



In the Matter of:

**SUMMITT INVESTIGATIVE SERVICE, INC.**  
**and**

**HAROLD WIGFALL and**  
**MICHAEL B. HOLIDAY,**  
**Individually and Jointly**

**ARB CASE NO. 96-111**

**(BSCA CASE NO. 95-10)**

**(ALJ Case No. 94-SCA-031)**

**DATE: November 15, 1996**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1</sup>

### **FINAL DECISION AND ORDER**

This matter is before the Administrative Review Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.* (SCA) and the regulations of the Department of Labor at 29 C.F.R. Part 8. The case is pending on the petition of the Administrator, Wage and Hour Division (Administrator) seeking review of an Administrative Law Judge (ALJ) decision dated September 25, 1995. The ALJ's decision denied the Administrator's request to debar Summitt Investigative Services, Inc., and Harold Wigfall and Michael B. Holiday, individually (collectively referred to as Summitt), for violation of the SCA. For the reasons stated below, the decision of the ALJ is reversed.

### **BACKGROUND**

On February 23, 1993, the Federal Aviation Administration (FAA) awarded Summitt contract number DTF A03-93-C-000015 in the amount of \$383,134.92 to provide security services for the FAA Technical Center and other facilities in Atlantic County, New Jersey. The contract was subject to the prevailing wage requirements of the SCA and the overtime payment provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 *et seq.* (CWHSSA). Summitt began performance under the contract on March 1, 1993 and

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<sup>1</sup> On April 17, 1996, a Secretary's Order was signed re delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

from the very beginning had problems making payroll.<sup>2</sup> On November 1, 1993 Summitt's employees walked off the job because they had not been paid, and on November 2, 1993, the FAA declared Summitt in default and canceled the contract.

The ALJ held that Summitt had violated the SCA and CWHSSA and ordered the Administrator to release funds withheld under the contract to reimburse Summitt's former employees in the total amount of \$62,091.95. Decision and Order (D. and O.), September 25, 1995. Summitt does not contest this order. The only issue before the Board is the ALJ's conclusion that "unusual circumstances" existed sufficient to relieve Summitt from debarment. The ALJ found that Summitt should not be debarred because "the failings of the FAA and the Department of Labor substantially contributed to [the violations of the SCA.]" D. and O. at 20.

### HEARING DEPARTMENT

The Administrator argues that the ALJ erred in not allowing testimony on the effect that bounced checks had on individual employees. Administrator's Brief at 22, n7. Although the ALJ concluded that "there was a tremendous impact on the employees who were not paid," D. and O. at 19, we agree that the ALJ was wrong to disallow any testimony on this clearly relevant point. T. 53, 353; *see* 29 C.F.R. § 4.188(b)(3)(ii)(under the debarment regulation a variety of factors may be considered "including the impact of violations on unpaid employees").<sup>3</sup>

We recognize that often it is easier to review the D. and O. and the record created by the ALJ than it is to create that record and write an initial decision. Therefore, we do not lightly place ourselves in the role of criticizing the manner in which a hearing has been conducted. Nevertheless, in this case the hearing transcript reveals a number of mistaken evidentiary rulings and frequent inappropriate comments and discussions for the record. The overall tenor of the hearing transcript has thus caused us concern sufficient to address these issues.

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<sup>2</sup> Summitt argues in its brief that this conclusion is not based upon record evidence. At 33. Although the ALJ sustained two of Summitt's objections regarding checks that bounced early on in the contract and were not alleged as violations of the SCA, Transcript (T.) 50 and T. 310-11, the record is replete with admitted evidence of bounced checks throughout Summitt's performance under the contract. T. 229-231, 311-312, 530-531, 532-533 (objection overruled), 535, and 539-40.

<sup>3</sup> We are also concerned by the manner in which this ruling was made. In discussing what factors were considered in recommending debarment, counsel for the Administrator asked the investigator, "did you take the employees' concerns into account"? Counsel for Summitt objected, mistakenly stating that "there is nothing in the regulations stating that employees' concerns are part of consideration for debarment." The ALJ asked, "[w]here does that come from, some secret manual?"

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401. Thus, the ALJ erred in sustaining a relevancy objection to the second question asked of one of the Administrator’s witnesses, “And what is your present employment.” T. 178. Some basic background information on every witness is admissible, if for no other reason than to establish credibility. The rules of evidence even allow for the use of leading questions on direct examination to develop these preliminary matters. 3 *Wigmore* § 775.

The record reflects erroneous evidentiary rulings based upon a misunderstanding of the objected to question. For example, counsel for the Administrator asked, “when you left the meeting, what did you think would take place in your absence”? The ALJ sustained the objection to this question, stating “To ask him to speculate what was going to happen afterward is beyond . . . his competence.” But the question did not call for such speculation. This witness was competent to testify as to what he *anticipated* would happen in his absence, to the extent that it is relevant. *See* 29 C.F.R. § 18.602.

Further, Summitt’s Vice-President testified on cross-examination that he did provide certain payroll records to the Administrator. T. 767. The ALJ then sustained an objection to the question, “If [the investigator] were to testify that you never provided payroll records, what would be your response?” T. 768. The ALJ held that “you’re asking him to characterize another witness’ testimony? I don’t think that’s appropriate.” T. 769. The question, although in the form of a hypothetical, was based upon evidence of record. The investigator had already testified that he was not given Summitt’s payroll records. T. 320-21, 355 and 512. Asking the witness to explain this conflict was appropriate and the objection should have been overruled.

The record is full of inappropriate interruptions to the examination of witnesses by counsel for the Administrator. For example, counsel for the Administrator inquired of Summitt’s Vice-President “why did it take you almost a month and a half to provide proof of the return of the money to the employees”? T. 746. The answer given was non-responsive. Counsel for Summitt then interrupted stating, “I think . . .” and for the next three pages engaged in a discussion with the ALJ. T. 747-750. On the next page of the transcript counsel for the Administrator asks, “are you familiar with all the terms of the contract”? The response is “Pretty much, sir, yes.” T. 751. Counsel for Summitt interrupted, not to object, but to state, “He’s got a good memory,” and the ALJ responded “That’s a full, hearty answer.” *Id.* At one point counsel for the Administrator asks for 30 seconds to look at his notes the ALJ replied, “I would say that makes business sense. What else it means, I’m not going to say.” T. 788. Counsel for Summitt chimed in, “Say uncle.” *Id.*

The following lengthy exchange from the record also demonstrates the basis for our concerns. Summitt’s Vice-President, Michael B. Holiday, is being cross examined by Mr. Sheris, counsel for the Administrator, concerning the terms of the contract, as follows:

Q. Okay. Section 4.3, could you read that sentence that's under the heading?

ALJ: Are you going to ask him to interpret that?

Mr. Sheris: Well, I was going to ask him . . . .

ALJ: Well, have Mr. Reilly [DOL's investigator] do some of that because he has 17 years of experience in these matters, and maybe Maccarone [FAA's contract representative] also, but . . . I think the contract speaks for itself . . . you can make any argument you want as to how I should construe the meaning of the words in the contract, but to ask this witness that question or that type of question, I think, is out of order.

Mr. Sheris: Okay. I will read Section 4.3 to you. It says, "All . . . ."

ALJ: To whom? To the witness?

Mr. Sheris: To the witness.

ALJ: For what purpose?

Mr. Sheris: I would like to ask him a question about that.

ALJ: To ask him what it means or how he interprets it?

Mr. Sheris: All right. Are you aware that -- I'm sorry.

ALJ: [For w]hat purpose are you going to ask him this question . . . ? Are you going to ask him how he interprets it or what it means?

Mr. Sheris: I would just like to . . . .

ALJ: Wave it in front of him? I'm going to sustain an objection to any question of interpretation or meaning or how he feels it should be applied, because it speaks for itself. He's not an expert in interpreting the contract.

Mr. Sheris: Can I ask him if he's aware in the way of a question? . . . .

ALJ: . . . [Y]ou asked him if he's aware of all the terms of the contract, and he said yes . . . I labeled that a full, hearty answer. So he said yes. That's your answer. He's aware of everything in the contract to one degree or another.

Mr. Sheris: Are you aware of the provision that all uniforms must be. . . .

Ms. Johnson  
[Summitt's  
Counsel]: Objection, Your Honor.

ALJ: That's subsumed -- is that part of the contract?

Mr. Sheris: Yes.

ALJ: Okay. Then he's aware of it.

