ADMINISTRATIVE REVIEW BOARD

UNITED STATES DEPARTMENT OF LABOR

WASHINGTON, D.C.

In the Matter of:

RASPUTIN, INC., AND
WILLIAM JOHNSON,

RESPONDENTS

Regarding a dispute over the issues of back pay, debarment, and applicability of automatic bankruptcy stay.

ARB Case No. 03-059

ALJ Case No. 97-SCA-32

ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

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In the Matter of: RASPUTIN, INC., AND WILLIAM JOHNSON, RESPONDENTS, Regarding a dispute over the issues of back pay, debarment, and applicability of automatic bankruptcy stay.	ARB Case No. 03-059 ALJ Case No. 97-SCA-32

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ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

The Administrator of the Wage and Hour Division submits, by counsel, her statement in response to William Johnson's Petition for Review of Administrative Law Judge Fletcher E. Campbell, Jr.'s ("ALJ") November 20, 2002 "Initial Decision" ordering the payment of back wages and fringe benefits by Johnson in the amount of $173,460.34, and the debarment of Johnson, under the McNamara-O'Hara Service Contract Act ("SCA" or "Act"), 41 U.S.C. 351 *et seq.*, and the applicable regulations.

ISSUES PRESENTED

1. Whether the ALJ correctly concluded that William Johnson is a "party responsible" who is thus individually

liable for violations of the SCA and the applicable regulations.

2. Whether the ALJ correctly concluded that William Johnson owes back wages in the amount of $173,460.34 as a result of violations of the SCA's prevailing wage and fringe benefit provisions.

3. Whether the ALJ correctly concluded that William Johnson should be debarred from entering government contracts for three years as a result of the company's violations of the SCA and the applicable regulations.

4. Whether the ALJ correctly concluded that the police and regulatory power exception to the automatic stay provision of the Bankruptcy Code applies to an SCA enforcement action seeking back wages and debarment.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings, And Decision Below

This case arises from an investigation of Respondents Rasputin, Inc. and William Johnson by the Wage and Hour Division for compliance with the labor standards of the SCA. It is not disputed that SCA requirements were applicable to a Department of Navy contract for security services in Jacksonville, Florida, awarded to Respondents

in September 1995. (GX 1).[1] The investigation covered the period of October 1995 through August 1996, and resulted in Wage and Hour concluding that Respondents had violated the prevailing wage and fringe benefit provisions of the Act.

An administrative complaint was filed on behalf of Wage and Hour on September 12, 1997, seeking recovery of back wages and the debarment of Respondents Rasputin and Johnson. Wage and Hour contended that back wages in the amount of $280,079.62 were due to 111 employees, $136,600 for prevailing wage violations and $143,479.62 for fringe benefit violations. Of the $280,079.62 claimed, a total of $106,619.28 was withheld from payment on the contract and released for payment to the employees and the union pension fund, leaving a claim against Respondents of $173,460.34. Rasputin failed to answer the complaint, and the ALJ entered a default judgment against it on July 18, 2001, making William Johnson the only remaining respondent in this proceeding.

Hearings were held before the ALJ in Cincinnati, Ohio and Jacksonville, Florida, on July 19, 2001 and April 9,

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[1] The government's exhibits are designated "GX__," the Respondents' exhibits are designated "RX__," the transcript of the hearing session of July 19, 2001 is designated "Tr.I__"), and the transcript of the hearing session of April 9, 2002 is designated "Tr.II __").

2002, respectively. By "Initial Decision" dated November 20, 2002, the ALJ ordered Johnson to pay the Department of Labor back wages and fringe benefits in the amount of $173,460.34, and ordered that he be ineligible to receive further federal contracts for three years. On appeal to the Administrative Review Board, Johnson denies that he was a "party responsible," denies the prevailing wage and fringe benefit violations found by Wage-Hour, asserts that debarment was inappropriate, and argues that the automatic stay provision of the bankruptcy law is applicable to this proceeding.

B. Statement Of Facts

Rasputin, Inc. was a corporation which provided security guard services. William Johnson became Rasputin's president and sole owner in August 1996; he was not an officer of the company during the time of the performance of the contract. (Tr.II 129, 164, 167, 184, 193-94, GX 4).[2] In September of 1995, Rasputin was awarded a contract by the U.S. Navy to provide, from October 1, 1995 to August 31, 1996, security guard services at the Navy Supply Center

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[2] As explained *infra*, the fact that Johnson was not an officer of the company during the period the contract was performed is by no means determinative of whether he was individually liable as a "party responsible" under the SCA for violations committed during that period.

and other locations at the Naval Air Station in Jacksonville, Florida. (Tr.II 6-7, GX 1). The contract referenced that provision of the Federal Acquisition Regulations which incorporates the Secretary's SCA regulations, 29 C.F.R. Part 4, into the contract. *See* 48 C.F.R. 52.222-41. (GX 1, page 70).

The services required by the contract obtained by Respondents had previously been performed pursuant to two contracts between the Navy and DGS Services, Inc. The predecessor contracts of DGS Services, Inc. were subject to collective bargaining agreements with collectively bargained wage rates. (RX 1, Tr.I 48, Tr.II 62-3).

From August 1996 through March 1997, Wage and Hour conducted an investigation of Respondents' compliance with SCA requirements in their performance of the contract during the period October 1995 through August 1996. The investigation involved the examination of time, payroll, and other employment records, and also included interviews of members of management and of certain employees. (Tr.II 120, 122, 130-32).

The investigation revealed that, during the period of the performance of the contract, Respondents failed to pay their employees engaged in security work the prevailing monetary wages required by section 2(a)(1) of the SCA, 41

U.S.C. 351(a)(1), and the SCA regulations at 29 C.F.R. 4.6 and 4.161. (Tr.II 119). Rather than paying the required rate of $6.26 per hour, Respondents paid employees $5.12 per hour. (Tr.II 115, 119). In addition, for the fringe benefits required by section 2(a)(2) of the SCA, 41 U.S.C. 351(a)(2), and the regulations at 29 C.F.R. 4.6 and 4.162, Respondents paid the union health and welfare fund $.89 per hour rather than the $1.00 per hour required by the applicable wage determination, and, for the $.40 and $1.42 required to be paid to the union pension plan and union benefit fund, respectively, they paid nothing. (GX 3; Tr.II 133).

Johnson abandoned performance of the contract with four weeks remaining in its term, resulting in two missed payrolls for the periods August 1 through August 15, 1996, and August 16 through August 31, 1996. (Tr.II 118). The total back wage violations were approximately $280,000 due 111 employees, with approximately $136,000 due for prevailing wage violations and approximately $143,000 for fringe benefit violations. (GXs 5, 6; Tr.II 141). On September 4, 1996, Johnson, who by then had become president and sole owner of Rasputin, authorized transfer and disbursement of the remaining contract funds totaling approximately $106,000, from which the employees were paid

for the missed payrolls in August 1996, and from which payments were made to the union pension fund.

Curtis Wayne Stewart, operations manager for Rasputin, testified that before work on the contract began he advised Johnson that the contract had been underbid by $80,000 to $100,000, but Johnson nevertheless decided to obtain the contract. (Tr.I 20-21). Although Stewart was the operations manager, he reported everything that related to the contract only to Johnson. Indeed, during the performance of the contract, Johnson held himself out as the president of Rasputin before officially assuming that position. (GX 2, p.3; Tr.II 34, 121). Johnson's approval was required for all decisions that were made concerning administration of the contract, including the purchase of equipment and uniforms and any other spending under the contract. Johnson had authority regarding the payment of contract bills and essentially all other questions of importance throughout the duration of the contract. (Tr.II 22-24, 27, 30, 32). For example, Johnson made decisions concerning which wage rate would be paid to the security guards working on the contract, the hiring of a portion of the workforce, and the development and approval of the policies and procedures for employees. (Tr.II 26, 28-9, 31). He authorized Wayne Benton, vice-president of

Rasputin, and Stewart to represent the company with respect to matters involving the government. Stewart talked to Johnson at least once a week regarding the contract with the Navy. (Tr.II 65, 69).

