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Issue Date: 27 October 2011

CASE NO.: 2010-SCA-6

IN THE MATTER OF

**ADMINISTRATOR, WAGE & HOUR
DIVISION, UNITED STATES
DEPARTMENT OF LABOR
Prosecuting Party**

v.

**ARES GROUP, INC.
Respondent**

APPEARANCES:

**LYDIA A. JONES
On behalf of the Solicitor**

**ALISON N. DAVIS
On behalf of the Respondent**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

**DECISION AND ORDER GRANTING ADMINISTRATOR'S
MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This case arises under the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended (the Act), 41 U.S.C. §§ 351, *et. seq.* and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327, *et. seq.*, and the federal regulations found at 29 C.F.R. Parts 4, 6, and 18. In particular, the complaint alleges the following: (1) Respondent failed to pay employees the minimum monetary wages in accordance with prevailing wage rates determined by the Secretary; (2) Respondent

failed to furnish employees the fringe benefits required by the Act; (3) Respondent failed to pay employees wages at a rate not less than the minimum rate specified under the FLSA and the Act; and (4) Respondent failed to compensate employees at a rate not less than one and one-half times their basic rate of pay for all hours worked by such employees in excess of forty hours in a workweek as required by CWHSSA and the Act. The relief sought is a finding of liability and debarment.

On September 9, 2011, Administrator submitted a Motion for Summary Decision and a Memo in Support of the motion. Respondent submitted a Response in Opposition to the Administrator's motion on September 24, 2011. Respondent filed its own Motion for Summary Decision on September 12, 2011. On September 27, 2011, Administrator submitted a Response in Opposition to Respondent's Motion for Summary Decision. Both parties attached exhibits to their motions and memos.

Issues

The issue in this case is whether Respondent should be debarred pursuant to §354(a) of the Act or if unusual circumstances exist which would preclude debarment. I have ruled on the parties' motions as a matter of law, and no hearing is required.

Preface

In August 2007, ARES entered into a government contract to provide security services for the Federal Protective Service, a division of the Department of Homeland Security. The prospective security guards attended training sessions to ensure they could meet the qualifications required under the contract. These sessions were held prior to the commencement of performance on the contract with DHS scheduled to begin October 1, 2007.

After the first paychecks were issued, complaints were made to the Tampa Wage and Hour office. An investigation was conducted regarding the alleged violations. The "final" conference was held between Ms. Kibler, a Wage and Hour investigator, and Ms. Czeck, former Vice President of Administration for ARES, on May 15, 2008.

Despite the agreements made at that conference and the provision of a Form WH-58 calculating back wages owed to each employee, ARES did not immediately compensate the security guards. After further discussion, ARES made complete overtime payments by March 19, 2009. Two more investigations regarding the same contract between ARES and DHS were initiated after the resolution of the initial investigation by Ms. Kibler.

Findings of Fact

The findings of fact and conclusions that follow are in part those proposed by the parties in the memos supporting their respective motions for summary decision. Where I agreed with the summations, I adopted the statements rather than rephrasing the sentences. The facts and conclusions were determined by me from the pleadings and the parties' exhibits.

1. Respondent ARES, Inc. is a corporation with a place of business at 8625C Engleside Office Park, Alexandria, Virginia 22309, and is engaged in business as a provider of professional security services to commercial and government entities. Respondent currently employs over 1,500 armed and unarmed security guards.

2. William ("Bruce") Moore, is the President and Chief Executive Officer of ARES.

3. During the relevant period, Respondent employed a Project Manager responsible for reporting all work hours and requests for time off to the payroll department at ARES' headquarters in Alexandria, VA.

4. On June 19, 2007, ARES submitted a bid quotation in response to Request for Quotation ("RFQ") No. 67751, from the Department of Homeland Security ("DHS") for the provision of Armed Security Guard Services for federal buildings in Northern and Central Florida.

5. On or about August 1, 2007, DHS notified ARES that the agency had awarded Contract #GS-07F-0363M (the "Contract") to the company pursuant to Blanket Purchase Agreement ("BPA") Number HSCEGI-07-a-00012. The effective date of the BPA was August 1, 2007, with performance to begin on October 1, 2007.

6. The Contract was a consolidation of five separate federal predecessor contracts. ARES agreed to provide security guard services for the Federal Protective Service, a division of DHS, at federal buildings in Northern and Central Florida, from October 1, 2007, through September 30, 2008.

7. The Contract was in excess of \$100,000, involved the employment of over 200 employees, and was performed in the United States.

8. Pursuant to the BPA, the minimum wage rates and fringe benefit rates were set by 10 wage determinations and two collective bargaining agreements (CBA), which covered security guards working at sites in the Tampa and Jacksonville area under the predecessor contractors, Alpha Protective Services (Alpha) and Security Consultant's Group (SCG).

9. On August 11, 2007, predecessor contractor SCG and UGSOA Local #236 executed a Memorandum of Understanding (the "Memorandum"), amending their CBA to establish higher wage and fringe benefit rates for the security guards effective October 1, 2007. The terms of this Memorandum were not attached to the RFQ or the Contract. On May 22, 2007, the DOL had issued All Agency Memorandum 2003, which increased health and welfare fringe benefits from \$3.01 to \$3.16, and required all invitations for bids opened, or other service contracts awarded on or after June 1, 2007, to include an updated Service Contract Act wage determination.

10. On August 20, 2007, one of SCG's contract administrators submitted a copy of the CBA Memorandum to DHS. A copy of the Memorandum was not provided to ARES.

11. All potential employees were required to complete an application so ARES could validate their credentials and certifications.

12. The Contract's "Statement of Work," Section 14, required all service providers to meet specific minimum training requirements prior to commencing work under the Contract, including a requirement that all security officers be 9-millimeter weapon qualified, trained in the usage of magnetometer and X-ray machines, and certified in CPR/AED and First Aid. Certain of these training requirements differed from the training required under the predecessor contracts. ARES advised the guards of these changes in qualifications. The Statement of Work further provided that security guards who worked under the predecessor contract and maintained their certification credentials would not be required to retake the training so long as they maintained their suitability.

13. Respondent knew that none of the incumbent security guards would meet all of the minimum requirements to work on the Contract. If an incumbent security guard wanted to continue to work at the same location, the individual had to submit an application to ARES and meet all of the minimum qualifications included in the Contract.

14. On or about August 11, 2007, Respondent informed the incumbent security guards of the qualifications for employment to work on the Contract. ARES told the security guards that completion of the training was voluntary. However, they advised the guards that the government had changed some of the qualifications to work on the contract. ARES informed the prospective security guards that the company would arrange for those persons interested to obtain free training through AGI Training

Academy at various locations. ARES explained that it would not compensate officers for time spent in training prior to the commencement of the Contract, and that completion of the training did not guarantee employment.

15. On or about August 14, 2007, Andrea Czeck, former Vice President of Administration for ARES, unofficially offered to pay the security guards ten dollars an hour for their time spent in training prior to the commencement of the Contract. USGOA refused respondent's offer.

16. Thereafter, on or about September 13, 2007, Respondent's position, as stated in a letter by its attorney Jay Sumner to the attorney for USGOA John Tucker, was that incumbent officers were not employees of ARES and therefore were not entitled to compensation for time spent in "voluntary" training. Respondent explained that they were not compensating any potential applicants who took advantage of the free-of-charge training.

17. On September 28, 2007, Mr. Tucker provided Respondent, through Mr. Sumner, with a copy of an excerpt from the Department of Labor Field Operations Handbook regarding the DOL's position regarding compensability of training time for security guards under the SCA. This section of the FOH provides:

14f02: Security guard services—compensability of training time.

- a) Where a covered contract dictates that persons are required to complete certain training before performing on the contract as security guards, such persons are considered employees of the contractor while undergoing such training and time spent in training is compensable hours worked. Whether the training is of limited application or more general in nature (e.g., state mandated training courses), it cannot be considered "voluntary" within the meaning of Reg. 785.27 since the contractor is obligated to provide employees in order to meet the stipulations in the contract which require training. Likewise, time spent in training which is specifically required by a covered contract is compensable hours worked even if the training is performed prior to formal contract award or the trainee subsequently is not hired as a contract security guard. The contractor must pay wages for this training time at rates not less than those prescribed in Sec. 2(b)(1) of the SCA unless otherwise specified in the applicable wage determination. (See Reg 4.146).

18. After receiving this excerpt from the FOH, Respondent did not seek clarification from either the contracting agency or the Department of Labor regarding whether the pre-commencement training it was providing constituted compensable time. Respondent relied on assistance from counsel.

19. The incumbent security guards decided to attend the training without any guarantee that they would be paid for the time. ARES provided training required under the Contract on specifically scheduled dates in August and September.

20. Ultimately, most of the incumbent guards were hired by ARES to perform security guard services under the Contract.

21. ARES began performance of the Contract on October 1, 2007.

22. Subsequently, ARES learned that USGOA Local #236 had negotiated a pay increase with SCG after the Contract award was made to ARES. Upon review of the agreement, ARES had concerns about the timing of the amendment and dates of execution. ARES contacted DHS contracting officer Lawana Nunnally to inquire about the effectiveness of the amendment.

23. On or about November 29, 2007, DHS incorporated the new wage rate into the Contract, effective October 1, 2007.

24. ARES issued its first paychecks to employees under the Contract on or about October 30, 2007. In this first paycheck, ARES (1) did not compensate any employees for the time they spent in training prior to the commencement of the Contract, (2) did not compensate employees of the USGOA Local #236 at the wage rate required by the Memorandum, (3) did not pay non-union employees at the health and welfare benefits required by All Agency Memorandum number 201, dated May 22, 2007, and (4) did not properly compensate all employees for the Columbus Day holiday, which had been on October 8, 2007.

25. Several guards filed complaints with the Wage and Hour Tampa District Office regarding these errors in their paychecks. Based upon these complaints, Wage and Hour Investigator (WHI) Sandra Kibler opened the subject investigation, Case ID 1496615.¹ WHI Kibler's investigation covered the payroll periods from October 1, 2007 through December 29, 2007.

26. This complaint was not the first time that the security guards had contacted Kibler about ARES not compensating them for pre-employment training hours. In August 2007, prior to ARES' commencement of performance of the Contract, some of the security guards had made the same complaint. WHI Kibler advised the security

¹ In Respondent's Memo in Support of Respondent's Motion for Summary decision, WHI Kibler's experience and knowledge with respect to investigating claims under the SCA was questioned. While the parties disagree on this matter, it has no bearing on the issue at hand. It is not a fact which would "establish an element of a claim or defense and, therefore, affect the outcome of the action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

guards that WHD does not open an investigation until the contractor is receiving financing from the government for the performance of the contract and there is a requirement to make payroll.

27. On October 30, 2007, WHI Kibler spoke to the Tampa District Director James Schmidt regarding the complaint DOL had received regarding ARES. The security guards at the Tampa sites were complaining that ARES was not compensating security guards at the correct rate and had failed to pay guards for training hours. Mr. Schmidt initially informed Kibler that she should drop the training issue because pre-employment training was not compensable time, in his opinion. WHI Kibler stated in her deposition that she had further discussions with Mr. Schmidt regarding the pertinent provisions of the Act and the FOH. She stated that eventually Mr. Schmidt aligned his position with hers in determining that the pre-employment training was indeed compensable time.

28. On November 7, 2007, WHI Kibler spoke with ARES representative Stanley Jones and hand-delivered to him a “walk-in appointment letter” (Appointment Letter) which explained Wage and Hour’s authority and described the audit process.² The letter also directed ARES to produce certain documents relevant to the Wage and Hour Division’s investigation. WHI Kibler recalled that Mr. Jones told her that the Appointment Letter would be faxed to Andrea Czeck, ARES’ Vice President of Operations.

29. One week later, on November 13, 2007, WHI Kibler stated she contacted Andrea Czeck via telephone and asked about the records requested in the Appointment Letter. Ms. Czeck claimed to have not received the Appointment Letter so WHI Kibler renewed her request for the documents needed to perform her investigation. WHI Kibler contacted Ms. Czeck again on December 4, 2007, and January 9, 2008, and again requested the documents.

30. On January 11, 2008, ARES provided WHI Kibler with the first set of records relevant to her document request. These documents were for the Tampa posts only. WHI Kibler received the requested records for the remaining Florida locations within the next few weeks. Additionally, on this date, WHI Gaut provided to WHI Kibler opinion letters from 2004³ and an internal memorandum related to compensation for employees

² Respondent asserts that Mr. Jones does not recall obtaining this letter from WHI Kibler. However, this fact had no bearing on my conclusion in this case.

³ On October 20, 2004, Timothy Helm, Office of Enforcement Policy, Government Contracts Team, responded to a letter from the United Government Security Officers of America, International Union regarding compensation for security guards undergoing required training and testing prior to employment on a government contract. Helm concluded that training, which a government contract requires an employer to provide to a security guard before the person commences work on the contract, is “compensable work time, but not at the compensation level provided by the contract wage determination.” Rather, the training is compensable at the minimum wage rate under the Fair Labor Standards Act. The parties do not disagree on this aspect of Helm’s letter. However, Respondent continued

undergoing required training and testing prior to employment on a contract to provide security guard services subject to the SCA.

31. When the contracting officer modified the BPA to incorporate the post-award increase in the wage rates for security guards in the Tampa and Panhandle areas, Kibler advised ARES not to pay these security guards retroactively since she would include those back wages in her calculations, which covered the period of October 1, 2007, through December 29, 2007. ARES wanted to pay the security guards for those back wages immediately.

