In the Matter of:

LLOYD T. GRIFFIN, et al.,

PETITIONERS/ RESPONDENTS,

v.

SECRETARY OF LABOR,

COMPLAINANT,

and

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO,
INTERVENOR.

ARB CASE NOS. 00-032
00-033

(Formerly ARB NO. 98-028)

ALJ CASE NO. 91-DBA-94

DATE: May 30, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioners/ Respondents:
Alden C. Harrington, Esq., *Boyajian, Harrington and Richardson, Providence, Rhode Island*

For Petitioner Administrator, Wage and Hour Division:
Leif G. Jorgenson, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Acting Solicitor, *U.S. Department of Labor, Washington, D.C.*

For Intervenor Building and Construction Trades Department, AFL-CIO:
Terry R. Yellig, Esq., James E. Rubin, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.*

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. § 276a et seq. (West 1997), the United States Housing Act of 1937 (USHA), 42 U.S.C.A. § 1437j (West 1997), Reorganization Plan No. 14 of 1950, 5 U.S.C.A. App. (West 1997) and the regulations at 29 C.F.R. Parts 5 and 7. We are considering the Petitions for Review filed by the Administrator, Wage and Hour Division (Administrator)

and Interested Person Building and Construction Trades Department, AFL-CIO (BCTD). Also before us is the Petition for Review filed by Lloyd T. Griffin, Jr.,[1] LTG Construction Co., Inc., Phoenix-Griffin Group II, Ltd., and Gatsby Housing Associates, Inc. (collectively, Respondents or Griffin). The parties and Intervenor are seeking review of aspects of a December 7, 1999 Administrative Law Judge's Decision and Order on Remand (Rem. D. & O.).

Given the procedural history of this matter (discussed more completely *infra* at 3-5), the Board is presented with a very limited range of issues by direction of the United States District Court for the District of Rhode Island, which reviewed (and subsequently remanded) the earlier final agency action, which had affirmed the first ALJ's Decision and Order. Pursuant to that direction, we are reviewing the administrative factual records and decisions and orders of both ALJ proceedings for the sole purpose of determining whether the doctrine of equitable estoppel may be applied to prevent the Administrator from enforcing the statutory and contractual DBA prevailing wage requirements which were otherwise applicable to the construction of a Federally-assisted housing project funded pursuant to the USHA.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear and decide appeals taken from ALJs' decisions and orders concerning questions of law and fact arising under the DBA and the numerous related Acts which incorporate DBA prevailing wage requirements. S*ee* 29 C.F.R. § 5.1 (2002); 29 C.F.R. § 6.34 (2002); 29 C.F.R. § 7.1(b) (2002).

In reviewing an ALJ's decision, the Board acts with "all the powers [the Secretary of Labor] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 7.1(d)(2002) ("In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary of Labor. The Board shall act as fully and finally as might the Secretary of Labor concerning such matters.") Thus, "the Board reviews the ALJ's findings de novo." *Thomas & Sons Building Contractors, Inc.*, ARB No. 00-050, slip op. at 4 (Aug. 27, 2001)*; see also Sundex, Ltd. and Joseph J. Bonavire*, ARB No. 98-130, slip op. at 4 (Dec. 30, 1999) and cases cited therein.

BACKGROUND

The labor standards disputes in this matter arose from Griffin's roles in the development and construction of a so-called "Turnkey scattered sites" housing project. This project consisted of some 92 separate housing units located at different sites throughout the city of Providence, Rhode Island. Funded in part by Federal financial assistance provided by the United States Department of Housing and Urban Development (HUD) under the USHA, construction and development of the project was therefore subject to the prevailing wage labor standards

[1] Counsel for Cross-Petitioners previously notified the Board of Mr. Griffin's death on November 24, 1999.

provisions of the DBA pursuant to section 1437j of the USHA.

A brief history of the project and descriptions of the three categories of violations at issue is in order for an understanding of the limited questions before the Board. The Providence, Rhode Island Housing Authority (Authority) sought proposals for constructing the scattered sites housing project. Subsequently, the Authority chose Phoenix-Griffin II, LTD (Phoenix) to be the developer for Phase I of the Turnkey Project. Rem. D. & O. at 2. Phoenix in turn contracted with LTG Construction Co., Inc. (LTG) to be the prime contractor for the Turnkey Project. *Id.* As part of the construction process, Griffin[2] chose to make wall panels for all of the units at a "prefabrication plant" located in Providence on Veazie Street. *Id.* The completed wall panel units were then transported as needed to the scattered sites of the Turnkey Project and installed on site at each separate unit.

