No. _____

In the Supreme Court of the United States

WAYNE B. HOLSTAD AND
NORTHWEST TITLE AGENCY, INC.,
Petitioners,

v.

UNITED STATES
DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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2022 – Bachman Legal Printing ■ (612) 339-9518

QUESTIONS PRESENTED

1. The Petitioners have argued that due process requires that there be a statute of limitations applicable to the claims made by the Department of Labor in this case. The Respondent's original argument that the six-year statute of limitations set forth in 28 U.S.C. §2415(a) was rejected by the Administrative Review Board. The Petitioners have argued that a two-year statute of limitations borrowed from either 29 U.S.C. §255 or Minn. Stat. §541.07(5) be applied. The United States District Court and the Eighth Circuit Court of Appeals held that there is no statute of limitations applicable to this case. The question presented is whether a statute of limitations is a due process requirement, and if so, what statute of limitations is applicable to this case?

2. Does an administrative agency have the authority to expand the definition of which persons are subject to a statute, based upon the agency's erroneous interpretation of court precedent, when that authority was not expressly delegated by Congress.

3. Does the Sixth Amendment require that anonymous, hearsay testimony be excluded in a proceeding in which significant monetary sanctions and a debarment penalty can be imposed?

PARTIES TO THE PROCEEDINGS

Northwest Title Agency, Inc. is a Minnesota business corporation that until December 2011 was licensed as a title insurance agent and escrow agent throughout the United States. Northwest Title Agency, Inc. was owned by a licensed Minnesota lawyer's professional limited liability corporation.

The United States Department of Labor is a United States administrative agency with jurisdiction to implement and regulate entities and individuals performing contract closing services related to closing sales of properties on behalf of the Secretary of Housing and Urban Development.

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PETITION FOR WRIT OF CERTIORARI

The petitioners Northwest Title Agency, Inc. and Wayne B. Holstad respectfully pray that a writ of certiorari issue to review the Order of the Eighth Circuit Court of Appeals entered in the above-entitled action on June 17, 2022.

DECISIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is unpublished and reprinted in the appendix hereto. App. A. pp. A-1.

The Judgment of the United States District Court, District Court of Minnesota is unpublished and reprinted in the Appendix hereto, App. B, pp. A-5.

The Decision of the Administrative Review Board dated June 12, 2020., regarding the review of the Decision and Order of the Administrative Law Judge, is reprinted in the Appendix hereto App. C, pp. A-29.

The Decision and Order of the Administrative Law Judge dated May 23, 2017 regarding the administrative agency proceeding held August 23 and 24, 2016, is reprinted in the Appendix hereto, App. D, pp. A-113.

JURISDICTION

The Eighth Circuit Court of Appeals rendered its decision on June 17, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution, section (1), provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV(1).

FEDERAL STATUTES

29 U.S.C. § 255, Portal to Portal Pay Act of 1947

Statute of Limitations. Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [19 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act.

(a) If the cause of action accrues on or after May 14, 1947 may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

41 U.S.C. § 6705(a) Service Contract Act of 1965

§6705. Violations. (a) Liability of Responsible Party. A party responsible for a violation of a contract provision required under section 6703(1) or (2) of this title or a violation of section 6704 of this title is liable for an amount equal to the sum of any reduction, rebate, refund or underpayment of compensation due any employee engaged in the performance of the contract.

FEDERAL REGULATIONS

29 C.F.R. § 4.187(e)(1) and (4)

(1) The term party responsible for violations in section 3(a) of the Act 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.

(4) It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of sanctions set forth in the contract clauses in §4.6, but includes all persons, irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who by action or inaction, cause or permit a contract to be breached.

MINNESOTA STATUTES

Minn. Stat. § 541.07 Two or Three Year Limitations.

(5) For the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or

overtime or damages, fees or penalties except, that if the employer fails to submit payroll records by a specified date upon request of the department of Labor and Industry or if the nonpayment is willful and not the result of mistake or inadvertence, the limitation is three years.

STATEMENT OF THE CASE

An administrative action was brought against the petitioners and Joel Holstad on July 25, 2014. A Settlement and Release of Joel Holstad was entered on August 16, 2016. An administrative hearing was held over two days in St. Paul, Minnesota on August 23 and 24, 2016. The original action alleged the misclassification of employees' salaries and the underpayment of benefits. Count IV of the original complaint alleging the misclassification of employees was dismissed on August 15, 2016.

A. Facts

The corporate petitioner, Northwest Title Agency, Inc. conducted closings pursuant to a contract from April 2009 to January 31, 2012, contracting with the Department of Housing and Urban Development. Northwest Title Agency, Inc. had the exclusive right to represent HUD, as the seller of HUD-owned properties, in the state of Minnesota. Petitioner Wayne B. Holstad was the owner and Chief Executive Officer of Northwest Title Agency, Inc. Wayne Holstad did not "manage the HUD contract" but delegated management duties to subordinates. On December 27, 2011, Joel Holstad took over management of the HUD contract and management of the company until he left on July 29,

2012. The company formally ceased operations on that date. A contemplated sale of the company dated December 29, 2011, from Wayne B. Holstad to Joel Holstad, was never completed. Joel Holstad was part of the original proceedings in this case but settled with the Department of Labor on August 16, 2016, days before the administrative hearing.

B. Proceedings Below.

1. Administrative proceedings.
   a. Administrative Law Judge's findings and conclusions

      Motions to dismiss were filed prior to and at the time of the hearing before the Administrative Law Judge held August 23 and 24, 2016. Objections based on the Sixth Amendment were made by objections made at the hearing and in post-hearing written submissions.
   b. Administrative Review Board's decision

      The Administrative Review Board affirmed the decision of the Administrative Law Judge but rejected the application of the six-year statute of limitations.

2. Federal court appeals
   a. Minnesota District Court judge's decision

      The district court judge (1) did not find an applicable statute of limitations and (2) deferred to the administrative rule objected to by petitioners in finding that Wayne Holstad was a "person responsible" under the statute.
   b. Eighth Circuit Court of Appeals decision

      The Court of Appeals affirmed the district court decision without analysis and

denied petitioners' Petition for a Panel Rehearing

REASONS FOR GRANTING THE WRIT

The petitioners identify two primary issues of significance left undecided by the Eighth Circuit Court of Appeals that the United States Supreme Court should consider and clarify, not only for the protection and preservation of certain constitutional rights due the petitioners, but also for the benefit of all entities and individuals dealing with administrative agency enforcement proceedings and the interpretation of administrative regulations as related to congressional statutes.

ISSUE 1

A statute of limitations is a due process right and the courts have the authority and responsibility to borrow either a relevant federal statute of limitations or an applicable state statute of limitations if there is no statute of limitations identified in the statute.

A recent decision from the United States Court of Appeals for the District of Columbia thoroughly addressed the necessity of a statute of limitations as a constitutional requirement. *See, PHH Corporation v. Consumer Protection Financial Bureau*, 881 F. 3d 75 (D.C. Cir. 2018). Thus far in this case, the only tribunal that identified a statute of limitations was the Administrative Law Judge. His holding was overruled by the Administrative Review Board, which held that the six-year statute of limitations cited by the Administrative Law Judge was inapplicable The Administrative Review Board, at the same time,

rejected the petitioners argument that either the federal two-years statute of limitations identified in the Fair Labor Standards Act and the Portal to Portal Pay Act or Minnesota's state two-year statute of limitations set forth in Minn. Stat. 541.07(5)., should have been applicable. Neither the United States District Court nor the Eighth Circuit Court of Appeals applied any statute of limitations. The petitioners argue, based on the *PHH Corporation* case and the foundational authority cited in that case, that the petitioners are entitled, as a matter of due process, to have a statute of limitations be identified to limit the seemingly perpetual time frame for the United States Department of Labor to bring enforcement actions against individuals and entities for actions where records and evidence are no longer available.

The sole, underling purpose of the enforcement action brought by the Department of Labor in this case was to seek reimbursement for employees of the petitioner Northwest Title Agency, Inc. for the alleged underpayment of benefits for its employees required by the Service Contract Act. Part of the petitioners' original defense was that records relevant to their defense were no longer available, which is relevant to the issue of why a statute of limitations must be required. The petitioners cited to both federal statutes of limitations and a state statute of limitations that were applicable to wage recovery actions. Minnesota's two-year statute of limitations, barring any employee from bringing a lawsuit to recover wages or benefits after two years of the alleged violation is directly on point. Although the district court was correct that states cannot bind the federal government to a state statute, the district court did not consider that it is well-grounded law that state tort laws can guide the federal courts to a statute of

limitations to be applied in Civil Rights Act cases and in other circumstances when no Congressional enactment of a statute of limitations can be found.

In support of their argument, the petitioners also note that the Administrative Law Judge was correct, at the outset, when he determined that the Service Contract Act of 1965 was an amendment to the Walsh-Healey Act of 1936. The two-year statute of limitations found in the Portal to Portal Pay Act of 1947 is specifically applicable to Walsh-Healey actions. Accordingly, that same statute of limitations should be applied to Service Contract Act actions. At this point, the Administrative Review Board and the district court, affirmed by the Eighth Circuit Court of Appeals, have ruled that there is no statute of limitations at all for actions brought under the Service Contract Act. That finding is both incorrect and unconstitutional.

ISSUE 2

The vague definition of who is a "person responsible" under 41 U.S.C. §6705 does not grant the administrative agency the authority to expand the class of persons identified as "managing the contract" to officers and owners of the company as "managers of the corporation".

Administrative agencies do not have the unlimited discretion to expand the scope of a statute beyond what the language of the statute authorizes. The petitioners have argued, from the beginning of these proceedings, that the plain language of the applicable statute, 41 U,S.C.

§ 6705, allows for actions only against the individuals that "managed the contract". Wayne B. Holstad never "managed the contract." He was the owner of the company and CEO. He should not be a "party responsible" under the statute. The Department of Labor argue that individuals who own and/or manage the corporation should also be liable because they "managed the corporation" and are, therefore, liable because they could have "managed the contract." That is not what the statute says. The Department of Labor is attempting to expand the statute to include those individuals who "manage the corporation". The authority cited in the rule are two federal district court cases that do not support the Department of Labor's new interpretation of the statute. An administrative agency does not have the authority to creatively reinterpret a statute by citing inaccurately to judicial precedents to add additional targets of their enforcement power.

The petitioners cited as authority before the Eighth Circuit Court of Appeals two cases in support of their argument that the Department of Labor exceeded its delegated authority in expanding the "parties responsible" for "managing the contract" section of the statute to essentially impose a strict liability standard on owners and "managers of the corporation". In *Drake v. Honeywell, Inc*., 797 F. 2d 603 (8th Circuit 1986), the court held than an administrative agency can only act upon power granted by Congress by the express language in the statute. In that case the court stated that an agency's interpretation of a statute is not law. That should also include an agency's interpretation of judicial precedents. In this case, the administrative agency has creatively reinterpreted the statute to add a class of individuals to be subject to the statute beyond a

rational interpretation of the statute's actual language by misinterpreting judicial precedent.

The petitioners also cited to *Granville House, Inc. v. Department of Health and Human Services*, 715 F. 2d 1292 (8th Cir. 1983), arguing that the Eighth Circuit had previously ruled that an interpretative rule or decision depends upon the thoroughness evident in the consideration, validity of reasoning, and the consistency with earlier pronouncements. When those determinations are not found, the agency action is considered capricious. To support their erroneous reinterpretation in enacting the new rule in 29 C.F.R. 4.187(e)(4), the agency badly misrepresented the holding of the two federal cases cited in the rule to support its position.

In this case, the agency is attempting to argue that, under a statute that holds a person personally responsible that has actually "managed the contract", that persons who did not "manage the contract" but had supervisory authority over the guilty parties are also liable under what appears to be a *respondeat superior* theory. But the statute doesn't say that. It is an expansion of the statute to hold an individual personally liable, when that person had no notice or expectation that they could be held personally liable. Expanding the statute as has occurred in this case is based on a policymaking decision. The agency cannot make its own policy. Congress is the policymaker. An agency does not have the authority to make policy as they are attempting to do in this case.

The issue revolves around 29 C.F.R. § 4.187(e)(4). To support the agency's interpretation of 41 U.S.C. § 6705(a), which is the statute the agency interpreted correctly in 29 C.F.R. § 4.187(e)(1), which has been incorrectly supplemented by an additional rule in 29 C.F.R. § 4.187(e)(4), the agency cites to two

specific, federal court cases, *United States v. Islip Machine Works, Inc.,* 179 F. Supp. 585 (E.D.N.Y. 1959) and *United States v. Sancolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y 1972). Neither of those cases support the Department of Labor's rule change. Both of those cases involved owners of corporations who were actively involved in "managing the contract". Those cases do not support expanding the rule to add to the class of individuals held responsible to "managing the contract" to "managers of the corporation". In those cases, the "managers of the corporation" were also the "managers of the contract". Those cases the facts do not support a rule holding supervisors of the actual managers or owners of the company who had ultimate authority to hire and fire the managers of the company individually liable. Some actual involvement with the contract must be required under the language of the statute to hold an individual personally liable. In this case, the evidence was uncontradicted that he did not have any personal involvement with managing the contract at any time. The evidence was clear that he had managerial authority of the company until December 27, 2011 at which time he relinquished managerial control of the company. The Department of Labor, aa an administrative agency, does not have the authority to legislate by enacting a new rule to incorporate new theories or new targets not contemplated under the original statute. It is important, from the perspective of the regulated entities and individuals, that the administrative agency be stopped.

The recent case of *West Virginia et al v. Environmental Protection Agency, et al,* 597 U.S. ___, (2022), provides a useful analysis regarding the separation of powers that preclude an administrative agency from legislating beyond the intent of Congress

expressed in the legislation. In the *West Virginia* case, the court stated that "[i]t is a fundamental of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).This Court then went on to state, as a fundamental principle of statutory construction, that "[w]here the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented---whether Congress in fact meant to confer that power the agency has asserted." *West Virginia* at ___, quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 159 (2000).

The petitioners' references to *Granville House, Inc. v. Department of Health and Human Services*, 715 F. 2d 1292 (8th Cir. 1983), and to *Drake v. Honeywell, Inc*., 797 F. 2d 603 (8th Cir. 1986), that an agency's interpretation of a court precedent is not law, and must be grounded in something more than an erroneous interpretation of a federal court decision, require that this court reign in the agency and clarify that the administrative agencies do not have legislative or judicial authority. A misinterpretation of a court precedent, cited by the agency as the only support for a rule change, requires that the rule be struck down. In this case, the administrative agency expanded the statute by adding to the list of a "person responsible" under the statute, which formerly meant "managing the contract", by changing the definition of a "person responsible" from a person who "manages the contract", as implied in the statute, to "managing the corporation". The agency correctly interprets the

statute in 29 C.F.R. §4.187(e)(1) but then improperly expands the definition of "persons responsible" in 29 C.F.R. §4.187(e)(4) to include any person who had authority within the corporation to manage the individuals who actually and directly "managed the contract". Within the context of the language of the rule itself, in which it is made clear that the basis of the rule change was the interpretation of two federal court cases, it is clear that the agency exceeded its power when it expanded the scope of the statute by an erroneous application of the two federal court cases, which were not precedent for the rule change.

The agency's citation to the two federal district court cases as precedent for the rule change, *United States v. Islip Machine Works, Inc*. 179 F. supp. 585. (E.D.N.Y. 1959) and *United States v. Sancolmar Industries, Inc.,* 347 F. Supp. 404 (E.D. N.Y. 1972), should be ignored. Neither of those cases cited as precedent for the rule change support the reinterpretation of the statute to support the rule change. In both of the cited cases, the owner of the company actively "managed the contract". To extend the application of the statute by a rule based on an incorrect interpretation of precedent not only violates the separation of powers principle to improperly attempting to legislate, but it also violates the separation of powers principle to an encroachment on the judiciary. Rules based simply on an interpretation of judicial precedent which does not support the rule change need to be struck down. The court has no duty to defer to an agency's interpretation of precedent. When the precedents cited as the only support for a rule change, the court has the power and the responsibility to strike down the rule.

Issue 3

The allowance of anonymous hearsay testimony in this proceeding is a violation of the Sixth Amendment.

There was no direct testimony that Wayne Holstad had any actual involvement in "managing the contract" or "managing the company" after December 29, 2011. The only evidence presented, over petitioners' objection, was testimony from the investigator that she heard from anonymous sources that Wayne Holstad was involved with the company after the transfer of ownership and management to Joel Holstad on December 27, 2011. That testimony was contradicted by testimony from both Joel Holstad and Wayne Holstad that he was no longer involved with management of the company and, had in fact, moved to a new location to maintain a full-time law practice. The investigator admitted that she had never interviewed Wayne Holstad prior to the commencement of these proceedings but learned of his name and title from a website. The petitioners have consistently argued that the precedent of *Greene v. McElroy*, 360 U.S. 474 (1959), disallowed such testimony. *Greene* supports the argument that in a debarment proceeding, which should also include enforcement proceedings seeking monetary sanctions, that the confrontation clause in the Sixth Amendment requires that anonymous hearsay testimony to be excluded in that administrative enforcement proceeding. The government's argument that "whistleblower" protections permitted anonymous testimony should have been rejected. Among other facts, the company was no longer in business when the enforcement proceeding was commenced, negating any suggestion of potential

retaliation, the only reason raised to justify anonymity.

CONCLUSION

The constitutional principles involved in this case are important and clarification by the United States Supreme Court is necessary. Antiquated principles of sovereign immunity do not justify the refusal to recognize any statute of limitations in a proceeding brought by the government. Second, an administrative agency cannot expand a statute based on an incorrect interpretation of case precedents.

Respectfully submitted,

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Dated: September 12, 2022

APPENDIX A

Eighth Circuit Court of Appeals Decision

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-3222

Wayne B. Holstad; Northwest Title Agency, Inc.
Petitioners - Appellants

v.

United States Department of Labor
Respondent - Appellee

Appeal from United States District Court for the District of Minnesota

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Submitted: June 6, 2022
Filed: June 17, 2022 [Unpublished]

Before KELLY, ERICKSON, and GRASZ, Circuit Judges.

PERCURIAM.

Wayne Holstad and Northwest Title Agency, Inc. (Northwest) appeal the district court's[1] affirmance of a decision of the Department of Labor's

[1] The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota.

Administrative Review Board (ARB), which found that they had violated the Service Contract Act (SCA) and ordered them to pay outstanding fringe benefits.

Upon careful review, see Northport Health Servs. of Ark., LLC v. United States HHS, 14 F.4th 856, 866 (8th Cir. 2021) (appellate court reviews de nova district court's decision on whether agency action violated Administrative Procedure Act); Williams v. United States Dep't of Labor, 697 F.2d 842, 844 (8th Cir. 1983) (noting nan-ow standard of review in SCA cases); 5 U.S.C. § 706(2)(A) (reviewing court shall hold unlawful and set aside agency action, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law); 41 U.S.C. §§ 6707(a), 6507(e) (administrative findings of fact in SCA proceedings are conclusive in federal court if supported by preponderance of evidence), we reject appellants' arguments for reversal. Specifically, we conclude that the ARB did not err in concluding that Northwest violated the SCA's fringe benefits requirement by failing to pay its employees required health and welfare benefits, see 41 U.S.C.§ 6703(2) (providing that federal contractors must pay service employees engaged in the performance of contract work certain fringe benefits); that Holstad was a "party responsible" under the statute, see 41 U.S.C. § 6705(a) ("A party responsible for a violation of a contract provision required under [the SCA] is liable for an amount equal to the sum of any deduction, rebate, refund, or underpayment of compensation due any employee engaged in the performance of the contract."); and that the administrative complaint was timely, see 29 C.F.R. 4.187(c) (SCA is not subject to statute of limitations in Portal-to-Portal Act, and

contains no prescribed period within which action must be instituted).

Accordingly, we affirm.

APPENDIX B

U.S. District Court Decision

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Wayne B. Holstad and
Northwest Title Agency, Inc.,

Petitioners,

v.

U.S. Department of Labor,

Respondent.

Case No. 20-cv-1867 (SRN/ECW)

MEMORANDUM OPINION AND ORDER

Frederic W. Knaak, Holstad & Knaak PLC, 4501 Allendale Drive, St. Paul, MN 55127, for Petitioner Wayne B. Holstad.

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SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on Petitioners Wayne B. Holstad ("Mr. Holstad") and Northwest

Title Agency, Inc.'s ("Northwest Title") Petition for Review ("Petition") (Doc. No. l] and Respondent U.S. Department of Labor's ("DOL") Motion to Dismiss or, in the Alternative, for Summary Judgment [Doc. No. 14]. Based on a review of the files, submissions, and proceedings herein, and for the reasons below, the Court **DENIES** the Petition, **DENIES** Respondent's Motion to Dismiss, and **GRANTS** Respondent's Motion for Summary Judgment.

I. BACKGROUND

A. Statutory and Regulatory Background

This case centers on the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 6701 *et seq.* ("SCA" or "Act"), and its implementing regulations. The SCA generally requires that all service contracts with the United States for amounts exceeding $2,500 include ce1tain protections for the contractor's employees. *See* 41 U.S.C. §§ 6702-03. As relevant here, it requires contracts to contain provisions specifying the minimum wages and fringe benefits to be paid to each class of service employee. *Id.* § 6703(1) (minimum wages); *id.* § 6703(2) (fringe benefits). A contractor may satisfy its obligation to provide fringe benefits by paying, "in addition to the monetary wage required, a cash amount per hour in lieu of the specified fringe benefits, provided such amount is equivalent to the cost of the fringe benefits required." 29 C.F.R. § 4.177(c)(l); *see* 41 U.S.C. § 6703(2) (providing that the obligation to provide fringe benefits may be satisfied "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under regulations established by the Secretary").

Contractors must provide fringe benefits "separate from and in addition to the specified monetary wages." 29 C.F.R. § 4.l 70(a). Further, "[a]n employer cannot offset an amount of monetary wages paid in excess of the wages required under the [wage] determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits." *Id.* The SCA also requires contractors to deliver notice to their employees of the minimum wage and fringe benefits owed to them, or to post such notice at a prominent place at the worksite. 41 U.S.C. § 6703(4); 29 C.F.R. § 4.6(e).

Further, contractors must provide employees the minimum compensation required under the SCA for "each hour worked in performance of a covered contract." 29 C.F.R. § 4.178. A contractor will be liable for any underpayment of compensation due to any employee pursuant to the SCA. 41 U.S.C. *§* 6705(a)-(b). And under the SCA, liability extends to any "party responsible," which includes corporate officers "who actively direct[] and supervise[] the contract performance" and "corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts." 29 C.F.R. § 4.187(e)(l)-(2); *accord* 41 U.S.C. § 6705(a). In general, contractors that have been found to violate the SCA are barred from being awarded a federal government contract for three years. 41 U.S.C. § 6706.

B. Factual Background

Northwest Title is an insurance title firm that performs title searches and settlement services. (Pet.

for Review [Doc. No. 1] at 3 ("ARB Decision").) In 2006, Mr. Holstad purchased Northwest Title, and he has held many positions at the firm, including Chief Executive Officer, President, and Chairman. *(Id.)* He is also its sole shareholder. *(Id.)* Mr. Holstad's brother, Joel Holstad, served as the firm's Chief Operating Officer and Chief Financial Officer in 2011 and 2012. (Id.)

On or around April 12, 2010, the U.S. Department of Housing and Urban Development ("HUD") awarded a contract to Northwest Title to "provide real estate property sales closing services" for certain properties owned by HUD. *(Id.)* The contract-in effect from April 19, 2010 through April 21, 2012-provided that it was subject to the SCA and its implementing regulations. *(Id.)* It also incorporated SCA Wage Determination 2005-2287, Revision 8, which detailed the minimum wages and fringe benefits owed to each employee who performed work under the contract. *(Id.)* This provision required Northwest Title to provide three fringe benefits in addition to the required hourly wage: (1) health and welfare benefits of $3.35 per hour; (2) certain paid vacation benefits that depended on length of service; and (3) certain paid holiday benefits. *(Id.)* In March 2011, this provision was updated, raising the hourly wage and increasing the health and welfare benefit to $3.50 per hour. *(Id.)*

In April 2012, Valerie Jacobson, an investigator within the DOL's Wage and Hour Division ("WHD"), began investigating Northwest Title's compliance with the SCA. *(Id.)* The investigation revealed violations of the SCA and its regulations, including Northwest Title's failure: (1) to pay required back wages; (2) to pay health and welfare benefits, or cash payments in lieu of such benefits; and (3) to keep and

provide adequate records of wages, benefits, and hours worked. *(Id.* at 4.) She calculated that Northwest Title owed $70,243.04 in health and welfare benefits to ten employees for the period from May 15, 2010 to May 5, 2012, but this amount was later corrected to $67,893.78. *(Id.)*

C. Proceedings Before the Administrative Law Judge

On July 29, 2014, the Administrator of the WHD filed an administrative complaint against Northwest Title, Mr. Holstad, and Joel Holstad. (Aff. of Sarah Starrett ("Starrett Aff.") [Doc. No. 18-10] at 18.)[1] On July 18, 2016, Joel Holstad-in his individual capacity-entered into a settlement agreement with the Administrator, wherein he agreed to pay $40,000, to be credited to the employees' unpaid back wages, and agreed to forego entering into contracts with the federal government for three years. *(Id.* at 20-21.) The settlement agreement disposed of all claims against Joel Holstad. *(Id.* at 21.)

On August 23 and 24, 2016, the ALJ conducted a hearing, and took testimony from Mr. Holstad, Joel Holstad, Ms. Jacobson, and two former employees of Northwest Title and received various exhibits. *(See id.* at 19-43.) Based on the evidence presented at the hearing, the ALJ made several findings of fact and conclusions of law that are relevant here: (1) Petitioners failed to pay required health and welfare benefits to ten employees; (2) Petitioners were not entitled to any offsets to the amount they owe; (3) the

[1] For clarity, the Court will refer to the ECF page numbers when referencing the Administrative Law Judge's ("ALJ") decision. *(See id.* at 17-63 ("ALJ Decision").)

Administrator's claims were not barred by the statute of limitations; and (4) Mr. Holstad was personally liable for the amount owed.

First, the ALJ found that Petitioners had failed to pay required health and welfare benefits of $3.35 per hour during the first contract year and $3.50 per hour during the second year, resulting in a total of $67,893.78 owed to ten employees. *(Id.* at 45-51.) At the hearing, Mr. Holstad testified in defense that Northwest Title had a company policy of paying higher wages to those who declined fringe health and welfare benefits and hence made cash equivalent payments consistent with the law. *(Id.* at 46.) However, the ALJ found more credible the testimony of Ms. Jacobson that there was no evidence of such a company policy and that Petitioners' payroll records did not show that any cash equivalent payments were made in lieu of providing health and welfare benefits. *(Id.* at 46-49.) Indeed, the ALJ noted that:

> none of the three Respondents offered into evidence any records other than those offered by Complainant and admitted in evidence. I must presume that if there were additional records showing that Northwest paid the ten employees at issue more in fringe benefits than shown by the records in evidence, such records would have been produced.

(Id. at 47.)

The ALJ also concluded that the regulations preclude Petitioners from counting wages paid in excess of the minimum wage toward the required health and welfare benefits. *(Id.* at 48-49 (citing 29

C.F.R. § 4.l 70(a) ("Fringe benefits required under the Act shall be furnished, separate from and in addition to the specified monetary wages," and "[a]n employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits")).) Therefore, in the absence of any evidence of cash payments in lieu of fringe benefits, the ALJ found that the Petitioners owed $67,893.78. *(Id.* at 49.)[2]

Second, the ALJ found that the Petitioners could not offset the unpaid health and welfare benefits amount by Joel Holstad's $40,000 settlement amount or by a debt HUD allegedly owed Northwest Title.[3] *(Id.* at 50-51.) He found that Joel Holstad's settlement amount only covered unpaid back wages. *(Id.* at 51.) Petitioners offered no argument or evidence to the contrary. *(Id.)*

Third, the ALJ considered Petitioners' argument that the two-year statute of limitations period under the Portal-to-Portal Act, 29 U.S.C. § 255, barred the Administrator's claims and concluded that this statute did not apply to claims arising under the SCA. *(Id.* at 44-45.)

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[2] Relatedly, the ALJ concluded that Petitioners had failed to keep and provide appropriate records that separately show amounts paid for wages and amounts paid for fringe benefits, along with other payroll information, in violation of the SCA. *(Id.* at 51- 52.) He farther concluded that Petitioners violated the SCA by failing to deliver notice of the required minimum wage and fringe benefits to their service employees, on their first day of work, or to post a notice of the required compensation in a prominent place at the worksite. *(Id.* at 52-53.)

[3] The ALJ also noted that Petitioners failed to explain how this alleged HUD debt was relevant to this case. *(Id.* at 50-51.)

Fourth, the ALJ found that Mr. Holstad was a corporate officer, had control over Northwest Title at all relevant times, and, therefore, was a "party responsible" under the SCA. He noted that both Mr. Holstad and Joel Holstad testified that Mr. Holstad managed Northwest Title as CEO through at least August 2012. *(Id.* at 31, 38.) He also found that Mr. Holstad had "overall authority" of Northwest Title through at least August 2012. *(Id.* at 54 n.83.) Indeed, Mr. Holstad testified that he "managed the managers" at Northwest Title and was aware of what they were doing. *(Id.* at 55-57.) Further, two former Northwest Title employees testified that Mr. Holstad directly supervised their manager on matters relating to the contract. *(Id.* at 57.)

The ALJ acknowledged Mr. Holstad's testimony that he sold Northwest Title to Joel Holstad on December 27, 2011 and, therefore, had no responsibility for SCA violations occurring after that date. *(Id.* at 54 n.83.) However, the ALJ rejected this testimony, finding instead that no sale occurred because the evidence showed that Joel Holstad never signed the relevant purchase agreement. *(Id.* at 23, 41, 54 n.83.)

As a result, the ALJ ordered Northwest Title and Mr. Holstad to pay $67,893.78 in health and welfare benefits to ten employees. *(Id.* at 60-61.) The ALJ also debarred them from being awarded a federal government contract for three years. *(Id.* at 61.)

D. Proceedings Before the Administrative Review Board

Petitioners appealed the ALJ Decision to the Administrative Review Board ("ARB"). The ARB affirmed, finding that the record "supports the ALJ's

findings of fact and conclusions of law." (ARB Decision at 4.) The ARB agreed that Petitioners failed to pay required health and welfare benefits. *(Id.* at 4-5.) And it rejected Petitioners' argument that wages paid in excess of the minimum wage could count toward its fringe benefit obligation because they failed to provide records showing that fringe benefits were included in employees' wages. *(Id.* at 5.)

Further, the ARB rejected Mr. Holstad's argument that he did not manage the contract and therefore was not personally liable as a "party responsible." *(Id.* at 5.) The ARB agreed with the ALJ's findings that Mr. Holstad "directed and supervised Northwest Title's performance under the HUD contract, including the labor and employment policies, and maintained sufficient control over the company and its operations." *(Id.)* Also, the ARB rejected Mr. Holstad's argument that the ALJ's findings regarding his personal liability were based on hearsay testimony. *(Id.)*

The ARB also rejected Petitioners' argument that Joel Holstad's settlement amount and the alleged debt from HUD should offset the amount of unpaid health and welfare benefits. *(Id.* at 5-6.) Further, it determined that the two-year statute of limitations periods under the Portal-to-Portal Act and under Minnesota state law do not apply to the Administrator's claims. *(Id.* at 6.)[4] Lastly, the ARB affirmed the ALJ's order debarring Petitioners. *(Id.* at 6.)

[4] The ARB declined to adopt the ALJ's conclusion that the six-year statute of limitations under 28 U.S.C. § 2415(a) applied to this action, reasoning that that statute does not apply to administrative proceedings. *(Id.* at 6 n.1.)

E. Petition for Review Before the Eighth Circuit

On July 10, 2020, Northwest Title and Mr. Holstad filed a Petition for Review in the U.S. Court of Appeals for the Eighth Circuit. *(See* Pet. for Review at 1.) Thereafter, the DOL filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, to transfer the case to an appropriate district court. *(See* Docs. Received from U.S. Ct. of Appeals for the Eighth Circuit [Doc. No. 4] at 5-13.)[5] Northwest Title and Mr. Holstad opposed the motion. *(See id.* at 80-83.) On August 13, 2020, the Eighth Circuit transferred jurisdiction over the case to this Court. *(See id.* at 84; Jurisdiction Transferred [Doc. No. 5].)

F. The Instant Proceedings

After the transfer, Northwest Title and Mr. Holstad filed a brief and affidavit supporting their Petition for Review. *(See* Pet'r's Br. to the Dist. Ct. ("Pet'r's Br.") [Doc. No. 9]; Aff. of Wayne Holstad ("Holstad Aff.") [Doc. No. 10].) The DOL then moved to dismiss this action and, in the alternative, moved for summary judgment. *(See* Resp't's Mot. to Dismiss or, in the Alternative, for Summ. J. [Doc. No. 14]; Resp't's Resp. to Pet. for Review and Mem. in Supp. of Mot. to Dismiss or, in the Alternative, for Summ. J. ("Resp't's Mem.") [Doc. No. 15]; Starrett Aff. [Doc. No. 18].) Northwest Title and Mr. Holstad then filed a brief in opposition to the DOL's motions. *(See* Pet'r's Mem. in Opp'n to the DOL's Mot. to Dismiss or, in the

[5] The page numbers included in this citation and the next two in-line citations refer to the PDF page numbers, rather than any of the internally labeled pagination.

Alternative, for Summ. J. ("Pet'r's Opp'n") [Doc. No. 20].) Thereafter, the DOL filed a reply brief. *(See* Resp't's Reply in Supp. of Mot. to Dismiss or, in the Alternative, for Summ. J. ("Resp't's Reply") [Doc. No. 23].)

Although the parties initially disagreed as to whether the Court has jurisdiction over this case, the parties agreed at oral argument that the Court could review the agency decisions at issue pursuant to the APA. *Accord Aune v. Adm'r, Wage & Hour Div., U.S. Dep't of Labor*, 2010 U.S. Dist. LEXIS 142352, at *57 (D.S.D. June 28, 2010) ("Because the SCA itself does not provide for federal judicial review of final agency decisions in cases arising under the SCA, the [APA] provides the sole basis for a district court's review of final agency decisions."). The Court will therefore review the decisions below pursuant to the APA.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if it may affect the outcome of the lawsuit." *TCF Nat'l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 707 (8th Cir. 2016). And a factual dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, the Court must view the evidence and any reasonable inferences drawn from the evidence in the light most favorable to the nonmoving

party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Although the moving party bears the burden of establishing the lack of a genuine issue of fact, the party opposing summary judgment may not "rest on mere allegations or denials but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. Cty. of Le Sueur,* 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation marks omitted); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Moreover, summary judgment is properly entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322.

The APA permits reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "highly deferential" and "narrow." *Org. for Competitive Mkts. v. U.S. Dep't of Agric.,* 912 F.3d 455,459 (8th Cir. 2018). Accordingly, an agency decision may be deemed arbitrary or capricious if "the agency ... entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Parks Conservation Ass'n v. McCarthy,* 816 F.3d 989, 994 (8th Cir. 2016). Moreover, courts generally defer to an agency's interpretation of a regulation unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452,461 (1997). However, *Auer* deference is only triggered if a regulation is genuinely ambiguous. *Kisor v. Wilkie,*

139 S. Ct. 2400, 2415 (2019).

A court reviewing agency action pursuant to the APA generally defers to the agency's findings of fact if "substantial evidence" supports them. 5 U.S.C. § 706(2)(E). However, because Title 41 governed the administrative proceedings below, the court applies a different standard of review when reviewing the agency's factual findings. *See* 41 U.S.C. §§ 6506-07. Under Title 41, the Secretary of Labor or his representative may "hold hearings" upon a complaint that a federal contractor has violated the law or the governing contract, and "[a]fter notice and a hearing, ... shall make findings of fact." 41 U.S.C. § 6507(b), (e). "The findings are conclusive for agencies of the United States," and "[i]f supported by a preponderance of the evidence, ... are conclusive in any court of the United States." *Id.* § 6507(e).

As courts have observed, the SCA is not perfectly clear as to what precise standard of review this Court should apply. One court summed up the source of this confusion:

> In its normal iteration, the preponderance of the evidence standard, like "clear and convincing" and "beyond a reasonable doubt," establishes a quantum of proof to be measured by the factfinder, not a standard for error- detection. When used to describe appellate review, however, the phrase is at best an awkward locution, for it connotes nothing about the degree of probability of error required before a reviewing court may set aside a factual determination.

Dantran, Inc. v. U.S. Dep't of Labor, 171 F.3d 58, 70 (1st Cir. 1999). Recognizing this lack of clarity, courts have construed § 6507(e)'s standard of review in different ways. *See Tri-Cty. Contractors, Inc. v. Perez,* 155 F. Supp. 3d 81, 88-90 (D.D.C. 2016) (comparing different interpretations of this standard of review). For example, some courts interpret *§* 6507(e) as requiring district courts to review the agency's factual findings for clear error. *See, e.g., Dantran, Inc.* at 70-71. In contrast, other courts have applied some form of de novo review. *See, e.g., Karawia v. U.S. Dep't of Labor,* 627 F. Supp. 2d 137, 143-45 (S.D.N.Y. 2009); *accord Dantran, Inc.,* 171 F.3d at 77 (Cudahy, J., concurring in part and dissenting in part) ("If the finder of fact and the reviewing authority are bound by the same standard in establishing the facts (preponderance of the evidence), the logic of the situation is that review is essentially *de novo.").* The Eighth Circuit does not appear to have directly addressed this issue. *See Williams v. U.S. Dep't of Labor,* 697 F.2d 842, 844 (8th Cir. 1983) (holding that a district court must accept the agency's factual findings if they are supported by a preponderance of the evidence and that the standard of review is "narrow").

However, the Court need not resolve this question because the Court would not overturn the factual findings made by the ALJ and upheld by the ARB under any standard of review. As explained below, the record evidence provides sufficient support for the ALJ's factual findings. Consequently, for purposes of its review, the Court "will assume that it reviews the [agency's] findings of fact essentially de novo in order to determine whether a preponderance of the evidence supports the agency's factual findings." *Tri-Cty. Contractors, Inc.,* 155 F. Supp. 3d

at 90 (internal quotation marks and citations omitted). Of course, the Court will review the agency's conclusions of law pursuant to the APA to determine whether they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

B. Analysis

1. Payment of Health and Welfare Benefits or Their "Cash Equivalent"

First, the Court considers Petitioners' argument that the ALJ erred in concluding that they did not provide "cash equivalent" compensation instead of fringe benefits to those employees who declined fringe benefits.

a. Disputed Findings of Fact

As noted, the ALJ found that Petitioners failed to pay $67,893.78 in health and welfare fringe benefits to ten employees. (ALJ Decision at 47-49, 60-61.) Ms. Jacobson calculated the unpaid benefits due to the ten employees using $3.35 per hour during the first year of the contract and $3.50 per hour during the second year, for the period from May 15, 2010 to May 5, 2012. *(Id.* at 46, 48.)

The ALJ found that the Petitioners failed to keep and provide records showing that they made separate "cash equivalent" payments instead of providing fringe benefits. *(Id.* at 50.) However, Petitioners contend that they did in fact pay "cash equivalent" payments in lieu of health and welfare benefits, but that evidence of those calculations no longer exists. *(See* Pet'r's Opp'n at 6.) In the absence

of any evidence to support Petitioners' claim, the Court agrees with the ALJ's finding that Petitioners failed to meet their burden of proof as to any "cash equivalent" payments made in lieu of health and welfare benefits.

Next, Petitioners dispute the ALJ's finding that Northwest Title did not have a company policy of paying higher wages in lieu of health and welfare benefits to employees who declined those benefits. In support, they point to Mr. Holstad's testimony that such a policy existed. (Pet'r's Opp'n at 12-13.) The ALJ, however, declined to accept this testimony and instead found Ms. Jacobson's testimony more credible that, based on all of the records Petitioners provided her, there was no such company policy. *(See* ALJ Decision at 46-48; *see also id.* at 47 (noting Joel Holstad's testimony that, to the extent he had health and welfare benefit records, they were provided to Ms. Jacobson).) Indeed, Petitioners point to no evidence of the existence of such a company policy, and Mr. Holstad even testified that this alleged policy was not "rigid" and that he left decisions regarding whether to raise a wage based on an employee's declination of benefits "entirely within" the discretion of one of his employees. *(Id.* at 40.)

b. Disputed Conclusions of Law

Petitioners contend that the ALJ and ARB erred in concluding, as a matter of law, that Petitioners failed to make "cash equivalent" benefit payments for two reasons. First, they argue that they complied with the law by merely paying their employees amounts exceeding the sum of the required minimum wage and required health and welfare benefits. (Pet'r's Opp'n at 20-21). Second, they argue

that any regulation requiring that "cash equivalent" payments be made separate from wages cannot be enforced against them because they had no prior notice of it. *(Id.* at 21-23.)

The Court disagrees with Petitioners on both fronts. First, the law unambiguously required them to make "cash equivalent" benefit payments separate from wages. The SCA allows contractors to fulfill their fringe benefit obligation by making "equivalent or differential payments in cash under regulations established by the Secretary." 41 U.S.C. § 6703(2). Under the regulations, contractors must provide fringe benefits "separate from and in addition to the specified monetary wages." 29 C.F.R. § 4.1?0(a). And "[a]n employer cannot offset an amount of monetary wages paid in excess of the wages required under the [wage] determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits." *Id.* Consequently, as the ALJ and ARB concluded, Petitioners cannot simply use wages paid in excess of the required minimum wage to satisfy their fringe benefit obligation.

Second, Petitioners had notice of these requirements. The relevant regulations have been in place for years. *See* Service Contract Act; Labor Standards for Federal Service Contracts, 48 Fed. Reg. 49736, 49792 (Oct. 27, 1983) (to be codified at 29 C.F.R. § 4.170). And the DOL has enforced these regulations for years. *See, e.g., In re United Kleenist Org.,* No. 00-042, 2002 WL 181779, at *5-7 (ARB Jan. 25, 2002). There is simply no basis for Petitioners' argument that they had no notice of the regulations.

For those reasons, Petitioners' citations to *Hennepin Cty. Medical Ctr.* v. *Shalala,* 81 F.3d 743

(8th Cir. 1996), and *Shalala v. St. Paul-Ramsey Cty. Medical Ctr.,* 50 F.3d 522 (8th Cir. 1995), are inapposite. *(See* Pet'r's Opp'n at 21-23.) As Petitioners note, these cases reaffirm the general rule that an agency cannot impose requirements that extend beyond statutory or regulatory language without providing notice of the new requirements. *See Hennepin Cty. Medical Ctr.,* 81 F.3d at 748; *St. Paul-Ramsey Cty. Medical Ctr.,* 50 F.3d at 528. But here, Petitioners had decades of notice. And ignorance of the regulatory requirements is no excuse for noncompliance. *See United States v. Int'l Minerals & Chem. Corp.,* 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."). For all the above reasons, the ALJ's and ARB's legal conclusions were not arbitrary and capricious.

2. Alleged Offsets to Unpaid Health and Welfare Benefits Due

Next, Petitioners contend that the ALJ and ARB erred when they declined to offset Joel Holstad's settlement amount and a debt allegedly owed to Northwest Title by HUD against the unpaid fringe ben fit amount. (Pet'r's Opp'n at 7-12.) In response, the DOL argues that the ALJ and ARB correctly declined to make these offsets because: (1) Joel Holstad's settlement amount only covered unpaid back wages, not unpaid health and welfare fringe benefits; and (2) Petitioners offered no evidence of any debt owed by HUD, and even if they could, the relevance of that debt to this case. (DOL Reply at 9-11.)

The Court agrees with the DOL. First, the

evidence shows that the funds that Joel Holstad paid as part of his settlement were an offset to back wages only. *(See* ALJ Decision at 51.) Second, any funds HUD may owe to Northwest Title are simply irrelevant to this action.

3. Statute of Limitations

Next, Petitioners argue that the ALJ and ARB erred by failing to apply the two-year statute of limitations periods under Minnesota law, Minn. Stat. § 541.07(5), and the Portal- to-Portal Act, 29 U.S.C. § 255. (Pet'r's Br. at 22-29; Pet'r's Opp'n at 23-25.) Minn. Stat. § 541.07(5) imposes a two-year statute of limitations period on actions "for the recovery of wages." The Portal-to-Portal Act imposes a two-year statute of limitations period on certain actions under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Davis-Bacon Act. *See* 29 U.S.C. § 255. The SCA itself does not expressly include a statute of limitations period. *See* 29 C.F.R. § 4.187(c).

The ARB correctly declined to apply the statute of limitations periods under Minn. Stat. § 541.07(5) and 29 U.S.C. § 255. First, the Minnesota statute cannot bar this action because, when the United States sues to enforce federal law, state statute of limitations periods do not bind it. *See United States v. Summerlin,* 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitation ... in enforcing its rights." (citations omitted)). Second, the Portal-to-Portal Act does not apply to SCA cases because the Portal-to-Portal Act does not list the SCA among the acts to which it applies. *See* 29 U.S.C. § 255; 29 C.F.R. § 4.187(c); *cf United States v. Deluxe Cleaners & Laundry,* 511 F.2d 926, 927-28 (4th Cir. 1975)

(holding that the statute of limitations in the Portal-to-Portal Act does not apply to actions under the SCA and noting that "the United States is not bound by any statute of limitations unless Congress explicitly directs otherwise").

4. Personal Liability as a "Party Responsible"

Finally, Mr. Holstad contends that the ALJ and ARB erred in finding him personally liable because he is not a "party responsible" under the SCA. (Pet'r's Opp'n at 25-31.) Under the SCA, a "party responsible" for certain SCA violations is liable for the "underpayment of compensation due any employee engaged in the perfo1mance of the contract." 41 U.S.C. § 6705(a). Parties responsible include corporate officers "who actively direct[] and supervise[] the contract performance" and "corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts." 29 C.F.R. § 4.187(e)(l)-(2). A party responsible is subject to personal liability. *See id.*

Here, Mr. Holstad contends that the ALJ erred in making the following findings of fact: (1) that Mr. Holstad managed Northwest Title at all relevant times; and (2) that Mr. Holstad did not sell the firm to Joel Holstad. (Pet'r's Br.at 29-35; Pet'r's Opp'n at 3-5, 17- 18.) In response, the DOL argues that the record is replete with evidence showing Mr. Holstad's control over Northwest Title. (DOL Reply at 15-17.) The DOL further argues that the ALJ correctly found that Mr. Holstad did not sell Northwest Title to Joel Holstad because Mr. Holstad failed to produce any evidence

showing that such a sale occurred. *(Id.* at 14-15.)

The Court agrees with the DOL. First, there is ample evidence in the record showing that Mr. Holstad managed Northwest Title at all relevant times. Mr. Holstad himself testified that he served as CEO of Northwest Title through at least August 2012. *(See* Starrett Aff. [Doc. No. 18-7] at 13.) He also testified that he was the "manager of the managers," and that he was "aware of the things [his] managers were doing," *(Id.* at 61- 63.) Second, there is insufficient evidence that Mr. Holstad sold Northwest Title to Joel Holstad. Although Mr. Holstad produced a purchase agreement, it only bears Mr. Holstad's signature-Joel Holstad did not sign it. Mr. Holstad points to no evidence showing that this sale was actually consummated. Indeed, as the ALJ found, the record evidence shows that Mr. Holstad was the sole owner and shareholder of the firm through at least August of 2012.

Next, Mr. Holstad contends that the ALJ and ARB erred because, in his view, he cannot be a "party responsible" because he only "managed the managers" and did not manage the HUD contract. However, personal liability as a "party responsible" extends to corporate officers who actively direct and supervise contract performance and corporate officers "who control, or are responsible for control of, the corporate entity." *See* 29 C.F.R. § 4.187(e)(l)-(2). As the ALJ described in detail, the record evidence shows that Mr. Holstad had sufficient control over the firm as a corporate officer to qualify as a "party responsible." *(See* ALJ Decision at 53-58.)

Finally, Mr. Holstad contends that the ALJ's conclusion that he was a "party responsible" should be overturned because the ALJ solely relied on anonymous hearsay testimony from Ms. Jacobson that

Mr. Holstad was the CEO and sole owner of Northwest Title. (Pet'r's Br. at 34-35; Pet'r's Opp'n at 18-19.) In response, the DOL argues that, in addition to Ms. Jacobson's testimony, the ALJ reached this conclusion based on various other testimonial and documentary evidence. (DOL Reply at 16-17.) It also contends that Ms. Jacobson's testimony was not hearsay because the statements at issue were those of Joel Holstad, a patty opponent. *(Id.)*

The Court agrees with the DOL. The ALJ did not solely rely on Ms. Jacobson's testimony-he relied on the testimony of Mr. Holstad, Joel Holstad, and two former employees of Northwest Title, as well as documentary evidence showing Mr. Holstad's control over Northwest Title. *(See* ALJ Decision at 54-58.) Further, Ms. Jacobson's testimony as to Joel Holstad's statements are plainly admissions by a party opponent, and the ALJ did not abuse his discretion in admitting them. *See* 29 C.F.R. § 18.80l(d)(2)(i); *Mercier v. U.S. Dep 't of Labor, Admin. Rev. Bd.,* 850 F.3d 382, 388-90 (8th Cir. 2017) (applying abuse-of-discretion standard in upholding ALJ's ruling on hearsay objection).[6]

III. CONCLUSION

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

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[6] Although the Federal Rules of Evidence do not apply in administrative hearings, the DOL's regulations on the admission of hearsay evidence are similar to the federal rules. *See Mercier,* 850 F.3d at 389 n.2 (citing 29 C.F.R. §§ 18.801-18.806).

Moreover, because the Court concludes that the ALJ and ARB did not err in concluding that Mr. Holstad is a "party responsible" under the SCA, it need not address Mr. Holstad's argument that "piercing the corporate veil" is the only way he could face personal liability in this case. *(See* Pet'r's Br. at 33-34.)

1. Petitioners' Petition for Review [Doc. No. **1] is DENIED** and

2. Respondent's Motion to Dismiss or, in the Alternative, for Summary Judgment [Doc. No. 14] is **DENIED** to the extent it moves to dismiss and is **GRANTED** to the extent it moves for summary judgment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 30, 2021

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

APPENDIX C

Administrative Review Board Decision

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington1 DC 20210-0001

In the Matter of:

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

COMPLAINANT,

v .

JOEL HOLSTAD and WAYNE HOLSTAD,
Individually, and NORTHWEST TITLE
AGENCY, INC.,

RESPONDENTS.

ARB CASE NO. 2017-0055
ALJ CASE NO. 2014-SCA-00011

DATE: JUN 12, 2020

Appearances:

For the Administrator, Wage and Hour Division:
Nicholas C. Geale, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Jonathan T. Rees, Esq.; and Sarah J. Starrett, Esq.; *U.S. Department of Labor, Office of the Solicitor;* Washington, District of Columbia

For Respondent Wayne Holstad:
Frederic W. Knaak, Esq.; *Holstad and Knaak, PLC;* St. Paul, Minnesota

For Respondent Northwest Title Agency, ln.c.:
Wayne B. Holstad, Esq.; *Holstad and Knaak,*

PLC; St. Paul, Minnesota

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge,* James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.8.C. § 6701 *et seq*. (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2018). On June 30, 2017, Northwest Title Agency, Inc. and Wayne Holstad (Respondents) filed a petition with the Administrative Review Board (ARB or Board) to review the Administrative Law Judges (ALJ) May 23, 2017 Decision and Order (D. & 0.). For the reasons set, forth below, we affirm the ALJ's D. & O.

BACKGROUND

Northwest Title is an insurance title firm that provides title searches and settlement services. Wayne Holstad purchased Northwest Title in 2006 and was, among many positions, the company's Chief Executive Officer, President, and Chairman, and was its sole shareholder. D. & O. at 22-23, 38. Joel Holstad, Wayne's brother, served as the company's Chief Operating Officer and Chief Financial Officer in 2011 and 2012. *Id.* at 6, 24.

On or about April 12, 2010, the United Stated Department of Housing and Urban Development (HUD) awarded Contract Number C-DEN-02375 (Contract) to Northwest Title, to "provide real estate

property sales closing services for single family properties owned by" HUD. The Contract was in effect from April 19, 2010, through April 21, 2012, and stated that it was subject to the SCA and its implementing regulations, Government Exhibit (GX) 1 at 1, 3, 38.

The Contract incorporated SCA Wage Determination 2005-2287, Revision 8, which described thl:1 prevailing minimum wages and fringe benefits due und8r the SCA to each employee performing work on the Contract. GX 3. The Wage Determination required Northwest Title to provide three types of fringe benefits in addition to the required hourly wage: (1) health and welfare benefits of $3.35 per hour, (2) vacation benefits of two to four weeks paid vacation, depending on length of service. and (3) at least ten paid holidays. D. & O. at 5, 9-10, citing GX 3. In March 2011, HUD incorporated an updated wage determination, which increased the applicable wage and fringe benefit rates. D. & O. at 91 citing GX 4 (SCA Wage Determination 2005-2287, Revision 10) and 5 (Amendment of Solicitation/ Modification of Contract).

Valerie Ferris Jacobson, a. Wage and Hour Division investigator, began investigating Northwest Title's compliance with the SCA in April 2012. During the investigation Northwest Title produced payroll records from 2010 through 2012, but those records did not contain sufficient information about employee classifications, hours worked, and fringe benefit payments the company was required to maintain pursuant to the SCA. The company also produced health insurance invoices but those documents only showed that it had paid for

insurance covering November and December 2011. Jacobson was unable to verify that Northwest Title had posted or provided to employees information about the prevailing wage and fringe benefit requirements of the SCA. D. & O. at 10-11, 13, 15, 26; GX 33 (Payroll Journal).

After completing her investigation Jacobson concluded that Northwest Title violated the SCA by failing to pay health and welfare fringe benefits, or cash. payments in lieu of such benefits, and by failing to keep and make available the required records of employee wages, benefits, and hours worked. D. & O. at 8-10, 13-15, 26, 44. She calculated the amount of unpaid health and welfare benefits due to each of ten employees who performed work on the HUD contract at $70,243.04 for the period from May 16, 2010 to May 5, 2012. That amount was later corrected to $67,893.78 to account for the benefits of one employee not included in the Complaint. GX 9 (Summary of Unpaid Wages) and 10 (Fringe Benefits Wage Transcription and Computation Worksheet); D. & O. at 30.

Following the investigation, the Administrator filed a complaint against Northwest Title, Wayne Holstad, and Joel Holstad, alleging that they violated the SCA by failing to pay employees the minimum wages and fringe benefits required by the SCA, failing to maintain records of hours worked and wages and benefits paid to the employees, and failing to notify those employees of the compensation and fringe benefits to which they were entitled under the SCA. GX 18 (Complaint). The Complaint also requested debarment of Wayne Holstad, Joel Holstad, and Northwest Title because of their

violations of the SCA, *Id.*

On July 18, 2016, Joel Holstad, in his individual capacity, entered into a settlement agreement with the Administrator. Joel Holstad agreed to pay $40,000, which was credited toward the employees' back wages, and to forego entering into any contracts with the United States government for a period of three years. D. & O. at 4-5; *see* ALJ's Order on Claims against Respondent Joel Holstad. The agreement resolved all claims against Joel Holstad and resulted in dismissal of the back wage portion of the Complaint. D. & O. at 5. The ALJ held a hearing on the remaining claims on August 23 and 24, 2016. Wayne Holstad, Joel Holstad, Jacobson, and. two former Northwest Title employees testified at the hearing.

The ALJ concluded that Northwest Title and Wayne Holstad failed to pay required fringe benefits, failed to maintain and make available required pay and time records and failed to provide or post notices of the required compensation at the worksite, in violation of the SCA. D. & O. at 27-37. He found them liable for $67,893.78 in unpaid health and welfare benefits, rejected their claims to various offsets, and rejected their argument that the Complaint is barred by the statute of limitations. *Id.* at 28-35. He also ordered that Northwest Title and Wayne Holstad be debarred for three years because they were the "parties responsible" for the SCA violations and they failed to establish the “unusual circumstances” necessary to warrant relief from debarment. *Id.* at 37-45.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear and decide appeals from ALJ decisions and orders concerning questions of law and fact arising under the SCA. 29 C.F.R §§ 6.20, 8.l(b)(l), (6). The Secretary of Labor has delegated to the Board authority to issue agency decisions under the SCA. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility-to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020). The ARB's review is in the nature of an appellate proceeding. 29 C.F.R. §§ 8.1(b)(1), (6). In review of final determinations other than wage determinations, the Board may affirm, modify, or set aside, in whole or in part, the decision under review and is authorized to modify or set aside the ALJ's findings of fact only where they are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b).

DISCUSSION

The SCA requires that employees working on covered Government service contracts be paid prevailing hourly wages and fringe benefits, including holiday pay, as determined by the Secretary of Labor. 41 U.S.C. §§ 6703(1)-(2); 29 C.F.R. § 4.6(b)(l). Workers are entitled to pay at the SCA wage rate for each hour worked in the performance of an SCA-covered contract. 41 U.S.C. § 6703(1)-(2); 29 C.F.R. § 4.178. The SCA requires contractors to provide notice of the required minimum wage. and fringe benefits to employees or to post such a notice in a prominent place at the worksite. 41. U.S.C. § 6703(4); 29 C.F.R, §4.6(e).

Because this entitlement to SCA compensation is based on the hours worked on a covered contract, contractors have an affirmative obligation to make and maintain accurate records of the "number of daily and weekly hours so worked by each employee." 29 C.F.R. §§ 4.6(g)(l)(iii), 4.178, 4.185. A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the provisions of the SCA, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor. 29 C.F.R. §§ 4.188(b)(4), 4.l0l(g), 4.L9l(a). A contractor or party responsible that violates the SCA is liable for, among other things, "underpayment of compensation due any employee" who is performing work under a covered contract, 41 U.S.C. §6705(a), and except in unusual circumstances, is subject to a three-year period of debarment. 41 U.S.C. § 6706.

The record supports the ALJ's findings of fact and conclusions of law. Respondent's failed to pay the minimum hourly wages and health and welfare benefits its employees were entitled to under the SCA. D. & O. at 35. They also failed to maintain records showing the contract work classifications, hours worked, amounts of health and welfare fringe benefits provided, or cash equivalents allegedly paid separate from and in addition to the required wages under the SCA. *Id.* at 36. Respondents raise five issues on appeal, none of which compels us to reverse the ALJ's rulings.

First, they argue that the ALJ erred by refusing to consider "wages paid in excess of the Service Contract Act minimum wage requirement as a 'cash equivalent' to satisfy the benefits requirement" of the SCA. Petitioner's Brief at 5. An

employer can satisfy its fringe benefit obligations by providing "equivalent or differential payments in cash" to its employees but it must "keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits." 29 C.F.R. §§ 4.l70(a)1 4.l.77(a); *see, e.g., United Kleenist Organization Corp.,* ARB No. 2000-0042, ALJ No. 1999-SCA-00018, slip op. at 6-8 (ARB Jan. 25, 2002). The ALJ considered the evidence and found that Respondents failed to provide payroll records to support their assertion that the fringe benefits were included in employee wages. D. & O. at 32-33, Respondents contend that a "[l]ack of cooperation from former employees and lack of records due to the same reason hampered [Respondents] from proving precisely the amount and recipient of benefits paid by the company." Petitioner's Brief at 6. But that lack of cooperation does not absolve Respondents of their obligations under the SCA.

Second, Wayne Holstad argues that he did not "manage[ ] the HUD contract once it was put into place" and therefore is "not personally liable as a 'responsible person' under any applicable federal or state court precedent." Petitioner's Brief at 10, 13. This is factually and legally incorrect. The ALJ did not accept Wayne Holstad's assertion that he surrendered control of the company to Joel Holstad but instead found that Wayne Holstad directed and supervised Northwest Title's performance under the HUD contract, including the labor and employment policies, and maintained sufficient control over the company and its operations. D. & 0. at 38-42. The SCA regulations require compliance not only by those who supervise employees working on the contract but also corporate officers. 29 C.F.R, §4.187(e)(1) ("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."); *see, e.g., Adm'r, Wage and Hour Diu. v. Puget Sound Envtl.,* ARB No, 2014-0068, ALJ No. 2012- SCA-00014, slip op. at 9 n.32 (ARB May 4, 2016). We reject Respondent's assertions that the ALJ's findings regarding Wayne Holstad's liability were based on hearsay testimony and inapplicable to this case Ul1der Minnesota law prohibiting "piercing the corporate veil." *See* Petitioner's Brief at 10-12.

Third, Respondents assert that funds owed to them by HUD and paid by Joel Holstad pursuant to his settlement agreement should be "offset against" the award to the employees, *Id.* at 15-16. But Respondents cannot subtract the back wages due from Joel Holstad from the unpaid health and welfare benefits that are the subject of the Complaint and due pursuant to the D. & O. And any monetary relief Respondents may be entitled to from other federal agencies are not relevant to this case.

Fourth, Respondents contend that the Complaint is untimely because the two-year statute of limitations in the Portal-to-Portal Act, 29 U.S.C. § 255, is applicable to this case. *Id.* at 16, However, that statute does not apply to proceedings under the SCA. *See, e.g., Cody-Zeigler Inc. v. Adm'r, Wage and Hour Div.,* ARB Nos. 2001-0014, -0015, ALJ No. 1997-DBA-00017, slip op. at 32-34 (ARB Dec. 19, 2003). Respondents also contend that a Minnesota state statute of limitations should apply, but the cases they cite do not establish that Minnesota. law is controlling in this case, *See* Petitioner's Brief at

H3-21 (and cases cited therein).[1]

Finally, Respondents argue that their debarment "is inappropriate because the alleged violations can be attributed to a reasonable interpretation of the statute." Petitioner's Brief at 21. Debarment is presumed once violation of the SCA have been found, unless the violator is able to show the existence of "unusual circumstances" that warrant relief from SCA's debarment sanction. 41 U.S.C. § 6706; 29 C.F.R. § 4.1.88; *see, e.g., Hugo Reforestation, Inc.,* ARB No. 1999-0003, ALJ No. 1997-SCA-00020, slip op. at 11-13 (ARB Apr. 30, 2001).

The SCA does not define the term "unusual circumstances" but the regulation at 29 C.F.R. § 4.188(b)(3) sets forth a three-part test to determine when "unusual circumstances" exist to relieve a contractor from the norm of imposing the sanction of debarment. Those factors include the absence of aggravated, willful or culpable conduct; the presence of certain mitigating factors; and assuming those requirements are both met, then the consideration of other enumerated factors. It is the Respondents' burden to show unusual circumstances. *Vigilantes, Inc. v. Adm'r, Wage and Hour Div.,* 968 F.2d 1412, 1418 (1st Cir. 1992). In *Hugo Reforestation,* the ARB summarized the regulatory three-part test:

[1] We do not adopt the ALJ's conclusion that the six-year statute of limitations applicable to contract actions brought by the United States, 28 U.S.C. § 2415{a), applies in this case. That statute does not apply to administrative proceedings. *See, e.g., BP Am. Prod. Co. u. Burton,* 549 U.S. 811, 91 (2006) (interpreting "action" in 28 U.S.C. § 2415(a) to refer solely to court, not administrative, proceedings).

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.,, 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 violated the SCA in the past, that such violation was not serious in nature. 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."

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.

Hugo Reforestation, Inc., ARB No. 1999-0003, slip op. at 12-13 (citations and footnotes omitted): *see also Admin., Wage* & *Hour Div. v. Price Gordon, LLC,* ARB No. 2019-0032, ALJ No. 2017-SCA-00008 (ARB Mar. 9, 2020).

Respondents in this case failed to pay their employees' health and welfare fringe benefits and failed to keep and make available the required records of employee wages, benefits, and hours worked. They did not provide notice of the required minimum benefits to their employees or post such information, and Wayne Holstad admitted that he failed to read the Contract and made no effort to determine whether his company's practices were in violation of the SCA D. & O. at 24, 44; Transcript (Tr.) at 308, 327. On appeal, Respondents assert that Jacobson failed to consider documents showing compliance, but the record indicates that those documents were accepted and rejected as insufficient to establish compliance. D. & O. at 17-18; Tr. at 211-12. In sum, the SCA violations in this case were the result of the "culpable conduct" of Respondents, and debarment is appropriate.

CONCLUSION

For the reasons stated above, the ALJ's D. & O. is AFFIRMED. Respondents Northwest Title Agency, Inc. and Wayne Holstad shall pay the Wage and Hour Division $67,893.78 in unpaid health and welfare benefits, which shall be distributed as follows to the

ten employees identified in the Complaint: (1) $841.75 to Timothy Bohl; (2) $2,391.19 to Jennifer Christensen; (3) $12,113.74 to Karla Cochran; (4) $6,864.38 to Kelsey Cochran; (5) $11,870.07 to Theresa Eaton; (6) $7,107.35 to Lisa Erickson; (7) $14,549.83 to Cynthia Orloff; (8) $5,871.49 to Ba1 ·bara Smith; (0) $5,256.73 to Lisa Rausch (formerly Lisa Stolp); and (10) $1,027.25 to Gilbert Wenzel.

Pursuant to 41 U.S.C. § 6706, the Secretary 1s directed to forward the names of Northwest Title Agency, Inc. and Wayne Holstad to the Comptroller General of the United States to be placed on the list of persons or firms that have violated the SCA and are therefore ineligible, for a period of three years, for the award of any contract with the United States.

SO ORDERED.

APPENDIX D

Administrative Law Decision

U.S. Department of Labor
Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202
(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 23 May 2017

Case No: 2014-SCA-00011

In the Matter of.

JOEL HOLSTAD and WAYNE HOLSTAD,
Individually, and
NORTHWEST TITLE AGENCY, INC.
Respondents

Appearances: David J. Rutenberg, Esq. and
David J. Tanury, Esq.
U.S. Department of Labor
Office of the Solicitor
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For the Complainant

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For Respondent Wayne Holstad

Wayne B. Holstad, Esq.
Holstad & Knaak, PLC
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For Respondent Northwest
Title Agency, Inc.

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER

This case arises under the Service Contract Act, as amended, 41 U.S.C. § 6701, *et seq.* (hereinafter "the SCA" or "the Act"), and the implementing regulations at 29 C.F.R. Parts 4 and 6. On August 1, 2014, Chief Administrative Law Judge Stephen L. Purcell issued a Notice of Docketing with the Office of Administrative Law Judges.

PROCEDURAL BACKGROUND

On July 29, 2014, the Administrator, Wage and Hour Division, United States Department of Labor (hereinafter "the Administrator or "Complainant"),[1] filed a complaint against Respondents Joel Holstad, Wayne Holstad and Northwest Title Agency, Inc. (hereinafter "Respondents"), alleging that provisions of the Act and regulations had been violated. The Complaint further alleges that Joel Holstad and Wayne Holstad are each a "responsible party" within the meaning of 41 U.S.C. § 6705(a) of the SCA.[2] The Complaint alleges that Respondents violated a

[1] As of January 20, 2017, the Deputy Administrator for Program Operations became the ranking official responsible for the Department of Labor's Wage and Hour Division. *See* Deputy Administrator for Program Operations' Post- Hearing Brief (hereinafter "Complainant's Post-Hearing Brief'). The term "Administrator" as used herein includes the Deputy Administrator with respect to matters after January 20, 2017.

[2] Wayne Holstad appeared at the hearing both as the attorney for Respondent Northwest Title Agency, Inc. and as an individual party.

contract entered into with the United States Government for the provision of real estate closing services for properties owned by the U.S. Department of Housing and Urban Development (hereinafter "HUD"). Specifically, the Complaint alleges that Respondents violated the SCA by failing to pay the minimum monetary wages required by the contract, by failing to pay the fringe benefits required by the contract, by failing to make, keep and preserve adequate records of employees and their wages and hours, and by failing to notify employees of the compensation and fringe benefits required to be paid and furnished for work on the contract. The Complaint includes a Summary of Unpaid Wages to ten employees, totaling $230,688.22.

On August 26, 2014, Respondents Wayne Holstad and Northwest Title, Inc. filed separate Answers to the Complaint. On September 17, 2014, Joel Holstad filed a motion to dismiss the Complaint against him for failure to state a claim upon which relief can be granted. The motion was denied on November 25, 2014 by then Acting Chief Administrative Law Judge Stephen R. Henley. On December 24, 2016, Joel Holstad filed his Answer to the Complaint. On October 14, 2015, Administrative Law Judge (hereinafter "ALJ") Christine L. Kirby denied Joel Holstad's motion for reconsideration.[3]

On April 4, 2016, Joel Holstad filed a Motion to Compel Wrongfully Withheld and Redacted Documents. The Administrator filed his response on

[3] This case was reassigned by Judge Henley to Judge Kirby. After Judge Kirby's departure from the Office of Administrative Law Judges, this matter was assigned to me. *See* Notice of Assignment and Order issued February 26, 2016.

May 2, 2016. I denied the motion in my order issued May 12, 2016.

On July 26, 2016, the Administrator and Joel Holstad filed a Settlement Agreement and Consent Findings between the Administrator and Respondent Joel Holstad. On August 16, 2016, I issued a Notice of Receipt of Settlement Agreement and Consent Findings between the Administrator and Respondent Joel Holstad and Summary of Telephone Conference Regarding Agreement. This Notice states that I found the form and substance of the consent findings and agreement to be acceptable and that the agreement and consent findings would be addressed in the final decision and order after the hearing on the remaining issues. *See* 29 C.F.R. § 6.18.

On August 12, 2016, Respondent Wayne Holstad filed a motion to dismiss on the grounds that he is not a "party responsible" within the meaning of 41 U.S.C. § 6705(a)[4] and on the grounds that any claims against him are barred by the statute of limitations. On the same date Northwest Title Agency, Inc. (hereinafter "Northwest") filed a motion in limine and motion to dismiss seeking to exclude certain alleged hearsay evidence and testimony regarding alleged violations prior to December 27, 2011. The Administrator's memorandum in opposition to the above motions was filed on August 22, 2016. On August 17, 2016 the Administrator filed a motion to dismiss Count IV of the Complaint, seeking underpayment of the minimum monetary wages for specified service employees. Because of the late filing

[4] Respondent cited 29 C.F.R. § 4.188 as the regulation defining "party responsible," but the reference should be to 29 C.F.R. § 4.187(e).

of these motions they were addressed at the hearing on August 23, 2016. Respondents had no objection to the Administrator's motion to dismiss Count IV of the Complaint and the motion was granted. I denied the Respondents' motions to dismiss and motion in limine for the reasons stated at the hearing. Hearing Transcript (hereinafter "Tr." at 7-10).

The hearing in this matter was held on. August 23 and 24, 2016 in St. Paul, Minnesota.[5] The parties were afforded a full opportunity to present evidence and argument. Joel Holstad participated only as a fact witness. At the hearing, the Administrator offered into evidence Government Exhibits ("GX") 1 through 33. Respondent Wayne Holstad objected to the admission of GX 20, arguing that it is hearsay. I overruled the objection, and GX 1 through GX 33 were admitted into the record. Tr. at 15-18. Respondent Wayne Holstad offered into evidence Wayne Holstad Exhibits ("WHX") 1 and 2. Tr. at 353-356. Respondent Northwest Title Agency, Inc. did not offer any exhibits in evidence. A schedule for the submission of post- hearing briefs was established at the hearing, with the parties submitting initial briefs and responsive briefs. The dates for filing of post-hearing briefs were changed by my orders issued on October 21 and December 6, 2016, and the last brief was filed on February 27, 2017.

ISSUES

[5] There were two previous hearings set during the period the case was assigned to Judge Kirby, which were cancelled. See Judge Kirby's order issued February I, 2016. On March 28, 2016 Respondent Joel Holstad filed a motion to change the hearing date, which was denied by my order of April 1, 2016. I note that the Prehearing Order issued by Judge Kirby on March 11, 2015 incorrectly references the Surface Transportation Act and the Defense Base Act.

1. Whether the contract between HUD and Northwest is subject to the provisions of the SCA.

2. Whether the claims against Respondents are barred by the applicable statute of limitations.

3. Whether Respondents failed to pay the required fringe benefits to their service employees in violation of 41 U.S.C. § 6703(2) and the relevant implementing regulations, and if so, the monetary amount of such unpaid benefits.

4. Whether Respondents failed to deliver to service employees notice of the required compensation or post such notice in a prominent place at the worksite, in violation of 41 U.S.C. § 6703(4) and the relevant implementing regulations.

5. Whether Respondents failed to maintain and make available to authorized representatives of the Administrator required pay and time records as set forth in 29 C.F.R. §§ 4.6(g) and 4.185.

6. Whether Respondents Wayne Holstad and Northwest are "parties responsible" within the meaning of 41 U.S.C. § 6705.

7. If Respondents violated the SCA, what is the appropriate relief?

APPLICABLE STANDARDS

The SCA governs contracts between the federal government and private parties made with the

principal purpose of "furnishing services in the United States through the use of service employees." 41 U.S.C. § 6702(a)(3). To be subject to the SCA, the contract must involve an amount exceeding $2500, have the principal purpose of furnishing services in the United States through the use of service employees, and not fall under any of the exemptions set forth in § 6702(b). A "service employee,, is defined in § 6701(3) as an individual engaged in the performance of such a contract other than an individual employed in an executive, administrative or professional capacity as those terms are defined in part 541 of the Code of Federal Regulations. The SCA provides that contracts subject to its provisions specify the minimum hourly wage and fringe benefit rates payable to the various classifications of service employees performing contract work, and that those rates may not be less than the amounts predetermined by the Secretary of Labor or provided for in a collective bargaining agreement, and may not be less than the minimum wage under the Fair Labor Standards Act. Further, the contracting party must either deliver to the employee or post notice of the required compensation. *See* 41 U.S.C.
§§ 6703 and 6704.

