



In the Matter of:

**UNITED STATES DEPARTMENT OF LABOR,**

**CASE NO. 93-SCA-26**

**PLAINTIFF,**

**DATE: June 10, 1997**

**v.**

**DANTRAN, INC. and ROBERT HOLMES,**

**RESPONDENTS.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

### **FINAL DECISION AND ORDER**

This matter arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (41 U.S.C. § 351 et seq.) (SCA or the Act) and the regulations at 29 C.F.R. Parts 4, 6 and 8. The case is before this Board on the petition of the Administrator of the Wage and Hour Division (Administrator) seeking review of the December 4, 1995 Decision and Order (D. and O.) of the Administrative Law Judge (ALJ).

Following an administrative hearing held on May 8, 1995, the ALJ issued a D. and O. which concluded that Dantran and Respondent Holmes had not violated the Act by their pay practices, specifically by their "cross-crediting" fringe benefits on their multiple contracts with the U.S. Postal Service and/or their payment to the affected service employees on a monthly basis. The Petition for Review and accompanying Statement of the Administrator (SA) were filed with the Board on February 26, 1996. For the reasons set forth below, the ALJ's D. and O. is reversed and the Respondents are ordered placed on the debarred bidder's list.

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<sup>1/</sup> On April 17, 1996, a Secretary's Order was signed re delegating jurisdiction to issue final agency decisions under this statute and the implementing regulations (29 C.F.R. Part 24) to the Administrative Review Board. 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

Respondent Holmes was the president and sole owner of Dantran, Inc. which was engaged in the business of mail hauling. Respondents were awarded multiple mail handling contracts with the United States Postal Service. It is undisputed that the mail handling contracts at issue were subject to Wage Determination No. 87-310 (Rev. 3) issued by the Department of Labor on February 10, 1989, and revised on March 9, 1990 (Rev. 4). Complainant's Exhibit (CX) 3. *See also*, T. 94. These wage determinations required that service employees be paid a total of \$1.69 per hour in fringe benefits -- a figure that was revised to \$1.94 per hour under Rev. 4 -- for the first forty hours worked during a week under each contract. Because its employees frequently worked under more than one contract, Respondents placed a weekly cap of forty hours on the amount of fringe benefits that an employee could earn. Consequently, even if an employee would have otherwise been entitled to additional hours of fringe benefits because he or she worked under more than one contract, Respondents limited the fringe benefits by treating them as if they had been earned under a single contract. This practice of cross crediting employees' hours among various contracts significantly reduced Respondents' fringe benefit payments.

Respondents were subject to two separate Wage and Hour investigations by Department of Labor compliance officers (CO). The first was conducted by CO Rioux in 1989 and covered the period of November, 1986 through November, 1988. The second was undertaken by CO Wilkenson in 1991, and covered 1989 and 1990. D. and O. at 14. The ALJ found with respect to CO Rioux's investigation, that, [the CO] expressed concerns to Respondents about their failure to keep records on a weekly basis . . . [and] advised [them] that the regulations require that employees be paid on a "semi-monthly or bi-weekly basis." D. and O. at 14. In addition to revealing a continuing frequency of payment violation, the second investigation uncovered the cross-crediting practice. With respect to both of these violations the ALJ found in his detailed review of the facts, D. and O. at 18-20, that "[t]he practices and procedures followed by Dantran during the period of [the first] investigation were identical to those employed by Dantran, Inc. during [the second] investigation and dealt with at least eight (8) of the same contracts." D. and O. at 19.

