U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 21 December 2005*In the Matter of*

R & W TRANSPORTATION, INC.
a corporation, and **REBECCA J. BROWN**, individually and as President of the corporate respondent,

Respondents.

Case No.: 2003-SCA-00024

DECISION AND ORDER

ORDERING DEBARMENT

This matter arises out of an investigation by the U.S. Department of Labor's Wage and Hour Division ("WH") initiated in 1998 pursuant to the requirements of the Service Contract Act ("SCA"), 41 U.S.C. § 351 *et seq.*, as amended. The WH investigation concluded that Respondents had failed to pay required wage rates, health and welfare benefits and holiday pay to their employees in violation of Sections 2(a)(1), 2(a)(2) and 2(b)(1) of the SCA, while performing on two mail-hauling contracts for the United States Postal Service ("USPS").

After the investigation was concluded and negotiations had been conducted, an agreement was reached, and the Respondents executed Consent Findings that established the amount of their liability and the schedule and methods of payment. These Consent Findings were approved by Order of Associate Chief Judge Thomas M. Burke on October 28, 2003. Subsequently a dispute arose between the Respondents and WH about compliance with the terms of the Consent Findings and Order, and it is from that dispute that this case has arisen before the Office of Administrative Law Judges, U.S. Department of Labor.

BACKGROUND OF THIS CASE

Law and Regulations

This case arises under the SCA, as amended, 41 U.S.C. § 351 *et seq*., and the implementing regulations issued thereunder at 29 C.F.R. Parts 4, 6, and 18. The purpose of the SCA is to punish those who have received federal monies via a service contract and have:

1. Failed to pay the minimum wages for each particular position listed in the Dictionary of Occupational Titles, a government compiled list of positions and the preliminary wages for the positions;
2. Failed to award minimum fringe benefits to employees;
3. Failed to maintain adequate records.

41 U.S.C. § 351 *et seq*. The SCA establishes standards for hours of work and overtime pay of laborers and mechanics employed in work performed under contract for, or with the financial aid of, the United States, for any territory and the District of Columbia.

Procedural History

On August 1, 2003, the Respondents executed Consent Findings in this case agreeing to pay a total of $36,846.08 in backwages based on the findings of the 1998 WH investigation. The Consent Findings were approved by Order of Associate Chief Judge Thomas M. Burke on October 28, 2003.

Specifically, the Consent Findings and Order specified that the payment of these $36,846.08 in backwages would be handled in two parts. First, in paragraph 14, the Consent Order specifies that "[i]n order to resolve this matter without further litigation, Respondents have agreed to allow USPS to release and distribute $31,715.18 in withheld funds to the Department of Labor." Second, in paragraph 15, the Consent Findings and Order stated that "Respondents have also agreed to pay an additional $5,130.90 in backwages and interest to be distributed by the Department of Labor to employees in three installments."

The Consent Findings and Order also allowed that "[i]f Respondents provide proof of payment of wages to employees that are now part of the total outstanding backwages as described in the attached Schedule A within the three-month installment payment period, deduction of that amount from the total amount owed by Respondents will be made."

During the three-month installment payment period, Respondents allegedly provided documentation of backwage payments and requested a reduction in their amount due. Upon review, WH concluded that this documentation did not prove the payment of any additional backwages.

On November 4, 2004, Respondents moved to reopen this case before the Office of Administrative Law Judges for a determination of the amount that they owed. Respondents argue that liability should have been established as $690.08. They argue further that even if the WH were correct, the amounts in question amount to an "insubstantial breach" not warranting debarment. See Respondents' brief.

The Department of Labor's Motion for Summary Decision

On June 27, 2005, the Department of Labor submitted a Motion for Summary Decision with supporting Memorandum. The Respondents submitted a response to the Department's motion, and the Department submitted a reply to that response.[1] On August 31, 2005, I held a telephone hearing on the record on that motion and ruled that the Consent Findings and Order authorized the immediate release of $31,715.18 in funds withheld from Respondents' mail-hauling contracts.

Since I granted partial summary decision as to the release of the $31,715.18 specified in the Consent Findings, only $5,130.90 of the $36,846.08 that Respondents agreed to pay remains in dispute. Since the start of this matter, the USPS has withheld an additional $4,906.94 from the mail-hauling contracts at issue. This amount is $223.96 short of the $5,130.90 that is still unpaid under the terms of Consent Findings.

The Department of Labor's Motion in Limine

The Department also filed a Motion in Limine to preclude the admission of certain evidence that the Respondents planned to submit during the hearing. The Respondents submitted a response to this motion as well. Citing the liberal standards of admission before the Office of

[1] The Respondents agreed to the withholding on August 1, 2003 and this was approved on October 28, 2003 by Judge Burke. See Factual Stipulation 16, below.

Administrative Law Judges, I ultimately ruled at the hearing to admit the Respondents' evidence, but I have considered the Department's arguments against its admission in determining the weight that this evidence should be given. This issue is discussed further *infra*.

