



In the Matter of:

**SUNDEX, LTD., Contractor**

**and**

**JOSEPH J. BONAIVIRE, Owner**

**and**

**ARB CASE NO. 98-130  
(Formerly ALJ Case  
No. 94-DBA-58)**

**DATE: December 30, 1999**

**Proposed debarment for labor  
standards violations by:**

**SUNDEX, LTD., Contractor**

**and**

**JOSEPH J. BONAIVIRE, Owner**

**With respect to laborers and mechanics employed by SUNDEX, Ltd. to repair and replace concrete floor slabs at the U.S. Army Natick RD&E Center, Natick, MA, under U.S. Army Contract No. DACA33-89-B-0083; install handicapped ramps at the U.S. Army Natick RD7E Center, Natick, MA under U.S. Army Contract No. DAAK60-89-C-1059; and construct helicopter pads with navigational lights at the United States Air Force transmit sites at Moscow and Columbia Falls, ME, under Air Force Contract No. F27604-88-C-0036**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Respondents:*

Robert M. Walsh, Esq., *Walsh and Associates, Manchester, New Hampshire*

*For the Complainant:*

Lois Zuckerman, Esq.; Paul H. Frieden, Esq.; Steven J. Mandel, Esq.;  
*U.S. Department of Labor, Washington, D.C.*

## FINAL DECISION AND ORDER

This case raises two issues: first, whether Respondent Sundex, Ltd. (Sundex), a construction contractor holding three Federal construction contracts violated Federal procurement laws by (a) unlawfully paying less than the prevailing wage and fringe benefit rates to its employees and misclassifying them, (b) unlawfully failing to pay employees the proper wage rates for overtime work, and (c) unlawfully falsifying payroll records; and second, if Sundex violated the law with regard to wages, fringe benefits, overtime payments and record keeping, whether the company and its principal, Respondent Joseph J. Bonavire (Bonavire), therefore should be debarred from further Federal contracts. Each of the three contracts was subject to the Davis-Bacon Act, 40 U.S.C. §267a (1994)(DBA) (requiring payment of prevailing wage and fringe benefit rates on Federal construction contracts), the Contract Work Hours and Safety Standards Act, 40 U.S.C. §327 *et seq.* (1994)(CWHSSA) (requiring payment of overtime rates on Federal construction contracts for work performed in excess of 40 hours per week) and regulations implementing these statutes at 29 C.F.R. Parts 1, 3 and 5 (1999).

Following an investigation by staff of the Labor Department's Wage and Hour Division, the Acting Administrator of the Division (Administrator) brought this administrative action against Sundex and Bonavire seeking payment of back wages and debarment. A hearing into the matter was held before an Administrative Law Judge (ALJ) pursuant to 29 C.F.R. §6.30, and the ALJ issued a [Recommended] Decision and Order (R. D. and O.) on April 27, 1998. Although the ALJ concluded that the Administrator failed to prove a few of the violations that originally had been alleged, he found against Sundex on most of the charges and ordered the payment of \$4,104.12 in back wages. The ALJ also recommended that Sundex and Bonavire be debarred. *Id.* Sundex and Bonavire appealed to this Board. We have jurisdiction pursuant to the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act, and the implementing regulations at 29 C.F.R. §§6.57 and 7.1 (1999).

## BACKGROUND

The facts are stated in detail in the R. D. and O. at pp. 4-11 and 14-15, and will be summarized only briefly here.

In 1990, Sundex held three contracts with the Department of Defense: (1) a contract for the repair and replacement of concrete floor slabs at the Army Research, Development and Engineering (RD&E) Center in Natick, MA, Contract DACA33-89-B-0083 (the "concrete slabs contract"); (2) a contract for the construction of handicap access ramps at the same Army RD&E Center, Contract DAAK60-89-C-1059 (the "access ramps contract"); and (3) a contract for the construction of helicopter pads in Moscow and Columbia Falls, Maine, Contract F27604-88-C-0036 (the "helicopter pads contract"). *See* CX (Complainant Administrator Exhibit) 2. It is undisputed that all three contracts were subject to the DBA and CWHSSA. The Administrator alleged a series of violations on each of the contracts.