The ALJ's, "Summary of the Evidence", D. and O. at 13-18, distinguishes the 1989 and 1991 investigations by noting that the earlier one "focused on allegations that Respondents had failed to pay employees for time spent traveling from Respondents' garage to their first stop and conversely, for time spent returning from the post office (their last stop) back to Respondents' garage, as well as for time spent doing pre-trip work such as vehicle safety checks." T. 126, 136, D. and O. at 13. This investigation was characterized as a "portal-to-portal hours worked" inquiry where CO Rioux spent the great majority of his time interviewing employee/witnesses and "only approximately 5% of his time on record review." T. 137-138, D. and O. at 14. The ALJ characterizes the initial investigation as "cursory" with regard to the review of Respondents' payroll records and concludes that the CO's limited review of these records, "indicated compliance with SCA requirements." *Id.* Significantly, the ALJ also noted that in response to the CO's concerns regarding the frequency of payment violations, Respondent Holmes indicated that he would have difficulty complying with the regulatory requirements since the Postal Service was paying him on a monthly basis. *Id.* The CO's compliance report found no actual pay

violation “at the time of his record review.” At some point during his investigation, the CO provided Respondents with a copy of SCA publication 1267 - Regulations, Part 4. T. 133, 139-140; CX 5.<sup>2/</sup>

## DISCUSSION

The ALJ accepted Respondents’ contention that debarment was not warranted in this matter because of the presence of “unusual circumstances.” 29 C.F.R. § 4.188. In addition, the ALJ held that Respondents were insulated from the debarment sanction in this case because of the doctrine of estoppel, that is, that the Department’s prosecution of this matter could not proceed under the factual circumstances presented because these Respondents had reasonably relied on the erroneous advice of the Department and/or its agents with regard to the payment practices at issue. We disagree.

The ALJ also held that the issues surrounding Respondents' pay period should not result in debarment since no violation of the Act had been shown. He held that there was considerable and justifiable confusion on this issue since the Act "does not prescribe the length of the pay period." D. and O. at 25. We agree with the Administrator that this analysis "ignore[s] altogether" the Department's regulation requiring payment not less frequently than twice monthly. 29 C.F.R. § 4.165 (2)(b).<sup>3/</sup> SA at 10. There is no confusion about the intent or meaning of this provision. Respondent contractors who, like Dantran in this instance, do not pay their covered employees at least twice a month are in violation of the Act.

With respect to the practice of cross-crediting their employees’ fringe benefit payments among their multiple contracts, the ALJ, at Findings of Fact Nos. 11, 12 and 13, D. and O. at

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<sup>2/</sup> Indeed, the ALJ found that it was “undisputed that Investigator Rioux provided Respondents with a copy of the applicable regulations . . . which they could have readily reviewed if they wished to determine whether they were in compliance. That they chose not to do this does not condone or excuse their affirmative obligation to ensure that their pay practices are in compliance with the SCA. *Vigilantes, Inc.* 769 F.Supp. 57, 62 (D. Puerto Rico 1991) (SCA contractor has affirmative duty to seek advice from Department of Labor regarding pay practice compliance. . . .” *See also*, 29 C.F.R. § 4.188(b)(4), citing *McLaughlin Storage, Inc.* Decision of the ALJ, SCA 362-365, November 5, 1975, Administrator, March 25, 1976. D. and O. at 7. (Tr. 133, 139-140; CX 5).

<sup>3/</sup> The regulation states:

The Act does not prescribe the length of the pay period. However, for purpose of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek for the pay period. A bi-weekly or semimonthly pay period may, however, be used if advance notification is given to the affected employees. A pay period longer than semimonthly is not recognized as appropriate for service employees and wage payments at greater intervals will not be considered as constituting proper payments in compliance with the Act. (emphasis added).

19, gives credence to Respondents' claims regarding their payroll practices. Specifically, in Finding of Fact No. 13, The ALJ finds that, "Mr. and Mrs. Holmes believed that they were acting appropriately and in compliance with SCA regulations in the cross-crediting fringe benefits in multiple contracts and in having a monthly payroll." *Id.* The bases for these findings are the factors listed at findings 11 and 12, *i.e.*, the specific approval of this practice by Postal Service officials. We do not agree with the ALJ's legal conclusion that Respondents' reliance was reasonable or binding on the Department of Labor. In concluding that Respondents' reliance on the advice or representations of contract agency negotiators was reasonable, the ALJ ignored the plain dictates of the governing regulation. 29 C.F.R. Sec. 4.187(e)(5).<sup>4/</sup> Even if the Board were to ignore the fact that the only evidence Respondents offered to support their allegations was self-serving hearsay, SA at 25-26, the Board would be hard pressed to avoid the clear mandate of the applicable regulation which provides that erroneous advice of a contracting agency official cannot be raised as a defense to a back pay violation. It is clear from the regulations and the precedents of this Board and its predecessor that the Department of Labor, which is charged with the statutory responsibility of assuring that covered employees are paid in accordance with the provisions of this Act, cannot be bound by the conflicting or erroneous/ mistaken advice from any of the various contracting agencies or their agents. See *L.T. G. Construction Co.*, WAB Case No. 93-15 (Dec. 30, 1994), citing *U.S. v. Stewart*, 311 U.S. 60 (1940) and *Graf v. C.I.R.*, 673 F.2d 784 (5th Cir. 1982). (The mistakes of one agency cannot be used to estop another agency from carrying out its statutory responsibilities.)

Notwithstanding the ALJ's musings on the wisdom or fairness of the policy, the applicable regulations at 29 C.F.R. §§ 4.172 and 4.175<sup>5/</sup> specifically provide that fringe benefits are to be

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<sup>4/</sup> § 4.187(e)(5) states:

Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act. *Standard Fabrication Ltd.*, Decision of the Secretary, PC-297, August 3, 1948; *Airport Machining Corp.*, Decision of the ALJ, PC-1177, June 15, 1973; *James D. West*, Decision of the ALJ, SCA 397-398, November 17, 1975; *Metropolitan Rehabilitation Corp.*, WAB Case No. 78-25, August 2, 1979; *Fry Brothers Corp.*, WAB Case No. 76-6, June 14, 1977.

<sup>5/</sup> § 4.172 states

“. . . Unless otherwise specified in the particular wage determination, such as one reflecting collectively bargained fringe benefit requirements, issued pursuant to section 4(c) of the Act, every employee performing on a covered contract must be furnished the fringe benefits required by that determination for all hours spent working on that contract up to a maximum of 40 hours per week and 2,080 (*i.e.*, 52 weeks of 40 hours each) per year, as these are the typical number of nonovertime hours of work in a week, and in a year, respectively. Since the Act's fringe benefit requirements are applicable on a contract-by-contract basis, employees performing on more than one contract subject to the Act must be furnished the full amount of fringe benefits to

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fully furnished on a “contract-by-contract basis” and “employees performing on more than one contract subject to the Act must be furnished the full amount of fringe benefits to which they are entitled under each contract and applicable wage determination.” § 4.172. The Board can find no ambiguity in these regulations; cross-crediting of fringe benefits is simply and clearly not permitted. The Board is bound by the regulations and has no authority to pass on their validity, Sec. Ord. 2-96, 61 Fed. Reg. 19979 § 4, May 3, 1996.

## I. The Inapplicability of the Estoppel/Detrimental Reliance Defense

It is well established that the privilege of contracting with the government carries with it the responsibility to be aware of and follow the applicable contractual and legal provisions governing contractual performance. Claims of ignorance by governmental contractors are, thus, not generally regarded with favor. In this case, there is scant evidence to support Respondents’ claim of ignorance or their related claim of detrimental reliance. While the facts reveal an arguable claim of Respondents being given erroneous information, their claim does not rise to a legally recognizable case of estoppel because, for the reasons discussed below, their reliance was neither reasonable nor, with regard to debarment question, based upon a *bona fide* issue of doubtful certainty. Respondents’ obligations were clear, from the face of their contractual agreement(s) and under the regulations which govern SCA contracts.

