



Issue Date: 09 September 2011

CASE NO.: 2008-SCA-11

IN THE MATTER OF

SOUTHWEST SECURITY SERVICES, INC., and
JESUS "JESSE" MORALES, JOSEPH MORALES, and
ARCHIE GONZALES,
Individually and Jointly,

Respondents

APPEARANCES:

CLARA SAAFIR, ESQ.
For The Department of Labor

JAMES BIRCH, ESQ.
JAMIE RAMÓN, ESQ.
For Respondents Southwestern Security Services, Inc.,
Jesse Morales and Joseph Morales

ARCHIE GONZALES, pro se

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351, et seq., (herein the SCA) and the regulations issued thereunder at 29 C.F.R. Part 4. This proceeding also arises under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 3701, et seq., (herein the CWHSSA) and the regulations issued thereunder at 29 C.F.R. Part 5.

The Associate Solicitor for Fair Labor Standards (herein Solicitor) filed a complaint against Respondents and the matter was referred to The Office of Administrative Law Judges for a formal hearing. Notice of Hearing was issued scheduling a formal hearing on December 14, 2010, in Harlingen, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The Solicitor, Complainant, offered three exhibits, Respondents proffered three exhibits which were admitted into evidence along with 19 Joint Exhibit and 10 Administrative Law Judge Exhibits. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Solicitor and the Respondents by the due date of May 16, 2011. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

On April 15, 2011, the undersigned rejected RX-4, finding the Collective Bargaining Agreement (CBA) inadmissible because the Respondents failed to establish that the CBA was incorporated into the contracts with the contracting agencies.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. That the effective contracts which led to this matter are Contract No. GS-07P-00HHD-0057 and Contract No. GS-07F-0306L, task orders and modification/amendments thereto. (ALJX-8).
2. That the proper legal name of the entity involved in these contracts was Southwestern Security Services, Inc., (herein Respondent). (Tr. 9).
3. That Jesse Morales died on May 14, 2010. (Tr. 10, 20, 34-35).

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-1____; Respondent's Exhibits: RX-____; Joint Exhibits: JX-____; and Administrative Law Judge Exhibits: ALJX-____.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether during the periods required for performance under the contracts, Respondents failed to pay certain service employees the minimum monetary wage required by the contracts.
2. Whether fringe benefits were properly paid under the contract.
3. Whether overtime compensation was properly paid under the contract.
4. Whether Jesus "Jesse" Morales, (herein Respondent Jesse Morales) president and owner of Southwestern Security Services, Inc., is a responsible party for purposes of debarment.
5. Whether Joseph Morales, (herein Respondent Joseph Morales or Respondent Morales) project manager for Louisiana, east and west Texas contracts, is a responsible party for purposes of debarment.
6. Whether Arsenio "Archie" Gonzales, (herein Respondent Gonzales) office manager and comptroller, is a responsible party for purposes of debarment.
7. Whether the Service Contract Act violations alleged against Respondents were willful, deliberate or of an aggravated nature, thereby making debarment mandatory.
8. Whether unusual circumstances exist to preclude debarment of Respondents.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Joseph Summerall

Mr. Summerall is a senior investigator advisor who has worked for the Wage and Hour Division of the Department of Labor since 1997. His position primarily involves government contract investigations under the Davis-Bacon Act and the SCA. Mr. Summerall is based in Shreveport, Louisiana. He was granted the

status of senior investigator advisor based on his experience. (Tr. 37). He was a Wage and Hour investigator from July 1997 until July 2009. During his tenure as a Wage and Hour investigator Mr. Summerall conducted approximately one to two investigations per year concerning the SCA. Since becoming a senior investigator advisor in 2009 he oversaw one other SCA investigation. (Tr. 38).

Mr. Summerall was the lead investigator in the case against Respondent. The investigation was initiated after an employee filed a complaint with the Wage and Hour district office in New Orleans, Louisiana. The employee alleged that Respondent was not paying health and welfare benefits for holidays, training time and travel time to training. The employee alleged that Respondent only paid for two hours of training time, but at times the training lasted longer than two hours. (Tr. 39).

Mr. Summerall substantiated the employee's allegations through his investigation. He contacted Respondent Gonzales and requested time and payroll records for employees who worked on the contract to provide security services for federal offices in north Louisiana, which was the subject of the employee's complaint. He also contacted the contracting officer for contract documents. The contract was to provide security services for federal offices in north Louisiana. (Tr. 40). The north Louisiana contract was between Respondent and Federal Protective Service. (Tr. 31). General procedure required Mr. Summerall to review records dating back to the earlier of two years from the complaint or the first day of the contract. The investigation was limited to wages paid under the contract for services in north Louisiana because the employee's allegations were limited to that contract. (Tr. 41).

He began the investigation by calling Respondent's home office. He was told to speak to Respondent Gonzales. For the remainder of the investigation Mr. Summerall "always talked" to Respondent Gonzales. (Tr. 41). Mr. Summerall told Respondent Gonzales the investigation concerned compliance with the SCA. Respondent Gonzales provided him with all time and payroll records pursuant to his request. Mr. Summerall requested time records for training but he was told by Respondent Gonzales that the training records were sent to the contracting agency. (Tr. 42). Mr. Summerall randomly interviewed employees at different locations. Seven to ten employees were interviewed. (Tr. 43).

Mr. Summerall obtained information from his review of the time and payroll records provided by Respondent Gonzales, which indicated Respondent was not paying health and welfare benefits for holidays. (Tr. 45-46). Respondent Gonzales did not dispute the discrepancies in the records regarding payments made on holidays for health and welfare benefits. Respondent Gonzales did not point to any information in the documents to indicate that the health and welfare benefits were properly paid, even after Mr. Summerall gave him an opportunity to do so. Mr. Summerall made his determination that the health and welfare benefits were not properly paid from a review of the time and payroll records. (Tr. 49). Mr. Summerall presented that information to Respondent Gonzales in a form WH-55 computation sheet, which he created from the payroll and time records. The form includes calculations for unpaid training, travel time, overtime and health and welfare computations. (Tr. 49-51; CX-1).

Respondent did not provide Mr. Summerall records related to training time. (Tr. 53). Under the regulations that apply to federal contractors, Respondent was obligated to retain accurate records of all hours worked. (Tr. 53-54). When employers fail to produce documents, the investigators "reconstruct them based on employee interview statements." Respondent Gonzales did not object to the reconstructed calculations made by Mr. Summerall. (Tr. 54).

Mr. Summerall presented the form WH-55 to Respondent Gonzales who verbally agreed to pay the amounts calculated by Mr. Summerall, but Respondent Gonzales indicated Respondent Jesse Morales would have to approve the payments in writing. (Tr. 54-55). Respondent then sent documentation, signed by Respondent Gonzales, to the Wage and Hour district office in New Orleans indicating Respondent agreed to pay the amount calculated, as shown on the form WH-56 a summary of unpaid back wages. (Tr. 55; CX-2).

Mr. Summerall observed previous investigations of Respondent in the WHISARD database, which contains records of past investigations. (Tr. 57). Mr. Summerall included summary reports from the previous investigations in the case file. (Tr. 57; CX-3). He clarified the WHISARD case summary reports by identifying the meaning of acronyms. He indicated "EE" stands for "employees," "ATP" indicated "agreed to pay" and "BW" meant "back wages." (Tr. 62; CX-3). Further, the section stating "liquidated damages" referred to the section of CWHSSA allowing for the allocation of liquidated damages in the amount of ten dollars per day in instances where the employer failed to

properly pay overtime. (Tr. 62-63; CX-3). "BNPI" was "branches not part of investigation," "CMP" meant "civil money penalties" and "HRS" indicated "hours." (Tr. 63; CX-3).

DOL-SWS-140 identifies the summary report regarding an investigation by the Albuquerque, New Mexico, district office beginning in 1991 against Respondent. (Tr. 59; CX-3, p. 140). In the Albuquerque investigation a total of \$20,777 in back wages was computed and Respondent agreed to pay \$17,057 in back wages. (Tr. 60; CX-3, p. 140). Mr. Summerall testified that the document indicated that the Albuquerque investigation originated because of a complaint. (Tr. 62; CX-3, p. 140). Liquidated damages were not assessed. (Tr. 63; CX-3, p. 140). Civil money penalties were not applicable in that investigation. (Tr. 63; CX-3, p. 140).

Mr. Summerall testified to the meaning of the acronyms in the summary notes section of case summary reports. Under his interpretation of the summary notes section sentence one should read: 135 hours SCA investigator wage scale, CWHSSA overtime, fringe benefits and recordkeeping violations substantiated. (Tr. 63-64; CX-3, p. 140). He stated that the abbreviations in sentence two indicate the subject agreed to comply and agreed to pay. Finally, he stated the last line indicated debarment was recommended. Mr. Summerall testified the absence of notes in the case conclusion notes section indicated the case was not submitted for debarment. (Tr. 64; CX-3, p. 140).

The investigation represented on Bates number DOL-SWS-139 originated in May 1997 from the New Orleans, Louisiana, district office against Respondent. (CX-3, p. 139). Mr. Summerall stated he knew the lead investigator, George Percy, who is deceased. (Tr. 64-65; CX-3, p. 139). Mr. Summerall stated that the abbreviations listed under the case summary notes indicate there were 49 total hours involved, the complainants were to be paid back wages and receipts were due to the district office by August 7, 1997. The guards were paid less than the minimum hourly rate through January 1997 and did not receive vacation pay. In that investigation debarment was not recommended. (Tr. 65; CX-3, p. 139).

DOL-SWS-138 identifies an investigation against Respondent that began in March 2000 at the Albuquerque, New Mexico, district office. (CX-3, p. 138). Mr. Summerall did not know the lead investigator. (Tr. 65; CX-3, p. 138). Interpreting the acronyms listed in the case summary notes, Mr. Summerall stated it should read SCA coverage established, eligible

employees, employer did not pay proper prevailing minimum wage, the proper rate in fringe benefits or the proper overtime. Mr. Summerall determined from the report that \$235,100.80 in total back wages were due, which Respondent agreed to pay, and \$195,940.57 was due to 227 employees under the SCA minimum wage because the basic hourly rate was not paid. (Tr. 66; CX-3, p. 138). Further, Respondent owed 139 employees \$10,552.60 in back wages for overtime under the CWHSSA, but Respondent had previously paid \$28,624.63 in fringe benefits. (Tr. 67-68; CX-3, p. 138). Mr. Summerall testified the report indicated Respondent "agreed to comply with all the acts," which would include the SCA and CWHSSA specifically. The investigator recommended "withholding of funds due to the amount of back wages, no debarment or assessment of liquidated damages." Finally, Mr. Summerall testified the last line indicated the investigator left publications for Respondent including "a handy reference guide [to the] Fair Labor Standards Act," publication number 1318 and Part 5 of the CWHSSA. (Tr. 68; CX-3, p. 138). Mr. Summerall stated he leaves publications with employers "in all occasions" to insure they "have knowledge of the law." He also reviews the publications with employers and answers questions. (Tr. 69).

The investigation represented on Bates number DOL-SWS-137 began in August 2000 out of the San Antonio, Texas, district office against Respondent. (CX-3, p. 137). Mr. Summerall stated he knew the lead investigator, Eden Ramirez, who is the District Director of the McAllen office. (Tr. 69; CX-3, p. 137). Mr. Summerall stated "IC" is the abbreviation used for "initial conference" and "FC" is the abbreviation used for "final conference." He explained an initial conference is the first appointment, "hopefully" in person, with the employer where the investigator explains both the process and the investigation and requests records. (Tr. 70). He explained in the final conference the investigator reviews violations with the employer and seeks an agreement to comply and an agreement to pay back wages if applicable. (Tr. 71). Based on the case conclusion notes, Mr. Summerall stated the case was concluded after Respondent paid back wages without "further action." (Tr. 71; CX-3, p. 137). Case summary notes are entered by the investigator, while case conclusion notes are entered by a manager after the case is reviewed. (Tr. 72).

Mr. Summerall conducted the initial conference in the instant case by telephone with Respondent Gonzales. (Tr. 70). Mr. Summerall conducted the final conference in the instant case by telephone with Respondent Gonzales. Respondent Gonzales

agreed to comply but stated Respondent Jesse Morales would have to approve the payment of back wages, which were ultimately paid. (Tr. 71).

The investigation described in Bates number DOL-SWS-136 originated out of the Albuquerque, New Mexico, district office in November 2000 against Respondent. (CX-3, p. 136). Mr. Summerall did not know the lead investigator. The case summary report indicated the contract was in excess of \$2,500.00 meaning the SCA required that contract stipulations and wage determinations be included in the contract itself. Further, the Fair Labor Standards Act applied to Respondent because it met the Act's definition of "an enterprise." (Tr. 72; CX-3, p. 136). An executive exemption was claimed from two of the employees under the Fair Labor Standards Act, meaning those employees would also be exempt under the SCA. Debarment was not recommended. (Tr. 73; CX-3, p. 136). Mr. Summerall explained a recommendation for or against debarment by an investigator leads to a review by a manager in the district office, an Assistant District Director or the District Director. (Tr. 74).

In the investigation against Respondent represented by Bates number DOL-SWS-135, which began in June 2001 out of the Houston, Texas district office, the investigator recommended debarment based on prior wage and hour investigations. (Tr. 75; CX-3, p. 135). However, the case conclusion notes, indicate that the manager or District Director who reviewed the case determined debarment was not worth pursuing because the amount of money owed (\$38.92) did not meet "BCDS criteria," which Mr. Summerall testified stands for "back wage data collection systems." (Tr. 75, 82; CX-3, p. 135). BCDS criteria are not used by investigators but are relied on by managers in making their final determination whether to pursue debarment. (Tr. 76). The case conclusion notes also indicate the case was "NFA," which means "no further actions" taken. (Tr. 76; CX-3, p. 135).

The investigation described in Bates number DOL-SWS-134 originated in the New Orleans, Louisiana district office in August 2001 against Respondent. (CX-3, p. 134). The investigator recommended a follow-up investigation on Respondent's compliance and debarment if continued violations existed. However, the case conclusion notes indicate the case

was filed without further investigation. (Tr. 77; CX-3, p. 134). One year passed between the case summary notes and the case conclusion notes, which Mr. Summerall indicated is "not normal." Nothing on the report indicated that a follow-up investigation was conducted. (Tr. 78; CX-3, p. 134).

Bates number DOL-SWS-133 against Respondent shows a conciliated matter originating from the Albuquerque, New Mexico, district office in December 2002, which is not considered an investigation. The conciliated matter was later expanded to a limited investigation. (Tr. 79; CX-3, p. 133). The amounts owed were ultimately paid. Debarment was not recommended due to "extenuating circumstances" because Respondent claimed it was not receiving funds from "the CBA [collective bargaining agreement] increase timely from the contracting agency." (Tr. 80; CX-3, p. 133). Mr. Summerall testified the employer is obligated to pay employees under the SCA regardless of whether they get paid or not. (Tr. 81).

The investigation represented by Bates number DOL-SWS-132 originated in the Dallas, Texas, district office in December 2002 against Respondent. (CX-3, p. 132). Mr. Summerall did not know the lead investigator. (Tr. 81). The investigation involved one employee who received \$1,630.51. The investigator recommended further action "as needed," but the case conclusion notes stated the case was not suitable for debarment. (Tr. 82-83; CX-3, p. 132). The investigation was for the same violations as the investigation in the instant case; Respondent did not pay fringe benefits, holiday pay, vacation pay and training pay. (Tr. 83; CX-3, p. 132).

Bates number DOL-SWS-131 identifies the case summary report for an investigation against Respondent that began in December 2001 in Dallas, Texas. (CX-3, p. 131). DOL-SWS-131 also involved the same types of violations as the instant case and \$1,732.46 in back wages. The investigator indicated he spoke to Respondent Gonzales. (Tr. 84; CX-3, p. 131). Respondent paid the amount owed, agreed to further compliance and no debarment was recommended. (Tr. 84-85; CX-3, p. 131). The investigator went back two years in his investigation with the investigation period spanning March 31, 2001 to April 4, 2003. (Tr. 86; CX-3, p. 131).

Bates number DOL-SWS-130 identifies an investigation against Respondent originating from the Dallas, Texas district office in October 2002. (CX-3, p. 130). The investigation involved fringe benefits for vacation, holidays or training

hours spanning a period from March 1, 2001 to April 6, 2003. (Tr. 87; CX-3, p. 130). Mr. Summerall stated investigations can involve concurrent periods when there are separate contracts at issue. (Tr. 87). The investigator talked to Respondent Gonzales, but debarment was not considered suitable. (Tr. 87-88; CX-3, p. 130). The summary report stated "Mr. Morales would have to decide reinst," but Mr. Summerall could not testify to the meaning of that abbreviation. (Tr. 87; CX-3, p. 130).

Bates number DOL-SWS-129 summarizes an investigation against Respondent that occurred between April and August 2004 and originated from the Albuquerque, New Mexico, district office. (Tr. 88; CX-3, p. 129). The investigation involved failure to pay the prevailing wage rate, health and welfare, overtime and previous wage rate violations. (Tr. 89; CX-3, p. 129).

Mr. Summerall recommended debarment in the instant case based on Respondent's past history. His reaction to the history was that Respondent was not going to comply. However, even if Respondent did not have a past history of violations Mr. Summerall would have recommended debarment under 29 C.F.R. § 4.188, which he stated requires him to recommend debarment when a monetary violation of the SCA is found. (Tr. 89-90). He could not explain why Respondent has never been debarred under any of the prior investigations. (Tr. 91).

Mr. Summerall discussed the repeated violations with Respondent Gonzales in the final conference conducted over the telephone. He mailed the pertinent Wage and Hour publications to Respondent. (Tr. 90). Respondent Gonzales's explanation was the instant violation was an oversight and Respondent was having computer problems. Respondent Gonzales confirmed that Respondent missed payrolls while the instant investigation was ongoing. (Tr. 91-92).

On cross-examination, Mr. Summerall confirmed Respondent did not know which employees he spoke to in the course of his investigation. He took a signed statement from the employees he spoke to but did not cross-examine them or take any steps to verify their stories. (Tr. 94). Form WH-55 was prepared and given to Respondent Gonzales. (Tr. 94; CX-1). The form does not indicate that by agreeing to those monetary numbers the employer is agreeing it violated the SCA. (Tr. 94-95; CX-1).

Mr. Summerall also prepared form WH-56 and presented it to Respondent Gonzales. Form WH-56 indicates Respondent agreed to pay the back wages, but it does not indicate Respondent agreed it violated the SCA. (Tr. 95; CX-2).

Mr. Summerall stated that anytime he found monetary violations, he would recommend debarment because he was required to recommend debarment, but he did not agree that the prior history was "irrelevant" to his recommendation. (Tr. 96-97). He described his past training in investigations beginning in 1997. (Tr. 97-98). He conducted his first SCA investigation in 1999 or 2000. He conducted the instant investigation for the two year period from 2005 to 2006. He conducted approximately five to ten SCA investigations before the instant case. (Tr. 99). He acknowledged that other investigators disagree on the discretion allowed them when recommending debarment. Mr. Summerall has not seen a case involving "extenuating circumstances" in any of the SCA investigations he conducted. (Tr. 100). He does not consider the government's failure to pay the contractor an extenuating circumstance because "the law requires them to pay," but he acknowledged that based on the WHISARD reports a manager disagreed with this interpretation. (Tr. 100-101). He did not discuss prior investigations with investigators nor did he review the files, with one exception. (Tr. 101-102, 141). He did discuss DOL-SWS-134 with the investigator from that case and asked what the violations were. (Tr. 102).

Mr. Summerall stated he did not know if Respondent Gonzales or Respondent Joseph Morales were employed by Respondent in 1991 when it was investigated. Respondent Joseph Morales is not mentioned in any of the past investigation reports. (Tr. 103). Mr. Summerall did not interview Respondent Joseph Morales nor did he contact Respondent Joseph Morales. (Tr. 103-104). He did not know whether Respondent Joseph Morales was involved in preparing payroll or setting payroll policy for Respondent. Respondent Gonzales told him that Respondent Joseph Morales was Vice-President of the Respondent. (Tr. 104). He took no notes during the investigation with Respondent Gonzales, but wrote down comments on the initial conference form. He did not ask for corporate records to determine who the officers and directors were. He did not recall the name Jose "Joe" Morales from the investigation. (Tr. 105). The conversation he had with Respondent Gonzales regarding the prior violations is not specifically documented in the narrative report. (Tr. 106). He did not tell Respondent Gonzales he could be personally liable. He told Respondent Gonzales of the possibility of debarment.

(Tr. 107). Mr. Summerall would have recommended Respondent be debarred regardless of whether the company agreed to pay the wages or not. (Tr. 108).

Mr. Summerall received an e-mail from Mr. De La Rosa of the main office district office (MODO), which is "responsible for overall enforcement in [a certain] geographic area," in this case the San Antonio district office. (Tr. 108-109). He received the email at the initiation of the investigation in which Mr. De La Rosa noted Respondent's "extensive history," urged him to "conduct a full investigation with the understanding that this case will probably have to be considered for debarment." (Tr. 109; RX-1). The email is dated June 20, 2005, before Mr. Summerall began his investigation. (Tr. 111; RX-1). Mr. Summerall received the email from Mr. De La Rosa in the ordinary course of his business in response to an email he sent. (Tr. 111). Mr. Summerall was predisposed to recommend debarment anytime he found a monetary violation. (Tr. 112).

The instant debarment action was not commenced until June 10, 2008. Respondent paid back wages in February 2006. (Tr. 113). Mr. Summerall received receipts for back wages from Respondent's employees. (Tr. 113-114; RX-2). All of the receipts were certified on February 20, 2006. (Tr. 114; RX-2). Respondent fully cooperated with Mr. Summerall in the investigation. (Tr. 115).

Respondent Gonzales indicated a computer problem caused the missed payroll during the investigation. Mr. Summerall did not expand his investigation based on that issue nor did he consider it a problem. (Tr. 115) DOL-SWS-133 was a conciliated matter that concerned a missed payroll period where no violations were found. (Tr. 115-116; CX-3, p. 133). Investigations DOL-SWS-131 and DOL-SWS-132 were substantially similar, having the same dates of assignment, review and conclusion, which Mr. Summerall stated could possibly indicate there was only one investigation written on two reports because two contracts were involved. (Tr. 116-117, 131; CX-3, pp. 131-132). On redirect examination, Mr. Summerall noted the different locations listed on the reports, but he indicated it was still possibly one investigation. (Tr. 131; CX-3, pp. 131-132). While the violations may have been the same, different employees would have been affected based on the different locations. The investigator recommended further action by the MODO in both reports. (Tr. 132; CX-3, pp. 131-132).

Mr. Summerall did not recommend the individual Respondents be debarred only the Respondent Employer/Contractor. He did not investigate the individual involvement of Respondent Gonzales or Respondent Joseph Morales in any of the decisions that resulted in the alleged violations. His only investigation as to the individuals concerned was an inquiry as to the names and titles of the officials. (Tr. 117). He could not state whether Respondent Joseph Morales had any involvement in the decisions that resulted in the missed payments. (Tr. 118).

Mr. Summerall was aware from his discussions with Respondent's employees that Respondent had a collective bargaining agreement (CBA) with at least two unions. After reviewing the contract between Respondent and the federal agency he found no evidence that the CBA was involved. He did not review the CBA. (Tr. 119). He was not aware of whether Respondent had submitted the CBA to the agency. He was not aware of any CBA that affected the service contract. There were no notations in the reports of CBA violations. (Tr. 120).

On redirect examination, Mr. Summerall stated Mr. De La Rosa is not his boss. (Tr. 128). Mr. De La Rosa's recommendation had no bearing on the way Mr. Summerall performed his investigation. (Tr. 128-129). He was required to report his findings to Mr. De La Rosa because Respondent's corporate office was located in the geographic area over which Mr. De La Rosa is responsible, meaning he is responsible for ensuring Respondent's overall compliance. The email from Mr. De La Rosa indicated that he was concerned about Respondent's history, but this did not influence the manner in which Mr. Summerall conducted the investigation. (Tr. 129).

Mr. Summerall noted that Part 4 of the regulation states that extenuating circumstances can excuse debarment. (Tr. 122). I take judicial notice of 29 C.F.R. § 4.188 relating to unusual circumstances and the history of violations. Mr. Summerall testified extenuating circumstances and unusual circumstances are used interchangeably. Mr. Summerall considers the employer's history of violations in determining whether unusual circumstances exist. (Tr. 126). Such a history weighs in favor of debarment. (Tr. 127). Part 4 requires employers to maintain all hours worked, hours paid, health and welfare benefits paid, gross and net pay for a three-year period after the conclusion of the contract. (Tr. 127-128). Respondent did not provide Mr. Summerall with all of the records it was required to maintain under Part 4. He could have determined whether Respondent properly paid for training and travel time without relying on

statements by employees if Respondent had provided all of the records required under Part 4. He requested those records from Respondent Gonzales. (Tr. 128). Mr. Summerall stated he had no training on what are unusual circumstances. (Tr. 139).

On redirect examination, Mr. Summerall stated a CBA, if it existed, would be incorporated into the service contract. The wage determination would be affected by the negotiated wage rate of the CBA. Mr. Summerall stated that to his knowledge none of the contracts incorporated a CBA. (Tr. 137). The contracting officer did not tell him of a CBA or provide a copy of the CBA. (Tr. 138). If a CBA provided a different amount than the wage determination, the CBA would have to be approved by the Wage and Hour Division of the Department of Labor in Washington, D.C., and the negotiated rates would be incorporated into the wage determination, becoming part of the contract regardless of whether the wage is higher or lower. (Tr. 137, 140). Under the SCA, travel time is payable if it is work time. Mr. Summerall testified a CBA that eliminated the employer's responsibility to pay travel time would be inconsistent with the SCA and the Fair Labor Standards Act. (Tr. 139-140). Mr. Summerall did not contact the contracting agency to determine whether the CBA was in place. (Tr. 140-141).

WHISARD report DOL-SWS at 574-579 are compliance action reports. (Tr. 143; RX-3). DOL-SWS-575 was signed by investigator Eden Ramirez on March 8, 2001, in connection with an investigation involving Respondent. (Tr. 144; RX-3, p. 575). DOL-SWS at 576-579 is a narrative report prepared by Eden Ramirez for the period of June 1, 2000 to November 30, 2000, which references a CBA in the disposition section of the report. (Tr. 144-145, 147; RX-3, pp. 576-579). The narrative report indicates the violation occurred due to a misunderstanding of the CBA. (RX-3, p. 578). Nothing in the narrative report indicated to Mr. Summerall that a CBA was in effect when he conducted his investigation from 2005 to 2006. (Tr. 147-148).

Denise Flores

Ms. Flores is the regional wage specialist for the Wage and Hour Division of the Department of Labor in Dallas, Texas, and has been so since March 2005. (Tr. 149). She has oversight over 3 program areas, including SCA. (Tr. 150). She reviews all SCA files that come into the regional office from the district offices and answers questions and provides guidance on

the SCA. (Tr. 150-152). She physically reviews 50 to 100 SCA files a year. (Tr. 153). The district office managers have conference calls with her on SCA cases and send her questions or seek her guidance regarding those cases. (Tr. 153-154).

In any SCA investigation within her region a conference call takes place where she is involved in a determination regarding debarment. (Tr. 154-156). After the conference call, she requests the file be sent to her in cases where she believes debarment should be pursued. (Tr. 155). The district office managers should indicate any unusual circumstances, and they can disagree with the investigator. However, she makes the determination regarding unusual circumstances and pursuit of debarment is ultimately her decision. (Tr. 156-157). She also decides who would be named responsible parties. (Tr. 157). She does not remember whether she recommended debarment in the instant case, but she writes a memo to the Wage and Hour counsel of the Solicitor's office recommending debarment for named individuals. (Tr. 157-158). On rare occasions the Wage and Hour counsel disagrees with her recommendation. The investigator does not have the final decision in the debarment recommendation. (Tr. 158).

She requires the District Director to state whether or not unusual circumstances exist, such as the agency paying the wrong wage determination or misclassified positions. (Tr. 159-160). She would not consider full cooperation by the employer in the investigation to be an unusual circumstance. (Tr. 159). She would not consider the contracting agency not paying an employer to be an unusual circumstance because the contractor agreed to pay its employees under the contract. (Tr. 161). She indicated the agency's obligation under the contract may be a procurement issue. (Tr. 162).

She stated the problems with Respondent's payments under the SCA had nothing to do with a wrong wage determination. She stated the problems were Respondent was not paying its employees for hours worked, travel time, training time and fringe benefits up to 40 hours. (Tr. 163). The wage determination indicated the prevailing wage and the health and welfare benefits due to Respondent's employees. A contractor may be debarred for only one violation of the SCA without showing a history of violations. In the absence of unusual circumstances, debarment is required for SCA violations. (Tr. 163). A showing of unusual circumstances is the burden of the Respondent. (Tr. 163-164).

Ms. Flores stated the existence of a CBA would be apparent in the contract because wage determinations are standardized and the wage determinations in a contract with a CBA would differ from those standardized figures. The contracting agencies incorporate wage determinations differently, but "either by looking at the wage determination or looking at the number of the wage determination you would be able determine whether or not a CBA was applicable." The wage determination would specifically identify the CBA. (Tr. 165). The Respondent had the responsibility of telling the contracting officer of the existence of a CBA. (Tr. 167). She did not know a CBA was incorporated into the contract. There is nothing in the file that indicated a CBA was part of the contract. (Tr. 168).

CBAs are a big part of what contracting officers do. Ms. Flores testified a contracting officer could not miss a CBA. The contracting officer will request a substantial variance hearing when the negotiated rates under the CBA greatly exceed rates typically paid. (Tr. 169). After reviewing the CBA, the contracting officer would send it to the Wage and Hour national office where a wage determination specific to the CBA is made. Alternatively, the contracting officer could use an automated system to generate a wage determination specific to the CBA. (Tr. 170). A cover sheet is produced, giving the appropriate wage determination and number, in either instance. (Tr. 170-171).

There was nothing in the file indicating a delay of payments from the contracting agency to the Respondent. (Tr. 171).

The investigators generally send a letter to the contactors putting them on notice of the investigation at the beginning of the investigation. (Tr. 172). Ms. Flores could not recall whether such a letter was included in the file in the instant case. (Tr. 173).

Debarment is based on the case file. Ms. Flores then looks at WHISARD reports and often reviews the narratives from previous investigations. She does not recall specifically whether she followed that process in the instant case but stated generally she does. She does not recall a conference call with the Solicitor regarding debarment in the instant case. (Tr. 174). Respondent's history caused her to believe Respondent "could not comply or would not comply with the SCA." (Tr. 175, 195).

