

U.S. Department of Labor

U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202



Date Issued: May 11, 1988

Case No. 85-DBA-117

In the Matter of

Disputes concerning the payment
of prevailing wage rates and
overtime compensation by:

LANCE LOVE, INC.
Prime Contractor
and

Proposed Department of Labor
Standards Violations by:

LANCE LOVE, INC.
Prime Contractor

MR. LANCE LOVE
President

GEORGE H. NONWEILER, JR.
Contract Sales Manager

With respect to laborers and
mechanics employed by Lance
Love, Inc. on Contract
DABT-82-C-0105
Ft. Benjamin Harrison, Indiana

APPEARANCES:

Richard D. Schreiber, Esq.
Schreiber and Sevenish
Indianapolis, Indiana
For the Prime Contractor

Phyllis B. Dolinko, Esq.
U.S. Department of Labor
Office of the Solicitor
Chicago, Illinois
For the Secretary

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This case arises under the Davis-Bacon Act (DBA), 40 U.S.C. Section 276(a) et seq., the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U. S. C. Sections 327 et seq., and Department of Labor Regulations, 29 C.F.R. Parts 3 and 5. The United States Department of Labor, Employment Standards Administration, (hereinafter DOL), issued an Order of Reference which determined that Lance Love, Inc., violated the provisions of DBA, CWHSSA, and Regulation 5 by failing to pay mechanics and laborers employed on Contract DABT-82-C-0105 (hereinafter Contract), which was being performed at Fort Benjamin Harrison, Indiana (hereinafter the Fort), prevailing wages, fringe benefits, and overtime compensation as required by the Contract. The DOL seeks full payment of the back wages for the mechanics and laborers and proposes the debarment of Lance Love, Inc., and its President, Lance A. Love, for having committed violations constituting a disregard of the contractor's obligations to its employees under the DBA and also for having committed aggravated or willful violations of the CWHSSA. Lance Love, Inc. and Lance A. Love both appealed the determination of DOL and requested a hearing. By letter dated January 8, 1985, the Department of the Army formally adopted the findings and conclusions of the compliance officer's report. Funds in the amount of the underpayments were transferred to the General Accounting Office to be held pending the disposition of this matter. (DOL Exhibit 1, pp. 246, 247) On August 12, 1986, the complaint of DOL was amended to seek the debarment of George H. Nonweiler, Jr., (Nonweiler), who was contract sales manager of Love Inc., for allegedly receiving kickbacks from employees of Love, Inc., in violation of 29 C.F.R. Part 3.

The hearing in this case commenced on February 10, 1987 in Indianapolis, Indiana. It concluded in the afternoon of February 12, 1987. Each of the parties had full opportunity to present evidence¹ and argument. The FINDINGS OF FACT AND CONCLUSIONS OF LAW which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations,

¹In this Decision, "DOL" refers to U.S. Department of Labor Exhibits, "Love" refers to the Exhibits of Lance Love, Inc., and Lance A. Love, "Stip" refers to the Stipulation of Facts, and "Tr" refers to the Transcript of the hearing.

statutes, and case law. Any exhibit or document admitted as evidence of record has been fully considered in arriving at the Decision herein. The parties were directed to file post-hearing memorandum briefs on April 24, 1987, and a reply brief no later than May 25, 1987. The DOL did file an excellent original brief. However, no briefs were filed on behalf of Lance Love or Lance Love, Inc. When this case was called for hearing, George Nonweiler did not appear on his own behalf but only as a subpoenaed witness. Forest Bowman, Jr., Esq., of the firm of Bowman, Parker, and Emery, Indianapolis, Indiana appeared at the hearing to represent Mr. Nonweiler only in his capacity as a subpoenaed witness. Following the commencement of the hearing, Ms. Dolinko moved that Mr. Nonweiler be defaulted since he had failed to respond to the amendment of the complaint and, therefore, had not filed an answer in this proceeding, and he had also failed to respond to the Pre-Hearing Order which required him to participate in the preparation of this matter for hearing. In a prehearing conference which took place immediately prior to the receiving of evidence in this case, Mr. Bowman advised that if George Nonweiler were called to testify in this case, that he would plead the Fifth Amendment to the U.S. Constitution and, thereby, refuse to respond specifically to any questions that related to his activities while employed by Love, Inc. Mr. Bowman declined to respond to the Motion to Default with respect to his client. Based upon these facts, the Motion to Default was granted at the hearing and debarment is found with respect to the activities of Mr. Nonweiler.

ISSUES

1. Whether Love, Inc., paid the various classes of laborers and mechanics the full amounts earned, computed at wage rates of not less than those determined by the Secretary of Labor, and included in the contract;
2. Whether Love, Inc., paid its laborers and mechanics overtime compensation of not less than one and one-half times their basic rate of pay for all hours worked on the project in excess of eight per day and forty per week;
3. Whether the weekly certified payrolls were correct and complete in disclosing the hourly rates paid, the number of hours worked, and reported data concerning all employees who worked on the project;
3. Whether Love, Inc., and Lance A. Love, President, should be placed on the Comptroller General's ineligible list for receiving federal government contracts for a period not exceeding three years from the date of publication; and
4. Whether DOL is subject to sanctions as the result of its refusal to comply with an express order of the Administrative Law Judge.

The original charging letter directed to Lance A. Love and Love, Inc., included an underpayment for Tim Foster based upon overtime work. The charging letter also included an underpayment for Sharon Kimble, who was registered as a carpentry trainee. The underpayments asserted against both of these individuals were withdrawn at the hearing. (Tr. I, p. 12) The charging letter also included liquidated damages in the amount of \$1,950.00. This office has no jurisdiction over that matter and, therefore, no determination will be made concerning that item.

IMPOSITION OF SANCTIONS CONCERNING THE CWHSSA VIOLATIONS

Compliance Specialist Nancy Dzara, DOL, conducted the investigation in this case. The investigation was initiated as the result of a complaint lodged by one of the competitors of Love, Inc. In the course of her investigation, Ms. Dzara took interview statements from numerous individuals. The statements were made contemporaneously with the interview and were signed by the party at the conclusion of the interview. The interview statements of Greg Beemer and Greg Ford were used in conjunction with the certified payrolls submitted by Love, Inc., and the records of Love, Inc., in computing the underpayments. The computations of the underpayments were computed in part by comparing the interview statements of the employees so as to determine that the representations concerning the number of hours worked were verified by the other employees.

In the course of cross-examining Ms. Dzara, Mr. Schreiber requested that DOL produce the interview statements of both Greg Beemer and Greg Ford. (Tr. 3, pp. 149, 151, 152) Department of Labor Exhibit 5 was prepared in part by Ms. Dzara based upon the content of the interview statements of Greg Beemer and Greg Ford. The Administrative Law Judge ordered DOL to produce the statements of both Beemer and Ford and Phyllis Dolinko refused to comply. Mr. 3, pp. 151-155, 158) Upon the refusal of DOL to produce the statements, Mr. Schreiber moved that DOL be held in contempt for failing to comply with the order to produce. That request was denied summarily. Mr. 3, p. 159)

The transcript seems to indicate that either Beemer or Ford had been subpoenaed to testify in this matter but had failed to appear. Mr. 3, p. 151) As an explanation for refusing to comply with the order, Ms. Dolinko offered that, as a general rule, an employee who does not choose to appear at the hearing still is employed by the contractor and is essentially concerned about his job security if he is required to testify. Mr. 3, pp. 151-152) She acknowledges that if the employee authorizes them to turn over the witness statements, then she is permitted to do that. Her explanation included a reference to DOL Guidelines on this problem, but no statutory, regulatory, or case cites were offered and no claim of privilege was made at the hearing. The brief filed by DOL in this case does not address the problem.

Any claim of privilege must be narrowly construed, J. R. Norton Co. v. Arizmendi, 108 F.R.D. 647 (S.D. CAL 1985), and the government bears the burden of

proving its applicability. Mobile Oil Corp. v. Department of Energy, 520 F.Supp. 414 (N.D. NY 1981). There are very specific procedural requirements which must be met in order for the government to properly invoke an assertion of privilege. It is clear that none of those requirements have been met in this case.

