



In the Matter of:

**INTEGRATED RESOURCE  
MANAGEMENT, INC. OF  
OREGON**

**ARB CASE NO. 99-119**

**ALJ CASE NO. 1997-SCA-14**

**DATE: June 27, 2002**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Petitioner:*

Leif G. Jorgenson, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Eugene Scalia, Esq., *U.S. Department of Labor, Washington, D.C.*

*For the Respondents:*

Kasia Quillinan, Esq., *Corvallis, Oregon*

**FINAL DECISION AND ORDER**

This matter is before the Administrative Review Board (ARB or the Board) pursuant to the prevailing wage labor standards provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.* (SCA or the Act), the overtime labor standards provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 *et seq.* (CWHSSA), and the implementing regulations found at 29 C.F.R. Parts 4, 5, 6, and 8. The Administrator, Wage and Hour Division (Administrator or Petitioner), filed a Petition for Review, seeking the Board's reversal of the August 10, 1999 Decision and Order (D&O) issued by an Administrative Law Judge (ALJ).

On a largely stipulated record, the ALJ found that the Respondents, Integrated Resource Management (IRM) and its president, Marc D. Barnes (Barnes) (collectively IRM or Respondents), had committed SCA prevailing wage and recordkeeping violations and CWHSSA overtime wage violations.

The ALJ concluded that the CWHSSA overtime violations did not warrant the Respondents' debarment from government contracting, given that there was no evidence that the overtime wage violations were "willful or aggravated" within the meaning of the implementing regulation at 29 C.F.R. § 5.12(b)(1).<sup>1</sup> The Administrator did not appeal this holding made by the ALJ.

The ALJ further ruled that debarment of the Respondents for their having committed SCA prevailing wage, fringe benefit, and record keeping violations was not appropriate in this matter, given his conclusion that the record demonstrated "unusual circumstances" within the meaning of Section 5(a) of the Act. In the absence of "unusual circumstances," the Secretary of Labor is required to transmit the name of those parties committing any violation of the SCA to the Comptroller General of the United States for placement on the list of debarred bidders for a period of three years. The ALJ's failure to order Respondents' debarment is the sole question to be decided by the Board.

## **BACKGROUND**

The United States Forest Service (Forest Service) awarded Contract No. 53-05M6-5-0006 (in the amount of \$444,030.43) to IRM on May 25, 1996. Stipulations at ¶5(b). Pursuant to the contract, IRM was to conduct vegetation surveys, generally, of the amounts and varieties of timber, in the Mount Baker-Snoqualmie and Olympic National Forests. GX-A at pp. 000001-000002.

The contract between IRM and the Forest Service contained the following provision (specifically entitled compensation) regarding the SCA obligations that were to be incumbent upon the contractor:

Each service employee employed in the performance of this contract by the Contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, or authorized representative.

GX-A at p. 48. The contract further contained the extensive SCA contract labor standards provisions required to be included in all Federal service procurement contracts subject to the Act.

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<sup>1</sup> The CWHSSA is a Federal overtime wage labor standards statute closely associated with the Davis-Bacon Act, 40 U.S.C. § 276a et seq. (DBA), and is a so-called "Davis-Bacon Related Act." The DBA provides for the payment of prevailing wages and fringe benefits to laborers and mechanics employed in the construction of Federal public works; numerous other Related Acts provide for similar prevailing rate standards to be applicable to the construction of Federally funded or assisted construction projects. Debarment from Federal contracting for a period not to exceed three years is the sanction prescribed for "willful or aggravated" violation of the Davis-Bacon Related Acts, including the CWHSSA. See 29 C.F.R. § 5.1 (2001) for a comprehensive list of the Related Acts.

*Id.* at pp. 000007-000015; *see* 29 C.F.R. § 4.6 (2001). Wage Determination No. 77-0209 (Revision 17), dated September 13, 1993, was also included in and made applicable to the Forest Service vegetation survey contract. GX-B. The parties memorialized the facts that the SCA provisions and the applicable wage determination were included in the contract. Stipulations at ¶5(b). Also in evidence was the Forest Service contracting officer’s affidavit attesting to his having discussed SCA payment requirements with Barnes at a pre-work meeting.

The parties to this matter stipulated that IRM “failed to pay service employees, who were employed in the performance of work on the contract, their minimum monetary wages, fringe benefits, and holiday pay as required by the CWHSSA and the Forest Service contract’s wage determination, the Service Contract Act and the applicable regulations.” Stipulation at ¶5(d). The parties also agreed that IRM “failed to pay employees . . . one and one-half times the basic rate of pay for all hours worked in excess of forty (40) hours in a work week,” as required by the overtime payment provisions of the Forest Service contract. *Id.* at ¶5(e). IRM and the Administrator further agreed that the combined dollar amount of these SCA and CWHSSA violations was \$22,000.00 due seventeen (17) employees. *Id.* at Attachment A.

## **JURISDICTION AND STANDARD OF REVIEW**

The Board has jurisdiction over this appeal pursuant to the SCA, CWHSSA, 29 C.F.R. § 8.1(b) (2001), and Secretary’s Order 2-96, 61 Fed. Reg. 19982 (May 3, 1996). The Board’s review of an ALJ’s decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d) (2001). 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. U.S. Dept. of Labor*, 171 F.3d 58 (1st Cir. 1999). However, conclusions of law are reviewed *de novo*. *United Kleenist Organization Corp. and Young Park*, ARB Case No. 00-042, ALJ Case No. 99-SCA-18, Jan. 25, 2002, slip op. at 5.

## **DISCUSSION**

Because Respondents failed to pay its service employees the prevailing wages required by the Act and the Forest Service contract, Section 5(a) of the SCA, which establishes the sanction of debarment for violators, applies. Section 5(a) of the SCA, 41 U.S.C.A. § 354(a), requires debarment from Federal contracting for three years for commission of all violations of the Act unless the Secretary of Labor finds “unusual circumstances”:

The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary [of Labor] have found to have violated this chapter. Unless the Secretary otherwise recommends because of *unusual circumstances*, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the

Secretary does not otherwise recommend because of *unusual circumstances*, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

41 U.S.C. § 354(a) (emphases supplied). In the absence of the Secretary of Labor's determination that "unusual circumstances" exist to mitigate or excuse such prevailing wage or fringe benefit and/or recordkeeping violations, any violation of the SCA merits a violator's debarment from Federal contracting for a period of three years.

This "unusual circumstances" language became part of the Act by amendment in 1972 as a limitation on the Secretary of Labor's previous, practically unlimited, discretion to excuse violators from the sanction of debarment. S. Rep. No. 92-1311, 92d Cong., 2d Sess. 3-4, *reprinted in* 1972 U.S.C.C.A.N., 35334, 35336. 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, Wage and Hour Division, U.S. Dep't of Labor*, 968 F. 2d 1412, 1418 (1st Cir. 1992). Early in the administration of the Act, a Secretarial decision on appeal from a Wage and Hour Administrator's debarment decision established criteria for the "unusual circumstances" provision. *Washington Moving and Storage*, Case No. SCA-168 (Sec'y Dec.), Mar. 12, 1974. The exemption from debarment where "unusual circumstances" are demonstrated by the contractor is an extremely narrow one. See *United Kleenist Organization Corp. and Young Park*, ARB Case No. 00-042, ALJ Case No. 1999-SCA-18, Jan. 25, 2002; *A to Z Maintenance Corp. v. Dole*, 710 F. Supp. 853, 855 (D.D.C. 1989) (describing Section 354(a) as "a particularly unforgiving provision of a demanding statute.").