The Hearing

A hearing was held in this case on September 8, 2005 in Washington, D.C. The Department of Labor was represented by Brian J. Mohin, Esquire, and Alfred J. Fisher, Esquire, Office of the Solicitor, Philadelphia, Pennsylvania. The Respondents were represented by Dean E. Wanderer, Esquire, Fairfax, Virginia. Rebecca J. Brown, one of the Respondents, testified as did Bobby G. Harrison, one of the Respondents' former employees, and Diane Koplewski, an investigator for WH. The Consent Findings and Order with attached Schedule A was admitted as Joint Exhibit ("JX") 1. The Respondents' Exhibits ("RX") 1-41 where admitted into evidence, as were the Government's Exhibits ("GX") 1-5. At the conclusion of the hearing, the parties were directed to submit post-hearing argument; the parties proposed submitting post-hearing arguments by November 10, 2005. Both parties filed briefs.

FACTUAL STIPULATIONS

During the pre-hearing telephone conference held on August 31, 2005, both parties stipulated to 18 paragraphs of facts. Tr. at 13-15. This stipulation was reaffirmed by both parties during the hearing held on September 8, 2005, and I accept that the record substantiates these stipulations. Tr. at 8. The factual stipulations are as follows:

1. Respondent Rebecca J. Brown, acting on behalf of the corporate Respondent, R & W Transportation, Inc., entered into contract numbers 20190 and 31337 with the United States Postal Service ("USPS") to provide mail hauling services between metropolitan areas in the states of Virginia and Georgia.

2. R & W Transportation, Inc. is a corporation incorporated in the state of Delaware since 1995.

3. Rebecca J. Brown has been the president and sole shareholder of R & W Transportation, Inc. since the company's incorporation.

4. In her capacity as president of R & W Transportation, Inc., Rebecca J. Brown was actively involved in the daily management of the subject contracts, hired and fired employees, and exercised control over the wages paid, hours worked, and other conditions of employment maintained by R & W Transportation, Inc.

5. USPS Contract Nos. 20190 and 31337 were contracts that were each for amounts in excess of $2,500.00 and more than five service employees performed the mail hauling services involved in those contracts.

6. Wage Determination No.77-195 (Rev. Nos. 20, 22, 23) was applicable to USPS Contract No.20190.

7. Wage Determination No.77-193 (Rev. nos. 23, 25 and 28) was applicable to USPS Contract No.31337.

8. During the performance of the contracts, Rebecca J. Brown was aware that the subject contracts were governed by the Service Contract Act.

9. Respondents' employees who worked on the subject contracts performed the services of "truck driver - other than trailer type."

10. With regard to Contract No. 20190, the pertinent Wage Determination provided that between August 19, 1995 and August 18, 1997 employees classified as "truck driver - other than trailer type" were to receive a minimum hourly wage of $14.05 per hour, plus a health and welfare contribution of $1.29 per hour, and a pension contribution of $.89 per hour. In Rev. 22, effective August 19, 1997 through June 30, 1998, the minimum hourly wage was $14.44 per hour, plus a health and welfare contribution of $l .29 per hour and a pension contribution of $.89 per hour. In Rev. 23, effective July 1, 1998 through June 30, 2000, the minimum hourly wage was unchanged at $14.44 per hour, plus the health and welfare contribution was unchanged at $1.29 per hour and the pension contribution was unchanged at of $.89 per hour.

11. With regard to Contract No. 31337, Wage Determination Rev. 23, effective February 1, 1997 through January 31, 1999, provided that employees classified as "truck driver other than trailer type" were to receive a minimum hourly wage of $13.28 per hour, plus a health and welfare contribution of $1.13 per hour and a pension contribution of $.88 per hour. In Rev. 25 effective February 1, 1999 through June 30, 1999, the minimum hourly wage increased to $13.90 and the fringe benefits and pension contributions were combined at $2.15 per hour. In Rev. 28 effective July 1, 1999 to June 30, 2002, the minimum hourly wage increased to $14.78 per hour and the wages and fringe benefits were combined and unchanged at $2.15 per hour.

12. Under the wage determinations applicable to the subject contracts, employees classified as "truck drivers - other than trailer type" were to receive ten paid holidays per year, including New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving and Christmas.

13. At all times relevant to the performance of the subject contracts, Respondent Rebecca J. Brown was aware that employees working on the subject contracts must receive the wages set forth in Wage Determination No.77-195 (Rev. Nos. 20, 22, and 23) and Wage Determination No. 77-193 (Rev. Nos. 23, 25, and 28).

14. In response to a complaint received by the Department of Labor's Wage and Hour Division, Baltimore District Office, the Wage and Hour Division initiated an investigation of Respondents on December 11, 1998.

15. The Wage and Hour Division's investigation revealed that Respondents owed backwages to thirty-six employees.

16. Respondents executed Consent Findings on August 1, 2003 agreeing to allow the USPS to release $31,715.18 in withheld funds and to pay the additional $5,130.90 in backwages due and interest in three monthly installments.

17. The USPS ultimately withheld an additional $4,906.94 from Contract Nos. 20190 and 31337 and provided those funds to the Wage and Hour Division, which is holding those funds pending resolution of this matter.

18. On August 1, 2003, Respondents executed Consent Findings agreeing to the release of funds withheld from two mail-hauling contracts with the USPS to satisfy minimum wage rate, health and welfare, pension and holiday pay found to be owed employees as a result of a the Wage and Hour Division's investigation of Respondents' business in the amount of $36,846.08. The Consent Findings were approved by Order of Associate Chief Justice Thomas M. Burke on October 28, 2003.

