U.S. Department of Labor

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

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

AMERICA'S STAFFING PARTNER, INC., JORGE CRUZ, an individual, and RUDY VEGLIANTE, an individual,

RESPONDENTS.

ARB CASE NO. 2023-0019

ALJ CASE NO. 2020-SCA-00010
ALJ LAUREN C. BOUCHER

DATE: November 12, 2024

Appearances:

For the Administrator, Wage and Hour Division:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus, Esq.; Jonathan T. Rees, Esq.; Sejal Singh, Esq.; *United States Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
Eric S. Montalvo, Esq.; *Federal Practice Group*; Washington, District of Columbia

Before WARREN, THOMPSON, and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

ROLFE, Administrative Appeals Judge:

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), and its implementing regulations.[1] On January 26, 2023, a United States Department of Labor Administrative Law Judge held that Respondents America's Staffing Partner, Inc. (ASP), Mr. Jorge Cruz, and Mr. Rudy Vegliante (collectively, Respondents) failed to establish the "unusual circumstances" the regulations require to warrant relief from an otherwise automatic three-year debarment for their undisputed SCA violations.[2] Respondents filed a Petition for Review challenging their debarment.

The presence of any aggravating factors exacerbating a violation prohibits a finding of unusual circumstances. Because a preponderance of evidence supports the ALJ's aggravated factor findings that Respondents' culpable conduct caused their violations and that Respondents had a history of similar SCA violations, we affirm the ALJ's decision.

BACKGROUND

1. Statutory and regulatory framework

The SCA requires government contractors to meet minimum standards in paying prevailing wages and fringe benefits.[3] Every contract must include clauses setting forth the contract's SCA obligations including a wage determination issued by the Secretary of Labor through the Wage and Hour Division (WHD) establishing the minimum prevailing wage rates and fringe benefits that contractors must pay service employees.[4]

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[1] 41 U.S.C. §§ 6701-6707 (2011), and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2024).

[2] D. & O. at 1, 16.

[3] 41 U.S.C. §§ 6702-6703. Since no collective-bargaining agreement (CBA) was at issue here, we do not discuss circumstances under which the CBA-negotiated wage rate would supersede the prevailing wage rate.

[4] 41 U.S.C. § 6703(1); 29 C.F.R. §§ 4.3(a), 4.6.

The SCA implementing regulations, among other things, require contractors to pay the prevailing wage rate and provide fringe benefits to all covered workers for "each hour worked."[5] Employers must "promptly" pay the prevailing wage rate no "later than one pay period following the end of the pay period in which they are earned."[6] In addition to creating liability for underpaid compensation, violations of these requirements result in an automatic three-year debarment unless the contractor can demonstrate that unusual circumstances warrant relief from the otherwise mandatory sanction.[7]

Under the regulations, offending contractors must satisfy each stage of a three-step process to establish unusual circumstances.[8] Step One -- the only step the ALJ reached here -- prohibits relief if any of four aggravating factors exacerbate a violation: (1) the conduct was willful, deliberate, or of an aggravated nature; (2) the violations were the result of culpable conduct, including culpable neglect or culpable disregard; (3) a contractor has a history of similar violations or repeatedly violated the SCA; or (4) any previous violations were serious in nature.[9]

ASP, a staffing corporation, received eight contracts to provide personnel support to different government entities between 2013 and 2017.[10] Jorge Cruz, the sole owner and Chief Executive Officer, and Rudy Vegliante, the Senior Vice President, both controlled the employment practices and policies on the contracts.[11] This appeal arises from WHD investigations into Respondents' SCA compliance on three contracts at military bases: 1) the Carl R. Darnall Army Medical Center in Fort Hood, Texas (Fort Hood contract); 2) the Keesler Medical Center in Keesler,

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5 29 C.F.R. § 4.178.

6 *Id.* § 4.165.

7 41 U.S.C. § 6706; 29 C.F.R. § 4.188(a).

8 29 C.F.R. § 4.188(b)(3); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Hearn's Enters., LLC*, ARB No. 2020-0050, ALJ No. 2017-SCA-00006, slip op. at 14 (ARB Mar. 10, 2022); *see also Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Igwe*, ARB No. 2007-0120, ALJ No. 2006-SCA-00020, slip op. at 11 (ARB Nov. 25, 2009) (citation omitted) (analysis of Step Two and Step Three unnecessary where employer cannot satisfy Step One)).

9 29 C.F.R. § 4.188(b)(3)(i). Step Two, which the ALJ did not arrive at in this case, lists a series of "prerequisites to relief" a contractor further must establish to obtain relief, and Step Three, which the ALJ also did not reach, consists of a "variety of factors" for a tribunal to consider prior to granting relief. 29 C.F.R. § 4.188(b)(3)(ii).

10 D. & O. at 3-4.

11 *Id.* at 1, 3.

Mississippi (Keesler contract); and 3) the Robins Air Force Base in Warner Robins, Georgia (Robins contract).[12]

2. Respondents' undisputed violations of three SCA-covered contracts

WHD's investigation of Respondents' SCA compliance began in October 2015 on the Fort Hood contract.[13] During the investigation, Respondents admitted they knowingly failed to timely provide SCA-required health and welfare benefits to their employees but blamed their noncompliance on a lack of liquidity caused by an unexpected tax complication.[14]

Respondents had entered into an installment agreement with the IRS to pay past due taxes owed.[15] Subsequently, the IRS mistakenly offset about $183,000.00 in funds from Respondents' contracts.[16] The IRS refunded the offset payments about six months later.[17] Faced with a liquidity crunch, Respondents deliberately chose to underpay health and welfare benefits in the first half of 2016, claiming they did so to avoid underpaying wages -- although no record evidence indicates that Respondents took any other measures to balance their books before underpaying their employees.[18]

WHD rejected Respondents' tax problem as a justification for permitting delayed payments and assessed two violations: (1) a failure to pay the prevailing wage rate regarding holiday pay; and (2) a failure to pay the full fringe health and welfare benefit.[19] At the final conference in September 2016, Respondents acknowledged the violations and, in October 2016, agreed to pay $204,448.09 to remedy them.[20]

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12 *Id.* at 1, 6-7, 9.

13 *Id.* at 6.

14 *Id.* at 5, 12.

15 *Id.* at 12.

16 *Id.*

17 *Id.*

18 *Id.*; Administrator's Response Brief (Administrator Br.) at 6, 38.

19 D. & O. at 6.

20 *Id.*

Notably, a WHD Investigator explicitly advised Respondents at that time of their ongoing SCA obligations on every contract to *promptly* pay the prevailing wage, to compute holiday pay as set forth in the regulations, and to pay health and welfare benefits "according to the wage determination incorporated into [each] contract."[21] After the violations at Fort Hood, a different WHD investigator headed a separate corporate-wide SCA investigation into each of Respondents' open contracts, including the Keesler and Robins contracts.[22]

Respondents received the Keesler contract in September 2016 -- the same month as the final conference on the Fort Hood contract.[23] Despite their previous violations at Fort Hood and WHD's explicit warning at the final conference, WHD found Respondents committed similar violations at Keesler.[24]

In 2017 and 2018, WHD issued two new wage determinations that required Respondents to increase and promptly pay their employees' prevailing wages.[25] Respondents admitted that they failed to pay the increased wages, but claimed they were waiting until they received an equitable adjustment to their billing to offset the raises.[26] Respondents similarly failed to fully pay SCA-mandated health and welfare benefits.[27] WHD again rejected Respondents' attempt to justify the underpayments through future retroactive payments, and in April 2019, Respondents acknowledged the violations and agreed to pay approximately $25,000.00 in addition to past amounts to remedy their Keesler contract violations.[28]

Respondents received the Robins contract in July 2017 -- ten months after the final conference on the Fort Hood investigation.[29] Similar to the previous

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21 *Id.*

22 *Id.* at 6-7.

23 *Id.*

24 *Id.* at 7.

25 D. & O. at 7, 10. Option year 1 started October 1, 2017, and Option year 2 started October 1, 2018. Administrator's Exhibit (CX) 11 at 3.

26 D. & O. at 10.

27 *Id.* at 7.

28 *Id.* at 6, 7, 7 n.4.

29 *Id.* at 15.

violations, WHD determined that Respondents underpaid health and welfare benefits on the Robins contract, sometimes paid them late, and sometimes did not pay them at all.[30] WHD further found that Respondents failed to make full fringe benefits contributions for all hours paid -- similar to the violation uncovered at Fort Hood.[31] Respondents again acknowledged the ongoing violations and agreed to pay $65,407.98 in back wages at the final conference.[32]

As a result of Respondents' violations on Keesler and Robins contracts -- and with the previous Fort Hood violations as a backdrop -- WHD filed a complaint with the Department of Labor Office of Administrative Law Judges seeking to enforce the three-year debarment under 41 U.S.C. § 6706 and 29 C.F.R. § 4.188.[33] Respondents did not contest their violations but contended that unusual circumstances warranted relief from debarment.[34]

3. The ALJ holds that aggravating factors prevent Respondents from establishing unusual circumstances

The ALJ held a two-day hearing in this matter in December 2021 solely to determine whether Respondents could demonstrate unusual circumstances to establish debarment relief.[35] The ALJ found Respondents could not satisfy the first step of the process because at least three aggravating factors exacerbated Respondents' undisputed SCA violations: its culpable neglect to determine whether its practices violated the SCA; its culpable disregard of whether it was actually in violation of the SCA; and its history of similar or repeated violations.[36]

First, while finding that Respondents did not willfully violate the Act, the ALJ found Respondents' failure to pay the prevailing wage rate upon the government's exercise of the Keesler contract's option years constituted culpable

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30 *Id.* at 7, 15, 15 n.20.

31 *Id.* at 14.

32 *Id.* at 7.

33 *Id.* at 1, 6-7.

34 *Id.* at 1, 9.

35 *Id.*

36 *Id.* at 15-16.

neglect.[37] The ALJ noted that the plain language of the Keesler contract incorporated the implementing regulations' requirement that Respondents pay each employee "as specified in [the] wage determination" and that nothing in the plain terms of the wage determination authorized the retroactive payment of wages.[38]

The ALJ thus rejected Respondents' argument that they reasonably could have believed that they could pay the higher wage rate once they had obtained an equitable adjustment to the contract.[39] The ALJ instead explained that Respondents had the responsibility to avoid transferring their cash flow problems to their employees.[40] The ALJ reasoned that "it strains credulity" that as experienced federal contractors Respondents "did not understand [their] obligation to pay prevailing wages at the time they were earned."[41]

Second, the ALJ found Respondents' similar failure to timely pay full health and welfare benefits under the Keesler and Robins contracts constituted culpable disregard, rejecting Respondents' various arguments that conditions outside their control justified their actions.[42] As a threshold matter, the ALJ again stressed the overarching SCA mandate for federal contractors to promptly pay full wages and benefits when they are due without passing financial hardships through to their employees.[43] The ALJ then rejected Respondents' argument that the IRS's erroneous temporary withholding excused Respondents' late payments.[44] In any event, the ALJ further found the withholding "immaterial" because it occurred during the Fort Hood contract in 2016 and could not have directly impacted the Keesler and Robins contracts years later.[45]

Likewise, the ALJ also rejected Respondents' assertion they were not culpable because they did not know the applicable wage determinations required

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37 *Id.* at 10, 12.

38 29 C.F.R. § 4.6(b)(1); D. & O. at 11; *see also* D. & O. at 3-4, ¶¶6, 10.

39 D. & O. at 10.

40 *Id.* at 11-12.

41 *Id.* at 12.

42 *Id.* at 12, 15.

43 D. & O. at 12; s*ee* 29 C.F.R. §§ 4.168, 4.175.

44 D. & O. at 12.

45 *Id.*

health and welfare benefits based on hours paid, or because they were waiting to adopt corrective measures at the behest of WHD, because the WHD investigator specifically reminded Respondents at the Fort Hood final conference of their obligations to promptly pay wages and benefits based on hours paid.[46] Therefore, the ALJ reasoned Respondents were actually aware of their obligations at the outset of the Keesler and Robins contracts and failed to fulfill them anyway.[47] And, the ALJ concluded, "it is never permissible for federal contractors to transfer their financial difficulties to their employees."[48]

Finally, in addition to each of these independently dispositive aggravating factors, the ALJ further found that the Fort Hood investigation was a separate investigation and did not comprise one part of a single corporate-wide investigation at Keesler and Robins.[49] Regardless of whether it was separate, however, the ALJ found Respondents actually knew of their affirmative duty to timely pay wages and benefits under the SCA no later than the final conference at Fort Hood given the WHD investigator's explicit warning.[50] Respondents' failure to do so after that instruction created a "history of similar violations" that exacerbated the Keesler and Robins violations.[51] Because at least three individually dispositive aggravating factors were present, the ALJ found Respondents could not satisfy the first element of the unusual circumstances test.[52] Thus, she barred relief without reaching the second or third elements of the test.[53]

Respondents on appeal do not point to any specific error of law or fact in the ALJ's decision. Rather they repeat the same general arguments the ALJ rejected and assert that their debarment is "disproportionate and draconian" when compared to other debarment cases.[54] The Principal Deputy Administrator

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46 *Id.* at 13-15.

47 *Id.* at 14.

48 *Id.* at 12.

49 *Id.* at 15. In the D. & O., the ALJ predominately considered ASP's argument about a corporate-wide investigation starting with the Fort Hood contract in her examination of culpable disregard. *See also id.* at 12-15.

50 *Id.* at 13-14.

51 *Id.* at 15-16.

52 *Id.* at 16.

53 *Id.*

54 Respondents' Brief at 1.

(Administrator) of the WHD responds that the preponderance of the evidence easily supports the ALJ's finding that at least three aggravating factors compounded Respondents' undisputed SCA violations and that the cases Respondents cite on appeal do not change that analysis.[55] The Administrator thus respectfully requests that the Board affirm the ALJ's decision in its entirety.[56]

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide appeals from ALJ decisions and orders under the SCA.[57] The Board's review of an ALJ's decision under the SCA is an appellate proceeding.[58] As such, the Board reviews conclusions of law de novo.[59] The Board may modify or set aside an ALJ's factual findings, however, only when a preponderance of evidence does not support them.[60] Moreover, the Board generally defers to an ALJ's credibility findings "unless they are inherently incredible or patently unreasonable."[61]

DISCUSSION

The SCA's debarment provision is a "particularly unforgiving provision of a demanding statute" forcing violating contractors "to run a narrow gauntlet" to establish relief.[62] Indeed, debarment "should be the norm, not the exception" with only "the most compelling of justifications" relieving a "violating contractor from [the] sanction."[63]

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55 Administrator Br. at 22, 31, 34.

56 *Id.* at 42.

57 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. 13,186 (Mar. 6, 2020); 29 C.F.R. §§ 6.20, 8.1(b).

58 29 C.F.R. § 8.1(d).

59 *Hearn's Enters., LLC*, ARB No. 2020-0050, slip op. at 4-5 (citation omitted).

60 29 C.F.R. § 8.9(b).

61 *Klinger v. BNSF Ry. Co.*, ARB No. 2023-0003, ALJ No. 2016-FRS-00062, slip op. at 5 (ARB July 23, 2024) (citations and inner quotations omitted).

62 *Hearn's Enters., LLC*, ARB No. 2020-0050, slip op. at 14 (citation omitted).

63 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Mesa Mail Serv., LLC*, ARB No. 2017-0071, ALJ No. 2009-SCA-00011, slip op. at 8 (ARB Sept. 30, 2020) (quotations and citations omitted).

This is not an exceptional case. Instead, as the ALJ recognized, Respondents plainly failed the first step of the "unusual circumstances" test on at least three distinct grounds. First, Respondents acted with at least culpable neglect when they knowingly failed to raise workers' pay to match an increase in the prevailing wage rate in the Keesler contract.[64] Second, Respondents' failure to promptly pay health and welfare fringe benefits in the Keesler and Robins contracts resulted from at least their "culpable disregard" of whether withholding those funds would violate the Act.[65] Finally, Respondents created "a history of similar violations" from "repeatedly violat[ing] the provisions of the Act."[66]

Each of these findings independently prohibits debarment relief.

1. Keesler contract: the preponderance of the evidence confirms Respondents acted with at least culpable neglect by paying less than the prevailing rate.

While the unusual circumstances determination "must be made on a case-by-case basis in accordance with the particular facts present,"[67] in no instance can a contractor receive debarment relief where its violations result from "culpable neglect."[68] Culpable neglect goes "beyond [mere] negligence," but falls "short of specific intent."[69] Indeed, the debarment regulation itself explicitly provides that when the contractor's "obligation to comply with the Act is plain from the contract," an employer's "plea of ignorance of the Act's requirements" does not constitute "unusual circumstances."[70] The Board therefore has held that when the SCA's requirements are plain from the face of a contract, a violating contractor is "*at least culpably negligent in failing to read and perform them*."[71]

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64 D. & O. at 10-12.

65 D. & O. at 15-16; 29 C.F.R. § 4.188(b)(3)(i).

66 D. & O. at 15-16; 29 C.F.R. § 4.188(b)(3)(i).

67 29 C.F.R. § 4.188(b)(1).

68 *Id.* § 4.188(b)(3)(i).

69 *Igwe*, ARB No. 2007-0120, slip op. at 9 (citation omitted).

70 29 C.F.R. § 4.188(b)(1).

71 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Integrated Res. Mgmt., Inc.*, ARB No. 1999-0119, ALJ No. 1997-SCA-00014, slip op. at 6 (ARB June 27, 2002) (emphasis added).

Both the SCA requirements and the Keesler contract were clear here. The SCA regulations provide that wages "shall be paid" to employees "promptly and in no event later than one pay period following the end of the pay period in which they are earned."[72] Further, the parties had specifically incorporated into the Keesler contract 29 C.F.R. § 4.6(b)(1)'s requirement that "each service employee" shall "be paid not less than the minimum monetary wages" specified "in any wage determination attached to this contract."[73]

It is undisputed that the Keesler contract incorporated wage determinations in 2017 and 2018 that increased the prevailing wage rate.[74] And it is also undisputed that Respondents "did not pay its employees the increased prevailing wage rate at the start of each option year."[75] The failure to follow the plain terms of the Act and the contract alone establishes culpable neglect.[76]

Regardless, the ALJ reasonably found Vegliante's testimony that Respondents believed they could legitimately withhold the wage increase and pay their workers' wages retroactively once they received an equitable adjustment to the contract, not credible.[77] The ALJ considered it unreasonable "for an experienced employer and businessperson to believe that an employee's earned wages may be paid retroactively."[78] The ALJ also found that it "strain[ed] credulity that ASP did not understand its obligation to pay prevailing wages at the time they were earned."[79]

It would exceed our scope of review to disturb those credibility findings. Far from being "inherently incredible," they are eminently reasonable -- particularly

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[72] 29 C.F.R. § 4.165(a)(1); *see also* 29 C.F.R. § 4.167 (requiring employers to "timely" pay wages "free and clear" and prohibiting an employer from retaining wages owed to workers).

[73] D. & O. at 11;*see also id.* at 3-4, ¶¶6, 10.

[74] CX 11 at 3-4; D. & O. at 10-12.

[75] D. & O. at 11.

[76] 29 C.F.R. § 4.188(b)(1); *Integrated Res. Mgmt., Inc.*, ARB No. 1999-0119, slip op at 6.

[77] D. & O. at 10-11.

[78] *Id.*

[79] *Id.* at 12. The Board generally defers to an ALJ's credibility findings "unless they are inherently incredible or patently unreasonable." *Klinger*, ARB No. 2023-0003, slip op. at 5 (citations and inner quotations omitted).

where WHD reminded Respondents of their responsibility to promptly pay wages and benefits at the conclusion of the Fort Hood investigation.[80]

We therefore affirm the ALJ's finding Respondents acted with at least culpable neglect when they knowingly failed to raise Keesler workers' pay to match an increase in the prevailing wage rate over the course of two contracts. That failure violated the plain terms of the Act that had been incorporated into the Keesler contract. And even assuming Respondents' ignorance-based justifications for their violations were relevant in the first place, the ALJ permissibly found them not credible. Respondents' culpable neglect in failing to pay the Keesler contract's wage determination, standing alone, prohibits debarment relief.[81]

2. Keesler and Robins contracts: the preponderance of the evidence confirms Respondents acted with at least culpable disregard in similarly failing to pay health and welfare fringe benefits.

