



In the Matter of:

**RAY'S LAWN AND CLEANING
SERVICES, INCORPORATED, and
HOWARD RAY,**

ARB CASE NO. 06-112

DATE: August 29, 2008

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondents:

**Richard D. Phillips, Esq., and Joseph C. Kitchings, Esq., *Phillips & Kitchings,*
Ludowici, Georgia**

For Administrator, Wage and Hour Division:

**Jennifer R. Marion, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq.,
Howard M. Radzely, Esq., *U.S. Department of Labor,* Washington, District of
Columbia**

FINAL DECISION AND ORDER

The Wage and Hour Division of the United States Department of Labor (DOL) investigated whether Ray's Lawn and Cleaning Services, Inc., and its President, Howard Ray (collectively, Ray's Lawn), failed to pay some of their employees required wage rates and fringe benefits pursuant to the McNamara-O'Hara Service Contract of 1965, as amended (SCA or Act),¹ for work on federal service contracts Ray's Lawn had with the United States Army. Federal service contractors who violate the SCA shall not be awarded federal contracts for three years unless they can prove "unusual circumstances."²

¹ See 41 U.S.C.A. § 351 *et seq.* (West 1994) and its implementing regulations at 29 C.F.R. Parts 4, 6 and 18 (2007).

² 41 U.S.C.A. § 354(a).

A United States Department of Labor Administrative Law Judge (ALJ) concluded that Ray's Lawn violated the Act and did not prove "unusual circumstances." Since a preponderance of the evidence supports the ALJ's findings, we affirm the ALJ's order that Ray's Lawn shall not be awarded United States Government contracts for three years.

BACKGROUND

Ray's Lawn is a corporation with its place of business located in Georgia. The United States Army entered into four contracts with Ray's Lawn to provide grounds maintenance services at Fort Stewart and Hunter Army Air Field in Georgia.³ The SCA governs these contracts.⁴ The SCA requires federal contractors to pay prevailing wages and fringe benefits that the Secretary of Labor predetermines or that a collective bargaining agreement specifies.⁵ Contractors who violate the SCA's wage provisions are liable for any underpayments owed their employees.⁶

In 2003, the Wage and Hour Division began investigating Ray's Lawn and their performance on the four contracts covering the period between May 1, 2001, and April 30, 2004.⁷ Previously, the Wage and Hour Division had investigated Ray's Lawn in 2001 and found that they had failed to pay some of their employees required wage rates and fringe benefits in accordance with the SCA.⁸ The more recent investigation, at issue herein, revealed that Ray's Lawn had again failed to pay some of their employees required wage rates and fringe benefits in accordance with the SCA.⁹ Pursuant to its

³ See Dec. 6, 2004 Complaint (Compl.) at 1-2; Hearing Transcript (HT) at 15.

⁴ The SCA generally requires that every contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision that specifies the minimum hourly wage and fringe benefit rates that are payable to the various classifications of service employees working on such a contract. See 41 U.S.C.A. § 351(a)(1)-(2). These wage and fringe benefit rates are predetermined by the Wage and Hour Division acting under the authority of the Administrator, who has been designated by the Secretary of Labor to administer the Act.

⁵ 41 U.S.C.A. at § 351(a).

⁶ *Id.* at § 352(a).

⁷ Compl. at 2; Government Exhibits (GX) C 1-4.

⁸ HT at 13-14, 38, 40, 62-65.

⁹ Compl. at 3.

investigation, the Wage and Hour Division concluded that Ray's Lawn had underpaid 39 service contract employees a total of \$13,736.81 in required wage rates and fringe benefits due them under the SCA.¹⁰ As a result of the investigation revealing the SCA violations, Ray's Lawn paid the back wages and fringe benefits it owed to the 39 service contract employees.¹¹

The Solicitor of Labor filed a complaint with the Office of Administrative Law Judges in December 2004.¹² Based on the SCA violations and the federal service contract underpayments, which had been paid, the Solicitor requested that Ray's Lawn be debarred and, therefore, not receive United States Government contracts for three years. Ray's Lawn ultimately responded to the complaint, urging that, as they had paid the back wages owed to the 39 employees, they not be debarred.

The ALJ held a hearing on November 15, 2005, in Savannah, Georgia. Based on the evidence of record, the ALJ concluded that Ray's Lawn had continued to violate the SCA and, therefore, had not established "unusual circumstances" to warrant relief from the debarment sanction. Therefore, the ALJ ordered that Ray's Lawn shall not be awarded United States Government contracts for three years. Ray's Lawn filed a Petition for Review with the Administrative Review Board (ARB or the Board).¹³

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to decide this case.¹⁴ 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."¹⁵

The Board's review of an ALJ's decision is an appellate proceeding.¹⁶ The Board shall modify or set aside an ALJ's findings of fact only when it determines that those

¹⁰ Compl. at 3; HT at 4.

