



Issue Date: 03 January 2012

Case No.: 2010-SCA-00023

In the Matter of:

**CHAE S. MCFARLAND doing business as
SK GATEWAY CLEANERS, and
CHAE S. MCFARLAND Individually and Jointly**

Respondent.

APPEARANCES:

**Mia F. Terrell, Attorney
For the Department of Labor**

Chae McFarland, *pro se*

BEFORE:

**Patrick M. Rosenow
Administrative Law Judge**

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act¹, and regulations issued pursuant thereto.² 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 31 Aug 10 the Solicitor filed a complaint on behalf of the Secretary of Labor against Respondent, alleging she had violated the Act by failing to pay the minimum wage, provide required fringe benefits, and maintain and make available pay records under contracts with the Army and Air Force Exchange Service (AAFES) to provide laundry, dry cleaning, and alteration services at Biggs Army Airfield and McGregor Range. I was assigned to hear the case and issued a Notice of Hearing. Although she has been assisted by friends, Respondent has been without counsel throughout the course of the litigation. Following a brief continuance to allow for discovery, a hearing was conducted on 1 Sep 11, at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, and make arguments.

¹ 41 U.S.C. §6701 *et seq.* (hereinafter "the Act").

² 29 C.F.R. Parts 4 and 6

At the hearing the parties called and offered the following witnesses and exhibits. I have considered all of those documents and that testimony in reaching my decision.

Witnesses

Respondent
Robert Holguin
Anna Hernandez
Nancy Gutierrez
Gutberto Martinez

Exhibits

Solicitor's Exhibits (SX) 1-5.
Respondent's Exhibits (RX) 1-6, 8.

After the hearing, Respondent attached to her argument a number of additional documents, which she labeled as Enclosures B-M. In her brief, the Solicitor objected to having them included in the record. I have elected to sustain her objection to Enclosure I as unreliable hearsay not subject to cross examination and Enclosure L as irrelevant. I considered the other enclosures in reaching my decision.

Law

The Act requires individuals who enter into contracts to provide services to the United States through the use of service employees³ to pay those employees minimum wages and provide fringe benefits reflective of those locally prevailing, as determined by the Secretary of Labor.⁴ Contractors who fail to do so are liable to their employees for the underpayment⁵ and may be barred from entering into additional service contracts for a three year period.⁶

The implementing regulations require contractors to maintain for three years records of the hours worked by each employee, the wages they earned and the fringe benefits they were provided. Contractors must also make those records available for inspection.⁷ A contractor's failure to maintain those may properly result in giving more weight to the agency's calculation of shortages.⁸

The regulations also clarify that debarment is appropriate unless the Secretary finds unusual circumstances exist; relief from that remedy is not warranted where there are willful or culpable violations and failure to maintain records.⁹ "The legislative history of the SCA makes clear that debarment of contractors 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."¹⁰

³ 41 U.S.C. §6702.

⁴ 41 U.S.C. §6703.

⁵ 41 U.S.C. §6705.

⁶ 41 U.S.C. §6706.

⁷ 49 C.F.R. §4.6(g)(1).

⁸ *Thomas & Sons Building Contractors, Inc.*, 1996-DBA-37 (ALJ Feb. 17, 2000), citing *Anderson v. Mt. Clemens Pottery Co.* 328 U.S. 680 (1946); *Groberg Trucking Inc.*, ARB Case No.09-137 (Nov. 30, 2004).

⁹ 49 C.F.R. §4.188(a).

¹⁰ *Vigilantes v. Administrator, Wage and Hour Div.*, 968 F.2d 1412, 1418 (citing 29 C.F.R. § 4.188(b)(2)).

Evidence

Robert Holguin testified at hearing in pertinent part that¹¹:

He started working for Respondent in 1984 or 1985. Between February 2007 and February 2009 he worked for Respondent at 110 McComb. Sometimes he would work five days a week, but mostly it was four days. He usually arrived at work around 4:00 or 4:30 in the morning so he could start washing and pressing the clothes and get the boiler on. He would sometimes sort the clothes or take care of the customers that would go in there. He would work until 2:00, but sometimes would stay until around 4:00 or 5:00. He wasn't given any breaks. He was in charge of that place. He washed and pressed clothes that came from Biggs Army Airfield. He could tell from the tags.

He would work between 25 and 32 hours a week and he always got \$100 a week. Respondent paid him \$100 in cash once a week. He would have to go over there to her place on Monroe and sometimes she wouldn't even have the \$100. She would open the cash register and she would tell him there was no money and he would have to wait. He would ask why she had no money and she would tell him to shut up. Sometimes she would go to her money belt, get \$80 and say he would get the rest later. She never gave him any holiday or vacation pay or any other kind of hourly fringe benefits. She never gave him a timecard and he never punched into work.

