



**Issue Date: 14 August 2014**

Case No.: 2011-SCA-00004

In the Matter of:

WAGE AND HOUR DIVISION,

Complainant,

v.

THOMAS E. IPOCK, SR.,

Respondent.

### **DECISION AND ORDER**

This proceeding arises under the McNamara-O’Hara Service Contract Act 41 U.S.C. § 6701 *et seq.* (“SCA”), and regulations issued pursuant to the Act, 29 C.F.R. Part 4. The SCA sanctions those who are awarded a federal contract and subsequently fail to (1) pay the required wages, (2) award minimum fringe benefits, or (3) keep adequate records, by barring them from receiving federal contracts for a period of 3 years

The Administrator, Wage and Hour Division, U.S. Department of Labor (“WHD”) filed a complaint against the Respondent, alleging violations of the SCA. A hearing was held in Kinston, North Carolina on February 11, 2014.<sup>1</sup> Neither party submitted post-hearing briefs or written arguments.

### **THE HEARING**

The hearing was scheduled to begin at 10:00 A.M. Snow, which had been predicted for the region, began to fall at approximately 8:30 A.M.

The Respondent, Mr. Thomas E. Ipock, Sr. arrived at the courthouse at approximately 9:00 A.M. He informed me that he was represented by Lonnie Carraway, Attorney at Law. Although the case has been pending for more than two years, with discovery and settlement discussions between the parties, this was the first indication that I received that Mr. Ipock was represented.

Mr. Ipock attempted to call Mr. Carraway at both his home and cellular telephone numbers and left voicemail messages. At the scheduled start time of 10:00 Mr. Ipock had not

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<sup>1</sup> The following citations are used in this opinion: T: Transcript pages; CX: Complainant’s Exhibit number; RX Respondent’s Exhibit number.

heard from Mr. Carraway. The snow was continuing to fall but was not accumulating on the streets or sidewalks near the courthouse.

At approximately 11:20, Mr. Ipock advised me that he had heard from Mr. Carraway, who was snowed in and could not get to the courthouse. He stated that Mr. Carraway requested that the hearing be continued until the next day. At that point I called the hearing to order and summarized the situation on the record, noting that:

1. I had not received a notice of appearance or any other indication that Mr. Ipock was represented until the morning of the hearing.
2. The government counsel, court reporter, and I, all of whom were from out of state, were present.
3. Although I did not know the conditions at Mr. Carraway's residence, I could see that the snow was continuing to fall in downtown Kinston. At that point there was still no visible accumulation on pavements in the vicinity of the courtroom.
4. Available weather forecasts indicated that snow would continue to fall through the day, strongly suggesting that the roads might be less passable the next day.

Based on those considerations, I denied the motion to continue. I noted that I was prepared to leave the record open for post-hearing development of evidence in order to substitute, to the extent feasible, for in-person presentation of evidence.

The government called the Wage and Hour Division investigator and Mr. Ipock as witnesses, and offered seven documentary exhibits (CX 1-7) into evidence. Mr. Ipock was offered the opportunity to cross-examine the investigator and to give testimony on his own behalf after government counsel examined him as a witness. He stated that there were documents in support of his case that he did not have with him, but that they would be faxed to my office. Those documents were faxed to my office the next day and have been marked as RX 1.

On February 25, 2014, I issued a post-hearing order addressed to the parties and to Mr. Carraway in which I asked Mr. Carraway to advise whether he was representing Mr. Ipock and, if so, whether he intended to submit post-hearing evidence. Mr. Carraway responded on March 12, 2014. In that letter he advised that, although he had met with Mr. Ipock the day before the hearing, he had not been retained and does not represent Mr. Ipock.

## **BACKGROUND**

Mr. Ipock was in business as a mail hauling contractor. The U.S. Postal Service (USPS) awarded contract number 28532 to him for the period July 1, 2008 to June 30, 2010. The contract was performed through the use of service employees within the meaning of 41 U.S.C. §357(b) and governed by the SCA.

