

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 May 2020

CASE NO.: 2017-SCA-00006

In the Matter of:

ADMINISTRATOR, WAGE & HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,
Complainant,

v.

HEARN'S ENTERPRISES, LLC, and
NICK HEARN, and
ELENA HEARN,
Respondents.

Appearances: Emelda Medrano, Esq.
Wage and Hour Division, U. S. Department of Labor
for Complainant

Nick Hearn and Elena Hearn, *in pro per*
for Respondents

Before: PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

DECISION AND ORDER

This case arises under the provisions of the McNamara-O'Hara Service Contract Act, as amended ("SCA" or "Act"), 41 U.S.C. § 6701 (formerly 41 U.S.C. § 351, *et seq.*) and the federal regulations found at 29 C.F.R. Part 4. The Administrator, Wage and Hour Division, United States Department of Labor ("Administrator") filed a Complaint against Hearn's Enterprises, LLC, Nick Hearn, and Elena Hearn ("Respondents") on May 31, 2017 alleging violations of the Act.

The findings of fact and conclusions of law contained herein are based upon my analysis of the entire record, the arguments of the parties, the applicable regulations, statutes, and case law, and my observation of the

demeanor of the witnesses who testified at the hearing. Because this case originally arose in the State of Michigan, Sixth Circuit law applies to this claim.

Procedural History

On May 31, 2017, the Administrator filed a Complaint against the above-named Respondents alleging violations of the Act. The Administrator alleged that Respondents had failed to pay a total of \$31,641.80 in wages and health and welfare benefits to 12 employees working under two contracts that Respondents had entered into with the U.S. Postal Service. The Administrator alleged that Respondents had failed to pay nine employees the correct wages, and had failed to pay those nine employees and three additional employees the correct amount of health and welfare benefits due under the contracts. The Administrator sought an order requiring payment of the unpaid wages and health and welfare benefits, and debarring Respondents for a period of three years.

After this case was docketed in the Office of Administrative Law Judges on June 1, 2017, Respondents filed a timely answer. The case was thereafter assigned to me, and I scheduled a hearing for October 17, 2017. The hearing was continued by order dated August 1, 2017 because of Respondents' counsel's busy trial schedule and because the parties desired additional time to complete discovery. Shortly thereafter, I granted the motion of Respondents' counsel to withdraw. Respondents' second attorney filed a Notice of Appearance on November 13, 2017, and I thereafter granted the parties' joint motion to extend the deadline to complete discovery due to the need for Respondents' counsel to come up to speed on the case. On January 25, 2018, I granted the parties' second joint motion for extension of time and extended the deadlines for completion of discovery and for filing dispositive motions. As no dispositive motions were filed, on March 29, 2018, I set a new hearing date of June 14, 2018 in Grand Rapids, Michigan.

On May 29, 2018, Respondents filed a motion to dismiss on the grounds that their new attorney had passed away unexpectedly. I denied the motion to dismiss, but canceled the hearing and ordered the parties to attend a pre-hearing conference on the previously-scheduled hearing date. At the pre-hearing conference, the parties agreed to the appointment of a settlement judge. On July 2, 2018, the Chief Administrative Law Judge appointed a settlement judge, who conducted settlement proceedings that concluded on September 6, 2018 without the parties reaching a settlement.

After I set a new deadline for dispositive motions, both the Administrator and Respondents filed motions for summary decision, and on February 5, 2019, I issued an order partially granting the Administrator's motion and denying Respondents' motion. The hearing to address the remaining issues took place on March 13 and 14, 2019 in Grand Rapids, Michigan. At the

hearing, the parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. Respondents and counsel for the Administrator attended the hearing. Ten witnesses testified at the hearing, including Respondents Elena Hearn and Nick Hearn; Emelda Medrano, counsel for the Administrator; Nick Moradi, Wage and Hour Investigator; and six drivers who worked for Respondents. Administrator's Exhibits ("AX") A-N were admitted, and I determined that I would consider the exhibits submitted by Respondents with their motion for summary decision as if they were introduced at the hearing. (Transcript of Hearing ("Tr.") at pp. 8-9. The parties filed timely post-hearing briefs.

Issues and Stipulations

In granting partial summary decision, I found that both Nick Hearn and Elena Hearn are "parties responsible" within the meaning of the Act, and I additionally found that Respondents owe five employees back wages as follows under the two contracts at issue here:

- a. Frank Childs - \$65.36
- b. Elliott Claybrook - \$3.83
- c. Anthony Smith - \$8.72
- d. Brett Springsteen - \$8.72
- e. Anthony Verburg - \$209.16

Accordingly, the following issues remain in dispute:

1. Whether Respondents failed to pay the correct amount of prevailing wages to four additional service employees, and failed to pay the correct amount of health and welfare benefits to 12 of their service employees?
2. If yes, the amount of prevailing wages and health and welfare benefits due to Respondents' service employees under the Act.
3. Whether Respondents have established "unusual circumstances" to warrant relief from debarment from entering contracts with the United States government for three (3) years as a result of the violations of the Act and regulations.

There is no dispute, and I find, that Respondent Hearn's Enterprises entered into two contracts with the United States Postal Service for mail hauling services, both of which were to be performed by "service employees" under the Act. In addition, there is no dispute, and I find, that (except as noted below) each of the employees named in the complaint is a service employee who worked for Hearn's Enterprises under one or both contracts.

Legal Standards

Service Contract Act

Under the Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.*, every contract entered into by the government of the United States over the amount of \$2,500.00, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following: (1) a provision specifying the minimum monetary wages to be paid under the contract; (2) a provision specifying the health and welfare benefits to be furnished to service employees; (3) a provision prohibiting performance under the contract where occupational health and safety standards are not met; (4) a provision requiring the contractor to deliver notice of compensation; and (5) a statement that certain wage determinations will be made by the Secretary of Labor where applicable. Any violation of required contract stipulations renders the responsible party liable for underpayments of compensation owed to an employee and could result in cancellation of the contract. In the event of a violation, the responsible parties are barred for a period of three years from entering into contracts with the United States, starting from the date of publication of the list of barred parties by the Comptroller-General, unless the Secretary of Labor determines otherwise based on unusual circumstances. *See* 41 U.S.C. §351 *et seq.*

In the present case, Respondents admitted in their Answer that they entered into two contracts with the U.S. Postal Service (AX B), and that contract number 485DA was in excess of \$2,500 and subject to the SCA. Respondents further admitted that they entered into contract number 500M2, and that it was in excess of \$,500 and subject to the SCA. [AX J, p. 4.] Respondents additionally admitted that each contract was to be performed by service employees.