The statutory term "unusual circumstances" is not defined in the Act. However, the Department of Labor's regulation governing debarment, 29 C.F.R. § 4.188, establishes a hierarchical three-part test for determining whether "unusual circumstances" exist under the facts of a particular situation. First, the violator must show that aggravated circumstances do not exist:

- (i) [W]here the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

29 C.F.R. § 4.188(b)(3)(i). If the violator “culpabl[y] neglect[ed]” or “culpabl[y] disregard[ed]” the Act’s obligations, that ends the inquiry. However, if the contractor establishes that “aggravated circumstances” do not exist, the test proceeds to the second and third parts.

In the second part of the test, the contractor must show:

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. . . .

29 C.F.R. § 4.188(b)(3)(ii). If the violator satisfies both the first and second parts of the test, a variety of other factors must still be considered before the contractor can be relieved from debarment because of “unusual circumstances”:

(ii) . . . Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

29 C.F.R. § 4.188(b)(3)(ii).

The implementing regulations specifically provide that a contractor’s claim of ignorance of the terms of the contract does not qualify as an “unusual circumstance”:

[U]nusual circumstances do not include . . . 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 where the obligation to comply with the Act is plain from the contract . . . .

29 C.F.R. § 4.188(b)(1).

Our review of the record, especially Respondent Barnes’s admission that he failed to read the SCA provisions of his contract, leads us to the conclusion that the violations in this case were the result of IRM’s and Barnes’ culpable negligence of their SCA obligations. At the time he entered the Forest Service contract, Barnes was a college graduate with bachelor’s and master’s degrees. Not only did Barnes fail to read the contract provisions “verbatim,” he testified that he only read “[t]he parts that I was interested in, in terms of procedure. Actually the contract – no, the part of the contract that I paid attention to was the – yeah, the technical procedural stuff.

That was where my – that’s what I was interested in.” Transcript (Tr.) at 72. *See also* Tr. at 149 (“I did not spend as much time reading what I should have.”).

In the only instance of addressing the matter of failing to read the contract, counsel for Respondents merely states that “[t]he fact that Mr. Barnes candidly admitted that he did not read the contract ‘verbatim’ is simply an example of the fact that Mr. Barnes has nothing to hide, and one of the factors that the ALJ considered.” Respondents’ Brief at 4-5. This does not address the central question before the Board: whether Barnes had something to hide or not, was he culpably negligent, and therefore liable for statutorily mandated sanction of debarment?

Under the applicable preponderance of the evidence test, we agree with the ALJ’s factual finding that Barnes failed to read the terms of the contract, but find that he erred as a matter of law in concluding from that fact that the Respondents met the criteria for “unusual circumstances.” The ALJ found, based on Barnes’ admission at the hearing, that “the (stipulated) violations were attributable to his unfamiliarity with the law, inexperience with federal contracts, and his failure to read the contract verbatim . . .” D&O at 2-3. Although he noted that “Barnes should have become familiar with the law and the contract at its inception[,]” the ALJ concluded that Barnes committed the violations “inadvertently, due to his ignorance of the law.” D&O at 4. He held that the contractor’s violations did not “amount to culpable conduct.” *Id.* at 4.

Because the SCA requirements were plain from the face of IRM’s contract, Barnes was at least culpably negligent in failing to read and perform them. As we have observed, 29 C.F.R. § 4.188 (b)(1) provides that “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 where the obligation to comply with the Act is plain from the contract . . .” do not establish “unusual circumstances.” Likewise, 29 C.F.R. § 4.188(b)(3)(i) considers “culpable neglect to ascertain whether practices are in violation” or “culpable disregard of whether they were in violation or not” as sufficiently aggravated conduct to preclude relief from debarment. Therefore, Respondents cannot prevail in their assertion that they have established the existence of “unusual circumstances” within the meaning of the Act and its implementing regulation. *C.f. Administrator, Wage and Hour Division v. Stuart A. Jackson*, ARB Case No. 00-068, ALJ Case No. 1999-LCA-0004, Apr. 30, 2001 (attorney who failed to read conditions of Labor Certification Agreement under H-1B program for immigrant workers held to be liable for back wage payments on theory that attorney had constructive knowledge of the agreement’s requirements.). Because we hold that the Respondents did not satisfy the first part of the three part hierarchical test for showing “unusual circumstances,” namely that the failure to read and follow the plain terms of the contract was culpable conduct, we need not consider whether Respondents established the mitigating factors considered at the second and third stages of analysis.<sup>2</sup>

