U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ADMINISTRATOR, WAGE & HOUR DIVISION, U.S. DEPARTMENT OF LABOR,	**ARB CASE NO. 2020-0050**
	ALJ CASE NO. 2017-SCA-00006
PROSECUTING PARTY,	**DATE: March 10, 2022**

v.

HEARN'S ENTERPRISES, LLC; NICK HEARN, an individual; and ELENA HEARN, an individual,

RESPONDENTS.

Appearances:

For the Administrator, Wage and Hour Division:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther, Esq.; Jonathan T. Rees, Esq.; and Amelia Bell Bryson, Esq.; *U.S. Department of Labor*; Washington, District of Columbia

For the Respondents:
Nick Hearn and Elena Hearn; *pro se*; Charlotte, Michigan

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), and its implementing regulations.[1] A

[1] 41 U.S.C. §§ 6701-6707 (2011), and its implementing regulations at 29 C.F.R. Parts 4 and 8 (2021).

United States Department of Labor Administrative Law Judge (ALJ) held that Respondents Hearn's Enterprises, Nick Hearn (Mr. Hearn), and Elena Hearn (Mrs. Hearn) violated the SCA's wage and health and welfare fringe benefits requirements and that the circumstances warranted Respondents' debarment from government contracts for three years. For the following reasons, we affirm the ALJ.

BACKGROUND

1. The Parties and Contracts

At issue in this case are two contracts pursuant to which Hearn's Enterprises provided mail hauling services for the United States Postal Service (USPS). The USPS awarded the first contract, numbered 500M2, to Hearn's Enterprises effective July 1, 2009 (the Iowa Contract).[2] That contract required the company to haul mail from the post office in Des Moines, Iowa to the Grand Rapids, Michigan Processing Annex.[3] Until June 30, 2013, the Iowa Contract required Hearn's Enterprises to pay its Tractor Trailer Drivers $19.03 per hour in wages and $4.65 per hour in health and welfare fringe benefits.[4] Beginning July 1, 2013, the Iowa Contract required Hearn's Enterprises to pay its Tractor Trailer Drivers $19.24 per hour in wages and $4.98 per hour in health and welfare fringe benefits.[5]

The USPS awarded the second contract, numbered 485DA, to Hearn's Enterprises effective July 1, 2013 (the Flint Contract).[6] The second contract required Hearn's Enterprises to haul mail from the post office in Flint, Michigan to Flint's Annex.[7] At all relevant times, the Flint Contract required Hearn's Enterprises to pay its Truck Drivers $17.43 per hour in wages and $4.98 per hour in health and welfare fringe benefits.[8]

Mr. Hearn was the sole owner of Hearn's Enterprises, signed the Iowa and Flint Contracts on behalf of the company, oversaw the company's day-to-day operations, was responsible for hiring, firing, and supervising employees, and made final business decisions.[9] Mrs. Hearn was responsible for the company's records and bookkeeping, payroll, accounts receivable, and general office administrative

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2 Amended Decision and Order (First Amended D. & O.) at 5.

3 *Id.*

4 *Id.* at 5 & n.2.

5 *Id.*

6 *Id.* at 5.

7 *Id.*

8 *Id.*

9 Order Granting Partial Summary Decision (Summary Decision Order) at 15.

functions.[10] She also served as the company's representative for the Department of Labor Wage and Hour Division's (WHD) investigation in this case.[11]

2. Wage and Hour Investigation and Complaint

In November 2014, the WHD began a nearly year-long investigation of Respondents' pay practices and compliance with the SCA.[12] Following this investigation, the Administrator of the WHD filed a complaint against Respondents with the Department of Labor's Office of Administrative Law Judges (OALJ) on May 31, 2017, alleging Respondents violated the SCA by: 1) failing to pay certain employees their full wages for all hours worked; and 2) either failing to pay, or underpaying, certain employees their health and welfare fringe benefits for all hours worked.[13] In total, the Administrator alleged Respondents owed $31,641.80 to twelve employees for the period of December 22, 2012, through December 20, 2014.[14] The Administrator sought an order: 1) requiring Respondents to pay the unpaid wages and health and wage fringe benefits to the employees; and 2) debarring Respondents from entering government contracts for three years.[15]

3. The Summary Decision Order

On October 29, 2018, the Administrator filed a motion for summary decision, arguing that there was no genuine dispute as to any material fact with respect to Respondents' violations of the SCA, Mr. and Mrs. Hearn's individual responsibility for the violations, or the grounds for Respondents' debarment from government contracting.[16] On February 5, 2019, the ALJ issued an Order Granting Partial Summary Decision (the Summary Decision Order). The ALJ determined undisputed evidence showed that Respondents owed five employees a total of $295.79 in unpaid wages.[17] The ALJ also determined undisputed evidence established that Mr. and

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10 *Id.* at 15-16.

11 Administrator's Exhibit (AX) L (Deposition of Elena Hearn) at 49.

12 Hearing Transcript (Tr.) at 29-33.

13 First Amended D. & O. at 2.

14 *Id*. at 2, 5-6. Although the Iowa and Flint Contracts were in effect for a longer period, the WHD limited its investigation and complaint to the period of December 22, 2012, through December 20, 2014. *Id.* at 5-6. We will therefore restrict our review to the same period.

15 *Id*. at 2.