The complaint alleges that during the period of performance, Mr. Ipock failed to pay employees the minimum monetary wages in accordance with prevailing wage rates, to furnish them required fringe benefits, and to make and maintain accurate records. The wage, benefit and record-keeping requirements are contained in 41 U.S.C. § 351(a) and regulations found at 29 C.F.R. §§ 4.6, 4.161, 4.162, 4.174, and 4.185.

The complaint further alleged that as a result of those violations, Mr. Ipock owed a total of \$1,578.93 to employees listed in the schedule attached to the complaint. The complaint closed by requesting that an order be issued authorizing the USPS to release funds that it has withheld for payment of back wages and determining Mr. Ipock to be ineligible for award of service contracts in accordance with 41 U.S.C. §354(a).

### **SUMMARY OF EVIDENCE**

Christine Daly, Assistant District Director at the WHD Raleigh office, testified for the government. She testified that her office received a complaint in 2009 from an employee working under contract 28532. This complaint alleged that Mr. Ipock had stopped paying the holiday pay required under the contract after Independence Day in 2008. In addition, the complaint alleged that Mr. Ipock did not pay downtime required in the contract. Downtime occurs when a load is not ready and the driver has to wait at the origin point. The complaint alleged that Mr. Ipock did not start a driver's compensable time until the actual departure, thereby failing to pay for downtime. (T. 13-14).

In the course of her investigation, Ms. Daly interviewed Mr. Ipock. In the course of this interview he stated that he had stopped paying holiday pay because the USPS "had cut him from deliveries on Sundays and holidays." Ms. Daly testified further that "when I discussed the down time issue, he said he paid it when he got ready to pay it and at the time that I did my investigation, he owed from March of 2009 through the end of my investigative period. It was only ten hours and something of down time that he owed." (T. 15).

Ms. Daly testified that Mr. Ipock acknowledged that he paid the drivers under the contract once a month. (T. 15). This is consistent with his response to pre-hearing discovery (CX 7) and with his testimony (T. 35-36).

CX 5 is a collection of USPS Late Slips issued to one of Mr. Ipock's drivers between March and September of 2009. These slips are issued to the driver by an employee of the originating postal facility whenever the truck is unable to depart on schedule. The slips reflect the scheduled and the actual departure time. The delay was usually 30 minutes or less. Ms. Daly's review of the driver's pay stubs and Mr. Ipock's payroll records indicated that he had stopped paying for downtime at the origin facility as of February, 2008 (T. 22-25). She testified that when she asked Mr. Ipock about this, "[t]he only explanation that I was given was that he'd pay him when he got ready to pay him." (T. 23).

In his testimony in the hearing Mr. Ipock described how he handled late slips:

Q Would the employees present late slips to you?

A Yes, ma'am.

Q And what would do with those late slips?

A File them away because most of the time, they might be 10 minutes and this is the thing. If it was a critical late slip, 15 minutes or more, you got paid for it. If you're talking about 10 minutes, you can make up 10 minutes, okay? There was a trend among drivers, "We're going to get paid so much money for being late 10 minutes. We're going to make doggone sure we're late at the other end." In a period of three hours, you can make up 10 minutes if the weather is not inclement. I discounted and forgot about a two minute late slip period. It's not critical, but some drivers like to use it as "We're going to get a bonus because we got a ten minute late slip" whereas if you're a good driver, a good employee, you get on down the road expeditiously, deliver the mail and don't worry about it . . . anything 10 minutes, I'd discount it and forget it period.

Q Was there ever a time when you did pay ---

A Yes, ma'am.

Q Was there ever a time when you did pay for late slips ---

A Yes, ma'am.

Q -- that were ten minutes or less?

A I doubt it. I doubt it very seriously

Q Did there come a time when you completely stopped paying for late slips?

A Could have been. I'm not sure. I'd have to check my records.

