



**In the Matter of:**

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

**ARB CASE NO. 14-021**

**ALJ CASE NO. 2013-SCA-004**

**PROSECUTING PARTY,**

**DATE: June 24, 2015**

**v.**

**5 STAR FORESTRY, LLC, and  
MICHAEL DOMINGUEZ,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Prosecuting Party Administrator, Wage and Hour Division:*

**Radha Vishnuvajjala, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.;  
Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Office of  
Solicitor, Washington, District of Columbia**

*For the Respondents, 5 Star Forestry, LLC and Michael Dominguez:*

**Erik H. Thorleifson, Esq.; Campbell & Bissell, PLLC; Spokane, Washington**

**Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce,  
Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge. Judge  
Corchado, concurring.**

### **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), and implementing regulations at 29 C.F.R. Part 4 (2014). On June 10, 2015, an Administrative Law Judge (ALJ) issued the Second Amended Decision and Order Assessing Service Contract Act Exemptions and Debarment, 2013-SCA-

00004 (2nd Amended D & O) which ordered 5 Star Forestry and Michael Dominguez (5 Star or Respondents) to pay health and welfare benefits to five employees whom the ALJ deemed covered under the SCA.<sup>1</sup> The ALJ also ordered debarment for both 5 Star and Michael Dominguez effective from the date of the ALJ's order. For the following reasons, the ARB affirms the 2nd Amended D. & O., with modification of the Order of Disbarment.

## BACKGROUND

On or about May 3, 2010, and again on June 29, 2010, 5 Star entered into contracts with the U.S. Department of Agriculture: Forest Service (Forest Service) for SCA-covered projects in the national forests of the Pacific Northwest. Performance of both contracts continued through October 31, 2010. The contracts at issue incorporated SCA Wage Determination (WD) No. 1977-0209, Revision No. 39 (Nov. 13, 2009), which required payment of a health and welfare benefit in the amount of \$3.35 per hour to each employee covered by the SCA.

The Department of Labor's Wage and Hour Division (WHD) investigated and discovered that Respondents did not pay some of 5 Star's employees health and welfare benefits required by the SCA. 2nd Amended D. & O. at 2, 4. On February 4, 2013, the WHD Administrator issued a Summary of Unpaid Wages in which 5 Star was found to have underpaid SCA-required health and welfare benefits in the amount of \$46,917.52 for sixty-two employees. 2nd Amended D. & O. at 2, 4. The Administrator also sought debarment of Respondents for three years. Parties agreed to have the matter determined on briefing before the Office of Administrative Law Judges (OALJ) in lieu of a hearing.

Before the ALJ, 5 Star conceded that the assessed fringe benefit amounts were due all but five of its employees,<sup>2</sup> whom 5 Star claimed were executive employees exempt from SCA coverage under 29 C.F.R. § 541.1 and thus not subject to the SCA fringe benefit requirements. Respondents further argued that there were unusual circumstances that relieved them from disbarment under the SCA. On December 10, 2013, the ALJ issued an Amended Decision and Order Assessing Service Contract Act Exemptions and Debarment (1st Amended D. & O.),<sup>3</sup>

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<sup>1</sup> The Respondents' originating appeal was from the presiding ALJ's Amended Decision and Order Assessing Service Contract Act Exemptions and Debarment, issued December 10, 2013, which the ALJ's Second Amended D. & O. of June 10, 2015 modified, pursuant to a limited remand ordered by the ARB. See discussion *infra*.

<sup>2</sup> The five employees were Juan Diaz, David Gonzalez (aka Vicente David Gonzalez Guerra), Alberto Santamaria, Gabriel Santamaria, and Isaac Santamaria.

<sup>3</sup> The ALJ issued his initial Decision and Order Assessing Service Contract Act Exemptions and Debarment on November 14, 2013. Pursuant to an unopposed request from the Administrator, the ALJ issued the December 10, 2013 1st Amended D. & O. correcting the caption to reflect that Michael Dominguez, 5 Star Member-Manager, is a party to this action, correcting the Order of

concluding that the five disputed employees were not exempt under the SCA's definition of "service contract employee," and thus entitled to full award of fringe benefits in accordance with the Administrator's February 4, 2013 findings. The ALJ also ordered that Respondents be debarred from receiving government contracts for a period of three years from the date of the ALJ's Order, and directed the Secretary of Labor to forward Respondents' names to the Comptroller General pursuant to 41 U.S.C.A. § 6706(a).

