**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**In the Matter of:**

**HUGO REFORESTATION, INC. and and HUGO PEREGRINO, an individual.**

***In re* Contract No. 14022H-952-C96-218 with the Bureau of Land Management, Portland, Oregon**

**ARB CASE NO. 99-003**

**ALJ CASE NO. 97-SCA-20**

**DATE: April 30, 2001**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Appearances:**

*For the Petitioners:*
James A. Nelson, Esq., *Toledo, Washington*

*For the Deputy Administrator:*
Joan Brenner, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

## FINAL DECISION AND ORDER

This case arises under the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended ("SCA"), 41 U.S.C. §§351-358 (1994), the Contract Work Hours and Safety Standards Act, as amended ("CWHSSA"), 40 U.S.C. §§327-333 (1994), and implementing regulations found at 29 C.F.R. Parts 4 - 8 (2000). Hugo Reforestation, Inc., and its President, Hugo Peregrino (collectively, "Petitioners") challenge the Administrative Law Judge's Decision and Order ("D&O") of August 28, 1998, in which the ALJ ordered that Petitioners be debarred and listed as ineligible for future government contracts because of wage underpayments and recordkeeping violations.

Based upon a thorough review of the record and the briefs of the parties, we affirm the ALJ's determination that Petitioners violated the SCA and CWHSSA. In accordance with the respective debarment provisions of the SCA and CWHSSA, we order that both Hugo Peregrino and Hugo Reforestation, Inc., be debarred.

## BACKGROUND

Petitioner Hugo Reforestation, Inc. is a Washington corporation in the business of contracting for the provision of reforestation services, including tree planting and thinning. The company maintains its headquarters in Chehalis, Washington, and employs approximately 30 to 40 workers annually. Petitioner Hugo Peregrino is the company's sole owner, CEO and president. Tr. at 169-170, 241-242; DX-12 at 196.[1/]

In April 1996 the Bureau of Land Management (BLM) awarded Contract No. 14-22H-952-C96-2018 to Hugo Reforestation, Inc. for "tree plantation brushing" and "conifer/hardwood spacing" on forestry lands operated by BLM near Grants Pass, Oregon. The contract provided for the payment of $195,500 (subsequently modified to $188,135) over the period commencing May 13, 1996, and ending July 20, 1996. DX-1, at 1, 4-5, 11. Approximately 24 employees were employed by Petitioners under the contract. All employees were Hispanic and most (if not all) spoke Spanish as a first language.

It is undisputed that the contract was subject to both the SCA and CWHSSA. D&O at 8. Under the contract, Petitioners were required to pay their employees a base hourly rate of $12.00 per hour, overtime pay at one and one-half times the base hourly rate for all hours worked in excess of 40 hours a week, fringe benefits of $0.90 per hour, and double-time for work on holidays which, in the instant case, included Memorial Day and July 4th. DX-1.

Upon receiving a complaint from the BLM, the Wage and Hour Division initiated an investigation of Petitioners' compliance in November 1996. Tr. at 27. The Division initially determined that Petitioners' employees worked more hours per week than the hours reported in payroll records; these additional hours were attributable especially to work performed on weekends. Tr. at 122-124; 137-138; DX-14. *See also* Tr. at 95-98; 98-100; 139-40; DX-7 at 159. The Division concluded that the employees worked more than 40 hours per week during several pay periods, but were not paid overtime. Tr. 45, 47-49; DX-4; DX-5 at 141, 147-148.

Petitioners did not deny that their employees worked the excess hours in certain weeks without receiving overtime pay. Instead, Petitioners sought to justify the practice on the grounds that it was an "accommodation" requested by the employees. Most of Petitioners' employees were based near Chehalis, Washington, approximately 335 miles and a five to six hour drive from the Grants Pass, Oregon, job site. Tr. at 242. Because the jobsite was far from their homes, Peregrino claimed, Petitioners provided the employees an eighty-hour, two-week work cycle consisting of a six-day work week the first week (48 hours) and a four-day work week the second week (32 hours) in an

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[1/] The citation form "DX-__" refers to Department of Labor exhibits introduced at the hearing before the ALJ, and citations to specific pages refer to the consecutively-numbered pages in the Department of Labor's "Exhibit Book" used at the hearing. The citation form "RX- __" refers to exhibits filed by Petitioners. "Tr. __" refers to transcript citations of the hearing before the ALJ.

attempt to "accommodate" the employees' desire for occasional three-day weekends. *See* Tr. 34, 37; DX-6 (signed statement of Hugo Peregrino, May 7, 1997).[2/]

The Wage and Hour Division further determined that Petitioners failed to pay some of the fringe benefits that were owed to their employees for hours actually worked. *See* DX-4 at 92-132. The Division also found that Petitioners did not pay the employees the correct holiday pay for their work on July 4th, DX-5 at 146, based largely on Petitioners' admission that they did not pay double-time for holidays, but only time and one-half. Tr. 33-35; DX-6.

As a result of its investigation, the Wage and Hour Division determined that $7,109.15 in back wages were owed Petitioners' employees. Specifically, $5,850.50 was owed for overtime worked; $232.65 was owed in fringe benefits; and $936 was owed to seventeen employees who worked on July 4th but were not paid at the correct rate. Tr. at 43-49; DX-4 at 92-132. Petitioners did not dispute the amount of back wages computed by the Division and paid the back wages on or about June 7, 1997. DX-2.

Petitioners were aware of the SCA and CWHSSA requirements under the contract. In addition to the requirements having been either specifically set forth or otherwise incorporated by reference into the contract with BLM, Contracting Officer's Representative (COR) Gary Larson personally reviewed with Peregrino the various terms and conditions of the contract when BLM issued its Notice to Proceed on May 8, 1996. Tr. 118-119. Larson further testified that the preceding year he had conducted a similar pre-work conference with Peregrino on a prior contract in which he reviewed the very same requirements. Tr. at 120. Additionally, Pamela Yerger, Assistant District Director for the Portland Office of the Wage and Hour Division, testified that Petitioners were advised on several prior occasions of the SCA and CWHSSA fringe benefit, holiday and overtime pay requirements, and record-keeping requirements in conjunction with previous Wage and Hour Division investigations. *See e.g.*, Tr. at 84-85, 88-90.

Petitioners also had been investigated on several occasions in the past for violations of various labor protection statutes, and repeatedly had been advised of SCA and CWHSSA requirements. The Wage and Hour Division files indicated that Petitioners were first investigated in September 1990 by a "reforestation task force" which revealed that Petitioners had failed to pay holiday pay on four contracts. The investigation found that for 21 employees, Petitioners failed to pay $51.50 per holiday, for a total of $2,165. At a "final conference" attended by DOL investigators "all applicable provisions" of both the CWHSSA and SCA were explained to Peregrino, and Peregrino personally agreed to comply with both laws in the future and pay the back wages. *See* Tr. at 83-85; D&O at 4.

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[2/] At the hearing before the ALJ, Peregrino also argued that he thought he was only required to pay his employees overtime pay after they had completed 80 hours of work in a two week period. Tr. 33-34. *See* discussion *infra* at p. 11 .

Yerger testified regarding a February 1991 investigation: "Two [Federal service] contracts were investigated during which probable violations of the MSPA [Migrant and Seasonal Agricultural Workers Protection Act] took place." D&O at 4. The complete file was not reviewed because it was archived, but some documents were nevertheless obtained and reviewed by Yerger. According to Yerger, during the course of investigating the alleged MSPA violations the Division also found monetary violations of the SCA totaling $2,300. Yerger was not able to determine from the available records what took place at the conference concluding the 1991 investigation. Tr. at 85-86.[3/]

Yerger also testified that a September 1992 investigation of two contracts covered by the SCA and CWHSSA found that Petitioners failed to pay holiday pay of $1,100 for 12 employees. At the close of the investigation, Petitioners were given copies of all SCA/CWHSSA regulations and statutes, including "particularly Part 516 regarding record-keeping" and agreed to comply in the future. *See* D&O at 4.

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[3/] With regard to the February 1991 MSPA-related investigation, Yerger also testified that the investigation also revealed $522 in back wages owed under the Fair Labor Standards Act, and that Peregrino was provided with a "summary of probable MSPA violations . . . and it showed that he had failed to properly disclose the employment conditions to workers." *Id.*

In addition, Yerger testified that Petitioners were investigated in February 1992 concerning FLSA child labor law violations after two minors were injured using chainsaws. Peregrino appealed the investigation's findings. A hearing was held before an ALJ, who entered findings against Peregrino and ordered that he pay a civil money penalty (CMP) of $2,000. The company was provided copies of the FLSA law and regulations and was advised on compliance, and agreed to FLSA compliance in the future. Tr. at 86-87, 112; D&O at 4.

Yerger also testified that in September of 1993, DOL received *allegations* of MSPA violations by Petitioners (failure to provide employees with proper wage statements and failure to pay minimum wage). However, there was no investigation; instead, DOL issued only a "conciliation letter" citing relevant regulations and statutes. D&O at 4; Tr. at 90-91. *See* DX-10. In August, 1995, DOL again received *allegations* of MSPA violations (workers did not know what their pay and fringe benefit entitlements were). Again there was no investigation; and a "conciliation letter" was issued. D&O at 4; Tr. at 92. *See* DX-11. Finally, Yerger testified regarding an investigation in 1997 involving MSPA violations involving the service contract at issue in this case. Tr. 93. As noted by Peregrino and conceded by the attorney for the Department, this recent investigation resulted in an ALJ-approved settlement expressly without admission of liability. Tr. 192-93. *See* "Consent Findings" in ALJ No. 97-MSP-16, attached as Exhibit 2 to the Department's Response to Motion for Summary Decision, filed with the ALJ March 31, 1997.

Although this testimony about FLSA and MSPA violations (either proven or merely alleged) was recounted by the ALJ in the D&O, the Division's findings or conciliation agreements regarding possible FLSA and MSPA violations by the Petitioners are not relevant to the underlying debarment concerns at issue in this case, *i.e.*, whether Petitioners had a history of violating the SCA or CWHSSA, and the extent to which they had been counseled concerning SCA or CWHSSA compliance. The alleged FLSA and MSPA violations therefore play no roll in our decision in this case.

After the Petitioners paid the back wages owed in the instant case, an administrative complaint was filed by the Wage and Hour Administrator seeking debarment under Section 5(a) of the SCA, 41 U.S.C. §354(a), and under applicable CWHSSA regulations, 29 C.F.R. §5.12, based on Petitioners' overtime, fringe benefit, and holiday pay violations.

## PROCEEDINGS BEFORE THE ALJ

Prior to the hearing on the merits, the ALJ determined upon cross-motions for summary decision that Hugo Reforestation, Inc.'s president, Hugo Peregrino, was a "party responsible" under Section 3(a) of the SCA, 41 U.S.C. §352(a), and therefore subject to debarment liability under the SCA. ALJ Order of April 24, 1998, Denying Respondent's Motion for Summary Decision and Granting Plaintiff's Cross-Motion for Summary Decision, at 4.

In the ALJ's subsequent decision on the merits, entered August 28, 1998, the ALJ first determined that Petitioners (both Hugo Reforestation, Inc. and Peregrino) had violated the SCA and CWHSSA by failing to pay their employees required overtime pay, holiday pay, and fringe benefits, and by committing record-keeping violations. D&O at 8-10. Accordingly, the ALJ turned to the issue of whether Petitioners should be debarred and declared ineligible to receive further Federal contracts under the SCA and CWHSSA. The ALJ determined that no "unusual circumstances" within the meaning of the SCA existed that would absolve Petitioners from debarment, and therefore held that Petitioners should be debarred and declared ineligible from the award of Federal contracts for a period of three years. D&O at 13-15.

## ISSUES ON APPEAL

Petitioners raise several issues for consideration on appeal, including:

(1) whether the ALJ's determination of SCA and CWHSSA violations was without evidentiary foundation;

(2) whether the ALJ's determination that no "unusual circumstances" existed that relieved Petitioners from debarment under the SCA and CWHSSA was in error;

(3) whether the ALJ erred in finding Hugo Peregrino to be a "party responsible" under the SCA and the CWHSSA, and ordering that he personally be debarred from future contracts; and

(4) whether Petitioners were deprived of a fair hearing because of the ALJ's evidentiary rulings, bias on the part of the ALJ, and prejudicial conduct by the Department of Labor in presenting its case.

## ARB JURISDICTION AND STANDARD OF REVIEW

Payment of *fringe benefits* and *holiday pay* on Federal contracts subject to the Service Contract Act is required by the SCA and its implementing regulations. 41 U.S.C. §351; 29 C.F.R. §§4.172, 4.174. In addition, the SCA regulations require contractors to maintain accurate payroll records. 29 C.F.R. §§4.6(g), 4.185.

