr. Ekhatior stated that there were rumors circulating about the union looking into whether people were working at the Project during the night. *Id.* Mr. Arroyo stated that, in total, he interpreted for Mr. Valladares in meetings with Mr. Ekhatior four or five times; Ms. Arroyo also served as interpreter. *Id.* at 338-339.

Mr. Arroyo testified that the police showed up twice while he was working, near the middle of his tenure on the Project. *Id.* at 339, 342. On one occasion, Mr. Arroyo and the others were working on the top floor when the police officers entered the unit he was standing in moving a portable light. *Id.* at 340. Mr. Arroyo testified that the officers told him to put his hands up and they were accompanied by two German Shepherd K-9s. *Id.* at 341. Mr. Arroyo told the officers that Francis was in charge and the officer walked the crew out to the hallway. *Id.* at 341. On the second occasion, Mr. Arroyo testified that two squad cars showed up while the workers were walking into one of the buildings and spoke to Francis. *Id.*

⁸ Mr. Arroyo testified that the first floor of the building in which he worked was commercial and did not have any units, which would be the West Building. *Tr.* at 364.

Mr. Arroyo testified about the day union representatives came to the Project. *Id.* at 342. Mr. Arroyo testified that he arrived to the jobsite at 7:00 a.m., Mr. Ekhaton let him into the gate that morning, and he remained onsite the entire time Mr. Ekhaton was there. *Id.* at 387, 389. Mr. Arroyo stated that he worked two hours that day, and he had been spraying a two bedroom unit on the top floor for approximately 20 minutes when the paint delivery truck showed up. *Id.* at 342, 349, 374, 389. Mr. Arroyo, Ms. Arroyo, Mr. Serilla, and Mr. Santiago carried the five gallon paint buckets from the truck up to the third and fourth floors and left the paint in the stairwells. *Id.* at 343, 373. Mr. Arroyo testified that the union representatives showed up shortly after the paint truck and took pictures. *Id.* at 389; GX 24. Mr. Arroyo spoke to one of the union representatives, Mr. Francisco, who told him that he and the others needed to be union members to work on the Project, that what Mr. Ekhaton was doing was wrong, and that he and the other workers were being paid much less money than they should be receiving. Tr. at 348, 355. Mr. Arroyo testified that he was paid \$250 by check for his work that day. *Id.* at 355-356. Mr. Arroyo received the check from Mr. Ekhaton, who drove him to his bank, took a picture of the check and Mr. Arroyo's ID, and made Mr. Arroyo cash the check in front of him. *Id.* at 356. Mr. Arroyo stated that Mr. Ekhaton said he took a picture of the check and Mr. Arroyo's ID "to prove [to] Mr. Francisco that he did pay us so he could shut up." *Id.* at 356. Mr. Arroyo testified that he was told by Mr. Ekhaton and Francis that he could no longer work for Jamek after the union showed up. *Id.* at 350-351.

Mr. Arroyo testified that he spoke with Mr. Jones twice, first in Wisconsin after he stopped working for Jamek. *Id.* at 351. Mr. Arroyo initially told Mr. Jones that he did not know anything about the Project and that he never worked there aside from the day the union showed up. *Id.* at 352. Mr. Arroyo denied any knowledge of or involvement with the Project because he was worried he would not be paid or would be fired. *Id.* at 357. The second time Mr. Arroyo spoke to Mr. Jones, Mr. Arroyo called him from the Wisconsin jobsite after he was no longer working with either Mr. Ekhaton or Mr. Onu. *Id.* at 356-357. Mr. Arroyo called Mr. Jones because he felt that what he said in their first conversation did not feel correct. *Id.* at 357. Mr. Arroyo stated that he was still worried he would not be paid if he spoke to Mr. Jones and that aside from the \$250 he was paid for moving paint, he was never paid for the work he did that week. *Id.* at 358. Mr. Arroyo testified that Mr. Jones never told him he would receive money for cooperating with the investigation, or that he needed to cooperate. *Id.* at 353.

Mr. Arroyo gave two witness statements to Mr. Jones, one dated December 2, 2015, and one dated February 18, 2016. *Id.* at 381; RX 146. In the February 8 statement, Mr. Arroyo asserts that he worked on the Project for three weeks from October 1, 2015, to October 22, 2015. RX 146 at 1. Mr. Arroyo states that he worked 30-50 hours per week on nights and weekends, and Mr. Ekhaton was usually the person supervising the workers at night. *Id.* When questioned about this statement Mr. Arroyo testified that it was incorrect, stating "before the Saturday he was there two times []. So there's no way he could be opening it most of the time." Tr. at 385.

Maria Arroyo Garcia

Maria Arroyo Garcia testified on behalf of the Acting Administrator; she is the sister of Mr. Arroyo. *Id.* at 392-393. Ms. Arroyo testified that she worked as a prep work for Jamek on the Project from mid to late-September 2015 until mid-October 2015. *Id.* at 392-393. As a prep work,

Ms. Arroyo testified that she covered the vents and windows in apartment units prior to spraying, refilled the spray machines with paint, and cleaned up after the sprayers finished painting. Ms. Arroyo only worked in one of the buildings and did not prep in the hallways, just the units. *Id.* at 393, 431, 444. Ms. Arroyo testified that she started working for Jamek through Mr. Valladares. *Id.* at 394. Mr. Valladares told Ms. Arroyo that she could work as a prepper on the Project during certain hours, but she initially did not know that those hours were only nights and weekends. *Id.* at 395. Ms. Arroyo testified that she discovered she was only allowed to work nights and weekends when she interpreted for Mr. Valladares during a meeting with Mr. Ekhaton. Mr. Ekhaton stated that the Project was a union job, and he did not want representatives from the union catching the potential workers during the day. *Id.* at 396, 400. Ms. Arroyo testified that she did not ask to be paid the union rate after she found out the Project was a union job because she needed the money, and she did not have the finances to join the union at the time. *Id.* at 401. Ms. Arroyo testified that it was easier for her to interpret for Mr. Valladares instead of her brother because Mr. Arroyo was the only sprayer on the job and Mr. Valladares' meetings were not always at the Project. *Id.* at 396-397. Some of the meetings at which Ms. Arroyo interpreted occurred at a Wendy's, in a Target parking lot in front of the Project, or at a McDonald's. *Id.* at 397. Ms. Arroyo began interpreting one or two weeks after she began working, and the meetings were initially only at the Wendy's. *Id.* at 397, 411. Mr. Valladares, Mr. Ekhaton, and a Francis whose last name Ms. Arroyo does not know would attend these meetings where they would discuss when workers would be paid, why the work quota had not been met, and other tasks that needed to be completed on the Project. *Id.* at 387-398. Ms. Arroyo testified that Mr. Santiago would occasionally attend meetings, though he never spoke. *Id.* at 412. Ms. Arroyo testified that Mr. Valladares would take some money for himself out of her paycheck, and if the workers were behind schedule they would not be paid until the following week when the tasks were complete. *Id.* at 398. Ms. Arroyo stated that she interpreted between three to five meetings with Mr. Ekhaton. *Id.* at 400.

Ms. Arroyo testified that Francis was the person in charge on the Project, and he was always onsite; Mr. Valladares would appear at the Project on occasion. *Id.* at 402. Ms. Arroyo knew Francis was in charge because during meetings Mr. Ekhaton would tell them to do whatever Francis told them. *Id.* at 410. Ms. Arroyo saw Mr. Ekhaton on the jobsite two or three times at night and once on the weekend when the union came. *Id.* Mr. Ekhaton would survey the work that was completed and what still needed to be done. *Id.* at 411.

Ms. Arroyo testified that she worked with Mr. Arroyo, Mr. Serilla, and Mr. Santiago. *Id.* at 406, 412-413. Mr. Arroyo was the main sprayer and was paid \$13/hour, Mr. Serilla was a prepper and paid \$10 or \$11/hour, and Mr. Santiago, who was a prepper and also learning to spray paint, was paid \$13/hour. *Id.* at 407-408, 412-413. Ms. Arroyo worked from 7:00 a.m. or 8 a.m. until 7:00 p.m. or 8:00 p.m. on Saturdays, from 8:00 a.m. until noon or 1:00 p.m. on Sundays, and until 1:00 a.m. or 2:00 a.m. during the week; she never saw any drywall or other workers during her shifts. *Id.* at 403; 415. Ms. Arroyo testified that she was paid \$9/hour except for the day the union came to the worksite, which the workers referred to as their "gift day." *Id.* at 404. Ms. Arroyo testified that aside from her hourly wage and the \$250 check from "gift day," she never received health insurance, a pension, a vacation fund, or any other benefits or compensation for working on the Project. *Id.* at 405-406. Ms. Arroyo testified that there was one spray paint machine on the jobsite. *Id.* at 430-431. Ms. Arroyo did not know the model or

manufacturer of the sprayer, and she could not identify the color because “[i]t was all paint . . .” *Id.* at 431.

Ms. Arroyo testified about the testified about the specifications of the apartment units. *Id.* at 432. The units had vents, flooring, and some had wood trim installed. *Id.* Ms. Arroyo testified that some of the units had exterior doors to enter from the hallway, and some units had interior doors for bathrooms and bedrooms. *Id.* at 433. Ms. Arroyo could not recall on which floors the units with doors installed were located, but she estimated that 25% of the units had exterior and interior doors. *Id.* Of the 25% of units with doors, Ms. Arroyo that she covered the interior doors as part of her prep work but she does not recall prepping the exterior doors. *Id.* at 434. Ms. Arroyo could not recall the specifications of the doorframes or what finish was used but she believed the frames were wood. *Id.*

The day the union representatives came to the Project, Ms. Arroyo testified that Mr. Arroyo drove her, Mr. Santiago, and Mr. Serilla to the jobsite. *Id.* at 426. Mr. Arroyo went around the back of the building and let her in through a side door. *Id.* at 426-427. Ms. Arroyo testified that, 15 to 20 minutes after they arrived, she was waiting for a paint delivery truck with Mr. Arroyo, who was painting a second floor unit, when they saw two men walking around the building.⁹ Mr. Santiago and Mr. Serilla were outside smoking at this time. *Id.* at 414-415, 427-428. Ms. Arroyo testified that they had never seen anyone else on the jobsite while they were there, so they scattered, but the two men eventually caught up to them and began asking questions. *Id.* at 415. The men asked them why they were there, who they worked for, what work they were doing, and if they had worked there before. *Id.* One of the representatives, who Ms. Arroyo identified as Francisco, spoke to the workers and told them that the Project was a union job, that they were not supposed to be there, and if they were working on a Saturday they should be paid a certain wage. *Id.* at 417-418; *see* GX 24 at 6. Ms. Arroyo testified that the workers called Mr. Valladares and either he or Mr. Arroyo called Mr. Ekhaton, who arrived approximately 20 minutes after the union representatives; Francis was not onsite. *Tr.* at 418. Ms. Arroyo received a check from Mr. Ekhaton for her work done on October 17 and he took her to the bank to cash the check because he said “it was easier that way.” *Id.* at 422. Ms. Arroyo testified that Mr. Ekhaton took her, Mr. Arroyo, Mr. Valladares, Mr. Serilla, and Mr. Santiago to the union after October 17, asked them if they wanted to join, and offered to pay their initiation fees, but she declined. *Id.* at 419-420. Ms. Arroyo testified that she interpreted two or three meetings after October 17, but she later got into a conflict with Mr. Valladares and stopped interpreting for him. *Id.* at 422. Ms. Arroyo did not do any other work at the Project after October 17. *Id.* at 425.

Ms. Arroyo testified that she was never told that her work on the Project was covered by the DBRA, the Copeland Act, the CWHSSA, or that there was a minimum wage workers were to be paid. *Tr.* at 408-409. Ms. Arroyo spoke with an investigator but she does not remember his name and she did not know that he was with Wage and Hour; she believed he worked for the union. *Id.* at 418-419. Ms. Arroyo testified that the investigator did not offer her money or the potential to receive money for cooperating with him, he did not tell her she was possibly owed

⁹ Ms. Arroyo testified that Mr. Arroyo “got three or four sprays in there before the union guys started to show up.” *Tr.* at 429. Ms. Arroyo identified one “spray” as “one whole up and down motion” on a wall, which takes one or two minutes. *Id.* at 430.

money, and she did not believe that speaking with him would lead to her receiving any money. *Id.* at 419. Ms. Arroyo stated that she cooperated with the investigator because two or three days after the union showed up Mr. Ekhaton and Mr. Valladares got into a confrontation at McDonald's and Mr. Ekhaton decided not to use Mr. Valladares on the Project anymore. *Id.* at 419, 441-442. Ms. Arroyo stated that if Mr. Valladares was not paid then she would not be paid, so she decided to stop working for Jamek. *Id.* at 419. Ms. Arroyo spoke with the investigator over the phone to provide a statement. *Id.* at 435-436; RX 147. Ms. Arroyo's written statement is signed but she testified that she did not sign it and she does not recognize the signature. Tr. at 438; RX 147 at 2. Ms. Arroyo asserts in her written statement that she worked for Jamek for four weeks, beginning and ending in October. RX 147 at 1. Ms. Arroyo testified that she was incorrect about the dates in her written statement and stated that she actually began working in September. Tr. at 438. Ms. Arroyo was asked about a claim in her written statement that "[s]ometimes I got to paint..." and she testified that twice when she was alone she used the sprayer to apply primer to the units. RX 147 at 1; Tr. at 440-441. Ms. Arroyo could not recall the color of paint that was used in the units. *Id.* at 444.

Kristin Tout

Kristin Tout is the Assistant District Director of the Minneapolis district office for the Wage and Hour Division, and she testified on behalf of the Acting Administrator. *Id.* at 448. Ms. Tout has been the Assistant District Director since 2011 and was previously a Wage and Hour Investigator, a Senior Investigator Advisor. *Id.* at 449. Ms. Tout testified that her office investigated Jamek in November 2013 for violations of the DBRA on the Abbott Housing Project; Ms. Tout was the case supervisor on the investigation. *Id.* at 453-454. Jamek was a painting contractor on the Abbott Housing Project, which was a residential housing project similar to Hamline Station. *Id.* at 453. Ms. Tout testified that her office concluded that Respondents failed to pay \$1,000 in base wages to two of its workers and failed to pay \$15,000 in fringe benefits. *Id.* at 456.

Wage and Hour held a final conference with Mr. Ekhaton to communicate its findings. *Id.* at 457. Ms. Tout testified that at a final conference, the investigator also seeks a response from the employer. *Id.* Much of the final conference is educating the employer on compliance with the statutes involved in the investigation and providing reference materials. *Id.* If back wages are owed, the investigator seeks a commitment to pay the wages, and in a DBA investigation debarment is discussed. *Id.* For first time violations, the employer receives a warning that debarment is a possibility, and the investigator seeks a commitment on behalf of the employer to comply with the statutes and regulations going forward. *Id.* A narrative report is completed for every statute investigated that details the course of the investigation. *Id.* at 458. A narrative report for the investigation into Jamek on the Abbott Housing Project was completed, which describes the final conference held on May 29, 2014, and states that Mr. Ekhaton was provided with 29 C.F.R. Parts 3 and 5, which are the regulations for the Copeland Act and DBA. *Id.* at 458-461; GX 43. Mr. Ekhaton disputed Wage and Hour's findings, asserted that he was not aware of the DBA requirements, and did not agree to pay back wages. Tr. at 462; GX 43 at 7. Ms. Tout testified that Wage and Hour did not seek debarment of Respondents because it was their first violation and therefore did not rise to the level of aggravated or willful, which is standard for debarment. Tr. at 463. Ms. Tout testified that the Wage and Hour investigator

extensively explained the requirements of 29 C.F.R. Parts 3 and 5 to Mr. Ekhaton because he claimed he did not understand what was required of him under the regulations. *Id.* at 465.

Jason Crowson

Jason Crowson is the Director of Organizing for the Painters Union, and he testified on behalf of the Acting Administrator. *Id.* at 487. Mr. Crowson is a drywall finisher by trade and has eight years of experience. *Id.* at 488. The Painters Union has approximately 3,500 members and covers Minnesota, western Wisconsin, North Dakota, South Dakota, and Montana. *Id.* at 490. As District Organizer, Mr. Crowson oversees the Painters Union organizing department and assists with the field representatives' staff in their daily operations. *Id.* at 489. Mr. Crowson assists contractors with DBA compliance and helps workers ensure they are paid the prevailing wage. *Id.* at 490. Mr. Crowson testified that when an employer is a signatory to a CBA that covers a DBRA project, the employer is required to pay fringe benefits. *Id.* at 492. For the Painters Union, fringe benefits are paid by the employer to Wilson-McShane and deposited into different funds for health and welfare, pensions, etc. *Id.* at 492-493. The Painters Union has an international pension and a local pension, both of which are administered by or through Wilson-McShane. *Id.* at 493.

Mr. Crowson testified that the Painters Union has an approved apprentice program, which requires employers to fill out an application and a letter of intent to sponsor an apprentice, and those documents are sent to the Finishing Trades Institute of the Upper Midwest for registration. *Id.* at 495. New union members and apprentices must pay an initiation fee, which was \$500 for journeymen and \$100 for apprentices in 2015. Employers may not deduct the initiation fee from their employees' paychecks. *Id.* at 496-497. Article 6 of the CBA authorizes employers to deduct checkoff dues from employee paychecks. *Id.* at 504; GX 14 at 7. Checkoff dues are a percentage of an employee's pay that is submitted to the Painters Union for dues to cover negotiating, facilitating contracts, etc. *Tr.* at 504. Mr. Crowson testified that there is nothing in the CBA that prohibits employers having a separate loan agreement with employees. *Id.* at 527.

Mr. Crowson testified that on DBA projects covered by the Painters Union CBA, the journeyman/apprentice ratio is typically three journeyman for every one apprentice, but in special circumstances an employer may be allowed one apprentice if it has only one journeyman. *Id.* at 496. Mr. Crowson testified that contractors may not use another contractor's employees in their journeyman/apprentice ratio. *Id.* Article 13 Section 2 of the CBA mandates that contractors will employ at least one apprentice and use the appropriate journeyman/apprentice ratio. *Id.* at 506; GX 14 at 11-12. Mr. Crowson testified that the journeyman/apprentice ratio applies "shop-wide" rather than "project-wide" so that a contractor could have one journeyman and two apprentices working on a particular project if shop-wide the ratio was in compliance. *Tr.* at 520. By "shop-wide," Mr. Crowson testified that the journeyman/apprentice ratio is determined by how many employees a contractor has performing all crafts, *i.e.*, painting, drywall, glazing, etc., and the total number of journeymen and apprentices a contractor has working at various projects is used to determine whether a contractor is in or out of ratio. *Id.* at 548. Mr. Crowson testified that occasionally the Painters Union will look at hour reports to see how many apprentices and journeymen an employer is using but usually the Painters Union is

not involved with how a contractor uses its apprentices. *Id.* at 500-501. The Painters Union does not require contractors to use specific employees. *Id.* at 500.

Mr. Crowson first became aware of Jamek in 2013 or 2014 when he joined the Painters Union as a staff member. *Id.* at 497. Jamek previously reached out to Francisco Altamirano, a Painters Union organizer, in 2012 about becoming a contractor. *Id.* The Painters Union became involved with the Project because there was a project labor agreement between the owner and the St. Paul Building Trades. *Id.* at 498. The project labor agreement incorporated the Painters Union CBA. *Id.* at 499. The St. Paul Building Trades sent the Painters Union a list of all the subcontractors who were awarded the Project, which Mr. Crowson received in June 2015. *Id.* at 498. Jamek signed the CBA and informed the Painters Union which employees would be working on the Project. *Id.* at 499. Mr. Crowson first met with Mr. Ekhtator to discuss the CBA in July 2015, then again in August 2015 and in early October 2015. *Id.* at 525.

Mr. Crowson monitored Jamek's compliance with the CBA and project labor agreement on the Project. *Id.* at 507. The Painters Union looked at hour reports, randomly visited the jobsite, spoke to employees, and checked union the employees' union cards. *Id.* Mr. Crowson began monitoring Jamek because the Painters Union received reports from drywall finishers working on the Project that there were employees working nights and weekends. *Id.* Subject to the CBA, jobsite hours are 7:00 a.m. to 3:30 p.m. and after hours is 5:30 p.m. and beyond. *Id.* at 508. After 5:30 p.m. employees are entitled to overtime pay. *Id.* The drywall workers would come arrive at the jobsite in the morning and notice that work was done that was not completed the previous day, such as windows being covered and objects being wrapped. *Id.* Mr. Crowson also received reports that people were seen entering and leaving the Project at night, and holes were observed in the chain link fence around the jobsite; Mr. Crowson never received complaints that paint was being applied to the walls in the evenings. *Id.* at 541-542. After Mr. Crowson received tips from the drywall workers, he sent two Painters Union field representatives, Francisco Altamirano and Alan Hanson, to the Project on Saturday October 17, 2015. *Id.* at 508-509. Mr. Crowson told the field representatives to take pictures if they saw any irregular activity. *Id.* at 509. The Painters Union utilizes an iPhone application to take pictures that includes a timestamp and the GPS coordinates of the picture location.¹⁰ *Id.* Mr. Hanson took several pictures of the jobsite and the workers he and Mr. Altamirano encountered, which they sent to Mr. Crowson the same day. *Id.* at 510, 528-529; GX 24. Mr. Crowson learned the identity of the people found on the jobsite from Mr. Altamirano and Mr. Hanson. *Tr.* at 510. The people encountered were Mr. Ekhtator, Mr. Arroyo, Ms. Arroyo, Mr. Serilla, and Mr. Santiago. *Id.* at 510-512. Mr. Crowson testified that Francis Ikonagbon was not at the Project that day. *Id.* at 514. Based on Mr. Hanson and Mr. Altamirano's visit, Mr. Crowson determined that Mr. Arroyo, Ms. Arroyo, Mr. Serilla, and Mr. Santiago were covering mechanical equipment and windows on October 17. *Id.* at 549. Mr. Crowson contacted Mike Wilde, lead counsel for the Fair Contracting Foundation, shortly after October 17 to have them investigate Jamek. *Id.* at 543-545.

¹⁰ The timestamp on the pictures reflect they were taken on October 17, 2015, from 15:06 to 15:42 UTC. GX 24. Mr. Crowson presumed UTC meant the universal time clock, but he was not sure if the pictures were actually taken in the afternoon or what relation UTC had to the time in Minnesota on that day. *Tr.* at 513-514.

Mr. Crowson concluded that Jamek's compliance with the CBA and project labor agreement was "fairly poor because during our visits we found these individuals that were not members of our organization." *Id.* at 515. On cross-examination, Mr. Crowson agreed that if the Painters Union believed Jamek violated the CBA it could have filed a grievance or sued Jamek. *Id.* at 517. The Painters Union business manager eventually terminated the CBA with Jamek due to its violations. *Id.* at 518.

Mr. Crowson was asked about the logistics of new construction projects based on his experience as a drywall finisher on cross-examination. *Id.* at 533. Mr. Crowson testified that drywall finishers must complete their work before painting can begin. *Id.* at 533. Mr. Crowson testified that he has worked on projects where doors were installed prior to painting. *Id.* Mr. Crowson did not recall whether there were doors installed in the units of the Project in October 2015. *Id.* at 533-534. Mr. Crowson testified that in a new construction project, such as Hamline Station, there would not be any trim installed in the drywall phase. *Id.* at 534. Ninety percent of the time, the trim is not installed until after the drywall finishers and painters complete their work. *Id.* at 535. Mr. Crowson testified that in his experience vents are installed on ductwork before the painter begins working, and in some cases the vents are installed before the sheet rocker and drywall finishers begin working, due to mechanical issues. *Id.* at 535-536. Mr. Crowson testified that in new construction the workers are working on a subfloor, which is plywood placed onto trusses, or gypcrete, which is cement poured on top of the subfloor. *Id.* at 536-537.

Alexander Dumke

Alexander Dumke is a Human Rights Specialist for the City of St. Paul, and he testified on behalf of the Acting Administrator. *Id.* at 552. Mr. Dumke enforces various city, state, and federal labor laws covering areas such as prevailing wage requirements, paid time off, and minimum wage. *Id.* at 552-553. Mr. Dumke monitors compliance with the DBA and DBRA on all federally funded projects, including construction projects. *Id.* at 553. During his eight year tenure in his position, Mr. Dumke has monitored 200 to 250 construction projects. *Id.* at 554. Mr. Dumke looks at contractor profiles, apprenticeship documents, certified payroll records, and conducts onsite visits to ensure that the information submitted to the city matches the activity occurring onsite. *Id.* at 554-555.

Mr. Dumke was in charge of enforcing compliance with federal labor laws on the Project, as it was partially funded by a \$1.1 million HOME loan from HUD. *Id.* at 556. Mr. Dumke first became aware of Jamek the Monday following Saturday October 17, 2015, when he received a call from the Painters Union business agent. *Tr.* at 565-566. The business agent raised several concerns on the phone call, including: 1) people were working on the weekend when no other businesses were on site, 2) they were not signatories to the project labor agreement, 3) some of the workers appeared underage, 4) the appropriate wages were not being paid, and 5) the Painters Union believed the individuals found working were not listed on payroll records. *Id.* at 566-568. Following the call, Mr. Dumke emailed Respondents requesting they submit their certified payroll records, as Respondents had not yet submitted any payroll records. *Id.* at 567-568. Mr. Dumke testified that it is a violation of the DBA to not timely submit payroll records. *Id.* at 570. Mr. Ekhtor responded that the workers discovered on October 17 worked for one of his

employees and were only at the Project to unload a delivery truck. Mr. Ekhaton also told Mr. Dumke that he did not believe the amount of time the individuals worked on October 17 came within the purview of the DBA requirements. *Id.* at 568. Mr. Ekhaton subsequently submitted payroll checks for the workers, which were picked up at Mr. Dumke's office in city hall or at the Project jobsite. *Id.*

Mr. Dumke received Jamek's first certified payroll record for September 27, 2015-October 3, 2015, on October 31, 2015. *Id.* at 570-571; *see* GX 21 at 21-22. Mr. Dumke testified that the first page of a payroll record details the number of hours worked by all employees for that workweek, and the second page contains a statement of compliance certifying that all information submitted is timely and correct, as required by the Copeland Act, and that all apprentices listed are registered in an apprentice program. *Tr.* at 572; *e.g.*, GX 21 at 21-22. After the city received Jamek's payroll records, Mr. Dumke discovered issues regarding apprenticeship, proof of apprenticeship, journeyman/apprentice ratios, and deductions from employee paychecks for union registration fees. *Tr.* at 573. Mr. Dumke testified that he does not believe deductions for union registration fees are permissible under the DBRA or CBA. *Id.* at 574. Mr. Dumke testified that St. Paul requires all deductions to be accompanied by an explanation from the employer, and there is a space on the payroll record for employers to describe the nature of the deductions. *Id.* at 576-577; *e.g.*, GX 21 at 11.

Mr. Dumke visited the Project on November 6, 2015, after the Prime Contractor requested he speak to Mr. Ekhaton about DBRA requirements. *Id.* at 583. Mr. Dumke met with Shane Walgamuth and Alicia Kiley, representatives of the Prime Contractor, the owner of Painting by Nakasone, and Mr. Ekhaton. *Id.* Mr. Dumke "gave a general overview of the requirements under the Davis-Bacon Act," what it means to be in or out of ratio under the DBRA, and the fringe benefits applicable to the Project. *Id.* at 584. Mr. Dumke also interviewed two Jamek employees on November 6 while Mr. Ekhaton was present and gave them "a quick update on their rights under the Davis-Bacon Act." *Id.* at 585, 590.

Mr. Dumke testified that Jamek was out of ratio, and therefore not in compliance with the DBRA, based on the payroll records submitted after the November 6 meeting. *Tr.* at 576. Mr. Dumke testified that he told Mr. Ekhaton he was out of ratio in person and via email, but Mr. Ekhaton claimed that another contractor's journeymen brought him in ratio. *Tr.* at 577; GX 30. Mr. Ekhaton submitted timesheets from November 9, 2015-November 13, 2015, for the journeymen he used to bring his journeyman/apprentice ratio into compliance, though they do not appear in any of Jamek's certified payroll records. Mr. Ekhaton told Mr. Dumke that the journeymen were provided by the Painters Union, and he initially thought they were going to be Jamek employees. *Tr.* at 595-596. Mr. Dumke testified that he does not believe that contractors can use each other's employees to count toward their journeymen/apprentice ratios under the DBRA. *Tr.* at 578. Mr. Dumke told Mr. Ekhaton that the employees on Painting by Nakasone's payroll records would count towards its journeyman/apprentice ratio and the employees on Jamek's payroll records would count towards its ratios. *Tr.* at 611.

Mr. Dumke concluded that Jamek owed back wages to its employees because four workers found on the jobsite on October 17, Jamek used incorrect journeyman/apprentice ratios, and Jamek deducted union initiation fees from some employees' paychecks. *Id.* at 585, 591. Mr.

Dumke determined that the four workers should be paid \$75/hour for their work on October 17 and that they needed to be included on Jamek's certified payroll records. *Id.* at 593; RX 82. Mr. Dumke testified that there were annotations by some employees' names on the payroll indicating that they had a loan agreement with Mr. Ekhtator for the union initiation fees. Mr. Dumke testified that he requested proof of the loan agreements but never received anything. *Tr.* at 614. St. Paul usually requests that employers submit updated payroll records showing that back wages have been paid, as well as copies of the checks or a direct deposit for proof of payment. *Id.* at 585-586. Mr. Dumke testified that he never received updated payroll records or proof of payment for the out of ratio employees or for deductions for union initiation fees. *Id.* at 586. Mr. Dumke did confirm that the four workers were paid \$225 for their work on October 17, as they all had to sign for their checks. *Id.* at 616. Mr. Dumke described Jamek's compliance on the Project was "frustrating" and "it kind of just displayed a contempt for the process or for the requirements to the point where I didn't think I was getting anywhere." *Id.* at 586-587.

