



In the Matter of:

**E&S DIVERSIFIED SERVICES, INC.,
MAYFIELD EVANS, BARRY EVANS,
JACQUELINE EVANS, and
WILLIE EVANS,**

ARB CASE NO. 13-019

**ALJ CASE NOS. 2011-SCA-008
2011-SCA-009**

RESPONDENTS.

DATE: March 20, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondents:

**James F. Nagle, Esq.; Allison L. Pehl, Esq.; Oles Morrison Rinker Baker
LLP, Seattle, Washington**

For the Administrator, Wage and Hour Division:

**Nancy E. Steffan, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.;
Jennifer S. Brand, Esq.; M. Patricia Smith, 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*; Lisa Wilson Edwards, *Administrative
Appeals Judge***

FINAL DECISION AND ORDER

The Administrator, Wage and Hour Division, United States Department of Labor (Administrator) filed a complaint alleging that the Respondents E&S Diversified Services, Inc. (E&S), Mayfield Evans, Barry Evans, Jacqueline Evans, and Willie Evans violated the health and welfare benefits provisions of the McNamara-O'Hara Service Contract Act (SCA) by not timely paying their contract employees these benefits. *See* 41 U.S.C.A. §§ 6703(1), (2); 6705; 6706 (Thomson Reuters 2015); 29 C.F.R. §§ 4.165(a), (b), 4.175(d), 4.177(c), (d) (Thomson Reuters 2015). The Administrator sought debarment of E&S, as well as the individual respondents, all of whom, it is undisputed,

were officers and/or directors of E&S at all relevant times. Administrator's Appendix Tab 1 (Complaint dated Feb. 24, 2011); Administrative Law Judge's Decision and Order at 3 (Oct. 18, 2012) (D. & O.).

Subsequent to a hearing, the Administrative Law Judge (ALJ) determined, (1) that the facts to which the parties stipulated establish the SCA violations; (2) that E&S failed to meet its burden to establish "unusual circumstances" warranting relief from the debarment sanction under 29 C.F.R. § 4.188(b), *see* 41 U.S.C.A. § 6706, and (3) that Willie Evans is a "party responsible" and subject to debarment under 41 U.S.C.A. §§ 6705(a), 6706; 29 C.F.R. § 4.187(e).¹ Accordingly, the ALJ ordered all Respondents debarred for a period of three years. Respondents appealed to the Administrative Review Board (ARB). For the following reasons, the ARB affirms the ALJ's order of debarment against all respondents but Willie Evans.

BACKGROUND

The facts are not disputed. We briefly summarize them. E&S, an Alaska corporation, entered into two commissary services contracts in June 2008, one for Eglin Air Force Base, Florida, and the other for Fort Stewart Army Base, Georgia. Both contracts specified the rate of health and welfare benefits to be paid to the contract employees. D. & O. at 3. The ALJ noted that Jacqueline Evans, E&S's secretary, treasurer, and day-to-day administrator, testified at the hearing that E&S had a practice of meeting health and welfare obligations through a third-party administered plan, but that in March 2008, some three months before E&S entered into these two contracts, E&S's Board of Directors voted unanimously to end its participation in the plan. *Id.* at 3-5, 15. The ALJ also addressed Jacqueline Evans's testimony that she understood that E&S had the option under the SCA to pay health and welfare benefits directly to the service contract employees, but did not do so. *Id.* at 4. The ALJ specifically noted that instead, from the June 2008 start of these contracts, E&S held the employees' health and welfare benefits amounts in its own accounts and only paid these benefits directly to certain employees upon their discharge or death. *Id.* at 2-3, 10-11. The ALJ determined, and the parties stipulated, that E&S eventually made health and welfare payments into the plan in December 2009, to discharge its obligations owing from the third quarter of 2008 through the second quarter of 2009, and then for 2010. *Id.* at 2-7.

¹ The parties stipulated, "At least Mayfield Evans, Barry Evans, and Jacqueline Evans are responsible parties as that term is used in the SCA regulations." Administrator's Appendix Tab 3 Parties' Stipulated Facts (Oct. 17, 2011).

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review enforcement actions involving violations of the SCA pursuant to 29 C.F.R. § 8.1(b)(3) (2014), *see* 29 C.F.R. § 6.20 (2014). 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). In the review of an ALJ's decisions under the SCA, the Administrative Review Board serves as an "appellate body," 29 C.F.R. § 8.1(d), empowered to "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," 29 C.F.R. § 8.9(b). Under this standard, the ARB "reviews an ALJ's findings of fact only for clear error." *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 72 (1st Cir. 1999). Accordingly, "[t]he findings of fact made by an ALJ in proceedings pursuant to the Service Contract Act are conclusive . . . if supported by a preponderance of the evidence." *Id.* (quoting *American Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1408-09 (10th Cir. 1984)). An ALJ's conclusions of law are reviewed de novo. *Admin., Wage & Hour Div. v. Tri-County Contractors, Inc.*, ARB No. 11-014, ALJ No. 2008-SCA-017, slip op. at 3 (ARB June 29, 2012).

DISCUSSION

The issues on appeal are three: (1) whether a preponderance of the evidence supports the ALJ's finding that the stipulated facts establish the SCA violations; (2) whether a preponderance of the evidence supports the ALJ's finding that "unusual circumstances" within the meaning of the SCA do not exist to warrant relief from the debarment sanction; and (3) whether a preponderance of the evidence supports the ALJ's finding that Willie Evans is a "party responsible" and subject to debarment.²

SCA violations

Upon review, we find that a preponderance of the record evidence supports the ALJ's determination that the stipulated facts establish the SCA violations as alleged by the Administrator. E&S stipulated to its repeated failure to pay the requisite health and welfare benefits to service contract employees on two separate contracts over a period of more than eighteen months. Administrator's Appendix Tab 3 Parties' Stipulated Facts (Oct. 17, 2011). E&S's argument (Reply Brief at 2) that it merely stipulated to the amount it owed in health and welfare to the employees on these two contracts, starting from 2008 until it paid these amounts in December 2009, is disingenuous. The factual

² In the Complaint, the Administrator sought no monetary amount, noting that E&S had made all health and welfare payments on behalf of the affected service contract employees. Administrator's Appendix Tab 1 Complaint at 3.

stipulations on their face establish the very violations the Administrator alleged, namely failure to timely pay health and welfare benefits to service contract employees on two contracts, as required by the SCA and its implementing regulations. See 41 U.S.C.A. §§ 6703(1), (2); 6705; 6706; 29 C.F.R. §§ 4.165(a), (b); 4.175(d); 4.177(c), (d). As a consequence, E&S is subject to debarment. We therefore turn to the issue of whether Respondent established that relief is warranted from imposition of the debarment sanction.

Unusual circumstances test

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 unless the Secretary of Labor otherwise recommends because of “unusual circumstances.” 41 U.S.C.A. §§ 6705, 6706; 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)). 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.” *Karawia v. U.S. Dep’t of Labor*, 627 F. Supp. 2d 137, 146 (S.D.N.Y. 2009) (quoting *Vigilantes, Inc. v. Adm’r of Wage & Hour*, 968 F.2d 1412, 1418 (1st Cir. 1992)).

The SCA does not define the term “unusual circumstances.” The SCA’s implementing regulations, at 29 C.F.R. § 4.188(b), set out the criteria for determining, (1) for what conduct relief from the penalty of debarment “cannot be in order;” (2) in the absence of such conduct, what factors are generally prerequisites to relief from the debarment sanction, and, even in the absence of the offending conduct and the presence of these prerequisites to relief, (3) what “variety of factors” must be considered to determine whether relief is appropriate.³

³ Addressing the case in which the conduct at issue is willful, deliberate, involves certain aggravating factors, or is the result of culpable conduct, and further addressing the case in which there are prior violations, 29 C.F.R. § 4.188(b)(3)(i) provides as follows:

The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. See, e.g., *Washington Moving & Storage Co.*, Decision of the Assistant Secretary, SCA 68,

The violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction. 29 C.F.R. § 4.188(b)(1). To meet its burden of proving “unusual circumstances,” the violating contractor must satisfy the regulatory showing. See 29 C.F.R. § 4.188(b)(3)(i), (ii); *Hugo Reforestation*, ARB No. 99-003, slip op. at 12-13.

August 16, 1973, Secretary, March 12, 1974; *Quality Maintenance Co.*, Decision of the Assistant Secretary, SCA 119, January 11, 1974. Thus, where the respondent’s conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order 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.

In a case in which none of the aggravating factors discussed in 29 C.F.R. § 4.188(b)(3)(i) exist, nonetheless several prerequisites to relief must be considered and are discussed at 20 C.F.R. § 4.188(b)(3)(ii), which provides as follows:

A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

Our review of the evidentiary record fully supports the ALJ's conclusion that E&S failed to meet its evidentiary burden of showing "unusual circumstances" under the first part of this three-part test. A preponderance of the evidence fully supports the ALJ's conclusion that "the Respondents' violations were culpably negligent, bordering on willful." D. & O. at 10. Specifically, the ALJ noted:

The Respondents knew that to comply with the Act, they needed to either pay the health and welfare benefits into a benefit plan or pay them to employees. (HT, pp. 133, 135.) Yet the Respondents instead chose to set aside these funds only on paper, not paying them into a legitimate benefit plan until many months after they were due. (E.g. *id.* at 135-36; RX H, p.117.) They had no reasonable reason to believe this was adequate fulfillment of their obligations under the SCA. This is the definition of "culpable neglect to ascertain whether practices are in violation" or "culpable disregard of whether they were in violation or not." 29 C.F.R. § 4.188(b)(3)(i)-(4) ("A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.").

D. & O. at 10.⁴ The ALJ also determined that the amount of benefits that E&S untimely paid was "very serious" and that "the Respondents have not defeated District Director [Donna] Hart's testimony about prior violations." *Id.* at 10-11, 12. The ALJ concluded that Respondents "have failed at the very first stage to make a case for unusual circumstances," determining that most of Respondents' arguments "totally ignored the fact that it was Respondents' own obligation" to produce evidence supporting their contention that these SCA violations were not willful, deliberate, or of an aggravated nature. *Id.* The ALJ further also concluded that Respondents "failed to present any plausible explanation for how these serious repeated violations could have been inadvertent, innocent, or in any way not the kind of aggravated, culpable acts Congress intended to punish through debarment." *Id.*

We hold, as did the ALJ, that E&S's characterization of these violations as unintentional, inadvertent, and not the result of culpable conduct or disregard of the SCA's provisions is belied by the uncontroverted facts. Furthermore, E&S admits to

⁴ See also D. & O. at 11 ("There may have been difficulties in reaching the correct person at the Plan or getting responses, but compliance with the act was the Respondents' responsibility and there were other methods of compliance the Respondents could have pursued (such as direct payment to employees) that did not require the Plan's cooperation. See 29 C.F.R. § 4.177(c).")

“holding funds” it would have paid to the service contract employees, funds that it “sequestered in its payroll and general accounts.” See Reply Brief at 3, 4. E&S thereby admits affirmative conduct resulting in violations of the SCA’s health and welfare provisions. Before the ARB, E&S also argues at length that it does not have a prior history of violations, and asserts that the ALJ’s reliance on the district director’s testimony was error where Jacqueline Evans testified that these violations were “technical” in nature. This argument, as well as several related arguments Respondents advance on appeal, ignore the critical fact that under 29 C.F.R. § 4.188(b)(1), it is the contractor who has the burden of showing no evidence of prior violations. The preponderance of the evidence supports the ALJ’s determination that E&S has not done so.⁵

For the foregoing reasons, the Board affirms the ALJ’s holding that E&S and Respondents Mayfield Evans, Barry Evans, Jacqueline Evans, as responsible parties, are not entitled to relief from the sanction of debarment. The ALJ did not err when she determined that the conduct of these Respondents, from which the SCA violations arose, was culpably negligent, bordering on willful. E&S and the three mentioned respondents failed to meet their burden of proof under the first part of the three-part test under 29 C.F.R. § 4.188(b)(3) for determining whether “unusual circumstances” exist to warrant such relief. Therefore, we do not consider any further mitigating factors,⁶ but turn to the remaining issue, namely whether Respondent Willie Evans is also a “party responsible” and subject to debarment.

Party responsible

Respondents argue that the record does not support the ALJ’s finding that Willie Evans is a “party responsible” and subject to debarment under 29 C.F.R. § 4187(e)(4). See 41 U.S.C.A. §§ 6705(a), 6706; 29 C.F.R. § 4.187(e)(1). “The term *party responsible* for violations in section 3(a) of the Act is the same term as contained in the Walsh-Healey Public Contracts Act, and therefore, the same principles are applied under both Acts. 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 [citations omitted].” 29 C.F.R. § 4.187(e)(1).

⁵ Respondents argue that the ALJ erred in admitting certain evidence proffered by the Administrator that purports to show prior violations. But all relevant evidence is admissible, 20 C.F.R. § 18.402, and the ALJ found that none of these documents showed “a meaningful prior violation.” D. & O. at 12. Moreover, the ALJ properly placed on Respondents the burden to show any *absence* of prior violations.

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

The ALJ determined that “[t]he evidence about Willie Evans’s role is mixed” where Jaqueline Evans testified that Willie Evans had an inactive role and other evidence showed that Willie Evans was on the Board of Directors. D. & O. at 15. In finding Willie Evans to be a “party responsible,” the ALJ reasoned that some three months before E&S signed these two contracts, the Board of Directors voted unanimously to end its participation in the plan “precipitating the violations at issue in this case.” *Id.* But whether or not E&S participated in a plan is not any evidence of the culpably negligent conduct the ALJ found to exist. As the ALJ herself found, the violation here is that E&S did not avail itself of “other methods of compliance.” *Id.* at 11. Critically, the ALJ did not find, as she must, that Willie Evans “exercise[d] control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance.” 29 C.F.R. § 4.187(e)(4). *See generally Johnson*, 205 Fed. Appx. 312 (6th Cir., 2006)(affirming the U. S. District Court for the Southern District of Ohio’s grant of summary judgment in favor of Department of Labor on petition for review of *In Re Rasputin, Inc.*, ARB No. 03-059, ALJ No. 1997-SCA-032 (ARB May 28, 2004)). Based on the foregoing, we hold that the ALJ’s finding that Willie Evans is a “party responsible” is not supported by a preponderance of the record evidence and is not consistent with applicable law. Accordingly, we modify the ALJ’s decision to exclude Willie Evans from the sanction of debarment.

CONCLUSION

E&S violated the SCA when it did not timely pay service contract employees fringe benefits due them under the two contracts. A preponderance of the evidence supports the ALJ’s finding that E&S’s conduct giving rise to these violations was culpably negligent, bordering on willful. Therefore, unusual circumstances warranting relief for E&S, Mayfield Evans, Barry Evans, and Jaqueline Evans from SCA’s debarment sanction do not exist. As a result, we **AFFIRM** the ALJ’s order that E&S, Mayfield Evans, Barry Evans, and Jaqueline Evans are debarred from the award of United States Government contracts for three years. Accordingly, the Secretary is directed to forward the names of Respondents E&S, Mayfield Evans, Barry Evans, and Jaqueline Evans to the Comptroller General as provided by 41 U.S.C.A. § 6706(b). We **VACATE** the ALJ’s Order of Debarment against Respondent Willie Evans.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Corchado concurs:

I concur in the majority's decision, but I find unclear the majority's statement of our standard of review. The majority refers to both a "preponderance of the evidence" standard and a "clear error" review of the ALJ's fact findings. Given that we are sitting as an appellate body reviewing an ALJ's determination, I am persuaded by the rationale in *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58 (1st Cir. 1999), that we should review the ALJ's fact findings for "clear error" rather than weighing the record evidence to determine which way it preponderates. We should clarify this standard, but the confusion in the standard seems harmless. Arguably, if the evidence preponderates in favor of the debarment, then the ALJ did not make a "clear error" in upholding the debarment.

LUIS A. CORCHADO
Administrative Appeals Judge