

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 07 August 2007**

**Case No.: 2006-SCA-00020**

*In the Matter of:*

**CHARLES IGWE, and KSC-TRI SYSTEMS USA, INC.,  
doing business as KSC TRI SYSTEMS, INC., USA,  
KSC-TRI SYSTEMS, KSC-TRI SYSTEM COMPANY,  
TOTAL RESOURCES INDUSTRIES, PREFERRED  
EDUCATIONAL DIAGNOSTICS & TESTING CENTER,  
PREFERRED EDUCATIONAL DIAGNOSTIC TRAINING  
CENTER, and TOTAL FIT-WELL,**

*Respondents.*

APPEARANCES:

Jeannie Gorman, Attorney  
For the Department of Labor

Charles Igwe  
For Respondents

BEFORE:  
Russell D. Pulver  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises under the McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 351-358 ("the Service Contract Act" or "SCA") and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-333 ("CWHSSA"). The regulations issued pursuant thereto can be found at 29 C.F.R. Parts 4 through 8. The SCA sanctions those who are awarded a federal contract and subsequently fail to (1) pay the required wage, (2) award minimum fringe benefits or (3) keep adequate records, by barring them from receiving federal contracts for a period of 3 years. The CWHSSA requires federal contractors to comply with various standards including payment of overtime rates for work beyond 40 hours in a week.

**Background and Procedural History**

On May 31, 2006, the Secretary of Labor ("Secretary") filed a complaint against Respondents, alleging they had violated numerous provisions of the SCA and CWHSSA relating

to the pay, compensation, notice and records regarding employees on multiple federal contracts. Administrative Law Judge Exhibit (“ALJX”) 1. Respondents answered the complaint in response to an Order to Show Cause on October 12, 2006. ALJX 2. The Complaint specifically relates to Contract No. FA4620-04-M-a002, a U.S. Department of the Air Force, Fairchild Air Force Base contract awarded October 1, 2003 for a test administrator or proctor (“Fairchild contract”); Contract No. F45603-03-P-0021-P00001, a U.S. Department of the Air Force, McChord Air Force Base contract awarded December 17, 2002 for aerobics instructors (“McChord contract”); Contract No. J30211C-024, a U.S. Department of Justice, Bureau of Prisons contract awarded February 27, 2003 for culinary arts instructors (“Coleman contract”); and Contract No. Sp3100-05-C-0001, a U.S. Department of Defense, Defense Distribution Center contract awarded July 13, 2004 for physical fitness instructors or recreational specialists (“Tracy contract”). ALJX 1, ¶ II-V. This matter was thereafter assigned to me and a Notice of Hearing was issued on December 5, 2006 for the hearing to be held on February 13, 2007. ALJX 5. Following rescheduling, the formal hearing was held on April 16, 17 and 18, 2007 in Long Beach, California, at which time all parties presented testimony and other evidence. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits (“ALJX”) 1-12; Administrator’s Exhibits (“AX”) 1- 89 and 91 and Respondents’ Exhibits (“RX”) 1-14. AX 75-84 are the deposition transcripts of Joshua Avila, Carliss Crowley, Jennifer Griswold, Anthony Holloway, Daniel Lehr, Chad Phelps, Santiago Rivera, Clara Roberts, Diane Skinnell and Laurie Whelan, respectively. Following the hearing, the Administrator offered and the undersigned accepts into evidence the post hearing deposition of Captain Jonathan Czarney as AX 92, which was taken due to Captain Czarney’s inability to attend the hearing. The Administrator called Seward R. Dinsmore, Jr., Claudia Cote-Martinez, Andy Noguchi, Daniel Pasquil, Kimchi Bui and Bonnie Barnish. Respondents presented testimony from Charles Igwe.

Following the hearing, the record was left open for the submission of closing briefs to be filed by June 18, 2007. Although the Administrator filed a post hearing brief timely, Respondents did not file their post hearing brief until June 29, 2007. The Administrator has filed an objection to the late filing of the brief by Respondents. While the undersigned overrules the objection to the tardy brief of Respondents, the undersigned does agree with the Administrator that no additional post trial evidence arising from the tardy brief should be considered. However, Respondents’ brief does not overtly appear to present such additional evidence but rather appears to be appropriate argument with regard to Respondents’ position herein with comment on the evidence presented at the hearing. Accordingly, the undersigned has considered the arguments presented by the post hearing briefs filed by both parties.

Prior to the hearing in this matter, the Administrator filed a Motion to Deem Requests for Admissions Admitted on February 5, 2007. In response to the undersigned’s Notice to Show Cause Why the Administrator’s Motion to Deem the Requests for Admission Admitted should not be granted, the Respondents filed Responses to the Administrator’s Requests for Admission on March 14, 2007. The Administrator contends that these Responses are incomplete, untimely and non-responsive and urges that the Requests for Admission be deemed admitted. Respondents allege that the discovery requests were not in fact delivered to them timely and claim that their subsequent responses were sufficient. In view of the contest regarding delivery of the requests and in view of the lack of legal representation on behalf of the Respondents, the undersigned denies the Administrator’s Motion and hereafter renders this opinion on the merits after

consideration of all the evidence and arguments presented on behalf of both the Administrator and Respondents.

### The Arguments of the Parties

The Administrator contends that Respondents did not pay service employees on four separate contracts the prevailing minimum wage and fringe benefits, including health and welfare benefits, vacation and holiday pay, as required by the contracts, the SCA and its implementing regulations. The Administrator further alleges that Respondents failed to notify the employees of the prevailing wage rate and fringe benefits, failed to make and maintain payroll records, failed to apply taxes and applicable lawful deductions to the wages of employees, failed to pay employees in a timely manner, and failed to cooperate with the DOL investigation. Additionally, the Administrator charges that Respondents failed to pay employees one and one-half times the basic pay for all hours worked in excess of forty hours in the workweek as required by the contract, the CWHSSA and the regulations. The Administrator argues that Respondents should be debarred for a period of three years because their conduct amounts to culpable neglect, and they are therefore not entitled to relief by proving the existence of unusual circumstances. The Administrator also argues that Respondents are precluded from establishing unusual circumstances which would relieve them from the sanction of debarment because they have a history of violating the Act. In the alternative, the Administrator argues that Respondents have failed to prove unusual circumstances.

Respondents argue that they were not subject to the SCA; they were misled by the contracting officers; that their employees were independent contractors and were paid what they wanted; and that the classification of the employees was vague and thus could not bind them to the prevailing wage rate. Respondents maintain that the violations were not the result of culpable conduct and that no other aggravating factors are present. They also argue they have proven the existence of unusual circumstances, including lack of prior violations, *de minimis* nature of the violations and the particular circumstances of the business, sufficient to warrant relief from the ordinary sanction of debarment.

### Issues

The issues presented for my resolution are:

- 1) Whether Respondents violated the SCA by:
  - a) Failing to pay their employees prevailing wages.
  - b) Failing to pay their employees fringe benefits including health and welfare benefits, holiday pay and vacation pay.
  - c) Failing to post the applicable Wage Determinations and thus notify their employees of the applicable wage rates.
  - d) Failing to prepare and maintain payroll and other records as required.

- e) Failing to apply taxes and other lawful deductions as required for wages.
  - f) Failing to pay their employees at least semi-monthly.
  - g) Failing to cooperate with the Administrator's investigation.
- 2) Whether Respondents violated the CWHSSA by failing to pay employees the overtime rate for all hours worked over forty hours in a workweek.
  - 3) The amount of back wages due and owing Respondent's employees for all such violations, if any.
  - 4) Whether Respondents are liable for prejudgment interest on any amounts found due to employees as back wages.
  - 5) Whether Respondents should be debarred for violations of the SCA.

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

### **A. FACTUAL BACKGROUND**

#### **Testimony of Seward R. Dinsmore, Jr.**

Dinsmore has been a Wage and Hour Investigator for DOL since 1975 and has conducted over 2000 investigations, about 140 of which dealt with the Service Contract Act although this case was his first dealing with the wage classification of test proctor. Hearing Transcript ("Tr.") 35-36, 59. Dinsmore investigated Charles Igwe and KSC in April and May of 2005 regarding the Fairchild AFB contract. Tr. 37; AX 9. Dinsmore testified that he requested time cards and payroll records from Respondents from October 1, 2003 to date. Tr. 38; AX 9 at 23. The investigation was initiated by a former employee under the contract who had not received an IRS form 1099 who had received her wages with no tax withholding. Tr. 42. This contract was subject to the SCA and Dinsmore determined that the appropriate wage under this contract was for a test proctor at \$13.87 per hour plus \$2.36 health and welfare benefit. Tr. 41-42. He stated that he determined test proctor was the appropriate wage classification by reviewing the scope of work in the contract. Tr. 60. Dinsmore indicated that he did not find a wage determination specifically for a test administrator as set out in this contract, so he read the scope of work, found it seemed to fit the classification of test proctor, and then he obtained the agreement of the contract specialist as to that job classification. Tr. 65-67. Dinsmore understands conformance to be a process whereby a contractor can seek confirmation of a wage rate where the contract classification is not listed in the DOL prevailing wage rate listing. Tr. 778-79.

Dinsmore testified that he did not receive payroll records from Respondents despite having talked with Igwe and extending him an extension of time within which to supply the records. Dinsmore determined that Respondents did not keep payroll records in accordance with the SCA based on the failure to produce such records as well as interviews with workers. Tr. 44-

46. Dinsmore stated that he determined that Respondents did not pay the prevailing wage to at least two workers based on his discussions with the two workers. Tr. 47. Dinsmore calculated back wages due for the two workers, Anthony Holloway and Bobbie Schroeder, including pay differential between the prevailing wage rate of \$14.39 and the actual payments of \$10.00 per hour, as well as fringe benefits and holiday pay due each employee. Tr. 48-52; AX 11 at 25-27. In calculating back wages due Ms. Schroeder, Dinsmore had figures for actual hours worked for August 2004 through October 2004, but had to use an average of these figures for the remaining months due to a lack of records. Tr. 53-56. Dinsmore testified that he calculated estimated back wages due the two employees because Respondents never furnished him the necessary payroll and time card information to do otherwise. Tr. 74-76. Dinsmore calculated holiday pay for the two workers by prorating the hours due since neither employee was full-time. Tr. 77. The employees on this contract worked 16 to 32 hours per week, usually three days per week. Tr. 61.

Dinsmore found that in addition to the wage, fringe benefit and holiday pay violations, Respondents also violated the SCA by paying employees monthly rather than semi-monthly, the minimum required by the SCA. Tr. 57-58. Dinsmore testified that he found Respondents failed to cooperate with him during his investigation as he never received the payroll records and documentation which he requested. Tr. 58. Dinsmore stated he was aware that Respondents requested a price adjustment in this contract based on an increase in the rate. Tr. 61-62. Dinsmore testified that the SCA requires service employees working under a covered contract to be paid the prevailing wage rate regardless of the employer's contractual relationship with its employees. Tr. 63. Dinsmore testified that it is the responsibility of DOL to determine appropriate pay compliance on an SCA contract. Tr. 70.

### **Testimony of Claudia Cotne-Martinez**

Martinez has been a Wage and Hour Investigator for DOL about six years, having conducted about 180 investigations. Tr. 80-81. Martinez initially investigated Respondents as a "conciliation" investigation based on the complaint of Mr. Eshu, but later upgraded to a regular investigation upon meeting with Igwe and finding that he apparently had no personal information on his employees nor the appropriate payroll and time records. Tr. 82-83. Martinez received the file to investigate from the Seattle DOL office where the complaint had been made due to the McChord AFB location. Martinez is located in the Los Angeles office nearer the location of Respondents. Tr. 145-146. Martinez testified that she determined Respondents had failed to pay employees under the McChord contract the appropriate wages pursuant to the SCA and she calculated back wages due each employee. Tr. 85-86; AX 27. Martinez based her calculations on the appropriate job classification of instructor which has a prevailing wage rate of \$22.01 and health and welfare fringe benefits of \$2.15 per hour. Tr. 87-88, 92. She also calculated holiday wages due as well as wages for December 2003 through February 2004 when none of the employees were paid. Tr. 93-95. Martinez found that Respondents failed to maintain time and pay records on its employees and failed to make lawful deductions for payroll taxes, as required by the SCA. Tr. 97. She further determined that Respondents failed to pay employees at least semi-monthly during the December 2003 to February 2004 period when employees were not paid at all. Tr. 98. Martinez testified that she found Respondents failed to cooperate in her investigation by failing to produce time and payroll records and by obvious reluctance in

providing information requested. Tr. 99. Martinez recommended that Respondents be debarred from future government contracts at the conclusion of her investigation. Tr. 100.

Martinez stated that Igwe furnished her with copies of the contract and the wage determination. Tr. 101. Martinez agreed that Igwe did not have the names and social security numbers of some of the employees who made complaint. However, she furnished this information to Igwe in their initial meeting and stated that these employees were hired by the manager for this job, Carliss Crowley, and had been paid by Respondents previously. Tr. 102-103. Martinez testified that Igwe had e-mailed Crowley on March 8, 2004 requesting information on the instructors, including names, social security numbers and hours worked so that payment could be made although Respondents had billed for and been paid for these instruction hours under the contract. Tr. 109-110. Martinez believed that Crowley had worked and been paid for over a year before the problem arose with pay in December 2003 and the contract was terminated by McChord AFB on March 9, 2004. Tr. 114-115. During her investigation, Martinez spoke with one employee and received written statements from four other employees about not being paid. Tr. 119-120. Martinez testified that although she did not give Respondents copies of documents received from the employees, she did furnish Igwe with copies of time sheets showing times and dates of classes which she received from the AFB athletic director. Tr. 121-124; AX 38 at 235-237. Martinez obtained schedules of the classes from the AFB and then wrote each employee asking them to confirm whether they worked the classes and hours indicated on these records. Tr. 125-127. Crowley also furnished documents showing hours worked by these employees. Tr. 130. Although the employees were told they were to receive \$18 per hour in 2003 and \$19.00 in 2004, Martinez calculated the wages due based on the prevailing wage rate of \$22.01. Tr. 133. Martinez originally calculated back wages based on the lower hourly rates as if the Fair Labor Standards Act applied rather than the SCA, but she corrected her final figures using the prevailing wage rate of \$22.01. Tr. 136-138.

### **Testimony of Andy Noguchi**

Noguchi has been an Assistant District Director at DOL for 10 years following twelve years as a Wage and Hour Investigator. Tr. 156-157. Noguchi conducted approximately 800 investigations as an investigator and has investigated or supervised investigations involving SCA in 80 to 100 cases. Tr. 158. Noguchi did not conduct this investigation into the Tracy contract but was responsible to review it to assure proper policies and procedures were followed. Tr. 160. The two locations for this DOD contract were at Tracy Depot and Sharpe Depot in the San Joaquin Valley of California. Tr. 181. The investigator, Connor Alexander, has since left DOL. Tr. 161, 186. The file contained notes of several meetings where Igwe failed to show up for meetings with the investigator, including the initial conference on April 28, 2005 and a meeting at Sharpe facility on June 29, 2005. Tr. 187-188. The file also noted that Igwe failed to appear on April 14, 2005 for an initial meeting at the facilities. Tr. 193. The investigator noted that Igwe contested DOL's jurisdiction to investigate and refused to complete a business profile or report. Tr. 202: AX 62 at 445. Alexander started his investigation on March 31, 2005 and the file was submitted to Noguchi on July 11, 2005. Tr. 210.

The investigation was commenced upon the written complaint of the contracting officer dated January 31, 2005, and based on complaints made by employees regarding lack of earnings

statements and not receiving overtime pay. Tr. 212-213; AX 59 at 426. This contract called for a prevailing wage rate of \$13.52 per hour plus health and welfare benefits of \$2.59 per hour and ten paid holidays for the position (classification) of recreational specialist. Tr. 162. Although the contract described the job as physical fitness instructor, Noguchi testified that there is no job classification for such in the prevailing wage rates so the classification of recreational specialist was chosen as the proper one. Tr. 239-244. Noguchi reviewed the wage classification as recreational specialist and determined that it was appropriate. Tr. 180. Noguchi stated that he knows nothing of any request for conforming this classification. Tr. 245. A conformance is required only where there is no appropriate job classification listed within the appropriate wage determination. Tr. 262. Noguchi testified that he did not find these positions fell within the exemption from SCA standards for certain salaried employees including managers, professional and administrative employees. Tr. 249-250.

Noguchi stated that the investigation found two employees, Joshua Avila and Michael Martinez, had not been paid overtime as required for hours in excess of 40 per week. Tr. 214-216; AX 66 at 460, 472. In reviewing this investigation, Noguchi found that Respondents had failed to pay prevailing wage rates as indicated on the wage transcription and computation sheets prepared by the investigator. Tr. 163-164; AX 66 at 455-472. These calculations were reached using the prevailing wage rate of \$16.11 less the actual hourly wage paid by Respondents of \$9.50. Tr. 168. Noguchi did correct the calculations for several employees whom he found not to be entitled to portions of holiday pay. Tr. 169-172; AX 65 and 66 at, 451-454,458,462. Some of the back wage calculations were made using information from the individual employees since Respondents failed to provide requested payroll records. Tr. 173-175; AX 88. The Investigator also looked at work schedules as well as personal calendars to determine violations and back wages due. Tr. 256. Noguchi conceded that these overtime calculations were based solely on the two employees' contention that they had worked over 40 hours without any written records to confirm their contention as Respondents offered no records to refute this issue. Tr. 229-230. Noguchi was unaware as to whether other employees had been paid overtime properly under this contract. Tr. 224-225. The overtime violations in this case fall under the CWHSSA rather than SCA. Tr. 253-254.

Respondent failed to pay holiday pay to the employees as required by the SCA. Tr. 176. Noguchi testified that Respondents failed to properly post the prevailing wage rate and fringe benefits owed as required by the SCA. Tr. 248-249. Respondents paid the employees on a monthly basis rather than at least semi-monthly and also failed to keep proper time and payroll records requiring the investigator to seek out the information from the individual workers themselves as well as from schedules and other people working at the facility. Tr. 177-178, 182. Respondents failed to make appropriate tax deductions from employees' wages. Tr. 182. Noguchi testified that all workers subject to the SCA must be paid with deductions for payroll taxes, whether deemed an independent contractor for IRS purposes or not. Tr. 263-265. Noguchi determined that Respondents had failed to cooperate with the investigation by failing to furnish proper time and payroll records and by failing to attend meetings with the investigator. Tr. 183. Noguchi recommended debarment of Respondents based on the extensive nature and egregiousness of the violations, the failure to maintain proper records and the failure to cooperate in the investigation. Tr. 184. Noguchi stated that where the prevailing wage determination is too

high to render a contract profitable, then a contractor should seek a modification from the contracting officer to reflect the higher wage costs involved. Tr. 261-262.

### **Testimony of Daniel Pasquil**

Pasquil was a Wage and Hour Investigator, handling more than 200 investigations, with DOL in Los Angeles from 1999 until he became an assistant district director in December 2006, although he has only investigated this one case dealing with culinary instructors and has only dealt with two cases involving modifications. Tr. 273-274, 329-330. Pasquil investigated Respondents in connection with the Coleman contract to furnish a culinary arts instructor at the Federal Correctional Center facility in Coleman, Florida. Tr. 275. Pasquil determined that Respondents did not pay the prevailing wage or fringe benefits or federal holidays on this contract. Tr. 277. He performed calculations regarding the back due wages owed to employee Chad Phelps by Respondents. Tr. 278; AX 51 at 269. Pasquil made these calculations using the prevailing wage rate for an instructor of \$18.36 per hour plus the health and welfare benefit of \$2.92 per hour less the actual wage paid of \$18.03 per hour. Tr. 280-282; AX 52 at 296. Pasquil made his calculations based on the employee's time sheets and interviews with the employee as Respondents offered no records. Tr. 285-286. Chad Phelps also was not paid holiday pay for federal holidays. Tr. 324-325. Upon Pasquil's move to become assistant district director, another investigator took over handling of this file. Pasquil coordinated with the new investigator, in arriving at additional calculations for Phelps and another worker, Rivera, for several months during which each employee was not paid. Tr. 287-289, 302; AX 50 and 51 at 268, 272. Pasquil did not believe the back wages have ever been paid. Tr. 308.

Pasquil determined that Respondents did not post the prevailing wage rates as required nor did they advise employees of the prevailing wage rate. Tr. 290. Pasquil stated that he determined that Respondents failed to cooperate in the investigation by failing to provide payroll documents, failing to appear for the final conference and by failing to come into compliance when the notice of violation letter was issued. Tr. 291-292. Pasquil stated that documents requested from employers are usually produced within 72 hours so allowing Respondents here two weeks was more than reasonable. Tr. 317. Pasquil testified that he received a telephone message from Igwe five hours after the final meeting was scheduled indicating that Igwe's car had broken down. Tr. 320. Pasquil never rescheduled the final meeting because Igwe never called back to do so. Tr. 321. Pasquil testified that he understood Respondents asked for additional funds on this contract. Tr. 294. Pasquil made a recommendation for cross-withholding against Respondents due to Respondents' claim of no money to pay these employee back wages. Tr. 297. Pasquil ran an internet search to determine if Respondents had other federal contracts and discovered some 28 awarded federal contracts from 2002 through March 2006. Tr. 298.

### **Testimony of Kimchi Bui**

Bui has been assistant district director, Wage and Hour Division, DOL, since 2001, preceded by four years as a Wage and hour Investigator. Tr. 340. Bui was responsible for reviewing the various investigations against the Respondents in this case. Tr. 342. Bui testified that under DOL's MODO (main office district office policy), the investigations involving Respondents were eventually consolidated in the Los Angeles office of DOL after the

investigators in Seattle and Sacramento felt that Respondents were being uncooperative. Tr. 368-371. Bui reviewed the McChord AFB contract investigation and confirmed the correct job classification as instructor as well as the applicability of the SCA and computation of back wages owed. Tr. 345. Bui then had a series of contacts with Respondents prior to issuing a due process letter to Respondents. Tr. 346-347; AX 17. Bui also reviewed the Fairchild AFB contract investigation and confirmed the correct job classification as test proctor as well as the applicability of the SCA and computation of back wages owed. Tr. 348-349. Bui then issued a due process letter to Respondents. Tr. 349-350; AX 4. Bui testified that she followed the same procedure with respect to both the Tracy and Coleman investigations and issued due process letters in each to Respondents. Tr. 350-354; AX 56 at 400. Bui reviewed and accepted the back wage calculations for Phelps and Rivera on the Coleman contract. Tr. 355-356; AX 89. Bui testified that Respondents paid Phelps on the Coleman contract wages, although not the correct SCA required wages, until February of 2006 when contract funds were withheld. Tr. 376-377.

