



**In the Matter of:**

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

**ARB CASE NO. 12-023**

**ALJ CASE NO. 2010-SCA-006**

**PROSECUTING PARTY,**

**DATE: August 30, 2013**

**v.**

**ARES GROUP, INCORPORATED.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Prosecuting Party:*

**M. Patricia Smith, Esq.; Jennifer Brand, Esq.; William C. Lesser, Esq.; Jonathan T. Rees, Esq.; Mary J. Rieser, Esq.; *United States Department of Labor, Washington, District of Columbia***

*For the Respondent:*

**Alison N. Davis, Esq.; *Littler Mendelson, P.C.; Washington, District of Columbia***

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.  
Judge Corchado concurs.**

**FINAL DECISION AND ORDER**

This case arises under the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C.A. § 6701 et seq. (Thomson Reuters 2012), the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. §§ 3701-3708 (West Supp. 2013), and implementing regulations. On January 20, 2010, the Department of Labor's Wage and Hour Division (WHD) filed a complaint alleging that ARES Group, Inc., a federal government contractor, failed to pay proper wages and benefits in violation of the SCA and CWHSSA. Following cross-motions for summary decision,

an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) on October 27, 2011, granting WHD's motion for summary decision, and ordering ARES Group debarred and ineligible to enter into contracts or subcontracts with the United States for a period of three years. ARES petitioned the Administrative Review Board (ARB) for review. We affirm.

## BACKGROUND

### A. Facts

The relevant facts are taken from supporting documents the parties filed on cross-motions for summary decision. See D. & O. at 3.

ARES is a corporation that provides professional security services to commercial and governmental entities. On June 19, 2007, ARES submitted a bid in response to a Request for Quotation from the Department of Homeland Security (DHS) to provide armed security guard services at federal buildings in Northern and Central Florida from October 1, 2007, through September 30, 2008. On August 1, 2007, DHS awarded Contract No. GS-07F-0363 (the Contract) to ARES to provide those services pursuant to Blanket Purchase Agreement (BPA) No. HSCEGI-07-a-00012. The Contract consolidated five separate predecessor contracts, and the BPA established wage and fringe benefit rates according to ten wage determinations and two collective bargaining agreements (CBA). *Id.*

The Contract specified certain preliminary training requirements for Security Guards and uniformed supervisors working under the BPA. Supp. App-110, 137 (Statement of Work for DHS Federal Protective Service Solicitation, Sec. 14). The Contract required, among other things, that before beginning work security guards be trained in the use of 9 millimeter weapons, magnetometers, and x-ray machines. Supp. App. 137-145 (Statement of Work, Sec. 14. Training); D. & O. at 4. See also Affidavit of Sandra Kibler (Kibler Aff.) at 3-4; Deposition of Andrea Czeck (Czeck Dep.) at 92-93; Deposition of Bruce Moore (Moore Dep.) 37-39. On August 11, 2007, ARES informed security guards employed by the predecessor contractors of the qualifications for continued employment. ARES notified the guards that it would provide free preliminary training, but would not compensate the security guards for such training prior to commencement of work on the contract, and that completing the training was not a guarantee of employment. D. & O. at 4-5.

Several security guards contacted WHD complaining that the company failed to compensate for the preliminary training time and committed other errors in their wages. WHD initiated an investigation. Upon completion of the investigation, WHD determined that ARES failed to (1) compensate security guards for training time prior to October 1, 2007; (2) pay employees at the proper rate; (3) pay employees for the Columbus Day holiday on October 8, 2007; (4) pay fringe benefits to employees not covered by a CBA; and (5) pay certain employees overtime wages. *Id.* at 8-9. WHD ordered the payment of back wages in the total amount of \$97,281.74. A final conference between WHD and ARES was held on May 5, 2008. ARES agreed to pay the back wages by June 16, 2008. ARES did not complete payment of the back

wages until March 19, 2009, ten months after WHD held its final conference with the company. *Id.* at 9-11.

### ***B. Proceedings before the ALJ***

On January 14, 2010, the WHD Administrator (Administrator) filed a Complaint for an administrative hearing against ARES based on the results of the investigation. The complaint sought, among other things, an order finding ARES liable for violating the SCA and CWHSSA, and debarment. Prior to a hearing, the parties filed cross-motions for summary decision. ARES moved for summary decision arguing that the company's failure to pay the security guards for preliminary training does not violate the SCA, and that any violation by ARES does not warrant debarment. The Administrator argued that ARES' failure to compensate the security guards for training violates the SCA and that the company's conduct mandates debarment.

