

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 July 2010

Case Number: 2008-SCA-00016

In the Matter of:

FREDY BOWERS aka F & B ENTERPRISES,
Respondent.

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For Complainant:

Charna C. Hollingsworth-Malone, Esq.

For Respondent:

Kristen Doolittle, Esq.

Before:

Stuart A. Levin
Administrative Law Judge

Summary Decision

This matter arises pursuant to complaint filed by the Secretary of Labor, alleging that Respondent, Fred Bowers, doing business as F&B Enterprises, violated the provisions of the McNamara O'Hara Service Contract Act, (SCA) 41 U.S.C. §351, et seq., and the regulations promulgated and published at 29 C.F.R. Parts 4, 6, and 18 to implement the Act in connection with a government contract with the U.S. Postal Service to haul mail. The complaint alleged that Respondent failed to notify employees of the compensation they were due for services provided under the contract, failed to pay required wages and fringe benefits, and failed to maintain accurate records. The complaint further alleged that no "unusual circumstances" exist that would relieve Respondent from the debarment provisions in Section 5(a) of the SCA.

Procedural History

Following an investigation by Complainant into Respondent's practices as a contract mail hauler, charges were lodged alleging violations of the SCA. On January 12, 2009, Respondent answered the complaint claiming that any deficiencies in the amounts he paid his employees or in his record keeping practices were due to his ignorance of the law, agreements by his employees to accept the pay levels he provided, and fraud against him by his employees. Respondent also requested a hearing.

In accordance with pre-trial discovery rules promulgated and published at 29 C.F.R. Part 18, Complainant, on July 16, 2009, served Respondent with a First Request for Interrogatories, a Request for Production of Documents, and a First Request for Admissions. Pursuant to the applicable the Rules of Practice at 29 C.F.R. §§ 18.6(d), 18.20(b), and 18.21, Respondent's discovery responses were due on or before August 20, 2009. When the deadline passed without a response, Complainant, on September 15, 2009, moved to compel Respondent to answer interrogatories and produce the documents requested. In addition, Complainant moved to deem admitted each matter for which an admission was requested on July 16, 2009. Respondent filed no response either to Complainant's Motion to Compel or the Motion to Deem the Requests for Admissions Admitted.

As a result, on October 5, 2009, Complainant's Motion to Compel was granted, and Respondent was ordered to answer the interrogatories and produce the documents requested. Respondent has since failed to comply with the discovery order. In addition, because Respondent failed to reply to the Request for Admissions or object to any of them, and provided no reason for its failure to respond within 30 days as required by Rule 18.20(b); Complainant's motion to deem requested admissions admitted was granted pursuant to Section 18.20(d) of the Rules.

Thereafter, the matter was scheduled for a hearing on the merits. On December 31, 2009, Complainant moved for Summary Decision. At the hearing, on January 14, 2010, Respondent, Fred Bowers, appeared *pro se*, and was granted to time to secure the assistance of counsel and time to respond to Complainant's Motion for Summary Decision. On March 5, 2010, Respondent, now represented by counsel, filed a Response in Opposition to Complainant's Motion for Summary Decision.

Summary Decision Criteria

Summary decision may be entered pursuant to 29 C.F.R. Section 18.40(d) under circumstances in which no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See, Gillilan v. Tennessee Valley Authority*, 91-ERA-31, at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1, at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision: "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Held v. Held*, 137 F.3d 998-99 (7th Cir. 1998). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, (1962); *Rogers v. Peabody Coal Co.*, 342 F.2d 749 (6th Cir. 1965).

When a complainant moves for summary decision on the ground that the respondent lacks evidence sufficient to establish a defense against the complaint, the respondent is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the

existence of a genuine issue of material fact. Lujan v. Defenders of Wild-life, 504 U.S. 555, 112 Sup. Ct. 2130 (1992); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Evidence submitted by a party opposing summary decision must then be considered in light of its content or substance rather than the form of its submission. Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir. 1994). Considering the foregoing principles, and for reasons set forth below, Complainant's Motion for Summary Decision will be granted.

Reliance on Admissions

Administrative Rule 18.20(b) provides that: "Each matter of which an admission is requested is admitted unless, within 30 days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed" serves upon the party requesting the admission a written answer or objection to the request. The language of Rule 18.20(b) is, in this regard, essentially the same as Rule 36 of the Federal Rules, and, as a consequence, in absence of an interpretation of the Rule 18.20 by the ARB, federal cases interpreting Federal Rule 36 are equally applicable here. *See, e.g.*, 29 C.F.R. §18.1(a). Since Respondent failed to answer Complainant's Request for Admissions, the matters contained within the Request for admissions were admitted by operation of law. *See*, Order Granting Motion to Compel and Deeming Requested Admissions Admitted (October 5, 2009); *accord*, Perez v. Miami-Dade County, 297 F.3d 1255 (11th Cir. 2002); Smith v. First Nat'l Bank of Atlanta, 837 F.2d 1575, 1577 (11th Cir. 1988); State Farm Ins. Co. v. Weiss, Case No. 6:03-cv-1645-Orl-31KRS (M.D. Fl., Dec.7, 2005). The facts thus deemed admitted under FRCP 36(a)(1) may form the basis for summary decision, *see*, United States v. 2204 Barbara Lane, 960 F.2d 126 (11th Cir.1992); Puerto Rico American Insurance Co. v. Vazquez, No. 08-2012, No. 08-2274 (1st Cir. May 10, 2010), and that principle is equally applicable to Rule 18.20(b). *See*, Canterbury v. Administrator, 2004 WL 3038067, 2002 SCA 007 (ARB, Dec. 29, 2004).¹

As in Vazquez, the facts deemed admitted in this proceeding form the basis for Complainant's Motion for Summary Decision. In answer to the summary decision motion, however, Respondent now disputes several material facts relied upon by Complainant, including the allegations that he violated the SCA's recordkeeping and notice requirements, hired or employed service contract employees during periods alleged, failed to pay required wages or fringe benefits, and refused to change his work practices. In addition, Respondent contends that he has satisfied his burden of demonstrating that "unusual circumstances" exist which relieve him from the debarment provisions of the Act. In support of the Opposition to Summary Decision, Respondent submits the Declaration of Fred Bowers, three Contract Personnel Questionnaires, and payroll records for six individuals. The initial issue presented is whether Respondent may now place dispute facts previously admitted.

Withdrawal of Admissions

Rule 18.20(e) provides that: "Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of

¹ Although Canterbury may suggest otherwise, it should here be emphasized that when a party fails to respond to a request for admissions, the facts are then deemed admitted, not as a sanction imposed by the judge as a matter of discretion, but by operation of the express provision of Rule 18.20(b).

the admission.” The proper procedural vehicle for initiating an attempt to withdraw admissions under the federal rule and Rule 18.20(e) is via a motion to withdraw. *See e.g.*, U.S. v. Kasuboski 834 F.2d 1345 (7th Cir. 1987); *but see*, Amer. Auto. Ass’n (Inc.) v. AAA Legal Clinic of Jefferson Cooke, P.C., 930 F.2d 1117, 1120 (5th Cir.1991 (reversing a withdrawal of admissions entered by the district court *sua sponte*). In this instance, Respondent has not specifically moved to withdraw the admissions; however, the courts are quite flexible when interpreting what constitutes a motion to withdraw under Federal Rule 36(b). For example, statements made by an attorney during oral argument have been deemed sufficient, *see*, Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 153-54 (6th Cir.1997); Rodgers v. Allen, 2009 WL 2192622 (N.D. Ill., 2009), while permission to amend an answer contradicting prior admissions has been construed as tantamount to permitting withdrawal of admissions. *See*, Gardner v. S. Ry. Sys., 675 F.2d 949, 953-54 (7th Cir.1982). Significantly, in Bergemann v. U.S., 820 F.2d 1117, 1121 (10th Cir.1987), a response to a summary judgment motion was found sufficient to constitute a motion to withdraw Rule 36(b) admissions.

Considering the types of communications the courts have been willing to construe as a motion seeking to set aside previous admissions, particularly during pre-trial stages of a proceeding, it would not seem an abuse of discretion to treat Respondent’s Opposition to Complainant’s Motion for Summary Decision in this proceeding as a Rule 18.20(e) motion to withdraw admissions. *See, e.g.*, Bergemann, *supra*. Accordingly, it is necessary to turn to the merits of what here will be deemed Respondent’s motion to withdraw.

Criteria for Withdrawal of Admissions

Under Federal Rule 36(b), a court: "may permit withdrawal or amendment [of an admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." *See also*, Perez, *supra*. Rule 18.20(e), however, unlike Rule 36, contains no specific provisions governing the circumstances under which the withdrawal of admissions may be permitted. Nevertheless, the decision to grant or deny a motion to withdraw admissions remains a matter of discretion, *see*, Dean v. Barber, 951 F.2d 1210, 1213 (11th Cir.1992); In re Durability Inc., 212 F.3d 551, 556 (10th Cir.2000); Mid Valley Bank v. North Valley Bank, 764 F.Supp. 1377, 1391 (E.D.Cal.1991), and the decisions rendered by courts in applying Rule 36 would seem to provide valuable guidance in the exercise of that discretion in the application of Rule 18.20(e).

