



In the Matter of:

FONTAINE BROS., INC.,
General Contractor, *et al.*

ARB CASE NO. 96-162
(ALJ CASE NO. 94-DBA-48)

DATE: September 16, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to one of the Davis-Bacon and Related Acts (DBRA), listed at 29 C.F.R. §5.1. This order disposes of two petitions for review of the Administrative Law Judge (ALJ)'s Decision and Order (D. and O.). We grant the petition of Respondent Fontaine Bros., Inc. (Fontaine) and deny the petition of Respondent Atlas Contractors, Inc. (Atlas).

BACKGROUND

The Wage and Hour Division of the Department of Labor investigated the compensation practices of subcontractor Atlas with respect to employees hired to work as painters on an apartment project in Holyoke, Massachusetts. The Holyoke Housing Authority was the contracting agency and Fontaine was one general contractor. The project was subject to the labor standards provisions of the National Housing Act of 1937, 12 U.S.C. §1715c (a DBRA), and Department of Labor regulations, 29 C.F.R. Part 5.

After a hearing, the ALJ found that Atlas and its officers, President Vasilios Gianasmidis and Treasurer Savvas Gianasmidis, were in willful violation of the labor standards provisions of the National Housing Act of 1937. The ALJ also ordered that Atlas and Messrs. Gianasmidis should be debarred for a period not to exceed three years from receiving any contract or subcontract subject to any of the DBRA. The ALJ denied the back wages claimed by three Atlas employees. Finally, the ALJ ordered Fontaine to release and pay Atlas "all sums withheld on account of the subject contract, stated to be in the amount of \$16,782.67."

The Administrator, Wage and Hour Division, filed a petition for review of the ALJ's determination that the three employees were not entitled to any back pay. The Administrator's petition later was dismissed at her request. Fontaine also petitioned for review, seeking

rescission of the ALJ's order to pay \$16,782.67 ("the disputed amount") to Atlas. The Administrator took no position on Fontaine's petition for review.

Although the Board authorized a late response to Fontaine's petition, Atlas did not file a response. The Board allowed Atlas to file late its own petition for review solely on the debarment issue. The Acting Administrator opposed Atlas' petition.

Fontaine's Petition

Fontaine asks that the Board correct and rescind the order to pay the disputed amount to Atlas. Based on unrefuted evidence submitted by Fontaine, we grant the request.

In the summer of 1993 Fontaine withheld the final progress payment due to Atlas on Phase One of the housing project pending the outcome of the Wage and Hour investigation of Atlas. Affidavit of Walter McLaughlin (McLaughlin Aff.) at ¶3. That August, Fontaine's attorney delivered to Atlas' attorney the final Phase One progress payment from Fontaine to Atlas. McLaughlin Aff. at ¶5. Atlas' treasurer, Savvas Gianasmidis, admitted in a deposition taken in a related civil action that Atlas had received the withheld money. Fontaine Petition, Exhibit D at 36-37, 47.

Thereafter, in December 1993 and January 1994, the United States Department of Housing and Urban Development asked the Holyoke Housing Authority to withhold the disputed amount pending the outcome of the Wage and Hour Division's investigation of Atlas. Counter Aff. at ¶6. The amount was withheld to insure that funds would be available to repay any violations of the prevailing wage provisions of the DBRA that might be found in this action. Fontaine Petition, Exhibit B.

Notwithstanding the request to withhold, the Housing Authority released the disputed amount to Fontaine in January 1995. Counter Aff. at ¶7; Lagowski Aff. at ¶7. The next month, by agreement between the Housing Authority and Fontaine, the disputed amount was deposited in the escrow account of Fontaine's attorney pending the outcome of this action. Counter Aff. at ¶8; Lagowski Aff. at ¶8.

The ALJ denied the prevailing wage claims against Atlas, D. and O. at 16, and that denial is not the subject of either of the petitions for review. Consequently, there no longer is a reason to hold the disputed amount in escrow. The disputed amount should be paid to Fontaine because it consists of money due to Fontaine under its contract with the Housing Authority.

There is no evidence indicating that Fontaine owes any amount of money to Atlas for its work on the housing project. Accordingly, we find that it was error to order Fontaine to pay the disputed amount to Atlas. We grant Fontaine's petition and rescind Paragraph 4 of the ALJ's D. and O. issued on June 19, 1996.

Atlas' Petition

Atlas seeks review of the ALJ's finding that Atlas and its officers were in willful violation of the labor standards provisions of the DBRA and ordering their debarment for a period of three years. Atlas does not contest the ALJ's findings concerning its compensation practices, but rather argues that its behavior was not "willful."

The ALJ found numerous instances of practices that violated the regulatory requirements. For example, Savvas Gianasmidis signed the name of his father, Vasilios, to payroll records certifying that each employee was paid the full weekly wages earned, at the correct wage rate, without impermissible deductions. D. and O. at 13. Savvas Gianasmidis took payroll deductions from employee wages to compensate Vasilios for money owed to him for rent and advances allegedly made to employees; to compensate the job foreman, Palangas, for loans to employees and advances on wages; and to compensate himself for moneys owed to him or Atlas. D. and O. at 13-15. With ample record evidence, the ALJ noted that the "conduct of business by Atlas Contractors Co., Inc. was blurred with the conduct of Messrs. Gianasmidis so that no real distinction existed among the three. Atlas and Messrs. Gianasmidis ran a 'company store' with Atlas employees, acting as landlord, banker, loan officer and collection agency." D. and O. at 14.

These questionable deductions were not documented. Savvas Gianasmidis kept no written record of any deductions taken, including those required by state and federal law. Nor were deductions noted on employees' paychecks. D. and O. at 15.

In answer to all this, Atlas and Messrs. Gianasmidis argue that the deductions "were in effect for the *bona fide* prepayment of wages," and that the employees did not complain about the deductions. Reply Br. at 4. They contend that their actions were not fraudulent, severe, or deceptive, but rather constituted "sloppy accounting practices." Statement in Support of Atlas Petition (Atlas Statement) at 3.

We defer to an ALJ's determination that a violation is willful unless the ALJ's findings are clearly erroneous. *LTG Constr. Co.*, Wage Appeals Board (WAB) Case No. 93-15, Dec. 30, 1994, slip op. at 7, (court history). As explained below, the ALJ's finding of willfulness is well supported in the record.

Contracts such as that at issue, which are subject to the DBRA, must include specific clauses setting forth the contractor's responsibilities, including the prevailing wage rate and record keeping requirements. See 29 C.F.R. §5.5. The record keeping requirements provide that payroll records "shall contain the name, address, and social security number of each worker, his or her correct classifications, hourly rates of wages paid . . . , daily and weekly number of hours worked, deductions made and actual wages paid." 29 C.F.R. §5.5(a)(3)(i).

The ALJ documented the numerous ways in which Atlas' records did not meet these most basic record keeping requirements. For example, Atlas failed to keep a record of any

payroll deductions for any of its employees. D. and O. at 9. In addition, the company did not keep any payroll records at all for one employee who was paid in cash. *Id.* We reject the contention that “sloppy accounting practices” excuses the failure to keep any payroll records, including name, address, or social security number for Sherif Elmwefy, the employee who was paid in cash. If, as Atlas maintains, Reply Br. at 4-5, Elmwefy refused to provide an address or social security number, Atlas should not have hired him.

Under established law, a “willful” violation “encompass[es] intentional disregard, or plain indifference to the statutory requirements. . . . Although mere inadvertent or negligent conduct would not warrant debarment, conduct which evidences an intent to evade or a purposeful lack of attention to, a statutory responsibility does. Blissful ignorance is no defense to debarment.” *LTG Constr. Co.*, slip op. at 7. The company’s complete disregard of payroll record keeping evidences either an intent to evade or a purposeful lack of attention to the regulatory requirements.

The Board has ordered contractors placed on the debarment list for record keeping violations in other cases. *See P.B.M.C., Inc., Prime Contractor, Great Western Drywall, Subcontractor*, WAB Case No. 87-57 (Feb. 9, 1991) (debarment was appropriate in view of contractor’s “complete failure to keep any records of the employees’ piecework production and the hours actually worked”). We therefore agree with the ALJ’s assessment that the Respondents’ violation merited debarment in this case.

Atlas argues that debarment is not necessary to serve the goal of enforcing the DBRA because Atlas is in receivership and has completed all its government contract work. Atlas Statement at 5. It also contends that Vasilios Gianasmidis is disabled and not physically able to engage in work subject to the DBRA. *Id.* Savvas Gianasmidis, who has been admitted to the Massachusetts bar, states that he “is only interested in pursuing a legal career and not in performing work subject to the DBRA.” Reply at 5.

Concerning Messrs. Gianasmidis, the Board consistently and lawfully has debarred individual corporate officers in DBRA cases. *See Facchiano Constr. Corp. v. United States Dept. of Labor*, 987 F.2d 106, 214 (3d Cir. 1993) (affirming authority of Board to debar responsible officers) and *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987) (same). Vasilios Gianasmidis, President of Atlas, was actively involved in corporate matters and ran the company with his son, Savvas. D. and O. at 13. Neither Vasilios nor Savvas has provided an acceptable explanation for the complete absence of payroll deduction records. Consequently we conclude that debarment of Messrs. Gianasmidis, who were the responsible corporate officers, furthers the goals of the DBRA.

Atlas argues that the debarment of Savvas Gianasmidis constitutes an unwarranted punishment because the stigma of debarment hinders his obtaining employment as a lawyer. Mr. Gianasmidis could have avoided this unintended effect of the debarment order by

complying with the DBRA labor standards provisions. He may seek removal from the debarment list after his name has appeared on the list for the minimum six month period.¹

CONCLUSION

The petition of Respondent Fontaine Bros., Inc. is **GRANTED** and Paragraph 4 at page 16 of the ALJ's Decision and Order issued on June 19, 1996 is rescinded.

The petition of Respondents, Atlas Contractors, Inc., Vasilios Gianasmidis, and Savvas Gianasmidis, is **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

¹ The Respondents' request for removal from the debarment list, Atlas Statement at 9, is premature since their names have not yet been published on the Comptroller General's list of ineligible bidders. Under the procedure at 29 C.F.R. §5.12(c), the Administrator of the Wage and Hour Division has authority to remove a name from the debarment list after the name has appeared on the list for at least six months.