



**In the Matter of:**

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

**ARB CASE NO. 03-137**

**ALJ CASE NO. 01-SCA-22**

**v.**

**DATE: November 30, 2004**

**GROBERG TRUCKING, INC. &  
KENNETH R. GROBERG,  
Individually**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioners:*

**David J. Holdsworth, Esq., Sandy, Utah**

*For Respondent Administrator, Wage and Hour Division:*

**Roger W. Wilkinson, 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**

This matter is before the Administrative Review Board (the Board) pursuant to the statutory authority of the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. § 351-357 (West 1994). Our jurisdiction to hear and decide appellate matters under the Act is established by the regulations at 29 C.F.R. Parts 4 and 8 (2004) and Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

Groberg Trucking, Inc. and Kenneth R. Groberg, individually (collectively Groberg or Petitioners) filed a Petition for Review with this Board. They seek reversal of a June 24, 2003 Decision and Order (D. & O.) in which an Administrative Law Judge (ALJ) found Groberg liable for \$103,843.53 in SCA back wages due employees and ordered the Petitioners' debarment from doing business with the Federal government for a period of three years. The Administrator, Wage and Hour Division, U.S. Department of Labor (Administrator), was the prosecuting party below and now opposes the Petition for Review.

We conclude that the ALJ did not err in any aspect of his decision and adopt as our own the ALJ's findings of fact and conclusions of law in their entirety (D. & O. attached). We therefore deny the Petition 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). Pursuant to 29 C.F.R. § 8.1(c), 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."

The Board's review of an ALJ's decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). Pursuant to 29 C.F.R. § 8.9(b), the Board shall modify and set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. *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 (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**

The crux of this dispute is whether the record supports the Administrator's estimate of hours worked by Groberg's service employee truck drivers on U.S. Postal Service contracts subject to the SCA's prevailing wage and recordkeeping requirements. The parties agreed on the amount of back wage liability in the event that the ALJ found in favor the Administrator on the question of hours worked. D. & O. at 5.

The ALJ concluded that the preponderance of the evidence established that Groberg violated the Act's recordkeeping provisions by failing to make and maintain accurate daily and weekly records of actual hours worked by its drivers. *Id.* at 29. Groberg himself admitted that the records (which always recorded exactly 10 hours of work for every employee's shift) were merely estimations.

The ALJ found credible (and therefore probative) the testimony of the Administrator's witnesses (three Wage and Hour Division investigators and four Groberg truck drivers). On the other hand, the ALJ specifically ruled that the Groberg's testimony (and another driver's) was not credible and therefore of no evidentiary value. Generally, the Board:

will defer to the factual findings of an ALJ, especially in cases in which those findings are predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony. As we have noted, although the Board "reviews the ALJ's findings de novo, 'it must be

remembered that the ALJ heard and observed the witnesses during the hearing. It is for the trial judge to make determinations of credibility, and an appeals body such as the ... Board should be loathe to reverse credibility findings unless clear error is shown.”

*Sundex, Ltd.*, ARB No. 98-130 (Dec. 30, 1999) (quoting *Homer L. Dunn Decorating, Inc.*, WAB No. 87-03 (Mar. 10, 1989)). Here, too, we follow our general practice, defer to the ALJ’s credibility findings, and accept all the ALJ’s findings of fact based on those credibility determinations.

The record demonstrates by a preponderance of the evidence that Groberg committed SCA recordkeeping violations and that its records of hours worked were false. Accordingly, under the standards the Supreme Court enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (arising under the Fair Labor Standards Act), and applied to the SCA in *United Kleenist*, at 3, n.4, the ALJ properly concluded that the Administrator successfully demonstrated the actual number of hours worked and amount of wages paid “as a matter of just and reasonable inference.” Groberg failed to negate the Administrator’s proof of actual hours worked because the ALJ rejected the Petitioners’ testimony regarding hours worked. *United Kleenist*, at 5-6.

Because Groberg committed SCA recordkeeping prevailing wage violations, the Petitioners are subject to the sanction of debarment from doing business with the Federal government for a period of three years. 41 U.S.C.A. § 354(a). A contractor may be relieved from debarment only if it demonstrates the existence of “unusual circumstances.” *Id.* The standards for establishing “unusual circumstances” is found in the SCA regulations at 29 C.F.R. § 4.188. “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 v. Administrator, Wage and Hour Div.*, 968 F.2d 1412, 1418 (citing 29 C.F.R. § 4.188(b)(2)). We conclude that there is no justification in this record for relieving the Petitioners from debarment.

The record demonstrates Groberg’s willful and deliberate disregard of whether it was complying with the Act’s requirements regarding proper wage payment and recordkeeping. Petitioners ignored repeated instructions about compliance requirements from Wage and Hour Division officials during two prior investigations where similar violations were reported. Instead, Groberg simply continued to keep inaccurate records of hours worked to mask its violations. This evidence demonstrates culpable, indeed willful, conduct in causing the violations and relief from debarment cannot be in order. 29 C.F.R. § 4.188(b)(3)(i). The record also clearly demonstrates that Groberg is a repeat offender of SCA recordkeeping requirements, further precluding the Petitioners’ relief from the three-year debarment sanction mandated by the Act. 29 C.F.R. § 4.188(b)(3)(ii).

## **CONCLUSION**

For the foregoing reasons in addition to the ALJ's stated findings of fact and conclusions of law, we **DENY** the Petition for Review. The Board hereby **AFFIRMS** the ALJ's D. & O. of June 24, 2003.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**