Two-Part Test

In assessing a motion to withdraw admissions, the courts have adopted a "two-part test." Smith v. First Nat'l Bank, 837 F.2d 1575, 1577 (11th Cir.1988). The first consideration is whether the withdrawal will subserve the presentation of the merits. If it will, it must then be determined whether the withdrawal will prejudice the party who obtained the admissions in its presentation of the case. Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir.1995); FDIC v. Prusia, 18 F.3d 637, 640 (8th Cir.1994). The two- part test is, moreover, strictly construed. Indeed, in Perez, the Court ruled that it constitutes an abuse of discretion under Rule 36(b) if a criterion beyond the two-part test is applied, or the test is grossly misapplied. *See also*, Gutting v.

Falstaff Brewing Corp., [710 F.2d 1309](#), 1313 (8th Cir.1983). In accordance with Perez, Hadley, and FDIC, we shall, therefore, see whether the withdrawal of the admissions will subserve the presentation of the merits, and then determine whether the withdrawal will prejudice the presentation of Complainant's case.

Promotion of the Presentation of the Merits

In Perez, the court explained that the first prong of the two-part test: “emphasizes the importance of having the action resolved on the merits,” Smith, 837 F.2d at 1577,” and it is “satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case,” Hadley, 45 F.3d at 1348.” Similarly, in Conlon v. United States, [474 F.3d 616, 622 \(9th Cir. 2007\)](#), the Court ruled that the first prong of [Rule 36\(b\)](#) is satisfied when upholding the admissions would eliminate any need for a presentation on the merits. In Hadley v. U.S., [45 F.3d 1345, 1348 \(9th Cir. 1995\)](#), the Court found that withdrawal was proper under circumstances in which two of the admissions “essentially admitted the necessary elements [of the claims].” *Id.*

In the instant case, the facts deemed admitted conclusively establish the violations charged under the SCA. For instance, Respondent admitted prior violations, admitted that he failed to pay prevailing wages and fringe benefits, failed to provide required notices or maintain accurate work records, and refused to change his work practices to comply with the SCA. *See*, Exhibit 2 (Admissions Deemed Admitted). These are the core elements of the violation and deeming them admitted eliminated the need for a presentation of the merits.

Thus, Complainant moved for summary decision on many of the ultimate issues in this case based on the admissions made by Respondent. Obviously, withdrawal of an admission need not be granted simply because it relates to an important matter in the litigation, *see*, Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., [123 F.R.D. 97, 108 \(D.Del.1988\)](#); however, in a case such as this, where admissions were made on elemental issues by a *pro se* litigant, it would seem well within the bounds of an appropriate exercise of discretion to find the first prong of the test satisfied. Rodgers v. Allen, 2009 WL 2192622 (N.D. Ill., 2009). Accordingly, I find that granting the motion to withdraw would “subserve the presentation of the merits,” and, therefore, the first prong of the two-part test has been satisfied. Perez, *supra*; Conlon, *supra*; Hadley, *supra*.

Prejudice to Complainant

Prong 2

The second factor of the two-part test is whether the withdrawal will prejudice Complainant in presenting the merits of the complaint. In Perez, citing Brook Village. N. Assoc. v. Gen. Elec. Co., [686 F.2d 66, 70 \(1st Cir.1982\)](#), the Court explained:

The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of

key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.

In addressing the issue of prejudice, the party that obtained the admissions has the burden of showing prejudice, [Hadley](#), 45 F.3d at 1348, and depending upon the stage of the proceeding, that burden may vary. Once a case has reached the stage of a final pre-trial conference or order or after a trial has commenced, the prejudice of withdrawal may be readily apparent. *See, e.g., 999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir.1985). In contrast, when there is substantial time available for the party that obtained the admissions to discover evidence in preparation for trial, courts are more willing to allow withdrawals. *See, Kirtley v. Sovereign Life Ins. Co.*, 212 F.3d 551, 556 (10th Cir.2000); *F.D.I.C., supra.* Thus, in *Conlon*, the Court was reluctant to find prejudice under circumstances in which a litigant abandoned discovery in reliance on an admission on the ground that the district court could have re-opened discovery. *Conlon* at 624. Similarly, in *Rodgers*, the Court was persuaded that the nonmoving parties suffered no prejudice, because they could obtain the discovery they had forgone in reliance on Plaintiffs' admissions by requesting the court to permit it.

Yet, delay that affects discovery can be a factor in finding prejudice under [Rule 36\(b\)](#), *see, e.g., Matthews v. Homecoming Fin. Network*, 2006 WL 2088194, (N.D.Ill. July 20, 2006); *Tidwell v. Daley*, 2001 WL 1414229, (N.D.Ill.2001)). In *Finlay v. Wolpoff*, Civil Action No. H-08-0786 (S.D. Tex., March, 31, 2009), for example, the court found that withdrawal of admissions would promote the presentation of the merits; however, it further found: "That fact is overshadowed in this case by the prejudice redounding to Plaintiff should the court grant Defendant's motion," since the moving party failed to cooperate in discovery and had not responded to the discovery requests at the time it moved to withdraw its admissions. *Id.*