On October 27, 2011, the ALJ issued a Decision and Order granting the Administrator's motion for summary decision, and denying ARES' motion. D. & O. at 20. The ALJ held that the SCA and implementing regulations applied to the security guard's preliminary training time prior to commencement of the government contract. *Id.* at 12-16. The ALJ further held that ARES failed to show unusual circumstances to rebut the presumption that the company be debarred. *Id.* at 16-19.

## **JURISDICTION AND STANDARD OF REVIEW**

The ARB has jurisdiction to review enforcement actions involving violations of the SCA pursuant to 29 C.F.R. § 8.1(b)(3) (2013). The ARB reviews de novo an ALJ's grant of summary decision under the same standard that governs the Administrative Law Judges. *In re Suburban Air Freight, Inc.*, ARB No. 98-160, ALJ No. 1997-SCA-004, slip op. at 2-3 (ARB Aug. 21, 2000). Under 29 C.F.R. § 18.40(d) (2013), an ALJ may enter summary decision where 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 the moving party is entitled to judgment as a matter of law. *White v. American Mobile Petroleum, Inc.*, ARB No. 12-058, ALJ No. 2011-STA-032, slip op. at 3 (ARB May 31, 2013); *Elias v. Celadon Trucking Svcs., Inc.*, ARB No. 12-032, ALJ No. 2011-STA-028, slip op. at 3 (ARB Nov. 21, 2012). The Secretary's decision to relieve violators from debarment is an exercise of discretion that should rarely occur and only after the violator meets the prerequisites set forth in the regulations. 29 C.F.R. § 4.188(a) (2013).

## **DISCUSSION**

### ***A. ARES failed to compensate security guards for preliminary training in violation of the SCA***

The parties do not dispute that the SCA applies to the Contract, and ARES does not dispute that it did not compensate the security guards for preliminary training prior to

commencement of the Contract. ARES argues, however, that the SCA does not require compensation to the security guards for preliminary training that was undertaken prior to commencement of the Contract. Respondent's Brief at 15. This is an incorrect interpretation of the laws governing the Contract.

Under the SCA, every contract the United States enters into in excess of \$2,500, the principal purpose of which is to furnish services through the use of service employees, must contain provisions specifying the minimum monetary wages and fringe benefits to be furnished the various classes of service employees under the contract. 41 U.S.C.A. § 6702. The SCA defines a "service employee" as "any person engaged in the performance of a contract entered into by the United States [with certain exemptions not relevant in this case] . . . , the principal purpose of which is to furnish services in the United States; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor." 41 U.S.C.A. § 6701.

Regulations promulgated to enforce the SCA address compensation to employees on government contracts for preliminary training before the federal contract begins. Section 4.146 of Title 29 of the Code of Federal Regulations reads:

If employees of the contractor are required by the contract to complete *certain preliminary training* or testing prior to the commencement of the contract services, or if there is a phase-in period which allows the new contractor's employees to familiarize themselves with the contract work so as to provide a smooth transition between contractors, the *time spent by employees undertaking such training* or phase-in work is considered to be *hours worked on the contract and must be compensated for even though the principal contract services may not commence until a later date.*

29 C.F.R. § 4.146 (emphasis added). The regulation clearly states that employees of a contractor who are required to undertake preliminary training that is mandated by the terms of a federal contract must be compensated. The Department of Labor Field Operations Handbook (FOH) further underscores the regulations, and expressly provides that contractors must compensate security guards for preliminary training time prior to performance on a federal contract:

Where a covered contract dictates that persons are required to complete certain training before performing on the contract as security guards, such persons are considered employees of the contractor while undergoing such training and time spent in training is compensable hours worked. Whether the training is of limited application or more general in nature (e.g., state mandated training courses), it cannot be considered "voluntary" within the meaning of Reg. 785.27 since the contractor is obligated to provide employees in order to meet the stipulations in the contract which require training. Likewise, time spent in training which is

specifically required by a covered contract is compensable hours worked even if the training is performed prior to formal contract award or the trainee subsequently is not hired as a contract security guard. The contractor must pay wages for this training time at rates not less than those prescribed in Sec. 2(b)(1) of the SCA unless otherwise specified in the applicable wage determination. (See Reg 4.146).

FOH Section 14f02(a).<sup>1</sup>

The undisputed facts in this case show that the underlying federal contract – DHS Contract No. GS-07F-0363 and the BPA – required preliminary training for security guards, including on the use of certain weaponry and security procedures. See *supra* at 2; D. & O. at 4. Based on the clear regulatory language of 29 C.F.R. § 4.146, and given the facts in this case, “prospective security guards that attended the training before the commencement of performance of the Contract as well as the security guards hired by ARES are ‘service employees’ under the Act and were rightfully entitled to compensation for training time as well as fringe benefits and the prevailing wages provided for under the Act.” D. & O. at 16. Indeed, the ALJ determined that “[u]ltimately, most of the incumbent guards were hired by ARES to perform security guard services under the Contract.” *Id.* at 6. The company’s failure to compensate the security guards for the preliminary training that was mandated by DHS Contract No. GS-07F-0363 is a clear violation of the SCA and 29 C.F.R. § 4.146.

### ***B. ARES fails to rebut the presumption of debarment***

Under SCA Section 5(a), persons or firms that violate the SCA are subject to debarment, that is, ineligible to receive federal contracts for a period of three years “[u]nless the Secretary otherwise recommends because of unusual circumstances.” 41 U.S.C.A. § 6706; 29 C.F.R. § 4.188(a), (b); see also *A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 855-856 (D.D.C. 1989). Debarment is presumed once a violation of the Act has been found, with the burden of proof falling to the violating contractor to prove that “unusual circumstances” exist. *In re Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-020, slip op. at 9 (ARB Apr. 30, 2001). As the ARB has recognized, “Section 5(a) is a particularly unforgiving provision of a demanding statute. A contractor seeking an ‘unusual circumstances’ exemption from debarment must, therefore, run a narrow gauntlet.” *In re R & W Transp., Inc.*, ARB No. 06-048, ALJ No. 2003-SCA-024, slip op. at 8 (ARB Feb. 28, 2008) (*quoting In re Sharipoff dba BSA Co.*, No. 1988-SCA-032, slip op. at 6 (Sec’y Sept. 20, 1991)). “The legislative history of the SCA makes clear that debarment of a contractor who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction.” *Vigilantes, Inc. v. Adm’r of Wage & Hour*, 968 F.2d 1412, 1418 (1st Cir. 1992).

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<sup>1</sup> This section of the FOH has been revised and renumbered since the investigation in this case, but the revision has not changed the requirement that employees be compensated for training. See FOH Section 14g02(a) (Rev. 660).

Department of Labor regulations, 29 C.F.R. § 4.188(b), establish a three-part test for determining when relief from debarment is appropriate. Under the first part of this test, the contractor must prove the non-existence of the aggravating factors listed in 29 C.F.R. § 4.188(b)(3)(i), such as willful, deliberate, aggravated, or culpable conduct. Second, the contractor must prove it met the prerequisites listed in 29 C.F.R. § 4.188(b)(3)(ii), essentially a good compliance history. Third, where the first two parts are met, the contractor must then satisfactorily address “other factors” listed in 29 C.F.R. § 4.188(b)(3)(ii). To meet its burden of proving “unusual circumstances,” the violating contractor must meet all three parts of the test to be relieved from the debarment sanction. 29 C.F.R. § 4.188(b)(1). See also *Hugo Reforestation*, ARB No. 99-003, slip op. at 13 (“it is the violator, and not the Department of Labor or the Wage and Hour Division, that has the burden of proving the ‘unusual circumstances’ that will warrant relief from the debarment sanction under the SCA.”); *Colorado Sec. Agency v. United States*, 1992 WL 415388, 1 Wage & Hour Cas. 2d 491 (BNA) (D.D.C. 1992) (granting summary judgment against Colorado Security on issue of debarment where Colorado Security failed to introduce evidence to support its claim of “unusual circumstances”). Under the circumstances here, ARES fails to establish the existence of unusual circumstances to rebut the presumption of debarment.

First, ARES fails to show the non-existence of aggravating factors. The regulations state that culpability exists “where the respondent’s conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation [or] culpable disregard of whether they were in violation or not. . . .” 29 C.F.R. § 4.188(b)(3)(i); see also *In re Hugo Deforestation*, ARB No. 99-003, slip op. at 11 n.3. The record shows that ARES was culpable by willingly ignoring guidance WHD provided that the SCA applied to the Contract’s preliminary training requirements, and that the company was required to compensate the security guards for expenses they incurred for the preliminary training. See, e.g., *In re International Serv., Inc.*, ARB No. 05-136, ALJ No. 2003-SCA-018, slip op. at 6 (ARB Dec. 21, 2007). (ARB holds that “the record plainly demonstrates that the Respondents repeatedly violated the Act after Wage and Hour had provided specific guidance on how to comply with the Act.”). The evidence in the record in this case fully supports the ALJ’s determination that the company “behaved willfully and culpably in choosing to disregard the agency information” that required compensating the security guards for preliminary training, and it therefore fails the first part of the test. D. & O. at 18.

Because ARES failed to meet its burden of proof under the first part of the three-part test, we need not consider any further mitigating factors. *Integrated Res. Mgmt., Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-014, slip op. at 6 n.2 (ARB June 27, 2002). Nonetheless, assuming ARES met the first part of the test, it fails to meet the second part. The prerequisites of the second part of the test require that the contractor demonstrate “[a] good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). For various reasons, ARES fails this test. First, ARES took several months to provide requested records and documents to WHD during the course of the investigation, and it did not pay the back wages owed until ten months after WHD held its final conference with the company. D. & O. at 6-11. Second, WHD’s investigation on this Contract determined that ARES failed to pay certain security guards for the Columbus Day holiday on

October 8, 2007, and to fully compensate some employees for health and welfare benefits at the proper rate. *Id.* at 8-9; see also WHD Complaint at 4-5 (Jan. 20, 2010). Third, the record shows that there were “two subsequent investigations concerning violations [by ARES] on the same Contract between 2008, and 2010.” *Id.* at 18; see Affidavit of David Dailey at 4-5 & Kibler Aff. at 15 (showing that WHD investigated complaints against ARES on the Contract in July 2008 and December 2010, and in both cases ARES agreed to pay certain wages due). Given these circumstances, the record fully supports the ALJ’s determination that ARES “has failed to show they should not be debarred under the second part of the analysis.” D. & O. at 18-19.

Finally, in light of ARES’ history of non-compliance in the Contract in dispute in this case, as well as evidence of noncompliance on other federal contracts, the company fails to satisfy the third part of the “unusual circumstances” test.<sup>2</sup> See 29 C.F.R. § 4.188(b)(3)(ii) (“Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act.”).

### CONCLUSION

For the foregoing reasons, the ALJ’s Decision granting the Administrator’s Motion for Summary Decision is **AFFIRMED**. Pursuant to 41 U.S.C.A. § 6706, the Secretary shall forward the Respondent’s name to the Comptroller General for debarment.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**Judge Luis A. Corchado, concurring:**

I concur that the debarment should be affirmed, but my reasons differ. In essence, as I briefly explain below, I do not believe that we can decide by summary decision the number of issues the majority decides.

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<sup>2</sup> The record in this case documents that prior to the WHD’s 2007 investigation on the Contract from which this case stems, ARES had been the subject of numerous other WHD investigations related to different contracts. D. & O. at 11-12 (citing WHD investigations of ARES for the periods of August 1, 2004, to July 31, 2006 (incorrect calculation of worker overtime); July 1, 2006, to June 30, 2007 (failure to contribute to 401k and health and welfare funds); July 1, 2006, to June 30, 2007 (failure to contribute to union pension fund); and July 1, 2006, to June 30, 2007 (failure to pay back wages to 49 employees)); see also Affidavit of Ray Gaut at 1-8.

I disagree with the majority's rationale for concluding that Ares's failure to pay for pre-employment training<sup>3</sup> in this case was a "clear violation" of the SCA. The majority quoted from: 41 U.S.C.A. § 6701<sup>4</sup>; 29 C.F.R. § 4.146; and from the FOH (saying it "underscores" the regulation). D & O. at 4. But, as Ares argued, Section 6107 expressly refers only to "persons engaged in the performance of a [covered] contract," not persons attempting to qualify to perform on a contract. Respondent's Brief at 16. Even the Administrator concedes that, "[a]lthough the SCA defines 'service employee,' it does not directly address the question whether an individual participating in preliminary training required by the contract falls within the definition."<sup>5</sup> Nor does 29 C.F.R. § 4.146 directly address the question about pre-employment training in this case. On its face, that regulation expressly refers to the "new contractor's employees," but the security guards in this case were not Ares's employees during the pre-employment training. Resp. Brief at 16.