¹¹ *Id.*

¹² *See* Dec. 6, 2004 Complaint.

¹³ *See* 29 C.F.R. § 6.20 (2007).

¹⁴ *See* 29 C.F.R. § 8.1(b) (2007).

¹⁵ 29 C.F.R. § 8.1(c).

¹⁶ 29 C.F.R. § 8.1(d).

findings are not supported by a preponderance of the evidence.¹⁷ But the Board reviews conclusions of law de novo.¹⁸

DISCUSSION

1. The Legal Standard

Under SCA Section 5(a), persons or firms that violate the Act are subject to debarment, that is, ineligible to receive federal contracts for a period of three years “[u]nless the Secretary otherwise recommends because of unusual circumstances.”¹⁹ Debarment is presumed once violations of the Act have been found, unless the violator is able to show that “unusual circumstances” exist.²⁰ “Section 5(a) is a particularly unforgiving provision of a demanding statute. A contractor seeking an ‘unusual circumstances’ exemption from debarment, must, therefore, run a narrow gauntlet.”²¹

The SCA does not define “unusual circumstances.” Relevant regulations, however, establish a three-part test that states the criteria for determining when relief from debarment is appropriate. The contractor has the burden of proving “unusual circumstances” and must meet all three parts of the test to be relieved from the debarment sanction.²² Under the first part of this test, the contractor must establish that the conduct giving rise to the SCA violations was not willful, deliberate, aggravated, or the result of culpable conduct. Moreover, the contractor must demonstrate the absence of a history of

¹⁷ 29 C.F.R. § 8.9(b). See *Dantran, Inc. v. U.S. Dep’t of Labor*, 171 F.3d 58, 71 (1st Cir. 1999).

¹⁸ *SuperVan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014, slip op. at 3 (ARB Sept. 30, 2002); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002).

¹⁹ 41 U.S.C.A. § 354(a); 29 C.F.R. § 4.188(a), (b) (2007).

²⁰ *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-020, slip op. at 9 (ARB Apr. 30, 2001).

²¹ *Sharipoff d/b/a BSA Co.*, No. 1988-SCA-032, slip op. at 6 (Sec’y Sept. 20, 1991). *Accord A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 855-856 (D.D.C. 1989); *Colorado Sec. Agency*, No. 1985-SCA-053, slip op. at 2-3 (Sec’y July 5, 1991); *Able Bldg. Maint. & Serv. Co.*, No. 1985-SCA-004 (Dep. Sec’y Feb. 27, 1991). See also *Vigilantes, Inc. v. Adm’r of Wage & Hour Div., U.S. Dep’t of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992) (“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.”)

²² 29 C.F.R. § 4.188(b)(1); *Hugo Reforestation*, slip op. at 12-13.

similar violations, an absence of repeat violations of the SCA, and that any previous violations were not serious²³

If the contractor succeeds on the first part, the second part of the test requires that it demonstrate a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance. If the contractor succeeds on the first and second parts, the third part lists other factors that must be considered, including whether the contractor has previously been investigated for SCA violations, whether the contractor has committed recordkeeping violations that impeded Wage and Hour's investigation, whether the determination of liability was dependent upon the resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, and the nature, extent, and seriousness of any past or present violations.²⁴

2. Ray's Lawn Violated the SCA

Because Ray's Lawn had paid the back wages and fringe benefits it owed to the 39 service contract employees, the ALJ found that it had "stipulated" to violations of the SCA for failing to pay service contract employees the wages and fringe benefits due them.²⁵ The SCA's debarment sanction applies to those persons or firms "found to have violated this chapter."²⁶ Since Ray's Lawn violated the SCA in underpaying service contract employees the wages and fringe benefits due them, the ALJ correctly concluded that Ray's Lawn is subject to debarment.

3. Ray's Lawn Does Not Meet Part 1 of the Test for Relief from Debarment

As set forth above, unless Ray's Lawn can meet the first part of the three-part test for relief from the sanction of debarment, they must be debarred. Therefore, Ray's Lawn must prove that their conduct in causing or permitting SCA violations was not willful, deliberate, of an aggravated nature, or the result of culpable conduct. "Culpable conduct" includes "culpable neglect to ascertain whether practices" violate the Act, "culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements."²⁷ Culpable neglect is conduct "beyond negligence, but short of specific intent."²⁸ Relief under this first part of the test is also precluded "where

²³ 29 C.F.R. § 4.188(b)(3)(i).

²⁴ See 29 C.F.R. § 4.188(b)(3)(ii).

²⁵ See Decision and Order (D. & O.) at 1, 4; see also Compl. at 3; HT at 4.

²⁶ 41 U.S.C.A. § 354(a).

²⁷ 29 C.F.R. § 4.188(b)(3)(i).

²⁸ *J & J Merrick's Enters., Inc.*, BSCA No. 94-009, slip op. at 5 (Oct. 27, 1994).

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

The ALJ determined that Ray’s Lawn continued to violate the SCA wage and fringe benefits provisions when it underpaid its service contract employees, even after the Wage and Hour Division’s initial investigation found similar SCA violations.³⁰ The ALJ’s findings are supported by a preponderance of the evidence. Therefore, we conclude, as did the ALJ, that Ray’s Lawn’s conduct amounts to culpable conduct within the meaning of 29 C.F.R. § 4.188(b)(3)(i).³¹

Ray’s Lawn contends that the underpayment of wages and fringe benefits was not intentional, but merely shows negligence.³² But Ray’s Lawn’s argument is based on a misinterpretation of the regulations. Ray’s Lawn failed to prove that their conduct in causing continued and repeated SCA violations was not willful, deliberate, or of an aggravated nature, *or* the result of culpable conduct.³³ The legal standard for culpable neglect does not require a finding of intent to violate the Act. Rather, as previously noted, culpable neglect or conduct requires conduct that is beyond negligence, but short of specific intent.³⁴ In this case, the preponderance of the evidence establishes that Ray’s Lawn continued to underpay their service contract employees the wages and fringe benefits due them *even after* the Wage and Hour Division’s initial investigation found similar SCA violations.³⁵

²⁹ 29 C.F.R. § 4.188(b)(3)(i).

³⁰ D. & O. at 4-5.

³¹ *Rasputin, Inc.*, ARB No. 03-059, ALJ No. 1997-SCA-032, slip op. at 10 (ARB May 28, 2004) (contractor’s failure to ensure that its pay practices are in compliance with the SCA constitutes culpable neglect).

³² Ray’s Lawn Brief at 4.

³³ *See* 29 C.F.R. § 4.188(b)(3)(i).

³⁴ *Hugo Reforestation*, slip op. at 9 n.10, quoting *J & J Merrick’s Enters., Inc.*, slip op. at 5.

³⁵ *See Nationwide Bldg. Maint., Inc. & William W. Johnson*, BSCA No. 92-004, slip op. at 12 (Oct. 30, 1992) (“Violations which are committed more than once - after proper notice - can also be seen as intentional, deliberate and willful.”); *see also A to Z Maint. Corp.*, 710 F. Supp 853, 857-859 (D.D.C. 1989) (contractor’s repeated violations of SCA even after receiving advice from Labor Department Compliance Officer is one of the aggravating factors that precludes a finding of “unusual circumstances” under 29 C.F.R. § 4.188(b)(3)(i)); *Hugo Reforestation*, slip op. at 10.

In addition, Ray's Lawn contends that they should not be debarred, as they have paid the back wages they owed to the 39 employees.³⁶ But this assertion would not change Ray's Lawn's obligation to pay the required wages and fringe benefits when they were due to their service contract employees. When Ray's Lawn underpaid their employees, it violated the SCA's wage and fringe benefits provisions. Ray's Lawn's payment of the underpayments they created is not a penalty for a SCA violation; debarment from United States Government contracts for three years is.³⁷

We conclude that Ray's Lawn's conduct in causing the SCA violations constitutes culpable conduct under 29 C.F.R. § 4.188(b)(3)(i). Therefore, like the ALJ, we conclude that Ray's Lawn did not satisfy that first part of the three-part test for determining whether "unusual circumstances" exist to warrant relief from debarment. Thus, relief from the debarment sanction is not in order.³⁸ Accordingly, we need not examine whether Ray's Lawn meets the second and third parts of the test.³⁹

4. Ray's Lawn's Additional Arguments

Ray's Lawn also contends that, as they were unrepresented at the hearing and in the ALJ proceedings, these proceedings were unfair. Specifically, Ray's Lawn asserts that the ALJ did not adequately fulfill his duty to develop the record on behalf of an unrepresented respondent such as Ray's Lawn.⁴⁰ This argument has no merit. While we have acknowledged that adjudicators must accord a party appearing pro se fair and equal treatment, a pro se litigant "cannot generally be permitted to shift the burden of litigating

³⁶ Ray's Lawn Brief at 4.

³⁷ See 29 C.F.R. § 4.188(b)(2). See also *Vigilantes*, 968 F.2d at 1418 (debaring government contractor and its president despite company's status as a Small Business Administration certified, Section 8(a) business); *Summitt Investig. Serv., Inc. v. Adm'r of Wage and Hour*, 34 F. Supp. 2d 16 (D.D.C. 1998)(enforcing debarment sanction against small disadvantaged minority-owned business).

