U.S. Department of Labor

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ISSUE DATE: 12 MAY 2014

OALJ №: 2012-SCA-00014

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR,

v.

PUGET SOUND ENVIRONMENTAL CORPORATION,
and

CARLOS MORENO, an Individual,
and

MORE SUPPORT SERVICES,
Respondents.

Decision and Order Granting Summary Decision

The Secretary of Labor ("Secretary"), through the Administrator of the Wage and Hour Division ("Administrator" or "The Department"), has moved for summary decision against Respondents Puget Sound Environmental ("Puget"), More Support Services ("More"), and Carlos Moreno, as an individual. The Department alleges they have violated provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351, *et. seq.*

No genuine dispute of fact precludes granting the Secretary's motion for summary decision. Respondents Puget and Moreno violated the Act by failing to pay service employees their minimum monetary wages and fringe benefits that Sections 2(a)(1) and (2) of the Act require; Respondents Puget and Carlos Moreno violated the Act by failing to make and maintain adequate and accurate employee records that could show employee classifications, monetary wages, and fringe benefits as required by 29 C.F.R. § 4.6(g). The Administrator was correct to assess $1,409,409.98 in back wages against Respondents Puget and Carlos Moreno; and all respondents should be debarred from federal contracting for three years.

I. Background

On May 22, 2012 Secretary filed a complaint against the Respondents, alleging violations of the McNamara-O'Hara Service Contract Act. An answer they submitted on June 19, 2012, included Moreno's address, phone number and email. Moreno is representing himself in this matter.

Secretary served Moreno with Requests for Admissions on September 20, 2012, that required responses by October 20, 2012. The Secretary granted Moreno repeated extensions of the deadline. On November 23, 2012, the Secretary told Moreno via email that she would file a motion to compel response to the requests for discovery if answers to requests for admissions and interrogatories were not received by November 28, 2012. On November 28, 2012, someone brought an envelope to the Seattle Office of the Solicitor of Labor by that contained an unsigned copy of the Secretary's Request for Admissions with hand written answers. These were served 29 days after the last extension the Respondents had received from the Department. The matters contained in the Request were admitted as a matter of law.

Moreno failed to provide the Secretary with further responses to the discovery requests. A Motion to Compel Discovery the Secretary filed on December 31, 2012 went unopposed, and was granted by Judge Pulver on March 14, 2013. Puget, Carlos Moreno, and More were ordered to answer the interrogatories and respond to the request for production. Documents sent to Moreno by Secretary were returned, and Moreno ignored many of Secretary's attempts to obtain his correct address or contact information. Meanwhile, Moreno continued to use the same address, phone number, and email address to express interest in federal contracts on the Federal Business Opportunities contracting website, expressing interest in contracts that were first listed as late as April and May 2013.

I spoke with the parties through a telephonic pre-trial conference on May 31, 2013. A trial date was set for June 11, 2013, but I continued the trial during this conference. The Secretary stated that a motion for summary decision would be filed against him and his businesses. Moreno affirmed that his address and email address had not changed and that he could be served with the motion at these locations. I made clear during the conference Moreno that when he received the motion, it was important that he respond to it within 10 days after receiving the motion. I also told him to make sure to request an extension if he could not file his response within the 10 days.[1] Additionally, I served Moreno and all parties with a Briefing Order on Motion for Summary Decision, which stated for a second time the

[1] Transcript of Prehearing conference of May 31, 2013 at 13.

procedure and the types of proof that may be used to respond to a motion for summary decision.

The Secretary filed a motion for summary decision on June 14, 2013. Moreno and his businesses filed a response received on July 2, 2013 that reiterated its past arguments. It included no proof in the form of depositions, declarations, affidavits or other proof.

The facts shown in the declarations and materials attached to the Secretary's motion, being unopposed, are undisputed, and established by proper proof. The Secretary is entitled to summary judgment.

II. Standard for Granting Summary Decision

Summary judgment is proper when there is no genuine issue of material fact for trial.[2] It is granted when the nonmoving part fails to offer evidence from which a reasonable finder of fact could decide in its favor. Moreno represents himself in this proceeding and some latitude should be afforded to unrepresented parties.[3] Nevertheless the Secretary is entitled to summary judgment when there is no material issue of fact, and judgment is appropriate as a matter of law.[4] Motions for summary judgment filed in cases under the Service Contract Act are analogous to motions brought under Fed. R. Civ. P. 56(e).[5]

III. Responsible Parties

The Service Contract Act imposes personal liability on corporate officers for violation of any of the contract stipulations; the president of a corporation has an obligation to assure compliance with the Act, the regulations, and the contract.[6] Moreno was the contracting official for Respondent Puget on the contracts at issue. The Department of Labor's investigation determined that Moreno's failure to fulfill his responsibilities under the Act makes him personally liable to Puget's former employees.

IV. Undisputed Facts

The three Respondents are, and at all times material to this action were, subject to the jurisdiction of the McNamara-O'Hara

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[2] 29 C.F.R. §18.41.

[3] *Peck v. Safe Air Int'l, Inc.,* ARB Case No. 02-028, ALJ No. 2001-AIR-3, slip op. at 19 (ARB Jan. 30, 2004).

[4] *Canterbury .v Administrator, Wage and Hour Division*, ARB No. 03-135, slip op. at 4; ALJ No. 2002-SCA-11 (ARB Dec. 29, 2004) 2004 WL 3038067.

[5] *Canterbury .v Administrator, Wage and Hour Division*, ARB Case No. 03-135; ALJ Case No. 2002-SCA-11 (ARB December 29, 2004) 2004 WL 3038067 at *3.

[6] 29 C.F.R. §4.187(e)(1).

Service Contract Act , 41 U.S.C. §§ 351, *et seq.* Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 20.

Contract No. N00406-08-D-8113 ("Contract 8113") was subject to the Service Contract Act. Exhibit 1 - Secretary's First Requests for Admission; Request for Admission No. 1. Exhibit 12 - Declaration of Sherrie Chan at ¶ 19 ("Chan Decl.").

Contract No. N406-10-D-1001 ("Contract 1001") was subject to the Service Contract Act. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 2; Chan Decl. ¶ 18.

Between June 2009 and September 2011 Respondents employed workers in the position of "Firewatch" as is defined by Contract 8113 and Contract 1001. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 3.; Chan Decl. 20.

Between June 2009 and September 2011 Respondents employed workers in the position of "Tank Void Watch" as that position is defined by Contract 8113 and Contract 1001. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 4; Chan Decl. ¶ 20.

Respondents employed workers in the position of "Gas Free Technician" and/or "Marine Chemist" between June 2009 and September 2011. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 8; Chan Decl. ¶ 21.

The Gas Free Technician(s) and/or Marine Chemist(s) Respondents employed between June 2009 and September 2011were employed for the purpose of providing the services of a "competent person" as that term is defined by 29 C.F.R. §1915 and Contract 1001 §3.1.3 and Contract 8113 §2.2.1. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 12.

Firewatches and Tank Void Watches were paid the rate assigned to "Laborer – 23470" under the prevailing wage determinations which were made part of the contract. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 13; Chan Decl. ¶ 20.

Firewatches and Tank Void Watches should have been classified as and paid at the rate of "Maintenance Trades Helper – 25380" under the Wage Determinations incorporated into Contracts 1001 and 8113. Chan Decl. ¶ 20.

Gas Free Technicians should have been classified as and paid at the rate of "Environmental Technician – 30090" under the Wage Determinations incorporated into Contract 1001. Chan Decl. ¶ 21.

Respondents failed to pay each Exhibit A employee the prevailing wage as specified in the Wage Determination incorporated into each contract for the period during which each employee performed work on Contracts 1001 and 8113. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 6; Chan Decl. ¶¶ 20 - 22.

For the period in which each individual listed on Exhibit A performed work under Contract 1001 and/or Contract 8113, Respondents did not pay each employee for each and every holiday required to be paid under the contracts and 29 C.F.R. §§4.174(a)(1)-(2). Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 9; Chan Decl. ¶¶ 23, 24.

For the period during which each individual listed on Exhibit A performed work under Contract 1001 and/or Contract 8113, Respondents failed to pay to each employee the vacation pay required by the contracts and 29 C.F.R. §4.173. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 10; Chan Decl. ¶ 25, 26.

For the period during which each individual listed on Exhibit A performed work under Contract 1001 and/or Contract 8113, Respondents failed to pay to each employee the cash equivalent of the health and welfare benefits required by the contracts. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 11; Chan Decl. ¶¶ 29, 30, 32, 33, 35, 37.

Respondent failed to maintain records required under 29 CFR Part 4.6(g)(1)(i) through Part 4.6(g)(1)(vi) in connection with both contracts which are the subjects of this case. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 14; Chan Decl. ¶¶ 39, 40.

No unusual circumstances apply, as the term is used in 29 C.F.R. §4.188(b), which would operate to exempt Respondents from debarment. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 15; Chan Decl. ¶¶ 3, 4, 6, 36, 41.

Respondents did not give the employees working under the contracts information regarding the compensation due them under the terms of Contract 8113 and/or Contract 1001 as is required by Section 2(a)(4) of the Act. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 16; Chan Decl. ¶ 38.

Respondents employed the wife of Carlos Moreno, Maria Isabel Moreno, and paid her from Respondents' corporate accounts when she actually performed no day-to-day work duties for the companies. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 17.

Respondents employed David Moreno, the son of Carlos Moreno, and paid him from Respondents' corporate accounts when he actually performed no day-to-day work duties for the companies. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 18; Chan Decl. ¶ 14, 15.

Respondents are each a "responsible party" as that term is used in 41 U.S.C. §352(a), and 29 C.F.R. §4.187(e). Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 19.

In connection with the Contract 8113 and Contract 1001, Respondents employed, on behalf of Puget, the persons listed on Exhibit A for the period shown on Exhibit A. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 21; Chan Decl. ¶ 45.

Respondent failed to provide the workers listed in Exhibit A with the proper fringe benefits as required by Contract 1001 and/or Contract 8113, the appropriate wage determinations, and 29 C.F.R. § 4.165(a)(1) and 29 C.F.R. § 4.175(d)(1). Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 24 and 45; Chan Decl. ¶¶ 28, 37.

None of the Respondents have paid the amounts owed to the employees listed in Exhibit A. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 25.

Carlos Moreno controlled the negotiation on behalf of Puget in connection with both Contract 8113 and Contract 1001. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 26; Chan Decl. ¶ 14.

Carlos Moreno was in charge of day-to-day operations of Puget during the contract periods of Contract 8113 and Contract 1001. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 27; Chan Decl. ¶ 14.

Carlos Moreno was in charge of day to day operations of More during the contract periods of Contract 8113 and Contract 1001. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 28; Chan Decl. ¶¶ 14 -17.

Respondents did not establish a "bona fide" fringe benefit fund, plan, or trust for employees listed in Exhibit A as that term is defined in 29 C.F.R. §§ 4.170 and 4.171. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 31; Chan Decl. ¶ ¶ 17, 31, 32, 33, 34, 35, 36.

Respondents did not request approval from the Administrator of the Wage and Hour Divison to establish an unfunded or self-insured plan pursuant to 29 C.F.R. § 4.171(b)(2). Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 32; Chan Decl. ¶ 34.

Respondents did not pay irrevocably to a trustee or third person, no less often than quarterly, pursuant to an insurance agreement, trust, or other funded arrangement the health and welfare benefits required by Contract 8113 and Contract 1001. Exhibit 1 - Secretary's

First Requests for Admission, Request for Admission No. 34; Chan Decl. ¶¶ 17, 31, 32, 33, 34, 35, 36.

Respondents did not specify in writing any benefit plan, fund, or program into which its employees' fringe benefits would be paid and did not communicate in writing any such plan to the affected employees. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 35 and 36; Chan Decl. ¶ 31.

Puget was More's only customer between January 2008 and September 2011. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 37; Chan Decl. ¶ 16.

More did not advertise its services publicly between January 2008 and September 2011. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 38; Chan Decl. ¶ 16.

More and Puget shared the same address between January 2008 and September 2011. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 39; Chan Decl. ¶ 16.

Puget paid insurance premiums for health insurance covering Carlos Moreno, his wife Isabel Moreno, and his son David Moreno during the relevant period. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 40 and 41; Chan Decl. ¶ 29

Puget took loans from More between January 2008 and August 2011. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 43; Chan Decl. ¶ 17.

Carlos Moreno took loans from More between January 2008 and August 2011. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 44.

Each of the individuals listed in Exhibit A was not covered by health insurance benefits for the entire period each individual was employed by Puget. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission No. 45.

Respondents employed the employees listed on Exhibit A and owe the amounts shown to each individual listed for the period shown. Exhibit 1 - Secretary's First Requests for Admission, Request for Admission Nos. 5 and 7; Chan Decl. ¶ 42.

Puget and Carlos Moreno owe 215 employees a total of $1,409,409.98. Chan Decl. ¶ 42.

Respondents did not serve answers or replies to the Department's Interrogatories, Requests for Admission, and Requests for Production served September 20, 2012. Bond Decl. ¶ 19.

V. Failure to Comply With the SCA

Respondents did not comply with the Act. Moreno's inability to produce any evidence of the sort of recordkeeping the Act requires, or to counter the findings in the United States Department of Labor Wage and Hour Division's investigation of Puget, Moreno, and More leave

them all liable. The contractor must pay prevailing wages, fringe benefits, and holiday pay on all federal contracts subject to the Act.[7] Those contractors are also required to maintain accurate payroll records. If a contractor elects to make health and welfare payments to a "bona fide" insurance plan instead of directly to employees, the payments to that plan must constitute a legally enforceable obligation, the plan must be in writing, and the payment obligation must be communicated to employees in writing.[8] Furthermore, the employer must make regular irrevocable payments to a third party trustee pursuant to an insurance agreement, and the trust must be set up in such a way that the contractor cannot access the funds for his own use.[9]

Respondents have produced no evidence that they paid all employees the minimum prevailing wage due to the workers in specified positions, paid holiday pay, or funded fringe benefits. Moreno did not keep adequate records to show employee classifications, their wages, or their fringe benefits, nor has he produced alternative evidence to counter the claims the Secretary filed against the Respondents.

The documents Moreno submitted on behalf of himself and his companies includes no evidence. A party cannot rely on its past denials once a matter reaches the stage of summary judgment. It must offer admissible proof that shows an issue of fact for trial.

Morneo submitted documents that do not deny the Secretary's claims. They do not constitute proof. If properly authenticated, at best they would show an effort to have the Fleet Industrial Supply Center of the U.S. Navy grant Moreno and his companies an equitable adjustment under its contract, to pay the amounts the Secretary has determined that Moreno, Puget and More owe.

VI. Debarment

A firm that is debarred is placed on a list that is distributed by the Comptroller General which represents firms to whom "no contract of the United states shall be awarded. . ."[10] A contractor who has violated the Act bears the burden to demonstrate unusual circumstances which warrant relief from debarment sanction despite an SCA violation.[11]

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[7] 41 U.S.C. §351.

[8] 29 C.F.R. §§ 4.175 (d)(1), 4.171(a)(1).

[9] 29 C.F.R. § 4.1.71 (a)(4).

[10] 41 U.S.C. § 354(a).

[11] 29 C.F.R. 4.1888(b).

A firm in which an individual has a "substantial interest" may also be debarred, especially where a firm shares common management, the same facilities or are owned by a relative.[12] Moreno has not proven unusual circumstances that warrant relief from debarment. Moreno has provided some documents and he orally voiced concern in the May 31, 2013 conference call that he was operating under the belief that he was paying Puget employees more than the prevailing wage, but he has not produced valid evidence to support this position, nor are his claims of ignorance of his legal responsibilities a valid defense to his violation of the Act.

More Support Service (More) was under common management with Puget and existed solely to provide services to Puget. More and Puget shared a physical address, and the corporate finances of Puget were comingled with More. More had no clients other than Puget.

In light of the undisputed facts and evidence Puget, Carlos Moreno, and More should be debarred.

VII. Order

The Secretary's motion for summary decision is granted and the following relief is ordered:

Respondents Puget Sound Environmental Corporation and Carlos Moreno violated the Act by failing to pay service employees their minimum monetary wages and fringe benefits as required by the contracts and by Sections 2(a)(1) and (2) of the Act;

Respondents Puget and Carlos Moreno violated the Act by failing to make and maintain, and to make available for inspection and transcription by an authorized representative of the Administrator, adequate and accurate records of the aforesaid service employees, showing among other things, their work classifications and a list of monetary wages and fringe benefits, as required by 29 C.F.R. § 4.6(g);

The Respondents Puget, and Carlos Moreno are assessed $1,409,409.98 in back wages;

[12] 29 C.F.R. §§4.188 (c)(1),4.188 (c)(2).

Puget, Carlos Moreno, and More Support Services Corporation are debarred from federal contracting for three years.

So Ordered.

Digitally signed by William Dorsey
DN: CN=William Dorsey,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges, L=San
Francisco, S=CA, C=US
Location: San Francisco CA

William Dorsey
ADMINISTRATIVE LAW JUDGE
San Francisco, California

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

Administrative Review Board
United States Department of Labor
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).