



In the Matter of:

**VGA INCORPORATED,
d/b/a VGA, INC.,**

and

VINCE AKINS,

RESPONDENTS.

ARB CASE NO. 09-077

ALJ CASE NO. 2006-SCA-009

DATE: September 29, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondents:

Steven D. Campen, Esq., Frederick, Maryland

For the Administrator, Wage and Hour Division:

Mary J. Reiser, Esq.; William C. Lesser, Esq.; Steven J. Mandel, Esq.; Carol DeDeo, Esq.; U.S. Department of Labor, Washington, District of Columbia

BEFORE: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises out of a complaint filed by the Administrator of the Wage and Hour Division of the U.S. Department of Labor (“Administrator”) against Respondents VGA Incorporated, d/b/a VGA, Inc. and Vince Akins (collectively “VGA”), alleging that the Respondents, individually and collectively, violated certain provisions of the McNamara-O’Hara Service Contract Act (“SCA” or “Act”), 41 U.S.C.A. § 351 et seq. (West 1994), and the SCA implementing regulations under 29 C.F.R. Parts 4, 6, and 18

(2011). A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order in which she found that VGA violated the SCA by failing to pay its employees the prevailing wage and required fringe benefits in accordance with the contracts VGA had entered into with the United States Government and the appended SCA wage determination. Pursuant to SCA Section 5(a), 41 U.S.C.A. § 354(a), the ALJ further ordered that the Respondents be debarred and declared ineligible to enter into contracts or subcontracts with the United States for a period of three years.

VGA filed a timely Petition for Review of the ALJ's Decision and Order with the Administrative Review Board. For the following reasons, we summarily affirm the ALJ's Decision and Order.

BACKGROUND

On February 20, 2004, VGA entered into two SCA-governed service contracts¹ with the United States Department of Veterans Affairs to provide non-emergent medical transportation or shuttle bus services for patients of the John D. Dingell Medical Center in Detroit, Michigan.² The contracts were for services furnished through the use of service employees and each contract contained the requisite SCA provisions and Wage Determination specifying pertinent hourly wage rates and fringe benefits to which the employees were entitled.

Following an investigation, the Administrator filed a complaint in February of 2006 alleging that VGA underpaid prevailing wages and benefits in violation of the labor standards provisions of the two federal service contracts, SCA Sections 2(a)(1) and 2(a)(2), 41 U.S.C.A. § 351(A), and 29 C.F.R. § 4.6. Since VGA paid the back wages and benefits the Administrator found to be owed to its employees, the issues for resolution before the ALJ were whether VGA violated the SCA's provisions by failing to pay their employees minimum monetary wages and fringe benefits and, if so, whether VGA, Inc. and Vince Akins should be debarred from soliciting any further government contracts pursuant to SCA Section 5(a).

¹ The SCA generally requires that every contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision which specifies the minimum hourly wage and fringe benefit rates that are payable to the various classifications of service employees working on such a contract. *See* 41 U.S.C.A. § 351(a)(1)-(2). These wage and fringe benefit rates are predetermined by the United States Department of Labor's Wage and Hour Division acting under the authority of the Administrator, who the Secretary of Labor has designated to administer the Act.

² Administrative Law Judge's Exhibit (ALJX) 1; Administrator's Exhibit (AX) 7a.

Following a hearing and post-trial briefing, the presiding ALJ issued a Decision and Order on February 12, 2009, in which she found that VGA had failed to pay its employees the minimum wage required by the contracts and the SCA, and held VGA, Inc. and Vince Akins (owner and chief executive officer of VGA, Inc.) individually and jointly liable for the violations. The ALJ found that the Administrator met her burden in proving by a preponderance of the evidence that VGA violated the SCA's provisions in establishing that VGA failed to pay at least 21 of its employees the prevailing wage in accordance with the wage determination appended to the contracts.³ The ALJ further determined that VGA violated the Act as the evidence substantiated that VGA failed to pay its employees all of the mandatory health and welfare benefits owed them and failed to afford its employees the requisite number of paid holidays under the contracts' terms.⁴

Additionally, having found both VGA, Inc. and Vince Akins to be the parties responsible for the SCA violations, the ALJ concluded that they both are subject to debarment in accordance with SCA Section 5(a), 41 U.S.C.A. § 354(a).⁵ The ALJ found that VGA "neither ascertained the exact hours that employees worked nor accepted the hours reflected by the [employees'] timecards, and the hours reported to the payroll office (for payment of wages) were false."⁶ The ALJ concluded that VGA failed to prove that "unusual circumstances" existed that would support relief from debarment.⁷ To the contrary, the ALJ found that a preponderance of the evidence established the existence of aggravating factors that precluded relief from debarment under the three-part regulatory criteria of 29 C.F.R. § 4.188(b)(3) and relevant case law.⁸ The ALJ determined that the violations were the result of either "a willful fabrication of employee hours and rates" or

³ Decision and Order (D. & O.) at 15, 18; *see* AX 10-11.