C. The Decision Of The Administrative Law Judge

On November 20, 2002, the ALJ ruled against Respondents on all issues.[3] He first determined that Johnson was a "party responsible" liable for the violations of the SCA which occurred in this case. The ALJ found that Johnson maintained sufficient de facto responsibility for the administration of the contract and the supervision of personnel to justify his being treated as a "party responsible" under the statute and the regulations. (Decision and Order, "D&O," p. 13). For example, it was not disputed that Johnson made decisions as to payrolls and paying the bills, and it was Johnson who had decided to accept the contract in the first instance. In addition, the ALJ found that Johnson had held himself out as president of the company and had admitted that he exercised substantial authority in the administration of the contract. *Id.* While, according to the ALJ, Johnson may

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[3] As previously noted, a default judgment was entered against Rasputin for failure to file an answer to the complaint.

not have been the only "party responsible" for the contract, it was clearly appropriate for Wage and Hour to have found him to be a "party responsible" for compliance with SCA requirements. *Id.*

The ALJ disagreed with Respondents' arguments that there had been no prevailing wage and fringe benefit violations. D&O, pp. 14-20. He concluded that Respondents' contract was subject to section 4(c) of the SCA, which requires a successor contractor to pay no less than the wages and fringe benefits to which his employees would been entitled if they were employed under the predecessor's contract and subject to the predecessor contractor's collective bargaining agreements. Employees under the predecessor contract here were paid according to the predecessor contractor's collective bargaining agreements; thus, the rates negotiated by the predecessor contractor that were effective on October 1, 1995 (the beginning date of the contract at issue) were, the ALJ stated, applicable to Respondents' contract.

The ALJ also concluded that Respondents had looked to the incorrect predecessor contract for the wages and fringe benefits to be paid. The work covered by Respondents' contract had been subject to two separate predecessor contracts. The ALJ pointed out that the SCA regulations

provide that in such case the predecessor contract which covers the greater portion of the kind of work to be performed under the new contract is deemed to be the applicable predecessor contract for purposes of section 4(c), and the wage rates and fringe benefit rates applicable to that predecessor contract are the wage and fringe benefit rates applicable to the successor contract. Respondents failed to follow these regulations, which were explained to them by officials of the Wage and Hour Division and, as a result, paid the incorrect wages and fringe benefits. D&O, pp. 19-20.

As a result of determining that Respondents had violated the prevailing wage and fringe benefit requirements of the SCA, the ALJ concluded that debarment of Johnson was required absent a showing of "unusual circumstances." According to the ALJ, Respondents clearly had not satisfied all the regulatory requirements for establishing the "unusual circumstances" necessary for relief from debarment. Specifically, Respondents had not satisfied two basic requirements -- that the back wages owing be repaid and that there be adequate assurances of future compliance. Respondents had not paid what they owed even under their interpretation of the wage and fringe

benefit requirements, and they had given no assurances of future compliance with the SCA. D&O, pp. 21-22.

Finally, the ALJ held that the Department's claim for back wages and debarment was not subject to the automatic stay provision of the Bankruptcy Code. Although Johnson had personally filed for protection under Chapter 11 of the Bankruptcy Code, which was later converted to a chapter 7 bankruptcy proceeding, the automatic stay provision was not applicable because of the exception for any action by a government agency to enforce its police and regulatory power, 11 U.S.C. 362(b)(4). The Department's proceeding to recover the back wages from, and to debar, Johnson as a "party responsible" was just such an action. D&O, p. 23.

As a result of his findings of fact and conclusions of law, the ALJ ordered that Johnson pay $173,460.34 for the prevailing wage and fringe benefit violations and that he be debarred from further federal contracts for three years.

ARGUMENT

THE ALJ CORRECTLY CONCLUDED THAT WILLIAM JOHNSON IS A "PARTY RESPONSIBLE" FOR THE SCA VIOLATIONS THAT OCCURRED IN THIS CASE, THAT NO "UNUSUAL CIRCUMSTANCES" NECESSARY TO RELIEVE JOHNSON FROM DEBARMENT WERE ESTABLISHED, AND THAT THE POLICE AND REGULATORY POWER EXCEPTION TO THE AUTOMATIC BANKRUPTCY STAY IS APPLICABLE

A. Standard Of Review

This Board modifies and sets aside an ALJ's findings of fact when it determines that those findings are not supported by a preponderance of the evidence. *See* 41 U.S.C. 353(a) (incorporating Walsh-Healey Act review standards providing that "if supported by the preponderance of the evidence," the Secretary's decision "shall be conclusive in any court of the United States"); 29 C.F.R. 8.9(b). Conclusions of law are reviewed de novo. *See generally* In the Matter of United Kleenist Organization Corp. and Young Park, 2002 WL 181779 *3 (DOL Adm.Rev.Bd. Jan. 25, 2003).

B. William Johnson Is A "Party Responsible" For The SCA Violations.

Johnson asserts that he was not a "party responsible" for any violations in this case, as that term is used in the SCA, 41 U.S.C. 352(a).[4] The facts prove otherwise.

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[4] "Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions,

The regulations interpreting the term "party responsible" provide, in pertinent part:

> It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in § 4.6, but includes all persons, irrespective of proprietary interest who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached.

29 C.F.R. 4.187(e)(4). This regulation makes clear that the term "party responsible" may be applied on the basis of the actions of the people responsible for the contractor's performance of the contract, as opposed to their legal status vis a vis the company. *Compare* 29 C.F.R. 4.187(e)(1)-(3) (discussing individual responsibility of corporate officers). Thus, even though Johnson was not the president of Rasputin during the performance of the contract, the preponderance of the evidence indicates that he played a dominant role in managing the company's

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rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract." 41 U.S.C. 352(a).

performance of the contract during that period, and thus is a "party responsible."

There is evidence that when officials at the Jacksonville Naval Station called Rasputin with complaints concerning the contract, they were referred directly to Johnson. (Tr.II 33). Although Johnson testified that he did not consider himself a "party responsible" for the contract, he did not refute the specifics of Stewart's testimony indicating that Stewart worked under Johnson. (Tr.II 208-9). Stewart testified that his authority as operations manager was subject to Johnson's approval (including the signing of pay checks); that he reported to, and took orders from, no one else but Johnson; and that Johnson specifically made decisions as to payrolls, to fire certain employees, which bills would be paid, and what uniforms and equipment to buy. (Tr.I 22-4, 26, 27, 29, 30). Stewart also testified that he advised Johnson that Rasputin's bid for the contract was too low to make any money, but that Johnson nevertheless made the decision to proceed. (Tr.I 20-21). Thus, according to Stewart's unrefuted testimony, Johnson exercised sufficient supervision over the "performance of the contract and . . . the pay practices of the company . . ." to be a "party responsible" under the SCA. Secretary of Labor v. Donald

M. Glaude, d/b/a D's Nationwide Industrial Services, 1999 WL 1257839 *4 (DOL Adm.Rev.Bd. Nov. 29, 1999).

Johnson relies on the testimony of Darlene Ford, office manager, to show that he had no role in the performance of the contract. But Ford's testimony merely shows that she was aware of the role Stewart played in the company; it does nothing to disprove the chain of command and control that flowed from Johnson to Stewart.

Whether or not Stewart, or any other individual, was also a "party responsible" for the violations of the SCA does not relieve Johnson of responsibility. The evidence is clear that Johnson exercised a sufficient degree of authority in the operations of Rasputin to make him a "party responsible" under the SCA and the accompanying regulations.

C. The Evidence Supports The Conclusion That Wage And Fringe Benefit Violations Occurred.

Section 4(c) of the SCA expressly directs that the collectively bargained rates of a predecessor contractor apply to the service contract of the successor contractor if "substantially the same services are furnished." 41 U.S.C. 353(c).[5] *See also* 29 C.F.R. 4.6(d)(2) (same). The

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[5] "No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay

legislative history and administrative case law addressing section 4(c) make clear the collectively bargained rates in a predecessor contract are to apply in the ordinary, usual circumstances, because the underlying purpose of section 4(c) is to achieve a degree of labor stability and economic security for service employees who frequently confront the situation of successor contracts and contractors. S. Rep. No. 1131, 92nd Cong., 2d Sess. 4, reprinted in 1972 U.S.C.C.A.N 3537; In the Matter of Wage Rates Collectively Bargained by United Healthserv, Inc., 1991 WL 733658 (L.B.S.C.A. Feb. 4, 1991); In the Matter of Applicability of Wage Rates Collectively Bargained by Big Boy Facilities, Inc., etc., 1989 WL 549943 (L.B.S.C.A. Jan. 3, 1989).

This case calls for the application of section 4(c) of the SCA. The services required by Rasputin's contract had previously been performed pursuant to two contracts between

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any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." 41 U.S.C. 353(c).

the Navy and DGS Services, Inc.; the two contracts involved the performance of substantially similar services. (RX 1, Tr.I 48, Tr.II 62-3). Furthermore, DGS Services, Inc. had been a party to a collective bargaining agreement with collectively bargained wage rates and fringe benefits. (RX 1, p.20, 28-9; Tr.II 70-72). In fact, Respondent's Post Hearing Brief states, at page 3:

> The Contract combined what was previously two separate contracts for guard services into one single contract. The two separate contracts which existed before Rasputin was awarded the Contract had two separate collective bargaining agreements.

Thus, the statute and the regulations, as applied to the facts of this case, required that Respondents pay the wage rates and fringe benefits collectively bargained by their predecessor. Indeed, the statute expressly provides that prospective increases negotiated by the predecessor contractor, as occurred here (effective October 1, 1995), are applicable to the successor contractor. *See* 41 U.S.C. 353(c); 29 C.F.R. 4.6(d)(2).

Respondents argue that the wage rates and fringe benefits negotiated by their predecessor were never physically incorporated into their contract. The correct wage determination, however, was available to them, and a representative of the Wage and Hour Division advised them

to use that wage determination because it contained the negotiated rates of the applicable predecessor contract. (GX 3; Tr.II 71-3). In any event, such incorporation is not necessary because section 4(c) creates "a direct statutory obligation and requirement . . . on the successor contractor . . . and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement." 29 C.F.R. 4.163(b) (emphasis added). *Cf.* In the Matter of: General Services Administration, Armed Guard Services, Health Care Financing Administration, 1997 WL 733631 *9 (DOL Adm.Rev.Bd. Nov. 21, 1997) ("It is unnecessary for Section 4(c) coverage to be reflected in the pertinent wage determination."). Thus, Respondents have no defense to the application of their predecessor contractor's collectively bargained wage rates and fringe benefits to their successor contract.

The preponderance of the evidence also supports the ALJ's determination that Respondents used incorrect information, as derived from one of two predecessor contracts, to determine their obligations under the SCA. As stated above, the work covered by Respondents' contract had been performed pursuant to two contracts of the predecessor contractor, both subject to collective

bargaining agreements setting wage and fringe benefit rates. The regulations provide that in a case

> where there is more than one predecessor contract to the new or consolidated contract, and where the predecessor contracts involve the same or similar function(s) of work, using substantially the same job classifications, the predecessor contract which covers the greater portion of the work in such function(s) shall be deemed to be the predecessor contract for purposes of section 4(c), and the collectively bargained wages and fringe benefits under that contract, if any, shall be applicable to such functions.

29 C.F.R. 4.163(g). This regulation, incorporated by reference into the contract (see page 5, supra), was specifically brought to the attention of Respondents by the Wage-Hour investigator. (Tr. II 71-72). The evidence presented by Wage and Hour showed that, either by comparing the number of employees working under each predecessor contract or the dollar amount of each predecessor contract, Respondents chose that predecessor contract covering the smaller portion of the similar work that was being performed on the successor contract, and thus chose the incorrect predecessor contract upon which to base the wage rates and fringe benefits for their successor contract. (Tr.II 70-73). The correct wage determination, which Respondents were advised to use, contained the wage rates from the predecessor contract with the greater number of employees. (GX 3). Therefore, the ALJ was correct in

concluding that Respondents should have applied the higher predecessor rates to their contract, as derived from the contract covering "the greater portion of the work.

D. No "Unusual Circumstances" Necessary To Relieve William Johnson From Debarment Have Been Established.

The conditions under which a contractor who has violated the SCA may be relieved from debarment are narrow. *See* 41 U.S.C. 354(a) (relief from debarment only where there are "unusual circumstances"); 29 C.F.R. 4.188(a) (same). Thus, "[i]f a contractor violates any provision of an employment contract that the SCA requires to be included, the [Department of Labor] shall forward the contractor's name to the Comptroller General for inclusion in the debarment list. The sole exception is for cases in which the Secretary of Labor concludes that 'unusual circumstances' justify exclusion from the list." A to Z Maintenance Corp. v. Dole, 710 F. Supp. 853, 855 (D.D.C. 1989). *See also* Integrated Resource Management, Inc. of Oregon, ARB Case No. 99-119 (June 27, 2002) ("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."), *aff'd sub nom.* Barnes, et al. v. U.S. Department of Labor, No. 02--6315-HO (D. Or. June 10, 2003).

When Congress amended section 5(a) of the Act in 1972, the "unusual circumstances" language was added as a specific limitation on the Secretary's discretion to grant relief from debarment. *See* S. Rep. No. 92-1311, 92d Cong., 2d Sess. 3-4, reprinted in 1972 U.S.C.C.A.N., 35334, 35336. As the First Circuit pointed out in Vigilantes v. Administrator of Wage and 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 violates the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction." *See also* Bither v. Martin, 30 Wage & Hour Cas. (BNA) 1615, 1618 (C.D. Cal. 1992).

Although the SCA does not define "unusual circumstances," the regulations at 29 C.F.R. 4.188(b) interpret this "relief from debarment" standard. Specifically, the regulations at 29 C.F.R. 4.188(b)(1) and (2) establish a three-part test prescribing the operative principles and procedures for determining when relief from debarment is appropriate, i.e., when "unusual circumstances" exist. This regulatory test has been

applied by the courts. *See, e.g.*, Vigilantes, 968 F.2d at 1418; A to Z Maintenance, 710 F. Supp. at 855; Kirchdorfer v. McLaughlin, 1989 WL 80437 (W.D. Ky. 1989).

The burden of establishing "unusual circumstances" rests with the violator. *See* 29 C.F.R. 4.188(b)(1); Bither, 30 Wage & Hour Cas. at 1618. The regulation is clear that a contractor must satisfy all three parts of the test in order to be relieved from debarment and that a contractor must meet Part I (no aggravated circumstances or culpable conduct may exist) before Part II (setting forth other prerequisites, *see infra*) may be considered. Only where the conditions in Parts I and II have been met may Part III's additional factors be considered to determine whether "unusual circumstances" exist. *See* 29 C.F.R. 4.188(b)(1); Vigilantes, 968 F.2d at 1418.

Addressing Part I, the regulations state:

> Thus, where 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 the 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, . . . relief from the debarment sanction cannot be in order.