Kevin Italio

Kevin Italio is a private sector contractor and testified on behalf of Respondents. *Id.* at 625. Mr. Italio has 30 years of experience as a painter and has been a member of the Local 286 union since 2000. *Id.* at 626. Mr. Italio worked as a journeyman for Jamek on the East Building of the Project for two weeks from the end of October 2015 to the beginning of November 2015. *Id.* at 627-628, 630. Mr. Italio was supervised by Mr. Ikonagbon on the Project, and testified that he has worked with Mr. Onu on other jobs. *Id.* at 629. Mr. Italio testified that he painted the apartment units and hallways on the Project. *Id.* at 630. Mr. Italio worked on the second and third floors of the East Building, as the painting was primarily finished on the fourth floor by the time he began work. *Id.* Mr. Italio testified that there were no doors installed in the hallways or in the individual units of the second or third floor, but he did not know if there were doors installed on the fourth floor. *Id.* at 631. Mr. Italio testified that doors are usually installed last because "[i]t would be ridiculous to have them up at that particular point in the process of the situation." *Id.* Mr. Italio also testified that there were no baseboards, crown moldings, vents, or flooring installed while he was working. *Id.* at 632-633. Mr. Italio stated that was common at that stage in new construction because it would "take twice as long to do our job if everything was already installed and we had to remove it or mask it, and that's just not how jobs are operated." *Id.* Mr. Italio testified that the bathroom shower enclosures and windows were the only two objects he had to mask before painting in the units, and there was no flooring that needed to be covered because the painters were working on a subfloor. *Id.* at 633-635.

Mr. Italio testified that he believed he used semigloss paint in the bathrooms, an eggshell paint on the rest of the walls in the units, and flat paint on the ceilings, but he could not recall exactly. *Id.* at 659. Mr. Italio testified that there were four or five sprayers on the jobsite, most of which were new and all of which were clean. *Id.* at 682. There were "a couple" of red Titan sprayers and "a couple" of blue Graco sprayers, and none were so covered in paint that it was impossible to tell if it was red or blue. *Id.* at 684. Mr. Italio testified that it can be difficult to tell the color of a sprayer if it is covered in paint, but paint only gets on the sprayer if it is in the same room that is being painted, and the sprayers onsite were kept away from the areas being painted by a 50 foot hose. *Id.* at 660, 682-683. While painting, Mr. Italio wore a spray sock over his head, which resembles a thin ski mask, a respirator to cover his mouth, long sleeves, and long

pants. *Id.* at 684-685. The only area of Mr. Italo's body that would be covered in paint was around his eyes. *Id.* at 685. Mr. Italo testified that a person operating a sprayer without a spray sock would have paint covering their face and hair. *Id.*

Mr. Italo testified that he worked from 7:00 a.m. until 3:30 p.m., and at the end of his shifts he would wrap up the sprayers, cover anything that was wet with plastic, and lock up all of his tools and respirators in a lockbox. *Id.* at 635-636. Mr. Italo testified that he never came into work in the morning to find the units in a different condition than they were left at the end of the previous shift; nothing was ever taped off and the sprayers were never moved. *Id.* at 637. Mr. Italo testified that the buildings had temporary heat in the hallways but not in the units. *Id.* Mr. Italo testified that the paint they were using runs more the colder the temperature is and cannot be used under 35 degrees. *Id.* at 638. Mr. Italo testified that he painted by natural light and never used or saw any temporary lighting on the jobsite. *Id.* at 639-640.

Mr. Italo testified that he entered into a loan agreement with Mr. Ekhaton dated October 27, 2015, in which Mr. Ekhaton would deduct \$75 per week from his paycheck to repay \$405 Mr. Ekhaton loaned him. *Id.* at 647; RX 65. Mr. Ekhaton paid Mr. Italo's \$255 initiation fee to rejoin the Painters Union, and Mr. Ekhaton gave Mr. Italo a \$150 advance. *Id.* at 647-648; RX 65.

Mr. Italo testified that he was paid in full by Jamek, and he does not believe that he is owed \$1,095.61 in back wages. *Id.* at 640-641; GX 38. Mr. Italo testified that he believes he was paid "over scale," as "scale" was \$30-\$31/hour and he was paid \$35/hour. *Id.* at 641-642. Mr. Italo does not know if he was paid fringe benefits. *Id.* at 642, 675. Mr. Italo drafted an affidavit with his girlfriend stating that he is not owed any additional money from Respondents, and he testified he was not prompted or influenced to draft the affidavit by Mr. Ekhaton but did so after he was contacted by Mr. Onu. Tr. at 644, 664; RX 141. Mr. Onu told Mr. Italo that "they were having some issues" with Jamek not being paid, and he asked Mr. Italo to write about his experience. *Id.* at 664-665. Mr. Italo's affidavit states, "[t]he union asked me to sign a loan agreement with James Ekhaton which he will deduct from my paycheck..." but Mr. Italo testified that no one at the Painters Union asked him to sign a loan agreement, and he did not know what his girlfriend meant by adding that language. *Id.* at 670-671; RX 141 at 1. Mr. Italo testified that Mr. Onu supplied him with the dates and hours he worked on the Project that he listed in the affidavit because he no longer had the records of the hours he worked. Tr. at 671-672; see GX 141 at 2.

Francis Onu

Francis Onu is a paint contractor and testified on behalf of Respondents. *Id.* at 696. Mr. Onu owns the company 5 Way Contractors, which he formed in 2013. *Id.* at 697. Mr. Onu worked for Jamek on the Project and previously on a home renovation job. *Id.* at 697-698. Mr. Onu originally bid on the Project himself but the Prime Contractor asked Mr. Onu to find another contractor to work with him because his company was so new. *Id.* at 699. Mr. Onu reached out to Mr. Ekhaton, who agreed to replace Mr. Onu as a subcontractor. *Id.* at 699-700. While Mr. Onu was working on the Project, 5 Way Contractors also had a job in New Richmond, Wisconsin, the Croft Place Apartments, which Mr. Onu worked on from October 2015 to

February 2016. *Id.* at 700-701, 703. Mr. Onu testified that he knew Mr. and Ms. Arroyo because they worked for Mr. Valladares, who was a subcontractor for 5 Way Contractors on the Croft Place Apartments. *Id.* at 702-703. Mr. Onu's company was allowed to work on the Croft Place Apartments any time so Mr. Valladares brought in a crew to work nights. *Id.* at 705-706. Mr. Onu testified that he never met with Mr. Arroyo and Mr. Ekhaton in New Richmond, and he has never met with Mr. Ekhaton anywhere in Wisconsin. *Id.* at 704. Mr. Onu testified that he did not have any sprayers of his own to use on the Croft Place Apartments so Mr. Valladares brought one to use on the jobsite. Mr. Onu testified that Mr. Valladares' sprayer was so covered in paint that it was impossible to discern the manufacturer. *Id.* at 705.

Mr. Onu worked on the Project for two to three weeks in October 2015. *Id.* at 706. Mr. Onu testified that he worked from 7:00-7:30 a.m. until 3:00-4:00 p.m. and never worked past 5:00 p.m. *Id.* Mr. Onu began working on the fourth floor of the West Building then moved to the fourth floor of the East Building after the West Building units were finished. *Id.* at 707-708. Mr. Onu did not work on any other floors of the East Building, and he only worked in the individual units. *Id.* at 707-708; 731. Mr. Onu testified that there were no interior or exterior doors, trim, crown moldings, or vents installed in the East or West Buildings. *Id.* at 708-710. The units consisted of sheetrock walls and gycrete flooring. *Id.* at 708-709. Mr. Onu testified that it is typical to paint in a completely empty room on a new construction project. *Id.* at 710. Mr. Onu taped the windows and tubs in the bathrooms before painting and did not tarp the floors because there was no flooring installed. *Id.* at 711-713. Mr. Onu testified that he used natural light to paint, as there was no permanent lighting in the units, although there were temporary lights in the hallways. *Id.* at 711.

Mr. Onu testified that he never arrived at the Project in the morning to find that work had been done overnight, taping or otherwise. *Id.* at 713-714. Mr. Onu and Mr. Ikonagbon taped everything themselves and they would prep everything in the units first before spraying. *Id.* at 714. Mr. Onu testified that there were two types of paint used, semi-gloss and eggshell. *Id.* at 715. There were four main sprayers in use on the Project and one "standby" sprayer. *Id.* at 715. Mr. Onu testified that he used the new sprayer, which was a red Titan, and Mr. Ikonagbon used a blue Graco 1095 sprayer. *Id.* at 715-716. In total, Mr. Onu testified that there were three red Titans and one blue Graco. Mr. Onu could not recall the manufacturer of the standby. *Id.* at 716-717. None of the sprayers were so covered in paint it was not possible to discern the color. *Id.* at 717. The standby was kept in storage on the jobsite with the paints, and Mr. Onu does not recall anyone using it during his time on the Project. *Id.*

Mr. Onu testified that spraying can be very messy if the person operating the sprayer is inexperienced but is quite clean if a professional is spraying. *Id.* Mr. Onu wears a "spray suit" while spraying, which consists of a spray sock, respirator, hard hat, and long sleeves. *Id.* Mr. Onu wore a one-piece jumpsuit but other sprayers wore separate pants and long sleeve shirts. *Id.* at 718. Mr. Onu testified that if someone wearing a short sleeve shirt, no goggles, and no hard hat was operating a sprayer, it would be "very impossible" for that person not to be covered in paint. *Id.* at 719.

Mr. Onu testified that he was "coerced" into joining the Painters Union by the Prime Contractor so that he could work on the Project. *Id.* at 700. Mr. Ekhaton paid Mr. Onu's \$150

initiation fee, and Mr. Onu testified that he authorized Mr. Ekhaton to make deductions from his paycheck as repayment. *Id.* at 720-721. Although Mr. Onu had five years of painting experience and the skill level of a journeyman, Mr. Onu testified that he joined the Painters Union as an apprentice because the Prime Contractor and the Painters Union said there could not be too many journeymen on the jobsite. *Id.* at 722. Mr. Onu never spoke to anyone about whether he should have been paid as a journeyman rather than as an apprentice. *Id.* at 723. Mr. Onu received a restitution check from Jamek for approximately \$100 to make up the difference between the apprentice and journeyman wages but he does not know if the check covered all or only part of the hours he worked. *Id.* at 723-724. Mr. Onu kept track of the hours he worked and never found any inconsistencies between the hours he worked and the amount he was paid. *Id.* at 724-725. Mr. Onu was paid between \$17 and \$18 per hour. *Id.* at 746. Mr. Onu does not believe that he is owed \$1,299.77 in back wages. *Id.* at 728; GX 38.

Mr. Onu gave a statement to Mr. Jones at the Wage and Hour office dated January 15, 2016. Tr. at 733; GX 51. Mr. Onu spoke while Mr. Jones typed on a computer; Mr. Onu did not write anything. Tr. at 749. In his transcribed statement, Mr. Onu asserts that he worked until 8:30 or 9:00 p.m. on two occasions masking and taping with Mr. Ikonagbon. GX 51 at 3. Mr. Onu testified that this was incorrect, and the latest he worked was 7:00 p.m. Tr. at 736.

On October 17, 2015, Mr. Onu testified that Mr. Ekhaton called him around 8:00 or 9:00 a.m. and said he needed people to move paint from a delivery truck. *Id.* at 741. Mr. Onu was not on the jobsite but called Mr. Valladares and asked if he had any workers who could move the paint. When Mr. Valladares said yes, Mr. Onu gave him Mr. Ekhaton's number so the workers could call when they arrived. *Id.* Mr. Onu testified that he asked Mr. Valladares for help because he didn't have any laborers on hand, and he and Mr. Valladares were recently introduced for work. *Id.* at 741-742.

Mr. Onu testified that he gave Mr. Italo copies of his timesheets in late 2015 or early 2016 after his interview with Wage and Hour but he has not had any communication with Mr. Italo regarding any statements or affidavits Mr. Italo was preparing. *Id.* at 744-745.

Omotola Edison-Edebor

Omotola Edison-Edebor is a senior accountant at Dougherty & Company and testified on behalf of Respondents. *Id.* at 754. Ms. Edison-Edebor also has her own company, Obilix Consulting, which prepares taxes and does payroll for small businesses. *Id.* at 757. Ms. Edison-Edebor has worked with Jamek since 2008 or 2009, and it is the only contractor for which Obilix does accounting work; Ms. Edison-Edebor testified is not a Jamek employee. *Id.* at 758, 783. Obilix handled the payroll for Jamek on the Project, and Ms. Edison-Edebor testified that she received the hours, wages, and fringes from Jamek then entered the information into a software program called CP Tracker. *Id.* at 760. Ms. Edison-Edebor testified that she was authorized by Mr. Ekhaton to sign and submit the payroll records on behalf of Jamek. *Id.*

During the Project, Mr. Dumke told Ms. Edison-Edebor that Jamek owed some workers a rate differential because Jamek was not using the correct journeyman/apprentice ratio. *Id.* at 762. Mr. Dumke emailed Ms. Edison-Edebor a list of the workers who needed to be reclassified,

the rates they were supposed to be paid, the rates they were actually paid, and the difference Jamek needed to pay. *Id.* at 762-763. After those communications, Ms. Edison-Edebor processed the restitution checks for the affected workers. *Id.* at 763; *e.g.*, GX 22 at 12. Ms. Edison-Edebor testified that she received the dollar amount for the restitution checks from Mr. Dumke, and she did not have the authority to enter different values. *Tr.* at 765. Ms. Edison-Edebor emailed copies of the restitution checks to Mr. Dumke. *Id.* at 765-766. Ms. Edison-Edebor also issued checks for \$225 to four individuals, and she was told by Mr. Dumke to treat them as independent contractors rather than employees. *Id.* at 768-769, 772.

Francis Ikonagbon

Francis Ikonagbon owns MABP House Services, LLC and testified on behalf of Respondents. *Id.* at 791. Mr. Ikonagbon has been a painter since 2011 and worked as a supervisor for Jamek for six or seven weeks in 2015. *Id.* at 791, 793. Mr. Ikonagbon began work on September 30 and was the first person to start working. *Id.* at 803. Mr. Ikonagbon started working on the second and third floors of the West Building then moved to the East Building. *Id.* at 802-803. Mr. Ikonagbon testified that he was asked by the site superintendent to paint the ceiling of the second floor hallway in the East Building on October 17, 2015, because electrical work was going to be done the following Monday. *Id.* at 793-794, 820-821. Mr. Ikonagbon arrived around 8:00 a.m. and used a door code to enter the jobsite. *Id.* at 795, 812. Mr. Ikonagbon testified that it is impossible for other people to have been painting or taping in the East Building that day without his knowledge. *Id.* at 795. Mr. Ikonagbon painted approximately 50% of the hallway ceiling, which he testified was 100-200 feet long, before his lunch break. *Id.* at 823-824. Mr. Ikonagbon testified that he was taking his lunch break around noon in a unit on the first floor when he saw the union representatives through a window facing east. *Id.* at 827-828. Mr. Ikonagbon saw four or five people in total, including Francisco and “two other guys and a lady which I’ve never met before...” *Id.* at 829-830. Mr. Ikonagbon testified that he is not sure when Mr. Ekhaton arrived but when he did Mr. Ikonagbon saw him arguing with the group of people. *Id.* at 833. Mr. Ikonagbon did not speak to anyone and left sometime in the early afternoon. *Id.* at 796-797. Mr. Ikonagbon testified that he also saw other people working outside that day who were not unloading paint and did not work for Jamek. *Id.* at 797-798.

There are no hours listed for Mr. Ikonagbon in Jamek’s certified payroll for October 17. *Id.* at 872; GX 21 at 17. Mr. Ikonagbon’s timesheet, which he testified is more accurate than the certified payroll, reflects that he worked 9:00 a.m. to 1:00 p.m. October 12, 10:00 a.m. to 12:00 p.m. on October 16, and 8:30 a.m. to 12:30 p.m. on October 17. *Id.* at 878; RX 29. Mr. Ikonagbon does not know he is not listed on the certified payroll records. *Tr.* at 878.

Mr. Ikonagbon testified that there were five sprayers used on the jobsite, four Titans and one Graco. *Id.* at 799. The sprayers were new and none of them were covered in paint. *Id.* at 800. Mr. Ikonagbon testified that he would remove the sprayers from the jobsite at the end of the day. *Id.* While spraying, Mr. Ikonagbon wore a long sleeve shirt, a mask, a respirator, and a hard hat. *Id.* at 801. Mr. Ikonagbon testified that a person would be covered in paint in about five minutes if they operated a sprayer without wearing protective equipment. *Id.* at 802. There were no doors in either of the buildings and no flooring; Mr. Ikonagbon only had to tape the

windows and the showers. *Id.* at 803-804. Mr. Ikonagbon never came to work and found that taping or painting had been done overnight, but there were occasions when he came to the jobsite and found that the apprentice he worked with had done work that morning before he arrived. *Id.* at 804, 880.

Mr. Ikonagbon detailed the process of painting an apartment unit at the Project. *Id.* at 836. Mr. Ikonagbon prepped by taping and covering the windows with plastic, then covering the showers and bathtubs with plastic. *Id.* Mr. Ikonagbon testified that it took an hour to an hour and a half to prep a one bedroom unit, one and a half to two hours to prep a two bedroom, and up to three hours for a three bedroom, depending on whether it was a corner unit. *Id.* at 839-841. After prepping and taping, Mr. Ikonagbon sanded the sheetrock walls, dusts the walls, then swept the floors. *Id.* at 841-842, 847-848. It took 30 minutes to sand a one bedroom, 10 minutes to dust the walls, and an additional 20 minutes to sweep the dust; it took 30 to 45 minutes to sand a two bedroom, 15 minutes to dust, and 20 minutes to sweep; and it took up to an hour to sand a three bedroom, 15-18 minutes to dust, and 30 minutes to sweep. *Id.* at 842-849. Mr. Ikonagbon testified that he then primed the walls and ceilings with two coats of paint after sweeping. *Id.* at 849-850. It took 30 minutes to apply one coat of primer in a one bedroom, 45-60 minutes for a two bedroom, and 90 minutes for a three bedroom. *Id.* at 851. The first coat of primer dried for a full day before the second coat was applied. *Id.* at 853. After priming, Mr. Ikonagbon sanded the walls again, which took approximately the same amount of time as the first round of sanding. *Id.* at 851-852. Mr. Ikonagbon applied two coats of the color coat after sanding, which took approximately 30 minutes longer than applying the primer. *Id.* at 852-854. The first coat dried for roughly an hour before the second coat was applied. *Id.* at 855.

Mr. Ikonagbon used the same process to paint the hallways, and he testified that it took 16 hours to paint a hallway in the East Building. *Id.* at 860. Although there was no flooring in the hallways or units, Mr. Ikonagbon put a tarp down before painting because paint prevents the carpet from sticking to the concrete when it is eventually installed. *Id.* at 863-864.

Mr. Ikonagbon testified that he has never spoken with anyone named Juan Valladares, and he has never met with a Juan Valladares at a McDonald's or Target parking lot. *Id.* at 875.

Randall Schwake

Randall Schwake is a painter and testified on behalf of Respondents. *Id.* at 884. Mr. Schwake testified that he paints the stripes, curbs, markings, handicap stencils, and crosshatches in parking lots and garages. *Id.* at 884-885. Mr. Schwake worked for Jamek for one day in November 2015 painting the below level parking garage in one of the buildings of the Project. Mr. Schwake testified that he never went inside the building. *Id.* at 885, 889. Mr. Ekhaton paid Mr. Schwake's union initiation fee, and Mr. Schwake repaid Mr. Ekhaton after he received his paycheck. *Id.* at 885-886. Mr. Schwake testified that he was paid everything to which he was entitled on the Project and drafted an affidavit to that effect. *Id.* at 886-887; RX 140. Mr. Schwake testified that he knew what the prevailing wage was when he worked on the Project and that he was paid more by Jamek. *Tr.* at 899-900. Mr. Schwake received a letter from the Building Trades Credit Union dated May 30, 2017, stating that he received benefits from his

employer and that he needed to open an account to access the money. Tr. at 887, 896-897; GX 52. Mr. Schwake opened an account but never received any money. *Id.* at 888.

Elia Stamboulieh

Mr. Stamboulieh is a painter and testified on behalf of Respondents. *Id.* at 904. Mr. Stamboulieh worked for Jamek for three weeks in November 2015. *Id.* Mr. Stamboulieh previously worked for Jamek on a small project in Minneapolis, but the Project was the first job for which he needed to join the Painters Union. *Id.* at 905. Mr. Stamboulieh has 15-17 years of experience as a painter and joined the Painters Union as a journeyman. *Id.* at 906. Mr. Ekhaton paid Mr. Stamboulieh's union initiation fees and Mr. Stamboulieh authorized Mr. Ekhaton to deduct \$225 from his paycheck as repayment. *Id.* at 933. Mr. Stamboulieh testified that he worked in both the East and West Buildings. *Id.* at 905. On the second and third floors of the East Building, Mr. Stamboulieh "was involved in brushing, cutting corners, and rolling" in the units, but he did not work in the hallways. *Id.* at 905-906. Mr. Stamboulieh testified that he worked with an apprentice named Oscar, Derrick, Daniel, and Francis, the supervisor. *Id.* at 906-907. In the West Building, Mr. Stamboulieh spray painted in the units on the third floor and one or two units on the second floor. *Id.* at 907.

Mr. Stamboulieh testified that in the East and West Buildings, the units were completely bare; there were no doors, flooring, vents, baseboards, or crown molding installed. *Id.* at 910. Mr. Stamboulieh only taped the windows and the bathtubs before painting. *Id.* Mr. Stamboulieh did some of the prep work but it was mostly done by Oscar. *Id.* at 911. While spraying, Mr. Stamboulieh wore a painting mask, *i.e.*, a spray sock, goggles, a hard hat, a respirator, long sleeves, and white pants. *Id.* at 912-913. Mr. Stamboulieh opined that someone would be completely covered in paint in three minutes if they were not wearing protective equipment while spraying. *Id.* at 913-915. Mr. Stamboulieh also testified that based on his experience, it would be impossible to paint in the East or West Building in the middle of the night in October or November because there were no lights, it gets dark early, and "no one in their right mind would want to paint where they can't see where they're painting." *Id.* at 920. Mr. Stamboulieh testified that he never came into work to find that taping or painting had been done overnight. *Id.* at 912.

Mr. Stamboulieh drafted an affidavit dated May 21, 2018, stating that he was paid more than the prevailing wage for his work on the Project, that he received several letters from the Building Trades Credit Union notifying him that it had received payroll savings on his behalf, and that he was not instructed or influenced to draft the affidavit. RX 142.

James Ekhaton

James Ekhaton is the sole owner and CEO of Jamek. Tr. at 935. Mr. Ekhaton is a civil engineer and has a Master's degree in Highway and Transportation Engineering. *Id.* at 936. Mr. Ekhaton started Jamek in 2007, and it is a licensed general contractor in Minnesota. *Id.* Jamek performs remodeling, painting, and carpentry work, and Mr. Ekhaton occasionally does some of the painting himself. *Id.* at 936-937.

Jamek become involved with the Project in 2015 after Mr. Ekhaton received a phone call from Mr. Onu asking him to replace 5 Way Contractors as subcontractor. *Id.* at 937. Mr. Ekhaton signed two contracts with the Prime Contractor on behalf of Jamek. *Id.* at 1002; GX 11 at 4; GX 12 at 4. Mr. Ekhaton testified that he did not read all of the attachments to the contracts or the DBRA regulations but he was aware that the Project was covered by the DBRA; he was aware of the wage provisions of the DBRA; he was aware of the fringe benefit provisions; he was aware that certified payroll records had to be submitted; but he was not aware of what deductions were authorized under the DBRA. Tr. at 1004-1006.

Jamek began work on the Project on September 30, 2015. *Id.* at 939. Mr. Ekhaton testified that he and Ms. Edison-Edebor could not submit payroll information during the first week of work because Mr. Dumke had to enter the apprentice classification into the system before they could enter employee information. *Id.* at 942-943, 946; RX 83. Mr. Ekhaton does not believe he is responsible for the delay in submitting payroll records before October 30, 2015, because Mr. Dumke was on vacation for two weeks in October. Tr. at 944, 947. Mr. Ekhaton testified that it is not true that Mr. Dumke never received copies of the restitution checks Jamek paid to its employees to make up for being out of ratio. *Id.* at 951. Mr. Ekhaton testified that he emailed copies of the restitution checks to Mr. Dumke on November 23, 2015, and never received a response. *Id.* at 951-952; RX 120.

Mr. Ekhaton testified that Jamek was allowed to work onsite between 7:00 a.m. and 3:30 p.m. but with special permission from the Prime Contractor they were allowed to work on the weekends. Tr. at 1032. Mr. Ekhaton visited the jobsite approximately twice per week for roughly 20-30 minutes per visit. *Id.* at 1033. Mr. Ekhaton went to the Project to inspect the work, make sure the workers were on schedule, and once or twice to meet with the Prime Contractor. *Id.* at 1035-1036. There were weekly meetings with the Prime Contractor at the Project but Mr. Ekhaton testified he was not permitted to attend because he did not purchase the necessary insurance that allowed him to be onsite. *Id.* at 1037.

On October 17, 2015, Mr. Ekhaton testified that he received a call from a delivery driver around 10:00 a.m. stating that he was going to deliver paint for the Prime Contractor at the Project. Tr. at 956-957. Mr. Ekhaton told the driver that he did not work on Saturday and to take the paint back to the store, but the driver refused. *Id.* at 957. The driver told Mr. Ekhaton that if no one was there he was going to leave the paint on the street. *Id.* Mr. Ekhaton testified that he called Mr. Onu to ask for help accepting the paint delivery. *Id.* at 958. Mr. Ekhaton arrived around 12:00 p.m. and the delivery driver arrived around 20 minutes later. *Id.* at 959-960. Mr. Ekhaton testified that the union representatives and four other individuals were already at the jobsite, on top of the East Building, when Mr. Ekhaton arrived. *Id.* at 960, 1019. Mr. Ekhaton testified that he never met the four individuals before that day, and they were not his employees. *Id.* at 960-961. Mr. Ekhaton testified that Mr. Altamirano began shouting when he saw Mr. Ekhaton and said that the four individuals had been working since that morning. *Id.* at 1026. Mr. Altamirano said he was going to debar Mr. Ekhaton from working on government jobs and accused Mr. Ekhaton of hiding workers on the jobsite. *Id.* at 961-962. Mr. Ekhaton testified that the woman present said, "this is our first time here," and that she did not move any of the paint buckets. *Id.* at 963. Mr. Ekhaton testified that two of the individuals moved the paint from the street into an empty unit on the east side of the East Building, which is approximately 25 feet.

Id. at 1020-1021. Mr. Ekhaton stayed on the jobsite for about an hour, and he spoke to Mr. Ikonagbon on the phone after he left. *Id.* at 964, 969. Mr. Ekhaton left before the union representatives and the four individuals. *Id.* at 1030.

Mr. Ekhaton testified that he did not intentionally leave Mr. Ikonagbon off of the certified payroll for October 17, and he didn't "entirely understand the information on the system." *Id.* at 983. Mr. Ekhaton testified that he first learned there were issues with Jamek's payroll when the Department of Labor contacted him. *Id.* at 984.

The Monday following October 17, Mr. Ekhaton received a call from the Prime Contractor saying they received a report from Mr. Dumke about the incident on Saturday and asking Mr. Ekhaton to explain. *Id.* at 970. Mr. Dumke emailed Mr. Ekhaton telling him he needed to pay the four workers who moved paint \$75/hour. *Id.* at 971. Mr. Ekhaton testified that he did not take any of the workers to his bank to cash their checks, nor did he have any meetings with Mr. or Ms. Arroyo. *Id.* at 973-974. Mr. Ekhaton testified that he never had employees working at night and that it would not be possible because it is too cold to apply the paint and there were no lights installed in the units. *Id.* at 975-978. Mr. Ekhaton testified that according to the manufacturer, it has to be at least 45 degrees Fahrenheit to use the paint. *Id.* at 1031. The only lights in both of the buildings were in the hallways and Mr. Ekhaton testified that Jamek did not own or rent any temporary lights. *Id.* at 978.

Mr. Ekhaton did a walkthrough of the hallways and units in October and November 2015. *Id.* He testified that there was no flooring installed, and there were no baseboards, doors, crown molding, or vents. *Id.* at 978-979. Mr. Ekhaton stated that Jamek uses drop cloths when the painters do touchups, which occurs after the fixtures and flooring have been installed. *Id.* at 980. On new construction no drop cloths are used when the painters first come in. *Id.* at 980-981.

Mr. Ekhaton testified that he had authorization from all six employees that had deductions for union dues taken from their paychecks. *Id.* at 982. Mr. Ekhaton testified that the Painters Union did not follow through with its promise to have a pool of painters for Jamek to use so he had to find painters to sign up with the union. *Id.* Mr. Ekhaton paid the initiation fees for the six employees "[b]ecause the people needed my help to end up when they start with the union, get registered and work to earn a living." *Id.* at 983. Mr. Ekhaton's testified that his payment of the initiation fees became a problem after October 17, 2015. *Id.*

Mr. Ekhaton testified that Jamek was paid approximately \$23,500 for the work done on both buildings, leading Jamek to file a mechanic's lien against the Project. *Id.* at 985. Jamek reached a settlement with the Prime Contractor in which it agreed to release its lien on the Project. *Id.* at 988-989; RX 145. The Prime Contractor agreed to pay Jamek \$72,188.26, the first \$15,000 of which was to be paid after Jamek released its lien. RX 145 at 3. The Prime Contractor is to pay Jamek \$41,709.06 if Jamek provides proof that it has fully satisfied its obligations to DOL and that DOL is no longer seeking payment from the Prime Contractor due to Jamek's actions or omissions. *Id.* at 3-4. The remaining \$15,479.20 is to be paid to Jamek once it delivers proof that it has satisfied its obligations to fringe benefit claimants and that those claimants are no longer seeking payment from the Prime Contractor. *Id.* at 4-5. Mr. Ekhaton testified that he has received the initial \$15,000 from the Prime Contractor, and he authorized the

Prime Contractor to make the \$15,479.20 fringe benefit payment. Tr. at 990. DOL reduced the alleged back wages that Respondents owe from \$41,709.06 to \$35,895.01. *Id.* at 996; GX 38(a). Mr. Ekhatore testified that DOL has not credited him for the \$15,479.20 he authorized the Prime Contractor to make on Jamek's behalf to the Fringe Benefit Funds, and he does not believe he owes back wages to anyone. Tr. at 996-997. Mr. Ekhatore testified that he did not make any unauthorized deductions and that any delay regarding the submission of certified payroll records was the fault of Mr. Dumke. *Id.* at 998.

Mr. Ekhatore testified that he did not make monthly or quarterly fringe benefits for work done on the Project. *Id.* at 1040-1041. Mr. Ekhatore paid \$199 in fringe benefits for September 2015 prior to the termination of Jamek's contracts on November 20, 2015. *Id.* at 1040; GX 34 at 1. The Prime Contractor paid \$15,479.20 to McGrann-Shea, which then paid the money to the Fringe Benefit Funds. *Id.* at 1041-1042. Neither Mr. Ekhatore nor Jamek paid any part of the \$15,479.20 to McGrann-Shea or the Fringe Benefit Funds. *Id.* at 1042. Mr. Ekhatore did not ask Wage and Hour whether the \$15,479.20 paid by the Prime Contractor would be credited towards the \$35,895.01 it alleges Respondents owe in back wages. *Id.* at 1043. The Prime Contractor paid \$41,709.06 to DOL, the remainder of which may be remitted to Jamek under the settlement agreement once Jamek has satisfied its obligations to DOL. *Id.* at 1044; RX 145 at 4.

APPLICABLE LAW

The Davis-Bacon Act requires that laborers and mechanics working on covered federal construction projects be paid a minimum wage "based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there." 40 U.S.C. § 3142(b). The purpose of the DBA is to: (1) give local laborers and contractors a fair opportunity to participate in building programs when federal money is involved; and (2) protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the locality. *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996); *United States v. Binghamton Constr. Co.*, 347 U.S. 171, *reh'g denied*, 347 U.S. 940 (1954). This minimum wage is referred to as the "prevailing wage." *Id.*; *see also* 29 C.F.R. § 1.3. If the DBA covers a construction project, the applicable wage determination is incorporated into the governing contract and provides the minimum rates for workers in the job classifications who work on the project. 29 C.F.R. § 5.5(a).

A general contractor is responsible for ensuring that all persons engaged in performing the duties of a "laborer" or "mechanic" on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. 29 C.F.R. § 5.2(o); *Arliss D. Merrell, Inc.*, 1994-DBA-00041 (Oct. 26, 1995). Where laborers and mechanics perform work in more than one classification, they may be compensated at the established rate for each classification for the time worked therein, provided that "the employer's payroll record accurately set forth the time spent in each classification in which work is performed." 29 C.F.R. § 5.5(a)(1)(i). This requires contractors to keep accurate payroll records that sufficiently and accurately demonstrate that workers were paid prevailing wages and fringe benefits for all compensable work. 29 C.F.R. § 5.5(a)(3)(i). These

certified payroll records must be accompanied by a signed statement of compliance certifying the DBRA wage requirements. 29 C.F.R. § 5.5(a)(3)(ii)(B).

The Administrator has the initial burden of proving that employees performed work on the DBA project for which they were improperly compensated. *See, e.g., Cody Zeigler, Inc.*, 1997-DBA-00017 (ALJ Apr. 7, 2000); *aff'd in relevant part*, Nos. 01-014, 01-015 (ARB Dec. 19, 2003); *Pythagoras Gen Contracting Corp.*, 2005-DBA-00014 (ALJ June 4, 2008), *aff'd*, Nos. 08-107, 09-007 (ARB Feb. 10, 2011) (*errata* issued Mar. 3, 2011). The Administrator carries its burden if it proves that the employees have “in fact performed work for which [they were] improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

The Administrator does not need to establish “the precise extent of uncompensated work.” *See Thomas & Sons Bldg. Contractors, Inc.*, 1996-DBA-00037 (ALJ Feb. 17, 2000), *aff'd*, No. 00-050 (ARB Aug. 27, 2001), *Order Denying Recons.* (ARB Dec. 6, 2001). Testimony by workers is acceptable “in the absence of accurate employer records” from either the contractor or the subcontractor. *Ray Wilson Co.*, No. 02-086, 2000-DBA-00014 (ARB Feb. 27, 2004). Additionally, in *Star Brite Construction Co.*, the Administrative Review Board held that given respondent’s lack of records, it was proper for an Administrative Law Judge to rely on the testimony of witnesses. *Star Brite Construction Co.*, No. 98-113, 1997-DBA-00012 (ARB June 30, 2000).

If the Administrator meets its burden, the burden then shifts to the respondent employer, who bears the ultimate burden of proof by a preponderance of the evidence. *Cody Zeigler, Inc.*, slip op. at 31; *Pythagoras Gen Corp.* The employer must “come forward with evidence of the precise amount of work performed or with evidence to negat[e] the reasonableness of the inference to be drawn from the employees’ or Administrator’s evidence.” *Cody Zeigler, Inc.; Pythagoras Gen Corp.*; *see also Ray Wilson Co.*, No. 02-086; *Thomas & Sons Bldg. Contractors, Inc.* If the employer fails to produce such evidence, the court may then award damages to the Administrator, on behalf of employees, even if the result is only approximate. *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88.

DISCUSSION

I. Payment of the Prevailing Wage and Fringe Benefits

To comply with the DBA provisions of a contract, contract workers must be paid according to the classifications used in the locality in which the contract is performed. *See Building & Constr. Trades’ Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983); *Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1427 (Fed. Cir. 1991) (citing *Building & Constr. Trades’ Dept.*, 712 F.2d at 614); *Johnson-Massman, Inc.*, No. 96-118 (ARB Sept. 27, 1996). The Acting Administrator alleges that Respondents owe the following individuals a total of \$35,895.01 in back wages for their failure to pay the prevailing wage, fringe benefits, overtime, or a combination thereof:

Name	Prevailing Wage Due ¹¹	Fringe Benefits Due	Overtime Due	Restitution Paid ¹²	Total Back Wages Due
Jorge Arroyo Garcia	\$2,495.16	\$2,507.04	\$95.67	\$0	\$5,097.87
Maria Arroyo Garcia	\$3,425.96	\$2,776.90	\$271.07	\$0	\$6,473.93
Lance Borger	-\$251.43	\$1,408.47	\$0	\$0	\$1,157.04
Derick Delgado	\$1,308.27	\$1,939.18	\$0	\$0	\$3,247.45
Francis Ikonagbon	-\$528.04	\$4,039.80	\$0	\$0	\$3,511.76
Kevin Italo	\$362.65	\$732.96	\$0	\$0	\$1,095.61
Francis Onu	\$204.28	\$1,205.83	\$0	\$110.34	\$1,299.77
Danny Rodriguez	\$768.54	\$1,057.73	\$0	\$0	\$1,826.27
Kevin Santiago	\$2,507.04	\$2,495.16	\$95.67	\$0	\$5,097.87
Randall Schwake	-\$3.06	\$78.35	\$0	\$0	\$75.28
Alexy Serilla	\$716.27	\$748.63	\$0	\$0	\$1,464.90
Elia Stamboulieh	\$197.88	\$1,462.44	\$0	\$0	\$1,660.32
Oscar Tula	\$1667.43	\$2,513.75	\$0	\$294.24	\$3,886.94

GX 38; GX 39.

A. The Prevailing Wage

i. *The Journeyman/Apprentice Ratio*

The Acting Administrator alleges that Respondents failed to pay their workers the prevailing wage by utilizing an impermissible journeyman/apprentice ratio in violation of 29 C.F.R. § 5.5(a)(4)(i). Br. at 37. The Acting Administrator argues that, by employing more apprentices than allowed, Respondents paid the lower apprentice rate to a larger number of employees than they would have if they abided by the proper journeyman/apprentice ratio. The Acting Administrator argues that Jamek's certified payroll records, internal payroll journals, and paychecks prove that Respondents violated 29 C.F.R. § 5.5(a)(4)(i). *Id.* at 38.

Mr. Dumke testified that Jamek was out of ratio during the week of October 25 to October 31 by employing three apprentices and two journeymen. Tr. at 575-578; GX 21 at 11. Mr. Dumke testified that he never received any proof that Respondents paid restitution to the apprentices who were working out of ratio, but Mr. Jones testified that he received copies of checks issued to Mr. Tula and Mr. Onu. Tr. at 586, 154, 222. Mr. Jones testified that he credited

¹¹ A negative dollar amount indicates the employee was paid more than the prevailing wage.

¹² For employees who were paid restitution, total back wages due = (prevailing wage due – restitution paid) + fringe benefits due.

Respondents for being in compliance from September 27 to October 3 and from October 4 to October 10, even though Respondents were technically out of ratio under the CBA. *Id.* at 107.

The DBA regulations state, in relevant part:

The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

29 C.F.R. § 5.5(a)(4)(i). The Painters Union CBA states:

At the discretion of the Joint Apprenticeship Committee, an apprentice may be placed in a shop that has only one (1) journeyman. Thereafter, the ratio of apprentices to journeymen employed in one shop shall be no more than one (1) apprentice to three (3) journeymen. No apprentice may be kept employed in any shop that employs no journeymen.

GX 14 at 13. A review of Respondents' certified payroll records reveal that they were out of ratio during the following weeks:

Week	Ratio
09/27/15-10/3/15	10/1: one journeyman, one apprentice 10/2: one journeyman, one apprentice
10/4/15-10/10/15	10/6: one journeyman, one apprentice 10/7: one journeyman, one apprentice
10/18/15-10/24/15	10/18: one apprentice 10/19: one journeyman, one apprentice 10/20: one journeyman, one apprentice 10/21: two journeymen, one apprentice 10/22: two journeymen, one apprentice
10/25/15-10/31/15	10/29: three journeymen, two apprentices
11/1/15-11/7/15	11/3: two journeymen, two apprentices 11/4: one journeymen, three apprentices 11/5: two journeymen, three apprentices 11/6: one journeyman, three apprentices
11/8/15-11/14/15	11/9: two journeymen, two apprentices 11/10: two journeymen, three apprentices 11/11: two journeymen, three apprentices 11/12: two journeymen, three apprentices

	11/13: one journeyman, three apprentices
11/15/15-11/21/15	11/16: three journeymen, two apprentices 11/17: three journeymen, two apprentices 11/18: three journeymen, two apprentices 11/19: three journeymen, two apprentices

GX 21.

Respondents’ certified payroll records support the Acting Administrator’s allegation that Respondents were out of ratio for several weeks on the Project. Accordingly, the Acting Administrator has met its burden, which now shifts to Respondents. Respondents must prove by a preponderance of the evidence that they were in compliance with the ratio during the weeks listed above.

Respondents argue that they paid their employees in accordance with the designation each employee was given by the Painters Union, *i.e.* journeyman or apprentice, and that they received “an unfair surprise at the end of the job” when Jamek was informed that it had to make restitution payments to some of its apprentices to conform with the journeyman/apprentice ratio set forth in the CBA. GX 48 at 4. Mr. Ekhatore testified that he made the required restitution payments to each employee identified by Mr. Dumke and emailed copies of the checks to Mr. Dumke on November 23, 2015, but never received a response. Tr. at 951-952; *see* RX 120. Mr. Jones testified that he received copies of restitution checks for Mr. Tula and Mr. Onu during his investigation, and he credited Respondents for those payments when he calculated back wages. Tr. at 154, 222.

Respondents further argue that they were not out of ratio for the week of November 8 to November 14 because three journeymen employed by another subcontractor brought Jamek within ratio. *See* RX 120. In the November 23, 2015 email from Mr. Ekhatore to Mr. Dumke, Mr. Ekhatore stated that Mr. Walgamuth, the project manager for the Prime Contractor, “suggested that the three painters will work with Jamek as employees but Anderson Companies will be responsible for their weekly payment which will be deducted from Jamek Contract based on the hours they work each week with their time sheets signed by Francis Ikonagbon at the end of the week.” *Id.* at 1. Mr. Jones testified to the same, stating that Mr. Ekhatore believed he could use three journeymen employed by Painting by Nakasone to comply with the journeyman/apprentice ratio. Mr. Jones opined that this was not permissible under the DBRA. Tr. at 90-91.

Respondents’ first argument is immaterial. Jamek should not have needed to be informed of the appropriate journeyman/apprentice ratio. It was clearly set forth in Article 13 of the CBA that Mr. Ekhatore, as CEO of Jamek, signed in June 2015, and it was Mr. Ekhatore’s responsibility to be appraised of the requirements of the jobsite. Furthermore, regardless of who gave the employees their designations or how many of each were sent to the Project, Respondents were required to pay their employees in accordance with the law. 29 C.F.R. § 5.5(a)(4)(i) clearly states that “any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.” Mr. Crowson also testified that he discussed the

CBA with Mr. Ekhaton in July, August, and October 2015. Tr. at 525. As such, I find that Respondents were on notice regarding the appropriate journeyman/apprentice ratio and the manner in which they were required to pay their employees when in and out of ratio.

Respondents' second argument is equally unpersuasive. Although Respondents made restitution payments to some of their apprentices, the underlying violation still remains. Under the DBA, employees are entitled to weekly payment of their full wages. 29 C.F.R. § 5.5(a)(1)(i) (“[a]ll laborers and mechanics . . . will be paid unconditionally and not less often than once a week . . . the full amount of wages . . . due at the time of payment . . .”). In *Blau Mechanical, Inc.*, the Wage Appeals Board (“WAB”)¹³ held that a subcontractor violated the DBA by withholding portions of its employees’ paychecks to place into an office pool, even though some of the employees eventually received their full pay:

The undisputed record clearly demonstrates that a portion of employees’ Davis-Bacon wages was withheld through Blau’s four-check system and was eventually redistributed to all of Blau’s employees, regardless of whether they had performed any work on the VA contract. VA contract workers did not receive the hourly amounts due them, and—*even if some employees eventually received 100% of the prevailing rate upon distribution of the pool money—a violation was still committed even with respect to those employees through Blau’s failure to ensure timely payment of the full accrued amounts on a weekly basis.*

Blau Mech., Inc., WAB No. 92-20, 1993 WL 331761, at *3 (July 22, 1993) (emphasis added). As set forth in *Blau*, the DBA violation is complete once there is a failure to remit wages weekly, regardless of whether the employees were later made whole. Respondents may be credited for the restitution payments in the calculation of back wages, discussed *infra*, but the violation of the DBA is not negated by such payments.

Respondents fail to cite any legal authority for their argument that they are able to use another subcontractor’s employees toward their journeyman/apprentice ratio. The regulations state “[t]he allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio *permitted to the contractor* as to the entire work force under the registered program.” 29 C.F.R. § 5.5(a)(4)(i) (emphasis added). The plain reading of the text mandates that the journeyman/apprentice ratio for a jobsite is determined on a contractor by contractor basis. Despite filling out Jamek timesheets, the three painters in question were listed on Painting by Nakasone’s certified payroll records, not Jamek’s. *Compare GX 32 with GX 21.* There is no evidence in the record showing that any payment was remitted to the three painters from Jamek, or that any deduction was taken from Jamek’s contract with Anderson Companies to account for payment made to the painters on behalf of Jamek. As Respondents provide no explanation or authority for how these painters are to be construed as Jamek employees, this argument fails.

Respondents have failed to show by a preponderance of the evidence that they were in compliance with the journeyman/apprentice ratio while working on the Project and have not

¹³ The Wage Appeals Board is a predecessor to the Administrative Review Board.

“negat[ed] the reasonableness of the inference to be drawn from the employees’ or Administrator’s evidence.” Accordingly, I find that Respondents violated 29 C.F.R. § 5.5(a)(4)(i).

ii. The Prevailing Wage Rates

The Acting Administrator argues that Respondents violated 29 C.F.R. §§ 5.5(a)(1) and (a)(4)(i) by failing to pay their apprentices, in ratio or otherwise, the prevailing wage. Br. at 40. The Acting Administrator argues that Respondents’ certified payroll records, internal payroll journals, and paystubs reflect that their apprentices were paid \$14.01/hour and \$15.29/hour, both of which are lower than the prevailing wage. *Id.* Respondents maintain that they paid all of their employees in accordance with the Painters Union rates, which was more than required under the federal prevailing wage. GX 48 at 3-4.