The Act provides that a party responsible for a violation of sections 6703 (1) or (2) or 6704 is liable for the amount of the deduction, rebate, refund or underpayment of compensation due to the affected employee. It further states that, absent unusual circumstances, a contractor that has violated the SCA may not be awarded a federal government contract for a period of three years. 41 U.S.C. § 6705 and 6706.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. SETTLEMENT AGREEMENT AND CONSENT FINDINGS BETWEEN THE ADMINISTRATOR AND RESPONDENT JOEL HOLSTAD

On July 18, 2016 the Administrator and Joel Holstad entered into a Settlement Agreement and Consent Findings (hereinafter "Settlement Agreement").[6] The Agreement provides that it resolves disputed claims related to Joel Holstad's compliance with the subject contract during the period between May 14, 2010 and May 12, 2012. It identifies the contract as C-DEN-02375, for the purpose of providing closing services to HUD. The Agreement provides that it is entered into by Joel Holstad in his individual capacity and not as a representative of either of the other two Respondents. The Agreement states that during the period from December 11, 2011 through April 20, 2012, Joel Holstad was the Chief Operating Officer of Northwest "and, along with other individuals, was responsible for the company's day-to-day employment policies and practices." Agreement at p. 2. Under the Agreement, Joel Holstad agrees to pay $40,000.00, representing "his agreed-upon share of the back wages and fringe benefits for the period from May 14, 2010 through May 12, 2012, for the employees listed in Exhibit A."[7] Agreement at p. 3. The Agreement further provides that Joel Holstad will not

[6] Filed July 26, 2016.

[7] Exhibit A to the Agreement lists ten employees (the same employees identified in Exhibit A to the Complaint) and the amount owed to each, totaling $40,000.00. The Agreement provides that the Department of Labor will distribute the stated amounts to the employees.

bid on or enter any contracts with the United States government for a period of three years. The Agreement states that its intent is to dispose in whole of proceedings against Joel Holstad. Agreement at pp. 5-6.

B. CONTENTIONS OF THE PARTIES

Complainant's Contentions:[8]

The Complaint alleges that the United States Government entered into a contract with. Respondents for the purpose of providing real estate closing services for properties owned by HUD[9] (hereinafter "the Contract" or "the HUD contract"). The Complaint alleges that the Contract was in effect for the period from April 19, 2010 through April 18, 2011 and an additional option year from April 19, 2011 to April 20, 2012. In Complainant's post-hearing briefs, Complainant states that the Administrator, Wage and Hour Division conducted an investigation of Northwest to determine its compliance with the Contract, focusing on ten service employees at Respondents' Minnesota office, identified in Exhibit A to the Complaint. Complainant alleges that the investigation revealed that Northwest violated the SCA by failing to pay the required health and welfare

[8] After the settlement agreement with Joel Holstad, Complainant proceeded only against the two remaining Respondents. Therefore, the remainder of this Decision focuses on the allegations, issues and evidence related to Respondents Northwest and Wayne Holstad.

[9] The contract is numbered C-DEN-02375 and is GX 1.

benefits[10] to its service employees,[11] by failing to keep the required records, and by failing to inform their service employees that their work was subject to the SCA and that they were entitled to specified forms and amounts of compensation.[12] It also determined that Wayne Holstad was a "party responsible" for Northwest's violations. Complainant seeks debarment of Northwest and Wayne Holstad pursuant to 41 U.S.C. § 6706.

Respondents' Contentions:

The Answer of Northwest to the Complaint admits the allegations in paragraph II of the

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[10] Valerie Jacobson, the lead investigator in this matter for the Department of Labor's Wage and Hour Division, testified that there are three categories of benefits that comprise "fringe benefits," *i.e.,* health and welfare benefits, vacation pay and holiday pay. Transcript of hearing (hereinafter "Tr.") at 380. *See* 41 U.S.C. § 6703(2); 29 C.F.R. §§ 4.6, 4.162, 4.165, 4.170-.77. The term "health and welfare benefits" therefore does not include the other two types of fringe benefits, vacation pay and holiday pay. This distinction is not always made in the testimony. Fringe benefits required under the SCA are to be provided by the contractor "separate and in addition to the specified monetary wages." 29 C.F.R § 4.170(a).

[11] The Complaint as originally filed sought back wages in addition to fringe benefits. After the settlement with Joel Holstad, Complaint amended the Complaint by dismissing Count IV, which sought recovery of the back wages. Although the amount of back wages sought was in excess of $40,000, counsel stated at the hearing that the Administrator considered the settlement as satisfying the claim for back wages. *See* Tr. at 9-10.

[12] Complainant indicated at the hearing that Complainant seeks health and welfare benefits in the total amount of $70,243.04. Tr. at 26, 56. However, in the Deputy Administrator for Program Operations' Post-Hearing Brief (hereinafter "Complainant's Post-Hearing Brief), the amount sought was amended to $67,893.78. *See* Complainant's Post-Hearing Brief at 20 and 34.

Complaint except to allege that the Contract was unilaterally suspended by HUD on January 31, 2012 and never reinstated. Northwest admits the allegations of paragraph ill of the Complaint and states that it does not have sufficient information to either admit to deny the allegations in paragraph I(c). Northwest denies the remaining allegations. Respondent Wayne Holstad's Answer to the Complaint admits the same allegations as Northwest and denies the remaining allegations.

In its post-hearing briefs, Northwest contends that all but three of the employees were paid wages and benefits in excess of the minimum amount required by the SCA, and that it complied with the SCA by paying wages in excess of SCA requirements such that the additional requirement to pay fringe benefits was satisfied. It states that the claim for back wages owed to three of the employees is barred by the statute of limitations and is less than the amount still owed to Northwest under the contract.

Wayne Holstad contends that he is not a responsible party as defined in the statute and that any claim for back wages is barred by the statute of limitations.

C. SUMMARY OF THE EVIDENCE

STIPULATIONS

At the hearing, the parties stipulated to the authenticity of the proposed documentary evidence. There were no other stipulations.

EXHIBITS

As indicated above, Government Exhibits (hereinafter "GX") 1-33 and Wayne Holstad (hereinafter "WHX") Exhibits 1 and 2 were received into evidence at the hearing. Northwest did not offer any exhibits in evidence.

The Government Exhibits are described in the Exhibit List at the beginning of the binder containing the Government exhibits. GX 1 is the Contract and GX 2 is the proposal for the Contract. GX 3 and GX 4 are Wage Determinations. GX 5 and GX 7 are Contract modifications. GX 6 is an employee statement from Lisa Erickson. GX 8 is a notice of "Employee Rights on Government Contract." GX 9 is the summary of unpaid wages, and GX 10 is the Fringe Benefit Wage Transcription and Computation Worksheet. GX 11 is a summary of invoices for health insurance premiums from Medica. GXs 12-16 are correspondence between HUD and Wayne Holstad. GX 17 is the Cost and Pricing Proposal for the Contract. GX 18 is the Complaint. GX 19 is the Minutes of a Meeting of the Board of Directors of Northwest on December 23, 2011 reflecting the resignation of a board member and that Wayne Holstad is the sole remaining board member. OX 20 is email correspondence between Northwest and Valerie Jacobson. OXs 21, 22 and 23 consist of Waivers of Notice and Consent to board meetings and Unanimous Writings in lieu of board meetings or shareholder meetings. OXs 26 through 32 are discovery requests and responses. OX 33 consists of Northwest payroll records.[13]

[13] The Government's Exhibit list also includes GXs 34, 35 and 36, which were not included in the notebook of exhibits or offered at the hearing. Tr. at 15-16. These documents were unredacted

WHX 1 is a "General Proxy" signed by "Wayne B. Holstad on behalf of Wayne B. Holstad, P.L.C." and dated December 27, 2011. The document "appoints Joel M. Holstad a general proxy to vote all shares of common stock which the undersigned is entitled to vote on the election of Directors and all other matters until the next Annual Meeting of Shareholders scheduled for August 7, 2012 at 2:00 p.m., or any adjournment thereof." WHX 2 is a document titled "Common Stock Purchase Agreement for shares of Northwest Title Agency, Inc. The document indicates it is for the purchase by Joel Holstad from Wayne Holstad of 10,000 shares of common stock in Northwest at a price of $60.00 per share. The document states that the closing date is to be April 1, 2012, subject to postponement "until certain conditions described below are met." The signature page has places for signatures for both Seller and Purchaser, but is signed only by Seller, on December 26, 2011. No fully executed copy of this document is in evidence, nor is any other documentation showing that the sale of the stock was consummated.

SUMMARY OF TESTIMONY

Valerie Ferris Jacobson[14]

employee statements that were the subject of my Order Denying Respondent Joel Holstad's Motion to Compel Withheld and Redacted Documents, issued May 12, 2016.

[14] Ms. Jacobson's testimony is at transcript pages ("Tr.) 35-118 (direct examination), 118-58 (cross examination),158-80 (redirect examination), 180 (recross examination) and 369-83 (rebuttal). She testified that her name was formerly Valerie Ferris, and that it changed to Valerie Ferris Jacobson after 2014.

Valerie Ferris Jacobson testified that she is an employee of the United States Department of Labor, Wage and Hour Division (hereinafter "WHD"), and began working for the wage and hour division in August 2008. She has held the title of wage and hour investigator since she began working at the WHD. She has a bachelor's degree from the University of Minnesota in applied economics, entrepreneurial management and writing studies. Her job duties as a WHD investigator include determining compliance with applicable labor laws for various employers and employees and trying to do what she can do to make sure that employers come into compliance and make employees whole whenever possible. When she was first hired she had a thirteen-week period of training where she was learning the regulations and shadowing other investigators to view the investigation process. Within her first year of being hired she also had a three-week long training called Basic I that included topics such as the Fair Labor Standards Act investigation process, calculation of back wages, interview process, speaking with the employer, obtaining information, determining compliance, determining the authority of the WHD regarding monitoring compliance and back wage calculations. In her second year of employment she had Basic II training, a three-week long training that included training specific to additional statutes, including the SCA, Davis-Bacon and related acts and others. The training focused on specific information regarding requirements under those acts and investigation procedures. Tr. at 35-38.

She testified that she has also received additional training that involved participating in investigations where she was not the lead investigator.

She had agency training specific to the SCA, and has been a trainer at prevailing wage conferences where she trains the public, businesses and other government agencies as well as other SCA investigators. She testified that her training on the computation of unpaid fringe benefits and back wages has been extensive. She testified that she investigates a variety of labor laws, including the SCA, the Davis-Bacon and related acts, the Fair Labor Standards Act, and the H-1B provisions of the Immigration and Nationality Act. She stated that since she joined WHD she has been involved in approximately 300 compliance actions or investigations, and has been the lead investigator in approximately 200 of those. She testified that she has been involved in approximately ten to fifteen investigations under the SCA. She also supervised WHD investigators for several months as Acting Assistant District Director. She testified that a minimum of 90% of her investigations require reviewing payroll records. Tr. at 38-40.

Ms. Jacobson stated that she personally performed the WHD investigation of Northwest, which was an investigation under the SCA. She testified that employers who enter into contracts with the federal government covered by the SCA have certain requirements, such as a minimum wage, payment of fringe benefits, and providing notice to employees of the fact that the work is subject to the SCA. She testified that under the SCA, an employer is permitted to pay more than the minimum wage, but may not incorporate a fringe benefit into that wage. Tr. at 40-42.

Ms. Jacobson testified that she was assigned to the Northwest investigation in April 2012, and WHD

conducted an investigation of a two-year period from May 15, 2010 through May 12, 2012. She initially looked at Northwest's website to obtain information about the corporation. When she went to Northwest's office for an initial meeting in May 2012, she asked to speak to Joel Holstad or Wayne Holstad because Wayne Holstad was listed as the CEO on the website and her research indicated that Joel Holstad was potentially a corporate officer. Neither was available when she appeared for the initial meeting so she spoke with another employee who told her she would have to speak with Joel Holstad. She met ;with Joel Holstad on May 14, 2012 and informed him that WHD would be looking into the SCA and also possibly the Fair Labor Standards Act. She learned that Joel Holstad was the Chief Operations Officer ("COO"). He indicated that Wayne Holstad was the Chief Executive Officer ("CEO") and 100% owner of the company. Joel Holstad said he did not own any of the company. Tr. at 42-46.

In the course of the investigation, Ms. Jacobson requested various records from Northwest, including the Contract and any modifications, payroll for the two-year period starting in May 2010, any corresponding daily or weekly time records for employees, a list of employees and their classification wage rate, any fringe benefits documentation of fringe benefits paid to a third-party plan or trustee or to any kind of benefit program, as well as any information about cash wages paid in lieu of fringe benefits. Northwest produced a copy of the Contract with HUD for Minnesota, many payroll records for the two-year period of time in question and two months of invoices from Medica, an insurance company. Ms. Jacobson identified GX 1 as the Contract between Northwest

and HUD for the State of Minnesota. She testified that page three of the Contract identifies the services to be provided as real estate property sales closing services for single family properties owned by HUD in the State of Minnesota. She testified that page two of the Contract shows the estimated value of the Contract in the first year to be $285,361. She testified that that because the contract value was over $2500, the Contract is subject to the SCA.[15] Ms. Jacobson testified that the wage determinations applicable to the Contract are specified at section H.5 on page 34 of the Contract as 2005-2287 (Revision 8). She explained that wage determinations establish the base wage, which is the minimum wage, and fringe benefits applicable to employees working on the Contract. The fringe benefits are set forth separately from the minimum wage. Tr. at 40-53.

Ms. Jacobson identified wage determination 2005-2287 (Revision 8), the initial wage determination applicable to the Contract, as GX 3. She testified that the wage determination requires the employer to provide health and welfare fringe benefits and vacation and holiday pay, as set forth on page 7 of GX 3.[16] She testified that in this case, fringe benefits

[15] The witness noted the reference on page 38 of the Contract to Federal Acquisition Act (hereinafter "FAR") section 41-52.222-49," Service Contract Act". *See* GX 1 at 35-39, incorporating other sections of FAR. These sections can be found at 48 C.F.R. §§ 52.100- 52.2S3-l.

[16] The amounts listed are $3.35 per hour or $134.00 per week or $580.66 per month. Paid vacation and holidays as set forth are also required. Page 1 of GX 3 indicates that this wage determination applies to the states of Minnesota and Wisconsin. Ms. Ferris testified, as GX 3 states, that the applicable fringe benefits follow the occupational listing. She said that the fringe benefit amount is the same regardless of the wage amount.

totaling $70,243.04 were found to be due to ten workers.[17] She testified that she received no documentation from Northwest stating what the wage classification for these employees was. She testified that they were eventually given some information from employees and from Joel Holstad, but it was not specific enough to show what classifications the employees were working in. She stated that when the option year extension of the Contract occurred there was a modification to the Contract that included an updated wage determination. The witness identified GX 5 as the modification of the Contract,[18] dated March 11, 2011, extending the Contract for twelve months, from April 22, 2011 to April 21, 2012.[19] The modification states that it incorporates wage determination 2005-2287 dated September 3, 2010. Ms. Jacobson identified this wage determination as GX 4, wage determination 2005-2287 (Revision 10), and noted the increase in the minimum wage and fringe benefit amounts.[20] Tr. at 53-63.

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[17] In Complainant's Post-Hearing Brief, Complainant indicates that the figure of $70,243.04 is in error because it erroneously includes $2,349.26 in holiday pay (referencing GX 10 at 8-9), which the Administrator is not requesting in this action. The correct figure is therefore $67,893.78. GX 9 and GX 10 show that the period for which recovery is sought is from May 15, 2010 to May 5, 2012.

[18] The modification is signed only by the Contracting Officer and not by Northwestern. Ms. Jacobson testified that this was the copy they obtained in discovery from Northwestern. Counsel for Wayne Holstad stated Respondents were not objecting to the document on that basis. Counsel for Administrator pointed out that Section E on the first page of the modification indicates that the contractor is not required to sign the document. Tr. at 60, 62.

[19] GX 5 states that as a result of the modification, the obligated amount of the contract and the estimated value of the contract are increased by $578,300.00, from $470,361.00 to $1,048,661.00.

[20] The fringe benefits amount is increased to $3.50 per hour or

Ms. Jacobson testified that to be in compliance with the SCA, employers must pay health and welfare benefits to their service employees. She stated that the health and welfare obligation can be discharged by providing employees with insurance to cover health or sickness or disability (e.g., health insurance or dental or vision insurance), or other programs such as a 401(k) plan. Employers can also discharge their health and welfare obligation by paying a separate cash amount instead of the benefits. If the employer chooses this option, the cash amount in lieu of fringe benefits must be at least equal to the amount indicated for health and welfare benefits (e.g., $3.50 in OX 4), and must be separately stated on the paycheck and in the payroll records. She testified that the additional cash wage cannot be integrated into the minimum wage, and that if the employer pays a wage higher than the minimum wage, the excess amount cannot offset their liability for health and welfare benefits. Employee contributions do not count toward the health and welfare benefit amount. Ms. Jacobson testified that Northwest was to pay $3.35 per hour in health and welfare benefits before April 11, 2011 and $3.50 per hour after that date.[21] Tr. at 64-66.

Ms. Jacobson testified that to determine whether an employer is paying the correct health and welfare benefits, she looks at payroll records and time records that show the rates paid and the number of hours paid and supplemental records that show any payments by the employer to a third-party plan such

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$140.00 per week or $606.67 per month. GX 4, p. 7.

[21] Ms. Jacobson clarified that fringe benefits are only due for hours paid up to 40 hours per week (2080 hours per rear). Tr. at 66-67.

as a health insurance program. She stated that simply looking at the wage rate listed does not show whether or not fringe benefits have been paid. She testified that the records she received from Northwest were the Contract, incomplete payroll records[22] and two monthly invoices for November and December 2011 indicating payments made to Medica, a health insurance company. She stated that she did not receive health insurance records for other months and did not receive other requested records. She said that the records she received did not include all the records that the SCA requires the employer to keep.[23] She testified that the records did not segregate SCA covered work from non-SCA work, as required by the regulations. She said that where an employer does not segregate out the hours, she has to assume that all hours are subject to the SCA requirements. She said that the two months of health insurance invoices they received did not separately show the employer and employee contributions. Tr. at 67-71.

Ms. Jacobson identified GX 33 as containing all of the pay and time records produced by Northwest. She testified that the records produced were not sufficient to determine whether or not Northwest properly paid the required health and welfare benefits, because the records did not include the number of hours worked on SCA versus non-SCA work, the daily and weekly hours worked, whether a cash fringe

[22] She testified that the payroll records were missing certain pay dates for certain employees and did not include the classification of the employees or the daily or weekly hours worked. Tr. at 70. She testified that the only payroll records and insurance benefit records produced were GX 11 and GX 33. Tr. at 86.

[23] GX 30 is the Administrator's Request for Production of Documents to Northwest.

benefit was paid in lieu of health and welfare, or any information about the employer's contributions to health and welfare.[24] They also did not include information sufficient to determine whether employees were properly classified and paid.[25] Using one employee as an example, Ms. Jacobson explained how to read the payroll information provided.[26] She stated that Northwest used a semi-monthly payroll and noted that a daily payroll was required and would have made it easier to determine whether Northwest was in compliance. She noted that the format of the payroll records for the years 2010 and 2011 was different than the format for 2012 (comparing the records at page 5 of GX 33 to those at page 82 of GX 33).[27] Tr. at 71-82.

Ms. Jacobson testified that the payroll records produced by Northwest did not clearly show that it made cash payments to employees in lieu of health and welfare benefits. She stated that the only records received that showed that Northwest paid for any health and welfare benefits were two invoices from Medica, a health insurance company (GX 11). These

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[24] She testified that the category in the payroll records labeled "IP Med Ins," which she presumed to be medical insurance, did not show an employer contribution to medical insurance. She stated that none of the payroll records showed a contribution to health insurance or to any other type of insurance. Tr. at 75-79.

[25] Although it is not now an issue in this case, Northwest and Wayne Holstad contended that all of the ten affected employees were classified as General Clerk I. *See* GX 26, page 12.

[26] The witness used as an example Jennifer Christensen at page *5* of GX 33. Tr. at 71-79.

[27] She also discussed another type of record produced, an Employee Earnings Record for individual employees, which also did not contain the required information. Tr. at 81-82 (discussing page 84 of GX 33).

invoices listed a total premium for each employee during the months of November and December 2011. She stated that records for all of the period being investigated were requested.[28] Tr. at 82-86.

Ms. Jacobson testified about how she reached her conclusions regarding violations of the SCA requirements regarding fringe benefits. She stated that she reviewed all of the records provided, which were incomplete, to make a determination.[29] She testified that whenever possible she gave Northwest credit toward the fringe benefit amount. She said this included the insurance invoices for November and December 2011 (GX 11) even though the records do not segregate out the portions of the premiums paid by Northwest and by the employees.[30] She further testified that page 7 of GX 4 shows that the amount of the health and welfare obligation for November 2011 was $607.00 for the month. She testified that since her

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[28] Ms. Jacobson testified that Joel Holstad was Northwest's representative for the investigation and that she met with him twice and exchanged telephone calls and emails. She identified GX 20 as the exhibit containing the emails. Tr. at 84-85.

[29] Ms. Jacobson testified that the Government Exhibits include all the payroll records used to calculate unpaid fringe benefits and all the payroll records for the ten subject employees during the relevant period that were produced by Respondents during the investigation and discovery. Tr. at 116-117.

[30] Ms. Jacobson explained how they determined the portions paid by the employer by using as an example page 3 of GX 11 and employee Karla Cochran. She explained that the "charge amount" shown on this page for Ms. Cochran is $297.32. She then looked at the payroll records (GX 33) to find the amount, if any, deducted from that employee's paycheck for medical insurance premiums. She subtracted from the total "charge amount" the amount shown in the payroll records as the employee's contribution and gave Northwest credit toward its health and welfare obligation for the remaining amount. Tr. at 88-93

investigation in 2012 and 2013, she has not seen any records in addition to GX 11 that would allow her to credit Northwest with additional amounts. Tr. at 86-93.

Ms. Jacobson identified GX 10 as the "Fringe Benefits Wage Transcription and Computation Worksheet", which consists of separate worksheets for each of the ten affected employees showing the amount of the underpayment. She stated that the information on these worksheets was taken from the employee's payroll records. Using page 2 of GX 10 as an example, she testified that the number of hours in the "Total Hours Worked" column may be more than in the "Hours Paid" column if the employee was paid for a holiday or vacation days. She stated that the health and welfare benefit is due for all hours paid up to 40 hours a week and 2080 hours a year. She said it is difficult to know if the Northwest properly paid for holidays and vacation days without complete records. She said that Northwest did not produce daily or weekly pay records or information to allow her to determine employee anniversary dates in order to calculate vacation pay owing. Therefore the amount calculated for health and welfare benefits does not include vacation pay. The amount does include holiday pay for two employees, and it includes the hourly health and welfare benefit amount for all ten affected employees. Noting the column on page 2 of GX 10 marked as "H & W" and the column adjacent to it marked as "$3.50," Ms. Jacobson explained that the health and welfare benefit for this time period, $3.50, applies only up to 40 hours a week. Therefore, for the row indicating pay date 9/9/11, where the employee worked 70.25 hours of which 3.5 hours were overtime, the number of hours for which the health and welfare

benefit had to be paid was 66.75, because the overtime hours, over 40 hours per week, are not subject to the health and welfare benefit. She stated that this computation gives Northwest the benefit of the doubt as it assumes the employee worked more than 40 hours per week. The amount owing for health and welfare benefits for this pay date is therefore $233.63 ($3.50 x 66.75). Tr. at 93-102.

Ms. Jacobson then explained how Northwest was credited for the amounts it did pay for medical insurance in November and December 2011. The witness referred to the rows toward the bottom of the page at page 2 of GX 10, for the months of November and December 2011. Using the row for the pay date of November 10, 2011, she stated that $100.02 (in the highlighted area) is the amount she assumed the employer paid toward the Medica insurance premiums by determining the amount paid by the employee and subtracting that amount from the total charge amount for the premium as shown on GX 33. The hourly credit was determined by dividing $100.02 by the number of hours paid *(i.e.,* $100.02 divided by 89 hours), with a resulting credit per hour of $1.12. For those hours, Northwest would therefore owe $3.50, less the credit amount of $1.12, multiplied by the number of health and welfare hours. In this instance, the figure of $211.49 under the column labeled "Total SCA Fringes" indicates the amount to be added to the $100.12 to determine the amount that should have been paid. Ms. Jacobson also clarified that the last column, titled "Total Back Wages," represents the amount of the unpaid fringe benefits. She stated for this specific employee, the total amount of unpaid fringe benefits for the two-year period investigated was $2,391.10.[31]

[31] The total reflected at the bottom of the page is $2,391.19. This

Tr. at 102-07.

Ms. Jacobson identified GX 9, titled "Summary of Unpaid Wages," as a summary of the unpaid fringe benefits. She testified that column 5, "BWs due," reflects the total amount of unpaid fringe benefits for the ten affected individuals on page 2 of the sheet, *i.e.,* $70,243.04. The ten individuals listed on this summary were those that were determined to be Northwest employees, subject to the SCA, who worked on the Minnesota HUD contract.[32] Tr. at 107-12.

Ms. Jacobson testified that as a result of the investigation, she concluded that Northwest Title, Wayne Holstad and Joel Holstad were all "parties responsible."[33] She stated that her determination that Wayne Holstad was a responsible party was based on his status as CEO and owner of 100% of the company, his supervisory authority over the higher-level managers and his control of the operations of the company. She stated that she determined this from her conversations with Joel Holstad and Northwest

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is the amount shown for this employee on the Summary of Unpaid Wages (GX 9).