Although reference was made by Ms. Dolinko to DOL guidelines, I find nothing in the applicable regulations that would provide any type of an exemption for the disclosure of this information. Clear statutory authority exists for the heads of each federal agency to prescribe regulations for the preservation of records, papers, and property pertaining to its operation. 5 U.S.C. §301. The regulations promulgated under authority of this statute have the force and effect of law and in the absence of a waiver by appropriate government officials, the courts have no power to compel the disclosure of this information. United States ex rel. Touhy v. Ragen, 340 U. S. 462, 95 L Ed. 417, 71 S.Ct. 416 (Regulations of Attorney General); Boske v. Comingore, 177 U. S. 459, 44 L Ed. 846, 20 S.Ct. 701 (Treasury Regulations); United States v. Marino, (CA2 NY) 141 F.2d 771, cert. denied, 323 U. S. 719, 89 L Ed. 578, 65 S. Ct. 48, rehearing denied 323 U.S. 813, 89 L Ed 647, 65 S.Ct. 113 (Treasury Regulation Walling v. Comer Carriers, Inc., (DC NY) 3 FRD 442 (Regulations of Department of Labor).

Twenty-nine C.F.R. Part 2, Subpart C, provides the procedures to be followed whenever an "order" of a court or other authority is made in connection with the proceeding to which DOL is not a party. These regulations outline clear procedures for handling disclosure requests. Those procedures were not followed in this case. Additionally, the regulation provisions apply to cases in which DOL is not a party. The DOL, under its own regulations, filed the complaint in this case and is clearly a party. Therefore, the Part 2, Subpart C regulations are not applicable to this case.

I am mindful of the provisions of 29 C.F.R. Part 70 dealing with the examination and copying of DOL records. Although some restrictions on disclosure are noted, the data involved in this case does not appear to fall within the framework of the areas outlined. The regulations provide specific procedures for responding to requests for information, including a written response detailing a brief statement of the reasons for a denial. 29 C.F.R. §70.49. A special exemption is noted for investigatory material compiled for law enforcement purposes, but even that provision would seem to indicate that at least a portion of the material should be disclosed while protecting any damaging representations. 29 C.F.R §70a.13(b)(2)(i)C(1) . The regulations also provide a disclaimer as to the exemption applicability with respect to information depriving an individual from learning of the existence of information maintained in a record about him, even though that information may have been received from a confidential source. 29 C.F.R. §70a.13(b)(2)(i)C(2).

Since no specific authority has been offered by DOL as a basis for refusing to produce the witness statements involved and I am unaware of any authority supporting that action, I must conclude that there exists no such authority and that even if there had been some regulation dealing with this subject matter, some more definitive method for

claiming the exemption under the regulations should have been undertaken by DOL in its attempt to assert that exemption.

The circumstances involved here are such that in my judgment, the majority of the information included within those witness statements was probably available from other sources within this record. The DOL acknowledged at the hearing that one of the two individuals had been subpoenaed and was scheduled to testify. Therefore, they had apparently intended to produce that witness statement if counsel requested for cross-examination purposes. I have a problem believing that the content of the second witness statement could have possibly qualified under one of the exemptions outlined under the applicable regulations.

In view of the above, it is my conclusion that DOL has clearly failed to comply with an order of the Administrative Law Judge and, therefore, sanctions are appropriate. In view of that finding, I conclude as an appropriate sanction in this case that all understatements of income asserted against Love, Inc., with respect to the overtime compensation of Greg Beemer and Greg Ford be stricken. 29 C.F.R. §18.6(d)(2)(v) and §18.29(a). In view of that disposition of the sanction question, I will not consider any adjustments pertaining to the underpayments asserted for work performed by either Greg Beemer or Greg Ford.

FINDINGS OF FACT

Love, Inc., is located in Indianapolis, Indiana and is a business engaging in the sale and installation of floor coverings. The company has both contract and retail divisions. Lance A. Love is the president, secretary, treasurer, and sole stockholder of the corporation. His brother-in-law, Michael Flanagan, is the general manager for Love Inc., and headed its Retail Sales Division. George H. Nonweiler, Jr., served as Contract Sales Manager. He was paid strictly a commission on sales based upon twenty-five percent of the contract's gross profit. Nonweiler's duties included the soliciting, estimating, and bidding for both government and commercial contracts. After Nonweiler estimated the cost associated with the proposed contract, Lance Love, Flanagan, and Nonweiler all prepared the bid for the project. A profit margin of approximately sixteen percent was included in the contract bid price.

