

Judge won't debar HCR contractor when USPS payment withholding is the cause

By David Hendel

The U.S. Department of Labor's proposed debarment of an HCR contractor was rejected by an administrative law judge because the contractor's failure to pay its drivers was caused by USPS payment withholdings. In a February 23, 2021 decision, the judge hearing the case refused to debar the contractor, finding the Postal Service's payment withholding constituted unusual circumstances. The judge also held that a travel time pay issue did not merit debarment. The case is *DOL v. Morris Transport, Inc. et. al*, ALJ No. 2019-SCA-7, February 23, 2021.

DOL investigated Morris Transport after receiving an anonymous complaint that one of the company's employees had not received pay for travel time. The unpaid travel time issue involved an employee who was instructed to drive his personal vehicle to a parking lot to retrieve the truck he would be using for his first run of the day. From the parking lot, he drove the empty truck to the origin postal facility, which was 15 minutes away. Similarly, after the last trip to the postal facility, the driver would drive the empty truck back to the same parking lot, another 15 minute trip. From there, he picked up his car and drove home, about a 5 minute drive. The contractor did not pay the driver for any of this travel time because it was not part of the contract schedule and thus the contractor did not believe it was required to do so.

While investigating the travel time issue, DOL also found that the contractor had not paid 14 drivers for the final 21 days of the contractor's performance. The contractor acknowledged it did not pay its drivers but said it couldn't because the Postal Service had withheld payment from the contractor.

Eventually, Morris Transport ceased operations completely and one of its co-owners died a year later. Nonetheless, DOL carried on with its proposed debarment. The judge hearing the case asked DOL if it really did wish to debar the defunct contractor and the deceased owner's widow, who was in her 80's. Heartlessly, DOL replied that it did, so the case proceeded to a hearing.

Background on the Service Contract Act

The Service Contract Act applies to every federal contract over \$2,500, including postal contracts. Under the SCA, contractors must pay employees who are performing a service under such contracts at least as much as the minimum prevailing wage rate and fringe benefits set by DOL. Contractors and their individual principal officers may be debarred for three years for an SCA violation. To defeat a proposed debarment, the contractor must either show that it did not violate the SCA or that there were "unusual circumstances."

The term "unusual circumstances" is not defined but DOL's regulations provide some guidance. First, the alleged violation must not be willful, deliberate, aggravated, or culpably negligent. Second, the contractor must show a good compliance history, cooperation with DOL's investigation, repayment of moneys owed, and assurances of future compliance. Third, the contractor must show mitigating factors, such as whether it is a first-time violator, kept proper records, and the seriousness of the violation.

Debarment is thus warranted when a person or firm has disregarded their obligations to their employees under the SCA. A "disregard for obligations" means a level of culpability beyond mere negligence, involving some element of intent. To support a debarment, the evidence must establish a

level of culpability beyond mere negligence or inadvertent behavior. If a contractor allows violations to persist, however, that can be evidence of intent to evade or show a lack of attention to SCA requirements which can support a debarment.

Travel Time issue

An employee's ordinary travel from home to work is a normal incidence of employment and is not compensable time. But an employee must be paid for the principal activities he is employed to perform. Here, the employee's travel time spent driving the company truck from its overnight parking lot to the postal facility to start work on the contract was integral to performing the contract. Without picking up the truck, the employee could not have picked up and delivered the mail. Moreover, the contractor chose to park the truck at the offsite parking lot, not the employee. The fact that the Postal Service contract did not include this time in the Schedule is irrelevant.

For purposes of the SCA, the contract work thus included the time it took to drive the truck from its offsite location to the contract's designated starting point. The 15 minute drive each way was also not so slight an expenditure of time as to be *de minimus*. So the judge determined that the employee's time spent driving the truck to and from the offsite parking lot was compensable SCA time.

The next issue was determining how much the contractor owed in back wages. DOL had only entered into evidence a contract that covered a shorter period of time than the period of back wages DOL had claimed. The judge limited the back wages to those that could have been worked under that contract, which was \$4,550, not the \$6,565 that DOL had sought.

