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KEVIN BITHER and BARRY BITHER, as individuals, and dba as K.B. BITHER TRUCKING, INC., a California corporation, formerly known as K.B. BITHER TRUCKING COMPANY, Plaintiffs, v. THE HONORABLE LYNN MARTIN, in her capacity as SECRETARY, UNITED STATES DEPARTMENT OF LABOR, and HONORABLE CHARLES A. BOWSHER, in his capacity as THE UNITED STATES COMPTROLLER GENERAL, Defendants.

No. CV 91-3455 CBM (Tx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

1992 U.S. Dist. LEXIS 14358; 122 Lab. Cas. (CCH) P35,667; 30 Wage & Hour Cas. (BNA) 1615

March 16, 1992, Decided
March 17, 1992, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a trucking business and its owners, filed suit against defendants, Secretary of Labor and United States Comptroller General, seeking injunctive and declaratory relief from a final administrative action by the United States Department of Labor under the McNamara-O'Hara Service Contract Act, *41 U.S.C.S. 351* et. seq.

OVERVIEW: The Secretary found that plaintiffs violated the Act by failing to pay their employees the minimum wage mandated by certain government contracts. As a result, the Secretary ordered that plaintiffs be debarred under § 5(a) of the Act, *41 U.S.C.S. § 354*(a). Plaintiffs sought to enjoin the Secretary and the Comptroller General from enforcing the disbarment. The court applied the preponderance of the evidence standard to determine whether the Secretary's decision was proper. The court determined that the Secretary correctly concluded that there were no unusual circumstances to prevent debarment in this case under the test set forth in *29 C.F.R. § 4.188(b)*. The court concluded that plaintiffs' violation of the Act was willful, deliberate, and culpable. This finding was warranted given testimony that plaintiffs knew they were violating the Act, but found it too difficult to adapt their payroll system to meet the various minimum wage requirements under the contracts. The court granted defendants' motion for summary judgment because it found that the Secretary's decision sustaining plaintiffs' debarment had a rational basis and was supported by a preponderance of the evidence.

OUTCOME: The court granted defendants' motion for summary judgment.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
[HN1] Pursuant to *5 U.S.C.S. § 706*(2)(A), the court may set aside the decision of the Secretary of Labor only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. While the ordinary burden of proof necessary to support an agency decision under § 706(2)(A) of the Administrative Procedure Act is that of "substantial evidence," the McNamara-O'Hara Service Contract Act (SCA) establishes a different burden. Section 5 of the Walsh-Healey Act, *41 U.S.C.S. § 39*, incorporated by § 4(a) of the SCA, *41 U.S.C.S. § 353*(a), provides that the Secretary's factual findings shall be conclusive upon all agencies of the United States and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States. Questions of fact are governed by a "preponderance of the evidence" standard, whereas questions of law are subject to an "arbitrary and capricious" standard.

Administrative Law > Judicial Review > Standards of Review > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
[HN2] The Secretary of Labor's regulations adopt the preponderance standard. *29 C.F.R. § 4.189* states: The Secretary is authorized pursuant to the provisions of § 4(a) of the McNamara O'Hara Service Contract Act to hold hearings and make decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of the Act. Pursuant to § 4(a) of the Act, the Secretary's findings of fact after notice and hearing are conclusive upon all agencies of the United States and, if supported by the preponderance of the evidence, conclusive in any court of the United States, without a trial novo.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Public Contracts Law > Dispute Resolution > Debarment
[HN3] Section 5(a) of the McNamara-O'Hara Service Contract Act provides that unless the Secretary of Labor recommends otherwise because of unusual circumstances, a service contractor who violates the Act shall be debarred for three years. *41 U.S.C.S. § 354*(a). Under the clear language of the Act, no relief from debarment is possible unless unusual circumstances are specifically found. Section 5(a) of the Act is a particularly unforgiving revision of a demanding statute. A contractor seeking an "unusual circumstances" exception for debarment must, therefore, "run a narrow gauntlet." Although the Act does not define "unusual circumstances," the regulations at *29 C.F.R. § 4.188(b)* establish by a three-part test the operative principles and procedures for determining when relief from debarment is appropriate. The burden of establishing unusual circumstances rests with the violator. 29 C.F.R. § 4. 188(b)(1).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Public Contracts Law > Dispute Resolution > Debarment
[HN4] Under Part I of the test to determine if unusual circumstances exist to preclude debarment under the McNamara-O'Hara Service Contract Act, the contractor must first show that no aggravated circumstances exist, that the violations were not willful, deliberate, or of an aggravated nature, or the result of culpable conduct such as culpable neglect to ascertain whether practices where in violation of the Act, or culpable failure to comply with record keeping requirements; nor may the contractor have a similar violation or have repeatedly or seriously violated the Act. *29 C.F.R. § 4.188(b)(3)(i)*. Under Part II, the contractor must demonstrate a good compliance history, cooperation in the investigation, repayment of monies due, and sufficient assurances of future compliance. *29 C.F.R. § 4.188(b)(3)(ii)*. Part III provides for the consideration of additional factors, including: whether the contractor was previously investigated for violations; whether record keeping violations impeded the investigation; whether liability depended upon resolution of a bona fide legal issue of doubtful certainty; 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; and whether sums due were promptly paid. *29 C.F.R. § 4.188(b)(3)(ii)*.