T. 41.

The current investigation was the third one conducted by WHD. The first involved failure to pay health and welfare benefits. Mr. Ipock was found to owe back wages. Under a settlement agreement he paid the back wages and promised future compliance. (T. 11-12)

The second investigation involved failure to pay vacation and holiday pay. Ms. Daly conducted this investigation, which found that he had not paid required vacation and holiday pay, and that he was paying monthly rather than semi-monthly. Once again, the investigation was settled. According to Ms. Daly, Mr. Ipock agreed to future compliance. (T. 11-13). Mr. Ipock contended that he did not agree to compliance with regard to semi-monthly pay. (T. 36-37).

Mr. Ipock provided Ms. Daly with payroll records on the two drivers in his employ for 2008 and 2009. (CX 2-3). These records stated "who the driver was, the number of hours that he paid them for, their gross wages and all legal deductions and what their net check was for." (T. 18). Based on these records, and pay stubs from the drivers, Ms. Daly calculated back pay owed

to the two drivers. (T. 20-21). She calculated that \$1,190.35 was owed to Larry Davis and \$388.58 to John Rouse. The sum of \$1,578.93 was withheld from funds due to Mr. Ipock under the contract.

Mr. Ipock did not dispute Ms. Daly's arithmetic. His disagreement was based on his belief, stated both in the investigation and in his testimony at the hearing, that he should not have to pay for the holidays, fringe benefits, and downtime that she included in her calculations.

## **DISCUSSION**

The implementing regulations require that pay periods be no longer than semi-monthly (i.e. 24 times per year:

The contractor shall unconditionally pay to each employee subject to the Act all wages due free and clear and without subsequent deduction (except as otherwise provided by law or Regulations, 29 CFR part 4), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Act may not be of any duration longer than semi-monthly.

29 C.F.R. § 4.6(h).

Mr. Ipock has been candid about his non-compliance with this requirement. Both in his testimony above and in his response to the Division's Request for Admissions (CX 7) he acknowledged that he paid his workers monthly. He also acknowledged that after the second investigation Ms. Daly had told him of the requirement to pay semi-monthly:

Q Did Wage Hour point out to you, the Wage Hour Division, that you were in error for paying employees on a monthly basis?

A Yes, ma'am.

Q And what did Wage Hour tell you?

A I had to pay twice a month.

Q Did you agree to pay twice a month?

A No, ma'am.

Q What did ---

A Never did. No, ma'am.

Q Did Wage Hour tell you that multiple times during the course of ---

A Probably multiple times. I told them just investigate all the mail contractors, "Leave me alone" and I don't know another mail contractor that's been investigated period. The fact Ms. Daly didn't know anything about mail contractors' agreements with the Labor Department, she investigated me.

Q But you'll agree that the Wage Hour Division did inform you that employees were to be paid?

A Told me twice a month.

Q But you made a decision not to do ---

A That's exactly right. I didn't have the money to pay twice a month. I paid once a month.

T. 36-37.

Comparing driver payroll records with late slips showed that driver Larry Davis was not paid for downtime after February, 2008. Mr. Ipock was equally open about his refusal to comply with this requirement of the contract. He also acknowledged to Ms. Daly that he had stopped paying holiday pay that was provided for in the contract.

#### **LEGAL STANDARD FOR DETERMINING DEBARMENT**

The Service Contract Act requires debarment unless the high standard of "unusual circumstances" is met. 41 U.S.C. § 354(a); 29 C.F.R. § 4.188(a). Under the Act, "any person or firm found . . . to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances." 29 C.F.R. § 4.188(a); 41 U.S.C. § 354 The Secretary's discretion to grant such relief is constrained, making "unusual circumstances" only a limited safety valve to an otherwise strict statute. *See* 29 C.F.R. § 4.188(b)(2); *R & W Transp., Inc.*, ALJ No. 2003-SCA-024, ARB No. 06-048, slip op. at 8 (ARB Feb. 28, 2008) (the debarment provision "is a particularly unforgiving provision of a demanding statute. A contractor seeking an 'unusual circumstances' exemption from debarment must, therefore, run a narrow gauntlet.").