32. Based on her investigation, WHI Kibler concluded that:

- a) Respondent was required to compensate individuals for their time and travel expenses associated with required pre-contract training. Individuals covered by a CBA were entitled to compensation for time spent in pre-performance training at the CBA wage and individuals not covered by a CBA were entitled to compensation at the FLSA minimum wage of \$5.85 for all pre-performance training hours. Respondent owed \$100,896.68 to 222 current and former employees in unpaid prevailing wages associated with the pre-Contract training.
- b) Between October 1, 2007, and December 15, 2007, Respondent did not pay the higher CBA wage rate negotiated between SCG and USGOA Local #236. Respondent owed \$78,918.16 in unpaid prevailing wages associated with this amendment to the USGOA Local #236 CBA.
- c) Respondent failed to pay all employees for the Columbus Day Holiday on October 8, 2007. In addition, between October 1, 2007, and December 15, 2007, ARES did not pay H&W fringe benefit to employees not covered by a CBA. ARES was paying H&W Fringe benefits of \$3.01 per hour but the Contract required H&W fringe benefits of \$3.16 per hour. Respondent owed 190 current employees \$13,646.66 in unpaid H&W fringe benefits.

to excerpt a portion of the letter which is argued to support the notion that the time an employee spends traveling from home to and from the training are not compensable hours of work. The Administrator asserts Respondent took this statement out of context. While the parties disagree on this matter, it has no bearing on the issue at hand. It is not a fact which would “establish an element of a claim or defense and, therefore, affect the outcome of the action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It does not change the fact that ARES failed to compensate the security guards for any of the training time or the Columbus Day holiday at any rate.

- d) ARES' failure to pay the appropriate prevailing wage as described in subparagraph (b) above resulted in overtime payments that were less than the statutory time-and-one half the regular rate. In addition, approximately 20 employees worked in excess of forty hours a week when they took a required CPR course on Saturday, November 3, 2007. They were not paid overtime for this training. ARES owed 87 current employees \$1,734.78 in unpaid overtime.
- e) Respondent was also liable for liquidated damages at \$10.00 per day for those service contract workers whose overtime back wages were in excess of \$20.00. Respondent owed 41 current employees \$1,070.00 in liquidated damages.

33. WHI Kibler awarded back pay to persons whom ARES did not hire who failed to meet the qualifications required under the Contract. WHI Kibler computed the unpaid wages for security guards, who potentially would work at sites where there was a wage determination based on a CBA, at the hourly rate included in the CBA instead of the FLSA minimum wage rate.

34. On May 15, 2008, WHI Kibler held a final conference with Respondent's attorney Alison Davis, and Ms. Czeck. WHI Kibler explained the violations she had found, and presented Respondent with a copy of a Summary of Unpaid Wages ("Summary") indicating back wages owed totaling \$197,281.74.

35. Ms. Czeck signed the top page of the Summary with the notation "with corrections." WHI Kibler stated she understood Ms. Czeck's notation to mean that Respondent would pay the calculated back wages, less any amounts which ARES could prove to WHI Kibler's satisfaction had already been paid to employees as part of its payroll corrections procedure.

36. Ms. Czeck asserts that her "with corrections" notation was intended to "include payroll corrections [WHI Kibler] had or any corrections that we...thought were needed with them as well." WHI Kibler did not authorize Ms. Czeck or anyone else at ARES to make unilateral "corrections" to the back wage calculations.

37. WHI Kibler also provided ARES with the individual "Receipts for Payment of Lost or Denied Wages, Employment Benefits, or Other Compensation," Form WH-58 ("Form WH-58"), which she had calculated for each of the 222 ARES' employees owed back wages. The Form WH-58 names the individual employee and states the gross amount of back wages due to him or her. WHI Kibler instructed ARES that it should ask each employee to sign his or her Form WH-58 at the time ARES provided the back wage payment.

38. At the final conference, Ms. Czeck signed a document entitled “Back Wages Disbursement and Pay Evidence Instructions.” This document instructs ARES to make the required back wage payments as described in the Summary by June 9, 2008, with the Tampa District Office receiving evidence of this payment by June 16, 2008.

39. ARES made no payments of back wages by June 9, 2008, in violation of the documents Ms. Czeck signed at the final conference. On June 17, 2008, WHI Kibler called Ms. Davis to ask about the status of back wage payments. Ms. Davis explained that ARES did not believe it was required to compensate its employees for time spent in the preliminary training. Respondent admitted that it had not made these back wages payments because ARES continued to dispute the amount due.

40. On June 17, 2008, Respondent sent WHI Kibler a facsimile which set forth the company’s position. This document stated that even though ARES did not believe time spent in pre-commencement training was compensable time, ARES was willing to pay all employees “at the minimum wage rate for the training time” in order to resolve the issue.

41. Respondent made some back wage payments to security officers in the Ocala area on or about June 27, 2008. On or about July 10, 2008, Respondent issued checks to security officers in the Jacksonville and Tampa area for a back wages owed to them as determined by WHI Kibler.

42. At the same time it handed out the checks, Respondent provided each security officer with a copy of his Form WH-58. Several security officers contacted WHI Kibler because the amounts on the checks issued by respondent on July 10, 2008, did not match the back wage amounts indicated on the Form WH-58. Respondent stated the company did not understand that the employees would be waiving their right to additional back wages by signing the Form WH-58.

43. WHI Kibler instructed the officers not to sign the Form WH-58 or accept a check for less than the full amount of back wages owed to them. Respondent issued checks for the amount Respondent believed was owed to its employees. On or about August 13, 2008, WHI Kibler advised Ms. Davis that Wage and Hour would not accept the partial payment of the back wages she had calculated. Over the next seven months, WHI Kibler worked with ARES and its employees to ensure that all back wages owed were paid according to the adjustments made to WHI Kibler’s initial calculation of back wages.

44. In response to additional information which ARES provided to the WHD, the agency’s computation of back wages was reduced to \$195,196.28. The majority of this total related to the training which potential employees received. Even though ARES still disputed the WHD’s finding of unpaid wages, the company eventually paid the back

wages in an effort to put the investigation behind the company and concentrate on administering the Contract. ARES paid all outstanding back wage payments by March 19, 2009, over ten months after the final conference held in May 2008.

45. Following the subject investigation by WHI Kibler, there have been two subsequent investigations of Respondent, both involving its performance of the Contract.

46. On January 7, 2009, WHI Donald Dailey of the Pensacola Field Office opened an investigation of Respondent, Case ID 1534763, covering January 1, 2008 to December 31, 2009.

At the completion of WHI Dailey's investigation, Respondent agreed to pay \$20,414.35 in back wages under the Contract.

47. On December 3, 2010, WHI Dailey was assigned to another investigation of ARES' performance on this contract. The investigative period was from January 1, 2010, to December 31, 2010. In this case the complainant asserted he had not been paid correctly for all mileage and per diem while on remote assignments under the Contract. After a self audit, Respondent agreed to pay complainant \$2,094.20 in unpaid prevailing wages during the investigative period.

48. Prior to WHI Kibler or WHI Dailey's investigations, Respondent was the subject of several other WHD investigations related to different contracts, which all resulted in Respondent's payment of back wages.

49. On or about October 6, 2004, the Baltimore District of WHD received a complaint that under a contract with the Department of Defense ARES had failed to pay an employee overtime because Respondent did not combine the number of hours which the employee had worked on the two government contracts.

50. WHI Ray Gaut was assigned to investigate ARES for the period of August 1, 2004 to July 31, 2006. ARES explained that the company calculated overtime for employees working on multiple contracts based on its interpretation of certain regulations. Gaut informed ARES that its interpretation of these regulations was incorrect. At the completion of WHI Gaut's investigation, Respondent agreed to pay 135 current and former security guards \$249,361.18 in CWHSSA overtime back wages.

51. WHI Gaut conducted another investigation for the period July 1, 2006 to June 30, 2007, relating to ARES' contract to provide security guard services at the DHS Customs National Data Center. WHD had received a complaint that ARES was not making the required contributions on behalf of union employees to their 401k and health and welfare funds. At the completion of WHI Gaut's investigation, Respondent agreed to pay the fringe benefit back pay wages totaling \$42,233.60.

52. WHI Gaut conducted an investigation for the period July 1, 2006, to June 30, 2007, relating to ARES' contract to provide security guard services at the DHS National Emergency Training Center. WHD had received a complaint that employees were not receiving credit for contributions made to certain union employees' pension fund. WHI Gaut's investigation found a technical, not monetary, violation of the SCA. He did not recommend ARES for debarment but found nine employees were owed a total of \$3,774.83 in back wages, and the pension administrator allocated \$15,853.66 in pension contributions owed to 40 employees.

53. WHI Gaut conducted an investigation for the period July 1, 2006 to June 30, 2007, relating to ARES' contract to provide security guard services for the DHS Maryland State-Wide Protective Services. WHI Gaut found ARES owed a total of \$178,313.78 in back wages to 49 employees. ARES paid the back wages in full even though the company did not agree with WHI Gaut's findings.

Conclusions of Law

An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, discovery materials, or matters officially noted show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d); 29 C.F.R. § 18.41. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When considering a motion for summary decision, the administrative law judge must view the evidence and inferences in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999). After reviewing the evidence and arguments offered by both parties, I have determined no such issue of material fact exists in this case. As such, I make the following conclusions of law based upon my analysis of the entire record, the arguments of the parties, and applicable regulations, statutes, and case law.

I. The Service Contract Act applies to the Contract and the security guards in question.

The Respondent argues that failure to pay these security guards for training or fringe benefits should not warrant debarment under the Act. ARES maintains that the prospective security guards were not "service employees" covered by the provisions of the SCA, and therefore the SCA does not apply to them. ARES cites to a six-part test for determining employment status under the FLSA. *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). The Administrator urges that reading the Act in conjunction with other agency statements of position makes it clear that the security guards were entitled to compensation as "service employees" under the Act during their pre-employment training

period. As a matter of law I find that the Act does so apply to the security guards during their training period and after being hired by ARES.