In this instance, while the presentation of the merits of the action would be subserved by the withdrawal of the admissions, I conclude that Complainant would be prejudiced in her ability to prepare for trial if the motion to withdraw the admissions were granted. Like the situation in *Finlay*, Respondent here did not cooperate in discovery; but unlike the situation in *Perez*, *Rodgers*, and *Conlon*, Complainant did not forego discovery to pursue summary decision based upon the admissions. Complainant in this proceeding actively pursued discovery and has already requested the aid of the court to compel Respondent to participate in discovery. Yet, despite the entry of an Order to Compel answers to interrogatories and to produce documents responsive to Complainant's Request to Produce Documents, Respondent was, and remains, non-compliant. To be sure, he was acting *pro se* during the discovery process, but his non-compliance continued, notwithstanding the appearance of counsel on his behalf.² Indeed, his Opposition to the Motion for Summary Decision annexes selected documents, but it does not mention the discovery matters which Respondent was ordered to address.

Under such circumstances, the possibility of re-opening discovery, as suggested in *Conlon*, would not obviate the prejudice to Complainant, because unlike a district court, the

² In *Perez*, the party relying on the admissions had, despite some resistance, engaged in discovery all along, and had only relied on the admissions for six days. Complainant in this proceeding attempted unsuccessfully to engage in discovery and met total resistance and non-compliance.

administrative process does not provide the range of options to compel compliance with discovery orders that are available to a district court.³ Consequently, since Complainant in this proceeding has already pursued its discovery options, and has obtained an Order Compelling Discovery that Respondent has ignored, re-opening discovery would appear futile. As such, the prejudice that would result from the withdrawal of the admissions would not be cured by the possibility of re-opening discovery as suggested in Conlon and Rodgers, because the problem here is not the availability of discovery previously foregone in reliance on the admissions, but the prejudice that would result from requiring Complainant to proceed to trial without the benefit of either the admissions or the fruits of discovery that Respondent has refused to provide in compliance with a discovery order.⁴

For these reasons, I conclude that Complainant has met the Perez and Hadley burden of establishing prejudice in her preparation for trial if the admissions are withdrawn. The Motion to Withdraw Admissions will, therefore, be denied. Accordingly, although Respondent, in his Opposition to the Motion for Summary Decision, seeks to inject fact disputes otherwise covered by the admissions; pursuant to Rule 18.20(e) the facts deemed admitted are conclusively established, and are, therefore, relied upon as a basis for the findings which follow.

Findings of Fact

1. Fredy Bowers, aka F&B Enterprises, at all times pertinent hereto, had a place of business in Jacksonville, Florida. Exhibit 2 Admissions Deemed Admitted; Exhibit 3.
2. Respondent engaged in the business as a mail haul contractor for the U.S. Postal Service. Id.
3. Contract No. 32040, awarded to Respondent by the U.S. Postal Service June 30, 2003, to haul mail during the period between July 1, 2003-June 30, 2007, for an amount in excess of \$98,706.00. Id.
4. Contract No. 32040 is subject to the SCA. Id.
5. Contract No. 32040 at all times pertinent hereto was performed in the U.S. through the use of service employees within the meaning of Section 8(b) of the SCA, 41 U.S.C. §357(b), and therefore, was covered by and subject to the SCA. Exhibit 2.
6. Jurisdiction in this matter is conferred by Section 4(a) of the SCA, 41 U.S.C. §353(a) and regulations promulgated and published by the Department of labor at 29 C.F.R. §§ 4.189 and 6.15.

³ It is unnecessary here to decide whether a party may rely upon documents withheld in discovery to later support a response to a motion for summary decision. It may be noted that Rule 18.40(d) addresses the converse situation involving non-cooperation by the movant, but the principle would seem to apply to the non-movant as well.

⁴ Here again, it is emphasized that the denial of the motion to withdraw the admissions is not a sanction for Respondent's failure to participate in discovery or comply with the discovery order, but is rather necessary to avoid prejudice to the Complainant in presenting her case. *See, Perez, supra.*