Establishment of a Compensable Violation

The Administrator of the Wage and Hour Division of the United States Department of Labor, as the party that initiated and brought the enforcement case, has the initial burden of proof of establishing that the employees performed work for which they were improperly compensated. *In the Matter of VGA, Inc.*, ARB No. 09-077, 2006-SCA-00009 (ARB Sept. 29, 2011). The Administrator satisfies that burden if she proves that employees have in fact performed work for which they were improperly compensated and if she produces sufficient evidence to show the amount and extent of that work through reasonable inference. The burden then shifts to the employer to show evidence of the precise amount of work performed or with other evidence to

negate the inference. If the employer fails to show this, a judge may award damages to the employee, even if the amount of damages is only approximated. *VGA, Inc.*, supra, quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). According to the U.S. Supreme Court in *Anderson*, the employer has the duty to keep proper record of wages, hours, and other conditions and practices of employment, and is in the best position to know the most probative facts concerning the nature and amount of work performed. *Anderson*, 328 U.S. at 687-88. As a consequence, employees are not penalized by denying back wages simply because the employer's documentation is incomplete or inaccurate. *Id.*, quoted in *Cody Ziegler Inc. v. Administrator, Wage and Hour Division*, ARB No. 01-014 and 01-015, 1997-DBA-00017 (ARB Dec. 19, 2003).¹

Findings of Fact and Conclusions of Law

A. Wages and Health and Welfare Benefits

The first contract, numbered 500M2, was awarded to Hearn's Enterprises effective July 1, 2009; it obliged Hearn's Enterprises to provide mail hauling services from the post office in Des Moines, Iowa to the Grand Rapids, Michigan Processing Annex. [AX C.] The second contract, numbered 485DA, was awarded to Hearn's Enterprises effective July 1, 2013, and it obliged Hearn's Enterprises to provide mail hauling services from the post office in Flint, Michigan to Flint's Annex. [AX D.] The Administrator refers to the former as the "Iowa Contract" and the latter as the "Flint Contract," and I will do likewise.

The Iowa Contract required Hearn's Enterprises to pay the wages and health and welfare benefits set forth in the Secretary's Wage Determination No. 1977-0196, Revisions 54 and 59.² The Flint Contract required Hearn's Enterprises to pay its drivers the wages and health and welfare benefits set forth in the Secretary's Wage Determination No. 1977-0196, Revision 59. Revision No. 54, promulgated on February 9, 2011, provided that federal contractors must pay Tractor Trailer Drivers \$19.03 per hour in wages and \$4.65 per hour in health and welfare benefits. Revision No. 59, promulgated on December 27, 2012, provided that federal contractors must (1) pay Tractor Trailer Drivers \$19.24 per hour in wages and \$4.98 per hour in health and welfare benefits, and (2) pay other Truck Drivers \$17.43 per hour in wages and \$4.98 per hour in health and welfare benefits. [AX C, pp. 26 and 44; AX D; p. 29.]

¹ In the current case, I will also consider the fact that some documentation may have become lost, missing, or inaccessible after the seizure of Moser's office records by the U.S. Postal Service Police. Where Respondents' testimony is more specific or more credible than conflicting written documentation, I will weigh the evidence below.

² Although it is not explicitly stated, it appears that the rates required by Revision No. 59 became effective as to Contract 500M2 when it was renewed as of July 1, 2013. [AX C, p. 48.]

Wage and Hour Investigator Nick Moradi reviewed Respondents' records in order to determine whether Hearn's Enterprises complied with its contractual obligations. His investigation covered the period December 22, 2012 through December 20, 2014. [Hearing Transcript ("Tr.") pp. 46-55. In the course of his investigation, Mr. Moradi reviewed Respondents' business records, interviewed Respondents' employees and managers, and compared that evidence to the contract requirements. [Tr. 33-56.] By agreement with Respondents and their original counsel, Mr. Moradi used the employees' timesheets to determine the number of hours the employees worked. [Tr. 69-71.]³

Utilizing the contract wage and benefits rates, Mr. Moradi calculated that Respondents had failed to pay the correct wages to nine of Respondents' drivers, and had failed to pay the correct health and welfare benefits to those nine and an additional three of Respondents' drivers. He calculated that Respondents owed \$2,614.41 in back wages to nine drivers, and a total of \$29,027.39 in health and welfare benefits to 12 drivers. [AX H, I.] Those calculations form the basis of the Administrator's complaint, and are the beginning of my analysis. The amount of wages (if any), and the amount of health and welfare benefits (if any), will be addressed by driver.

In calculating the amount of health and welfare benefits that are due, I first note that there are large discrepancies between the charges made by Blue Cross/Blue Shield (AX F) and the insurance premium checks written by Respondents (Undesignated exhibit in Respondents' opposition to the Administrator's motion for summary decision). I accept the Blue Cross/Blue Shield charges as set forth in AX F as the best evidence of the value of the health insurance coverage provided to Respondents' drivers. Those charges are specific to the individual employees, unlike the premium checks and unlike the partial lists of employees submitted by Respondents. Additionally, I affirm my conclusion in the order granting partial summary decision that Respondents are not entitled to any overpayment of either wages or health and welfare benefits. There is any number of ways to calculate the amount that is due. After considering several, I have determined that I will calculate the total number of hours, up to 40 hours per week, that a driver worked, for (1) periods that the driver was not covered by Respondents' Blue Cross/Blue Shield health insurance policy, and (2) periods that the employee was covered by the policy. For the periods that the employee was not covered by the policy, I will multiply the number of hours by the hourly rate for health and welfare benefits at the time the hours were worked. For the periods that the employee was not covered by the insurance policy, I will calculate the total number of hours and multiply that total by the applicable hourly rate, and then deduct the amount of insurance premiums paid by Respondents to Blue Cross/Blue Shield during

³ I agree with the parties that the employee timesheets are the best evidence of the hours actually worked.

that period. This may, as a practical matter, result in a small credit for overpayment, because premiums are paid monthly while hours are calculated weekly. But that is an incidental result of the calculation method, and not a finding that Respondents are entitled to any overpayment. And because there is not a precise overlap between work weeks and benefit periods, I will pro-rate the benefit payments to the extent necessary. Finally, in the below discussions of health and welfare benefits, reference to “40-hour” weeks is intended to mean weeks in which the employee worked 40 or more hours, and is therefore entitled to 40 hours of health and welfare benefit payments.

David Allen

The Administrator alleges that Respondents owe no back wages to Mr. Allen, but owe him \$131.18 in health and welfare benefits. Specifically, the Administrator argues that Respondents failed to pay Mr. Allen any health and welfare benefits for the pay period from June 23 to July 6, 2013, with a pay date of July 12, 2013; that Mr. Allen worked 26.5 hours that pay period; and that based on the hourly health and welfare benefits rate under the Flint contract, the total owed to Mr. Allen is \$131.18.

The evidence of record includes a pay stub for the pay period in question, which demonstrates that Mr. Allen did work 26.5 hours. Nothing on the pay stub shows whether Respondents paid any health and welfare benefits. Mr. Moradi explained that in the absence of any amount listed for health and welfare benefits on a pay stub, he would look for other evidence that the benefits were provided some other way. [Tr. 42-43.] Here, AX F consists of the premiums paid by Respondents to a health insurance carrier, listing each employee on whose behalf premiums were paid – and therefore each employee who was covered by the health insurance policy – for a number of time periods. For the pay period involved in Mr. Allen’s case, AX F shows that he was not listed as a covered employee.

The worksheet prepared by the investigator, AX I, shows that Mr. Allen received health and welfare benefit payments for all other pay periods, totaling more than 70, that were examined by the investigator.

Mr. Allen testified at the hearing (Tr. 178-183) that any pay he received was reflected on his pay stubs. He did not receive any additional payments in cash, check, or otherwise. In addition, he testified that he drove the “Cody Station” route at all times that he was employed by Hearn’s Enterprises. Mr. Allen testified that he drove a box truck when driving that route, and described the route as going from 4:15 a.m. to 7:30 a.m. and 3:50 p.m. to 6:05 p.m. His description of the route he drove corresponds to the route specified for the Flint contract. [AX D, p. 6.]