16 Respondents also filed a motion for summary decision, which the ALJ denied.

17 Evidence subsequently introduced at the hearing showed that two of these five employees did not work on the Flint or Iowa Contracts. Accordingly, in the D. & O. the ALJ

Mrs. Hearn were individual "parties responsible" for the violations of the SCA, as defined by the regulations.[18] However, the ALJ found there were disputed facts that precluded summary decision concerning the wages Respondents owed to four employees and the health and welfare fringe benefits Respondents owed to all twelve employees. The ALJ similarly found disputed facts remained regarding the issue of whether Respondents should be debarred.

4. The Decision and Order

After conducting an evidentiary hearing on March 13 and 14, 2019, the ALJ issued a Decision and Order (D. & O.)[19] finding Respondents violated the SCA by underpaying ten employees a total of $25,202.74, consisting of $1,972.89 in unpaid wages and $23,229.85 in health and welfare fringe benefits.[20] The ALJ also determined Respondents had not shown that they were entitled to relief from debarment, and ordered Respondents, as well as any entity in which they had a substantial interest, debarred from entering into contracts with the federal government for three years.[21] Respondents appealed the ALJ's judgment to the Administrative Review Board (ARB or the Board).

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide appeals from ALJ decisions and orders under the SCA.[22] The ARB's review is in the nature of an appellate proceeding.[23] The Board reviews conclusions of law de novo, but may modify or set

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held that Respondents did not owe wages or fringe benefits to these two employees. First Amended D. & O. at 8-10.

[18] *See* 29 C.F.R. § 4.187(e).

[19] The ALJ originally issued the D. & O. on May 5, 2020. On May 19, 2020, the ALJ issued an Amended Decision and Order to remove a footnote unrelated to the case. On May 29, 2020, the ALJ issued a Second Amended Decision and Order to correct two transposition and mathematical errors regarding the amount Respondents owed its employees. The ALJ initially determined the amount owed was $25,361.03. In the Second Amended Decision and Order, the ALJ corrected the amount owed, reducing it to $25,202.74.

[20] Second Amended Decision and Order at 2. This sum included the wages that the ALJ found were owed in the Summary Decision Order.

[21] First Amended D. & O. at 22-25.

[22] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. §§ 6.20, 8.1(b)(3), (6).

[23] 29 C.F.R. § 8.1(b)(3), (6).

aside an ALJ's findings of fact only when it determines those findings are not supported by a preponderance of the evidence.[24]

DISCUSSION

Respondents raise a number of points of error regarding the ALJ's Summary Decision Order and the D. & O. Respondents contend the ALJ erred by: 1) finding Respondents underpaid employees in violation of the SCA; 2) refusing to give Respondents a "credit" or reducing their liability for overpayments or extra payments they made to the affected employees; 3) holding Mrs. Hearn individually liable; 4) ordering debarment; 5) denying Respondents certain discovery; and 6) refusing to hold the Administrator's counsel responsible for supposedly improper conduct. We consider and reject each of Respondents' arguments in turn below, and affirm the ALJ, subject to one modification set forth herein.

1. Respondents' SCA Violations

Contracts subject to the SCA, like the Iowa and Flint Contracts, must contain provisions specifying the minimum monetary wages and fringe benefits to be furnished to the contracts' various classes of service employees.[25] The party or parties responsible for contractors who fail to provide these minimum wages and fringe benefits on time, and in full, for each hour worked are liable for the underpayment owed to employee[26] and may be debarred from contracting with the government.[27]

As set forth above, the ALJ found Respondents violated the SCA with respect to the Iowa and Flint Contracts in two ways. First, in certain workweeks, Respondents failed to pay some employees the required hourly wage rate for all hours worked. Second, Respondents did not pay certain employees the full amount of health and welfare fringe benefits that the contracts required. In some instances, Respondents simply failed to furnish any health and welfare fringe benefits for some hours worked, either in cash or through a qualifying fringe benefit plan or fund.[28] In other instances, Respondents paid for employees to receive health and

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[24] 29 C.F.R. § 8.9(b); *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Mesa Mail Serv., LLC*, ARB No. 2017-0071, ALJ No. 2009-SCA-00011, slip op. at 4 (ARB Sept. 30, 2020) (citations omitted).

[25] 41 U.S.C. §§ 6702, 6703.

[26] *Id.* § 6705.

[27] *Id*. § 6706.

[28] The SCA's regulations permit a contractor to satisfy certain fringe benefits obligations by: 1) paying the amount owed directly to the employee in cash; 2) paying the

welfare fringe benefits through an insurance provider at a rate less than what the contracts required.

Applying the *Anderson v. Mt. Clemens Pottery*[29] burden-shifting framework, the ALJ determined that: 1) the Administrator carried its burden to establish the amount and extent of the work the affected employees performed without proper compensation as a matter of just and reasonable inference; and 2) Respondents' arguments and evidence to the contrary did not negate this inference.[30]

Upon review of the ALJ's decision, the record, and the parties' briefs, we find that the ALJ's decision is a logical, well-reasoned ruling. With one exception discussed below, we conclude the ALJ's analysis is supported by a preponderance of the evidence and is consistent with applicable law.

The Administrator introduced a detailed accounting of the hours worked and compensation received, on a weekly basis, for each of the ten employees at issue.[31] The WHD compiled this accounting from Respondents' own timesheets, pay records, and health insurance payment records.[32] The WHD investigator and several of the affected employees also testified at the hearing and confirmed the accuracy and reliability of the information and calculations presented by the Administrator. The ALJ found the WHD investigator credible and accepted his accounting and the other records introduced at the hearing as accurate and reliable evidence of the hours worked by, and the compensation paid to, the affected employees.[33] We find

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amount owed to a bona fide fund, plan, or program on the employee's behalf, or 3) a combination of the two. 29 C.F.R. § 4.170.

29 328 U.S. 680 (1946).

30 Under the *Mt. Clemens Pottery* framework, the Administrator has the initial burden of proof to establish that the employees performed work for which they were improperly compensated. *VGA, Inc.*, ARB No. 2009-0077, ALJ No. 2006-SCA-00009, slip op. at 5 (ARB Sept. 29, 2011). If the Administrator satisfies that burden by proving that employees have "in fact performed work for which [they were] improperly compensated and . . . produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," then "the burden [ ] shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference[.]" *Id.* (quoting *Mt. Clemens Pottery*, 328 U.S. at 687-88). "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.*

31 AX I.

32 Tr. at 46-59; *see also* AX E, F, N.

33 First Amended D. & O. at 11 & n.5.

no basis to disturb the ALJ's credibility findings.[34] The evidence demonstrated Respondents failed to pay the required wage and health and welfare benefit rates for all hours worked and allowed the ALJ to calculate the amounts owed to the affected employees.

Respondents do not appear to challenge the ALJ's findings and calculations regarding their liability with respect to six of the ten affected employees.[35] Regarding the remaining employees, Respondents suggest that: 1) the timesheets upon which the Administrator and the ALJ relied were not accurate in some instances; 2) some of the affected employees overstated or misstated their hours; and 3) the Administrator's evidence did not capture all the compensation they paid to the employees. However, Respondents' arguments are vague and conclusory. In almost all instances, their arguments lack citation to supporting evidence in the record, do not identify the precise pay periods when the Administrator's evidence and calculations were supposedly incorrect, or otherwise negate or rebut the Administrator's evidence.[36]

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[34] The Board will not disturb an ALJ's credibility determination unless it is "inherently incredible or patently unreasonable." *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB May 9, 2019) (internal quotations and citation omitted); *accord Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 391 (7th Cir. 2010) ("[T]he resolution of [a credibility contest] belongs in all but the extraordinary case to the judge who heard and observed the witnesses first hand.").

[35] While Respondents argue they are entitled to "credits" with respect to essentially all of the affected employees, Respondents present no argument regarding their liability with respect to six of the ten affected employees. Respondents' Opening Brief (Resp. Br.) at 6-10. To be clear, we distinguish between the issue of whether Respondents paid employees on time and in full for each hour worked, discussed in this Section, and the issue of Respondents' request for deductions and credits for some overpayments and extra payments it alleges it made to the affected employees for other periods, discussed in Section 2. The former issue concerns whether Respondents violated the SCA, and the latter issue concerns the damages Respondents owe for any such violation.

[36] Respondent's Petition for Review (Petition) at 8 (stating that one employee "did not wait for the tire repair very often," "did not commit he was not paid for the hours he worked," "committed he performed other deliveries than haul the U.S. mail," and "was not able clear to specify the date when he was stared to haul the U.S. mail [sic throughout]," without elaborating or citing evidence); Resp. Br. at 8 ("sometimes" two employees "worked 30 hours a week," without elaborating or citating evidence); at 9 (one employee "regularly recorded hours worked that he did not work," without citing evidence); at 10 (with respect to one employee, "[t]here are also a few wage discrepancies where proof was provided but credit has not been added," without elaborating or citing evidence); at 19 (one employee "admitted he stated the rout earlier then required by the schedule created by the USPS [sic throughout]" and "admitted the logbook was falsified," without citing evidence).

However, we agree with Respondents that the ALJ erred in determining the amount of health and welfare fringe benefits owed to one employee, Craig Edwards. The ALJ found Respondents did not provide Mr. Edwards, a driver on the Iowa Contract, with any health and welfare fringe benefits as called for by the contract during the investigation period. As Respondents correctly assert, however, undisputed evidence reflects Mr. Edwards received health and welfare fringe benefits from November 15, 2014, through his last day of work on December 5, 2014, totaling $503.17.[37] Thus, we find this sum should be deducted from the amount owed to Mr. Edwards. Subject to this modification, we affirm the ALJ's conclusion Respondents failed to properly compensate employees for all hours worked as required by the SCA.[38]

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[37] AX F at 27. Respondent paid $718.82 to provide health insurance for Mr. Edwards for the period of November 15, 2014, through December 14, 2014. *Id.* As reflected in AX I, Mr. Edwards' last day of employment was December 5, 2014. Therefore, the prorated amount of fringe benefits provided to Mr. Edwards for the period of November 15, 2014, through December 5, 2014, is $503.17. This amount is calculated as $718.82 (the amount of health and welfare fringe benefits paid for the period of November 15, 2014, through December 14, 2014), times twenty-one (the number of days from November 15, 2014, through December 5, 2014), and then divided by thirty (the number of days from November 15, 2014, through December 14, 2014).