The ALJ accepted Respondents’ contention that the Department was barred from prosecuting this matter, “by virtue of the well-settled doctrine of estoppel [which is] available as a defense against the government if the government’s wrongful conduct threatens to work a serious injustice and if the public’s interest would not be unduly damaged by the imposition of estoppel.” D. and O. at 4 (citing *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975)). Respondents’ specific argument is that, “the Department of Labor is estopped from pursuing a debarment action against Mr. Holmes and Dantran, Inc. in light of the specific affirmative actions of George Rioux, the Department of Labor’s investigator, as well as U.S. Postal Service’s executives and representatives (Mr. Richard Friar and Stephen Kennedy).” D. and O. at 7. The

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<sup>2</sup>(...continued)

which they are entitled under each contract and applicable wage determination.  
(emphasis added);

§ 4.175 states:

(a) *Determining the required amount of benefits.* (1) Most fringe benefits determinations containing health and welfare and/or pension requirements specify a fixed payment per hour on behalf of each service employee. These payments are usually also stated as weekly or monthly amounts. As set forth in § 4.172, unless specified otherwise in the applicable determination such payments are due for all hours paid for, including paid vacation, sick leave, and holiday hours, up to a maximum of 40 hours per week and 2.080 hours per year on each contract. (emphasis added)

gravamen of this position is that, given the “clean bill of health” allegedly given Respondents after CO Rioux’s initial investigation, equity, if not the law, mitigates against debarment.

This position is not supportable on the facts of this case. The dispositive point of law is that the obligation to comply with contractual requirements as well as the burden of obtaining the knowledge of how to comply rests, at all times, with the government contractor.<sup>6/</sup> One cannot properly rely on mistaken advice or the alleged negligent performance of investigatory duties as a means of avoiding mandated contractual requirements. A legally recognizable case of estoppel against the government must be based upon a factual element -- affirmative misconduct by the governmental agency or its agent(s) -- which is simply not present here. This issue was addressed in a March, 1990 decision by the Deputy Secretary holding that the actions on which an estoppel argument against the government is based must involve affirmative misconduct by the government; and that neither neglect, negligence, nor delay constitutes affirmative conduct by the Government. (emphasis added). *In the Matter of CACI, Inc.*, Case No. 86-SCA-OM-5, Dep. Sec., March 27, 1990, slip. op. at 29 (and cases cited therein). *See also, United States v. Hatcher*, 922 F.2d 1402, 1410-1411, (9th Cir. 1991) (affirmative misconduct is more than misinformation); *Azizi v. Thornburgh*, 980 F.2d 1130, 1136 (2nd Cir. 1990) (more than negligence); *Rider v. United States Postal Service*, 862 F.2d 239, 241 (9th Cir. 1988), *cert. denied*, 490 U.S. 1090 (more than a simple misstatement), *Housing Authority v. Bergland*, 749 F.2d 1184, 1990 (6th Cir. 1984). Cf. *Heckler v. Community Health Services*. In this case, CO Rioux’s failure to discover and disclose the cross crediting of overtime hours violation was, at most, negligent and not in any way affirmative misconduct. Respondents did not seek nor did the CO specifically render advise on the cross-crediting issue. The matter simply did not come up. There can be no reasonable reliance on advice not given. The crux of the matter is that as government contractors Respondents had a legal obligation to comply with the regulations which governed their contractual performance which they cannot shirk by complaining that the violation should have been brought to their attention at an earlier date. As the court stated in *Heckler, supra* at 63, “those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.”

## II. The Absence of Unusual Circumstances

This Board through its predecessor, the Board of Service Contract Appeals (BSCA), has long recognized that contractors who seek to escape the debarment provision of Section 5(a) of the Act face a daunting task in successfully raising the unusual circumstances defense. *See Nationwide Building Maintenance, Inc.*, BSCA Case No. 92-04 (Oct. 30, 1992); *A to Z Maintenance Corp. v. Dole*, 710 F. Supp. 853 (D.D.C. 1989). Under the three-part test for

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<sup>6/</sup> We note in this regard, that the regulatory framework at § 4.187(e)(5) creates strict liability, *i.e.* a limitation on the defense of “reliance” when such reliance rest upon the advice of “contracting agency officials” or Department of Labor officials without final advisory authority, for a contractor who fails to adhere to the payment requirements of their contract.

unusual circumstances, set out at 29 C.F.R. § 4.188(b)(3) debarment relief is to be denied if the contractor's conduct evidences one of the enumerated aggravating circumstances specified at § 4.188(b)(3)(i), including culpable neglect or culpable disregard on the part of a contractor of its regulatory obligations.