LTG used its own employees and also contracted with purported subcontractors to prepare the housing sites, construct the units (most importantly including the wall panel installation), and install interior fittings such as linoleum and cabinets. After construction of the units was completed, LTG used Gatsby Housing Associates (Gatsby) to clean the units and prepare them for occupancy prior to turning the units over to the Authority. *Id.* at 5-6. Phoenix, LTG and Gatsby were all owned and controlled by Lloyd T. Griffin, Jr.

After conducting an investigation of the Turnkey Project and Griffin's compliance record with the DBA labor standards provisions of the contract, the Wage and Hour Division reported that Griffin had committed prevailing wage violations of the USHA. Further, the Wage and Hour Division alleged that Griffin's violations were "willful or aggravated," i.e., that Griffin prepared or was responsible for preparation of payroll reports which were falsely certified to HUD or the Authority to wrongly reflect proper payment of prevailing wages to all employees. Specifically, the Administrator asserted that Griffin failed to pay prevailing wages to the three categories of Turnkey Project workers discussed above: the Veazie Street panel fabricators; the workers ("working subcontractors") who installed the panels and constructed the units at each Turnkey site; and the cleaners who prepared the units after construction was completed.

Griffin disagreed with the findings of the Wage and Hour Division's investigation and requested an administrative hearing to determine the merits of the allegations. During that administrative hearing (which lasted for 24 days and proved to be only the first of two hearings), Griffin asserted the argument, inter alia, that several HUD employees informed it that the various categories of employees the Wage and Hour Division alleged were underpaid were exempt from the DBA's prevailing wage requirements on the Turnkey Project. Thus, based on this purportedly erroneous advice, Griffin argued that the Federal government agents (i.e., HUD) misled it into committing the prevailing wage violations. Accordingly, because of this deception, Griffin further asserts that the Federal government (i.e., the Administrator) should be estopped from asserting the Wage and Hour Division's claim for all three of the categories of employees alleged to be due back wages. On July 1, 1993, an ALJ issued a Decision and Order

[2] Although LTG was the contractor, Mr. Lloyd Griffin utilized all of the respondent companies as his alter egos and made all decisions regarding operations of all of the companies.

(1993 D. & O.) holding, in part, that the doctrine of equitable estoppel did not apply to the United States government. 1993 D. & O. at 40. Given the conclusion that the Administrator's wage claims were not estopped, the ALJ proceeded to rule that Griffin had failed to pay applicable prevailing rates to the employees and thereby committed prevailing wage violations with respect to each of the three categories of Griffin employees. The ALJ also ordered debarment of all the Respondents for commission of willful or aggravated violations of the USHA.

Griffin appealed the 1993 D. & O. to our predecessor agency, the Wage Appeals Board (WAB)[3]. The WAB affirmed the ALJ's 1993 D. & O. in its entirety, including the ALJ's ruling that the estoppel defense was not available to Griffin. The WAB held that Griffin could not legally invoke estoppel against the Administrator's claims on the basis of purported misstatements of law by representatives of HUD, a separate Federal agency not charged with final interpretation and enforcement authority of all prevailing wage statutes. Further, the WAB affirmed the ALJ's conclusion that in committing the prevailing wage violations, Griffin did not, in fact, rely on the purported misstatements by HUD officials. *L.T.G. Construction Co., Prime Contractor*, WAB No. 93-15, slip op. at 6-7 (Dec. 30, 1994).

Griffin sought review of the WAB's decision in the United States District Court for the District of Rhode Island. The district court acknowledged that "the Supreme Court has emphasized that it has never upheld a decision of a Court of Appeals applying equitable estoppel against the government." *Griffin v. Reich*, 956 F. Supp. 98, 106 (D.R.I. 1997). Nevertheless, the district court concluded that Griffin's defense of equitable estoppel was not foreclosed simply by virtue of the fact that the Federal government was the party against whom Griffin sought to assert the estoppel defense. The district court also rejected the WAB's conclusion that estoppel could not lie against one Federal agency (the Administrator) by virtue of misinformation disseminated by another Federal agency (HUD). In doing so, the court noted its belief that "the WAB did not fully assess whether the actions of HUD could constitute 'affirmative misconduct' for purposes of the equitable estoppel defense." *Id.* at 108.

Consequently, the district court remanded this matter to the Administrative Review Board (which had by then been constituted to replace the WAB). This Board in turn remanded the case to the Office of Administrative Law Judges for additional fact finding and conclusions of law consistent with the district court's opinion. The administrative hearing on remand was conducted solely for additional fact finding and conclusions of law concerning application of equitable estoppel (based on HUD's representations) with respect to the three categories of violations alleged by the Administrator. The district court directed the Department of Labor to first determine whether Griffin "reasonably relied on affirmative representations by HUD" and secondly, whether Griffin, "in fact, complied with HUD's policies." *Id.* at 109.

The second administrative hearing was conducted. During the course of that proceeding, the BCTD intervened and commenced its participation in this matter. In the ALJ's decision and

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[3] The WAB issued final agency decisions pursuant to the DBA and its related statutes from its establishment in 1964 until creation of the Administrative Review Board in 1996.

order on remand, a second ALJ ruled that that the Administrator was not estopped from enforcing the DBA provisions on the Turnkey Project on behalf of those employees of subcontractors who were treated as exempt "owner-operators" and those employees who cleaned the Turnkey Project units after construction but prior to occupancy. Additionally, the ALJ concluded that Griffin had committed "willful or aggravated" violations of the prevailing wage statute and, as a consequence, directed that all of the Respondents be placed on the list of persons and firms debarred from receiving Federal or Federally-assisted contracts for a period not exceed three years. Griffin sought the Board's review of these three adverse determinations in its Petition for Review.

The ALJ in the second proceeding also ruled that the Administrator was estopped from seeking back wages on the Turnkey Project for all of the employees allegedly due back wages because of their work in fabricating the modular housing panels at the Veazie Street facility. The Administrator's Petition for Review seeks reversal of the adverse Veazie Street ruling. Intervenor BCTD filed a separate Petition for Review seeking our review of this issue.

Each party (and the BCTD as an interested person in this proceeding) has filed statements in opposition to the Petition for Review filed by the opposing side(s).

DISCUSSION

For our framework in discussing the merits of the Petitions for Review in this matter, in Part I, we address the issues raised by the Griffin Petition for Review. With respect to Griffin's Petition, we will discuss separately the question of estoppel and its possible applicability to each of the two categories of violations alleged regarding the individuals treated as exempt "owner-operators" of Griffin subcontractors and the Gatsby workers who cleaned the scattered sites housing after construction but prior to occupancy. We will also briefly address Griffin's appeal of the ALJ's order that the all of the respondents be debarred for a period of time not to exceed three years. The Petitions of the Administrator and the BCTD seeking review of the adverse determination regarding the Veazie Street fabrication workers will be treated in Part II of this discussion.

I. Griffin's Petition for Review

A. Working Subcontractors

Griffin asserts that the ALJ erred in ruling that the estoppel defense was not available to it with respect to this category of violations. Within the context of this matter, the term "working subcontractors," refers to certain of Griffin's employees whom Griffin purported to be bona fide owners of a construction business enterprise who also performed construction work on the project and were therefore due the prevailing rate according to the Administrator's charges. Griffin posits that it relied on "working subcontractor" advice contained in a HUD publication which contains guidance concerning all aspects of its DBA programs: *Federal Labor Standards*

Compliance in Housing and Community Development Programs (the *Handbook*) (Complainant's (Administrator's) Exhibit (CX) 38). Before us, the Administrator notes that the Wage and Hour Division considers even bona fide owner-operators performing DBA-covered work on a DBA-covered project to be due the prevailing rate. Adm. Response to Respondents' Pet. for Rev., at 5 n.2. Without conceding this assertion regarding bona fide owner operators, the Administrator argues that the ALJ properly reached the conclusion of law that estoppel was not available based on the ALJ's finding of fact that Griffin failed to demonstrate that it relied on the *Handbook*'s guidance and that this reliance caused the violations.

Specifically, Griffin relies on Section 7-3 of the HUD *Handbook*, which contains the following guidance, compliance with which (in HUD's view) exempts working subcontractors from the DBA requirements:

> Contractual relationships between contractors and alleged subcontractors (who perform mechanic's work) which are formed for the purpose of evading the application of prevailing wage requirements are expressly prohibited and may provide a basis for debarment. Where there is any doubt as to the bona-fide [sic] nature of a self-employed subcontractor who has no other employees, the following must be checked:
>
> 1. Does the subcontractor have a registered trade name and is there a telephone listing under that name?
>
> 2. Does the subcontractor have a license?
>
> 3. Does the subcontractor have liability insurance or a subcontractor's bond?
>
> 4. Federal Tax Identification Number.
>
> Any of these criteria in conjunction with a signed contract containing HUD Federal Labor Standards Provisions from each such subcontractor should be sufficient to establish that he or she is a bona-fide [sic] subcontractor. Such a subcontractor will submit payrolls indicating only that he/she is the owner, the hours worked and the classification. The phrase "self-employed owner" shall be written under the name, address, and Social Security Number (See Column 1 on the Optional Form WH-347[4]). *Nonbona-fide* [sic]

[4] Optional Form WH-347 is a Wage and Hour Division-approved form for use by Federal construction contractors for certifying and reporting their compliance with prevailing wage statutes. Intentional falsification or false reporting of the wage information contained in these forms for Federally-assisted construction may subject violators to the criminal penalties established under the Federal False Claims Act, 18 U.S.C.A. § 1001 (West 1997). In addition, falsification of these

> *self employed contractors must be carried as employees on the payroll of the contractor who engaged him/her, and must be paid the prevailing wage rate for the classification of work performed.*

CX 38 (emphasis added).

HUD's plain language in this guidance makes it explicit that there are two types of working subcontractors: those who are bona fide and those who are non-bona fide. The *Handbook* is unambiguous in explaining that the prevailing wage requirements apply to non-bona fide subcontractors. In fact, the *Handbook* underscores the seriousness of such violations in stating that these violations can warrant debarment from Federal contracting.

In the decision on remand, the ALJ "concluded from [his] review of the record that the Respondents have not established that they complied with HUD's policy on subcontractors." Rem. D. & O. at 17. The ALJ specifically observed "no evidence has been offered [by Griffin] in the proceedings on remand which is inconsistent with Judge DiNardi's findings regarding [Griffin's] conduct with respect to subcontractors." *Id*. at 18. The first ALJ's findings of fact regarding Griffin's purported bona fide subcontractors are extensively quoted and adopted in the decision and order on remand. These findings include the facts that Mr. Griffin knew the purported subcontractors were not bona fide and, of course, that the "subcontractors" did not have any of the HUD-required proof to document status as legitimate subcontractors. Further, the ALJ on remand found that Mr. Griffin participated in a scheme to avoid payment of prevailing rates to the fraudulent subcontractors and encouraged the preparation and submission of false certified payrolls to HUD to conceal the underpayments. *Id*. at 17-18.

Griffin intentionally failed to comply with the HUD *Handbook* regarding subcontractor status verification. Accordingly, it is abundantly clear that Griffin did not commit the working subcontractor violations because Griffin relied on the HUD *Handbook*. Rather, the record demonstrates Griffin's working subcontractor violations were committed because Griffin failed to comply with the applicable HUD *Handbook* directive concerning this category of employees. Therefore, the estoppel defense is not available to Griffin on this category of violations, since nothing that HUD representatives said or wrote induced Griffin to commit these working subcontractor violations.

In passing, we note that the Petitioners object to the ALJ's adverse working subcontractor determination partly because the ALJ on remand relied on facts found by the first ALJ. Rather than error, we view this economy measure as being sound husbandry of scarce administrative hearing resources. We see no error in this reliance on the findings generated by the first trier-of-fact. Our review of the entire administrative record demonstrates that the "working subcontractor" facts found by the first ALJ were properly and adequately based on the evidence of record and that the second ALJ was correct in adopting these facts. As the second ALJ

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certified payrolls is also a violation that can subject Federal contractors to the sanction of debarment from Federal contracts for a period not to exceed 3 years.

correctly noted, "no evidence has been offered in the proceedings on remand which is inconsistent with [the first ALJ's] findings regarding [Griffin's] conduct with respect to subcontractors." Rem. D. & O. at 18.

B. POST-CONSTRUCTION CLEANING WORK

The ALJ also ruled that the defense of estoppel was unavailable regarding underpayment for cleaning of the units after construction but before occupancy. Griffin challenges this legal conclusion as erroneous, arguing that the record demonstrates it relied on HUD advice in committing these violations. As with the question of working subcontractors, Griffin argues that it relied on advice from HUD and that advice induced it to commit the prevailing wage violations arising from the post-construction cleaning work. Our review discloses no factual basis in either administrative record to support Griffin's assertion it committed the scattered sites cleaning violations because it relied on incorrect HUD advice.

Regarding the cleaners, Section 7-4 of the HUD *Handbook* is implicated in Griffin's claim of reliance. Griffin does not allege that HUD provided it with any advice other than the *Handbook* regarding the post-construction cleaning. On this issue, the *Handbook* states:

> *Cleaning performed during construction is subject to prevailing wage provisions*. In the absence of a specific wage rate for the cleaning classification, or if [the Department of Labor] disapproves a conformance request, the cleaners must be paid the predetermined wage rate for laborers. *Cleaning performed after the completion of construction in order to prepare the premises for occupancy which is not being done under the construction contract is not subject to the prevailing wage requirements.*

CX 38 (emphasis added). Attempting to demonstrate that these Gatsby cleaning violations were induced by HUD's representations, Griffin relies on the *Handbook*'s purported distinction between cleaning prior to occupancy during construction (which is covered by the DBA provisions) and cleaning prior to occupancy, which is not done under a covered construction contract (which is not covered). But, the ALJ on remand rejected the notion that there was any such distinction made on the Turnkey Project between the two types of cleaning noted in the *Handbook*. In the hearing on remand, the key witness on the nature of the cleaning work was Kemphis Bason, who the property management firm for the Turnkey Project employed to perform cleaning work at the scattered sites. The ALJ found that the specifics and details of Bason's testimony on this category of violations made Bason's testimony more credible than that of Mr. Griffin. The ALJ explained in great detail the reasons why he rejected Mr. Griffin's testimony:

> Mr. Bason's description of the cleaning work performed by Gatsby employees is far more detailed and consequently more credible than Mr. Griffin's vague testimony about construction-related and post-construction, pre-occupancy cleaning. Accordingly, *I find*

> *that a preponderance of the credible evidence of record establishes that the individuals employed by Gatsby at less than prevailing wage rates performed cleaning work such as removing stucco from windows, toilets and bathtubs and cleaning tile adhesive from floors and baseboards which is not only clearly covered by the technical specifications* of the Turnkey Project contract but which can not reasonably be classified as separate and distinguishable from construction-related cleaning that Mr. Griffin claims was done by tradesmen at prevailing wage rates. Indeed, Mr. Bason's testimony shows that the Gatsby employees performed some functions (e.g., laying grass and moving appliances into the housing units) which appear to be more appropriately considered construction activities than cleaning. *Rather than adhering to the distinction made by HUD officials between construction-related and post-construction final cleaning, I find that the Respondents substantially merged cleaning on the Turnkey Project into a single undertaking which was accomplished by Gatsby employees who were not paid at prevailing wage rates.*

Rem. D. & O. at 23-24 (emphasis added). Bason's detailed testimony, which the ALJ accepted over Mr. Griffin's less credible testimony, demonstrates the Gatsby work was construction-related and due the prevailing wage pursuant to the HUD *Handbook* guidance. Gatsby employees' "heavy" clean-up (such as clean up of debris and removal of construction materials and adhesives) was not the sort of "light" cleaning after construction of units was complete (but before occupancy) contemplated by the HUD *Handbook*.

Generally, this Board will defer to the factual findings of an ALJ, especially in cases in which those findings are predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony. As we have noted, although the Board "reviews the ALJ's findings de novo, '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 … Board should be loathe to reverse credibility findings unless clear error is shown.'" *Sundex, Ltd.*, ARB No. 98-130 (Dec. 30, 1999) (quoting *Homer L. Dunn Decorating, Inc.*, WAB No. 87-03 (March 10, 1989)). Griffin has failed to demonstrate that the ALJ on remand committed clear error in weighing the credibility of the witnesses on this issue and determining that Bason's testimony was more credible than Mr. Griffin's. Bason's credible testimony is substantial evidence that proves Gatsby's cleaning work was the type of construction contract-related cleaning which the *Handbook* advice deems DBA-covered work.

We reject Griffin's further argument that it relied to its detriment on misleading HUD advice because the disputed cleaning work was not performed "under" the construction contract (within the meaning of the guidance provided in the *Handbook*) since the Gatsby employees' cleaning work occurred after Phoenix and the Authority closed on individual units of the scattered-site project. But the Turnkey construction contract itself requires in Section 3.2 of the specifications that the final cleaning of the units – such as removal of construction-related debris

and spills – had to be completed in preparation for substantial completion of the construction or for occupancy. CX 95. Thus, early closing on the units contrary to the terms of the contract did not change the nature of the cleaning work. That work was construction cleaning work performed under the terms of the construction contract. Griffin did not rely on HUD advice in committing the Gatsby cleaning violations. Rather, regardless of the timing of closing on the units, the Gatsby cleaning work always remained covered construction work as specified in the construction contract itself.

C. DEBARMENT OF RESPONDENTS

The final issue Griffin raises to the Board is whether upon remand the ALJ committed error in finding that Respondents had committed prevailing wage and payroll certification violations, which were "willful or aggravated." Debarment from Federal contracting for a period not to exceed three years is a possible sanction for commission of "willful or aggravated" violations of prevailing wage statutes (such as the USHA) related to the DBA (the so-called Davis-Bacon Related Acts; *see* 29 C.F.R. § 5.1 (2002)). 29 C.F.R. § 5.12(a)(1).

Respondents challenged the debarment findings and order in their Petition for Review. During the pendency of these proceedings, counsel for Respondents notified the Board that Mr. Griffin died after the filing of the present Petition for Review. The Administrator, in response to the notification of Mr. Griffin's death, reconsidered the question of whether debarment remained appropriate under the circumstances. Counsel for the Administrator informed the Board that "[b]ecause of the death of Mr. Griffin, and the fact that all the respondent corporations served as Mr. Griffin's alter ego, the Administrator is dropping the claim for debarment." Adm. Resp. to Resp. Pet. for Rev. at 2. Accordingly, we hereby vacate those portions of the 1993 D. & O. and the 1999 Rem. D. & O. directing the debarment of Mr. Griffin and the Griffin corporate Respondents.

