



Issue Date: 24 March 2016

Case Number: 2015-SCA-00001

In the Matter of:

**MATERIAL MOVEMENT, LLC, and
MARY TALANO and JEFFERY TALANO,**
Respondents

DECISION AND ORDER GRANTING SUMMARY DECISION

This case arises under the McNamara-O'Hara Service Contract Act ("SCA") of 1965, as amended, 41 U.S.C. § 6701 *et seq.*, and its implementing regulations at 29 C.F.R. Parts 4 and 6.

Procedural Background

This matter commenced on October 20, 2014, when the Associate Regional Solicitor, U.S. Department of Labor, Chicago Regional Office ("Plaintiff"), filed a Complaint with the Office of Administrative Law Judges ("OALJ") against the Respondents based on alleged violations of the SCA. The Complaint alleged that Respondents failed to pay two employees the monetary wages and fringes benefits required by the SCA and the Complaint asserted that Respondents were liable for an amount equal to the underpayment (a total of \$1,737.38) and subject to debarment from Federal contracts for three years pursuant to 41 U.S.C. § 6706. The Chief Administrative Law Judge ("ALJ") issued a Notice of Docketing on October 27, 2014, directing Respondents to file an Answer to the Complaint within 30 days. On November 12, 2014, Respondents requested additional time to file an Answer and the request was granted.

On April 14, 2015, the Chief ALJ issued an Order directing Respondents to show cause why a default decision that adopted the material facts alleged in the Complaint should not be entered due to their failure to file an Answer. On April 29, 2015, Respondent Mary Talano sent a letter stating that Respondents did not agree with the amount of the underpayment Plaintiff had calculated. She attached a spreadsheet to the letter that conceded liability for a portion of the underpayment (a total of \$922.70 in underpaid wages and benefits) and disputed the remainder (leaving a total of \$814.68 in dispute). On May 15, 2015, Plaintiff filed a Motion for Judgment by Default asserting that Respondents failed to file an Answer to the Complaint. By letter dated May 20, 2015, Respondents stated that the April 29, 2015, letter was their Answer. On May 22, 2015, the Chief ALJ found that the letter was sufficient to constitute an Answer and subsequently he assigned the case to me for adjudication.

I issued a Notice of Hearing and Prehearing Order on June 8, 2015, setting the case for trial on September 9, 2015. On August 5, 2015, Plaintiff filed a Motion to Compel Respondents to Serve

Complete and Responsive Discovery Responses and to Deem Admitted Requests for Admissions Left Unanswered. By Order dated August 13, 2015, I granted the Motion to Compel, canceled the hearing pending resolution of the discovery issues, and directed Respondents to show cause why the requests for admissions that were left unanswered should not be deemed admitted. Respondent Jeffrey Talano submitted a response to the Show Cause Order on August 19, 2015. On November 30, 2015, I issued an Order rescheduling the trial for April 26, 2016.

On February 12, 2016, Plaintiff filed a Motion for Summary Judgment.¹ Respondent Jeffrey Talano sent Plaintiff a Response to Motion for Summary Judgment dated February 23, 2016, but he did not file the Response with OALJ. Plaintiff subsequently forwarded a copy of the Response to OALJ. On February 29, 2016, I issued a Notice Concerning Motion for Summary Judgment (a *Roseboro* notice)² directing Respondents' attention to the requirement to support their assertions and present evidence of a genuine issue of material fact in response to the motion for summary decision. On March 5, 2016, Respondent Jeffrey Talano sent Plaintiff a letter addressed to me expressing appreciation for the *Roseboro* notice and advising that he had already sent a response on February 23, 2016. He did not submit the letter to OALJ; however, Plaintiff forwarded a copy to OALJ.

Standard for a Motion for Summary Decision

The standard for summary decision in cases before this tribunal is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). An ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Celotex*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence. *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth "specific facts" showing that there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there

¹ The motion is titled Motion for Summary Judgment. "Summary Judgment" is the terminology used in Federal Rule of Civil Procedure 56 that applies in U.S. District Courts. The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, specifically 29 C.F.R. § 18.72, uses the term "Summary Decision." The rule at § 18.72 is modeled after Federal Rule of Civil Procedure 56. In practice, the two terms refer to the same process.