The DBA regulations state, in relevant part:

All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 C.F.R. Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

29 C.F.R. § 5.5(a)(1)(i). Furthermore, apprentices “must be paid at not less than the rate specified in the registered program for the apprentice’s level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination.” 29 C.F.R. § 5.5(a)(4)(i).

The Project was covered by a CBA and federal wage determination MN 140085, which required spray painters to be paid the following rates:

	Prevailing Wage	Fringe Wage	CB Base Wage	CB Fringe Wage
Journeyman	\$31.89	\$17.41	\$33.57	\$19.38
Apprentice	\$15.95	\$13.06	\$16.29	\$14.62

GX 17 at 3; GX 15. The wage determination does not provide separate apprentice and journeyman rates; rather, the apprentice rate is calculated as a percentage of the journeyman rate. 29 C.F.R. § 5.5(a)(4)(i). Mr. Jones testified that he calculated the apprentice prevailing wage by taking the applicable percentage from the CBA, 50%, and multiplying it by the prevailing wage. Tr. at 108. Mr. Jones calculated the apprentice fringe rate by dividing the journeyman and

apprentice fringe rates in the CBA, which provided the applicable percentage, then multiplying that by the prevailing fringe rate.¹⁴ *Id.* at 110. Wage and Hour only enforces the wages in the prevailing wage determination; it does not enforce wages in CBAs even if they may be higher than the prevailing wage. *Id.* at 43-44, 65.

I consider the evidence for each alleged employee to determine whether there is a “just and reasonable inference” that he or she performed undercompensated work for Respondents. *Mt. Clemens Pottery Co.*, 328 U.S. at 687. First, I decide if the alleged employee in fact performed work for Respondents. Second, I decide which classification and correlative wage rate was appropriate for the work that he or she performed. Third, I determine his or her approximate total work hours and actual earnings, in order to estimate the actual wage rate that he or she received. If this is lower than the wage rate to which he or she was entitled, this establishes a just and reasonable inference that the stated employee performed undercompensated work, and therefore the Acting Administrator has carried its burden regarding that worker. Once I determine whether the Acting Administrator has carried its burden, I consider whether Respondents rebut this reasonable inference for each employee, by providing precise and specific contrary evidence.

a. “Off-the-Book Workers”: Jorge Arroyo Garcia, Maria Arroyo Garcia, Kevin Santiago, and Alexy Serilla

The Acting Administrator argues that Respondents employed four “off-the-book” employees—Mr. Arroyo, Ms. Arroyo, Mr. Santiago, and Mr. Serilla—to work nights and weekends on the Project and failed to pay them prevailing wages or fringe benefits. *Br.* at 44.

Mr. and Ms. Arroyo testified at the hearing. I do not find either of them to be credible witnesses. In arriving at a decision, it is well settled that the factfinder is entitled to determine the credibility of witnesses, weigh the evidence, and draw its own inferences therefrom. *Pasack Builders, Inc., Tristate Building Co., and Franklin Petty, Jr.*, 2015-DBA-00017, slip op. at 12 (ALJ Feb. 2, 2016) (citing *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997)); *Administrator v. Grober Trucking, Inc.*, No. 03-137 (ARB Nov. 30, 2004) (citing *Sundex, Ltd.*, No. 98-130 (ARB Dec. 30, 1999)). I have considered and evaluated the rationality and consistencies of the witnesses’ testimony, including the manner in which the testimony supports or detracts from other evidence. In doing so, I have considered all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *Holt and Holt, Inc.*, 2014-DBA-00005, slip op. at 9 (ALJ Apr. 21, 2015) (citing *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971)). An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness’ testimony but may choose to believe only certain portions of the testimony. *Id.* (citing *Mijangos v. Avondale Shipyard, Inc.*, 948 F.2d 941 (5th Cir. 1991)).

Mr. and Ms. Arroyo’s testimonies were internally inconsistent, inconsistent with each other, and contained several statements against the weight of the record. Mr. Arroyo spoke with Mr. Jones on two occasions during the Wage and Hour investigation. *Id.* at 351. Mr. Arroyo testified that he was no longer working for Respondents when he first met with Mr. Jones in New

¹⁴ $(14.62 \div 19.38) \approx 0.75$. $(0.75 \times 17.41) = 13.0575$.

Richmond, Wisconsin. *Id.* Mr. Arroyo's first statement to Mr. Jones is handwritten and dated December 2, 2015. RX 146. Much of the statement is illegible, but part of it states:

I first started on this project 2 months ago. Usually it is me and Derek and sometimes other workers. Hernando, Santiago, Maria sometimes on Saturday. Derek and me work here Monday through Friday and sometimes Saturday. I work here and sometimes help out friends or Juan on a remodel. We went to help them unload the paint and the union came over there at Hamline. Derek used to work over there under the union and Oscar under the union too. I don't know if he or anyone worked there at night. It was a Friday or Saturday that I unloaded the truck out there. It got delayed so we went and helped them out. We did not have [illegible] so taped up windows 10 minutes and it was an hour-two hours max to bring paint inside. Juan has this one and I am not sure what else—working for 5 Way on the New Richmond project. It was just that day. They paid us \$15 an hour for that day. I don't know what Oscar and Derek got paid because they paid us in check.

James talk to us about Hamline and he is one that paid us for unloading the truck. I don't remember exactly what he said. He took pictures of the check and our IDS. He said union needed proof. Juan sent us and I explained not working for them, but working for Juan. James and my sister and me went to the bank. We went to the bank by his office. He took us there because he wanted us to cash checks. We cashed the checks in the bank. That was the only time I have done that. He said he brought us there to cash the check and do it up there. Romans [sic] union did not want us out there. Derek and Oscar are doing classes for the union. They went and worked for the union. I usually get paid by the hour. Saturday I get time and a half. I got paid \$15.00 an hour. I get paid weekly. Sometimes I get paid bi-weekly. Like this month I have money saved up. I believe they stopped working out in Hamline. Derek and Oscar tell me what is going on Juan asked us if we wanted to do a quick job and it was just unloading paint.

Id. at 4-8.

In his second written statement, dated February 18, 2016, Mr. Arroyo claims “[t]he reason I told a different story to you was at the time they were the only ones giving me a job and they told that they were going to fire us if we told them anything.” RX 146 at 1. Mr. Arroyo explained that, rather than only unloading paint on a Saturday, he actually worked at Hamline 30-50 hours per week from October 1-22, 2015. *Id.*

I find Mr. Arroyo's December 2, 2015 statement to be more credible than his testimony and his February 18, 2016 statement. As an initial matter, Mr. Arroyo testified that he did not read or review his February statement; it was transcribed by Mr. Jones while they spoke over the phone. Tr. at 382. The February statement is signed but Mr. Arroyo testified that it is not his

signature. *Id.* at 382-383. As for the contents of the statement, Mr. Arroyo testified that he stopped working for Jamek on October 17, 2015, yet he claims that he did not tell the truth during his first interview with Mr. Jones because he was worried about being fired. *Id.* at 371. I do not find it plausible that Mr. Arroyo would not tell the truth for fear of losing his job when he had not worked for Jamek for six weeks. Mr. Arroyo also testified that Mr. Ekhaton only came to the Project three times while he was working, including the day the union showed up, and Francis was the one in charge and at the job site during all of his shifts. *Id.* at 334. Yet in his second statement, Mr. Arroyo claimed that “[m]ost of the time it was James at night . . . he would let the entrance down and let us in.” RX 146 at 1.

I also do not find Ms. Arroyo’s written statement from 2016 to be credible.¹⁵ Ms. Arroyo’s statement also contains a signature that is not hers. RX 147; Tr. at 438. In the statement, Ms. Arroyo claims she worked on the Project for four weeks, beginning and ending in October, but she testified that she actually worked from “early/mid-September and then till the union showed up.” *Compare* RX 147 at 1 *with* Tr. at 435. Notwithstanding the inconsistencies, Jamek’s first day on the Project was not until September 30, 2015. Tr. at 940. Additionally, Mr. Arroyo testified that Ms. Arroyo started a week after him, which would make his first day sometime in early to mid-September. *Id.* at 329. Yet Mr. Arroyo alleges that he began work at the end of September or the beginning of October. Tr. at 329; RX 146. Ms. Arroyo also claimed in her written statement that Francis was only at the jobsite “a couple times,” but she testified that he was there every shift. *Compare* RX 147 at 1 *with* Tr. at 402.

I also do not find credible the Arroyos’ testimony regarding the fixtures installed in the apartment units. Mr. Arroyo testified that he covered the windows, metal objects, and laid tarp on the floors of the units prior to painting. *Id.* at 318. Ms. Arroyo likewise testified that she covered the windows and vents prior to the sprayers painting. *Id.* at 432, 444. Ms. Arroyo also testified that some units had wood trim installed and approximately twenty five percent of the units had interior and exterior doors installed. *Id.* at 432-434. Contrary to the Arroyos, Mr. Italio, Mr. Onu, Mr. Ikonagbon, and Mr. Stamboulieh testified that there were no doors, trim, crown moldings, vents, or flooring installed in any of the units. *Id.* at 632-633, 708-710, 803-804, 910. All four men testified that this was typical for the painting stage of a new construction project, as having those features installed prior would make their jobs more difficult and would extend the time it takes to paint. I find that Mr. Italio, Mr. Onu, Mr. Ikonagbon, and Mr. Stamboulieh’s testimony about the process of painting a new construction project is more credible than that of Mr. and Ms. Arroyo, given their roughly 60 years of combined painting experience.

Mr. and Ms. Arroyo also inaccurately described the sprayers that were onsite. Mr. Arroyo testified that there was one old blue sprayer that “got ruined” and was replaced with a red sprayer. *Id.* at 368. Ms. Arroyo testified that there was one sprayer onsite that “was all painted” to the extent that she could not tell what color it was. *Id.* at 438. While the Arroyos both testified that there was only one sprayer, Mr. Italio, Mr. Onu, and Mr. Ikonagbon testified that there were at least four sprayers onsite. Mr. Italio testified that there were four or five sprayers, a “couple” red and a “couple” blue; Mr. Onu testified that there were three red Titans and a blue

¹⁵ The typewritten date on the statement is 04/12/2016 but that is crossed out and 2/14/16 is written above it. Ms. Arroyo could not recall which date was accurate. Tr. at 438-439.

Graco; and Mr. Ikonagbon testified that there were four red Titans and one blue Graco. Tr. at 682-684, 715-717, 799. Mr. Arroyo and Ms. Arroyo both testified that they previously worked for Mr. Valladares, who worked for Mr. Onu. *Id.* at 319, 442. Additionally, while Mr. Onu testified that Mr. Valladares brought a sprayer that was completely covered in paint to the Croft Place Apartments in New Richmond, Mr. Italo, Mr. Onu, and Mr. Ikonagbon all described the sprayers at Hamline Station to be new and clean. *Compare* Tr. at 705 *with* Tr. at 682, 717, 799. As noted previously, Mr. Arroyo and Mr. Onu testified that Mr. and Ms. Arroyo were working at the Croft Place Apartments during the same period Jamek was working on the Project. Tr. at 337, 702-703.

Taken as a whole, I do not find credible Mr. Arroyo’s or Ms. Arroyo’s testimony regarding their work on the Project. Their testimony contained multiple factual inconsistencies and did not align with the evidence of record. Accordingly, the Acting Administrator has not met its burden to prove that Mr. Arroyo or Ms. Arroyo worked for Respondents on any day except October 17, 2015, unloading the paint delivery truck. As the Acting Administrator has not offered any other evidence that Mr. Arroyo, Ms. Arroyo, Mr. Serilla, or Mr. Santiago worked on the Project, I find that Respondents did not employ any “off-the-book” workers, and they are not owed any back wages.

b. “On-the-Book Workers”

Respondents’ certified payroll records reflect the following hourly wages paid to their employees for work performed on the Project:

Name	9/27/15-10/3/15	10/4/15-10/10/15	10/11/15-10/17/15	10/18/15-10/24-15	10/25/15-10/31/15	11/1/15-11/7/15	11/8/15-11/14/15	11/15/15-11/21/15
Lance Borger		\$33.57	\$33.57	\$33.57		\$30.52	\$30.52	
Derick Delgado					\$14.01	\$14.01	\$14.01	\$14.01
Francis Ikonagbon	\$33.57	\$33.57	\$33.57	N/A ¹⁶	\$30.52	\$30.52	\$30.52	\$30.52
Kevin Italo				\$33.57	\$30.52			
Francis Onu	\$16.29	\$16.29		\$16.29	\$14.01			
Danny Rodriguez							\$14.01	N/A
Randall Schwake								\$30.52
Elia Stamboulieh						\$30.52	\$30.52	\$30.52
Oscar Tula				\$16.29	\$14.01	\$14.01	\$14.01	\$14.01

GX 21.

Respondents’ internal payroll journals and copies of employee paychecks show that their employees were paid the following rates:

¹⁶ “NA” indicates that the employee is not listed on the certified payroll record but is listed in the internal payroll journal and/or has a copy of their paycheck in the record for that week.

Name	9/27/15-10/3/15	10/4/15-10/10/15	10/11/15-10/17/15	10/18/15-10/24/15	10/25/15-10/31/15	11/1/15-11/7/15	11/8/15-11/14/15	11/15/15-11/21/15
Lance Borger		\$35.62	\$35.62	N/A ¹⁷		N/A	N/A	
Derick Delgado					N/A	N/A	N/A	\$15.29
Francis Ikonagbon	\$35.62	\$35.62	\$35.62	\$35.62 \$69.19 ¹⁸	\$32.57	N/A	N/A	\$32.57
Kevin Italo				N/A	\$32.57			
Francis Onu	\$17.57	\$17.57		\$17.57	\$15.29			
Danny Rodriguez							N/A	\$15.29
Randall Schwake								\$32.57
Elia Stamboulieh						N/A	N/A	\$32.57
Oscar Tula				\$17.57	\$15.29	N/A	N/A	\$15.29

RX 14; RX 15; RX 23; RX 25; RX 26; RX 27; RX 28; RX 55; RX 56; RX 63; RX 78; RX 79; RX 80; RX 81; RX 113; RX 115; RX 116; RX 117; RX 118; RX 119.

Respondents' certified payroll records and their journeymen's paystubs reflect different rates of pay from October 25 to November 21. The certified payroll records show that Mr. Ikonagbon, Mr. Italo, Mr. Schwake, and Mr. Stamboulieh were paid below the prevailing wage for their classification during that time period, but the paystubs show that they were paid above the prevailing wage. Compare GX 21 at 1-12 with RX 78, RX 80, RX 104, RX 113, RX 116, RX 118. There are no paystubs for the fifth journeyman, Mr. Borger, in the record, but his certified payroll record entries also reflect that he was paid below the prevailing wage from November 1-November 14. I find the certified payroll records to be more probative than the paystubs. Social Security is withheld at 6.2% and Medicare is withheld at 1.45%. 26 U.S.C. § 3101(a) and (b)(1). The withholdings on both the certified payrolls and the paystubs show that the taxes were withheld based on the certified payroll rates, not the paystub rates. For example, Mr. Ikonagbon's certified payroll entry for October 25 to October 31 indicates he worked 21 hours at \$30.52/hour, for a gross amount of \$640.92. GX 21 at 11. Mr. Ikonagbon's paystub reflects that he worked 21 hours at \$32.57/hour, for a gross amount of \$683.97. RX 78. The certified payroll record and paystub both reflect a net pay of \$477.27, Social Security withholding of \$39.73, and Medicare withholding of \$9.29. Compare GX 21 at 11 with RX 78. \$39.73 is 6.2% of \$640.92, not \$683.97.¹⁹ Likewise, \$9.29 is 1.45% of \$640.92, not \$683.97.²⁰ Accordingly, I find that the certified payroll records reflect the actual rate Respondents' journeymen were paid. As \$30.52 is below the prevailing wage of \$31.89, the Acting Administrator has met its burden of establishing that Respondents' journeymen were paid less

¹⁷ "NA" indicates that the employee is listed on the certified payroll record for that week but was not listed on the internal payroll journal and there was not a copy of their paycheck in the record.

