U.S. Department of Labor

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

In the Matter of

ALEXIS HERMAN
SECRETARY OF LABOR,

COMPLAINANT,

v.

DONALD M. GLAUDE, d/b/a
D'S NATIONWIDE INDUSTRIAL
SERVICES,

RESPONDENT.

ARB CASE NO. 98-081

ALJ CASE NO. 95-SCA-38

DATE: November 24, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Steven J. Mandel, Esq., William J. Stone, Esq., Barry H. Joyner, Esq.
U.S. Department of Labor, *Washington, D.C.*

For the Respondent:
Donald M. Glaude,
Pro se, Fremont, California

FINAL DECISION AND ORDER

This matter is before the Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (SCA) and the regulations at 29 C.F.R. Part 8. The Department of Labor's Wage and Hour Division filed a complaint under the SCA against Donald M. Glaude (Glaude), d/b/a D's Nationwide Industrial Services (Nationwide) on June 5, 1995, alleging that Glaude and Nationwide violated the SCA during the performance of a service contract with the United States Postal Service (Postal Service). Following a hearing on the merits, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) holding that Glaude violated the SCA by failing to pay no-less-than the SCA prevailing wage to five drivers performing work on the Postal Service contract. Glaude and Nationwide appealed the decision to this Board. For the following reasons we affirm the D. and O.

BACKGROUND

The relevant facts are uncontested. Glaude was the controlling partner and business manager of Nationwide. D. and O. at 2. In 1989 Glaude and Nationwide entered into a $60,000 per year contract to transport mail for the Postal Service (Contract No. 95034). Government's Exhibit (GX) 17, 18. The contract incorporated the requirements of the Service Contract Act and SCA Wage Determination 77-194 (Rev. 14). The wage determination set forth the minimum prevailing wage rate to be paid to drivers performing services under the contract: $11.52 per hour, plus $.90 per hour for fringe benefits and $.70 per hour for "other" remuneration. GX 18, D. and O. at 2.

Nationwide employed several individuals to work as truck drivers hauling mail under the contract, including James Casares (Casares), Salvador Covarrubias (Covarrubias), Orlando Flintroy (Flintroy), Royal Glaude, Victor McCoy (McCoy), and Alan Yoshikawa (Yoshikawa) . GX 6-8, 10, 13. None of these drivers was paid on an hourly basis but instead received salaries ranging from $850 per month to $1500 per month. GX 6, 7, 8, 10; T. at 100-101, 116, 118, 131, 136-137.

In July 1990, the Wage and Hour Division's San Francisco Area Office received two letters alleging that Nationwide was not paying its drivers the requisite SCA minimum wage on its Postal Service contract. GX 1, 2. Thereafter, Wage and Hour Division investigator George Wedemeyer (Wedemeyer) initiated an investigation. T. at 22-24, D. and O. at 2. He interviewed Glaude and the drivers, and examined records from both the Postal Service and Nationwide. D. and O. at 2-3. Glaude told Wedemeyer that Casares, Covarrubias and Royal Glaude were partners in Nationwide, each with a one percent interest in the business. GX 11, T. 25-26.

In April 1991, the Wage and Hour Division informed Glaude that he owed $27,471.92 to six of his employees,[1] and requested that he submit that amount to the Department of Labor. On July 24, 1991, Glaude entered into an oral agreement with the Wage and Hour Division to pay the back wages in monthly installments to the Department. D. and O. at 3. Glaude made one payment, however that check "bounced" and was returned to Glaude on October 2, 1991. *Id.* As a result, the Wage and Hour Division requested both the Postal Service and the United States Navy (with which Nationwide had another service contract) to withhold payments still due to

---

[1] The back wages asserted to be due each of the employees was as follows:

Casares:	$17,342.92
Covarrubias:	3,101.41
Flintroy:	4,288.86
Royal Glaude:	1,182.92
Yoshikawa:	1,492.21
McCoy:	63.60.

GX 21-25, D. and O. at 6.

Nationwide under their respective contracts; both agencies agreed to withhold the funds. GX 4, 5; T. 45. Thereafter, on June 5, 1995, the Wage and Hour Division brought this action against Glaude and Nationwide to collect the unpaid wages and to debar Glaude and Nationwide from holding federal contracts.

At the hearing, Casares and Covarrubias testified that they had signed a paper stating that they had a one percent interest in Nationwide, but they never received any profits from the company and never carried out any managerial or administrative duties. GX 6, 7, T. 101, 109, 112, 116-17. Flintroy and Yoshikawa testified that they never had any partnership interest in Nationwide and did not indicate that they engaged in managerial or administrative activities. T. 131-136, 137-144. Neither McCoy nor Royal Glaude testified.

THE ALJ'S DECISION

The ALJ held that the contract between Nationwide and the Postal Service was subject to the requirements of the SCA, and that five of the six drivers were "service employees" under 41 U.S.C. §357(b). D. and O. at 5-6. The ALJ concluded that the sixth employee considered by the Wage and Hour Division, McCoy, "was the Manager of Trucking and at least some of the time a 20% . . . partner, and only an occasional driver," and therefore was not a service employee subject to the SCA. *Id.* at 6.[2] [3]

The ALJ concluded that Nationwide and Glaude were liable for the payment of back wages to the five drivers in the amounts calculated by the Wage and Hour Division. *Id.* at 6-7. The ALJ therefore ordered the Postal Service and the Navy to release the withheld funds to the Wage and Hour Division, to be paid to the drivers. Because the withheld funds were insufficient to cover the back wages owed to the drivers, the ALJ also authorized the Wage and Hour Division to collect the remaining $13,347.59 from Glaude and Nationwide. *Id.* at 7.

The ALJ found that there were no circumstances weighing against debarment, and debarred Glaude and Nationwide from contracting with the government for three years. *Id.*

---

[2] The ALJ does not identify explicitly the legal basis for his conclusion that McCoy was not covered. We note, however, that a worker employed in an bona fide executive or administrative capacity would be exempt from SCA coverage so long as he or she devotes no more than 20% of the work week to non-exempt tasks. *See* 29 U.S.C. 357(b) ("service employee" does not include persons falling within the executive, administrative or professional definitions of 29 C.F.R. Part 541); 29 C.F.R. §541.1(e) (definition of exempt executive employee); 29 C.F.R. §541.2(d)(definition of exempt administrative employee). In finding that McCoy was exempt from SCA coverage, it appears that the ALJ relied upon the fact that McCoy spent very little time driving.

[3] The ALJ also held that the Wage and Hour Division's complaint against Nationwide was not barred by the statute of limitations or laches. *Id.* at 6.

ISSUES

1. Whether the drivers employed by Glaude and Nationwide were "service employees" within the meaning of the SCA and, if so, whether Nationwide violated the SCA by failing to pay the drivers the specified minimum wage.

2. Whether Glaude and Nationwide should be debarred from contracting with the federal government for a period of three years.

3. Whether the ALJ, the Wage and Hour Division, or the Department of Labor abused their authority or committed any acts of bias against Glaude and Nationwide.

STANDARD OF REVIEW

The Board has jurisdiction to hear and decide appeals from decisions of Administrative Law Judges regarding questions of law and fact arising under the SCA. 29 C.F.R. Part 8. The regulations at Part 8 provide that "the ARB shall 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); *see, e.g., Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999).

Pursuant to the Administrative Procedure Act, in reviewing the ALJ's conclusions of law the Board (as the designee of the Secretary) acts with "all the powers [the Secretary] would have in making the initial decision. . . ." 5 U.S.C. §§557(b). Accordingly, the Board reviews the ALJ's conclusions of law *de novo. See Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) and *Roadway, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *see generally Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

DISCUSSION

I. Whether the Five Nationwide Drivers were "Service Employees"

Glaude argues that Nationwide's drivers who worked on Contract No. 95034 were partners in Nationwide and therefore were not service employees within the meaning of the SCA. We need not decide whether any of the five drivers were, in fact, partners in Nationwide, because even if they were, their status would not remove them from coverage under the SCA. The SCA defines "service employee" as

> any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title,[4] whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); *and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.*

41 U.S.C. §357(b) (emphasis added). The regulations governing the SCA provide:

> *Any person*, [except those employed in a genuine executive, administrative or professional capacity] . . . *who performs work called for by a contract or that portion of a contract subject to the Act is, per se, a service employee.* Thus, for example, a person's status as an "owner-operator" or an "independent contractor" is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.

29 C.F.R. §4.155 (emphasis added). Thus, it is clear that it is an employee's work duties, not his or her title or status in the business, that determine whether he or she is a service employee. Here, the five Nationwide employees were indisputably working on a contract entered into by the United States which provided services delivery of U.S. mail in the United States. Their asserted status as partners in Nationwide is irrelevant to the issue of coverage under the SCA.

The Secretary previously has addressed and rejected a similar claim that service workers were partners and therefore exempt from the SCA in *In re Ayres*, Case No. 87-SCA-83, Sec'y Final Dec. and Ord. (June 26, 1991). In that case the respondent argued that workers hired to perform on a contract with the U.S. Forest Service were partners and therefore not service employees within the meaning of the SCA. The ALJ held that the under the SCA, the alleged partnership "has no bearing on a contractor's duty to comply with the Act." *In re Ayers,* slip op. at 6. The Secretary affirmed, observing that "Respondent's insistence on referring to his workers as 'partners,' either as a genuine belief or as a scheme to evade an employer's obligations, cannot alter the disposition of this case." *Id.* at 6-7. The principle in *Ayers* is applicable to this case: the

---

[4] The exemptions under 41 U.S.C. §356 are inapplicable in this case. They include any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works; any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. §35 *et seq.*); any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect; any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 (47 U.S.C. §151 *et seq.*); any contract for public utility services, including electric light and power, water, steam, and gas; any employment contract providing for direct services to a Federal agency by an individual or individuals; and any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

asserted status of the Nationwide drivers as "partners" does not alter the fact that they were "service employees" within the meaning of the SCA.

The only exemption from SCA coverage for "persons employed in a bona fide executive, administrative, or professional capacity" is not applicable to the five Nationwide drivers. Part 541 of Title 29 provides extensive guidance on the meaning of the phrase "employed in a bona fide executive, administrative, or professional capacity," and includes the requirement that an employee must devote at least 80 percent of his or her hours of work to executive, administrative, or managerial activities. 29 C.F.R. §§541.1(e), 541.2(d), 541.3(d). Glaude presented no evidence that the drivers in question who worked hauling, loading, and unloading mail spent any of their time working in an executive, administrative or professional capacity. This exemption therefore is inapplicable.

For these reasons we affirm the ALJ's holding that the five Nationwide drivers are "service employees" within the meaning of the SCA.

II. Driver Back Wages

We also affirm the ALJ's conclusion that the accrued payments due on Nationwide's contracts with the Postal Service and the Navy, in the amounts of $3,099.50 and $10,961.23, respectively, should be withheld for payment of the back wages owed. D. and O. at 6. When an employer fails to pay at least the minimum compensation due under the SCA, "[s]o much of the accrued payment due on the contract or other contracts between the same contractor and the Federal Government may be withheld as is necessary to pay such employees." 41 U.S.C. §352(a). Such withholding may occur prior to the commencement of any administrative proceeding by the Wage and Hour Division. 29 C.F.R. §4.187(a).

We also affirm the ALJ's holding that Glaude and Nationwide are liable for the remaining $13,347.59 (the total back wages minus the withheld amounts). As the business manager who supervised the performance of the contract and directed the pay practices of the company, Glaude is liable for the back wages individually and jointly with the company. 29 C.F.R. §4.187(e)(1). Because Glaude did not maintain records demonstrating the actual number of hours worked by the underpaid drivers, the Postal Service's records were sufficient proof of hours worked for backwage reconstruction purposes. *See, e.g., Ray v. Department of Labor*, 26 WH Cases 1244, 1246 (C.D. Ill. 1984); *In re Grover*, 22 WH Cases 1302, 1306 (1976).

III. Debarment

We affirm the ALJ's order debarring Glaude and Nationwide from holding government contracts for a period of three years. The SCA provides that, unless the Secretary recommends otherwise because of "unusual circumstances," a violating contractor shall be debarred from being awarded federal contracts for a period of three years. 41 U.S.C. §354(a). Contractors who seek to escape the debarment provision of Section 5(a) of the Act face a daunting task in successfully establishing the unusual circumstances defense. *See, e.g., Nationwide Building Maintenance, Inc.*, BSCA Case No. 92-04 (Oct. 30, 1992); *A to Z Maintenance Corp.*, 710 F. Supp. 853, 856 (D. D.C. 1989). 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, Wage and Hour Div., U.S.D.O.L.*, 968 F.2d 1412, 1418 (1st Cir. 1992).

The term "unusual circumstances" is not defined in the SCA, but interpretive regulations at 29 C.F.R. §4.188(b) set forth a three-part test for determining when such circumstances exist and relief from debarment is appropriate. *See. e.g., Island Movers, Inc.,* BSCA Case No. 92-29 (Oct. 30, 1992). The test has also been applied by the courts. *See, e.g., Vigilantes*, 968 F.2d at 1418; *A to Z Maintenance Corp.,* 710 F.Supp. at 855. Under part one of the test:

> [W]here 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, [or] culpable disregard of whether they were in violation or not, . . . relief from the debarment sanction cannot be in order.

29 C.F.R. §4.188(b)(3)(i). In other words, there must be not be proof of willful or culpable conduct, which would preclude relief from debarment. Part two of the test lists other prerequisites to relief, including a good compliance history, cooperation in the investigation, repayment of money due and assurances of future compliance. 29 C.F.R. §4.188(b)(3)(ii). Part three of the test lists additional factors which are to be weighed and considered, but only if the mandatory conditions set out in parts one and two have been satisfied. These include:

> [W]hether 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.

29 C.F.R. §4.188(b)(3)(ii).

It is clear that Glaude and Nationwide failed to meet the challenging test for avoiding debarment under the SCA. First, as the SCA interpretive regulations make clear, a federal contractor is under an "affirmative obligation to ensure that its pay practices are in compliance with the SCA, and cannot itself resolve questions which arise, but must seek advice from the Department of Labor." 29 C.F.R. 4.188(b)(4). Glaude and Nationwide did not seek such advice in this instance, and in fact continued to adhere to a position that is flatly contrary to the SCA and its regulations.

Glaude and Nationwide also failed to satisfy part two of the test. Neither Glaude nor Nationwide have paid the back wages due to the drivers, nor have they given any assurance that they will do so in the future. "A contractor seeking an 'unusual circumstances' exemption must run a narrow gauntlet." *A to Z Maintenance Corp., 710 F. Supp. at 855.* Because Respondents have failed to establish unusual circumstances justifying relief from debarment, we affirm the ALJ's finding that Glaude and Nationwide should be debarred.

IV. Other Claims

In their brief before the Board, Glaude and Nationwide allege various acts of wrongdoing on the part of the ALJ,[5] the Wage and Hour Division,[6] and the Department of Labor in general.[7] None of these allegations merit our attention. Suffice it to say that the record in this case fails to support a finding of any improper action on the part of the Wage and Hour Division, the ALJ, or the Department of Labor.

CONCLUSION

We affirm the ALJ's D. and O. authorizing the Wage and Hour Division to collect $13,347.59 from Glaude and/or Nationwide and authorizing the release of funds withheld by the Postal Service and U.S. Navy to the Department for distribution to the five underpaid employees. Those employees shall be paid the following amounts from the funds obtained:

Casares	$17,342.92
Covarrubias	3,101.41
Flintroy	4,288.86
Royal Glaude	1,182.92
Yoshikawa	1,492.21.

---

[5] Glaude and Nationwide allege that the ALJ failed to disclose "the wrong doing of the Investigating Agent, his supervisors superiors and the U.S. Department of Labor Administration Board"(sic); "refused to give a clarification of which statute Respondents were being charged with;" exhibited bias by not requiring the Wage and Hour Division to answer interrogatories regarding the cost of the investigation and whether the Wage and Hour Division granted "Respondents its rights as required by law" (sic); constantly interrupted and cross examined Glaude during his opening statement at the hearing; and did not take action against the Department of Labor for refusing to call Veva Graves, Wedemeyer's supervisor, as a witness at the hearing.

[6] Glaude and Nationwide allege that Wedemeyer bribed witnesses; lied under oath about the manner in which the investigation was conducted; and failed to produce a written memorialization of the verbal agreement by which Glaude would be allowed to make installment payments. They also assert that no complaints were filed by the partners of Nationwide.

[7] Glaude and Nationwide allege the Department of Labor lied to members of Congress; caused Nationwide to be "non- responsive" on other contracts; did not intend to release the withheld funds to the drivers; refused to answer interrogatories regarding the cost of the investigation and whether the Wage and Hour Division gave "Respondents its rights as required by law" (sic); "assigned this case to the Washington D.C. office instead of the San Francisco branch office . . . to financially frustrate Respondents"; refused to grant Glaude an immediate hearing; and returned the bounced check submitted by Glaude only because it was improperly addressed.

Any sum not paid to an employee because of inability to do so within three years shall be paid to the Treasury of the United States as miscellaneous receipts. 29 U.S.C. §354(b).

We also affirm the ALJ's order that Glaude, Nationwide, and any firm, partnership, or association in which Glaude has a substantial interest shall be ineligible to receive any Federal contract or subcontract for a period of three years. Within 90 days of this Decision, the Administrator is directed to forward Respondents' names to the Comptroller General for debarment. 29 U.S.C. §354(a); *see also* 29 C.F.R. §6.21(a).

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member