Bui stated that while Igwe participated in three face to face meetings and several phone conversations, he did not appear for a number of scheduled meetings with investigators and failed to ever provide time and payroll records as required by the SCA. Tr. 374-375. Bui met personally with Igwe on September 22, 2005 to attempt to resolve the issues in these investigations. Tr. 359. Igwe presented his defenses that he felt these contracts were not subject to the SCA and that the employees were independent contractors, neither of which Bui felt were persuasive. Tr. 361. Bui again met with Igwe on October 12, 2005, at which time he brought copies of payments he had received from the contracting agencies, but no payroll or time records. Tr. 362. A last meeting was held on January 23, 2007, with no additional records or new arguments being presented by Igwe. Tr. 363. Bui ran a corporate status search of Igwe's business identity of KSC Systems, Inc. which indicated on the California Secretary of State's website that the corporation was suspended. Tr. 364-365. Bui discussed all of the investigations with Igwe except the Coleman contract. Tr. 365. Bui agreed with the recommendation for debarment of Respondents. Tr. 365. Thereafter, she sent the files to Bonnie Barnish, the regional wage specialist to commence withholding procedures. Tr. 366. Bui stated that while Igwe promised future compliance with the SCA, she had received other complaints from other areas of the country against Igwe indicating lack of compliance. Tr. 386-387.

### **Testimony of Bonnie Barnish**

Barnish, an attorney, has been a regional wage specialist for DOL in San Francisco since November of 2005, and first became involved in this case at the request of Ms. Bui in December of 2005. Tr. 391-392. Barnish stated that a due process letter is sent to a contractor after a final conference has been held with no resolution, indicating to the contractor that the withholding process is about to begin. Tr. 393. Barnish testified that she talked with Igwe on several occasions regarding the violations and his belief that the SCA should not apply to these contracts because the contracts did not pay enough to pay the prevailing wages. Tr. 395-396. She also indicated Igwe sent her some documentation regarding a request for price adjustment, but she indicated that she never received any information that she determined was a viable defense to the failure to pay the prevailing wages. Tr. 397. Thus, Barnish testified that she initiated withholding of funds owed to Respondents. Tr. 398-403; AX 1, 3, 15, 16, 39, 54, and 55. No funds were available for withholding on the McChord and Fairchild contracts. Tr. 405-406. Funds in the

amount of \$13,810 were withheld on the Tracy contract. Tr. 407-409. Barnish testified that the amount requested to be withheld on the Coleman contract was adjusted upward by an additional \$5,797.44 to a total of \$20,791.08 due to additional back wages due Phelps on that contract when he was not paid. Tr. 411-412. The Federal Bureau of Prisons withheld \$7,994.82 from the Coleman contract and also cross withheld from Respondents' contract with FCC Mariana an additional \$12,796.26, for a total of \$20,791.08. Tr. 416-417. Barnish testified that the total amount withheld by DOL from Respondents is \$34,601.08, leaving an additional \$20,780.38 needed to satisfy completely the back wages computed under the four contracts. Tr. 418; AX 91. Barnish stated that she recommended debarment of Respondents due to the history of non-compliance, failure to cooperate with investigations, failure to repay the wages due to the employees, and lack of assurances of future compliance with the SCA. Tr. 418-419.

Barnish conceded that Respondents at times paid Phelps the appropriate prevailing wage and health and welfare benefit, but stated that Respondents failed to pay vacation and holiday pay and failed to pay Phelps at all for a couple of months once the withholding on the Coleman contract was initiated. Tr. 420-423. Barnish testified that in most federal government contracts for performed services involving in excess of \$2,500, the SCA applies unless for exempt services involving managerial, administrative or professional positions. Tr. 423-424. Professionals include attorneys, psychiatrists, physicians, dentists, and engineers if they are using their actual degrees to perform services. Tr. 425. Administrative positions involve performing operational work that is not directly related to the business, for example a human resources position. Tr. 426. Barnish stated that she has had occasions where the SCA provisions were not placed in a contract or where the wage determination was incorrect where she has advised the contracting officer to modify the contract to comply with the SCA. Tr. 428-429. Barnish testified that no such mistakes were present in these four contracts. Tr. 430-431.

### **Testimony of Charles Igwe**

Igwe is vice president of KSC-TRI Systems USA, a California corporation established in 1997 and owned by Igwe and other members of his family, including his wife and sister. Tr. 438-439. The corporation did not do any contracting work until 2002 and has done primarily federal government contracting. Tr. 439. Igwe stated that the company is a personnel staffing agency that in the majority of instances takes over contracts using the existing employees, typically at the same salary as prior to taking over the contract. Tr. 440. The corporate offices are located in Igwe's home although he is considering moving to Texas and opening an office there. Tr. 441. Since 2002, Respondents have been awarded 33 or 34 contracts which were sought out on the internet. All of these have been personnel placement contracts so that Igwe has only had to personally fill in on a single occasion at one of the jobs, a computer class which fit in with Igwe's training as an engineer. Tr. 443-444.

Igwe testified that he never heard of the SCA until contacted by DOL on the Tracy contract. Tr. 445. He stated that most of his employees are part time and the Tracy dispute began because an employee, Joshua Avila mistakenly thought that he was entitled to overtime when working more than eight hours per day. *Id.* Igwe testified that with respect to the Tracy contract, he found out that the prior contract rate was about \$9.50 or \$10.00 per hour and thus made his bid fifty cents lower because he had less overhead and intended to keep the same employees. Tr.

447. Igwe stated that he usually asks the current employees about their wages and may also check with a data base or placement agencies before bidding on a new contract. Tr. 493-494. Igwe stated that on all four of these contracts the employees were paid as independent contractors with no tax withholding. Tr. 448. He indicated that several of the employees had their own businesses and billed their services to him using their business name. Tr. 449. Although each of these four contracts may have referenced the SCA, Igwe stated that it was never pointed out to him. Tr. 452. Igwe testified that on each of these contracts, he bid at or slightly lower than the previous contract such that the prior contractors should have had the same problems with being unable to pay the prevailing wages at the contract amounts. Tr. 453. Igwe requested and was granted a modification on the Fairchild contract after the prevailing wage issue was raised. Tr. 454-455.

Igwe testified that he has had several instances since this investigation where contracting officers were unaware of the SCA or the prevailing wage determination. Tr. 456-457; RX 4 and 13. Igwe noted that he has several contracts currently for professionals to which the SCA does not apply. Tr. 458. Igwe stated that he has a current contract for a dental hygienist for which he needs to make a determination as to whether the professional exemption applies. Tr. 490. Igwe stated that most of the contracting officers knew nothing of the SCA and showed a modification on a contract for Allison AFB where the modification had to be requested when Igwe brought the SCA issue up to the contracting officer. Tr. 478-479; RX 14. Igwe testified that he has since refused a Bureau of Land Management contract because using SCA prevailing wages on the contract made it impossible to break even on the contract. Tr. 484-485. Igwe stated that he did hire employees for about a month on the BLM contract before he determined the SCA prevailing wage applied such that the contract was not profitable. Tr. 491.

Igwe testified that employees are paid on a monthly basis but that pay advances may be offered. Tr. 463; RX 5. On the Tracy contract, either Robert Alvarez or Mike Martinez would fill out the work schedule and then send it to Igwe at the end of the month. Tr. 465. Igwe disputed the investigator's calculations for Tracy employees since the calculations go through the end of April while the employees quit working on April 18. Tr. 466-467. Igwe testified that he did pay Phelps holiday pay for six hours on December 26 even though he didn't work that day. Tr. 467-468; RX 8.

Igwe stated that the corporation is still suspended for nonpayment of annual fees to the state of California, but that he is working on resolving this problem. Tr. 470-471. Igwe testified that he does have payroll records in the form of IRS Form 1099s and work schedules as well as payroll records showing payments to employees, but that he felt DOL was unreasonable in demanding these records in a week or less. Tr. 472-473. Igwe stated that he felt he should have been given at least three weeks to gather and submit documents to the investigators as he was busy with traveling for work. Tr. 481-482. Respondents paid their payroll through online banking. Tr. 474-476.

Igwe stated that since December of 2005, he has obtained at least 4 or 5 contracts where the SCA may apply. He testified that he has paid the SCA prevailing wage where it clearly applies. Tr. 486. However, Igwe admitted that Respondents have not complied yet with payment of holiday pay, paying at least semi-monthly or withholding taxes on employee wages, but

indicated that they “were going to.” *Id.* Igwe testified that he had invoiced the Coleman facility for recruiting costs for Phelps because after Respondents’ contract with Coleman was terminated, Coleman directly hired Phelps. Tr. 496-499. Igwe testified that he sometimes receives payment from the corporation on contracts, perhaps \$1,000 to \$4,000. Tr. 504-505. Igwe stated that he believes the withholding on Respondents’ contracts was improper as it prevented them from paying employees but he did indicate that he wished to have the employees paid and the matter resolved. Tr. 510-511.

### **Testimony of Joshua Avila**

Avila was employed by KSC TRI Systems at the fitness centers in Tracy and Lathrop, California. AX 75 at 773. Avila stated that he worked as a fitness advisor, opening and closing the fitness centers from November 2004 until December 27, 2004. AX 75 at 774. He testified that he dealt with Charles Igwe on this job and had never previously performed these services for any other federal contractor. AX 75 at 775. Avila turned in a job application through an acquaintance already working at the fitness center and then spoke with Igwe on the phone at which time Igwe asked him what he wanted to be paid. Avila told Igwe he would like \$14.00-15.00 an hour but Igwe stated that the pay would be somewhat less than that. AX 75 at 776. Avila stated that he was paid either once or twice a month by electronic funds transfer, but didn’t receive his first pay for almost two months. AX 75 at 777-778. Avila testified that he was paid based on schedules or timesheets that he filled out and faxed to Igwe; however, the pay received was not always comparable to the hours he had submitted and no explanation of the pay figures was ever given to him by Igwe. AX 75 at 779. Avila believed that he worked some overtime, over eight hours in a day, but he was unsure whether he had worked more than 40 hours in a week. AX 75 at 780. Avila stated that he was never told of a wage determination and never saw such a wage determination posted at the workplace. AX 75 at 781. Avila testified that he doesn’t believe that taxes were withheld from his pay and that he did not receive a W-2 form from Respondents. AX 75 at 782-783.

### **Testimony of Carliss Crowley**

Crowley worked for KSC as aerobics coordinator at McChord AFB from January of 2003 until March of 2004. AX 76 at 797. Crowley testified that she had the contract for a couple of years before KSC took over the contract. Her contact at KSC was Charles Igwe. AX 76 at 798. Crowley contacted Igwe and sought employment. Igwe agreed to pay Crowley \$800.00 per month to coordinate the program and teach classes as needed. AX 76 at 799. Igwe agreed to pay the class instructors \$18 per class in 2003 and \$19 per class in 2004 with payment to be made once a month by the 10<sup>th</sup> day of the second month thereafter, which was the same manner in which Crowley had paid instructors when she had the contract. AX 76 at 800. Crowley testified that all of the payments made by Respondents were late. AX 76 at 801. Crowley testified that she was not aware of a wage determination until the contracting officer for McChord gave her a copy. AX 76 at 803. Crowley stated that she was paid by Igwe by way of a single check with no taxes withheld which included the pay for the instructors whom Crowley then had to pay by writing checks herself. AX 76 at 804. Crowley testified that she and the instructors at McChord were never paid by Respondents from December of 2003 through the end of February of 2004

when she notified the contracting officer that they were quitting due to not receiving pay from Respondents. AX 76 at 809-810.

### **Testimony of Jennifer Griswold**

Griswold worked for KSC as a spinning instructor at McChord AFB from late 2003 until early 2004 when Respondents stopped paying her. AX 77 at 822-823. Griswold stated that she had worked for the previous contractor on the same pay and terms as KSC offered when it took over in late 2003. AX 77 at 824. Griswold testified that she was unaware of any wage determination during her employment with Respondents. AX 77 at 825. Griswold stated that she is due back wages from Respondents from December of 2003 through February or March of 2004. AX 77 at 826.

### **Testimony of Anthony Holloway**

Holloway worked for Respondents from October 1, 2004 to October 1, 2006 as a test administrator or test proctor at Fairchild AFB. AX 78 at 836. Holloway responded to an ad in the paper and interviewed with Charles Igwe by phone. AX 78 at 837. Igwe agreed to pay Holloway \$10.00 per hour with an increase to be made after six months but no increase occurred. AX 78 at 838. Holloway stated that he worked twenty hours per week but never had a discussion with Respondents regarding fringe benefits. AX 78 at 839. Holloway testified that he was paid monthly by check with no taxes withheld, AX 78 at 840-841. Holloway stated that he was unaware of any wage determination for his position until he saw the wage determination in the bid package he was asked to submit as a replacement contractor to Respondents. AX 78 at 841-842. Holloway testified that he now holds this contract and pays himself according to the wage determination. AX 78 at 843.

### **Testimony of Daniel Lehr**

Lehr worked for Respondents in the fitness centers at Tracy and Sharp depots in California showing new patrons around, giving personal trainer advice and cleaning and performing maintenance at the centers. AX 79 at 855. Lehr had worked for the previous contractor at the centers and then worked for Respondents from October of 2004 until March of 2006. AX 79 at 856. Lehr stated that he interviewed for the job with Charles Igwe and Pam Milton and was told that he would receive the same pay he had been receiving from the prior contractor. AX 79 at 856-857. Although he was promised a raise after three months, Lehr stated that he never received such a raise. AX 79 at 858. Lehr testified that he was paid once a month for his hours which varied from 10 hours to 40 hours per week. AX 79 at 859. Lehr stated that he was paid by electronic funds transfer with no taxes taken out of his \$10.00 per hour wages. AX 79 at 860. Lehr stated that he was unaware of any wage determination pertaining to his job and had never seen one posted at the worksite. AX 79 at 861. Lehr stated that he has never been paid for the last six weeks that he worked for Respondents. AX 79 at 866.

### **Testimony of Chad Phelps**

Phelps was a culinary arts instructor for Respondents at the Federal Corrections Center in Coleman, Florida from August 13, 2003 until May 1, 2006, during which time he dealt exclusively with Charles Igwe. AX 80 at 879. Phelps testified that he had 30 years of experience in culinary arts but had never worked at a prison before Igwe called him and asked if he would be interested in the instructor position at the prison. AX 80 at 880. Phelps stated that Igwe told him he would be working from 8:00 a.m. to 3:00 p.m. Monday through Friday with a one hour lunch and with holidays off at \$17.50 per hour. AX 80 at 881. Igwe also advised Phelps that he would get three days of sick time per year and some vacation time although that time was never specified. AX 80 at 882. Phelps testified that he was paid once a month by Respondents. AX 80 at 883. He stated that he was paid without any tax deductions as a contractor although he did receive one \$200 annual bonus the first year. AX 80 at 884. Phelps testified that he first learned of the wage determination for his position in October of 2005 when Phelps did some research on his own. AX 80 at 885. Phelps calculated the amount of back wages Respondents owed him at approximately \$9,000.00 but was told by Igwe that the prison was not paying Igwe so Igwe was not going to pay Phelps. AX 80 at 887. Phelps testified that he was not paid at all for March and April of 2006 and was told by Igwe that Igwe was not going to pay any back wages to him because Igwe felt the government needed to increase the amount of money Igwe was receiving for the contract. AX 80 at 888-889.

### **Testimony of Santiago Rivera**

Rivera worked for Respondents as a culinary instructor at the Federal Corrections Center in Coleman, Florida. AX 81 at 900. Charles Igwe hired Rivera who was referred to Igwe by Chad Phelps with whom Rivera worked in a catering business. AX 81 at 901. Rivera testified that he actually accepted the job prior to Phelps and was to receive \$200.00 per month in addition to the hourly salary of \$17.50 for preparing the curriculum and acting as a supervisor. AX 81 at 903. Rivera stated that he was paid once a month, almost always later than the day on which he was supposed to be paid. AX 81 at 905. Rivera never knew there was a wage determination for this position. AX 81 at 906. Rivera worked for Respondents from May of 2003 until August of 2004. AX 81 at 909.

### **Testimony of Clara Roberts**

Roberts has been a contract specialist (contracting officer) at the Federal Correctional Complex in Coleman, Florida for over six years and has 15 years of contracting experience with the Bureau of Prisons. AX 82 at 920. As a contracting officer, Roberts is responsible for purchasing goods and services following the federal acquisition regulations (FARs). AX 82 at 921. Roberts stated that a request for quotes on a new contract is processed through an automated system which notes the various clauses and provisions that are to be included in the solicitation. AX 82 at 922. Roberts stated that she dealt with Charles Igwe on behalf of KSC-TRI Systems to whom she sent the contracting documents following his successful bid. AX 82 at 923. The Coleman contract was awarded to Respondents effective February 27, 2003. AX 82 at 925. There was a new wage determination thereafter which was sent to Respondents to allow for adjusting the bid based on the new wage determination. AX 82 at 927. The original solicitation for the Coleman contract incorporates the requirement to comply with the SCA. AX 82 at 928-929. The solicitation is placed on a website with all attachments which bidders are to download

and acknowledge receipt, as evidenced by Igwe's acknowledgement on his proposal. AX 82 at 930. The Coleman contract was a one-year base with four option years; however, the fourth year was not exercised because the contract was terminated in the third option year for default on the part of Respondents. AX 82 at 930. Roberts stated that she furnished the wage determination to Respondents marking the wage rate for instructor and the health and welfare benefits. AX 82 at 931-932. Roberts testified that Respondents never questioned the position classification as instructor. AX 82 at 933.

Respondents were terminated for cause by Roberts based on failure to provide the services contracted for. AX 82 at 935. Roberts stated that she became aware that the instructors were not being paid according to the wage determination when Chad Phelps approached her about not being paid. AX 82 at 935. Roberts furnished Phelps with a copy of the wage determination and was told by Phelps that he was not being paid the wage determination rate. AX 82 at 936. Roberts testified that Respondents have continued to bill the Bureau of Prisons for the last two months of work which were withheld based on notification to do so by DOL, as well as for interest on these amounts. AX 82 at 939-940. Respondents have also billed \$5,000.00 for recruiting costs for Chad Phelps whom the Coleman facility hired directly to do the work upon termination of the contract with Respondents, a sum which Roberts stated is not owed as there is no such provision in the contract authorizing such a payment. AX 82 at 941. Roberts testified that although Respondents originally used the name of Preferred Education Diagnostics & Test Center, a division of KSC-TRI Systems USA, the contract just carried the name of KSC-TRI Systems USA, Inc. AX 82 at 944-945. Roberts stated that Igwe was furnished several contract modifications which incorporated revised wage determinations throughout the term of the contract period, which Igwe signed and returned to Roberts. AX 82 at 946-948. Although Igwe did not request an adjustment in price on the initial two wage determination modifications to the contract, he did request and received such an increase with respect to the third modification to reflect the higher wage level in the wage determination. AX 82 at 949-950.

### **Testimony of Diane Skinnell**

Skinnell has been the lead contracting officer for the Defense Logistics Agency for the past year and was previously a contract specialist with the Agency for 14 years. AX 83 at 966-968. Skinnell testified that she was the contract specialist on the Tracy contract and dealt with Charles Igwe on behalf of Respondents. AX 83 at 968-969. Skinnell stated that the contract which was sent to Respondents stated that it was subject to the SCA, identified the appropriate wage determination and attached a copy of the wage determination to the contract. AX 83 at 970-971. The contract was for a base year of October 1, 2004 through September 30, 2005, and a one-year option was exercised to run through September 30, 2006. AX 83 at 971. Skinnell testified that Igwe questioned the classification in the contract as "recreation specialist" but he did not ever provide any written documentation to challenge the classification. AX 83 at 974. The contract was modified on September 22, 2005 to reflect the new wage determination that was revised on June 9, 2005. AX 83 at 976. Skinnell stated that the contract was terminated for cause for nonperformance due to frequent closures of the fitness centers. AX 83 at 977-978. Although Respondents have continued to bill on the contract, Skinnell stated that she was working on the withholding of any amounts due as requested by DOL. AX 83 at 981-982.

### **Testimony of Laurie Whelan**

Whelan has been a contract specialist for the Air Force for seven years. AX 84 at 995. Whelan has handled thousands of contracts for goods or services in excess of \$2,500.00. AX 84 at 997. Whelan testified that Respondents were furnished the SCA clause and attached wage determination with the initial solicitation for the Fairchild contract. AX 84 at 999. She stated that only a few days after the contract was awarded, Igwe was sent a contract modification with a new wage determination. AX 84 at 1000-1004. The job classification for this contract was test proctor. AX 84 at 1005. Whelan testified that additional contract modifications were sent to Respondents as newer wage determinations came out. AX 84 at 1007-1009. She stated that Igwe sought and was granted two equitable adjustments to the contract based on the higher labor costs reflected in newer wage determinations. AX 84 at 1010-1012. Whelan testified that adjustments based on new wage determinations should be granted based on the SCA. AX 84 at 1017. This contract has now expired and the Air Force had no funds remaining to be withheld pursuant to DOL's request. AX 84 at 1021. Whelan stated that the test proctor contract is now held by Anthony Holloway who had previously done the work in the employ of Respondents. AX 84 at 1023.

### **Testimony of Captain Jonathan Czarney**

Czarney is a Captain in the U.S. Air Force and has been the Plans and Programs Flight Commander at the 62<sup>nd</sup> Contracting Squadron at McChord AFB for the past two years. AX 92 at 1069-1070. From December of 2003 through June of 2005, Czarney was a contract specialist at McChord AFB and handled over 200 contracts for services in excess of \$2,500.00. AX 92 at 1071. Czarney testified that Charles Igwe was sent copies of the contracting documents for the McChord aerobics instructors contract including notice of the obligation to comply with the SCA and FLSA and a copy of the wage determination. AX 92 at 1072-1073. Czarney stated that the McChord contract with Respondents was for a base year of January 1, 2003 through December 31, 2003, plus an option year for the calendar year of 2004 although the contract was terminated for cause during the option year. AX 92 at 1073-1074. Czarney testified that Respondents appealed the termination of the contract but the termination was upheld by the Armed Service Board of Contract Appeals. AX 92 at 11; AX 19. He indicated that the termination was effective on May 5, 2004 and was based on nonperformance. AX 92 at 1076-1077. Although five modifications were done on this contract, only one increased the money paid based on an addition of more classes to the contract. AX 92 at 1078. Czarney testified that the contract contained a wage determination for the job classification of "instructor" which was marked on the wage determination sheet to bring it to the attention of the contractor along with the applicable health and welfare benefits. AX 92 at 1080-1081. Czarney did not recall Respondents ever objecting to the classification as instructor. AX 92 at 1082. Czarney testified that Igwe was very difficult to work with and got upset very quickly. AX 92 at 1083-1084.

## **B. STATUTORY FRAMEWORK**

This case arises under the SCA, as amended, 41 U.S.C. § 351 *et seq.*, and the implementing regulations issued thereunder at 29 C.F.R. Parts 4, 6, and 18. The purpose of the SCA is to punish those who have received federal monies via a service contract and have:

1. Failed to pay the minimum wages for each particular position listed in the Dictionary of Occupational Titles, a government compiled list of positions and the preliminary wages for the positions;
2. Failed to award minimum fringe benefits to employees;
3. Failed to maintain adequate records.

41 U.S.C. § 351 *et seq.*

The SCA establishes standards for hours of work and overtime pay of laborers and mechanics employed in work performed under contract for, or with the financial aid of, the United States, for any territory and the District of Columbia. The Service Contract Act of 1965 (McNamara-O'Hara Act), 41 U.S.C. § 351 *et seq.* requires minimum wage, per 29 U.S.C. § 206(a)(1), and fringe benefits on U.S. government contracts over \$2,500. "The Act covers service contracts of the Federal agencies. . . the principal purpose of which is to furnish services in the United States through the use of service employees. . ." 29 C.F.R. § 4.110. "The Act's purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment. (*See* H.R. Rep. No. 948, 89th Cong., 1st Sess. at 2-3 (1965); S. Rep. No. 798, 89th Cong., 1st Sess. at 3-4 (1965).)" 29 C.F.R. § 4.104(b).

Contracts with the U.S. government, over \$2,500, must contain the following clause:

(b)(1) Each service employee employed in the performance of this contract by the contractor . . . shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract.

29 C.F.R. § 4.6(b).

The SCA defines a "service employee" as:

. . . any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons. . .

## 41 U.S.C. § 357(b).

The Act generally covers the following employees: All service employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performance of other duties necessary to the performance of the contract, are thus subject to the Act unless a specific exemption (see § 4.115 *et seq.*) is applicable. 29 C.F.R. § 4.150. Employees in bona fide executive, administrative, or professional capacity are excluded from coverage. 29 C.F.R. § 4.156. The Act makes no distinction between temporary, part-time, and full-time employees. The prevailing rate established by a wage determination under the Act is the minimum rate. 29 C.F.R. § 4.165(a)(2) and (c). Employee coverage does not depend on the form of employment contract. 29 C.F.R. § 4.155.

Any funds withheld from an offending contractor by the contracting officer or agency are to be transferred to the Department of Labor for disbursement to the underpaid employees by order of the Secretary, an administrative law judge, or the Administrative Review Board. 29 C.F.R. § 4.187(a). Under section 5 of the Act, any person or firm found to have violated the Act is ineligible for further contracts for a three-year period unless the Secretary recommends otherwise due to the presence of unusual circumstances, a determination that must be made on a case-by-case basis. 41 U.S.C. § 54; 29 C.F.R. § 4.188.

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

## C. DISCUSSION

### **Service Contract Act Violations**

The regulations at 29 C.F.R. § 4.155 state, in part, the following: Any person, [except those employed in a genuine executive, administrative or professional capacity] . . . who performs work called for by a contract or that portion of a contract subject to the Act is, *per se*, a service employee. Thus, for example, a person's status as an "owner operator" or an "independent contractor" is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements. Moreover, in *Stephen W. Yates*, ARB No. 02-119, ALJ No. 2001-SCA-21 (ARB Sept. 30, 2003), payment of SCA prevailing wages for truck drivers was required "regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons."

After reviewing the record in toto, I find that Respondents violated the SCA by failing to pay prevailing wages, fringe benefits and holiday pay. The SCA establishes standards for minimum compensation and safety and health protection of employees performing work for contractors and subcontractors on service contracts entered into with the Federal Government and the District of Columbia. 29 C.F.R. § 4.103. Under section 2(a)(1) of the SCA, codified at 41 U.S.C. § 351(a)(1), all service contracts covered by the Act are required to contain a provision specifying the “minimum monetary wages to be paid the various classes of service employees in the performance of the contract,” as determined by the Secretary of Labor. Section 2(a)(2) (41 U.S.C. § 351(a)(2)) provides that such contracts must contain a provision specifying the fringe benefits, which includes health and welfare benefits as well as holiday pay, to be furnished to the various classes of service employees, as determined by the Secretary. Any violation of the contract stipulations required by sections 2(a)(1) and 2(a)(2) results in the responsible party being liable for the amount of underpayment (or nonpayment) of compensation due to any employee engaged in performance of the contract, under section 3(a) of the Act. 41 U.S.C. § 352(a); 29 C.F.R. § 4.187(a); see also 29 C.F.R. §§ 4.6, 4.104, 4.161, 4.162, 4.165, 4.187.

The undersigned has considered and found lacking in merit Respondents’ contentions that the contracts were not subject to the SCA, that Respondents were misled by the contracting officers, that the job classifications were vague, and that the SCA does not apply because Respondents’ employees were “independent contractors.” Each of the four subject contracts referenced the SCA and noted that the contract was subject to the provisions thereof. AX 12 at 33; AX 20 at 83; ax 59 at 415; and AX 67 at 475. Further, each of the contracting officers testified that the contracts were subject to the SCA and that each contract contained notice thereof as well as notice of the applicable wage determination pertaining to each contract. AX 82 at 923, 928-929, 931-932; AX 83 at 970-971; AX 84 at 999; and AX 92 at 1072-1073. Moreover, numerous modifications were issued by the contracting officers and sent to Respondents which referenced new wage determinations, leaving little room for question on Respondents’ part about the applicability of the wage determinations to these contracts. AX 82 at 927, 946-948; AX 84 at 1007-1009; AX 12 at 30; AX 52 at 277.

While Igwe expressed some questioning of the classification with respect to several of the contracts, Respondents never pursued any objection to the job classification set forth in the contracts and attached wage determinations or sought conformance with respect to any of these job classifications. AX 83 at 974; AX 82 at 933; and AX 92 at 1082. There is no evidence that any of the contracting officers in the four subject contracts misled Respondents in any matter relating to the SCA requirements or wage determinations. Rather, the entirety of the evidence clearly indicates a failure on the part of Respondents to make adequate inquiry into the responsibilities placed upon contractors on federal projects subject to the SCA. As Igwe pointed out, he had never heard of the SCA until this investigation was begun, despite that fact that each of these contracts clearly noted that the provisions of the SCA applied. Tr. 445. I find that Igwe’s complaint that no one pointed out the applicability of the SCA to these contracts is merely an effort to shift the responsibilities of Respondents as contractor to others and is not a valid defense herein. Tr. 452.

Finally, Respondents’ argument that its workers under these contracts were “independent contractors” and not employees again indicates the total disregard of the pertinent SCA

provisions which clearly state that service employees are to be paid the applicable wage determination rates “regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons...” 41 U.S.C. § 357(b). Accordingly, I find that the arguments raised by Respondents are totally without merit and form no basis for relief from the requirements imposed upon Respondents by the SCA with regard to the four contracts at issue herein.

### **Prevailing Wage Violations**

I find that Respondents violated the SCA by failing to pay their employees the minimum prevailing wages during the time period covered by the Wage and Hour investigation. 29 C.F.R. § 4.165(a)(1)-(2) governs minimum wage payment requirements, and states that the contractor must pay the minimum hourly wage set forth in the wage determinations to all employees engaged in work covered by the SCA, absent an “express limitation” that says otherwise. Furthermore, the aforementioned hourly wage is only a minimum and the contractor is free to pay more than this rate. 29 C.F.R. § 4.165(c) (2001).

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

I further find Respondents are responsible for holiday pay violations based upon their failure to pay employees for each holiday specified in the contract. When a contract lists specific holidays that employees will be paid for, “an employee who performs any work during the workweek in which a named holiday occurs is entitled to the holiday benefits,” unless an applicable wage determination says otherwise. 29 C.F.R. § 4.174(a)(1). Absent a contrary agreement, the parties are required to comply with this rule. Furthermore, the regulations explicitly state that “holiday benefits cannot be denied because . . . the employee did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination.” *Id.* Thus, employees are entitled to holiday pay unless they performed absolutely no work during the week in which the named holiday falls. *Id.* § 4.174(a)(2). Thus, each employee who was entered into the payroll records as having worked during a week in which a holiday occurred was entitled to receive holiday pay.

### **Failure to Post & Notify Employees of Wage Determination**

The SCA and its implementing regulations require that the contractor either notify each employee of the prevailing wage and fringe benefits required to be paid under each contract or to

post a copy of the applicable wage determination at the workplace. 41 U.S.C. §351(a)(4); 29 C.F.R. § 4.6(e). The administrator charged that Respondents failed to comply with this notice requirement on the Coleman and Tracy contracts.<sup>1</sup> Employees at both the Coleman and Tracy worksites testified that they were not given the wage determination information nor was the wage determination posted at the worksites. AX 80 at 885-886; AX 81 at 906; AX 75 at 781-782; AX 79 at 861. Given the Respondents' alleged defense of lack of knowledge of the applicability of the SCA, it is not surprising that Respondents failed to follow the notification requirements of the SCA. Clearly, Respondents violated the wage notification provisions of the SCA at least on the Coleman and Tracy contracts.

### **Failure to Maintain Records**

DOL regulations require every contractor performing work subject to the SCA to keep payroll records for three years from the completion of the work and to make those records available to authorized representatives of the Wage and Hour Division. Among other things, those records must include the number of daily and weekly hours worked by each employee and any deductions, rebates, or refunds from the total daily or weekly compensation of each employee. *See* 29 C.F.R. §4.6 (g)(1). The purpose of these regulations is self-evident, *i.e.*, to require a contractor to maintain, and make available to Agency personnel for inspection, records which reflect: (1) when the contractor is performing work on a government contract; (2) which of its workers are performing that work; (3) how many hours of contract-related work each of those workers perform; and (4) what compensation they receive for performing such work. Without such records, the Agency cannot properly determine whether the contractor's workers are receiving the wages and benefits to which they are entitled under the wage determination applicable to the contract under which services are being provided. Thus, when a contractor fails to maintain records which identify the periods during which it is providing contract-related services and the employees who are providing those services, it becomes the contractor's burden to overcome the presumption that all of its employees, and all of the hours worked by those employees during the contract period, are governed by the wage and benefits provisions of the contract.