STATEMENT OF ISSUES

As follows:

1) Did the Respondents provide any proof of payment of backwages pursuant to paragraph 16 of the Consent Findings adequate to justify a reduction in the amount of backwages that the Respondents agreed to pay in paragraph 15 of the Consent Findings and Order?

2) Should the Respondents should be debarred pursuant to paragraph 11 of the Consent Findings and Order and the provisions of the SCA. 41 U.S.C. § 354 *et seq*. for failing to comply with the Consent Findings and Order?

SUMMARY OF THE EVIDENCE

Respondents' Documentary Evidence

The Respondents' Exhibits 1-18 are employee work and payment records for the employees involved in the performance of Contract No. 20190, and the Respondents' Exhibits 19-38 are the same for the employees involved in the performance of Contract No. 31337. Each exhibit is a folder of copies of canceled checks and payment statements for one employee. The first page of each exhibit is a spreadsheet that serves as a summary of the rest of the documents contained in that exhibit.

These spreadsheets show revised numbers of hours worked by Respondents' employees and recalculations of the required wages and fringe benefits owed to Respondents' employees. The exhibits show "overpayments" to Respondents' employees based on Respondents' revision of their work hours. Many of the spreadsheets bear a notation on the bottom that reads "[h]ours adjusted due to hours incorrectly reported on time sheets."

Testimony of Rebecca Brown for the Respondents

Rebecca Brown, the President and sole shareholder of R & W and a Respondent in this case, testified that she began performing on Contract No. 20190 on August 10, 1995 and that she has held three federal contracts over the years since then. Tr. at 48. She testified that she is familiar with the process by which the wage, health and welfare, and pension minimums are established for federal contracts. Tr. at 48.

Brown alleged that she provided the documents included in the Respondents' exhibits, with the exception of the new summaries, during the time period permitted by paragraph sixteen of the Consent Findings and Order. Tr. at 24.

Brown testified that she did not believe she owes any employees any wages or holiday pay. Tr. at 46-47. Additionally, she testified that she would have been willing to pay backwages to her employees "[i]f [she] owed it," but she testified that she "knew that [she] did not owe." Tr. at 39. She admitted, however, that she believes she does owe three employees backwages for their pension and health and welfare benefits. Tr. at 46-47. She testified that the total amount of the backwages due for these unpaid benefits were "like $700.00 or $800.00, something like that." Tr. at 46-47.

Brown averred that she paid all required holiday pay to her employees and that she had provided that information to WH during the time period permitted by paragraph sixteen of the Consent Findings and Order. Tr. at 35-36. She admitted, however, that she sometimes recorded holiday hours as regular hours. Tr. at 36-37.

Brown testified that she had enrolled her company in a health program to provide health and welfare benefits to her employees, and she testified that she provided this information to WH, who "rejected it." Tr. at 38. Brown further testified that the Respondents' own exhibits showed no evidence that employee Charles Strain was ever paid any health and welfare benefits. Tr. at 53-55. She testified that Strain was enrolled in the health program that the company had set up, but she testified that there was no documentation of that program among the Respondents' exhibits. Tr. at 53-55. She testified that the same thing was true for William Allison. Tr. at 53-55. She testified that WH was never able to verify her claims of enrolling the company in a health benefits program from the documentation she had submitted. Tr. at 53-55.

Brown alleged that the hours being recorded by the USPS and by her employees were inaccurate. Tr. at 32-34. Brown testified that she had problems with employee credibility with regard to their hours, and she testified that she attempted to provide that information to WH during the time period permitted by paragraph sixteen of the Consent Findings and Order. Tr. at 34-35. Brown testified that she believed "a lot of overpayments" had been made to her employees. Tr. at 52. She also testified that she wanted those overpayments of wages to be applied to the amounts of the various fringe benefits that she owed to her employees, but she admitted that "on the regulations, it can't be done." Tr. at 52.

Brown testified that she resubmitted the same cancelled checks to WH on more than one occasion for some employees with additional notations made on them. She testified that she did this to eliminate any confusion about the wages or benefits for which the checks had been issued. Tr. at 45-46.

Brown claimed on direct examination that she had "never" received complaints from employees about them not getting paid. Tr. at 44. She admitted, however, that she had to go to court to settle wage disputes with some of her employees and that the court ordered her to make additional wage payments to her employees. Tr. at 34-35.

Brown further noted that Rufus Fair filed a lawsuit over unpaid wages. Tr. at 48-49. Brown testified that she had been in wage disputes with other employees as well, including Cooper and Mosely. Tr. at 49-52. She testified that she had withheld Mosely's wages because he had damaged one of her trucks and that the amount she "wanted to pay him, he wouldn't accept the payment." Tr. at 49-52. She stated that she was later directed by WH to pay him the wages. Tr. at 49-52.

Brown signed the Consent Findings and the Consent Findings were approved by the Order of Judge Burke on October 28, 2003. Tr. at 59-61. Brown admitted that she had agreed to make certain payments of back wages but that she did not make any of those payments because "no one could determine what [she] owed." Tr. at 56. She also testified that the Consent Findings had specified that she agreed to pay off the remaining $5,130.90 in a series of three monthly installment payments "if [she] owed it," but that she never made any of those monthly installment payments "because [she] didn't owe them and [WH] already had the funds that I didn't owe." Tr. at 59-61.