On June 4, 1982, Love, Inc., by George H. Nonweiler as Contract Sales Manager, entered into a contract with the Department of the Army (hereinafter DOA) to replace and/or install floor covering in Building 1 and the post buildings located at Ft. Benjamin Harrison, Indiana. The bid price was \$47,179.00 and the contract contained labor standard provisions pertaining to DBA, CWHSSA, and the Copeland Act. The wage and other requirements of these Acts were all made applicable to any subcontracts. The contract called for the payment of compensation at the following rates for workers inside of Marion County, Indiana:

	<u>Prevailing Wages</u>
<u>Carpenter</u>	\$13.95 per hour
Health and Welfare Benefits	.75 per hour
Pension	.95 per hour
Education and Apprenticeship Training	.08 per hour
Total	\$15.73 per hour

	<u>Prevailing Wages</u>
<u>Laborers</u>	\$ 9.50 per hour
Health and Welfare Benefits	.85 per hour
Pension	.75 per hour
Education and Apprenticeship Training	.09 per hour
Total	\$11.19 per hour

This contract was bid upon the basis of a price per square foot which included the tile and latex and also the labor cost.

On opening the bids submitted by the contractors for this project, the government determined that the bid prices ranged from an estimated \$47,179.00 to \$102,251.00. Love, Inc., had submitted the low \$47,170.00 bid. The government, on April 21, 1982, sent a possible mistake-in-bid notice to Love, Inc., advising them of the disparity in prices and calling to their attention the wage rate requirements included within the contract. Nonweiler, on behalf of Love, Inc., responded immediately by advising that their bid was firm and that they had taken into account the wage requirements. This contract was an open-ended contract covering a one-year period for orders for work to be issued as the work was required. Although the government engineers had estimated that a reasonable bid price should be in the area of \$90,050.00 for the initial contract, that estimate of work to be performed proved low in that ultimately delivery orders were eventually written against the contract in the amount of \$250,698.75. The contract provided an option for Love, Inc., to refuse any work in excess of that stated in the initial contract bid. That option, however, was not exercised by Love, Inc., and they performed all of the work for which work orders were written.

A pre-commencement conference was held on June 14, 1982 and was attended by Mari Jane Renfro, contract specialist, DOA, and George Nonweiler on behalf of Love, Inc. The conference included discussions for an accident prevention policy and also Nonweiler was provided with copies of all applicable forms and posters required to comply fully with DOL guidelines. Love, Inc., used six employees who performed work as either laborers or carpenters to complete the contract. These employees were essentially paid upon a piece-rate basis. Nonweiler was the project manager on behalf of Love, Inc., for all of the contract work. Incorporated by this reference is Attachment "A" which includes the method of computation used by DOL in computing the amount of back wages due each of these employees. The computations were based upon an analysis

of checks produced by Love, Inc., an evaluation of the certified payrolls, witness statements from the employees, and a cross check of the witness statements between each other. Of this group of employees, only Tim Foster was paid an hourly rate. His activities were supervised by one of the subcontractors. Foster testified as to the inaccuracy of the certified payrolls. The other Love, Inc. employees who worked on this contract did not report their hours worked since they were paid piece rate based upon building size or by the square foot. They were paid no fringe benefits and they were not notified of the wage determination requirements. Additionally, the record shows that the wage requirements were not posted at the job site.

Adams and Johnson worked together as laborers ripping up floors, removing the flooring from the area by placing it in dumpsters, preparing the floors for the plywood to be installed, and hauling tile onto the site after the plywood had been laid. They were not required to work regular hours since they were paid on a piece rate basis. Their compensation was substantially less than the \$12.00 per hour shown on the certified payrolls and they were not compensated at time and one-half for overtime hours. Both individuals testified that George Nonweiler advised them that if anyone were to ask the rate of their compensation, that they were to represent that it was \$12.00 per hour. The record also shows that both of these individuals, for some period of time, paid approximately ten percent of their wages per week to Nonweiler as kickbacks to retain their jobs. At some point during the execution of this contract, Lance Love personally became aware of these kickbacks.

Wayne Jones worked as a carpenter and was compensated at the rate of \$.15 per square foot for laying plywood subflooring and \$.14 per square foot for ripping out old flooring. He also had worked with a subcontractor in doing the same type of work. He testified to some overtime work as a carpenter. He was not required to report his work hours to Love, Inc.

