In the Matter of:

COAST INDUSTRIES, INC. dba COAST JANITORIAL SERVICES and HERMAN GRIMES, An Individual and JEROME SCOTT, An Individual,

PETITIONERS,

v.

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

RESPONDENT.

ARB CASE NO. 04-004

ALJ CASE NO. 2002-SCA-003

DATE: February 28, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioners:
J. William Bennett, Esq., ***Cannon Beach, Oregon***

***For the Respondent Administrator, Wage and Hour Division*:**
Carol Arnold, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Solicitor, ***U.S. Department of Labor, Washington, D.C.***

FINAL DECISION AND ORDER

Federal service contractors who violate the McNamara-O'Hara Service Contract Act (SCA or the Act)[1] shall not be awarded federal contracts for three years unless they can prove "unusual circumstances."[2] Coast Industries, Inc. and its President, Herman Grimes, and Vice-President, Jerome Scott, admitted violating the Act, and the

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1 41 U.S.C.A. §§ 351-358 (West 1994).

2 *Id.* at § 354.

Administrative Law Judge (ALJ) found that they did not prove "unusual circumstances." Since a preponderance of the evidence supports the ALJ's finding, we order Coast, Grimes, and Scott debarred.

BACKGROUND

In April 1995 the United States Department of the Army awarded Contract No. DAAH-03-95-D-0019 to Coast to provide janitorial services at the Redstone Arsenal in Alabama. The contract was for $19,128,277.45. The contract was subject to the SCA which requires federal contractors to pay prevailing wages and fringe benefits that the Secretary of Labor predetermines or that a collective bargaining agreement specifies.[3] The contract was also governed by the Contract Work Hours and Safety Standards Act (CWHSSA), which required Coast to compensate its Redstone Arsenal employees at one and one-half times their hourly pay rate for all hours worked in excess of forty hours in a workweek.[4] Contractors who violate the wage provisions of these statutes are liable for any underpayments owed their employees.[5] The SCA also sanctions contractors with a three-year debarment from contracting with the Federal government.[6] But the Secretary of Labor has the authority to relieve a violator from debarment where the contractor demonstrates "unusual circumstances."[7]

Herman Grimes was Coast's President and Jerome Scott its Vice President during the Redstone Arsenal contract. In 1998 Grimes hired Stan Cuff to be the new project manager at Redstone. TR 51. Part of Cuff's responsibility was to be aware of and document the hours that the Redstone janitors worked. Respondent's Exhibits 4-10. According to Grimes, Coast did not have a "comp time" policy and paid overtime when employees worked more than a 40-hour workweek. TR 46-47. But in December 1999, Grimes learned that Cuff was requiring some of the janitors to work overtime but not paying them time and a half. Instead, these employees were given paid time off for the overtime hours at their regular hourly rate. TR 54, 57.

Carol Rogers, of the U.S. Department of Labor's Wage and Hour Division, investigated whether Coast complied with the wage statutes during the period from May 2, 1998, through May 6, 2000. She determined that Coast had not paid some employees

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[3] 41 U.S.C.A. § 351(a).

[4] 40 U.S.C.A. § 328(a).

[5] 41 U.S.C.A. § 352(a); 40 U.S.C.A. § 330.

[6] An aggravated or willful violation of the CWHSSA may also result in debarment. 29 C.F.R. § 5.12 (a). The ALJ granted Coast's motion to limit the question of debarment to the SCA. R. D. & O. at 2.

[7] 41 U.S.C.A. § 354.

the required time and a half for overtime but instead had credited them with "comp time," by which they received an hour of paid leave at their regular hourly rate for each hour of overtime they had worked. Furthermore, Rogers testified that Coast had kept "comp time logs" that purportedly contained records of its comp time policy. She said that Coast never made the logs available to her. TR 99-100.

As a result of Rogers's investigation, the Regional Solicitor, U.S. Department of Labor, filed a complaint with the Office of Administrative Law Judges.[8] The complaint alleged that Coast, Grimes, and Scott violated the SCA and its implementing regulations by not paying certain employees minimum wages, fringe benefits, and overtime pay.[9] The Regional Solicitor also alleged that Coast violated the CWHSSA when it did not pay employees overtime during the period in question and that it failed to make, maintain, and make available for inspection and transcription records showing the daily and weekly hours its employees worked.[10]

Before the hearing, the parties stipulated that Coast had underpaid minimum wage, overtime, and fringe benefits on the Redstone contract and, to resolve its liability for the underpayments, agreed to pay two employees $6,595.97. The parties agreed that the only issue for the ALJ to resolve was whether Coast, Grimes, and Scott should be debarred.[11] Plaintiff's Exhibit Number 1 at para. (5), (7).

