In the Matter of:

ADMINISTRATOR, WAGE & HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 11-014**
	ALJ CASE NO. 2008-SCA-017
PROSECUTING PARTY,	**DATE: June 29, 2012**

v.

TRI-COUNTY CONTRACTORS, INC.,

and

JOHN K. HUNTER,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondents:
Kenya R. Martin, Esq.; *Kenya R. Martin, LLC*; Jackson, Mississippi

For the Administrator, Wage and Hour Division:
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Jonathan T. Rees, Esq.; Mary J. Reiser, Esq.; *U.S. Department of Labor*, Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises from a complaint the Administrator of the Wage and Hour Division of the U.S. Department of Labor (Administrator) filed against Respondents Tri-County Contractors, Inc., and John K. Hunter (collectively Tri-County), 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 (DOL) Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in which he found that Tri-County should be debarred and declared ineligible to enter into contracts or subcontracts with the United States for a period of three years.

Tri-County 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

In April 2006, Tri-County entered into an SCA-governed service contract.[1] D. & O. at 2. The DOL conducted an investigation of Tri-County in late 2006, and found prevailing wage, fringe benefits, and Contract Work Hours and Safety Standards Act (CWHSSA) violations totaling $52,994.42.[2] *Id.* at 4. At the closing conference held at the conclusion of the first investigation in December 2006, Wage and Hour investigator, Melissa Van Etten, told Tri-County that it must keep accurate records of actual hours worked, pay proper prevailing rates, and pay overtime wages in the future. *Id.* at 4. DOL conducted a second investigation of Tri-County and again found prevailing wage, fringe benefits, and CWHSSA overtime violations, this time in the amount of $49,015.39. *Id.* at 5. DOL again found that Tri-County did not keep accurate records of actual hours worked. *Id.* at 5. The second investigation uncovered the same type of prevailing rate, fringe benefit, recordkeeping, and overtime violations as those uncovered in the first investigation. *Id.* at 6.

Since Tri-County paid the back wages and benefits the Administrator found that it owed to its employees, the issue for resolution before the ALJ was whether Tri-County should be debarred from soliciting any further government contracts pursuant to SCA Section 5(a).

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[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] The CWHSSA is codified at 40 U.S.C.A. § 3701, et seq. (Thomson Reuters 2012).

Following a hearing and post-trial briefing, the presiding ALJ issued a Decision and Order on February 12, 2009, in which he found that Tri-County and Hunter were both subject to debarment in accordance with SCA Section 5(a), 41 U.S.C.A. § 354(a). The ALJ noted that "debarment is presumed whenever there is a finding of violations under the Act unless the contractor is able to show the existence of 'unusual circumstances.'" *Id.* at 7 (citing 29 C.F.R. § 4.188(a), (b)). The ALJ concluded that Tri-County failed to prove that "unusual circumstances" existed that would support relief from debarment. *Id.* at 9. Consequently, the ALJ ordered that Hunter and Tri-County be debarred for a period of three years. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to decide this case pursuant to 29 C.F.R. Part 8.1(b) (2011). 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 of fact 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). Ultimately, the Secretary's decision to relieve violators from debarment is an exercise of discretion that should rarely occur and only after the violator meets the prerequisites set forth in the regulations. 29 C.F.R. § 4.188(a).

DISCUSSION

The sole issue on appeal is whether "unusual circumstances" within the meaning of the SCA exist warranting relief for Tri-County from debarment.

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); *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, ALJ No. 1997-SCA-020, slip op. at 9 (ARB Apr. 30, 2001). 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 & 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 prove the non-existence of the aggravating factors listed in 29 C.F.R. § 4.188(b)(3)(i), such as willful, deliberate, aggravated, or culpable conduct. Second, the contractor must prove it met the prerequisites listed in 29 C.F.R. § 4.188(b)(3)(ii), essentially a good compliance history. Third, only if the first two parts are met, the contractor must then satisfactorily address "other factors" listed in 29 C.F.R. § 4.188(b)(3)(ii).

Our review of the evidentiary record fully supports the conclusion that Tri-County failed to meet its evidentiary burden of showing "unusual circumstances" that would relieve Tri-County from debarment. The overwhelming evidence supports the ALJ's conclusion that the repetitive nature of Tri-County's violations "can be seen as culpable conduct requiring debarment under the Act." D. & O. at 8.

Because Tri-County 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.[3] However, assuming Tri-County was able to establish the nonexistence of aggravating factors under the first part of the debarment test, Tri-County could not prevail under the second part of the test. The prerequisites of the second part of the test require that the contractor demonstrate "[a] good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii). While it is true that Tri-County paid the money due its employees, nevertheless, as the ALJ properly noted, the "Respondents impeded the second investigation by failing to keep accurate time records and by denying for several months that employees' hours had been computer-generated when this was in fact the case." D. & O. at 9. As the ALJ properly concluded, Tri-County failed to meet the prerequisites of the second part of the test. *Id.* Finally, it is noted that Tri-County had prior violations that were serious in nature, thereby running afoul of the third part of the "unusual circumstances" test. *See* 29 C.F.R. § 4.188(b)(3)(ii).

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

CONCLUSION

The evidence fully supports the ALJ's finding that Tri-County failed to establish "unusual circumstances" warranting relief from the debarment sanction do not exist. As a result, we **AFFIRM** the ALJ's order that Tri-County Contractors, Inc. and John K. Hunter shall not be awarded United States Government contracts for three years. As the Act provides, at 41 U.S.CA. § 354(a), the Secretary shall forward the Respondents' names to the Comptroller General.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge