



In the Matter of:

IBEW LOCAL NO. 103

ARB CASE NO. 96-123

**With respect to a petition
for review challenging removal of
the following contractors' names
from the list of bidders ineligible
to receive federal contracts:**

(Formerly WAB CASE NO. 96-07)

DATE: November 12, 1996

**WAYNE J. GRIFFIN ELECTRIC, INC.
WAYNE J. GRIFFIN, President
ALICE GRIFFIN, Secretary**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board on the petition of Local No. 103, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Local 103), seeking review of the September 2, 1994 letter issued by the Deputy Assistant Administrator, Wage and Hour Division of the Department of Labor, instructing the United States General Accounting Office (GAO) to remove Wayne J. Griffin Electric, Inc., Wayne J. Griffin, and Alice Griffin (Griffin) from the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* pursuant to 29 C.F.R. § 5.12(c). For the reasons set forth below, the petition for review is denied and the decision of the Wage and Hour Division is affirmed.

¹ On April 17, 1996, the Secretary of Labor re delegated authority to issue final agency decisions under, *inter alia*, the Davis-Bacon and Related Acts and their implementing regulations to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. *See also*, 29 C.F.R. Part 7 (1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions.

BACKGROUND

This matter arises out of three violations by Griffin of two of the Davis-Bacon Related Acts (DBRA). In 1987 it was determined by the Wage and Hour Division that Griffin had violated the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5310, 1440(g), a DBRA, by failing to pay its employees on a construction project fringe benefits during their first 90 days of work, and by paying its employees less than the required minimum fringe benefits under the applicable wage determination. *Wayne J. Griffin Electric, Inc.*, Wage Appeals Board (WAB) Case No. 93-05, Oct. 29, 1993, slip op. at 2. The Wage and Hour investigator explained the requirements to Wayne Griffin and to Griffin's bookkeeper. Griffin agreed to pay restitution of more than \$28,000 for the wage violations and agreed to future compliance with the DBRA requirements, including those relating to fringe benefits. *Id.*

In 1988 Griffin was the subject of two more Wage and Hour investigations at another federally funded or assisted construction project subject to DBRA requirements. The first covered the period February 1987 through August 1988 and determined that once more Griffin was failing to pay fringe benefits during its employees' first 90 days of employment and was not paying its employees full fringe benefits in violation of the DBRA requirements of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609. *Id.* at 3. Griffin agreed to pay \$18,000 in assessed back wages. Wage and Hour's investigator once again explained the requirements of the law to Griffin's bookkeeper. The second investigation occurred some months later at the same construction site as a result of complaints of continuing violations. Griffin had made no changes in its fringe benefit payment practices at that site and therefore was continuing to violate the fringe benefit requirements under the DBRA. *Id.* Nearly \$10,500 in back wages were assessed for these violations. *Id.* The Wage and Hour Division investigator discussed the violations with Griffin's new bookkeeper and with Griffin's vice president, who agreed to pay the back wage assessment and pledged future compliance with the DBRA requirements. *Id.*

Based upon these three violations of the fringe benefits requirements of the DBRAs, Wage and Hour charged Griffin with aggravated and willful violation of the DBRA requirements and sought Griffin's debarment. Griffin requested a hearing on that charge.

On February 18, 1993, a Department of Labor Administrative Law Judge (ALJ) issued a decision and order (D. and O.) holding that Griffin had committed violations of DBRA requirements in "reckless disregard" of its statutory and contractual obligations and finding that these violations were therefore "aggravated or willful" within the meaning of the regulations at 29 C.F.R. § 5.12(a)(1)(1995). D. and O. at 5. The ALJ further held that there were no extraordinary circumstances present in the case and therefore ordered Griffin's debarment from federal contracting for a period not to exceed three years. *Id.* at 6. Upon Griffin's appeal of the ALJ's D. and O., the Department of Labor's Wage Appeals Board affirmed that decision in relevant part. *Wayne J. Griffin Electric, Inc., et al., supra.* Among other conclusions the WAB declined "to order a debarment period of less than three years on facts where there are no extraordinary circumstances." *Id.* at 7. The WAB explicitly noted,

however, that “[p]ersons, and firms placed on the ineligible list pursuant to 29 C.F.R. 5.12(a)(1) are permitted to request removal from the ineligible list after completing six months of the debarment period, pursuant to the procedure set forth at 29 C.F.R. 5.12(c).” *Id.* at 7 n.2. Pursuant to the WAB’s decision, Griffin’s name was placed on the debarment list effective December 1, 1993.

Six months after the debarment period commenced, Griffin requested that it be removed from the debarment list pursuant to 29 C.F.R. § 5.12(c). Administrative Record (Rec.), Tab O. Griffin stated that following the debarment it had instituted major changes in its labor practices. It had prepared and implemented a written compliance program. It established a compliance team, which is responsible for ensuring that Griffin complied with the DBRA requirements and other labor-related federal and state laws. It hired a compliance consultant to review its progress in complying with the labor standards laws, to investigate any prevailing wage issues, and to make job site visits and conduct confidential interviews with employees. It also set up an “800” toll-free telephone number for employees to call with concerns regarding labor standards. *Id.*

The Deputy Assistant Administrator responded to Griffin’s request. Rec. Tab M. He reiterated the factors which are to be considered in evaluating a request for removal from the debarment list and informed Griffin that the first requirement of Section 5.12(c) was to determine whether Griffin was in current compliance with the DBRA requirements. *Id.* The Wage and Hour Division then initiated an investigation of the status of Griffin’s current compliance with Federal labor standards statutes. Rec. Tab N. The investigation covered the period 1992-1994 and concluded that procedures adopted by Griffin following its debarment had “reduced the chance of violation of the FLSA and DBRA to near zero.” Rec. Tab J, Narrative Report at 5. However the Wage and Hour Regional Administrator recommended that Griffin’s name not be removed from the debarment list. “Although Wayne Griffin’s current compliance status is commendable to say the least, his past history and severity of the past violations preclude me from reaching a different conclusion than what [the ALJ] stated in his Decision and Order.” Rec. Tab F at 2.

After review of the Regional Administrator’s recommendation, as well as all of the information submitted in conjunction with Griffin’s request,² on September 2, 1994, Wage and Hour notified Griffin that its request had been granted. Rec. Tab A. The letter concluded: “In view of the firm’s current status of compliance and after a careful review of the facts of this case as they related to the factors outlined in section 5.12(c), we have determined that you and your firm have demonstrated a current responsibility to comply with the Davis-Bacon labor standards provisions.” *Id.* Wage and Hour also notified GAO that Griffin should be removed from the debarment list. Rec. Tab A, Enclosure. Griffin’s name did not appear on the November 1994 debarment list or any list published thereafter.

² Included in those materials was a letter from Local 490 of the IBEW supporting the removal of Griffin from the debarment list. Rec. Tab B.

On February 22, 1995, Local 103 of the IBEW wrote the Secretary of Labor regarding the removal of Griffin from the debarment list after six months. Statement of Administrator in Opposition to Petition for Review (Stmt.), Exhibit 1. In his response, dated April 18, 1995, the Deputy Assistant Administrator noted that Griffin's removal from the debarment list followed "a careful review of the facts of this case as they relate to the factors outlined in section 5.12(c)," including the results of the Regional Office's investigation of Griffin's compliance with Federal labor standards statutes on projects from August 1992 to June 1994, and the significant changes made by Griffin in the way it monitored compliance with DBRA prevailing wage requirements and other labor statutes. Stmt., Ex. 2. After receiving this explanation and copies of internal documents regarding consideration of the removal request, Local 103 filed the pending petition to review that decision with the Wage Appeals Board.

DISCUSSION

Local 103 argues that the Deputy Assistant Administrator did not consider all of the factors contained in 29 C.F.R. § 5.12 (c) (1995) in determining that it was appropriate to remove Griffin from the debarment list after the passage of ten months, and requests a remand to the Administrator with instructions to reinstitute the debarment. Petition for Review at 19-20. In response, Griffin argues that the Board does not have jurisdiction to review a decision of the Administrator granting a request for early removal, challenges Local 103's standing to oppose the removal, and argues that Local 103's petition for review of the Deputy Assistant Administrator's determination to effect Griffin's early removal from the debarment list was not timely filed. Motion to Dismiss on Behalf of Griffin Electric, April 29, 1996. Griffin also argues that the Deputy Assistant Administrator considered all of the regulatory factors in granting Griffin's request for early removal, and that removal was appropriate. Brief of Griffin Electric in Opposition to the Petition for Review on Behalf of IBEW Local No. 103, June 7, 1996. The Administrator argues that the Board has jurisdiction to review the removal of Griffin from the debarment list, takes no position on the other procedural arguments raised by Griffin, and argues that the Deputy Assistant Administrator properly considered the Section 5.12(c) factors in concluding that Griffin should be removed from the list. Statement of the Administrator in Opposition to Petition for Review on Behalf of IBEW Local No. 103, May 8, 1996.

We agree with the Administrator that this Board has authority to review the Wage and Hour Division's granting a request for early removal from the debarment list. Of course, it is the case that 29 C.F.R. § 5.12(c), the regulatory provision explicitly dealing with removal from the debarment list, only refers to the right to appeal from a *denial* of a request for removal. However, the general regulatory provision dealing with debarments includes a right to petition for review of a "final decision in any agency action under part . . . 5 of this subtitle." 29 C.F.R. § 7.9(a) (1995). A decision by the Administrator to remove an employer from the debarment list prior to the expiration of three years is a "final decision"

within the meaning of 29 C.F.R. § 7.9(a). Therefore, we conclude that the Board has jurisdiction to decide a petition for review of such a decision.³

The Department of Labor regulation at 29 C.F.R. § 5.12(c) provides that:

Any person or firm debarred under § 5.12(a)(1) may in writing request the removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list. Such a request should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210, and shall contain a full explanation of the reasons why such person or firm should be removed from the ineligible list. In cases where the contractor or subcontractor failed to make full restitution to all underpaid employees, a request for removal will not be considered until such underpayments are made. In all other cases, *the Administrator will examine the facts and circumstances surrounding the violative practices which caused the debarment, and issue a decision as to whether or not such person or firm has demonstrated a current responsibility to comply with the labor standards provisions of the statutes listed in § 5.1, and therefore should be removed from the ineligible list. Among the factors to be considered in reaching such a decision are the severity of the violations, the contractor or subcontractor's attitude toward compliance, and the past compliance history of the firm. In no case will such removal be effected unless the Administrator determines after an investigation that such person or firm is in compliance with the labor standards provisions applicable to Federal contracts and Federally assisted construction work subject to any of the applicable statutes listed in § 5.1 and other labor statutes providing wage protection, such as the Service Contract Act, the Walsh-Healey Public Contracts Act, and the Fair Labor Standards Act. If the request for removal is denied, the person or firm may petition for review by the Wage Appeals Board pursuant to 29 CFR part 7.*

29 C.F.R. § 5.12(c) (1995); emphasis supplied. The record strongly supports the conclusion that the Deputy Assistant Administrator considered all of the relevant factors in determining to remove Griffin from the debarment list. First, that is precisely what the Deputy Assistant Administrator stated in his letter to Griffin granting its request. The Deputy Assistant Administrator wrote that “[i]n view of the firm’s current status of compliance and after a careful review of the facts of this case as they relate to the factors outlined in section 5.12(c),

³ Griffin argues that Local 103 is not an “aggrieved person” within the meaning of 29 C.F.R. § 7.9(a), and that, in any event Local 103 did not file its appeal “within a reasonable time” of the decision granting early removal. Because we have concluded that the Deputy Assistant Administrator considered the proper factors in determining that early removal was appropriate, and we affirm his decision, we do not here address these two claims.

we have determined that you and your firm have demonstrated a current responsibility to comply with the Davis Bacon labor standards provisions.” Rec. Tab A. Thus, the Deputy Assistant Administrator clearly stated that he had evaluated the factors listed in Section 5.12(c).