The CWHSSA requires payment of *overtime rates* for work performed in excess of 40 hours per week on Federal contracts. 40 U.S.C. §328. The CWHSSA is considered to be one of the Davis-Bacon Related Acts, and is subject to the implementing regulations found at 29 C.F.R. Part 5. *See* 29 C.F.R. §5.1. The Part 5 regulations include a separate recordkeeping requirement. 29 C.F.R. §5.5(a)(3).

This Board has jurisdiction to review enforcement actions involving alleged violations of the SCA pursuant to 29 C.F.R. §6.20, 29 C.F.R. §8.1(b), and 29 C.F.R. Part 8, Subpart C. Our jurisdiction to review alleged CWHSSA violations on Federal service contracts derives from these same sections. *Id.*

The Secretary's enforcement authority under the SCA is governed by provisions originally enacted as part of the Walsh-Healey Act, specifically 41 U.S.C. §§38, 39 (1994). *See* 41 U.S.C. §353(a). Our review of the ALJ's decision is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). The Board will set aside or modify an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. §8.9(b). Issues of law are reviewed by the Board *de novo*. 5 U.S.C. §557(b) (1994).

## DISCUSSION

In this case, the Department of Labor has charged Petitioners with violating both the SCA (fringe benefit and holiday underpayments, and recordkeeping violations) and the CWHSSA (overtime and recordkeeping requirements). In the first section of this Discussion, we review the merits of the underlying violations. Next, we turn to whether Petitioners should be debarred under the distinctly different debarment standards applicable to SCA and CWHSSA violations. Third, we consider whether the ALJ correctly found Hugo Peregrino to be a "party responsible" under the SCA and CWHSSA, and thus personally subject to debarment. Finally, we consider Petitioners' procedural challenges.

### I. Violations of the SCA and CWHSSA

As previously noted, Petitioners paid back wages to the employees that the Wage and Hour Division calculated were due even before this formal enforcement case was initiated. Nevertheless, in order to address the debarment question it was necessary first for the ALJ to determine whether Petitioners had violated the SCA and CWHSSA. The ALJ found that the violations had occurred, as alleged by the Secretary. On appeal, the Petitioners argue that the ALJ's findings of SCA and

CWHSSA violations are without evidentiary foundation. We disagree, and therefore affirm the ALJ's determination that Petitioners violated both the SCA and CWHSSA by failing to pay required overtime, fringe benefits and holiday pay, and for failing to keep proper records.

### A. CWHSSA Overtime Pay Violations

Employee overtime pay is mandated under the CWHSSA, which requires Federal contractors to pay time-and-a-half overtime rates for all hours worked in excess of forty in a work week. *See* 40 U.S.C. §328; 29 C.F.R. §5.5(b)(1). Hugo Reforestation maintained a bi-weekly (*i.e.*, 2-week) pay schedule. The testimony of Carol Rogers, Wage and Hour Investigator, and supporting documentation demonstrated clearly that Petitioners failed to pay the proper overtime pay to their employees in three of the five two-week pay periods covered by the contract. *See* Tr. 45, 47-49; DX-4; DX-5 at 141, 147-148. Rogers' testimony and documentation were corroborated by BLM Contracting Officer's Representatives (CORs) Larson and Milton Coyle, who testified, based on their work site observations, that Petitioners' employees worked more hours per week than the hours reported in payroll records, especially unreported weekend work. Tr. at 122-124; 137-138; DX-14. Additional corroboration is found in the employee interviews conducted by the CORs and Wage and Hour Division Assistant District Director Yerger, in which the employees stated that they worked in excess of forty hours per week without receiving overtime pay. Tr. at 95-98; 98-100; 139-40; DX-7 at 159.

Before the ALJ, Petitioners offered conflicting evidence, simultaneously attempting to refute the evidence of overtime underpayments through the testimony of several of their employees, while at the same time seeking to justify the improper payment practices as an effort to accommodate their employees' desire to have occasional three-day weekends.[4/] With regard to the employees' testimony that they did not work more than forty hours per week, we agree with the ALJ's determination that the employees' testimony is either rebutted by other credible evidence, refuted by payroll records, or simply not credible. D&O at 9. *See* Tr. at 38, 133, 263; DX-5 at 142, 145, 150, 152. With respect to Petitioners' alternative argument that they were merely attempting to accommodate their employees' desire for long weekends, we agree with the ALJ that Petitioners' argument is legally untenable. The employees' right to overtime pay under the CWHSSA is mandated by statute, and as such could neither be waived by Petitioners' employees nor otherwise bargained away. *Lance Love, Inc.*, WAB No. 88-32 (Mar. 28, 1991); *Harlow Restoration Corp.*, WAB No. 81-14 (May 11, 1983); *Ernest Roman and Contract Maintenance*, SCA-275 (Ass't Sec'y, 1975). *See Fleming v. Warshawsky*, 123 F.2d 622, 626 (7th Cir. 1941); *United States v. Morley Constr.*, 98 F.2d 781, 789 (2d Cir. 1938).

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[4/] Before the ALJ, Petitioners submitted documents signed by some of the affected employees purporting to waive their right to receive overtime compensation in exchange for this accommodation. RX-1-13.

### B. SCA Fringe Benefit and Holiday Pay Violations

The SCA requires Federal service contractors to pay their employees no less than the prevailing wages and fringe benefits as determined by the Secretary of Labor. *Elaine's Cleaning Serv., Inc. v. Dep't of Labor*, 1995 WL 1612534, *2 (S.D. Ohio, 1995). *See* 41 U.S.C. §351(a); 29 C.F.R. §§4.170, 4.177 (fringe benefits). This includes payment of holiday pay. 29 C.F.R. §4.174 (holiday pay).

The employees offered contradictory testimony regarding whether and to what extent fringe benefits were paid, attempting to support Petitioners' position; this testimony was discounted by the ALJ. D&O at 10. To the extent that Petitioners paid fringe benefits at the required $0.90/hr. rate, *see* DX-5 at 133-153, clearly fringe benefits were not paid for all hours that the employees actually worked. *See* DX-4 at 92-132. The record plainly supports the ALJ's finding of fringe benefit underpayments.

Concerning holiday pay, the record clearly supports the ALJ's finding that Petitioners did not pay proper holiday pay for their work on July 4th. *See* DX-5 at 146. Indeed, Petitioners do not dispute their failure to pay the required double-time for holiday work, but admit paying their employees only a time and one-half rate. *See* Tr. 33-35; DX-6. As a result, seventeen employees who worked for Petitioners on July 4th were underpaid approximately $55 per employee for their work on that holiday. *See* DX-4.[5/]

### C. Recordkeeping Violations

The SCA and CWHSSA regulations each require Federal contractors to maintain for a period of three years, and make available when requested, detailed payroll records including hours worked and wages, overtime, and fringe benefits paid. *See* 29 C.F.R. §§4.6(g), 4.185, and §5.5(a)(3). The ALJ correctly found that Petitioners failed to keep accurate records in violation of these SCA and CWHSSA requirements. D&O at 9-10.

The inaccuracy of Petitioners' records primarily concerned hours worked on a weekly basis. Petitioners' records did not match the actual hours worked by employees. Tr. at 45, 47, 122-123; DX-5 at 141, 147-148; DX-4. *See* D&O at 10. Notably, the time sheets provided by Petitioners, DX-5, did not corroborate Petitioners' claim that employees worked a two-week cycle of six-day/four-day work weeks. Thus, while the weight of the evidence supported the ALJ's finding that the employees actually worked the six-day/four-day two-week work cycle as admitted by Petitioners, *see* Tr. 34, 36-37, the company's time sheets instead indicated that the employees worked two five-day work weeks of eight or fewer hours worked per day during each bi-weekly pay period. *See* Tr.

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[5/] Although the Wage and Hour Division did not charge Petitioners with any holiday pay violation for Memorial Day, there also is unrefuted evidence that at least one employee did not receive holiday pay for working on that holiday. *See* Tr. at 139; DX-14 (BLM daily diary entry for June 11, 1996).

at 35, DX-5.[6/] In an attempt to verify the company's records, the Wage and Hour Division sought the foreman's daily time cards and/or notebook from which the time records had apparently been prepared, but these records were never produced. Tr. at 32-33, 195-196. As Yerger testified, Petitioners' failure to comply with these requirements impeded the Wage and Hour Division's investigation. Tr. at 106. *See* D&O at 10. The record clearly supports the ALJ's determination that Petitioners failed to keep accurate records, thereby violating the CWHSSA and SCA.

## II. Debarment under the SCA and CWHSSA

"[A]nalogies between the appropriateness of debarment under the Service Contract Act and the Davis-Bacon Related Acts must be drawn with great care, given the differences in the standards set forth in those two debarment schemes." *Marques Enterprises dba Lisbon Contractors*, WAB No. 91-34, slip op. at 7(Sept. 29, 1992). As discussed in more detail below, the SCA and CWHSSA impose different standards for assessing liability for debarment. Under the CWHSSA – a Davis-Bacon Related Act – the burden is on the Secretary to establish that the violations are "aggravated or willful" such that debarment is warranted. 29 C.F.R. §5.12(a). Under the SCA, on the other hand, debarment is presumed once violations of that Act have been found, unless the violator is able to show the existence of "unusual circumstances" that warrant relief from SCA's debarment sanction. 29 C.F.R. §4.188(a) and (b). *Ventilation and Cleaning Eng'rs, Inc.*, No. SCA-176 (Sec'y, Sept. 27, 1974) Labor L. Rep. (CCH) ¶30,946.

The debarment sanction differs under the two Acts as well. By statute, debarment under the SCA is for three years, without modification. By comparison, under the Department's regulations and Board precedent, a contractor debarred under the Davis-Bacon Related Acts (including the CWHSSA) is placed on the ineligibility list for a period "not to exceed" three years, 29 C.F.R. §5.12(a)(1), from which the contractor may petition to be removed after six months. 29 C.F.R. §5.12(c).

Accordingly, charges of CWHSSA violations (*e.g.*, overtime underpayments and recordkeeping) must be analyzed under the Davis-Bacon Related Acts regulations applicable to CWHSSA, while SCA violations (*e.g.*, fringe benefit and holiday underpayments, and recordkeeping) must be analyzed under the SCA debarment standard.

### A. Debarment for CWHSSA violations

There is no statutory debarment mechanism for violations of the labor standards provisions of the CWHSSA. Nevertheless, pursuant to the Secretary of Labor's authority under the CWHSSA, the Department has promulgated procedures directing regulatory debarment for violations of the Davis-Bacon Related Acts, including the CWHSSA:

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[6/] Peregrino acknowledged that he personally recorded hours worked in the time sheets, and claimed that they reflected hours worked as reported to him by his foreman. Tr. 195-196.

> Whenever any contractor or subcontractor is found . . . to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in §5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years . . . to receive any contracts or subcontracts subject to the Davis-Bacon or Related Acts.

29 C.F.R. §5.12(a)(1).[7/]

This "aggravated or willful" standard has been strictly applied. As explained in the seminal case of *A. Vento Constr.*, WAB No. 87-51 (Oct. 17, 1990), in Related Act debarment cases "the term 'aggravated or willful' has not been expanded to encompass merely inadvertent or negligent behavior." Slip op. at 7. Instead, adopting the standard that has been applied by the Supreme Court for determining "willful" conduct in FLSA and ADEA cases,[8/] the Board and its predecessors typically have found an employer's action to be "aggravated or willful" if it meets "the literal definition of those terms – intentional, deliberate, knowing violations of the labor standards provisions of the Related Act." *Id*. *See, e.g., M. & C. Lazzinnaro Constr. Corp.*, WAB Nos. 88-08 and 89-12 (Mar. 11, 1991); *Wayne J. Griffin Elec., Inc*., WAB No. 93-05, slip op. at 5 (Oct. 29, 1993); *Gaines Elec. Serv. Co.*, WAB No. 87-48, slip op. at 3 (Feb. 12, 1991).

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[7/] The Secretary of Labor's authority to institute debarment by regulation has been upheld based on the CWHSSA's structure and legislative history. *See Sharipoff dba BSR Co.*, No. 88-SCA-32, slip op. at 2 (Sec'y Sept. 20, 1991); *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 91 (2d Cir. 1987). "Like the statutory debarment procedure in the Davis-Bacon Act, the Secretary's regulation is intended to foster compliance with applicable labor standards." *A. Vento Constr.*, WAB No. 87-51 (Oct. 17, 1990).

[8/] For purposes of determining whether a violation of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. §201 *et seq.*, is "willful" such that civil penalties should be imposed, the Supreme Court has applied the same standard of willfulness adopted under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §621 *et seq.*: "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677 (1988), *citing Trans World Airlines v. Thurston*, 469 U.S. 111, 126-127, 105 S.Ct. 613 (1985). As the First Circuit recently noted in *Baystate Alternative Staffing v. Herman*, 163 F.2d 668 (1998), in adopting this definition the Supreme Court in *Richland Shoe* expressly rejected a negligence standard of liability, noting that an employer does not act willfully "even if it acts unreasonably in determining whether it is in compliance with the FLSA." 163 F.2d at 681.

In the instant case the evidence inescapably leads to the conclusion that Petitioners willfully violated the overtime pay requirements of the CWHSSA. As previously noted, the overtime pay requirements were incorporated by reference into the procurement contract, and Petitioners were advised by BLM and Wage and Hour Division officials on numerous occasions of the CWHSSA overtime pay requirements. *See* discussion *supra* at 4-5. Notwithstanding, Peregrino protested that he thought he was only required to pay his employees overtime after they had completed 80 hours of work in a two week period. Tr. 33-34; DX-6. However, as the ALJ noted, Petitioners' pay records reflected occasionally that Petitioners in fact paid employees overtime for hours worked in excess of 40 in a week, which reasonably led the ALJ to find that Peregrino's claim that he was unfamiliar with CWHSSA's overtime pay requirement simply was not credible. D&O at 3. *See* Tr. at 38; DX-5 at 142, 145. We agree.

We additionally concur in the ALJ's conclusion that Petitioners fraudulently maintained their payroll records in an effort to simulate CWHSSA compliance. While Peregrino readily acknowledged that his employees worked two-week work cycles consisting of six day the first week and four days the second week, Petitioners' employee time records (DX-5) – which Peregrino had personally entered (Tr. 195) – indicated that Petitioners' employees had worked five-day, forty-hour work weeks. Tr. at 34-35. *See* D&O at 3, 7. It is well-established that "failure to pay employees the appropriate wage rate or overtime compensation, accompanied by falsifying certified records in an effort to conceal Related Acts violations, warrants debarment" under the CWHSSA. *Miller Insulation,* WAB No. 91-38, slip op. at 10 (Dec. 30, 1992). *See also Gaines Elec. Serv. Co., supra*; and *A. Vento Constr. supra*, slip op. at 7, n.4. *See generally M. & C. Lazzinnaro Constr. Corp., supra*.[9/]

Based upon the foregoing, we find Petitioners in aggravated and willful violation of the overtime pay requirements of the CWHSSA, and thus subject to debarment pursuant to 29 C.F.R. §5.12(a)(1).

### B. Debarment for SCA violations

Under Section 5(a) of the SCA, any person or firm found by the Secretary of Labor to have violated the Act shall be declared ineligible to receive Federal contracts for a period of three years from the date of listing by the Comptroller General "[u]nless the Secretary otherwise recommends because of unusual circumstances." 41 U.S.C. §354(a). *See A to Z Maintenance Corp. v. Dole*, 710 F.Supp. 853, 855 (D.D.C. 1989). The Secretary's discretion to relieve a violator from the sanction

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[9/] It has also been held that falsification of certified payrolls to conceal violations or to simulate compliance with the applicable labor standards may of itself constitute willful violation of the Related Acts. *See, e.g., Brighton Painting Co.*, WAB No. 87-9 (Sept. 20, 1989), Lab. L. Rep. (CCH) ¶ 31,835; *Rust Constr. Co.*, WAB No. 87-15 (Oct. 2, 1987), Lab. L. Rep. (CCH) ¶ 32,007; *Warren E. Manter Co.*, WAB No. 84-20 (June 21, 1985); *Marvin Hirchert dba M. & H. Construction*, WAB No. 77-17 (Oct. 16, 1978), Lab. L. Rep. (CCH) ¶ 31,353.

of debarment is limited. 29 C.F.R. §4.188(b)(1). *See* S. Rep. No. 92-1311, 92d Cong., 2d Sess. 3-4, *reprinted in* 1972 U.S.C.C.A.N. 35334, 35336.

As has on many occasions been noted, "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." *Sharipoff dba BSR Co.*, No. 88-SCA-32, slip op. at 6 (Sec'y Sept. 20, 1991). *Accord Colorado Security Agency*, No. 85-SCA-53, slip op. at 2-3 (Sec'y July 5, 1991); *Able Building, Maintenance & Serv. Co.*, No. 85-SCA-4 (Dep. Sec'y Feb. 27, 1991); *A to Z Maintenance Corp. v. Dole*, 710 F.Supp. at 855-856.

> Contractors who seek to escape the debarment provision of Section 5(a) of the Act face a daunting task in successfully establishing the unusual circumstances defense. "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."

*Secretary of Labor v. Glaude*, ARB No. 98-081, ALJ No. 1995-SCA-38, slip op. at 6-7 (ARB Nov. 24, 1999) (quoting *Vigilantes v. Adm'r of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992)) (citations omitted).

Department of Labor regulations establish a three-part test prescribing the criteria for determining what constitute "unusual circumstances" such that relief from debarment is appropriate. *See* 29 C.F.R. §1.188(b)(3)(i)-(ii). This determination is made on a case-by-case basis. *Id.* Under Part I of this test, the contractor must establish that the conduct giving rise to the SCA violations was neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result of "culpable conduct."[10/] Moreover, the contractor must demonstrate an absence of a history of similar violations, an absence of repeat violations of the SCA and, to the extent that the contractor has

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[10/] "Culpable conduct" is defined in the regulation to include "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 recordkeeping requirements (such as falsification of records)." 29 C.F.R. §1.188(b)(3)(i). As the Board of Service Contract Appeals stated in *J & J Merrick's Enterprises, Inc.*, BSCA No. 94-09, slip op. at 5 (Oct. 27, 1994):

> Culpable neglect or conduct is more than just acting in a negligent manner. It requires conduct which is beyond negligence, but short of specific intent. The New Hampshire Supreme Court has defined "culpable neglect" as being "less than gross carelessness, but more than the failure to use ordinary care, it is a culpable want of watchfulness and diligence. . . . It exists '[i]f no good reason, according to the standards of ordinary conduct, [for the negligence] is found.'" *Cass v. Ray*, 556 A.2d 1180, 1181-2 (N.H. 1989)."

violated the SCA in the past, that such violation was not serious in nature. 29 C.F.R. §1.188(b)(3)(i). Under Part II of the test – assuming none of the aggravated circumstances of Part I are found to exist – there must be established on the part of the contractor, as prerequisites for relief, "a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances [by the contractor] of future compliance." 29 C.F.R. §1.188(b)(3)(ii).

Finally, assuming the first two parts of the regulatory test are met, under Part III a variety of additional factors bearing on the contractor's good faith must be considered before relief from debarment will be granted including, *inter alia*, whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed record-keeping violations which impeded the Department's investigation, and whether the determination of liability under the Act was dependent upon resolution of *bona fide* legal issues of doubtful certainty. *Id.*[11/]

We thus turn to an analysis under Part I of the "unusual circumstances" test, *i.e.*, whether the conduct giving rise to the SCA violations was willful, deliberate or of an aggravated nature, or otherwise the result of culpable conduct. In this regard, there must be an absence of a history of similar violations, an absence of repeat violations of the SCA, and – if it is found that the contractor has violated the SCA in the past – that the past violation was not serious in nature. 29 C.F.R. §4.188(b)(3)(i).

The ALJ held that Peregrino's violations "were culpable, willful and aggravated, given his history of violations, his repeated opportunities to learn and abide by the law, and his failure to do so [abide by law] when he knew what was required." D&O at 13. The ALJ cited the fact that Peregrino was "investigated numerous times in the past" and that relevant statutes and regulations, warnings and instructions regarding what was required under the law had repeatedly been given to Petitioners in the past.

Peregrino challenges the ALJ's ruling, arguing that: (1) no documentary evidence was introduced establishing prior violations or even prior investigations; (2) the only documentary evidence that was introduced consisted of two "conciliation letters" containing unsubstantiated allegations of violations which were never investigated by DOL; and (3) the only other basis for the ALJ's conclusion was the "hearsay testimony" of Yerger regarding the "results" of her review of DOL records.

The first fallacy in Peregrino's challenge is his failure to recognize that 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. 29 C.F.R. § 4.188(b)(1). *Vigilantes, Inc.*, No. 82-SCA-7, slip op. at 10 (Dep. Sec'y Aug. 5, 1988), *aff'd*, *Vigilantes v. Adm'r of Wage & Hour Div.*, 769 F.Supp. 57, 60 (D.P.R. 1991), *aff'd*, 968 F.2d 1412 (1st Cir. 1992); *Elaine's Cleaning Serv.*, BSCA No. 92-07 (Aug. 13, 1992), *rev'd on other grounds*

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[11/] *See* 29 C.F.R. §4.188(b)(3)(ii) for a complete listing of the additional factors to be considered under Part III of the test.

*Elaine's Cleaning Serv., Inc. v. Dep't of Labor*, 1995 WL 1612534 (S.D. Ohio, 1995); *Able Building Maintenance and Serv. Co.*, BSCA No. 85-SCA-4, slip op. at 4 (Feb. 27, 1991). *See Colorado Security Agency v. United States*, 1992 WL 415388 (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"). Thus it was the *Petitioners* who were obligated to produce evidence supporting their contention that the SCA violations in the instant case were not willful, deliberate, or of an aggravated nature. But in this case the Petitioners failed to introduce any evidence supporting, for example, their contention that they had no history of similar violations, that they had not repeatedly violated the SCA in the past, or that such past violations were not serious. Thus, once the SCA violations were established, debarment under the SCA would have been appropriate even if the Wage and Hour Division had presented no evidence concerning Petitioners' past conduct, because there is a legal presumption that Petitioners' violations of the SCA warrant debarment *unless* the Petitioners affirmatively demonstrate that unusual circumstances are present that militate against a debarment order under the standards outlined in the SCA regulations.

Second, even assuming *arguendo* that there were shortcomings in the *documentary* evidence – a claim with which we disagree – the *testimonial* evidence introduced by the Division establishes that Petitioners' conduct in violating the SCA was the result of culpable conduct, in this case culpable disregard of the SCA fringe benefit and holiday pay requirements. Petitioners were repeatedly informed, and fully apprized on numerous past occasions as to the law's demands. Yerger's testimony recounting her review of DOL records was unchallenged[12/] when she stated that the Petitioners had been investigated repeatedly for SCA-related violations and, in each instance, fully apprized at the conclusion of each episode as to the requirements of the law, including requirements for paying fringe benefits and holiday pay under the SCA, and SCA record-keeping requirements.[13/] The Board of Service Contract Appeals held in *Nationwide Building Maintenance*, BSCA No. 92-04 (Oct. 30, 1992) that the violation of the SCA's holiday pay requirement was the result of culpable neglect where the employer was found to have been put on specific notice of the SCA holiday pay requirement as a result of a previous investigation.

Petitioners fail to explain why, in light of the prior warnings and information previously and repeatedly provided them pertaining to SCA's requirements, they nevertheless continued to pay less than the SCA-required holiday pay, failed to pay full fringe benefits owed, and failed to comply with SCA recordkeeping requirements. Their only response, which provides no explanation at all, is to argue that Petitioners have paid the back wages due and owing and given their assurance of future compliance. However, as the ALJ noted, if this were all that was required to avoid debarment, it

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[12/] Certainly Peregrino would have been in a position to present evidence in contravention of Yerger's "hearsay" testimony, had it been incorrect. He did not, instead seeking to prevent her testimony from being introduced by arguing that the documents upon which her testimony was based had not been provided to him during discovery.

[13/] *See* discussion *supra* at n.3, for elaboration of Yerger's testimony regarding the Department's records pertaining to prior investigations of Petitioners under the SCA, CWHSSA and other related laws.

would only serve to perpetuate their non-compliance and what appears to be a pattern of "compliance only when caught." D&O at 13. As the ALJ stated, "The labor standards herein are designed to protect employees on a consistent basis, and thus it would be a violation of the purpose of the statutes in question to allow the respondent to continue this pattern. Debarment is designed to break down a chain of non-compliance and to force employers to take the labor regulations seriously." *Id.* Taking the SCA requirements seriously is obviously something Petitioners have failed to do.

Having concluded that Petitioners failed to establish that their conduct met Part 1 of the "unusual circumstances" test (*i.e.*, that their violations were not willful, deliberate or of an aggravated nature), the ALJ could have stopped her inquiry. However, she went on to address Parts II and III of the SCA "unusual circumstances" test, finding with regard to each that Petitioners failed to meet their burden of proof. D&O at 12-13. Because we concur with the ALJ's finding that Petitioners failed to establish the first part of the "unusual circumstances" test, we decline to address the second and third aspects of the test because to do so would not advance or alter in any meaningful way our disposition of this case.

## III. Peregrino is a "Party Responsible" under both the SCA and CWHSSA, and eligible for debarment.

The Service Contract Act provides that "[a]ny violation of the contract stipulations required by [the SCA] shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contact. . . ." 41 U.S.C. §352(a) (1994). The debarment section of the SCA provides that "[t]he Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary of Labor have found to have violated this Chapter." 41 U.S.C. §354(a).

The SCA regulations provide that:

> The term *party responsible* for violations in section 3(a) of the Act [41 U.S.C. §352(a)] is the same term as contained in the Walsh-Healey Public Contracts Act, and therefore, the same principles are applied under both Acts. An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company. . .
>
> The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty . . .

29 C.F.R. §4.187(e).

Peregrino argues that since the contract at issue in this case was between the Bureau of Land Management and Hugo Reforestation, Inc., he is not a "party responsible" within the meaning of the SCA. However, this effort to limit the term "party responsible" to only the parties to the contract ignores 29 C.F.R. §4.187(e) and applicable case precedent which squarely places upon corporate officials an affirmative obligation to ensure that their companies adhere to their statutory obligations under the SCA:

> The law governing responsible party under [the SCA] is presently codified at 29 C.F.R. §4.187(e)(1) (1989) . . . . Under the regulations it is clear that a corporate official who controls the day-to-day operations and management policy, or is responsible for the control of the corporate entity, or who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is liable for the violations individually and jointly with the company. 29 C.F.R. 4.187(e)(1), (2), (3).

*Nissi Corp.*, SCA No. 1233, slip op. at 14 (Dep. Sec'y, Sept. 25, 1990).

In the instant case, not only did Peregrino sign the contract with BLM on behalf of Hugo Reforestation, Inc., he was the owner and president of Hugo Reforestation. Moreover, he controlled the day-to-day operations of the company, including hiring and firing of company employees and directing their employment activities. *See* "Undisputed Facts" set forth in ALJ's Order Denying Respondent's Motion for Summary Decision and Granting Plaintiff's Cross-Motion for Summary Decision, April 24, 1998. There can be no doubt that Peregrino is, as the ALJ held, a "party responsible" under the SCA.[14/] *See Nissi Corp.* at 13-15.

For similar reasons, Peregrino is liable as a responsible party under the CWHSSA. As discussed above, although the CWHSSA statute does not expressly provide for debarment of violators, Department of Labor regulations implementing the Davis-Bacon Related Acts (including the CWHSSA), provide for *regulatory* debarment. *See* 29 C.F.R. §5.12(a)(1). As the Third Circuit noted in *Facchiano Constr. Co. v. U. S. Dep't of Labor*, 987 F.2d 206, *cert. denied*, 510 U.S. 822 (1993), the Wage Appeals Board "has consistently interpreted subsection 5.12(a)(1) to include 'responsible officers' and routinely debars individual corporate officers in Related Acts cases." 987

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[14/] We reject Petitioners' argument that Washington state law governing "piercing the corporate veil" prohibits finding Peregrino personally liable under the SCA. Under the Rules of Decision Act, 28 U.S.C. §1652, relied on by Petitioners, it is clear that whether state or federal law is to be applied depends on whether the issue in question is a federal matter or a nonfederal matter; if it is a federal matter, federal law will apply. *Liteky v. United States,* 510 U.S. 540, 555 (1994). Moreover, given the specificity of the SCA regulations with regard to the criteria for determining who is a "party responsible," *see* 29 C.F.R. §4.187(e), it is unnecessary to "pierce the corporate veil" in order to establish Peregrino's personal liability.

F.2d at 213 (*citing, e.g., R. J. Sanders, Inc.*, WAB No. 90-25 (Jan. 31, 1991); *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987)).[15/] The court deferred to the Department of Labor's interpretation of its own regulation (citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)), stating "[w]e find such interpretation to be reasonable in furthering the remedial goals of the Davis-Bacon Act and Related Acts [because] debarment may in fact 'be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of non-compliance.'" 987 F.2d at 214 (citation omitted). To "exclude responsible officers from debarment," the court reasoned, "may in fact render the regulations ineffective if an offending corporate officer is allowed to create new businesses or continue to bid through other preexisting businesses in order to avoid debarment." *Id.* n.12. Based on the facts in this case, we find that Peregrino – the owner and president of Hugo Reforestation, and the person responsible for the company's day-to-day operations – is personally responsible for the company's CWHSSA violations, and shall be debarred.[16/]

## IV. Whether Petitioners were deprived of a fair hearing before the ALJ

On appeal, Petitioners argue that they were deprived of a fair hearing before the ALJ because (a) the ALJ admitted hearsay evidence, (b) the ALJ was biased against them, and (c) the Labor Department engaged in improper conduct (*i.e.*, prosecutorial misconduct) when presenting its case, and this improper conduct was prejudicial to the Petitioners. We find these contentions to be without merit.

### A. The ALJ's evidentiary rulings

Petitioners contend that it was a violation of the governing hearsay rule, 29 C.F.R. §18.802, for the ALJ to allow Yerger to testify about information contained in Wage and Hour Division records about prior investigations of, and past contacts with, Petitioners without introducing the documents themselves. We find this argument unpersuasive.

We note first that there is nothing in the record indicating that Petitioners objected before the ALJ to Yerger's testimony based on its hearsay nature. Instead, the record shows that Petitioners only objected to Yerger's testimony by arguing that it was based on documents which Petitioners had requested through discovery, but which had not been produced. Tr. at 14-17, 82-83. Although the

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[15/] *See also Sundex, Ltd.*, ARB No. 98-130 (Dec. 30, 1999); *KP&L Elec. Contractors*, ARB No. 99-039 (May 31, 2000); and *Marques Enterprises*, WAB No. 91-34 (Sept. 29, 1992).

[16/] In reaching this result, we do not suggest that Peregrino's status *viz a viz* Hugo Reforestation, Inc. *alone* suffices as a basis for debarment under the CWHSSA. While status may be sufficient to determine whether an individual corporate official may be held liable, more is required in order to determine whether under the CWHSSA that individual can be personally barred from future government contracts. *See Facchiano Constr. Co.*, 986 F.2d at 214-215, and *Transcon Assoc.*, ALJ No. 93-DBA-22 (ALJ, Apr. 9, 1996).

ALJ generously referred in her Decision and Order to Petitioners' objection to Yerger's testimony at the time of hearing as "based on its hearsay nature," D&O at 10, in reality there does not appear to have been a timely objection to this testimony based on the hearsay rule.[17/]

Even assuming that Petitioners timely raised the hearsay objection, we uphold the ALJ's admission of the testimony in question over Petitioners' objection. The governing ALJ regulations direct that the evidence rules be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." 29 C.F.R. §18.102. In addition, the rules state that "[Evidentiary] error may not be predicated upon a ruling which admits or excludes evidence *unless a substantial right of the party is affected*[.]" 29 C.F.R. §18.103(a) (emphasis added). Taken together, these provisions lead us to conclude that the ALJ did not commit reversible error in admitting and relying on Yerger's testimony.

The underlying rationale for the hearsay rule is to avoid prejudice by protecting against the admission of unreliable evidence and by insuring that an opposing party can have effective cross-examination. Had Yerger testified about meetings or events unknown to Petitioners, it could be argued that her testimony would have affected a "substantial right" guaranteed them. In the instant case, however, Yerger's testimony recounted the results of investigations, meetings and actions taken that were fully within Petitioners' knowledge, and thus within Petitioners' ability to effectively counter or rebut.[18/]

Moreover, Petitioners cannot show that they were prejudiced by the introduction of Yerger's testimony. Substantial credible and probative evidence other than Yerger's testimony, as previously discussed, ultimately served as the evidentiary basis for finding the CWHSSA violations and ordering debarment. *Star Brite Constr. Co.*, ARB No. 98-113, ALJ No. 97-DBA-12, slip op. at 10 (ARB June 30, 2000); *Cycle Building Maintenance, Inc.*, No. 83-SCA-90, slip op. at 4 (Dep. Sec'y Nov. 2, 1988). As to the SCA violations, Yerger's testimony was immaterial as it was Petitioners' burden to prove the "unusual circumstance" that would preclude a determination of debarment. *See* discussion, *supra* at 17.

Concerning Petitioners' objection to Yerger's testimony because it was based on documents which had been requested through discovery but which had not been produced, we also find no

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[17/] But for the characterization by the ALJ of Petitioners' underlying objection as one based on hearsay, we would hold that Petitioners, having failed to raise the hearsay objection before the ALJ, have waived their right to now raise this issue on appeal. 29 C.F.R. §18.103(a)(1). *Cf. Howell Construction, Inc.*, WAB No. 93-12, slip op. at 9 (May 31, 1994) (ALJ's ruling that testimony in surrebuttal would not be permitted not subject to challenge on appeal where the petitioner failed to timely object to ALJ's ruling at hearing).

[18/] Significantly, Petitioners did not deny the truth of Yerger's testimony, raising instead objections based on *technical* violations of the evidentiary rules in an obvious attempt to prevent the introduction of certain evidence which Petitioners feared would otherwise serve as a basis for debarment.

reversible error. Petitioners' raised this objection to Yerger's testimony at trial, but the ALJ overruled the objection because the Petitioners had failed to file a timely motion to compel production of the documents. Given Petitioners' failure to raise or argue before the ALJ the Department's obligations under 29 C.F.R. §18.16 (*see also* Rule 26(a)(3), F.R.C.P.), or to demand that the documents and records upon which Yerger's testimony was based be introduced into evidence pursuant to 29 C.F.R. §18.1002 (*see also* Federal Rule of Evidence 1002), we conclude that the ALJ acted within her discretion. Moreover, we note that the underlying documents and records had been brought to court by the Wage and Hour Administrator's attorney, and therefore were present in the hearing room and available to the Petitioners. *See* Tr. at 16.

### B. ALJ bias warranting disqualification

Petitioners argue that the ALJ's disposition of the issue whether Hugo Peregrino was personally responsible under the SCA and CWHSSA, and subsequent rulings at the final hearing, demonstrated bias for which the ALJ should have recused herself.[19/] We disagree. In finding Peregrino personally responsible for the labor standards violations and subject to debarment, and in making her rulings during the hearing, the ALJ did nothing more than is expected, indeed required, of a presiding judge: she applied the law to the facts and the issues before her, and ruled accordingly. As the Supreme Court has explained:

> Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See United States v. Grinnell Corp.*, 384 U.S. [563] at 583 [1966]. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

*Liteky v. United States,* 510 U.S. 540, 555 (1994). We find no support for Petitioners' claim of bias.

### C. "Prosecutorial misconduct"

Finally, Petitioners argue that they were deprived of a fair hearing because of the conduct of the Department of Labor's trial attorney, which they claim "demonstrated vilent [sic] partisanship, partiality, and misconduct." Pet. for Review, at 18. Citing essentially the same points as raised

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[19/] Before the ALJ, Petitioners cited the ALJ's summary disposition of the question of Peregrino's personal liability as the basis for their motion to disqualify the judge. The ALJ denied Petitioners' motion both on the merits and as being untimely filed. Because we affirm the ALJ's denial of the disqualification motion on the merits, we do not reach the question of timeliness.

above regarding the submission of Yerger's testimony and Petitioners' claim of bias on the part of the ALJ, Petitioners argue that the Department's trial attorney violated proscriptions applicable to prosecutors in criminal cases and Washington State Court rules of professional conduct. Pet. for Review, at 18-20.

We find nothing in the record that might even remotely convince us that the Department's attorney engaged in the "partisanship, partiality, and misconduct" claimed. As the Deputy Administrator notes in his response to these charges, the points the Petitioners raise are primarily evidentiary matters governed by the ALJ's evidentiary regulations, 29 C.F.R. Part 18. *See* Statement of the Deputy Administrator in Response to Petition for Review at 26. Petitioners' charges of misconduct have no merit.

## V. Conclusion and Order of Debarment

For the foregoing reasons, the Board concludes that Hugo Peregrino and Hugo Reforestation, Inc., respectively, should be debarred pursuant to the SCA and CWHSSA. Accordingly, it is **ORDERED**:

a. Pursuant to section 5 of the SCA, 41 U.S.C. §354, that Hugo Peregrino and Hugo Reforestation, Inc., respectively, be debarred and ineligible to receive any contracts or subcontracts with the United States for a period of three years from the date of publication by the Comptroller General of their names on the ineligible list; and

b. Pursuant to 29 C.F.R. §5.12(a)(1), that Hugo Peregrino and Hugo Reforestation, Inc., respectively, be debarred and ineligible to receive any contract or subcontract subject to any of the statutes listed at 29 C.F.R. §5.1 for a period of three years from the date of publication by the Comptroller General of their names on the ineligible list, subject to such subsequent request for reconsideration as the Petitioners, together or individually, might file pursuant to 29 C.F.R. §5.12(c).

**SO ORDERED.**

**PAUL GREENBERG**
Chair

**E. COOPER BROWN**
Member

**CYNTHIA L. ATTWOOD**
Member