Respondents timely appealed the ALJ's December 10, 2013 1st Amended D. & O. to the ARB. Subsequently, pursuant to joint motion of the parties, on April 30, 2015, the ARB issued a Limited Order of Remand returning the case to the ALJ for the sole and limited purpose of addressing the parties' request to modify Order No. 6 of the December 10, 2013 Amended Decision and Order to permit immediate payment of the full ordered award to employees Juan Diaz, Alberto Santamaria, and Gabriel Santamaria, while excepting Isaac Santamaria and David Gonzalez (aka Vicente David Gonzalez Guerra) because Respondents continued to contest the two employees' SCA coverage on appeal before the ARB. On June 10, 2015, in accord with the limited remand, the ALJ issued the Second Amended Decision and Order (2nd Amended D. & O.) now under consideration, pursuant to which he ordered full award payment to the three named employees, while noting that Respondents continued to challenge any award payment under the SCA to Isaac Santamaria and David Gonzalez.<sup>4</sup>

The ALJ having issued the June 10, 2015 Second Amended D. & O., the ARB now considers the two remaining issues in this case: (1) whether Isaac Santamaria and David Gonzalez are SCA-covered employees to whom SCA fringe benefits are owed; and (2) the effective date of Respondents' ordered disbarment from receiving government contracts.

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

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b) (2002). Pursuant to 29 C.F.R. § 8.1(c), 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." 5 U.S.C.A. § 557(b).

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Debarment to include Dominquez, and correcting the amount of overdue fringe benefits that he ordered Respondents to pay Isaac Santamaria. 1st Amended D. & O. at n.1.

<sup>4</sup> The 2nd Amended D. & O. substitutes stipulated language at page 15, paragraph #6 of the 2013 Amended D. & O and deletes the previous language of that paragraph. In all other respects, the Second Amended Decision and Order is the same as the 2013 Amended Decision and Order, including the Order of Disbarment, as well as the ALJ's award to Gonzalez of \$2,546 in fringe benefits and to Isaac Santamaria of \$1,943 in fringe benefits. Given the parties' motion for a limited remand, we accept the previously filed briefs as applicable to the 2nd amended order.

The Board's review of an ALJ's decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). Pursuant to 29 C.F.R. § 8.9(b), the Board shall modify and set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. See *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014 (ARB Sept. 30, 2002); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002).

## DISCUSSION

Respondents' petition for review is limited to two issues; first, the exemption status of two employees, Vincente David Gonzalez Guerra (aka David Gonzalez) and Isaac Santamaria. Respondents argue that the ALJ erred in finding that these two employees were service employees covered by the Service Contract Act because they were not employed in a bona fide executive capacity and therefore did not qualify as exempt "executive" employees under 29 C.F.R. §§ 4.156 and 541.100(a).<sup>5</sup>

Respondents also argue on appeal that the ALJ erred by ordering debarment effective from the date of the ALJ's 1st Amended D. & O., rather than from the date of publication by the Comptroller General of their names of the debarment list.<sup>6</sup>

### 1. SCA Statutory and Regulatory Framework

The SCA requires the Secretary of Labor to determine minimum wage and fringe benefit rates for service employees employed on federal service contracts. The Administrator is charged by regulation with the responsibility for implementation. 29 C.F.R. § 4.3(a). Wage determinations are incorporated into contract specifications for each federal service contract. In the absence of a collective bargaining agreement covering such employees, the Administrator issues a wage determination that reflects wages and benefits prevailing for service employees "in the locality." 41 U.S.C.A. §§ 6703(1),(2); 29 C.F.R. §§ 4.50, 4.54; *Palmetto GBA*, ARB No. 10-056 (ARB Feb. 28, 2012).

The SCA applies only to service employees and excludes employees working in a bona fide executive, administrative, or professional capacity. 41 U.S.C.A. § 6701(3)(c) provides:

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<sup>5</sup> The parties have stipulated to the fringe-benefits amount owed should the two employees be deemed covered by the SCA. See 2nd Amended D. & O. at 4.

<sup>6</sup> On this point, the Administrator agrees with 5 Star that debarment should begin when Respondents' names are published on the debarment list and not from the date of the ALJ's order, citing 29 C.F.R. § 4.188; 29 C.F.R. § 6.21. See discussion, *infra*.

(3) Service employee. — The term “service employee” — (C) does not include an individual employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations.

The statute’s implementing regulation at 29 C.F.R. § 4.156 further provides:

§ 4.156 Employees in bona fide executive, administrative, or professional capacity.

The term service employee as defined in section 8(b) of the Act does not include persons employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541 . . . .

Both the SCA and the implementing regulations incorporate Fair Labor Standards Act regulation 29 C.F.R. Part 541, which provides the standard for meeting the executive-employee exemption under the FLSA. 29 C.F.R. § 541.100 establishes a four-factor test for determining executive employees:

(a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

## **2. Application of 29 C.F.R. § 541.100**

The employer bears the burden of establishing that its employees are exempt from coverage. *Walling v. General Indus. Co.*, 330 U.S. 545, 547-48 (1947). Moreover, each of the four factors must be met for an employee to be exempt. *Solis v. SCA Rest. Corp.*, 938 F. Supp. 2d 380, 396 (D.D.C. 2013). “[E]ach requirement must be fulfilled before the exemption can be applicable because the elements are in the conjunctive.” *Brennan v. Carl Roessler, Inc.*, 361 F. Supp. 229, 232 (D. Conn. 1973). Under the FLSA regulations, job titles alone are not dispositive. *In re Yates*, ARB 02-119, ALJ No. 2001-SCA-021, slip op. at 7 n.7 (ARB Sept. 30,

2003). The factors are to be narrowly construed against employers. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Because the employer must satisfy each of the four factors required to demonstrate that an employee is working in a “bona fide executive, administrative, or professional capacity,” if one factor is not met, the exemption from SCA coverage must fail. Because we affirm the ALJ’s holding on Factor Four, we need not comment on factors one through three. Factor Four dictates that an exempt employee must have:

the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100. The regulations also give a list of considerations for evaluating the factors:

§ 541.105 Particular weight. To determine whether an employee’s suggestions and recommendations are given “particular weight,” factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee’s suggestions and recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

29 C.F.R. § 541.105.

The ALJ credited 5 Star’s evidence for Factor Four based on Dominguez’s declaration averring that he relied on recommendations of his foremen when making hiring and firing decisions. 2nd Amended D. & O. at 7, 10. However, the ALJ found that the record otherwise contained no evidence to show that Gonzalez or Santamaria had the authority to hire or fire or that either influenced hiring and firing decisions. 2nd Amended D. & O. at 7, 10.

5 Star claims that because Gonzalez or Santamaria were foremen in the field at various locations, their recommendations had particular weight because common sense dictates that a company owner with multiple crews in various locations could not evaluate employee

performance without the input of a foreman, who was actually supervising the crew. 5 Star Br. at 8-9. 5 Star claims that it does not have a sophisticated human resources department that other companies have including hiring and firing conferences and formal job descriptions. Reply Br. at 4.

The Administrator argues that the ALJ did not err in concluding that 5 Star did not show that Gonzalez and Santamaria had the ability to hire or fire or influence the hiring and firing of others. Admin. Br. at 10. The Administrator cites to examples that 5 Star could have offered to demonstrate that Gonzalez and Santamaria had the power to hire and fire or influence hiring and firing decisions. Admin. Br. at 11. 5 Star counters that the list includes possible factors and is not a required set of prerequisites to find influence in hiring or firing. Reply Br. at 7. 5 Star claims that the regulations do not require minute detail for every component of the executive exemption. 5 Star points out that WHD offers nothing to challenge Dominguez's declaration.