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<sup>2</sup> We note that the second prong of the three-part test for unusual circumstances should never be examined in the event that culpable conduct is a factor in the commission of the SCA violations. *See* 29 C.F.R. § 4.188(b)(3)(i), (ii). The third factor, also, may not be examined where aggravated circumstances or culpable disregard of obligations is demonstrated. Nevertheless, the ALJ erroneously concluded that IRM promptly paid the back wages due the

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IRM's reliance on *Dantran, Inc. v. U.S. Dep't of Labor*, 117 F.3d 58 (1st Cir. 1999) is misplaced. In that case, the First Circuit reversed a Board decision ordering Dantran debarred. The court in *Dantran* drew a distinction between the culpability which attaches to the violation of ambiguous government regulations, which would not establish a sufficient level of culpability to support debarment, and the violation of the express terms of a Federal service procurement contract, which is the situation presented here. Because the SCA contract was not sufficiently clear as to the contractor's obligations in *Dantran*, the contractor was not viewed as culpably negligent. However, the court noted that the regulations contemplate a finding of culpability when the contractor's obligations are obvious from the face of the contract:

Fairly read, this language [29 C.F.R. § 4.188(b)] contemplates an automatic finding of culpability only when the law's requirements are *obvious on the face of the contract*. Under such circumstances, a contractor's disregard of legal requirements legitimately can be considered willful or grossly negligent, and thus manifest the species of culpability delineated by the regulations.

*Id.* at 69 (emphasis supplied). In this case, contrary to Respondents' arguments, *Dantran* actually supports the Administrator's argument, with which we concur, that a violation of the express terms of the contract does not does not qualify as unusual circumstances.

As a matter of sound public policy, all prospective SCA contractors should be required to read, understand and comply with their prevailing wage obligations. That is not to say that debarment is always appropriate where a respondent may seek to mitigate the sanction by defending the commission of violations as having been a result of a failure to read the SCA labor standards provisions and wage determination. The facts and circumstances in another case might establish a colorable claim for "unusual circumstances" within the meaning of the Act. On the facts of the case before us, however, Barnes chose to ignore the contents of his contract and both he and IRM should be held fully responsible for this culpably negligent violation of the Act. Given Respondents' culpable negligence in committing violations of the Act as a result of failing to read their SCA contract requirements, debarment is appropriate.

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affected employees. D&O at 4. This is not correct. Contract funds were withheld from IRM after the investigation; however, IRM did not authorize their release to employees until 1999, which is not timely payment. Moreover, the ALJ improperly considered the amount of the wage violations here to be insignificant (*Id.*), even though the violations amounted to nearly 5% of the contract amount. Finally, the ALJ considered the adverse effect of debarment on IRM's business (*Id.*), which is not a permissible consideration under the regulatory test. Debarment is the statutorily required sanction for SCA violators and its adverse effects should not be considered a reason to excuse a contractor for its wrongdoing.

## **CONCLUSION**

For the foregoing reasons, the Administrator's Petition for Review is **GRANTED** and the ALJ's D&O of August 10, 1999 is **REVERSED**. It is hereby **ORDERED** that the names of Respondents Integrated Resource Management, Inc. of Oregon and Marc D. Barnes be placed on the list of persons and firms ineligible to receive Federal contracts for a period of three years.

**SO ORDERED.**

**WAYNE C. BEYER**

Administrative Appeals Judge

**M. CYNTHIA DOUGLASS**

Administrative Appeals Judge

**OLIVER M. TRANSUE**

Administrative Appeals Judge