From the evidence of record, I find and conclude that Mr. Allen did not receive payment in lieu of health and welfare benefits, and did not have health and benefits otherwise provided, for the 26.5 hours he drove during the pay period from June 23 through July 6, 2013. His duties were provided under the Flint contract, which requires health and welfare benefits at a rate of \$4.98 per hour, up to 40 hours in a work week. As Mr. Allen was not covered under Respondent's health insurance plan for the week in question, Respondents were required to pay him the cash equivalent for the hours worked. 29 C.F.R. § 4.175(c)(1). They did not.

However, the contract applicable to Mr. Allen – the Flint contract – was effective for the period from July 1, 2013 through June 30, 2017. [AX D, pp. 2 and 3.] The pay period at issue was from June 23 through July 1, 2013. The period from June 23 – June 30, therefore, was not covered under the only Flint contract in evidence. But Mr. Allen worked no hours for the week ending June 29 (AX I), and only 0.25 hours on June 30. [AX I.] He worked a total of 26.25 hours between July 1 and July 6. At an hourly health and welfare benefit rate of \$4.98, I find that he is entitled to \$130.73 for that period.

Jeff Blair-Bey

The Administrator alleges that Mr. Blair-Bey is entitled to \$183.02 in back wage and \$3,151.90 in health and welfare benefits; however, the evidence establishes that he did not provide services under either of the contracts at issue in this matter.

Mr. Blair-Bey testified at the hearing that he worked for Respondents from January to August or September of 2013, and that he drove a route among Holly, Fenton, Linden, Pontiac, Metroplex, and Flint. He testified that he worked a split shift, from 3:00 a.m. to 7:30 or 8:00 a.m., and again from 3:00 p.m. to 8:00 p.m. or 9:00 p.m. He was paid for 55 hours of work per week, or 110 hours biweekly. [Tr. pp. 110-123.] Mr. Blair-Bey provided the same information in a declaration prepared a few months before the hearing. [AX N.]

Elena Hearn testified that Mr. Blair-Bey did not work under contract number 485DA, but instead worked under contract number 484M4. [Tr., pp. 198-199.]

Contract number 485DA specifies the routes that are included in its scope. The routes include stops at several different locations in Flint, as well as locations in Davison, Grand Blanc, Atlas, Goodrich, and Ortonville, Michigan. [AX D.] The contract does not require driving to any of the cities that Mr. Blair-Bey identified as his route, and Mr. Blair-Bey specifically denied that he ever drove to Ortonville as part of his regular route. [Tr., p. 119.] He did say that he may have driven to Ortonville as a “fill-in”; however, he did not specify what

dates he did so, and the documentary evidence related to his working hours (EX E) doesn't either.

In AX I, the spreadsheet relating to Mr. Blair-Bey indicated that he worked under the Flint contract (485DA). Mr. Moradi testified that he placed the information on the spreadsheet after reviewing Respondents' timesheets and payrolls. He explained that he determined which contract a driver worked under by interviewing the driver about the routes, and examining the timesheets and pay stubs. [Tr., pp. 55-56.] With respect to Mr. Blair-Bey, Mr. Moradi used the notation on the driver's log that the location was "Flint" as part of his determination that he worked on the Flint contract. [*Id.*, p 56.]

Although AX I, the spreadsheet prepared by Mr. Moradi, shows that Mr. Blair-Bey provided services under contract number 485DA, I find that that conclusion by Mr. Moradi amounts to more than an assumption. It is contradicted by the testimony and declaration of Mr. Blair-Bey and the testimony of Elena Hearn. It is of no value in establishing that Mr. Blair-Bey provided services under the Flint contract.

I find and conclude that the Administrator has failed to show that Mr. Blair-Bey provided services under either contract involved in this matter. Both at the hearing and in written closing argument, the Administrator suggests only that Respondents did not make the claim that Mr. Blair-Bey's services were not provided under the Flint contract at any time during the lengthy proceedings until the hearing itself. That may be true, but it is without legal significance: the facts adduced from the Administrator's own witnesses and evidence, and from the Respondents, establish beyond any dispute that Mr. Blair-Bey's services were provided under a different contract that is not at issue here. Accordingly, I find that the Administrator has not established an underpayment to Mr. Blair-Bey under contract 500MD or contract 485DA.

Frank Childs

As was the case with Mr. Blair-Bey, the evidence establishes that Mr. Childs did not perform services under either of the contracts at issue, and he is therefore entitled to no payment.

Mr. Childs did not testify at the hearing. The Administrator's evidence includes a declaration from him, stating that while employed by Hearn's Enterprises, he worked a split shift from 3:00 a.m. to 7:00 a.m. and from 3:00 p.m. to 8:00 p.m. He described the route he drove in the morning shift as starting in Flint, and taking him to Linden, Holley, and the Annex in Pontiac. He described the route he drove in the afternoon shift as taking him from Flint to Linden, Fenton, Holly, the Metroplex in Pontiac, back to Holly and Linden, and returning to Flint. [AX N, p. 3.] As discussed above, the Flint contract requires routes that are to entirely different locations.

Elena Hearn testified at the hearing that Mr. Childs, like Mr. Blair-Bey, did not work under contract number 485DA, but worked under contract number 484M4, which, like contract number 485DA, also covered routes that originated in Flint.

The only evidence tending to show that Mr. Childs performed services under the Flint contract is in AX I, the spreadsheet prepared by Mr. Moradi. But again, for the reasons set forth in the discussion of Mr. Blair-Bey, I do not credit this evidence.

As was the case with Mr. Blair-Bey, I find and conclude that the Administrator has not shown that Mr. Childs performed services under either of the contracts involved in this matter. And the Administrator's objection to Respondents waiting until the date of the hearing to raise the issue is, as discussed above, without merit.

Accordingly, I find that the Administrator has not established an underpayment to Mr. Childs under either of the contracts at issue here.

However, in the order granting summary decision, I found that Mr. Childs is entitled to payment of \$65.36 in unpaid wages. That order was based on the evidence presented at the time, which did not include any evidence that Mr. Childs did not perform services under the Flint or the Iowa contract. Had I denied summary decision and made findings on the evidence presented at the hearing, I would have found that Mr. Childs is not entitled to that \$65.36 because he did not perform services under either of the contracts involved herein. As Respondents are self-represented and not trained in the procedural rules of litigation, I will excuse them for not having filed a motion for reconsideration on this issue. They did the functional equivalent by raising the issue at the hearing. And indeed it was the Administrator's own evidence – Mr. Childs's declaration – that alerted them to the issue. Because it is clear that Mr. Childs did not perform services under either of the contracts at issue here, I vacate the portion of the order granting summary decision to the extent that it found that Mr. Childs is entitled to \$65.36 in unpaid wages, and hold that he is not entitled to any payment under either contract at issue here.⁴

Elliott Claybrook

⁴ Arguably, counsel for the Administrator could have presented different evidence at the hearing had she been on notice that this issue would be raised. But I don't see how that can be the case; my findings with respect to the health and welfare benefits are based on the same evidence that would have been dispositive as to wages, and the Administrator made no effort to contradict that evidence even after the hearing.

In my order granting partial summary decision, I found that Mr. Claybrook is entitled to \$3.83 in unpaid wages. The issue to be determined now is whether he is also entitled to unpaid health and welfare benefits. The Administrator has alleged that he is entitled to \$5,207.83.

Mr. Claybrook performed services under the Flint contract, which requires payment of health and welfare benefits at the rate of \$4.98 per hour for each hour worked, up to 40 hours in any one week.

After reviewing the timesheets, driver logs, and insurance information provided by Respondents, Mr. Moradi determined that Mr. Claybrook was covered under Respondents' health insurance policy provided by Blue Cross/Blue Shield for the period from mid-April through December of 2014. Mr. Moradi also determined that Mr. Claybrook was not provided with health insurance for the period from December of 2013 through April of 2014. Mr. Moradi credibly testified that he made these determinations from records provided to him by Respondents. Although the payroll records were not included in the hearing evidence, I find that Mr. Moradi's testimony was reliable and I credit it.⁵ However, AX F, showing the employees who were covered under the Blue Cross/Blue Shield policy, demonstrates that Mr. Claybrook was included as of March 15, 2014, rather than mid-April, and continued to be included through the end of the investigation period, December 20, 2014.

December 22, 2014 – March 14, 2014

For the period from December 22, 2013⁶ through March 14, 2014, when Mr. Claybrook was not included in the insurance policy provided by Respondents, he is entitled to payment of \$4.98 per hour for each hour he worked up to 40 hours per week. 29 C.F.R. § 4.175(a). That period of time encompasses 12 weeks during which he worked more than 40 hours per week. He is therefore entitled to \$2,390.40 (12 weeks x 40 hours/wk x \$4.98/hr) for that period of time.

March 15, 2014 – December 20, 2014

For the period from March 15, 2014 through December 20, 2014, Mr. Claybrook is entitled to payment of \$4.98 per hour for each hour he worked up to 40 hours per week, reduced by the amount that Respondents paid for his health insurance coverage during that period of time. 29 C.F.R. § 4.175(c). According to AX I, Mr. Claybrook worked 37 weeks of 40 or more hours, and one week of 17.70 hours. At \$4.98 per hour, the total entitlement is \$7,458.55.

⁵ This credibility determination applies to the spreadsheet as it relates to all employees.

⁶ AX I starts with the week ending December 28, 2013. The first day of that week was Sunday, December 22, 2013.

During that period of time, however, Respondents paid Blue Cross/Blue Shield premiums on behalf of Mr. Claybrook. From March 15 – December 14, Respondents paid a total of \$5,050.42 to Blue Cross/Blue Shield for Mr. Claybrook’s health insurance coverage.

Respondents also paid \$503.76 for Mr. Claybrook’s health coverage for the period between December 15, 2014 and January 14, 2015. The investigation period, however, ended on Saturday, December 20, 2014. The period between December 20 and January 14 is 25 days, while the coverage period was 30 days long. Respondents are credited with paying a health insurance premium equal to one-sixth (5/30 days) of the \$503.76 monthly payment for that period, or \$83.96. Mr. Claybrook is entitled to payment of \$7,458.55 less \$5,134.38 paid by Respondents to Blue Cross/Blue Shield for health insurance. For the period between March 15 and December 20, 2014, Mr. Claybrook is entitled to \$2,324.17.

Adding the amount for December 22, 2013 – March 14, 2014 to the amount for March 15, 2014 – December 20, 2014, Mr. Claybrook is entitled to a total of \$4,713.57 in health and welfare benefits.

In summary, I find that Mr. Claybrook is entitled to \$3.83 in wages and \$4,713.57 in health and welfare benefits, for a total payment to him of \$4,717.40.

Ralph Cummins

Wages

The Administrator contends that Respondents owe Mr. Cummins \$248.86 in back wages, based on a underpayment of six hours’ work during the week ending on February 9, 2013, three hours during the week ending on July 12, 2014, three hours during the week ending on July 26, 2014, and one hour for the week ending on November 15, 2014. There is no dispute that Mr. Cummins performed services under the Iowa contract, which provided for hourly wages of \$19.03 before July 1, 2013 and \$19.24 thereafter. Applying those hourly rates to the alleged hours that were not paid results in the Administrator’s figure of \$248.86.

AX E includes time sheets and pay stubs relating to Mr. Cummins. For the pay period ending February 16, 2013, the total number of hours recorded for Mr. Cummins on his was either 80 or 86 hours. For the week ending February 9, the timesheet shows one shift of 16 hours and two shifts of 10 hours, which totals 36 hours for the week, but the “weekly total” column shows a figure of 30 hours. There is no similar discrepancy for the following week, which was the second in the bi-weekly pay period. [AX E, Cummins pp. 1-2.] AX E does not include a pay stub for this period of time. Mr. Cummins testified

at the hearing that the figures on the timesheets for the two weeks ending on February 16 were in his handwriting and bore his signature. [Tr., pp. 169-170.] As discussed above, I credit Mr. Moradi's testimony concerning his preparation of the spreadsheet.

By the foregoing evidence, the Administrator has met her burden of showing that Mr. Cummins performed work for which he was improperly compensated and is sufficient evidence to show the amount and extent of that work through reasonable inference. The burden now shifts to Respondents to show evidence of the precise amount of work performed or with other evidence to negate the inference. This the Respondents have failed to do. In their opposition to the Administrator's motion for summary decision, Respondents included a spreadsheet purportedly showing that Mr. Cummins worked only 30 hours, not 36 hours, during the week ending February 9, 2013. But they provided no explanation for the discrepancy. I conclude that Respondents used the incorrect number that Mr. Cummins wrote in the "weekly total" column – 36 hours – rather than verifying his addition. Mr. Cummins noted a further explanation of the six-hour difference: he had a total of six hours of wait time and repair time on one of his work days that week. There is no suggestion that he is not entitled to be paid for the time he spent waiting for a repair, and I conclude that he was not paid for six hours of work. In February of 2013, his hourly rate was \$19.03 under the Iowa contract, so he is entitled to \$114.18 in unpaid wages for the week ending February 9, 2013.

The Administrator has likewise met her burden to show that Mr. Cummins was underpaid for the weeks ending July 12 and 26, 2014 and November 15, 2014, for a total of seven hours. Respondents offered no contrary evidence, except for their spreadsheet showing that Mr. Cummins was underpaid \$17.72 for the week ending July 12, 2014; but as noted in my order granting partial summary decision, that was clearly a typographical error. At the post-July 1, 2013 hourly rate of \$19.24, three hours of work would earn \$57.72 rather than \$17.72. Mr. Cummins is entitled to seven hours of pay that he was not paid for the weeks ending July 12, July 26, and November 15, 2014 at \$19.24 per hour for a total of \$134.68. Added to the unpaid wages for February of 2013, Mr. Cummins is entitled to \$248.86 in unpaid wages.

Health and Welfare Benefits

The spreadsheet prepared by Mr. Moradi, which I credit, shows that Mr. Cummins was covered by Respondents' policy with Blue Cross/Blue Shield for the entire period of the investigation. He worked varying numbers of hours each of the 104 weeks, usually equaling or exceeding 40 hours per week, but occasionally working fewer than 40 hours. Under the Iowa contract, the hourly rate for health and welfare benefits was \$4.65 through June 30, 2013, and \$4.98 thereafter.