[32] The Minnesota contract is the contract at issue here. Ms. Jacobson testified that it is "very likely" that there were other employees of Northwest subject to the SCA during this time period working on the two other HUD contracts Northwest had for the states of Wisconsin and Missouri. She stated that because of the lack of records and availability of those employees, it was not possible to detem1ine which employees worked on which contract and when. Tr. at 110-111.

[33] Tr. at 112. Section 6705(a) of the SCA provides: "Liability of Responsible Party. - A party responsible for a violation of a contract provision required under sections 6703(1) or (2) of this title or a violation of section 6704 of this title is liable for an amount equal to the sum of any deduction, rebate, refund, or underpayment of compensation due any employee engaged in the performance of the contract." *See also* 29 C.F.R. § 4.187(e).

employees and research from Northwest's website. She testified that she toured Northwest's office. She said she did not speak to Wayne Holstad during the course of the investigation. She did speak to Lisa Erickson, a Northwest employee who is now deceased, and was present at the deposition of Wayne Holstad. Tr. at 112-14.

Ms. Jacobson testified that she found other violations of the SCA in addition to non-payment of fringe benefits and record keeping. She determined that there was a failure to provide notice to employees as required by the SCA, *i.e.,* Northwest did not post a SCA poster in a conspicuous place or otherwise provide such information to employees, and did not provide the information contained in the wage determination.[34] She stated that during her site visit she asked to be shown where the poster was and where the wage determination was posted, and that there was no posting. She also spoke with employees and "they did not know they were subject to the Service Contract Act for the most part, let alone the prevailing wage requirements nor the fringe benefit requirements." With regard to compliance with the record-keeping requirement,[35] Ms. Jacobson stated that Northwest's records were "by far the worst that I had ever seen on an SCA contract." Tr. at 115-16.

On cross-examination by counsel for Wayne Holstad, Ms. Jacobson stated that she has not taken any courses in forensic accounting. She agreed that record retrieval would be complicated by the fact that a business is no longer operating. She noted that the

[34] 41 U.S.C. § 6703(4) requires notice to employees of the required compensation (minimum wage and fringe benefits).

[35] *See* 29 C.F.R. § 4.6(g) and 4.185.

SCA requires the employer to retain the relevant records for three years after completion of the contract.[36] She testified that she received training in how to determine the responsible party. She testified that at the time of the investigation, Joel Holstad stated that he was running the company on a day-to-day-basis. Joel Holstad indicated that Northwest was winding down its operations. As the representative for Northwest for the investigation, he was the person to whom Ms. Jacobson directed questions regarding employee benefits and requests for records. Ms. Jacobson further agreed that she did not speak to Wayne Holstad during the investigation and that he was not on site during the on-site visits. She reiterated that her determination that Wayne Holstad was a responsible party was based on information from Joel Holstad, conversations with employees and public information available on Northwest's website. Ms. Jacobson agreed that since December 2011, Joel Holstad exercised control, supervision and management over performance of the HUD contract, but stated that multiple people can have such authority. The witness was shown Exhibit A to the Administrator's response to Joel Holstad's Motion to Dismiss. She agreed that her Declaration states that her "investigation also disclosed that at least after December 27, 2011, Wayne Holstad was not operating Northwest Title, and that Joel Holstad was operating the day-to-day operations of Northwest Title in his absence."[37] She testified that she was not assisted in the investigation by any other investigator. Tr. at 118-37.

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[36] *See* 29 C.F.R. § 4.6(g) and 4.185.

[37] The Declaration is Attachment A to Administrator's Response to Respondent Joel Holstad's Motion to Dismiss, filed October 10, 2014.

On cross examination by counsel for Northwest, Ms. Jacobson was asked to refer to page 39 of the Contact, a section titled "Key Personnel." (GX 1). She testified that during her investigation she did not speak to any of the three individuals identified in that section. She testified that page 1 of the Contract showed that it was signed by "John Lindell, General Counsel." She testified that during the course of the investigation she did not speak with John Cerrito, Kimberly Schultz or Tom Foley. She stated that she did not request payroll records directly from the Paychex, the company that provided the payroll records in GX 33, or from Medica regarding health insurance. Ms. Jacobson testified that she did not know whether Northwest ever received the full contract amount (referring to page 4 of GX 33), indicating that that was not part of the investigation. She testified that she was not aware of the specifics of the payment schedule or payment amounts in the Contract. She testified that she was not aware of any document granting option year number two under the Contract. Tr. at 140-50.

Ms. Jacobson testified that she believes it very likely that the subject employees did perform non-Contract work as well as Contract work, based on her conversations with Joel Holstad and employee interviews. She testified that the categories of the individuals identified in GX 10 were based on their statements to her in her interviews of those employees who were accessible to her. She also spoke to Joel Holstad and Randy Kamstra. During her investigation, she was told that employees reported their hours worked and they were then entered into Paychex. She was also questioned, in the context of GX

6, about what constituted Contract work. She was also asked about records she received from Northwest and whether she declared them unacceptable. She stated that she reviewed all the records. Tr. at 150-58.

On redirect examination, Ms. Jacobson stated that the records she received from Northwest were not adequate because, based on the regulations, they were missing information. With regard to her testimony that she believed it very likely that some employees performed non-Contract work, she said it would be impossible for her to estimate the amount of such work. She stated that based on speaking with Joel Holstad and the employees, she believed the majority of the work was covered under the SCA. She said the records provided by Northwest did not indicate "at all" how much work was Contract work or non-Contract work. She stated that the applicable regulations require an employer who performs both contract work and non-contract work to designate which hours are subject to the SCA and which are not. She testified that since she concluded the investigation in early 2013, additional Northwest records were produced in discovery and are included in GX 33, but that those records also did not segregate Contract work hours and non-Contract work hours or show any differential cash payments or fringe benefits. With regard to her conclusion that Wayne Holstad was a responsible party, she stated it was based on his status as CEO and 100 percent owner, and his ability to control the operations of the company either directly or indirectly. She clarified that Wayne Holstad was 100 percent owner of a company called "Wayne B. Holstad PLC," which is the 100 percent owner of Northwest. She stated that she first visited Northwest on May 7, 2012, and that the period under investigation was May 14,

2010 through May 12, 2012. She testified that Northwest was still operating at the time she visited and there were employees still performing work under the Contract.

Ms. Jacobson testified that since signing the Declaration concerning Joel Holstad in connection with the Administrator's response to his motion to dismiss, she attended the deposition of Wayne Holstad in 2016 and no longer believes that it was only Joel Holstad operating the day-to-day operations of Northwest after December 27, 2011. She stated that based on the new information' she would probably word the Declaration differently. She stated that she does not agree with the characterization of counsel for Wayne Holstad that Northwest "totally imploded" when she was there, because people were still performing work. She stated that, to her knowledge, Northwest still exists. With regard to health insurance benefits, she stated that she was told by some employees that they did not receive health benefits, and the employees indicated on the Medica invoices were unsure of how long they had insurance. Ms. Jacobson was asked about the second full paragraph on page 2 of GX 6, the statement by Lisa Erickson. Ms. Erickson's statement indicates that since December 12, 2011, when Northwest lost its underwriter, "all of the contracts [were] pretty much "HUD," and that before that date "probably about 75% of the time they were HUD contracts." Ms. Jacobson testified that she took this statement from Ms. Erickson and the handwritten notation after this paragraph is Ms. Erickson's writing. Tr. at 158-80.

Joel M Holstad[38]

[38] Joel Holstad's testimony is at transcript pages 181-90 (direct

Joel Holstad testified that he is the brother of Wayne Holstad. He testified that he entered into a settlement agreement with the Administrator. He said he worked at Northwest beginning December 27, 2011 and ending August 30, 2012. He started working there because Wayne Holstad asked him to help over Christmas 2011 because employees were leaving and "he needed someone to help him hold together the operation so that he could determine what was going on." He testified that Stewart Title, the underwriter Northwest had prior to December 12, 2011, terminated its relationship with Northwest a few days before December 12th. He testified that he was involved in conversations in January to try to revive the relationship. He said that he was not brought into Northwest specifically to try to revive the relationship with Stewart Title, but "to try to save whatever could be saved at Northwest Title." He testified that he agreed to help because his mother had advanced Northwest approximately $180,000 and he did not think she would recover it if he did not intervene. He was given the title of Chief Operating Officer, a role he held until he left the company. He testified that he believed Wayne Holstad remained the CEO through August 31, 2012, and that he had no knowledge whether he was still the CEO currently. He did not recall that Wayne Holstad ever tried to tender his resignation as CEO to him. Tr. at 181-85.

Mr. Holstad testified that on approximately December 20, 2011, HUD decided to stop sending cases

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examination), 191-208 (rebuttal and cross examination), and 208-20 (redirect examination). This summary of his testimony will refer to Joel Holstad as Mr. Holstad and to Wayne Holstad by his full name.

under the contract with Northwest. He said that HUD gave two reasons for this, concerns about Northwest not having a title insurance agency contract, and HUD put something in the Federal Register about concerns with the weather in Minnesota. He testified that under his supervision, Northwest undertook to complete the files it had been assigned prior to the cessation of new orders, without compensation. That work was finished in approximately April or May 2012. He said that Northwest was also doing other title-related services when he started work there. He testified that he received no compensation from Northwest. Mr. Holstad was questioned about seven of the employees for whom complainant is seeking recovery of unpaid health and welfare benefits, and testified as to whether they were doing Contract work.[39] Tr. at 185-88.

Mr. Holstad testified that during his time as COO, to August 31, 2012, Wayne Holstad communicated with HUD on behalf of Northwest regarding Contact work. He said that Wayne Holstad remained the owner of the company during this period. He testified that he was not an owner of Northwest and has never been an owner. He stated that he did not hire Wayne Holstad to represent Northwest in this proceeding. During his time as COO, he testified that, aside from Wayne Holstad, other managers at the company were John Lindell, Contract Manager and Vice- President, who continued in that capacity through February 1, 2012. He said that Northwest did maintain the record of the corporation, which would include copies of share certificates, shareholder

[39] The employees he was asked about were Timothy Bohl, Karla Cochran, Kelsey Cochran, Cynthia Orloff, Barbara Smith, Lisa Stolp, and Gilbert Wenzel.

resolutions, board minutes and similar matters, but that he has never seen it. Tr. at 188-90.

On questioning by counsel for Wayne Holstad,[40] Joel Holstad testified that he has worked with Wayne Holstad in the past and is familiar with his management practices. He said that his brother is a stickler for corporate formalities and structure and believes in delegation through persons who have clearly delegated authority. He said it would not surprise him that Wayne Holstad says he is unfamiliar with the details of the HUD contract. He said that based on the fact that Northwest had a significant administrative task and the size of the company, he would expect him not to be familiar with the specific contract provisions. He testified that after December 2011 he (Joel Holstad) was in charge of the day-to-day operations of the company. He said that Northwest went from having 160 employees to 10 employees in two weeks. He assumed he was "broadly responsible" for everything, "mostly because there weren't any other decision-makers on the floor." He added that HUD would not allow him to have access to Contract information until the middle of February 2012. Tr. at 191-94.

Mr. Holstad testified that he cooperated with Ms. Jacobson's investigation, and provided records "to the extent that were possible." He stated that he provided her with thousands of pages of payroll records that "she rejected at the receipt of for reasons that I still find troublesome." He testified that

[40] Counsel asked that he be permitted to do his cross examination and rebuttal questioning of Joel Holstad at the same time because the witness had a medical procedure scheduled that would make him unavailable the following day.

Northwest provided evidence of the payments to Medica. He said he was unable to provide copies of checks for individual monthly premiums, but did find a statement from Medica that health insurance premiums had been paid fully up through February 1, 2012, and that this was supported by the payroll records he had provided showing that health insurance premiums had been provided on a roster to individual employees with the amount of the deduction made from each individual paycheck. He stated that Ms. Jacobson said she could not take any of it because it had been created by Paychex through online input of employees and not hand-generated by timesheets manually presented to management in the office. He said that the records were exhaustive and commercially produced, not under the control of Northwest but with direct control and verification by the employees.[41] He said Ms. Jacobson told him that did not follow the format required under the SCA, and that she needed handwritten timesheets for each employee going back three years, which did not exist. He said the records he provided showed three years of payments, and "it showed itemized deductions for health insurance premiums, to the extent the employees made payments, which leaves the residual as a payment on behalf of the employee." He said it also showed accrual of vacation time and sick time. He said the records were computer-generated records for 2010, 2011 and 2012. He said the 2012 records were less specific because he changed the payroll contract with Paychex to a much simpler system. He said because the system was encrypted it could not be

[41] He said it was an encrypted program where employees would input the data themselves, a third party would verify the information, and then the employees would verify the information before the payroll was generated. Tr. at 196.

altered by Northwest. He said that the records provided to Ms. Jacobson were about thirteen inches thick. Tr. at 194-99.

Mr. Holstad stated that he did not agree that he gave Ms. Jacobson records of only two months of insurance payments. He said he provided a statement to her from the health insurance provider indicating that health insurance premiums had been fully paid through February 1, 2012. He said Northwest also had a roster of employees who had been covered and the time period they were covered for showing that premium payments had been made all through 2012 and 2011. He said Ms. Jacobson told him that without checks for individual months payment of premiums she was not able to consider that information. Mr. Holstad said he could not provide the checks because he could not access that computer system because a prior manager who left the company refused to give them passwords,[42] and Northwest was also unable to obtain help from the software provider. He said that he made the decision to terminate the health insurance coverage, but that it was fully paid through February 1st. He also stated that Northwest provided life insurance coverage that all the employees benefited from. He stated that the monthly payments for health benefits were approximately $15,000 a month at the end. He testified that he believed about eighteen employees were covered by medical benefits, primarily employees in Minnesota. Mr. Holstad testified that Northwest went from doing a million dollars in gross revenues a month to $20,000 a month in ten days. He stated that Northwest had offices in

[42] He identified the individual as Patti Bahr, who was the accounting administrator who quit when Joel Holstad arrived. Tr. at 201-02.

ten states. Tr. at 199- 205.

Mr. Holstad also testified about his settlement agreement, and stated that he refused to accept an agreement that included debarment. He said he agreed to pay an amount that was equal to or greater than the claim asserted by the Administrator for the period he was responsible for, December 27, 2011 forward. Tr. at 205-07.

On redirect examination, Mr. Holstad testified that when he said Ms. Jacobson "rejected" the payroll records, he meant that she did accept them but said they were not sufficient. He said the documents were sent to her by email about two weeks after May 7th. He said that the records that are inaccessible on the computer program do not show separation of work between Contract work and non-Contract work. He testified that the records that show health and welfare benefits, to the extent Northwest had information about health and welfare benefits, were the records provided to Ms. Jacobson that she accepted but said she would not consider. When asked whether he issued a subpoena to Ms. Bahr to obtain the records on the computer system they did not have a password for, Mr. Holstad stated that the computer the data was stored on was destroyed "a long time ago" by whoever had storage of the machine. He said that he did not have custody of the computer. Mr. Holstad stated that he did not request records concerning checks to Medica from the bank because the bank does not keep information as to the identity of the payee on a check. He said he has never seen a bank statement that shows a payee. He said Northwest made exhaustive efforts to obtain the missing data before his contact with Ms. Jacobson because the company needed the

data to reconstruct tax returns and to find out what happened to the company. He said that he has never seen copies of the unobtainable documents Tr. At 208-14.

Mr. Holstad testified that he does not know how much Northwest paid to the employees in fringe benefits. He said he had that calculation but "we no longer needed the information when we entered into the settlement agreement." He said that this information was delivered to Ms. Jacobson in June of 2012 and she refused to consider it. He said the Paychex records showed an accumulation of available sick time and vacation accrual, and that there is a dollar value to those accruals that is a function of the wage rate. He said that the employees had an amount of hours available to them that they could take as uncompensated time. He stated that the amount Northwest paid for health insurance premiums in 2010 and 2011 could be calculated by determining the amount deducted from the employee's paycheck for health insurance and deducting that amount from the amount actually paid. He said he knows the premiums were paid because the health insurance provider confirmed it for them in a letter, which he gave to Ms. Jacobson at the time of their meeting, but she said she could not consider it. He did not know if it was produced during discovery. He said there were ongoing conversations in which Northwest indicated that Ms. Jacobson's calculations for unpaid wages were not consistent with the Paychex records. Tr. at 216-20.

Mr. Holstad agreed that since he was not working for Northwest before December 27, 2011, he did now know exactly what role Wayne Holstad had. Tr. at 220.

Lisa M Rausch[43]

Ms. Rausch testified that her last name was "Stolp" before she married in August 2014. She is a former employee of Northwest. She worked for Northwest from May 2011 until she left the company in February 2012. She was hired by John Cerrito, who was the part-time human resources employee for Northwest. She did not receive an orientation when she started work there. She was paid twice a month and was an hourly employee. She started as a post-closing assistant, at $14 an hour, and was promoted to an extension coordinator in August 2011, at $16 an hour. She performed administrative and clerical work including getting funds from buyers who were purchasing a HUD home. All of this work was on the Minnesota HUD contract. She testified that Northwest provided closing services for homes that were foreclosed on in Minnesota, and did the title closing services on behalf of HUD, the seller. She worked on the HUD contract for all of her employment at Northwest, and 100% of her work was on the HUD contract. She was full-time, working 40 hours per week or more. Her direct supervisor was Kimberly Schultz, who was the Minnesota HUD contract manager. Ms. Schultz was responsible for supervising the staff who prepared the files for closing, including post-closing, prior to closing and processing of the files for HUD. She testified that everyone who worked under Ms.

[43] Ms. Rausch is listed as Lisa Stolp in Attachment A to the Complaint and in the Administrator's Amended Prehearing Statement. Her testimony is at transcript pages 221-46 (direct examination), 246-51(cross examination), 251 (redirect examination), 251-55 (recross examination), 255- 57 (redirect examination) and 257 (recross examination).

Schultz worked on the HUD contract. She said the Ms. Schultz' boss was Wayne Holstad. She said Ms. Schultz deferred to Wayne Holstad for any questions she had relating to the Contract. She said Wayne Holstad was listed as the owner of the company and communicated with Kimberly about issues that came up on the HUD contract. She said Ms. Schultz was right below Wayne as far as dealings with the production staff for the HUD contract. It was Ms. Rausch's belief that Wayne Holstad was in charge of the company and had overall control of the business. Tr. 221-30.

Ms. Rausch testified that the office consisted of two buildings, one in which the production staff and accounting, human resources and others worked in. Next door was the law office of Wayne Holstad, where there was a room used for all of the HUD closings. She testified that she does not recall ever meeting Louis White or John Lindell, but believed they were employees of Northwest. She stated that no one at N011hwest told her that her work on the HUD contract was subject to the SCA, or explained the requirements of the SCA. She said she was not told that she was considered a General Clerk I, and said no classification was given to her. She said no one at Northwest ever told her what fringe ben fits the company was required to provide to her for her work under the Contract. She said she was not told about the concept of fringe benefits or health and welfare benefits or the concept of cash differential payments under the SCA. She said she never heard from Northwest that it was to pay a certain amount each month for certain benefits. She testified that she did receive health insurance from the company for a portion of the time she was there, about six months or

less. She paid a portion of the premium, which was deducted from her paycheck. She did not know whether Northwest paid any of the premium. She said she paid about $150 a month for the insurance. She testified that her paychecks did not indicate that Northwest paid a share of the health insurance premiums. She testified that she decided to purchase health insurance outside the company because it was cheaper, and told Northwest to stop the deductions from her paychecks. She testified that after this, her hourly wage did not change. She testified that she believed that life insurance was also taken out of her paycheck, less than one dollar per paycheck, and she is not sure if the employer contributed to that or not. Tr. at 230-35.

Ms. Rausch testified that during her time at Northwest no one in management showed her the document entitled "Employee Rights on Government Contracts" **(GX 8),** and she did not recall seeing it hanging in the office. She also testified that no'one in management showed her the Wage Determinations admitted as GX 3 and GX 4, but stated that she has seen these three documents previously when she was doing online research on her own in December 2011. She was not aware of them prior to that. She testified that she believes that after she found them online she showed them to a couple of other employees, one of whom was Jen Christiansen. She did not think that the employees had ever seen the documents before she showed them to them but was not sure. Tr. at 235-41.

The witness testified that she was never required to segregate hours for time spent working on Contract work versus non-Contract work, but that all of her work was Contract work. She stated she did not

believe there was an option in the pay system to change anything for Contract or non-Contract work but she was not positive. She testified that she worked with Jennifer Christensen, Karla Cochran, Kelsey Cochran, Cynthia Orloff, Barb Smith, Lisa Erickson and Gilbert Wenzel, and she believed they all did work for the Minnesota HUD contract. Tr. at 241-44.

On cross examination by counsel for Wayne Holstad, Ms. Rausch testified that she worked for Northwest for about eight months. She received health benefits for about six months, but then obtained health insurance outside the company that was less expensive. She testified that she spoke with Ms. Jacobson when she was conducting the investigation. She did not recall if she told Ms. Jacobson the period of time for which she received benefits from Northwest but does not think she told her anything inconsistent with what she testified to. With reference to OX 8, she stated that she did not recall seeing it anywhere on the walls of the Northwest offices but agreed that if it had been there she may not have seen it. She stated that her last day of work at Northwest was February 13, 2012. She was asked if she was an employee of Northwest when she saw "this."[44] Tr. at 246-51.

On redirect examination, the witness again stated that her wages did not change after she canceled the insurance she had through Northwest. Tr. at 251.

On cross examination by counsel for Northwest (Wayne Holstad), Ms. Rausch reiterated that she did not remember ever meeting Louis White or John

[44] The reference appears to be to GX 8.

Lindell, but did meet Wayne Holstad. She stated that she was never present during the conversations between Wayne Holstad and Kimberly Schultz. Ms. Rausch stated she was familiar with the "Gators" software system she used at Northwest. She testified about her duties at Northwest and about the content and locations of her conversations with other Northwest employees. Tr. at 251-55.

On redirect, Ms. Rausch was asked how she knew that Kimberly Schultz had conversations with Wayne Holstad and explained the basis for her knowledge. She testified that the positions held by Northwest employees changed from time to time, especially during the end of her employment. She stated that she met Wayne Holstad towards the middle of the time she worked at Northwest. Tr. at 255-57.

Jennifer M Christensen[45]

Ms. Christensen is a former employee of Northwest. She worked for the company from August 22, 2011 until "just after" January 1, 2012. She was hired by Kimberly Schultz. She testified that she did not receive an orientation when she was hired or thereafter. She was paid twice a month at the rate of $15.00 an hour. She worked on the Minnesota HUD contract. She explained her understanding of what that contract entailed. Her job was primarily to answer telephone calls, and she also accepted mail. She said that to her knowledge all of her work was on the HUD contract. Her direct supervisor was Kimberly

[45] Ms. Christensen's testimony is at transcript pages 258-68 (direct examination), 268-77 (cross examination) and 277-80 (redirect examination).

Schultz, who was the Minnesota HUD Closing Manager. She believed Wayne Holstad was Ms. Schultz's boss because when she had questions she said she would get in touch with Wayne Holstad. Ms. Christensen said she did not recall meeting Wayne Holstad. She said she thought he was in charge of the company because he was listed as owner of the company, his law offices were across the alley, and all the closings for the HUD homes were done c1;t his office. Tr. at 258-63.

Ms. Christensen testified that she was never told of the requirements of the SCA or that she was considered a General Clerk I. She stated she was not told about fringe benefits or health and welfare benefits, or that she would receive additional cash benefits if she did not take health and welfare benefits. She was not told that Northwest was to pay a certain amount each month for certain benefits. She testified that she received health insurance for November and December 2011. She said deductions for the insurance were taken out of her paycheck. She said Northwest covered a portion of the premium for her insurance. She did not know the amount but estimated it was about 50%. She said that her paycheck did not increase when she no longer received health benefits.[46] She did not recall if she received life insurance. When asked about GX 3, GX 4 and GX 8, she testified that they were not shown to her at Northwest and this was the first time she had seen any of them. She testified that no one at Northwest told her what her SCA job classification was. She testified that she reported her

[46] The witness testified that November and December 2011 were the last two month she was at Northwest, but that she was to receive a paycheck in January, which she eventually received. Tr. at 273-7S. It is not clear what time feriod this check was for.

hours by logging into Paychex and pushing a button to clock in and to clock out, and that she did not have to specifically indicate a given amount of time spent on work on the Contract. She stated that there was no place on the Paychex system to differentiate whether she was doing Contract work or non-Contract work. Tr. at 263-68.

On cross examination by counsel for Wayne Holstad, Ms. Christensen testified that she left Northwest because her employment was terminated by Joel Holstad, and that November and December 2011 were her last two full months at the company. She stated that she would have no reason to dispute that in her employee interview statement[47] she said that she received medical benefits for two of the four and one-half months she worked for Northwest. She stated that John Lindell worked in the offices where Wayne Holstad was located, where the closings took place. She did not know what Mr. Lindell'sjob was but believed he was an attorney. Tr. at 268-76.

On cross examination by counsel for Northwest, Mr. Holstad asked whether the witness described her position in the employee interview with Ms. Jacobson as "administrative assistant," and said that it was likely she did because her job involved more responsibility than just answering phones. Tr. at 276-77.

[47] My Order Denying Respondent Joel Holstad's Motion to Compel Withheld and Redacted Documents, issued May 12, 2016, indicated that if any of the informants testified for Complainant at the hearing, the Administrator must make such witnesses' unredacted statements available to Respondents for cross-examination.

On redirect examination, Ms. Christensen stated that she had dependent medical insurance coverage for her husband, but that she had to pay for that herself. Tr. at 278-79.

Wayne B. Holstad[48]

Mr. Holstad testified that he is Joel Holstad's brother and the CEO of Northwest. He graduated from college in 1976 after studying economics and graduated from law school in 1980. He has been practicing law since 1980 and is admitted to the bar of Minnesota. He currently practices law, civil litigation, with the firm of Holstad and Knaak. He testified that he started a title insurance company in 1983 called Northwest Title and Escrow Corp., which is a different company than Northwest. He has been in business since he began to practice law. He testified that Northwest Title and Escrow Corp. ceased doing business in 2006, and that Northwest was a subsidiary of Northwest Title and Escrow Corp. He testified that his law firm, Wayne B. Holstad, PLC, purchased Northwest in 2006, and that he is the only member of his law firm. He said that he had always been the sole shareholder of Northwest. He stated that Northwest provided title searches and settlement services to its clients and at various times had offices in between ten and fifteen states. He testified that the number of employees varied, but at one point it employed 75 to

[48] Wayne Holstad was called in the Complainant's case as an adverse witness. His testimony is at transcript pages 285-339 (referred to in transcript as direct examination), 339-58 (examination by counsel for Wayne Holstad, referred to in transcript as cross examination), and 358-65 (referred to in transcript as redirect examination) and 365- 67 (questions by ALJ). This summary of his testimony will refer to Wayne Holstad as Mr. Holstad and to Joel Holstad by his full name.

200 people. He testified that the main office was in Minnesota. Tr. at 285-89.

Mr. Holstad testified that Northwest is no longer actively doing business, and that the last time it had an active business was in August 2012. He testified that Joel Holstad was to purchase Northwest on December 23, 2011, but did not follow through and Mr. Holstad never received any money. He said there was a verbal agreement, and he followed up with a signed contract, but Joel Holstad never signed it. Mr. Holstad stated that he served as Northwest's CEO until at least August 2012, but that "[a]t this point I'm just the party remaining." He said that Minnesota has a statute that when a company is going through dissolution proceedings any remaining shareholder, officer or director can do what is needed to wrap up the company's affairs. He said he does not serve as CEO. He said Northwest is in the process of being dissolved. He testified that he also served as chairman of Northwest and as a board member. He said he served as President at various times. He agreed that he managed Northwest as CEO. He said that he and John Cerrito would meet once a year and formally elect the officers of the company. He said there would be two documents, a written waiver of the notice of the meeting and a unanimous writing of directors with a resolution electing the officers. Mr. Holstad identified GX 23 as an example of what he was referring to. Mr. Holstad agreed that the second page of GX 23 indicates that he was made President of Northwest a month before the Contract was signed. He said that John Lindell was Secretary until he resigned in February 2012 and then he (Mr. Holstad) became Secretary again. Mr. Holstad stated that he maintains the corporate record books. He agreed that he managed

the managers at Northwest and that there was no one above him to whom he reported. He agreed that he had the ability to delegate authority and to take it back. Tr. at 289-96.

Mr. Holstad testified that he is familiar with the Contract and that it was primarily for the preparation of title search reports and settlement services for HUD. He said the management group discussed the decision to bid on the Contract, but that it was he who ultimately decided to go forward with the bid. He also bid on two identical contracts for Missouri and Wisconsin. He stated that Northwest had existing offices in all three states. He believed these were the first government contracts Northwest bid on. Mr. Holstad identified GX 2 as Northwest's proposal for the Contract. He stated that he hired Wayne Olhoft to prepare the proposal. He said he had a discussion with Mr. Olhoft about the classification of employees in the upper two categories, closers and title examiners. He knew there were three service contract categories. He agreed that page two of GX 2 identifies him as the person authorized to sign the offer. Mr. Holstad testified that he was involved in estimating the prices for each contract item. He agreed that no amount for fringe benefits was included on the Cost and Pricing Proposal (GX 2, p. 6). He also agreed that no amount is shown for the "Fringe Benefit Rate" (GX 2, p. 24). Tr. at 296-305.

Mr. Holstad stated that he was one of the title examiners for the Contract after the initial title examiner died. He testified that after the initial proposal was submitted to HUD, HUD wanted some changes and clarifications before Northwest was awarded the contract. Mr. Holstad identified GX 1 as

the Contract. He agreed that the contract period began April 19, 2010 and that HUD exercised one contract year option (referring top. 29, paragraph F.2). Mr. Holstad agreed that the Contract was worth more than $2,500. He further agreed that Wage Determination 2005-2287 (Revision 8) applied to the Contract (referring to GX 1, p. 34). He stated that he never read the Contract until after John Lindell resigned in February 2012. He agreed the Contract incorporates the terms of the SCA, and that the Contract requires compliance with the SCA. Tr. at 305-09.

Mr. Holstad agreed that GX 3 is the wage determination referred to in the Contract, 2005-2287 Revision 8. He agreed that page 7 of G 3 provides for health and welfare fringe benefits for service employees of $3.35 per hour or $143 per week or $580.66 per month. He also agreed that when the contract was renewed for a second year, in March 2011, the Contract was modified to incorporate an updated Wage Determination, 2005-2287 (Revision 10) (referring to GX 5, Modification of Contract). He identified OX 4 as the Wage Determination referred to in the Contract modification, and agreed that page 7 of GX 4 states that the new rate for health and welfare benefits was $3.50 per hour or $140.00 per week or $606.67 per month. Tr. at 309-13.

Mr. Holstad testified that John Cerrito was the Human Resources Director for the Contract, Louis White was the HUD Contract Manager, and Kimberly Schultz was the HUD Contract Closing Manager, and that these managers were supervised by him and reported to him. He said that Louis White was the initial HUD Contract Manager, and was "technically was never replaced." He said there was conflict in the

office between Mr. White and Ms. Schultz on various issues and although he never formally took Mr. White off the contract, he ended up agreeing with Ms. Shultz on the issues in dispute. Mr. Holstad testified that he hired John Lindell as Northwest's General Counsel and was his supervisor. Mr. Holstad stated that until the end of the contract period when Northwest was in danger of losing the Contract, he did not discuss matters about the HUD contract with Mr. Lindell on a day-by-day basis, and left issues regarding closing entirely to Mr. Lindell. Tr.at 313-18.

Mr. Holstad testified that he approved the hiring of Had Solberg Benefits, LLC (hereinafter "Had Solberg"), an independent contractor, to procure fringe benefits. Had Solberg reported to John Cerrito, and Mr. Cerrito kept Mr. Holstad advised about the benefits work. Mr. Holstad gave Mr. Cerrito his opinions regarding fringe benefits. Northwest offered health benefits through Medica, but did not force employees to take them and some employees did not take them. Mr. Holstad understood his company's policy to be that, in determining the amount of an employee's salary or hourly wage, Mr. Cerrito took into consideration whether or not the employee would be receiving fringe benefits, and that the amount of an employee's wage would reflect whether or not the employee chose to take fringe benefits. He asked the managers to comply with the requirements of the Contract, and he assumed that John Lindell was ensuring that the fringe benefit practices complied with those requirements. Mr. Holstad said it was his understanding that it was Company policy that when negotiating with an employee Mr. Cerrito would take into consideration whether an employee wanted fringe benefits. When asked whether his contention was that

if the employee said they did not want to take fringe benefits their wage would be higher, Mr. Holstad stated "It could be. My understanding is that's something Professor Cerrito would take into consideration, that he may offer more. But it wasn't rigid. I can't say that every time somebody didn't take benefits they would make more hourly." He said he did not know whether the wage was to be higher by any specific amount. He said that he left that "entirely within [Mr. Cerrito's] discretion." Tr. at 318-21.

As an example, Mr. Holstad was referred to page 21 of GX 33 (payroll records). Mr. Holstad agreed that the payroll record for Kelsey Cochran for the pay period ending June 24, 2011 does not reflect that she was receiving health benefits and shows that she received an hourly wage rate of $15.00. He further agreed that the wage rate reflected at page 7 of OX 4 (Wage Determination 2005-2287, Rev. 10) for a General Clerk I, which Northwest contends was Ms. Cochran's classification, is $14.03, and that the hourly health and welfare fringe benefits per hour is $3.50, for a total sum of $17.53, more than the $15.00 Ms. Cochran was paid. Mr. Holstad responded that that calculation does not include the holiday and vacation pay of $480 shown as the year-to-date amount on page 21 of OX 33. He stated that holiday and vacation pay are in the same category as health and welfare fringe benefits on page 7 of GX 4.[49] Mr. Holstad admitted that he did not think about whether Northwest was in compliance with the SCA until after his lawsuit was started. Tr. at 322-28.

[49] He agreed that the payroll record does not show that Ms. Cochran received holiday or vacation pay during the pay period used as an example.

Mr. Holstad testified that Northwest lost its underwriter, Stewart Title, on December 11, 2011. He testified that Northwest required an underwriter to issue title insurance. He testified that in 2011, before losing the underwriter, Northwest had monthly revenue of about $600,000 and annual revenue of about $7,000,000. After Northwest lost its underwriter, Joel Holstad joined the company and became a Board member, Chief Operating Officer and Chief Financial Officer (referring to GX 21). Mr. Holstad identified GX 19 as the minutes of a Board of Directors' meeting on December 23, 2011, documenting the resignation of John Cerrito. He testified that Louis White left Northwest somewhere around January 10, 2012, John Lindell left the company around February 12, 2012 and Kimberly Schultz left on December 31, 2011. After Mr. Lindell resigned, Mr. Holstad took his place as Secretary of Northwest (OX 22). Mr. Holstad stated that after HUD suspended the Contract, he communicated with HUD about whether HUD had the authority to do so. Mr. Holstad identified GX 13 as the Cure Notice sent to him by HUD regarding the status of the company's licensing, specifically the loss of its title insurance license. He identified GX 14, on Northwest letterhead, as his response to HUD, which he said was drafted by John Lindell. He identified GX 15 as his letter to HUD, on Northwest letterhead, dated March 8, 2012. Mr. Holstad agreed that GX 7, the Contract modification, states that Wayne Holstad and Joel Holstad are authorized signers and refers to Wayne Holstad as CEO. Tr. at 328-39.

On cross examination, Mr. Holstad testified that he was CEO of Northwest through 2012. He stated that he referred to himself as the manager of

the managers, and he delegated to the managers and did not undercut their authority. He stated that he is an adjunct college professor of principles of management. He said he was aware of what his managers were doing, that they would advise him of things they thought he needed to know and he would give them direction. He said he was not an active participant in the HUD contract. He stated that he was the person authorized to sign the offer and Louis White and John Lindell were the persons authorized to sign the Contract (referring to GX 2).[50] He stated that he wanted John Lindell, as General Counsel, to monitor compliance with contracts, and that Mr. Lindell was responsible at least in part for the day to-day operations of Northwest in handling the HUD contract. He testified that he did not have conversations about daily matters related to supervision of the HUD contract with any other manager. He testified that over the course of six months, Northwest went from a $600,000 a month business to almost nothing. He said that on August 30th the company was at zero revenue, but still had leases all over the country and payments that were due. He testified that as a result of having to deal with the wind up of the business, he had to change professions and went from having a comfortable lifestyle to being "fairly broke." When asked if he could pay a judgment against him if the Government obtained one, he responded that he is on Social Security. He said Northwest is now his main client and that it has no revenue. He said he is in the process of dissolving Northwest but that the company is not yet dissolved because of outstanding claims. He said he

[50] Page 4 of GX 2 actually says that Louis White and John Lindell were authorized to *negotiate* the contract on behalf of the contractor.

would not have assets to pay a judgment. He said the only asset Northwest has is an account receivable, an incentive payment of $22,000 under the Contract, which is disputed. Tr. at 339-47.

Mr. Holstad testified that because of the competition in its field, he believed Northwest paid its employees above the market rate. He said Northwest offered benefits because it found out it would lose at least 50% of potential employees if it did not. He said he believed leave and vacation to be an essential component of benefits. He stated that the software program they had produced reports providing information about benefits in 2010, 2011 and 2012. He said that according to Joel Holstad's testimony, these records were all provided to the Department of Labor during its investigation. He stated that when Joel Holstad came on, he took complete control of the company and he (Wayne Holstad) walked away and began practicing law again. He said that he gave Joel complete authority and he made all the decisions and ran the company. He said he and Joel Holstad made a verbal agreement for Joel to buy Northwest for $600,000. Mr. Holstad identified WHX 1 as the document reflecting the transfer of authority to vote the shares held by Wayne Holstad. He identified WHX 2 as the Common Stock Purchase Agreement, dated December 26, 2011, for the sale of his stock in Northwest to Joel Holstad, which he said reflected their verbal agreement. Mr. Holstad signed the document but Joel Holstad did not. Tr. at 347-56.

Mr. Holstad testified that prior to receiving notice from the Department of Labor that it was going to conduct an investigation he had no reason to believe there was any nonperformance or incorrect action by

Northwest with respect to the Contract, and he was not aware of any noncompliance until he received the Complaint. He estimated that between 25% and 50% of Northwest's annual revenue was from the HUD contract. Tr. at 356-57.

On redirect examination with respect to WHX 1, Mr. Holstad stated that the proxy gave Joel Holstad the right to vote the shares until the next annual shareholder meeting. He stated that Joel Holstad never held a shareholder meeting. He said that he tendered his resignation as CEO to Joel Holstad contemporaneously with WHX 1 but Joel Holstad did not accept it. He said that it was his understanding that WHX 1 would allow Joel Holstad to elect directors. Tr. at 362-65.

In response to my questions, Mr. Holstad testified that Northwest was incorporated in the state of Minnesota. He said John Lindell was General Counsel and held that position full-time from 1993 until he resigned in February 2012. He testified that Northwest's loss of business in 2012 was due to the termination of the contract with Stewart Title. He stated that Northwest lost all of its clients immediately, except for HUD, and they tried to convince HUD that Northwest could continue to perform the Contract. Tr. at 365-67.

Valerie Ferris Jacobson on rebuttal[51]

Ms. Jacobson testified that when she met with Joel Holstad on May 29, 2012, he gave her copies of

[51] Ms. Jacobson's rebuttal testimony is at transcript pages 369-7S (direct examination); 37S-76 (cross examination); 376-80 (redirect examination); and 380-83 (questions from ALJ).

payroll records and she took all of the records he provided. She stated that they do not need a specific type of record as long as it shows the information they need. She stated that she did not reject any records provided by Joel Holstad or Northwest. She said that she did tell Joel Holstad that the payroll records provided did not indicate daily and weekly hours worked and were not what the WHO would consider time records. She stated that GX 33 includes all the payroll documents she reviewed to determine the fringe benefits due to the ten employees for whom she computed benefits.[52] She testified that the only other documents given to her that factored into the calculations were the Medica records (GX 11). Tr. at 369-71.

On cross examination by counsel for Wayne Holstad, Ms. Jacobson testified that the records provided by Joel Holstad covered the period from May 14, 2010 through May 12, 2012. She stated that health and welfare, vacation and holiday are all under the umbrella of fringe benefits. She said that the calculation of unpaid fringe benefits in this case primarily included health and welfare and holidays, and did not include a calculation of unpaid vacation because the records indicated that at least some vacation time had been paid. She said the benefits sought are unpaid health and welfare, and unpaid holiday pay for two employees. Tr. 371-75.

On redirect examination, Ms. Jacobson stated that unpaid wages and fringe benefits go to the employees. She said that in conducting an

[52] Ms. Ferris indicated that there were additional payroll records provided that are not in GX 33 because they pertain to employees other than the ten employees involved in this claim.

investigation regarding fringe benefits, WHD considers all documents it receives, even nonconventional records. She stated that in any case where they have documents, such as the Medica records, that have validity, they will use those to give credit against any liability. She testified that for the ten employees for whom recovery is sought, GX 11 and GX 33 constitute all of the documents they received that would show higher or lower fringe benefits due. She testified that holiday pay, vacation pay and health and welfare benefits are three different categories of benefits and are computed separately. She said that the health and welfare amounts shown in GX 3 ($3.35 per hour) and GX 4 ($3.50 per hour) exclude holiday and vacation pay. Tr. at 376-80.

In response to my questions, Ms. Jacobson clarified that, with respect to vacation and holiday pay, she was able to tell from the payroll records that at times vacation pay was paid to employees and that holiday pay was paid to certain employees. She said that WHD did not have enough information to calculate vacation pay due to employees. She stated that the amount sought in this case does not include any amount for unpaid vacation pay, or any amount for holiday pay except with respect to two employees. She further clarified that the term "health and welfare benefits," as that term is used at page 7 of GX 3 and GX 4, does not include vacation pay or holiday pay. She testified that health and welfare benefits include benefits such as health insurance or other insurance premiums paid by employers. The amount indicated in the wage determination does not include vacation pay or holiday pay. Ms. Jacobson also testified that during the investigation they determined that some of the employees were not properly classified. She said that

misclassification would affect the wage, but would not affect the calculation of health and welfare benefits. She confirmed that the period for which recovery of unpaid fringe benefits is sought is the period indicated in GX 9 and GX 10. Tr. at 380-83.

D. DISCUSSION

Was the Contract subject to the SCA?

The Contract was for the provision of real estate property sales closing services for single-family properties owned by HUD located within the state of Minnesota. GX 1 at 3. The Contact had a beginning date of April 19, 2010 for a period of one year. It contained an option for HUD to extend the base contract period in yearly increments, for a total of four additional years. GX 1 at 29, 4-5; Tr. at 307. HUD exercised the first option year, extending the Contract for twelve months for the period from April 22, 2011 to April 21, 2012. GX 5; Tr. at 307.[53] Northwest's underwriter, Stewart Title Guaranty Fund, terminated its relationship with Northwest on December 12, 2011. Northwest therefore no longer had the ability to issue title insurance, which was the predominant source of its revenue. Tr. at 183; 328-29; 366. Wayne Holstad testified that Northwest has not been actively in business since August 2012, and that he is in the process of dissolving the company. Tr. at 289-90; 346

To be subject to the SCA, a contract must involve an amount exceeding $2500, have the principal

[53] Northwest's underwriter, Stewart Title Guaranty Fund, terminated its relationship with Northwest on December 12, 2011. Northwest required an underwriter to issue title insurance. Tr. at 328-29; 366.

purpose of furnishing services in the United States through the use of "service employees" and not fall under any of the exemptions in 41 U.S.C. § 6702(b).[54] None of the section 6702(b) exemptions apply here. A "service employee" is defined in 41 U.S.C. § 6701(3) as an individual engaged in the performance of such a contract other than an individual employed in an executive, administrative or professional capacity as those terms are defined in part 541 of the Code of Federal Regulations.

Here, the Contract is one with the federal government and involves an amount exceeding $2,500. *See* GX 1; Tr. at 48-49, 307; Settlement Agreement at II. Paragraph I.9 of the Contract states that it is subject to the SCA.[55] The Contract has as its principal. purpose the furnishing of services in the United States through the use of service employees. The ten employees for whom recovery is sought furnished the services and were "service employees" as defined in the SCA and applicable regulations, as they were not employed in an executive, administrative or professional capacity as defined in 29 C.F.R. Part 541, and Respondents have not contended otherwise.[56] *See* Tr. at 114, 225-227, 258-261, GX 26 at 4-8. The employer bears the burden of establishing that its

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[54] *See generally* 29 C.F.R. § 4.101 -4.156.

[55] Paragraph 1.9 of the Contract (at GX 1, p. 38) is a section of FAR, specifically 48 C.F.R. § 52.222-49, which states that the Contract is subject to the SCA.

[56] *See* 29 C.F.R. § Subparts B, C, and D; 29 C.F.R. §§ 4.6(k)(l) and 4.156. *See Administrator, Wage$ Hour Division, US. DOL v. 5 Star Forestry LLC,* ARB No.14-021 (June 24, 2015). In their Answers to the Complaint, both Northwest and Wayne Holstad admitted the allegations of paragraph III that the services specified in the Contract were furnished by respondents through the use of service employees as defined by the SCA.

employees are exempt from coverage.[57] In its Answer to the Complaint, in response to paragraph II,[58] Northwest admitted that the Contract "was in excess of $2500.00 and was subject to and contained the representations and stipulations required by the SCA and the aforesaid Regulations." Wayne Holstad admitted the allegations of paragraph II except to allege that the Contract was suspended on January 21, 2012.[59] Wayne Holstad testified at the hearing that the Contract was worth more than $2500, that the SCA applies to the Contract and that the Contract requires compliance with the SCA. Tr. at 307-309. Respondents did not contend at the hearing or in their post-hearing briefs that the Contract is not subject to the SCA or that the ten employees are not "service employees."[60]

Based on the record, I find that the Contract

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[57] *Administrator, Wage & Hour Divlrion, US. DOL v. 5 Star Forestry LLC,* ARB No.14-021 at 5-7 (June 24, 2015).

[58] Paragraph II of the Complaint alleges that the Contract was in effect between April 19, 2010 through April 18, 2011 and an option year between April 19, 2011 and April 20, 2012, and that the Contract was in excess of$2500 and subject to the SCA

[59] The allegation that the Contract was suspended in January 2012 may be a reference to the "Cure Notice" HUD sent to Northwest (to Wayne Holstad) regarding "the possible change in your licensing status." (GX 13). GX 14 is Mr. Holstad's response. Valerie Jacobson testified that Northwest was still operating and employees were still performing work under the Contract when she was at Northwest (in May 2012). Tr. at 168-69. This is consistent with the payroll records. *See* summaries at GX 9 and GX 10.

[60] At page 2 of the Joint Reply Brief of Northwest Title Agency, Inc. and Wayne Holstad, Respondents state that all of the work by "the relevant employees" was Contract work and that Northwest has never claimed that the wages to such employees were not covered by the SCA.

meets the requirements for coverage under the 41 U.S.C. § 6702 and is subject to the SCA. *See also* 29 C.F.R §§ 4.107 and 4.110-114. I further find that the ten employees for whom recovery is sought are "service employees" as that term is defined in the SCA. *See* 41 U.S.C. § 6701; 29 C.F.R. § 4.113.

Are the Claims against Respondents barred by the applicable statute of limitations?

On August 12, 2016, Respondents Northwest and Wayne Holstad filed motions to dismiss, based in part on their argument that the claims against them are barred by the applicable statute of limitations. I denied the motions on the record at the beginning of the hearing. Tr. at 7-9. Respondents have repeated this argument in their joint post-hearing brief. Respondents contend that the applicable statute of limitations is set forth in the Fair Labor Standards Act, 29 U.S.C. § 255(a) (part of the Portal-to-Portal Act), which prescribes a two-year period. Complainant contends that the statute applicable to SCA actions is that at 28 U.S.C. § 2415(a), which specifies a six-year period.

Although 29 U.S.C § 255 expressly references certain Acts, it does not reference the SCA. In *United States v. Deluxe Cleaners and Laundry, Inc.,* 511 F.2d 926 (4th Cir. 1975), the defendant contended that the action against it was barred by the statute of limitations of the Portal-to-Portal Act. The District Court found that the Service Contract Act was "so connected and interwoven with the Portal-to-Portal Act" that the period of limitation in the Portal-to-Portal Act should apply. *Id.* at 927. The Fourth Circuit disagreed, finding that the general period of limitation

of six years prescribed by 28 U.S.C. § 2415(a) governs actions under the SCA. The Court held that reference in the Portal-to-Portal Act to the Walsh-Healey Act did not mean that its statute of limitations was intended to apply to the SCA, noting that the United States is not bound by any statute of limitations unless Congress explicitly directs otherwise. *Id.* at 928. In the Deputy Administrator's post-hearing brief, she also cites to other cases that have held that 28 U.S.C. § 24lS(a) applies to the SCA, including a case by the Board of Service Contract Appeals, a predecessor to the Administrative Review Board. *See* Deputy Administrator's Response to Respondents Joint Brief in Support of Dismissal at pp. 3-4 (citing *Nat'l Electro-Coatings, Inc. v. Brock,* Case No. C86-2188, 1988 WL 125784 (N.D. Ohio July 13, 1988); *Ray v. US. Dept. of Labor,* Case No. 81-2248, 1984 WL 3148 (C.D. Ill. Feb. 13, 1984); and *Southwestern Film Service,* L.B.S.C.A. Case No. 81-SCA-1390, 1990 WL 656146 (L.B.S.C.A.. Sept. 28, 1990)).

In support of their argument, Respondents cite *United States v. Lovknit Mg. Co.* 189 F.2d 454 (5th Cir. 1951). In that case, however, suit wa brought under the Walsh-Healey Act, one of the Acts which, unlike the SCA, is explicitly named in 29 U.S.C. § 255 as subject to its provisions. Respondents also cite *Lance v. United States,* 190 F.2d 204 (4th Cir. 1951), and *United States v. W.H Kistler Stationery Co.,* but these cases also involve actions under the Walsh-Healey Act, not the SCA. Respondents cite no case holding that the two-year limitation period of 29 U.S.C. § 255(a) applies to the SCA.

I find that the applicable statute of limitations is 28 U.S.C. § 2415(a), which prescribes a six-year

period. I therefore find that this claim was timely filed.

Did Respondents Fail to pay the required fringe benefits to their service employees?

The SCA requires employers to pay specified fringe benefits to service employees. 41 U.S.C. § 6703(2).[61] The regulations set forth the criteria for fringe benefits. 29 U.S.C. § 4.170-77. The requirements for the health and welfare category of fringe benefits are addressed at 29 C.F.R. § 4.175. The requirements for vacation fringe benefits and holiday fringe benefits are addressed at 29 U.S.C. §§ 4.172, 4.173 and 4.174. The base wages and fringe benefits applicable to employees working on contracts subject to the SCA are established by Wage Determinations. Tr. at 51-53. The Wage Determination applicable to the Contract for its initial period (April 19, 2010 to April 18, 2011) is identified in the Contract as 2005-2287 (Revision 8) (GX 1 at 34) and exhibited as GX 3. Page 7 of the Wage Determination sets forth the "Health & Welfare" benefit amount, $3.35 per hour or $134.00 per week or $580.66 per month. The Wage Determination also separately states the requirements for paid vacation and holiday pay. When the parties extended the Contract for the first option year (GX 5 from April 2011 to April 2012), a new Wage Determination, 2205-2287 (Revision 10), became effective, and the required rate for Health and Welfare benefits increased to $3.50 per hour or $140.00 per week or $606.67 per month. GX 4, p. 7. In her testimony, Ms. Jacobson testified that unpaid fringe benefits were found to be due to ten employees[62] who

[61] Relevant implementing regulations include 29 C.F.R. §§ 4.6, 4.165, 4.162, 4.165 and 4.170-.77.

[62] The ten employees are Timothy Bohl, Jennifer Christensen,

worked on the Contract, in the total amount of $70,243.04. That amount was corrected to $67,893.78 in Complainant's Post-Hearing Brief.[63] The SCA provides that a party responsible for a violation of section 6703(1) or (2) is liable for the amount of any underpayment of compensation due to an employee. 41 U.S.C. § 6705.[64]

The regulations state that fringe benefits required under the SCA "shall be furnished, separate from and in addition to the specified monetary wages" required. 29 C.F.R. § 4.1?0(a). The employer "may not include the cost of fringe benefits or equivalents furnished as required [by the Act] as a credit toward the monetary wages it is required to pay under [the Act]." *Id.* At §4.167. An employer cannot offset monetary wages paid in excess of the required wages against its fringe benefit obligation. *Id.* at § 4.170(a); *see also id.* at § 4.177(a). An employer may satisfy its fringe benefit obligations by providing "equivalent or differential payments in cash" to its employees. *Id.* at

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Karla Cochran, Kelsey Cochran, Theresa Eaton, Lisa Erickson, Cynthia Orloff, Barbara Smith, Lisa Stolp (now Lisa Rausch (Tr. at 222)) and Gilbert Wenzel.

[63] In her Post-Hearing Brief, Complainant indicated that the figure of$70,243.04 erroneously included $2,349.26 in holiday benefits for Lisa Erickson, which is reflected on GX 9 at I and GX 10 at 8-9. *See* Complainant's Post- Hearing Brief at pages 20 and 34, stating that the correct total for Lisa Erickson is $7,107.5 [sic] and the correct total for the ten employees is therefore $67,893.78. *See* Tr. at 110, where counsel for Complainant stated that GX 9 and GX 10 had been updated after these exhibits were first provided to the parties.

[64] The Administrator states that no funds are being withheld in connection with theHUD contract or pursuant to 41 U.S.C. § 6705(b)(l). *See* page 9, footnote 6 of The Deputy Administrator's Response to Respondents Northwest Title Agency, Inc. and Wayne Holstad's Joint Brief in Support of Dismissal.

4.177(a). However, employers "must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits." *Id.* at § 4.170(a). *United Kleenist Organization,* ARB Case No. 00-042 2002 WL 181779 (January 25, 2002).

Northwest contends that it was its policy to include health and welfare fringe benefits in the wages paid to employees. Wayne Holstad testified that it was his understanding of "company policy" that when negotiating a salary or hourly wage with an employee, John Cerrito, his Human Resources Director, would take into consideration whether an employee wanted fringe benefits. When asked whether his contention was that if the employee did not want to take fringe benefits the employee's wage would be higher, Mr. Holstad stated, "It could be. My understanding is that's something Professor Cenito would take into consideration, that he may offer more. But it wasn't rigid. I can't say that every time somebody didn't take benefits they would make more hourly." He said he did not know whether the wage was to be higher by any specific amount. He said that he left that "entirely within [John Cerrito's] discretion." Tr. at 318-321.

Valerie Jacobson testified that she did not reject or refuse to consider any records provided by Northwest or Joel Holstad. I find her testimony on this issue more credible than that of the Respondents. She was in charge of the investigation and was familiar with the records produced. Further, none of the three Respondents offered into evidence any records other than those offered by Complainant and admitted in evidence. I must presume that if there were additional records showing that Northwest paid the ten employees at issue more in fringe benefits than shown

by the records in evidence, such records would have been produced. Additionally, Joel Holstad testified that to the extent he had health and welfare benefit records, they were given to and accepted by Ms. Jacobson (although he testified that Ms. Jacobson said she would not consider them). Tr. at 211-12. Ms. Jacobson testified that GX 33 includes all of the payroll records for the ten employees at issue that were provided. She said the only other payroll records provided not in GX 33 are records pertaining to employees for whom WHD is are not seeking recovery for fringe benefits. She testified that Northwest did not provide records for every pay period. She said that none of the payroll records indicated employer contributions for health and welfare benefits for any pay period or showed that Northwest made differential cash payments in lieu of health and welfare benefits. She said the only other records provided indicating that Northwest paid for any health and welfare benefits were the Medica records (GX 11). Tr. at 82, 369-371. She testified that the amount due for fringe benefits includes unpaid holiday pay for two employees. It does not include any unpaid vacation pay because the payroll records did not provide enough information to calculate any unpaid vacation pay due. Tr. at 98- 99, 380-81. She testified that there are three different categories of fringe benefits, and that the monetary amounts shown for "health and welfare benefits," as that term is used at page 7 of both GX 3 and GX 4, does not include any amount for vacation pay holiday pay. The amounts of $3.35 per hour and $3.50 per hour (and the corresponding weekly and monthly amounts) are separate and exclusive of vacation and holiday fringe benefits. Tr. at 380.

Ms. Jacobson testified how she calculated the

amount of fringe benefits due from the payroll records provided. She identified GX 10 as a print-out of the Microsoft Excel spreadsheet she used to calculate the amounts due. There is a separate calculation for each of the ten affected employees. She testified that although the exhibit uses the term "wages,' the computations shown are for fringe benefits. As an example, she used the sheet for Jennifer Christenson to explain the meaning of the entries and how she obtained them (page 2 of GX 10). Tr. at 94-107.[65] She identified GX 9 as her "Summary of Unpaid Wages" and explained how to read it. She clarified again that although the summary uses the term "wages," these

[65] She stated that the "Total Hours Worked" column is blank for the pay periods for which the records provided were insufficient to provide a total. Tr. at 97. She explained why there may be a difference in "Total Hours Worked" and "Hours Paid." She testified that the health and welfare benefit is due for 40 hours a week, 2080 hours a year, and that WHD could not determine if Northwest properly paid holiday and vacation pay because Northwest did not provide daily or weekly pay records. Tr. at 97-98. She stated that the column heading "SCA Wage" indicates the amount WHD asserted was the applicable hourly wage rate, and the heading "H&W Hours Due" reflects the hours for which fringe benefits were due. Credit given for fringe benefits actually provided by Northwest during that pay period is indicated in the column headed "H&W Credit/Hr," *e.g.,* on page two of GX 10, for the pay period ending "11/10/11," $1.12 was subtracted from the fringe benefit amount of$3.50 to credit Northwest for fringe benefits provided during this pay period, *i.e.,* $100.02, as shown under the column titled "Gross H&W pd." This was attributable for the amount paid by Northwest to Medica for health insurance for this pay period for this employee. To obtain the total fringe benefits due, the number of health and welfare hours was multiplied by the applicable fringe benefit amount for the relevant period after accounting for any credit due. In this example, the total fringe benefit amount still owing after the credit was applied is $211.49. Tr. at 96-105. Respondents have not contended that the actual calculations in GXs 9 and 10 are incorrect.

are fringe benefits.[66] She testified that the ten individuals identified on the summary were all employees of Northwest, worked on the Contract and were subject to the Contract.[67] Tr. at 94-110. The total of the amounts in GX 10, and the amount shown in GX 9, is $70,243.04. Complainants' Post-Hearing Brief states that the calculation shown for Lisa Erickson included $2,349.26 for holiday pay that should not have been included, and the correct total is $67,893.78. *See* Complainant's Post- Hearing Brief at page 20, footnote 19.

In its post-hearing briefs, Northwest and Wayne Holstad contend that all but three of the employees at issue were "paid hourly wages and benefits in excess of the minimum amount required" under the SCA. Joint Brief in Support of Dismissal of Northwest Title Agency, Inc. and Wayne Holstad (hereinafter "Respondents' Post-Hearing Brief) at 2.[68] The brief states that the calculations are "applicable to

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[66] With reference to the heading "BWs Due" (back wages due) in column *S* of the summary, Ms. Jacobson stated that the computer program used does not allow this to be changed.

[67] Ms. Jacobson testified that there were "very likely" other employees of Northwest subject to the SCA working on the contracts between HUD and Northwest for Wisconsin and Missouri. She said she was directed to limit her investigation to these ten employees. Tr. at 110-11.

[68] Respondents Post-hearing Brief summarizes the amounts, if any, it contends are due to eight employees for the period ending December 27, 2011, but does not indicate the beginning period or cite to specific records within GX 33. It uses hourly rates for these employees, but these rates changed for some of the employees during the period for which Complainant calculates underpaid fringe benefits, *i.e.,* for Theresa Eaton, Kelsey Cochran, Karla Cochran, Lisa (Stolp (Lisa Rausch), Cynthia Orloff, and Barbara Smith.

the period ending December 27, 2011."[69] *Id at 4.* The brief states that Lisa Stolp (now Lisa Rausch) may be owed $1,184.73, Jennifer Christensen may be owed $1,109.00 and Kelsey Cochrane may be owed $1,898.50. They contend that Cynthia Orloff, Barbara Smith, Karla Cochrane, and Theresa Eaton are not owed any amount. They do not address the amounts Complainant contends are owed to Timothy Bohl or Gilbert Wenzel. Respondents' recalculation of the amounts due to the employees they specifically address is apparently based in part on their contention that they are entitled to a credit, equal to the amount of hourly wages paid in excess of the required wage rate, against any amounts owed for fringe benefits.[70]

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[69] Respondents' apparent reason for not including calculations for the period after December 27, 2011 is their argument that Wayne Holstad is not liable for violations after that period. *See* page 16 of Respondents' Post-Hearing Brief

[70] Respondents contend that this calculation should be based upon a wage rate of$14.03 for General Clerk I and a benefit amount of $3.50. Even if Respondents' argument were otherwise valid, it is not clear that $14.03 would be the appropriate base wage to use for all the affected employees. The hourly wage rate of $14.03 is the rate shown for General Clerk I on GX 4, the Wage Determination applicable to the period April 22, 2011 to April 21, 2012 (the option year). *See* Tr. at 58-63 and GXs 4 and 5. However, several of the employees are identified in GX 10 with classifications other than General Clerk I. Ms. Jacobson testified that WHD received no documentation from Northwest showing what the wage classification for the employees was, and that the information WHD obtained from Joel Holstad and other employees was not specific enough to show what classifications the employees were working in. Tr. at 56. She testified that in the course of the investigation, some of the employees' job titles were reclassified based on the work they actually did, but that this was not included in the calculations. Tr. at 382-83. The SCA regulations require the contractor to maintain work records showing, *inter alia,* the correct work classifications for each employee. 29 C.F.R. § 4.6(g)(l)(ii).

As argued in Complainant's Post-Hearing brief, the regulations and applicable case law indicate otherwise. *See* 29 C.F.R. § 4.170(a) ("Fringe benefits required under the Act shall be furnished, separate from and in addition to the specified monetary wages", and "[a]n employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits"); § 4.167 ("The employer may not include the cost of wages it is required to pay ... as a credit toward the monetary wages it is required to pay"). *See also* 29 C.F.R. § 4.l 77(a). *See also United Kleenist,* ARB No. 00-042 (Jan. 25, 2002). In *Kleenist,* Petitioners argued that the money they were required to pay for fringe benefits was included in the hourly wage paid to employees, which was $10 an hour instead of $7.17, the required hourly wage. Noting the requirement in the regulations that the employer must keep appropriate records separately showing amounts paid for wages and the amounts paid for fringe benefits (see 29 C.F.R. § 4.170 (a)), the Board stated that there was nothing in the record to suggest that Petitioners maintained records documenting such a policy. ARB No. 00-042, PDF at 8. The Board noted that previous SCA decisions on administrative review have consistently held that "overpaid" wages cannot be credited against an employer's fringe benefit obligation. *Id.*

Additionally, the payroll records produced by Respondents do not support the existence of such a policy. After being shown an example for one employee, Kelsey Cochran, demonstrating that the

wage she received did not include any additional amount for fringe benefits, Wayne Holstad stated that it was his interpretation of the Contract that holiday and vacation benefits are the same as health and welfare benefits.[71] *See* Tr. at 232-327; *supra* p. 24. Respondents make the same argument in their post-hearing briefs, *i.e.,* that the health and welfare amount of $3.35 in Wage Determination 05-2287 (Revision 8) (GX 3) and the health and welfare benefit amount of $3.50 in Wage Determination 05-2287 (Revision 10) (GX 4) include the benefit required for vacation pay and holiday pay. Respondents' Post-Hearing Brief at 14-15; Joint Reply Brief of Northwest Title Agency, Inc. and Wayne Holstad (hereinafter "Respondents' Reply Brief') at 1-2. Even if this argument were valid, the regulations require that an employer "must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits." 29 C.F.R. § 4.170(a). The record here does not contain such documentation. Respondents have offered no calculation of underpaid fringe benefits based on a calculation consistent with the SCA and the implementing regulations. The Complainant has offered a calculation that is consistent with the Act, the regulations and the evidence (GXs 9 and 10). I accept the Complainant's calculation as accurate, with the correction noted in Complainant's post-hearing

[71] I note that Mr. Holstad testified that he did not read the Contract until after John Lindell resigned in February 2012. Tr. at 308. Because Mr. Holstad did not read the Contract before Northwest signed it, it is not clear how he could have had any understanding of the language at issue at the time the Contract was signed. Northwest produced no other witness who was aware of this provision of the Contract to testify as to what Northwest's understanding of the provision was at the time the Contract was signed.

brief.[72]

I further find that all hours included in the calculation must be considered as reflecting work performed on the Contract. The regulations require that where both work covered by the SCA and non-covered work is performed by service employees, the contractor must identify and segregate covered work from non-covered work. 29 C.F.R. § 4.179. The regulations state that "in the absence of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented." *Id.* Here, Respondents presented no affirmative proof to overcome this presumption. In *James Bishop DIBIA Safeway Moving & Storage,* BSCA No. 92-12, 1992 WL 752886, p. 3 (Nov. 30, 1992), the Board, citing section 4.179, stated: "It is implicit in the regulations that the identification of contract work requires adequate payroll records. A mere allegation that records exist without being able or willing to produce them does not constitute affirmative proof, as required by the regulations, that hours were segregated." Respondents here did not contend that the hours were segregated, and the evidence shows that they were not. *See* Tr. at 241, 267-268, 328.

As noted above, Respondents argue that their interpretation of the language regarding health and welfare benefits, holiday benefits and vacation benefits in the applicable Wage Determinations (GX 3 at page 7 and GX 4 at page 7) is that holiday and vacation pay are part of the $3.35 or $3.50 per hour,

[72] *See* footnote 62 *supra.*

and thus holiday and vacation pay may be used to satisfy that benefit. Respondents state that the language regarding fringe benefits is ambiguous because Respondents' interpretation differs from that of the Complainant. Complainant contends that the language is not ambiguous. "Contract interpretation begins with the plain language of the agreement." *Foley Co. v. United States,* 11 F.3d 1032, 1034 (Fed. Cir. 1993). When a contract's language is unambiguous, it must be given its "plain and ordinary" meaning and a court may not look to extrinsic evidence to interpret its provisions. *Teg-Paradigm Envt'l, Inc. v. United States,* 465 F.3d 1329, 1338 (Fed. Cir. 2006). Here, the two Wage Determinations contain identical language except as to the amount of the health and welfare benefit. *See* GX 3 at p. 7 and GX 4 at p. 7. In the section dealing with fringe benefits, the Wage Determinations state: "All occupations listed above receive the following benefits:" They then list separately "Health & Welfare," "Vacation," and "Holidays." I find the language at issue here to be unambiguous, and that vacation and/or holiday benefits, assuming they were paid, cannot be used to satisfy Northwest's obligation to provide "health and welfare" benefits in the amounts set forth in the two Wage Determinations.[73] I note that Northwest

[73] Even if these provisions were ambiguous and extrinsic evidence to aid in interpretation were admissible, the evidence here, the testimony of Valerie Jacobson, an experienced investigator for WHD with significant past experience in SCA and other WHD cases *(see* Tr. at 36-42), and the regulations discussed above, do not support Respondents argument. Ms. Jacobson testified that the three categories of fringe benefits are separate categories and are separately comp ted, and that the hourly rates of $3.35 and $3.50 exclude vacation and holiday pay. Tr. at 380. This is consistent with the regulations, which contain separate sections regarding meeting requirements for "vacation fringe benefits,"

produced no records "separately showing amounts paid for wages and amounts paid for fringe benefits."§ 4.170(a).

Northwest also contends that HUD owes it an incentive bonus under the Contract in the amount of $21,909.20,[74] and that this amount must be applied as an offset to any amount it owes. It also contends that the amount paid by Joel Holstad in his settlement with Complaint should be applied to offset any amount it owes. For support, Respondents cite 41 U.S.C. § 6503(d), a provision of the Walsh-Healey Act. Respondents do not state how this provision applies to this action. Apart from Wayne Holstad's assertion in his testimony that HUD owes it an incentive payment of approximately $22,000, which he said HUD disputes,[75] Respondents offered no evidence in support of the claim. I note that this claim was not asserted as a set-off or counterclaim in Northwest's Answer to the Complaint. With respect to the $40,000 amount in the Settlement Agreement, counsel for Complainant stated at the hearing that it is only for back wages and not fringe benefits, and that the amounts set forth in Exhibit A to the agreement are only for back wages. [76]

"holiday fringe benefits," and "health, welfare, and/or pension benefits." *See* 29 C.F.R. §§ 4.173, 4.174, and 4.175. Further, the section for health and welfare benefits includes examples of its application, which clearly indicate that the hourly/weekly/monthly health and welfare fringe benefit amount must be paid in addition to holiday and vacation pay. *See, e.g.*• § 4. l 7S(a)(ii),(iii) and (iv).

[74] *See* GX 16

[75] Tr. At 346-47. Mr. Holstad's testimony refers to a letter, presumably OX 16, which sets out incentives and disincentives under the Contract, and appears to suggest that Northwest earned $25,000 in incentive against $3,390.80 in disincentives.

[76] Paragraph V of the Settlement Agreement refers to fringe benefits as well as back wages. At the hearing, Complainant's counsel stated that the

None of the Respondents filed an objection to the settlement Agreement or raised one at the hearing. Respondents offered no argument or evidence at the hearing that any portion of the $40,000 was in fact for unpaid fringe benefits.

In *United Kleenist Organization,* ARB Case No. 00-042 2002 (January 25, 2002), the Board approvingly cited *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-88 (1946), holding that where it has been shown that an employee has performed work for which he was improperly compensated, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." Northwest has not done so in this case, and I accept the Complainant's calculation of the amounts owed as reasonable and based on the available evidence.[77]

I find that Northwest failed to pay to the ten identified service employees for whom recovery is sought in this case the fringe benefits required pursuant to 41 U.S.C. § 6703(2) and the implementing regulations discussed above. I find that all hours included in the Complainant's calculation must be

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language regarding fringe benefits was intended to cover any potential liability of Joel Holstad for fringe benefits.

[77] Calculation of damages "need not be proved with absolute precision." *United States v. Sancolmar Industries. Inc.,* 347 F. Supp. 404,408 (E.D.N.Y. 1972). It is sufficient if "the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate." *Id, citing Story Parchment Co. v. Paterson Parchment Paper Co.*• 282 U.S. *555* (1931). *See also* National Electro-Coatings, Inc. v. Secretary of Labor, 1988 WL 125784 (N.D. Ohio 1988).

considered as reflecting work performed on the Contract. I further find that Northwest is not entitled to any credit or offset because of the Settlement Agreement or because of its claim against HUD for approximately $22,000.

Did Respondents fail to maintain and make available required pay and time records?

The SCA regulations clearly require that an employer performing work under the Act must maintain specified records for a period of three years from completion of the work. 29 C.F.R. § 4.6(g)(l). The records specified by this section include:

> (ii) The correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of fringe benefit payments in lieu thereof, and total daily or weekly compensation of each employee.
>
> (iii) The number of daily and weekly hours so worked by each employee.
>
> (iv) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.

The record shows that Northwest did not maintain any of the above records.

Employers subject to the SCA "must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits." *Id.* at§ 4.170(a). *United Kleenist Organization,* ARB Case No. 00-042 (January 25, 2002). Similarly, where both work

covered by the SCA and non-covered work is performed by service employees, the contractor must identify and segregate covered work from non-covered work. 29 C.F.R. § 4.179. Northwest did not maintain such records. As stated in *James Bishop DIBIA Safeway Moving & Storage,* cited above, "[i]t is implicit in the regulations that the identification of contract work requires adequate payroll records."

The regulations state that "[f]ailure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of the Department of Labor and notification of the contractor, shall take action to cause suspension of any further payment or advance of funds until such violation ceases." 29 C.F.R. § 4.6(g)(3). The regulations further state that the records required to be kept by section 4.6 "must be kept for each service employee performing work under the contract, for each workweek during the performance of the contract." 29 C.F.R. §4.185.

The evidence here shows that Respondents did not maintain the required records. They did not segregate SCA-covered work from non-covered work, did not separately show employer and employee fringe benefit contributions, did not maintain daily or weekly hours worked and did not maintain records showing deductions from the daily or weekly compensation of each employee. The records did not show the employees' classifications and the payroll records did not include certain pay dates for certain employees. Tr. at 69-86.[78] *See also* Tr. at 241, 267-68, and 328.

[78] All of such documents are within the scope of Complainant's

I find that Northwest violated its obligation to maintain and make available to Complainant the records required by the regulations cited above and thereby violated the SCA.

Did Respondents deliver to their service employees notice of the required compensation or post such notice in a prominent place at the worksite?

Employers subject to the SCA are required to deliver to their service employees, on the date an employee begins work under the contract, notice of the required minimum wage and fringe benefits, or post a notice of the required compensation in a prominent place at the worksite. 41 U.S.C. § 6703(4); 29 C.F.R. §§ 4.6(e), 4.183 and 4.184.

Lisa Rausch (formerly Lisa Stolp), one of the ten employees, testified that she was not told that her work on the HUD contract was subject to the SCA and that she was not informed of the requirements of the SCA. She was not told what fringe benefits Northwest was required to provide and was not told about the concept of fringe benefits or health and welfare benefits or cash differential payments. She was not told that she was considered classified as, a General Clerk I. When shown GX 8, the document entitled "Employee Rights on Government C0ntracts," she testified that no one in management showed her such a document and she did not see it hanging in the office. She said no one in management showed her the Wage

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Requests for Production of Documents to Respondents Joel Holstad, Wayne Holstad and Northwest (GXs 29 and 30).

Determinations (GXs 3 and GX 4).[79] Tr. at 230-241. Another of the ten employees, Jennifer Christensen, also testified that she was never told of the requirements of the SCA or that she was considered to be a General Clerk I. She testified that she was not told about fringe benefits or health and welfare benefits or about receiving additional cash benefits if she did not take health and welfare benefits. She did not know that Northwest was required to pay a certain amount per month for benefits. She testified that GX 3, GX 4 and GX 8 were not shown to her at Northwest. Tr. at 263-268.

Valerie Jacobson testified that she found that Northwest did not provide the required notice to the employees, *i.e.,* it did not post a notice or otherwise convey such information to the employees. She said she inquired about a posted notice on her site visit and there was none. She also spoke with employees and they did not know they were subject to the SCA or the requirements for wages or fringe benefits. Tr. at 115-117.

Neither Wayne Holstad nor Joel Holstad testified that the ten service employees were given the required information concerning their compensation or that such information was posted in the office. Respondents called no witnesses to contradict the testimony of Ms. Jacobson, Ms. Rausch or Ms. Christensen on this issue. Respondents produced no documentary evidence to contradict such testimony or to show that they delivered to any of the ten service employees the required notice of compensation.

[79] She stated that she did see these when she was doing online research on her own in December 2011.

I find that Northwest did not provide to the ten service employees the notice required by 41 U.S.C. § 6703(4) and the implementing regulations cited above.

Are Respondents Wayne Holstad and Northwest 'parties responsible" within the meaning of the SCA?[80]

The SCA and its implementing regulations provide that a "party responsible" for a violation of a contract provision required under 41 U.S.C. § 6703(1) or (2) is liable, individually and jointly with the contractor, for the amount of the underpayment. 41 U.S.C. § 6705(a); 29 C.F.R. § 4.187(e). *See United States v. Sancolmar Industries, Inc.*, 347 F. Supp. 404, 408 (E.D.N.Y. 1972)[81] and other cases cited at 29 C.F.R. 4.187(e)(2). This regulation states that "a[n] 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." 29 C.F.R. § 4.187(e)(1). The regulation states that the term "party responsible' includes "corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts." *Id.* at § 4.187(e)(2). Responsible

[80] In this discussion, the reference to "Mr. Holstad" is to Wayne Holstad unless otherwise indicated.

[81] *Sancolmar* was an action under the Walsh-Healey Public Contracts Act. The SCA regulations state that the same principles are applied for determining the "party responsible" for violations of both Walsh-Healey and the SCA. 29 C.F.R. § 4.187(e).

individuals include corporate officials who permit violations as well as those who cause violations. *Id* at§ 4.187(e)(3). Individual liability is not limited to officers of the contracting firm or to signatori1 s to the Government contract, but includes all persons "irrespective of proprietary interest, who exercise control, supervision or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached." *Id.* at § 4.187(e)(4) (citing cases). The regulations emphasize that "[t]he 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." *Id* at§ 4.187(e)(2) (citing *Sancolmar Industries, Inc., supra).*

In *Hugo Reforestation, Inc.* ARB No. 99-003 (April 30, 2001), the Administrative Review Board cited prior precedent holding that "[u]nder the regulations it is clear that a corporate office who controls the day-to-day operations and management policy, or is responsible for the control of the corporate entity, or who activity 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." (emphasis added) *(citing Nissi Corp.,* SCA No. 1233, slip op at 14 (Dep. Sec'y. Sept. 25.1990). *See also Rasputin, Inc. and William Johnson,* ARB Case No. 03-059 (May 28, 2004).

Here, the record shows that Wayne Holstad,

through his law firm, Wayne Holstad, PLC,[82] purchased Northwest in 2006. Since then he has always been the sole shareholder of the company. Tr. at 287-89.[83] He served as the CEO of Northwest since he purchased the company in 2006 until at least August 2012. Tr. at 286, 292. He agreed that the CEO is a corporate officer and he agreed that he managed Northwest as the CEO. Tr. at 293-93, 296, 364. He testified that he served as Northwest's President at

[82] Mr. Holstad testified that he is, and always has been, the only member ofhis law firm. He testified that Northwest was a subsidiary of Northwest Title and Escrow Corp., which ceased doing business in 2006. Tr. at 288.

[83] He testified that he and Joel Holstad agreed he would sell his shares of stock to Joel, but that Joel did not sign the contract. Tr. at 290-91. *See* Exhibit WHX 2, dated December 26,201I. Joel Holstad testified that he did not purchase the company and has never been an owner of Northwest, and that Wayne Holstad remained the owner at least through August 2012. Tr. at 188-89. WHX 1 is a General Proxy dated December 27, 2011 giving Joel Holstad a proxy to vote Wayne Holstad's shares of stock until the next shareholder meeting, scheduled for August 7, 2012. The proxy is dated a day after the proposed purchase agreement for the stock (WHX 2). Wayne Holstad testified that no shareholder meeting was ever held, and thus Joel Holstad apparently never used the proxy. Wayne Holstad testified that the purpose of WHX 1 was to let everyone know that Joel was running the company. Tr. at 362. Wayne Holstad's responses to the Administrator's interrogatories say that he was a Director until December 29, 2011. The response also says he was an owner until December 29,2011. *See* GX 26 at 13, Answer No. 10. These responses appear to be premised on the assumption that there was in fact a sale of Wayne Holstad's stock to Joel Holstad, which is not consistent with the evidence. This interrogatory response also states that Wayne Holstad had "overall supervisory responsibilities and authority over all aspects of [Northwest] until December 29, 2011 but had no responsibilities or authority from January I, 2012 to August 30, 2012 at which time the corporation ceased operations." The evidence, however, shows that he retained overall authority through at least August 2012.

various times and was on the Board of Directors.[84] He agreed that OX 23 shows that he was made President of Northwest a month before the Contract was signed.[85] Tr. at 293-95. He testified that the Board consisted of him and John Cerrito, and they met once a year to elect the officers of the company. He testified that John Lindell was the Secretary until he resigned in February 2012 and then he (Mr. Holstad) became the Secretary *(see* GX 22, p. 2, dated February 17, 2012). Mr. Holstad agreed that he managed the managers at Northwest, that there was no one above him to whom he reported, and that he had the ability to delegate authority and to take it back. Tr. at 289-96. He agreed that the proposal for the Contract identifies him as the only person authorized to sign the offer.[86] GX 2 at 2. He included his resume in the proposal for the Contract. He testified that he hired Wayne Olhoft to prepare the proposal and that he discussed with Mr. Olhoft the classification of employees and was involved in estimating prices for each contract item. Tr. at 296-305.

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[84] GX 23 indicates that Wayne Holstad was a member of the Board of Directors on March 24, 2010. GX 19 indicates that as of December 23, 2011, Wayne Holstad was the sole member of the Board of Directors. GX21 shows that Wayne Holstad was a member of the Board of Directors on December 27, 2011 and GX 22 shows that he was still a Director on February 17, 2012. Joel Holstad became a member of the Board of Directors on December 27, 2011. *See* GX 21. Both Joel and Wayne Holstad were identified as Directors on GX 22 (p. 1), dated February 17, 2012.

[85] It is not clear whether Mr. Holstad was the President at any time prior to this, or how long he remained the President. GX 2 (p. 2), dated March 28, 2012, refers to John Lindell as President, but Mr. Lindell left Northwest in early January 2012. GX 21, dated December 27,2011, indicates that the only officers of the company were Wayne Holstad and Joel Holstad.

[86] The Contract was actually signed by John Lindell as General Counsel. GX 1, p. 1.

Mr. Holstad supervised John Cerrito, the Human Resource Director for the Contract, Louis White, the Contract manager, Kimberly Schultz, the Contract Closing Manager and John Lindell, the General Counsel.[87] He approved the employment policies established by John Cerrito, including its benefits policy, and had the authority to approve or disprove the wages set by Mr. Cerrito. He served as a title examiner for the Contract and approved all title work. He testified that until the end of the contract period when Northwest was in danger of losing the Contract he did not discuss matters about the Contract with Mr. Lindell on a day-to-day basis. Tr. at 313-18. Mr. Holstad approved the hiring of a company (Had Solberg) to procure fringe benefits. He testified that Had Solberg reported to Mr. Cerrito, who kept Mr. Holstad advised concerning benefits, and that he gave Mr. Cerrito his opinions concerning fringe benefits. He testified that he asked the managers to comply with the requirements of the Contract and he assumed that John Lindell was ensuring that the fringe benefit practices complied. Tr. at 318-321. He testified that prior to receiving notice that WHD was going to conduct an investigation, he had no reason to believe there was any non-performance of the Contract. Tr. at 305-06, 313, 356-57. Although he testified that prior to the WHD investigation he had no reason to believe there was any non-compliance with the Contract, he also testified that he did not think about whether Northwest was in compliance until after the beginning of this proceeding. Tr. at 327-28.

[87] Mr. Lindell resigned in February 2012. Tr. at 366. John Cerrito resigned on December 23, 2011. GX 19 and Tr. at 331-32. Louis White left Northwest around January 10, 2012, Tr. at 332. Kimberley Schultz left the company on December 31, 2011. *Id.*

Mr. Holstad contends he is not a party responsible because he did not sign the Contract and because he was "not the officer personally responsible for contract compliance or human resource development." Respondent's Joint Post-Hearing Brief at 16. Signing the contract is not a prerequisite to being held a party responsible. The Act provides that personal liability for violations extends to "all persons, irrespective of proprietary interest, who exercise control; supervision or management over performance of the contract, and who, by action or inaction, cause or permit a contract to be breached." *See* 29 C.F.R. § l.187(e)(4) and cases cited therein. The broad language of section 4.187 does not limit liability to the officer responsible for contract compliance or human resource development. Mr. Holstad further contends that Minnesota law does not permit "piercing the corporate veil" to hold him individually liable. In *Hugo Reforestation, Inc.* ARB No. 99-003 (April 30, 2001), the Board rejected the argument that state law regarding piercing the corporate veil is controlling in an SCA case, noting that in a federal matter federal law applies *(citing Liteky v. United States,* 510 U.S. 541, 555 (1994). The Board also noted that given the specificity of the SCA regulations, a finding that a person is a responsible party does not require piercing the corporate veil. PDF at 16. Mr. Holstad also argued that he should not be personally liable because of his financial situation. Tr. at 344-46. The regulations include no exception from a finding of personal responsibility based on the individual's financial status. *See Rasputin,* PDF at 10, footnote 6, regarding debarment.

In *Hugo Reforestation, Inc.* the Board found that the ALJ properly found the company's President to be

a party responsible where he was the owner and president and controlled the day- to-day operations of the company, including hiring and firing and directing employees' activities. *Hugo Reforestation, Inc.* ARB No. 99-003 (April 30, 2001), PDF at 16. In *Rasputin, Inc.* ARB No. 03-059 (May 28, 2004), *aff'd in relevant part sub nom. Johnson v. U.S. Dep't of Labor,* Case No. 2:04-CV-0775 (S.D. Ohio August 16, 2005), *aff'd,* Case No. 05-4355 (6th Cir. August 16, 2006) (unpub.), the Board upheld the ALJ's finding that the an individual who held himself out as the company's president and retained ultimate authority over the operations of the contract through his contract manager was a party responsible. *See also Stephen W. Yates,* ARB No. 02-119 (Sept. 30, 2003), noting that Mr. Yates had more than enough indicia of control over the business to fall within the regulatory definition of a responsible party. The Board noted that 29 C.F.R. § 4.187(e)(2) states that the failure to perform a statutory duty under the SCA 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." *See also Sancolmar Industries, Inc.,* 347 F. Supp. 404,0408 (E.D. N.Y. 1972).

Mr. Holstad argues that he "managed the managers" and was not an active participant in the HUD contract. However, he admitted that he was aware of what his managers were doing, that they would advise him of what they thought he needed to know and he would give them direction. He pointed out that he was not one of the individuals authorized to negotiate the Contract (Tr. at 341-42; *see* Gx 2 at p. 4), but he made the final decision to bid on the Contract, hired Wayne Olhoft to prepare the proposal, discussed the classification of employees with Mr. Olhoft and

was involved in estimating prices for the contract items (Tr. at 297-303). He testified that he wanted John Lindell, as General Counsel, to monitor compliance with the Contract. Tr. at 340-43. Mr. Holstad was shown in the Contract proposal (GX 2) as the person authorized to sign the Contract. He was apparently the person to whom HUD directed correspondence. *See* GXs 12, 13, and 16. Mr. Holstad authored letters on February 7 March 8, 2012, responding to HUD's concerns about the Contract. GX 14 and GX 15. He was the President of Northwest when the Contract was entered into, and was the CEO and sole shareholder of Northwest at all times relevant to the procurement and performance of the Contract. Joel Holstad testified that during the time he was the COO, from December 2011 through August 2012, Wayne Holstad communicated with HUD concerning the Contract on behalf of Northwest. Tr. at 188. Although Joel Holstad testified that he was in charge of the day-to-day operations of the company (Tr. at 193-94), his signed Declaration in support of Respondent Joel Holstad's Motion to Dismiss, filed on September 17, 2014 (attached as Exhibit A to Complainant's Post-Hearing Brief), suggests otherwise. In his Declaration Mr. Holstad stated:

> I was not involved in the direct administration or performance of the HUD contract numbered C-DEN-02375. My role was to attempt to maintain the [Northwest] facilities so that [Northwest] staff could close out the remaining pending files. I was not involved in the completion of those files nor in the oversight of personnel who were closing out the remaining pending files.

Paragraph 6 of Declaration. Paragraph 7 of the Declaration further stated:

> I was not an authorized individual, nor a member of key personnel named under HUD contract number C-DEN-02375 dated April 22, 2010, nor the Amendment/Modification No. N0004 dated March 21, 2012 identified by Requisition/Purchase Request No. R-20ll-SSH-00022. I did not negotiate this government contract, was in no manner involved in the administration or performance of that HUD contract or contract modification, and did not actively control the day-to- day operations and management policy of the company related to the HUD contract.

Joel Holstad further testified that since he was not working for Northwest before December 27, 2011, he did not know exactly what role Wayne Holstad had. Tr. at 220. The record does not show that Joel Holstad had any role in the company prior to December 27, 2011.

Lisa Rausch, one of the ten service employees, testified that her direct supervisor was Kimberly Schultz, who was the Minnesota HUD Contract Manager and responsible for preparing and processing the files for HUD.[88] She worked only on work related to the Contract. She said that Ms. Schultz's boss was Wayne Holstad, that Ms. Schultz deferred to him regarding any questions related to the Contract and that he communicated with Ms. Schultz about issues that arose on the contract. It was Ms. Rausch's

[88] Ms. Rausch (fonnerly Lisa Stolp) testified that she worked at Northwest from May 201I to February 2012. Tr. at 223.

understanding that Wayne Holstad was in control of the company and had overall control of the business. Ms. Rausch did not recall ever meeting Louis White or John Lindell.

Jennifer Christensen, another of the ten service employees, testified that she worked at Northwest from August 22, 2011 to just after January l, 2012, and that all of her work was related to the Contract. Her direct supervisor was Kimberley Schultz, who she understood to be the Minnesota HUD Closing Manager.[89] She believed that Wayne Holstad was Ms. Schultz's boss because Ms. Schultz would contact him with any questions. Ms. Christensen did not recall meeting Wayne Holstad but understood him to be in charge of the company because he was listed as owner of the company, his law offices were across the alley, and all closings for HUD homes were done at his office. Tr. at 258-63.

Wayne Holstad testified that that Kimberly Schultz reported to him. He said Ms. Schultz discussed with him concerns about the Contract and whether what she was doing was in compliance with the Contract. Tr. at 314-16. He testified that Louis White was initially the HUD Contract Manager, but there was conflict between him and Ms. Schultz regarding issues related to the Contract and he agreed with Ms. Schultz's position. Tr. at 314-15. Mr. Holstad was also the direct supervisor of John Cerrito, the Human Resources Director, Louis White, the initial HUD Contract Manager and John Lindell, Northwest's General Counsel, whom he wanted to monitor compliance with the Contract. He hired all of the

[89] The witnesses at times appeared to use the terms "contract manager" and "closing manager" to describe the same position.

managers. Tr, at 313-18. He hired the company responsible for procuring fringe benefits and approved the employment policies established by John Cerrito, and John Cerrito kept him advised concerning fringe benefits. He was Northwest's Chief Executive Officer for the entire term of the Contract and was the President when the Contract was signed.

As in *Stephen W. Yates,* cited above, the record here contains sufficient indicia of control over the business to fall within the regulatory definition of a responsible party. The Act provides that liability extends to those who exercise control, supervision or management over performance of the contract, who "by action or inaction," cause or permit the contract to be breached. 29 C.F.R. § 4.187(e)(4). The regulations state that individual liability attaches to the "corporate official who is responsible for, and therefore causes or permits," violation of the contract stipulations required by the Act. *Id* at§ 4.187(e)(3). As stated in *Sanco/mar Industries, Inc.* 347 F. Supp. 404,408 (E.D. N.Y. 1972), "[t]he failure to perform the statutory public duty is not only a corporate liability but also the liability of each and every officer charged by reason of his or her corporate office with performing that duty." *See also Hugo Reforestation,* noting "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." *Id.,* PDF at 16.

I find that Wayne Holstad, in addition to Northwest, is a "party responsible" within the meaning of the SCA for Northwest's violations of the required Contract provisions discussed above.

What is the appropriate relief for Respondents' violations of the SCA?

Under the SCA, persons or firms that violate the Act are subject to debarment, *i.e.,* not eligible to receive federal contracts for a period of three years, absent a finding of "unusual circumstances." 41 U.S.C. § 6706; 29 C.F.R § 1.188. *See Administrator v. Garcia Forest Service, LLC,* ARB No. 14-052 (April 8, 2016); *E&S Diversied Services, Inc.,* ARB No. 13-019 (Mar. 20, 2015). Debarment is presumed once a violation is found. The burden of proof to show that "unusual circumstances" exist is on the contractor. *Garcia Forest Service.* PDF at 4 (citing *Hugo Reforestation, Inc.,* ARB No. 99-003 (Apr. 30, 2001); 29 C.F.R § 4.188(b)(l). The regulations provide that negligence per se does not constitute unusual circumstances. 29 C.F.R. § 4.188(b)(6). *See Vigilantes, Inc. v. Administrator,* 968 F.2d 1412, 1418 (1st Cir. 1992), stating that "debarment of contractors who violate the SCA "should be the norm, not the exception." The SCA does not define the term "unusual circumstances," but the applicable regulation sets forth a three-part test. 29 C.F.R. § 4.188(b)(3)(i) and (ii). *See Vigilantes, Inc.,* 968 F.2d at 1418.; *Integrated Resource Management, Inc.,* ARB No. 99-119, PDF at 4-5 (June 27, 2002). The first part of the test is set forth as follows:

> Thus, where the respondent's conduct in causing or permitting violations of the [SCA] 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 recordkeeping requirements (such as falsification of records), relief from the debarment sanction 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 provisions of the Act, or where previous violations were serious in nature.

29 C.F.R, § 4.l 88(b)(3)(i). If the contractor cannot satisfy part one of the test, it cannot avoid debarment. *Integrated Resource Management, Inc.,* PDF at 5. Part two of the test requires that the violator show a "good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii). If the violator satisfies both parts one and two, the factors in Part three of the test must be considered:

> Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously bee.n investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, 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.

Id. Here, Northwest and Wayne Holstad are unable to meet the first part of the test. In *Integrated Resource Management, Inc.,* the Board found culpable negligence under Part one of the test where respondent failed to read the SCA provisions of the contract. The Board stated that:

> Because the SCA requirements were plain from the face of IRM's contract, Barnes was at least culpably negligent in failing to read and perform them. As we have observed, 29 C.F.R. § 4.188(b)(l) provides that 'negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract 'do not establish 'unusual circumstances.'

Id., PDF at 6. Because the respondent could not satisfy the first part of the test, the Board stated that it did not need to consider the second and third prongs of the test and stated that it would be improper to do so. *Id.*

I find that here, the conduct of Respondents Northwest and Wayne Holstad constituted culpable conduct. Mr. Holstad, Northwest's CEO, sole shareholder and a member of the Board of Directors, testified that he did not read the Contract until February 2012. Tr. at 308. He testified that he did not even think about whether Northwest was in compliance with the SCA until this proceeding was initiated. When asked at the hearing whether he

understood that the Contract was subject to the requirements of the SCA, he responded, "[w]ell, I do now." Mr. Holstad has been a practicing attorney since 1980 and has significant business experience. *See* Tr. at 285-88 and Mr. Holstad's resume a p. 9 of GX 2. His conduct amounts to "culpable disregard of whether they were in violation or not." 29 C.F.R. §4.188(b)(3)(i). Respondents' conduct also evinces "culpable failure to comply with recordkeeping requirements."[90] *Id.* Therefore, Respondents have not established the existence of "unusual circumstances" and relief from debarment is not available.[91]

I therefore find that Respondents Wayne Holstad and Northwest have not shown unusual circumstances to relieve them from the debarment provisions of the SCA.

CONCLUSION

I find that Respondents Northwest Title Agency, Inc. and Wayne Holstad violated the SCA by failing to pay the specified fringe benefits, as required by 41 U.S.C. § 6703(2), to the ten service employees for whom relief is sought herein. I find that these Respondents violated the SCA by failing to maintain the records required to be maintained for a period of three years from completion of the work under the Contract. *See* 29 C.F.R. § 4.6(g)(1). I find that these

[90] Valerie Jacobson testified that Northwest's records "were some of the worst that I've ever seen, and they were by far the worst that I had ever seen on an SCA contract." Tr. at 115-16.

[91] Even if Respondents could satisfy the first part of the test, they could not satisfy the second part, as they committed recordkeeping violations that impeded the investigation. See testimony of Valerie Jacobson at Tr. at 115-16. They also did not take steps to ensure compliance with SCA and have not repaid the sums due.

Respondents violated the SCA by failing to deliver to their service employees notice of the required minimum wage and fringe benefits, or post a notice of the required compensation in a prominent place at the worksite, as required by 41 U.S.C. § 6703(4). I further find that these Respondents have not shown the existence of unusual circumstances necessary to relieve them from the three-year prohibition on new contracts, *i.e.,* debarment, required by 41 U.S.C., § 6706. I find that Respondents Northwest Title Agency, Inc. and Wayne Holstad are individually and jointly liable for the amounts of the underpayments specified in the following Order.

ORDER ON CLAIMS AGAINST RESPONDENTS NORTHWEST TITLE AGENCY, INC. AND WAYNE HOLSTAD

1. Respondents Northwest Title Agency, Inc. and Wayne Holstad shall pay to the Wage and Hour Division, United States Department of Labor, for distribution to the ten former employees identified in the Administrator's Complaint, or their legal representative, the following amounts for unpaid fringe benefits:

   A. To Timothy Bohl, the sum of $841.75;
   B. To Jennifer Christensen, the sum of $2,319.19;
   C. To Karla Cochran, the sum of $12,113.74;
   D. To Kelsey Cochran, the sum of $6,864.38;
   E. To Theresa Eaton, the sum of $11,870.07;
   F. To Lisa Erickson, the sum of $7,107.35;[92]

[92] Complainant's calculation of the amount owing to Ms. Erickson after subtracting $2,349.26 (which it says should not be included from the original amount of $9,456.61) is shown as "$7,107.5", apparently because

G. To Cynthia Orloff, the sum of $14,549.83;
H. To Barbara Smith, the sum of $5,871.49;
I. To Lisa Rausch (formerly Lisa Stolp), the sum of $5,256.73;
J. To Gilbert Wenzel, the sum of $1,027.25.

2. In accordance with 41 U.S.C. § 6706, the names of Respondents Northwest Title Agency, Inc. and Wayne Holstad shall be placed on the list maintained by the Comptroller General of the United States of persons or firms having been found to have violated the Service Contract Act and therefore having become ineligible, for a period of three (3) years form the date of publication on the list, for the award of any contract with the United States.

ORDER ON CLAIMS AGAINST RESPONDENT JOEL HOLSTAD

On July 26, 2016, the Administrator, Wage and Hour Division, United States Department of Labor and Respondent Joel Holstad filed a Settlement Agreement and Consent Findings (hereinafter "Consent Findings") between the Administrator and Respondent Joel Holstad. Pursuant to 29 C.F.R. § 6.18, I hereby accept and adopt the Consent Findings, which are attached hereto and incorporated by reference herein. The Consent Findings provide, *inter alia*, that Joel Holstad agrees to pay the sum of $40,000.00 in designated installments as set forth therein, with such amounts to be distributed to the employees specified on Exhibit A to the Consent

of a typographical error. The correct calculation results in $7,107.35, resulting in the same total amount of $67,893.78. *See* Complainant's Post-Hearing Brief at p. 20, footnote 19.

Findings or their legal representatives. Such Employees are those identified in the Administrator's Complaint in this matter. The Consent Findings also provide that Joel Holstad agrees that he shall not, as the prime contractor or subcontractor, bid on or enter contracts with the United States Government or the District of Columbia, or perform work on such contracts as a responsible party of in a management capacity, of a period of three years. The Consent Findings dispose of all proceedings against Joel Holstad in this matter.

The above orders dispose of all claims against all Respondents in this matter.

SO ORDERED.

Larry A. Temin
Administrative Law Judge