



In the Matter of:

**ADMINISTRATOR, WAGE & HOUR
DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

ARB CASE NO. 12-046

ALJ CASE NO. 2010-SCA-023

PROSECUTING PARTY,

DATE: January 15, 2014

v.

**CHAE S. McFARLAND d/b/a/
SK GATEWAY CLEANERS, and
CHAE S. McFARLAND, jointly
and individually**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondents:

Chae S. McFarland, *pro se*, El Paso, Texas

For the Administrator, Wage and Hour Division:

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Jonathan
T. Rees, Esq.; Erin M. Mohan, Esq.; U.S. Department of Labor, Washington, District
of Columbia**

**BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce,
Administrative Appeals Judge; and Lisa Wilson Edwards, *Administrative Appeals Judge***

FINAL DECISION AND ORDER

This case arises from a complaint the Administrator of the Wage and Hour Division (WHD) of the U.S. Department of Labor (Administrator) filed against SK Gateway Cleaners (Gateway) and Chae S. McFarland, alleging that Respondents, individually and collectively, violated the McNamara-O'Hara Service Contract Act (SCA or Act) and its implementing

regulations.¹ A Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Gateway should pay a total of \$28,626.04 in back wages and be debarred from entering into contracts or subcontracts with the United States for three years. Gateway timely filed a Petition for Review with the Administrative Review Board (ARB or Board). For the following reasons, we summarily affirm the ALJ's decision.

BACKGROUND

In March 2006, Gateway entered into an SCA-governed contract² with the Army and Air Force Exchange Service (AAFES) to provide laundry, dry cleaning, and alterations for military personnel stationed at Biggs Army Air Field and McGregor Range in El Paso, Texas. Under the contract, which was renewed through April 2010, Gateway established pick-up/drop-off concessions at the two military bases. The contract contained a wage determination, effective May 29, 2007, which required Gateway to pay counter attendants and pressers a minimum wage of \$7.03 an hour, and washers a minimum of \$7.54 an hour, plus fringe benefits worth \$3.16 an hour.³

The WHD Administrator filed a complaint with the Department of Labor's Office of Administrative Law Judges (OALJ) on August 26, 2010, following a two-year investigation of Gateway's employment records. The Administrator alleged that Gateway had failed to pay the required wages or fringe benefits from February 2007 to February 2009 to four employees, and neglected to maintain and make available for inspection the employment records required under the SCA and the contract.

An ALJ held a hearing on September 1, 2011, at which Gateway's owner, Chae S. McFarland; Gateway's three employees, Robert Holguin, Anna Hernandez, and Nancy Gutierrez; and WHD investigator Gutberto Martinez testified. The ALJ noted that while McFarland appeared to have been candid during much of her testimony, she "also appeared to have concluded that she should not be subject to the Act and therefore was justified in failing to comply with it or frustrating its enforcement." The ALJ concluded that McFarland's testimony alone was "sufficient to establish that she failed to pay her employees the designated minimum

¹ 41 U.S.C.A. § 6701 *et seq.* (Thomson/Reuters 2011); 29 C.F.R. Parts 4 and 6 (2013).

² The SCA generally requires that every contract in excess of \$2,500.00 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. §§ 6701(a)(1)-(3), 6703(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, whom the Secretary of Labor has designated to administer the Act.

³ Complainant's Exhibit (CX) 3.

wages, provide them the requisite fringe benefits, or even properly maintain hour-and-wage records.”⁴

The ALJ also found that Gateway and McFarland were both subject to debarment under section 5(a) which provides that 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.”⁵ The ALJ noted that “debarment of contractors 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.”⁶

Finally, the ALJ found that the “absence of anything even approaching comprehensive and accurate wage-and-hour records makes determining the quantum of liability problematic.” The ALJ noted that the “incomplete assortment of records” McFarland produced was not sufficient to establish monetary damages even when supplemented by post-hearing records, and the employee witnesses “were likewise limited in their ability to recall specific details” and had “independent motives to be paid without full documentation in pay and tax records.”⁷

The ALJ concluded that the “testimony and records of Gutberto Martinez [were] the most reliable source of information upon which to base a finding” of damages and adopted his calculations of McFarland’s liability to each employee.⁸ He awarded Hognin \$18,556.08; Hernandez, \$1,996.99; Gutierrez, \$6,735.90, and Chong Welch, an employee who did not testify, \$1,337.07.⁹

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide this case under 29 C.F.R. § 8.1(b) (2013).¹⁰ 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), (d). The ARB’s authority to modify or set aside an ALJ’s findings of fact is

⁴ Decision and Order (D. & O.) at 8.

⁵ 41 U.S.C.A. § 670(a); 29 C.F.R. § 4.188(a), (b).

⁶ D. & O. at 2. 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).

⁷ D. & O. at 8.

⁸ *Id.* at 9, *see* CX 5.

⁹ CX 4.

¹⁰ *See also* Secretary of Labor Order 02-2012, 77 Fed. Reg. 69378 (Nov. 16, 2012).

limited to those instances in which a preponderance of the evidence does not support the ALJ's findings of fact. *Id.* at § 8.9(b).¹¹ The Board's review of an ALJ's conclusions of law is de novo.¹²

DISCUSSION

The issues on appeal are whether a preponderance of the evidence supports the amount of monetary damages the ALJ awarded to the four Gateway employees and the ALJ's finding of debarment.¹³ In summarily affirming the ALJ's decision, we limit our comments to the most critical points.

The back pay awards

The SCA and its implementing regulations require payment of prevailing wages, fringe benefits, and holiday pay on federal contracts subject to the Act.¹⁴ In addition, the SCA regulations require contractors to maintain accurate payroll records.¹⁵

When the employer's records are "inaccurate or inadequate" and the employees have no adequate substitute, the evidentiary principles delineated in *Anderson v. Mt. Clemens Pottery Co.* apply.¹⁶ The U.S. Supreme Court held that the WHD Administrator, as the party that initiated and brought the enforcement case, has the initial burden of proof to establish that the employees performed work for which they were improperly compensated. If the Administrator produces sufficient evidence to show the amount and extent of that work as "a matter of just and reasonable inference," the burden then shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such

¹¹ See *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999).

¹² *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).

¹³ While McFarland did not appeal the ALJ's finding of debarment, she is a pro se complainant and stated in her brief that she was not fluent in English. In the interests of justice, we will address the debarment issue. *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 10 n.4 (ARB Dec. 31, 2007).

¹⁴ 41 U.S.C.A. § 351; 29 C.F.R. §§ 4.172, 4.174.

¹⁵ 29 C.F.R. §§ 4.6(g), 4.185.

¹⁶ *Cody-Zeigler, Inc. v. Admin'r, Wage and Hour Div.*, ARB Nos. 01-014, -015; ALJ No. 1997-DBA-017, slip op. at 7-8 (ARB Dec. 19, 2003).

evidence, the court may then award damages to the employee, even though the result be only approximate.”¹⁷

On appeal, McFarland argues that her employees were not entitled to SCA wages because they worked only part-time and only infrequently at the pick-up/drop-off concessions at the bases under the contract with the Army. She also contends that Investigator Martinez “fabricated” the amounts of back wages due to the employees.¹⁸

In effect, McFarland is arguing that her employees are not covered under the SCA. The relevant inquiry is whether the persons working on the contract come within the SCA definition of “service employee.” The Act defines service employee as “any person engaged in the performance of a contract entered into by the United States [with certain exemptions not relevant here] . . . , the principal purpose of which is to furnish services in the United States; and shall include all such persons”¹⁹ Thus, the plain language of the Act includes within its coverage all persons working in the performance of an SCA-covered contract, with certain limited exceptions not applicable here.

Our review of the evidentiary record demonstrates that a preponderance of the evidence supports the ALJ’s finding that the employees testified credibly about their hours of work, what kind of work they did, where they did that work, and what they were paid.²⁰ For example, Gutierrez, whom the ALJ found to be the most credible, testified that she worked for McFarland for 13 years as a counter attendant at Biggs for six or seven hours a day and was paid \$7.00 an hour. She stated that McFarland did not pay any fringe benefits and believed that she “shouldn’t have to pay fringe benefits on government contracts.”²¹

Similarly, Holguin testified that he worked at Gateway’s McComb plant as a washer and presser four days a week, sometimes five, and that McFarland would pay him \$100.00 a week in cash but he received no benefits and never had a timecard. Hernandez stated that she worked as a counter attendant at Biggs from October through December 2008. McFarland paid Hernandez \$6.55 an hour for six hours six days a week, but she received no breaks and no holiday pay or

¹⁷ *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687-88 (1946); *see also Pythagoras Gen. Contracting Corp. v. Adm’r, Wage & Hour Div.*, ARB Nos. 08-107, 09-007; ALJ No. 2005-DBA-014, slip op. at 5, 11, 13, 23-24 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011).

¹⁸ Opening Brief at 2 (unnumbered).

¹⁹ 41 U.S.C.A. § 6701(3)(A)-(B).

²⁰ Each of the employees also testified that McFarland failed to post the DOL poster advising them of their wages and fringe benefits. Hearing Transcript (Tr.) at 99-100, CX-8. The ALJ found that McFarland failed to post the required notice of her SCA obligations and “throughout the process . . . demonstrated an attitude that she should not be subject to the Act.” D. & O. at 8; *see* 41 U.S.C.A. § 6703(4).

²¹ Tr. at 49-50.

fringe benefits.²² Thus, all the employees “perform[ed] work called for by a contract . . . subject to the Act,” and each of them is accordingly “per se, a service employee.”²³

McFarland also attacked “the ruling of the financial amount awarded” to the four employees, contending that some of them worked for Gateway prior to the beginning of the contract with the Army, and that Gutierrez and Hernandez worked only part-time under the contract.²⁴

Martinez’s reconstruction was appropriate under the principles in *Mt. Clemens Pottery Co.*²⁵ If an employer’s records are inaccurate or incomplete, the Administrator will not penalize the employees by denying them back wages simply because the precise amount of uncompensated work cannot be proved. As the Supreme Court stated: “Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees’ evidence”²⁶

In this case, Martinez, who worked for DOL for 22 years and conducted more than 1,000 investigations, fully explained his computations of the wages and benefits owed to the four employees but noted that he did not have a complete payroll register or work log for the employees.²⁷ He testified that he interviewed three Gateway employees and reviewed the wage-and-hour documents McFarland provided. He stated that McFarland did not provide any timecards for Hernandez and Chong, and “threw away” those of Holguin in March 2009.²⁸ The

²² Tr. at 36-47.

²³ *Igwe*, ARB No. 07-120, ALJ No. 2006-SCA-020, slip op. at 7-8 (ARB Nov. 25, 2009).

²⁴ Opening Brief at 1, 6 with enclosures of weekly payrolls of Holguin, Welch, and Gutierrez. See 29 C.F.R. § 5.5(a)(3)(i). The ALJ noted that McFarland submitted documents labeled Enclosures B-M post-hearing; he sustained the Administrator’s objection to Enclosures I as hearsay and L as unreliable and accepted the rest. D. & O. at 2.

²⁵ 328 U.S. 680 (1946).

²⁶ *Id.* at 693; see also *United Kleenist Org. Corp.*, ARB No. 00-042, slip op. at 2-3; *Star Brite Constr. Co., Inc.*, ARB No. 98-113, slip op. at 5-6 (June 30, 2000).

²⁷ 328 U.S. at 693. The *Mt. Clemens* principles permit the award of back wages to non-testifying employees such as Chong Welch based on the representative testimony of a small number of employees. Thus, the Administrator may rely on the testimony of representative employees to establish a pattern or practice of violations. Once a pattern or practice is established, the burden shifts to the employer to rebut the occurrence of violations or to show that particular employees do not fit within the pattern or practice. Thus, the employer must come forward with evidence of the precise amount of work performed or “with evidence to negate the reasonableness of the inference to be drawn from the employee’s evidence.”

²⁸ Tr. at 91-92; CX 6.

Gutierrez timecards McFarland provided did not comply with SCA regulations because they did not identify the employee's classification, the work week, the payment date, and the year.²⁹

McFarland's payroll register was similarly deficient because it lacked the employee's address and classification, the pay period, and the number of hours worked.³⁰ Martinez noted that he used the same method of computation for Welch and Gutierrez but had to figure Holguin's back wages a little differently because McFarland testified that she recorded his weekly wages as only \$100.00 for tax purposes but actually paid him more than that.³¹ Thus, Martinez based the hours worked for Holguin and Hernandez on their testimony and extrapolated the hours worked for the others based on the timecards and check stubs McFarland furnished.³²

The ALJ credited the investigator's calculations based on his testimony and the records McFarland submitted. Thus, the Administrator met her burden of proof to present sufficient evidence to allow for the reasonable inference that the employees performed work for which they were not compensated. The burden of proof then shifted to McFarland to proffer evidence of the precise amount of work performed or present evidence sufficient to negate the reasonableness of the inferences to be drawn from the Administrator's evidence.³³

McFarland failed to offer accurate or precise evidence of the time the four employees worked. Nor was her testimony sufficient to negate the reasonable inference drawn from the employees' testimony. As the ALJ found, the "incomplete assortment of records she offered at hearing was not sufficient to establish her liability, even when supplemented by post-hearing records which she may or may not have altered and which, in any event, were not available for her to be questioned about on cross-examination."³⁴ Because McFarland offered no probative evidence to rebut the reasonableness of the Administrator's findings and a preponderance of the evidence supports the ALJ's findings, we affirm the ALJ's decision.

The debarment penalty

The SCA requires debarment – ineligibility to receive federal contracts for a period of three years – of responsible parties for any SCA violation unless the service contractor demonstrates that "unusual circumstances" were present.³⁵ Although not defined in the Act, the

²⁹ Tr. at 98-99.

³⁰ *Id.* at 99, CX 7.

³¹ Tr. at 97-98, 117-21.

³² Tr. at 108-14.

³³ *Pythagoras Gen. Contracting Corp.*, ARB Nos. 08-107, 09-007; slip op. at 11.

³⁴ D. & O. at 8.

³⁵ 41 U.S.C.A. § 354(a).

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.³⁶

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, and sufficient assurances of future compliance; and (3) address other factors such as previous violations of the SCA.³⁷

Our review of the evidentiary record fully supports the conclusion that McFarland failed to meet her evidentiary burden of showing unusual circumstances that would relieve her company from debarment. The ALJ found that McFarland’s “failure to pay and provide fringe benefits was chronic, knowing, and willful, even if based on [her] belief that the revenues from the contract were inadequate to allow her to meet those requirements.”³⁸

McFarland’s own testimony supports the ALJ’s conclusion that there was no basis in the record for finding an exception to the general rule requiring that violating contractors be placed on the excluded list for three years. For example, McFarland testified that that she paid minimum wage and neither the rates nor fringe benefits stated in WHD’s wage determination.³⁹ She also admitted that her payroll records were incomplete and that she never agreed to pay any back wages owed.⁴⁰ Such admissions constitute a wilful violation of the SCA, thus precluding McFarland from proving unusual circumstances under the first two parts of the regulatory test.

CONCLUSION

The evidence fully supports the ALJ’s findings that Gateway and McFarland violated the SCA. Accordingly, we **AFFIRM** the ALJ’s order that SK Gateway Cleaners and Chae S. McFarland shall not be awarded United States government contracts for three years and shall pay to Hognin \$18,556.08; Hernandez, \$1,996.99; Gutierrez, \$6,735.90; and Welch \$1,337.07. In

³⁶ 29 C.F.R. § 4.188(b).

³⁷ 29 C.F.R. § 4.188(b)(1)(i-iii).

³⁸ D. & O. at 8.

³⁹ Tr. at 76, 120, 122-25, 127.

⁴⁰ *Id.* at 18-19, 78-84, 136.

addition, the Secretary shall forward the Respondents' names to the Comptroller General for debarment.⁴¹

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

⁴¹ 41 U.S.C.A. § 6706(b).