Gary Greever testified to his work with Love, Inc., together with his partner, Dan Kloss. His testimony was that they had worked thirty-two hours each on the contract and that they were paid a piece rate per building and that they did not report their hours worked. They worked both as laborers and carpenters. The Love, Inc., certified payrolls do not refer to either Greever or Rloss, although the check stubs provided by the company show their employment. Love, Inc., also used subcontractors on this job. Harry Ken Phillips and Albert Weir apparently worked individually and as a part of a subcontracting team doing business as A & K Tile. The subcontractors were required by Love, Inc., to sign documents entitled "ACKNOWLEDGMENT". This statement indicated that the individual understood that he was not an employee of Love, Inc., but was an independent contractor and that his gross earnings were not subject to withholding for Social Security taxes or Federal or State income taxes. Additionally, the statement indicated that the individual would furnish his own insurance. There apparently were no other subcontract agreements executed by any of these contractors. They were paid by the square foot of work performed and apparently kept their own hours. Nonweiler prepared the certified payrolls which included the hours worked for these individuals. Love, Inc., compensated the subcontractors at a piece rate of \$.30 per square foot when they tore up

the old flooring and installed new flooring. They were not apprised of the basic wage requirements nor was a wage determination posted at the job site. The compensation actually paid these individuals and the underpayments of compensation for each of these individuals was determined in essentially the same way as for the employees of Love, Inc. The compliance officer used A & K Tile Company ledger sheets, in addition to discussions with the bookkeeper for that concern. The transcription of information from the records of A & R Tile disclosed significant underpayments in compensation to these individuals. Ms. Dolinko also prepared a spreadsheet covering the compensation paid and the underpayments to all of the subcontractors' work activities. That computation is incorporated herein by this reference and is evidenced by Attachment "B" to this Decision and Order.

The certified payrolls of Love, Inc., reflected an hourly rate of compensation for laborers of \$12.00 per hour and an hourly rate for mechanics of \$16.00 per hour. This compensation was greater than the prescribed wage determination rates. Compliance specialist, Rosemary Persley, testified concerning her examination of the certified payrolls and other records. It was her testimony that within the construction industry, it was relatively-common to have companies half the overtime hours and record compensation at twice the amount actually paid in order to demonstrate compliance with the requirements of the wage laws. She also interviewed employees to verify the information on the records which she was provided. She located numerous inconsistencies and falsification of data. The payrolls reflected erroneous total compensation paid in relation to the number of hours worked and the rate of compensation stated. Check stubs provided for examination by Love, Inc., did not coincide with the certified payroll record of gross wages for corresponding periods. Small increments of time were also recorded which, based upon her experience, she considered to be unusual. Also, she located reductions from compensation for tools which are not authorized under these regulations. She also was provided check stubs for some individuals for which there were no corresponding entries on the certified payrolls.

Lance A. Love testified that he delegated the responsibility for the government job at Ft. Benjamin Harrison to George Nonweiler. He testified that the certified payrolls were prepared by Mr. Nonweiler and he would ask him whether they were correct, and if the response was in the affirmative, then he would sign them. During the term of the contract, he had no knowledge that the certified payrolls had been improperly prepared. He had heard of the kickbacks being paid to Mr. Nonweiler and his testimony was that he approached Nonweiler who denied that he had received any kickbacks. He also approached the employees and they denied paying the kickbacks. He disclaimed knowledge about events occurring at Ft. Benjamin Harrison because Nonweiler had been in charge of that job. Mr. Love considered both Flanagan and Nonweiler to be management employees for him. Flanagan was in charge of the retail end of the business and Nonweiler took charge of the commercial end of the business. Mr. Love disclaimed any particulars with respect to the preparation of the certified payrolls.

Numerous witnesses testified during the course of this hearing. I find all of that testimony to be credible even though I note that there exist inconsistencies within the record.

CONCLUSIONS OF LAW

ISSUE NO. 1

Whether Love, Inc., paid the various classes of laborers and mechanics the full amounts earned, computed at wage rates of not less than those determined by the Secretary of Labor, and include in the contract.

