In the Matter of:

DARREN G. FIELDS AND
W/D ENTERPRISE, INC.,

RESPONDENTS.

ARB CASE NO. 06-018

ALJ CASE NO. 2004-SCA-005

DATE: January 31, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Administrator, Wage and Hour Division*:**
Maria Van Buren, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Jonathan L. Snare, Esq., Gregory F. Jacob, *U.S. Department of Labor*, Washington, District of Columbia

For the Respondents:
John S. Irving, R. Timothy Stephenson, Jeffrey B. Wall, *Kirkland & Ellis*, Washington, District of Columbia, and David S. Fortney, *Fortney & Scott*, Washington, District of Columbia

FINAL DECISION AND ORDER

Federal service contractors who violate the McNamara-O'Hara Service Contract Act (SCA or the Act)[1] shall not be awarded federal contracts for three years unless they can prove "unusual circumstances."[2] A United States Department of Labor Administrative Law Judge (ALJ) concluded that W/D Enterprise, Inc. (W/D Enterprise) and its President, Darren G. Fields (Fields), violated the Act and did not prove "unusual circumstances." Since a preponderance of the evidence supports the ALJ's findings, we affirm the ALJ's order that W/D Enterprise and Fields shall not be awarded United States Government contracts for three years.

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1 41 U.S.C.A. §§ 351-358 (West 1994).

2 *Id.* at § 354(a).

BACKGROUND

The ALJ set forth the facts of the case as stipulated by the parties.[3] Complainant's Exhibit 1 (Parties' Joint Stipulation of Facts); *see* Decision and Order (D. & O.) at 3-11. At all relevant times, W/D Enterprise was a corporation that had a principal place of business in Wichita, Kansas. Stipulations 2, 6. W/D Enterprise had over 440 employees and its contracts with the United States Government comprised more than 90% of its business. Stipulations 136, 137. W/D Enterprise filed for Chapter 11 Bankruptcy protection in February 2004. Stipulation 149.

The parties stipulated in May 2005 that W/D Enterprise began servicing the federal government in October 1998 and had serviced approximately 50 to 60 contracts. Stipulation 138. Since October 1998, the total value of all of W/D Enterprise's 50-60 federal contracts exceeded $16,000,000.00. Stipulation 139. During the period that the Wage and Hour Division, United States Department of Labor (Wage and Hour) investigated W/D Enterprise, W/D Enterprise was a Small Business Administration certified Section 8(a) disadvantaged business contractor. Stipulation 140.

During the course of contract performance, Wage and Hour investigated several federal contracts held by W/D/ Enterprise. The ALJ set forth the relevant facts regarding these contracts, including the investigative facts, as stipulated by the parties. D. & O. at 3-10. In 2001 and 2002, Wage and Hour investigated the following 5 federal contracts with W/D Enterprise:

- Contract No. 66436 for mail haul route services from July 1, 2000 to June 30, 2001, Complainant's Exhibit 10, Stipulations 12-22;

- Contract No. GSO6P99GXC0005 for janitorial and maintenance services from May 1, 1999 through May 1, 2002, at the United States Courthouse, Wichita, Kansas, Complainant's Exhibit 11, Stipulations 23-43;

- Contract GSO6POOGXC0029 for janitorial services starting in September 2000, at both the Frank Carlson Federal Building and United States Courthouse and the Social Security Administration building in Topeka, Kansas, Complainant's Exhibit 12, Stipulations 44-50;

- Contract F2965199C0001 for postal services starting in 1998 at Holloman Air Force Base, New Mexico, Complainant's Exhibit 13, Stipulations 51-58;

[3] The Parties' Joint Stipulation of Facts is undated. Complainant's Exhibit 1. Counsel for the Labor Department submitted the Joint Stipulation to the ALJ on May 19, 2005. The ALJ admitted it to the record at the May 24, 2005 hearing. Hearing Transcript (T.) at 27-28.

-Contract DAKF29-99-7304 for custodial services from September 1, 1999 to April 30, 2003 (renewed contract), at the United States Army Reserve Building, McConnell Air Force Base, Wichita, Kansas, Complainant's Exhibit 14; Stipulations 59-77.

In 2003 Wage and Hour investigated the following 3 federal contracts held by W/D Enterprise:

- another investigation of Contract DAKF29-99-P-7304 for janitorial services from September 1, 1999 to April 30, 2003 (renewed contract), at the United States Army Reserve Building, McConnell Air Force Base, Wichita, Kansas, Complainant's Exhibit 14; Stipulations 78-86;

- Contract V255P(657)0374 for the provision of telephone operators from December 1, 2000 through November 30, 2002 (renewed contract), for the Department of Veterans Affairs' "Gulf War" Hotline, Complainant's Exhibit 15, Stipulations 87-101;

- Contract DAK29-02-P-0289 for grounds maintenance services from January 23, 2002 to February 28, 2004 (renewed contract), at the United States Army Reserve Center, St. Louis, Missouri, Complainant's Exhibit 16, Stipulations 102-134.

The parties stipulated that each of the above-detailed contracts was subject to the SCA. Stipulation 135. The SCA requires federal contractors to pay prevailing wages and fringe benefits that the Secretary of Labor predetermines or that a collective bargaining agreement specifies.[4] Contractors who violate the wage provisions of the SCA are liable for any underpayments owed their employees.[5]

Pursuant to its 2001 and 2002 investigations, Wage and Hour concluded that W/D Enterprise had underpaid 86 service contract employees a total of $55,695.75 in wages, welfare and fringe benefits, and holiday pay due them under the SCA. Stipulation 10. The parties stipulated that this $55,695.75 underpayment equals 4% of the total value ($1,388,959.53) of these five federal contracts. Stipulation 11. Pursuant to its 2003 investigation, Wage and Hour concluded that W/D Enterprise had underpaid 26 service contract employees a total of $14,486.62 in wages, welfare and fringe benefits, and holiday pay due them under the SCA. Stipulation 133. The parties stipulated that this $14,486.62 underpayment equals 2.5% of the total value ($572,600.40) of these three federal contracts. Stipulation 134. By stipulating to these facts, W/D Enterprise agreed that it had underpaid a total of 112 service contract employees a total of $70,182.37 in wages and fringe benefits due them under the SCA. *See* Stipulations 10, 133, 135.

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[4] *Id.* at § 351(a).

[5] *Id.* at § 352(a).

The Solicitor of Labor (the Solicitor) filed a complaint with the Office of Administrative Law Judges in February 2004.[6] Based on federal service contract violations of the SCA, the Solicitor requested that Fields and W/D Enterprise (Respondents) be debarred, that is that the Respondents not receive United States Government contracts for three years. The Solicitor alleged that the Respondents had failed to pay $14,387.74 in wages and fringe benefits on Contracts V255P(657)0374, DAK29-02-P-0289, and DAKF29-99-7304, and that the Respondents had underpaid $71,778.82 in wages to 103 service contract employees in connection with Wage and Hour investigations in 2001 and 2002 – which underpayment had been paid.

The Respondents answered the complaint and requested an evidentiary hearing. The ALJ held a hearing on May 24, 2005, in Wichita, Kansas. The ALJ concluded based on the stipulated facts and other evidence of record, that the Respondents had violated the SCA and had not established "unusual circumstances" to warrant relief from the debarment sanction. Therefore, the ALJ ordered that Fields and W/D Enterprise shall not be awarded United States Government contracts for three years. The Respondents filed a Petition for Review with the Administrative Review Board (ARB or the Board).[7]

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to decide this case.[8] In rendering its decisions, "the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters."[9]

The Board's review of an ALJ's decision is an appellate proceeding.[10] The Board shall modify or set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.[11] But conclusions of law are reviewed de novo.[12]

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6 The Labor Department filed a Complaint on February 9, 2004 and an Amended Complaint on February 24, 2004.

7 *See* 29 C.F.R. § 6.20 (2007).

8 *See* 29 C.F.R. § 8.1(b) (2007).

9 29 C.F.R. § 8.1(c).

10 29 C.F.R. § 8.1(d).

11 29 C.F.R. § 8.9(b). *See Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999).

DISCUSSION

1. The Legal Standard

Under SCA Section 5(a), persons or firms that violate the Act are subject to debarment, that is, ineligible to receive federal contracts for a period of three years "[u]nless the Secretary otherwise recommends because of unusual circumstances."[13] Debarment is presumed once violations of the Act have been found, unless the violator is able to show that "unusual circumstances" exist.[14] "Section 5(a) is a particularly unforgiving provision of a demanding statute. A contractor seeking an 'unusual circumstances' exemption from debarment, must, therefore, run a narrow gauntlet."[15]

The SCA does not define "unusual circumstances." Relevant regulations, however, establish a three-part test that states the criteria for determining when relief from debarment is appropriate. The contractor has the burden of proving "unusual circumstances" and must meet all three parts of the test to be relieved from the debarment sanction.[16] Under the first part of this test, the contractor must establish that the conduct giving rise to the SCA violations was not willful, deliberate, aggravated, or the result of culpable conduct. Moreover, the contractor must demonstrate the absence of a history of

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

[13] 41 U.S.C.A. § 354(a); 29 C.F.R. § 4.188(a), (b) (2007).

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

[15] *Sharipoff dba BSA Co.,* No. 1988-SCA-032, slip op. at 6 (Sec'y Sept. 20, 1991). *Accord Colorado Sec. Agency*, No. 1985-SCA-053, slip op. at 2-3 (Sec'y July 5, 1991); *Able Bldg. Maint. & Serv. Co.*, No. 1985-SCA-004 (Dep. Sec'y Feb. 27, 1991); *A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 855-856 (D.D.C. 1989). *See also Vigilantes, Inc. v. Adm'r of Wage & Hour Div., U.S. Dep't of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992) ("The legislative history of the SCA makes clear that debarment of a contractor who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction.")

[16] 29 C.F.R. § 4.188(b)(1); *Hugo Reforestation*, slip op. at 12-13.

similar violations, an absence of repeat violations of the SCA, and that any previous violations were not serious.[17]

If the contractor succeeds on the first part, the second part of the test requires that it demonstrate a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance. If the contractor succeeds on the first and second parts, the third part lists other factors that must be considered, including whether the contractor has previously been investigated for SCA violations, whether the contractor has committed recordkeeping violations that impeded Wage and Hour's investigation, whether the determination of liability was dependent upon the resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, and the nature, extent, and seriousness of any past or present violations.[18]

2. W/D Enterprise and Fields Violated the SCA

The Respondents have stipulated that they violated the SCA when they failed to pay service contract employees the wages and fringe benefits due them. *See* Stipulations 10, 133, 135. The SCA's debarment sanction applies to those persons or firms "found to have violated this chapter."[19] Because the Respondents violated the SCA when they underpaid service contract employees the wages and fringe benefits due them, the ALJ correctly concluded that the Respondents are subject to debarment.

3. W/D Enterprise and Fields Do Not Meet Part 1 of the Test for Relief from Debarment

As set forth above, unless the Respondents can meet the first part of the three-part test for relief from the sanction of debarment, they must be debarred. Therefore, the Respondents must prove that their conduct in causing or permitting violations of the SCA was not willful, deliberate, of an aggravated nature, or the result of culpable conduct. "Culpable conduct" includes "culpable neglect to ascertain whether practices" violate the Act, "culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements."[20] Culpable neglect is conduct "beyond negligence, but short of specific intent."[21] Relief under this first part of the test is also

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17 29 C.F.R. § 4.188(b)(3)(i).

18 *See* 29 C.F.R. § 4.188(b)(3)(ii).

19 41 U.S.C.A. § 354(a).

20 29 C.F.R. § 4.188(b)(3)(i).

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

precluded "where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature."[22]

a. Respondents allege a lack of culpable conduct

The ALJ determined that the Respondents engaged in culpable conduct when they failed to ensure that W/D Enterprise's pay practices complied with the SCA and found that Fields "was negligent, to the point of disinterested as to compliance."[23] The ALJ's findings are supported by a preponderance of the evidence. "A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot resolve questions which arise, but rather must seek advice from the Department of Labor" (citations omitted).[24] Fields testified that he understood as of April 23, 2001, his duty to pay increased wages and fringe benefits according to the applicable revised wage determinations.[25] Yet, even thereafter, the Respondents repeatedly failed to pay their employees the increased wages and fringe benefits due them under several of W/D Enterprise's federal contracts.[26] Fields testified that he did not read the revised wage determinations he received from the Labor Department, did not review W/D Enterprise's existing federal contracts for compliance with any revised wage determination, and did not follow through on W/D Enterprise's attempt to modify the United States Courthouse, Topeka, Kansas contract based on an increase in the required wage, in spite of W/D's previous violations, training, and access to Wage and Hour's experts in the field.[27]

The preponderance of the evidence shows that the Respondents failed to ensure that W/D Enterprise's pay practices complied with the SCA. The Respondents repeatedly violated the Act's wage and fringe benefits provisions by underpaying its service contract employees, despite having received Wage and Hour's expert advice in connection with prior violations. Therefore, we conclude, as did the ALJ, that the Respondents' conduct amounts to culpable conduct within the meaning of 29 C.F.R. § 4.188(b)(3)(i).[28]

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22 29 C.F.R. § 4.188(b)(3)(i).

23 D. & O. at 21.

24 29 C.F.R. § 4.188(b)(4).

25 T. at 76.

26 T. at 78-81; D. & O. at 21, 27.

27 T. at 60-61, 72-75, 79, 80-82; *see* Stipulations 21, 26, 27, 29 .

28 *Rasputin, Inc.,* ARB No. 03-059, ALJ No. 1997-SCA-032, slip op. at 10 (ARB May 28, 2004) (contractor's failure to ensure that its pay practices are in compliance with the SCA constitutes culpable neglect); *see also Integrated Res. Mgmt., Inc. of Or.,* ARB No. 99-119,

b. Respondents allege a lack of intent to violate the Act

The Respondents contend that their underpayment of wages and fringe benefits was not intentional and therefore does not amount to culpable conduct.[29] They submit that W/D Enterprise "violated the SCA because it was unable to successfully navigate the complexities of the SCA and its accompanying regulations."[30] They concede that Fields "was negligent in its [sic] wage and benefits payments, but was not *culpably* negligent" because his conduct was not intentional or reckless.[31] The Respondents assert that absent a finding of "intentional or reckless misconduct," the ALJ's finding of culpable conduct under 29 C.F.R. § 4.188(b)(3)(i) and ensuing order of debarment are legally incorrect and cannot stand.[32]

The Respondents' arguments are based on a misinterpretation of the regulations. The Respondents failed to prove that their conduct in causing repeated violations of the SCA was not willful, deliberate, or of an aggravated nature, *or* the result of culpable conduct.[33] The legal standard for culpable neglect does not require a finding of intent to violate the Act or a finding of "reckless misconduct." Rather, culpable neglect or conduct requires conduct which is beyond negligence, but short of specific intent.[34]

In this case, the parties stipulated to facts plainly establishing that the Respondents continued to underpay their service contract employees the wages and fringe benefits due them *even after* Wage and Hour had provided them with specific SCA compliance guidance on the contract(s) at hand. Stipulations 13, 20, 21, 23-25, 28, 29, 30, 38, 39, 40-41, 75-77, 94-95.[35]

ALJ No. 1997-SCA-014 (ARB June 27, 2002) (contractor's admission that he did not read SCA requirements contained on the contract's face was evidence of culpable neglect).

[29] Respondents' Brief at 2-15.

[30] *Id.* at 15.

[31] *Id.* at 2.

[32] *Id.* at 2-8.

[33] *See* 29 C.F.R. § 4.188(b)(3)(i).

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

[35] *See Nationwide Bldg. Maint., Inc. & William W. Johnson*, BSCA No. 92-004, slip op. at 12 (Oct. 30, 1992) ("Violations which are committed more than once - after proper notice - can also be seen as intentional, deliberate and willful."); *see also A to Z Maint. Corp.*, 710 F. Supp 853, 857-859 (D.D.C. 1989) (contractor's repeated violations of SCA even after

The ALJ also determined what the Respondents knew about their SCA obligations and when they knew it. The ALJ examined the record in chronological order. The ALJ found that prior to the Respondents' first government contract, Fields and others at W/D Enterprise lacked training in government contracts, and that W/D Enterprise, in its "early history," lacked sufficient financial resources to hire contracting experts.[36] But the ALJ noted Fields' testimony that by April 2001, he understood his obligation under the SCA to pay wages and fringe benefits according to applicable revised wage determinations and how to petition the contracting agency for contract modification.[37] The ALJ further found that during Wage and Hour's second (initiated August 2001) and third (initiated January 2003) investigations, "Mr. Fields knew or should have known that he continued to violate the SCA. I find that his assertion that all the subsequent errors were caused by mistakes, misunderstandings and confusion, which may have been true at first, was no longer credible."[38] We agree with the ALJ's finding as a preponderance of the evidence supports it.

c. The Respondents allege that they did not repeat SCA violations

The Respondents assert that they did not repeat their SCA violations but "fixed [their] mistakes."[39] They argue that the ALJ failed to recognize that the contracts examined in Wage and Hour's second and third investigations overlapped and that the amount of the Respondents' overpayment dropped dramatically from the second to the third investigation.[40] But these assertions, whether true or not, would not change the Respondents' obligation to pay the required wages and fringe benefits when they were due their service contract employees. When the Respondents underpaid their employees, they violated the SCA's wage and fringe benefits provisions. The Respondents' payment of the underpayments they created is not a penalty for violation of the SCA; not being awarded United States Government contracts for three years is.[41]

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receiving advice from Labor Department Compliance Officer is one of the aggravating factors which preclude a finding of "unusual circumstances" under 29 C.F.R. § 4.188(b)(3)(i)); *Hugo Reforestation,* slip op. at 10.

[36] D. & O. at 20.

[37] *Id.* at 21; *see* T. at 76.

[38] D. & O. at 21.

[39] Respondents' Brief at 18.

[40] *Id.* at 17-18.

[41] *See* 29 C.F.R. § 4.188(b)(2). *See also Vigilantes,* 968 F.2d at 1418 (debarring government contractor and its president despite company's status as a Small Business Administration certified, Section 8(a) business); *Summitt Investig. Serv., Inc. v. Adm'r of*

d. The Respondents concede Fields' failure to supervise subordinate employee

The ALJ found that Fields' failure to supervise his office manager, Sheila Jackson, in implementing revised wage determinations and Wage and Hour's compliance advice, constitutes culpable neglect.[42] The Respondents argue that because they did not dispute the fact that Fields failed to supervise Jackson, the ALJ erred by relying on this fact to find culpable conduct.[43] In the same vein, the Respondents decry the fact that the Labor Department sought to debar W/D Enterprise where it "cooperated with the Department and stipulated to its violations."[44] These arguments are counterintuitive and we reject them. Further, the Respondents do not appeal from the ALJ's ruling that Fields is subject to debarment as a "party responsible" under the SCA. We note that Fields cannot avoid debarment by arguing that his assistant, Sheila Jackson, was responsible for the SCA violations.[45]

Therefore, while Fields testified that he did not purposefully violate the SCA, a preponderance of the evidence supports the ALJ's conclusions that, "he was negligent, to the point of disinterested as to compliance," and the Respondents' actions in causing the SCA violations amounted to culpable conduct.[46] We conclude that the Respondents' conduct in causing the SCA violations constitutes culpable conduct under 29 C.F.R. § 4.188(b)(3)(i). Therefore, like the ALJ, we conclude that the Respondents did not satisfy that first part of the three-part test for determining whether "unusual circumstances" exist to warrant relief from debarment. Thus, relief from the debarment sanction is not in

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Wage and Hour, 34 F. Supp. 2d 16 (D.D.C. 1998) (enforcing debarment sanction against small disadvantaged minority-owed business).

[42] D. & O. at 22.

[43] Respondents' Brief at 18-19; Reply Brief at 14.

[44] Respondents' Brief at 19.

[45] *See* 29 C.F.R. § 4.188(b)(5) (attempting to shift responsibility to subordinate employees does not relieve contractor from debarment).

[46] D. & O. at 21, 22.

order.[47] Accordingly, we do not examine whether the Respondents meet the second and third parts of the test.[48]

CONCLUSION

The parties stipulated that the Respondents violated the Act when they underpaid their employees SCA wages and fringe benefits due them under the federal contracts. A preponderance of the evidence supports the ALJ's finding that Respondents' actions in causing the SCA violations amounted to culpable conduct. Therefore, "unusual circumstances" warranting relief from the debarment sanction do not exist. As a result, we **AFFIRM** the ALJ's order that Fields and W/D Enterprise shall not be awarded United States Government contracts for three years. As the Act provides, the Secretary will forward to the Comptroller General Fields' and W/D Enterprise's names.[49]

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[47] 29 C.F.R. § 4.188(b)(3)(i). The Respondents contend that W/D Enterprise will be forced to dissolve if it is debarred. Respondents' Brief 10, 20-21. But, the ARB has held that "[d]ebarment is the statutorily required sanction for SCA violators and its adverse effects [on the contractor's business] should not be considered a reason to excuse a contractor for its wrongdoing." *Integrated Res. Mgmt., Inc. of Or.*, slip op. at 7 n.2.

[48] *Id.*, slip op. at 6 n.2 (The second prong of the three-part test for unusual circumstances should never be examined in the event that culpable conduct is a factor in the commission of the SCA violations. The third factor, also, may not be examined where aggravated circumstances or culpable disregard of obligations is demonstrated). Consequently, we do not reach the Respondents' arguments supporting their contention that the ALJ erred by failing to consider evidence that the Respondents' noncompliance was due to mitigating circumstances applicable in parts 2 and 3 of the three-part test at 29 C.F.R. § 4.188(b)(3)(ii). *See* Respondents' Brief at 15-20.

[49] *See* 41 U.S.C.A. § 354(a).