Unpaid employees

The much larger amount at issue was wages and benefits due 14 drivers for the last 21 days of the contract. The contractor did not dispute that the employees were unpaid. The sole reason the contractor did not pay the employees was that the Postal Service had withheld payment from the contractor.

Here's how the payment withholding arose. In the middle of 2017, the contractor tried to enter into discussions with USPS on issues it was having under the contract, including wage increases, extra trips, late slips, and local employees telling his drivers that USPS would be switching contractors. The Postal Service refused to discuss or resolve these matters. On November 16, 2017, the contractor called the contracting officer and told her that USPS's refusal to discuss these issues made it financially impossible for it to continue as a viable business. On the next day, the contractor did not complete its work under contract.

The Postal Service then terminated for default the contractor's contracts. Worse, it withheld payment from the contractor for the services it performed in November. If USPS had paid the contractor, then it would have been able to pay its 14 employees the entirety of the wages due them.

Debarment decision

The judge first addressed DOL's proposed action against Nathaniel Morris, the now deceased co-owner. Individual liability for SCA violations attaches to corporate officials who are responsible for the violation, and an SCA enforcement action can survive a corporate official's death. But DOL failed to substitute *the estate of* Nathaniel Morris for the action against Nathaniel Morris. The judge thus

dismissed the action against him, holding that he is not liable for any amount of back wages or subject to any period of debarment.

The judge next turned to Betty Morris, who was Nathaniel Morris's widow and surviving co-owner. As co-owner and an officer of Morris Transport, she was a responsible party and could also potentially be held individually liable for any SCA violations.

Betty served as the company's bookkeeper and payroll manager. The judge found that she maintained the requisite SCA records and had reasonably determined the amounts owed the 14 unpaid drivers. The sole reason she had not paid these drivers was because USPS had withheld payment from the contractor. This was not a case where a company had funds available and intentionally refused to pay its employees. The proximate cause of the inability to pay was USPS's refusal to pay the contractor for the work it had performed, which the judge called a "dubious decision" by USPS.

[The case does not explain why the Postal Service withheld payment from the contractor. Your humble author speculates that USPS withheld funds as a reserve or setoff for reprocurement costs. The Postal Service's right – or lack of right – to withhold or setoff amounts owed a contractor will be the subject of a future *Legal Corner* article. Spoiler alert: USPS cannot properly withhold more than it is, in fact, owed.]

The judge noted that Betty did not falsify or destroy records, that she had fully cooperated with the investigation, and she was not culpably negligent. Additionally, the judge found the company had no history of prior SCA violations and the amount owed the 14 drivers was less than 0.03% of the total value of its contracts – a "minuscule" amount.

As to the failure to pay travel time to the one driver who picked up the truck at an offsite parking lot, the contractor did not believe it was required to pay the driver for such time. The judge noted that the arrangement might have actually benefited the driver. Since the lot was closer to his home than the contractor's facility, he saved wear and tear on his vehicle and spent less on gas because of the shorter commute to his starting point. While the contractor's ignorance of the law was no defense, these were still factors in deterring that "unusual circumstances" existed for the SCA violation.

Having determined that "unusual circumstances" existed, the judge found that debarment was not warranted. Betty and the contractor were still liable for the back wages owed to the drivers. But the judge ordered DOL not to seek enforcement of that judgment without the approval of the Bankruptcy Court, as Betty had been forced to seek bankruptcy relief.

Lessons learned

One hopes that DOL has learned its lesson that it should not seek to debar a widow in her 80's who was thrown into bankruptcy because another agency withheld payments owed to her company. It's hard to understand why DOL persisted with this case.

For contractors, it lays out the arguments and defenses for contesting – and prevailing in -- a proposed DOL debarment. You may not have all of these defenses, but you likely have some of them. Still, prevailing in these proceedings is difficult because the contractor must show "unusual circumstances," and there is no bright line test for that. Best to avoid being thrown into one of these proceedings.

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