There was a time from 1 Jan 09 to 21 Feb 09 when Respondent sent him to work at another drycleaner's called Perry's Drycleaners. They were doing her work and he was pressing her clothes. She would stop there to see how well he was doing. They were still doing clothes from Biggs Army Airfield. He worked five days a week from 7:30 to 3:00. All he did was pressing. She kept paying him \$100 a week, but no holiday pay, vacation, or any other fringes.

He knows Nancy Gutierrez, because she was working at Biggs Field. She also worked at McGregor Range. He also knows Chong Welch, who worked with him at the McComb location for about a month. She was a presser and did clothes that came from Biggs Army Airfield.

He never saw any posters about wages posted at work. Respondent never gave him something called a wage determination that would inform him of the prevailing wage and that saying he was supposed to be paid the prevailing wage if he worked on clothes from Biggs. He even told her one time that he figured she was paying him just around \$3.45 an hour, and that was not even minimum wage. She said oh, shut up.

¹¹ Tr. 20-33.

Anna Hernandez testified at hearing in pertinent part that¹²:

She started working for Respondent in September 2008 at the Monroe location. In October, November, and December of 2008, she moved to Biggs and worked receiving clothes, tagging clothes, separating laundry and dry cleaning, and preparing clothes to get shipped out to get cleaned. She was a counter attendant. She worked Monday through Saturday from 1:00 p.m. to 7:00 p.m. That was the second shift. The first shift was worked by Nancy Gutierrez. There was no meal break.

Respondent paid her \$6.55 an hour with no holiday, vacation or other kind of hourly fringes. She did fill out time cards at Biggs and note where she was working. She would work at Biggs and the PX.

She never saw CX-8 at work and Respondent never showed her a document telling her about the prevailing wage.

When she talked to the Wage and Hour Investigator, Respondent told her to tell him that she was only working there for food and for gas. That was a lie. Respondent was paying her in cash so she could avoid taxes.

Nancy Gutierrez testified at hearing in pertinent part that¹³:

She has worked for Respondent for 13 or 14 years, including the period between February 2007 and February 2009. She was working at Biggs six or seven hours a day with no meal breaks. Biggs was open from 7:00 in the morning until 7:00 in the evening. She helped the customers, received their clothes, made out their tickets, gave them their clothes back, and handled money.

Up to 1 Oct 08, Respondent paid her \$6.50 per hour. After 1 Oct 08, it was \$7.00. She was paid by weekly check. She got no holiday, vacation, or any other type of health and welfare fringes. She did pickup and drop-off of clothes from Biggs to McGregor Range.

She never saw CX-8 and Respondent never showed her the wage determination that sets forth the prevailing wage, although she saw it once when she helped Respondent sign her government contract. She was Respondent's right hand and helped with all the contracts. The contract had a wage determination clause that set forth a 40 hour wage. Respondent said she wasn't going to do that, she shouldn't have to pay fringe benefits on government contracts, and that AAFES had her back.

She doesn't know if Respondent had enough money to pay fringe benefits. There were times Respondent asked her to not cash a pay check for a while so she could cover it.

When she talked to the Wage Hour Investigator, Respondent told her to tell him that she never worked at Biggs, so that she wouldn't have to pay the fringe benefits.

¹² Tr. 36-41.

¹³ Tr. 47 to 51.

Gutberto Martinez testified at hearing in pertinent part that¹⁴:

He has worked for the Department of Labor, Wage and Hour Division for approximately 22 years. He is a Wage/Hour Investigator and has done over 1,000 investigations.

In a SCA case he asks for the contractor information and payroll records that identify the employees and go through hours worked, wages paid, deductions, and associated timecards. Then he goes to the employees and obtains information from them. He analyzes the information and has a final conference with the employer to discuss the issues regarding compliance.

Under the SCA, if there are more than 2,000 hours, employees are entitled to specific wages based on their specific classification. The contract between Respondent and the Army and Air Force Exchange Service was covered by the SCA.

He investigated a two-year period from February 2007 to February 2009. He found that Respondent failed to pay employees the minimum wage for the specific classifications of pressers, counter clerks and washers. She also failed to pay fringe benefits to the employees and failed to keep and maintain records for each employee.

In his investigation, he requested Respondent's payroll registers, employee timecards, and employee registers. She did not provide documents that completely and accurately reported the number of hours worked by each employee on a daily basis. She provided no timecards for Anna Hernandez, Robert Holguin, or Chong Welch, and timecards only for a couple of pay periods for Nancy Gutierrez.¹⁵ In March 2009, she said she had thrown away Robert Holguin's and Chong Welch's timecards.