*Concrete slabs contract* – The contract slabs contract at the Army’s Natick, MA, facility was subject to Davis-Bacon wage determination MA89-1, which called for laborers to be paid an hourly wage ranging from \$15.45/hr. (Laborer Class I) to \$17.45/hr. (Laborer Class IV), plus fringe benefits of \$4.60/hr. Six employees who worked on the concrete slabs contract performing tasks such as operating a jackhammer or hauling trash testified that Sundex paid them only \$10 or \$12 an hour for work performed during March and April, 1990, with no money deducted for taxes and no payment of fringe benefits. *See* T. (transcript of hearing) 37-39; 47-49; 57; 61; 65; 102. However, certified payrolls signed by Bonavire reported that the employees were paid \$15.75/hr. in wages, plus fringe benefits. CX 4. Furthermore, several of the employees worked more than 40 hours per week, but were paid only at their straight-time rate of pay.

Copies of canceled checks made out to these and other employees suggest that the number of hours worked as reported on the payroll reports generally was accurate,<sup>1/</sup> but that the employees actually were paid at the lower \$12 or \$10/hr. wage rate, with no payment of fringe benefits or overtime payments. Although the Respondents argued that fringe benefits had been paid in cash, and that discrepancies between amounts paid and reported were merely mathematical errors made in good faith, the ALJ found that Respondents failed to pay the prevailing wage rate and fringe benefits required on the concrete slabs contract and that Respondents falsified the certified payrolls submitted to the government. R. D. and O. at 13. The ALJ adopted the Wage and Hour investigator’s calculation of back wages due in exhibits C-30 to C-40. *Id.*

*Access ramps contract* – On the access ramps contract at the Army RD&E facility, the Administrator originally alleged that two employees were not paid the prevailing wage rate for work performed in September 1990 and that the Respondents committed record keeping violations. However, any wage underpayments had been paid to the employees by the time of the hearing, and the Administrator ultimately argued only that the contractor committed record keeping violations and failed to pay withholding taxes on time. R. D. and O. at 14.

The only evidence supporting these allegations was the “general testimony” of the Wage and Hour investigator, with no testimony by the affected workers or other evidence being introduced. The ALJ concluded that this was “insufficient evidence” to prove that Respondents violated the DBA or CWHSSA on the handicap ramp contract. *Id.*

*Helicopter pads contract* – The issue on the helicopter pads contract was whether three employees (Steven Hobson, Andrew Bertin, and foreman Jim Lacey) were paid for work on August 1, 1990. Hobson and Bertin testified at the hearing that although they were paid for some of their work on the helicopter pad contract on other days, they specifically did not receive any pay for 13 hours of work performed on August 1. R. D. and O. at 14. Their testimony is confirmed by a letter from Bonavire to one of the employees, Steven Hobson, in which Bonavire acknowledges the non-payment, attributing the problem to Lacey. CX 19. Notwithstanding his acknowledged failure to

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<sup>1/</sup> There are several small discrepancies between the number of hours worked (as evidenced by the pay checks) when compared with the number of hours worked that were reported by Sundex and Bonavire on the certified payroll reports.

pay Hobson and Bertin for their work on August 1, the certified payrolls indicated that each employee received \$80 in pay for eight hours of work that day.

Bonavire could not produce canceled checks to demonstrate that these two employees were paid for work on August 1, 1990, and the ALJ found that the two employees had not been paid; however, he also found that there was no evidence showing that the third employee, Lacey, had not been paid. R. D. and O. at 15. Although the Administrator had alleged that the work performed by Hobson and Bertin (erecting simple forms, pouring and screeding concrete) properly should have been classified as the work of cement masons, the ALJ credited Bonavire's testimony that the work performed was properly classified as laborer's work, to be paid at the Laborer's rate (\$4.76/hr.) under the wage determination applicable to the contract, ME88-3. *Id.*, 15-16.

## DISCUSSION

The Administrative Review Board has jurisdiction to hear and decide appeals from decisions of Administrative Law Judges regarding questions of law and fact arising under the DBA and the Related Acts. 29 C.F.R. §7.1(b). Pursuant to the Administrative Procedure Act, in reviewing the ALJ's recommended decision the Board (as the designee of the Secretary) acts with "all the powers [the Secretary] would have in making the initial decision. . . ." 5 U.S.C. §557(b). Accordingly, the Board reviews the ALJ's findings *de novo*. See generally *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

### A. Violations of the Acts.

Respondents argue that the ALJ did not properly weigh the evidence because he did not give sufficient weight to Bonavire's testimony that he paid the prevailing wage on the concrete slab contract, that he made tax payments for each employee and paid fringe benefits in cash. They also argue that the ALJ ignored W-2 forms submitted for each employee on the project (CX21), as well as a signed statement by one of the employees declaring that he received prevailing wages from Sundex, that fringe benefits were paid in cash and that proper amounts were withheld for taxes.

The central issue for us is whether the ALJ properly credited the testimony of the employees over that of Bonavire, the owner of Sundex. In the decision below, the ALJ made this assessment of Bonavire's testimony:

Upon careful consideration of all of the evidence of record, and based on my observations of Mr. Bonavire's demeanor during his lengthy performance on the witness stand, I find his testimony that he paid his employees the applicable prevailing wage rates along with cash for the required fringe benefits, as reflected in the certified payroll records, to be as incredible as his assertion that he is the

victim of some dark conspiracy on the part of the Administrator and/or his minions to prove violations of the federal prevailing wage and hour laws through perjurious employee testimony. He was argumentative and repeatedly failed to directly respond to questions, and he showed a disturbing proclivity to burden the record with digressions, obfuscations and *sotto voce* commentary. His lack of credibility in these critical areas is compounded by the complete absence of any corroborating records, a void that I find astounding for a well-educated man who has secured over 200 government contracts and who, at the time of the events at issue, employed the services of a certified public accountant. Equally incredible is his testimony that he meticulously completed certified payroll records reflecting payment of the appropriate prevailing wage and fringe benefits and then repeatedly made careless mathematical errors in making out the employee pay checks.

R. D. and O. at 12.

In *Universal Camera v. NLRB*, 340 U.S. 474 (1950), the Supreme Court expressed its support for the following observation, quoted from a report of the Attorney General's Committee on Administrative Procedures, regarding appellate review of a trial hearing officer's findings:

Conclusions, interpretations, law and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

*Id.* at 494. In earlier cases under the Davis-Bacon Act and the Davis-Bacon Related Acts (including CWHSSA), our predecessor body, the Wage Appeals Board (WAB), followed this admonition faithfully, observing that "it must be remembered that the ALJ heard and observed the witnesses during the hearing. It is for the trial judge to make determinations of credibility, and an appeals body such as the Wage Appeals Board should be loathe to reverse credibility findings unless clear error is shown." *Homer L. Dunn Decorating, Inc.*, WAB Case No. 87-03 (Mar. 10, 1989), slip op. at 3; *accord, Wayne J. Griffin Electric, Inc.*, WAB Case No. 93-05 (Oct. 29, 1993), slip op. at 6 ("The Board will not reverse credibility determinations where they are not clearly erroneous." *citing Milnor Construction Corp.*, WAB 91-21 (Sept. 12, 1991)); *Trataros Construction Corp.*, WAB Case No. 88-08 (Mar. 11, 1991).

On the record before us, we find no error in the ALJ's credibility findings, and therefore adopt them. We note further that Respondents did not otherwise challenge the ALJ's findings of violation of the Acts. We therefore affirm the ALJ's findings that the Acts were violated, and deny this aspect of the Petition for Review.

