

**U.S. Department of Labor**

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**Issue Date: 14 November 2013**

CASE NO.: 2013-SCA-00004

*In the Matter of:*

ADMINISTRATOR, WAGE AND HOUR DIVISION,  
U.S. DEPARTMENT OF LABOR,  
Prosecuting Party,

v.

5 STAR FORESTRY, LLC,  
Respondent.

Before: Richard M. Clark  
Administrative Law Judge

**DECISION AND ORDER ASSESSING SERVICE CONTRACT ACT EXEMPTIONS  
AND DEBARMENT**

This case arises from a complaint filed by the Administrator of the Wage and Hour Division of the U.S. Department of Labor (“Administrator”) against Respondent 5 Star Forestry, LLC (“Respondent”) for alleged violations of the McNamara-O’Hara Service Contract Act (“SCA” or “the Act”), as amended, 41 U.S.C. §§ 6701 *et seq.*, formerly known as 41 U.S.C. § 351 *et seq.*, and the implementing regulations promulgated under 29 C.F.R. part 4, subpart C, and part 6. Jeannie Gorman, Attorney at Law, represented Administrator. Erik Thorleifson, Attorney at Law, represented Respondent.

On February 4, 2013, Administrator issued a Summary of Unpaid Wages in which it found Respondent liable for \$46,917.52 in unpaid health and welfare benefits required by the SCA. *See* Stipulations; Administrator’s Exhibit 4 at 1-4. The Administrator seeks the amount due from this investigation and to debar Respondent for three years for violating the SCA. In response, Respondent contends that the Administrator incorrectly assessed health and welfare benefits for five employees who were exempt executive employees and, therefore, were not subject to the SCA fringe benefit requirement. Respondent further argues that there are unusual circumstances that should relieve the company from disbarment under the SCA.

On June 4, 2013, the parties agreed to submit the matter for decision on the briefs, without the need for trial. On July 12, 2013, the parties submitted simultaneous briefing on the SCA issues. The Administrator, in addition to its brief in lieu of hearing, attached Exhibits 1-10 (known hereinafter as “Administrator’s Exhibits” or “AX”). Respondent submitted Exhibits A-G (known hereinafter as “Respondent’s Exhibits” or “RX”), along with the Declaration of Michael Dominguez. Respondent also filed a Reply Brief on July 19, 2013. All exhibits and declarations are admitted into evidence.<sup>1</sup>

For the reasons discussed below, Respondent is ordered to pay the overdue fringe benefits as assessed by Administrator for all five employees in question, as well as the remainder of the moneys due for the other unpaid employees. Respondent is also ordered debarred under the SCA for a period of three years.

## **I. ISSUES IN DISPUTE**

This matter presents the following disputed issue:

1. Whether Juan Diaz, David Gonzalez, Isaac Santamaria, Alberto Santamaria, and Gabriel Santamaria are due health and welfare fringe benefits, or are exempt from the Act as persons employed in a bona fide executive capacity under 29 C.F.R. part 541, and
2. Whether unusual circumstances exist which relieve Respondent from debarment under the Act?

## **II. STIPULATIONS**

The parties agreed to the following stipulated facts, as set forth in Agreed Exhibit (“AE”) 1 at 1-2:

1. On or around May 3, 2010, Respondent contracted with the U.S. Department of Agriculture: Forest Service (“Forest Service”) for Frosty ladder fuels reduction in the Tonasket Ranger District: Okanogan National Forest. The contract was in the amount of \$100,320.00 (“Contract One”).
2. On or around June 29, 2010, Respondent contracted with the Forest Service for Frosty ladder fuels reduction in the Tonasket Ranger District: Okanogan National Forest. The contract was in the amount of \$104,720.00 (“Contract Two”).
3. Performance on Contracts One and Two was through October 31, 2010.
4. Respondent’s employees performed forest industry services on Contracts One and Two.

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<sup>1</sup> Respondent initially submitted RX C and D in Spanish. The parties agreed to allow Respondent to submit translated copies of RX C and D, which were received via fax on October 28, 2013. For recordkeeping purposes, the translated copies are marked as RX C-1 and RX D-1.

5. Wage Determination (“WD”) No 1977-0209, Revision No. 39 (November 13, 2009) applied to Contracts One and Two.

6. WD No 1977-0209 applicable to Contracts One and Two required a health and welfare benefit in the amount of \$3.35 per hour to be paid to each employee.

7. Respondent failed to pay the health and welfare benefit to its employees.

8. With the exception of five employees that are in dispute, the Administrator’s calculations of fringe benefits due employees is accurate and reflected on Form WH-56 (AX 4).

9. With the exception of five employees which are in dispute, the Administrator’s determination of the time period during which employees were due fringe benefits is accurate as reflected on Form WH-56 (AX 4).

10. The parties agree that Hermilio Angeles, Dwayne Harris, Jason Permann and Tomas Diaz Yudiche have already been paid the SCA-due fringe benefit.

11. Respondent contends that Juan Diaz, Vicente David Gonzalez Guerra (“David Gonzalez”), Alberto Santamaria, Gabriel Santamaria, and Isaac Santamaria are exempt employees and not subject to the WD. These five individuals are the only employees in dispute.

12. Respondent will forward any contact information for employees to the Administrator that supplements or updates the information contained on the AX 3.

13. The Administrator seeks debarment. Respondent contends it is relieved from debarment.

The foregoing stipulations are accepted for all purposes in this matter.

### **III. BACKGROUND**

The Service Contract Act governs contracts between the federal government and a private party made with the principal purpose of “furnishing services in the United States through the use of service employees.” 41 U.S.C. § 6702(a)(3). In order to be subject to the SCA, the contract must involve an amount exceeding \$2,500 and not fall under any of the exemptions specified in 41 U.S.C. § 6702(b). Contract One and Contract Two at issue here satisfy these requirements and are governed by the SCA and its provisions. In particular, the SCA requires federal contractors to pay prevailing wages and fringe benefits, as the Secretary of Labor predetermines or a collective bargaining agreement specifies. *See* 41 U.S.C. § 6703(2). Respondent was required to pay its employees a health and welfare benefit in the amount of \$3.35 per hour under the Act. *See* Stipulations ¶ 6; AX 1 at 1.

The Administrator's February 2013 investigation revealed that Respondent had failed to pay some of its employees required health and welfare benefits in accordance with the SCA. *See* AX 4; AX 5. Pursuant to its investigation, the Administrator concluded that Respondent had underpaid 62 service contract employees a total of \$46,917.52 in required fringe benefits due them under the SCA. AX 4 at 59. Respondent stipulated that the Administrator's calculations of fringe benefits due employees was accurate with the exception of its calculations regarding Juan Diaz, David Gonzalez, Alberto Santamaria, Gabriel Santamaria, and Isaac Santamaria. Stipulations ¶ 8. Respondent contends that these five men are exempt employees under 29 C.F.R. § 541.1 and not subject to the SCA fringe benefits requirement. Stipulations ¶ 11.

#### IV. ANALYSIS

##### A. Executive Exempt Employees – Legal Framework

Employees working in a bona fide executive, administrative, or professional capacity are not included as service employees under the SCA. 41 U.S.C. § 6701(3)(C). These exemptions define the categories of workers who fall outside labor protections, such as minimum wage and maximum hour requirements, as enumerated in the Fair Labor Standards Act, 29 U.S.C. § 213, with implementing regulations at 29 C.F.R. part 541.

The Secretary of Labor has promulgated regulations to better define employment in a bona fide executive capacity. The general test for employment in a bona fide executive capacity is located at 29 C.F.R. § 541.1 and provides as follows:

- (a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:
  - (i) Compensated on a salary basis at a rate of not less than \$455 per week...exclusive of board, lodging or other facilities;
  - (ii) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
  - (iii) Who customarily and regularly directs the work of two or more other employees; and
  - (iv) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status or other employees are given particular weight. 29 C.F.R. § 541.1(a)(i-iv).

In this analysis, the Respondent has the burden of establishing all four elements with respect to each allegedly exempt executive employee. *See Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992) (stating that the employer bears the burden of proving the applicability of an exemption to the FLSA requirements by “clear and affirmative evidence”). The Supreme Court has found that FLSA exemptions, which the SCA exemptions echo under 41 U.S.C. § 6701(3)(C), are to be “narrowly construed against...employers and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit.’” *Auer v. Robbins*, 519 U.S.

452, 462 (1997) (*quoting Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). Thus, an adjudicator must be cautious in depriving workers of would-be protections by finding them to be exempt employees. Each of the five disputed employees is examined below.

### 1. *Juan Diaz*

Administrator found that Juan Diaz was owed a total of \$654.94 in fringe benefits from July 3, 2010, to October 16, 2010. AX 4 at 56. Respondent did not establish that Mr. Diaz was an exempt executive employee.

The first prong requires Respondent to show that it compensated Mr. Diaz “on a salary basis at a rate of not less than \$455 per week...exclusive of board, lodging or other facilities.” *See* 29 C.F.R. § 541.1(a)(i). Respondent presented no evidence that Mr. Diaz was ever compensated on a salary basis – let alone at a rate of \$455 or more per week. The payroll records show that Mr. Diaz received only the hourly pay that all service employees earned for regular work. *See* AX 2. None of his payroll entries indicate a recurring salary-based compensation for executive duties. Indeed, Mr. Diaz did not even receive a “Foreman Wage” or “Foreman Salary” during the disputed period. *Id.* This is not to say that a foreman wage or salary necessarily satisfies the requirement under 29 C.F.R. § 541.1(a)(i), but it does at least indicate a different category of payment from the regular hourly project-based compensation generally given to service employees. Because Respondent cannot show that Juan Diaz’s employment satisfies the first step of 29 C.F.R. § 541.1, no further analysis is required. Respondent must pay the fringe benefits assessed for Mr. Diaz in the amount of \$654.94 for the period July 3, 2010, to October 16, 2010.

### 2. *Vicente David Gonzalez Guerra*

Administrator found that David Gonzalez was owed a total of \$2,546.00 in fringe benefits from May 22, 2010, to August 21, 2010. AX 4 at 57. Respondent did not establish that Mr. Gonzalez was an exempt executive employee.

In order to prevail, Respondent must show that Mr. Gonzalez was, “[c]ompensated on a salary basis at a rate of not less than \$455 per week...exclusive of board, lodging or other facilities.” *See* 29 C.F.R. § 541.1(a)(i). As with Mr. Diaz, there is no evidence that Mr. Gonzalez was ever paid on a salary basis. The payroll records reveal that Mr. Gonzalez was frequently paid “foreman wages” or “foreman salary” during the period in question. *See* AX 2. Yet, these payments fluctuated based on the number of hours Mr. Gonzalez worked. For instance, on August 27, 2010, Mr. Gonzalez received \$1300 in “Foreman Wages” for 80 hours of work on “CNF-Western White Pine Pruning.” AX 2 at 42. On June 4, 2010, however, Mr. Gonzalez only received foreman wages of \$650 – commensurate with the 40 hours of work he had done on the MT-Spring Tree Plant project. RX 2 at 44. Indeed, though his compensation exceeds \$455 per week, all of the foreman wages Mr. Gonzalez received appear to have been earned on an hourly basis. Under the regulations, payment on a salary basis requires that in each pay period, an employee receive “... a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.” 29 C.F.R. § 541.602(a). The regulations further make clear that

“...an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” *Id.* Because Mr. Gonzalez’s pay changed in direct proportion to the number of hours worked, even as a foreman, he was not paid on a salary basis. Thus, Respondent did not meet the requirements of the first prong.

Even though I find that Respondent has not met the first prong in the analysis, because there is some evidence that Mr. Gonzalez worked as a foreman, I will consider the remaining prongs.

The second prong requires a consideration of whether Mr. Gonzalez’s primary duty was management of Respondent’s enterprise or a subdivision thereof. *See* 29 C.F.R. § 541.1(a)(ii). According to Michael Dominguez, Mr. Gonzalez served as a “regular foreman for 5 Star Forestry.” Decl. of Michael Dominguez ¶ 7. A March 18, 2013, email from Michelle Brotnov-Gonzalez<sup>2</sup> stated that, “[w]hile employed by 5 Star Forestry[,] I, Vicente David Gonzalez was a non-working foreman.” RX F at 1. An undated change report from Michael Dominguez to his administrative assistant mentions that Mr. Gonzalez would take over as Inspector during Isaac Santamaria’s one-week vacation. RX J at 3. A company document dated September 1, 2011, also names Mr. Gonzalez as a “Foreman/Inspector.” RX G at 2. Yet, none of this evidence provides specific insight as to the ratio between Mr. Gonzalez’s regular nonexempt hourly work and his duties as foreman for the period in question – May 22, 2010, to August 21, 2010. Respondent did submit a May 6, 2010, performance schedule that identified David Gonzalez as a foreman, but the document does not provide insight as to whether management was Mr. Gonzalez’s primary duty or whether he was still performing nonexempt hourly work. RX J at 2. Thus, Respondent has not submitted enough evidence to meet the second prong under 29 C.F.R. § 541.1(a)(ii).

The third prong requires an evaluation of whether Mr. Gonzalez customarily and regularly directed the work of two or more other employees. *See* 29 C.F.R. § 541.1(a)(iii). The May 6, 2010, performance schedule that identified Mr. Gonzalez as a foreman also included a detailed description of his duties:

“5 Star Forestry’s representative will be Isaac Santamaria...He will observe work in progress and any problems will be reported to the foremen David Gonzalez and Alberto Santamaria to ensure the problems are corrected. The inspector will not direct operation of the crew as this is the responsibility of the Foremen. 5 Star expects the foremen to inspect work in progress and take corrective action prior to being notified by the representative or COR....5 Styar[sic] Forestry will use two crews on this contract. Each crew will be 14 workers per foreman.” RX J at 2.

The duties of a foreman clearly required Mr. Gonzalez to regularly and customarily supervise the work of two or more employees. Respondent could point to the payroll records to show that Mr. Gonzalez worked as a foreman during the period from May 22, 2010 to August 21, 2010, which would arguably meet the burden of proof with respect to prong three. AX 2.

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<sup>2</sup> The relationship between Michelle Brotnov-Gonzalez and Mr. Gonzalez was not made clear in the record.

The final prong requires an examination of whether Mr. Gonzalez had authority or influence over the hiring and firing of other employees. *See* 29 C.F.R. § 541.1(a)(iv). As noted earlier, Michael Dominguez claimed to have relied on recommendations of his foreman for hiring and firing decisions because he was not always out in the field with them. Decl. of Michael Dominguez ¶ 9. Yet, the record contains no specific evidence that Mr. Gonzalez influenced any of Mr. Dominguez's hiring and firing decisions. I find that without additional evidence in the record, Mr. Dominguez's statement is not enough to show that David Gonzalez had the level of influence over hiring and firing decisions that would be expected of an exempt executive employee.

Thus, Respondent has failed to show that David Gonzalez was an exempt executive employee as defined under 29 C.F.R. § 541.1(a)(i-iv). Respondent must pay the assessed fringe benefits for Mr. Gonzalez totaling \$2,546.00 from May 22, 2010, to August 21, 2010.

### 3. *Alberto Santamaria*

Administrator found that Alberto Santamaria<sup>3</sup> was owed a total of \$1,246.20 in fringe benefits from June 5, 2010, to October 16, 2010. AX4 at 59. Respondent did not establish that Alberto Santamaria was an exempt executive employee.

As with Mr. Gonzalez, Respondent's exemption claim for Alberto fails on the first prong because he was not paid on a "salary basis," as defined under 29 C.F.R. § 541.602(a). Although Alberto did receive "foreman wages" or a "foreman salary" during the period in question, his compensation fluctuated according to the number of hours he worked. For instance, on August 27, 2010, Alberto received \$810 for the 72 hours of work he performed as a foreman, as compared to the \$900 he earned for working 80 hours as a foreman during the July 16, 2010, pay period. *See* RX 2 at 5, 29. This variation in compensation based on the quantity of work does not satisfy the "salary basis" requirement of 29 C.F.R. § 541.1(a)(i).

Even though I find that Respondent has not met the first prong in the analysis, because there is some evidence that Alberto worked as a foreman, I will consider the remaining prongs.

The second prong requires a consideration of whether Alberto's primary duty was management of Respondent's enterprise or a subdivision thereof. *See* 29 C.F.R. § 541.1(a)(ii). As with Mr. Gonzalez, the evidence Respondent submitted regarding Alberto is often vague or undated, making it impossible to determine whether management was his primary duty between June 5, 2010, and October 16, 2010. Michael Dominguez explained that Alberto had been pulled from the working ranks, where he had previously been performing nonexempt hourly work, to become a foreman, but did not provide information as to when this transition took place. Decl. of Michael Dominguez ¶ 7. Similarly, Alberto submitted a declaration, stating that while he worked as a supervisor for 5 Star Forestry, he "only monitored the work of the other workers." RX D-1 at 1. One document from Respondent refers to Alberto as the project foreman for the "Frosty units," but the document is undated and there is no additional information provided. Indeed, the one dated document referring to Alberto as foreman falls outside the period in which the

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<sup>3</sup> Because there are three disputed employees with the last name "Santamaria," for clarity, I am referring to each employee by his first name.

Administrator assessed overdue fringe benefits. RX J at 2. Thus, I find that Respondent did not satisfy the second prong because there was insufficient information to determine whether management of 5 Star's forestry enterprise or a subdivision of it constituted his primary duty for the period in question.

The third prong requires an evaluation of whether Alberto customarily and regularly directed the work of two or more other employees. *See* 29 C.F.R. § 541.1(a)(iii). The payroll records show that Alberto received a foreman wage for some of the work he completed between June 5, 2010, to October 16, 2010, which would have required him to supervise the work of two or more other workers. *See* AX 2; RX J at 2. Thus, Respondent has arguably met its burden with respect to 29 C.F.R. § 541.1(a)(iii).

The final prong requires an examination of whether Alberto had authority or influence over the hiring and firing of other employees. *See* 29 C.F.R. § 541.1(a)(iv). With respect to hiring and firing authority, Respondent again points to the statement from Michael Dominguez about taking the opinions of his foremen into advisement when making decisions about acquiring or terminating employees. Decl. of Michael Dominguez ¶ 9. Yet, as stated above, I do not find this statement alone to be enough to meet Respondent's burden without additional evidence of Alberto's supposed influence over hiring and firing.

Respondent has failed to show that Alberto Santamaria was an exempt executive employee as defined under 29 C.F.R. § 541.1(a)(i-iv). Respondent must pay the assessed fringe benefits for Alberto Santamaria totaling \$1,246.20 from June 5, 2010 to October 16, 2010.

#### 4. *Gabriel Santamaria*

Administrator found that Gabriel Santamaria was owed a total of \$335.00 in unpaid fringe benefits from August 28, 2010, to October 16, 2010. AX 4 at 59. Respondent did not establish that Gabriel was an exempt executive employee.

The payroll records contain no evidence that Gabriel received compensation for anything other than nonexempt hourly work between August 28, 2010, and October 16, 2010. *See* AX 2. Mr. Dominguez stated that Gabriel was pulled from the working ranks to become a foreman and supplement 5 Star's regular foremen, but the work documents submitted by Respondent do not mention Gabriel taking on management of 5 Star's forestry work in any capacity. Decl. of Michael Dominguez ¶ 7. Without documentation, it is impossible to determine when Gabriel was asked to serve as a foreman and whether his duties rose to the level of an exempt executive employee. Gabriel submitted a declaration stating, "...while working at Five Star Forestry as the Supervisor, I only monitored the work of the other workers. I was not a worker with this group in this particular company." RX C-1 at 1.. Without knowing *when* Gabriel served as a supervisor or foreman, it is impossible to determine whether he should be exempt from fringe benefit payments from August 28, 2010 to October 16, 2010.

Thus, Respondent has failed to show that Gabriel Santamaria was an exempt executive employee as defined under 29 C.F.R. § 541.1. Respondent must pay the assessed fringe benefits for Gabriel Santamaria totaling \$335 from August 28, 2010, to October 16, 2010.

## 5. *Isaac Santamaria*

Administrator found that Isaac Santamaria was owed a total of \$1,943.00 in unpaid fringe benefits from May 22, 2010, to October 16, 2010. AX 4 at 59. Respondent has failed to establish that Isaac Santamaria was an exempt executive employee during this period.

Like the other four workers at issue in this case, Isaac fails to meet the first prong of the exempt executive employee regulation because he was not paid on a salary basis. Although the payroll records show that Isaac received “foreman wages” or “foreman salary” regularly during the summer of 2010, his pay fluctuated depending on how many hours he worked. For example, on July 30, 2010, Isaac received \$1500 in “foreman salary” pay for 80 hours of work. AX 2 at 39. Yet, the pay period just prior to that, Isaac had only received a foreman salary of \$750 because he only worked 40 hours. *Id.* As discussed above, pay that fluctuates in direct proportion to the number of hours worked does not constitute compensation on a “salary basis” under 29 C.F.R. § 541.602(a) and does not satisfy the requirements of 29 C.F.R. § 541.1(a)(i). Thus, Respondent has failed to meet its burden in proving the first step of the exempt executive employee test.

Even though I find that Respondent has not met the first prong in the analysis, because there is some evidence that Isaac Santamaria worked as a foreman, I will consider the remaining prongs.

The second prong requires a consideration of whether Isaac’s primary duty was management of Respondent’s enterprise or a subdivision thereof. *See* 29 C.F.R. § 541.1(a)(ii). On this point, Michael Dominguez described Isaac as a “regular foreman” for Respondent. Decl. of Michael Dominguez ¶ 7. Isaac submitted an undated statement, stating that he had worked for 5 Star “for approximately 7 years and in these 7 years I have only worked as a foreman, supervising the job done by the, ‘workers’ and inspecting the unit/units to be sure the job is done properly. To this day, I have never been a, ‘worker.’[sic]” RX E at 1. Respondent submitted Contract Daily Diary entries from May 25, 2010, and June 30, 2010, both of which identified Isaac as the contract representative on site.<sup>4</sup> RX I at 6-7. The record does not extensively describe the duties of an onsite contract representative, but the documents appear to authorize Isaac to act on Michael Dominguez’s behalf when Mr. Dominguez was not present at the site. RX G at 2. Moreover, the payroll records show that Isaac frequently completed 80 hours of foreman work within a given pay period during summer/fall 2010. AX2. Based on all this evidence, I find that Isaac Santamaria’s primary duty during the period in question was the onsite management of Respondent’s contracts and projects. Thus, Respondent has met its burden with respect to 29 C.F.R. § 541.1(a)(ii).

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<sup>4</sup> Respondent also submitted other evidence to show that Isaac Santamaria had served as a contract representative, foreman, or inspector, but these documents were dated well after the period in question. *See, e.g.*, RX G at 2 (Designation of Representative Form dated September 1, 2011, naming Isaac Santamaria as Foreman/Inspector); RX H at 2 (Revised Performance Schedule dated May 23, 2012, naming Isaac Santamaria as contract representative); RX I at 3 (Contract Daily Diary dated May 23, 2012, identifying Isaac Santamaria as contract representative); RX I at 4 (Contract Daily Diary dated May 20, 2012, identifying Isaac Santamaria as contract representative); RX I at 5 (Contract Daily Diary dated August 15, 2012, identifying Isaac Santamaria as contract representative).

The third prong requires an evaluation of whether Isaac customarily and regularly directed the work of two or more other employees. *See* 29 C.F.R. § 541.1(a)(iii). Mr. Dominguez referred to Isaac as a regular foreman, but all the other evidence in the record describes Isaac as an inspector or contract representative. RX J at 3. As an inspector and contract representative, Isaac “observe[d] any work in progress” and reported any problems to the foremen to ensure that they were corrected. RX J at 2. Contract documents further explain that “[t]he inspector will not direct operation of the crew as this is the responsibility of the Foremen,” suggesting that Isaac did not have a role in directing the work of the regular employees, but instead appears to have provided more generalized inspection and oversight for the whole site. *Id.* Based on the evidence, I find that Isaac’s role as inspector or contract representative required him to customarily and regularly direct the work of the foremen. Thus, Respondent has produced sufficient evidence to satisfy 29 C.F.R. § 541.1(a)(iii).

The final prong requires an examination of whether Isaac had authority or influence over the hiring and firing of other employees. *See* 29 C.F.R. § 541.1(a)(iv). As mentioned, Michael Dominguez relied on opinions from his foremen when making hiring and firing decisions because they had observed the workers firsthand when he could not. Decl. of Michael Dominguez ¶ 9. In Isaac’s case, his duties as an inspector and onsite contract representative may not have given him the opportunity to form opinions about individual workers. On the other hand, Isaac’s position as a contract representative gave him authority to act on Mr. Dominguez’s behalf in his absence, which arguably may have given him additional sway in hiring and firing decisions. RX G at 2. Ultimately, however, there is no evidence of Isaac Santamaria ever having influenced a hiring/firing decision, nor is there anything in the documents to suggest that his contract representative authority extended to hiring/firing. For this reason, I find that Respondent has not satisfied its burden with respect to the final step of the exempt executive employee test.

In sum, Respondent has failed to show that Isaac Santamaria was an exempt executive employee under all the requirements of 29 C.F.R. § 541.1(a)(i-iv). Respondent must pay the assessed fringe benefits in the amount \$1,943.00 from May 22, 2010, to October 16, 2010.

#### B. Debarment: Unusual Circumstances and SCA – Legal Framework

The SCA requires that monetary wages specified under the Act be “paid to the employees to whom they are due promptly and in no event later than one pay period following the end of the pay period in which they are earned.” 29 C.F.R. § 4.165(a)(1). Respondent acknowledged in the joint stipulations that it failed to pay the required health and welfare benefits to its employees, effectively admitting to a violation of the SCA. *See* Stipulations ¶ 7. Under the SCA, “any person or firm found...to have violated the Act shall be declared ineligible to receive Federal contracts unless the Secretary recommends otherwise because of unusual circumstances.” 29 C.F.R. § 4.188(a); 41 U.S.C. § 354.

The existence of “unusual circumstances” is determined on a case-by-case basis, “in accordance with the particular facts present.” 29 C.F.R. § 4.188(b)(1). The Secretary’s discretion to grant such relief is constrained, making “unusual circumstances” a very limited exception to an otherwise strict statute. *See* 29 C.F.R. § 4.188(b)(2). Though debarment is a severe penalty, Congress intended that it be the norm, rather than the exception, for violating contractors. *See*

*Summitt Investigative Serv., Inc. v. Herman*, 34 F.Supp. 2d 16, 19 (D.D.C. 1998); *see also Vigilantes, Inc. v. U.S. Dep't of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992) (“only the most compelling of justifications should relieve a violating contractor from that sanction”). “Debarment is designed to break down a chain of non-compliance and to force employers to take the labor regulations seriously,” by restricting the award of government contracts to responsible bidders. *Hugo Reforestation, Inc.*, ALJ No. 1997-SCA-20, ARM No. 99-003, slip op. at 13 (ARB Apr. 30, 2001) (internal citation and quotation omitted); 29 C.F.R. § 4.188(b)(6). Relief from debarment can only be granted in cases where the violation is shown to have been minor and inadvertent, or where disbarment would be “wholly disproportionate to the offense.” 29 C.F.R. § 4.188(b)(2).

As debarment is presumed for violations under the Act, the SCA violator bears the burden of establishing the existence of “unusual circumstances.” 29 C.F.R. § 4.188(b)(1). In order to show “unusual circumstances,” the violator must establish the “absence of aggravating factors and the presence of mitigating factors.” *See* 29 C.F.R. § 4.188(b)(3)(i-ii); *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58 (1st Cir. 1999). These factors have been broken down into a three-part test, and a violator must satisfy every stage of the test to be eligible for relief from debarment. *See Hugo*, ARB No. 99-003, slip op. at 13. Failure at any point of the test ends the analysis, without the need to consider the remaining steps. *Id.*

#### 1. *Step One: Culpability*

The first step of the “unusual circumstances” test concerns the violating contractor’s culpability. The violator’s conduct:

“...must not be willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records).” 29 C.F.R. § 4.188.

Past violations also come to bear on the contractor’s culpability, as the violator presumably had the opportunity to learn from past mistakes and ensure future adherence to the law. *See, e.g., Hugo*, ARB No. 99-003, slip op. at 11. A violator with a history of similar, repeated, or serious violations cannot receive relief from debarment. 29 C.F.R. § 4.188(b)(3)(i).

Here, Administrator argues that Respondent knew of the requirement to pay fringe benefits, but failed to do so. Administrator’s Brief at 14. Administrator points out that some of Respondent’s employees did receive fringe benefits, though not on a regular or consistent basis, which indicates the Respondent had an awareness of the fringe benefits requirement. *Id.*; *see also* RX A at 1-3. Respondent, in turn, argues that Administrator never alleged any intentional willful conduct, falsification of records, or other type of aggravated behavior. Respondent’s Brief at 5. Acknowledging that the company did make fringe benefit payments to some of the employees during this period, Respondent counters that this suggests a willingness to comply with the law. *Id.* In its reply brief, Respondent further asserted that the failure to pay fringe benefits was due to minor technical bookkeeping errors. Respondent’s Reply at 3.

In considering Respondent's culpability, I am more inclined to agree with the Administrator's view of the case. The fact that Respondent had been paying fringe benefits, at least in part, shows that it was aware of the SCA requirements and cannot now pretend ignorance. Moreover, Respondent had past experience with government contracts, which put them on notice regarding the fringe benefit requirement. *See* RX K. Regarding Respondent's argument that a computer glitch caused the underpayment of fringe benefits, there is nothing in the record to support this assertion. Even if the error was due to a technology-based problem, Respondent should be double checking its records and paying attention to its payroll documentation to ensure that such a problem is speedily rectified. Culpable neglect refers to conduct "beyond negligence, but short of specific intent." *Ray's Lawn and Cleaning Servs., Inc. and Howard Ray*, ARB Case No. 06-112, p. 5 (Aug. 29, 2008). I find that Respondent's failure to pay a total of \$46,917.52 to 62 employees over the course of five months goes beyond pure negligence and constitutes culpable neglect. *See* AX 4 at 56-59.

Respondent's history of past SCA violations also undermines its unusual circumstances argument. The Department of Labor previously cited Respondent in 2007 for violations of the SCA and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). AX 8 at 203. Respondent argues that this 2007 violation was a minor donning/doffing problem under the Fair Labor Standards Act, which was incorrectly labeled as an SCA violation. Respondent's Reply at 3. The record contains no evidence to support Respondent's argument that the Department of Labor mischaracterized the 2007 violations, and I am not now going to look behind the previous charges to determine if the Department should have brought them under another statute. Respondent's history of other SCA violations weighs against granting Respondent relief from debarment. 29 C.F.R. § 4.188(b)(3)(i).

## 2. *Step Two: Mitigating Prerequisites*

In the second part of the "unusual circumstances" test, the contractor must establish 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).

With respect to Respondent's compliance history, Administrator points to the 2007 SCA and MSPA violations discussed above to show that Respondent has a poor compliance record under the SCA. Specifically, Administrator notes Michael Dominguez's assurances of future compliance following the 2007 violations, arguing that the company could not hope to show good compliance history after failing to keep its pledge. Administrator's Brief at 15. Respondent, in turn, seeks to discount the 2007 violations as mislabeled, and provides a list of dozens of federal contracts it successfully completed before this dispute to show good compliance history. RX K. As stated above, I find that Respondent's 2007 violations weaken arguments for good compliance history and lessen its chances for relief from debarment.

Concerning cooperation in the investigation, both parties agree that Respondent was cooperative and provided appropriate documentation as necessary. Decl. of Michael Dominguez ¶ 11. I have no reason to disagree with this characterization of Respondent's behavior.

On the matter of repayment of moneys due, Respondent had only repaid four employees at the time the case was submitted for hearing on the record. *See* Stipulations ¶ 10. Respondent attempted to pay more of the employees after the investigation, but was told in a January 18, 2013, email, “[p]lease don’t re-send the SCA checks. My understanding of Judge Clark’s order concerned only the payments due under the H-2b program.” RX L at 1. Indeed, Administrator has not been willing to take payment since filing this case. Administrator argues that Respondent could have paid back the employees, at least those not in dispute, in the 26 months between the summer/fall 2010 work and the February 2013 complaint. Administrator’s Brief at 15-16. Here, I find that the evidence weighs in Respondent’s favor, as Administrator was not cooperative with Respondent’s attempts to send payment of moneys due. It is unclear why the Administrator could not take Respondent’s payments in January, and I see no reason to hold Respondent accountable for Administrator’s refusal to accept the moneys due before now.

Finally, this prong requires that I evaluate whether the Respondent has made sufficient assurances of future compliance. Respondent argues that its commitment to future compliance has already been shown through ongoing compliance in dozens of federal contracts since 2010. *See* RX K. Michael Dominguez stated that he had discussed future compliance with the investigators and, “they indicated [his] commitment to future compliance was adequate.” Decl. of Michael Dominguez ¶ 12. It may be that Respondent has every intention of keeping its promise for future compliance, but this does not hold as much weight after Respondent promised future compliance in 2007 and violated the SCA again in 2010.

Overall, I find that Respondent’s past violation of the SCA and its failure to live up to its past assurances of future compliance weighs against relief from debarment under this prong. As explained, debarment is meant to end patterns of noncompliance and force employers to take SCA requirements seriously. I believe such action would be appropriate in these circumstances.

3. *Step Three: Past Investigations, Reasonable Mistake, Effort to Prevent, Impact of Violation on Employees*

If both of the initial steps are satisfied, the analysis then shifts to a broad consideration of the following:

“...whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.” §4.188(b)(3)(ii).

Should deliberation of these factors come out in the contractor’s favor, the violating party may be entitled to relief from debarment.

Because the Respondent failed to make its case for “unusual circumstances” at the two initial steps of the analysis, step three is moot. However, if the case had been strong enough to reach this final stage, on the evidence presented, the record would justify an unfavorable view of Respondent’s actions. As discussed extensively above, Respondent does have a history of previous violations under the Act. *See* AX 8 at 203.

Administrator did not allege any recordkeeping violations following its investigation, but now argues that Respondent listed its own address for many of the workers, in violation of 29 C.F.R. 4.6(g). AX 3 at 50-54. Respondent responds that Administrator may not bring up new allegations at this point in the proceedings, which is correct. However, this does not prevent a consideration whether the absence of individual addresses for the workers impeded the investigation. The Administrator points out that they will be left with the task of searching for the unpaid workers, many of whom have returned to their homes in southern Mexico, without the aid of accurate contact information. While Administrator did not timely allege this as a recordkeeping violation, and no assessment is sought, this failure on Respondent’s part does place a significant burden on Administrator in locating the employees.

Regarding liability, Respondent argues that the case turned on the bona fide legal question of exempt executive employee status for the five workers analyzed above. Administrator contends that this was not a bona fide legal issue because it only concerned five of the 62 workers who had not received fringe benefits. Even with Respondent’s liability regarding the five disputed employees in question, it could still have paid for the remaining 57 workers. Thus, to say that the entire case turns on a bona fide legal issue of doubtful certainty is to overstate the issue.

Respondent’s attempts to ensure compliance have been discussed at length above. As noted, Respondent did pay fringe benefits to some employees – but not in a regular and consistent manner. Whether this was due to a glitch in the payroll system used to track the SCA fringe or to human error, it was Respondent’s responsibility to be aware of potential oversights. This is especially true where Respondent was dealing with foreign, seasonal workers who had come to work in the United States based on reliance of full pay. Respondent tries to argue that the accounting errors did not have significant impact on the underpaid employees, but the fact that 62 employees were underpaid by a total of \$46,917.52 belies that argument. *See* AX 4 at 55-56. Indeed, this amount represents a significant escalation over Respondent’s 2007 violation, in which it owed \$933.15 to 10 employees. *See* AX 8 at 203. All of these factors cut against relief from debarment.

Finally, Respondent seeks to mitigate arguments for debarment by showing its importance to the local economy. Decl. of Michael Dominguez ¶ 14. Respondent submitted a letter of support from the Idaho County Board of Commissioners, discussing the positive impact the company has on the local economy through its federal contracts. RX M at 1. I do not doubt the value of Respondent to the local community, but this does not outweigh the significance of repeated violations and the numbers and amount of money underpaid to its workers. Indeed, the importance of federal contracts to contractors and local economies means that those who do contract with the federal government must be vigilant in guaranteeing compliance with the law.

Therefore, I find that the Respondent has failed to make a persuasive case for “unusual circumstances” at each of the three steps of analysis. In the absence of unusual circumstances, the Act requires the Respondent’s debarment from receiving federal contracts for three years. 29 C.F.R. §4.188(a). On the facts established in this matter, I find the penalty appropriate and within the guidelines Congress intended for the circumstances present here.

## V. ORDER

1. Respondent must pay Juan Diaz the amount of \$654.96 for overdue fringe benefits in accordance with the Administrator’s February 4, 2013, findings.

2. Respondent must pay David Gonzalez the amount of \$2,546 for overdue fringe benefits in accordance with the Administrator’s February 4, 2013, findings.

3. Respondent must pay Alberto Santamaria the amount of \$1,246.20 for overdue fringe benefits in accordance with the Administrator’s February 4, 2013, findings.

4. Respondent must pay Gabriel Santamaria the amount of \$335 for overdue fringe benefits in accordance with the Administrator’s February 4, 2013, findings.

5. Respondent must pay Isaac Santamaria the amount of \$1,9436 for overdue fringe benefits in accordance with the Administrator’s February 4, 2013, findings.

6. Pursuant to the stipulations of the parties, Respondent shall pay the full award to all remaining unpaid employees in accordance with the Administrator’s February 4, 2013, findings. Respondent shall provide checks made payable in the alternative to “[Employee’s Name] or the U.S. Department of Labor,” showing all lawful deductions taken therefrom, and with a list of each employee’s social security number or any other identifying number available and each employee’s last known address, within 10 days of the date of the Court’s order. In turn, Administrator will be required to authorize release of the full amount of funds being held by the U.S. Forest Service within 10 days of the Administrator receiving certified checks, as set forth in the Order.

7. Respondent 5 Star Forestry is hereby DEBARRED from receiving government contracts for a period of three years from the date of this Order. Pursuant to 41 U.S.C. § 354(a), the Secretary will forward the Respondent’s name to the Comptroller General, as required by the Act.

RICHARD M. CLARK  
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).