

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 August 2003

CASE NOS: 2002-FLS-0003
2002-SCA-0003

In the Matter of:

COAST INDUSTRIES, INC.,
d/b/a COAST JANITORIAL SERVICES

and

HERMAN GRIMES,
An Individual,

and

JEROME SCOTT,
An Individual

DECISION AND ORDER

Case No. 2002-FLS-0003 arises from an Order of Reference by the Regional Administrator Wage and Hour Division (Complainant), alleging violations of the Fair Labor Standards Act 29 U.S.C. §§ 201 et seq. (FLSA) and the applicable regulations thereunder at 29 C.F.R. Parts 578, 579, 580.

Case No. 201-SCA-0019 arises from a complaint filed by the U.S. Department of Labor (Complainant) alleging violations of the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 351, et seq. and the regulations issued thereunder at 29 C.F.R. §§ 4.1. et seq.

On February 21, 2003, an Order consolidating these cases was issued based upon a motion by Claimant which was agreed to by Respondents.

A hearing was held in these cases in Portland, Oregon on April 28, 2003. Prior to the hearing, the parties entered into stipulations which resolved all issues, except the question of debarment, in the SCA case. The stipulations were accepted and received in evidence at the hearing. (CX 1, 2)¹ Evidence was taken on the issue of debarment in the SCA case. It was not an issue in the FLSA case. The cases were submitted subject to the filing of briefs, which have been received.

Respondent's Motion

Complainant's brief seeks debarment under the SCA and the Contract Workers Hours and Safety Standards Act (CWHSSA). Respondents filed an alternative motion which seeks to exclude consideration of debarment under the CWHSSA or additional time to brief that issue. Complainants respond that the CWHSSA and the stipulation between the parties refers to the Davis Bacon Act and the CWHSSA is a Davis Bacon related Act for which debarment is provided. (29 C.F.R. § 5.12(a)(i))

At the hearing evidence was adduced showing violations of the CWHSSA, but the Act, itself, was not mentioned. The stipulation between the parties is somewhat contradictory. The pertinent parts state:

- (4) The parties to this agreement waive any right to challenge or contest the validity of the Order entered into in regard to the specific under payments and record keeping violations of the Davis-Bacon Act in accordance with the agreement;

. . . .

- (7) The parties hereto have not agreed to whether or not debarment is an appropriate sanction in this matter. Petitioner believes that Respondent has violated the SCA and thus debarment is warranted and Respondent believes that debarment is not appropriate in this matter and will present evidence at the hearing that, due to unusual circumstances, debarment is not appropriate; (CX 1.)

I am of the opinion that the same result would occur in this case under the SCA or the CWHSSA and in order to not unnecessarily enlarge this proceeding, I grant Respondent's motion to limit the question of debarment to the SCA.

The FLSA Case

Based upon the stipulation of the parties, I make the following findings of fact:

1. At all times pertinent hereto Coast Industries, Inc., has been an enterprise engaged in commerce or whose employees have worked with products or equipment which have moved in

¹ References to the hearing transcript are indicated by "Tr.", references to Complainant's Exhibits and Respondent's Exhibits are indicated by "CX" and "RX", respectively.

interstate commerce within the meaning of Sections 3(r) 3(s) (2) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. §§203 (r) and 203 (s) (2)).

2. Respondent certifies that it is presently in compliance with the provisions of Section 7 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 207), and the regulations set forth at 29 C.F.R. Part 578 and 579, and further says that it will continue in compliance therewith.

3. In consideration of the terms hereinafter set forth, Complainant modifies the Assessment of Civil Money Penalty dated October 30, 201, by reducing the assessment of civil money penalty to \$0.00.

Respondent withdraws its exception to the assessment of civil money penalty, and agrees to pay to the United States Department of Labor, Wage and Hour Division, in lieu of a civil money penalty, the sum of \$10,000.00 which sum shall be paid to Respondent's former employees, in amounts to be determined by the Complainant in its sole discretion, for unpaid overtime hours worked for the respondent determined as a result of Plaintiff's investigation number 1121346 which began on 2/06/2001 at respondent's operations at the Redstone Arsenal in Alabama which covered the period 5/02/98 through 5/06/2000. These provisions are final and binding, and Respondent agrees to pay said total amount of \$10,000.00 on or before March 30, 2003. In the event payment is more than 15 days date, Respondent shall pay the additional sum of \$5,000.00 and that the entire amount of \$15,000.00 will become due immediately.

4. The order entered in accordance with these Consent Findings shall, pursuant to 29 C.F.R. § 580.18(b)(1), have the same force and effect as an order made after a full hearing.

5. The entire record upon which the order herein is based shall, pursuant to 29 C.F.R. §580.18(b)(2), consist of the notice of penalty, as modified herein, and the Consent Findings.

6. All further procedural rights provided by 29 C.F.R. Part 580 and any rights to contest the validity of the Consent Findings and the following order issued pursuant thereto are hereby waived. See 29 C.F.R. §§18.9(b)(3) and (4).

7. By signing the Consent Findings, each party waives any claim it may have to costs and/or attorney fees.

Since debarment is not an issued in the FLS case, further discussion is not necessary. Appropriate provisions based on the Consent Findings will be made in the ensuing order.

The SCA Case

8. The ensuing order as it relates to the specific under payments and record keeping violations under the SCA and CWHSSA shall have the same force and effect as an order made after full hearing.

9. The he entire record in regard to specific under payments and record keeping

violations under the SCA and/or CWHSSA shall consist solely of the Complaint, the stipulations entered into between Complainant and Respondents, the agreement between the parties and any evidence related to debarment presented at the hearing.

10. The parties waived any further procedural steps before the Office of Administrative Law Judges regarding this proceeding except in regard to debarment as it pertains to the Respondents Coast Industries, Inc. (dba Coast Janitorial Services Inc.), and Herman Grimes and Jerome Scott, individually. The parties have waived any right to challenge or contest the validity of the Order entered into in regard to the Specific under payments and record keeping violations of the Davis-Bacon Act in accordance with the agreement.

11. The following under payments of minimum wage, overtime and fringe benefits are true and correct:

NAME	Period Covered	Backwages Due
Larry Bone (SCA)	05/02/98 to 05/06/2000	\$2001.75
Roy Whitworth (SCA)	05/02/98 to 05/06/2000	\$3417.46
Larry Bone (CWHSSA)	05/02/98 to 05/06/2000	\$ 127.98
Roy Whitworth (CWHSSA)	05/02/98 to 05/06/2000	\$1038.78
TOTAL		\$6595.97

12. Respondent, Coast Industries, Inc. shall pay all outstanding monies, totaling \$6,595.97, owed to its employees as set forth in Finding No. 11 herein, which will resolve all monetary obligations of Respondents, as identified in the Complaint in this case. Checks shall be made payable to the individual employees in the gross amounts listed in Finding No. 11 minus all legal payroll deductions. Checks shall be delivered to each employee as set forth in Finding No. 11 within 60 days of the signing of the Consent Findings. Any monies due under the Consent Findings which have not been negotiated by the appropriate employees within 100 days of issuance (due to Respondent's inability to locate said employee, to the employee's failure to negotiate the check with in 90 days of issuance or for any other reason) shall be combined and issued in certified check form, payable to the U.S. Department of Labor. The check shall be in the net amount accompanied by a list of the employees from whom the check represents backwage payment, their social security numbers and the legal deductions made from the gross amounts due. The check shall be mailed to the U.S. Department of Labor, Wage-Hour Division, 1515 S.W. Fifth Avenue, Suite 1040, Portland, Oregon 97201-5445. If there is a default in the receipt (by the affected

employee or by the Wage-Hour Division of the U.S. Department of Labor as set forth above) of the checks of more than 20 days, each employee shall be paid an additional penalty of twenty percent (20%) of the gross amount due that employee. Complainant shall distribute the monies paid by Respondent to the employees identified in Finding No. 11 or their estates if necessary. Any money not so paid with three years because of the inability to locate said employees or because of their refusal to accept said proceeds shall be deposited forthwith with the Treasurer of the United States pursuant to 28 U.S.C. 2041. The parties have not agreed whether or not debarment is an appropriate sanction in this case. Complainant believes that Respondent has violated the SCA and thus debarment is warranted.

14. Respondent believes that debarment is not appropriate in this matter and will present evidence at the hearing that, due to unusual circumstances, debarment is not appropriate.

15. The rights, if any, of employees or ex-employees not specifically mentioned in the complaint are not affected or extinguished by the agreement and stipulations of the parties and neither party intends or contemplates that the Order entered in this action will affect such rights, if any

16. The parties have agreed that no costs or Attorney fees will be requested by either party.

Debarment

I now consider whether debarment is appropriate in this case. It has been held that:

Section 5(a) of the SCA provides that , “[u]nless the Secretary recommends otherwise because of unusual circumstances,” the contractor who violates the Act shall be debarred for three years. 41 U.S.C. § 354(a). Although the Act does not define “unusual circumstance,” the regulations at 29 C.F.R. § 4.188(b) establish a three part test. Part I asks whether the Contractor’s violations were “willful, deliberate or of an aggravated nature“ or the results of “culpable conduct such as culpable neglect to ascertain whether practices are [or were] in violation” of failure to comply with record keeping requirements. 29 C.F.R. § 4.188(B)(3)(i). Part II calls for the following prerequisites to be present: a good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance. Finally, if the conditions in Part I and II are met, a number of factors are considered to determine “unusual circumstances” are present, bearing on good faith.

Vigilantes, Inc. v. Adm’r, Wage and Hour Div., 968 F.2d 1412, 1418 (1st Cir. 1992).

In their efforts to carry their burden of proving the “unusual circumstances” necessary for relief from debarment under the SCA, Respondents first called Brenda Caldwell who testified that she worked until July 1999 for Coast as its Government Contracts Manager, administering government contracts across the country. (Tr. 9) Caldwell said that the Redstone Arsenal project

included custodial services performed at approximately 100 buildings by approximately 150 employees. There were daily services plus additional cleaning services at night. (Tr.9) There were sing-in and sign out sheets for employees in each zone. Each zone had a budget for payroll. (Tr.11). Caldwell testified that overtime was not acceptable without authorization. (Tr.14). Further, she testified that overtime had to be authorized in advance because the labor portion of the projects were always the biggest costs involved in a project. "And to control the costs, you control the hours." (Tr.16) Caldwell testified regarding Respondent's Exhibit 5, a Memorandum from Caldwell to the Project Manager, Stan Cuff dated March 19, 1999 which appears to be chiding Cuff for being over budget that there was a discrepancy between hours that had been called in on a daily basis and the timecards she was receiving. (Tr.17) Caldwell did not work at the Redstone Arsenal, but at Coast in Portland, Oregon, and only made two trips to the Redstone Arsenal. (Tr. 18,26) In introducing Respondents' Exhibit 6, Ms. Caldwell said that the project records being maintained at the Redstone project office were routinely copied to the home office by the project office. (Tr. 19) Caldwell left Coast in July 1999. (Tr. 19). Caldwell said they had a few labor violations such as failure to classify or failure to properly pay, but they were usually corrected either through the union or directly with the employee. She was sure there were cases where people were paid additional monies for misclassifications. (Tr.23).

Caldwell was asked by Respondents' attorney whether Coast had a clearly defined policy on payment for or use of comp time on the Redstone project. (Tr.24) Her reply was "I would be afraid to comment on it." (Tr.24) On cross examination, Caldwell testified that although she only made two trips to the Redstone site, Grimes was there a lot. She said that he was President of the company and was in charge of the operation. (Tr. 26) When questioned about the comp logs she said "I don't remember ever seeing one." (Tr.27) However, Caldwell admitted that she did generate a memorandum to Cuff telling him that comp. time had to stop. (Id.) Ms. Caldwell testified that Respondent Grimes occasionally acted as both the project manager at the Redstone project as well as the President of the company, prior to the hiring of Stan Cuff. (Tr.28) Caldwell said that Plaintiff's Exhibit 3 was "something that I would have done." Complainant's Exhibit 3 is a memorandum dated October 28, 1996 from Caldwell to Grimes setting forth failure to pay \$11,051.76 in Health and Welfare contributions to Coast employees and warning of debarment possibility.

Respondents called Herman Grimes, former Coast President as a witness. Grimes testified that he was President of Coast Industries from 1994 through July or August of 2002. (Tr.37) Prior to that he was Vice President of Government Contracts at Coast from 1991. He testified that the Redstone Arsenal project started in 1995 and ended in 2000. He said that he prepared the initial proposal (for the contract), that he participated in the contract negotiations, the initial phase-in, the second phase-in and the contract startup. (Tr.39) He said that Brenda Caldwell reported directly to him and that the project managers reported to Caldwell with some oversight by him. He said that he had dealings with the labor law compliance elements of the contract and discussed the collective bargaining agreement and wage determinations. (Tr. 39) He testified that he made periodic trips to the project site at Redstone, talking with vendors, quality control inspectors, suppliers, the management team and holding meetings with employees, including holding town hall meetings with employees out in their individual work locations. He said they would have employee meetings around lunchtime and then would try to resolve employee problems. (Tr. 41) He also said there was an "1-800" number of employees to call the problems (Tr. 42) Grimes was

presented with Respondents' Exhibit 8 (Memorandum from Project Manager Stan Cuff, dated 8/27/99 stating that comp time, a permitted practice in the past, was no longer permissible). Grimes denied any knowledge of a comp time use policy in place for custodial employees at

Redstone. (Tr. 46) He said he only learned about it “after the fact.” (Tr. 46) He said comp time was never used for hourly employees. (Tr.47) Grimes testified that while he made many trips, he could not recall the exact locations or the time frames of the trips.

Grimes testified that he hired a new project manager in 1998, Stan Cuff. (Tr. 51) He said that Cuff was given the contract to review, along with a large binder, the proposal, organization chart, the classes of service that had to be performed, and the collective bargaining agreement as well as the Service Contract Act. (Tr. 52, 53) He testified that he was at the project site after Cuff became the project manager (Tr. 53) and that he had been available to talk with employees regarding wage issues and other issues. (Tr. 54) In discussing Stan Cuff’s tenure with Coast, Grimes testified that in December 1999 he learned that there were problems with Cuff’s management, including the fact that Cuff was apparently working employees overtime and had given them straight time off, that he was apparently keeping some type of records, but they may have been destroyed. (Tr. 57) Further, he testified that he never found the records that Cuff was keeping (Tr.57) He testified that he took action to retrieve records from the Redstone project office relative to employee payrolls. (Tr. 57) He also said that Jennifer Harper said that Cuff was keeping another set of records and that she had seen them. (Tr. 58) Grimes testified that he became aware of the problems of wage hour violations in December 1999. (Tr. 60) He also said that a civil action had been filed against Coast in October 1999 by individual employees through a private attorney claiming that they had not been paid properly. (Tr. 61)

In response to a question as to what the company might have been able to do that could have avoided the violations that eventually came to light in regard to proper payment of the employees, Grimes testified, “Sitting in Portland, other than go down and watch every employee sign in and sign out physically, which was impossible. Even on site it was impossible for me to go out and know if everybody is signed in and signed out because you’ve got 500 buildings spread out over 40,000 acres taking over half an hour to get to one of those buildings” (Tr. 67) On cross examination, Grimes said that Cuff reported indirectly to him (Tr. 68) and that he was Jerome Scott’s boss (Tr. 68, 69). He also said that he was at the Redstone Arsenal site every single day during the run of the contract. (Tr. 69).

Also on cross examination, Grimes said that Wage and Hour Investigator Rogers “might have been calling him regularly,” but he didn’t recall. He didn’t recall whether or not he returned her calls. He did not recall whether Ms. Rogers scheduled a final conference with him. (Tr. 75) He did not recall failing to show up for the final conference. (Tr. 76) He testified that he was informed by Wage and Hour that back wages were owed to some employees as a result of the investigation. (Tr. 76) When asked if any effort had been made from the date of the closing conference on July 13, 2001 until the end of March 2003 to pay the employees the monies owed, (Tr. 76), he did not recall (Tr. 77). He did not recall a prior, 1997 SCA complaint when Coast paid \$600 to an employee for health and welfare violations. (Tr.78).

Grimes testified that Coast informed its project manager that it was overrunning its budget in 1999. (Tr. 82) He denied that Coast told its project managers to cut overtime, but said that the project manager was told to “perform in accordance with the task and frequency schedule requested by Wage Hour. (Tr. 83)

Jerome Scott, Vice President of Coast, testified that he does the payroll and general ledger entries and produces financial statements. (Tr. 86) Scott said that he has been finance officer at Coast for 10 years and has been with Coast for 20 years. (Tr. 86, 87) Scott said that his recollection of a meeting with the DOL Wage and Hour Investigator was simply that Ms. Rogers came to his back door and said, "Hey you've got a violation." He said the exit interview consisted of Rogers saying "I'm here" and then she was gone. He did not recall being asked for any records. (Tr. 87) Scott said Grimes would have handled records and that payments had been made to Larry Bone and Roy Whitworth for monies owed under the Service Contract Act "within the last two months." (Tr. 88, 90) Further, Scott testified that the same procedures remain in place in regard to compliance with wage and hour requirements. (Tr. 92)

Carol Rogers testified on behalf of Complainant, Wage and Hour Division. Rogers said that she had been a Wage and Hour Investigator for the Department of Labor since September 10, 1978. (Tr. 96) As part of her investigation in this case, she had looked into the history of Coast Industries in regard to prior violations of the Service Contract Act. (Tr. 97) There were several prior investigations conducted by the Birmingham, Alabama office. In one limited investigation, one employee was found due \$606 for failure to properly pay health and welfare benefits. Another conciliation was done where an employee had complained about vacation pay violations. That was corrected under the collective bargaining agreement. (Tr. 97) Rogers testified that during her investigation she discovered that there was an ongoing union lawsuit. She said that although the suit was brought under the FLSA, that did not make sense, because the employees were actually Service Contract Act employees, that is they were actually the janitors working on the contract and the suit should have been under the SCA. (Tr. 98) She testified further that she was told that there were 11 employees involved in the suit and the total amount paid by Coast was about \$40,000. It was her understanding that each employee received about \$2000. (Tr. 98) In regard to Coast's cooperation in the investigation, Rogers testified that she called Grimes several times in July when she was finished with her investigation to try and meet with him in person to review the findings. He did not return her calls. (Tr. 99) She was finally able to schedule one appointment with him on July 13th. Grimes was not there, so she held the final conference with Scott. (Tr. 99)

Rogers testified that she discovered in her investigation that for some period, comp time logs had been kept by Coast, but that Grimes had instructed employees to gather up those logs and forward them to the Portland Office. (Tr. 99) She said that none of those records were available to Wage and Hour when Coast vacated the property, and that it was her understanding that Mr. Grimes had come and emptied all the records. On cross examination, Rogers said that she had informed Coast of the Service Contract Act violations with respect to Bone and Whitworth. She testified that she provided Coast with a back wage summary, which showed the period of the investigation. Further she said that Coast never requested an itemization of the actual time and dates of the violations from her. (Tr. 103)

Rogers was cross-examined about information she possessed regarding comp time logs. Rogers testified that she discovered that there was a period when these logs were used and then there was a period when they were not allowed, where people were just expected to not be compensate for the extra time they worked. (Tr. 106) Rogers testified that her impression was that there was a book where people wrote in their extra time (Tr. 107) Some said they were not

allowed to do so. Rogers said that in her final conference with Scott, she told him about each Act's violations, explained to him what had happened and what she had found. (Tr 108)

As indicated, debarment is warranted in the absence of "unusual circumstances" or if it is determined that the contractor acted in "willful" or "culpable" violation of the SCA. *Dantran, Inc. v. U.S. Dep't. Of Labor*, 171 F.3d 58, 68, (1st Cir. 1999) (if the contractor acted willfully or culpably, then it "cannot be saved from debarment"); *Vigilantes, Inc. v. U.S. Dep't of Labor*, 968 F. 2d 1412 (1st Cir. 1992) (debarment required where no unusual circumstances present). Furthermore, a respondent is responsible for the acts of its employees and cannot avoid debarment by delegating authority to others. (United Kleenist Organization Corp., 1999 - SCA-18(ALJ Jan. 10, 2000, *aff'd* ARB Case No. 00-042 (ARB Jan. 25, 2002; *William J. Carr*, 1999 - SCA-2 (ALJ Jan. 4, 2000; Nantom Services, Inc., 1997 - SCA-35 (ALJ Dec. 22, 1998).

The applicability of the SCA and the violations in regard to SCA wages owed have been admitted. Debarment is assumed once violations of the Act have been found, unless the violator is able to show the existence of "unusual circumstances" that warrant relief from the SCA's debarment sanction. 29 C.F.R. §4.188(a) and (b). 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 v. Administrator of Wage and Hour Division*, *supra*)

The burden of proving "unusual circumstances" falls to the employer. 29 C.F.R. §4.188(b)(1), *Bither v. Martin*, 992 WL 207912 (C.D. California 1992), *Vigilantes, Inc.*, *supra*, at page 60.) Under Part I of the "unusual circumstances" test found at 29 C.F.R. §4.188(b), the contractor must establish that the conduct giving rise to the SCA violations was neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result or culpable conduct. Coast offered no evidence at the hearing that the violations admitted by way of stipulation were not willful, deliberate or of an aggravated nature. The evidence offered by Coast through the testimony of Grimes, Caldwell and Scott did nothing to establish that Coast's conduct was neither willful, deliberate nor of an aggravated nature. In fact, the testimony of Caldwell and Grimes was often in conflict. Caldwell said that there were 150 employees and 100 buildings. Grimes said there were 500 buildings. Grimes said that there was never any comp time policy in place for hourly employees and that he only became aware of any such practices in December o 1999. However, Caldwell testified that she left Coast's employ in July 1999 and that she herself had directed project manager Stan Cuff to discontinue the comp time practice prior to her departure, rendering Grimes' denial of the existence of the use of comp time not credible. In addition Caldwell, who was by her own testimony aware of the practices, reported directly to Grimes. Grimes denied pressuring the project manager about overtime, but Caldwell's testimony refutes this. She testified that there were cost overruns and that to control the costs you had to control the hours. Caldwell issued a Memorandum to this effect on March 19, 1999. (RX5) There was no doubt that Project Manager Cuff felt the pressure to cut down on hours paid as can be seen by his own Memorandum to that effect dated March 21, 1999. (RX6) The testimony of Rogers indicates that employees worked for comp time and when that was no longer allowed, they were expected to work extra hours for no compensation.

What Coast offers as "unusual circumstances" is a blame shifting scheme, e.g.,

scapegoating of the on site project manager, Stan Cuff. However, neither the regulations nor the case law permit this sort of evasion of responsibility. (29 C.F.R. §4.188(b)(5); *Security systems, Inc.*, Decision of the ALJ, SCA 774-775, April 10, 1978; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974.) In addition, Grimes himself was the Project Manager during part of the investigation period and according to his own testimony was on site much of the time during the run of the contract. Record keeping violations of the SCA were made obvious by the Respondents' own Exhibits. Respondents' Exhibit 8 makes it clear that as of August 27, 1999 a comp time practice had been in place at Coast. Respondents Exhibit 9, which was copied to Jerome Scott, Executive Vice President of Coast, is also dated August 27, 1999. This Memorandum recounted a meeting with the union representative. It is obvious that discussions were held with that representative, Jimmy Myhan, about Coast's illegal use of comp time for overtime. Interestingly, the memorandum suggests that the union representative was told that comp time was "suspended some time ago," when the memorandum from Cuff discontinuing the comp time practice was dated the same day. Further it appears that the union representative was promised that employees would get a "payout" for comp time hours during the "next pay cycle." Nevertheless, on October 6, 1999, Jennifer Harper sent a Memorandum to corporate headquarters (Don Englehart) asking for ½ labor hours for employees who had worked comp time, in the amount of \$993.05 (Rx 10) The numbers of comp time hours owed reflected in this exhibit show that this was an established practice.

The SCA does not permit the payment of hourly employees with compensatory time. It is obvious that the records of these hours were not maintained for review by DOL or the contracting agency. Actually, they were not available to the Wage and Hour Investigator during her investigation, thereby impeding the investigation. In fact, Grimes admitted in his testimony that he removed the payroll records from the Redstone site so that he could "see what was going on." Grimes also testified that he never found Cuff's records, but Respondents' Exhibit 15 suggested that such records were removed from the project office and reported to Coast's attorney as having been altered. By the time the letter was written blaming Cuff for those woes of the company, it knew very well what the pay practices were on the Redstone project as Brenda Caldwell testified, as Jerome Scott was notified in writing, and as Don Englehart was aware when he reviewed the comp time logs submitted to him by Jennifer Harper, all of these events occurring months before the letter was written. In addition, Brenda Caldwell testified that project records being maintained at the Redstone project were routinely copied to the home office by the project office.

Under the requirements set forth in 29 C.F.R. §4.188(b)(3)(i), if there is culpable failure to comply with the record keeping requirements of the SCA (such as falsification of records) relief from debarment can never be in order.

Further, the burden under Part 1 also requires that the contractor demonstrate the absence of a history of similar violations, and absence of repeat violations of the SCA, and to the extent that the contractor has violated the SCA in the past, that such violation was not serious in nature. Coast could not demonstrate an absence of history of similar violations. Coast not only had similar violations in the past, as testified to by both Grimes and Rogers (the prior investigations where monies had been paid, including an employee who was paid \$606 for SCA violations), but had been put on notice in the past by its own contracts administrator that it was not in compliance with applicable laws, owed its employees approximately \$11,000 in wrongfully withheld fringe benefits

(CX 3), and had been sued, at the behest of the employee's union, by eleven janitors for improper payment of wages which it settled for \$40,000. Although this suit was brought under the FLSA (where employees have a private right of action) rather than the Service Contract Act, testimony of Carol Rogers made it clear that the affected employees were janitors who were covered by the Service Contract Act, in addition to the FLSA. Further, Caldwell testified that during her tenure, there had been misclassification of employees resulting in the necessity of back wage payments, and conceded that she had likely written the memorandum regarding Coast's failure to pay proper fringe benefits to employees.

Part II of the test requires the contractor to demonstrate a good compliance history, cooperation in the investigation, repayment of the monies due, and sufficient assurances of future compliance. Coast fails this test as well. The compliance history is riddled with incidences of non-compliance as mentioned above. In regard to the necessity of showing cooperation in the investigation, Coast presented evidence that it had not cooperated in the investigation. (See RX15 in which Coast's attorney advises Coast that it has falsified records and should remove them from the job site.) Carol Rogers testified that her investigation showed the existence of those records but that Wage and Hour was not able to have Coast produce them. Further, Rogers testified that Grimes would not return her calls and that although he made an appointment for a closing conference, he did not attend the conference.

In connection with the requirement that Coast show it had repaid the monies due, it is clear from Complainants Exhibit #1, as well as the testimony of Mr. Scott, that the monies owed to the two employees, Whitworth and Bone, under both the SCA and CWHSSA, were not paid until a few weeks prior to the hearing in this case, even though Coast had been on notice of the amounts due since the closing conference by Wage and Hours in July 2001 by way of the Wage Summaries presented, most certainly since the filing of the Complaint herein.

Part II also requires sufficient assurances of future compliance. Coast offered no evidence of a change in its practices which would assure future compliance. In fact, the only evidence offered in regard to how the business is run currently was testimony from Scott that the same system which was in place during the violation period remains in place.

Under Part II of the "unusual circumstances" test, the Judge must consider (among other things) whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed record keeping violations which impeded the Department's investigation, whether sums due were promptly paid and whether the determination of liability under the Act was dependent upon the resolution of a bona fide legal issue of doubtful certainty.

Coast has been previously investigated by DOL for violations of the SCA. Rogers testified that there were several prior investigations, resulting in payments and conciliations.

Coast is required by both the SCA and the CWHSSA to keep accurate records of hours worked and monies paid to its employees and to make those records available to DOL. (SCA regulations require contractors to maintain and make available such records to the Department of Labor for a period of three years after the conclusion of a contract. 29 C.F.R §4.185.)

In this case, Coast apparently kept two sets of records of hours worked. Those records showed (as indicated by Respondents' Exhibits) that, contrary to the requirements of the SCA compensatory time was utilized as a means of paying for overtime for the janitorial employees. Comp logs were kept for the purpose of paying the employees for overtime worked and this compensatory time was allowed to be taken only at "straight time" rates. This was confirmed in the testimony of Brenda Caldwell as well as Respondents Exhibits #8, #9 and #10. In addition, according to the testimony of Rogers, some employees were required to work extra hours for no compensation at all.

Lastly, the sums due were not promptly paid. In fact they were not paid until shortly before the hearing on debarment in April or 2003, although Coast had been on notice of the debt since July 2001.

The debarment period applies not only to the violating contractor, but also to any person or firm in which the debarred contractor holds a substantial interest. Congress did not define the term "substantial interest." However, implementing regulations list specific connections between a debarred person and a firm that establish a substantial interest per se. 29 C.F.R. §41.188(c). Itemized connections include part ownership in the firm, participation in the firm's contract negotiations, and as particularly relevant in this case, service as an officer in the firm, i.e., "where a person is an officer or director in a firm . . . a "substantial interest will be deemed to exist." (*In the Matter of: Development Resources, Inc.*, 2002 WL 831821 (DOL Adm. Rev.Bd.), ARB Case No. 02-046, April 11, 2002)

Grimes was President of Coast, fully participated in the negotiation and procurement of the contract for the work at Redstone Arsenal, was responsible for the day to day operation of the company, was frequently onsite at Redstone, was for lengthy periods project manager himself, educated his replacement project manager in all aspects of the contract, according to his testimony, Grimes's testimony in regard to the violations is not believable. He had "no recall" of comp time, even though his government contracts manager, Brenda Caldwell, who reported directly to him, did remember. He denied pressuring the project manager about cost overruns and overtime, even though Caldwell wrote at least one memorandum on the subject. It was clear from the testimony of both Brenda Caldwell and Mr. Scott that Grimes directed the entire operation and was a party responsible under the SCA.

While Scott had less to do with the on site management of the Redstone Project, he was nevertheless a "party responsible" in this case. He was the Vice President of Coast Industries during the investigation period and was in charge of the financial management of the company. He testified that he had been finance officer for 10 years. He was in charge of payroll and maintenance of the general ledger. Further, according to the testimony of Caldwell, the corporate offices were copied with all memoranda issued by the project offices. Mr. Scott was aware of the comp time and record keeping practices of Coast as can be seen by Respondents' Exhibits 9 and 10. In addition, even though Mr. Scott is still an officer of Coast, he did not make any effort to see that the underpaid employees were paid until immediately prior to the hearing in this matter and has not done anything to assure that compliance with the SCA is more likely in the future than it was at the time of the violations.

Additional Findings

17. Respondents have to failed show any “unusual circumstances” which would warrant relief from debarment. There was culpable conduct and falsification of payroll records. The existence of either prohibits relief from debarment. Coast failed Parts II and III of the unusual circumstances test as well. Coast’s corporate officers are parties responsible under the law and were complicate in the failure to abide by the SCA’s requirements.

18. Coast Industries, Inc., Herman Grimes and Jerome Scott should be debarred for violating the SCA and for the failure to prove unusual circumstances which would militate in favor of relief from the strict debarment requirements of the SCA.

Based upon the findings and conclusions heretofore made, I enter the Order which follows:

ORDER

It is Ordered that:

1. The parties shall comply with the agreements and stipulations contained in Complainant’s Exhibits 1 and 2 and reflected in Findings of Fact 1 through 16 herein.
2. Coast Industries, Inc., dba Coast Janitorial Services shall be debarred for a period of three years under Section 5(a) of the Service Contract Act (41 U.S.C. § 354(a).)
3. Herman Grimes, an individual, shall be debarred for a period of three years under Section 5(a) of the Service Contract Act (41 U.S.C. §354(a).)
4. Jerome Scott, individual shall be debarred for a period of three years under Section 5(a) of the Service Contract Act (41 U.S.C. §354(a).)

A

DONAL B. JARVIS
Administrative Law Judge