The Service Contract Act requires payment of prevailing wage rates and fringe benefits to service employees employed on contracts to provide services to the federal government. The Act defines “service employee” as:

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

41 U.S.C. § 357(b) (emphasis added).

The implementing regulations of the Act further bolster the notion that the SCA applies to the Government’s contract with ARES, and the security guards for whom they provided training were due compensation. It is explicitly stated that when employees of a contractor “are required by the contract to complete certain preliminary training or testing prior to the commencement of the contract services,” this training time is considered to be hours worked. 29 C.F.R. § 4.146. The regulations also note the employees doing pre-commencement training are to be compensated even if they do not begin “principal contract services” until a later date. *Id.* To perform services under the Contract, the security guards first had to be trained according to the new government regulations regarding nine millimeters. The training was not principle contract services, but the contract required these security guards be properly trained to do the work of the contract.

While the Act itself does not advise whether a person participating in training before the commencement of a contract is within the definition of “service employee,” more guidance is provided by the Department of Labor Field Operations Handbook (“FOH”). The FOH indicates that persons “required to complete certain training before performing on the contract as security guards” are to be classified as employees of the contractor during the training. Department of Labor Field Operations Handbook § 14f02(a). This is true even when the training is prior to awarding the contract or the

trainee is not subsequently hired by the contractor. *Id.* Furthermore, the FOH notes that the time these employees spend in such training “is compensable hours worked.” *Id.*

ARES argues the FOH should not be given any weight as it is not considered as binding authority. However, the Opinion Letters and FOH capturing the Agency’s interpretation should be given the level of deference provided for in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See *Christensen v. Harris County*, 529 U.S. 576 (2000). The Court in *Skidmore* instructed that the amount of weight given to these types of documents in making a ruling should depend on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140. As the Administrator notes, the Department of Labor has been consistent in its interpretation of the Act, finding that training time is compensable for persons such as the security guards who qualify as employees under the Act. Reading the Act in conjunction with the implementing regulations, the Department of Labor FOH, and the Opinion Letters from Mr. Helm⁴ supports the Administrator’s assertions that the SCA is indeed applicable to the Contract and the security guards who participated in the training in this case.

ARES argues that not only should the FOH and other interpretive documents be given no weight in this decision, Respondent asserts the FOH is inconsistent with judicial decisions interpreting the FLSA. In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the Supreme Court examined whether yard brakemen who received training free of charge from a potential employer were “employees” entitled to remuneration under the FLSA. The applicant-trainees worked alongside and were supervised by experienced yard brakemen. At the end of the training period, applicants were certified as competent in the field and had the potential to be hired by the respondent railroad. It was held that these trainees were not employees under the FLSA, and their training time was not compensable. *Id.* at 153. The Respondent has interpreted *Portland Terminal Co.* to create a checklist for determining whether a trainee is an employee under the FLSA; if all six factors apply, the trainees are not employees:

- (1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
- (2) The training is for the benefit of the trainees.
- (3) The trainees do not displace regular employees, but work under their close observation.
- (4) The employer that provides the training derives no immediate advantage from the activities of the trainees; and on occasion, operations may actually be impeded.

⁴ See FN3

- (5) The trainees are not necessarily entitled to a job at the conclusion of the training period.
- (6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Granted, the circumstances of *Portland Terminal Co.* ring familiar to those of ARES and the security guards in this case. However, applying the six factors to the employees at issue does not cast the security guards to the same fate as the railroad yard brakemen trainees. The security guards' training did not include actual operation of the facilities of the employer as did the training of the railroad yard brakemen. The security guards here were provided training with a third party at the expense of Respondent. Additionally, the question of whether the trainees displace regular employees is inapplicable here. There were no "regular employees" for the prospective security guards to displace. No one had been hired yet to do the work on the Contract when the security guards attended the training sessions. Likewise, the prospective security guards were not under the "close observation" of ARES' "regular employees"; they were trained by AGI Training Academy. The respondent's employees in *Portland Terminal Co.* were encumbered by the trainees as they had to slow their regular work to supervise and teach the trainees. ARES' performance on the Contract was not impeded by the training received by the prospective security guards. Performance on the Contract was not scheduled to begin until October 1, 2007, well after the training was completed. While it is true the prospective security guards could have obtained employment elsewhere after receiving training provided free by ARES, it was ARES who arranged for the training and recruited and motivated these employees to attend the training. The respondent railroad in *Portland Terminal Co.* provided training not to establish a workforce, but to supplement on an as-needed basis an already existing and toiling workforce. Without first assembling a group of qualified employees, ARES would have been unable to perform on the Contract.

