



In the Matter of:

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

ARB CASE NO. 14-068

ALJ CASE NO. 2012-SCA-014

PROSECUTING PARTY,

DATE: MAY - 4 2016

v.

PUGET SOUND ENVIRONMENTAL, and  
CARLOS MORENO, an individual, and  
MORE SUPPORT SERVICES CORP.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant, Administrator, Wage and Hour Division:*

Ann Caps Webb, Esq.; Jonathan T. Rees, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq., *U.S. Department of Labor, Office of Solicitor, Washington, District of Columbia*

*For the Respondents, Puget Sound Environmental Corp., Carlos Moreno, and More Support Services Corp.:*

Carlos Moreno, pro se, *Puget Sound Environmental Corp., Federal Way, Washington*

Before: E. Cooper Brown, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj Desai, *Administrative Appeals Judge*. Judge Corchado, concurring.

### FINAL DECISION AND ORDER

An Administrative Law Judge (ALJ) concluded that Petitioners Carlos Moreno and Puget Sound Environmental Corporation violated two contracts subject to the McNamara-O'Hara

Service Contract Act and the Department of Labor regulations implementing that Act.<sup>1</sup> The ALJ ordered Moreno and Puget Sound Environmental to pay \$1,409,409.98 in back wages and benefits, and debarred Moreno, Puget Sound Environmental, and More Support Services (Moreno et al.) from federal contracting for three years. The ALJ made his decision without a hearing or trial, based on a motion for summary decision brought by the Department of Labor's Wage and Hour Division (Wage and Hour or the Administrator), which is charged with enforcing the Act. His conclusion that there was no genuine issue of material fact relied on some "undisputed" facts that Moreno et al. denied, but the ALJ treated those facts as undisputed because Moreno et al. failed to serve timely responses to Wage and Hour's Requests for Admission, did not respond to any of Wage and Hour's other discovery requests (even after an Order to Compel), and did not provide any admissible evidence of their own.

On appeal, Moreno et al. argue that there are disputed material facts, at least with respect to some of the alleged violations. Their principal argument is that the contracting agency—here, a supply center at a naval shipyard in Bremerton, Washington—misled them about the classification of some of their employees and that the contracting agency should thus be held responsible for that portion of the alleged violations arising out of the misclassification of employees. We affirm the ALJ's Decision and Order because (1) the undisputed facts establish Puget Sound Environmental and Moreno are liable under the Service Contract Act and that Moreno et al. should be debarred; and (2) even if there were facts showing that the contracting agency misled Puget Sound Environmental and Moreno about the classification of certain employees, Puget Sound Environmental and Moreno would still be liable for the misclassification.

## FACTS

This case involves two multi-million dollar federal contracts between Puget Sound Environmental and the Fleet and Industrial Supply Center at the United States Department of the Navy's Puget Sound Naval Shipyard in Bremerton, Washington (Navy Supply Center). Both contracts require Puget Sound Environmental to provide various general housekeeping, painting, maintenance, and health and safety services on ships and shore facilities, primarily at the Puget Sound Naval Shipyard. The first contract was originally issued for more than \$6 million on April 30, 2008, and was renewable for four extension periods. The second contract was originally issued for a little over \$8.25 million on October 13, 2009, and it was renewable for four years. The second contract increased to nearly double that amount, \$16.5 million, in 2010. Both contracts were subject to the McNamara-O'Hara Service Contract Act (the Service Contract Act or the Act), and both included the contractual terms required by the Act and the Department of Labor's regulations implementing that Act.<sup>2</sup>

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<sup>1</sup> 41 U.S.C. Chapter 67 (2012); 29 C.F.R. Part 4 (2012).

<sup>2</sup> Decision & Order (D. & O.) at 4; Chan Decl. ¶¶ 18-19.

Carlos Moreno is the sole owner of Puget Sound Environmental, and he is also all of its corporate officers.<sup>3</sup> Moreno's other company, More Support Services Corporation, had only one client, Puget Sound Environmental, and its sole purpose was to support Puget Sound Environmental. Though now inactive, More Support Services listed Carlos Moreno's son, David Moreno, as its President and all of its other officers. It was incorporated days after David Moreno's eighteenth birthday, and he was a college student while the company was in business, apparently doing no actual work for it.<sup>4</sup> The two companies shared an office and a receptionist, and commingled funds; three times, they moved simultaneously to new locations together.<sup>5</sup> Legally of course, Moreno, Puget Sound Environmental, and More Support Services are three separate legal persons, but for all intents and purposes, both Puget Sound Environmental and More Support Services are effectively Carlos Moreno. So, for simplicity's sake, we refer to them collectively in the third-person plural as "Moreno et al." except where making a distinction among the three is necessary.

Puget Sound Environmental has repeatedly violated wage laws on the very contracts at issue in this case. From May 1, 2008, to May 31, 2009, Puget Sound Environmental failed to pay prevailing wages and fringe benefits to 220 of its employees, violating not only the Service Contract Act but also the Contract Work Hours and Safety Standards Act as well. In September 2009, Puget Sound Environmental entered into a settlement with the Administrator, agreeing to pay more than \$380,000 to those employees and to "comply [with the Service Contract Act] in the future." It defaulted on that agreement in 2011 after paying only \$52,000. Then, for a stretch in the late summer of 2011, Puget Sound Environmental simply stopped paying sixty-nine of its employees altogether, violating countless wage laws in the process. In September 2011, the Administrator determined that the company owed those sixty-nine employees about \$44,000 for that period. Fortunately for those employees, the contract still had about \$67,000 in undisbursed funds when the Administrator completed his investigation, and Moreno (on behalf of Puget Sound Environmental) agreed to sign a release of those funds. The Administrator then paid the sixty-nine unpaid employees and used the remaining \$23,000 and change to help pay down a small portion of what Puget Sound Environmental still owed on the settlement of its 2008-09 violations. In other words, even before we start this case, Puget Sound Environmental owed more than \$300,000 for violations of various provisions of the Act.<sup>6</sup>

The Wage and Hour Division conducted the investigation at issue in this case from June to September 2011. The investigation covered the period June 1, 2009, through September 9, 2011. Sherrie (Leung) Chan, the Wage and Hour investigator in charge, (1) reviewed the two Navy contracts and a variety of other documents, including payroll records, bank records, government contracts, employee statements, and public records from the Washington State Secretary of State Corporations; (2) held numerous meetings with an uncooperative Moreno; (3) conducted interviews with U.S. Navy officials, as well as both employees and service

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<sup>3</sup> Chan Decl. ¶¶ 8-10.

<sup>4</sup> *Id.* at ¶¶ 13-14.

<sup>5</sup> *Id.* at ¶ 15.

<sup>6</sup> *Id.* at ¶¶ 3-4.

providers of Puget Sound Environmental and More Support Services; and (4) visited Puget Sound Environmental's worksite.<sup>7</sup>

Based on this extensive three-month investigation and acting on the Administrator's behalf, Chan concluded that Puget Sound Environmental had once again violated the Service Contract Act by failing to pay its employees the prevailing wages and fringe benefits required by the contracts. First, she concluded that Puget Sound Environmental misclassified two categories of its employees under the contracts' wage determinations, resulting in those employees being paid less than the required prevailing wage. Based on the difference in pay between what the misclassified employees should have been paid and what they were in fact paid, she calculated that Puget Sound Environmental owed 215 employees a total of \$679,251.98.<sup>8</sup> Second, she concluded that Puget Sound Environmental failed to provide the ten paid holidays per year required by the contracts. She then calculated, in accordance with the Department's Service Contract Act regulations, that 209 employees were entitled to \$60,188.92 in holiday back pay.<sup>9</sup> Third, she concluded that Puget Sound Environmental failed to provide the appropriate vacation time required by the contracts, resulting in Puget Sound Environmental owing 209 employees \$36,525.83 in vacation back pay.<sup>10</sup> Finally, she concluded that Puget Sound Environmental failed to provide many of their employees the contractually mandated "health and welfare" benefit (or health insurance in lieu of that benefit) for most of the time covered under the investigation. Although not directly relevant for the violations of the Service Contract Act in this case, she also found that Puget Sound Environmental gave their employees seemingly legitimate health insurance cards, even during times when they were not covered by insurance. This led many of these employees to seek medical treatment based on the false belief that they had insurance, resulting in several employees being stuck with "staggering medical bills" when they later learned they had no insurance.<sup>11</sup> After giving credit for the insurance premiums that Puget Sound Environmental did actually pay, she determined that Puget Sound Environmental owed 203 employees \$633,109.25 in health and welfare fringe benefits.<sup>12</sup> In total, she concluded that Puget Sound Environmental owed 215 employees a total of \$1,409,409.98.<sup>13</sup>

<sup>7</sup> Chan Decl. ¶¶ 5-6.

<sup>8</sup> D. & O. at 4; Chan Decl. ¶¶ 20-22.

<sup>9</sup> D. & O. at 5; Chan Decl. ¶¶ 23-24.

<sup>10</sup> D. & O. at 5; Chan Decl. ¶¶ 25-26.

<sup>11</sup> Chan Decl. ¶ 32.

<sup>12</sup> D. & O. at 5; Chan Decl. ¶¶ 27-37.

<sup>13</sup> The total of \$1,409,409.98 comes from adding the amounts owed to each of the 215 employees listed on what was attached as Exhibit A to the Administrator's Complaint. At least one of the four numbers that Chan lists as a subtotal in her Declaration must, however, be wrong. We independently added the four numbers and arrived with the figure of \$1,409,075.98, a \$334 disparity.



None of this has stopped Moreno et al. from expressing further interest in securing federal contracts. As late as April or May 2013, about a year after the Administrator filed his Complaint in this case, Moreno was still seeking federal contracts for Puget Sound Environmental on the Federal Business Opportunities contracting website.<sup>14</sup>

### PROCEDURAL HISTORY

The Administrator brought a Complaint against Moreno, Puget Sound Environmental, and More Support Services on May 22, 2012, seeking \$1,409,409.98 in back wages and fringe benefits, as well as an order of debarment prohibiting Moreno, Puget Sound Environmental, More Support Services, “and any entity in which they have a substantial interest” from being awarded a federal contract for three years. Moreno et al. responded with an answer on June 19, 2012.

Following the Complaint and Answer, the procedural history of this case is largely a story of how Moreno et al. engaged in various dilatory tactics to avoid responding to the Administrator’s discovery requests. Some detail is necessary to give a flavor of Moreno et al.’s approach to this proceeding. On September 20, 2012, the Administrator served Moreno et al. with various discovery requests. On October 4, 2012, the Administrator agreed to give Moreno et al. a ten-day extension to respond to the discovery requests, making the responses due on October 30, 2012. October 30th came and went, but Moreno et al. still hadn’t responded to any of the discovery requests. On November 9, 2012, the Administrator, through counsel, told Moreno et al. that he would file a motion to compel if he did not receive responses to his discovery requests by November 23, 2012. On that day (the Friday after Thanksgiving), Moreno sent the Administrator’s counsel an e-mail asking to meet. This was Moreno’s first attempt to contact the Administrator’s counsel since October 4th (more than seven weeks earlier), when the Administrator gave Moreno et al. the ten-day extension. The next business day, Monday, November 26, 2012, the Administrator’s counsel responded to Moreno via e-mail that she did not think a meeting would make sense until after Moreno et al. had responded to the discovery requests; she further stated that, unless she received responses by November 28, 2012, she would file the Administrator’s motion to compel that day. On November 28, 2012, the Administrator’s counsel’s office received a document that appeared to consist of responses to the Administrator’s Requests for Admission, although the responses consisted solely of a handwritten “Yes” or “No” under each request, and the document was not signed; nor was it accompanied by a cover letter or certification page, though the envelope did list “Puget Sound Environmental” as the sender on the top left corner. At the same time, Moreno et al. provided no responses to any of the Administrator’s other discovery requests.

Indeed, other than this one unsigned, handwritten set of “Yes” and “No’s,” Moreno et al. never responded to any of the Administrator’s discovery requests. The day after receiving the handwritten responses to the Requests for Admission, November 29, 2012, the Administrator’s counsel spoke with Moreno on the telephone, and the two agreed on December 3, 2012, as a new deadline for Moreno et al.’s response to the discovery requests. December 3rd came and went, and there was still no word from Moreno et al. On December 31st, the Administrator filed a

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<sup>14</sup> D. & O. at 2.

motion to compel. Moreno et al. not only failed to respond to the other discovery requests, they also failed to respond to the motion to compel. On March 15, 2013, the ALJ granted the Administrator's motion to compel. Notwithstanding this Order compelling responses to the Administrator's discovery requests, Moreno et al. never responded.

This neglect on Moreno et al.'s part was compounded by the fact that during the discovery period, Moreno et al. changed their address at least twice without notifying either the Administrator's counsel or the ALJ. This led to returned packages and forced the Administrator's counsel to spend time and effort just trying to locate Moreno et al. These moves no doubt made this proceeding all the more frustrating for everyone else involved.

On May 31, 2013, the ALJ held a telephone conference with Moreno and the Administrator's counsel. Moreno stated that he would be handling the case himself, and without a lawyer, because, as he put it, "I don't even have \$100 in my pocket or in my bank, so I cannot afford a lawyer." He then told the ALJ that he believed it was "the Department of the Navy[] that is responsible for the situation," to which the ALJ replied, "Mr. Moreno, if you have a claim against the Department of the Navy, that's fine, but . . . I have nothing to do with that." The Administrator's counsel said that she intended to file a motion for summary decision. The ALJ then told Moreno, "The Department of Labor is going to make a motion to enter a judgment in your case against you based on the record as it exists now, and you're going to get that in writing," to which Moreno replied, "Okay." The ALJ then said, "When you get it, make sure you respond to it, because—" to which Moreno said, "I will." The ALJ continued, "—if you don't, bad things will happen," to which Moreno replied, "Okay." A few minutes later, the ALJ reiterated, "Well, Mr. Moreno, after you get the motion from the Department, make sure that you answer it," to which Moreno responded, "Yes, Your Honor." The ALJ followed up, "And there will be instructions that . . . if you want to dispute any of the facts that the Department is saying, you'll have to have some sort of proof in the answer to the motion. Just saying that you deny it will not be enough," to which Moreno again responded, "Yes, Your Honor."

The Administrator then filed his motion for summary decision on June 14, 2013. To establish the facts supporting his allegations, the Administrator relied on the Declaration of Sherrie (Leung) Chan, the Wage and Hour investigator, and the facts in his Requests for Admission. Moreno et al. responded on July 2, 2013, but with absolutely no admissible evidence. The ALJ granted the Administrator's motion a little less than a year later, on May 12, 2014. His conclusion that there were no material facts in dispute was based entirely on the Chan declaration and the Administrator's Requests for Admission, which were all deemed to have been admitted because Moreno et al. failed to serve the Administrator with timely responses.

### **JURISDICTION AND STANDARD OF REVIEW**

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b) (2012). In rendering its decisions, "the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning

such matters.”<sup>15</sup> The Board’s review of an ALJ’s decision is in the nature of an appellate proceeding.<sup>16</sup>

The Board reviews an ALJ’s grant of summary decision de novo and under the same standard that governs the ALJ.<sup>17</sup> The ALJ “may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”<sup>18</sup> Importantly, “a party opposing the motion may not rest upon . . . mere allegations or denials.”<sup>19</sup> Rather, the party opposing the motion “must set forth specific facts showing that there is a genuine issue of fact for the hearing.”<sup>20</sup> Because we review the ALJ’s grant of summary decision under the same standards that govern the ALJ, we must affirm an ALJ’s grant of summary decision if there is no genuine issue as to any material fact and the moving party is entitled to decision as a matter of law.<sup>21</sup>

## DISCUSSION

### Violation of Service Contract Act and Debarment

The Service Contract Act and the Department of Labor’s regulations implementing that Act require certain federal contractors to pay their employees prevailing wages and fringe benefits.<sup>22</sup>

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<sup>15</sup> 29 C.F.R. § 8.1(c) (2012); *see also* 5 U.S.C. § 557(b) (2012) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”).

<sup>16</sup> 29 C.F.R. § 8.1(d) (2012).

<sup>17</sup> *Alexander v. Atlas Air, Inc.*, ARB No. 12-030, ALJ No. 2011-AIR-003, slip op. at 3 (ARB Sept. 27, 2012).

<sup>18</sup> 29 C.F.R. § 18.40(d) (2012); *see also* 29 C.F.R. 18.72(a) (2015) (in new, post-2015 rule, noting that ALJ “shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law”). This standard is analogous to the summary-judgment standard in federal court. *See Trammel v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. at 4-5 (ARB Mar. 27, 2009).

<sup>19</sup> 29 C.F.R. § 18.40(c).

<sup>20</sup> *Id.*

<sup>21</sup> 29 C.F.R. § 18.40(d); *see also* 29 C.F.R. 18.72(a) (2015).

<sup>22</sup> *See* 41 U.S.C. Chapter 67; 29 C.F.R. Part 4.

The undisputed facts demonstrate that the contracts in this case are subject to the Service Contract Act,<sup>23</sup> and that Moreno and Puget Sound Environmental violated the contract terms required by the Act by (1) misclassifying workers and thereby failing to pay them the prevailing wages stated in the wage determination built into the contracts;<sup>24</sup> (2) failing to pay their employees for holidays, a fringe benefit required by the contracts;<sup>25</sup> (3) failing to pay their employees for vacation time, a fringe benefit required by the contracts;<sup>26</sup> and (4) failing to pay their employees a “health and welfare” benefit (or provide health insurance in lieu of that benefit), a fringe benefit required by the contracts.<sup>27</sup> Here, because it is unrefuted, the Chan Declaration establishes the relevant facts necessary to grant summary decision,<sup>28</sup> and because Moreno et al. submitted no admissible evidence, those facts are undisputed.<sup>29</sup>

Moreno is also personally liable for these violations.<sup>30</sup> The Service Contract Act imposes liability on any “party responsible for a violation of a contract provision” required by the Act.<sup>31</sup> There is no question that Puget Sound Environmental is a “party responsible,” since the underpaid employees worked for Puget Sound Environmental. However, according to the relevant regulations, the term “party responsible” also includes any “officer of a corporation who actively directs and supervises the contract performance.”<sup>32</sup> Here, the undisputed evidence

<sup>23</sup> They were made by the federal government, involve more than \$2,500, and have as their principal purpose the furnishing of services in the United States through the use of service employees. *See* 41 U.S.C. § 6702(a).

<sup>24</sup> *See* 41 U.S.C. § 6703(1); 29 C.F.R. § 4.161.

<sup>25</sup> *See* 41 U.S.C. § 6703(2); 29 C.F.R. § 4.174.

<sup>26</sup> *See* 41 U.S.C. § 6703(2); 29 C.F.R. § 4.173.

<sup>27</sup> *See* 41 U.S.C. § 6703(2); 29 C.F.R. § 4.175.

<sup>28</sup> *See supra* notes 8 to 13. In contrast to the ALJ, we do not rely on any of the statements in the Administrator’s Requests for Admission that the ALJ deemed to have been “admitted” under the Rules of Practice and Procedure. *See* 29 C.F.R. § 18.20(b). None of those statements is necessary for us to affirm.

<sup>29</sup> *See, e.g., In the Matter of Material Movement, LLC*, ALJ No. 2015-SCA-001, slip op. at 7 & n.7 (ALJ Mar. 24, 2016) (ALJ relying on Wage and Hour Division investigator’s calculations in granting summary decision).

<sup>30</sup> D. & O. at 3.

<sup>31</sup> 41 U.S.C. § 6705(a).

<sup>32</sup> 29 C.F.R. § 4.187(e)(1); *see also* 29 C.F.R. § 4.187(e)(3) (“[I]ndividual 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” (emphasis added)).



established that Moreno actively directed and supervised the performance of the two contracts.<sup>33</sup> Indeed, he signed the contracts, owns the entire company, and serves as every one of its corporate officers. Based on the undisputed facts, Moreno was thus a “party responsible” for the violations here, and Moreno et al. do not contest this conclusion.

Moreno and Puget Sound Environmental are liable for \$1,409,409.98 in back wages and benefits to the 215 employees listed in Exhibit A to the Administrator’s Complaint.<sup>34</sup>

Moreover, all three Petitioners—Moreno, Puget Sound Environmental, and More Support Services—should be debarred from being awarded any federal contract for three years.<sup>35</sup> The Act provides that, “[u]nless the Secretary recommends otherwise because of unusual circumstances,” any person or firm that has violated the Act may not be awarded a federal contract for three years. Based on the undisputed facts, there are no “unusual circumstances” meriting an exception.<sup>36</sup> The undisputed facts also require the debarment of More Support

<sup>33</sup> D. & O. at 6; Chan Decl. ¶¶ 9-10, 12.

<sup>34</sup> Although not directly relevant to the relief the ALJ ordered, the undisputed facts also demonstrate that Moreno and Puget Sound Environmental failed to keep the records required by the Department’s regulations. See D. & O. at 5; Chan Decl. ¶¶ 39-40. The relevant regulations are at 29 C.F.R. §§ 4.6(g); 4.185. Moreno et al. also failed to post notices required by the Service Contract Act. D. & O. at 5; Chan Decl. ¶ 38; see 41 U.S.C. § 6703(4).

<sup>35</sup> 41 U.S.C. § 6706(b).

<sup>36</sup> The ALJ ordered that all three be debarred. See D. & O. at 10. Strictly speaking, though, the ALJ does not have the authority to debar anyone for Service Contract Act violations. The Department’s Service Contract Act regulations require the ALJ to “include in his/her decision an order *as to whether the respondent is to be relieved from the ineligible list*,” 29 U.S.C. § 6.19(b)(2) (2015) (emphasis added), the Comptroller General’s list of persons and firms who have violated the Service Contract Act, see 41 U.S.C. § 6706(a); the regulations do not, however, give ALJs authority to do anything more. Thus, the final full sentence in the ALJ’s decision that Moreno et al. “are debarred from federal contracting for three years,” D. & O. at 10, was beyond his authority. The ALJ should have simply concluded that Moreno et al. had failed to establish the “unusual circumstances” necessary to be relieved from the “ineligible list.” Formally, it is the Administrator who, on the Secretary’s behalf, must forward to the Comptroller General the names of those found to be in violation of the Act. See 29 C.F.R. § 6.21(a) (“Upon the final decision of the Administrative Law Judge or Administrative Review Board, as appropriate, the Administrator shall within 90 days forward to the Comptroller General the name of any respondent found in violation of the Service Contract Act, including the name of any firm, corporation, partnership, or association in which the respondent has a substantial interest, unless such decision orders relief from the ineligible list because of unusual circumstances.”); 41 U.S.C. § 6706(b) (“If the Secretary does not recommend otherwise because of unusual circumstances, the Secretary shall, not later than 90 days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the person or firm found to have violated this chapter.”); see generally *Admin., Wage & Hour Div. v. 5 Star Forestry*, ARB No. 14-021, ALJ No. 2013-SCA-004, slip op. at 7-8 (ARB June 24, 2015).

Services as well. The Act provides for the debarment of any “entity in which [a] person or firm [who has violated the Act] has a substantial interest.” Here, Moreno and/or Puget Sound Environmental had a “substantial interest” in More Support Services: More Support Services was under common management with Puget Sound Environmental; existed solely to provide services to Puget Sound Environmental and appears to have been solely owned by Moreno; had no other clients and never sought any clients other than Puget Sound Environmental; and shared both a physical address and commingled funds with Puget Sound Environmental.<sup>37</sup>

Moreno et al.’s Allegations of “Disputed Facts”

In challenging the ALJ’s decision, Moreno et al. seem to misunderstand what the ALJ meant when he concluded that “there is no genuine issue of material fact for trial” and when he referred to the facts he listed on pages 3 through 7 of his Decision and Order as “[u]ndisputed [f]acts.”<sup>38</sup> Moreno et al. argue that many of the facts listed in the ALJ’s decision are “disputed”—after all, they say, they have continually denied some of those facts, and they continue to do so on appeal.<sup>39</sup>