I am convinced after reviewing this entire record that Love, Inc., has failed to pay the various classes of laborers and mechanics the full amounts earned as required by the DOA contract. I am also convinced after reviewing this entire record that the computations of DOL reflecting the underpayments and as evidenced by Attachments "A" and "B" to this Decision and Order, are basically correct. That is not to suggest that they are exactly correct, but that is not the burden of DOL. If the contractor fails to maintain adequate records of hours worked, it is not necessary to prove uncompensated or undercompensated wage payments of each employee with precision. It is sufficient to show the amount and extent of work in a job classification as a matter of reasonable inference even though the result may only be approximate. James Q. West and James Whaley, SCA 397 (1975); Glenn Electric Company, Inc., 79 DBA 119 (1979). Love, Inc., had a statutory obligation to maintain proper records pursuant to this contract. The Supreme Court, in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), addressed the problems associated with an employer's failure to discharge its statutory obligation of maintaining proper records:

(W)here the employer's records are inaccurate or inadequate ... (t)he solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-688.

Where improper records are maintained, the standard clearly requires the employer to produce evidence demonstrating with specificity the actual compensation which should have been paid to these employees. As an alternative, the standard allows the employer to produce evidence which negatives the reasonableness of the inference to be drawn from the employee's evidence. This record does contain evidence that some of the employees may not have worked the total number of hours asserted in the DOL computations. However, the employer has failed to establish with specificity the exact number of hours for which these individuals worked in view of the fact that the record may contain conflicting data with respect to those individuals. Love, Inc., offered no records to disprove the basis upon which the compliance officer had made her computations. Based upon the standard enunciated in Mt. Clemens, I find that DOL has established a prima facie case of wage underpayment and that the employer has failed to carry its burden of establishing the precise amount of compensation which ought to have been paid nor was evidence produced which negatives the reasonableness of the inference drawn from the employees' evidence. In arriving at that conclusion, I note that it is not necessary that each employee testify in order for DOL to have made a prima facie case of the number of hours worked as a matter of 'Just and reasonable inference.' Brennan v. General Motors Acceptance Corp., 482 F.2d 825 (5th Cir. 1973); Donovan v. New Floridian Hotel, Inc., 676 F.2d 468 (11th Cir. 1982). An employee may not waive any rights conferred under the Davis-Bacon Act. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945). Thus, the "Acknowledgments" signed by some employees did not impact upon any rights conferred by the statutes.

Upon the basis of this entire record, I conclude that Love, Inc., failed to pay the various classes of laborers and mechanics the full amounts earned pursuant to the contract and, therefore, is obligated for those payments as determined by DOL with the exception of Greg Ford and Greg Beemer.

ISSUE NO. 2

Whether Love, Inc., paid its laborers and mechanics overtime compensation of not less than one and one-half times their basic rate of pay for or all hours worked on the project in excess of eight per day and forty per week.

No need exists to discuss in detail either the burdens of proof associated with this issue or the manner in which DOL computed the underpayments for overtime work. My analysis of this record made in the last issue discussion applies equally here. I find the computations of DOL with respect to the overtime pay to be reasonable projections of the actual dollars earned. The DOL has established a prima facie case and Love Inc., has failed to carry its burden under the Mt. Clemens standard.

Therefore, this issue is also decided against the contractor.

ISSUE NO. 3

Whether the weekly certified payrolls were correct and complete in disclosing the hourly rates paid, the number of hours worked, and reported data concerning all employees who worked on the project.

This issue must also necessarily be decided against the contractor. Clearly, the certified payrolls were false. Certification was made that the records were correct and complete, that proper compensation was paid, and that the designated classifications were correct. In each instance, one or more of those items was clearly erroneous. This record evidences certified payrolls containing obviously false and fictitious entries. The individual in charge of the job acknowledged that the subcontractors were paid by the square foot and not an hourly rate and that he was not even aware of the total number of hours worked by these individuals. The record contains evidence that one or more of the employees involved were asked to make erroneous representations concerning their hourly wage in the event any individual questions them. A compliance officer testified as to the erroneous nature of some of the information contained on the certified payrolls. She found erroneous hours assigned, improper compensation noted, mathematical inconsistencies, inconsistencies from the certified records with the actual check stubs or other records of the company, and what amounts to an acknowledgment by Nonweiler that he really did not know how many hours the subcontractors' employees even worked. This record will support no conclusion other than that the certified payrolls were falsely prepared, incorrect, and incomplete.

ISSUE NO. 4

Whether Love, Inc., and Lance A. Love, President, should be placed on the Comptroller General's ineligible list for receiving federal government contracts for a period not exceeding three years from the date of publication.

Based in part upon the disposition of the other issues involved in this case, I find that Lance A. Love and Love, Inc., are in aggravated or willful violation of the Labor Standards Provisions of these Acts. The deficiencies associated with the record keeping requirements are all noted above and need not be repeated here. The record also shows that the anti-kickback prohibitions contained within the Copeland Act have been violated.

The regulations implementing the Davis-Bacon Act provide that "contractors or subcontractors and their responsible officers, if any, (and any firms in which the contractors or subcontractors are known to have an interest)" may be placed on an ineligible list barring them from receiving any federal contract or subcontract subject to the labor standards provisions of the statutes listed in 29 C.F.R. §5.1. Section 5.12(a)(2) states that debarment shall be recommended where contractors or subcontractors are found to have "disregarded their obligations to employees" imposed by the terms of the

Act and contracts entered into which are subject to the Act. Unlike relevant provisions in the statutes listed in 29 C.F.R. §5.1, a finding of "aggravated or willful" violations of the Act is not required in order to trigger debarment for violations of the Davis-Bacon Act.

In the majority of Davis-Bacon cases where debarment is ordered, the contractor or subcontractor is found to have violated the Davis-Bacon Act and one of the Davis-Bacon related statutes listed in 29 C.F.R. §5.1. In that circumstance, administrative law judges and the Wage Appeals Board tend to apply the "aggravated and willful" standard and to conclude that actions which are found to be "aggravated and willful" clearly encompass the lower disregard of obligations to employees standard. See e.g., In re Ace Contracting Co., [September 1978 -January 1981 Transfer Binder Lab. L. Rep. CCH) ¶31,357 (1980); In re Cosmic Construction Co., [September 1978 - January 1981 Transfer Binder] Lab. L. Rep. (CCH) ¶31,382 (1980); In re P. J. Stella Construction Corp., 2 Wage Hours Lab. L. Rep. CCH ¶31,435 1984. For that reason, the body of case law which specifically addresses the disregard of obligations to employees standard is quite small.

Lance Love offered little in the way of a defense to the debarment in this case. It was Love's contention that he was unaware of the specific provisions of this contract and that he signed the certified payrolls without verifying any of the specific information which they included because of his explicit trust in George Nonweiler. When rumors of kickbacks finally reached him, he spoke to both Nonweiler and some employees, but apparently took no other affirmative action to determine if the allegations were true. My impression is that he did not consider these rumors to be a serious matter. Although he held the offices of president, secretary, treasurer, and sole stockholder of his company, his testimony was that Flanagan and Nonweiler basically saw to the day-to-day operation of the business. He has, in essence, taken the position that he was unaware of any wrong doing of his subordinates. That contention does not remove him from responsibility for his actions or the actions of his company. P. J. Stella Construction Corp. & My Glass Co., WAB 80-13 (March 1, 1984).

Even assuming that Mr. Love was totally ignorant of all of the circumstances and violations associated with the Benjamin Harrison Contract, I must conclude that because of his position within the company, that he was grossly irresponsible in failing to oversee his company's performance on the contract. Based upon this scenario of events, I conclude that Lance A. Love and Love, Inc., are in aggravated or willful violation of the labor standards associated with each of the Acts involved in this case.

ORDER

In view of the disposition of all of the issues in this case, IT IS HEREBY ORDERED that:

1. The General Accounting Office shall release all funds being held in escrow for the payment of back wages as determined in Attachments "A" and "B" to this Decision and Order;
2. The General Accounting Office shall return to Lance Love, Inc., that portion of the funds being held in escrow which related to alleged underpayments for Greg Beemer and Greg Ford;
3. It is recommended that Lance A. Love and Lance Love, Inc., be placed on the ineligible list pursuant to Section 3(a) of the Davis-Bacon Act and 29 C.F.R. §5.12(a)(1) for a period not to exceed three years from the date of publication by the Comptroller General of the United States; and
4. It is recommended that George A. Nonweiler be placed on the ineligible list pursuant to Section 3(a) of the Davis-Bacon Act and 29 C.F.R. §5.12(a)(1) for a period not to exceed three years from the date of publication by the Comptroller General of the United States.

RUDOLF JANSEN
Administrative Law Judge