Brown testified that she was an accountant, but she admitted that neither she nor anyone else had ever conducted an audit of her records. Tr. at 22 & 69-70.

Testimony of Bobby Harrison for the Respondents

Bobby Harrison, a former employee of the Respondents, testified for the Respondents that he had received all of the wages and benefits to which he was entitled. Tr. at 77. Harrison, however, could not explain how he had been paid health and welfare benefits, which made up the vast majority of the backwages to which WH had determined he was entitled. Tr. at 81-83 & 111-112. Harrison also testified that he only received two checks per each pay period: one for wages and one for his pension benefit. Tr. at 81-83.

Harrison also testified that he was not aware of the calculations made by WH as to the amounts he was owed or for what he was owed them. Tr. at 79-80.

Testimony of Diane Koplewski for the Department of Labor

Diane Koplewski, who served for eight years as the Assistant District Director of the Baltimore Wage and Hour Division office for the district office in Baltimore, testified for WH. Tr. at 85-86. Her duties in that position included supervising a group of field investigators conducting investigations under various statutes that Wage Hour has the responsibility to enforce, including the Service Contract Act. Tr. at 87. She testified that she:

> …would assist them in day-to-day activities in terms of answering questions, assisting in their research, guiding them through their investigation process and then reviewing the case files upon conclusion when they submitted them to me.

Tr. at 87. She testified that she was familiar with the requirements of the Service Contract Act and the procedures for conducting investigations under the Act. Tr. at 87.

She testified that she oversaw the investigation of the Respondents. Tr. at 87. She testified that the investigation of the Respondents started when, in the early part of 1998, the Baltimore District Office received "two complaints from different individuals who alleged that they were not paid for all their hours of work and the hours that they were paid." Tr. at 87-88.

She testified that, initially, the complaints were assigned to an investigator named Sharling who attempted to pursue a mediation-conciliation effort with the company, "which is a process of presenting the issues to the company by phone and see what the matter is, see if the allegations are in fact valid, what the employer has to say, that type of process." Tr. at 88. She testified that Sharling's investigation found that the allegations were valid, "that people were not paid for all their hours worked" and that "the hours that were paid were not paid properly." Tr. at 88-89.

Koplewski continued that the next step was to expand the investigation to include all of the Respondents' employees to see if further violations existed. Tr. at 89. Sharling attempted to get the Respondents to perform a self-audit but she was unsuccessful. Tr. at 89. After Sharling was promoted, the case was reassigned to an investigator named Beamer. Tr. at 89.

Koplewski testified that Beamer began his investigation by requesting "payroll records, documentation, any type of records that would show the company had complied with the wage determination that was in the Service Contracts that were under investigation." Tr. at 89. Koplewski explained that the amount of the backwages due was determined by examining all of the payroll records provided by the Respondents and comparing them against the wages and fringe benefits required by the applicable contracts and wage determinations. Tr. at 95-96. She testified that it took an "extensive period of time" because the investigators had difficulty getting the requested records from the Respondents. Tr. at 90.

Koplewski testified that the Respondents claimed to have provided insurance premiums as health and welfare benefits for their employees but only for a period of about four months from December 1995 to March 1996. Tr. at 107-108. She testified that WH was never able to confirm that the Respondents had bought into any healthcare plan to provide for their employees. Tr. at 107-108.

Koplewski alleged that Beamer was ready to conclude his investigation around January 2002. Tr. at 90. She testified that it is routine to have a closing conference with

an employer to inform them of the investigation's results. Tr. at 90. This closing conference was held, and it included Beamer, Koplewski, John Scott (who would be taking over for Beamer), Rebecca Brown, and her counsel Dean Wanderer. Tr. at 90.

At the conference, the violations discovered and the backwages owed were outlined for the Respondents. Tr. at 91. Koplewski testified that at that time, Brown agreed to comply in the future and stated that WH's backwages determination may not be completely accurate because "some people had been paid." Tr. at 91. Scott agreed to review whatever documentation Brown provided of such payments and to make any necessary adjustments to the WH determination. Tr. at 91.

Koplewski testified that Scott continued this process of reviewing the materials provided by the Respondents' until July 2002. Tr. at 91. She testified that some adjustments to the backwage determination were made based on these records submitted by the Respondents. Tr. at 127.

In August 2002 Beamer met with Brown again and Brown signed a Settlement Agreement setting a total backwage payment amount. Tr. at 91. The agreement stated that the Respondents would be paying approximately $37,000.00 to about 37 employees. Tr. at 91. She testified that Brown agreed to an installment schedule to pay back those wages beginning in late September or early October 2002. Tr. at 91. In September 2002, Scott was promoted out of the WH office in Northern Virginia. Tr. at 92.

Koplewski explained that the Respondents were required to provide proof of the scheduled installment payments to the District Office, but that, in the fall of 2002, WH received no proof that any of the required installment payments were being made. Tr. at 92. She testified that when she contacted her lawyer, Mr. Wanderer, about this in December 2002 to find out if the payments were being made, she was informed that no payments had been made. Tr. at 92. She testified that she was told by Mr. Wanderer that "when [Brown] had agreed to make the back wage payments and signed the installment agreement, she had no intention of ever paying any back wages because she didn't have the money." Tr. at 92-93.

She testified that she explained to Mr. Wanderer that the next step WH would take would be to have the USPS withhold funds in the amount of the back wages due from any monies owed to the Respondents under their contracts. Tr. at 93. She informed Wanderer that she was going to request that this be done. Tr. at 93. A due process letter was provided in late December notifying the Respondents that the funds would be withheld, and WH made the formal request to the USPS to withhold the funds in January 2003. Tr. at 93.

After the Consent Findings were signed and approved in August 2003, Koplewski testified that she personally reviewed all of the materials submitted by the Respondents during the ninety-day window allowed by paragraph 16 of the Consent Findings and Order. Tr. at 97. To review these documents, she testified that she went through them individual by individual and compared the previous computations of backwages due against the payroll records supplied by the Respondents. Tr. at 97. She testified that the Respondents submitted cancelled payroll checks as well, some of which had new notations written on them, but that "[t]here was nothing new in terms of those cancelled checks." Tr. at 97-98.

Koplewski testified that, in addition to the documents submitted during the ninety-day window allowed by paragraph 16 of the Consent Findings and Order, the Respondents continued to attempt to submit documents even after January 2004. Tr. at 134. She testified, however, that the majority of these documents were duplicates of documents that

had already been submitted in the past. Tr. at 135. She also testified that she spoke with Dean Wanderer both during the ninety-day window and after, including two meetings after January 2004. Tr. at 134.

In Koplewski's testimony, she next went through a many of the specific records from the Respondents' Exhibits in detail, including payroll sheets, cancelled checks, and summaries, to demonstrate how they compared with the previous determinations made by WH contained in the Government's exhibits and to explain why they did not represent any additional payment of the backwages due. Tr. at 100-119.

Koplewski testified that to her knowledge, "not a penny" of the backwages due has been paid by the Respondents. Tr. at 96.

DISCUSSION

Relative Weight of the Evidence

Respondents allege that they submitted proof of payment of backwages pursuant to paragraph 16 of the Consent Findings adequate to justify a reduction in the amount of backwages.

Part of my determination goes to the credibility of the witnesses and to weight given to certain documents of record. The Respondents bear the burden of proof. "Burden of proof," as used in this setting and under the Administrative Procedure Act ("APA") is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d). The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [***Ondecko***], 512 U.S. 267, 18 B.L.R. 2A-1 (1994).

The Respondents' Documentary Evidence

The Department of Labor filed a Motion *in Limine* to preclude the admission of these summaries arguing that they should not be admitted for two reasons. First, they argued the evidence was inadmissible because it purports to show not that backwages had been paid but that backwages were never owed to begin with, which contradicts the terms of the signed Consent Findings and Order. Second, they argued the evidence was inadmissible because the regulations governing offsetting made it irrelevant.

Citing both the liberal standards of admission before the Office of Administrative Law Judges and the legitimacy of exhibits that serve as summaries of voluminous materials, I ultimately ruled at the hearing to admit the Respondents' evidence. The fact of its admission, however, does not determine what weight it should be given.

The Respondents argue that The Department of Labor has never instituted any proceedings in this matter. It is alleged that the Department of Labor has submitted two motions and participated in a hearing related to the Respondents' Motion, but it has never invoked its rights under paragraph 11. "Therefore, debarment of the Respondents is inappropriate." See Brief. They argue that Consent decrees and orders to which the government is a party should be construed basically as contracts.[2] I am advised that when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.[3]

[2] Citing to ***United States V. ITT Continental Baking Company***, 420 U.S. 223, 238 (1975).
[3] Citing to ***United States v. Winstar Corp***., 518 U.S. 839, 895 (1996).

However, I find that the Department of Labor is correct that defense offered by the Respondents is primarily a postjudgment attempt to alter the Consent Findings by showing that Respondents' total liability for unpaid backwages and fringe benefits is less than the amount to which the Respondents agreed – to show that backwages were never owed rather than that they had been paid. The terms of the Consent Findings, which the Respondents signed, clearly establish the amount of backwages they owe, and to the extent that this evidence attempts to contradict that, its weight must be discounted.

The Supreme Court has held that consent decrees are enforceable under the terms of the decree to which the parties consented. *See* ***United States v. Armour & Co.***, 402 U.S. 673 (1971). The Court stated that:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation…For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

402 U.S. at 681-682.

Consent decrees signed by an Administrative Law Judge under the SCA have the same force and effect as any other judgment and are a final adjudication on the merits. ***In the Matter of Jesse Fence and Construction Co.,*** WAB No. 95-01 (June 29, 1995), 1995 WL 646571. *See also* ***Securities and Exchange Commission v. Thermodynamics, Inc***, 319 F. Supp. 1380, 1382 (D. Colo. 1970); ***A.D. Julliard & Co. v. Johnson***, 166 F. Supp 577, 585 (S.D. N.Y. 1957). By consenting to the issuance of a decree by a court having jurisdiction, the parties "waive" any errors committed in the issuance of the decree. ***Fleming v. Warshawsky & Co.***, 123 F.2d 622, 625 (7th Cir. 1941). Consent decrees must be construed as they are written. ***Richardson v. Edwards***, 127 F.3d 97, 101 (D.C. Cir. 1997). Where a decree was entered by consent, no issue other than that reserved by such decree should be determined. ***McGowan v. Parish***, 35 S.Ct. 543 (1915).