But, Moreno et al. misunderstand what “undisputed” means in this context. Just because Moreno et al. might *disagree with*, or *deny*, some of the facts does not make those facts “disputed.” Where the moving party—here, the Administrator—has supported the motion for summary decision with specific evidence, the opposing party’s—here, Moreno et al.’s—unsupported disagreement with, or denial of, those facts is not enough. When we (and the ALJ) refer to there not being a “genuine issue of material fact,” this means simply that, *given the rules of evidence and procedure in matters before the ALJ*, there are no disputed material facts.<sup>40</sup> This is not the same thing as there being no disputed material facts in the abstract. To deny a fact is not the same as to “dispute” that fact in a legal proceeding. To make a fact “disputed” in a legal proceeding, Moreno et al. must provide the judge with *admissible evidence* relevant to that fact. Without such admissible evidence, neither the ALJ nor we have any authority to rely on Moreno et al.’s denials.<sup>41</sup> Here, what Moreno et al. provided to the ALJ was not admissible evidence:

<sup>37</sup> D & O. at 7; Chan Decl. ¶¶ 13-17.

<sup>38</sup> D. & O. at 3.

<sup>39</sup> See Moreno et al. Petition at 2 (“What PSE is refuting in Judge Dorsey’s decision is his unsupported conclusion that PSE, over the past two years, failed to dispute what [the Wage and Hour Division] states are facts enumerated on pages 4, 5, 6, 7, and 8 in his Decision and Order Granting Summary Decision. On the contrary, PSE does dispute and has disputed [Wage and Hour’s] allegations of failing to follow the SCA.”).

<sup>40</sup> See D. & O. at 8 (“The documents Moreno submitted on behalf of himself and his companies include[] no evidence. A party cannot rely on its past denials once a matter reaches the stage of summary judgment. It must offer *admissible proof* that shows an issue of fact for trial.” (emphasis added)).

<sup>41</sup> See 29 C.F.R. § 18.40(c) (“a party opposing [a motion for summary decision] may not rest upon . . . mere allegations or denials.”).

none of the documents they submitted with their response to the Administrator's motion for summary decision were authenticated,<sup>42</sup> and none of their claims and/or denials were supported even by a declaration. Since Moreno et al. did not provide the ALJ with any admissible evidence, Moreno et al.'s denial of certain facts does not undermine our conclusion that there are no disputed material facts.

Moreno et al.'s Lack of Legal Representation

Moreno et al.'s only remotely conceivable claim in this case is one they do not explicitly make, that the ALJ should have given them more leeway because they do not have a lawyer.<sup>43</sup> To Moreno et al., it must seem grossly unfair for the ALJ to call certain facts "undisputed" when Moreno et al. actually denied those facts, just because of a failure to follow the rules of discovery. If Moreno et al. had had an even halfway decent lawyer, we suspect the lawyer would have served timely responses to all of the Administrator's discovery requests and would have submitted some admissible evidence in response to the Administrator's motion for summary decision. Given Moreno et al.'s lack of legal representation, then, perhaps it would have been fairer to Moreno et al. if the ALJ had permitted Moreno et al. to withdraw his admissions, particularly those he denied in his late-served responses to the Administrator's Requests for Admission, and at least not treat those as admitted facts.<sup>44</sup> Perhaps the ALJ should have looked more closely at all the documents Moreno et al. submitted in response to the Administrator's motion for summary decision, even though their response did not contain any admissible evidence.<sup>45</sup> Perhaps he should have at least told Moreno at the May 31, 2013 teleconference how easy it is to authenticate documents and/or draft a declaration and that, if Moreno wanted certain claims to be treated as evidence, all it would require is for him to authenticate his documents or provide a declaration signed under penalty of perjury. After all, the only evidence the ALJ relied upon in support of the Administrator's motion were (i) a single declaration (i.e., not even a notarized affidavit) from Chan, the Wage and Hour Investigator, and (ii) the "admissions" from the Administrator's Requests for Admission; and the only evidence we rely on in affirming the ALJ is the Chan Declaration. In short, perhaps it would have been better if the ALJ had been more willing to cut Moreno et al. some slack since they were unrepresented.

But the fact that Moreno et al. did not have a lawyer does not warrant a reversal and/or remand here. First, the ALJ had a fine line to walk: while an ALJ does have some role in

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<sup>42</sup> See 29 C.F.R. § 18.901.

<sup>43</sup> *Hasan v. Commonwealth Edison Co.*, ARB Nos. 01-002, -003, -005; ALJ Nos. 2000-ERA-008, -011, -013, slip op. at 4 (ARB Apr. 23, 2001) (noting that where a complainant "is a pro se litigant and is not a lawyer, we allow him considerably more leeway").

<sup>44</sup> See 29 C.F.R. § 18.20(e) (2012) (allowing ALJ to permit a party to withdraw an admission); see also 29 C.F.R. § 18.63(b) (2015) (same).

<sup>45</sup> See *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 13 (ARB Jan. 30, 2004) ("We construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude.").

assisting an unrepresented party, “he also has a duty of impartiality. A judge must refrain from becoming an advocate for the [unrepresented] litigant.”<sup>46</sup> While the ALJ would have been within his discretion to explain in more detail what he meant when he said to Moreno, “you’ll have to have some sort of proof in the answer to the motion. Just saying that you deny it will not be enough,” the ALJ was within his discretion not to have done more than he did.<sup>47</sup>

Second, these are multimillion dollar contracts with the United States Department of the Navy. In fact, if our math is right, from 2008 to 2012, more than \$80 million of taxpayer money has been funneled through Moreno or some Moreno-owned entity. Indeed, the Administrator’s allegations involve more than \$1.4 million in back pay (not to mention the more than quarter million that Puget Sound Environmental still owes on the 2009 Agreement). Moreno has a lot of money at stake here. Surely, he could have—and, quite frankly, probably should have—hired a lawyer. The Department’s regulations give him that right.<sup>48</sup> Even if, as he appears to have claimed, he lacked the cash flow to hire a lawyer—and, we have nothing other than his say-so during a teleconference with the ALJ to support that claim<sup>49</sup>—the ALJ was not required to let him off the hook, given the vast sums of money that the government has awarded to Moreno et al.

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<sup>46</sup> *Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op at 10 (ARB July 10, 2003)

<sup>47</sup> Similarly, rather than telling Moreno only that “bad things will happen,” the ALJ could have been a little clearer about the consequences of a motion for summary decision. Here, however, there is no evidence Moreno didn’t understand the consequences of the motion. *But see Charles v. Profit Investment Management*, ARB No. 10-071, ALJ No. 2009-SOX-40, slip op. at 4 (ARB Dec. 16, 2011) (remanding a grant of summary judgment where ALJ failed to provide non-moving pro se complainant with “a form of notice sufficiently understandable to one in appellant’s circumstances fairly to apprise him of what is required”).

<sup>48</sup> 29 U.S.C. § 6.7(a) (“The parties may appear . . . by counsel . . .”); *id.* § 4.189 (“Rules of practice for administrative proceedings [under the Service Contract Act and Part 4 of Title 29] are set forth in parts 6 and 8 of this title.”); *cf. also id.* § 8.13 (“Each interested party shall have the right to appear . . . by counsel . . . before the [Administrative Review] Board.”). Indeed, if this case were in either federal court or state court in Washington State, Moreno would have been required to have a lawyer: corporate entities such as Puget Sound Environmental and More Support Services need to be represented by licensed counsel. *See Rowland v. California Men’s Colony*, 506 U.S. 194, 201-02 (1993) (“It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel. . . . As the courts have recognized, the rationale for that rule applies equally to all artificial entities.”); *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co., Inc.*, 958 P.2d 1035, 1038 (Wash. App. 1998) (“corporations appearing in court proceedings must be represented by an attorney”).

<sup>49</sup> *See* May 31, 2013 Hrg. Trans. at 5 (“[R]ight now, I don’t even have \$100 in my pocket or in my bank, so I cannot afford a lawyer.”). We are hard-pressed to understand how a man whose company has been awarded more than \$80 million in government contracts from 2008 through 2012 could not “even have \$100 in [his] pocket or in [his] bank.”



Moreno et al.'s Argument about the Navy Supply Center

Although we do not wade into the facts—that is the purview of the ALJ, not this Board—we briefly respond to the principal claim to which Moreno et al. ask us to “give strong consideration”: Moreno et al. argue that Puget Sound Environmental followed what the contracting agency, the Navy Supply Center, told it when awarding the contract.<sup>50</sup> As Moreno et al. put it, the Wage and Hour Division “committed a procedural error in failing to hold [the Navy Supply Center] responsible for making an erroneous determination.” Moreno et al. argue that Wage and Hour must hold the Navy Supply Center responsible because the Navy Supply Center “fail[ed] to include the appropriate wage determination” in the contracts. Moreno et al. go even further, contending that the Navy Supply Center failed to include the appropriate wage determination in an earlier (2005) contract. The argument appears to be premised on what the law calls an estoppel theory: (1) the Navy Supply Center misled (and even for years before this contract, had been misleading) Moreno et al. as to what the correct wage determination should have been; (2) the Administrator failed to go after the Navy Supply Center for doing this; and therefore, (3) the Administrator should be prevented (or, using the legal term-of-art, estopped) from seeking enforcement against Moreno et al. for not paying their employees based on the proper wage determination.

We make no finding as to whether the Navy Supply Center misled Moreno et al., but even if it did, this would not matter here. Moreno et al. rely on 29 C.F.R. § 4.5(c), the relevant portion of which reads as follows:

Where the Department of Labor discovers and determines . . . that a contracting agency . . . failed to include an appropriate wage determination in a covered contract, the contracting agency . . . shall include in the contract the stipulations contained in § 4.6 and an applicable wage determination issued by the Administrator or his authorized representative through the exercise of any and all authority that may be needed (including, where necessary, . . . its authority to pay any necessary additional costs . . .).<sup>51</sup>

Moreno et al.'s belief that the provision is relevant here is flawed for at least two reasons. First, Moreno et al. misunderstand what the Administrator's investigation concluded. Put another way, Moreno et al. seem to have misunderstood precisely what they did wrong. The Administrator did not conclude that there was a mistake in the wage determination—that is, as opposed to the situations in which 29 C.F.R. § 4.5(c) applies, “the Department of Labor” did *not* “determine[] . . . that [the Navy Supply Center] . . . failed to include an appropriate wage determination in” the two contracts. Rather, the Administrator concluded that the Navy Supply

<sup>50</sup> This argument relates solely to Moreno et al.'s misclassification of workers and is irrelevant to the Administrator's claims that Moreno et al. violated the Service Contract Act by failing to (1) pay employees for legal holidays; (2) pay employees for vacation time; and (3) provide health and welfare benefits.

<sup>51</sup> 29 C.F.R. § 4.5(c).



Center *did* include the correct wage determination, but that, when deciding which employees fall in which categories *within that wage determination*, Moreno et al. placed some employees in the wrong categories. Even if someone at the Navy Supply Center wrongly advised Moreno et al. as to which category those employees belonged in, that would not mean that the Navy Supply Center “failed to include an appropriate wage determination in a covered contract.” In this context, the phrase “wage determination” does not refer to the determination of a particular employee’s wage. Rather it refers to *the entire set of* minimum wage rates and fringe benefits that apply to a class of workers.<sup>52</sup> Here, the Administrator is not saying that the “wage determination” was somehow mistaken; rather, he is saying that it was Moreno et al.’s placement of certain employees within that “wage determination” that was wrong.

Second, the regulations are crystal clear as to what happens in situations of the sort Moreno et al. allege to have occurred here: the contractor remains liable for its back wages and benefits. The provision entitled “Recovery of underpayments” in the “Enforcement” subpart of the Service Contract Act’s regulations includes language explicitly stating that “[r]eliance on advice from contracting agency officials . . . is not a defense against a contractor’s liability for back wages under the Act.”<sup>53</sup> Again, we reiterate that we make no determination about what anyone at the Navy Supply Center did or did not do; however, even assuming someone at the Navy Supply Center made a mistake in telling Moreno et al. which employees belonged in which categories of the wage determination, that would be irrelevant to Moreno et al.’s liability to pay the proper wages and benefits under the Service Contract Act.

### CONCLUSION

In sum, Carlos Moreno and Puget Sound Environmental violated contract provisions required by the Service Contract Act and are thus liable for \$1,409,409.98 in back wages and benefits. Moreover, those violations mean that the Administrator shall, within 90 days, forward to the Comptroller General the names of Carlos Moreno, Puget Sound Environmental, and More Support Services (the last because it is a firm in which Moreno and/or Puget Sound Environmental have a substantial interest) for inclusion on the list of persons and firms ineligible

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<sup>52</sup> See 29 C.F.R. § 4.1a(h) (defining “[w]age determination” as “includ[ing] any determination of minimum wage *rates* or fringe *benefits* made pursuant to [the relevant provisions of the Service Contract Act] for application to the employment in a locality of *any class or classes* of service employees in the performance of any [relevant contract]” (emphasis added)).

<sup>53</sup> 29 C.F.R. § 4.187(e)(5).

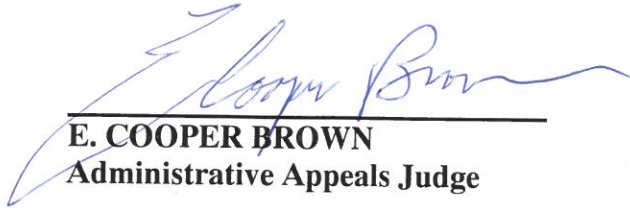
for federal contracts, where they are to remain for three years. Accordingly, we **AFFIRM** the ALJ's order granting the Administrator's motion for summary decision and ordering relief.

**SO ORDERED.**



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**ANUJ DESAI**  
Administrative Appeals Judge

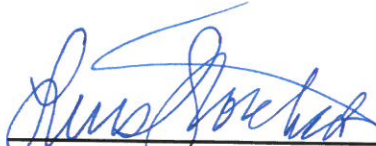


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**E. COOPER BROWN**  
Administrative Appeals Judge

*Luis A. Corchado, Concurring*

I concur that summary decision should enter for the Administrator and against Moreno, et al. The Administrator filed a properly supported motion for summary decision showing that the Administrator was entitled to summary judgment as a matter of law. Moreno, et al., failed to raise a genuine issue of material fact and essentially admitted that SCA violations occurred. I agree with the majority opinions' rationale on the issues related solely to summary decision. Such is the extent of my concurrence.



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**LUIS A. CORCHADO**  
Administrative Appeals Judge