Igwe testified that Respondents maintain payroll records in the form of IRS Form 1099s and work schedules as well as online bank records showing payments to workers. Tr. 472-476. Respondents filed as exhibits at the hearing RX 6 consisting of handwritten timesheets and Tracy fitness center schedules from Robert Alvarez; RX 8 containing time records for Chad Phelps on the Coleman contract for the month of December 2005; and RX 10 consisting of four pages of payroll summaries for various periods. The initial page of RX 10 shows names, locations, hourly rates, number of hours worked and total payment made to a number of workers on contracts other than the four involved in this matter. The other three pages of RX 10 shows only payments made to various workers, including workers on the four contracts in question, but supply no information with regard to hourly rates of pay, nor hours worked. Clearly, such records do not meet the requirements of the Act and regulations.

---

<sup>1</sup> Although the violation was charged for only the Coleman and Tracy contracts, it appears that notification was also not complied with on either the Fairchild or McChord contracts as well. Tr. 290; AX 76 at 803; AX 77 at 825; and AX 78 at 841-842.

Igwe testified that he objected to DOL's "unreasonableness" in demanding documents and insisted that he should have been given three weeks to submit payroll records. Tr. 481-482. Nonetheless, each of the investigators and DOL managers who participated in this investigation testified that payroll documents were requested but were never furnished. Tr. 44-46, 99, 177-178, 291-292, 374-375, 397. Indeed, even at the hearing, Respondents failed to produce adequate payroll records pertaining to these four contracts containing employees' hourly wages, hours and dates worked, and calculation of payments and withholdings made. There is no rational conclusion to be drawn herein other than that these Respondents violated the SCA by failing to maintain proper payroll records.

### **Failure to apply taxes and other lawful deductions against wages**

The regulations provide that payments to service employees covered by the SCA shall be paid "in cash or negotiable instrument payable at par" and must be "made finally and unconditionally and 'free and clear'". 29 C.F.R. § 4.167. Further, deductions are limited "to those required by law, such as taxes payable by employees required to be withheld by the employer..." 29 C.F.R. § 4.168(a). Igwe, as well as all of the employees and investigators who testified indicated that Respondents paid all workers hired by Respondents under the four subject contracts as "independent contractors" and made no tax withholding from any of their payments. Tr. 448, 63, 182,361; AX 75 at 782-783; AX 76 at 804; AX 78 at 840-841; AX 79 at 860; and AX 80 at 884. The investigators and DOL supervisors involved in the investigation testified that covered employees under the SCA must be paid with appropriate deductions withheld for taxes as required of employers by the IRS. Tr. 63, 97, 263-265, and 361. Clearly the regulations, as noted above, contemplate that SCA service employees shall be paid as "employees" subject to normal employment tax withholding rules. To permit payment as "independent contractors" would permit an employer to circumvent the minimum wage requirements of the Act by imposing on the employee the responsibility to pay the employer's portion of employment taxes such as FICA and Medicare. Accordingly, I find that Respondents have violated the SCA by failing to apply taxes and other lawful deductions against employees' wages.

### **Failure to pay employees at least semi-monthly**

The applicable regulation regarding method of payment to employees under SCA contracts states:

The Act does not prescribe the length of the pay period. However, for purposes of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods, and the records must be kept on this basis. It is appropriate to use this workweek for the pay period. A bi-weekly or semimonthly, pay period may, however, be used if advance notification is given to the affected employees. *A pay period longer than semimonthly is not recognized as appropriate* for service employees and wage

payments at greater intervals will not be considered as constituting proper payments in compliance with the Act.

29 C.F.R. § 4.165(b), emphasis added.

Igwe testified, and was supported by the testimony of the employees and investigators, that the workers under these four contracts were paid monthly. Tr. 463, 57-58, 98; AX 80 at 883; AX 81 at 905. Accordingly, I find that Respondents violated the SCA by failing to pay their employees under the four contracts in question at least semi-monthly in accordance with 29 C.F.R. § 4.165(b).

### **Failure to Cooperate with Administrator's Investigation**

The regulation requiring cooperation in the Administrator's investigation states:

(g)(1) The contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work records containing the information specified in paragraphs (g)(1) (i) through (vi) of this section for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor:

(i) Name and address and social security number of each employee.

(ii) The correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of fringe benefit payments in lieu thereof, and total daily and weekly compensation of each employee.

(iii) The number of daily and weekly hours so worked by each employee.

(iv) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.

(v) A list of monetary wages and fringe benefits for those classes of service employees not included in the wage determination attached to this contract but for which such wage rates or fringe benefits have been determined by the interested parties or by the Administrator or authorized representative pursuant to the labor standards clause in paragraph (b) of this section. A copy of the report required by the clause in paragraph (b)(2)(ii) of this section shall be deemed to be such a list.

(vi) Any list of the predecessor contractor's employees which had been furnished to the contractor pursuant to Sec. 4.6(1)(2).

(2) The contractor shall also make available a copy of this contract for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of the Department of Labor and notification of the contractor, shall take action to cause suspension of any further payment or advance of funds until such violation ceases.

29 C.F.R. § 4.6(g).

As noted previously, Respondents failed to prepare and keep proper payroll records with respect to these four contracts. Accordingly, it follows that they were unable to cooperate fully in the Administrator's investigation as they did not have the proper records to disclose to the investigators<sup>2</sup>. Tr. 58, 99, 183, 291-292, and 374-375. However, Respondents' failure to cooperate extended beyond the failure to produce the appropriate payroll records to include reluctance to provide virtually any information, contesting DOL's jurisdiction to investigate, failure to complete a business profile, and failing to appear for scheduled meetings. Tr. 99, 193, 202, 183, 320-321, 374-375; AX 62 at 445. Accordingly, I find that Respondents violated the Act by failing to cooperate with the Administrator's investigation.

### **Overtime Violation of the CHWSSA**

In addition to the SCA violations, I find that Respondents violated applicable provisions of the CWHSSA. The CWHSSA governs the rate of pay for all overtime hours worked by laborers. 40 U.S.C. § 328(a). It requires government contractors to pay their employees "one and one-half times the basic rate of pay for all hour worked in excess of forty hours in the workweek." *Id.*; see also 29 C.F.R. § 5.5(b)(1). Regulations applicable to the CWHSSA provide that "[t]he wages of every laborer and mechanic for performance of work on [contracts subject to the CWHSSA] must include compensation at a rate not less than 1 ½ times the employees' basic rate of pay for all hours worked in any workweek in excess of 40." 29 C.F.R. § 4.181(b) (2003). Respondents failed to pay employees one and one-half times the basic rate of pay for all hours worked in excess of forty hours in the workweek, as required by both the contracts themselves as well as section 328 of the CWHSSA (40 U.S.C. § 102) and 29 C.F.R. § 5.5.

### **Calculation of Back Wages Due Respondents' Employees**

Records of actual costs would be ideal (and preferable), but such records were simply not available due to the lack of recordkeeping by Respondents. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the United States Supreme Court held that once an employee has shown that he performed work and was not properly paid for it, and he produces sufficient evidence of the amount and extent of work as a matter of just and reasonable inference, the burden shifts to the employer to produce evidence of the precise amount of work that was

---

<sup>2</sup> Nor to present at the hearing in this matter, as pointed out previously herein.

performed or evidence to negate the inference created by the employee's evidence. *Id.* at 687-88. The Court explained that it is the employer's duty to keep precise records and that such a burden should not fall on the employee and bar the employee from recovery when such records cannot be produced. *Id.* at 687. *Mt. Clemens Pottery* involved a claim brought under the Fair Labor Standards Act, but the Supreme Court's holding has been adopted in deciding claims brought under other acts, such as the Davis-Bacon Act (see *In the Matter of Permis Construction Corp.*, WAB No. 87-55, 1991 WL 494686, at \*4 (WAB Feb. 26, 1991), and most notably, by the Administrative Review Board in an LCA case (see *Administrator, Wage and Hour Division v. Ken Techs., Inc.*, ARB No. 03-140, ALJ No. 03-LCA-15, 2004 WL 2205233, at \*2 (ARB Sept. 30, 2004). Although *Anderson* involved back wage awards under the Fair Labor Standards Act, the logic and reasoning underlying the *Anderson* standard is equally applicable to awards under the SCA and CWHSSA. See generally *American Waste Removal Company v. Donovan*, 748 F.2d 1406 (10th 1984) Because this is an enforcement action brought by the Wage and Hour Administrator, the initial burden of proving that wages have been underpaid falls to the Administrator. See, e.g., *Thomas & Sons Building Contractors, Inc.*, Order Denying Reconsideration, ARB No. 00-050, ALJ No. 96-DBA-37 (ARB Dec. 6, 2001). Thus, if I initially find that the Administrator has established that Respondent failed to properly compensate the workers under these four contracts, then Respondent bears the burden of establishing the existence of circumstances that warrant the wages not being paid or benefits not being offered, by a preponderance of the evidence. *Ken Techs., Inc.*, 2004 WL 2205233, at \*2. Otherwise, Respondent is liable for the payment of back wages and other financial remedies.

DOL investigators made calculations with respect to the exact amounts due and owing to Respondents' employees under the four contracts as a result of the failure to pay prevailing wage rates, fringe benefits, holiday pay and overtime. Investigator Dinsmore performed the calculations for the Fairchild contract. Tr. 48-56, 77; AX 10 and 11. The calculations under the McChord contract were performed by investigator Martinez. Tr. 85-88, 92-95, 136-138; AX 26 and 27. Investigator Pasquil calculated the back wages due employees under the Coleman contract. Tr. 278, 280-282, 287-289; AX 50, 51. The Tracy back wage calculations were performed by investigator Alexander and reviewed by Mr. Noguchi. Tr. 163-164; AX 65 and 66. All of these calculations were reviewed and accepted, with some corrections, by Ms. Bui. Tr. 348-356. Although proper payroll records showing employees' hours and dates worked were repeatedly requested by investigators, no such suitable payroll records were ever produced by Respondents. Tr. 74-76, 99, 229-230, 291-292, 374-375. The investigators thus were compelled to estimate the wage calculations relying on interviews with employees and others at the contracting facility, work schedules, personal calendars, class schedules and employee time sheets and records, and by sometimes relying on average figures for hours worked. Tr. 53-56, 74-76, 125-127, 173-175, 229-230, 256. I find that these calculations by experienced DOL investigators, as corrected by even more experienced supervisors, amply satisfy the Administrator's burden of proving the amount of back wages owed.

Indeed, the only specific exceptions to these wage calculations by Respondents are: 1) Respondents claim that the McChord calculations are incorrect as workers are included for which Respondents claim to have no social security numbers in their records and because the calculations allegedly total more hours than the total of the contract called for (Respondents' Post Trial Brief); 2) Respondents contend that the Coleman calculations incorrectly include

holiday pay for Chad Phelps for December 26, 2005, claiming that Phelps did receive holiday pay for that day which he did not work (Tr. 467-468; RX 8); and 3) Respondents claim that the calculations for the Tracy employees incorrectly extend through the end of April, while Respondents contend that the employees quit on April 18 (Tr. 466-467; Respondents' Post Trial Brief).

With respect to the McChord calculations, Respondents have no basis upon which to claim they don't owe wages to workers for whom they have no social security numbers as Respondents chose to have Ms. Crowley serve as coordinator on the project and attempted to leave all subsequent personnel matters solely up to her rather than managing the contract properly with proper payroll records. AX 76 at 799-800. Further, investigator Martinez furnished this information to Igwe in her initial meeting. Tr. 102-103. With respect to the allegation that the total hours calculated exceed the total called for by the contract, the calculations at AX 27 are in the same number as those indicated on the receiving reports from the facility administrator and also agree with the billings under the contract. AX 27 at 177-179, 180, 183 and 187. Accordingly, I find no basis to uphold Respondents' objections to the McChord calculations.

Respondents submitted RX 8 showing that Chad Phelps was paid six hours of holiday pay for December 26, 2005, a day on which he did not work. However, a review of the calculations performed by investigator Pasquil clearly shows that Pasquil did not compute back wages owed for the holiday of December 26, 2005. AX 51 at 269. Thus, the Coleman contract calculations appear to be correct.

Respondents contend that the Tracy calculations as prepared by investigator Alexander and reviewed by Mr. Noguchi are incorrect as the workers are paid through April 30, 2006 rather than through the date on which the employees quit, April 18, 2006. The Notice of Termination for this contract was issued under date of May 4, 2006; however, the initial page of the termination notice states that the termination is due to repeated unscheduled closings of the fitness centers culminating in the "indefinite closure" of the fitness centers due to a lack of staffing on April 19, 2006. AX 58 at 404. Accordingly, it does appear that none of the workers on the Tracy contract worked after April 18, 2006. The calculations at AX 65 indicate that back wages were calculated through April 30, 2006 for four employees: Matt Francis, Daniel Lehr, Brian Martinez and Michael Martinez. Unfortunately, the copies of the actual wage calculations made by Alexander at AX 66 are virtually illegible, although it does appear that some back wage calculations were performed for these four employees through April 30, 2006. It appears that no such back wages should be due beyond the date of April 18, 2006, when these employees apparently quit. Due to the largely illegible copies of the investigator's calculations and the lack of specific testimony with regard to these calculations, I do not have the information available with which to correct these calculations. Accordingly, the Administrator shall be given 15 days following the issuance of this Decision and Order within which to submit corrected calculations with respect to the Tracy contract employees and Respondents shall file any Opposition thereto within 15 days of the date of service upon them. I find that all of the other back wage calculations as to the Fairchild, McChord and Coleman contracts are correct and the sums set forth therein are owed by Respondents.

### **Prejudgment Interest**

While neither the SCA nor CWHSSA contain provisions for the recovery of prejudgment interest, courts have awarded prejudgment interest to employees who have prevailed on their claims for SCA violations. See *United States v. Powers Bldg. Maintenance*, 336 F.Supp. 822-23 (W.D. Okla. 1972); *National Electro-Coatings, Inc. v. Brock*, 109 Lab. Cas. ¶ 35,106, 1988 WL 125784, \*14 (N.D. Ohio 1988) (upholding an award of prejudgment interest on SCA back wages); see also *Rodgers v. United States*, 332 U.S. 371, 373-74 (1974) (where a statute lacks an interest provision, the purpose of the statute and the nature of the award determine whether interest can be awarded). Inasmuch as it is within my discretion to do so, I grant DOL's request that prejudgment interest be awarded in this case on all back wages owed to Respondents' employees in an amount consistent with the findings set forth above. A grant of prejudgment interest will allow the employees to be fully compensated for the delay in the payment of wages. Interest is to be calculated from the moment when the violations began and will continue to accrue until a judgment is issued in this case. Furthermore, the interest shall be compounded annually. See *Robinson v. S.E. Pa. Transp. Auth.*, 1993 WL 126449, \*4 (E.D. Pa. 1993). However, because "the extent of the sum awarded [in prejudgment interests is] within the trial court's discretion," I find it is appropriate that, before computing the amount of prejudgment interest which is owed, DOL must deduct the \$34,601.08 that was withheld by the Agency from unpaid funds owed Respondents under the contracts from the total amount of back wages due. *Robinson*, 1993 WL 126449 at \*4 (E.D. Pa. 1993). My decision to exclude this amount from the prejudgment interest computations is based on the fact that DOL has had control of these funds since the withholding occurred. It would thus be inappropriate to assess against Respondents prejudgment interest on the \$34,601.08 in contract funds which were withheld by DOL. I further find that the use of the IRS interest rate as suggested by the Administrator is a proper rate that has been validated by the courts. See *EEOC v. County of Erie*, 751 F.2d 79, 81 (2nd Cir. 1984) (upholding award of prejudgment interest at adjusted prime rate used by IRS for tax underpayments on amounts recovered as back wages under FLSA and Equal Pay Act); *Powers Bldg. Maintenance Co.*, 336 F.Supp. at 823 (awarding prejudgment interest at IRS rate on amounts recovered for SCA violations). In *County of Erie*, the court stated that it was "well within the discretion of the district court" to order that this rate be used to calculate prejudgment interest "since the goal of a suit under the FLSA . . . is to make whole the victims of the unlawful underpayment of wages, and since the adjusted prime rate has been adopted as a good indicator of the value of the use of money." 751 F.2d at 82.

## **Debarment**

Respondents are subject to debarment under the SCA, which prescribes an automatic three-year period of debarment.

The debarment provision of the SCA states:

The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States

shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

41 U.S.C. § 354(a).

Debarment is warranted in the absence of "unusual circumstances" or if it is determined that the contractor acted in "willful" or "culpable" violation of the SCA. *Dantran, Inc. v. U.S. Dep't. of Labor*, 171 F.3d 58, 68 (1<sup>st</sup> Cir. 1999) (if the contractor acted willfully or culpably, then it "cannot be saved from debarment"); *Vigilantes, Inc. v. U.S. Dep't. of Labor*, 968 F.2d 1412, 1418 (1<sup>st</sup> Cir. 1992) (debarment required where no unusual circumstances present; minority employer had numerous deficiencies under several contracts totaling more than \$70,000, failed to meet its successor contractor responsibilities, and failed to make prompt payment of monies due). In *Summitt Investigative Service, Inc. v. Herman*, 34 F.Supp. 2d 16, 19 (D.D.C. 1998), the court noted that, although debarment may constitute a severe penalty, Congress intended that it be the norm for violating contractors as opposed to the exception. The court stated that "Congress recognized that employees of government-service contractors historically tended to be among the lowest paid people in the economy, and they tended not to be organized by trade unions." Upon further review of the legislative history, the court determined that "the statutory safety valve of 'unusual circumstances' was to apply only to 'situations where the violation was a minor one, or an inadvertent one' or where disbarment would be 'wholly disproportionate to the offense.'" (citation omitted). *Id.* at 19.

As noted above, debarment is presumed whenever there is a finding of violations under the Act unless the contractor is able to show the existence of "unusual circumstances." 29 C.F.R. §§ 4.188(a) and (b); see *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-20 (ARB Apr. 30, 2001); *A to Z Maintenance*, 710 F.Supp. 853, 855 (D.D.C. 1989). "The debarment of contractors is the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction." *Sec'y of Labor v. Glaude*, ARB No. 98-081, ALJ No. 1995-SCA-38, slip op. at 6-7 (ARB Nov. 24, 1999) (quoting *Vigilantes v. Adm'r of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992)). The term "unusual circumstances" is not statutorily defined and any determination with respect thereto "must be made on a case-by-case basis in accordance with the particular facts present." 29 C.F.R. § 4.188(b)(1). Neither ignorance of the SCA's requirements nor negligence, e.g., failure to read and become familiar with the terms of the contract, are sufficient to demonstrate unusual circumstances. See 29 C.F.R. § 4.188(b)(1) and (b)(6); *Integrated Res. Mgmt, Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14 (ARB June 27, 2002). Similarly, the lack of a history of noncompliance is insufficient to establish unusual circumstances. See, e.g., *Jernigan's Backhoe and Loader*, Case No. 86-SCA-9 (Dep. Sec'y. May 16, 1991) (finding of unusual circumstances does not turn solely on the absence of culpable conduct, but must take into account, inter alia,

history of similar violations and compliance history, cooperation, payment of monies due, and assurances of future compliance).

The determination as to whether unusual circumstances exist is governed by a three-part test. 29 C.F.R. § 4.188(b)(3)(i)-(ii); *Hugo Reforestation, Inc., supra*. Under part one, the contractor must establish that the violations were not willful, deliberate, aggravated in nature, or the result of “culpable conduct” and must also demonstrate an absence of a history of similar, “culpable conduct.” 29 C.F.R. § 4.188(b)(3)(i). The regulation states that “culpable conduct” includes the following: culpable neglect to ascertain whether practices are in violation, culpable disregard of whether the contractor was in violation, or culpable failure to comply with recordkeeping requirements. *Id.* Further, there must not be a record of repeated or serious violations of the SCA. *Id.* Under part two of the test, the contractor must show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). Finally, under part three, a variety of factors must be considered, including any prior investigations for violations of the Act, recordkeeping violations which impeded the investigation, the existence of a “bona fide legal issue,” the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any violations (including the impact on employees), and whether the amount due was promptly paid. 29 C.F.R. § 4.188(b)(3)(ii). It is “the violator of the Act [who] has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction.” 29 C.F.R. § 4.188(b)(1); *Bither v. Martin*, 1992 WL 207912, \*5 (unreported) (C.D. California 1992), *Vigilantes, Inc., supra*.

Respondents, as explained below, have failed to meet their burden of demonstrating “unusual circumstances” under any of the three parts of the SCA debarment test.

### **Part I of the SCA Debarment Test**

The evidence of record convincingly proves that Respondents’ SCA violations were willful, deliberate, aggravated in nature, or the result of culpable conduct. Respondents have offered no convincing evidence of innocence of culpable conduct. 29 C.F.R. § 4.188(b)(3)(i) dictates that violations are a result of culpable conduct where there is culpable neglect to ascertain whether practices are in violation or a culpable disregard of whether they were in violation or not. In this case, culpable neglect appears obvious. The solicitations issued by the contracting agencies contained the requirements for minimum prevailing wage, fringe benefits and holiday pay. If there were only one contract involved, Respondents’ position might be more reasonable. But there were four contracts, overlapping each other in time. Respondents had to review the bid solicitation for each project and each one contained the pay requirements and references to the SCA and the wage determination. Igwe signed each of the contracts and the subsequent modifications, several of which changed the applicable wage determination. AX 82 at 923, 927-929, 931-932, and 946-948; AX 83 at 970-971; AX 84 at 999, 1007-1009; AX 92 at 1072-1073; AX 12 at 30; AX 52 at 277. Yet, Igwe apparently still failed to read or inquire as to the requirements of the SCA and the wage determinations contending that no one pointed these particulars out to him. Tr. 452. Respondents are responsible for reading and complying with all provisions of the contracts and ignorance in the face of repeated notifications of the applicability of the SCA and the wage determinations is clearly culpable neglect.