He ultimately was able to calculate back wages for the four employees by using their statements and some receipts from accounts payable with dates and hours on them. For all but Robert Holguin, he compared the actual pay rate with the minimum wage plus fringe benefits and holiday pay (adjusted pro rata to account for less than 40 hours work) to calculate the amount underpaid per hour and then multiplied by hours worked. That resulted in an aggregate total of \$28,626.04.¹⁶ He calculated each employee's shortfall.¹⁷ For Robert Holguin, it was a little different, because he was paid \$100 a week, and that was below the minimum wage.

The timecards for Nancy Gutierrez did not comply with SCA obligations because they do not identify the classification of the employee, the workweek, the payment date, and the year. Respondent's payroll register¹⁸ does not comply with the SCA because there is no address for the individual, no identification of the pay period, and no identification of the number of hours worked daily or the classification of the employee. As a result, he could not match the register with the timecards.

¹⁴ Tr. 87 to 101.

¹⁵ CX-6.

¹⁶ CX-4.

¹⁷ CX-5.

¹⁸ CX-7.

He asked the employees, visually searched the job site, and determined that Respondent had neither posted the DOL poster that is CX-8 nor shared the wage determination with Robert Holguin, Nancy Hernandez, or Chong Welch.

Respondent was not cooperative during the investigation. She instructed the employees to deny they were at the Biggs location and say that they were volunteers working for food and gas. She also wouldn't provide all the records that he requested. When he asked for the time cards for the past two years, she provided timecards for two or three weeks. She did give him some check stubs in piecemeal. The pay stubs had the person's name and date, but he didn't know if the date was the pay period or the pay date. Some had hours and some had no hours. He could divide the pay by the rate to get hours, though.

He went to her place of business and she gave him two envelopes with attachments and he transcribed that information on his computer. She said she had thrown away the cards for Holguin and Welch. He does not recall her saying they don't ever do timecards. He had to figure the wages for them based on their statements. The other two employees had timecards for some weeks, but not others. He worked with those and the check stubs.

Respondent testified at hearing in pertinent part that¹⁹:

She has owned and operated SK Gateway Cleaners since approximately 1999. She has no employees now, but had some in the past. Anna Hernandez, Robert Holguin, Nancy Gutierrez, and Chong Welch used to be her employees at SK Gateway Cleaners. She hired them, fired them, assigned them to locations and hours, and was responsible for paying them.

In 2006 she was awarded a contract with the Army and Air Force Exchange Service to provide laundry, dry cleaning, and alteration services at Biggs Army Airfield and McGregor Range.²⁰ She was aware of the paragraph that says certain wages and fringe benefits that must be paid to employees at the pickup points on the installation and the employees of your plant that are involved in the processing of orders from the installation. AAFES estimate the contract at \$180,000 over the years of the contract. She did earn more than \$2,500 on the contract.

The contract stated the prevailing wage in the first term of the contract for a counter attendant and presser was \$6.61. The prevailing wage for a washer was \$7.09. It also said that health and welfare benefit fringes were required for those occupations and were \$2.87 an hour. CX-3 is another contract she signed. She was still conducting business at Biggs.

She paid her employees every Friday. She paid them the federal minimum wage for the hours that they worked. She did not pay them the rate stated in the wage determination and did not pay them health and welfare fringe benefits.

¹⁹ Tr. 59-87, 116-152.

²⁰ CX-1.

She agrees that Nancy Gutierrez and Anna Hernandez did work the counter at Biggs Field for some amount of time, but not as much as alleged. She also agrees that Chong Welch and Robert Holguin were pressers and that part of that job was washing clothes sometimes.

She wanted Robert Holguin to fill out timecards, but he didn't want to. He was on salary. Chong Welch only did time cards some of the time and those were incomplete. She had to call every Thursday to find out how many hours. She has provided all the time cards she could find.

She doesn't know how much in back wages she owes and has not agreed to pay the amount alleged by Wage/Hour.

She did contract with several other cleaners to do the washing and drying of uniforms from Biggs Army Airfield. She agreed to pay them money and they agreed to launder the clothes. She did pay them.

Robert Holguin was working for her for a long time. He had a problem with child support and food stamps. He had no bank account, so she paid him cash. She paid him cash on half and half on tax. That's what he wanted her to do. Only half his pay was on the payroll. She would pay him \$250 to \$350 a week, based on his hours, even though he was on salary, not hourly. That's why he doesn't have a timecard. That was 2006 and she did not have a contract on Biggs.

Once she had the contract with AAFES, he was an hourly wage employee. She paid him minimum wage. That was \$6.55 or \$6.25, she doesn't remember. He probably averaged around 30 hours per week. They still only had half of it taxed. She paid him all the money every week. Except one time she didn't pay him when she got robbed in the store.

She hired Anna Hernandez as a part time employee in September when she had the Fort Bliss contract. Hernandez wanted to be paid cash off the payroll to protect her food stamps entitlements. It was her idea to tell the investigator that she was working for gas and food. She paid Hernandez minimum wage also. Hernandez worked 15 to 20 hours a week and got \$200 to \$300 per week. She worked two days out of the week at Biggs.

She paid Nancy Gutierrez a quarter more than minimum wage because she's known her for a long time. Gutierrez was part time. She also paid Gutierrez holidays, based on her average daily hours. The holiday pay wasn't on the timecards as holiday pay; she just gave her credit for more hours. She didn't pay the others for holidays. She did have to stop paying her holidays when the minimum wage went up to \$7.25 because the business was struggling. She also stopped the extra quarter then.

Nancy Gutierrez has been with her for a long time and she trusts her to make her own check.

It is her fault that she didn't pay fringe benefits to whoever worked at Biggs, but if no income comes in, that's \$2,000 a month to cover. She knows she has to pay if money comes in, but there was no money. That's her point: there was no money. The McGregor Range store didn't even last one year because she had to work 7:00 to 9:00 at night. Nancy Gutierrez was working there one week.

Nancy Gutierrez is a manual worker and not at Biggs, except in an emergency because she needs Nancy's help. When she asks, if Nancy will do that, she always agrees, never fights, and is always good to her.

She talked to Nancy Gutierrez about the requirement that because of the army contracts she was supposed to pay more than the minimum wage. Gutierrez said it was okay because there was no money.

She was lucky to have enough money to pay the minimum wage, because there was nothing happening. There was nothing close to \$180,000 in sales a year. She couldn't even get \$1,000 a month sometimes. The average was about \$2,000. Ms. Gutierrez knew how much they were making, because she did the paperwork. There was no money. She was wrong, but paid what she could, which was the minimum wage.

The Biggs store was never open 7:00 to 4:30. It was always from 11:00 in the morning. There were three months it was 8:00 in the morning.

Discussion

Although Respondent appeared to be candid during much of her testimony, her credibility was diminished by her inability to accurately recall and confusion over details, although some of that may well have been due to language problems. She also appeared to have concluded that she should not be subject to the Act and therefore was justified in failing to comply with it or frustrating its enforcement. In any event, her testimony alone was sufficient to establish that she failed to pay her employees the designated minimum wages, provide them the requisite fringe benefits, or even properly maintain hour and wage records. Accordingly, the only real issue is the quantum of her liability and whether she should be exempt from debarment.

There is no basis in this case for an exception to the general rule requiring the placement of violating contractors on the excluded list for three years. The failure to pay and provide fringe benefits was chronic, knowing, and willful, even if it was based on Respondent's belief that the revenues from the contract were inadequate to allow her to meet those requirements. Moreover, at worst, she encouraged her employees to lie to the investigator. At best, she knowingly allowed them to do so. She failed to post employee notices of her obligations under the Act and throughout the process has demonstrated an attitude that she should not be subject to the Act. Accordingly, I find that she should be placed on the list of debarred bidders for a three-year period.

The absence of anything even approaching comprehensive and accurate wage and hour records makes determining the quantum of liability problematic. Respondent's testimony was limited by her ability to recall such highly detailed information, which underscores the reason for the requirement that she was to maintain accurate records. The incomplete assortment of records she offered at hearing was not sufficient to establish her liability, even when supplemented by post-hearing records, which she may or may not have altered and which, in any event, were not available for her to be questioned about on cross examination.

The employee witnesses were likewise limited in their ability to recall specific details and demonstrated they had independent motives to be paid without full documentation in pay and tax records. Of those witnesses, because of her close relationship with Respondent, I found Nancy Gutierrez to be the most credible.

Considering all the evidence in the case, I found the testimony and records of Gutberto Martinez to be the most reliable source of information upon which to base a finding of the quantum of liability. He is a highly experienced investigator who appeared to have done a thorough review of all the available records and witness statements. His methodology for calculating Respondent's liability to each employee was reasonable. His testimony was very credible and I adopt his calculations as my findings.

FINDINGS & ORDER

1. Respondent contracted with the United States to provide laundry, dry cleaning, and alteration services from 2006 to 2010. In the performance of that contract, Respondent hired as service employees, Robert Holguin, Anne Hernandez, Nancy Gutierrez, and Chong Welch.
2. From February 2007 to February 2009, Respondent violated the Act and implementing regulations by failing to maintain required wage and hour records, pay said employees the minimum wages, and provide said employees the required fringe benefits.
3. In compensation for the wages not paid and benefits not provided, Respondent shall pay to Robert Holguin \$18,556.08; to Anne Hernandez \$1,996.99; to Nancy Gutierrez \$6,735.90; and to Chong Welch \$1,337.07.
4. Respondent shall be debarred from eligibility for contracts as per the Act for a period of three years.

ORDERED this 3rd day of January, 2012 at Covington, Louisiana.

A

PATRICK M. ROSENOW
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).