II. The Administrator's and BCTD's Petitions

By far the largest amount of back wages alleged due in this matter arises from Griffin's construction activities at the Veazie Street wall panel fabrication facility. The Administrator has noted to the Board that "approximately $250,000 of the total of $300,000" back wages concern this category of alleged violations. Adm. Stmt. in Support of Pet. for Rev. at 7 n.4.

Both the Administrator and the BCTD seek review of the ALJ's adverse determination on remand that the Administrator is estopped from enforcing the USHA's prevailing wage provisions on behalf of Griffin employees who fabricated the wall panels at Veazie Street. However, the Administrator and Intervenor advance markedly different rationales in support of their Petitions for Review on this issue.

The Administrator argues that the factual record demonstrates that Griffin did not and,

indeed, could not as a matter of law have relied on any HUD advice in the record regarding off-site panel fabrication, thereby inducing Griffin to commit the Veazie Street violations. Rather, reasons the Administrator, if Griffin had actually followed the fabrication facility advice provided Griffin by HUD, no violations would have been committed. All of HUD's advice to Griffin, argues the Administrator, provided that no exemption from DBA requirements was available if Veazie Street production went solely (or nearly so) to the scattered sites housing project.

Throughout proceedings in this matter, the Administrator alleged that Griffin's payment practices were violations under two separate theories only one of which – so-called "site of the work" DBA coverage – is now before the Board in light of our limited mandate on remand from the district court.[5] Oddly enough, our examination of "site of the work" principles comes on the heels of the decision in *Ball, Ball & Brosamer*, 24 F.3d 1447 (D.C. Cir. 1994), in which the Circuit Court for the District of Columbia invalidated the Department of Labor's "site of the work" regulation as inconsistent with the DBA's language. However, Griffin's estoppel argument is based on its purported reliance on HUD advice interpreting that regulation. Thus, in this review, we examine the record for evidence of whether or not the HUD advice Griffin purportedly followed caused Griffin to commit the Veazie Street violations.

Our analysis begins with the regulation, which, during construction of the HUD project, established Department of Labor criteria for considering the question of DBA coverage and exemption for off-site fabrication facilities such as Veazie Street. The regulation, provided, inter alia, that:

> Except as provided in paragraph (l)(3) of this section [providing exemption for permanent offsite facilities operated by a covered contractor], *fabrication plants*, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., *are part of the site of the work provided they are dedicated exclusively, or nearly so, to performance of the contract or project*, and are so located in proximity[6] to the actual construction location that it would be reasonable to include them.

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[5] The Administrator's continuing pursuit of the Veazie Street wage claims is now solely based on the legal theory that Griffin violated the express language of the USHA, which provides that all construction activity funded or assisted under its auspices is subject to DBA requirements if that work is performed "in the development" of a covered project. Thus, USHA has no "site of the work" restriction.

[6] The "proximity clause" of the "site of the work" regulation was invalidated by the D.C. Circuit (*Ball, Ball & Brosamer*, 24 F.3d 1452) because the regulation was not consistent with the Act's provision of coverage for laborers and mechanics performing construction work "directly upon the site of the work," i.e., that location where the construction will remain after completion and not

29 C.F.R. § 5.2(l)(2) (1993) (emphasis added). Under the clear terms of this regulation, an off-site fabrication facility (such as Veazie Street) could not be exempted from DBA coverage if production of the plant was dedicated "exclusively, or nearly so," to the DBA-covered project it is serving.

This regulatory language is essentially, and in some cases is exactly, the same as the only three items of HUD information provided to Griffin. The first item was HUD policy guidance in the *Handbook*. Regarding "site of the work" DBA coverage and fabrication facilities serving covered Federal projects, the *Handbook* offered the following guidance for compliance with the Act's requirements:

> The precutting of parts and/or the prefabrication of assemblies are not covered unless conducted in connection with and at the site of the project, or in a temporary plant set up elsewhere to supply the needs of the project *and dedicated exclusively, or nearly so, to the performance of the contract or project.*

Handbook, 1344.1 (Rev. 1) 7.12 (1986) (emphasis added).

The second item of HUD information that Griffin argues led it to commit the fabrication plant violations is contained in a HUD letter dated September 9, 1989. CX 42. With respect to the question of "site of the work" coverage, the letter contained exactly the same language as that of the regulation at 29 C.F.R. §5.2(l)(2).

The third and final piece of HUD information alleged by Griffin to have induced it to commit the Veazie Street violations was in the form of a single oral statement of a single HUD employee, Mr. Azar, whose sole contribution to the question of coverage, according to Mr. Griffin's own testimony was that Azar:

> looked in the [*Handbook*] and said, "Well, if you want to do this for Turnkey, *you have to have more than one project that you are going to service from Veazie Street.*" Mr. Griffin responded that *he intended to use the Veazie Street plant for a planned second phase* of the Turnkey Project, for which he had a letter of commitment from the PHA, and for another project known as Barbara Jordan III, *and Mr. Azar indicated that he would not have*

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off-site facilities which assist in the construction.

> *to pay prevailing wages as long as the plant was not specifically used for a single project*.

1993 Transcript at 2670, 2695 (testimony of Mr. Griffin)(emphasis added).

Azar's hearsay statement (as recounted by Mr. Griffin) was very clear: Veazie Street's operations were exempt from DBA coverage, but only if not used for the single scattered sites project. Thus, the HUD *Handbook*, the HUD letter, and the HUD employee statement contain the same or virtually the same language and guidance as the Department of Labor regulation, which required DBA "site of the work" coverage for off-site prefabrication plants where the production went solely to service the needs of otherwise covered projects.

We have reviewed the records of both administrative proceedings and conclude that all of the pertinent record evidence demonstrates beyond doubt that the Veazie Street prefabrication plant exclusively served the scattered sites project. We now turn our examination to factual bases for the ALJ's conclusion of law on remand that Griffin committed its prefabrication plant violations because of the HUD advice.

In the first decision and order, the ALJ found as a fact that the Veazie Street plant "was established as a result of the Turnkey Project and was located to serve that project *and served it exclusively, or nearly so.*" 1993 D. & O. at 23 n.10 (emphasis added).[7] In that first proceeding, Griffin failed to produce any evidence purporting to demonstrate sales or distribution of the Veazie Street wall panels anywhere other than HUD's DBA-covered scattered sites housing project. Accordingly, the 1993 D. & O.'s finding of fact concerning Veazie Street's actual use (rather than a speculative intended use) is supported by substantial evidence, i.e., the Administrator's undisputed demonstration on the record that the panels went solely to the scattered sites housing units.

Likewise, all of the relevant findings of fact in the Rem. D. & O. confirm the original ALJ's determination that Veazie Street's production went exclusively to the HUD project. Mr. Lloyd Griffin admitted in testimony at the hearing on remand that Griffin had never once sold or distributed a single Veazie Street panel anywhere other than the HUD project: "the only housing panels fabricated at the Veazie Street facility to date [i.e. at the time of the second administrative hearing in November 1998] were those used in the Turnkey Project." Rem. D. & O. at 8. Mr.

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[7] Griffin objects to use of certain facts contained in the first administrative record, especially the factual finding regarding exclusivity of use of the Veazie Street panels in construction of the scattered sites housing. However, we reject this argument because Griffin has failed to argue, let alone demonstrate, that any of the findings in the 1993 D. & O. were clearly erroneous and should therefore be reversed. *See discussion* at 7, *supra*.

Griffin's admission conclusively shows that no Veazie Street wall panels served any purpose other than construction of the scattered sites housing.

All of the pertinent findings of fact in the Decision and Order on Remand demonstrate that the plant's prefabricated panel production went entirely to the HUD project. This single finding of fact alone should have served as an absolute bar to the ALJ's conclusion of law on remand that Griffin committed the Veazie Street violations as the result of relying on misleading HUD advice. The ALJ's reasoning on remand improperly focused on Griffin's *intent* to supply prefabricated panels to other endeavors and also on certain HUD regional office *workers' knowledge of Griffin's intent.* Mr. Griffin's intent and HUD's knowledge of his intent are simply not legally relevant. *See United Constr. Co., Inc.*, WAB No. 82-10, slip op. at 8- 9 (Jan. 14, 1983) (actual, rather than intended, use of off-site asphalt batch plant determinative of DBA coverage). Griffin's failure to actually supply other projects or buyers meant that he failed to comply with any of the three pieces of HUD advice.[8] Griffin's failure to follow the HUD advice caused these violations.

Griffin has directed our attention to no record evidence that any official from HUD ever specifically informed Griffin that DBA did not apply to the prefabrication facility. Nor has our independent review revealed any such evidence. Rather, Griffin's sole substantive argument is that the ALJ's conclusion of law should be affirmed because it is supported by substantial evidence and is not clearly erroneous. But, as demonstrated above, Griffin's unsupported testimony was insufficient to support the ALJ's conclusion of law that HUD's advice misled Griffin into committing violations.