## **B. Debarment.**

The Davis-Bacon Act, which applies specifically to construction contracts entered into directly by the United States or the District of Columbia, mandates a 3-year debarment for “persons or firms . . . found to have *disregarded their obligations* to employees and subcontractors.” 40 U.S.C. §276-2(a)(emphasis added). The debarment procedures for violations of the DBA are found at 29 C.F.R. §5.12(a)(2). “Disregard for obligations” under the Act has been interpreted to mean a level of culpability beyond mere negligence, involving some element of intent. *Structural Concepts, Inc.*, WAB Case No. 95-02 (Nov. 30, 1995). However, once a violation is established, the standard for debarment is a “bright line” test, *i.e.*, a 3-year debarment period is mandatory, without consideration of mitigating factors or extraordinary circumstances. *G & O General Contractors, Inc.*, WAB Case No. 90-35 (Feb. 19, 1991).

In addition to the *statutory* debarment requirement of the Davis-Bacon Act, the Labor Department’s regulations include a separate *regulatory* debarment provision for violations of the Davis-Bacon *Related Acts* (listed at 29 C.F.R. §5.1), including the CWHSSA. As noted above, Respondents’ failure to pay overtime wages to several employees constituted a CWHSSA violation. *See* 40 U.S.C. §328. The regulatory debarment mechanism for violations of the Related Acts provides that:

Whenever any contractor or subcontractor is found . . . to be in *aggravated or willful violation* of the labor standards provisions of any of the applicable statutes listed in §5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years . . . to receive any contracts or subcontracts subject to the Davis-Bacon or Related Acts.

29 C.F.R. §12(a)(1)(emphasis added).

The ALJ held that Respondents’ failure to keep accurate records and submission of falsified records to the government justifies debarment under the Davis-Bacon Act and the regulation at 29 C.F.R. §5.12(a)(2). R. D. and O. at 16. The ALJ did not address the question of debarment under 29 C.F.R. §5.12(a)(1) for violation of the Related Acts, such as CWHSSA.

Respondents assert that the evidence fails to show any falsification of records but at most shows some “small vagrencias [sic]” between the paychecks and the certified payrolls, and that debarment therefore is not warranted. We cannot agree. Crediting the statements of the employees who testified at the hearing, *see* discussion above, there were significant differences between what the employees were actually paid and the certified payrolls. In addition, the canceled checks in the record corroborate the employees’ testimony that they were paid a straight \$10 or \$12 per hour without deductions for taxes or payments for benefits, and without payment for overtime for work in excess of 40 hours per week. We concur with the ALJ’s finding that Respondents failed to keep accurate records and submitted falsified payroll records to conceal the fact that the prevailing wages were not paid to their employees.

Underpayment of wages and falsification of records are serious violations of law, fully justifying debarment. *Miller Insulating Company, Inc.*, WAB Case No. 91-38 (Dec. 30, 1992)(Related Acts violation under §5.12(a)(1)); *A. Vento Construction*, WAB Case No. 87-51 (Oct. 17, 1990) (Related Acts violation under §5.12(a)(1)); *Phoenix Paint Co.*, WAB Case No. 87-08 (May 6, 1989) (DBA violation under §5.12(a)(2)). Based on the record before us, we find that debarment of Respondents is warranted in this case both under §5.12(a)(1) and (2). Accordingly, the Petition for Review is **DENIED**.

It is hereby **ORDERED**:

1. Respondents shall pay unpaid wages to the employees who worked on the Natick, MA, concrete slabs job as calculated by the ALJ:

Paul Mandziak	\$232.94
Robert Coburn	499.69
Joseph Boyle	239.66
Mark Houle	716.76
Scott Greeley	180.98
Tim Greeley	311.52
Paul Houle	158.39
Sean Greeley	130.24
John Shield	54.76
Steven Hobson	567.39
Andrew Bertin	888.03

*See* R. D. and O. at 17, Part III(1).

2. Respondents shall pay unpaid wages to the employees who worked on the helicopter pad job as calculated by the ALJ:

Steven Hobson	\$61.88
Andrew Bertin	61.88

*See* R. D. and O. at 17, Part III(2).

3. The Administrator shall transmit the names of Sundex, Ltd. and Joseph J Bonavire to the Comptroller General for placement on the list of persons and firms ineligible to receive government contracts or subcontracts for a period of three years.

**SO ORDERED.**

**PAUL GREENBERG**  
Chair

**E. COOPER BROWN**  
Member