T. 752-755.

On direct examination Holiday gave extensive testimony concerning all aspects of this case. He testified that he was familiar with the terms of the contract. The record shows that Holiday was Summitt's most knowledgeable witness regarding the facts and circumstances of this case. Therefore, it was entirely appropriate to question him regarding Summitt's interpretation of the contract. The ALJ's analysis of this evidentiary issue leaves Summitt in the unenviable position of not having anyone competent to testify concerning the meaning of the terms of the contract. Only the Administrator's witnesses would be competent to testify regarding the proper interpretation of the terms of the contract. Further, the issue before the ALJ was not only the proper legal effect to give the contract, but ultimately, Summitt's culpability in causing the violations that were found to have occurred. While ignorance of the law or the contract is not an excuse for an SCA violation, (29 C.F.R. §4.188(b)(1); *Elaine's Cleaning Service*, Board of Service Contract Appeals (BSCA) Case No. 92-07, Aug. 13, 1992), a reasonable misunderstanding regarding the terms of the contract may make the contractor less culpable for a violation. *J & J Merrick's Enterprises, Inc.*, BSCA Case No. 94-09, Oct. 27, 1994. Therefore, the ALJ erred in not allowing counsel for the Administrator to question Holiday concerning his understanding of Summitt's obligations under certain provisions of the contract.

We are also concerned about the arbitrary time limitation for cross examination placed upon the Administrator's counsel by the ALJ. Summitt's counsel spent 122 pages of transcript

to elicit direct testimony from Holiday. After 59 pages of cross-examination by counsel for the Administrator the ALJ stated: “It’s twenty to 6:00. There’s been interminable delays between questions. I’m going to give you ten minutes to finish up, Mr. Sheris . . . .” T. 793. Although there may have been delays between questions that are not reflected in the record, a review of the transcript indicates that nearly half of the total 60 pages of cross-examination is made up of statements by the ALJ, or counsel for Summitt, and Holiday’s responses. We can imagine scenarios where it would be appropriate to place time limits on the completion of cross examination. But the arbitrary placement of such a short time period in this case was in error.

We find ourselves in a situation similar to the one encountered by the Eighth Circuit in *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950):

The record consists in large part of colloquies between the trial judge and counsel with respect to the admissibility of evidence, for which discussions there was, in our opinion, little excuse, since no jury was present and no technical rulings on evidence were necessary or desirable.

The Eighth Circuit went on to explain that “[i]n the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence.” *Id.* On the other hand, if evidence is excluded that should have been admitted, a new hearing is likely to be necessary.

In this case we avoid the necessity of a remand because we find that the evidence admitted is sufficient to reverse the finding of the ALJ regarding debarment. If we were to find that the record evidence supported the ALJ’s decision, a remand would likely be necessary to allow the Administrator to place in the record that evidence which was wrongly excluded. In addition, following the guidance provided by the *Builders Steel* case, *i.e.*, taking under advisement disputes as to the admissibility of evidence and sifting through them later as necessary, saves time by avoiding prolonged discussions for the record of these issues. We recognize that applying this principle will not always be appropriate, *e.g.*, where allowing questionable testimony in the record will necessitate a time consuming response by the opposing party. Yet, we steadfastly believe that general application of this principle will result in shorter hearings and fewer remands.

## DISCUSSION

Section 5(a) of the SCA states that “Unless the Secretary otherwise recommends because of unusual circumstances” all persons or firms that the “Federal agencies or the Secretary have found to have violated the Act” shall be placed on the debarred bidders list. 41 U.S.C. § 354(a). Thus, once a violation of the SCA has been found, the offending parties must be debarred unless an affirmative finding of “unusual circumstances” is made. The Secretary’s regulations at 29 C.F.R. §4.188(b) define “unusual circumstances.” As shown

by the regulation and the interpretive case law, “[a] contractor seeking an ‘unusual circumstances’ exemption must run a narrow gauntlet.” *A to Z Maintenance Corp. v. Dole*, 710 F. Supp. 853, 855 (D.D.C. 1989).

The regulations at 29 C.F.R. § 4.188(b) have been interpreted as setting forth a three-part test for determining when relief from debarment is appropriate. The test clarifies the criteria established in the leading case of *Washington Moving & Storage Co.*, Case No. SCA-168, Decision of the Secretary, Mar. 12, 1974, and other significant cases defining what constitutes “unusual circumstances.” At 29 C.F.R. § 4.188(b)(3)(i), Part I of the test states:

[W]here the respondents’ 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, culpable disregard of whether they were in violation or not, or culpable failure to comply with record keeping requirements (such as falsification of records) relief from debarment cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the Act, or where previous violations were serious in nature.

The second part of the test lists as prerequisites for relief “a good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” Part III lists additional factors which must be considered if the conditions of Parts I and II are met, such as whether the contractor has committed record keeping violations which impeded the investigation; whether liability was dependent upon resolution of a *bona fide* legal issue of doubtful certainty; the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees; and whether the sums due were promptly paid. See *Florida Transportation Service, Inc., Federal Transportation Services, Inc., and John C. Gorman, Jr.*, BSCA Case No. 92-03, Aug. 31, 1992; *Elaine’s Cleaning Service*, BSCA Case No. 92-07, Aug. 13, 1992; and *Crimson Enterprises, Inc., and Carl H. Weidner*, BSCA Case No. 92-08, Sept. 29, 1992.

Summitt argues that “unusual circumstances” are present in this case due to the misconduct of the FAA and the Administrator that “resulted in Respondents committing SCA/CWHSSA violations.” Summitt’s Brief at 27. Summitt classifies the alleged misconduct of the FAA and the Administrator, as follows:

- (1) Misclassification issue -- failure to conform a wage determination that caused clerical employees to be overpaid;
- (2) Fringe benefit issue -- requiring the payment of cash in lieu of fringe benefits during overtime hours at a time and a half rate;

- (3) Vacation issue -- ordering payment for vacations before legally required; and
- (4) Uniform issue -- requiring the purchase of new uniforms.

*Id.*

The ALJ agreed with this argument and found that “Summitt was unable to continue to absorb the requirements being imposed by the Department of Labor and the FAA” and “simply ran out of money.” D. and O. at 10. The ALJ’s decision must be reversed because for each of the issues identified above, the position taken by the FAA and/or the Administrator is supported by the statute, regulations and/or contract in question. Summitt cannot be relieved from debarment because the FAA and the Administrator made it comply with the obligations for which it had contracted, even if these obligations caused a cash flow shortage. We find, for the reasons set out below, that Summitt has failed to show compliance with the first part of the unusual circumstances test, in that its conduct did constitute culpable neglect or culpable disregard of obligations.

#### ***Misclassification Issue***<sup>4</sup>

The premise of Summitt’s argument regarding this issue is that the FAA and the Administrator improperly failed to correct the wage determination to correspond with a statement in the bid solicitation that indicated a lower wage rate for certain clerical personnel. The statement in the bid solicitation relied upon by Summitt in making this argument cautions that “THIS STATEMENT IS FOR INFORMATION ONLY: IT IS NOT A WAGE DETERMINATION” (capitalization in original). The wage determination attached to the bid solicitation clearly set out only three wage classifications, Court Security Officer, Guard I and Guard II. Summitt ignored the caution in the bid solicitation and based its bid on the wage rates set out in the solicitation, rather than those contained in the wage determination. Thus, the contract was seriously underbid from the very beginning.

The ALJ’s conclusion that the FAA or the Administrator were even partly at fault in causing this problem completely misapprehends the duties and responsibilities of a prospective bidder under the SCA. The ALJ found that “Summitt’s responsibilities under the contract were highly confusing due to the differences among the classifications listed in the contract, those contained in the wage determination and those actually employed by the predecessor contractor the FAA itself and, ultimately, by Summitt.” D. and O. at 18. The regulations make it clear however, that the “minimum monetary wages and fringe benefits for service

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<sup>4</sup> The record reflects two aspects to the misclassification issue. Only the failure to include in the wage determination lower wage rates for clerical workers is relevant here. The dispute involving the proper classification of certain guards (Guard I v. Guard II) was resolved by FAA paying the full disputed amount prior to contract default.



employees . . . will be set forth in wage determinations issued by the Administrator.” 29 C.F.R. § 4.3(a). Therefore, any confusion that existed was solely caused by Summitt’s failure to understand or accept one of the basic tenets of the SCA.

Further, any confusion that did exist regarding the accuracy of the wage determination should have been raised by Summitt prior to contract award. The regulations implementing the SCA provide a mechanism for contractors to challenge the accuracy or completeness of a wage determination prior to bidding or the award of a contract. By providing a challenge procedure prior to the initiation of work, the regulations seek to avoid any unfair surprise to an employer, its employees, or the government, respecting the wage standards governing a particular contract. *See* 29 C.F.R. §4.55(a). This process assures fairness to all potential bidders. There is an attendant obligation on the part of would-be contractors to familiarize themselves with the governing wage determination and to take advantage of the challenge procedure should the wage determination be deficient. *See Sumlin and Sons, Inc.*, Wage Appeals Board (WAB) Case No. 95-08, Nov. 30, 1995 (under the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*). Here Summitt failed to point out any deficiencies in the wage determination prior to bidding on the contract and instead chose to raise these concerns only ten days after commencing performance under the contract. *See* Respondent’s Exhibit (R) 2.

Finally, Summitt’s argument that the FAA or Administrator is at fault for failure to conform the wage determination is without merit. The Administrator’s recourse to the conformance process is discretionary and a contractor may not rely on this process to be relieved of the obligation under the regulations to seek review and reconsideration of a wage determination prior to opening of bids. *See Kord’s Metro Services*, BSCA Case No. 94-06, Aug. 24, 1994. The conformance procedure is not intended to be a substitute for timely challenging a wage determination. *See Swanson’s Glass*, WAB Case No. 89-20, Apr. 29, 1991; *A.S. McGaughan Co., Inc.*, WAB Case No. 92-17, May 26, 1993 (both under the Davis-Bacon Act, *supra*).

As set out above, any cash flow problem caused by an inaccurate or non-conformed wage determination was the fault of Summitt, not the FAA or the Administrator. We reject the ALJ’s conclusions, D. and O. at 10 and 19, to the contrary.

### ***Fringe Benefit Issue***

Summitt alleged that it was “required” by the FAA to do three things regarding fringe benefits that were not necessitated by the SCA, the regulations, or the contract: (1) pay employees cash instead of providing a fringe benefits package as originally intended; (2) pay the fringe benefit rate for overtime hours; and (3) pay the overtime fringe benefit rate at time and a half. Summitt sought a credit of \$1,383.62 for time and a half overtime payments made on fringe benefits. The ALJ rejected this argument and Summitt does not contest that finding. The ALJ’s debarment analysis refers to the “difficulties” caused by the fringe benefit issue in concluding that the first part of the unusual circumstances test was met by Summitt. D. and O. at 18.

The record shows that any confusion surrounding its fringe benefit obligations under the contract was of Summitt's own making. First, Summitt's Vice-President, Michael B. Holiday, corrected a leading question by his own counsel to admit that Summitt was not "required" by FAA to pay cash in lieu of providing a benefits package. Although his earlier testimony on this issue was quite confusing Holiday clarified his testimony, as follows:

Q. Now was there anyone else at FAA besides the contracting officer, Mr. Maccarone, who told you that you had to pay the employees in cash as opposed to the fringe benefit package?

A. Well, he actually didn't say you have to pay it. He strongly suggested that in order to keep them happy, we pay them that out in the dollars.

T. 643-644.

Next Summitt argues that the SCA regulations prohibit the payment of fringe benefits on overtime hours. Summitt's Brief at 10. Summitt provides no legal support for this position. The applicable regulation, 29 C.F.R. § 4.182 "permits" the exclusion of fringe benefit payments from the calculation of overtime wages, but does not require it as asserted by Summitt. The wage determination that governed this contract specifically stated that the fringe benefit payment is to be "computed on the basis of all hours worked." Petitioner's Exhibit (P) 2. Thus, Summitt was only required to pay what it contractually agreed to pay.

Finally, Summitt did pay time and a half for overtime on fringe benefits which was not required by the SCA, the regulations, or the contract. Summitt asserts that it was required to make this wrongful payment by the FAA. Summitt's Brief at 26. The ALJ repeatedly characterized this incident as a "misunderstanding." D. and O. at 5, 7, 8, and 16. The FAA employee who allegedly made the statement that time and half must be paid on the fringe benefit portion of overtime hours was not called to testify by either party. The testimony rendered by Holiday in support of this allegation is very confusing and almost entirely based upon his assent to leading questions.<sup>5</sup> The record thus supports the ALJ's conclusion that

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<sup>5</sup> See T. 628-30:

A: . . . . We received calls from the contracting officer in the Department of Labor stating that the contract says all hours worked, therefore, you have to pay overtime on the fringe benefit, on all hours worked.

Q: . . . .[T]hey also tell you that you had to pay time and a half on those fringe benefits that you paid?

(continued...)

Summitt *mistakenly* believed it had to pay time and half on the fringe benefit portion of overtime hours, as opposed to being wrongfully required to make such payments.

Another aspect of this issue may have played a role in the ALJ's general characterization of the fringe benefit issue as a "difficult[y]," D. and O. at 18, that may have been caused by the "failings" of the FAA and the Administrator. D. and O. at 20. The Administrator's investigator, Patrick Reilly, admitted that he was aware of Summitt's payment of time and a half on fringe benefit overtime hours, but that he did not consider it his job to correct Summitt's misunderstanding. D. and O. at 8-9. The SCA is a minimum wage law. It does not prohibit a contractor from paying wages or fringe benefits higher than those contained in the applicable wage determination. Thus, Reilly's description of his job duties as not including an obligation to tell the contractor that he could pay less, is accurate. Although under these circumstances we question Reilly's failure to correct Summitt's misunderstanding, we cannot draw any inference from his failure to do so that supports a finding of unusual circumstances.

Although the D. and O. is unclear, it appears that the ALJ relied, at least in part, on a finding that partial fault for Summitt's fringe benefit induced cash flow problem rests with the FAA or the Administrator. D. and O. at 18-20. For the reasons set out above, we reject any such inference.

### ***Vacation Issue***

The ALJ found that Summitt was liable for paying vacation benefits to its employees who had completed at least one year of service, including service under the predecessor contractor. D. and O. at 15-16. Summitt did not contest this conclusion. However, Summitt alleges, without providing any legal support for the position, that it was not legally required to make payments to vacationing employees until "the employees next anniversary date." Summitt's Brief at 13. Summitt then argues that it was wrong for the Administrator to take

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<sup>5</sup>(...continued)

A: I may be lumping these together, but the conversation -- there were several conversations going back and forth. . . . [Holiday then goes on to discuss conversations between himself and the FAA contracting officer]. . .

Q. Now, did there come a time when someone told you had to pay time and a half on . . .

A: Yes, and that was the discussion I said . . . we're not required to pay that, and he directed me to the wage determination.

But, the wage determination does not require payment of the fringe benefit on overtime hours at time and a half. P 2.

the “unilateral,” D. and O. at 13, action of requiring it to make vacation payments to the employees at the time they took their vacations and that this action contributed to its cash short fall. This argument is without merit because the regulations, 29 C.F.R. § 4.173, and wage determination, P 2, require a “paid vacation,” *i.e.*, payment at the time the vacation is taken, not up to a year later.

In spite of the finding against Summitt on this issue by the ALJ, the D. and O. does note in the debarment discussion that FAA “forced [Summitt] to absorb unforeseen costs of paid vacations . . . .” At 19. We reject any inference that the Administrator’s insistence upon Summitt’s compliance with the regulations and the wage determination regarding paid vacations can be a basis for a finding of unusual circumstances.

### ***Uniform Issue***

The ALJ noted that “Summitt bid on the contract on the assumption that its stock uniforms would be approved by the [FAA].” D. and O. at 6. The uniforms were not approved by the FAA. *Id.* Summitt argues that FAA’s refusal to approve its stock uniforms saddled it with another financial burden, the purchase of new uniforms, “not required by law or under the contract.” Summitt’s Brief at 26-7. The contract clearly states that “all uniforms must be approved by the [FAA] prior to purchase.” P 1. Therefore, we must reject the ALJ’s inference that the FAA wrongfully forced “Summitt to absorb unforeseen costs,” D. and O. at 19, by requiring the purchase of new uniforms. Again, Summitt was only required to do what it had contractually obligated itself to do, and this cannot lend support to a finding of unusual circumstances.

## **CONCLUSION**

Summitt committed serious SCA violations because it exercised extremely poor business judgment in under bidding this contract. The ALJ’s conclusion that “the FAA and the Department of Labor substantially contributed” to Summitt’s cash flow problem is without support in the record. D. and O. at 20. We note that the failure to pay employees because of “[f]inancial problems resulting from poor business judgment” constitutes culpable neglect. *Unified Services, Inc.*, BSCA Case No. 92-36, Jan. 28, 1994, *and cases cited therein*. Therefore, Summitt has failed to establish Part I of the three part test for determining when relief from debarment is appropriate.

In addition, we find that Summitt has failed to establish Parts II and III of the test for relief from debarment. Summitt committed serious violations of the SCA throughout its performance under this contract by bouncing payroll checks nearly every pay period. See sources cited *supra*, note 1. In the *Unified Services* case it was noted that the failure to make “four very large payrolls” during the contract at issue was a “continuing, repeated and quite serious” violation of the SCA. At 8. We agree with the ALJ’s conclusion that the negative impact of the missed payrolls on employees was “tremendous.” D. and O. at 19. Further, Summitt’s arguments in this case, as refuted above at pp. 6-11, present a basic

misunderstanding of the purpose and principles of the SCA such that future compliance is far from assured. Finally, Summitt's arguments did not present a *bona fide* legal issue of doubtful certainty. We therefore, reject the ALJ's conclusion that this factor "weighs heavily in favor" of Summitt. D. and O. at 19. For all the reasons stated above, we reverse the order of the ALJ denying the Administrator's request for debarment.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member