As part of the executed Consent Findings in this matter, the Respondents agreed that they owed their employees $36,846.08 in backwages and fringe benefits. Testimony that the original payrolls contained "errors," that the employees were "overpaid," and the submission of summary sheet exhibits purporting to demonstrate such overpayments and errors, are not an attempt to prove that the backwages have been paid. Brown alleged that the hours being recorded by the USPS and by her employees were inaccurate. I find that there is no evidence to support this allegation. I find further that the exercise after the Consent Order was issued is an attempt to deny that Respondents incurred the underlying liability for the backwages in the first place. Although the Consent Findings allowed Respondents to show proof of payments of the outstanding backwages and fringe benefits to employees, nowhere do the Consent Findings allow Respondents to deny that they actually owed their employees $36,846.08 in backwages.

After entering into the Consent Findings approved by an Administrative Law Judge, Respondents failed to produce credible testimony and records in an attempt to reduce the total liability they agreed to in the Consent Findings. Under ***Armour, Jesse Fence,*** and ***Thermodynamics***, those backwages became part of a final adjudication on the record and Respondents have waived their right to litigate the total amount of unpaid backwages, and to the extent that this evidence attempts to litigate that, its weight must be discounted.

In addition to attempting to contradict the terms of the Consent Findings and Order, the Respondents' evidence is made largely irrelevant by the regulations governing offsets. Even if the overpayments alleged by the Respondents could be conclusively established with this evidence and the consideration of those overpayments did not contradict the Consent Findings and Order, those overpayments cannot be used to offset wages due in other pay periods or to offset unpaid fringe benefits.

Contractors under the SCA cannot offset wage rate deficiencies for some hours with wage overpayments for other hours. The regulation at 29 C.F.R. § 4.166 states that "[f]ailure to pay for certain hours at the required rate cannot be transformed into compliance with the Act by reallocating portions of payments made for other hours which are in excess of the specified minimum." *See* ***In the Matter of Pryor's Court***, B.S.C.A. No. 81-SCA-1355 (December 4, 1985) 1985 WL 286230 (regulations are explicit in not permitting employer to offset wages). Therefore, even if the Respondents could establish that wage overpayments had been made, those overpayments cannot offset backwages due for the failure to pay other hours at the correct rates.

Nor can wage overpayments be offset against fringe benefits. The regulation at 29 C.F.R. § 4.170(a) specifically prohibits the application of any wage overpayments to liability for fringe benefits stating "[f]ringe benefits required under the Act shall be furnished, separate from and in addition to 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 fringe benefit obligations under the Act." *See* ***In the Matter of Gaylord and Associates***, B.S.C.A. 85-SCA 19 (July 17, 1991), 1991 WL 733675 (regulations are explicit in not permitting employer to offset wages against fringe benefits). Respondent Brown even admitted during her testimony that she knew such offsets were prohibited by regulation. Therefore, even if the Respondents could establish that wage overpayments had been made, those overpayments cannot offset unpaid fringe benefits.

Therefore, because such overpayments cannot offset wage underpayment for other hours or fringe benefit payments, the weight of the Respondents' evidence alleging wage overpayments must be discounted even further

In addition to these two problems, the Respondents' evidence is undercut by the more credible testimony of Diane Koplewski. She testified that she had reviewed all documentation provided by Respondents' during the ninety-day window allowed by paragraph 16 of the Consent Findings as well as the documents submitted after that period had ended. She testified in detail about how she compared each provided document to the backwage calculations for the period of time in which the document purported to show additional payment and to the Respondents' payroll records, and using this process, she determined that Respondents had not provided proof of any additional payment for backwages pursuant to the consent decree.

Given the fact that the this documentary evidence proffered by the Respondents attempts to contradict the terms of the consent order, is made largely irrelevant by the regulations governing offsets, and is controverted by more credible testimony, I find that this evidence is entitled to no weight at all.

The Testimony of Rebecca Brown for the Respondents

The testimony of Rebecca Brown for the Respondents contains too many contradictions to carry much weight. In her testimony she asserted that she had purchased health insurance for her employees, but she admitted that none of her exhibits could support that assertion. She

testified that she had never had any complaints from employees about not getting paid, but she then admitted that she had prior disputes with her employees regarding their hours and wages that resulted in local court actions in which she was ordered to pay backwages to her employees. She admitted that she had agreed to make certain payments of back wages, but then testified that she had not paid. She testified that "no one could determine what [she] owed" despite the fact that she had signed both a Settlement Agreement and the subsequent Consent Findings, both of which delineated exactly what she owed. Tr. at 56.

Additionally, she admitted that she had failed to pay health and welfare benefits to some employees, she admitted that she had submitted inaccurate documents to WH, she admitted that many of the documents she submitted were resubmissions of documents she had already submitted, and she admitted that she had failed to perform an audit of her records or to have one performed despite the fact that she herself was an accountant. Although she prepared and submitted employee summary sheets showing an underpayment of $690.08, on close examination, she conceded that the offsets of overpayments against fringe benefits that she credited to herself are prohibited by regulation. In light of all of these contradictions and admissions, her testimony carries little weight, and in fact, tends to support the Department's position in this case.

The Testimony of Bobby Harrison for the Respondents

Bobby Harrison testified that he had received all of the wages and benefits to which he was entitled, but this testimony was not credible for two reasons. First, Harrison could provide no adequate explanation of how he had been paid health and welfare benefits, which made up the vast majority of the backwages to which WH had determined he was entitled. Second, Harrison was not aware of the calculations made by WH as to the amounts he was owed ($11,536.99) or for what he was owed them. Since he did not even know the amounts to which WH had determined he was entitled, he could not testify credibly that he had been paid all that he was owed.

Moreover, Harrison testified that he only ever received two checks per pay period: one for wages and one for his pension benefit. Since regulations require that his health and welfare benefit be paid separately, this testimony actually supports the Department's position that Harrison's health and welfare benefit was not paid as required.

The Testimony of Diane Koplewski for the Department of Labor

Former WH assistant district director Diane Koplewski credibly testified that she had reviewed all documentation provided by the Respondents' during the ninety-day window allowed by paragraph 16 of the Consent Findings as well as the documents submitted after that period had ended. She testified in detail about how she compared each provided document to the backwage calculations for the period of time in which the document purported to show additional payment and to the Respondents' payroll records, and using this process, she determined that Respondents had not provided proof of any additional payment for backwages pursuant to the consent decree.

Koplewski also reviewed all of Respondents' exhibits submitted into evidence at the hearing in this matter and found they provided no proof that Respondents had paid backwages pursuant to the Consent Findings. None of the documents produced by Respondents showed additional payments of backwages because they did not represent additional payments to employers for backwages owed; they merely showed that Respondents had paid wage and

pension obligations when they were due. As Koplewski testified, "There was nothing new in terms of those cancelled checks." Tr. at 98.

Given the thoroughness of Koplewski's review of the documents submitted by the Respondents in the past and the exhibits they submitted for this case, as well as her experience with WH's SCA investigations in general, her testimony is entitled to great weight. Her testimony was consistent, detailed, and credible.

Amount of Backwages Owed

It was stipulated by the parties, in both paragraph 16 of the Consent Findings and Order and at the hearing held on September 8, 2005, that the Respondents bear the burden of proving whether any additional payments of backwages have been made that entitle the Respondents to a deduction from the amounts established in paragraphs 14 and 15 of the Consent Findings and Order. Tr. at 5. Respondents argue that liability should have been established as $690.08. The Respondents have failed to carry their burden.

First, the Respondents have produced no proof that they have paid these backwages; they have simply produced many of the same documents twice to WH, once during the investigation and once after the issuance of the Consent Findings and Order, relabeled in an attempt to show payments of backwages. As discussed *supra*, this documentary evidence carries no evidentiary weight because it attempts to contradict the terms of the Consent Findings and Order, is made irrelevant by the regulations governing offsets, and is controverted by the more credible testimony of Koplewski.

Second, the testimony of Rebecca Brown for the Respondents also fails to substatiate the Respondents' assertion that any of the backwages owed have been paid. As discussed *supra*, in her testimony she could not support her assertion that she had purchased health insurance for her employees, she admitted that she had failed to pay health and welfare benefits to some employees, she admitted that she had submitted inaccurate documents to WH, she admitted that she had prior disputes with her employees regarding their hours and wages that resulted in local court actions in which she was ordered to pay backwages to her employees, and she even testified that she had not paid because "no one could determine what [she] owed" despite the fact that she had signed the Consent Findings delineating exactly what she owed. Tr. at 56. Therefore, her testimony also fails to prove the Respondents' assertion that any of the backwages owed have been paid, and in fact, it tends to support the Department's position in this case.

Third, the testimony of Bobby Harrison also fails to prove the Respondents' assertion that any of the backwages owed have been paid. His testimony is not credible because he could provide no adequate explanation of how he had been paid health and welfare benefits, which made up the vast majority of the backwages to which WH had determined he was entitled, and because he was not even aware of the calculations made by WH as to the amounts he was owed and for what he was owed them. Moreover, his testimony as to the checks he regularly received supports the Department's position that he was not paid the health and welfare benefits that he was owed.

Finally, Diane Koplewski testified credibly and in great detail that she had reviewed all documentation provided by the Respondents' during the ninety-day window allowed by paragraph 16 of the Consent Findings as well as the documents submitted after that period had ended and that she had determined that the Respondents were not entitled to any further deductions. She also reviewed all of Respondents' exhibits submitted into evidence at the

hearing in this matter and found that they provided no proof that Respondents had paid backwages pursuant to the Consent Findings.

Conclusion

Because the Respondents have failed to carry their burden of establishing that they are entitled to any deduction, I find that no deduction should be made from the $36,846.08 of backwages owed that was specified in paragraphs 14 and 15 of the Consent Findings and Order. I find that to pay the $5,130.90 of this amount that currently remains unpaid, the remaining $4,906.94 that has been withheld from the contracts that are the subject of this action should be released for distribution to the employees of the Respondents, and the Respondents should pay the remaining $223.96. I also find that in accordance with paragraph 11 of the Consent Findings and Order, the Respondents should pay interest on that $223.96 at the short-term rate plus 3 percent as provided in 26 U.S.C. § 6621(a)(2).