² The notice takes its name from *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

is no genuine issue of material fact, and the moving party is entitled to summary decision. *Celotex*, 477 U.S. at 322-23. In assessing the merits of a motion for summary decision, an ALJ must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. An ALJ is not to weigh conflicting evidence or make credibility determinations. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

Factual Background

The facts of this case are not particularly complicated nor are they in significant dispute; what is in dispute is what the law requires with respect to the facts.

Material Movement is a limited liability corporation established in Illinois. It is owned by Respondent Mary Talano and operates out of a home office in St. Joseph, Michigan. Respondent Jeffery Talano is the son of Mary Talano and he is the operations manager for Material Movement. On May 28, 2010, Jeffery Talano, on behalf of Material Movement, signed an offer in response to a U.S. Postal Service solicitation to provide mail hauling service between Grand Rapids and Walhalla, Michigan. (Motion, EX 3, p. 3). On June 18, 2010, the U.S. Postal Service awarded contract number HCR 49334 to Material Movement. The contract was for more than \$2,500.00 and if it was subject to the Service Contract Act. (*See Admissions, Mary Talano, July 30, 2015*). The period of performance ran from July 1, 2010 through June 30, 2014. (EX 3, p. 26). The contract noted that the times and distances listed in the solicitation were only estimates and stated:

Prior to submitting a proposal, the supplier must determine the actual hours.

See the contract Terms and Conditions for further information regarding miles and hours.

SPECIAL NOTE: Any additional hours or miles which may result from supplier's unique operations should be included in the proposal price. (EX 3, p. 9-11).

Nicholas Moradi, an investigator from the U.S. Department of Labor's regional office in Grand Rapids, Michigan, investigated Respondents' wages, benefits, hours and other conditions of employment to determine their compliance with the SCA for the period from February 3, 2013 through March 29, 2014. Respondents provided him with payroll records and daily trip logs. Respondents also spoke with Mr. Moradi and made the two employees that worked on contract HCR 49334 available for interviews. Mr. Moradi compared the number of hours recorded in the trip logs with the number of hours shown in Respondents' bi-weekly payroll records. His investigation disclosed that the employees were paid based upon the time that was allotted for the route schedule rather than for the actual time it took them to complete the route. He also discovered that the employees were not paid for the holidays listed on the applicable Wage Determination. As a result, Mr. Moradi determined that Respondents underpaid Robert McLeod \$1,020.88 (\$769.24 in wages and \$251.64 in fringe benefits) and underpaid Michael Sobieski

\$716.50 (\$428.07 in wages and \$288.43 in fringe benefits) for a total underpayment of \$1,737.38 during the period February 3, 2013 to March 29, 2014. Respondent Mary Talano told Mr. Moradi that she should not have to pay drivers for holidays during weeks when they did not work saying, "it is money out of our pocket and it's just not right." She also refused to comply with the SCA going forward. (Moradi Declaration, Motion, EX 2; Summary of Unpaid Wages, EX 9).

Neither Respondent Mary Talano nor Respondent Jeffery Talano has contradicted the essential elements of Mr. Moradi's findings. In his response to Plaintiff's interrogatories dated July 24, 2015, Jeffery Talano said (in pertinent part):³

side note: the drivers are paid for the time it takes to do the runs (just as the usps pays its own "mailmen"), and then

they are paid additional when their additional time is authorized and is properly documented. JUST LIKE IN ANY

UNSUPERVISED SCHEDULED OPERATION IN BUSINESS.

side note: but it does NOT state in which way hours to be paid are to be calculated. for reference, the usps pays its

"mailmen" by the hour also (check a "job wanted" posting or ask the usps), yet they do this by conducting a survey of

how long the route takes and then the hours are computed and paid based on that and NOT how a factory would pay

hours with a timeclock that you "punch in" and "punch out" with. (EX 5, p. 2).

In his "Response to motion for summary judgment request of extortion artists at the department of labor and a request for summary judgment for the defendants AGAINST the extortion artists at the department of labor" submitted on February 23, 2016, Mr. Talano again explained how Respondents calculated the wages of its two drivers. He said (in pertinent part):⁴

If the loading takes longer than the allotted time in the contract, then the drivers are supposed to get a late slip from the post office that documents the extra time. If they dont do that, THEY DONT GET PAID FOR IT.

³ Mr. Talano asserts a claim for "1 million dollars for harassment" in his response. (EX 5, p. 1). That issue is not before me for adjudication.

⁴ Mr. Talano asserts a claim for "5 million dollars for their unfounded and dishonest harassment and violation of our rights" and demands that the Department of Labor attorneys be "stripped of their law licenses and jobs with the government." (See Response dated Feb. 23, 2016). These issues are not before me for adjudication.

That is part of their job requirement and if they dont do their job, then they dont get paid. Its really quite simple to understand for a non-“government goon”.

The usps surveys these routes and then creates the schedules; anytime there is extra time required because of mail volumes or postal problems, the drivers MUST GET late slips from the usps if they want to get paid for that time, that is part of their job, because if they dont get the late slips, THEN WE DONT GET PAID for the extra time that our truck and driver is in use by the usps, so obviously we are not able to pay the drivers for it !! (in the event that this was the case in a particular instance.) If there are other delays like extremely bad weather, then they must document it and submit it for payment.

the bottom line is that these “logs” are not “payroll” logs, they are delivery logs. We pay the drivers based on the average time the trip takes, JUST LIKE THE USPS PAYS ITS MAILMEN; then we pay additional hours ONLY when they are authorized by us, or when they are authorized AND properly authorized and/or documented. (Jeffery Talano Response, Feb. 23, 2016, p. 4-5).

Respondent Mary Talano also confirmed that the two drivers were not compensated based upon the actual amount of time each one worked to fulfill the requirements of the contract. Attached to the letter she submitted to the Chief ALJ on April 29, 2015 were her own calculations in which she claimed Material Management only owed Robert McLeod \$599.98 and Michael Sobeski \$322.72 in back wages and benefits. Her calculations were based upon the difference between the “hours per truck logs” versus “hours paid.” As an example, Ms. Talano calculated that Mr. McLeod was due \$55.13 for work performed during the week ending on March 29, 2014, by taking the time that was recorded in the truck log (22.09 hours) and subtracting the hours for which he had been paid (19.61 hours), which resulted in an additional 2.48 hours of uncompensated work that she valued at \$55.13. (See Attachment to Mary Talano’s letter to Chief ALJ, Apr. 29, 2015).

Discussion

1. Underpayment of Wages and Benefits

Employees performing work under an SCA-covered contract are entitled to monetary compensation for wages and benefits for the actual amount of time they worked. That is manifestly clear in the regulations implementing the SCA. For instance, in 29 C.F.R. Part 4, it states (in pertinent part):

§ 4.166 Wage payments – unit of payment.

The standard by which monetary wage payments are measured under the Act is the wage rate per hour. An hourly wage rate is not, however, the only unit for payment of wages that may be used for employees subject to the Act. Employees may be paid on a daily, weekly, or other time basis, or by piece or task rates, so long as the measure of work and compensation used, when

translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that will fulfill the statutory requirement. ***Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate.*** Failure to pay for certain hours at the required rate cannot be transformed into compliance with the Act by reallocating portions of payments made for other hours which are in excess of the specified minimum.

§ 4.178 Computation of hours worked.

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked in each workweek when such work under the contract is performed is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in part 785 of this title which is incorporated herein by reference. ***In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. The hours worked which are subject to the compensation provisions of the Act are those in which the employee is engaged in performing work on contracts subject to the Act.*** However, unless such hours are adequately segregated, as indicated in § 4.179, compensation in accordance with the Act will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract, in the absence of affirmative proof to the contrary that such work did not continue throughout the workweek.

§ 4.6 Labor standards clauses for Federal service contracts exceeding \$2,500.

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

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

(emphasis added).