Ms. Flores also looks at the individuals who are responsible for the violations. She reviews the file and the interview statements to determine the responsible parties that should be named in a debarment action. She takes several factors into account in determining responsible parties including employee statements, contact with the contracting officer and signatures on the contracts. (Tr. 175).

Ms. Flores followed her normal procedure in reviewing the instant case. She prepared a memorandum to the Solicitor's Office. (Tr. 177). She makes the decision with regard to debarment for the Wage and Hour Division; however, the Solicitor may reject her determination for a "valid reason." (Tr. 179, 181). She did not review case law in making her recommendation. A determination of unusual circumstances is based on professional experience. (Tr. 181). She was not aware of any documents that give written guidance as to the existence of unusual circumstances. (Tr. 181-182).

Referring to DOL-SWS-133, Mrs. Flores indicated it was an error for the report to compute liquidated damages at \$6,980 then state there were no liquidated damages. (Tr. 182-183; CX-3, p. 133). She testified when there are CWHSSA violations Wage and Hour must compute liquidated damages for the contracting agency, then the contracting agency makes a determination to assess, waive or reduce the liquidated damages. (Tr. 182-183). No one at Wage and Hour can make the recommendation to waive liquidated damages. (Tr. 183).

Ms. Flores makes all "withholding requests." She may make a request for immediate withholdings in instances where the contract will soon expire or the contractor is filing for bankruptcy or she may review the file then request withholdings based on the evidence in the file. (Tr. 184). The "emergency" withholding request protects the contractors by allowing time for a thorough investigation. Ms. Flores would recommend debarment in a case where the contract was set to expire in 30 days. (Tr. 185).

On cross-examination, Ms. Flores stated she reviewed the case file. (Tr. 186). She stated the file "would not leave [her] desk" without reviewing interview statements, but she could not specifically recall the interview statements she reviewed in the instant case. She stated the "JRC call" would have included herself, Wage and Hour counsel, and the district

office manager. She could not recall the conversation. (Tr. 187). She also could not remember the details of the memorandum sent to the Solicitor's office. (Tr. 187-188). She knew she wrote a memorandum, but could not recall specifically writing it. (Tr. 188). She could not confirm with certainty that she followed her standard procedure. She does not re-interview the witnesses. She did not contact the Respondent. (Tr. 189-190).

Ms. Flores believed her predecessor as the regional wage specialist held the position in 2000. (Tr. 190). She did not have firsthand knowledge of the prior investigations other than the WHISARD reports; she was not involved in any of the prior investigations. (Tr. 191, 198-199; CX-3). The reports did not indicate whether her predecessor recommended debarment. (Tr. 191; CX-3).

In the absence of unusual circumstances, Ms. Flores would recommend debarment any time a monetary penalty exists. In instances where the contractor simply made a mistake, she would consider the magnitude of that mistake in determining whether to recommend debarment. The contractor is responsible for maintaining accurate records. (Tr. 192).

On redirect examination, Ms. Flores pointed out 10 case summary reports that contained similar violations as those found in the present investigation namely DOL-SWS-129, DOL-SWS-130, DOL-SWS-131, DOL-SWS-132, DOL-SWS-134, DOL-SWS-135, DOL-SWS-136, DOL-SWS-138, DOL-SWS-139 and DOL-SWS-140. (Tr. 196-198; CX-3, pp. 129-132, 134-136, 138-140). Her testimony as to the similarities between the investigations was based only on her review of the case summary notes contained in the WHISARD reports. (Tr. 199-200). She could not recall which narratives she read in connection with the case summary reports. (Tr. 200). She did not know whether the Mr. Morales mentioned in a case summary report referred to Respondent Joseph Morales, Respondent Jesse Morales or an unrelated person with the last name Morales who worked for Respondent. (Tr. 201).

Ms. Flores stated once back wages are paid in full the investigation is concluded and the case is closed in WHISARD, unless debarment is pursued. In most cases, debarment will begin after the final conference, but Wage and Hour will not wait until back wages are paid. (Tr. 202). She could not answer why the debarment action began over two years after back wages were paid in the instant case. (Tr. 203). She stated two years was a long delay. She could not recall the date of her debarment recommendation. (Tr. 204). The Solicitor's office

will request the compilation of the files for review, which may take some time if the files are in the Federal Records Center. (Tr. 206). Ms. Flores recalled working with the assistant District Director in sending requests for files in the instant case. (Tr. 207).

Archie Gonzales

Respondent Gonzales was formerly employed by Respondent as an accountant. He also prepared bid proposals for federal contracts. He received no training on doing so. He simply followed the requirements. (Tr. 209). He submitted two to three bid proposals per week. (Tr. 210). He did not discuss bid proposals with Respondent Joseph Morales, but he discussed the proposals with Respondent Jesse Morales. (Tr. 213).

He began working for Respondent in October 1992 and was terminated on June 15, 2010. (Tr. 210). He was terminated for not preparing hourly journals of the work performed daily as requested in a memo prepared by Respondent Joseph Morales. (Tr. 211). Respondent Gonzales declined to submit the journals and was fired after nearly 18 years with the company. (Tr. 212). Respondent Joseph Morales took charge of the company after the death of Respondent Jesse Morales. (Tr. 213).

Respondent Gonzales also prepared the financial statement and reconciled the individual accounts through audits. (Tr. 213). Further, he "coordinate[d] the payables and payroll from the accounting aspect." He was not involved in the preparation of payroll. Ray Visarra, with Carlos Ibarra, has been in charge of payroll for Respondent since 1996. (Tr. 214). Respondent Gonzales supervised Ray Visarra on the accounting aspects of the payroll including "the journal, the entries, what account it should go, the expenses, the liability." Respondent Gonzales made sure payroll was sent out on time. (Tr. 215). He also stamped the payroll checks with the signature of Respondent Jesse Morales. (Tr. 215-216).

Employees who encountered issues with the payroll relayed those issues to the contract manager who would inform the payroll department. (Tr. 216). It was seldom that a problem with payroll came to Respondent Gonzales. He recalled three to four times when employees called him because they did not get paid. (Tr. 217). Neither Respondent Gonzales nor any other

employees trained Ray Visarra or Carlos Ibarra in payroll or accounting. (Tr. 217, 231). He did give the instruction that any hours exceeding 40 hours a week should be calculated as overtime. (Tr. 217).

Respondent Gonzales did not recall complaints related to the payment of overtime. The only complaints he recalled receiving were about not being paid for basic and firearms training. He did not remember the date, but it may have been within the last five years. (Tr. 218).

He spoke to the Wage and Hour Division between five and ten times during his employment with Respondent; most of the time they were looking for Respondent Jesse Morales. (Tr. 219-220). Respondent Gonzales indicated most of the time Respondent Jesse Morales was out of the office, leaving him to answer the calls. He was told of the investigations and payroll records were requested. He would go to Ray Visarra to produce the payroll records. Respondent Gonzales believed Ray Visarra worked for Respondent at the time of the hearing and reported to Respondent Joseph Morales because he was "running the business." (Tr. 220).

In preparing bids for federal contracts, Respondent Gonzales would complete the bid solicitation packages he requested from contracting officers. (Tr. 221). He also prepared costs analysis associated with contracts after reviewing Respondent's accounting and financial records. (Tr. 221-222). He would then submit a cost evaluation to Respondent Jesse Morales. They discussed the overhead and profit under the contract. He would finalize and submit the bid to the contracting officer. The contract awards were addressed to Respondent Jesse Morales. (Tr. 223).

After investigations by the Wage and Hour investigations Respondent Gonzales spoke to Ray Visarra or Carlos Ibarra about paying the proper amount. This would occur after employees complained to Respondent Gonzales about improper payment of wages. He told them to properly pay the health and welfare benefits. (Tr. 224). He recalled the Wage and Hour Division discussing several problems with him including improper payment of health and welfare benefits, holiday pay, training pay and overtime. (Tr. 225).

Respondent Joseph Morales was a contract manager for Louisiana, Beaumont, east and west Texas. (Tr. 225). In 2001 Respondent Joseph Morales took over a Louisiana contract. The office controlling the Louisiana contract was in Houston, Texas. (Tr. 226). In 2006 Respondent lost the Louisiana contract; Respondent Joseph Morales was the manager at that time. He remained in Houston after losing the Louisiana contract to manage the Texas contracts. (Tr. 227).

Respondent Gonzales did not recall any issues after Hurricane Katrina with the Louisiana contracts. (Tr. 227-228). During the hurricane, some of Respondent's locations closed and some employees were transferred to other jobs. Respondent Gonzales did not know of employees who were fired as a result of the hurricane. (Tr. 228). Respondent Joseph Morales, the contract manager, was responsible for the transfer of employees to other jobs. (Tr. 228-229). Respondent purchased mobile homes for offices and rented hotels for the employees after the hurricane. (Tr. 229-230). Respondent Jesse Morales asked the federal agency to reimbursement Respondent. Respondent Gonzales was not aware of Respondent actually receiving a reimbursement. (Tr. 230).

Supervisors were responsible for getting employees their pay checks. Employees would submit their time sheets to their supervisor. The supervisors would then submit the time sheets to the Houston office. Mr. Joseph Morales oversaw the supervisors. (Tr. 231).

Respondent Gonzales believed Ray Visarra and Carlos Ibarra were experienced in computing payroll. He interviewed Ray Visarra but had no authority to hire or fire employees. Respondent Jesse Morales hired Ray Visarra. (Tr. 232). Respondent Gonzales gave Respondent Jesse Morales a positive review of Ray Visarra after the interview. Respondent Jesse interviewed Carlos Ibarra and Tito Orellana, a general manager. (Tr. 233). Respondent Gonzales believed Respondent Joseph Morales fired Tito Orellana the week before Gonzales was fired. Tito Orellana was the general manager hired in 2008 to oversee operations. (Tr. 234). Respondent's employees, with the exception of Jesse Morales, reported to Tito Orellana. (Tr. 234-235). Respondent Gonzales was unsure whether Respondent Joseph Morales reported to Tito Orellana. Tito Orellana did not hire anyone. (Tr. 235).