JUDGES: [*1] MARSHALL

OPINIONBY: CONSUELO B. MARSHALL

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for injunctive and declaratory relief from a final administrative action by the Department of Labor ("the DOL") under the McNamara-O'Hara Service Contract Act, as amended, *41 U.S.C. 351* et. seq. (hereinafter "SCA" or "the Act") and the regulations promulgated thereunder, 29 C.F.R. Parts 4, 6.

2. In a complaint filed on October 17, 1986, the Administrator of the Wage and Hour Division ("Administrator") alleged minimum wage and record keeping violations against plaintiffs Kevin and Barry Bither and their business, Bither Trucking Company ("Bither"). The complaint also sought debarment under section 5(a) of the SCA *(4 U.S.C. § 354*(a)). C.A.R. 2. The complaint was amended on December 30, 1988 to allege additional violations disclosed during a post-complaint investigation. C.A.R. 170.

3. On May 10, 1989, a one-day hearing was held before Administrative Law Judge ("ALJ") Thomas Schneider. C.A.R. 232 et. seq. The hearing concerned 11 contracts to perform mail hauling for the United Sates Postal Service ("USPS"). Prior to the hearing, Bither [*2] had agreed to pay a total of approximately $ 21,000 to employees in settlement of the Administrator's backwage claims. Most of the facts in this case were not in dispute; as stipulated by the parties, the only issue to be resolved at the hearing was whether Bither should be debarred. C.A.R. 216, 237. Based on that proceeding, paragraphs 4 through 8 are in the administrative record.

4. Of the 11 contracts at issue, all but one began between June 1984 and April 1985 and, including renewals, seven continued at the time of the hearing. The contracts set wage rates which varied depending on the localities covered by the contracts and whether an em-

ployee drove a "bobtail" truck or a "tractor/trailer" rig (C.A.R. 28). It was possible for a driver to have more than one route, with more than one wage rate applicable to his weekly mail hauls (C.A.R. 289-90). The required hourly wage rates of the ten 1984-85 contracts, including fringe benefits, ranged between $ 10.45 and $ 11.65. C.A.R. 411. However, Bither, knowing it was wrong, only paid its employees a flat rate of $ 9.00 per hour during the period covered by the first investigation. C.A.R. 261, 327, 354:11-15. No payment above [*3] the flat rate was made for fringe benefits. C.A.R. 276:23-24.

5. Bither's violation also resulted from its failure to increase its employees' wage rates at the proper time, as required by the contracts. C.A.R. 130. Bither's practice was to delay paying its employees the increased amounts until the USPS granted the company's request for an adjustment in its compensation, usually a month or two after the pay increases were due. C.A.R. 364-365.

6. Barry Bither, company vice-president, testified about the company's history as a mail hauler, describing a two-man firm, two trucks, and the eventual hiring of one employee. C.A.R. 249-250. He testified that Bither held two mail-haul contracts at the time it was contacted by the USPS soliciting additional "emergency" bids in May 1984. C.A.R. 247-250; 252. According to Mr. Bither's testimony, bids had to be prepared within about 10 days, and the brothers were surprised to be awarded eight of the contracts on which Bither had bid. C.A.R. 254. Bither testified that when he asked the USPS whether the firm could accept fewer than the eight contracts it was awarded in June 1984, he was told that his company had to accept all the contracts or [*4] none, and that this would include the two contracts it was currently performing. C.A.R. 255. n1 Mr. Bither testified that he and his brother thought the multiple-contract award was a good business opportunity. C.A.R. 255.

n1 The USPS witness testified that it is not USPS policy to require forfeiture of existing contracts if a contractor cannot accept new contract awards. C.A.R. 320.

7. Mr. Bither described the preparations made over a two-week period in light of the company's increased responsibilities, including the arrangement it devised to address the multiple wage rates applicable to the contracts. C.A.R. 259-261. Mr. Bither stated that the brothers looked at the lowest pay scale and at the highest and "shot somewhere in the middle" to pay one rate. Mr. Bither thought paying one rate would make it fair for all employees even though the $ 9.00 rate chosen was below the minimum required for many of the employees. C.A.R. 261. The Bithers explained this arrangement to its drivers when they were hired. C.A.R. 261, [*5] 266. Under cross examination, Barry Bithers acknowledged that the brothers knew that their payment of a single rate was a violation of wage determination requirements. C.A.R. 274. He testified that his energies went toward getting the mail delivered on time. C.A.R. 265. Mr. Bithers staid that the firm's payroll solution was temporary, based on exigency. C.A.R. 266-267. Barry Bithers also acknowledged that it took a long time until the firm secured the services of a payroll company. C.A.R. 284. This "temporary" solution of underpaying many of their employees lasted over a year until 1986 when the Bithers finally hired Automatic Data Processing ("ADP") to handle the payroll. C.A.R. 284, 287.

8. Company president Kevin Bither's testimony provided additional details with regard to the second group of violations. C.A.R. 364-365. Mr. Bither acknowledged that the company had failed to raise the pay of its employees when new wage rates went into effect, as disclosed by the second investigation, but he stated that the increased rates were now being paid on time. C.A.R. 365-366. He also acknowledged that Bither did not implement the new pay practice immediately after the investigation, [*6] but took some period of time before it changed its practices. C.A.R. 373.

9. After an administrative hearing, the Administrative Law Judge (ALJ) issued a decision on July 31, 1989 recommending against debarment.

10. The Secretary of Labor reversed the decision of the ALJ finding that the facts presented did not demonstrate unusual circumstances which would provide a basis for relief from debarment. C.A.R. 630. The Secretary first found that the ALJ had failed to apply the test set forth in the regulations at *29 C.F.R. 4.188(b)(3)*. C.A.R. 623. Second, the Secretary found the finding that the Bithers were not wilfully violating the terms of the Service Contract Act was not supported by a preponderance of the evidence. C.A.R. 625. The Bithers had testified that they knew they were paying employees less than the required rates. C.A.R. 261, 274. They also failed to pay their employees required fringe benefits. C.A.R. 276. These knowing underpayments were found by the Secretary to be deliberate and wilful violations of the Act. C.A.R. 625.

11. The Secretary further found that the Bithers' asserted justification for the knowing underpayments did not demonstrate "unusual circumstances." [*7] Choosing a rate that they knew was less than the amount required to be paid to many of their employees in order to obviate the need to deal with the complexity of the wage schedules was not a legitimate justification for underpaying employees. Under that rationale, the Bithers could have lawfully obviated the need to deal with the com-

plexity of the wage schedules by paying their employees the highest rate. C.A.R. 626.

12. The Secretary found that the ALJ erred by finding that there were no repeat violations. The two investigations covered different periods of time. There was no evidence in the record to establish that the second violations occurred due to mistakes that were made in an attempt to correct the first violations. C.A.R. 628. Accordingly, the Secretary found the Bithers' violations of the Act to be "willful, culpable and repeated, each of which preclude a finding of 'unusual circumstances.'" C.A.R. 628.

13. The Secretary distinguished the inadvertent conduct of contractors found in other cases from the "conscious management decision" of the Bithers who "knowingly established a policy of underpaying employees." C.A.R. 629.

14. The Secretary concluded that the plaintiffs [*8] failed to demonstrate "unusual circumstances" in this case which would warrant graining them relief from the debarment provisions of section 5(a) of the Act *(41 U.S.C. 354*(a)). C.A.R. 630. Accordingly, the Secretary directed that the Comptroller General n2 be notified to place the names of the plaintiffs on the list of those ineligible to enter into contracts with the Government.

> n2 The Comptroller General of the United States performs only the ministerial duty of placing on the ineligible bidders list the names of persons or firms whom the Secretary has found violated the Act. *41 U.S.C. 354*(a).

15. Plaintiffs were notified in May, 1991 that they would be placed on the debarment list. C.A.R. 631-634.

16. Plaintiffs filed this action on June 26, 1991 for injunctive and declaratory relief. Plaintiffs' complaint requested a preliminary injunction prohibiting the defendants from placing their name on the debarment list. See Complaint at p. 15.

17. Plaintiffs [*9] were placed on the debarment list in September 1991. See Plaintiffs' Request for Judicial Notice, Ex. A.

18. To the extent that any of the following conclusions of law are deemed to be uncontroverted facts, they are incorporated in this statement of uncontroverted facts.

II. CONCLUSIONS OF LAW

1. [HN1] Pursuant to *5 U.S.C. § 706*(2)(A), this Court may set aside the decision of the Secretary only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." While the ordinary burden of proof necessary to support an agency decision under Section 706(2)(A) of the Administrative Procedure Act is that of "substantial evidence," the SCA established a different burden. Section 5 of the Walsh-Healey Act, *41 U.S.C. § 39*, incorporated by Section 4(a) of the SCA, *41 U.S.C. § 353*(a), provides that the Secretary's factual findings "shall be conclusive upon all agencies of the United States and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States . . ." [emphasis added]. n3 See *Federal Food Service, Inc. v. Donovan, 658 F.2d 830, 833 (D.C. Cir. 1981);* [*10] *Midwest Maintenance & Construction Co. v. Vela, 621 F.2d 1046, 1048 (10th Cir. 1980); Vigilantes, Inc. v. Administrator, 769 F. Supp. 57, 60-61 (D.P.R. 1991).* Questions of fact are governed by a "preponderance of the evidence" standard, whereas questions of law are subject to an "arbitrary and capricious" standard. *A to Z Maintenance Corp. v. Dole, 710 F. Supp. 853 (D.D.C. 1989).*

> n3 [HN2] The Secretary of Labor's regulations adopt the preponderance standard as well. Section 4.189 of 29 C.F.R. states:
>
> The Secretary is authorized pursuant to the provisions of section 4(a) of the Act to hold hearings and make decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of the Act. Pursuant to section 4(a) of the Act, the Secretary's findings of fact after notice and hearing are conclusive upon all agencies of the United States and, if supported by the preponderance of the evidence, conclusive in any court of the United States, without a trial novo. (Emphasis added).

[*11]

2. The SCA is a minimum wage statute which guarantees certain wages and fringe benefits for employees of government service contractors. The Act requires the Secretary to predetermine wages and fringe benefits by job category and geographic area ("wage determinations"). Contracts subject to the Act must incorporate the appropriate wage determinations. *Saavedra v. Donovan, 700 F.2d 496 (9th Cir. 1983),* cert. denied, *464 U.S. 982 (1983).*

3. A reading of section 5(a) and a review of the pertinent legislative history demonstrate that Congress mandated strict application of the debarment provision of the SCA. After it was originally enacted by Congress, Congress grew displeased with what appeared to be lax en-

forcement of the debarment provision and held extensive hearings to investigate the matter. Proposed Amendments to the Service Contract Act: Hearings on H.R. 6244 and 6245 Before the Spec. Sub Comm. on Labor of the House Comm. on Education and Labor, 92nd Cong., 1st Sess. (1971). On the basis of evidence presented at those hearings, the Special Subcommittee concluded that: "Although we intended this debarment provision [*12] to be virtually automatic, with discretion in the Secretary of Labor to grant relief in unusual cases, we discovered during the course of the hearings that debarment has become the exception rather than the rule." Special Comm. on Labor of the House Comm. on Education and Labor, "The Plight of the Service Worker Under Government Contracts", 92nd Cong., 1st Sess. 12 (Comm. Print 1971). Accordingly, the statute was amended.

4. [HN3] Section 5(a) of the SCA, as amended, now provides that "unless the Secretary recommends otherwise because of unusual circumstances," a service contractor who violates the Act shall be debarred for three years. *41 U.S.C. § 354*(a). Under the clear language of the Act, no relief from debarment is possible unless unusual circumstances are specifically found. As one Court has stated, section 5(a) is a particularly unforgiving revision of a demanding statute. *A to Z Maintenance Corp., 710 F. Supp. at 855*. A contractor seeking an "unusual circumstances" exception for debarment must, therefore, "run a narrow gauntlet." *Id. at 856.*

5. Although the SCA does not define "unusual [*13] circumstances," the regulations at *29 C.F.R. § 4.188(b)* establish by a three-part test the operative principles and procedures for determining when relief from debarment is appropriate. This test, which clarifies and codifies the criteria of Washington Moving and Storage, SCA-168 (Decision of the Secretary, March 12, 1974), has been approved by the Deputy Secretary, e.g., Habitech, Inc., 92-SCA-106 (Decision of the Secretary, September 18, 1987), and has recently been applied by the courts. *Vigilantes, Inc., 769 F. Supp. at 62; A to Z Maintenance Corp., 710 F. Supp. at 855-856;* Kirchdorfer v. McLaughlin, No. C-0771-L(B) (W.D. Ky, Mar. 1, 1989).

