



Issue Date: 13 April 2010

Case No.: 2009-DBA-00002

In the Matter of:

Proposed debarment for labor standards violations by:

KEELAN McLAUGHLIN

With respect to laborers and mechanics employed
by the Subcontractor CRANA ELECTRIC, INC.
on Contract No. F0536CC10088

**ORDER GRANTING ADMINISTRATOR'S
MOTION FOR FINAL DECISION**

This matter arises under the Davis-Bacon Act, 40 U.S.C. §3142 *et seq.*, and implementing regulations at Title 29, Code of Federal Regulations. It is currently set for hearing on April 21, 2010, in New York City. Under the governing regulation, 29 C.F.R. § 5.12(b)(1), a contractor or subcontractor who has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to its employees under section 3(a) of that statute is subject to debarment action. Section 3(a) of the Davis-Bacon Act requires that wages at the prevailing wage rate be paid to employees, and imposes other requirements on the contractors and subcontractors in federal construction projects. 40 U.S.C. § 3142(c).

Procedural History

This matter was initially filed by the Administrator against Vanguard Construction & Development, Inc., a prime contractor, and Crana Electric, Inc., a subcontractor. The Administrator sought payment of prevailing wage rates, fringe benefits, and overtime pay against both companies. In this action, the Administrator also sought debarment for labor standards violations against Crana Electric, Inc., (hereafter, "Crana,") and its president, Hugh McLaughlin.

This matter was referred to the Office of Administrative Law Judges on April 16, 2009. By Order dated September 2, 2009, at the request of the parties, I dismissed the action against Vanguard, Crana, and Hugh McLaughlin, because they had entered into consent findings with the Administrator. The consent findings included a provision whereby Crana and Hugh McLaughlin consented to debarment for a period of three years.

Prior to the dismissal of the action against the original parties, on July 21, 2009, the Administrator filed a "Motion to Amend the Notification Letter, Order of Reference and Caption

to Add Keelan McLaughlin as a Respondent.” A hearing was held on the Motion on October 28, 2009, at which time the Administrator presented evidence in support of the Motion. Keelan McLaughlin did not respond to the Administrator’s motion or attend the hearing.

By Order dated December 9, 2009, I granted the Administrator’s Motion to add Keelan McLaughlin as a Respondent.¹ That same day, I issued a separate Notice of Hearing informing the parties that a hearing on this matter would be held on March 25, 2010, in New York City.² By subsequent Order dated March 16, 2010, I granted the Administrator’s Motion to reschedule the hearing.³

Evidence of Record

By Motion dated January 28, 2010, the Administrator filed a “Motion for Final Judgment Against Respondent Keelan McLaughlin; or, in the Alternative, Motion to Deem Admitted the Matters in the Administrator’s First Requests to Admit and Motion for Summary Decision; or, in the Alternative, Motion to Compel the Deposition of Keelan McLaughlin,” with supporting declarations and documentation, including a Memorandum of Law. The Respondent, Keelan McLaughlin, did not respond to the Motion. On February 17, 2010, I granted in part and denied in part the Administrator’s Motion. I granted that portion of the Administrator’s Motion that the Requests for Admission, submitted to the Respondent on December 18, 2009, be deemed admitted, because the Respondent had not answered the Requests for Admission.⁴ See 29 C.F.R. § 18.20. I denied that portion of the Administrator’s Motion relating to summary decision. In that same Order, I also issued a subpoena for the Respondent’s attendance at a deposition, to be held at a future date selected by the Administrator, with notice to be issued in conformance with the regulatory requirements of 29 C.F.R. § 18.22.

On February 16, 2010, the Administrator filed a “Motion in Limine to Admit Testimonial Evidence and Exhibits into Evidence.” In the Motion, the Administrator sought to admit, on the merits at the upcoming hearing, witness testimony and documentary exhibits submitted at the evidentiary hearing, held on October 28, 2009. The Respondent did not respond to the Motion. By Order dated March 4, 2010, I denied that portion of the Administrator’s Motion pertaining to admission of witness testimony, and invited the Administrator to renew the Motion, as to any witnesses who were unavailable for the hearing on the merits. Order at 3. See 29 C.F.R.

¹ In that same Order, I also directed that the case caption be changed to reflect that Keelan McLaughlin was the sole Respondent, because the other respondents in this matter had previously been dismissed.

² Because Keelan McLaughlin was added as a party after this matter was referred to the Office of Administrative Law Judges for hearing, a hearing was scheduled. I note, however, that the regulation provides for a hearing only upon a respondent’s request. See 29 C.F.R. § 5.11.

³ The Administrator filed a request to reschedule the hearing by letter on March 4, 2010. I construed the Administrator’s request as a Motion, and directed that if the Respondent wished to file an answer to the Motion, he do so by March 15, 2010. See § 18.6(b). No answer from the Respondent was received.

⁴ As my Order reflected, these items are found at Exhibit N of the Administrator’s Motion. Order of February 17, 2010, at 3.

§ 18.804(a)(pertaining to admissibility of hearsay testimony when the declarant is unavailable). I took under advisement that part of the Administrator's Motion pertaining to the admission of documents, and I invited the Administrator to supplement the Motion by delineating the subsection of 29 C.F.R. § 18.803 (pertaining to admission of hearsay statements) that applied to each Exhibit for which admission is sought. Order at 3.

The Administrator's Pending Motions

On March 22, 2010, the Administrator filed a Motion "That Final Decision Be Rendered Against Respondent Keelan McLaughlin" (hereafter, "FD Motion"). I received this Motion on March 24, 2010. On March 30, 2010, the Administrator filed a "Second Motion for Summary Decision"⁵ (hereafter, "Second SD Motion"). I received this Motion on March 31, 2010. Administrator filed multiple exhibits in support of each Motion.

The Respondent has not responded to either Motion, and the time for filing a response to the FD Motion has passed.⁶

In the FD Motion, the Administrator asserted, among other things, that a determination against the Respondent was fully supported under 29 C.F.R. § 18.6(d)(2)(v)(which permits a decision to be rendered against a party that fails to comply with an order or subpoena). Motion at 2.

In the Second SD Motion, the Administrator asserted that there are no genuine issues of material fact and that, based on the undisputed facts, Keelan McLaughlin was a responsible officer of Crana who disregarded his obligations under the Davis-Bacon Act in multiple ways. Memorandum of Law in Support of Second SD Motion, at 1-2.

Standard for Final Decision

As the Administrator points out, final decisions rendered against respondents who have repeatedly failed to comply with orders, a subpoena, or discovery requests, have been upheld. Supervan, Inc., ARB Case No. 00-008 (ARB: Sept.30, 2002). In Supervan, the ALJ entered default judgment against a company for failing to respond to a request for production of documents, in violation of two orders; later, the ALJ also entered a default judgment against a

⁵ On March 31, 2010, by letter, the Administrator informed me that an incorrect set of pages for Exhibit AX55 to the Motion had been attached, and substituted a new Exhibit AX55 with the correct pages.

⁶ Pursuant to 29 C.F.R. § 18.6(b), the time for filing an Answer to a Motion is 10 days after service. Pursuant to 29 C.F.R. § 18.4(c)(3), five days are added to the response period for documents served by mail. The Administrator's cover letters and certificates of service for the Motions indicate the Respondent was served by certified mail (FD Motion) and Federal Express (Second Motion for Summary Decision). Presuming that the Respondent received the FD Motion on March 24, the same day I did, and including in the calculations the additional five days for receipt of a response filed by mail, then the Respondent's response to that Motion must be received by April 12, 2010.

company official, after finding that his failure to comply with the ALJ's orders was "either due to his own conduct or due to circumstances within his control." Id., slip op. at 3. The Administrative Review Board held that the ALJ's entry of default judgments fell within his discretion. Specifically, the Board noted that "flagrant non-compliance with discovery requests and orders" can justify this sanction, and stated: "To hold otherwise would render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously." Id., slip op. at 5-6.

In addition, the Administrative Review Board has also recognized default judgment may be appropriate, even when the party against whom judgment is to be entered is not represented by counsel. It has held: "... ALJs and this Board must be able to impose appropriate sanctions even against pro se parties when they fail to comply with the orders and procedures in the administrative process." Charles D. Canterbury, ARB Case No. 03-135 (ARB: Dec. 29, 2004)(SCA case), slip op. at 4. In contrast, the Board has overturned an ALJ's entry of default judgment against a pro se party who responded to orders, but whose submissions were deficient, and held that in such circumstance the ALJ exceeded the discretion conferred in the regulation. Mitchem Transports, Inc., ARB Case No. 03-115 (ARB: June 30, 2004)(SCA case), slip op. at 7-8.

Discussion

In the Motion, the Administrator asserts that a final decision against the Respondent is an appropriate sanction for the Respondent's failure to respond to my Order regarding his deposition and to the Administrator's repeated requests to obtain discovery. FD Motion at 8. Specifically, the Administrator cited the following:

- Respondent's failure to address the Administrator's then-pending Motion to add the Respondent to this action, including his failure to attend the evidentiary hearing in October 2009;
- The Respondent's failure to respond to the Administrator's Requests for Admission, dated December 2009 (Exhibit M to FD Motion);
- Respondent's failure to object to or attend a deposition in January 2010, upon notice from the Administrator in December 2009 (Exhibit Q to FD Motion);
- Respondent's failure to object to or attend a deposition on March 11, 2010, upon notice from the Administrator, pursuant to a subpoena issued by my Order dated February 17, 2010 (Exhibit 8 to FD Motion).

The governing regulation provides rules of procedure for administrative proceedings under the aegis of the Department of Labor, Office of Administrative Law Judges. 29 C.F.R. § 18.1(a). These proceedings include actions under the Davis-Bacon Act. See 29 C.F.R. § 6. The regulation authorizes an administrative law judge to exercise "all powers necessary to the conduct of fair and impartial hearings," including issuing subpoenas; compelling the production of documents or witnesses under the control of the parties; issuing orders; and, where applicable, taking any appropriate action authorized by the Rules of Civil Procedure. 29 C.F.R. § 18.29(a). Under the regulation, sanctions may be imposed for failure to comply with a subpoena, or with an order of the administrative law judge. 29 C.F.R. § 18.6(d)(2). Among the sanctions listed, "a

decision of the proceeding [may] be rendered against the non-complying party.” 29 C.F.R. § 18.6(d)(2)(iv).

My Order of December 9, 2009 (Notice of Hearing), stated: “Failure to comply fully with this order may result in sanctions” and cited both 29 C.F.R. §§ 18.6(d) and 18.29, the regulatory provisions that addressed sanctions. Further, in my Order of February 17, 2010, I not only issued a subpoena directing the Respondent to appear for a deposition, but I also discussed the regulatory provision that permits a decision to be entered against a party who fails to comply with an administrative law judge’s subpoena. Order at 3.

Based on the record before me, I am satisfied that the Respondent was provided adequate notice of this matter. The record establishes that from July 2009, when the Administrator initially filed the Motion to add him as a party to this matter, to the present, a period of almost nine months, the Respondent has consistently and repeatedly ignored these proceedings. During this timeframe, in addition to being served with copies of the Administrator’s various motions, the Respondent was also provided with copies of all relevant documents relating to this proceeding. Specifically, pursuant to my Order of December 9, 2009, the Administrator provided the Respondent with a copy of the record compiled to date. Order at 2. These items included copies of the Administrator’s Order of Reference, dated October 14, 2008; the Chief Administrative Law Judge’s pre-hearing Order, dated November 21, 2008; the Administrator’s response to the pre-hearing Order, dated December 17, 2008, and the responses of the former parties (Vanguard and Crana) to the pre-hearing Order. In addition, as reflected in the Administrator’s letter of March 12, 2010, the Respondent has been sent a copy of the Administrator’s pre-hearing statement, as well as copies of all exhibits the Administrator intends to introduce at the hearing.

I also am satisfied, based on the record before me, including but not limited to my Orders of December 9, 2009, and February 17, 2010, that the Respondent is aware that his failure to adhere to my orders could result in sanctions against him, including a decision against him based on his noncompliance.⁷

Based on the exhaustive record compiled to date, which consists not only of the numerous motions the Administrator filed and the multiple Orders I have issued, but also the Administrator’s actions in sending documents sent to the Respondent (and subsequently attesting to such actions), I find it is not reasonable to conclude that the Respondent does not have notice of this proceeding, or that he is unaware of the Administrator’s multiple attempts to engage in discovery, including his deposition pursuant to my subpoena.⁸ Consequently, I conclude that the

⁷ I also am satisfied that the Respondent received actual notice of these Orders. The record reflects that these two Orders were sent to the Respondent to his business address of record by certified mail, which comports with the requirements of the regulation. 29 C.F.R. § 18.3(d). See also Total Property Services of New England, Inc., ARB Case No. 97-008 (ARB: Jan. 20, 1998)(compliance with the regulatory requirements for service is sufficient to establish notice).

⁸ The Record also reflects that delivery (via Federal Express) of my Orders of March 4, 2010, March 8, 2010, and March 16, 2010 was refused at the Respondent’s place of business. These items were returned unopened to my office.

Respondent's failure to respond to any of the multitude of document deliveries, Motions, Orders, etc., that have been sent to him since July 2009 is the result of his own willful determination.⁹

Moreover, as the record also reflects, the Respondent has not responded to the Administrator's instant Motion, which was sent to him by certified mail.¹⁰

I find the governing regulation provides me the discretion to enter a decision against a party who fails to comply with my subpoena or other order. 29 C.F.R. § 18.24. I also find that Respondent was previously on notice of this regulatory provision. Order of February 17, 2010, at 3. I further find, based on the record, that the Respondent failed to attend a deposition scheduled for March 11, 2010, despite adequate notice from the Administrator, including notice that I had issued a subpoena directing his attendance. Exhibit 8 to FD Motion. In addition, I note that I have not received any communication from the Respondent whatsoever regarding the instant proceedings. Specifically, I find that I have received no communication from him regarding his failure or refusal to attend the deposition on March 11, 2010, such as a Motion to Quash, and the time for filing such a communication has long since expired. See § 18.24(c).

In light of the foregoing, therefore, after reviewing the record and considering the refusal or failure of the Respondent, Keelan McLaughlin, to participate in this matter, I find it proper to enter a judgment by default against him.

DECISION

I adopt the following findings, which are set forth in the Administrator's Order of Reference, dated October 2008, as amended by my Order dated December 9, 2009 (Granting Administrator's Motion to add Keelan McLaughlin as a Respondent).

- 1) Crana, as a subcontractor on the Pavilion Restoration Project of the Smithsonian's National Museum of the American Indian, in New York City (hereafter, "Smithsonian Project"), was subject to the Davis-Bacon Act.
- 2) Crana committed Davis-Bacon Act violations as follows:
 - i) failed to pay prevailing wages;
 - ii) misclassified electricians as apprentices or helpers and paid inappropriate wages;
 - iii) failed to pay overtime at the rate of time-and-a-half for work in excess of 40 hours per week;
 - iv) submitted falsified payroll records.

⁹ In addition, although the record indicates the Respondent is not represented by counsel in this proceeding, the record also establishes that the Respondent was represented by counsel in a state court proceeding related to this matter, in which Crana filed a civil action against Vanguard. Exhibits 9 and 10 to FD Motion. The record thereby suggests that the Respondent has access to the advice of counsel, if he chooses to avail himself of it.

¹⁰ The certificate of service, signed by Paula Lewis, reflects that the Motion and supporting Memorandum of Law were sent to Keelan McLaughlin at the following address on March 22, 2010: 600A East 132nd Street, Bronx, NY 10454.

- 3) At the time that Crana was a subcontractor on the Smithsonian Project, the Respondent, Keelan McLaughlin, was an official of Crana, and was specifically involved with the Smithsonian Project.
- 4) Keelan McLaughlin, on behalf of Crana, exercised authority over wage and payroll matters for employees on the Smithsonian Project. Specifically, his responsibility included assigning employees; setting wage rates and work hours; approving overtime; and certifying payrolls.

Based on the foregoing findings, I find that the Respondent, Keelan McLaughlin, disregarded Crana's obligations to its employees under § 3(a) of the Davis-Bacon Act. Therefore, I recommend that the Respondent, Keelan McLaughlin, be debarred from future contracts or subcontracts of the United States or the District of Columbia, and any contract or subcontract subject to the labor standards provisions of the statutes listed in 29 C.F.R. § 5.1, for a three year period. See 29 C.F.R. § 5.12(a)(2).¹¹

Because I have disposed of this matter through entry of a decision against the Respondent pursuant to the Administrator's FD Motion, I decline to address the Administrator's Second Motion for Summary Decision.

SO ORDERED.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

¹¹ As set forth in my Order of December 9, 2009 (Granting Administrator's Motion to Add Keelan McLaughlin as a Respondent), I find the only action the Administrator intended to pursue against Keelan McLaughlin was debarment. Order at 8.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within forty (40) days of the date of issuance of the administrative law judge’s decision. *See* 29 C.F.R. § 6.34. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

When a Petition is timely filed with the Board, the administrative law judge’s decision is inoperative until the Board either (1) declines to review the administrative law judge’s decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.