For the period from December 23, 2012 through June 30, 2013, Mr. Cummins worked a total of 15 40-hour weeks, seven 30-hour weeks, and one 36-hour week, as well as 10 hours on June 30, for a total of 856 hours. [AX I.] Multiplied by \$4.65 in health and welfare benefits, he was entitled to \$3,980.40 in health and welfare benefits. For the period from January 15, 2013 through June 14, 2013, Respondents paid Blue Cross/Blue Cross a total of \$3,083.75 for Mr. Cummins's coverage. [AX F.] The pro-rated premium for the period December 23, 2012-January 14, 2013 (22 days) is calculated to be \$452.28. The pro-rated premium for the period June 15-30, 2013 (16 days) is calculated to be \$328.93. Thus, for the period from December 23, 2012 through June 30, 2013, the total of \$3,980.40 is reduced by payments to Blue Cross/Blue Shield totaling \$3,864.96, leaving a balance of \$115.44 owed to Mr. Cummins.

For the period from July 1, 2013 through July 6, 2013, Mr. Cummins worked 50 hours, and would be entitled to 40 hours of health and welfare benefits but for the fact that the 10 hours worked on the first day of that week have already been counted above. He is therefore entitled to 30 additional hours of health and welfare benefits for the week of June 30-July 6, 2013, at the post-July 1 rate of \$4.98. Between July 7, 2013 and December 20, 2014, Mr. Cummins worked 56 40-hour weeks, 19 30-hour weeks, and one 20-hour week. Thus he worked 2,860 hours that qualified for health and welfare benefits for that period. At an hourly rate of \$4.98, that number of hours equates to \$14,282.80. For the period from July 1, 2013 to July 14, 2013 (14 days), Respondents paid Blue Cross/Blue Shield \$287.82 (pro-rated from the 30-day payment of \$616.75 for the period June 15 – June 30) for covering Mr. Cummins. Between July 15, 2013 and December 14, 2014, Respondents paid Blue Cross/Blue Shield \$11,952.37 for covering Mr. Cummins. Between December 15 and 20, 2014, Respondents paid a pro-rated amount of \$167.57 (6/31 of the total premium for December 15, 2014 and January 14, 2015). Respondents therefore provided health and welfare benefits in the total amount of \$12,407.76. Deducting that amount from the total entitlement of \$14,282.80 results in an underpayment of \$1,875.04, and I find that Mr. Cummins is owed that amount.

In summary, Mr. Cummins is owed \$284.86 in wages and \$1,875.04 in health and welfare benefits, for a total payment of \$2,159.90.

Craig Edwards

Wages

The Administrator alleges that Respondents owe Mr. Edwards \$192.40 in unpaid wages for the period between August 31, 2014 and December 6, 2014.⁷ Specifically, the Administrator alleges that Mr. Edwards worked for 30 hours during the week ending September 27, 2014. As Mr. Edwards performed services under the Iowa contract, he was entitled to wages of \$19.24 per hour; 10 hours at that hourly rate equals the Administrator's determination that he was underpaid by \$192.40.

Mr. Edwards' timesheet for the week ending September 27, 2014 reflects that he worked 10 hours on September 21, 23, and 27, for a total of 30 hours. [AX E, Edwards p. 1.] The same exhibit reflects that he worked 50 hours during the week ending September 20, 2014. Those two weeks total 80 hours, but the pay stub at AX E, Edwards p. 2 shows that Mr. Edwards was paid for 70 hours during that pay period. At the hearing, Mr. Edwards testified that he mistakenly wrote that he worked 10 hours on September 14, 2017; in fact, he was off that day. [Tr. 163.] Mr. Edwards was a credible witness, and I accept his testimony. Thus, for the two-week period ending on September 27, 2017, he worked a total of 70 hours, and he received pay based on 70 hours. He is not entitled to additional wages in this matter.

Health and Welfare Benefits

The mistaken entry of 10 hours' work on September 14, 2014, does not affect the calculation of health and welfare benefits. For the remainder of that week, Mr. Edwards worked 40 hours, and that is the maximum number of weekly hours for which Respondents are required to pay health and welfare benefits.

For the period between August 31 and December 5, 2014 (his last day of work), Mr. Edwards worked nine 40-hour weeks and five 30-hour weeks for purposes of calculating health and safety leave, for a total of 510 hours. Mr. Edwards is additionally entitled to 20 hours' health and welfare benefit payments for two holidays: Columbus Day and Thanksgiving (AX D, p 29), bringing the total to 530 hours. According to AX F, Respondents did not provide Mr. Edwards with any health and welfare benefits, and there is nothing to show that they paid Mr. Edwards the cash equivalent. Accordingly, Mr. Edwards is entitled to 530 hours at \$4.98 per hour, for a total of \$2,639.40, in health and welfare benefits.⁸

⁷ AX I shows that Mr. Edwards worked for Respondents beginning on the week ending on September 6, 2014; that week began on Sunday, August 31. His last week of work was the week ending on December 6, 2014.

⁸ At the hearing, I asked Mr. Edwards whether he was sure that he had not been provided health insurance by Respondents, and referred to EX F which showed that a Mr. Edwards was listed among the covered employees. [Tr. 164-165.] Upon closer review, the Edwards listed in EX F is not Craig Edwards, but Joseph R. Edwards. Craig Edwards is not shown on any page of EX F.

In summary, Mr. Edwards is entitled to no additional wages, and \$2,639.40 in health and welfare benefits, for a total of \$2,639.40.

Jack Platschorre

Wages

The Administrator alleges that Respondents owe Mr. Platschorre \$1,694.34. As noted in my order granting partial summary decision, Respondents agree that they owe him \$1,013.86. The difference between the two figures is equivalent to the differing amounts the parties claim are due to Mr. Platschorre for the weeks ending February 16, 2013, December 7, 2013, January 25, 2014, March 15, 2014 and May 17, 2014. Each of those weeks will be addressed below.

In addition, Respondents believe their liability should be reduced by \$57.09 for the week ending June 1, 2014 and another \$57.09 for the week ending June 8, 2014 because they allege the overpaid Mr. Platschorre by three hours in each of those weeks. I affirm my conclusion in the order granting partial summary decision that 29 C.F.R. § 4.165(a)(1) prohibits such a reduction.⁹

For the week ending February 16, 2013, Mr. Platschorre's timesheet shows that he worked 10.5 hours on each of four days, for a total of 42 hours. [EX E, Platschorre 1.] His timesheet for the previous week shows 55 hours of work, for a total for the pay period of 97 hours. The pay stub found at EX E, Platschorre 2 shows that he was paid for 91 hours of work for that pay period, a shortfall of six hours. In their opposition to the Administrator's motion for summary decision, Respondents gave detailed information concerning some of the discrepancies, but they did not address this one. And in their testimony at the hearing, neither Mr. Platschorre, Nick Hearn, nor Elena Hearn addressed this specific issue. Because the calculation by Mr. Moradi is uncontested, and is supported by his entries on AX I, I find that Mr. Platschorre is entitled to \$114.18 for the pay period ending February 16, 2013.

The parties' next disagreement concerns the week ending December 7, 2013. The Administrator contends that Mr. Platschorre is entitled to an additional \$105.82 for 5.5 hours of work. Respondents contend that he is entitled to no additional pay. AX I reflects that Mr. Platschorre worked 58.5 hours during that week, and was paid for only 53 hours. Although AX E, Platschorre, does not provide any other evidence to support those figures, I

⁹ In her closing brief, the Administrator argues that "\$114.18 is due to Mr. Platschorre for those weeks." This is incorrect: Mr. Platschorre was paid, and Respondents are seeking credit for that amount. It is a credit for overpayment that is at issue, not an underpayment.

credit Mr. Moradi's testimony that he obtained them from the timesheets provided by Respondents. And as Respondents have offered to contrary evidence, I find that the Administrator has carried her burden and that Mr. Platschorre is entitled to \$105.82 in additional pay.

For the week ending January 25, 2014, the Administrator contends that Mr. Platschorre is entitled to an additional \$192.40 for 10 hours' work. Again, AX I supports that conclusion, as it shows that Mr. Platschorre worked 27 hours and was paid for only 17 hours. AX I also shows that Mr. Platschorre worked 51 hours the following week; the pay stub in AX E, Platschorre p. 3 shows that he was paid for 68 hours for the pay period comprising those two weeks instead of the 78 hours reflected on his timesheet. Respondents offered no contrary evidence, and I find that the Administrator has carried her burden to show that Mr. Platschorre is entitled to an additional \$192.40 in wages.

For the week ending March 15, 2014, the Administrator contends that Mr. Platschorre is entitled to an additional \$86.58 for 4.5 hours' work. Again, AX I supports this conclusion, as it shows that Mr. Platschorre worked 63 hours that week and was paid for 58.5 hours. However, a review of the timesheet submitted by Mr. Platschorre for the week ending March 15 shows that he worked 11.5 hours on March 9, 11.5 hours on March 11, 12.5 hours on March 12, 11.5 hours on March 13, and 11 hours on March 14. This totals 58 hours, not the 63 hours reflected on the timesheet. There is a hand-written notation on the timesheet that the truck was "down for 4½ hours" on March 14, but based on the evidence of record it is not possible for me to determine whether that 4.5-hour period is included in the hours recorded on the timesheet for March 14, or is in addition to those hours. Because of the inconsistencies and inaccuracies on the timesheet, I find that the Administrator has not met her burden, and that Mr. Platschorre is entitled to no additional pay for the week ending March 15, 2014.

For the week ending May 17, 2014, the Administrator contends that Mr. Platschorre is entitled to an additional \$67.34 for 3.5 hours of unpaid work. Again, AX I tends to support that conclusion. Likewise, the timesheet prepared by Mr. Platschorre (EX E Platschorre, p. 4) shows that he worked 53 hours that week and 43.5 hours the following week, for a total of 96.5 hours, but the pay stub (*ibid.*) shows that he was paid for only 93 hours for those two weeks. Respondents offered no contrary evidence. Accordingly, I find that Mr. Platschorre is entitled to an additional \$67.34 for 3.5 hours worked during the week ending May 17, 2014.

In their response to the Administrator's motion for summary decision, Respondents alleged that Mr. Platschorre routinely recorded hour that he had not actually worked. They provided some examples, consisting of discrepancies between Mr. Platschorre's driver logs and his timesheets for a few days in late April and early May 2014. Those dates, however, are not in dispute. In the

absence of evidence that Mr. Platschorre submitted incorrect timesheets for the pay periods that actually are in dispute, I accept the figures set forth above.

The total amount of wages due to Mr. Platschorre is \$479.74 plus the uncontested amount of \$1,013.86 for a total of \$1,493.60.

Health and Welfare Benefits

The Administrator contends that Mr. Platschorre is entitled to an additional payment of \$2,329.62. Mr. Platschorre was included on Respondents' Blue Cross/Blue Shield health insurance policy for the entire time he worked for Respondents, but the Administrator calculated that the cost of that premiums paid on behalf of Mr. Platschorre policy was less than the health and welfare benefit payment required by the Iowa contract. Under the contract, health and welfare benefits were assessed at \$4.65 per hour before July 1, 2013, and at \$4.98 per hour on and after that date.

For the period between December 9, 2012 and June 30, 2013, Mr. Platschorre worked 21 40-hour weeks for a total of 840 hours, and five other weeks with varying numbers of hours totaling 161.5 hours. The total health and welfare benefit due for that period was therefore 1001.5 hours multiplied by \$4.65 per hour, or \$4,656.98. For the period from December 15, 2012 through June 14, 2013, Respondents paid Blue Cross/Blue Shield a total of \$3,700.50 in premiums for Mr. Platschorre's coverage. From June 15-30, 2013 (16 days), the pro-rated amount paid for Mr. Platschorre's coverage was \$328.93. Thus, for the period before June 30, 2013, when the health and welfare benefit changed, Respondents paid Blue Cross/Blue Shield a total of \$4,029.43. Mr. Platschorre is entitled to the difference between the amount due and the amount paid, amounting to \$627.55.

For the period beginning July 1, 2013 through the end of the investigation period, Mr. Platschorre worked 26 40-hour weeks for a total of 1040 hours, and 20 additional weeks with varying numbers of hours totaling 546.5 hours. The total health and welfare benefit due for that period was therefore 1,586.5 hours multiplied by \$4.98 per hour, or \$7,900.77. For July 1-14, 2013 (14 days), the pro-rated amount paid for Mr. Platschorre's health insurance coverage was \$287.82. For the period from July 15, 2013 to June 14, 2014, Respondents paid Blue Cross/Blue Shield \$6,990.51. For June 15-21, 2014 (7 days), Respondents paid a pro-rated amount of \$147.68; thus, for the period from July 1, 2013 through June 21, 2014 (Mr. Platschorre's last day of employment), Respondents paid \$7,426.01 for Mr. Platschorre's health insurance. Mr. Platschorre is entitled to the difference between the amount due and the amount paid, amounting to \$474.76.

Accordingly, I find and conclude that Mr. Platschorre is entitled to \$1,493.60 in wages and \$1,102.31 in health and welfare benefits, for a total amount due of \$2,595.91.

Michael Redick

Wages

The Administrator does not allege that Mr. Redick is owed any unpaid wages, and has presented no evidence that he is.

Health and Welfare Benefits

The Administrator alleges that Mr. Redick is owed \$2,038.77 in unpaid health and welfare benefits. There is no dispute that Mr. Redick provided services under the Flint contract, and that the contract required payment of health and welfare benefits at a rate of \$4.98 per hour. AX I shows that Mr. Redick worked for Respondents between July 1, 2013 and September 18, 2013. During that period of time, he worked 11 40-hour weeks and one 35-hour week, for a total of 475 hours. At \$4.98 per hour, he was entitled to health and welfare benefits totaling \$2,365.50. He was not covered under Respondents' health insurance policy with Blue Cross/Blue Shield until September 15, 2013, and therefore was covered for four days until the last day of his employment, September 18, 2013. The pro-rated premium paid by Respondents for that period of time amounts to \$85.02. Mr. Redick is entitled to the difference between the amount due and the amount paid, or \$2,280.48.

Anthony Smith

Wages

As I found on summary decision, Mr. Smith is owed \$8.72 in unpaid wages.

Health and Welfare Benefits

The Administrator alleges that Mr. Smith is owed \$5,668.89 in unpaid health and welfare benefits, based on an hourly rate of \$4.98 payable during the period from July 1, 2013¹⁰ through December 20, 2014. AX I shows that during that period of time, Mr. Smith worked 62 40-hour weeks, totaling 2,480 hours, and 14 additional weeks with varying numbers of hours totaling 517 hours. He is therefore entitled to health and welfare payments for 2,997 hours at \$4.98 per hour, or \$14,925.06. Respondents did not provide Blue

¹⁰ The Administrator's calculations begin with the week ending July 6, 2013. Mr. Smith's first day of work that week was July 1, 2013. [AX I.]

Cross/Blue Shield coverage for Mr. Smith at the beginning of his employment; specifically, he was not covered during the period from July 1 to September 14, 2013. From September 14, 2013 through December 14, 2014, Respondents paid Blue Cross/Blue Shield a total of \$8,866.90 to cover Mr. Smith. For the period from December 15-20, 2014 (6 days), Respondents paid a pro-rated amount of \$97.50. The total amount paid by Respondents for Mr. Smith's health insurance was \$8,964.40. Mr. Smith is entitled to the difference between the amount due and the amount paid by Respondents, which amounts to \$5,960.66.

Accordingly, I find and conclude that Mr. Smith is entitled to \$8.72 in wages and \$5,960.66 in health and welfare benefits, for a total of \$5,969.38.

Brett Springsteen

Wages

As I found on summary decision, Mr. Springsteen is owed \$8.72 in unpaid wages.

Health and Welfare Benefits

The Administrator alleges that Brett Springsteen is owed \$196.71 in health and welfare benefits. AX I shows that Mr. Springsteen worked 39.5 hours during the period from July 1 to July 6, 2013, was not paid a cash equivalent for his health and welfare benefit, and did not otherwise receive those benefits. The pay stub for this period is found at AX E Springsteen p. 1, and shows that Mr. Springsteen was paid wages, but no fringe benefits. Likewise, EX F shows that Mr. Springsteen was not included in the premium paid by Respondents to Blue Cross/Blue Shield for the period from June 15 to July 13, 2013. Accordingly, I find that Mr. Springsteen is entitled to health and welfare benefits in the amount of \$196.71 (39.5 hours at \$4.98 per hour).

Chad Springsteen

The Administrator does not allege that Chad Springsteen is owed any wages, but alleges that he is owed \$2,040.00 in health and welfare benefits. AX F demonstrates that Mr. Springsteen was not covered under Respondents' Blue Cross/Blue Shield policy until the premium beginning on September 15, 2013. Prior to that time, AX I demonstrates that Mr. Springsteen worked 6.25 hours on July 7, 2013, and a total of 293.98 hours over the next nine weeks of varying numbers of hours. AX I further demonstrates that he did not receive payment for those 300.23 hours, and is entitled to \$4.98 per hour for a total of \$1,495.15. For the period from September 15, 2013 through December 7, 2013, Mr. Springsteen worked 10 40-hour weeks and two additional weeks totaling 73.5 hours. For those 473.5 hours, the health and welfare benefits

total \$2,358.03. Respondents paid Blue Cross/Blue Shield on behalf of Mr. Springsteen the amount of \$1,275.32 for the period from September 15 to November 14, 2013. From November 14, 2013 to December 7, 2013 (24 days), Respondents paid a pro-rated amount of \$510.13; thus, for the period between September 15, 2013 and December 7, 2013 (the last day that Mr. Springsteen provided services), Respondents paid \$1,785.45 to Blue Cross/Blue Shield for Mr. Springsteen's health insurance. He is entitled to the difference between the amount due and the amount paid, or \$572.58.

Combining the amounts due for the period he was not covered by insurance, and for the period that he was covered by insurance, Mr. Springsteen is entitled to \$2,067.73 in health and welfare benefits.

Daniel Verburg

Wages

As found on summary decision, Mr. Verburg¹¹ is entitled to \$209.16 in unpaid wages.

Health and Welfare Benefits

The Administrator alleges that Mr. Verburg is entitled to \$2,235.24 in unpaid health and welfare benefits for the period between July 1, 2013 and June 14, 2014.¹² AX I demonstrates that Mr. Verburg began earning wages after July 1, 2013, and that the \$4.98 hourly rate for health and welfare benefits is applicable. AX F demonstrates that he was covered under the Blue Cross/Blue Shield policy beginning on September 15, 2013. AX I shows that for the period between July 1, 2013 and September 14, 2013, Mr. Verburg worked 11 weeks of less than 40 hours totaling 323.75 hours, entitling him to \$1,612.28 in cash in lieu of health and welfare benefits. Between September 15, 2013 and June 14, 2014, Mr. Verburg worked 39 weeks with varying hours – all less than 40 hours per week – totaling 1,278.34 hours. At \$4.98 per hour, Respondents were responsible for paying \$6,366.13 in health and welfare benefits. During that period, they paid Blue Cross/Blue Shield \$5,715.19 for Mr. Verburg's coverage. He is entitled to the difference of \$650.94. Added to the \$1,612.28 for the period during which Mr. Verburg was not covered by health insurance, he is entitled to health and welfare benefits of \$2,263.22.

Accordingly, I find and conclude that Mr. Verburg is entitled to \$209.16 in wages and \$2,263.22 in health and welfare benefits, for a total of \$2,872.38.

¹¹ Mr. Verburg was incorrectly identified as "Anthony Verburg" in the order granting summary decision. His correct name is "Daniel Verburg."

¹² The Administrator found that Respondents properly paid Mr. Verburg's health and welfare benefits for the period from June 15, 2014 through December 20, 2014.

Conclusion

In summary, I find that Respondents' employees are entitled to the following payments:

Employee	Back Wages	Health and Welfare Benefits	Total Due to Employee
David Allen	N/A	\$130.73	\$130.73
Jeff Blair-Bey	\$0.00	\$0.00	\$0.00
Frank Childs	\$0.00	\$0.00	\$0.00
Elliot Claybrook	\$3.83	\$4,713.57	\$4,717.40
Ralph Cummins	\$248.86	\$1,875.04	\$2,123.90
Craig Edwards	\$0.00	\$2,639.40	\$2,639.40
Jack Platschorre	\$1,493.60	\$1,102.31	\$2,595.91
Michael Redick	N/A	\$2,280.48	\$2,038.77
Anthony Smith	\$8.72	\$5,960.66	\$5,969.38
Brett Springsteen	\$8.72	\$196.71	\$205.43
Chad Springsteen	N/A	\$2,067.73	\$2,067.73
Dan Verburg	\$209.16	\$2,263.22	\$2,872.38
GRAND TOTAL			\$25,361.03

B. Debarment

1. *Respondents Have Not Shown They Are Entitled to Relief from Debarment*

Unless the Secretary of Labor otherwise recommends because of unusual circumstances, a violation of the Service Contract Act results in the sanction of a three year debarment on the ability of a contractor to enter into a contract with the federal government. 41 U.S.C. §354(a). Upon a finding of a compensable violation under the Service Contract Act and a finding that Respondents are properly named defendants, the burden of proof shifts to Respondents to articulate unusual circumstances such that they should not be subject to the three year bar in contracting with the federal government. *Oneida Building Services, Inc.*, 1983-SCA-00005 (Dep. Sec'y Jan. 8, 1991). Relief from debarment is often a product of a minor or inadvertent violation, or cases in which debarment is a wholly disproportionate penalty for the severity of the offense. *Karawia v. Administrator, Wage and Hour Division*, 627 F.Supp.2d 137 (S.D.N.Y. 2009). The regulations define "culpable conduct" to include "culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements." 29 C.F.R. § 4.188(b)(3)(i).