7. In 2003, The U.S. department of labor, Wage and Hour Division, investigated respondent for complaints regarding failure to pay fringe benefits under SCA §2(a)(2). Exhibit 4.
8. Between October, 2001, and October, 2003, respondent employed Charlie Jones and Nathaniel Scott as service employees. Exhibit 4; Exhibit 2.
9. Between October, 2001, and October, 2003, Fredy Bower did not maintain records of weekly hours worked by Charlie Jones as required under the SCA. Exhibit 4; Exhibit 2.
10. The U.S. department of Labor, Wage and Hour Division, found that, between October, 2001, and October 2003, Fredy Bowers failed to pay \$5,349.93 in fringe benefits to Charlie Jones as required by the SCA. Exhibit 4; Exhibit 2.
11. Between October, 2001, and October, 2003, Fredy Bower did not maintain records of weekly hours worked by Nathaniel Scott as required under the SCA. Exhibit 4; Exhibit 2.
12. The U.S. Department of Labor, Wage and Hour Division, found that, between October, 2001, and October 2003, Fredy Bowers failed to pay \$9,066.65 in fringe benefits to Nathaniel Scott as required by the SCA. Exhibit 4; Exhibit 2.
13. In 2003, Fredy Bowers agreed, during a conference with Wage and Hour Division Investigator Daniel White, that Fredy Bowers would comply with the requirements of the SCA in the future. Exhibit 4; Exhibit 2.
14. In 2003, Fredy Bowers agreed to pay, and did pay, a total of \$14,416.68 in back wages for failure to provide fringe benefits to employees under SCA §2(a)(2) . Exhibit 4; exhibit 2.
15. Between November, 2004, and November, 2006, the U.S. Department of Labor, Wage and Hour Division, investigated Respondent for complaints regarding failure to pay prevailing wage rates, fringe benefits and failure to disclose prevailing wage rates. Exhibit 5; Exhibit 2.
16. The employees identified in the complaint were employed by Fredy Bowers at some time between July 1, 2003, and June 30, 2007. Exhibit 2. Specifically, Respondent employed the following individuals as service contract employees: Larry Andrews, June 3, 2006 to June 10, 2006; Joe Green, October 28, 2006, to November 4, 2006; Leslie Heimach, April 16, 2005, to June 17, 2006; Judy Jackson, February 4, 2006, to April 8, 2006; Ceasar Levy, October 14, 2006, to October 21, 2006; Herbert Levy, September 23, 2006, to September 30, 2006; Bobby Neusome, August 5, 2006, to September 2, 2006; and Rochelle Snelson, October 28, 2006, to November 4, 2006. Exhibit 2; Exhibit 5; Exhibit 6.
17. During times between July 1, 2003 to June 30, 2007, Fredy Bowers failed to pay employees the minimum monetary wages in accordance with prevailing wage rates

determined by the secretary as required by Section 2(a)(1) of the SCA, 41 U.S.C. § 351(a)(1), and Regulations at 29 C.F.R. §§ 4.6 and 4.161. Exhibit 2; Exhibit 5.

18. During times between July 1, 2003 to June 30, 2007, Fredy Bowers failed to pay employees for holidays, vacation and health and welfare benefits required by Section 2(a)(2) of the SCA, 41 U.S.C. § 351(a)(2), and Regulations at 29 C.F.R. §§ 4.6 and 4.161. Exhibit 2; Exhibit 5. Eight employees were found due \$5,206.95 for health and welfare violations. Id.
19. During times between July 1, 2003 to June 30, 2007, Fredy Bowers failed to maintain accurate records of each employee's daily and weekly hours worked as required by Regulations found at 29 C.F.R. §§ 4.6(g) and 4.185. Exhibit 5; Exhibit 2.
20. During times between July 1, 2003 to June 30, 2007, Fredy Bowers failed to notify each service employee of the compensation to be paid and the fringe benefits to be furnished, as required by regulations found at 29 C.F.R. §§ 4.6(e) and 4.183. Exhibit 5; Exhibit 2.
21. During times between July 1, 2003 to June 30, 2007, Fredy Bowers failed to inform Larry Andrews, an employee, of the prevailing wage rate. Exhibit 2; Exhibit 5; Exhibit 6.
22. During times between July 1, 2003 to June 30, 2007, Fredy Bowers did not pay Larry Andrews, an employee, wages for training time – the time the employee spent learning routes and duties. Exhibit 5; Exhibit 2.
23. In January, 2007, at a final conference with a U.S. Department of Labor Wage and Hour Investigator, Fredy Bowers refused to pay back wages that the Wage and Hour Division determined were due. Exhibit 2; Exhibit 5.
24. In January, 2007, at a final conference with a U.S. Department of Labor Wage and Hour Investigator, Fredy Bowers stated that he refused to to change his work practices to follow the requirements of the SCA. Exhibit 2; Exhibit 5.
25. On June 28, 2007, the U.S. Department of Labor Wage and Hour Division withheld contract payments to ensure back wages distributions to employees. Exhibit 2; exhibit 5.
26. In 2007, as a result of its investigation, The U.S. department of labor, Wage and Hour Division, concluded that eight of Respondent's employees were due back wages. Exhibit 2; Exhibit 5.
27. On February 15, 2008, Fredy Bowers signed an Authorization for Disbursement of Funds stating that "I do not dispute the back wage findings and do not desire an opportunity for a hearing before the department of Labor Administrative Law Judges. Exhibit 7; Exhibit 5; Exhibit 2.