³⁸ 29 C.F.R. § 4.188(b)(3)(i). Ray's Lawn contends that its employees will be unemployed if it is debarred. Ray's Lawn Brief at 4. But, the ARB has held that "[d]ebarment is the statutorily required sanction for SCA violators and its adverse effects [on the contractor's business] should not be considered a reason to excuse a contractor for its wrongdoing." *Integrated Res. Mgmt., Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-014, slip op. at 7 n.2.

³⁹ *Integrated Res. Mgmt., Inc.*, slip op. at 6 n.2 (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. The third factor, also, may not be examined where aggravated circumstances or culpable disregard of obligations is demonstrated).

⁴⁰ Ray's Lawn Brief at 1-2.

his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.”⁴¹ Pro se litigants have the same burdens of production and persuasion as litigants represented by counsel.⁴² Although the ALJ has some duty to assist pro se litigants, he also has a duty of impartiality. A judge must refrain from becoming an advocate for the pro se litigant.⁴³ Furthermore, affording a pro se litigant undue assistance in developing a record would compromise the adjudicator’s role in the adversary system.⁴⁴ Consequently, we reject Ray’s Lawn’s contention.⁴⁵

Finally, Ray’s Lawn contends that the Secretary based its debarment case on inadmissible hearsay evidence. Ray’s Lawn asserts that the Wage and Hour Division officials’ testimony regarding the prior Ray’s Lawn investigation, based on their review of the investigation file, constitutes inadmissible hearsay evidence.⁴⁶ It is well established, however, that hearsay evidence is admissible in SCA administrative proceedings arising.⁴⁷ In any event, the testimony of the Wage and Hour Division

⁴¹ *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983).

⁴² *Cf. Canterbury v. Administrator*, ARB No. 03-135, ALJ No. 2002-SCA-011, slip op. at 3-4 (ARB Dec. 29, 2004).

⁴³ *See, e.g., United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975)(per curiam)(“The trial judge is charged with the responsibility of conducting the trial as impartially and fairly as possible.”)

⁴⁴ *See Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 9 (ARB Feb. 28, 2003) citing Jessica Case, Note: *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701 (2002); **MODEL CODE OF JUDICIAL CONDUCT**, Canon 3 (1990) (A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently).

⁴⁵ Ray’s Lawn also cites to a regulation that allows for a “window of correction” to correct violations under the Act. *See* Ray’s Lawn Brief at 3; 29 C.F.R. § 541.118(a)(6), *superseded by* 29 C.F.R. § 541.603(c) (2007). Ray’s Lawn’s citation is misplaced, however, as this regulation implements the Fair Labor Standards Act and is inapplicable to the SCA. In addition, Ray’s Lawn contends that they were unable to present evidence regarding problems with their employees using false identification. But because the ALJ correctly found that Ray’s Lawn has “stipulated” to SCA violations for failing to pay service contract employees the wages and fringe benefits due them, as Ray’s Lawn paid the back wages and fringe benefits it owed to its employees, any issue regarding employees using false identification is irrelevant.

⁴⁶ Ray’s Lawn Brief at 6-11.

⁴⁷ *Bishop d/b/a/ Safeway Moving & Storage*, BSCA Case No. 92-12 (Sec’y Nov. 30, 1992).

officials recounted the results of the prior investigation, which was fully within Ray's Lawn's knowledge, and thus within their ability to effectively counter or rebut.⁴⁸ Moreover, the Wage and Hour Division officials' testimony was based on their own personal review of the prior investigation's public file and, therefore, does not meet the plain definition of hearsay.⁴⁹ Thus, we reject Ray's Lawn's assertion.

CONCLUSION

Ray's Lawn violated the SCA when they underpaid their employees SCA wages and fringe benefits due them under the federal contracts. A preponderance of the evidence supports the ALJ's finding that Ray's Lawn's actions in causing the SCA violations amounted to culpable conduct. Therefore, "unusual circumstances" warranting relief from the debarment sanction do not exist. As a result, we **AFFIRM** the ALJ's order that Ray's Lawn shall not be awarded United States Government contracts for three years. As the Act provides, the Secretary will forward to the Comptroller Ray's Lawn's and Howard Ray's names.⁵⁰

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁴⁸ See *Hugo Reforestation, Inc.*, slip op. at 18 n. 18.

⁴⁹ See 29 C.F.R. § 18.801(c)(Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.). Alternatively, the testimony of the Wage and Hour Division officials also falls within the "public records and reports" exception to the hearsay rule. See 29 C.F.R. § 18.803(a)(8)(iii)(exempting "[f]actual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness").

⁵⁰ See 41 U.S.C.A. § 354(a).