⁴ D. & O. at 15-17; *see* AX 7a, 7b, 8. *See also* 29 C.F.R. §§ 4.172, 4.174(c)(1), 4.175(a). The ALJ also found the evidence "unrefuted" that VGA failed to furnish paid vacation days to some of its employees whose continuous service merited them under the terms of the contract and, therefore, in violation of the Act. D. & O. at 17; *see* AX 7a, 7b, 10. *See also* 29 C.F.R. § 4.173(a)(i)-(ii).

⁵ 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." 41 U.S.C.A. § 354(a); 29 C.F.R. § 4.188(a), (b). Debarment is presumed once violations of the Act have been found, unless the violator is able to show that "unusual circumstances" exist. *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-020, slip op. at 9 (ARB Apr. 30, 2001).

⁶ D. & O. at 20.

⁷ *Id.*

⁸ D. & O. at 20-22.

a “culpable failure to comply with recordkeeping requirements” under the SCA. Consequently, the ALJ concluded that VGA was not entitled to relief from debarment under the first part of the test at 29 C.F.R. § 4.188(b)(3)(i),⁹ and ordered that Akins and VGA, Inc. be debarred for a period of three years.¹⁰

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to decide this case pursuant to 29 C.F.R. § 8.1(b). In rendering its decision, “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.” 29 C.F.R. § 8.1(c). The Board’s review of an ALJ’s SCA decision is an appellate proceeding. 29 C.F.R. § 8.1(d). Accordingly, the Board’s authority to modify or set aside an ALJ’s findings of fact is limited to those instances where the ALJ’s findings are not supported by a preponderance of the evidence. 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). The Board’s review of conclusions of law is de novo. *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).

DISCUSSION

The issues on appeal are two: (1) whether the ALJ’s findings that VGA violated the SCA are supported by a preponderance of the evidence; and (2) whether “unusual circumstances” within the meaning of the SCA exist warranting relief for VGA from disbarment.¹¹

Under the SCA, every contract the United States enters into in excess of \$2,500, the principal purpose of which is to furnish services through the use of service employees, must contain provisions specifying the minimum monetary wages and fringe benefits to be furnished the various classes of service employees under the contract. See 41 U.S.C.A. § 351(a)(1), (2).

⁹ D.& O. at 20.

¹⁰ D. & O. at 22. As Akins and VGA are jointly and severally liable under 29 C.F.R. § 4.187(e)(1)-(2), the ALJ properly noted that it was unnecessary to distinguish VGA, Inc., from Akins or VGA Enterprises.

¹¹ As VGA paid the back wages due and is not seeking reimbursement for the funds, the only issues before the ALJ were whether VGA violated the SCA and whether VGA is subject to debarment. See D. & O. at 1-2, 17 n. 14; Hearing Transcript at 22, 116-117.

In concluding that VGA violated the terms of its service contracts with the federal government and pertinent SCA provisions in this case, the ALJ found that VGA “failed to abide by the statutorily mandated contract terms requiring them to: pay the prevailing wage in accordance with the wage determination appended to the contracts, pay all necessary health and welfare benefits, and afford their employees the requisite number of paid holidays. Based upon the available evidence, it also appears that [VGA] failed to furnish paid vacation days to employees whose continuous service merited them under the terms of the contract.”¹²

Under the principles enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Administrator, as the party that initiated and brought the enforcement case, has the initial burden of proof of establishing that the employees performed work for which they were improperly compensated. The Administrator carries her burden if she proves that the employees have:

in fact performed work for which [they were] improperly compensated and if [she] produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Mt. Clemens Pottery, 328 U.S. at 687-688; *see also Pythagoras Gen. Contracting Corp. v. Adm’r, Wage and Hour Div.*, ARB Nos. 08-107, 09-007; ALJ No. 2005-DBA-014, slip op. at 5, 11, 13, 23-24 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011); *Igwe*, ARB No. 07-120, ALJ No. 2006-SCA-020, slip op. at 7-8 (ARB Nov. 25, 2009).

Notwithstanding VGA’s challenges to the various evidentiary findings upon which the ALJ concluded that VGA violated the SCA’s provisions, ultimately VGA failed to produce any credible evidence to refute the Administrator’s evidentiary proof upon which the ALJ’s conclusion of SCA violation is based. Thus, we hold that the ALJ’s findings that VGA violated the SCA in failing to pay its employees the prevailing wage, pay all necessary health and welfare benefits, and afford their employees the requisite number of paid holidays, are fully supported by the preponderance of the evidence and in accordance with applicable law.

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.” 41

¹² D. & O. at 18-19.

U.S.C.A. § 354(a); 29 C.F.R. § 4.188(a), (b); *see also A to Z Maint. Corp. v. Dole*, 710 F. Supp. 853, 855-856 (D.D.C. 1989). Debarment is presumed once a violation of the Act has been found; with the burden of proof falling to the violating contractor to prove that “unusual circumstances” exist. *Hugo Reforestation, Inc.*, ARB No. 99-003, slip op. at 9. As the ARB has recognized, “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.” *R & W Transp., Inc.*, ARB No. 06-048, ALJ No. 2003-SCA-024, slip op. at 8 (ARB Feb. 28, 2008), *quoting Sharipoff dba BSA Co.*, No. 1988-SCA-032, slip op. at 6 (Sec’y Sept. 20, 1991). “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.” *Vigilantes, Inc. v. Adm’r of Wage and Hour*, 968 F.2d 1412, 1418 (1st Cir. 1992).

The term “unusual circumstances” is not defined in the SCA. However, the SCA’s implementing regulations, at 29 C.F.R. § 4.188(b), establish a three-part test for determining when relief from debarment is appropriate. To meet its burden of proving “unusual circumstances,” the violating contractor must meet all three parts of the test to be relieved from the debarment sanction. 29 C.F.R. § 4.188(b)(1); *Hugo Reforestation*, ARB No. 99-003, slip op. at 12-13. 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 similar violations, an absence of repeat SCA violations, and that any previous violations were not serious. 29 C.F.R. § 4.188(b)(3)(i).

Our review of the evidentiary record fully supports the conclusion that VGA failed to meet its evidentiary burden of showing “unusual circumstances” that would relieve VGA from debarment. A preponderance of the evidence fully supports the ALJ’s conclusion that VGA’s violations “were either a result of intentional conduct or reflective of culpable neglect with respect to record keeping” and based upon the evidence presented, “would constitute a willful and deliberate disregard of the requirements of the SCA concerning wages and recordkeeping.”¹³

Because VGA failed to meet its burden of proof under the first part of the three-part test for determining whether “unusual circumstances” exist to warrant relief from debarment, we need not consider any further mitigating factors.¹⁴ However, assuming VGA were able to establish aggravating factors under the first part of the debarment test, nevertheless VGA could not prevail under the second part of the test. The second part of the test requires that the contractor demonstrate “[a] good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances

¹³ D. & O. at 20.

¹⁴ *Integrated Res. Mgmt., Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-014, slip op. at 6 n.2 (ARB June 27, 2002).

of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). While it is true that VGA paid the moneys due its employees, nevertheless, as the ALJ properly noted, “there was only limited cooperation in the investigation and a delay before [VGA] came into compliance.”¹⁵ In any event, as the ALJ properly concluded, “mitigating factors alone are not enough to overcome the very strict application of debarment under the SCA where, as here, there are aggravating factors.”¹⁶ Finally, it is noted that Akins had been previously debarred, thereby running afoul of the third part of the “unusual circumstances” test. *See* 29 C.F.R. § 4.188(b)(3)(ii).

For the foregoing reasons, we affirm the ALJ’s holding that VGA is not entitled to relief from debarment. The preponderance of the evidence fully supports the conclusion that VGA’s SCA violations constituted culpable neglect if not willful conduct under 29 C.F.R. § 4.188(b)(3). *See, e.g., Karawia v. U.S. Dep’t. of Labor*, 627 F. Supp. 2d 137, 150 (S.D.N.Y. 2009); *Johnson v. U.S. Dep’t. of Labor*, No. 05-4355, slip op. at 4 (6th Cir., Aug. 16, 2006)(unpub.).

CONCLUSION

VGA violated the SCA when it underpaid its employees SCA wages and fringe benefits due them under its federal service contracts. A preponderance of the evidence supports the ALJ’s finding that VGA’s actions in causing the SCA violations amounted to willful or culpable conduct. Therefore, “unusual circumstances” warranting relief from the debarment sanction do not exist. As a result, we **AFFIRM** the ALJ’s order that VGA, Inc. and Vince Akins shall not be awarded United States Government contracts for three years. As the Act provides, at 41 U.S.C.A. § 354(a), the Secretary shall forward the Respondents’ names to the Comptroller General.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹⁵ D. & O. at 21-22.

¹⁶ *Id.*