It is only the FOH that expressly provides that "persons" going through "required" pre-contract training "are considered employees of the [new] contractor while undergoing such training" even if the "trainee subsequently is not hired as a contract security guard." A central factor in the FOH is that the training be *required by the contract*. To be entitled to summary decision, the Administrator carries the burden of showing that this material fact was settled in the record while the nonmoving party is entitled to favorable inferences.<sup>6</sup> But, in my view, it was not sufficiently clear that the parties agreed on whether the pre-employment training was "required" by the Contract or simply "qualifying" training and not necessarily part of the "required" training.<sup>7</sup> I saw no evidence showing that the pre-employment training matched up with the training that was allegedly required in the Contract. Also, too many factual disputes exist to determine if Ares "cooperated in the investigation" of this alleged violation. Too many facts were unsettled to decide by summary decision whether Ares had a "good compliance"

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<sup>3</sup> Given that the majority focused on only this alleged SCA violation as the impetus for debarment, I similarly limit my focus. This alleged violation accounted for \$100,869.68 of the total amount (\$197,281.74) deemed owing as of May 15, 2008.

<sup>4</sup> 41 U.S.C.A. § 6701 was previously 41 U.S.C.A. § 357, but was amended and recodified after the contract was executed in this case.

<sup>5</sup> Statement of the Deputy Administrator in Response to Petition for Review, p. 17.

<sup>6</sup> *See, e.g., Turin v. AmTrust Fin. Serv., Inc.*, ARB No. 11-061, ALJ No. 2010-SOX-018, slip op. at 5 (ARB Mar. 29, 2013). *See, e.g., Schwabenbauer v. Bd. of Ed.*, 667 F.2d 305, 313-314 (2d Cir. 1981)("there must also be no controversy as to the inferences to be drawn from them" and "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.").

<sup>7</sup> *See, e.g., Summary Judgment Practice*, 5 Am. Jur. Trials 105 § 8 (moving party must prove the non-existence of a genuine issue of any material fact and "any doubt as to either the genuineness of a fact issue appearing on the face of the pleadings, or as to the materiality of the fact in issue, will be resolved against the moving party. . . .").



history through 2007, when the bulk of the violations allegedly occurred.<sup>8</sup> Overall, there are too many disputed facts to determine by summary decision whether Ares “willfully, deliberately or culpably” violated the SCA based solely on the language of the statute, the regulation and the FOH in this case.

But Ares’s conduct after the final conference on May 15, 2008 (the “Final Conference”) with WHD is clear and allows me to concur with the majority’s ultimate decision. Ares admits that WHD held a Final Conference where it explained to Ares the SCA violations.<sup>9</sup> Ares admits that it told WHD in June 2008 that it “did not believe that it was required to compensate its employees for time spent in the preliminary training prior to commencement of the contract services.”<sup>10</sup> Ares admits that it did not pay these back wages until March 19, 2009, over ten months after the final conference.<sup>11</sup> The SCA clearly gave the Secretary of Labor the “authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action.” 41 U.S.C.A. § 351 (West 2007). Without question, Ares’s decision not to pay after May 15, 2008, was a deliberate and/or willful choice to drag its feet and arguably thumb its proverbial nose at the Department’s order to pay the pre-employment training back wages. These facts prevent Ares from establishing “unusual circumstances” as a matter of law.

I do not believe that we can summarily resolve the numerous remaining factors for “unusual circumstances” and then blaze through a weighing of the “other factors” without the benefit of an evidentiary hearing in this case. The majority correctly notes that the “other factors” include the undisputed fact that Ares was previously investigated, but that is one factor that must be weighed with the other factors on undisputed facts or findings of fact after a hearing. Consequently, it is only Ares’s conduct after May 15, 2008, that allows me to concur with the majority’s decision to affirm debarment by summary decision.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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<sup>8</sup> Even if we considered the second most costly violation (\$78,918.16) of failing to pay in 2007 the “higher CBA wage rate negotiated between SCG [Security Consulting Group] and USGOA Local #236,” I cannot say that the record is sufficiently clear for a summary decision. Ares won the bid on August 1, 2007. Yet, inexplicably, eleven days later, the predecessor contractor negotiated an MOU with USGOA Local #236 to raise the wage and fringe rates to be paid by Ares starting on the day that Ares took over.

<sup>9</sup> Resp. Counterstatement of Contested Facts 42.

<sup>10</sup> See Administrator’s proposed undisputed fact number 50; Resp. Counterstatement number 50.

<sup>11</sup> See Administrator’s proposed undisputed fact number 64; Resp. Counterstatement number 64.