28. In 2008, Fredy Bowers paid \$16,427.66 in back wages for violations under the SCA §§ 2 and 4. Exhibit 8; Exhibit 5; Exhibit 2.
29. Despite an agreement in 2003 to comply with the Act, Respondent is a repeat violator of the SCA. The Wage and Hour Division 2007 finding that Respondent owed employees back wages was the second finding by the Wage and Hour Division that respondent violated the SCA. Respondent's violations of the SCA between October, 2001, and October, 2003 and between September 2003, and June, 2007, include the same violations for failure to pay fringe benefits Exhibit 5; Exhibit 5. Respondent contends that violations in 2003 were different from the most recent violation because the fringe benefit violations in 2003 involved fulltime employees whereas the recent fringe benefit violations involved part time temporary employees. Resp. Opp. at 6.
30. Wage and hour's 2007 violations findings by respondent include more violations than those found as a result of its 2003 investigation. Respondent's additional violations for failure to pay prevailing wage rates, notification violations and record keeping violations. Exhibit 5.
31. Respondent stated that he paid service contract worker \$15.00 per hour. Exhibit 1. The hourly rate under the applicable wage determination for Contract 32040 awarded June 30, 2003, was \$16.10 per hour. Exhibit 5.

Conclusions of Law

The undisputed facts establish that Respondent violated the SCA and its regulations when he failed to pay the employees the proper hourly wage, fringe benefits, and holiday pay, and failed to provide required notices, and maintain accurate records. As a consequence of these violations, Respondent is subject to the debarment provisions set forth in Section 5 of the Act, 41 U.S.C. § 354(a), which provides that any person or firm found in violation of the SCA shall be declared ineligible to receive further federal contracts for three years unless the Secretary recommends otherwise because of unusual circumstances. Accordingly, debarment is presumed whenever there is a finding of violations under the Act, 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); *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), and a violator must be debarred unless he establishes the existence of unusual circumstances which warrant relief from the sanction. *U.S. Department of Labor v. Sanitary Disposal Systems, Inc.*, No. 85-SCA 63, (Decision of the Secretary, December 22, 1986).

Unusual Circumstances

The standards used to determine whether "unusual circumstances" justify relief from debarment are set forth in the regulations in a three part test. 29 C.F.R § 4.188; *see also, Washington Moving & Storage Co.*, No. SCA-168 (Decision of the Secretary, March 12, 1974); *Habitech, Inc.*, 92-SCA-106 (Decision of the Secretary, September 18, 1987); *see also, 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, “culpable neglect” includes the failure 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).

Part two of the test, requires the contractor to 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). Under each prong: “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. Cal., 1992), Vigilantes, Inc., *supra*; A to Z Maintenance Corp. v. Dole, 710 F. Supp. 853, 855 (D.D.C. 1989); *See*, 29 C.F.R. §§ 4.188(b).

Culpable Conduct

In his attempt to avoid debarment, Respondent initially contends that his failure to pay prevailing wages and fringe benefits was inadvertent and due to his mistaken use of the wrong wage determination which led him to believe that he should pay \$15.00 per hour rather than \$16.10 per hour. In addition, he contends his employees were all temporary or part-time workers, and he claims ignorance of the need to pay them fringe benefits. Res. Opp. at 8-9.

In defining “culpable conduct,” the Sixth Circuit notes that: “the most uniform interpretation of culpability includes an element of reckless disregard or willful blindness.” Elaine's Cleaning Serv., Inc. v. U.S. Dep't of Labor, 106 F.3d 726, 729 (6th Cir. 1997). In Dantran, Inc. v. United States Department of Labor, 171 F.3d 58 (1st Cir. 1999), the Court noted that: “culpability must require more than simple negligence or a mere failure to ascertain whether one's practices coincide with the law's demands.” *Id.* at 68. The court further required “affirmative evidence” to support a finding of culpable conduct, such as a contractor’s disregard of legal requirements contained on the face of the contract. *Id.* at 69. *See*, 29 C.F.R. § 4.188(b)(1) and (b)(6); Integrated Res. Mgmt, Inc., 1997-SCA-14 (ARB June 27, 2002). Colorado Sec., 1992 WL 415388, at *4. Thus, it is well-established that “culpable conduct” goes beyond mere negligence but falls short of gross carelessness or specific intent. 29 C.F.R. §4.188(b)(3)(i). Indeed, the First and Fourth Circuits have defined culpable conduct under the SCA as more than “mere negligence.” *See*, Werner v. Upjohn, Co., 628 F. 2d 848, 857-57 (4th Cir 1980); U.S. v. Dantran, Inc., 171 F. 3d 58, 68 (1st Cir. 1999).