Additionally, the impropriety of the compensation scheme Respondents used in this case was addressed in *Fast Freight, Inc. v. J. W. Lasater*, BSCA No. 92-35 (BSCA May 6, 1994) where the Board of Service Contract Appeals⁵ affirmed the decision of an ALJ that a company violated the SCA by paying employees for hauling mail “according to a pre-arranged schedule set forth

⁵ The Secretary of Labor created the Administrative Review Board in 1996 and gave it responsibility for functions previously performed by the Board of Service Contract Appeals, the Wage Appeals Board and the Office of Administrative Appeals. 61 Fed. Reg. 19978 (May 3, 1996).

by the company for a particular route” rather than the actual amount of time the employees worked performing the requirements of the contracts.⁶

To establish a genuine issue as to the existence of an element, the non-moving party must point to evidence in the record upon which a reasonable fact-finder could find in its favor. *See Anderson*, 477 U.S. at 248. The genuine issue must also be material; that is, it must involve facts that might affect the outcome of the case under the governing law. *See id.* Here, Respondents conceded that: this was an SCA-covered contract, Mr. McLeod and Mr. Sobieski were their employees, their employees performed work in furtherance of the contract, and their employees were not compensated based upon the actual number of hours they worked. The only issue not expressly conceded is whether Mr. McLeod and Mr. Sobieski received compensation for all of the pay and benefits to which they were entitled for the amount of time they worked. As § 4.166 states, an employee can be paid on a basis other than a pure hourly rate provided it results in “a rate per hour that will fulfill the statutory requirement.” Respondents have not, however, presented any evidence that their employees were fully compensated for all of their work time at a rate that met the SCA requirement. Instead, Respondents expressed generally, “we do not agree with the amount of back wages that the DOL computed.” (*See* Letter from Mary Talano to Chief ALJ dated Apr. 29, 2015, and Response from Jeffery Talano dated Feb. 23, 2016). Ms. Talano prepared her own calculation of what she determined Mr. McLeod and Mr. Sobieski were due, but she provided no documentation to justify her figures. Mr. Moradi, on the other hand, calculated the amount of underpaid wages and benefits using the applicable Wage Determination and the actual work times recorded on the daily trip logs. (*See* Moradi Declaration, Motion, EX 2; Wage Determination, EX 3, p. 45; Daily Trip Logs, EX 7; Summary of Unpaid Wage, EX 9; and Computation Spreadsheets, EX 10). There is substantial evidence supporting the reasonableness and accuracy of Mr. Moradi’s calculations. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689 (1946).⁷ Viewing the evidence in the light most favorable to the Respondents and drawing all inferences in their favor, there are simply no material facts that are in issue and no way to construe the facts that are established in a way that could possibly result in a decision favorable to the Respondents.

Accordingly, I find that there is no genuine issue of material fact for trial and that a decision is appropriate as a matter of law; therefore, the Secretary’s Motion for Summary Judgment is **GRANTED**.

⁶ In his February 23, 2016 Response, Mr. Talano asserted that Material Movement did not “have to pay hours like a timeclock at a factory and can instead pay [Mr. McLeod and Mr. Sobieski] just as the usps pays its own mailmen!!” (*See* Response, p. 2, para. 5). The requirement to pay for actual time worked is discussed above. With respect to how the U.S. Postal Service pays mail carriers; first, Mr. Talano offered no evidence establishing U.S. Postal Service compensate practices and, second, even if he had, he failed to establish the relevance it would have in resolving any material issue in a Service Contract Act case.

⁷ Mr. Talano raised general allegations in his Response dated February 23, 2016 that the drivers did not properly complete their daily logs in order to pad their hours. An employer has a duty to maintain accurate records of the daily and weekly hours each employee worked. 29 C.F.R. § 4.6. If there were disputes concerning the hours that were logged, those disputes should have been resolved at the time with the employees. Additionally, Respondents offered no evidence to negate the accuracy or reasonableness of the hours recorded in the logs. *Administrator v. Groberg Trucking, Inc.*, ARB Case No. 03-137 (Nov. 30, 2004).

2. Debarment

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). Debarment for a violation is a severe penalty, but Congress intended for it be the rule rather than the exception. *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); 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 debarment would be “wholly disproportionate to the offense.” 29 C.F.R. § 4.188(b)(2).⁸

Since debarment is presumed for SCA violations, the 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. Dept. of Labor*, 171 F.3d 58 (1st Cir. 1999); *Karawia v. U.S. Dept. of Labor*, 627 F.Supp.2d 137 (S.D.N.Y. 2009). These factors result in a three-part test, and a violator must satisfy all stages of the test to be eligible for relief from debarment. *Id.* at 146. Failure at any point in 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. To satisfy the first step, 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

⁸ The regulation, 29 C.F.R. § 4.188, permits the debarment of both firms and persons. Whether a person has a “substantial interest” and is subject to debarment is made on a case-by-case basis. An ownership interest in the business entity is not required. Factors to consider include whether “such person has participated in contract negotiations, is a signatory to a contract, or has the authority to establish, control, or manage the contract performance and/or the labor policies of a firm.” § 4.188(c). Here, while Mary Talano owned Material Movement, LLC, her son Jeffery Talano had a “substantial interest.” As noted above, this included, among other things, Jeffery Talano signing the proposal that led to the contract, managing the day-to-day performance of the contract, and negotiating with the Department of Labor on issues related to the contract. Accordingly, I find that Respondent Jeffery Talano had a substantial interest and may be subject to debarment. *But see Talano v. United States*, No. 13–572C, slip op. at 3 (Fed. Cl. Dec. 19, 2013) (Jeffery Talano “may perform many important functions,” but he could not seek relief on behalf of Material Movement in the Court of Federal Claims).

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(b)(3)(i).

Previous violations are relevant in assessing the contractor’s culpability as the violator presumably had the opportunity to learn from past mistakes and ensure future compliance with 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).

As is discussed more fully in Step Two below, this was not the first violation of a similar nature involving this contract, and it shows at a minimum culpable neglect to ascertain whether Respondents’ compensation practices were in violation of the SCA and a culpable disregard for whether Respondents were in violation of the SCA.

2. Step Two: Mitigating Prerequisites

In the second part of the “unusual circumstances” test, the violator 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 Respondents’ compliance history, Plaintiff points to a prior investigation “between February 12, 2011 and February 11, 2013” that “disclosed SCA violations, including failure to pay the prevailing wage as well as Health and Welfare benefits and also recordkeeping violations.” As a result, Respondent Mary Talano agreed to pay “\$5,717.24 in backwages.” (Motion, p. 6). Plaintiff did not provide any additional evidence concerning the prior investigation.⁹ In her responses to interrogatories and requests for admissions, Ms. Talano acknowledged “one previous investigation” on this contract and, while she “did not recall the degree to which I contested this ruling,” she said she had paid the \$5,717.24 as Plaintiff alleged. (*See* Mary Talano, Answer to Interrogatory #10 and Response to Request for Admission #18, Jul. 30, 2015). This prior wage violation, which should have served as a warning and put Respondents on notice to be more diligent, negates establishing a good compliance history.

Finally, this prong requires that I evaluate whether the Respondents have made sufficient assurances of future compliance. Mr. Moradi noted in his declaration that in the course of his investigation he ascertained that “Respondent Mary Talano refused to comply in the future with the SCA.” (EX 2, p. 4). This alone is sufficient to find that there is no assurance of future compliance. I note, too, that Respondent Jeffery Talano offered no assurance of future compliance. In his February 23, 2016 Response, he said:

As for the previous EXTORTION payment to the drivers on this run in the last “go around” with the dol thieves; I was TOTALLY opposed to paying it because I am infinitely more familiar with the lies, treachery, and rico-hobbs criminality that is our government (generally) ... with a special emphasis on its lawyers/goons.

⁹ Plaintiff refers to another investigation on a mail hauling contract in Louisiana; however, no dates or details are provided. (Motion, p. 6). I decline to consider that alleged incident here.

However, my mother was of the mistaken belief that if she just paid the money THAT TIME, that the government goons would then leave her alone !! lol !!

Well, she is learning the true nature of government goons and their vampire like perpetual bloodlust first hand now !! and thanks to them she no longer considers government fair or benevolent !! LOL !! so perhaps I owe the goons a “thank you” on that account !!

the fact of the matter is that we should sue the government in the federal court under the racketeering statutes and civil rights laws for their extortion of my mother the last time ... (but we may end up in front of some moron criminal like [Judge Frank H.] Easterbrook as the 7th circuit is this area's federal appeals court.)

(Jeffery Talano Response, Feb. 23, 2016, p. 4-5) (emphasis in original).

Overall, I find that Respondents' past violation of the SCA, their failure to comply after having been put on notice that they needed to exercise greater care with respect to the calculation of wages, and their statements that clearly evidence no intention of complying with the SCA in the future weigh heavily against granting relief from debarment under this prong of the test. As explained before, debarment is meant to end patterns of noncompliance and force employers to take SCA requirements seriously.¹⁰ I find that such action is appropriate under the circumstances presented here.

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 shifts to consideration of:

“...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).

If these factors are in the violator's favor, it 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 Respondents' actions. As discussed above, Respondents have a history of previous violations

¹⁰ The U.S. Government's System for Award Management (SAM) shows that Respondent Jeffery Talano was previously debarred from February 28, 1996 to February 27, 1999 for violating the SCA. Available online at: <https://www.sam.gov/portal/SAM>.

under the Act. They also failed to keep complete and accurate records, which impeded the ability to establish the actual hours Mr. McLeod and Mr. Sobieski worked.¹¹

Therefore, I find that the Respondents failed to make a persuasive case for “unusual circumstances” at each of the three steps of analysis. In the absence of unusual circumstances, the SCA requires the Respondents’ 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.

“The Act expressly provides that the three year debarment period runs from the date of publication of the violator’s name on the debarment list.” *Cimpi v. Dole*, 739 F.Supp. 25, 27 (D.D.C. 1990) (citing 41 U.S.C.A. § 354(a), now 41 U.S.C.A. § 6706(b)). Where respondents have been found to have violated the SCA, the ALJ’s jurisdiction with regard to debarment is limited under the SCA’s implementing regulations to “includ[ing] in his/her decision an order as to whether the respondents are to be relieved from the ineligible list as provided in section 5(a) of the Act [41 U.S.C.A. § 6706], and, if relief is ordered, findings of the unusual circumstances, within the meaning of section 5(a) of the Act, which are the basis therefor.” 29 C.F.R. § 6.19(b)(2). Within 90 days following an ALJ’s final decision, or the Board’s final decision if the ALJ’s decision is appealed, the Administrator is required to forward the names of any respondents found in violation of the SCA to the Comptroller General “unless such decision orders relief from the ineligible list because of unusual circumstances.” 29 C.F.R. § 6.21(a). Beyond the foregoing, neither the ALJ nor the Board has authority with regard to debarment. *Administrator v. 5 Star Forestry, LLC*, ARB Case No, 14-021 (Jun. 24, 2015).

ORDER

1. The Secretary’s Motion for Summary Judgement is **GRANTED**, the hearing scheduled for April 26, 2016, in South Bend, Indiana, is **CANCELED**, and the following relief is **ORDERED**.
2. Respondents violated the Service Contract Act and its implementing regulations by failing to pay Robert McLeod and Michael Sobieski wages and fringe benefits for the actual hours they worked in the performance of contract HCR 49334 during the period February 3, 2013 to March 29, 2014. Respondents owe Robert McLeod \$1,020.88 (\$769.24 in wages and \$251.64 in fringe benefits). Respondents owe Michael Sobieski \$716.50 (\$428.07 in wages and \$288.43 in fringe benefits). The total amount Respondents are ordered to pay under the authority of 41 U.S.C. § 6705 is \$1,737.38.
3. Respondents did not meet their burden of establishing “unusual circumstances” that would justify relief from the three-year debarment period established by 41 U.S.C. § 6706. Therefore, debarment is warranted and the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, should forward the names of the Respondents – Material Management, LLC; Mary Talano and Jeffery Talano – to the

¹¹ In her response to Plaintiff’s request for admissions, Ms. Talano confirmed that there were no records of the hours her employees worked for the week ending March 2, 2013 and the period December 14, 2013 to February 1, 2014. (See Response to Request for Admissions number 20 and 21).

Comptroller General for inclusion on the list of parties ineligible to receive Federal contracts for violating the Service Contract Act.

SO ORDERED.

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.

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, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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). However, if you e-File your petition, only one copy need be uploaded.

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).