Local 103 apparently finds it significant that the Deputy Assistant Administrator specifically found that Griffin was in current compliance with the laws, but did not mention the specifics of the other factors listed in Section 5.12(c): severity of the violation, current attitude toward compliance, and history of past violations. It is clear to the Board, however, that the Deputy Assistant Administrator merely structured his letter to mirror the framework of Section 5.12(c). Section 5.12(c) requires first that it be determined whether there is current compliance. If there is not, the Section 5.12(c) inquiry goes no further, because, “[i]n no case will . . . removal be effected unless the Administrator determines after an investigation that such person or firm is in compliance with the labor standards provisions” Once the inquiry into current compliance is completed, and it is determined that the firm is in current compliance, the Administrator is required to determine whether the firm has “demonstrated a current responsibility to comply with the labor standards provisions of the statutes listed in § 5.1, and therefore should be removed from the ineligible list.” The regulation then lists the factors to be considered in the determination whether the firm has demonstrated a current responsibility to comply: “the severity of the violations, the contractor’s . . . attitude toward compliance, and the past compliance history of the firm.” The Deputy Assistant Administrator’s letter to Griffin simply recited in proper order the steps of the inquiry which Section 5.12(c) requires.

The Wage and Hour Division is entitled to a presumption that it properly carried out its administrative responsibilities. “[T]he recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities [cannot] be overcome by speculative allegations.” *Braniff Airways, Inc. v. C.A.B.*, 379 F. 2d 453, 462 (D.C. Cir. 1967). Local 103’s theory that the Administrator did not consider the factors listed in Section 5.12(c) in spite of the Deputy Assistant Administrator’s explicit statement that he did so is not entitled to credence in light of the record presented.

Second, the record before the Deputy Assistant Administrator contained evidence relevant to the factors listed in Section 5.12(c). Detailed descriptions of the violations upon which the debarment was based in the ALJ’s D. and O. and in the WAB’s decision provided ample evidence regarding the severity of the violations. And the fact that the violations were found to be willful in the debarment proceeding does not automatically mean that the violations are of such severity as to render Griffin ineligible for removal from the list pursuant to 29 C.F.R. § 5.12(c). As the WAB noted in *Fred A. Nemann, et al.*, WAB Case No. 94-08, June 27, 1994, at 3, the removal provision “presupposes that a willful violation has occurred, otherwise debarment would not have been appropriate, and therefore, the notion of a ‘severe’ violation as set out in 29 C.F.R. 5.12(c) must mean more than just willful.”

Evidence of Griffin's past compliance history is also contained in the ALJ's and WAB's decisions. In addition, Wage and Hour had before it evidence relating to Griffin's past compliance history. *See, e.g.* Rec. Tab C in which Wage and Hour's investigator reported that there had been no other Wage and Hour investigations other than the three at issue in WAB Case No. 93-05.

There is also significant evidence in the record regarding Griffin's current attitude toward compliance. That attitude is reflected in its lengthy request for removal (Rec. Tab O); the Wage and Hour investigator's report, which states that Griffin has "reduced the chance of violation of the FLSA and DBRA to near zero" (Rec. Tab. J, Narrative Report at 5); and in the Wage and Hour Regional Administrator's statement that Griffin's "current compliance status is commendable to say the least" Rec. Tab F at 2.

Local 103 asserts that even if there were evidence in the record relevant to the factors contained in Section 5.12(c), "the Deputy Assistant Administrator nevertheless failed to give it appropriate consideration." Specifically, Local 103 argues:

The Administrator apparently believes that, because debarment pursuant to the Secretary's regulations is not a "penalty," once a debarred contractor demonstrates that it is currently in compliance with federal labor standards requirements and a positive attitude toward compliance with such requirements, she has no choice but to grant a request for early removal from the debarment list. However, such an interpretation virtually writes the "severity of the violation" and "past compliance history" factors out of the regulation. In so doing, the Administrator's interpretation of Section 5.12(c) tends to undermine the very purpose of debarment which is to protect the integrity of the statutory scheme of the Davis-Bacon Related Acts.

Memorandum in Response to Statement of the Administrator in Opposition to Petition for Review, June 10, 1996, at 10. Neither the record, nor the Deputy Assistant Administrator's letters regarding the removal request or the statement filed by the Administrator in this case, support Local 103's contention that the Wage and Hour Division felt constrained to grant the removal request. However, there certainly was more than sufficient evidence before the Administrator to warrant the decision to remove Griffin from the debarment list.

For all the reasons stated above, the decision of the Administrator is affirmed and the petition for review is **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member