Respondents' undisputed failure to promptly pay health and welfare fringe benefits on both the Keesler and Robins contracts erects a similar barrier. The SCA requirement contained in 29 C.F.R. § 4.6(b)(1) to pay health and welfare benefits was explicitly incorporated into the wage determinations of both contracts. The straightforward text of the SCA, its regulations, and the Keesler and Robins contracts thus again plainly obligated Respondents to promptly pay full health and welfare benefits with the same urgency as wages.[82] And Respondents' undisputed failure to promptly pay them again establishes Respondents' culpability with no need to go further: "[T]he privilege of contracting" carries "the responsibility to be aware of and follow the applicable contractual and legal provisions" providing for employees' welfare.[83]

Nonetheless, the ALJ once again aptly rejected Respondents' post hoc justifications for nonpayment. As the ALJ reasoned, nothing in the plain text of the

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80 *See Klinger*, ARB No. 2023-0003, slip op. at 5.

81 *See Igwe*, ARB No. 2007-0120, slip op. at 10 (affirming the ALJ's finding that a federal contractor that signed multiple contracts and subsequent modifications that "changed the applicable wage determination," yet failed to comply with the wage determinations, "clearly" acted with "culpable neglect.") (citation omitted).

82 *See* 29 C.F.R. § 4.165.

83 *Igwe,* ARB No. 2007-0120, slip op. at 10 (citation omitted).

SCA or the caselaw permits a contractor to pass on its financial hardships (such as a liquidity problem caused by tax issues) to its employees.[84] Instead, Congress mandated debarment for SCA violations and added the unusual circumstances test to limit the Secretary's discretion in granting relief from it.[85]

And even if that was not the case, the ALJ recognized the undisputed facts again belied Respondents' pleas of ignorance of the law: the WHD investigator "explicitly told" Respondents at the conclusion of the Fort Hood investigation they had to pay health and welfare fringe benefits "for all hours paid up to 40 in a workweek according to the wage determination incorporated into the contract."[86] Respondents do not challenge that factual finding on appeal (nor could they reasonably), and their failure to timely pay health and welfare fringe benefits provides another, independent reason for prohibiting debarment relief.[87]

3. Respondents' history of violations further precludes relief from debarment.

Debarment is mandatory "where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature."[88] One prior similar violation sufficiently warrants debarment.[89]

The record here speaks for itself. Respondents repeatedly violated the Act in similar ways causing serious repercussions for their employees over the course of approximately three years on three different contracts.[90] Moreover, Respondents were explicitly warned following their initial violations on the Fort Hood investigation and subsequently still knowingly violated the Act. Respondents'

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84 D. & O. at 10, 12.

85 S. REP. No. 92-1131 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3534, 3536.

86 D. & O. at 14.

87 41 U.S.C. § 6706; 29 C.F.R. § 4.188.

88 29 C.F.R. § 4.188(b)(3)(i).

89 *See A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 857 (D.D.C. 1989) (holding that the SCA statute and regulations do not spare "second-time violators" and upholding an ALJ's conclusion that debarment was mandatory for a contractor that committed only one prior violation).

90 D. & O. at 6-7.

conduct thus easily fits under all three clauses of the regulation. And counter to Respondents' primary argument on appeal, nothing in the Act, regulations, or caselaw requires that the violations be uncovered in separate investigations.

But even if that was not the case, the ALJ found the Fort Hood investigation *was* separate and distinct from the Keesler and Robins investigations.[91] The ALJ correctly determined a significant period separated the Fort Hood investigation from the Keesler and Robins investigations, different investigators conducted them, and though the investigations uncovered similar violations, they were not identical.[92] Respondents on appeal have shown no error in the ALJ's factual findings. We therefore affirm the ALJ's finding that the Fort Hood investigation was separate from the Keesler and Robins investigations as supported by a preponderance of the evidence.[93]

Respondents' history of similar and serious violations, therefore, independently prohibits debarment relief.[94]

4. Respondents' arguments on appeal do not change this analysis.

Respondents' specious arguments on appeal that a liquidity shortfall caused by government interference or government delay creates special exceptions to these aggravating factors is without merit. As the Administrator points out "the statute and the regulations do not include any exceptions [to the requirement to pay the prevailing wage] much less an exception for an employer's liquidity shortfall."[95] Instead, the Board has long held that an employer's "unfortunate financial circumstances" neither excuses its legal responsibility to pay its workers "on time and in full under the SCA" nor allows a contractor to escape the legal consequences of underpaying its workers.[96] So too here.

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91 *Id.* at 13.

92 *Id.* at 13, 13 n.16.