The Department of Labor has promulgated regulations establishing a three-part test to determine the existence of unusual circumstances in a particular case, weighing aggravating and mitigating factors. 29 C.F.R. § 4.188(b)(3)(i)-(ii). First, as a threshold matter, the alleged violation must be free from aggravating factors such as willful or deliberate conduct, culpable neglect, a history of violations, or a serious violation in the instant case; but “relief from debarment cannot be in order where a contractor has a history of similar violations....” 29 C.F.R. § 4.188(b)(3)(i). Second, a good compliance history, cooperation with the investigation, and repayment of money owed are generally prerequisites to a finding of unusual circumstances. Third, where the prerequisites exist but aggravating factors do not, a judge may consider a variety of mitigating factors including status as a first-time violator, proper record keeping, existence of a bona fide legal issue of doubtful certainty, efforts at compliance, and the nature and extent of prior violations. *Karawia*, supra, quoting 29 C.F.R. § 4.188(b)(3)(ii). The presence of an aggravating factor generally precludes consideration of the prerequisites and mitigating factors. *Karawia*, supra; see *Charles Igwe, et al.*, ARB No. 07-120, ALJ No. 2006-SCA-020 (ARB Nov. 25, 2009).

In the current case, Respondents will be unable to avoid debarment. This investigation of Respondents was the third in which they were found to have committed similar violations. The first investigation, which examined a time period from 1994 to 1996, resulted in findings that Hearn’s Enterprises was liable for over \$16,000 in back wages and unpaid health and welfare benefits. [Tr. pp. 12,13, 29, 198-200, 264-268.] The second, covering the period from 2008 to 2010, resulted in Hearn’s Enterprises repaying between \$50,000 and 60,000 for similar violations. [Tr. 30, 264-268.] As discussed above, “relief from debarment cannot be in order where a contractor has a history of similar violations....” 29 C.F.R. § 4.188(b)(3)(i). Thus, Respondents do not even satisfy the requirements to get over the threshold for relief from debarment.

Assuming Respondents did get over the threshold, they are not entitled to relief. Under 29 C.F.R. § 4.188(b)(3)(ii), a good compliance history, cooperation with the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. As discussed above, Respondents do not have a good compliance history – this is the third investigation resulting in payment of back wages and health and welfare benefits. Additionally, Respondents have not shown that they cooperated with the investigation. To the contrary, Mr. Moradi testified that his initial efforts to obtain information from Respondents was hindered by having to work through their attorney, and they took significantly more effort than the typical investigation. In his opinion, having performed over 200 compliance investigations, he believed that Respondents were not cooperative in this one. Respondents dragged out the investigation over a long period of time, required many meetings to discuss their computations, and refused to accept the regulations. There are many problems with Respondents’ record-keeping; in AX

I, half of the employees involved have at least one week for which pay records were not available. In addition, Respondents did not – and still have not – repaid the moneys due, and their conduct with regard to this investigation, coupled with the fact that they have two prior investigations for the same issues, satisfies me that they have not made sufficient assurances of future compliance to warrant relief.

As a mitigating factor, Respondents provided testimony concerning unexpected increases in their operating expenses over the course of these contracts, including significant increases in workers' compensation premiums and in the cost of repairs to their vehicles. As Mr. Moradi testified, however, these expenses are not considered in relation to Respondents obligations under the contracts. And although Nick and Elena Hearn made some personal sacrifices to help their company meet budget, there is no evidence that Respondents sought other resources, such as a loan, to meet their payroll obligations. Respondents' history of prior violations coupled with their non-innocent conduct in the present case is enough to prevent me from finding unusual circumstances under the debarment provisions of the SCA.

In conclusion, I find that Respondents have not met their burden to show they are entitled to relief from debarment. As Respondents admit that Hearn's Enterprises and Nick Hearn are responsible parties under the Act, and I have previously found that Elena Hearn is likewise, all Respondents are jointly and severally liable for the back wages and health and welfare benefits. "The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability, but also a personal liability charged by reason of his or her corporate office while performing that duty." 29 C.F.R § 4.187(e)(2).

2. Release of Contract Funds Withheld

The Administrator states that the United States Postal Service has withheld certain funds under the contracts, based on the results of the investigation conducted here. The Postal Service will be required to release the withheld contract funds to the Administrator as payment toward the total back wages due herein.

C. Request for Investigation

Respondents have requested that an investigation be commenced to look into the conduct of counsel for the Administrator. Respondents point to the testimony of Jack Platschorre at the hearing and argue that it shows that counsel promised Mr. Platschorre that he would receive money in exchange for his testimony. The transcript of the hearing shows otherwise: Mr. Platschorre was specifically asked whether he had been promised any money as a result of the litigation, and he responded "You didn't actually promise me. You said there was a possibility." [Tr. p. 136.] Likewise, counsel was permitted to testify

on this issue, and stated that she had told the witnesses what the Administrator was seeking, but never indicated that any of them would in fact receive the money. [*Id.* p. 105.] There is no evidence to the contrary in the record.¹³ Accordingly, I find that Mr. Platschorre was not promised money in exchange for his testimony, and Respondents' request that I refer this matter for criminal investigation is denied.

CONCLUSION

I find that Respondents are liable for a violation of the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§ 351, *et seq.* I further find that, as responsible parties, Nick Hearn, and Elena Hearn are individually responsible for payment of the unpaid wages and health and welfare benefits as set forth above and in Appendix A. Additionally, as responsible parties, the Hearn's, and any entity in which they have a substantial interest, are debarred from entering into contracts with the federal government for a period of three years.

ORDER

Based on the foregoing, IT IS ORDERED that:

1. The United States Postal Service shall release to the Administrator of the Wage and Hour Division the full amounts withheld under the contracts mentioned herein;
2. Respondents shall pay the amount of \$25,361.03, less the sum returned to the Administrator of the Wage and Hour Division by the United States Postal Service, and each of the named Respondents is individually liable for payment of said amount;
3. The Administrator of the Wage and Hour Division shall distribute the funds collected under the paragraphs 1 and 2 above, less appropriate withholding, to the employees listed in the chart above;
4. Respondents Hearn's Enterprises, LLC, Nick Hearn, and Elena Hearn shall be debarred from entering into contracts with the federal government for a period of three years; and

¹³ Although Mr. Hearn read from a statement from another individual demonstrating that specific dollar amounts were discussed, that statement is not in the record.

5. Any firm, corporation, partnership, or association in which Respondents Hearn's Enterprises, LLC, Nick Hearn, or Elena Hearn have a substantial interest, as defined in the Act and 29 C.F.R. § 4.188(c), shall be debarred from entering into contracts with the federal government for a period of three years.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

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).