In this case, there is ample evidence of culpable conduct on the part of Respondents and we find the ALJ erroneously ignored such evidence. With regard to its improper payroll period, the record is clear, indeed Respondents admit, T. 183-184, that at least since 1986, they paid their employees on a monthly basis rather than "at least semimonthly." 29 C.F.R. § 4.165(b). Yet, even after they were informed by a Departmental investigator that they needed to make payments to their workers more frequently, Respondents were defiant in their response and in their practice -- refusing to comply unless they were paid in a different manner by the Postal Service. *Id.* See also, D. and O. at 14. We find this to be a culpable disregard of Respondents' statutory obligation such as to preclude relief from debarment.

In addition, Respondents practice of cross-crediting their employees' hours for the purposes of calculating fringe benefits was culpably negligent. The regulation establishing Respondents' obligation to pay such benefits for each contract worked is abundantly clear. Further, Respondents' reliance on an alleged clean bill of health following a compliance review, which was only minimally focused (roughly 5%) on its payroll records, can hardly be said to be reasonable. There is no evidence that CO Rioux stated or implied that Respondents' practice of cross-crediting fringe benefits was acceptable under the Act. Respondents' attempt to read into CO Rioux's failure to discover the violations, a stamp of approval is ill-founded. In light of the clear regulation to the contrary, Respondents' practice of cross-crediting fringe benefits displayed a culpable neglect of its obligations to its employees.

Relying primarily on the Respondents purported confusion with regard to its cross-crediting payment practices, the ALJ concluded that the debarment sanction was not warranted in this case. As with the issue of estoppel/detrimental reliance, the ALJ's conclusion that the debarment sanction was not warranted proceeds from flawed legal analysis. He found that Respondents had not violated the Act (D. and O. at 23) which they clearly did and, in addition, he found a "bona fide legal issue of doubtful certainty," 29 C.F.R. § 4.188(b)(iii), with regard to the fringe benefits practice where none exists.

There is no doubt that Respondents cross-credited hours and that this practice violated the Act. The regulations at § 4.188(b)(1) specifically exclude from possible unusual circumstances:

those circumstances which commonly exist in cases where violations are found such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements . . . .

*In the Matter of Elaine's Cleaning Service*, BSCA Case No. 92-07. Dec. issued Aug. 13, 1992. Dantran's plea of ignorance in this matter proceeds from its view that it was "lulled" into non-compliance and/or misinformed as a result of the neglectful actions of the Postal Service's contract negotiators or the Wage and Hour compliance officers. This attempt to shift the responsibility for violative payment practices must fail. The misconduct in this matter, as noted above, was Respondents' when they paid their employees once every four weeks in violation of 29 C.F.R. § 4.165(b), and cross-credited hours for the purpose of calculating their employees fringe benefits in spite of the clear and unambiguous regulatory language at 29 C.F.R. § 4.172 and 4.175.

We find, therefore, that these Respondents have violated the Act through their negligent disregard of their contractual requirements. Notwithstanding the ALJ's finding to the contrary, there was no *bona fide* legal issue of doubtful certainty presented here. See *White Glove Building Maintenance v. Hodgson*, 459 F.2d 175 (9th Cir. 1972). There being no true uncertainty as to either Respondents' obligations under the Act or the reasonableness of their reliance on alleged representations made to them, the Board finds that Respondents were culpably negligent in a manner which precludes debarment relief under the standards of 29 C.F.R. § 4.188(b).

### **CONCLUSION**

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

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member