The Administrator urges that analysis of *Portland Terminal Co.* is not necessary as the FLSA and SCA are not mutually exclusive, and the provisions of the FLSA and the SCA may apply as long as they do not conflict. *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 513-19 (1950); *Lee v. Flightsafety Services Corp.*, 20 F.3d 428, 431 (11th Cir. 1994); *Masters v. Maryland Management Co.*, 493 F.2d 1329, 1332 (4th Cir. 1974). Even under the *Portland Terminal Co.* test applicable to the FLSA, the security guards at issue were employees at the time of their pre-employment training. All six of the *Portland Terminal Co.* factors are not met when applied to the prospective security guards. They cannot be precluded from the definition of employee under the FLSA. Their classification is not in conflict with their employment status granted by the SCA. Therefore, under the SCA, which is the applicable Act in this case, the security guards are employees of ARES and were also "service employees" at the time of their training.

The FOH, Opinion Letters, and implementing regulations are all persuasive in this case as they adopt interpretations of the SCA that connect in a logical and consistent manner. A “service employee” under the Act is a person performing on the contract regardless of their contractual relationship, or lack thereof, with the contractor. Even though the security guards in this case may not have had a contract with ARES or a common law employee-employer relationship prior to commencement of performance of the contract as Respondent urges, it is the definition of the Act, and the agency interpretation of that definition, that controls in this case. Again, for ARES to perform services under the Contract, these security guards had to be properly trained to do the work of the contract. The prospective security guards that attended the training before the commencement of performance of the Contract as well as the security guards hired by ARES are “service employees” under the Act and were rightfully entitled to compensation for training time as well as fringe benefits and the prevailing wages provided for under the Act.

II. Debarment is presumed, and ARES has failed to establish unusual circumstances.

The provisions of the Act have been determined to be applicable to the prospective and hired security guards recruited by ARES for performance of the Contract. It remains to be resolved whether debarment is warranted for ARES’ violations of the Act reported by WHI Kibler. Neither party presented a genuine issue of material fact which would preclude a determination on this issue as a matter of law.

The debarment provision of the SCA states in relevant part:

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

41 U.S.C. § 354(a).

As noted above, debarment is presumed whenever there is a finding of violations under the Act. Numerous violations were found by WHI Kibler's investigation. The major concern of the Administrator is that Respondent did not pay any of the security guards at all for their time spent in pre-employment training. The majority of the total amount WHI Kibler determined was owed by ARES was attributed to the compensation owed for the training time. Despite ARES' argument, \$100,896.68 is not *de minimis*. Respondent has not contested the fact that the security guards were not initially paid for the training time. ARES argues WHI Kibler's calculation of the amount of wages owed for this training was incorrect, and that the higher CBA wage rate in the Memorandum did not apply until the CBA was incorporated into the contract on or about November 29, 2007. Nonetheless, it has been determined that the Act applies to the security guards during the training period, and they should have been compensated for this time. ARES failed to do so in any amount. As a matter of law, these facts establish that Respondent violated the Act. Debarment is presumed.

The contractor has a defense against debarment if the existence of "unusual circumstances" is demonstrated. 29 C.F.R. §§ 4.188(a)-(b). The term "unusual circumstances" is not statutorily defined, and any determination with respect thereto "must be made on a case-by-case basis in accordance with the particular facts present." 29 C.F.R. § 4.188(b)(1). Neither ignorance of the Act's requirements nor failure to read and become familiar with the terms of the contract, are sufficient to demonstrate unusual circumstances. 29 C.F.R. §§ 4.188(b)(1), (b)(6). Similarly, the lack of a history of noncompliance is insufficient to establish unusual circumstances.

The determination as to whether unusual circumstances exist so as to rebut the presumption of debarment is governed by a three-part test. 29 C.F.R. §§ 4.188(b)(3)(i)-(ii). First, the contractor must establish that the violations were not willful, deliberate, aggravated in nature, or the result of culpable conduct, and must also demonstrate an absence of a history of similar culpable conduct. 29 C.F.R. § 4.188(b)(3)(i). Second, the contract must show a "good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii). Third, a variety of factors must be considered, including any prior investigations for violations of the Act, recordkeeping violations which impeded the investigation, the existence of a "bona fide legal issue," the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any violations, and whether the amount due was promptly paid. 29 C.F.R. § 4.188(b)(3)(ii). Moreover, the contractor bears the burden of proving the existence of unusual circumstances to warrant relief from the debarment sanction. 29 C.F.R. § 4.188(b)(1).

Under part one of the unusual circumstances analysis, Respondent has failed to show that the violations discovered by WHI Kibler were not willful, deliberate, aggravated in nature, or the result of culpable conduct. Culpable conduct can include "neglect to ascertain whether practices are in violation." 29 C.F.R. § 4.188(b)(3)(i).