As noted above, the ARB functions as an appellate body and reviews the ALJ's fact findings with deference. The employer had the burden to demonstrate the exemption, which is to be narrowly construed against the employer seeking to assert it. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992). Courts have required more than informal input to satisfy Factor Four of the executive-employee exemption. *Madden v. Lumber One Home Ctr. Inc.*, 745 F.3d 899, 904 (8th Cir. 2014). 5 Star had several means available to show that Gonzales or Santamaria influenced hiring and firing decisions. The regulations at 29 C.F.R. § 541.105 list factors to aid in the determination that the employer gave the executive employee's input "particular weight." 5 Star did not provide job descriptions that listed the ability to hire or fire or influence the hiring or firing of others. 5 Star did not offer evidence of specific instances when the employer consulted the employees about hiring or firing or gave their input "particular weight."

Respondents have failed to persuade us that the ALJ erred in concluding that 5 Star did not satisfy its burden to show that the two employees at issue had the authority to hire or fire or influence the hiring and firing of others. By failing to meet the fourth factor under 29 C.F.R. § 541.100(a), Respondents have failed to establish that Gonzalez or Santamaria are executives exempt from SCA coverage and the requirement to pay the fringe benefits to which the ALJ held they were entitled.

### **3. Debarment**

Respondents also argue that the ALJ exceeded his authority by ordering their debarment effective from the date of the ALJ's Decision and Order.<sup>7</sup> Respondents cite the SCA and the relevant implementing regulations in support of their argument that the three-year debarment

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<sup>7</sup> The ALJ's Amended D. & O provides, at 16, Order No. 7: "Respondent 5 Star and Michael Dominguez are hereby DEBARRED from receiving government contracts for a period of three years from the date of this Order."

period is measured from the date their names appear on the debarment list published by the Comptroller General. Respondents' Opening Brief, at 9-11, citing 41 U.S.C.A. § 6706. The Administrator agrees that Respondents' debarment should begin when Respondents' names are published on the debarment list and "that under the circumstances of this case, debarment as of the date of the ALJ's Order would not be appropriate." Administrator's Response Brief, at 12, n.5.

"The Act expressly provides that the three year debarment period runs from the date of publication of the violator's name on the debarment list." *Cimpi v. Dole*, 739 F. Supp. 25, 27 (D.D.C. 1990) (citing 41 U.S.C.A. § 354(a), now 41 U.S.C.A. § 6706(b)). Where the respondent has been found to have violated the SCA, the ALJ's jurisdiction with regard to debarment is limited under the SCA's implementing regulations to "includ[ing] in his/her decision an order as to whether the respondent is to be relieved from the ineligible list as provided in section 5(a) of the Act [41 U.S.C.A. § 6706], and, if relief is ordered, findings of the unusual circumstances, within the meaning of section 5(a) of the Act, which are the basis therefor." 29 C.F.R. § 6.19(b)(2). Within ninety days following an ALJ's final decision, or the ARB's final decision if the ALJ's decision is appealed, the Administrator is required to forward the names of any respondent found in violation of the SCA to the Comptroller General "unless such decision orders relief from the ineligible list because of unusual circumstances." 29 C.F.R. § 6.21(a). Beyond the foregoing, neither the ALJ nor the ARB has authority with regard to disbarment. The ALJ thus exceeded his authority in ordering the debarment period in this case to begin on the date of his Order.

## CONCLUSION

The ALJ's Second Amended Decision and Order Assessing Service Contract Act Exemptions and Debarment, issued June 10, 2015, is **AFFIRMED** in all respects except for the ALJ's order that the period of Respondents' debarment from receiving government contracts commences as of the effective date of the ALJ's Decision and Order, which is **VACATED**.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**



**Luis A. Corchado, *Administrative Appeals Judge*, concurring**

I concur with the majority that 5 Star failed to prove at least one of the criteria for the executive employee exemption. 5 Star fell short of meeting its burden of proof under a preponderance of the evidence standard. I also agree that the ALJ exceeded his authority in ordering the immediate commencement of the debarment.

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