[38] Although we affirm the ALJ's decision, we note the ALJ appears to have made additional mathematical and transposition errors regarding other employees that were not corrected with the Second Amended D. & O. With respect to Elliot Claybrook, the ALJ appears to have miscalculated the amount of health and welfare fringe benefits he received for the period of March 15, 2014, through December 14, 2014. The ALJ cites AX F, which shows insurance payments totaling $5,050.44 (four payments of $632.91, and five payments of $503.76), but the D. & O. indicates a total of $5,050.42. First Amended D. & O. at 11. The ALJ also determined Respondents owed Mr. Claybrook health and welfare fringe benefits totaling $2,390.40 for the period of December 22, 2014, through March 14, 2014, and $2,324.17 for the period of March 15, 2014, through December 20, 2014. Those amounts total $4,714.57, but the D. & O. indicates a total of $4,713.57. *Id.* at 11-12. With respect to Ralph Cummins, the ALJ indicated Mr. Cummins worked 2,860 hours from July 1, 2013, through December 20, 2014. Multiplied by his applicable $4.98 per hour fringe benefit rate, this would mean that Mr. Cummins earned a total of $14,242.80 in fringe benefits for this period. However, the D. & O. indicates Mr. Cummins earned $14,282.80. *Id.* at 14. With respect to Mr. Cummins, the ALJ also separately calculated the fringe benefits owed for the periods of December 23, 2012, through June 30, 2013 ($115.44), and July 1, 2013, through December 20, 2014 ($1,875.04). However, when identifying the total fringe benefits owed to Mr. Cummins, the D. & O. appears to have left out the former period. *Id.* at 22 (indicating a total of $1,875.04 owed to Mr. Cummins for health and welfare fringe benefits). With respect to several employees, the ALJ also appears to have made errors calculating the prorated health and welfare fringe benefits Respondents paid for certain periods. For example, with respect to Mr. Claybrook, the ALJ calculated the prorated fringe benefits Respondents paid for the period of December 15, 2014, through December 20, 2014, as: $503.76 (total amount paid for the period of December 15, 2014, through January 14, 2015)

2. Respondents' Request for Credits

Contractors that violate the SCA's pay requirements are "liable for an amount equal to the sum of any deduction, rebate, refund, or underpayment of compensation due any employee engaged in the performance of the contract."[39] Accordingly, the ALJ assessed damages against Respondents in the amount of $25,202.74, equal to the amount of wages and health and welfare fringe benefits it underpaid to its employees during the investigation period.

Respondents contend even if they violated the SCA by underpaying employees for certain pay periods, they should receive a credit or reduction in the damages assessed against them for certain overpayments, extra payments, and extra fringe benefits they allegedly provided to the affected employees. The ALJ rejected Respondents' request for credits, determining the regulations did not permit extra payments or overpayments for some weeks and some hours to offset underpayments for other weeks and other hours.[40] We agree with the ALJ the additional payments and extra fringe benefits Respondents allege they provided to employees do not reduce their liability or damages in this case. We address each type of credit Respondents seek in turn.[41]

A. Credit for Wage Overpayments

Respondents contend they mistakenly overpaid some of the affected employees by paying some of them for more hours than they actually worked and by paying others in some pay periods at a rate exceeding the minimum wage rates set forth in the USPS contracts.[42] Respondents, thus, contend they should receive a credit for these excess payments.

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times five (number of days from December 15, 2014, through December 20, 2014) and then divided by thirty (number of days in the period of December 15, 2014, through January 14, 2015). *Id.* at 12. However, there are six days from December 15, 2014, through December 20, 2014, and 31 days from December 15, 2014, through January 14, 2014. The ALJ appears to have made similar proration errors with respect to Mr. Cummins and Chad Springsteen. *Id.* at 14, 20. However, neither party raised these apparent errors with the ALJ or on appeal to the Board. Therefore, we have not addressed them in this appeal.

[39] 41 U.S.C. § 6705(a).

[40] Summary Decision Order at 13-14; First Amended D. & O. at 6.

[41] The Board requested the parties file supplemental briefs regarding whether Respondents could receive credits in the circumstances of this case. We have considered the parties' supplemental briefs in reaching our decision.

[42] Resp. Br. at 7-10.

The SCA requires contractors subject to the Act to pay employees the pre-designated minimum wage and fringe benefit rates set forth in the applicable contracts and wage determinations. However, the regulations do not preclude a contractor from paying an employee more than the designated minimums, as Respondents apparently did with respect to some affected employees here.[43] Indeed, the regulations are clear than an employer may not use excess wage payments in one pay period to offset liability for underpaid wages or fringe benefits in other pay periods.[44] Therefore, we deny Respondents' request for a credit or offset for wages paid in excess of the minimums required by the SCA.

B. Credit for "Cash Out" Payment

Respondents next contend they should receive credit for a "cash out" payment made to one employee.[45] Other than to label the payment as a "cash out," Respondents have not described the payment or indicated the purpose for which the payment was issued. Respondents have also not pointed to any evidence in the record that demonstrates they made this "cash out" payment. Accordingly, we have no basis upon which to assess whether the "cash out" payment might be properly deducted from the amount Respondents owe to the affected employees.

C. Credit for Extra Health and Welfare Fringe Benefits

Respondents assert although they consistently paid the affected employees less than the required health and welfare fringe benefits during their employment, they made up for the deficiencies by subsequently paying for the employees to receive additional health insurance coverage for one or more months after they left their employment with the company. Respondents request a credit for these extra,

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[43] 29 C.F.R. § 4.165(c).

[44] Section 4.170(a) of the regulations provides that: "An employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act . . . ." *See also* 29 C.F.R. § 4.166 ("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"); *R & W Transp., Inc.*, ARB No. 2006-0048, slip op. at 4-5 (ARB Feb. 28, 2008) (rejecting argument that mistaken wage overpayments for certain periods should be applied to offset the amount of back wages owed for other periods); *Mesa Mail Serv.,* ARB No. 2017-0071 slip op. at 7-8 (rejecting argument that mistaken instances where drivers were overpaid should "balance" when drivers were underpaid); *Pryor's Court, Inc.*, No. 1981-1355, slip op. at 5 (Under Sec'y Dec. 4, 1985) (rejecting "respondent's claim below that deficiencies in fringe benefits be made up by allocating wages paid for hours not actually worked").

[45] Resp. Br. at 7.

extended benefits.[46] We agree with the ALJ and the Administrator that the extra health and welfare fringe benefits cannot be used to reduce the damages assessed against Respondents.[47]

As a preliminary matter, Respondents' assertion they supplied post-separation health insurance coverage to many of the affected employees is not supported by evidence in the record. In many cases, the record does not actually reflect the employees' separation dates or contain evidence proving Respondents continued to pay for employees to receive health insurance after their separation.[48] As with the alleged "cash out" payment, we have no basis to assess the veracity of Respondents' claims that they made excess payments, or to give them credit for such payments.

Even if Respondents could clear these evidentiary hurdles, the post-separation insurance Respondents provided to some of the affected employees did not remedy or mitigate Respondents' failure to timely provide the health and welfare benefit entitlements as required by the SCA. The post-separation health insurance did not cover or apply to the pay periods when the affected employees had previously been denied or underpaid their health and welfare fringe benefits and did not otherwise compensate the affected employees for the specific pay periods

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[46] *Id*. at 5-6.

[47] Respondents appear to suggest that an unnamed Department of Labor representative led them to believe, during a call on an unidentified date, that the post-separation coverage was an appropriate remedy. *Id*. at 18 (stating that they were "advised by DOL representative from Detroit MI office to continue to pay health insurance coverage to terminated employees . . . ."); at 23 (stating that Mr. Hearn spoke with a "Department of labor representative from Detroit office with a question about to continue to pay the health insurance premium to all service employees after employer-employee relationships had been terminated [sic throughout]."") Respondents cite no evidence supporting this proposition. At the hearing, Mr. Hearn did not testify that he discussed providing post-separation fringe benefits, specifically, with the representative, or that the representative indicated that such benefits could remedy the SCA violations. *See id.* at 253-56; *see also* AX M (Deposition of Nick Hearn) at 31-32.

[48] Some of the affected employees' separation dates could be deduced from the evidence indicating the last day they were paid wages by Respondents. *See* AX I. However, the pay records introduced at the hearing end on December 20, 2014, which was the end of the WHD's investigation period, and Respondents represent that several of the affected employees remained employed by Respondents beyond that date. Respondents have not directed the Board to any evidence in the record that would allow us to deduce when these other affected employees separated from their employment with Hearn's Enterprises. Without a fixed separation date, we also cannot deduce which of the subsequent health and welfare fringe benefits were actually made post-separation, or which might have instead simply been payments Respondents were required to make to fulfill their SCA obligations to the employees as they continued working on the ongoing Flint and Iowa Contracts.

when the violations occurred. Instead, Respondents provided a different, and belated, benefit entirely, by providing health insurance coverage for a later period, when the employees were no longer working on the government contracts at issue or even employed by Respondents. Although the post-separation health and welfare fringe benefits may have had some value to the affected employees and may have been a benefit to which the employees otherwise were not entitled,[49] they were not appropriate recompense for the unpaid and underpaid fringe benefits as required by the SCA or the regulations. The post-separation coverage did not replace or restore what the affected employees had lost by virtue of Respondents' underpayments and did not constitute an equivalent benefit or compensation in an amount equal to what Respondents owed to them.[50]

Respondents contend denying them a credit for these post-separation fringe benefits would disincentivize contractors like Respondents who cannot keep up with their obligations under the SCA or its regulations from taking any subsequent steps to cure or mitigate the harm suffered by the affected employees.[51] To be sure, we recognize there may be circumstances where a contractor that violates the SCA by failing to make full and timely payments may take remedial steps to reduce the damages they ultimately owe to affected employees.[52] For example, the regulatory context indicates that contractors could make separate cash payments repaying, in whole or in part, the amount of wages or fringe benefits owed.[53] The Administrator also acknowledges that contractors may reduce or eliminate their monetary liability in some circumstances by securing belated, but retroactive insurance coverage for

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[49] Respondents assert that the post-separation fringe benefits were immensely valuable to some of the affected employees who were suffering from health issues at the time of their separation and needed the extended health coverage. Resp. Br. at 9-10. While this may be true for some employees, it is also easy to conceive of situations when post-separation health insurance may be of little or no value to some individuals, such as when the individuals receive coverage through a subsequent employer or through a spouse. Furthermore, even though we appreciate that Respondents' decision to provide post-separation fringe benefits may be laudable and a good business practice in the abstract, it does not cure or mitigate the specific harm their violations caused.

[50] *See* 41 U.S.C. § 6705(a); 29 C.F.R. § 4.187(c).

[51] Resp. Br. at 11.

[52] We do not intend our decision to establish steadfast rules as to what circumstances might warrant a credit or deduction from a contractors' liability for a violation. Whether a credit is warranted depends on the particular facts and circumstances of each case. Our holding that Respondents are not entitled to a credit or deduction is limited to the particular circumstances of this case.

[53] Indeed, the regulations incentivize contractors to make their best efforts to repay amounts owed to underpaid employees, even if only to mitigate their damages. When assessing whether a contractor should be debarred for violating the SCA, a relevant factor is whether the contractor promptly repaid the moneys due. 29 C.F.R. § 4.188(b)(3)(ii).

the periods when health and welfare fringe benefits had not been provided as the contract required.[54] Although such recompense would not undo the contractors' violations, it may nevertheless mitigate the damages resulting from the violations in some circumstances not present here. However, contractors are not free to do what Respondents did here, and fashion their own remedy by supplying a distinct and different fringe benefit covering a different period that is not consistent with either the SCA's statutory or regulatory requirements. Accordingly, we deny Respondents' request for such a credit.[55]

3. Mrs. Hearn's Liability as a "Party Responsible" for the SCA Violations

The SCA extends liability to any "party responsible for a violation of a contract provision required [by the Act]."[56] The term "party responsible" encompasses not only the contracting entity itself, but also any individuals who "exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached."[57] The ALJ determined Mrs. Hearn was a "party responsible" for the company's SCA violations because of her responsibility for and control over the company's payroll and role in permitting the pay violations.[58]

Respondents argue that Mrs. Hearn is not a "party responsible" under the SCA because she is "not [a] member of the company and does not have any [percentage] of ownership in the company."[59] However, as the ALJ correctly recognized, the regulations provide that "personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm," nor is responsibility contingent on the individual holding a "proprietary

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[54] Administrator's Supplemental Brief at 12 n.3; *see Unified Services, Inc.*, No. 1992-0036, slip op. at 5 (BSCA Jan. 28, 1994) ("[I]t is clear beyond peradventure to this Board that whenever such payments [of fringe benefits to funds] are made in so untimely a fashion that service employees are deprived of the benefits to which the SCA entitles them, those payments are late and in violation of the SCA's payment obligations.").

[55] Respondents also request a credit for one employee whom they paid more than the required minimum health and welfare fringe benefits for certain pay periods not at issue in this litigation. Resp. Br. at 10. For the same reasons already discussed in this Section, we deny Respondents' request for a credit for these overpayments.

[56] 41 U.S.C. § 6705(a).

[57] 29 C.F.R. § 4.187(e)(4); *accord id.* § 4.187(e)(1)-(3).

[58] Summary Decision Order at 15-16. The ALJ also determined that Mr. Hearn was a "party responsible." *Id.* at 15. Respondents do not appeal that determination.

[59] Petition at 9.

interest" in the contracting entity.[60] Thus, the mere fact that Mrs. Hearn was not a member or owner of Hearn's Enterprises does not necessarily relieve her of liability under the SCA. Respondents have not otherwise presented any evidence or argument on appeal as to Mrs. Hearn's individual liability under the SCA. Therefore, we find no basis to disturb the ALJ's conclusion that she was a "party responsible" for the violations.

4. Debarment

Respondents next challenge the ALJ's order that they be debarred from receiving Federal contracts for three years. A three-year debarment is an automatic sanction for parties found to have violated the SCA, unless the contractor can demonstrate "unusual circumstances" warrant relief from debarment.[61] As the Board has repeatedly emphasized, the SCA's debarment provision is a "particularly unforgiving provision of a demanding statute," and a contractor seeking relief must "run a narrow gauntlet" to establish unusual circumstances.[62]

The SCA's regulations articulate a three-part test prescribing the criteria for determining when unusual circumstances may exist to relieve a party from debarment.[63] The violating contractor must meet each of the three parts of the test to receive relief.[64] Under the first, threshold stage of the test, the contractor must establish that the conduct giving rise to the SCA violations was not willful, deliberate, or of an aggravated nature and that the violations were not the result of "culpable conduct."[65] The contractor must also demonstrate an absence of a history of similar violations, an absence of repeated violations of the SCA, and, to the extent a contractor has violated the SCA in the past, that such violations were not serious in nature.[66] If the contractor can pass the first part of the test, the contractor must next establish several other prerequisites to relief at the second stage. These include "[a] good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurance of future compliance . . . ."[67] Finally, if the contractor has satisfied the first two parts of the test, the final stage requires

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60 29 C.F.R. § 4.187(e)(4).

61 41 U.S.C. § 6706(b).

62 *Hugo Reforestation, Inc.*, ARB No. 1999-0003, ALJ No. 1997-SCA-00020, slip op. at 12 (ARB Apr. 30, 2001) (internal quotations and citation omitted).

63 29 C.F.R. § 4.188(b)(3).

64 *Int'l Servs., Inc.*, ARB No. 2005-0136, ALJ No. 2003-SCA-00018, slip op. at 5 (ARB Dec. 21, 2007).

65 29 C.F.R. § 4.188(b)(3)(i).

66 *Id.*

67 *Id.* § 4.188(b)(3)(ii).

consideration of a variety of other factors bearing on the contractor's good faith, including:

> [W]hether 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.[68]

The ALJ determined Respondents failed at each step of the unusual circumstances test. Respondents raise essentially the same arguments regarding unusual circumstances as they made before the ALJ, most of which focus on their unexpected financial distress that rendered them unable to keep up with their pay obligations, and their alleged lack of bad faith in violating the SCA. We find the ALJ's analysis to be well-reasoned and supported by a preponderance of the evidence. Therefore, we conclude Respondents have not carried their burden in demonstrating that the circumstances surrounding their violations are so unusual as to relieve them from the automatic sanction of debarment.

Regarding the first stage of the unusual circumstances test, the ALJ found Respondents had a history of committing violations like those established in this case.[69] The WHD found Hearn's Enterprises violated the SCA twice before, first between 1994 and 1996 when the company was held liable for over $16,000 in back wages and health and welfare fringe benefits, and again between 2008 and 2010, when the company paid more than $50,000 for similar violations.[70] Respondents do

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68 *Id.*

69 First Amended D. & O. at 23. The ALJ resolved the first part of the unusual circumstances test strictly on the basis of Respondents' compliance history, and did not determine whether Respondents otherwise acted willfully or deliberately, or engaged in culpable conduct. We need not make any findings or conclusions regarding Respondents' willfulness, deliberateness, or culpability, either, because the ALJ's application of the unusual circumstances test is otherwise supported by a preponderance of the evidence.

70 *Id.*

not appear to dispute the company underpaid workers in violation of the SCA in either instance.[71] Under the regulations, this type of history requires debarment.[72]

The ALJ next determined even if Respondents could pass the first stage of the unusual circumstances test, Respondents had not shown that they met any of the secondary prerequisites to relief. The ALJ's analysis is supported by a preponderance of the evidence. In particular, we emphasize, and affirm, the ALJ's conclusions Respondents did not cooperate in the WHD's investigation and did not make sufficient assurances of future compliance.[73]

Although Respondents summarily assert they cooperated in the WHD's investigation, the WHD investigator testified that Respondents resisted his efforts to obtain information from them during the investigation. Specifically, the WHD investigator testified that a typical investigation took him no more than ninety days and that Respondents belabored the investigation by dragging it out for nearly a year by limiting access to records, which necessitated the WHD investigator make approximately ten different trips to Respondents' and their attorney's offices to review and copy records.[74] The WHD investigator also testified that Respondents were resistant to his explanations of Respondents' obligations under the SCA.[75] Relief is not warranted under these circumstances.[76]

Turning to Respondents' assurances of future compliance, Respondents have not pointed to any evidence they ever made an explicit assurance that they would comply with the requirements of the SCA in the future. To the contrary, we believe the ALJ reasonably found Respondents' poor compliance history and recalcitrance

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[71] Respondents seem to imply the second investigation may have been punitive and was settled for less than that which the Administrator originally claimed was owed. Resp. Br. at 22. However, Respondents do not appear to deny they violated the SCA.

[72] 29 C.F.R. § 4.188(b)(3)(i) ("[R]elief from debarment **cannot be in order** where a contractor has a history of similar violations . . . ." (emphasis added)). Mr. and Mrs. Hearn contend that first violation should not be held against them when assessing whether they should be debarred, individually, because it occurred long ago when the company was under different management. Resp. Br. at 22. Even if the individual Respondents could clear this first stage of the unusual circumstances test, we affirm the ALJ's determination Respondents did not demonstrate that they passed either of the next two stages of the test.

[73] *See* First Amended D. & O. at 23.

[74] *Id.*; Tr. at 30-33, 47, 63-64.

[75] Tr. at 63-64.

[76] *See R & W Transp., Inc.*, ARB No. 2006-0048, slip op. at 10-11 ("[S]ince we affirm the ALJ's finding that [the contractor] failed to cooperate with the DOL in the resolution of this case, [the contractor] failed to establish the second part of the three-part criteria test for determining when relief from debarment is appropriate . . . .").

with respect to the WHD investigation demonstrated that any such assurance, even if made, was insufficient to overcome the automatic debarment sanction.[77] In addition, while Respondents contend that unexpected financial distress is to blame for their SCA violations, they have not offered any evidence that their finances have improved to the point that they could ensure that they will comply with their pay obligations in the future, or that they have taken adequate measures to ensure that their financial problems—and their concomitant inability to pay their employees—would not recur.

Finally, the ALJ determined that even if Respondents had established that they passed each of the first two stages of the unusual circumstances test, the remaining mitigating factors considered at the third stage of the test also weighed against relief from debarment.[78] We find that the ALJ's analysis was reasonable and amply supported by the evidence in the record. Respondents stress that they did not act in bad faith in failing to pay their employees in accordance with the requirements of the SCA, and that their pay violations spawned from a series of unforeseen and unusual financial catastrophes, including high vehicle repair and replacement costs, harsh winter conditions, and increased workers compensation and insurance costs.[79] Although we are sympathetic to the unfortunate financial circumstances that Respondents appear to have encountered, we agree with the Administrator and the ALJ that these financial troubles do not relieve Respondents of their legal obligation to pay employees on time and in full under the SCA or relieve Respondents of the consequences for not doing so in the circumstances of this case.[80]

Moreover, even if we did consider Respondents' financial distress as a mitigating factor, the ALJ reasonably concluded that the other factors enumerated in the regulations for this third stage of the unusual circumstances test weigh against relieving Respondents of debarment. As cited by the ALJ, Respondents have been subject to past investigations and failed to maintain complete records.[81]

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77 First Amended D. & O. at 23.

78 *Id.* at 24.

79 Resp. Br. at 17-18, 21-22.

80 *See Custodial Guidance Sys., Inc.*, No. SCA-1235, slip op. at 3 (Dep. Sec'y July 17, 1987) ("[T]he defense raised in this instance, i.e. financial difficulties, is not sufficient to excuse the violations of the Act and avoid the otherwise mandatory sanction which Congress deemed necessary to guarantee both compliance with and employee protection under the Act."); *Unified Servs.,* No. 1992-0036, slip op. at 7 ("Departmental regulations require SCA contractors to be 'responsible,' (29 C.F.R. 4.188(b)(6)) and that standard is not met where—as here—'undercapitalization and severe cash-flow problems apparently impeded [the contractor's] ability to meet its payment obligations under the Act.'").

81 First Amended D. & O. at 23-24.

Respondents also failed to show that they promptly repaid the sums due to the underpaid employees. Even under Respondents' theory that they repaid employees by paying for extended health and welfare fringe benefits after their separation from the company, the "repayments" were months late and extended over lengthy periods of time. Finally, Respondents' violations, resulting in more than $25,000 owed to ten employees, are not insignificant.

Although debarment is undoubtedly a significant penalty, "[t]he legislative history of the SCA makes clear that debarment of a contractor who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from [the automatic debarment] sanction."[82] For the foregoing reasons, we affirm the ALJ's conclusion Respondents did not demonstrate sufficient unusual circumstances to relieve them from debarment.

5. The Administrator's Alleged Discovery Violations

Respondents repeat their assertions before the ALJ that they were denied some type of discovery critical to support their case. However, Respondents' argument is difficult to parse. Respondents vaguely reference the Administrator's apparent failure to produce "intramural communications likely to elucidate the impressions of the non-attorney actors closest to the investigative filed in this case."[83] However, Respondents have not clearly articulated the specific discovery requests at issue, the Administrator's responses or objections to Respondents' discovery requests, or the precise nature or details of the discovery dispute.

The discovery arguments in Respondents' appellate briefs are copied, almost word-for-word, from a portion of a motion to compel Respondents filed with the ALJ after the close of discovery below. That motion provides a bit of clarity for Respondents' argument in this appeal.[84] Respondents' motion concerned communications between the WHD investigator and his supervisor and other

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[82] *Herman v. Glaude*, ARB No. 1998-0081, ALJ No. 1995-SCA-00038, slip op. at 6-7 (ARB Nov. 24, 1999) (citation omitted).

[83] Petition at 4, Resp. Br. at 15-16.

[84] *See* Petition at 1-5; Resp. Br. at 12-16; Respondent's March 9, 2018 Motion to Compel at 12-16. Although we might normally summarily reject an incomplete and largely inscrutable argument like the one presented in Respondents' appellate briefs, we recognize that Respondents are proceeding pro se and are therefore due a degree of adjudicative latitude. *See Gloss v. Tata Chems. N. Am.*, ARB No. 2021-0039, ALJ No. 2020-CAA-00008, slip op. at 7 (ARB Oct. 22, 2021); *Young v. Park City Transp.*, ARB No. 2011-0048, ALJ No. 2010-STA-00065, slip op. at 3 (ARB Aug. 29, 2012). Accordingly, we have reviewed the record surrounding Respondents' motion to compel to help elucidate the discovery dispute and Respondents' arguments.

internal WHD correspondence and documents concerning the WHD's investigation of Respondents. The Administrator had redacted or withheld several of the documents pursuant to the government deliberative process privilege, the government informer's privilege, and the investigative file privilege. Respondents assert those materials were critical to helping it establish that unusual circumstances existed to relieve it from debarment and that the Administrator had not properly invoked the various privileges.

The ALJ denied Respondents' motion for two valid reasons.[85] First, Respondents failed to certify they made a good-faith effort to resolve the discovery dispute before filing the motion, as required by the OALJ Rules of Practice and Procedure.[86] Second, Respondents failed to provide copies of the documents at issue to the ALJ, which prevented the ALJ from being able to assess whether the privileges asserted by the Administrator were applicable or properly raised.

ALJs have wide discretion in controlling and limiting discovery and will be reversed only when their rulings are arbitrary or an abuse of discretion.[87] Although Respondents vaguely argue they were entitled to the discovery at issue, Respondents have not offered any explanation for their failure to follow the applicable procedural rules[88] or to provide the materials necessary for the ALJ to resolve their motion to compel, any argument regarding the Administrator's assertions of privilege, or any other basis to conclude that the ALJ abused his discretion or acted arbitrarily in denying the discovery. Accordingly, we decline to reverse the ALJ with respect to this discovery issue.

6. Allegations of Improper Conduct by Counsel for the Administrator

Finally, Respondents assert that counsel for the Administrator engaged in improper, and perhaps even criminal, conduct by promising witnesses money in exchange for favorable testimony and by otherwise attempting to improperly influence witnesses. The ALJ considered and rejected the same argument below. We agree with the ALJ that Respondents' claims are not supported by evidence in the record. Instead, Respondents' allegations are based on misstatements of testimony adduced at the hearing and on written statements that were not part of the record

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85 March 29, 2018 Notice of Hearing and Order Denying Motion to Compel.

86 *See* 29 C.F.R. § 18.57(a)(1).

87 *Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020); *Robinson v. Martin Marietta Servs., Inc.*, ARB No. 1996-0075, ALJ No. 1994-TSC-00007, slip op. at 4 (ARB Sept. 23, 1996).

88 Although Respondents are currently proceeding pro se, they were represented at the time they filed their motion to compel. Even if they were not represented at that time, pro se litigants are not excused from the rules of practice and procedure. *Jeanty*, ARB No. 2019-0005, slip op. at 12.

before the ALJ.[89] As the ALJ noted, counsel for the Administrator was also permitted to testify at the hearing and denied she engaged in the conduct that Respondents attribute to her. We find no basis to disturb the ALJ's decision or find that counsel for the Administrator engaged in improper or illegal conduct or otherwise abused her discretion.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's decision, subject to the modification set forth herein.

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[89] *See Pollock v. Cont'l Express*, ARB Nos. 2007-0073, 2008-0051, ALJ No. 2006-STA-00001, slip op. at 14 n.94 (ARB Apr. 7, 2010). In addition to the fact that the statements are not part of the record, we also note that neither of the individuals who prepared the statements testified at the hearing before the ALJ.