U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

GARCIA FOREST SERVICE, LLC, and SAMUEL GARCIA,

RESPONDENTS.

ARB CASE NO. 14-052

ALJ CASE NO. 2011-SCA-002

DATE: April 8, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

J. Larry Stine, Esq. and Ray Perez, Esq.; *Wimberly Lawson Steckel Schneider & Stine, P.C.*; Atlanta, Georgia

For the Administrator, Wage and Hour Division:

Sarah J. Starrett, Esq.; Jonathan T. Rees, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor, Office of the Solicitor*, Washington, District of Columbia

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge.* Judge Corchado, *concurring.*

FINAL DECISION AND ORDER

This case arises under the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C.A. § 6701 et seq. (Thomson Reuters, 2012), (and implementing regulations at 29 C.F.R. Part 4 (2015)), and the Contract Work Hours and Safety Standards Act, 40 U.S.C.A. § 3701 et seq. (Thomson Reuters 2015). (CWHSSA). On March 27, 2014, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding that Respondents Garcia Forest Service, LLC (Garcia Forest) and Samuel Garcia violated the minimum wage, fringe benefit, and record keeping requirements of the SCA and CWHSSA, and ordering debarment for both Garcia Forest and Mr. Garcia effective from the date of the ALJ's order.[1] For the following reasons, the Board affirms the ALJ's D. & O.

BACKGROUND

Garcia Forest provides forest management service. Its principle place of business is Rockingham, North Carolina. Samuel Garcia is president, sole owner, and manager of Garcia Forest. The majority of the company's work is performed under contract with the United States Forest Service, an agency of the United States Department of Agriculture.

In 2007, Garcia Forest entered into a contract with the U.S. Forest Service for reforestation services in the Superior National Forest in Minnesota (Contract No. AG-63A9-07-0001). The contract specified an hourly rate of $10.98 for brush thinning and $9.14 for tree planting, with a $3.01 hourly rate for fringe benefits. The contract provided for the workers to be paid on an hourly basis. Mr. Garcia decided to pay the crew on a production basis. He instructed the payroll clerk, Veronica Garduno Garcia (Garcia's niece), to pay on a production basis, but to ensure that the amount that they were paid was at least as much as they would be owed for hourly work at the contract rate.

The crew leader, Flavio Hernandez, kept records of each worker's production in a notebook, and provided Ms. Garcia with both the production figures and the hours worked for each man.[2] From this she created two separate spreadsheets to compare the production and hourly earnings. If a worker's production earnings exceeded the earnings based on the reported

[1] The Wage and Hour Division of the United States Department of Labor (WHD) included Flor Garcia, Samuel Garcia's wife, in the present complaint. The ALJ found that Flor Garcia was not a "party responsible" based on her intermittent administrative work, and lack of evidence of her active management of contract performance, employment policies, or other activities giving rise to the violations. This finding is not challenged on appeal.

[2] Hernandez testified that he discarded his handwritten notes of the hours worked after he called them in at the end of each week. Ms. Garcia testified that she did not retain the actual records of hours worked that Hernandez called in every week, but "would get rid of the paper" after transferring the data to her computer. Hearing Transcript at 285, 330-331.

actual hours, the worker's pay was calculated based on the higher production earnings. She produced checks using the payroll system, which was not set up to calculate pay on a production basis, as this was the only crew paid this way. Thus, to pay a worker for production, she had to add hours to the worker's time until it covered the higher production earnings. Ms. Garcia did not add in fringe benefits, or overtime and holiday pay separately when calculating pay on a production basis.

The Wage and Hour Division initiated an investigation of the contract with Garcia Forest in June of 2007.[3] A review of the timesheets consistently showed identical hours for the crew members for Monday through Thursday, and widely disparate hours for Friday of each week. The facts that Hernandez discarded his handwritten notes after calling in the information at the end of each work week and that the computer on which Ms. Garcia kept the spreadsheets crashed and attempts to recover the data from the hard drive were unsuccessful impeded an attempt to reconstruct the hourly records. Thus, there are no surviving records of the actual hours worked.

After adjusting for estimated weather days, Mr. Garcia agreed to pay the back pay calculated by the Wage and Hour investigator. The investigator was given conflicting information throughout the investigation and did not understand how the company actually managed its payroll until the depositions. No one at Garcia Forest ever reviewed the payroll clerk's work to ensure it was done correctly.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review enforcement actions involving violations of the SCA pursuant to 29 C.F.R. § 8.1(b)(3) (2015), *see* 29 C.F.R. § 6.20 (2015). The Board's review of an ALJ's decision under the SCA is in the nature of an appellate proceeding.[4] 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.[5] An ALJ's conclusions of law are reviewed de novo.[6]

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[3] In a 2007 investigation, the Wage and Hour Division determined that Garcia Forest had failed to pay holiday pay under three previous federal contracts covering the period 2005-2006. At that time, the WHD investigator explained the debarment process. Because Mr. Garcia cooperated in good faith, the file was closed on an administrative basis with no debarment proceedings.

[4] 29 C.F.R. § 8.1(d).

[5] *See Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999).

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

DISCUSSION

The ALJ found that Respondents Garcia Forest and Samuel Garcia violated the SCA and CWHSSA by failing to pay the minimum wage and fringe benefits required under the contract, including holiday pay; by failing to maintain accurate pay and time records; and by failing to pay the proper overtime rate. D. & O. at 7. Respondents do not challenge these findings on appeal. After a review of the evidence, the ALJ found that Garcia Forest and Mr. Garcia are responsible parties and that they have not demonstrated unusual circumstances that could relieve them from the sanction of 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 unless the Secretary of Labor recommends otherwise because of "unusual circumstances."[7] 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.[8] 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."[9] 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."[10]

Although not defined in the Act, the Administrator has promulgated a regulatory standard for determining the existence of "unusual circumstances" and whether or not "unusual circumstances" exist according to a three-element test.[11] To prove "unusual circumstances" under the regulations, the violating contractor must (1) establish that the SCA violations were not willful, deliberate, aggravated, or the result of culpable conduct; (2) meet the listed prerequisites of a good compliance history, cooperation in the investigation, repayment of the moneys due,

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7 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).

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

9 *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)).

10 *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)).

11 29 C.F.R. § 4.188(b).

and sufficient assurances of future compliance; and (3) address other factors such as previous violations of the SCA.[12]

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.[13]

Our review of the evidentiary record fully supports the ALJ's conclusion that Garcia failed to meet his evidentiary burden of showing unusual circumstances that would relieve his company from debarment. The ALJ found that Garcia's foreman misled the investigators during the initial investigation and that the investigators encountered obviously falsified hourly work records. The ALJ also noted that the company had recently been investigated and warned of the necessity for compliance. The ALJ also found that Garcia knew that the contract provided for hourly pay and chose to switch the crew to a production-based pay system.[14]

CONCLUSION

The evidence fully supports the ALJ's findings that Garcia Forest and Garcia violated the SCA. Accordingly, we **AFFIRM** the ALJ's order that Garcia Forest Service, LLC and Samuel Garcia shall not be awarded United States government contracts for three years. In addition, the Secretary shall forward the Respondents' names to the Comptroller General for debarment.[15]

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[12] 29 C.F.R. § 4.188(b)(1)(i-iii).

[13] *See* 29 C.F.R. § 4.188(b)(3)(i), (ii); *Hugo Reforestation*, ARB No. 99-003, slip op. at 12-13.

[14] We note that while the SCA does not require that the workers be paid an hourly rate, it does require that the calculation of the final rate of pay include the minimum fringe benefits paid separately and the CWHSSA requires the payment of one-half time the workers' base rate of pay for all hours worked over 40 in a workweek.

[15] 41 U.S.C.A. § 6706(b).

Judge Corchado, concurring:

I concur in the decision. I only write separately to say that it seems clear that Garcia Forest knew it was not paying its workers the proper wage and, therefore, cannot establish that its violations were not willful, aggravated or culpable. On that basis alone I can affirm the ALJ's rejection of the Garcia Forest's claim of "unusual circumstances" to escape debarment.

LUIS A. CORCHADO
Administrative Appeals Judge