While debarment is a severe penalty, Congress intended that it be the norm for violating contractors as opposed to the exception. *Summitt Investigative Service, Inc. v. Herman*, 34 F. Supp.2d 16, 19 (D.D.C. 1998); *see also Vigilantes, Inc. v. U.S. Dep't. of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992) ("only the most compelling of justifications should relieve a violating contractor from that sanction.")

The existence of "unusual circumstances," is determined on a case-by-case basis, "in accordance with the particular facts present." 29 C.F.R. § 4.188(b)(1) Negligence or ignorance of contract provisions cannot excuse violations, nor can belatedly paying amounts owed under the Act and promising to comply better in future. 29 C.F.R. § 4.188(b)(1)-(2); *KSC-Tri Systems*

*USA, Inc.*, ALJ No. 2006-SCA-20 (ALJ Aug. 7, 2007). “Debarment is designed to break down a chain of non-compliance and to force employers to take the labor regulations seriously,” restricting the award of government contracts to only responsible bidders. *Hugo Reforestation, Inc.*, ALJ No. 1997-SCA-20, ARB No. 99-003, slip op. at 13 (ARB Apr. 30, 2001) (internal citation and quotation omitted); 29 C.F.R. § 4.188(b)(6). Only in cases where the violation is shown to have been minor and inadvertent, can relief be granted. 29 C.F.R. § 4.188(b)(2); see *Fed. Food Serv., Inc. v. Donovan*, 658 F.2d 830, 834 (D. C. Cir. 1981) (“we do not suggest that a ‘pure heart’ and a lack of willfulness are sufficient to show unusual circumstances,” only that the “use of debarment against innocent and petty violations was not intended.”)

The regulations place the burden of establishing the existence of “unusual circumstances,” squarely on the violator. 29 C.F.R. § 4.188(b)(1). In fact, “debarment is presumed once violations of that Act have been found, *unless* the violator is able to show the existence of ‘unusual circumstances’ that warrant relief from SCA’s debarment sanction.” *Hugo*, ARB No. 99-003, slip op. at 8-9 (emphasis added). To show “unusual circumstances,” the violator must establish the “absence of aggravating factors and the presence of mitigating factors.” See 29 C.F.R. § 4.188(b)(3)(i)-(ii); *Dantran, Inc. v. U.S. Dep’t. of Labor*, 171 F.3d 58 (1st Cir. 1999). This has developed into a three-part test, which the violator must satisfy every stage of to be eligible for relief from debarment. *Hugo*, ARB No. 99-003, slip op. at 13.

In essence, the first stage of this test requires showing that the violations were not ones the contractor can be considered culpable for, as culpable (let alone intentional) violations are aggravating factors that require debarment. Evidence of serious prior violations also places the contractor beyond the range of relief, since presumably the past citations put them on notice of their obligations under the Act. 29 C.F.R. § 4.188(b)(3)(i). In this case, Mr. Ipock was put on notice after the two earlier investigations.

In the second stage, the contractor must establish the following mitigating prerequisites to relief: “[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). In this case, rather than an assurance of future compliance, there is an explicit refusal to comply.

If both of the initial steps are satisfied, a more diffuse set of considerations are weighed in the third step. These include: “the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees,” whether the contractor had been investigated for violations in the past, and whether current liability “was dependent upon resolution of a bona fide legal issue of doubtful certainty.” 29 C.F.R. § 4.188(b)(3)(ii). None of the three steps have been met in this case. Accordingly, I find that there are no extraordinary circumstances warranting relief from debarment.

## **ORDER**

The United States Postal Service shall release to the Administrator of the Wage and Hour Division the full amounts withheld under the contract mentioned above. The Administrator of the Wage and Hour Division shall distribute the funds released to the employees mentioned above in the amounts indicated, less appropriate withholding.

Thomas E. Ipock, Sr., is hereby **DEBARRED** from receiving government contracts for a period of three years from the date of this Order. Pursuant to 41 U.S.C. § 354(a), the Secretary will forward the Respondent's name to the Comptroller General, as required by the Act.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/mrc

**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. 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).