Additionally, “[a] contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.” 29 C.F.R. § 4.188(b)(4). ARES failed to seek guidance on whether compensation of the security guards’ training time was required. ARES had been provided with excerpts from FOH § 14f02 regarding compensability of training time for security guards. By this, ARES was put on notice that the company’s own interpretation of how to compensate the security guards may have been incorrect. Respondent did not seek clarification from either the contracting agency or the Department of Labor regarding whether the pre-commencement training it was providing constituted compensable time. ARES had some notion that compensation for the training time was required as Ms. Czeck initially presented the local UGSOA with an offer for an hourly wage of \$10 for the training time. Respondent behaved willfully and culpably in choosing to disregard the agency information provided, failing to fulfill their affirmative duty to seek advice from the Department of Labor, and ultimately deciding not to compensate the security guards properly for their training period.

Respondent also fails to survive the analysis in part one of the unusual circumstances analysis for failure to demonstrate an absence of a history of similar culpable conduct. ARES admitted to several investigations by the Wage and Hour Division prior to WHI Kibler’s investigation in 2007. ARES has failed to properly pay overtime wages and other benefits on multiple occasions. The repetitive nature of Respondent’s violations can be seen as culpable conduct requiring debarment under the Act. *Vigilantes, Inc. v. U.S. Dept. of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992); *A to Z Maint. Corp. v. Dole*, 710 F.Supp. 853, 857-859 (D. D.C.1989); Therefore, Respondent has failed to show the presence of unusual circumstances such that they should not be debarred under part one of the test.

Under part two, Respondent must show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). Respondent did not make prompt repayment of monies owed to their employees. By June 9, 2008, ARES still had not made any payments of back wages, a violation of the documents Ms. Czeck signed at the final conference held May 15, 2008. The required payments were not complete until March 19, 2009, over ten months after the final conference was held. Respondent argues that this was due to continued discussions regarding the amount owed. However, this is not a sufficient defense. Respondent argues assurances of future compliance have been made and facilitated through extensive updates in their payroll system. While an admirable effort, these updates are irrelevant here as the failure to pay the security guards for training was not a payroll system error but a conscious decision on the part of ARES not to compensate them for this time. Furthermore, there were two subsequent investigations concerning violations on the same contract between 2008 and 2010, after the 2007 payroll system updates. The evidence also shows a history of violations by ARES on other contracts. Whether ARES delay in payment was attributable to a lack of

cooperation, the other circumstances here establish sufficient aggravating factors. Based on this evidence, Respondent has failed to show they should not be debarred under the second part of the analysis.

Respondent has also failed to demonstrate they should not be debarred under the final part of the test. As previously noted, Respondent's violations prior to and subsequent to WHI Kibler's investigation fail to mitigate the violations she uncovered in this case. Moreover, the violations revealed by three of DOL's investigations were serious in nature, with two instances totaling nearly \$200,000 and another totaling \$249,361. Based on this evidence, Respondent has failed to show they should not be debarred under the third part of the analysis

The presumption of debarment is met by Respondent's failure to pay the security guards for their training time as they were employees during the training period under the Act. Respondent has not been able to establish unusual circumstances to preclude debarment through the three part analysis. Again, ARES' efforts to ensure future compliance were unsuccessful as subsequent violations of the Act have been investigated since the payroll system updates were put into place. Therefore, based on the totality of the evidence and a lack of genuine issue of material fact, I find Respondent should be debarred pursuant to § 354(a) of the Act.

While the amount owed to the security guards who participated in the training period cannot be considered *de minimis*, neither can the remainder of the balance WHI Kibler determined was owed by ARES. In Paragraph 30 of the proposed findings of facts from Administrator's Memorandum in Support of Its Motion for Summary Decision, the Administrator outlined the deficiencies of the first paychecks received by the security guards hired by ARES under the contract. It was stated that ARES failed to compensate any employees for time spent in the training period and the Columbus Day holiday. Additionally, the Administrator noted that USGOA Local #236 employees were not compensated at the proper wage, and non-union employees were not paid properly for health and welfare benefits. WHI Kibler's findings in response to her investigation of these omissions were admitted by Respondent who clarified that "WHI Kibler purported" to reach these conclusions. WHI Kibler calculated ARES owed \$96,384.06 for these additional violations. This amount is not *de minimis*, and Respondent's failure to properly pay these wages and benefits to its employees too constitutes a clear violation of the Act that went basically undefended.

ORDER

It is hereby **ORDERED** that the Administrator's Motion for Summary Decision is **GRANTED**, and the Respondent's Motion for Summary Decision is **DENIED**.

As a result, it is hereby **ORDERED** that Respondent shall be debarred pursuant to Section 354(a) of the Act.

So **ORDERED** this 27th day of October, 2011, at Covington, Louisiana.

A

C. RICHARD AVERY
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).