U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

HOUSTON BUILDING SERVICES, INC., **ARB CASE NO. 95-041A**

and **ALJ CASE NO. 91-SCA-30**

JASON YOO,
Individually and Jointly **DATE: August 21, 1996**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

This matter arises under and is before this Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C. § 351 *et seq*. (1988) and the implementing regulations at 29 C.F.R. Parts 4, 6 and 8. The case is pending pursuant to the Petition for Review (PR) of Jason Yoo, an individual (Yoo) and the corporate entity which he serves as president, Houston Building Service, Inc. (HBS)(collectively, Petitioners), seeking review of the April 27, 1995 Decision and Order (D. and O.), issued by the Administrative Law Judge (ALJ).[2/] The ALJ held that Petitioners were jointly and severally liable for a total of $19,061.71 in SCA fringe benefit underpayments to sixteen (16) individual service employees. D. and O. at 14. The ALJ further recommended that Petitioners be placed on the ineligible or debarred bidders list as a result of the "serious violation of the Act" which he found regarding Petitioners' failure to make required severance payments to the above referenced employees. *Id.* On June 3, 1995, Petitioners filed a petition for review. On August 4, 1995, the Wage and

---

[1/] On April 17, 1996 a Secretary's Order was signed, redelegating jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

[2/] The case was assigned to ALJ Charles W. Campbell who conducted the hearing in Austin, Texas, in January of 1993. Judge Campbell retired before issuing the decision and the case was transferred to Judge Daniel J. Rocketenetz.

Hour Administrator filed a Statement in Opposition to Petition For Review of Decision and Order of Administrative Law Judge (AS). Finally, on September 9, 1995, Petitioners filed a reply to the Administrator's Statement (RS). For the reasons stated below, the D. and O. is affirmed.

BACKGROUND

A. *General*

Petitioner HBS is a janitorial service provider. HBS was awarded the contract at issue (No. GS-07-P-87-HT-C-0179) by the General Services Administration in November of 1987. D. and O. at 2. The contract called for HBS to provide "janitorial and related services" at three U.S. government buildings in Austin, Texas during the period from December 1, 1987 through November 30, 1988. *Id*. The contract included the required wage determination (No. 80-288)(Rev. 9), which mandated that certain specified wages and fringe benefits be paid to those workers who performed the contract. Subsequently an investigation of the contract performance by the Wage and Hour Division (Wage and Hour) revealed $926.35 in minimum wage and fringe benefit violations (the contract's total monthly value was found to be $24,391.81). D. and O. at 3. That amount has since been paid and the substance of those violations is not the central issue in dispute as the case now stands. The matter in issue, as discussed below, has to do with Petitioners' use of their work force and, in particular, the nature of their obligation, as a successor employer, to provide severance pay benefits to certain of their employees upon their termination from work under this SCA contract.

B. *Petitioners' Status As A Successor Contractor and Their Utilization of Employees Employed By Their Predecessor*

As Petitioners commenced performance of this contract, they made a knowing decision to, at least temporarily, continue with the workforce of their predecessor[3/] (Housekeeper Maintenance Service and Supply (Housekeeper)). Moreover, it is undisputed that Petitioners' GSA contract contained, within Section 6 as incorporated by the Wage Determination, a severance pay provision. *See*, GX-1, D. and O. at 7, 8.

Petitioners, while awaiting required security clearances for the staff it intended to use to perform the contract, hired the staff of the predecessor contractor to begin the work. The facts reveal that despite the contractual assurances to provide severance pay, in December 1987,

---

[3/] In fact, five previous janitorial contractors had performed this GSA contract between 1980 and 1987 and each had maintained a collective bargaining relationship with the Industrial, Technical and Professional Employees Division of the AFL-CIO and their unit members. Each successive employer had hired the old employees leading the United States Court of Appeals for the Fifth Circuit to conclude that the "new job was merely a continuation of the old." *N.L.R.B. v. Houston Bldg. Service, Inc.*, 936 F.2d 178-179, (5th Cir. 1991).

January, 1988 and February 1988, HBS discharged nineteen former Housekeeper's employees without severance pay and replaced them with HBS employees after they obtained their security clearances. Transcript (T.) at 16, GX28-32, 39-55 and 97, D. and O. at 4. In so doing, the ALJ held that Petitioners activated the contract's express provisions on severance allowances. *See*, D. and O. at 3.

DISCUSSION

The SCA, at Section 4(c) provides, in pertinent part, as follows:

> (c) Predecessor contracts; employees' wage and fringe benefits
>
> No contractor or subcontractor under a contract which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract; . . .

41 U.S.C. § 353(c).

Section 4(c) imposes on successor contracts an obligatory wage and fringe benefit floor in the event that the predecessor contract has specified collectively bargained rates. Wages paid and benefits furnished under a successor contract must be greater than or equal to those provided under the predecessor contract. *In the Matter of Applicability of Wage Rates Collectively Bargained by United Healthserv, and Laborers International Union of North America, AFL-CIO, To Employment of Service Employees Under a Contract for Hospital Aseptic Management Services At [Various Federal Air Force Bases],* Case Nos. 89-CBV-1 *et al.*, Dec. of the Dep. Sec., Feb. 4, 1991. The ALJ found, and we concur, that HBS was a successor contractor within the meaning of Section 4(c) and its obligation to pay the disputed severance allowance was clear from the face of the contract.[4/] There is no question but that HBS is a "contractor," that it succeeded "a contract subject to [the SCA] . . . under which substantially the same services are furnished" and that, as a result, it was obligated to pay to its employees, no "less than the wages and fringe benefits . . . . to which such service employees would have been entitled if they were employed under the predecessor contract . . . ." Though Mr. Yoo did not directly negotiate the

---

[4/] Upon review, we also dismiss as without merit, Petitioner Yoo's argument that he was not the party responsible for the violations of the SCA. The ALJ's findings that Mr. Yoo signed the contract, and was responsible for the day-to-day operation of HBS, including the assignment of jobs and responsibilities under the contract (D. and O. at 2, 3 and 7), are supported by a preponderance of the record evidence and are thus dispositive. 29 C.F.R. § 4.187(e)(2) and (3).

disputed severance allowance, he accepted it as an express term of his contract and his undeniable status as a successor contractor binds him, on the facts of this record, to stand in the shoes of his predecessor.

The Fifth Circuit's decision in the separate case against HBS, 936 F.2d 178, is instructive in this regard. That case involved injunctive action to enforce a bargaining order under the National Labor Relations Act (NLRA), 29 U.S.C.A. § 151 *et seq*. In affirming a ruling issued by the National Labor Relations Board (NLRB), the court found that HBS was Housekeeper's successor in that there was a "substantial continuity between the enterprises." 936 F.2d at 180. We concur with the Fifth Circuit that the determination as to whether one is a "successor" ('employer' under the NLRA or 'contractor' under the SCA) is primarily factual in nature and is based upon the totality of the circumstances of a given situation.[5/] The court went on to hold that "[o]f all these factors, one of the most significant is the overlap in workforces between the two entities." *Id*.

Among the Fifth Circuit's relevant additional findings were that: a) virtually the entire HBS workforce was hired from the ranks of its predecessor with whom the union had a collective bargaining agreement which was to run into 1989; b) at no time did HBS comply with the old collective bargaining agreement; and c) by this failure, HBS engaged in a prohibited tactic, *i.e.* the unilateral change of collectively bargained working conditions. Thus, the court found that HBS became a successor from the time a "'substantial and representative complement of the new employer's workforce came onto the job." *Id*. Finally, in direct response to Petitioners' argument in this matter regarding the obligation of a successor, the court found its contentions regarding the circumstances under which it was "forced" to hire predecessor employees to be "irrelevant" and its problems regarding the union and the collective bargaining agreement to be, in large part, of HBS' "own making." *Id.*

As for the severance allowance, it is undisputed that it is a bona fide fringe benefit under the SCA, *see* 41 U.S.C. § 353(c) and 29 C.F.R. § 4.52, and HBS does not deny its obligation to

---

[5/] *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1978) (citing *N.L.R.B. v. Burns Int'l Security Servs., Inc.* 406 U.S. 272 (1972) where the following factors were listed: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

The Fifth Circuit found in the companion case that the predecessor had recognized the union and signed a collective bargaining agreement that was to run into 1989. However, when HBS was awarded the GSA contract in 1987, it ignored the terms of the bargaining agreement. Therefore, the Fifth Circuit held that HBS violated its obligation to bargain under that agreement. Within approximately 10 days of starting work on the contract, HBS terminated eleven of the holdover employees followed, over the next few weeks, by several more, and gradually replaced them with new employees who had passed security clearance procedures.

the former employees of its predecessor contractor. HBS does, however, dispute the method of calculating the benefit, *i.e.* based upon time spent on the job with the predecessor. Petitioners' objection in this regard is without foundation. The provisions of Section 4(c) are self-executing.[6/] *See*, 29 C.F.R. § 4.163(b). By accepting its predecessor's employees, HBS automatically assented to those employees' collectively bargained benefits and their expressly calculated fringe (severance) benefit. *See,* the severance provision of Petitioners' GSA contract at section 6 (GX-1).

As the severance allowance itself and its method of calculation were properly determined by the ALJ to be the subject of express contractual provisions, the salient question becomes Petitioners' contention that the ALJ erred in his conclusion that there were no unusual circumstances on this factual record which were sufficient to relieve Petitioners from the debarment sanction. The ALJ's analysis, while sound, failed to make specific reference to the applicable regulation at 29 C.F.R. § 4.188(b)(3) which sets forth the particular criteria, by hierarchical phases, which govern the debarment analysis. 29 C.F.R. § 4.188(b)(3)(i) lists certain aggravating conditions, the presence of which prohibit a finding that debarment relief is warranted. The factor most at issue in this case has to do with contract violations where there has been culpable neglect by a contractor to ascertain whether its practices are in violation, or culpable disregard of whether they were in violation or not. The findings of the ALJ are, we conclude, dispositive on this point. He found that:

> [r]espondents' voluntary hiring of the predecessor employees, *and its failure to consider the severance allowance in the contract's wage determination* were circumstances completely under the Respondent's control.

D. and O. at 9-10 (emphasis supplied). The ALJ further found that:

> [t]he problems concerning the acquisition of security clearances [for their own employees] was [sic] *not* beyond Respondents' control. Knowledge of the responsibilities required by the contract is the duty of the Respondents.

D. and O. at 10 (emphasis in the original)(citing testimony of the GSA contracting officer that no HBS employees even made an attempt to obtain security clearances until December 1, 1987, the day the contract commenced). *Id.,* citing T. 63-64.

[6/] "An SCA successor contractor may be under no obligation to hire employees based on its predecessor's employees' seniority but once those employees were hired . . . without a break in service, the employees were due the required SCA fringe benefits from their first day of service regardless of whether [the employer] considered them probationary or not." *Unified Services, Inc. and Jerry Davis, Jr.*, BSCA Case No. 92-36 (Jan. 28, 1994), slip op. at 6 (citing *Industrial Maintenance Service Inc.*, BSCA Case No. 92-22 (Apr. 5, 1993).

A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act. 29 C.F.R. § 4.188(b)(4). HBS' failure to comply with the severance obligation of its contract was either culpably negligent or exhibited a culpable disregard of its contracted for responsibilities. Thus, relief cannot be in order. 29 C.F.R. § 4.188(b)(3)(i).

Petitioners' other contentions are equally without merit. The fact that the ALJ who wrote the decision in this case was not the same ALJ who heard the case, is overcome in this instance by the fact that the case was not and, indeed, need not have been decided on the basis of the presiding judge's credibility determinations. As the Administrator points out, "the facts upon which the ALJ relied for debarment purposes were never at issue before the ALJ. Since Yoo admitted that he did not make severance payments, the determination that failure to make severance payments constitutes violation of the Act was a pure legal issue." AS at 21.

Accordingly, for all of the foregoing reasons, the D. and O. is affirmed. The Petition for Review is denied and Petitioners names shall be forwarded to the Comptroller General for debarment in accordance with 29 C.F.R. § 6.21(a).

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member