When Respondent Gonzales was hired by Respondent he estimated 95 percent of Respondent's work was federal contract work. (Tr. 235). Respondent Gonzales believed all federal contracts were completed in March 2010. Respondent Gonzales did not believe Respondent had a minority contractor certification. Respondent once had an 8(a) certification. (Tr. 236). Respondent Gonzales did not know how Respondent qualified as an 8(a) contractor because it occurred before he was hired. 8(a) contracts are limited to small businesses. Respondent Gonzales believed Respondent lost its 8(a) certification in 1997 and could no longer bid on 8(a) contracts. (Tr. 237-238). Contracts made before Respondent lost its certification were not terminated until the completion of the contract. Respondent Gonzales believed the last contract under the 8(a) certification was completed in 2001. Respondent Gonzales testified that the bid process was basically the same after the 8(a) certification ended. (Tr. 238).

Respondent's highest contract earnings while Respondent Gonzales was employed there were \$25 million gross in one year, and the lowest was \$1 million in 1992 for only one contract. (Tr. 239-240). From 2004 through 2010, Respondent Gonzales's salary was \$4,500 per month. (Tr. 241). During the same period, Respondent Gonzales believed Respondent Jesse Morales was received \$4,000 per month in salary and \$4,000 per month in dividends. (Tr. 242). Respondent Gonzales did not recall what Respondent Joseph Morales earned during that period. (Tr. 242-243).

Gonzales asked the Department of Labor if the agency offered training on payroll practices, and he was told they did not. (Tr. 243). He wanted training on the payroll for himself, Ray Visarra and Carlos Ibarra. (Tr. 243-244). He had no training on payroll practices or managing payroll under a federal contract. The only training they had was when the computer program was changed from "Easy Accounting to "QuickBooks." (Tr. 244).

Only Respondent Jesse Morales could open the mail. (Tr. 244). Respondent Gonzales testified that the Form 58 in the instant case for receipt for payment of lost wages was signed by Ray Visarra. (Tr. 245; RX-2, p. 1). CX-2 is a document he signed for Respondent Jesse Morales. Respondent Gonzales identified his signature on the summary of unpaid wages report prepared in the investigation by Mr. Summerall. (Tr. 246; CX-2). Respondent Gonzales testified he signed the document at the direction of Respondent Jesse Morales. (Tr. 246). He spoke to

Mr. Summerall and was shown calculations. He did not review the calculations and asked no questions but stated Respondent would pay it. (Tr. 247).

After his discussion with Mr. Summerall, Respondent Gonzales asked Ray Visarra why payroll was not being paid properly for health and welfare and overtime. Ray Visarra told Respondent Gonzales that the payroll was based on hours the employees submitted and discrepancies would exist if the training or other additional hours were not reported. (Tr. 248). The contract managers were responsible for ensuring that the employees attend and sign in for training. The contract manager, such as Respondent Joseph Morales, also was responsible for turning the employees' time sheets in to payroll. (Tr. 249).

Respondent Gonzales stated he read some of the SCA. (Tr. 249). He could not remember reading Part 4 of the regulations. Respondent had copies of the regulations or could go to the Internet on how to calculate fringe benefits. (Tr. 250-251). Respondent Gonzales occasionally went online to review the wage determinations, but he did not "have time to go to the internet every time." The contract awarded usually had a wage determination attached, which Respondent Gonzales would often give to payroll. (Tr. 251). The wage determinations stated the prevailing wage classification and health and welfare benefits. (Tr. 252).

Respondent Gonzales was not involved in CBA negotiations, only Respondent Joseph Morales was involved. (Tr. 252). The CBA was incorporated into some of Respondent's federal contracts. (Tr. 253). After reviewing JX-1 through JX-19 Respondent Gonzales indicated he could go to the Wage and Hour website to determine whether the wage determinations listed on the contracts involved a CBA. (Tr. 255-256). The wage determinations were sent to payroll, and a complete copy of the contracts and the task orders were sent to the contract managers. (Tr. 256).

Training certifications were submitted to the contracting agencies by the contract managers. (Tr. 262). Respondent kept payroll hours, checks, locations of the hours, overtime and all hours submitted to payroll on file for more than three years. (Tr. 263). The employees were responsible for submitting their hours to their supervisor. The supervisor or manager then submitted the hours to the payroll department. (Tr. 264).

On cross-examination, Respondent Gonzales acknowledged his title was accountant/comptroller. (Tr. 264). He was deposed on January 14, 2010. (Tr. 265-266). On page 22 of the deposition, he stated he was an accountant and office manager in 1992 and that comptroller was not his present title. (Tr. 267). In his deposition, Respondent Gonzales identified two project managers- Respondent Joseph Morales and Jose Morales. (Tr. 268-269). Jose Morales was sometimes referred to as "Joe Morales." They were called project managers, but Respondent Gonzales testified that he considered the term contract manager "very similar" to project manager. (Tr. 269, 329, 332). Respondent used both titles interchangeably. (Tr. 330). Respondent Gonzales stated he did not refer to Respondent Joseph Morales as vice-president. (Tr. 270).

The parties stipulated that Respondent Joseph Morales was not a vice-president of Respondent. (Tr. 271-272). Respondent Jesse Morales owned the company. Respondent Gonzales did not believe that Respondent Joseph Morales owned any interest in the company until the death of his father. Respondent Gonzales did not know if Respondent Joseph Morales owned an interest in the company at the time of the hearing. (Tr. 273).

Respondent Gonzales stated he was not upset with Respondent Joseph Morales for firing him. (Tr. 273-274, 279). His blood pressure was high while working for Respondent, but it was improved at the time of the hearing. Respondent had no ongoing government contracts at the time Respondent Gonzales was fired. (Tr. 274).

Respondent Jesse Morales exercised control and approved everything. Respondent Jesse Morales approved all expenses, regardless of the cost. (Tr. 275). Respondent Joseph Morales had to get approval from Respondent Jesse Morales and had no authority himself. (Tr. 276-278). Only Respondent Jesse Morales had the authority to change the way wages were paid. (Tr. 277). Respondent Joseph Morales, as the manager, should have reviewed time cards in the areas under his supervision. (Tr. 278).

Respondent Gonzales applied for unemployment benefits but they were denied after a hearing. He stated he had no ill will toward Respondent or Respondent Joseph Morales because of their opposition. (Tr. 279-280).

Respondent Gonzales had conversations with the Department of Labor about wages owed, but had to get Respondent Jesse Morales to approve the back wages. Respondent Jesse Morales did not ask Respondent Gonzales to make any changes after this occurred. (Tr. 281). He did not tell Respondent Joseph Morales about wages due or changes to wage policies. (Tr. 282). Respondent Jesse Morales, and not Joseph Morales, set the wage and payroll policy; Respondent Gonzales and the payroll department simply implemented it. (Tr. 282-283).

The bid process involved preparing a cost analysis. Mark Faith, quality control manager, prepared technical aspects of the bids including the number of guards, their qualifications and hours to be worked. (Tr. 283). Respondent Joseph Morales did not participate in the bid process. Only the contracting officers had the authority to make changes to the contracts. (Tr. 284). Respondent Jesse Morales approved all bids which were then submitted to the contracting agency. (Tr. 285). If there was a price adjustment, Respondent Gonzales had no authority to negotiate; only Respondent Jesse Morales could do so. (Tr. 285-286).

Respondent Gonzales had two phone conversations with Mr. Summerall, but none in person. (Tr. 295). He never questioned the amounts owed and did not do any analysis of money owed or proper hours. (Tr. 295-296). Ray Visarro told Respondent Gonzales some training hours were not submitted for payroll by the employees. If he was told the employees were underpaid, his first instinct is to pay the employees. (Tr. 296). He could not recall if Mr. Summerall told him he had the right to contest his findings. Mr. Summerall did not tell him of the possibility for debarment for himself personally or for Respondent. (Tr. 297).

Respondent Gonzales only told Respondent Jesse Morales of his conversations with Mr. Summerall; he did not tell Respondent Joseph Morales. (Tr. 297). The "proper channels" were to go to Respondent Jesse Morales. (Tr. 297-298). Respondent had a CBA during some of the investigation by Mr. Summerall. (Tr. 298). In his deposition Respondent Gonzales stated the CBA was in place in 2004. (Tr. 299).

RX-4 is the CBA which covered a unit of security guards in Northeast Louisiana. (Tr. 300-301; RX-4). The CBA was rejected by separate order dated April 15, 2011, for the reason the Respondents failed to establish the CBA was incorporated into the contracts with the contracting agencies. Mr. Summerall used

\$12.24 per hour in computing back wages, which came from the wage determination. (Tr. 305, 324; CX-1, p. 1). The CBA wages were higher, \$15.75 per hour on October 1, 2004, and \$16.50 per hour on October 1, 2005. (Tr. 305, 324; RX-4, p. 20). Respondent, under the direction of Respondent Jesse Morales, applied the CBA when it conflicted with the wage determination. Respondent Gonzales relayed that policy to the payroll department. (Tr. 306). Article 18, Section 2 of the CBA on training provided the training rate of pay "will not include fringe benefits or overtime pay." (Tr. 308; RX-4, p. 21). Respondent Gonzales did not do payroll and did not know if that provision of the CBA was followed. (Tr. 308-309). The CBA does not refer to a contract in existence. (Tr. 309). Respondent Jesse Morales was to submit the CBA to the contracting agency. (Tr. 310). Respondent Gonzales also knew the Federal Protective Services would not pay timely. (Tr. 311).

Respondent Jesse Morales hired Hollis-Rutledge Consultants to assist in collecting delinquent payments from the Federal Protective Services, locating potential bids, marketing and operating the computer system. Respondent Gonzales did not know why they were hired. (Tr. 316).

Payroll policies were established by Respondent Jesse Morales. Respondent Gonzales supervised payroll. (Tr. 317). RX-6 is a memo on the computation of training hours. The memo was issued by Respondent Jesse Morales to the office manager and staff. (Tr. 317-318; RX-6). The memo stated, "No training hours listed on time sheets will be paid unless all training backup information is submitted with time sheets." (RX-6). Respondent Gonzales and the payroll department followed this policy. (Tr. 318). Respondent Jesse Morales was responsible for all hiring decisions and personnel policies. All bids, with the exception of one, were submitted by Respondent Jesse Morales. (Tr. 319). Respondent Joseph Morales had no authority to make decisions without consulting with Respondent Jesse Morales. Before Respondent Jesse Morales died, Respondent Gonzales did not think Respondent Joseph Morales had any supervisory authority over him. (Tr. 320).

On redirect examination, Respondent Gonzales stated the memo from Respondent Jesse Morales was dated March 24, 2004, and it was an attempt to reconcile problems with training documentation not being submitted to the payroll department. (Tr. 321-322; RX-6). Respondent Gonzales was the main office manager in 2004. (Tr. 323). The final sentence of the memo stated, "If backup is not received, payroll should contact

corresponding manager to make them aware that backup was not received." (Tr. 323; RX-6). Respondent Joseph Morales, as a project manager, was one of the corresponding managers. He would have been the one responsible for ensuring that the payroll department received the proper documentation. (Tr. 323). The records would then be filed in the individual employees' files. (Tr. 324).

On recross examination, Respondent Gonzales stated Respondent's employee manual instructed the payroll department to follow the CBA. (Tr. 331, 334). The instructions were based on the CBA and the manual, not Respondent Gonzales's knowledge of the law. (Tr. 334). Respondent Gonzales wrote the employee manual under the direction of Respondent Jesse Morales. The individuals under Respondent Gonzales reported first to him then to Respondent Jesse Morales, but at times, as an exception to protocol, they reported directly to Respondent Jesse Morales. (Tr. 331). Respondent Gonzales stated he would not have broken the law if Respondent Jesse Morales told him to do so. Further, he stated that he was not aware Respondent was breaking the law. (Tr. 334).

Joseph Morales

At the time of the hearing, Respondent Joseph Morales was the Director of the Respondent and did not have any superiors. (Tr. 336). He began with Respondent while in high school as a guard on a commercial contract. In 1979 he became a supervisor for two and one-half years and then left the company. In 1993, he returned to the company and opened a branch office in Houston, Texas. (Tr. 337). Jose Cavazos was the manager of operations at the time. Respondent Joseph Morales was the branch operations manager. (Tr. 338).

During that time, Respondent Morales was licensed as a branch office manager by the Private Security Bureau Division of the Department of Protective Services, of the State of Texas. (Tr. 338). To qualify for licensing, Respondent Morales had to complete an application, which showed prior supervisory experience, and pay a fee. (Tr. 338-339). The Bureau expected him to ensure that every officer was registered with the State Board and complied with the State Board rules. The board rules included training requirements and the certification of officers. (Tr. 339). Respondent Morales was responsible for

providing some training. (Tr. 339-340). His father, Respondent Jesse Morales, became ill in 2008 at which time he closed the Houston office and moved to the corporate office in Brownsville, Texas. (Tr. 340).

From 1993 until the late 1990s, Respondent Joseph Morales worked on a contract with the Department of Housing and Urban Development (HUD). (Tr. 340, 349). In 1995, Respondent contracted to provide the first commercial guards through GSA for a Social Security Administration office, and Respondent Joseph Morales assisted with the implementation of training requirements. (Tr. 340). Respondent began with one or two officers working on the federal GSA contract and grew to 25 or 30 guards working on federal contracts. (Tr. 341, 350). Guards would begin by working on commercial contracts and could move up to federal contracts if they performed well. (Tr. 341).

Jose Cavazos hired training officers from within a pool of officers on Respondent's payroll, who were typically supervisors. (Tr. 342-343). Then, Respondent Joseph Morales would assist the training officers in becoming certified by the State of Texas as an instructor. (Tr. 342). Jose Cavazos died in 2000 and was good friends with Respondent Jesse Morales. Jose Cavazos worked for Respondent from 1993 to 1995; no one replaced him in the Houston office. (Tr. 343). Respondent Joseph Morales alone was the Houston branch manager from 1995 to 2008. (Tr. 343-344). He assisted employees in submitting their credentials to the corporate office for processing so that they could be certified by the Texas Private Security Bureau. The credentials included a personnel resume, which identified their experience, criminal history and background checks. (Tr. 344). Employees who began work on federal contracts earned more money. (Tr. 345).

Supervisors made recommendations to promote guards and he would submit paperwork to the corporate office for advancement of federal guards. (Tr. 345). If a guard's work was poor, he would work with the supervisor who had the authority to demote pursuant to Respondent's progressive disciplinary policy. (Tr. 346-347). Respondent Joseph Morales managed that process and assisted the supervisors in gathering the required documentation. (Tr. 347).

The instant contract began with the Houston metropolitan area, then expanded to include Beaumont-Port Arthur, Texas, and Louisiana. There were 8-9 different locations. (Tr. 350). In New Orleans, Louisiana, the branch manager/qualifying agent was

Lieutenant Williams. Respondent Joseph Morales assisted Lieutenant Williams and the New Orleans branch with equipment, statement of work, training and discipline. (Tr. 351). He reviewed the statement of work "very often." At the start of a contract the statement of work was reviewed with the employees. (Tr. 352). He also reviewed the statement of work and training procedures with the supervisors in staff meetings monthly from 1995 to 2000. (Tr. 352-353). From 2000 to 2008, he held supervisory meetings every two weeks where training and statement of work were discussed. (Tr. 354). He discussed problems the supervisors were experiencing "in the field." (Tr. 355). He also reviewed company regulations, GSA and building rules, which were part of training. (Tr. 355). Respondent Joseph Morales scheduled training for some locations and coordinated with the corporate office in making sure the proper employees were in attendance. (Tr. 356-357). He assisted the supervisors in "the remote locations" in identifying the individuals who were licensed by the State Board to provide training. (Tr. 357).

He was responsible to make sure guards had equipment. (Tr. 357-358). When the government changed regulations it would relay those changes to the contracting officer, who would relay the changes to Respondent. Then Respondent would update the building post orders to reflect those changes. (Tr. 358). Respondent Joseph Morales would hold a safety minute meeting before implementing the changes. A supervisor would deal with a guard who quit his post. (Tr. 359). The supervisors would gather all information after a guard quit his post then discuss it with Respondent Joseph Morales. A report would then go "up the chain." Respondent Joseph Morales filed copies of such reports. (Tr. 360). Company policy requires disciplinary reports be kept. (Tr. 361).

Respondent Joseph Morales requested a copy of the Federal Protective Service Policy Handbook from the Federal Protective Service, but he never received it. (Tr. 361-362). He was familiar with the Contract Guard Information Manual, which was used in the training of guards who worked in federal buildings. The Federal Protective Service administered a test in connection with the manual. Guards must pass the test before beginning work on a federal contract. (Tr. 362). The guards were required to complete eight hours of government training, divided into one or two sittings. Respondent Joseph Morales contacted the contracting officer's technical representative (COTR) to set up the training and testing. (Tr. 363).

The federal government provided cell phones or two-way radios in some areas. (Tr. 363-364). The supervisors would collect federal equipment that was no longer in use and return it to the federal agency. (Tr. 365-366). The supervisors would document the distribution of federal equipment and send it to the corporate and branch offices. (Tr. 366). The COTR would contact Respondent Joseph Morales about serial numbers for some of the equipment. (Tr. 367). The contracting officer contacted Respondent Joseph Morales once during the term of the contract regarding a location in New Orleans. He directed her to call the corporate office. (Tr. 370).

Respondent Joseph Morales continued to manage the same contracts after he moved to the corporate office in 2008. (Tr. 365).

Respondent Joseph Morales is familiar with the SCA and at times referred to it in answering questions from supervisors. (Tr. 371). He had a conversation with representatives of Wage and Hour in Lubbock, Texas, when an employee claimed he was owed vacation pay. (Tr. 371-372). The Wage and Hour representative called and asked for documentation, which he provided. It was determined to be a fraudulent claim and Respondent was sent a letter stating the case was dismissed. (Tr. 372). That incident occurred before Respondent Joseph Morales left the Houston office in 2008. (Tr. 372-373). The corporate office provided him documentation to show that the employee was not owed vacation time, which he sent to Wage and Hour. (Tr. 373-374). He always cooperated with Wage and Hour. (Tr. 373).

Firearm training was required under the federal contracts, and Respondent Joseph Morales is a licensed firearm instructor. At times he provided the firearm training personally. He kept sign-in and sign-out sheets, which the supervisors turned in to the payroll department. (Tr. 374). Respondent Joseph Morales issued the certifications of training; he then sent them to the corporate office along with sign-in and sign-out forms. (Tr. 374-375). The corporate office would forward the certifications to the contracting agencies. (Tr. 375). He spoke with Terry Vinson, another firearms instructor, about not properly reporting the sign-in sheets several times. (Tr. 375-376). They used a Form 139, provided by the federal agencies, to record those times. (Tr. 376).

The last layoffs by Respondent occurred in 2009. He did not recall any layoffs at the Houston branch. Respondent Joseph Morales personally laid off those employees in 2009. (Tr. 377).

He negotiated the CBA for Respondent. The process began with communications with the union. (Tr. 377). After an agreement was negotiated it was sent to the corporate office for approval; signatures are then gathered and the CBA is sent to the Department of Labor to make the CBA part of the agency contract. (Tr. 377-378). The last CBA was negotiated in the summer of 2009. He has negotiated three to four CBAs in the last ten years. (Tr. 378). RX-4 is the CBA he negotiated, which was submitted by Respondent's corporate office to the Department of Labor. (Tr. 379; RX-4). He incorporated provisions from the SCA into the CBA. His understanding was that the new wage determination would be based on the CBA. He stated, "I really didn't understand what that said." (Tr. 380). He stated that when he negotiated he did not understand that the CBA indicated it was subject to the wage determination, not vice versa. (Tr. 381).

He did not know that Wage and Hour initiated an investigation in Wichita Falls, Texas. (Tr. 382-383).

Jose "Joe" Morales is an administrative assistant and "IT guy" who later became a project manager, and conducted safety minute meetings, trained supervisors and communicated with contracting agencies about contracts. (Tr. 383-386).

Respondent Joseph Morales never communicated with the contracting agencies about the CBA. (Tr. 386). Once the CBA was approved, he believed any questions were directed to the corporate office; if the corporate office had any questions they contacted him. (Tr. 387).

CX-4 is a letter dated July 27, 2006, from the corporate office to the Federal Protective Service that states the CBA was submitted for approval and to contact Respondent Joseph Morales with any questions. (Tr. 388; CX-4). The CBA was for Baton Rouge and northern Louisiana. (Tr. 394; CX-4). The telephone number listed in the letter was the number for the branch office in Houston. (Tr. 388-389; CX-4). The letter was addressed to John Quackenbush, a former contracting officer, with whom Respondent Joseph Morales was familiar. (Tr. 389; CX-4). John Quackenbush never contacted him. (Tr. 389). No contracting officer ever contacted him about the CBA. (Tr. 390).

Federal Protective Service would send information to the corporate office; the corporate office sometimes forwarded that information to Respondent Joseph Morales or called him to make him aware of the approval. (Tr. 390-392). All CBAs were approved by letter to commence on the anniversary date of the contract. (Tr. 391-392). All of the CBAs he negotiated were approved. (Tr. 391). CX-5 is a similar letter to CX-4, stating contact Joseph, but CX-5 referred to an east Texas location and was written on July 22, 2005. (Tr. 393; CX-5). Karen Nelson, the contracting officer, never contacted him. (Tr. 394).

After Hurricane Katrina, Respondent lost its office in New Orleans and 80 officers were displaced. (Tr. 395). Employees from west, east and south Texas were relocated to assist in guarding the federal buildings and FEMA locations in Baton Rouge and New Orleans. Respondent provided food, clothing, guns, uniforms and sleeping quarters, and Respondent Joseph Morales worked with the corporate office to make it happen. He was "on the ground" in the area. (Tr. 396). All of the additional expenses were submitted by Respondent Jesse Morales to the federal agencies, but Respondent was not reimbursed. (Tr. 397). Respondent Jesse Morales purchased supplies and a motor home to serve as a temporary office and, together with and Jose Morales, brought it to Louisiana from Brownsville, Texas. (Tr. 397-398). Respondent Joseph Morales contacted FEMA to discuss post orders and the requirements for the guards. (Tr. 398). The pay rate for officers working in the temporary locations after Hurricane Katrina did not change. (Tr. 399).

As branch manager in Houston he generated commercial jobs. He attended the Minority Business Council Conference in Washington, D.C., for networking purposes. (Tr. 400).

On cross-examination, Respondent Joseph Morales stated he was currently President and Director of Respondent appointed by the estate executor of Respondent Jesse Morales. (Tr. 401-402). As of the date of the hearing the stock of the company was owned by the estate of Jesse Morales. He was appointed as interim director, until ownership of the company is established. He proposed to buy the company and be the sole owner. (Tr. 402). Prior to the death of Respondent Jesse Morales, he did not own any stock or hold any corporate position. (Tr. 403).

In high school he worked as a guard for Respondent on the weekends. He attended Texas Southmost College and Pan American University and is 17 semester hours short of a degree in marketing and management. (Tr. 403). He obtained his

commission license from Texas Southmost College. He then obtained a real estate license and worked one year in "the valley" and moved to Austin, Texas. He then went to California and worked in magazine publishing. (Tr. 404). He returned to Texas to assist Jose Cavazos as a branch manager at Respondent's Houston office. As branch operations manager, he dealt with supervisors to make sure they were following the contract. (Tr. 405).

He agreed that his father, Respondent Jesse Morales, was a "fairly controlling boss." (Tr. 405). He had no discretion in running the business from his father. He had no authority to hire supervisors for federal contracts. The corporate office decided which supervisors to hire, with Respondent Jesse Morales making the ultimate decisions. Federal Protective Service had to approve the supervisors hired. (Tr. 406).

Concerning payroll, the time sheets were the responsibility of the onsite supervisors who reported directly to the corporate office with a copy to him, as a backup. (Tr. 407-408). He was not responsible to review the time sheets. (Tr. 408). The corporate office established pay day and payroll practices, especially Respondent Jesse Morales. (Tr. 408-409).

Regarding training hours, when he served as an instructor he kept track of sign-in sheets and turned them over to the supervisor who added the hours to the time sheets and sent on to the corporate office. (Tr. 409-410). He periodically received instructions from the corporate office regarding the recording of hours. (Tr. 410). He received the memo from Respondent Jesse Morales, RX-4, through fax sent by the corporate office. (Tr. 411; RX-4). He had no authority to change the payroll practice and had no input on payroll practices, the calculation of fringe benefits, vacation pay or hours worked. (Tr. 411).

The CBA written from a template, was provided by a consulting firm that specialized in union agreements, after the employees filed for a union election. (Tr. 412). Respondent hired the consulting company to assist in the election, and the union was certified in March 2004. (Tr. 412-413). He had no final authority on the CBA. (Tr. 414-415). Respondent Jesse Morales had to approve the CBA and he made changes to it. (Tr. 415).

Ray Visarra prepared invoices that were sent to the contracting agencies, and Respondent Jesse Morales handled collection issues with the contracting agencies. After Respondent Jesse Morales became ill, he hired Hollis Rutledge and Associates to assist him in collections. (Tr. 416).

Respondent Joseph Morales had no involvement in the payroll process except for his immediate staff in the branch office. (Tr. 417-418). On May 29, 2010, after he became interim President, was the first time he could make or change personnel policies for Respondent. (Tr. 418-419). In April 2010, Respondent Joseph Morales worked with Respondent Jesse Morales, while he was in the hospital, in preparing a memo that required that corporate office employees in the corporate office submit a weekly journal. (Tr. 419, 447, 450). The purpose of the journal was to familiarize Respondent Joseph Morales with the roles of the individuals working in the corporate office. (Tr. 420).

Tito Orellano refused to submit a weekly journal. (Tr. 420-421). Tito Orellano was a contractor; Respondent Joseph Morales gave him an opportunity to stay with Respondent, but he terminated his contract. (Tr. 421).

Respondent Joseph Morales requested reports from Respondent Gonzales regarding a journal of his daily hours. Respondent Gonzales refused and was terminated for insubordination. Respondent Gonzales filed for unemployment and Respondent Joseph Morales opposed the filing, which was ultimately denied. (Tr. 424-425).

Since his appointment as interim president, he is the primary custodian of the company records. (Tr. 426).

CX-4 reflects his Houston office phone number, but he was not copied on the letter and never received a phone call. (Tr. 428-429; CX-4). RX-5 is a letter regarding the status of the CBA dated August 8, 2006. (Tr. 426-428; RX-5). After negotiating the CBAs, Respondent Joseph Morales sent them to Respondent's corporate office and had no further involvement in the process. (Tr. 430).

He was not aware of the instant investigation until 2008 and did not know anything about the investigation conducted in 2006. (Tr. 432-433). He had no contact with Mr. Summerall about the instant investigation. Respondent Gonzales did not tell him about the instant investigation. (Tr. 433).

Regarding the WHISARD reports, in 1991 he was not with the company and was not aware of the investigation. (Tr. 433-434; CX-3, p. 140). He was not aware of the investigation from October 1996 to May 1997 in Slidell, Louisiana. (Tr. 434-435; CX-3, p. 139). He was not aware of the investigation from December 1999 to February 2000 in Brownsville, Texas. (Tr. 435; CX-3, p. 138). He was not aware of any of the investigations set forth in any of the remaining WHISARD reports. (Tr. 436; CX-3, pp. 129-137). He was aware Respondent had some issues with back wages and the Department of Labor, but he did not know the details of any such issues. (Tr. 436). He was never told Respondent was calculating training time incorrectly. If he had been aware he would have taken steps to fix the problem, but he had no authority to change the policies that were in place. (Tr. 437).

At the time of the hearing, Federal Protective Service owed Respondent unpaid invoices. Respondent Joseph Morales became aware of the unpaid invoices by Federal Protective Service of \$4 million, which was eventually paid between 2005 and 2007. (Tr. 439). Respondent Jesse Morales hired Hollis Rutledge and Associates to assist him with this collection. (Tr. 439, 443). Federal Protective Service's failure to pay was a constant problem and Respondent had to borrow money to pay its employees. (Tr. 439, 445). Respondent's last government contract terminated in February 2010. Respondent presently has only 12 employees. (Tr. 440). Respondent had 450 to 500 employees in 2005 and 2006. (Tr. 441).

On redirect examination, Respondent Joseph Morales confirmed that RX-4, the CBA, is not a fully executed document since it has no signatures. (Tr. 441-442; RX-4). The signature page could not be located. (Tr. 442).

The captains or Respondent Joseph Morales, himself, trained the supervisors. Respondent Joseph Morales or training instructors trained the captains. (Tr. 442). In 2008, he became part of the corporate office. (Tr. 443). He made recommendations for changes to his father, Respondent Jesse Morales, but they were not accepted. (Tr. 445-446). He stated, "I tried to implement things, and he [Respondent Jesse Morales] did not want me messing with his staff." (Tr. 446). At the time of the hearing, Respondent had three commercial jobs. (Tr. 451).

The Contentions of the Parties

Respondents contend unusual circumstances exist to preclude debarment. Respondents argue unusual circumstances are present because no willful conduct occurred, Respondent cooperated with the investigator, back wages were promptly paid and violations were the result of good faith reliance on the CBA. Respondents assert they were never told they could contest the investigative findings and were never told which employees were not paid. Respondents contend debarment violates due process. Respondents further contend debarment of Respondent Jesse Morales is futile because he is deceased. Finally, Respondents contend Respondent Joseph Morales should not be debarred because he exercised no control over the employment policies under the contract.

The Solicitor contends Respondents violated the SCA by failing to properly pay employees for travel time, training time and health and welfare benefits for holidays. The Solicitor argues Respondent must be debarred because Respondent's repeated violations of the SCA are aggravating factors and no mitigating circumstances exist. The Solicitor concedes Respondent Jesse Morales is no longer a party to the debarment proceeding. The Solicitor argues Respondent Archie Gonzales is a responsible party because he exercised control over the business operations and supervised the Respondent's accounting department, including the payroll department. Finally, the Solicitor asserts Respondent Joseph Morales is a responsible party because he exercised control over the operation of the business and managed the federal contract.

IV. DISCUSSION

The SCA was enacted for the purpose of providing "wage and safety protection to employees working under service contracts with the United States government, where the contract amount exceeds \$2,500 and the contract is performed within the United States." Marlys Bear Medicine v. United States, 47 F. Supp. 1172 (D. Mon. 1999), aff'd in pertinent part and rev'd on other grounds, 241 F.3d 1208 (9th Cir. 2001). Findings of fact under the SCA are held to the preponderance of the evidence standard found at 41 U.S.C. § 39. Dantran, Inc. v. Dep't. of Labor, 171 F.3d 58, 71 (1st Cir. 1999).

A. Violation of the SCA

Under the SCA federal contractors are affirmatively obligated to pay their employees a certain minimum wage, provide certain minimum fringe benefits and ensure compliance with the SCA. 41 U.S.C. § 351; 29 C.F.R. § 4.188(b)(4). A contractor that violates the SCA is liable for a sum equal to the amount of unpaid compensation or benefits. 41 U.S.C. § 352.

After reviewing Respondent's payroll and time records, Mr. Summerall determined that Respondent was not paying its employees health and welfare benefits for holidays. Further, he found Respondent owed its employees back wages for travel and training time.

In post-hearing brief, Respondents admit to a violation of the SCA in the amount of \$11,000. Respondent paid the amount owed prior to the initiation of the debarment proceeding. Respondent argues its failure to timely pay employees resulted because of a delay in payment by the contracting agency. However, contractors bear the affirmative obligation of ensuring compliance with the SCA. 29 C.F.R. § 4.188(b)(4). The SCA does not "permit an employer to temporarily suspend its obligation to its employees while waiting for reimbursement from another agency." Sec'y of Labor v. Int'l Resources Corp., Case No. 1994-SCA-35, slip op. at 7 (ALJ, Jan. 3, 1996) (citing In re Kleen-Rite, Corp., BSCA 92-09 (Oct. 13, 1992)).

Therefore, I find Respondent violated the SCA by miscalculating and underpaying its employees for training and travel time, overtime and health and welfare benefits for holidays. I further find that any late payment by the contracting agency did not suspend the Respondent's obligations to its employees under the SCA.

B. Debarment

The SCA 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, no 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).

Whenever there is a violation under the SCA, debarment is presumed unless the contractor can show the existence of "unusual circumstances." 29 C.F.R. §§ 4.188(a) and (b); 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). "[T]he violator of the Act has the burden of establishing the existence of unusual circumstances." 29 C.F.R. § 4.188(b)(1); Vigilantes v. Adm'r of Wage and Hour Div., 968 F.2d 1412, 1418 (1st Cir. 1992). "The debarment of contractors is the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from the 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, Inc., supra.).

The SCA does not define "unusual circumstances;" determinations are made on a case-by-case basis. 29 C.F.R. § 4.188(b)(1). Ignorance of the requirements under the SCA and negligence, or failure to read the contract, do not constitute 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). Unusual circumstances "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." Summitt Investigative Service, Inc. v. Herman, 34 F. Supp. 2d 16, 19 (D.D.C. 1998).

A three-part test is used to determine whether unusual circumstances exist. 29 C.F.R. § 4.188(b)(3)(i)-(iii). Under the threshold requirement, debarment is mandated unless the contractor shows that the violations were not willful, deliberate, aggravated in nature or the result of "culpable conduct." 29 C.F.R. § 4.188(b)(3)(i). The regulations define "culpable conduct" to include "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." Id. Further, the contractor may not be relieved from debarment where there is a history of similar violations. Id.

Part two of the test requires that the contractor 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). Part three sets out a variety of factors to be considered, including previous investigations for violations of the SCA, recordkeeping violations which impeded investigation, the existence of a "bona fide legal issue," the contractor's efforts to ensure compliance, the nature, extent and seriousness of any violations, and whether the amount due was promptly paid. 29 C.F.R. § 4.188(b)(3)(ii).

The First Circuit has found that repeated violations of the SCA rose to the level of "culpable neglect" under part one of the test when the contractor had "more than adequate notice" of the possibility of debarment for noncompliance with the SCA. Vigilantes, Inc., supra. Culpability "requires more than simple negligence or a mere failure to ascertain whether one's practices coincide with the law's demands...but does not require specific intent. Karawia v. United States Dep't of Labor, 627 F. Supp. 2d 137, 154 (S.D.N.Y. 2009).

Here, Respondent argues it did not engage in willful, deliberate or aggravated behavior because it cooperated with the investigation and did not intend to underpay its employees. Further, Respondent asserts in post-hearing brief that the violation was de minimus because it represented only .001% of Respondent's payroll for the investigation year. I reject this argument because Respondent's behavior rose to the level of culpable neglect. Respondent was investigated for SCA violations on 12 separate occasions prior to the instant case.

Moreover, several of the investigations involved SCA violations of the same nature as those found in the instant case. Respondent received Wage and Hour publications on compliance with the SCA after the prior investigations.

The presence of aggravating factors "forecloses a contractor from availing itself of the exception" of unusual circumstances. Summit Investigative Service, Inc. v. Herman, supra, at 20. Although a finding of aggravating circumstances would alone be sufficient to order debarment, I further find, Respondent has not established that it meets parts two or three of the unusual circumstances test due to the egregious nature of its numerous SCA violations. Respondent argues unusual circumstances exist because it complied with the instant investigation and promptly paid back wages. However, the record clearly shows a poor compliance history and repeated violations of the SCA beginning in 1991 and spanning over 15 years. Therefore, I find debarment of Respondent is mandated because the SCA violations were the result of culpable neglect and because of Respondent's history of similar violations.

C. Responsible Parties

"The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability, but also a personal liability charged by reason of his or her corporate office while performing that duty." 29 C.F.R § 4.187(e)(2). An officer "who actively directs and supervises the contract performance, including employment policies and practices" is individually and jointly liable for violations of the SCA. 29 C.F.R. 4.187(e)(1). Further, responsible parties also include "signatories to the Government contract who are bound by and accept responsibility for compliance with the Act" and "all persons irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract." 29 C.F.R. § 4.187(e)(4). "[T]hose individuals . . . who are found responsible for a service contractor's performance of a contract" may also be responsible parties. See Rasputin, Inc., ARB Case No. 03-059, 1997-SCA-32 (ARB, May 28, 2004), aff'd. in relevant part sub. nom., Johnson v. U.S. Dep't. of Labor, 2005 WL 1970742, Case No. 2:04-CV-0775 (S.D. Ohio, Aug. 16, 2005), aff'd., Case No. 05-4355 (6th Cir. Aug. 16, 2006) (unpub.).

In determining whether an individual is a "party responsible" examination of "the duties, authority, and activities" of the individual is necessary to determine the extent he participated in the management of the company's business, the performance of the contract and the practices that led to the SCA violations. See In re Taskpower Int'l Inc., 22 Wage and Hour Cas. (BNA) 802, 807 (Dep't of Labor 1975). In re Taskpower involved an individual who was the vice-president and manager of local operations in the area where a contract, which resulted in a SCA violation, was performed. Id. at 805. The Assistant Secretary of Labor remanded the case to the Administrative Law Judge for the introduction of evidence concerning the individual's "authority and duties and the extent to which he controlled employment policies connected with the performance of the contracts." Id. at 805, 807.

1. Respondent Jesse Morales

At the formal hearing the parties stipulated that Respondent Jesse Morales is deceased. In footnote one of its post-hearing brief, the Solicitor conceded Respondent Jesse Morales was no longer a party to the debarment proceeding. Therefore, Respondent Jesse Morales cannot be debarred.

The record is replete with evidence to show Respondent Jesse Morales was solely responsible for implementing company policies, including payroll policies. Respondent Jesse Morales actively directed and supervised the contract performance, including employment policies and practices. He exercised complete control over the supervision and management of the contract. Respondent Jesse Morales would be a party responsible and subject to debarment under the SCA were he not deceased.

2. Respondent Archie Gonzales

Complainant argues Respondent Archie Gonzales is a responsible party because he supervised the payroll department, prepared cost analysis for bid proposals and prepared solicitation packages for federal contracts. However, Respondent Archie Gonzales had no control over payroll policies and practices, that were set by Respondent Jesse Morales, and which were simply implemented by the payroll department. Only Respondent Jesse Morales had the authority to change the way wages were paid. Respondent Archie Gonzales discussed all bid proposals with Respondent Jesse Morales who approved the bid proposals and received the contract awards. Respondent Jesse Morales exercised control over and approved everything.

Therefore, I find Respondent Archie Gonzales is not a party responsible under the SCA because he did not exercise control, supervision or management over the contract.

3. Respondent Joseph Morales

Complainant further argues Respondent Joseph Morales is a responsible party because he served as a branch office manager in Respondent's Houston office, conducted meetings with supervisors, provided training for guards and ensured that guards had the proper safety equipment. However, Respondent Joseph Morales had no authority to hire supervisors for federal contracts. He was not responsible for reviewing the time sheets. The corporate office, under the direction of Respondent Jesse Morales, established pay day and payroll practices. Respondent Joseph Morales had no authority to change the payroll practice and had no input on payroll practices, the calculation of fringe benefits, vacation pay or hours worked.

Respondent Joseph Morales had some management authority over the day-to-day operation of the north Louisiana contracts that were the subject of the instant case. The Solicitor cites Houston Building Services, Inc. and Jason Yoo, ARB Case No. 95-041A, 1991-SCA-30, slip op. at 3 (ARB, Aug. 1, 1996), in support of its argument that an individual who is responsible for day-to-day operations under a federal contract is a party responsible. However, the individual held responsible in Houston Building Services, Inc. was the president of the company and signed the federal contract. Id. Therefore, I do not find such arguments persuasive because the instant case regarding Respondent Joseph Morales is clearly distinguishable.

In the instant case, all final decisions regarding company policy were made by Respondent Jesse Morales. Although Respondent Joseph Morales was a branch manager, he exercised very little, if any, control over policy decisions. He had no authority to change the company's policies or practices.

During 2005 and 2006, the period of the instant investigation, Respondent Joseph Morales had no authority over the payroll practices of Respondent. Moreover, Respondent Joseph Morales was not involved in payroll at all during that period. All payroll practices were adopted by Respondent Jesse Morales. Therefore, I find Respondent Joseph Morales is not a party responsible under the SCA because he did not exercise control over the practices that led to the SCA violations.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent violated the SCA by failing to properly pay fringe benefits, overtime compensation, training time and travel time as required by the federal contract.

2. Respondent Southwestern Security Services, Inc., shall be debarred from eligibility to accept any Government contracts or sub-contracts for a period of three years based upon the violations herein.

3. Respondent Archie Gonzales shall not be debarred from accepting Government contracts based upon the violations herein.

4. Respondent Joseph Morales shall not be debarred from accepting Government contracts based upon the violations herein.

5. Respondent Southwestern Security Services, Inc., is found to be liable for failing to properly pay health and welfare benefits for holidays, training time, travel time for training and overtime compensation in the amount of \$11,849.26, which Respondent has paid and for which Respondent is entitled to a credit.

ORDERED this 9th day of September, 2011, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

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

Administrative Review Board
United States Department of Labor
Suite S-5220
200 Constitution Avenue, NW
Washington, DC 20210

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

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

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