The ALJ's findings of fact on remand which the ALJ cited to support his conclusion that HUD misled Griffin do not resolve this dispute. The ALJ found that Mr. Griffin "came up with the concept of manufacturing housing panels at a separate facility for delivery to construction sites before he became involved with the Turnkey Project which he saw as an opportunity to put his prefabrication concept into practice." Rem. D. & O. at 7. Similarly, based on the evidence presented in both administrative hearings, the ALJ found that "Mr. Griffin created the Veazie Street plant with the *intention of supplying prefabricated building panels* for use in housing

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[8] The ALJ also mistakenly concluded that Veazie Street was exempt "because the plain language of Handbook section 7-12 requires that a prefabrication plant be both temporary *and* dedicated exclusively, or nearly so, to the project to fall out of the prevailing wage exemption." Rem. D. & O. at 16 n.10. As a general proposition, it may be true that a prefabrication plant exclusively supplying a Federal contract may still be exempt so long as it is not a temporary prefabrication plant. The fact that Griffin may have subsequently used Veazie Street for minor activities totally unrelated to the production of wall panels is not dispositive of the question of whether Veazie Street was a permanent *wall panel production plant.* If the Veazie Street wall panel prefabrication plant produced no wall panels after the scattered sites project (but was used for other minor and unrelated activities), it was in fact only a temporary prefabrication plant and was therefore not exempt from the Act, because its production went solely to the scattered sites project.

construction projects throughout the Providence area, including Phase I of the Turnkey Project, a second planned phase of the Turnkey Project as well as another scattered site housing project known as Barbara Jordan III." *Id.* at 8 (emphasis added). The ALJ also found that, although Griffin used the Veazie Street facility for other activities, such as:

> the fabrication of cabinets, door frames and other materials[9] for maintenance and repairs on Barbara Jordan I and II [housing projects which were separate from the scattered sites project but did not receive wall panel production from Veazie Street], completed housing projects now under Griffin's management; …; and the facility continued in operation as of the date of the hearing on remand." *Id.* [*Transcript citations omitted.*] However, *the only housing panels fabricated at the Veazie Street facility to date were those used in the Turnkey Project.*

Id. (emphasis added). Mr. Griffin's "intentions" regarding making the Veazie Street fabrication a continuing concern remained merely that: intentions and not actions. The Department of Labor regulation and the written HUD advice could not be more clear in requiring that a fabrication plant had to serve more than the DBA project at hand, and failure to do so removes the plant from eligibility for exemption from the Act's and USHA's requirements. Similarly, Griffin argues that it based its bid for the project on the incorrect assumption that work at Veazie Street was exempt. The ALJ found that Griffin's "[l]abor costs were factored into the proposal which assumed that prevailing wage rates would not be required for employees working at a separate pre-fabrication facility." But the purported basis for Griffin's bid is not relevant. It is relevant that HUD advised Griffin that the Veazie Street panel fabrication plant *could be* exempt if not used solely for scattered sites project. Griffin's failure to meet this HUD criterion caused the violations, in retrospect rendering its purported "basis" a bad business decision in light of its subsequent failure to follow the HUD advice.

We will assume, arguendo, for the purposes of this decision that the facts found by the ALJ and contained in the preceding paragraph are correct, i.e., that the facts are based on substantial evidence in the record[10] and that they are not clearly erroneous. However, these facts are not relevant in any way to the question of whether HUD misled Griffin into committing wage violations.

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[9] In addition to these activities, Griffin also argues that the Veazie Street plant continued to serve other uses up to the time of the hearing on remand: "for the storage of supplies and equipment and for the fabrication of building components such as window and door frames, cabinets and countertops." Resp. Reply Br. at 7. None of these activities, of course, have anything to do with determining whether *Griffin's wall panel fabrication plant* served parties other than HUD.

[10] These findings of fact made by the ALJ are all taken from Mr. Griffin's own testimony as presented at either one or both of the administrative hearings.

The BCTD's position is that this Board as well as the Administrator are "bound retroactively" to apply the holding of the Circuit Court of Appeals in *Ball, Ball & Brosamer, Inc.*. BCTD Stmt. in Support of Pet. for Rev. at 10. The BCTD asserts that Griffin's failure to pay prevailing wages at Veazie Street was a violation of the Act based on the contention that the "site of the work" regulation was invalidated but not enjoined by the D.C. Circuit. Given that the scattered sites project is located in Rhode Island, a part of the First Circuit, the BCTD argues that the "site of the work" regulation continues to be binding on the Administrator and this Board everywhere save within the jurisdiction of the District of Columbia Court. We decline to adopt this position for the reason that the Board is now considering this matter solely under the Rhode Island district court's mandate limiting the Department to examining the factual record for a determination of the legal merits of the estoppel issue. Further, we offer no comment or opinion on the Administrator's apparent declination to adopt the BCTD position regarding the "site of the work" regulation's validity outside the District of Columbia.

CONCLUSION

For the foregoing reasons, the Administrative Law Judge's Decision and Order on Remand dated December 7, 1999 is **AFFIRMED** in part, **REVERSED** in part and **VACATED** in part.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge