



In the Matter Of

**JOHN'S JANITORIAL SERVICE, INC.
("JJS"), JJS SERVICES, INC.,
JOHN WOMACK AND BRENDA CHOUINARD**

CASE NO. 94-SCA-2

DATE: July 30, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.* (SCA) and the regulations of the Department of Labor at 29 C.F.R. Parts 4, 6 and 8. The case is before this Board on the petition of John's Janitorial Service, Inc., JJS Services, Inc. (JJS), John Womack and Brenda Chouinard (collectively Petitioners) for review of the Administrative Law Judge's (ALJ) September 8, 1995 Decision and Order (D. and O.) debaring JJS and its principal corporate officers for admitted violations of the SCA prevailing wage and fringe benefits provisions. 41 U.S.C. § 351 (a)(1) and (2). Petitioners assert that the ALJ erred in determining that: 1) they deliberately and intentionally violated the Act; and 2) the legal analysis of an SCA violation required as a result of the Act's 1972 amendments, 29 C.F.R. § 4.188(b)(3)(I) and (ii), precludes a full inquiry of whether "unusual circumstances" sufficient to support debarment relief exist on the record in this case. For the reasons stated below, the D. and O. is affirmed.

BACKGROUND

Petitioners are experienced government contractors in the cleaning and janitorial service field. They have been in business since 1979, and received their first government contract in 1980 and their first contract with the United States Air Force in 1987. Transcript (T) at 180, D. and O. at 2. The ALJ noted that, "[Petitioners] have performed a number of different contracts for various government agencies". *Id.*

^{1/} On April 17, 1996 a Secretary's Order was signed re delegating jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board. 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive orders, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached.

The facts in this matter are essentially not in dispute. Moreover, Petitioners do not dispute the occurrence of the labor standards violations. See, Petition for Review (PR) p.3, fn.1.^{2/} The violations, as uncovered during a 1991 investigation conducted by the Wage and Hour Division, disclosed \$40,922.18 in prevailing wage and fringe benefit underpayments due to 158 JJS employees. Statement of The Administrator (SA) at 3. At the March, 1992 closing conference held by the Wage and Hour compliance officer and attended by Brenda Chouinard, Petitioners agreed to pay this amount by May 25, 1992 and to forward to Wage and Hour a copy of the back wage receipts for each employee by June 1, 1992. *Id.* See also Complainant's Exhibit (CX)11. In addition, Petitioners agreed to calculate and pay additional back wages due for ongoing violations during the period from January 17, 1992 through February 28, 1992. While the initial back wage liability was paid, Petitioners failed to comply with the other terms agreed to at the closing conference. As a result a follow-up Wage and Hour investigation was conducted in December of 1992.

The follow-up investigation revealed an additional \$13,918.33 in back wage liability which Petitioners then agreed to pay, in equal installments on April 1, 1993 and May 1, 1993. SA at 4. Once again, Petitioners also agreed to submit proof of these payments to Wage and Hour by the end of May, 1993. Although the payments were made as promised, the proof of payment was not submitted, despite Wage and Hour's attempts to obtain full compliance with the agreed upon terms, until July 30, 1993.

As a result of the difficulty in obtaining compliance following the seventh and eighth investigations of these Petitioners, the Administrator of the Wage and Hour Division filed an administrative complaint against them on October 6, 1993. D. and O. at 1.

DISCUSSION

The regulations which define and control the analysis of SCA debarment determinations are found at 29 C.F.R. § 4.188. While such determinations were previously subjectively reviewed based upon a set of factors set out in *Washington Moving and Storage Co.*, Case No. 74-SCA-168, Sec. Dec. and Ord., March 12, 1974, slip op. at 3-4, they are now governed by a "strict hierarchy of the importance which attaches to each of the *Washington Moving and Storage* factors." *Elaine's Cleaning Service*, BSCA Case No. 92-07 (Aug. 13, 1992), slip op. at 3. Moreover, the standards contained in 29 C.F.R. § 4.188 and the hierarchical interpretation of them have been validated by the courts as a sound and permissible interpretation of the SCA statutory debarment authority under 41 U.S.C. § 354(a). See, e.g., *A to Z Maintenance Corp. v. Dole*, 710 F.Supp. 853, (D.D.C. 1989).

Under the initial part of the three-phased analysis which must be made under 29 C.F.R. § 4.188, a condition precedent to relief from debarment is that nay violation must not be willful, deliberate or of an aigrette nature or the result of culpable conduct. If any of these factors are

^{2/} Wherein, Petitioners outline their compliance history under the Act. In summary, that history includes eight Wage and Hour compliance investigations since 1986, six of which reveal SCA violations. Petitioners have paid nearly \$109,000 to 727 employees as a result of the violations found during this period. The contracts at issue in this case involve approximately \$54,000 in back wage underpayments owed to 255 employees.

present, debarment cannot be recommended. 29 C.F.R. § 4.188(b)(3)(I) contains Part one of the test. It reads, in pertinent part, as follows:

[W]here the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of a culpable conduct such as a culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, . . . relief from debarment cannot be in order.

The second phase of the test lists prerequisites to relief and include, *inter alia*, a good compliance history under the Act. Part three, of the test, the provision which is finally determinative on the question of unusual circumstances, lists additional factors which are to be weighed and considered, but only if the mandatory conditions set out in Parts one and two have been satisfied.

Under the regulations and the factual circumstances presented by the record in this case, the ALJ's analysis and legal conclusions were a proper application of this "particularly unforgiving provision of a demanding statute." *A to Z Maintenance Corp.*, supra, at 855. As the Board of Service Contract Appeals previously noted, "[t]he undeniable Congressional purpose behind the 1972 amendments to the debarment section was to limit the Secretary of Labor's discretion [as delegated to this Board -- see fn. 1, supra,] to relieve violators from federal contracting ineligibility." *Elaine's Cleaning Service*, supra, slip op. at 4. "The clear language of the SCA, administrative law precedent, and the regulations mandate that relief from debarment after a finding of violations is to be the exception, rather than the rule." *Id.* at 5. Thus, contrary to Petitioners' assertion, the ALJ was correct in finding that his discretion to consider the "unusual circumstances" allegedly presented by this case was limited. The ALJ's discretion was further and properly limited in this case because of the finding that these Petitioners had wilfully violated the Act D. and O. at 9, and had "engaged in repeated violations," constituting "culpable neglect" which, pursuant to the Part one and two of the analysis set forth above, precludes the Part three "unusual circumstances" analysis from even being made.^{3/}

^{3/} In addition, the totality of the circumstances presented by this case includes the ALJ's finding that Petitioners willfully violated the Act "at least with respect to overtime pay." D. and O. at 9. The ALJ's findings that Petitioners failed to make necessary "extra efforts" to obtain wage data in the face of their previous promises of compliance under the SCA, amounts to a finding that they were culpably neglectful of their contractual obligations. Either one of these factors by themselves would preclude debarment relief. 29 C.F.R. § 4.188(b)(3)(I).

Additionally, we find the ALJ's more specific conclusions rejecting Petitioners' claims to be supported by a preponderance of the evidence.^{4/} These factors, and in particular, Petitioners' history of repeated violation of the SCA mandate no debarment relief under 29 C.F.R. § 4.188(b)(3).

Finally, a central component of Petitioners' position on review is that the ALJ abused his discretion, "by ignoring the evidence before him, and basing his findings solely on the testimony of Collette Hanson (Petitioners' former payroll and human services administrator)" PR at 5. First, a judge's evaluations of a witnesses' credibility should be overruled only where clearly erroneous. See, *Raymond G. Richardson, Jr., Raymond G. Richardson Mail Service and Mar Jean Richardson d/b/a J & M Trucking*, BSCA Case No. 93-03 (May 6, 1994), slip op. at 6, and *Executive Suite Services, Inc.*, BSCA Case No. 92-26, (March 12, 1993), slip op. at 10 (and cases cited therein). The ALJ's credibility determinations in this case are not clearly erroneous. Additionally contrary to Petitioner's argument the ALJ's conclusions in this case were based upon substantially more than the testimony of one particular witness.

Accordingly, for all of the foregoing reasons, the D. and O. is affirmed. The Petition for Review is denied and Petitioners names shall be forwarded to the Comptroller General for debarment in accordance with 29 C.F.R. § 6.21(a).

BY ORDER OF THE BOARD.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

^{4/} For example, Petitioners' argument that the violations revealed during previous Wage and Hour investigations were "technical" and/or "*de minimis*" is properly rejected, under the hierarchical analysis scheme of § 4.188, because of their history as a violator, D. & O. at 10. The same holds true with respect to the contention that alleged troubles receiving wage data information provides them with a *bona fide* or genuine legal issue in dispute in this case. *Id.* As multiple, repeat violators of the SCA, Petitioners simply do not have a good compliance history and the ALJ's recognition of this is beyond debate.