In this instance, Respondent contends that his wage underpayments are not attributable to any culpable conduct, but rather to his mere inadvertent use of the wrong wage determination, and he notes that the wage determination was revised fourteen times during the term of the

contract. While the record does not show that Respondent changed his wage payments in light of any of the revised wage determinations, his excuses for non-compliance are dubious notwithstanding the revisions. This was not Respondent's first government contract. As an experienced mail hauler, he was no doubt aware that the wage determination is an important contract document which discloses an important contract cost. An experienced bidder would not likely overlook the initial wage determination. Nor would an experienced contractor likely ignore revisions during the course of the contract term. *See*, 29 C.F.R. §4.161. Nevertheless, construing facts in a light most favorable to Respondent as required by the principles governing the adjudication of a Motion for Summary Decision, I accept Respondent's assertion that he mistakenly used the wrong wage determination.⁵ As such, it would be difficult to characterize the inadvertent "mistake" as an act of willful neglect or reckless disregard of the SCA's requirements within the meaning of Werner and Dantran. I, therefore, do not find Respondent's conduct "culpable" in this respect.

Fringe Benefits

Respondent also admitted, however, that he failed to pay his employees' fringe benefits, and claims again that he was unaware of his obligation to pay fringe benefits to part-time and temporary workers. Here, too, the reason Respondent failed to pay fringe benefits was not an admitted fact. Nevertheless, Respondent's decision in this instance is not quite as benign as his inadvertent use of the wrong wage determination. While temporary and part-time workers may not be entitled to the same fringe benefits under the SCA as a full time worker, they are entitled to a proportionate share of fringe benefits. 29 C.F.R. §4.176; *see*, Res. Opp at 9.

Respondent acknowledges that he had been previously cited under a prior contract for fringe benefit violations, but notes that the prior violation involved full-time workers, and he claims he was unaware that his temporary or part-time workers were entitled to any fringe benefits.⁶ In view of his past difficulties with the fringe benefit requirements of the Act, however, the contractor, having once before been cited for fringe benefit violations, clearly acted willfully when he again decided to withhold fringe benefits from service workers involved in subsequent contracts without seeking the advice of the Wage and Hour Division.

Now I am mindful that the court in Dantran, noted that: "culpability must require more than ... mere failure to ascertain whether one's practices coincide with the law's demands," *Id.* at 68, However, in Dantran, the court emphasized that the type of violation found during a second investigation was not brought to the employer's attention during the first investigation. Respondent, without citing Dantran, seems to invoke the Dantran principle and emphasizes that his first fringe benefits violation involved full-time workers whereas these fringe benefit violations involves part-time and temporary workers. Dantran, however, is not so finely nuanced;

⁵ It should be noted that the reason Respondent underpaid his workers was an admitted fact.

⁶ At one point in his Opposition to the Motion for Summary Decision, Respondent contends that because he was paying an incorrect wage rate he was also paying an incorrect amount in fringe, thus suggesting that his non-culpable use of the wrong wage determination also explained his fringe benefit violation. *See*, Res. Opp. at 8. He did not, however, "pay an incorrect amount" of fringe benefits, he paid no fringe benefits; and, as he explained it, the reason he did not pay fringe benefits was allegedly due to his: "belief that since the employees identified were not full time or permanent, that they were not entitled to fringe." Res. Opp at 9.

particularly since the first investigation in Dantran revealed no violation. In this instance, in contrast, Respondent knew he had run afoul of the fringe benefit requirements of the SCA in the past, and in light of the earlier violation, his decision to withhold payment of all fringe benefits, rather than inquiry whether he was treating allegedly part-time and temporary workers in a manner consistent with the law's demands constitutes culpable neglect that Dantran does not excuse. Ignorance without inquiry it is not an open-ended defense under Dantran, and "willful blindness" is not a satisfactory excuse. Elaine's Cleaning Service, Inc., *supra*, (culpability includes an element of "willful blindness"). Respondent, as he had previously, again elected not to pay fringe benefits, and this time he is culpable.

Employment Records

Respondent next contends that he did, in fact, maintain employment records and provided those records to the Wage and Hour investigator who refused to accept them, allegedly because they were not properly organized in a manner satisfactory to the investigator. Res. Opp. at 10. Construing facts in a light most favorable to Respondent as required by the principles governing the adjudication of a Motion for Summary Decision, I accept his assertion that he provided employment records to the investigator. The accuracy of the records, however, is another matter.

Notwithstanding the records allegedly rejected by the investigator, Respondent had an opportunity to produce employment records in response to Complainant's document production request, was afforded a second chance in response to the Order compelling him to produce, and passed up a third opportunity to attest to the accuracy of his employment records when he failed to respond to the Request for Admissions. He was not forthcoming when he had ample opportunity address the matter, and it is now conclusively established, pursuant to Rule 18.20(e), that, while he may have provided records that the investigator rejected, he failed to maintain accurate employment records under Contract No. 32040.⁷ Moreover, the failure to maintain accurate employment records is an "aggravating factor" under the debarment regulations. *See*, 29 C.F.R. §4.188(b)(3)(i); Washington Moving & Storage, *supra*. Consequently, the aggravating factors in this instance include the repeat violations of the fringe benefit requirements under Section 2(a)(2) of the SCA and 29 C.F.R. §§ 4.6 and 4.162 of the regulations, and the failure to maintain accurate records pursuant to 29 C.F.R. §§4.6(e) and 4.185.