Debarment

General Standards for debarment

The SCA debars violating contractors from receiving any contracts from the United States for three years, without modification. 41 U.S.C. § 354(a). "The legislative history of the SCA makes clear that debarment of contractors who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction." ***Vigilantes, Inc. v. Administrator***, 986 F.2d 1412, 1418 (1st Cir. 1992). "Because of the important interests at stake, Congress found that simply requiring violating contractors to 'pay what they should have to begin with'…inadequately deterred and punished such employers." ***Summitt Investigative Service v. Herman***, 34 F. Supp. 2d 16 (D. D.C. 1998). Under the SCA, debarment is presumed once violations have been established unless the respondent can prove the existence of "unusual circumstances" that warrant relief from debarment. 29 C.F.R. § 4.188(a) and (b); ***Hugo Reforestation, Inc***., ARB Case No. 99-003, 2001 WL 487727 (ARB Apr. 30, 2001).

The Effect of the Consent Findings and Order

Paragraph 11 of the Consent Findings and Order provides that

> …if the Respondents fail to comply with the installment payment agreement set forth in paragraph 15 herein, the Department of Labor may institute proceedings for the purpose of determining whether a violation has occurred. If through the administrative hearing and appeal process it is determined that a violation, other than an inadvertent clerical error, has occurred…Respondents shall agree to the entry of an order placing them on the list of persons who have violated the SCA and associated regulations and who are to be denied the award of any contract with the United States for the period provided in 41 U.S.C. § 354…the effect of this paragraph is that in any case in which the Department of Labor demonstrates that either Respondent has committed violations of the SCA during the relevant time period, that Respondent has waived the right to attempt to show the existence of "unusual circumstances" within the meaning of 41 U.S.C. § 354(a) and 29 C.F.R. § 4.188 as it pertains to the defense in any such proceeding.

Based on the plain language of the Consent Findings and Order, therefore, the Respondents consented to debarment and have waived the opportunity to assert an "unusual circumstances"

defense to debarment if they failed to make the required installment backwage payments. As discussed *supra*, under ***Armour*** and ***Jesse Fence***, consent decrees are enforceable under the terms of the decree to which the parties consented, have the same force and effect as any other judgment, and are a final adjudication on the merits.

Paragraph 16 of the Consent Findings and Order does not alter the impact of paragraph 11. Paragraph 16 simply provides the Respondents the opportunity to provide proof of payment of outstanding backwages within a ninety-day period after entry of the Consent Findings and Order in order to have that amount deducted from the total they owe. This paragraph does not alter in any way the Respondents' consent to debarment and to the waiver of the "unusual circumstances" defense if they are found to have violated the Consent Findings and Order or the SCA.

The Respondents have also argued that the provisions of paragraph 11 are only applicable in an action initiated by WH. Resp't Hearing Brief at 6. Their arguments that these provisions are inapplicable because they initiated this proceeding misapprehend the language of paragraph 11. The paragraph does begin by giving WH the right to initiate an action, but that is not a prerequisite to the other provision of paragraph 11.

Under paragraph 11, the Respondents have consented to debarment "[i]f through the administrative hearing and appeal process it is determined that a violation, other than an inadvertent clerical error, has occurred." This sentence does not require any particular party to initiate the process that leads to such a determination. Moreover, paragraph 11 specifies that the defense of "unusual circumstances" is waived "in any case in which the Department of Labor demonstrates" that violations have occurred. Again, this language does not require any particular party to initiate the case in which the violation is demonstrated.

The Respondents allege that the violation is *de minimus*, in that the dispute affects only 0.6% of the total volume of business Respondents have under the SCA. However, application of paragraph 11 precludes the viability of this argument as they waived the right to attempt to show the existence of "unusual circumstances" within the meaning of 41 U.S.C. § 354(a) and 29 C.F.R. § 4.188.

Conclusion

The Respondents did not make the installment payments as agreed in the Consent Findings and Order during the ninety-day schedule. Although they did attempt to submit materials as allowed under paragraph 16 during the ninety-day window, these materials were primarily resubmissions of materials that had already been reviewed prior to the execution of the Consent Findings and Order. The documents were reviewed thoroughly by WH and found not to justify any deductions. Despite being informed of this determination, the Respondents still refused to make any of the payments they had agreed to make under the Consent Findings and Order. The Respondents continued this standoff with WH until November 2004 when they initiated this action. Now, more than two years since the issuance of the Consent Findings and Order, the Respondents have not paid a penny of the $5,130.90 in backwages that they agreed they owed.

I find that this failure to comply with the terms of the Consent Findings and Order and to cooperate with WH in the resolution of this matter constitutes a violation of the Consent Findings and Order. In accordance with paragraph 11 of that Order, the Respondents shall not be permitted to present any defense of "unusual circumstances" and shall be debarred for the three-year period provided in 41 U.S.C. § 354.

ORDER

It is hereby **ORDERED**:

1. The remaining $4,906.94, which has been withheld from the contracts of the Respondents, shall be released for payment to the employees of the Respondents;

2. The Respondents shall pay an additional $223.96 to the United States Department of Labor, Wage and Hour Division for payment to the employees of the Respondents together with interest at the short-term rate plus 3 percent as provided in 26 U.S.C. § 6621(a)(2); and

3. The Respondents shall be placed on the list of persons who have violated the SCA and associated regulations and who are to be denied the award of any contract with the United States for the three-year period provided in 41 U.S.C. § 354.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board ("ARB") within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). *See* 29 C.F.R. § 6.20. The Board's address is:

Administrative Review Board
United States Department of Labor
Room S-4309
200 Constitution Avenue, NW
Washington, DC 20210

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

The ARB's Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b).

Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).