The ALJ recommended that Coast, Grimes, and Scott be debarred. R. D. & O. at 14. In accordance with 29 C.F.R. § 6.20, Coast petitioned for review.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b). In rendering its decisions, "the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters." 29 C.F.R. § 8.1(c). The Board's review of an ALJ's decision is an appellate proceeding. 29 C.F.R. § 8.1(d). The Board shall modify or set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. 8.9(b). *See Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. *SuperVan, Inc.,* ARB No. 00-008, ALJ No. 94-SCA-14, slip op. at 3

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[8] Complaint (File No. 2002-SCA-3) dated January 7, 2002. *See* 29 C.F.R. § 6.15.

[9] *See* 41 U.S.C.A. § 351 (a) (1), (2); 29 C.F.R. § 4.6(h).

[10] *See* 40 U.S.C.A. § 328 (a); 29 C.F.R. § 4.6(g).

[11] Grimes and Scott concede that if we affirm the ALJ's conclusion that Coast Industries must be debarred, they too must be debarred. Statement in Support of Petition for Review at 24. *See* 41 U.S.C.A. § 354(a).

(ARB Sept. 30, 2002); *United Kleenist Org. Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002).

DISCUSSION

1. Overview of the SCA's statutory and regulatory debarment provisions

Under Section 5(a) of the SCA, any person or firm that the Secretary of Labor finds has violated the Act shall be ineligible to receive federal contracts for a period of three years "[u]nless the Secretary otherwise recommends because of unusual circumstances."[12] Debarment is presumed once violations of the Act have been found, unless the violator is able to show that "unusual circumstances" exist.[13]

As has been noted on many occasions, "Section 5(a) is a particularly unforgiving provision of a demanding statute. A contractor seeking an 'unusual circumstances' exemption from debarment must, therefore, run a narrow gauntlet." *Sharipoff dba BSA Co*., No. 88-SCA-32, slip op. at 6 (Sec'y Sept. 20, 1991). *Accord Colorado Sec. Agency*, No. 85-SCA-53, slip op. at 2-3 (Sec'y July 5, 1991); *Able Building Maint. & Serv. Co*., No. 85-SCA-4 (Dep. Sec.'y Feb. 27, 1991); *A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 855-856 (D.D.C. 1989). "The legislative history of the SCA makes clear that debarment of a contractor who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction." *Vigilantes v. Administrator of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992).

The SCA does not define "unusual circumstances." DOL regulations, however, establish a three-part test which sets forth the criteria for determining when relief from debarment is appropriate.[14] 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 the 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, the contractor must demonstrate a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance. Under Part III, other factors that must be considered include whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed recordkeeping violations which impeded the Department's

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[12] 41 U.S.C.A. § 354(a).

[13] 29 C.F.R. § 4.188(a) and (b); *Hugo Reforestation, Inc*., ARB No. 99-003, ALJ No. 97-SCA-20, slip op. at 9 (ARB Apr. 30, 2001).

[14] *See* 29 C.F.R. § 4.188(b).

investigation, and whether the determination of liability under the Act was dependent upon the resolution of bona fide legal issues of doubtful certainty. The contractor has the burden of proving "unusual circumstances" and must meet all three parts of the test in order to be relieved from debarment.[15]

2. Cuff's conduct was "willful" and caused the SCA violations. Therefore, Coast and its officers must be debarred.

The ALJ found that Coast did not meet Part I of the "unusual circumstances" test because the evidence demonstrated that Project Manager Cuff willfully and deliberately violated the SCA when he underpaid the janitors. R. D. & O. at 10. We agree with this finding because a preponderance of the evidence supports it. First, the parties stipulated that Coast violated the SCA's prevailing wage provisions. Plaintiff's Exhibit 1, para. (5). And second, Coast admits that Cuff, in his attempts at keeping overhead low by substituting comp time for overtime, ignored the SCA regulation that employees be paid "all wages due free and clear and without subsequent deduction." 29 C.F.R. § 4.6(h). Coast further admits that it violated the recordkeeping regulation at 29 C.F.R. § 4.6(g) when Cuff deliberately falsified its payroll records to cover up the wage violations. Respondents' Statement in Support of Petition for Review at 16; Respondents' Exhibit 15, p. 2-3.