93 29 C.F.R. § 8.9(b) ("The Board shall modify or set aside findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.").

94 *See A to Z Maint. Corp.*, 710 F. Supp. at 857 ("When a contractor who has been found to have violated the SCA in the past does so again, he or she must be debarred.").

95 Administrator Br. at 32.

96 *Hearn's Enters., LLC*, ARB No. 2020-0050, slip op. at 17 (citation omitted); *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

Finally, as the Administrator further argues, "the few cases [Respondents] cite[] in support of its novel [exceptions] are readily distinguishable" and "almost none of them are binding[.]"[97] Respondents cite to *Price Gordon*,[98] claiming the Board found relief from debarment "appropriate because [the] inability to pay employees occurred due to government seizure of contractor's payment."[99]

But Respondents misstate the Board's holding. The *Price Gordon* Board held that the respondents in that case satisfied Step One of the analysis, deferring to the ALJ's factual finding that the contractors did not act with culpable neglect and had not previously violated the SCA.[100] Any analysis of payment occurred at Step Three of the analysis -- and has no relevance here where the ALJ correctly found both culpable conduct and a history of violations at Step One.[101]

Respondents also argue that *Elaine's Cleaning Service, Inc. v. United States Department of Labor*[102] held "that a fringe benefit violation is not willful if the contractor cannot pay, especially if the inability to pay is caused by the government withholding funds."[103] But *Elaine's Cleaning* does not apply to the circumstances of this case. There, the Sixth Circuit vacated a debarment order finding the ALJ's decision "unintelligible" and that it failed to tie its debarment decision to facts in the record.[104] The Sixth Circuit said nothing about the legal sufficiency of the contractor's argument that they had underpaid benefits because of delays in

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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.").

97 Administrator Br. at 34.

98 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Price Gordon, LLC*, ARB No. 2019-0032, ALJ No. 2017-SCA-00008 (ARB Mar. 9, 2020).

99 Petition for Review (PFR) at 13 (citing *Price Gordon,* ARB No. 2019-0032, slip op. at 8-9).

100 *Price Gordon,* ARB No. 2019-0032, slip op. at 8.

101 D. & O. at 15-16.

102 106 F.3d 726 (6th Cir. 1997).

103 PFR at 28 n.8 (citing *Elaine's Cleaning Serv., Inc.*, 106 F.3d at 728).

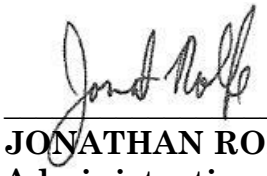
104 *Elaine's Cleaning Serv., Inc.*, 106 F.3d at 729.

receiving payments from the government.[105] The ALJ's decision here, by contrast, is a clear-eyed accounting of Respondents' repeated and serious violations over the course of three separate contracts. Respondents' case law simply does not support a finding of "unusual circumstances."[106]

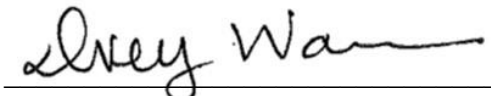
CONCLUSION

We **AFFIRM** the ALJ's findings that "unusual circumstances" do not exist to relieve Respondents from debarment. As a result, we **AFFIRM** the ALJ's order that the Respondents shall not be awarded United States government contracts for three years. In addition, the Secretary will forward the Respondents' names to the Comptroller General for debarment.[107]

SO ORDERED.



JONATHAN ROLFE
Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

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105 Respondents cite narrow aspects of several ALJ decisions in addition to this authority. Even if those cases stood for the broad propositions Respondents suggest they do, they do not bind the ARB or change the analysis here.

106 Moreover, even if Respondents met the First Step, they would fail at the two remaining. To satisfy the Second Step, Respondents would need to demonstrate "a good compliance history" and "sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii). That is not possible on this record. Step Three likewise requires a tribunal to balance a number of factors that focus on compliance history and whether the violations were based on a good faith interpretation of the law that -- on this record -- weigh heavily against finding unusual circumstances.

107 41 U.S.C. § 6706(b).

CERTIFICATE OF SERVICE

ARB-2023-0019 AMERICA'S STAFFING PARTNER, INC. v. AMERICA'S STAFFING PARTNER, INC.
(Case No: 2020-SCA-00010)

I certify that the parties below were served this day.

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