



In the Matter of:

**ADMINISTRATOR, WAGE
& HOUR DIVISION, U.S.
DEPARTMENT OF LABOR**

ARB CASE NO. 2019-0032

ALJ CASE NO. 2017-SCA-00008

PROSECUTING PARTY,

DATE: March 9, 2020

v.

**PRICE GORDON, LLC d/b/a VETERAN
NATIONAL TRANSPORTATION, LLC d/b/a
VNT; LMC MED TRANSPORTATION, LLC;
NICHOLAS PRICE, an individual; and
TRACY BEASLEY, an individual,**

RESPONDENTS.

Appearances:

For the Administrator, Wage and Hour Division:

**Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Jonathan T. Rees,
Esq.; and Heather Maria Johnson, Esq.; U.S. Department of Labor,
Office of the Solicitor; Washington, District of Columbia**

***For the Respondents Price Gordon, LLC, d/b/a Veteran National
Transportation, LLC, d/b/a LMC Med Transportation, LLC., and Nicholas
Price:¹***

**Timothy J. Turner, Esq.; and Daniel McAuliffe, Esq.; Whitcomb,
Selinsky, McAuliffe, P.C.; Denver, Colorado**

¹ Counsel does not represent Tracy Beasley.

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*, James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*.

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA). 41 U.S.C. § 6701 *et seq.* (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, 8 (2018). On February 21, 2019, the Administrator, Wage and Hour Division (the Administrator), as Prosecuting Party, filed a petition with the Administrative Review Board (ARB or Board) to review the Administrative Law Judge's (ALJ) January 11, 2019 Decision and Order (D. & O.).² For the reasons set forth below, we affirm in part and modify in part the ALJ's D. & O.

BACKGROUND

The facts are not in dispute. Respondents Nicholas Price and Tracy Beasley formed LMC Med Transportation, LLC (LMC) in 2013. The company was certified as a "service-disabled veteran-owned small business" (SDVOSB) and became eligible for government contracts set aside for these businesses with Nicholas Price as the owner and requisite manager and supervisor,³ and Tracy Beasley his employee.

LMC contracted with the U.S. Department of Veterans Affairs on May 1, 2015, to provide non-emergency medical transportation services to veteran beneficiaries of the Southern Arizona Veterans Affairs Health Care System. D. & O. at 1. The contract incorporated the provisions of SCA and required SCA prevailing wage and fringe benefits for drivers and dispatchers.

After initiating the contract, Price delegated management to Beasley and other staff. In June 2016, however, Price resumed direct management of the contract following complaints from the Department of Veterans Affairs. As part of that resumption, Price removed Beasley and changed the company's name to Price

² William T. Barto (the ALJ) subsequently became the Chief Administrative Appeals Judge of the Administrative Review Board but did not participate in the consideration of this case while it was pending on appeal before the Board.

³ The provision at 13 C.F.R. Part 125 subpart B requires that SDVOSB owners maintain control of the entity.

Gordon, LLC d/b/a Veteran National Transportation (VNT). Order Granting Partial Summary Decision (Summary Decision Order) at 3 (Apr. 5, 2018).

On June 7, 2017, the Administrator filed a complaint alleging that Respondents failed to pay certain service employees the wage rate and fringe benefits required by the Contract and the SCA. As part of the enforcement proceedings, the Department of Veterans Affairs withheld from VNT SCA contract payments. Respondents stopped working on the contract about May 30, 2017. *Id.* at 6.

Parties filed motions for summary decision. On April 5, 2018, the ALJ issued an Order Granting Partial Summary Decision. In his April 5 Order, the ALJ found that the Respondents violated the terms of the SCA by not paying SCA wages and fringe benefits for all hours worked in the performance of a contract with the United States Department of Veterans Affairs. The ALJ found that Respondents erroneously limited drivers' SCA wages to those times when drivers were actually transporting patients. Summary Decision Order at 4. For other times, drivers received the applicable minimum wage rather than the SCA wage. The ALJ found that Respondents owed wages for several tasks including inspecting a vehicle, driving a vehicle, and waiting at a pick-up location. *Id.* at 9. The ALJ scheduled a hearing on April 24–26, 2018, to resolve disputed facts concerning the actual wages owed.

After hearing, the ALJ issued a Decision and Order on January 11, 2019. In the D. & O., the ALJ modified his findings of April 5, 2018, to find that drivers' wait time was compensable at SCA wages if it primarily benefited the employer and his business. D. & O. at 10. The time spent waiting to be dispatched was an integral and indispensable component of the principal activities of Respondents and thus was in fact compensable at SCA wages. *Id.* at 10–11. Agreeing with the Administrator, the ALJ found that Respondents failed to pay dispatchers the appropriate SCA rate for all hours worked with Respondents. *Id.* at 12–13. The ALJ also found that Respondents failed to show that they paid holiday pay appropriately and thus owed holiday pay to all employees according to the SCA and its regulations. *Id.* at 14.

Having found that Respondents violated the SCA and owed employees SCA wages, the ALJ then examined the individual liability of Beasley and Price. The ALJ found that Beasley failed to answer pleadings or participate in the proceeding and therefore he was jointly and severally liable with LMC for all violations. D. & O. at 9. The ALJ found that Nicholas Price was liable only for violations occurring after June 8, 2016, because he took control and supervision of LMC's employment and management policies at that time. *Id.*

Because the ALJ found that Respondents violated the Act, Respondents were subject to debarment unless the ALJ found exceptional circumstances relieved them from that sanction. The ALJ found “unusual circumstances” warranted relieving Price and VNT from the sanction of debarment.

On appeal, the Administrator seeks review of the ALJ’s decision to limit VNT and Price’s back wage liability. The Administrator also appeals the ALJ’s decision declining to debar Respondents Price and VNT. The Respondents filed an opposition to the appeal.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide appeals from ALJ decisions and orders concerning questions of law and fact arising under the SCA. 29 C.F.R. §§ 6.20, 8.1(b)(1), (6). The Secretary of Labor has delegated to the Board authority to issue agency decisions under the SCA. Secretary’s Order 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (Feb. 21, 2020). The ARB’s review is in the nature of an appellate proceeding. 29 C.F.R. §§ 8.1(b)(1), (6). In review of final determinations other than wage determinations, the Board may affirm, modify, or set aside, in whole or in part, the decision under review and is authorized to modify or set aside the ALJ’s findings of fact only where they are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b).

DISCUSSION

1. Statutory and Regulatory Framework

The SCA requires that employees working on covered Government service contracts be paid prevailing hourly wages and fringe benefits, including holiday pay, as determined by the Secretary of Labor. 41 U.S.C. §§ 6703(1)–(2); 29 C.F.R. § 4.6(b)(1). Workers are entitled to pay at the SCA wage rate for each hour worked in the performance of an SCA-covered contract. 41 U.S.C. § 6703(1)–(2); 29 C.F.R. § 4.178. Because this entitlement to SCA compensation is based on the hours worked on a covered contract, contractors have an affirmative obligation to make and maintain accurate records of the “number of daily and weekly hours so worked by each employee.” 29 C.F.R. §§ 4.6(g)(1)(iii), 4.178, 4.185. A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the provisions of the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor. 29 C.F.R. §§ 4.188(b)(4), 4.101(g), 4.191(a). A contractor or party responsible that violates the SCA is liable for, among

other things, “underpayment of compensation due any employee” who is performing work under a covered contract, 41 U.S.C. § 6705(a), and except in unusual circumstances, is subject to a three-year period of debarment. 41 U.S.C. § 6706.

2. The ALJ erred in limiting the scope of Price’s liability to activities after June 8, 2016

The ALJ found that Price and VNT were liable only for the time period after June 8, 2016, when Price resumed control.

The Administrator argues on appeal that because VNT and Nicholas Price are responsible for violations during the contract’s effective dates, the ALJ committed reversible error in deciding to limit their back wage liability. In support, the Administrator notes that while the company’s name changed from LMC to VNT during the contract period, the company remained the same legal entity—and Respondent so admits. Joint Exhibit 5 at 3. The Administrator adds that Price, as an owner and manager of the company throughout the contract period, is an individual jointly and severally liable for the entire back wage amount under 41 U.S.C. § 6705(a); 29 C.F.R. § 4.187(e)(1)–(4).

