U.S. Department of Labor

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

In the Matter of:

Dispute concerning the payment of prevailing wage rates and overtime pay by:

JAMEK ENGINEERING SERVICES, INC., Subcontractor,

PETITIONER,

and

Proposed debarment for labor standards violations by:

JAMEK ENGINEERING SERVICES, INC., Subcontractor; and JAMES AL EKHATOR, an individual and owner.

With respect to laborers employed on Contract Nos. CFDA 14-239 and 14-2369, for painting and related work of Hamline Station Apartments Project, located in St. Paul, Minnesota.

ARB CASE NO. 2022-0039

ALJ CASE NO. 2017-DBA-00021

DATE: September 22, 2022

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., and Daniel Colbert, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For the Petitioner:
Aaron A. Dean, Esq.; *Moss & Barnett*; Minneapolis, Minnesota

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL and PUST, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This matter is before the Administrative Review Board (Board) pursuant to the provisions of the Davis-Bacon Act (DBA) and "Related Acts" (DBRA), 40 U.S.C. § 3141 *et seq.*, and the applicable implementing regulations at 29 C.F.R. Parts 3 and 5. After an investigation, the Regional Acting Administrator of the U.S. Department of Labor's Wage and Hour Division (Administrator) issued findings that Jamek Engineering Services, Inc., and its owner James Ekhator (collectively, "Petitioner") had violated DBRA labor standards for painting work performed on a federally-funded construction project. Petitioner contested the findings and requested a hearing. After a hearing, an Administrative Law Judge (ALJ) found that Petitioner had violated certain labor standards of the DBA and DBRA and debarred Petitioner from federal contract work for three years.

The Administrative Review Board (Board) affirmed in part and reversed and vacated in part the ALJ's decision. The Board held that the ALJ had used inaccurate payroll information to calculate how much Petitioner paid its employees, failed to consider whether Petitioner intended to make the required fringe benefits payments for its employees when submitting certified payrolls, and improperly ordered debarment under the DBA when only the DBRA applied. The Board affirmed the remainder of the ALJ's decision. On remand, the ALJ found that Petitioner owed $2,108.88 in wages using the correct payroll records, did not intend to make the required fringe benefits payments at the time of payroll certification, and had committed an aggravated or willful violation of the DBRA that warranted a three-year debarment. We affirm.

BACKGROUND

On September 18, 2014, Anderson Companies (Anderson) contracted to construct two buildings for the Hamline Station Apartments Project in St. Paul, Minnesota.[1] Anderson subcontracted with Petitioner to paint the buildings.[2] The labor standards requirements of the DBRA[3] cover the prime contract and subcontracts because the U.S. Department of Housing and Urban Development funded the project.[4]

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[1] Decision and Order (D. & O.) at 4. Anderson contracted with Hamline Station Family Housing Limited Partnership and Hamline Station Limited Partnership. *Id.*

[2] *Id.* at 4, 28.

[3] This includes the requirements of the Copeland Act, 40 U.S.C. § 3145, and the Cranston-Gonzalez National Affordable Housing Act of 1990, 42 U.S.C. § 12701 *et seq.*

[4] D. & O. at 1. *See* 40 U.S.C. § 3145 ("The Secretary of Labor shall prescribe reasonable regulations for contractors and subcontractors engaged in constructing . . .

Petitioner signed a letter of assent agreeing to be bound by the Project Labor Agreement (PLA) between Anderson and the Saint Paul Building and Construction Trades Council, which incorporates a collective bargaining agreement (CBA).[5] Under the CBA, contractors may employ journeyworkers, who are experienced tradesmen, and apprentices, who are less experienced workers.[6] On a job, the CBA required employers to use three journeyworkers for every one apprentice.[7] The DBRA required Petitioner to pay any apprentice working on a job site who exceeded that ratio the same rate as journeyworkers.[8] The prevailing wage rate was $31.89 in base rates and $17.41 in fringe benefits for journeyworkers and $15.95 in base rates and $13.06 in fringe benefits for apprentices.[9]

Petitioner hired four apprentices to work with five journeyworkers on the project.[10] On September 30, 2015, Petitioner began working on the project until Anderson terminated the contract on November 20, 2015.[11] Petitioner complied with the required 3:1 journeyworkers to apprentice ratio for only one of the eight weeks of its work.[12] On November 19, 2015, Alexander Dumke, a human resources specialist for the City of St. Paul who served as a point of contact for DBA and DBRA related matters, notified Petitioner of its failure to use the required ratio.[13] Shortly thereafter, Petitioner issued restitution payments to apprentices who were

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public buildings . . . that at least partly are financed by . . . the Federal Government."); *Lakeshore Plaza Holding, LLC*, ARB No. 2014-0072, ALJ No. 2013-DBA-00006, -00007, slip op. at 2 (ARB Feb. 5, 2016) ("The Davis-Bacon and related Acts . . . incorporate the DBA's various wage requirements into contracts between a non-Federal entity, such as a State or local government, and a contractor where the Federal government provides funding.").

5 D. & O. at 5. The agreement is between Minnesota Painting and Wallcovering Employers Association and the International Union of Painters and Allied Trades District Council #82 (Locals 61 and 386). *Id.*

6 *Id.*

7 *Id.*

8 29 C.F.R. § 5.5(a)(4)(i).

9 D. & O. at 5, 37. The Secretary of Labor determines prevailing wage and fringe benefits rates based on the rates for corresponding classes of laborers employed on similar projects in the state in which the work is performed. 40 U.S.C. § 3142(b).

10 D. & O. at 6.

11 *Id.* at 5.

12 *Id.* at 34-35.

13 *Id.* at 6, 21-22. 25-26; Government's Exhibit (GX) 30; Hearing Transcript (Hr.) at 578.

not paid journeyworkers rates during out-of-ratio work based entirely on the calculations provided by Dumke.[14]

Petitioner maintained certified payroll records and an internal payroll journal during the project.[15] For the last four weeks of its work, Petitioner's certified payrolls stated that journeyworkers were paid $30.52 and apprentices were paid $14.01 an hour.[16] The journal stated that journeyworkers were paid $32.57 and apprentices were paid $15.29.[17] Petitioner filed all but two of the certified payrolls late and omitted two of its employees for certain weeks on the submitted payrolls.[18]

The PLA required Petitioner to pay the fringe benefits to a fund administered for the Painters and Allied Trades District Council No. 82 (Union); the DBRA allows contractors to make such required payments quarterly, rather than weekly.[19] Petitioner made a timely fringe benefit payment for the third quarter of 2015 but not for the fourth quarter.[20] Petitioner did not pay all required contributions to the fund until January 11, 2017, after Anderson had agreed to pay the remaining amount from money it withheld from Petitioner for its work.[21] On its certified payrolls' "Statement of Compliance," Petitioner's accountant checked a box to certify that "payments of fringe benefits as listed in the contract have been or will be made to the appropriate programs."[22]

Under the CBA, employers agreed "to check off . . . administrative dues" from the employees' wages for the Union "for each hour worked or paid for."[23] In addition to deducting Union dues from workers' paychecks, Petitioner also paid the Union

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14 D. & O. at 21-22, 44; Respondent's Exhibit 120.

15 D. & O. at 7-8.

16 *Id.* at 41.

17 *Id.* at 42.

18 *Id.* at 47. Petitioner had to submit accurate weekly payrolls to the City of St. Paul. 29 C.F.R. §§ 3.3(b), 3.5(a).

19 D. & O. at 18, 45; 29 C.F.R. § 5.5(a)(1)(i).

20 D. & O. at 45. Petitioner only worked on the project for one day in the third quarter of 2015. *Id.* at 31.

21 *Id.* at 11, 30, 45.

22 GX 21. This reflects the DBRA's requirement that employers include in their payrolls the "rates of contributions or costs anticipated for bona fide fringe benefits" and submit a Statement of Compliance certifying that such information is accurate and being maintained. 29 C.F.R §§ 5.5(a)(3)(i), 5.5(a)(3)(ii)(A)-(B).

23 D. & O. at 18, 49. Checkoff dues are a percentage of an employees pay submitted to the union to cover negotiating, facilitating contracts, etc. *Id.*

initiation fees for six of the employees and deducted those payment amounts from their paychecks.[24]

After receiving complaints from the Union that Petitioner had engaged in multiple DBRA violations, the WHD began an investigation of Petitioner's labor standards compliance in November 2015.[25] The WHD had investigated Ekhator two years earlier for failure to pay base wages and fringe benefits on a similar contract and an investigator counseled Ekhator on DBRA requirements at the end of that investigation after he claimed that he did not understand the requirements.[26] On August 16, 2016, the Administrator issued findings that Petitioner had violated the DBRA by failing to pay prevailing wages and fringe benefits and taking improper deductions, and therefore owed backwages totaling $41,709.06 and should be debarred from future federally-funded contracts for three years.[27] Petitioner contested the findings and requested a formal hearing before an ALJ.[28]

After a hearing, the ALJ found that Petitioner violated the DBRA by failing to pay four of its workers the required prevailing wage rate for the last four weeks of the project.[29] The ALJ based his finding on the certified payrolls submitted by Petitioner rather than the internal payroll journal, which contained rates that were $2.05 higher for journeyworkers and $1.28 higher for apprentices.[30] The ALJ found that the certified payrolls reflected the actual rate Petitioner paid the employees because the tax withholdings on both documents were based on the certified payroll rates.[31] The rates on the certified payrolls, unlike the rates in the journal, were below the prevailing wage rates.

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24 *Id.* at 30.

25 *Id.* at 6.

26 *Id.* at 26; Tr. 465. Petitioner was a painting contractor on the Abbott Housing Project, which was a similar residential housing project. D. & O. at 17. The WHD determined that Petitioner had failed to pay $1,000 in base wages and $15,000 in fringe benefits. Tr. at 456. The WHD did not seek debarment because it was Petitioner's first offense. D. & O. at 17.

27 D. & O. at 2.

28 *Id.*

29 *Id.* at 43.

30 *Id.* at 42-43. The journal showed Petitioner paid journeyworkers $32.57 an hour, while the certified payroll showed Petitioner paid them $30.52 an hour. *Id.* at 42. The journal showed that Petitioner paid apprentices $15.29 an hour, while the certified payroll showed Petitioner paid them $14.01 an hour. *Id.* at 43.

31 *Id.*

The ALJ further found that Petitioner failed to maintain the CBA's required 3:1 ratio during seven of the eight weeks it worked on the contract and failed to pay the journeyworker rate to the apprentices for out-of-ratio work.[32] The ALJ noted that the restitution payments made to the apprentices by Petitioner, as calculated by Dumke, did not cover all of the hours the ALJ found to be out-of-ratio.[33] The ALJ determined Petitioner owed a total of $3,110.13 in back wages to its employees.[34]

The ALJ found that Petitioner violated the DBRA by failing to make timely contributions to the fringe benefits fund.[35] Recognizing that Petitioner eventually paid the amount owed, the ALJ determined that Petitioner still unlawfully failed to make the quarterly contributions on time.[36] The ALJ also found that Petitioner had violated the Copeland Act and DBA's requirement to file timely and accurate certified payrolls by representing that it had paid the fringe benefits on the certified payrolls, filing all but two weekly certified payrolls late, and omitting two employees from some payrolls.[37]

The ALJ found that Petitioner had violated the Copeland Act by deducting union initiation fees from its employees' paychecks because the CBA did not permit the deductions and the deductions did not fall within any of the regulatory exceptions that permit certain loan agreements.[38]

Last, the ALJ ordered that Petitioner and Ekhator be debarred from federal contracting for three years.[39] The ALJ found that Petitioner purposefully, knowingly, and willfully falsified its certified payroll records and took unlawful deductions from employees' pay, which justified a three-year debarment under the DBRA.[40] The ALJ also found that Petitioner disregarded its obligations to its employees under the DBA by failing to pay the required wage and fringe benefit contributions and submitting false payrolls, which warranted a concurrent three-year debarment.[41] Petitioner appealed the ALJ's decision to the Board.

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32 *Id.* at 43-44.

33 *Id.* at 44. The ALJ subtracted the amount Petitioner paid in restitution. *Id.* at 44-45.

34 *Id.* at 44-45.

35 *Id.* at 45.

36 *Id.*

37 *Id.* at 46-47.

38 *Id.* at 48-50.

39 *Id.* at 54.

40 *Id.* at 52.

41 *Id.* at 53.

On June 23, 2021, the Board issued a Decision and Order Affirming in Part, Reversing in Part, and Vacating and Remanding.[42] The Board first held that the ALJ erred in relying on the certified payroll records instead of Petitioner's internal payroll journal to calculate wages paid.[43] The journal included amounts permissibly deducted for Union dues and showed the actual wages paid, while the certified payrolls subtracted those deductions.[44] The Board therefore reversed the ALJ's finding that Petitioner owed $3,110.13 and ordered the ALJ to calculate the wages paid based on the internal payroll journal.[45]

The Board next held that Petitioner violated the DBRA by submitting payrolls that were untimely and omitted employees.[46] The Board noted that the certified payrolls required Petitioner to check a box that stated, "payments of fringe benefits as listed in the contract have been *or* will be made to the appropriate programs."[47] Petitioner did not make the required quarterly fringe benefits payments for the fourth quarter of 2015. However, the ALJ had not determined whether Petitioner intended to make the payments by the end of that quarter at the time of certification. The Board therefore vacated the ALJ's finding that the Petitioner's statements on the certified payrolls regarding fringe benefits were falsified and ordered the ALJ to find whether Petitioner intended to pay fringe benefits by the end of the fourth quarter.[48]

The Board affirmed the ALJ's finding that Petitioner violated the Copeland Act by deducting union initiation fees from employee paychecks.[49] The DBRA allows deductions that are provided in the pertinent CBA.[50] The Board held that the deductions were not for administrative dues "for each hour worked or paid for" that are permitted by the CBA because the initiation fee was a flat fee unrelated to the amount of hours worked.[51] The Board also determined that the deduction was not a loan agreement allowed by the Copeland Act or a deduction provided to the

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42 *Jamek Eng'g Servs., Inc.*, ARB No. 2020-0043, ALJ No. 2017-DBA-00021 (ARB June 23, 2021).

43 *Id.* at 8-9.

44 *Id.* at 8.

45 *Id.* at 9.

46 *Id.* at 10.

47 *Id.* (emphasis added).

48 *Id.* at 11.

49 *Id.* at 12.

50 *See* 29 C.F.R. § 3.5(i).

51 *Jamek Eng'g Servs., Inc.*, ARB No. 2020-0043, slip op. at 11.

employee without restriction as permitted by the DBRA because Petitioner paid the initiation fees directly.[52]

Last, the Board vacated the ALJ's order to debar Petitioner because it vacated and remanded the finding that Petitioner submitted false payroll information regarding fringe benefits, which the ALJ had relied on to debar Petitioner under the DBRA.[53] Further, the Board held that the ALJ's debarment analysis was flawed because he had ordered debarment under both the DBRA and the DBA, the latter of which uses a different standard for determining if debarment is appropriate.[54] The Board noted that the Administrator stated on appeal that the DBA did not cover the pertinent contracts.[55]

On remand, the ALJ allowed the parties to submit briefs on the remaining issues by October 18, 2021, and additional evidence on the issue of payment of fringe benefits by August 6, 2021.[56] The Administrator submitted its closing brief on November 11, 2021, and Petitioner filed its closing brief on the following day.[57] Neither party submitted evidence on the issue of payment of fringe benefits for the fourth quarter of 2015, though the Administrator attached three exhibits to its closing brief demonstrating its calculation of back wages using the internal payroll journals.[58] On November 21, 2021, Petitioner moved to strike the exhibits because they did not pertain to the fringe benefits payments and because it gave Petitioner no opportunity to address the exhibits in its closing brief.[59]

On March 31, 2022, the ALJ issued a Decision and Order on Remand. First, the ALJ denied the Motion to Strike, holding that the Administrator did not include the back wages calculations and accompanying explanation with its brief to backdoor in new evidence because the ALJ had already admitted the payroll journal.[60]

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52 *Id.* at 11-12.

53 *Id.* at 12.

54 *Id.* at 12-13.

55 *Id.* at 13.

56 Decision and Order on Remand (D. & O. R.) at 2-3.

57 *Id.* at 3.

58 *Id.* The exhibits included: a Declaration from Wage and Hour investigator Matthew Jones explaining how he calculated the back wages owed to the journeyworkers; a Wage Transcription and Computation Worksheet showing the breakdown of Mr. Jones' revised back wages calculations; and a Summary of Unpaid Wages. *Id.*

59 *Id.*

60 *Id.* at 3-4.

The ALJ then discussed whether Petitioner intended to make the fringe benefits payment for the fourth quarter of 2015 when it submitted payroll records during that quarter and certified that the payments "have been or will be made." The Administrator argued that Petitioner presented no evidence that it had intended to make the payments and noted Dumke's testimony that Petitioner displayed contempt for the compliance process and DBRA requirements.[61] Petitioner argued that it did not make the payments only because Anderson terminated the subcontract on November 20, 2015, and withheld $70,000 in contract funds.[62] However, the ALJ noted that Ekhator never indicated in his July 26, 2018 deposition and hearing testimony that he did not make the required fringe benefits payment because Anderson withheld funds.[63]

On January 27, 2016, Petitioner paid $500 to the benefits fund, which it claimed was a showing of good faith. However, Cole Metcalf, who audited Petitioner for the Union's benefits administrator, testified that the $500 payment had resulted from the Union garnishing Petitioner's bank account. The ALJ credited Metcalf's testimony over Petitioner's claims.[64] Accordingly, the ALJ found that Petitioner never intended to make the fourth quarter fringe benefits payments and inaccurately stated that it paid or intended to pay the benefits in its payrolls.[65]

The ALJ then discussed how much Petitioner paid its employees based on the information provided in the internal payroll journal and if Petitioner owed any back wages. The ALJ determined that Petitioner had paid the journeyworkers in full but owed $2,108.88 in back wages to its apprentices, after accounting for restitution already paid by Petitioner to some of them.[66] Almost all the owed wages were for Petitioner underpaying apprentices for out-of-ratio work, while a small amount was for paying apprentices less than the apprentice prevailing wage for in-ratio work during the last four weeks of the project.[67]

Last, the ALJ discussed whether the violations warranted debarment under the DBRA. The ALJ found that Petitioner "purposefully, knowingly, and willingly"

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61 *Id.* at 5.

62 *Id.*

63 *Id.*; GX 47 at 110, 113.

64 D. & O. R. at 6. The ALJ explained that Metcalf had no reason to lie about garnishing Petitioner's bank account. *Id.*

65 *Id.*

66 *Id.* at 7-9.

67 *See id.* Petitioner paid apprentices $15.29 an hour, while the apprentice prevailing wage was $15.95 for in-ratio work and $31.89 for out-of-ratio work. *Id.* Petitioner underpaid apprentices for 236.5 hours of out-of-ratio work and 147.5 hours for in-ratio work. *Id.*

falsified its payroll records by stating that it either had paid or intended to pay the required fringe benefits contributions for that quarter and took unlawful deductions from its employees' paychecks.[68] The ALJ found the multiple violations rose to the level of aggravated and willful and that Petitioner presented no evidence of "extraordinary circumstances" warranting a shorter disbarment.[69] Accordingly, the ALJ debarred Petitioner for three years under the DBRA.[70]

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in DBRA cases.[71] In reviewing an ALJ's decision in a DBRA case, the Board "shall act as the authorized representative of the Secretary of Labor" and "as fully and finally as might the Secretary of Labor concerning such matters."[72]

The Board's review of the ALJ's decision "is in the nature of an appellate proceeding," and the Board "will not hear [factual] matters de novo except upon a showing of extraordinary circumstances."[73] Under this standard of review, the Board "will assess the ruling to determine whether it is consistent with the applicable statute and regulations, and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA and DBRA."[74] The "Board will defer to the factual findings of an ALJ, especially in cases in which those findings are predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony."[75]

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68 *Id.* at 10.

69 *Id.*

70 *Id.*

71 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. § 7.1(b).

72 29 C.F.R. § 7.1(d).

73 *Terrebonne Par. Juv. Just. Complex*, ARB No. 2017-0056, slip op. at 3 (ARB Sept. 4, 2020) (quoting 29 C.F.R. § 7.1(e)).

74 *Interstate Rock Prods., Inc.*, ARB No. 2015-0024, ALJ No. 2013-DBA-00010, slip op. at 9 (ARB Sept. 27, 2016).

75 *Griffin v. Sec'y of Lab.*, ARB Nos. 2000-0032, -033, ALJ No. 1991-DBA-00094, slip op. at 9 (ARB May 30, 2003).

DISCUSSION

Petitioner appeals several aspects of the ALJ's decision on remand. First, Petitioner argues that the ALJ incorrectly calculated the back wages. Second, Petitioner contests the ALJ's finding that it did not intend to pay fringe benefits when it submitted certified payrolls for the fourth quarter of 2015. Last, Petitioner contends that its conduct did not warrant debarment. We address each argument in turn.

1. Back Wages

Petitioner first argues that the exhibits demonstrating the WHD investigator's recalculation of back wages using the internal payroll journals should have been stricken because the Administrator did not file them before the deadline to submit new evidence and because the ALJ did not allow the parties to provide new documentary evidence regarding back wages. The ALJ denied the motion to strike because the Administrator could have included the calculations and explanations in its closing brief and because the internal payroll journals, upon which the calculations were based, were already in the record. The Board reviews an ALJ's evidentiary rulings under an abuse of discretion standard.[76] Because the internal payroll journal was already in the record and the attachments were only expository, we decline to hold that the ALJ abused his discretion in admitting the exhibits.

Petitioner further contests the ALJ's back wages award, claiming that it only owes $35.85 to its former employees. The ALJ correctly used the internal payroll journals to calculate the wages that Petitioner had paid its employees. Petitioner does not appear to contest the ALJ's calculations or that it still owes unpaid wages for some in-ratio apprentice work. Rather, Petitioner seems to argue that it does not owe further back wages for the hours that apprentices worked out-of-ratio because it earlier paid restitution for the amount that Dumke had said it owed in an email on November 19, 2015.

The record demonstrates that apprentices continued to work out-of-ratio after Dumke informed Petitioner of the deficiency on November 19, 2015, and after Petitioner paid the restitution a few days later.[77] Therefore, Petitioner had not paid for all out-of-ratio work under the contract. There is no legal basis to allow Petitioner not to pay for the out-of-ratio work not included in its initial restitution payment. We have carefully reviewed the record and the ALJ's back wages

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[76] *NCC Elec. Servs., Inc.*, ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 6 (ARB Sept. 30, 2015).

[77] Tr. at 763-68; GX 22 at 12, 17-18, 21, 25.

calculations and, discerning no errors, we therefore affirm the $2,108.88 back wages order.

2. Intent to Pay Fringe Benefits

Petitioner contests the ALJ's finding that it violated the DBRA by submitting weekly certified payrolls to the City of St. Paul that inaccurately stated that fringe benefits payments "have been or will be made to the appropriate program" for the fourth quarter of 2015. The DBRA requires that contractors submit weekly payrolls that certify that: (1) the payrolls contain all required information and that such information is correct and complete; (2) each employee has been paid their full wages without any impermissible deductions; and (3) each employee has been paid not less than the applicable wage rates and fringe benefits.[78] The DBRA requires contractors to submit the payrolls to the appropriate government agency within seven days after the regular payment date of the payroll period.[79]

Petitioner did not pay timely fringe benefits payments for the fourth quarter of 2015. Therefore, the ALJ had to determine on remand whether Petitioner *intended* to make the payments when submitting the certified payrolls during the fourth quarter. If Petitioner did have such intention, it would not have been inaccurate to state that the benefits "will be made." The ALJ cited testimony from Dumke, Metcalf, and Jones, who said that Ekhator never told them that he had not made the fringe benefits payments because Anderson withheld the contract funds. Although Petitioner cited the $500 payment to the Union as evidence of good faith toward paying the required benefits and thereby supporting a finding of intent to pay, the ALJ credited Metcalf's conflicting testimony that the $500 was a garnishment obtained during the Union's audit, not a voluntary payment, as evidence that no intent to pay was established.

Petitioner made the benefits payments for the third quarter, and Anderson's decision to withhold its payments for Petitioner's work on the project would understandably make paying the fringe benefits more difficult. However, even without the testimony that the $500 payment was obtained through garnishment, this payment would not be particularly probative that Petitioner had intended to make the payments. First, the third quarter fringe benefits payment covered only the one day of work in that quarter,[80] which does not show a pattern of timely benefits payments. Second, Dumke's testimony that working with Petitioner was "frustrating" because Ekhator "displayed a contempt for the process or for the requirements" demonstrates that Petitioner did not prioritize complying with the

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78 29 C.F.R. § 5.5(a)(3).

79 29 C.F.R. § 3.4(a).

80 Petitioner's only day of work on the project during the third quarter was on September 30, 2015.

DBRA. Based on the entirety of the evidence, we decline to disturb the ALJ's finding that Petitioner did not intend to make the fringe benefits payments when submitting the certified payrolls and affirm the ALJ's finding that petitioner submitted inaccurate payroll records regarding fringe benefits payments.

3. Debarment from Federal Contracts

Petitioner argues that it should not be barred for its violations of the DBRA. The DBRA permits debarments of up to three years for "aggravated or willful" violations.[81] The Board has explained that violations are aggravated or willful if they are "voluntary, deliberate, intentional, and not merely negligent."[82] The ALJ relied on Petitioner's unlawful union initiation fee deductions and the inaccurate payroll statements regarding fringe benefits to debar Petitioner.

Petitioner contends that those violations were not aggravated or willful. Petitioner notes that the CBA did not expressly provide that union initiation fee deductions were prohibited and reiterates that it had intended to pay the fourth quarter fringe benefits. However, Petitioner fails to demonstrate that it was careful in attempting to comply with the DBRA and shows a pattern of disregard for the requirements that exceeds negligence. The WHD had previously counseled Ekhator on DBA and DBRA requirements after investigating him for violating the DBRA by failing to pay fringe benefits and accurate wage rates on a previous contract in May 2014.[83] Thus, Ekhator knew of the relevant laws but still violated several of them again on the present project. While "inadvertent or negligent conduct would not warrant debarment" under the DBRA, "conduct which evidences an intent to evade or a purposeful lack of attention to . . . statutory responsibility does."[84] The fact that employees requested the deductions is not relevant to Petitioner's intent when violating the DBRA, and Petitioner conveying that it intended to make the fringe benefits payments is a clear example of a "knowing" violation. Accordingly, we affirm the ALJ's finding that Petitioner engaged in "aggravated or willful" violations of the DBRA.

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81 29 C.F.R. § 5.12(a)(1) (A contractor or subcontractor that violates the DBRA "shall be ineligible for a period not to exceed 3 years . . . to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.").

82 *J.D. Eckman, Inc.*, ARB No. 2017-0023, ALJ No. 2015-DBA-00030, slip op. at 4 (ARB July 9, 2019).

83 D. & O. at 17. A Wage and Hour investigator extensively explained the requirements of the Copeland Act and DBA to Ekhator because he had claimed he did not understand what was required of him under the regulations. Tr. at 463, 465.

84 *In re Abhe & Svoboda, Inc.*, ARB No. 2001-0063, -0066, -0068, -0069, -0070, ALJ No. 1999-DBA-00020 through -00027, slip op. at 36 (ARB July 30, 2004) (quoting *L.T.G. Constr. Co.*, WAB Case No. 1993-0015, slip op. at 7 (Dec. 30, 1994)) ("Blissful ignorance is no defense to debarment.").

Petitioner argues that if debarment is warranted, the term should be shorter because it has been functionally disbarred since it has not worked on a federal project since November 2015 and because the payrolls' inaccuracies regarding the fringe benefits were due to Anderson withholding the funds. Absent "extraordinary circumstances," the Board will order a debarment of three years if a contractor has committed an aggravated or willful violation of the DBRA.[85] Besides the payroll inaccuracies, Petitioner fails to explain how the other violations were excusable and does not cite any caselaw that supports its functional disbarment argument. Therefore, Petitioner has not established extraordinary circumstances allowing the Board to shorten the debarment period.[86]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's Decision and Order on Remand.

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

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[85] *Adm'r, Wage and Hour Div., USDOL v. Coleman Constr. Co.*, ARB No. 2015-0002, ALJ No. 2013-DBA-00004, slip op. at 18 (ARB June 8, 2016).

[86] We note that the current regulations allow a debarred person or business to provide an explanation for why such person or entity should be removed from the ineligible list. 29 C.F.R. § 5.12(c). The Administrator of the WHD will then consider "the facts and circumstances surrounding the violative practices which caused the debarment" and then issue a decision as to whether or not such person or firm has demonstrated a current responsibility to comply with the" DBRA and should be removed from the list. *Id.*