Mitigating Circumstances

Compliance History

Although the aggravating factors preclude relief from debarment, it may be noted that Respondent also failed to demonstrate the "prerequisites to relief" under the "unusual circumstances" test. Pursuant to the applicable regulation, Respondent must show that he had a good compliance history, that he cooperated during the investigation, that the money due has been repaid, and that he has provided "sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii) (2001). Respondent argues that he has been a government contractor for over 17 years and has, during that time, been cited on only two occasions for what he describes as

⁷ It is again noted that this conclusion is not based on a sanction imposed under Rule 18.6(d)(2), but upon the operation of law under rule 18.20(e).

inadvertent violations. He claims he cooperated in the most recent investigation, was completely forthcoming with the investigator, repaid all the funds the Wage and Hour Division alleged were due even though he disagreed, and has taken steps to insure his future compliance. Res. Opp. at 12.

Although Respondent now provides assurances of future compliance, it must yet be noted that he admitted that he stated at the January, 2007 final conference with the Wage and Hour investigator that he refused to change his work practices to comply with the Act. In addition, the record shows his compliance history has been trending downward. The second investigation revealed violations more numerous than the first investigation, despite the allegedly inadvertent prevailing wage violation. Further, Respondent initially declined to pay the back wages owed to his underpaid service workers. As a result, contract payments had to be withheld to ensure back wage recovery for his employees. Under such circumstances, Respondent's limited cooperation and future assurances is not sufficient to establish the "prerequisites for relief" from the debarment provisions of the Act.

Other Factors

Finally, even if none of the aggravating factors and all of the prerequisites to relief were present, other factors still must be considered, *see*, Section 4.188(b)(3)(ii), and these weigh in favor of debarment. Considering the first of these factors (prior violations), it is undisputed that Respondent has been investigated before and found in violation of the SCA. Respondent has also committed recordkeeping violations due to his failure to maintain accurate records of each employee's daily and weekly hours worked in violation of SCA § 4.6(g). In addition, Respondent has not presented any *bona fide* legal issues in defense of his non-compliance with the SCA. The only legal issue Respondent raised was whether temporary and part-time workers are entitled to fringe benefits, and the express language of Section 4.176 of the regulations states that the SCA makes no distinction between part-time temporary and full-time workers: "Accordingly, in the absence of express limitations, the provisions of an applicable fringe benefits determination apply to all temporary and part-time service employees engaged in covered work." Such clear language does not raise *bona fide* issues "of doubtful certainty" with regard to the coverage of Respondent's part-time and temporary workers.

Nor has Respondent shown that he diligently sought to ensure compliance with the SCA prior to being investigated. Under the Act: "[a] contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act by directing inquiries to the Department of Labor." 29 C.F.R. § 4.188(b)(4) (2001). As previously noted, Respondent alleges that he was unaware of his obligation to pay fringe benefits to his part-time and temporary service workers; but given his prior fringe benefit violations, I find his failure to seek clarification from the Department reflects not merely a lack of due diligence but an attitude of willful indifference to his SCA obligations.

Respondent also fails the "prompt payment" test. He admitted that, in January, 2007, he refused to pay back wages in the non-*de minimis* amount of \$16,427.66 which the Wage and Hour Division determined were due to eight employees. On June 28, 2007, contract wages were withheld to ensure the payment of back wages, and it was not until February 15, 2008, more than

a year later, that Respondent signed the authorization allowing for the disbursement of the withheld funds. Under these circumstances, it would be difficult to conclude that Respondent acted promptly to rectify the underpayment violations.

For all of the foregoing reasons, I find and conclude that Respondent has failed to demonstrate the existence of genuine issues of material fact for hearing, and, accordingly, Complainant is entitled to summary decision. 29 C.F.R. §§18.40(d) and 18.41(a). I further find and conclude that Respondent has failed to establish “unusual circumstances” within the meaning of 29 C.F.R. § 4.188(b)(3) that would justify relief from the debarment provision of Section 5(a) of the Act. Therefore;

ORDER

IT IS ORDERED that the Complainant’s Motion for Summary Decision finding Respondent in violation of the Service Contract Act be, and it hereby is, Granted, and;

IT IS FURTHER ORDERED that Respondent’s request for relief from the debarment provisions of Section 5(a) of the Service Contract Act is, hereby, denied.

A

Stuart A. Levin
Administrative Law Judge

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
Suite S-5220
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).