Despite its protestations to the contrary, Coast in fact argues that we should not attribute Cuff's willful conduct to the company or its officers. Statement in Support of Petition for Review at 15-16. Coast contends that it had a well-defined system for computing the hours its employees worked and that company policy was to pay its employees the proper SCA wages. Therefore, Cuff's actions were aberrant. Furthermore, it claims that its officers did not know what Cuff was doing until December 1999, and when they found out, they reacted swiftly to correct the situation and fired Cuff. *Id.* at 15-17.

But the ALJ concluded that Coast could not evade responsibility for Cuff's conduct. R. D. & O. at 10-11. As authority for so concluding, he cited an SCA regulation:

> Furthermore, *a contractor cannot be relieved from debarment by attempting to shift his/her responsibility to subordinate employees*. . . . As the Comptroller General has stated in considering debarment under the Davis-Bacon Act, "[n]egligence of the employer to instruct his employees as to the proper method of performing his work or to see that the employee obeys his instructions renders the employer liable for injuries to third parties resulting therefrom. . . . The employer will be liable for acts of his

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15 *See Hugo Reforestation,* slip op. at 12-13.

> employee within the scope of the employment regardless of whether the acts were expressly or impliedly authorized. . . . Willful and malicious acts of the employee are imputable to the employer under the doctrine of respondeat superior although they might not have been consented to or expressly authorized or ratified by the employer."

29 C.F.R. § 4.188 (b)(5) (emphasis supplied) (citations omitted).

Relevant Labor Department decisions fully support the ALJ's conclusion that section 4.188 (b)(5) applies and that Coast cannot avoid debarment by blaming Cuff. *See Reliable Janitorial Service, Inc.,* 86-SCA-46 (Deputy Sec'y Nov. 22, 1988) (though bookkeeper "inexplicably" paid lower than prevailing wages to SCA janitorial employees after being advised of the proper wage rates, contractor precluded from gaining relief from debarment by asserting bookkeeper responsible for violation); *Robert Young d/b/a/Royal Crest Bldg. Maint.,* SCA-715 (Sec'y May 19, 1978) (contractor may not shift his responsibility for compliance with SCA to bookkeeper who failed to pay fringe benefits to employees); *In re Roman,* SCA-275 (Ass't Sec'y Aug. 13, 1975) (contractor may not shift his responsibility to comply with SCA because he was unaware that local contract managers were not properly paying janitorial employees).[16]

CONCLUSION

Since a preponderance of the evidence supports the ALJ's finding that Cuff's conduct in underpaying the janitors was willful, we affirm that finding. Moreover, the ALJ properly concluded that Coast, Grimes, and Scott cannot evade responsibility for Cuff's conduct. Thus, since Coast did not satisfy the first part of the three-part hierarchical test for showing "unusual circumstances," we need not consider whether

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[16] In addition to its argument that it should not be debarred for Cuff's actions, Coast contends that since the violations here are minimal (that is, the back wages owed constitute less than one fourth of 1% of its total Redstone payroll for the two years at issue), we should not find the violations willful. It cites *Federal Food Ser., Inc. v. Donovan,* 658 F. 2d 830 (D.C. Cir. 1981) as authority for this position. In *Fed.*, the ALJ ordered that the contractor be debarred because of previous violations and because he found that proper management would have precluded the underpayments to employees. The Secretary concurred in the ALJ's decision and the district court affirmed. The D.C. Circuit reversed and remanded. The court found that the record did not support the ALJ's finding about improper management because it was based solely on the basis of de minimus underpayments. The court explained that large underpayments might have been res ipsa loquitur of improper management, but absent evidence other than the mere fact that the underpayments were small, debarment was arbitrary. Thus, the court in *Federal* addressed mimimal underpayments solely in the context of the ALJ's finding concerning improper management. Therefore, we reject Coast's claim that *Federal* is an authority that indicates that "when the violation is *de minimus* it would not be proper to find willful violation." Statement in Support of Petition for Review at 14-15.

Coast established the mitigating factors to be considered at the second and third stages of analysis.[17] Therefore, we **AFFIRM** the August 30, 2003 recommended order debarring Coast, Grimes, and Scott.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[17] *Integrated Res. Mgt., Inc.,* ARB No. 99-119, ALJ No. 1997-SCA-14, slip op. at 6 (ARB June 27, 2002).