Respondents underpaid their workers by not paying them for holidays that are standard in every federal contract and by not paying the applicable rates and fringe benefits set forth in the wage determinations referenced and attached to each contract. The Respondents were under an affirmative obligation to ensure that their pay practices complied with applicable laws. Neither simple negligence nor ignorance of the law, as noted above, constitutes “unusual circumstances” which would preclude debarment. *See* 29 C.F.R. § 4.188(b)(1) and (b)(6). In fact, where, as here, the SCA requirements are plain from the face of the contract, the contractor is “at least culpably negligent in failing to read and perform them.” *See Integrated Res. Mgmt, Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14 (ARB June 27, 2002). The regulations specifically state that such “culpable neglect to ascertain whether practices are in violation” constitutes sufficiently aggravated conduct to preclude relief from debarment. 29 C.F.R. § 4.188(b)(3)(i). Under the first prong of the unusual circumstances test, culpable conduct includes culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records). 29 C.F.R. § 1.188(b)(3)(i). Ignorance of the law has constituted “unusual circumstances” in limited circumstances. *See Integrated Resource Management, Inc.*, ALJ No. 1997-SCA-14 (ALJ Aug. 5, 1997) (when notified that he was violating the SCA and CWHSSA, the contractor who was performing his first federal contract immediately raised employees pay rates, paid back wages as soon as he was notified, and sent all records to the DOL’s investigator). However, in the present case, Respondents did not raise all employees pay rate to the minimum nor paid back wages but in fact continue to argue that they should not be subject to the Act presumably because they were “mislead” by the contracting officers. I find no evidence that Respondents were misled by the contracting officers but rather I find that Respondents were totally culpable in failing to take any steps to apprise themselves of the SCA requirements or, when informed of their violations, to take appropriate steps to come into compliance.

Further, the burden under part one also requires that the contractor demonstrate the absence of a history of similar violations, and absence of repeat violations of the SCA, and to the extent that the contractor has violated the SCA in the past, that such violation was not serious in nature. Respondents did not demonstrate an absence of history of similar violations. Indeed, at the hearing, Igwe promised compliance but when specifically asked whether offending pay practices had been corrected, stated that they were “working on it” despite the passage of well over a year since these violations were brought repeatedly to Respondents’ attention during the course of these investigations. Tr. 486. Such continued disregard of the SCA requirements confirms the culpability and aggravated nature of these violations by Respondents.

This evidence taken together establishes that the aforementioned violations were the product of Respondents’ willful, deliberate, or culpable conduct, and consequently, Respondents have failed to establish “unusual circumstances” under part one of the debarment test.

## **Part II of the SCA Debarment Test**

Although their failure to meet part one of the “unusual circumstances” test would alone be sufficient to order debarment, I further find, as explained below, that Respondents have not established either that they cooperated in DOL’s investigation of this matter, or that they promptly repaid moneys due covered employees for back wages and benefits or made sufficient

assurances of future compliance. Respondents have thus failed to meet the second part of the debarment test as well.

Under part two of the “unusual circumstances” test, the Judge must consider (among other things) whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed recordkeeping violations which impeded the Department’s investigation, and whether sums due were promptly paid. The recordkeeping problems were noted previously. None of the sums due have been paid. In fact, additional sums due had to be calculated following the conclusion of the investigation as Respondents failed to pay any wages to Phelps and Rivera once the DOL placed a hold on funds from this contract to secure payment of the previously underpaid wages. Tr. 287-289. Igwe’s explanation that he couldn’t pay unless the government paid on the contract shows a total and continuing lack of understanding on Respondents’ part as to their responsibilities as a federal government contractor. Tr. 510-511. Respondents are under the mistaken assumption that they are “entitled” to a profit on their contractual undertakings with the government. While increases in contract amounts are given contractors, particularly where the wage determination rates have been raised during the course of the contract,<sup>3</sup> no such adjustment is required where the contractor has totally failed to apprise itself of the wage obligations set forth in the contract offering and through its own negligence underbids a contract, as appears obviously to be the case in these four contracts. In such circumstances, the contractor is free to seek modification to the contract; however, whether it receives an increase in the contract amount or not has no bearing on the contractor’s obligation to pay the required wage rates as set forth in the wage determination.

Part two also requires sufficient assurances of future compliance. As noted previously, Respondents have echoed empty promises of future compliance but have yet to even correct their pay system violations. Tr. 486. Having failed to cooperate with DOL during the course of its investigation, or to repay promptly all wages and fringe benefits resulting from violations of the SCA, Respondents do not meet the “unusual circumstances” requirement under part two of the debarment test. This lack of proof by Respondents, as previously noted with respect to the part one requirements, would alone justify debarment.

### **Part III of the SCA Debarment Test**

With respect to part three of the debarment test, I find that Respondents have committed recordkeeping violations which impeded the investigation. As noted previously, contractors are required to maintain the records enumerated in the regulations for three years from the completion of the work and to make them available for inspection and transcription by authorized representatives of DOL. 29 C.F.R. § 4.6(g); 29 C.F.R. § 4.185; see also 29 C.F.R. § 4.6(g)(2)(3). The time and expense required to complete DOL’s investigation would undoubtedly have been less substantial had Respondents maintained and produced the records required by the regulations. The Agency’s investigation was thus clearly impeded as a result of Respondents’ recordkeeping violations.

---

<sup>3</sup> See testimony of contracting officer Whelan who stated that adjustments based on new wage determinations should be made based on the SCA, explaining why she had twice adjusted upward the amount due Respondents on the Fairchild contract based on higher labor costs reflected in new wage determinations during the course of that contract. AX 84 at 1010-1012, 1017.

Finally, the regulations make clear that “unusual circumstances” do not include those circumstances which commonly exist in cases where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor’s plea of ignorance of the Act’s requirements where the obligation to comply with the Act is plain from the contract, as well as a failure to keep necessary records and the like. 29 C.F.R. §4.188(b)(1). Hopefully, debarment will, however, instill in future contractors the desire to read and comply with the requirements, and specifically federal wage requirements, of these contracts rather than to simply obtain the contract and ignore the wage details.

In view of the failure of Respondents to meet either the first or second prongs of the three part test, the issue of unusual circumstances under part three need not be reached, although it is clear that there are no such unusual circumstances present in this case.

### Parties Responsible under the SCA

The SCA provides:

*Any violation of any of the contract stipulations required by section 351(a)(1) [wages] or (2) [fringe benefits] or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract.*

41 U.S.C. § 352(a) (emphasis added).

The SCA does not define the term “party responsible.” However, one of the Act’s implementing regulations fills this gap and makes it clear that “party responsible” includes not only corporate officers or owners but also those individuals who are found responsible for a service contractor’s performance of a contract. This regulation provides that

the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in [29 C.F.R.] § 4.6, but includes all persons, irrespective of proprietary interest who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached.

29 C.F.R. § 4.187(e)(4) (emphasis added).

Thus, the debarment period applies not only to the violating contractor, but also to any person or firm in whom the debarred contractor holds a substantial interest and to persons who supervise and manage the performance of the contract. Although there has been no argument that

Igwe should not be a Respondent, it is clear from the evidence that Igwe is not only an owner in the contracting entities but also was the key individual responsible for the supervision and management of the employees under the four subject contracts herein. It is well settled that an individual with share ownership who is responsible for the performance of the contract or who has overall control of the business operations is personally responsible for violations of the Act and can be debarred. *See Nantom Services, Inc.*, 1997-SCA-35 (ALJ Dec. 22, 1998); *Rasputin, Inc.*, ARB No. 03-059, ALJ No. 1997-SCA-32 (ARB May 28, 2004); *Stephen W. Yates*, ARB No. 02-119, ALJ No. 2001-SCA-21; *SuperVan, Inc.*, ARB No. 00-0008, ALJ No. 1994-SCA-47 (ARB Sept. 30, 2002); *Hugo Reforestation, Inc.*, ARB Case No. 99-0003, ALJ No. 1997-SCA-20 (ARB Apr. 30, 2001); *Melton Sales and Services, Inc.*, ALJ No. 1982-SCA-127 (ALJ Nov. 18, 1985). Accordingly, I find that all named Respondents herein, including Charles Igwe, are responsible for the violations and the back wages due, and should be debarred.

Based on all the foregoing, I find there is thus nothing under any one of the three parts of the debarment test, which would warrant a finding of “unusual circumstances” to preclude debarment under the SCA. Debarment of Respondents will thus be imposed as ordered below.

### ORDER

#### IT IS HEREBY ORDERED:

1. Respondents, Charles Igwe, and KSC-TRI Systems USA, Inc., doing business as KSC TRI Systems, Inc., USA, KSC-TRI Systems, KSC-TRI System Company, Total Resources Industries, Preferred Educational Diagnostics & Testing Center, Preferred Educational Diagnostic Training Center, and Total Fit-Well, are liable for back wages in violation of the SCA to the following employees, in the amounts indicated:

a)	Holloway	\$4,283.30
b)	Schroeder	\$1,769.39
c)	Carthan	\$ 309.29
d)	Crowley	\$1,033.31
e)	Flowers	\$ 602.73
f)	Griswold	\$ 338.73
g)	Jenks	\$ 720.50
h)	Naubert	\$ 452.97
i)	Robinson	\$ 412.97

j)	Seamans	\$1,253.78
k)	Rivera	\$4,348.05
l)	Phelps	\$16,443.03
m)	Alvarez	\$6,775.82
n)	Avila	\$1,301.85

2. Respondents, Charles Igwe, and KSC-TRI Systems USA, Inc., doing business as KSC TRI Systems, Inc., USA, KSC-TRI Systems, KSC-TRI System Company, Total Resources Industries, Preferred Educational Diagnostics & Testing Center, Preferred Educational Diagnostic Training Center, and Total Fit-Well, are also liable for back wages to employees Matt Francis, Daniel Lehr, Brian Martinez and Michael Martinez. The Administrator shall be given 15 days following the issuance of this Decision and Order within which to submit corrected calculations to, in accordance with this Decision and Order, with respect to these employees and Respondents shall file any Opposition thereto within 15 days of the date of service upon them.
3. The amount of \$34,601.08, which has been withheld from the contracts of Respondents, shall be released for payment to the employees of Respondents for payment of back wages.
4. Respondents shall pay an additional amount for payment to the employees, plus prejudgment interest, to be determined and issued in a Supplemental Decision and Order following submission of corrected calculations.
5. Respondents, Charles Igwe, and KSC-TRI Systems USA, Inc., doing business as KSC TRI Systems, Inc., USA, KSC-TRI Systems, KSC-TRI System Company, Total Resources Industries, Preferred Educational Diagnostics & Testing Center, Preferred Educational Diagnostic Training Center, and Total Fit-Well, shall be debarred for a period of 3 years as provided in 41 U.S.C. § 354.

**A**

Russell D. Pulver  
Administrative Law Judge

*San Francisco, California*

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

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

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

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

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