6. The burden of establishing unusual circumstances rests with the violator. 29 C.F.R. 4. 188(b)(1); *Vigilantes, Inc., 769 F. Supp. at 60;* Ventilation and Cleaning Engineers, Inc., SCA-176 (Decision of the Secretary, October 2, 1974).

7. [HN4] Under Part I of the test, the contractor must first show that no "aggravated circumstances exist, that the violations were not willful, deliberate, or of an aggravated nature, or the result of culpable [*14] conduct such as culpable neglect to ascertain whether practices where in violation of the Act, or culpable failure to comply with record keeping requirements; nor may the contractor have a similar violation or have repeatedly or seriously violated the Act. *29 C.F.R. § 4.188(b)(3)(i)*. Only if these criteria are satisfied does debarment analysis properly proceed to Part II of the test, which calls for certain pre-requisites to be met.

8. Under Part II the contractor must demonstrate a good compliance history, cooperation in the investigation, repayment of monies due, and sufficient assurances of future compliance. *29 C.F.R. § 4.188(b)(3)(ii)*.

9. Finally, if the conditions in Parts I and II are met, Part III provides for the consideration of additional factors to determine whether unusual circumstances can be found. These factors include: whether the contractor was previously investigated for SCA violations; whether record keeping violations impeded the investigation; whether liability depended upon resolution of a bona fide legal issue of doubtful certainty; the contractor's efforts to ensure compliance; the nature, extent, and seriousness of any past or present violations, including [*15] the impact of violations on unpaid employees; and whether sums due were promptly paid. *29 C.F.R. § 4.188(b)(3)(ii)*.

10. When the three-part test is applied to this matter, it is clear that Bither did not carry its burden of "establishing the existence of unusual circumstances to warrant relief from the debarment sanction." *29 C.F.R. § 4.188(b)(1)*. The record here, rather than demonstrating that this case is the exceptional one for which relief from debarment is appropriate, reflects just the opposite. Bither's conduct was willful, deliberate, and culpable.

11. Bither has completely failed under the record in this case to fulfill a contractor's obligation, in seeking to avoid debarment for admitted violations of the SCA, to establish that its actions were neither willful nor culpable. Bither's claims that the Department of Labor proffered no evidence that Bither's actions were willful is incongruous in light of clear testimony that Bither's SCA violations were knowing, and resulted from a payment practice of its own choosing. C.A.R. 274, 284, 290. Moreover, despite Bither's repeated claims that it over paid some employees, the $ 9.00 per hour paid by Bither, once fringe benefits [*16] are factored in, was lower than every rate in the applicable wage determinations. C.A.R. 411.

12. Part one of the test requires a contractor to prove that its actions in violating the SCA were not willful, deliberate or of an aggravated nature, or the result of culpable conduct. As the Secretary found, the Bither's testimony established that they knew they were underpaying employees. C.A.R. 274, 284 290. The record shows that Bither knowingly violated the Act's requirement to pay the wage determination amounts.

13. Bither's explanation that the violations were caused by exigency (the unexpected award of eight contracts) provides no excuse for the company's ignoring the SCA requirements. See *29 C.F.R. § 4.188(b)*. ("A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.").

14. Even though Kevin Bither's testimony showed the company was not clear about proper procedures in this regard (C.A.R. 373-380; 396), the record is clear that Bither at no time sought advice from the Department of Labor regarding implementation [*17] of wage determination increases prior to adjustment from the USPS, but instead chose to pursue conduct that Bither simply assumed was acceptable.

15. Bither's violation of the minimum wage requirements of the Act resulted from conscious management policies: first, to simplify its payroll preparation and, second, to spare itself financial hardship. Since Bither failed to meet the requirements of Part I of the three-part test, its willful and culpable conduct prohibits relief from debarment. Accordingly, there is no need to address Part II or Part III of the test.

16. The record in this case establishes that the Secretary's decision sustaining the plaintiffs' debarment had a rational basis and was supported by a preponderance of the evidence. Accordingly, defendants are entitled to summary judgment as a matter of law.

17. To the extend that any of the foregoing uncontroverted facts are deemed to be conclusions of law, they are incorporated with these conclusions of law.

DATED: Mar 16 1992

CONSUELO B. MARSHALL

UNITED STATES DISTRICT JUDGE