¹⁸ Mr. Ikonagbon's paystub reflects that he was paid double time at \$69.19/hour for 6.5 hours. RX 56.

¹⁹ $640.92 \times 0.062 = 39.73704$. $683.97 \times 0.062 = 42.40614$.

²⁰ $640.92 \times 0.0145 = 9.29334$. $683.97 \times 0.0145 = 9.917565$.

than the prevailing wage. The burden now shifts to Respondents to rebut the Acting Administrator’s reasonable inference.

Respondents presented the testimonies of Mr. Ikonagbon, Mr. Italo, Mr. Schwake, and Mr. Stamboulieh as evidence they do not owe their journeymen back wages. Mr. Schwake, for example, testified that he was paid “like \$40 an hour or something,” and if he believed he was paid less than the prevailing wage he “would have went back to Jamek Construction and said, ‘hey, you didn’t pay me the prevailing wage.’” Tr. at 902, 900. However, the employees’ paystubs on their face do not prove that they were paid above the prevailing wage. As demonstrated above, a different story emerges when one actually calculates how their taxes were withheld. Mr. Ikonagbon, Mr. Italo, Mr. Schwake, and Mr. Stamboulieh would not have known that there was a different amount reflected on the certified payrolls, and it is unlikely they calculated the taxes that should have been withheld from their checks based on the gross pay listed. Therefore, I do not find that Respondents have put forth precise and specific contrary evidence to rebut the Acting Administrator’s reasonable inference that Respondents paid their journeymen below the prevailing wage between October 25, 2015, and November 21, 2015.

The Acting Administrator alleges that Mr. Ikonagbon is owed \$3,511.76, Mr. Italo is owed \$1,095.61, Mr. Schwake is owed \$75.28, Mr. Stamboulieh is owed \$1,660.32, and Mr. Borger is owed \$1,157.04. GX 38; GX 39. The Acting Administrator calculated back wages using \$32.57 as the base wage rather than \$30.52 as I have found. The Acting Administrator also included fringe benefits and union initiation fees in its calculations, neither of which I have found the apprentices are entitled to, as discussed *infra*. Accordingly, Mr. Ikonagbon, Mr. Italo, Mr. Schwake, Mr. Stamboulieh, and Mr. Borger are owed back wages in the following amounts:

Journeyman	Back Wages Owed ²¹
Francis Ikonagbon	$(\$31.89-\$30.52) \times (21 + 32 + 40 + 39) = \180.84
Kevin Italo	$(\$31.89-\$30.52) \times (37.6) = \$51.51$
Randall Schwake	$(\$31.89-\$30.52) \times (4.5) = \$6.17$
Elia Stamboulieh	$(\$31.89-\$30.52) \times (21.5 + 24 + 38.5) = \115.08
Lance Borger	$(\$31.89-\$30.52) \times (12.5 + 4) = \22.61

For the four apprentices—Mr. Delgado, Mr. Onu, Mr. Rodriguez, and Mr. Tula—the certified payroll records and their paystubs both show the employees were paid below the prevailing wage. Mr. Rodriguez is not listed on the certified payroll for 11/15-11/20, but he has a paystub and timesheet for that week in the record. RX 119; RX 105. Mr. Delgado, Mr. Onu, Mr. Rodriguez, and Mr. Tula were entitled to \$15.95/hour but certified payroll records reflect a wage of \$14.01/hour, and their paystubs show a rate of \$15.29/hour. RX 79; RX 81; RX 115; RX 119. As with Respondents’ journeymen, I find the apprentice’s certified payrolls to be more probative than the paystubs due to the withholding amounts. Using Mr. Onu as an example, the certified payroll for October 25 to October 31 shows Mr. Onu worked 16.5 hours at \$14.01/hour for a gross amount of \$231.17. GX 21 at 12. Mr. Onu’s paystub for that week shows he worked 16.5 hours at \$15.29/hour for a gross amount of \$252.29. RX 79. Both documents show a net pay of \$202.90, Social Security withholdings of \$14.34, and Medicare withholding of \$3.35.

²¹ \$31.89-\$30.52 is the difference between the prevailing wage and what the journeymen were paid. The hours were taken from Respondents’ certified payroll records. GX 21.

Compare GX 21 at 12 with RX 79. \$14.34 is 6.2% of \$231.17, and \$3.35 is 1.45% of \$231.17.^{22,23} Accordingly, I find that the certified payroll records reflect the actual rate Respondents' apprentices were paid. As \$14.01 is below the prevailing wage of \$15.95, the Acting Administrator has met its burden of establishing that Respondents' apprentices were paid less than the prevailing wage. The burden now shifts to Respondents to rebut the Acting Administrator's reasonable inference.

Respondents argue that they do not owe their apprentices back wages because they made restitution payments in November 2015 to account for the hours they were out of ratio. Tr. at 951-952. Respondents' internal payroll journals show that restitution checks were issued to Mr. Onu, Mr. Tula, Mr. Delgado, and Mr. Rodriguez, and Mr. Ekhaton also emailed Mr. Dumke copies of the checks on November 21, 2015. RX 120. Mr. Onu was issued one check on November 17, 2015, for \$110.34 (6 hours at \$18.39/hour), and another check on November 20, 2015, for \$27.59 (1.5 hours at \$18.39/hour). RX 126 at 13, 19. Mr. Tula was issued two checks on November 20, 2015, one for \$292.42 (16 hours at \$18.39/hour), and one for \$220.79 (13 hours at \$18.39/hour). *Id.* at 19-20. Mr. Delgado was issued a check on November 20, 2015, for \$490.63 (31 hours at \$18.39/hour). *Id.* at 21. Mr. Rodriguez was issued a check on November 20, 2015, for \$118.78 (13 hours at \$18.39/hour).²⁴ *Id.* at 18.

Despite the restitution payments, Respondents did not account for all hours owed to their apprentices for being out of ratio, nor did they account for paying their apprentices below the prevailing wage when they were in ratio. The Acting Administrator alleges that Respondents owed Mr. Onu \$1,299.77, Mr. Tula \$3,886.94, Mr. Delgado \$3,247.45, and Mr. Rodriguez \$1,826.27. GX 38; GX 39. However, the Acting Administrator calculated back wages using \$15.29 as the wage the apprentices were paid, rather than \$14.01. The Acting Administrator also included fringe benefits and union initiation fees in its calculations, neither of which I have found the apprentices are entitled to, as discussed *infra*. Accordingly, I have determined that Respondents owe their apprentices the following back wages:

Apprentice	Total Hours Worked	Hours out of Ratio ²⁵	Restitution Hours Paid	Restitution Hours Remaining	Regular Hours Remaining	Back Wages Owed ²⁶
Francis Onu	75	13	7.5	5.5	62	$[(5.5 \times \$17.88) + (62 \times \$1.94)] - (\$0.51 \times 7.51) = \214.79

²² $231.17 \times 0.062 = 14.33068$. $252.29 \times 0.062 = 15.64198$.

²³ $231.17 \times 0.0145 = 3.35153$. $252.29 \times 0.0145 = 3.658205$.

²⁴ While copies of the checks issued to the apprentices would have been preferable to the November 21, 2015 email and the entries in Respondents' internal payroll journals, I am still crediting Respondents for these restitution payments.

²⁵ These hours are taken from GX 39. Mr. Jones testified that, per Wage and Hour policy, he rotated between apprentices to determine who was in and out of ratio for a given week. Tr. at 107.

²⁶ \$17.88 is the difference between the journeyman prevailing wage, \$31.89, and what the apprentices were paid, \$14.01. This amount is multiplied by Restitution Hours Remaining, which is Hours out of Ratio – Restitution Hours Paid. \$1.94 is the difference between the apprentice prevailing wage, \$15.95, and the \$14.01 the apprentices were actually paid. This amount is multiplied by Regular Hours Remaining, which is Total Hours Worked – Hours out of Ratio. \$0.51 is the amount Respondents overpaid in their restitution payments, (\$18.39-\$17.88), which is multiplied by Restitution Hours Paid and subtracted from the total back wages owed.

Oscar Tula	162	91.5	29	62.5	54.5	$[(62.5 \times \$17.88) + (54.5 \times \$1.94)] - (\$0.51 \times 29) = \$1,208.44$
Derrick Delgado	125	70.5	31	39.5	54.5	$[(39.5 \times \$17.88) + (54.5 \times \$1.94)] - (\$0.51 \times 31) = \796.18
Danny Rodriguez	68	39	13	26	29	$[(26 \times \$17.88) + (29 \times \$1.94)] - (\$0.51 \times 13) = \514.51

In total, I find that Respondents owe \$3,110.13 to nine employees.

B. Fringe Benefits

The Acting Administrator alleges that Respondents violated 29 C.F.R. § 5.5(a) by failing to make regular fringe benefit contributions. Br. at 34.

In addition to setting the prevailing wage, the Department of Labor determines a prevailing fringe benefit rate, which is based on the prevailing amount that employers set aside for a worker's benefits. The DBA requires that employees be paid "the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor." 29 C.F.R. § 5.5(a)(1)(i). Fringe benefits may be paid to a fund rather than directly to the employee, but contributions must be made at least quarterly. *Id.*

Fringe benefits for work performed on the Project were to be paid to Wilson-McShane, the fringe administrator for the Painters Union. Tr. at 262. The applicable fringe benefit rate was \$17.41/hour. GX 17 at 3. Mr. Ekhtor testified that he only made one fringe benefit contribution of \$199.23 to Wilson-McShane for September 2015. Tr. at 1040; GX 34 at 1. As Mr. Ekhtor conceded that he only made one fringe benefit contribution, the Acting Administrator has satisfied its burden of proving that Respondents failed to make regular fringe benefit contributions, in violation of 29 C.F.R. § 5.5(a)(1)(i).

Respondents suggest that the \$15,000 payment Jamek authorized the Prime Contractor to make to Wilson-McShane in 2017 resolved the issue of their not making regular fringe benefit payments. Tr. at 996-997. This argument is without merit. The regulations allow a 90-day window for fringe benefits to be paid to benefit funds on behalf of employees. 29 C.F.R. § 5.5(a)(1)(i). The fringe benefits that were due for September to November 2015 were not paid until January 2017 when the Prime Contractor remitted payment to Wilson-McShane, making such payments late and in violation of the DBA. Further compounding the problem, Mr. Ekhtor was investigated by Wage and Hour two years before the Project for failure to pay fringe benefits and was extensively counseled on the DBA requirements in the final conference. Tr. at 465. As such, Mr. Ekhtor knew that a lump sum fringe benefit contribution two years after payment was due was not satisfactory under the DBA.

Although Respondents violated the DBA by not making timely fringe benefit contributions, Respondents' employees are not entitled to those fringe benefits as back wages. Mr. Metcalf testified about the administration of the Painters Union Fringe Benefits Fund, and he stated that the benefits do not vest until the employee works at least 1,000 hours in twelve months. If the employee does not hit the 1,000 hour mark, their funds are not vested and the contributions become assets of the fund. *Id.* at 265-268. The Administrator has put forth no evidence that any of Respondents' affected employees met the vesting requirement, and therefore they would not have been entitled to the fringe benefits even if Respondents had made the contributions. In sum, while Respondents violated the DBA, the employees are not entitled to the fringe benefits as back wages.

II. Maintenance of Payroll Records

The Acting Administrator alleges that Respondents failed to keep accurate payroll records by not including off-the-book employees, in violation of the DBA, and failed to timely submit accurate payroll records, in violation of the Copeland Act. Br. at 60-63.

Under the DBA, payroll and time records must be maintained by the contractor during the course of work for all employees working in the construction or development of a project for a period of three years thereafter. 29 C.F.R. § 5.5(a)(3)(i). Specifically, the payrolls must contain “[t]he name, address, and social security number of each worker, his or her correct classification, hourly rate of wages paid (including...costs anticipated for bona fide fringe benefits...), daily and weekly number of hours worked, deductions made, and actual wages paid.” 29 C.F.R. § 5.5(a)(3)(i). Apprenticeship records must also be kept. *Id.* Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the contractor, subcontractor, or his or her agent and certifying: (1) the payroll for the payroll period contains correct and complete information; (2) each laborer or mechanic has been paid the full weekly wages earned, without rebate, and that no impermissible deductions have been made; and (3) “each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.” 29 C.F.R. § 5.5(a)(3)(ii)(B).

The Copeland Act, whose regulations are found at 29 C.F.R. Part 3, dictates the submission of certified payroll records. The regulations state:

Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part 3 and part 5 of this title during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages

(a) Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency in charge at the site of the building or work

29 C.F.R. §§ 3.3(b), 3.5(a).

As outlined above, I do not find that Respondents employed off-the-book employees, and therefore Respondents did not violate the DBA by failing to include those individuals on their certified payrolls. However, Respondents' payroll records were repeatedly submitted late and contained several inaccuracies. As detailed in the chart, *supra*, Mr. Ikonagbon and Mr. Rodriguez were both left off Respondents' payroll records despite having timesheets and paystubs showing that they worked. Except for the last two weeks of the Project, every payroll was submitted late. *See* GX 21. Mr. Ekhaton attempted to blame Mr. Dumke by testifying that he was on vacation for several weeks in October 2015. Tr. at 942-946. Be that as it may, Mr. Dumke emailed Mr. Ekhaton on October 30, 2015, stating that he had input the necessary employee classifications that were previously preventing Mr. Ekhaton from certifying his payroll. RX 83. Respondents have not offered an explanation for why their payroll for 11/1/15-11/7/15 was still submitted late despite this correction. GX 21 at 8-9.

Additionally, all of Respondents' payroll records reflect that they paid fringe benefits on behalf of their employees, but by his own admission Mr. Ekhaton testified that he only paid fringe benefits for September 2015. The certified payroll records were therefore inaccurate, and accordingly, I find that Respondents violated the DBA and the Copeland Act by failing to comply with the recordkeeping requirements of 29 C.F.R. § 5.5(a)(3)(i), (ii) and 29 C.F.R. §§ 3.3(b), 3.5(a).

III. Overtime

The Acting Administrator alleges that Respondents failed to pay their off-the-book employees overtime in violation of the Contract Work Hours and Safety Standards Act. Br. at 60. The CWHSSA applies to contracts involving public works or federal funding that are greater than \$100,000 and are financed by loans guaranteed by the federal government. 40 U.S.C. § 3701. Contracts CFDA 14-239 and CFDA 14-2369 exceeded \$100,000 and were financed by loans guaranteed by HUD. Therefore, the CWHSSA applied to these contracts. Contractors subject to the CWHSSA must pay their workers at least time and a half for any hours worked over forty in a week. 29 C.F.R. § 5.5(b)(1).

As stated above, I do not find that Respondents employed off-the-book employees. The Acting Administrator does not allege that any other employees were not paid overtime. Accordingly, I find that Respondents did not violate the CWHSSA by failing to pay their employees overtime.

