



In the Matter of:

**INTERNATIONAL RESOURCES  
CORPORATION**

**ARB CASE NO. 96-172**

**ALJ CASE NO. 94-SCA-35**

**DATED: March 27, 1998**

### **FINAL DECISION AND ORDER**

This matter arises under the provisions of the McNamara-O'Hara Service Contract Act of 1965 (SCA or the Act), as amended, 41 U.S.C. § 351 *et seq.*, and the implementing regulations at 29 C.F.R. Parts 4 and 8 (1997). Pursuant to the request of Petitioner, International Resources Corporation (IRC), and Bertram Fountain, president of IRC, a hearing was held on January 20, 1998, concerning the issues presented in this case and the circumstances surrounding the decision issued by the presiding Administrative Law Judge (ALJ). For the reasons set forth below, this case is dismissed with prejudice.

### **BACKGROUND**

Petitioner was charged with alleged violations of the SCA in connection with four contracts covered by the Act. Specifically, contracts were awarded to IRC to provide various custodial and food services for the U.S. Army at Fort Belvoir, Virginia, and at Whiting Field Naval Air Station in Milton, Florida. Following an investigation, the Wage and Hour Division alleged SCA violations in the performance of these contracts. Petitioner requested a hearing before the OALJ, which was held in Washington, D.C. on September 12, 1995.

The presiding ALJ retired from federal service on January 3, 1996, before issuing a decision in the case. On March 19, 1996, a Decision and Order finding against Petitioner and purportedly signed on January 3, 1996 by the presiding ALJ, was sent to the parties in this case. A Certificate of Service attesting to the purported mailing of the order on January 3, 1996, was attached to the decision.

Petitioner's counsel, alarmed that the time to appeal the adverse decision had expired prior to his receipt of the decision, requested an explanation for the delay in mailing. He was advised that the presiding ALJ had, in fact, retired in January but returned to the office early in March 1996, and signed and backdated several documents, including the subject decision. This

action created the impression that the decision had been signed and issued when the ALJ still had the authority to issue decisions. The Acting Chief Administrative Law Judge, after investigating the factual circumstances surrounding the issuance of the decision, determined that the decision had been backdated.

On April 5, 1996, the Acting Chief ALJ conducted a telephone conference call with counsel for IRC and the Department of Labor, in an attempt to reach a mutually agreeable solution to the backdating problem. During that conference call the parties putatively agreed that the OALJ would “rehire” the presiding ALJ to “reconsider[]” the January 3rd decision.<sup>1/</sup>

A virtually identical decision and Certificate of Service were issued and dated June 26, 1996. The single difference between the January 3rd decision and the one signed on June 26th is the sentence added at the bottom of the first page: “The undersigned is a rehired annuitant [sic] rehired for the purpose of entering this Decision and Order - Assessing Damages And Debarment.”

## DECISION

The regulations under which this Board operates in deciding appeals pursuant to the SCA state that “the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and as finally as might the Secretary of Labor concerning such matters.” 29 C.F.R. § 8.1(c). The Secretary oversees the entire Department of Labor, including this Board, the Wage and Hour Division, the Solicitor’s Office and the OALJ.

We are confident that the Secretary would not countenance the manner in which the underlying decision was issued. The backdating of a decision and the falsification of a certificate of service are not and never will be acceptable, notwithstanding how well intentioned or nonprejudicial the actions. Issuing backdated decisions compromises the integrity of the Department’s adjudicatory process and it is our duty to act to safeguard that integrity. Therefore, we find the decision to be void.

The Administrator would have the Board cure the infirmity by finding that IRC waived any argument regarding the validity of the decision by agreeing during the April 5, 1996, conference call to the rehiring of the ALJ. Even if the record supported a factual finding of waiver, we would hesitate to give it effect. In any event, the record does not factually support a finding of waiver.

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<sup>1/</sup> Memorandum of Telephone Conference Call, by John M. Vittone, Acting Chief Administrative Law Judge, dated April 9, 1996.

The only record of what was agreed upon during the April 5, 1996, conference call is the memorandum by Judge Vittone. It states:

As a result of the conference call, it was agreed that the best course of action would be for the Department of Labor to rehire Judge Fath for the limited purpose of reconsidering the Decision and Order dated January 3, 1996, and to take whatever action he deemed appropriate under the circumstances. *Mr. Hoogstraten [IRC's attorney] indicated that a rehiring of Judge Fath to consider the issues raised by the backdating would address his client's concerns about whether Judge Fath still had the authority to issue the decision when it was actually mailed.* Mr. Blair [DOL's attorney] voiced no objection to the rehiring of Judge Fath for this purpose. (Emphasis added)

Exhibit C attached to Petitioner's Brief.

The memorandum speaks not to waiver but only to the purpose for which Judge Fath was being rehired. It does not memorialize any agreement by the parties as to what issues were appropriate subjects for appeal. Additionally, it clearly implies that Judge Fath would address the issues raised by the backdating. These issues were not in fact addressed in the ALJ's decision. The Board can find no waiver where none has been expressed. The circumstances of this case call for a clear and intelligible waiver. Finding an implied waiver risks compounding the errors already made in this case.

Our review of the record indicates that the parties are basically in agreement about the underlying facts of the case. They proffer differing interpretations of the applicable regulations, however, with regard to employees' rights with successor contractors where there are unclear or disputed provisions of prevailing Collective Bargaining Agreements. Although we favor the ALJ's determination concerning the legal issues presented, we find that the decision is tainted by the backdating and so cannot stand.

Notwithstanding that we have set the decision aside, we reject Petitioner's characterization of the ALJ's conduct at the hearing as badgering witness Fountain or in any way demonstrating a bias against him. The hearing transcript reveals that Fountain is a college graduate; with more than 20 years as a small business entrepreneur; that he successfully bid on sizable contracts in the two years preceding the contracts at issue; and that he testified that he was unfamiliar with the cost details of contracts on which he had successfully bid and which were the bases of the proceeding. Fountain, Transcript (Tr.) at 200, 202-203, 212-13. The ALJ's pique at Fountain's non-responsiveness to fundamental questions regarding the details of contracts with which he should have been fully cognizant was not excessive.

We are advised by counsel that there is no longer any dispute with regard to the back wage issue concerning sick leave underpayments allegedly owed to IRC's employees under the Fort Belvoir contract. The withheld funds have been duly disbursed to the employees, and IRC

does not dispute the disbursement. (Letter from Carol Arnold, Esq. to Peter D.P. Vint, Esq., dated March 4, 1998; letter in response from Mr. Vint to Ms. Arnold, dated March 11, 1998).

**ORDER**

For the foregoing reasons, this case is **DISMISSED WITH PREJUDICE**.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member