In the Matter of:

SUPERVAN, INC., SPECIAL SERVICES TRANSPORTATION, INC., DONALD S. RULLO and CHRISTINE RULLO, Individually and Jointly,

RESPONDENTS.

ARB CASE NO. 00-008

ALJ CASE NO. 94-SCA-14

DATE: September 30, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For The United States Department of Labor:
Joan Brenner, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Eugene Scalia, Esq., *U.S. Department of Labor, Washington, D.C.*

*For the Respondent*s:
Donald S. Rullo, *pro se*, *Kailua-Kona, Hawaii*

FINAL DECISION AND ORDER

This matter involves a dispute arising from a federal services procurement contract for taxi and other transportation services performed at Lackland Air Force Base. The contract was subject to the prevailing wage rate provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. § 351 *et seq.* (West 2001) and the implementing regulations found at 29 C.F.R. Parts 4, 6 and 8. SuperVan, Inc. (SuperVan) and Donald S. Rullo (Rullo) (collectively Respondents) filed a Petition for Review seeking reversal of default judgments issued against them. The Administrator, Wage and Hour Division of the U.S. Department of Labor (Administrator), who was the prosecuting party below, opposes the Petition for Review. We hold that the Petition for Review warrants consideration by the Board and that the ALJ acted within his discretion when he entered default judgments against the Respondents. We therefore deny the Petition for Review.

BACKGROUND

The adjudicative facts herein consist of the procedural history surrounding the requests for, and the entry of, the default judgments against SuperVan and Donald S. Rullo. On November 24, 1997, the Administrator propounded a "First Set of Interrogatories" and a "First Request for Production of Documents." The Respondents failed to respond to these discovery requests, and on February 13, 1998, the Administrator filed a Motion to Compel responses to the requests for answers to interrogatories and production of documents. With the administrative hearing scheduled for

September 15, 1998, the Administrator filed a motion to expedite the ALJ's consideration of the Motion to Compel. The Administrator also sought a continuance of the hearing on the ground that she did not have adequate time to receive the responses to the discovery requests and prepare for the hearing.

On July 10, 1998, the ALJ issued an Order Granting Motion to Compel (July 10 Order). The Respondents were directed to comply with the Administrator's discovery requests by July 27, 1998. In the July 10 Order, the ALJ noted that almost eight months had elapsed since service of the discovery requests and that prejudice to the Administrator's case would result if the requests remained unanswered. Further, the ALJ warned the Respondents of the possibility of sanctions for failure to comply with the Administrator's discovery requests and the July 10 Order.

Rullo, now representing both SuperVan and himself *pro se* (see Statement of Respondents for Petition for Review at 5-6), filed an objection to the discovery requests on July 20, 1998, claiming that he had been improperly served. On July 30, 1998, the Administrator again served the discovery requests, using the mailing address provided by Rullo. Also on July 30, 1998, the Administrator again sought a continuance of the hearing and requested entry of default against SuperVan, Special Services Transporation, Inc. (SST) and Christine Rullo.[1] The ALJ denied default judgment as to SuperVan on the ground that such action was "premature." He also granted the motion to continue the hearing. Rullo responded to the discovery requests on August 28, 1998. However, this response provided only a few of the documents requested, and the answers to the interrogatories were not complete. Again, the Administrator filed a Motion to Compel and sought a further continuance of the hearing.

The ALJ granted the continuance request. However, the ALJ did not rule on the Motion to Compel but instead ordered Rullo to respond to that motion by September 28, 1998. Rullo responded by reiterating an earlier motion for summary judgment (based on two statutory exemptions from SCA coverage for certain categories of contracts) and objecting to the Motion to Compel on the grounds, *inter alia*, that he was "semi-retired" during the period of performance of the Lackland contract and that other people were responsible for administering the contract. On September 30, 1998, the Administrator filed a Motion for Default pursuant to 29 C.F.R. § 18.1(a) and Federal Rules of Civil Procedure 37(b)(2)(C), citing Respondents' failure to respond to the ALJ's latest order regarding discovery. The Administrator also filed a response to Respondents' motion for summary judgment.

On November 24, 1998, the ALJ denied the Administrator's Motion for Default, but he noted that Respondents had been informed of the possible sanctions for failure to comply adequately with the discovery requests. He determined that the Respondents had failed to comply with his July 10, 1998 discovery order and had submitted evasive and incomplete discovery responses to the prejudice of the Administrator's prosecution of the case. The ALJ denied the Respondents' Motion for

---

[1] On August 18, 1998, the ALJ issued a Decision and Order Granting Partial Default Judgment against SST and Christine Rullo on the basis of their failure to participate in the proceeding. The ALJ held those parties liable for the full amount of back wages sought in the complaint and ordered both debarred. SST and Christine Rullo did not seek review of this order and Donald S. Rullo does not purport to represent Christine Rullo or SST. Accordingly, the ALJ's August 18, 1998 order is final as to SST and Christine Rullo. 29 C.F.R. § 6.20 (establishing a 40-day time limit for filing a Petition for Review from an adverse ALJ decision issued pursuant to the SCA).

Summary Judgment. The ALJ also granted the Respondents 15 additional days to file amended responses to the discovery requests. Rullo responded to the November 24 Order on December 5, 1998, but, again, provided answers that were unresponsive and furnished no additional documents. The Administrator again moved for default on January 6, 1999, on the ground of a continuing failure to comply with discovery requests and orders.

On April 29, 1999, the ALJ issued a Decision and Order Granting Partial Default Judgment (Default Judgment I), against SuperVan, Inc., finding it had failed to pay service employees minimum wages and fringe benefits as required by the Act. He assessed liability for back wages in the amount of $104,633.65 and debarred SuperVan, Inc. from federal government contracting for three years. Default Judgment I was entered against SuperVan, Inc. for failing "to respond to the Administrator's 'First Request for Production of Documents' in violation of the [ALJ's] Orders issued on July 10, 1998 and November 24, 1998." Default Judgment I at 3. The ALJ declined to enter default against Donald S. Rullo because such action was not "warranted" at that time. *Id.* at 4.

On May 11, 1999, the Administrator filed a Motion for Reconsideration of the April 29th partial default judgment order. The Administrator argued that Rullo was a "party responsible" within the meaning of the Act and that, therefore, Rullo was personally liable for the SCA violations that the ALJ had attributed to SuperVan in Default Judgment I. On July 23, 1999, the Administrator supplemented this motion with additional deposition testimony from Mario Mendiola, Supervan's general manager and vice-president. On August 18, 1999, the ALJ entered default judgment against Donald S. Rullo (Default Judgment II). In this order, the ALJ held Rullo individually liable for violations of the Act and assessed the same amount of back pay as had been imposed on SuperVan in Default Judgment I. The ALJ found that Rullo was a "party responsible" for the SCA violations and that his "failure to comply with the Orders issued on July 10, 1998, and November 24, 1998 was either due to his own conduct or due to circumstances within his control." Default Judgment II at 4. In addition, he found that the Department of Labor's ability to proceed to a formal hearing had been "adversely affected" by Rullo's non-compliance. On August 27, 1999, Respondents moved for reconsideration of the default orders. Rullo, in a letter dated August 27, 1999, to the ALJ and which was enclosed with the motion for reconsideration, explained that his failure to produce the additional documents requested by the Administrator was because Christine Rullo, his former wife, pursuant to court order, removed "all of the records relating to Special Services Transportation Inc. and SuperVan Inc." from a ranch in Texas. After the ALJ denied their Motion for Reconsideration, Respondents filed the Petition for Review on October 20, 1999.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b) (2001) and Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996). The Board's review of an ALJ's decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d) (2001). Pursuant to 29 C.F.R. § 8.9(b), the Board shall modify and set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. See Dantran, Inc. v. U.S. Dept. of Labor, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. United Kleenist Organization Corp. and Young Park, ARB No. 00-042, ALJ No. 99-SCA-18 slip op. at 5. (ARB Jan. 25, 2002).

Department of Labor regulations further circumscribe our jurisdiction in matters such as this:

> [U]nless the petition for review [cites] alleged procedural irregularities in the proceeding below and not the merits of a case, the Board shall not consider a petition for review filed by any party against whom default judgment has been entered pursuant to the provisions of [29 C.F.R. Part 6].

29 C.F.R. § 8.1(d).

When the Board exercises jurisdiction in cases such as this one, it reviews the entry of default judgment to determine whether the ALJ acted within his discretion. Tri-Way Security and Escort Service, Inc., Board of Service Contract Appeals (BSCA) No. 92-05, slip op. at 3-4. (July 31, 1992).[2]

ISSUES TO BE DECIDED

1. Whether the Petition for Review cites alleged procedural irregularities in the proceeding below and should, therefore, be considered.

2. Whether the ALJ acted within his discretion in entering default judgments against SuperVan, Inc. and Donald S. Rullo.

DISCUSSION

1. The Board will consider the Petition for Review since it cites alleged procedural irregularities in the proceedings below.

We note that the Petition for Review primarily recites issues pertaining to the merits of the Respondents' case. However, it also alleges a denial of "due process" and claims that the proceeding "was delayed time and again" by the Department of Labor. Petition for Review at 1. The Board finds that these allegations, though vague, sufficiently refer to alleged procedural irregularities to warrant consideration of the Petition. We therefore conclude that consideration of the Petition For Review is appropriate.

2. The ALJ acted within his discretion in entering default judgment against Super Van and Donald S. Rullo.

A. Default Judgment I

We have noted that on April 29, 1999, the ALJ entered a default judgment against SuperVan but did not default Donald S. Rullo at that time. The ALJ predicated Default Judgment I on SuperVan's failure "to participate in this matter" in that it did not "respond to the 'Department's First Request for Production of Documents' in violation of the [ALJ's] Orders issued on July 10, 1998, and November 24, 1998." This Board concludes that entry of default judgment against SuperVan was within the ALJ's discretion.

---

[2] Prior to the establishment of this Board in 1996, the Board of Service Contract Appeals was responsible for issuing final agency decisions under the SCA.

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges apply to SCA enforcement proceedings. *See* 29 C.F.R. § 18.1(a); 29 C.F.R. Subtitle A, Part 6, Subtitle B. These rules, in pertinent part, provide that:

> If a party or an officer or agent of a party fails to comply with . . . an order, including, but not limited to, . . . the production of documents, or the answering of interrogatories . . ., *the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:*
>
> ***
>
> Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken *or that a decision of the proceeding be rendered against the non-complying party, or both.*

29 C.F.R. § 18.6(d)(2)(v) (emphases supplied).

The record herein clearly supports the ALJ's finding that SuperVan did not comply with the Administrator's discovery requests and the ALJ's July 10 and November 24, 1998 Orders. 29 C.F.R. § 18.6(d)(2)(v), cited above, authorizes the ALJ to issue default judgments and his decision to do so was within his discretion. The ALJ recognized that entry of default judgment was a "severe sanction" and that it is "generally reserved for repeat violations of discovery requests or orders." (Default Judgment I at 3). Since SuperVan, Inc. repeatedly failed to comply with the discovery request and the ALJ's orders, default was appropriate.

We find that the factual backgrounds of *Tri-Way Security and Escort Service, Inc.,* BSCA No. 92-05 (July 31, 1992) and *Cynthia E. Aiken,* BSCA No. 92-06 (July 31, 1992) are similar to the facts here. In both *Tri-Way* and *Aiken* the Respondents not only failed to answer a prehearing statement, as ordered, but also failed to respond to an order to show cause which, in both cases, advised them default would result if they did not respond. Although the ALJ here did not issue an order to show cause, we note that SuperVan was specifically notified in both the July 10 and November 24 Orders to Compel that the Department of Labor would be permitted to seek default judgment in the event of non-compliance. July 10, 1998 Order at 2; November 24, 1998 Order at 9.

Furthermore, the Board finds that the non-compliance involved herein was equally or even more egregious than that which occurred in *Tri-Way* and *Aiken*, and we think the rationale for the decisions in both of those cases is persuasive. As the BSCA noted in *Aiken*, "[i]f an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissals or default judgments must be available when parties flagrantly fail to comply." *Id.* at 4. *See also Tri-Way* at 3-4. The *Aiken* rationale must be applied to all situations involving flagrant non-compliance with discovery requests and orders. To hold otherwise would

render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously.

B. Default Judgment II

The ALJ declined to enter judgment against Donald S. Rullo, individually, on April 29, 1999 (Default Judgment I) because it was "not warranted," that is, the Administrator had not rebutted Rullo's assertions that he did not have possession or control of the requested SuperVan documents and that SuperVan's general manager and vice-president Mario Mendiola, not Rullo, was responsible for and managed the SuperVan operation. Default Judgment I at 5. In short, the ALJ held that Rullo was not the "party responsible" for the SuperVan violations of the SCA. *See* 41 U.S.C.A. § 352 and discussion below. Furthermore, relying upon *Marshall v. Segona,* 621 F.2d 763, 768 (5th Cir. 1980) and *Dorsey v. Academy Moving and Storage, Inc.,* 423 F.2d 858, 859-62 (5th Cir. 1970), the ALJ determined that Rullo's noncompliance with the production requests and orders "was due to his inability to comply, and was not done in bad faith nor callous disregard." Therefore, the ALJ denied default as to Rullo, at that time. Default Judgment I at 5.

On May 11, 1999, the Administrator filed a Motion to Reconsider Default wherein he urged the ALJ to examine new evidence. Exhibit A to the Motion to Reconsider consists of portions of a deposition of Mendiola. Exhibit B to the Motion to Reconsider is a copy of the Concessionaire Contract between SST and Lackland Air Force Base, dated July 31, 1992, and signed by Donald S. Rullo. On July 23, 1999, the Administrator supplemented the Motion to Reconsider Default with additional deposition testimony from Mendiola. The Administrator's Motion requested that the ALJ find that Rullo was a "party responsible" for the alleged SCA violations and that he be held personally liable for the violations attributed to SuperVan, Inc. in Default Judgment I. The Administrator also requested that Rullo be debarred. Motion to Reconsider Default at 1-2.

On August 18, 1999, the ALJ issued Default Judgment II and found Donald S. Rullo liable for $104,633.65 in back wages owed to the service employees who performed the Lackland contracts. He ordered Rullo to pay that amount to the U.S. Department of Labor for disbursement to the employees. He also ordered that Rullo be debarred according to the conditions and procedures set out in 41 U.S.C.A. § 354 and found that there were no unusual circumstances to warrant relief from debarment. The Administrator's argument and Mendiola's deposition testimony had persuaded the ALJ to conclude that Rullo was the "party responsible," and, in effect, Rullo could no longer assert that circumstances beyond his control had prevented him from producing the documents. Therefore, since the ALJ had already found that SuperVan, Inc. had "failed to and refused to pay service employees the minimum monetary wages and fringe benefits as required by the contracts, the SCA, and the regulations"(Default Judgment I at 4), Rullo, as the "party responsible," was personally liable for these violations. The Act provides:

> Any violation of the contract stipulations required by section 351(a)(1) or (2) [the required provisions in a SCA contract relating to the wages and the fringe benefits to be furnished] or of section 351(b) [the contractor shall not pay employees less than the minimum wage] of this title shall render the *party responsible* therefore liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract.

41 U.S.C.A. § 352 (emphasis added). The regulations implementing the Act describe the term "party

responsible."

> An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company. … Accordingly, it has been held by administrative decisions and by the courts that the term *party responsible*, as used in section 3(a) of the Act, imposes personal liability for violations of any of the contract stipulations required by … the Act on corporate officers who control, or are responsible for control of, the corporate entity… .

29 C.F.R. § 4.187(e)(1), (2).

The ALJ's finding and conclusion that Rullo was the "party responsible" is supported by the fact that Rullo admitted that he was the "president of SuperVan, Inc." and that he "held a 95 percent interest in the company." Respondents' Answer To First Set of Interrogatories, Response No. 2. Mendiola's deposition testimony convinced the ALJ that Rullo had signed the Concessionaire Contract on behalf of SST, and that he "controlled corporate policy." Default Judgment II at 4. Furthermore, the ALJ found no evidence that Rullo had "made a good faith effort to secure the requested records," and that his failure to comply with the July 10, 1998 and November 24, 1998 Orders to Compel Discovery was, contrary to his assertions, "due to his own conduct" or to "circumstances within his control." *Id*. at 4.

We, too, conclude that Donald S. Rullo is the "party responsible" and is therefore liable for the violation of the wage payment and fringe benefit provisions of the contracts involved herein. We also find the record demonstrates by a preponderance of evidence that the documents which the Administrator sought were kept at SuperVan's accounting office. Thus, they were either available to Rullo at all times relevant to this proceeding or he did not make a good faith effort to secure them. *See* Mendiola Deposition attached to Motion to Supplement Motion to Reconsider Default at 66.[3]

The Board finds from an examination of the entire record that a preponderance of evidence exists which demonstrates that Rullo chose either to ignore or only partially comply with the Orders

---

[3] The regulations implementing the Act require contractors or subcontractors to keep records concerning the rate of monetary and fringe benefits paid to employees subject to the Act, the number of hours worked, and the total daily and weekly compensation paid to each employee. The contractor or subcontractor is required to maintain the records for three years from the completion of the work. 29 C.F.R. §§ 4.6, 4.185. SuperVan, Inc. was a subcontractor under the Concessionaire Contract at issue here (see Respondents' Answers To The Department's First Set Of Interrogatories Under Order To Compel Answers Found To Be Inadequate Of Certain Questions at Response No. 6 Expanded) and was, therefore, required to keep these records. Rullo appears to argue that because he was served with the Request for Production of Documents more than three years after completion of the contract, neither SuperVan, Inc. nor he was required to produce the documents. Statement of The Respondents For The Petition For Review at 11. We reject this argument for two reasons. First, we concur with the ALJ who, in addressing this issue, correctly concluded that since the complaint herein was properly served on the Respondents, they therefore were "given notice that the records should be preserved." November 24, 1998 Decision and Order Granting Motion to Compel, Denying Motion For Summary Judgment, and Denying Motion For Default Judgment at 5. Moreover, Rullo himself "recognize[s] the responsibility to preserve records subject to litigation… ." Statement of The Respondents For The Petition For Review at 11.

to Compel. See 29 C.F.R. §§ 8.1(d), 8.9(b). His failure to comply with the Request for Production and the subsequent orders compelling discovery were proper grounds for the ALJ to invoke the sanctions prescribed in 29 C.F.R. § 18.6(d)(2)(v). *See* Discussion of Default Judgment I, supra. We conclude that the ALJ acted within his discretion in issuing Default Judgment II against Donald S. Rullo. *See Tri-Way Security*, BSCA No. 92-05, slip op. at 3-4; *Aiken*, BSCA No. 92-06, slip op. at 3-4.

CONCLUSION

For the foregoing reasons, the Petition for Review is **DENIED** and the ALJ's Orders of April 29, 1999, entering default judgment against SuperVan, Inc. and August 18, 1999, entering default judgment against Donald S. Rullo are **AFFIRMED**. It is hereby **ORDERED** that the names of SuperVan, Inc., and Donald S. Rullo, be placed on the list of persons and firms ineligible to receive Federal contracts for a period of three years. Furthermore, in the event that SST and Christine Rullo were not previously placed on the debarment list when the ALJ issued his final order as to them on August 18, 1998, (*see* n.1, *supra*), they too shall be placed on the list of persons and firms ineligible to receive government contracts for a period of three years.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge