

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 December 2007

Case No.: 2007-SCA-00006

In the Matter of:

ROBERT GOMEZ,
doing business as
MAGIC BRITE JANITORIAL,
Respondent.

APPEARANCES:

Norman E. Garcia, Attorney
For the Department of Labor

Bryan J. Cohen, Attorney
For Respondent, Robert Gomez, dba Magic Brite Janitorial

BEFORE:
Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351 ("the Service Contract Act" or "SCA" or "the Act"). The regulations issued pursuant thereto can be found at 29 C.F.R. Parts 4 and 6. The Act sanctions those who are awarded a federal contract and subsequently fail to (1) pay the required wage, (2) award minimum fringe benefits or (3) keep adequate records, by barring them from receiving federal contracts for a period of 3 years.

Background and Procedural History

On March 19, 2007, the Secretary of Labor ("Secretary") filed a complaint against Respondent, alleging he had violated the Act by failing to timely pay minimum fringe benefits under various contracts with Federal agencies. Administrative Law Judge Exhibit ("AX") 1, ¶ IV. The Secretary and Respondent reached an accord to resolve those issues by Respondent agreeing to pay said fringe benefits and Consent Findings were approved by Chief Judge John Vittone on April 5, 2007. AX 1. On April 19, 2007, Chief Judge Vittone issued an Order seeking clarification of the Consent Findings regarding the issue of debarment. AX 2. On May 8, 2007, the parties submitted a Joint Statement to Chief Judge Vittone which identified debarment as the sole remaining issue in this matter. AX 3. This matter was thereafter assigned to me and a Notice

of Hearing was issued on March 23, 2006, for the hearing to be held on June 22, 2006. AX 4. In a Pretrial Statement dated June 28, 2007, the Solicitor indicated that the Secretary would present no opposition to Respondent's efforts to be excused from the ineligibility list provided Respondent complied with the terms of the Consent Findings and did not present misleading information at the hearing. AX 6. After a continuance, the formal hearing was held on August 31, 2007, in Las Vegas, Nevada, at which time all parties presented testimony and other evidence. AX 5 and 8. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits ("AX") 1-9 and Respondent's Exhibits ("RX") 1-212. Respondent presented evidence in support of his request for relief from debarment, including testimony from respondent Robert Gomez. Following the hearing, the record was left open for the submission of closing briefs. Respondent filed a Post-Hearing Brief on November 9, 2007.

Issue

The only issue presented for my resolution is whether Respondent shall be debarred pursuant to § 354(a) of the Act. Furthermore, in reaching an outcome, I need not address whether Respondent actually violated the Act, since he has admitted doing so, although he argues these violations were not intentional. I thus need only determine whether Respondent has established that he is entitled to relief from debarment.

The Arguments of the Parties

Respondent argues the violations were not the result of culpable conduct and that no other aggravating factors are present. He also argues he has proven the existence of unusual circumstances, including lack of prior violations, the particular circumstances of the business, serious illness of the Respondent's daughter diverting his attention from management of the business and delay in payments due Respondent by the Government, sufficient to warrant relief from the ordinary sanction of debarment.

Statement of Facts

Testimony of Robert Gomez

Gomez is the sole owner and general manager of Magic Brite Janitorial, a small Las Vegas area janitorial service employing 130 full-time employees which primarily furnishes services to government and commercial entities. Hearing Transcript ("Tr.") at 13-14. The firm's administrative functions are carried out by Gomez; his wife, Sue Gomez; and sister, Kim Rivela. Tr. 15. Magic Brite has been operating since 1993 and has handled between 12 and 16 government services contracts comprising approximately fifty percent of its total operations. Tr. 15-16.

Gomez testified that Magic Brite offers medical, dental and vision plans to its employees as well as a retirement plan as fringe benefits. Tr. 36-38. He stated that Magic Brite determined the appropriate contributions to these plans by multiplying the number of hours worked by each employee by the fringe benefit rate set in each government contract. Gomez testified that after making the payments for the various health plans, the remaining fringe benefit amounts were submitted to the Boone Group, a third-party administrator that handles the employee retirement

accounts. Tr. 38-39. The fringe benefit violations at issue in this matter related solely to the retirement plan contributions as all of the health plan payments were consistently made. Tr. 40. Gomez stated that Magic Brite first began falling behind in its contributions to the Boone Group by a month or two until late October 2005 and the first half of 2006 when more significant delays in payments to the Boone Group occurred. Tr. 22-25.

Gomez testified that these delays in making the fringe benefit payments to the Boone Group were attributable primarily to two significant problems encountered by the family-run operation. The first of these was a significant medical problem encountered by Gomez's daughter. Gomez stated that in late 2003, his 11 year old daughter began to show unusual symptoms of fatigue. He stated that after months of traveling across the country to various hospitals and doctors, his daughter was ultimately diagnosed with Chronic Inflammatory Demyelinating Polyneuropathy ("CIDP"), a rare nerve disorder, in January of 2004. Tr. 18-21; RX 3-28. Gomez indicated that his daughter's condition had only recently stabilized after over three years of treatment. Tr. 21. At about the same time, Magic Brite began experiencing delays in payment on several government contracts apparently relating in large part to delays in obtaining modifications to existing contracts when increases in pay rates and fringe benefit contributions were dictated by updated wage determinations. Tr. 22-23. Gomez testified that at one point his firm was owed over \$415,000.00 on various government contracts which were delayed. Tr. 24. This delay in payments hindered Respondent's ability to make contributions to the Boone Group. Tr. 26. In essence, Gomez contends that the distraction caused by his daughter's illness and need for extraordinary medical treatment compounded by the delays in government approval of contract modifications needed to bring in sufficient income lead to the firm's falling behind in the payment of the employees' retirement benefits to the Boone Group.

Gomez testified that he cooperated with the Department of Labor ("DOL") investigator during the course of the investigation and produced all records requested although he was initially somewhat slow due to coping with his daughter's situation. Tr. 45-46. Counsel for the Secretary agreed that Respondent, after a slow start, showed a high degree of cooperation. Tr. 48. Gomez denied any previous violations or investigations. Tr. 49. Gomez testified that although the violations numbered approximately 300, there were only about 60 employees involved per year over the course of almost five years. Tr. 42-45. He also pointed out that only retirement benefits were affected and that employees received all of their pay and health benefits without interruption. Tr. 39-40. All of these amounts have been brought up to date pursuant to the agreement reached with the Secretary following the investigation. Tr. 44, 48.

Gomez further testified that he has taken steps to ensure future compliance with the Act. He has instituted a review process within his office to assure that benefits are properly calculated. Tr. 35-37. Gomez also indicated that he had benefited from the assistance of the DOL investigator who had shown Gomez the DOL website and the various tools and information available thereon. Tr. 49-50. Gomez testified that he now also promptly follows up on modification requests and has learned to appeal to the Board of Contract Appeals if he continues to experience problems with being properly paid on government contracts. Tr. 50-52.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Respondents are subject to debarment under the SCA, which prescribes an automatic three-year period of debarment.

The debarment provision of the SCA states:

The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

41 U.S.C. § 354(a).

As noted above, debarment is presumed whenever there is a finding of violations under the Act unless the contractor is able to show the existence of “unusual circumstances.” 29 C.F.R. §§ 4.188(a) and (b); *see Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-20 (ARB Apr. 30, 2001); *A to Z Maintenance*, 710 F. Supp. 853, 855 (D.D.C. 1989). “The debarment of contractors is the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction.” *Sec’y of Labor v. Glaude*, ARB No. 98-081, ALJ No. 1995-SCA-38, slip op. at 6-7 (ARB Nov. 24, 1999) (quoting *Vigilantes v. Adm’r of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992)). The term “unusual circumstances” is not statutorily defined and any determination with respect thereto “must be made on a case-by-case basis in accordance with the particular facts present.” 29 C.F.R. § 4.188(b)(1). Neither ignorance of the SCA’s requirements nor negligence, e.g., failure to read and become familiar with the terms of the contract, are sufficient to demonstrate unusual circumstances. *See* 29 C.F.R. § 4.188(b)(1) and (b)(6); *Integrated Res. Mgmt, Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14 (ARB June 27, 2002). Similarly, the lack of a history of noncompliance is insufficient to establish unusual circumstances. *See, e.g., Jernigan’s Backhoe and Loader*, Case No. 86-SCA-9 (Dep. Sec’y. May 16, 1991) (finding of unusual circumstances does not turn solely on the absence of culpable conduct, but must take into account, inter alia, history of similar violations and compliance history, cooperation, payment of monies due, and assurances of future compliance).

The determination as to whether unusual circumstances exist is governed by a three-part test. 29 C.F.R. § 4.188(b)(3)(i)-(ii); *Hugo Reforestation, Inc., supra*. Under part one, the contractor must establish that the violations were not willful, deliberate, aggravated in nature, or the result of “culpable” conduct, and must also demonstrate an absence of a history of similar, “culpable conduct” as defined in the regulation to include culpable neglect to ascertain whether practices are in violation, culpable disregard of whether the contractor was in violation, or culpable failure to comply with recordkeeping requirements. 29 C.F.R. § 4.188(b)(3)(i). Further, there must not be a record of repeated, or serious violations of the SCA. 29 C.F.R. § 4.188(b)(3)(i). Under part two of the test, the contractor must show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). Finally, under part three, a variety of factors must be considered, including any prior investigations for violations of the Act, recordkeeping violations which impeded the investigation, the existence of a “bona fide legal issue,” the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any violations (including the impact on employees), and whether the amount due was promptly paid. 29 C.F.R. § 4.188(b)(3)(ii). It is “the violator of the Act [who] has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction.” 29 C.F.R. § 4.188(b)(1); *Bither v. Martin*, 1992 WL 207912 (unreported) (C.D. California 1992), *Vigilantes, Inc., supra*.

Part I of the SCA Debarment Test

Magic Brite contends that its failure to timely make the fringe benefit payments under the Act were not willful, but rather resulted from financial inability to make the payments timely compounded by the distraction accompanying the young daughter’s unusual illness. Respondent points out that it continued to make payments during the course of the investigation and promptly agreed with the Secretary on repaying all of the fringe benefit amounts due upon completion of the investigation. Tr. 53; AX 1.

Indeed, the facts in this matter are similar to those in *Elaine’s Cleaning Service, Inc. v. U.S. Department of Labor*, 106 F. 3d 726 (6th Cir. 1997), wherein the Court held that failure to pay fringe benefits due to lack of funds related to late government contractual payments was not culpable conduct. The Court noted that “the most uniform interpretation of culpability includes an element of reckless disregard or willful blindness.” *Id.* at 729. In the present case, Respondent was similarly hindered in its ability to make the fringe benefit contributions by delayed payments on government contracts. Further, Respondent continued to make payments as it could and has paid all such amounts to date.

The burden under part one 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. Respondent has demonstrated an absence of history of similar violations. Tr. 49.

This evidence taken together establishes that the aforementioned violations were not the product of Respondent’s willful, deliberate, or culpable conduct, and consequently, Respondent has established “unusual circumstances” under part one of the debarment test.

Part II of the SCA Debarment Test

Under part two 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 recordkeeping violations which impeded the Department’s investigation, and whether sums due were promptly paid. As noted previously, Respondent has no prior violations of the Act nor any prior investigations conducted against it. Tr. 49. Respondent submitted records to the investigator and cooperated with the investigation to the satisfaction of the Department. Tr. 48. Respondent has complied with the Consent Findings filed herein and has paid all monies due thereunder. Tr. 44, 48.

Part two also requires sufficient assurances of future compliance. Respondent offered evidence of a change in office administrative practices which would assure future compliance. Tr. 35-37. Gomez also testified that he has gained knowledge as to how to assure more timely payments from government entities as a result of the investigation process. Tr. 49-52.

Accordingly, Respondent also meets the “unusual circumstances” requirement under part two of the debarment test.

Part III of the SCA Debarment Test

With respect to part three of the debarment test, I find that Respondent has no prior violations under the Act, committed no recordkeeping violations which impeded the investigation, and continued to make payments during the course of the investigation. Tr. 45-46, 49. I further note that Respondent delayed only the fringe benefit contributions to the retirement plan while it met its obligations with regard to payment of actual wages and health benefits. Tr. 39-40. Finally, Respondent promptly entered into Consent Findings and paid the amounts owed thereafter demonstrating its efforts to ensure compliance with the Act.

It has been the burden of the Respondent to demonstrate “unusual circumstances” which would justify relief from the debarment requirements of the SCA. Based on all the foregoing, I find that Respondent has met its burden with respect to each of the three parts of the debarment test, which warrants a finding of “unusual circumstances” to preclude debarment under the SCA.

ORDER

IT IS HEREBY ORDERED that Respondent shall not be debarred from accepting Government contracts based upon the violations herein.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board (“ARB”) within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). *See* 29 C.F.R. § 6.20. The Board’s address is:

Administrative Review Board
United States Department of Labor
Room S-4309
200 Constitution Avenue, NW
Washington, DC 20210

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

The ARB’s Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b). Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).