Respondents counter that Price, while the owner throughout the contract period, did not exercise his management responsibilities prior to June 2016 when he ousted Beasley, and therefore the ALJ correctly limited Price’s liability to back wages owed after June 8, 2016. Respondents’ Resp. to Admin. Br. at 9.

We conclude that the ALJ erred in limiting Price’s liability to accrued back wages owed after June 8, 2016. Even if Price did not exercise his management responsibilities prior to June 2016, but delegated them to Beasley, such delegation would not relieve him of liability. The regulations provide that corporate officers who control or who are *responsible for control* of the corporate entity, and who by their action or inaction cause or permit a contract to be breached, are “parties responsible.”⁴ Price’s status as sole owner meant that he was a “party responsible”

⁴ 29 C.F.R. §§ 4.187(e)(2),(3),(4):

(2) The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty.... Accordingly, it has been held by administrative decisions and by the courts that the term *party responsible*, as used in section 3(a) of the Act, imposes personal liability for violations of any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers *who control, or are responsible for control of, the corporate entity. . . .*

and remained responsible for control of the corporate entity at all times. We also note that Price was the service-disabled veteran who was awarded this contract based on his status as such. The rules and regulations implementing the SDVOSB program require that the SDVO maintain control and day-to-day operations of the entity. 13 C.F.R. Part 25.

3. The ALJ committed harmless error in declining to debar Price and VNT

Under the SCA, debarment is presumed once violations of that Act have been found, unless the violator is able to show the existence of “unusual circumstances” that warrant relief from SCA’s debarment sanction. 41 U.S.C. § 6706; 29 C.F.R. §§ 4.188(a), (b); *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-020 (ARB Apr. 30, 2001).

The ALJ found that unusual circumstances precluded Price’s debarment. D. & O. at 15. In so finding, the ALJ criticized the three-part test utilized in applicable precedent. *Id.* at 15, n.71. Specifically, the ALJ stated: “[n]either the plain text of the regulation nor the Act supports such an interpretation, and as such I will conduct my analysis by examining the totality of the evidence as described below.” *Id.* The ALJ also criticized additional factors provided for by § 4.188(b)(3)(ii) concerning prior investigations and recordkeeping violations but ultimately concluded that these factors were restatements of the criteria articulated in § 4.188(b)(1), which the ALJ already found were not present. For the factor considering the impact of the violation on employees, the ALJ noted that the Government’s withholding SCA payments was a dominant cause of Respondents’ inability to pay employees owed wages. *Id.* at 17, n.78.

(3) In essence, individual liability attaches to the corporate official who is responsible for, and therefore causes or permits, the violation of the contract stipulations required by the Act, i.e., corporate officers who control the day-to-day operations and management policy are personally liable for underpayments because they cause or permit violations of the Act.

(4) It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract *who are bound by and accept responsibility for compliance* with the Act and imposition of its sanctions set forth in the contract clauses in § 4.6, but includes all persons, irrespective of proprietary interest, 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. . . .

On appeal, the Administrator argues that the ALJ erred in finding that VNT and Nicholas Price demonstrated “unusual circumstances” warranting relief from the sanction of debarment. Specifically, the Administrator argues that the ALJ erred by not applying the applicable SCA regulation and instead applied a “totality of the evidence” and a “rule of lenity” to support his conclusion that unusual circumstances existed to warrant relief from the sanction of debarment. The Administrator also asserts that the ALJ erroneously focused on a purported “good faith disagreement” or “bona fide legal issue of doubtful certainty” between the parties as factors against debarment.

The SCA does not define the term “unusual circumstances.” The regulation at 29 C.F.R. § 4.188(b)(3) sets forth a three-part test to determine when “unusual circumstances” exist to relieve a contractor from the norm of imposing the sanction of debarment. Those factors include the absence of aggravated, willful or culpable conduct; the presence of certain mitigating factors; and assuming those requirements are both met, then the consideration of other enumerated factors. It is the Respondents’ burden to show unusual circumstances. *Vigilantes v. Adm’r of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992). In *Hugo Reforestation*, the ARB summarized the regulatory three-part test:

Under Part I of this test, the contractor must establish that the conduct giving rise to the SCA violations was neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result of “culpable conduct.” Moreover, the contractor must demonstrate an absence of a history of similar violations, an absence of repeat violations of the SCA and, to the extent that the contractor has violated the SCA in the past, that such violation was not serious in nature. Under Part II of the test assuming none of the aggravated circumstances of Part I are found to exist there must be established on the part of the contractor, as prerequisites for relief, “a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances [by the contractor] of future compliance.”

Finally, assuming the first two parts of the regulatory test are met, under Part III a variety of additional factors bearing on the contractor’s good faith must be considered before relief from debarment will be granted including, inter alia, whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed record-keeping violations which impeded the Department’s investigation, and whether the determination of liability

under the Act was dependent upon resolution of bona fide legal issues of doubtful certainty.

ARB No. 99-003, slip op. at 12–13 (citations and footnotes omitted).

We agree with the Administrator that the ALJ erred in finding that the three-part test is not applicable to debarment proceedings. Neither the ALJ nor the ARB is able to rule upon the validity of the regulations. Secretary’s Order No. 02-2020, Secretary’s Order, para. 5 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (Feb. 21, 2020) (“Secretary’s Order”) (“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.”). In *M.E.S. Servs., Inc.*, No. 1986-SCA-065 (Sec’y July 28, 1989), available at 1989 WL 549936, the Deputy Secretary rejected the ALJ’s use of “totality of evidence” in place of the three-part test. *Id.* (“[I]t is error for the ALJ to ignore the properly promulgated regulation which was developed for determining the existence of “unusual circumstances,” set forth at 29 C.F.R. [sec] 4.188(b)(3). This regulation sets out a three-part test for a finding of unusual circumstances. . . .”); see also *A to Z Maint. Corp. v Sec’y of U.S. Dep’t of Labor*, 710 F. Supp. 853 n.8 (D.D.C. 1989) (declining to give effect to administrative cases that do not comply with the procedure set out in § 4.188(b)(3)).

However, we further conclude that the ALJ’s error is harmless because he did in fact apply the necessary factors and consider the appropriate circumstances in finding that unusual circumstances relieve Respondents from debarment. For example, the ALJ found that Respondents did not willfully intend to violate the Act and were not culpably neglectful toward their responsibilities. D. & O. at 15–16 & n.72. The ALJ found that there was no evidence that Respondents previously violated the SCA. The ALJ noted that Price sought to ascertain whether its payroll practices violated the Act and that there was no evidence that Respondents misrepresented its payroll practices or falsified employment records to conceal practices. *Id.* at 15–16. Rather, Respondents and the Administrator had a “good faith” disagreement on the meaning and interpretation of the SCA’s requirements upon which Respondents litigated and ultimately prevailed in part. D. & O. at 15–18. The ALJ also found that Respondents did not fail to cooperate in the investigation and distinguished any failure to provide sufficient assurances of future compliance. The ALJ refused to interpret Respondents’ decision to litigate as evidence of contumacious noncompliance. *Id.* at 16–17 & n.75 (arguing that an employer has the ability to contest genuine, bona fide legal issues without fear of forfeiting eligibility for future government contracts). The ALJ noted that Respondents were not able to pay owed back wages in large part because of the

withholding of contract payments that accompanied the Administrator's process against Respondents. *Id.* at 17.

In sum, while the ALJ erred in applying the totality of circumstances, that error was harmless because the ALJ found that the factors were not present and thus had the ALJ applied the factors in the three-part test, he would have found that Respondents satisfied that test and thus unusual circumstances were present to justify relief from debarment.

CONCLUSION

We **MODIFY** the ALJ's decision by extending Respondents' liability to cover the entire contract period. We **AFFIRM** the ALJ's denying debarment because of the presence of unusual circumstances.