IV. Deduction of Union Initiation Fees

The Acting Administrator alleges that Respondents violated 29 C.F.R. §§ 3.5 and 5.5.(a)(1)(i) by deducting union initiation fees from the paychecks of Mr. Delgado, Mr. Italo, Mr. Onu, Mr. Stamboulieh, Mr. Rodriguez, and Mr. Tula. Br. at 40-41.

The DBA requires that contractors pay their employees “the full amounts” of prevailing wages and fringe benefits to which they are entitled, “unconditionally,” and “without subsequent deduction or rebate on any account, . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.” 29 C.F.R. § 5.5(a)(1). Exceptions to this rule, in relevant part, include:

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(b) Any deduction of sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is made without discount or interest. A *bona fide prepayment of wages* is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(i) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however*, that a collective bargaining agreement between the contractor or subcontractor and representatives of its employees provides for such deductions and the deductions are not otherwise prohibited by law.

29 C.F.R. § 3.5 (emphasis in original).

There is no suggestion by Respondents or evidence in the record that Respondents applied to the Secretary of Labor for approval to take the deductions from their employees’ paychecks. Therefore, the deductions must fall within one of the exceptions listed in 29 C.F.R. § 3.5 in order not to constitute a violation.

Respondents’ argument that they did not violate the Copeland Act because there is not “any sentence in this entire collective bargaining agreement that says an employer is prohibited from deducting the apprentice application fee or apprentice initiation fee from a paycheck if the employee authorizes the deduction” is a misreading of the regulations. Tr. at 524. The regulation states that union initiation fees may be deducted if the CBA *provides for* the

deductions. 29 C.F.R. § 3.5(i) (emphasis added). Providing for a deduction and failing to prohibit a deduction are not equivalent.

Likewise, Respondents' argument that the CBA does actually provide for the deductions because "the term 'administrative dues' is not defined in the collective bargaining agreement," is a misreading of the CBA. Tr. at 522. Article 6 of the CBA, "Dues and Administrative Fees Check-off Provision," states:

Every Employer signatory to this Agreement hereby agrees to check off from the wages of all Employees covered by this Agreement, during the term of this Agreement, administrative dues for Painters and Allied Trades District Council No. 82 in the amount stated in the By-Laws for each hour worked or paid for. Said sums shall be remitted to the depository in the same manner and on the same forms provided for the payment of all fringe benefit funds. The Employer will be provided the appropriate provisions of the By-Laws.

The Administrator of said Funds, upon receipt of said monies, shall remit the amount deducted by the Employers to the Painters and Allied Trades District Council No. 82. The obligations of the Employer under this section shall apply only to those Employees who have voluntarily signed authorization for dues check-off.

GX 14 at 8.

Respondents attempt to expand the definition of "administrative dues" to include union initiation fees by suggesting that "under the collective bargaining agreement all administrative dues, quote 'all administrative dues' are allowed to be deducted from an employee's paycheck" Tr. at 521-522. However, nowhere does the CBA state that "all administrative dues" may be deducted from employee paychecks. Rather, the CBA states that employers agree "to check off from the wages of all Employees covered by this agreement . . . administrative dues . . . in the amount stated in the By-Laws for each hour worked or paid for." GX 14 at 8. This is a much more specific definition than that provided by Respondents. Union initiation fees are not tied to the hours "worked or paid for." They are flat rate fees employees must pay to join the union. *See* Tr. at 523-524. Administrative dues, or checkoff dues, on the other hand, are tied to the hours an employee works. Mr. Crowson testified that "[t]he dues checkoff in our instance is a percentage of the total package that the employee is paid that gets submitted to the Union for dues, which covers the cost of negotiating contracts, facilitating the contracts, running the Union, etc." *Id.* at 504. These deductions appear on employee paystubs and are authorized by Article 6 of the CBA. *Id.* at 504-505. Furthermore, the manner in which the union initiation fees were deducted and distributed from Jamek's employees weighs against their being considered administrative dues. The union initiation fees were withheld from the paychecks and went to Mr. Ekhaton personally. Administrative dues are paid by the employer to the Painter's Union fringe benefit administrator using the same remittance form for fringe benefits. The fringe benefit administrator then distributes the money to the Painters Union. GX 14 at 8.

Accordingly, Respondents' deductions of employees' union initiation fees do not fall within the definition of "administrative dues" contained in the CBA.

Respondents also argue that they were allowed to deduct the union initiation fees because there is nothing "in the collective bargaining agreement that prohibits an employer from having a separate loan agreement between the employer and the employee for a loan of any purpose." Tr. at 526. Respondents are correct that the CBA does not prohibit an employer and employee from entering into separate loan agreements. That does not mean, however, that the employer is then entitled to deduct the amount of the loan from the employee's check as repayment. 29 C.F.R § 3.5(f) covers the repayment of loans and states "any deduction requested by the employee to enable him to repay loans to or purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes." The deduction of union initiation fees plainly does not fall within this exception, as the employees were not repaying loans to credit unions. The deduction also does not fall within 29 C.F.R § 3.5(b) as a "bona fide prepayment of wages." Mr. Ekhaton paid the initiation fees directly by charging them to his credit card. There was no cash or its equivalent exchanged between Mr. Ekhaton and his employees, and the employees had no freedom of disposition over the money at any time. Mr. Ekhaton testified that the loans were only to be used for the initiation fees. Tr. at 1009-1010. Accordingly, the initiation fees do not fall within 29 C.F.R § 3.5(b).

While I find that Respondents technically violated the Copeland Act by deducting the union initiation fees from employee paychecks, I decline to adopt the Acting Administrator's position that Respondents should repay the deductions to the employees. *See* GX 39 (including union initiation fees in calculation of back wages). It is the employee's responsibility to pay union initiation fees, not the employer's. Respondents effectively advanced a loan, albeit unauthorized, to the employees for them to join the union. Were I to adopt the Acting Administrator's position, Respondents would be paying the initiation fees, not the employees.

V. Debarment

The Acting Administrator seeks debarment of Respondents for a period of three years for willfully violating the DBRA. Br. at 63. The Acting Administrator argues that a three-year debarment is particularly appropriate here because Respondents falsified their payroll records and because Respondents were previously investigated for DBRA violations. *Id.* at 65-66.

Under the DBA, debarment is a "preventative, prophylactic tool for the enforcement of the Act." *Phoenix Paint Co.*, No. 87-08 (WAB May 5, 1989). It is intended to be a remedial, rather than a punitive measure. *Palisades Renewal Enter., LLP*, 2006-DBA-00001 (ALJ Aug. 3, 2007), *aff'd*, No. 07-124 (ARB July 30, 1999). There are two standards for debarment, one for violations of the DBA, and one for violations of the Related Acts. *See* 29 C.F.R. § 5.12(a)(1) and (2). As this case involves violations of both, each will be discussed in turn.

29 C.F.R. § 5.12(a)(1) governs the standard for debarment under the Related Acts and states:

Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

29 C.F.R. § 5.12(a)(1). In *A. Vento Construction*, the WAB explained that “[a]ctions typically found to be ‘aggravated or willful’ seem to meet the literal definition of those terms: intentional, deliberate, knowing violations of the Act.” No. 87-51 (WAB Oct. 17, 1990).

Although the regulation appears to afford some discretion about the length of debarment, ARB precedent holds that once the Administrator shows that a violation is “aggravated or willful,” debarment should be for the full three years except in “extraordinary circumstances.” *Coleman Constr. Co.*, No. 15-002, slip op. at 19 (ARB June 8, 2016) (citing *A. Vento Constr.*, No. 87-51, slip op. at 5 (“unless a case presents extraordinary circumstances, an order imposing a three-year debarment is warranted under the provisions governing debarment for ‘aggravated or willful’ of the labor standards provisions of the Related Acts”). Falsification of payroll records is “[a] typical example of ‘aggravated or willful’ behavior in the Related Acts debarment cases . . .” *A. Vento Constr.*, No. 87-51, slip op. at 7 fn. 4. Additionally, “[a] violation of the Copeland Anti-Kickback Act is also an act warranting debarment . . .” *Id.*

As one of “the applicable statutes listed in § 5.1 other than the Davis-Bacon Act,” violations of the Copeland Act are governed by 29 C.F.R. § 5.12(a)(1). As detailed above, I have determined that Respondents violated the Copeland Act by failing to timely submit accurate certified payroll records and by taking unauthorized deductions from their employees’ paychecks.

On each of the payroll records Respondents certified, they checked the box indicating that they were paying fringe benefits to an approved plan, fund, or program. By Mr. Ekhatov’s own testimony, only one such payment was made to Wilson-McShane. Mr. Ekhatov attempted to shift the blame to his accountant by claiming that he did not “entirely understand the information on the system.” Tr. at 983. Notwithstanding whether Mr. Ekhatov knew how to use the payroll software, he was aware that he was required to pay fringe benefits to his employees and to submit accurate payroll records when he signed the subcontracts. *Id.* at 1005. His argument, however, is also factually dubious. Ms. Edison-Edebor testified that not only was she authorized to act on behalf of Respondents, she also received the hours, wages, and fringes that she entered into the payroll software from Mr. Ekhatov. *Id.* at 760. Furthermore, in an October 30, 2015 email from Mr. Dumke to Mr. Ekhatov and Ms. Edison-Edebor, Mr. Dumke points out that they were inputting the fringe benefit information into the system incorrectly. Mr. Dumke wrote, “[i]t looks like you entered amounts for both the FRINGES/CONTRIBUTIONS (benefits) and an amount for WAGES PAID IN LIEU OF FRINGES. It should really be one or the other,

either the individual is receiving employee benefits or the employer is paying a cash wage “in lieu of fringes.” RX 82. Mr. Ekhaton knew, at least by October 30, 2015, that the payroll records required accurate fringe benefit information, and he continued to certify that he was making fringe benefit contributions when he knew that was false.

Respondents also willfully took improper deductions from employee paychecks. Mr. Ekhaton testified that he was not aware of what deductions were authorized under the DBA when he signed the subcontracts. *Id.* Even accepting that as true, Mr. Ekhaton testified that he became aware that his payment and subsequent deduction of the initiation fees was a problem after October 17, 2015, yet he still continued to make them. *Id.* at 983; *see* GX 22 (deductions taken on October 23, October 30, November 6, and November 20). Respondents repeatedly argue that they were not prohibited from entering into loan agreements with employees but that fact has no bearing on whether the deductions themselves were authorized, which they were not. It is also of no import whether the employees “authorized” the deductions. Other than specified deductions, employers are to pay employees the full amount of their wages “regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.” 29 C.F.R. § 5.5(a)(1). Respondents’ repeated disregard for the Copeland Act plainly rises to the level of aggravated and willful required for debarment. *See A. Vento Constr.*, No. 87-51, fn. 4.

Accordingly, I find that Respondents purposefully, knowingly, and willfully falsified their certified payroll records on the Project and took unlawful deductions from their employees’ paychecks. As Respondents have put forth no evidence of “extraordinary circumstances” warranting a shorter duration, such conduct justifies three-year debarment under 29 C.F.R. § 5.12(a)(1).

Unlike debarment for violations of a Related Act, which provides some discretion for the period of debarment, the DBA and its regulations mandate a three-year period of debarment. The DBA states that “[n]o contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest *until three years have elapsed* from the date of publication of the list.” 40 U.S.C. § 3144(b)(2) (emphasis added); *see also* 29 C.F.R. § 5.12(d)(1); *Coleman Construction Co.*, No. 15-002, slip op. at 17 (ARB June 8, 2016). 29 C.F.R. § 5.12(a)(2), which sets forth the debarment standard under the DBA:

In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any

contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

29 C.F.R. § 5.12(a)(2).

Respondents' conduct warrants a three-year debarment under 29 C.F.R. § 5.12(a)(2), as I have already determined Respondents should be debarred under § 5.12(a)(1). "Under Davis-Bacon, the standard for debarment is relatively low—a mere 'disregard' of one's obligations suffices—whereas under Related Acts . . . the standard for debarment is a tad more stringent—one has to have been in 'aggravated or willful violation' of the relevant labor standards provisions." *Coleman Constr.*, No. 15-002, slip op. at 17. A consistent pattern of underpayment of wages and subsequent falsification of records constitutes disregard of obligations under the DBA. *G&O Gen. Contractors, Inc.*, 1986-DBA-00088 (ALJ July 10, 1990) (citing *Phoenix Paint Co.*, 87-08). The employer's acts "need not be the equivalent of intentional falsification for it to qualify as disregard of its DBA obligations." *NCC Electrical Services, Inc.*, No. 13-097 (ARB Sept. 30, 2015). Conduct showing an intent to evade statutory responsibility or purposeful lack of attention to statutory responsibility also warrants debarment. *L.T.G. Constr. Co.*, No. 93-15 (WAB Dec. 30, 1994).

Respondents repeatedly violated the DBA by failing to pay the prevailing wage and fringe benefits to their employees and failing to maintain accurate payroll records. Mr. Ekhaton has prior experience with DBA contracts and was extensively counseled on DBA requirements after the prior Wage and Hour investigation into his work on the Abbott Housing Project. Respondents' underpayment of the prevailing wage for several weeks on the Project and one fringe benefit contribution, coupled with their falsified payroll records is a clear disregard for their obligations to their employees. Mr. Jones testified that Mr. Ekhaton gave no indication he intended to pay fringe benefits, and Mr. Dumke similarly opined that Mr. Ekhaton exhibited "a contempt for the process or for the requirements" during their interactions. Tr. at 249, 586-587. Accordingly, I find that Respondents disregarded their obligations to their employees, in violation of the Davis-Bacon Act. Mr. Ekhaton and Jamek Engineering are therefore debarred from receiving any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. § 5.1 for a period of three years, pursuant to 29 C.F.R. § 5.12(a)(2). The debarment shall run concurrently with the debarment under § 5.12(a)(1).

CONCLUSION

1. Respondents violated the Davis-Bacon Act by failing to pay the prevailing wage and fringe benefits on the Project. Respondents owe \$3,110.13 in back wages to the following nine employees:

- a. Francis Ikonagbon is entitled to \$180.84;
- b. Kevin Italio is entitled to \$51.51;
- c. Randall Schwake is entitled to \$6.17;
- d. Elia Stamboulieh is entitled to \$115.08;
- e. Lance Borger is entitled to \$22.61;
- f. Francis Onu is entitled to \$214.79;

- g. Oscar Tula is entitled to \$1,208.44;
- h. Derrick Delgado is entitled to \$796.18; and
- i. Danny Rodriguez is entitled to \$514.51.

2. Respondents violated the Davis-Bacon Act and the Copeland Act by failing to maintain and timely submit accurate payroll records.
3. Respondents did not violate the Contract Work Hours and Safety Standards Act by failing to pay their employees overtime.
4. Respondents violated the Copeland Act by unlawfully deducting union initiation fees from their employees' paychecks.
5. Respondents are debarred for three years pursuant to 29 C.F.R. §§ 5.12(a)(1) and (2). The debarments shall run concurrently.

I am requesting that this Decision and Order be served by email on the following: (1) Aaron Dean, Esq., counsel for Respondents; (2) David Rutenberg, Esq., counsel for the Acting Administrator; (3) the Associate Solicitor; and (4) the Chicago Regional Solicitor.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within forty (40) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 6.34. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request ("EFSR") system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions

electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents issued by the Board through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs, can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.