29 C.F.R. 4.188(b)(3)(i). In the words of the Board, "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." Integrated Resource Management, Inc. of Oregon, *supra*.

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

> A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.

29 C.F.R. 4.188(b)(3)(ii). If the violator satisfies both the first and second parts of the test, several other factors must still be considered before the contractor may be relieved from debarment because of "unusual circumstances,"

> 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).

With respect to the first part of the test for "unusual circumstances," the absence of "culpable conduct,"

Johnson abandoned performance of the contract with four weeks remaining in its term, resulting in two missed payrolls for the periods August 1 through August 15, 1996, and August 16 through August 31, 1996. (Tr.II 118). This deliberate failure even to attempt to comply with the SCA constitutes culpable conduct on the part of Johnson; thus, on this basis alone he has failed to satisfy the first regulatory requirement for the finding of the "unusual circumstances" necessary for relief from debarment. *See* 29 C.F.R. 4.188(b)(3)(i). Additional evidence of culpable conduct is to be found in Respondents' failure to pay the correct prevailing wage and fringe benefits in accordance with the applicable predecessor contract, despite being directly informed by the Wage-Hour investigator of the pertinent regulatory requirements in this regard. (Stewart was told of these regulations over the telephone, and then was sent a copy of them.) Finally, despite being warned by Stewart that the proposed bid would not cover the wage requirements of the contract, Johnson nevertheless proceeded to obtain the contract. (Tr.I 20-21). Because Johnson has failed to satisfy the first part of the three-part test for establishing the "unusual circumstances" necessary for consideration for relief from debarment, it is not necessary for the Board to determine whether he has

established the mitigating factors set out in the second and third stages of the analysis.[6]

Even assuming that Johnson has satisfied the first requirement of showing no culpable conduct, he has not satisfied the second requirement, which includes the repayment of money due the employees. The claim by the Wage and Hour Division against Johnson for unpaid wages and fringe benefits is over $170,000. Johnson cannot, as he attempts to do, rely on a declaration of bankruptcy to show "unusual circumstances" for the purpose of avoiding debarment, i.e., repayment would have been made but for the bankruptcy. Bankruptcy may protect Johnson from the claims of certain creditors, but it does not protect him from debarment by means of showing "unusual circumstances." This would constitute a perversion of the "unusual circumstances" criteria. There is also no evidence of record to support the conclusion that there were adequate assurances of future compliance by Johnson.

Thus, Johnson has failed to meet the requirements for establishing the existence of "unusual circumstances," and

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[6] The ALJ concluded that there was no culpable conduct because Respondents requested a new wage determination. Irrespective of that request, Johnson's actions regarding performance of the contract clearly constituted culpable conduct.

his debarment from future federal contracts for three years pursuant to the dictates of the SCA is warranted.

E. The Police and Regulatory Power Exception To The Automatic Bankruptcy Stay Is Applicable to This SCA Enforcement Proceeding.

The Bankruptcy Code provides that commencement of a bankruptcy case stays

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. 362(a)(1). Acts by a governmental unit in furtherance of its police and regulatory power to enforce laws that protect public health, safety, or welfare, however, generally are exempt from the "automatic stay" pursuant to 11 U.S.C. 362(b)(4). This provision of the Bankruptcy Code specifically provides that commencement of a bankruptcy case does not operate as a stay

> of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. 362(b)(4).

The legislative history of this provision states that "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." S. Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S.S.C.A.N. 5787, 5838 (emphasis added). And "Paragraph (5) [incorporated into Paragraph (4) in 1998, Pub. L. 105-277, 112 Stat. 2681-886, Div. I, Title VI, Sec. 603(1) (Oct. 21, 1998)] makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of [a] money judgment, but does not extend to permit enforcement of a money judgment." H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S.S.C.A.N. 5693, 6299.

Courts have stated that the Department's enforcement of the SCA by pursuing back wages and debarment against violators clearly comes within the police and regulatory power exception to the automatic bankruptcy stay. As the Tenth Circuit stated in Eddleman v. Department of Labor, 923 F.2d 782, 791 (10th Cir. 1991), in applying 11 U.S.C. 362(b)(4) to an SCA enforcement action:

> The remedies sought by DOL are not designed to advance the government's pecuniary interest. DOL's pursuit of debarment and liquidation of back-pay claims was primarily to prevent unfair competition in the market by companies who pay substandard wages. Although we do not feel bound to apply it, we also conclude that the "public policy" test presents no barrier to DOL's actions. Despite the fact that DOL sought liquidation of back-pay claims for specific individuals, we do not characterize the use of that remedy as an assertion of private rights. We conclude instead that the request for liquidation of back-pay claims was but another method of enforcing the policies underlying the SCA. Our conclusion is bolstered by the fact that the back-pay claimants would not receive any extra priority by virtue of the DOL action. Actual collection of the back-pay claims must proceed according to normal bankruptcy procedures. Accordingly, we hold that DOL's enforcement proceedings in this case were exempt from the automatic stay under section 362(b)(4).

Similarly, in <u>In re Career Consultants, Inc.</u>, 84 B.R. 419, 424 (Bankr. E.D. Va. 1988), a bankruptcy court applied the section 362(b)(4) police and regulatory power exception to an SCA enforcement action seeking back wages and debarment, stating that "[c]oloring the Secretary's action as 'primarily' for a 'pecuniary purpose' would be a simplistic view of the situation."

Therefore, the actions of the Wage and Hour Division in the instant case to enforce the requirements of the SCA

involve the "police and regulatory power" specified in the exception to the automatic stay provision.[7] Accordingly, this exception should apply to the Board's review of the ALJ's decision addressing that enforcement action.[8]

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[7] The Board has the authority to issue an order affirming the debarment of Johnson, which would not be affected by the bankruptcy proceeding. The Board could also issue an order for payment of the back wages, with only the collection of the wages affected by the bankruptcy proceeding. *See* 3 Collier on Bankruptcy ¶ 362.05[5][b] (15th ed. Rev. 2001) (governmental unit may commence or continue any police or regulatory action, including one seeking a money judgment; only "[e]nforcement of a money judgment remains subject to the automatic stay").

[8] The Board's recent decision in Davis et al. v. United Airlines, ARB Case Nos. 02-105, 02-088, 03-037, 02-054 (May 30, 2003), does not change the result urged by the Administrator here. In that case, the Board rejected the Assistant Secretary for Occupational Safety and Health Administration's position that the police and regulatory power exception to the automatic bankruptcy stay is applicable to the conduct of administrative whistleblower proceedings under AIR 21, 49 U.S.C. 42121, where the Department has neither "prosecuted" the case nor is a party. The Board's decision "reject[ed] the notion that an agency adjudication could be a § 362(b)(4) governmental unit"; rather, the Board concluded that "§ 362(b)(4) refers to prosecutorial activity by a government unit." Such "prosecutorial activity" by DOL in enforcing the SCA is precisely what is involved in the instant case.

CONCLUSION

For the foregoing reasons, the ALJ's decision of November 20, 2002 should be affirmed.

Respectfully submitted,

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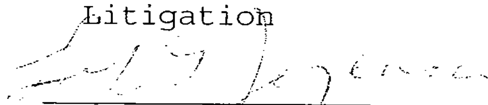

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CERTIFICATE OF SERVICE

I certify that on June 30, 2003, a copy of the foregoing Administrator's Response to Petition for Review was mailed to:

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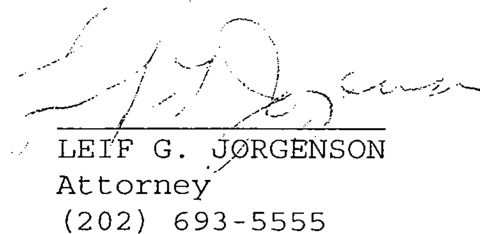

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