

BLACKLISTING FEDERAL CONTRACTORS

Factors in Ineligible List Recommendations Under the Walsh-Healey Public Contracts Act

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Mars, the machine-made colossus, straddles the globe, and the total conflict is eminently exemplified by the conversion of our national industry to war production. A legal concomitant is the enormous and ever-increasing number of Government contracts and contractors subject to the Walsh-Healey Public Contracts Act.¹ In train with this amplified ambit of its substantive provisions has come (due to the substantial proportion of violations found²) expanding invocation of an enforcement procedure which includes disbarment from participation in future contracts—the “blacklist.”

A précis of the statute and its motives may serve us as both exordium and mnemonic jog. Generally speaking, the Act covers contracts awarded by agencies of the United States for the manufacture or furnishing of materials, supplies, articles or equipment in any amount exceeding \$10,000.³ It establishes standards for wages, hours, child labor and safe and sanitary working conditions, by decreeing that they shall be included as stipulations in such contracts.⁴ The Act is administered by the Secretary of Labor, who is empowered to hold hearings to determine whether any violation of the stipulations has occurred, and to make findings and decisions necessary to enforce the Act.⁵ In

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1. (1936) 49 Stat. 2036, 41 U. S. C. A. §§35-45, hereinafter called the Act. It is a safe estimate that the number of agreements subject to its provisions, received by the Office of Public Contracts at Washington, is now several thousands weekly; more were received in 1942 than in all of the other years of the Act together, according to the Division's Annual Report to Congress for the year 1942.

2. Of the contractors inspected, some 30% have been found in violation.

3. §1.

4. *Ibid.*

5. §§4, 5. The Rules of practice delegate the power of final decision to the Administrator of the Wage and Hour and Public Contracts Division, subject to appellate review by the Secretary, *Rules of Practice*, July 27, 1939, *Wage and Hour Manual* (1942 Ed.) p. 915. Hereafter the words are used interchangeably to mean the deciding official, except where referring to a single cited case.

addition to cancellation of the contract, violation renders the party responsible therefor liable for liquidated and other damages.⁶ The real penalty is the ineligible list, or so-called black-list, provided by Section Three, which is here quoted in full because of its importance in the subsequent discussion:

"Sec. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred."

The setting of such relatively recent legislation is too well known to need much teleology or history here. In 1935, the administration saw as one aspect of the demise of the National Industrial Recovery Act, threatened lowering of the general purchasing power which it was raising as a dike against the chill tide of economic depression. Passage of the Walsh-Healey Act followed the first rallying to the revetment for repairs. It was a bulwark in the broadest breach; an effort to end the paradox in which the Government dextrad urged employers to increase purchasing power in the form of wages, and sinistrad was forced by existing statutes to give vast orders for supplies and construction to the lowest bidder, who often was such because he paid the lowest wages.⁷

In this impasse, it was less than notable for Congress to prescribe minimum labor standards to be observed in the performance of public contracts, and to enjoin that the Government should no longer buy from those who failed to maintain them. Among these dealings with more looming exigencies, however, the steps leading to blacklisting are remarkable as a painstaking effort by a customer to exercise care and fairness towards suppliers in terminating the bestowal of its custom.⁸ It is to this

6. §2. The damages are ascertained in the hearing, but must be recovered by a separate suit, unless voluntarily paid.

7. H. R. Rep. No. 2946 (1936) 74th Cong., 2d Sess., 4.

8. We are here concerned with the substantive side of blacklisting. For fairly detailed descriptions of procedure to 1940, see the Monograph of the Attorney General's Committee on Administrative Procedure, "Division of

end that the Act directs that before concluding that the labor conditions of the contract have been broken, and withdrawing future awards, a hearing shall be given the contractor on that question; and only upon formal finding is he to be barred. Even this justice is to be tempered by the possibility of relief in the form of a recommendation by the Secretary to the Comptroller General, rendering the ineligibility inoperative in the particular case.⁹

Luminally, one result of the legislature's language should be stressed. The power confided to the Secretary in the matter of making or denying this recommendation against ineligibility is absolutely discretionary and not subject to review.¹⁰ Discretion is normally nebulous in nature, and it has been Departmentally declared that: "The Secretary's action, or refusal to act, of course should not be based on whim, but there is no obligation upon the Secretary to explain, or give any precise reasons for action or non-action, nor is there any such obligation upon the Examiner or upon me to account to the respondents for our mental processes in formulating our recommendations to the Secretary."¹¹ In spite of this, in making their written findings all of the officials mentioned have in every case appended their conclusions as to the blacklist issue, and usually stated the reasons therefor. These decisions have come to form a body of law,

Public Contracts, Department of Labor, The Walsh-Healey Act" Sen. Doc. N. 186 (1940) 76th Cong., 3d Sess.; Gellhorn and Linfield, Administrative Adjudication of Contract Disputes: The Walsh-Healey Act (1939) 37 Mich. L. Rev., 841. A more recent survey is contained in 4 C. C. H. Fed. Adm. Pro. ¶68,008-68,057. Since 1940, the establishment of a separate office of Chief Trial Examiner and decentralization of the handling of the Government's case to the regional level are conspicuous changes.

9. Matter of Park Dale Clothes, Inc., decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236, for example, conceives the problem in this way. Accord: Perkins v. Lukens Steel Co. (1940) 310 U. S. 113, 127.

10. Matter of Lane Cotton Mills Co., decision of Administrator (July 15, 1940) 3 Wage Hour Rep. 313. "The power of the Secretary of Labor to grant relief from the provisions of Section 3 of the Act is purely discretionary. What the Secretary of Labor will consider in arriving at a conclusion, and what the Examiner and I will consider in formulating recommendations likewise are discretionary." Matter of Adjustable Engineers Cap Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633. The courts are without jurisdiction. Lane Cotton Mills Co. v. Perkins (D. C. D. C. 1940) 3 Wage Hour Rep. 461, oral opinion of Bailey, J., decided upon the authority of Perkins v. Lukens Steel Co. (1940) 310 U. S. 113. A novel possibility of judicial quasi-review is suggested by way of dictum in Perkins v. Endicott Johnson Co. (C. C. A. 2, 1942) 128 F. (2d) 208, n. 20a, aff'd (1943) 63 S. Ct. 339, 87 L. Ed. (Adv.) 329.

11. Matter of Adjustable Engineers Cap Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633.

not only in the realistic but in the technical, juridical sense, a *corpus* of logically related principles and precedents upon which administrative adjudication is more or less uniformly based. These emergent rules governing the granting or gainsaying of grace we shall presently try to formulate.

II

By way of plotting the periphery of the legally possible, for future reference, a few preliminary conclusions may be indulged in. The blacklist problem begins in a situation where the contractor has been found guilty of breaching the labor stipulations inserted into his contract by the Act.¹² Guilt, in this connection, is coextensive with legal liability for the damages described in Section Two, and is determined according to the ordinary principles of contract law.¹³ Then, in the absence of Secretarial action, the penalty of Section Three is automatic,¹⁴ the most minor violation is legally sufficient to call it into play, and the burden is on the respondent to justify and persuade the relieving recommendation.¹⁵ Finally, the blacklist is the only real penalty provided by the statute—the solitary tool which the Act brings to the task of punishing offenders and deterring others from the like lawless conduct. To compel the respondent to pay as damages the sums withheld from his employees is to do no more than make him fulfil his promise previously made, and is thus no punishment at all.¹⁶ Therefore, the blacklist should be imposed, unless unusual facts exist warranting relief.

Our concept thus bottomed on discretion short of whim, and ceiled as above, it is time to extract from the tessellate struc-

12. As a matter of law, until this point is reached, there obviously can be no question of the application of §3. *Matter of S. D. Hoffman*, decision of Administrator (Mar. 1, 1941) 4 Wage Hour Rep. 117, 2 C. C. H. Labor Law Serv. ¶38,022.

13. *Matter of Adjustable Engineers Cap Co.*, decision of Secretary (Oct. 12, 1942) 6 Wage Hour Rep. 35. Also, see cases cited on *Equitable Responsibility, infra*.

14. "The Secretary of Labor does not invoke Section 3. It is self-executing unless the Secretary intervenes to stop it." *Matter of Adjustable Engineers Cap Co.*, decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633. See also, *Rulings and Interpretations* No. 2, Sept. 29, 1939, Sec. XI (6).

15. *Matter of Olga Knitting Mills, Inc.*, decision of Secretary (January 12, 1943) 6 Wage Hour Rep. 80, 2 C. C. H. Labor Law Serv. ¶38, 168.

16. *Matter of Maykitt Garment Co., Inc.*, decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091; *Matter of Mid City Uniform Cap Co.*, decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123.

ture of the decisions a typical tessera or two, in pursuit of patterns. The cases detailed were selected because they show among them so many of the factors influencing the Departmental attitude, and should be considered "leading" cases only in the sense that they conduct us toward further conclusions.

*Matter of Sigmund Eisner Co.*¹⁷ was the first formal complaint proceeding disposed of by the Secretary. At the hearing before the Trial Examiner it had been found that the company had violated the Act and the stipulations of its contract by (1) failing to pay the minimum wages, (2) failing to pay the required overtime compensation, and (3) falsifying its records required to be kept by the Regulations issued under the Act, so that they concealed the other violations and purported to show compliance; supervisors had required employees so to record their time that their piecework wage would yield the legal rate. The later record indicates that an employee was discharged for giving testimony as to the true state of affairs. The Examiner's report recommended application of the blacklist:

"Congress has made it plain in Section 3 that violators are to suffer the penalty prescribed unless the Secretary sees reason in equity to intervene in their behalf and recommend that, as to them the penalty be not invoked. The respondent, or its agents, by causing the time cards to be falsified, have perpetrated a fraud on the United States, on competitors, and on the employees, violating the very interests which it was the intent of Congress to protect."

The recommendation was adopted by the Administrator, who rejected an attempt to place responsibility for the violations on the plant supervisors:

"Surely, falsification of records is one of the most serious violations possible, and Congress intended the Government to be protected from having to do business with a company which indulged in a fraud on the Government, whether or not the owners or policy-making officials of that company personally participated in the fraud. I do not believe that the operation of Section 3 should be interfered with where there has been deception on the Government"

"To interfere with the application of Section 3 in this case, would result in no punishment for the respondent for its serious violations, since the restitution of wages to the

17. Report of Examiner (1939) decision of Administrator (July 12, 1939) 2 C. C. H. Labor Law Serv. ¶35,207.08; decision of Secretary (Sept. 30, 1939) 2 Wage Hour Rep. 442.

employees is merely compliance with the contractual obligations which the respondent voluntarily assumed. . . ."

Meanwhile, after the report of the Trial Examiner a delegation of respondent's employees had appeared before the Secretary, petitioning that the blacklist be not invoked. It was alleged that 98% of the company's production was on Government order and ineligibility would force it to cease operation. Upon appeal, the Secretary, after reviewing the record, concluded to grant conditional relief from Section Three. The company was ordered to pay some \$31,958 in damages, to reinstate the discharged employee to her former position without prejudice to her seniority and other rights and privileges, dismissing if necessary persons of less seniority hired after the beginning of the proceedings, and to conform to the required stipulations in performance of all contracts subject to the Act. Upon compliance with the order, relief from the blacklist was granted.

In the *Matter of Lackawanna Pants Manufacturing Company*,¹⁸ the respondents were found guilty of failure to pay the required minimum and overtime wages in amounts totaling about \$3,000. The records of hours worked by employees had been falsified by reduction and by requiring the employees not to punch the time clock on certain days. Three members of the partnership had previously violated the overtime provisions of the Act on another contract. The Trial Examiner's report recommended that the respondent be blacklisted, and this recommendation was adopted by the Administrator. Concerning respondents' plea that respondent Koppleman was the managing partner in sole charge of operations, and that the penalty should therefore be confined to him, the Administrator said:

"Although it is quite clear that the financial interest of the partners is sufficient in law to establish their individual responsibility for the acts and omissions of the firm, which point respondents have not opposed in their objections, it may well be that the exercise of the decision committed to the Secretary under Section 3 of the Act, involves equitable considerations which would permit a distinction between several members of a firm.

"In this connection, however, files of this Division disclose

18. Report of Examiner (1940) 2 Wage Hour Rep. 451; decision of Administrator (Nov. 8, 1940) 3 Wage Hour Rep. 531, 2 C. C. H. Labor Law Serv. ¶38,007, supplemental decision of Administrator (Dec. 21, 1940) 4 Wage Hour Rep. 22, 22.

that the partners interested only financially in the Lackawanna Manufacturing Company, Samuel Dickstein, Harry Dickstein, and Joseph M. Harris, have participated in Government contracts under the firm name of Anthracite Overall Manufacturing Company, and paid to the Secretary of Labor liquidated damages because of violations of the Act by that Company not long before the performance of this contract was commenced. Consequently, in view of their established knowledge of the Government contract requirements and of their substantial interest in the Lackawanna firm, their failure to insist upon compliance with the contract requirements by the managing partner, whether or not he consulted them, precludes the possibility of distinction between them and the managing partner in the application of Section 3."

After this decision, respondents were granted a second hearing before the Administrator on the blacklist question, and tendered a check for the back wages owing. Following the hearing the Administrator rendered a supplemental decision withdrawing his former recommendation and recommending that the respondents be relieved of the penalty of Section Three. The new decision explained this action:

"The hearing was officially reported and the transcript has been made a part of the record in this proceeding. Also forming a part of the record is a petition signed by some 381 employees requesting that the Secretary intervene to prevent the operation of Section 3, submitted by respondents several days after the hearing."

"All the facts and circumstances bearing upon the propriety of my last recommendation have been carefully weighed and considered in the light of the record as thus supplemented, and I have come to the conclusion that steps have been taken by the company to indicate its good faith in the matter and to guarantee strict compliance in the future. Nonetheless, the violations which have already occurred were serious, and if there is not strict compliance on future contracts, I should have no hesitation in recommending the imposition of the full punishment under Section 3 in the event of any future violation."

The last sentence proved prophetic. In a second complaint proceeding¹⁹ involving later contracts, the firm was found guilty of overtime, child labor, and safety and sanitation violations, and

19. Decision of Administrator (Apr. 29, 1942) 5 Wage Hour Rep. 354, decision of Secretary (July 20, 1942) 5 Wage Hour Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125.

of falsifying its records. Since the original proceedings it had been convicted of criminal violations of the Fair Labor Standards Act²⁰ and had been enjoined from further violations thereof in a civil suit. Application of the blacklist was now practically predestinate, despite respondents' repetition of their pleas that they attempted to prevent violations, and the hardships to their employees. Regarding the Wage and Hour Law violations, the Administrator observed:

"I have referred to the proceedings under the Fair Labor Standards Act because they do have a bearing upon the question whether this Department should take affirmative action to permit the respondents to continue to participate in Government contract business. The fact that they have been in difficulty under another Federal statute providing for minimum wages and maximum hours should be considered when the Department is requested to take such affirmative action."

The Secretary affirmed the decision on appeal:

"The record of this company, which shows repeated violations of the Public Contracts Act and the Fair Labor Standards Act indicates that this is an appropriate instance for the application of the ineligible list penalty."

The *Matter of Maykitt Garment Company, Inc.*,²¹ involved minimum wage, overtime and child labor violations. In addition, the respondents had required employees to "kick back" or return to the company certain of the overtime wages paid. False records had been prepared. Relief from the blacklist was denied by the Administrator. Regarding respondent's conduct, the opinion observed:

"I cannot fail to take into consideration the fact that after an investigator of this office inspected the company . . . and pointed out to them the requirements of the Act, the respondents in apparent effort to comply with the requirements of the Act set up a time-recording and book-keeping system designed on its face to show compliance with the requirements of the Act and their contracts. They have admitted that they have so manipulated these records as to conceal underpayments probably as serious as those which were occurring prior to the investigator's visit.

20. (1938) 52 Stat. 1060, 29 U. S. C. A. §§201-219.

21. Decision of Administrator (Nov. 19, 1941) 4 Wage Hour Rep. 676, 676, 2 C. C. H. Labor Law Serv. ¶38,069; decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130,130, 2 C. C. H. Labor Law Serv. ¶38,091.

"The respondents had an opportunity to show that they had reformed and they refused to seize hold of it. Instead, they acted so as to evidence the continued and unchanged intention to take advantage of their employees."

An effort by respondents to whiten themselves proved a boomerang:

"Respondents have impressed upon me that in their operations they have not at any time been gangster dominated. . . . Without in any way meaning to state that I would consider such domination in mitigation of the offenses of individuals or companies so dominated, I think that I must point out that the respondents have in effect stated that without any pressure from outside forces they have themselves elected to indulge in the practices recited. This in itself makes the offense possibly of a worse variety than where the weak individual or company yields to underworld influences."

The plea that the blacklist would work a hardship on respondents' employees was answered by pointing out that the plant had only recently expanded, that the worker peak was past, and that other employment was open to them:

"The expansion is some indication of the availability of work in the garment trade in New York, and I have information to this effect from other sources. . . .

"The employees with whom we are dealing are not employees who have had a long tenure of service with this company; and much as I regret taking any steps which would cause them to lose their present jobs, I believe that their interests are not best served by continuing their employments on Government contracts under conditions such as those under which they have heretofore worked."

In adopting the ineligibility list recommendation on appeal, the Secretary emphasized the wilful nature of the violations:

"In these actions of appellants there are involved knowledge that legal requirements obtained concerning overtime pay and wilful intention to evade by means of falsification and kick back. Under these circumstances, a clear case is made out for application of Section 3 of the Act."

To urging that the ratio of the amount of wages due employees to total payroll was small, the Secretary replied that:

". . . . the Administrator has not made a final determination of this amount and the figure specified in his decision is a minimum estimate. Indeed, the actions of appellants in falsifying records and requiring kick-backs,

with the consequent necessity of relying on the memories of bookkeepers and employees, prevent an accurate estimate of the amount owing . . . Nor can the methods employed in covering up violations of the Act be overlooked because of the amounts involved."

A contention was rejected that the respondents had been already sufficiently punished:

"It is apparent that enforcement of the Act and accomplishment of its policies cannot be secured if violators are required simply to return any sums which they have withheld from their employees at such time as their violation is discovered. Congress has determined that additional sanctions are desirable for the effectuation of the purposes of the Act. Each case must be considered on its own facts to determine whether there are grounds for recommending non-application of this enforcement provision. It is my judgment that the public interest will not be advanced by recommending mitigation in this case."

The *Matter of Park Dale Clothes, Inc.*,²² was to similar effect. Considering extensive violations of the overtime provisions, falsification of records and previous conviction of the company for violations of the Fair Labor Standards Act involving the same conduct, the Secretary overruled the pleas (although supported by intervention of the labor union of the employees), that the respondents had been sufficiently punished; that a hardship would be worked on employees; that the company had large sums invested in machinery and equipment which was useful only on Government work; that creditors would lose large amounts owed by respondents; and that an effective producing unit would be removed from the war effort.

"The foregoing arguments presented by the respondents are not unusual in this type of case and do not alter the fact that wilful and flagrant breaches of the contracts were committed. In providing the ineligibility list Congress undoubtedly realized the serious implications of such a penalty from creditors, employees, and other third parties.

"The hardships which may result to respondents as well as their workers have received my sympathetic consideration. Each case, however, must be considered on its own merits in order to determine whether there are justifiable grounds for relieving respondents from the application of

22. Decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236; decision of Secretary (Mar. 29, 1942) 5 Wage Hour Rep. 441, 442.

this provision. Due weight must also be given to the fact that Congress considered the blacklist sanction necessary to assure effective enforcement of the Act. Upon the basis of the entire record, it is my opinion that the public interest will not be advanced by recommending relief in this case."

III.

Under the eye of induction, two inclusive rubrics appear at once in our cases. As the Secretary or Administrator moves to a consideration of the blacklist issue, the situation is in many aspects similar to the admission to or refusal of probation by a trial judge, although the allusion is qualified by the self-executing nature of Section Three.²³ The history-minded are struck by another related analogy; to the beginnings of our present body of court equity, to the chancellor weighing relief from the strict rule of the common law, as the Secretary weighs relief from the letter of the statute. The comparison is demonstrably apt, for the Departmental decisions are expressly based on equity in the sense of good conscience, and upon equitable considerations.²⁴ Relief from the penalty of Section Three will be granted where equity commends it.

Another generalization, and one more fundamental because it is the proverbial Polaris by which all blacklist recommendations are charted, is the concept of public interest. The Act was intended to protect employees on Government work from sub-standard labor conditions;²⁵ to protect competing contractors ("who have a direct interest in the enforcement of the statute since their bids reflecting the estimates of cost are based upon

23. Matter of Adjustable Engineers Cap. Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633.

24. Matter of Sigmund Eisner Co., report of Examiner (1939); Matter of S. D. Hoffman, supplemental decision of Administrator (Feb. 20, 1942) 5 Wage Hour Rep. 162; Matter of Lackawanna Pants Mfg. Co., decision of Administrator (Nov. 8, 1940) 3 Wage Hour Rep. 531, 2 C. C. H. Labor Law Serv. ¶38,007. Aside from the difference noted already, the similarity to probation is reinforced; the latter has been called an "equitable" graft upon the criminal law. Grinnell, *The Common Law History of Probation: An Illustration of the "Equitable" Growth of the Criminal Law* (1941) 32 Jour. Crim. Law 15.

25. Matter of Ulmer and Wagner Mfg. Co., decision of Administrator (July 27, 1940) 3 Wage Hour Rep. 346; Matter of Maykitt Garment Co., Inc., decision of Administrator (Nov. 19, 1941) 4 Wage Hour Rep. 676, 2 C. C. H. Labor Law Serv. ¶38,069; Matter of Park Dale Clothes, Inc., decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236; Matter of Mid City Uniform Cap Co., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123.

the statutory wages") ;²⁶ to protect the Government²⁷ and others; in short, for the public benefit.²⁸ In every case, the recommendation of the Secretary or the Administrator is an effort to arrive at the decision which will best effectuate these purposes of the Act, and further the public interest.²⁹ Hornbook-wise, we may formulate it as a basic, bold-face doctrine that mitigation of the blacklist penalty will be granted where the public interest will be advanced thereby.

In the spelling-out of this cardinal principle, as we have noted, the whole record is reviewed vis-a-vis the problem of mitigation, the examination resolving itself (sometimes formally so in the opinions) into three branches: (1) respondent's conduct, (2) respondent's business and labor record, and (3) other mitigating or aggravating circumstances.

RESPONDENT'S CONDUCT

The examination of respondent's activities is an inquiry into the nature of the violations, the way in which they were committed, his degree of participation therein, his cooperation with the Division's investigator in the inspection, and any other conduct of his in the particular case evidencing his attitude toward future compliance if relief should be granted. Among all the possible violations and types of conduct, there have emerged some which have so universally been held to preclude relief and call for ineligibility as to be badges of blacklisting, like the old badges of fraud or the acts of bankruptcy. Accordingly, they are reliable clues to decision.

Chief among these stigmas is falsification of records. The Regulations issued under the Act by the Secretary require the

26. Matter of Cohen-Fein Co., decision of Administrator (June 14, 1940) 3 Wage Hour Rep. 264; Matter of Park Dale Clothes, Inc., decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236.

27. Matter of Sigmund Eisner Co., decision of Administrator (July 12, 1939) 2 C. C. H. Labor Law Serv. ¶35,207.08; Matter of Mid City Uniform Cap Co., supplementary decision of Administrator (Feb. 13, 1942) 5 Wage Hour Rep. 176.

28. "The compliance with the Public Contracts Act and the contract stipulation is not a matter wholly of private concern but is clearly affected with the public interest." Matter of Cohen-Fein Co., decision of Administrator (June 14, 1940) 3 Wage Hour Rep. 264.

29. Matter of Maykitt Garment Co., Inc., decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091; Matter of Park Dale Clothes, Inc., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441.

contractor to keep wage and hour and other records for all employees covered by the contract stipulations.³⁰ We have seen that sometimes, in an effort to conceal violations of the wage and hour standards, an employer constructs false records which simulate compliance. This is rightly and roundly condemned in the opinions as one of the most serious violations possible, a fraud upon the Government,³¹ a fraudulent practice³² designed to deceive and mislead,³³ dishonest,³⁴ wilful, deliberate and flagrant,³⁵ and an aggravated offense³⁶ which cannot be condoned,³⁷ and treated accordingly.

Apart from the righteous indignation which even-handed justice may permit itself upon such provocation, there are pragmatic reasons for this attitude. The offense is always wilful, for it involves a moral wrong rather than the ignorant commission of some *malum prohibitum*, and as was said in the *Maykitt* case, an admission of actual knowledge of the law is immanent in the act. Obviously, falsification of the type we are here considering is accompanied by other violations, since its very *raison d'etre* is to hide them; and experience indicates that where such dishonesty is undertaken, concealed cheating on the contract specifications for the commodity being produced is a frequent con-

30. Regulations Prescribed by the Secretary of Labor, No. 504, Part II, Art. 501.

31. Matter of Mid City Uniform Cap Co., supplemental decision of Administrator (Feb. 18, 1942) 5 Wage Hour Rep. 176; Matter of Sigmund Eisner Co., decision of Administrator (July 12, 1939) 2 C. C. H. Labor Law Serv. ¶35,207.08.

32. Matter of Adjustable Engineers Cap Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633; Matter of Park Dale Clothes, Inc., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441; Matter of Mid City Uniform Cap Co., supplemental decision of Administrator (Feb. 18, 1942) 5 Wage Hour Rep. 176.

33. Matter of Schaeffer Body, Inc., decision of Administrator (July 5, 1939).

34. Matter of Mid City Uniform Cap Co., decision of Administrator (Dec. 18, 1941) 5 Wage Hour Rep. 176, supplemental decision of Administrator, *ibid.*; Matter of Adjustable Engineers Cap Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633.

35. Matter of Promenade Clothes, Inc., decision of Administrator (July 14, 1942) 5 Wage Hour Rep. 573, 2 C. C. H. Labor Law Serv. ¶38,127; Matter of Maykitt Garment Co., Inc., decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Service ¶38,091; Matter of Park Dale Clothes, Inc., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441.

36. Matter of Schaeffer Body, Inc., decision of Administrator (July 5, 1939).

37. Matter of Mid City Uniform Cap Co., supplemental decision of Administrator (Feb. 13, 1942) 5 Wage Hour Rep. 176.

junct.³⁸ Lastly, from the standpoint of practical policing, a very cogent basis exists for the use of the strongest measures to extirpate falsification. It hampers enforcement by rendering all other violations more difficult of detection, and the damages more difficult to ascertain.³⁹

As would be expected, this sort of falsification of records is beyond peradventure the most weighty single factor in the refusal of relief from the blacklist. A large proportion of the cases which go to hearing are brought because of its involvement, and in the vast majority of those where it is established, the Secretary has refused to interfere with the operation of Section Three.⁴⁰

38. "As a matter of experience and practice, contractors who have been found derelict in meeting the record-keeping requirements to any extent, by way of omission or intentional falsification, have also been found in violation of the wage and hour requirements of the Act. In other words, the non-observance of the record-keeping requirements has been shown to have been motivated out of the contractor's desire not to reveal or furnish documentary evidence of his non-observance of the wage and hour requirements. In such cases the contractor's record-keeping dereliction argues most strongly against intervention by the Secretary of Labor to prevent the full operation of Section 3 of the Act." Opinion Letter by Administrator (Sept. 25, 1941) 2 C. C. H. Labor Law Serv. ¶38,084. "It frequently happens that contractors who are cheating their employees are also cheating the Government on the technical specifications of the commodity called for by the contract." Matter of Mid City Uniform Cap Co., supplemental decision of Administrator (Feb. 13, 1942) 5 Wage Hour Rep. 176, 177.

39. Note 38, *supra*; Matter of Sigmund Eisner Co., decision of Administrator (July 12, 1939) 2 C. C. H. Labor Law Serv. ¶35,207.08; Matter of S. D. Hoffman, decision of Secretary (June 19, 1942) 5 Wage Hour Rep. 489, 2 C. C. H. Labor Law Serv. ¶38,122; Matter of Maykitt Garment Co., Inc., decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091.

40. Matter of B. and O. Mfg. Co., report of Examiner (1940) 3 Wage Hour Rep. 43, decision of Administrator (Jan. 19, 1940) [subsequently reinstated]; Matter of Riverside Underwear Corp., decision of Administrator (Apr. 24, 1940) 3 Wage Hour Rep. 182; Matter of Model Blouse Co., decision of Secretary (May 14, 1940) 3 Wage Hour Rep. 242; Matter of Ulmer and Wagner Mfg. Co., decision of Administrator (July 27, 1940) 3 Wage Hour Rep. 346; Matter of Zwarico and Semenko, Inc., report of Examiner (1941) 4 Wage Hour Rep. 2, 2 C. C. H. Labor Law Serv. ¶38,025; Matter of Maykitt Garment Co., Inc., decision of Administrator (Nov. 19, 1941) 4 Wage Hour Rep. 676, 2 C. C. H. Labor Law Serv. ¶38,069; decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091; Matter of Herbert J. Freezer Co., decision of Secretary (June 13, 1940) 4 Wage Hour Rep. 157n. (subsequently reinstated); Matter of Dependable Clothing Co., decision of Administrator (Dec. 12, 1941) 5 Wage Hour Rep. 6, 2 C. C. H. Labor Law Serv. ¶38,080, supplemental decision of Administrator (Feb. 12, 1942) 5 Wage Hour Rep. 149, 2 C. C. H. Labor Law Serv. ¶38,090, decision of Secretary (Mar. 19, 1942) 5 Wage Hour Rep. 253, 2 C. C. H. Labor Law Serv. ¶38,101; Matter of Mid City Uniform Cap Co., report of Examiner (1941) 4 Wage Hour Rep. 347, decision of Administrator (Dec. 13, 1941)

The failure to make and preserve all or a part of the required wage and hour records stands upon a somewhat different plane from falsification; wilfulness is not inherent in the omission, which may result from lack of knowledge of the requirements, or some other relatively viceless reason. In such cases, other things being equal, the discretion to relieve will be exercised.⁴¹ Where, however, the failure is wilful, as where the purpose is

5 Wage Hour Rep. 176, supplemental decision of Administrator (Feb. 13, 1942) 5 Wage Hour Rep. 176, decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123; Matter of Park Dale Clothes, Inc., decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236, decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441; Matter of Lackawanna Pants Mfg. Co., decision of Administrator (Apr. 29, 1942) 5 Wage Hour Rep. 354, decision of Secretary (July 20, 1942) 5 Wage Hour of Examiner (1942) 5 Wage Hour Rep. 231, decision of Administrator Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125; Matter of S. D. Hoffman, report of Examiner (1940) 3 Wage Hour Rep. 342, decision of Administrator (Feb. 20, 1941) 4 Wage Hour Rep. 117, 2 C. C. H. Labor Law Serv. ¶38,022, supplemental decision of Administrator (Feb. 20, 1942) 5 Wage Hour Rep. 162, decision of Secretary (June 19, 1942) 5 Wage Hour Rep. 489, 2 C. C. H. Labor Law Serv. ¶38,122; Matter of Promenade Clothes, Inc., decision of Administrator (July 17, 1942) 5 Wage Hour Rep. 573, 2 C. C. H. Labor Law Serv. ¶38,127, decision of Secretary (Sept. 14, 1942) 5 Wage Hour Rep. 755; Matter of Adjustable Engineers Cap Co., report of Examiner (1942) 5 Wage Hour Rep. 231, decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633, decision of Secretary (Oct. 12, 1942) 6 Wage Hour Rep. 35; Matter of Art Fashion Clothes, Inc., report (Nov. 2, 1942) 5 Wage Hour Rep. 873, decision of Secretary (Dec. 30, 1942) 6 Wage Hour Rep. 36; Matter of Coronet Clothes, report of Examiner (1942) 5 Wage Hour Rep. 927; Matter of Olga Knitting Mills, Inc., decision of Administrator (Aug. 15, 1942) 5 Wage Hour Rep. 687, decision of Secretary (Jan. 13, 1943) 6 Wage Hour Rep. 80, 2 C. C. H. Labor Law Serv. ¶38,168; Matter of D. R. Clothing Co., report of Examiner (1943) 6 Wage Hour Rep. 170; Matter of Ideal Uniform Cap Mfrs., report of Examiner (1943) 6 Wage Hour Rep. 202; Matter of Lubell Bros., Inc., report of Examiner (1943) 6 Wage Hour Rep. 373. Contra: Matter of Sigmund Eisner Co., decision of Secretary (Sept. 30, 1939) 2 Wage Hour Rep. 442; Matter of Lackawanna Pants Mfg. Co., supplemental decision of Administrator (Dec. 21, 1940) 4 Wage Hour Rep. 22; Matter of Ross Galvanizing Works, Inc., report of Examiner (1940) 3 Wage Hour Rep. 517, decision of Administrator (Aug. 5, 1941) 4 Wage Hour Rep. 479, 2 C. C. H. Labor Law Serv. ¶38,033; Matter of Spriesch Tool and Mfg. Co., report of Examiner (1941) 4 Wage Hour Rep. 555 (manipulated rates); Matter of Montpelier Glove Co., Inc., decision of Administrator (Apr. 14, 1942) 5 Wage Hour Rep. 333, decision of Secretary (Feb. 4, 1943) 6 Wage Hour Rep. 150.

41. Matter of Woodbine Borough Clothing Co., Inc., report of Examiner (1940) 3 Wage Hour Rep. 103; Matter of Daniel Duskin, Inc., decision of Administrator (Mar. 20, 1941) 4 Wage Hour Rep. 189, 2 C. C. H. Labor Law Serv. ¶38,026; Matter of Davis Box Toe Co., Inc., decision of Administrator (Dec. 20, 1940) 4 Wage Hour Rep. 13; Matter of Presto Gas Mfg. Co., decision of Administrator (Aug. 11, 1941) 4 Wage Hour Rep. 479; Matter of Bernard Greenberg Co., Inc., decision of Administrator (Apr. 13, 1942) 5 Wage Hour Rep. 317, 2 C. C. H. Labor Law Serv. ¶38,105; Matter of Conro Mfg. Co., Inc., decision of Administrator (May 25, 1942) 5 Wage Hour Rep. 452, 2 C. C. H. Labor Law Serv. ¶38,127, decision of Secretary (Dec. 8, 1942) 6 Wage Hour Rep. 36.

to conceal the employment of a homeworker in violation of the Act, it is treated as a false record.⁴²

Closely akin to falsification is the so-called kickback, in which the employer pays his employees the statutory wages, and then requires return of a portion. Indeed, this makes the record of the original payment false, and carries this a step farther, its purpose usually being to enable respondent to say deviously that his workers were "paid" in accordance with the Act, and to furnish canceled checks to bolster this half-truth. The considerations already mentioned apply equally here, and the results are similar.⁴³

Our survey of the force of fraud in influencing the recommendation has revealed that in large part it is the character of respondent's conduct that is important; he exhibits himself in such cases as a dishonest business man with whom it is undesirable for the Government to deal. Like reasoning applies where the offenses absent deceit, yet are vicious in some other way. Uniformly, it is the exposure of the contractor as not merely a law-breaker in the technical sense, but as one beyond the benefit of another chance; who cannot be trusted to abide the elementary ethics of competition and minimum labor standards embodied in the Act, that impels the conclusion that the public interest requires application of the blacklist. So, when respondent's violations are of serious, wilful character, or flagrant, as where they are continued after an inspection or a prior complaint proceeding has informed him of the legal requirements,⁴⁴ or are persistent,⁴⁵ the penalty will be allowed to operate. Contrariwise, where the violations are minor, relief is very likely to be obtained.⁴⁶

42. Matter of Ideal Uniform Cap Mfrs., report of Examiner (1943) 6 Wage Hour Rep. 202.

43. Matter of E. and O. Mfg. Co., report of Examiner (1940) 3 Wage Hour Rep. 43; Matter of Maykitt Garment Co., Inc., decision of Administrator (Nov. 19, 1941) 4 Wage Hour Rep. 676, 2 C. C. H. Labor Law Serv. ¶38,069, decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091.

44. Matter of Anthracite Overall Mfg. Co., decision of Administrator (May 22, 1942) 5 Wage Hour Rep. 439, 2 C. C. H. Labor Law Serv. ¶38,125; Matter of Mid City Uniform Cap Co., report of Examiner (1941) 4 Wage Hour Rep. 347, decision of Administrator (Dec. 13, 1941) 5 Wage Hour Rep. 176, supplemental decision of Administrator (Feb. 13, 1942) *ibid.*, decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123.

45. Matter of D. R. Clothing Co., report of Examiner (1943) 6 Wage Hour Rep. 170.

46. Matter of Consolidated Stone and Sand Co., decision of Secretary (May 31, 1941) 4 Wage Hour Rep. 314, 2 C. C. H. Labor Law Serv. ¶38,031; Matter of Woodbine Borough Clothing Co., report of Examiner

EQUITABLE RESPONSIBILITY

Where violations serious enough to call for the blacklist penalty are confessed, or are so definitely established that they can no longer be denied or explained away, respondent usually grapples with the issue from the standpoint of his responsibility therefor. Here he seeks aids in equitable concepts, and argues that although under strict contract rules he may be legally liable for the damages flowing from the violations, they were perpetrated by others (sometimes his co-respondents) without his participation, knowledge or consent, and for these or other reasons, in equity he should not be held responsible for the breaches to the extent of placement on the ineligible list.

Although on occasion the Secretary cites literal contract principles as determinative,⁴⁷ the doctrine of equitable responsibility has been recognized in the decisions, and is now well-established and considerably defined. Thus, a contractor is legally liable for violations committed by a substitute manufacturer; but where

(1940) 3 Wage Hour Rep. 103; Matter of Daniel Duskin, Inc., decision of Administrator (Mar. 20, 1941) 4 Wage Hour Rep. 189, 2 C. C. H. Labor Law Serv. ¶38,026; Matter of Morris Kopp, report of Examiner (1940) 3 Wage Hour Rep. 485, decision of Administrator (Apr. 14, 1941) 2 C. C. H. Labor Law Serv. ¶38,027; Matter of Brown Knitting Co., report of Examiner (1940) 3 Wage Hour Rep. 500, decision of Administrator (Apr. 25, 1941) 4 Wage Hour Rep. 288, 2 C. C. H. Labor Law Serv. ¶38,028; Matter of Davis Box Toe Co., Inc., decision of Administrator (Dec. 20, 1940) 4 Wage Hour Rep. 13; Matter of Cohen-Fein Co., decision of Administrator (June 14, 1940) 3 Wage Hour Rep. 264; Matter of P. H. McConnell, Inc., decision of Administrator (Aug. 25, 1941) 4 Wage Hour Rep. 534, 2 C. C. H. Labor Law Serv. ¶38,034; Matter of Presto Gas Mfg. Co., decision of Administrator (Aug. 11, 1941) 4 Wage Hour Rep. 479; Matter of Bernard Greenberg Co., Inc., decision of Administrator (Apr. 18, 1942) 5 Wage Hour Rep. 317, 2 C. C. H. Labor Law Serv. ¶38,105; Matter of Eastern Uniform Corp., decision of Administrator (Apr. 13, 1942) 5 Wage Hour Rep. 294, 2 C. C. H. Labor Law Serv. ¶38,104; Matter of Conro Mfg. Co., Inc., decision of Administrator (May 25, 1942) 5 Wage Hour Rep. 452, 2 C. C. H. Labor Law Serv. ¶38,126, decision of Secretary (Dec. 8, 1942) 6 Wage Hour Rep. 35; Matter of Mercer Clothing Co., report of Examiner (1942) 5 Wage Hour Rep. 872; Matter of Pestco Mfg. Co., report of Examiner (1942) 5 Wage Hour Rep. 872; Matter of Nasco Awnings, Inc., report of Examiner (1942) 5 Wage Hour Rep. 999, decision of Administrator (Mar. 27, 1943) 6 Wage Hour Rep. 360. See, also, Matter of Verne McCullough, Inc., decision of Administrator (June 25, 1941). Size of restitution is no test. Matter of Maykitt Garment Co., Inc., decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091; Matter of Art Fashion Clothes, Inc., decision of Administrator (Nov. 2, 1942) 5 Wage Hour Rep. 873.

47. Matter of Sigmund Eisner Co., decision of Administrator (July 12, 1939) 2 C. C. H. Labor Law Serv. ¶35,207.08; Matter of Adjustable Engineers Cap Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633.

they are without the knowledge or abetment of the contractor, he is uniformly relieved from the application of Section Three on that ground.⁴⁸ Where the violations occur in the contractor's plant, the situation is of course more complex. Mere showing of instructions to plant officials or of a "policy" against violation is insufficient,⁴⁹ and pleas that the breaches were the sole doing of plant managers or supervisors have in general been rejected because the record showed participation or knowledge by respondent,⁵⁰ or facts placing him on notice and giving rise to a duty, which went wilfully undischarged, to see to compliance.⁵¹ Absent such factors, however, one or more respondents may be granted individual relief on the equitable basis.⁵² Similar rules apply to distinctions between partners of a firm.⁵³ Weaker, but sometimes successful where the violations are not too serious, is showing that the violations were due to expansion difficulties,⁵⁴

48. Matter of Morris Koop, report of Examiner (1940) 3 Wage Hour Rep. 485, decision of Administrator (Apr. 14, 1941) 2 C. C. H. Labor Law Serv. ¶38,027; Matter of Cohen-Fein Co., decision of Administrator (June 14, 1940) 3 Wage Hour Rep. 264; Matter of Coronet Clothes, report of Examiner (1942) 5 Wage Hour Rep. 927; Matter of D. R. Clothing Co., report of Examiner (1943) 6 Wage Hour Rep. 170; Matter of Lubell Bros., Inc., report of Examiner (1943) 6 Wage Hour Rep. 373. Where a contractor buys from others for use in performance parts which as a regular practice in his industry would be made by the contractor, the vendor becomes a "substitute manufacturer." *Rulings and Interpretations* No. 2, Sept. 12, 1939, Sec. II (2) (b).

49. Matter of Lane Cotton Mills Co., decision of Administrator (July 15, 1940) 3 Wage Hour Rep. 313; Matter of Lackawanna Pants Mfg. Co., decision of Secretary (July 20, 1942) 5 Wage Hour Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125.

50. Matter of Maykitt Garment Co., decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091; Matter of Dependable Clothing Co., decision of Secretary (Mar. 19, 1942) 5 Wage Hour Rep. 253, 2 C. C. H. Labor Law Serv. ¶38,101; Matter of S. D. Hoffman, decision of Secretary (June 19, 1942) 5 Wage Hour Rep. 489, 2 C. C. H. Labor Law Serv. ¶38,122; Matter of Art Fashion Clothes, Inc., decision of Administrator (Nov. 2, 1942) 5 Wage Hour Rep. 873.

51. Matter of Mid City Uniform Cap Co., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123; cf. Matter of Sigmund Eisner Co., report of Examiner (1939) decision of Administrator (July 12, 1939) 2 C. C. H. Labor Law Serv. ¶35,207.08.

52. Matter of S. D. Hoffman, decision of Secretary (June 19, 1942) 5 Wage Hour Rep. 489, 2 C. C. H. Labor Law Serv. ¶38,122; Matter of Ideal Uniform Cap Mfrs., report of Examiner (1943) 6 Wage Hour Rep. 202.

53. Matter of Lackawanna Pants Mfg. Co., decision of Administrator (Nov. 8, 1940) 3 Wage Hour Rep. 531, 2 C. C. H. Labor Law Serv. ¶38,007; Matter of Adjustable Engineers Cap Co., decision of Administrator (July 7, 1942) 5 Wage Hour Rep. 633; Matter of Lackawanna Pants Mfg. Co., decision of Secretary (July 20, 1942) 5 Wage Hour Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125.

54. Matter of Nasco Awnings, Inc., report of Examiner (1942) 5 Wage Hour Rep. 999.

or to financial straits amounting to inability to meet payrolls.⁵⁵

Claims that the employer violated under duress by his employees⁵⁶ or coercion of their union⁵⁷ have been rejected when unfounded, but where he was in effect bound by his union contract and union practice to rely upon the collective bargaining organization to furnish him with employees over the minimum age, relief from the blacklist was recommended.⁵⁸ In a few cases arguments were made which amounted to denials of legal as well as equitable responsibility. Where respondents had organized sham corporations and accepted contracts in their names, the corporate aegis was transpierced and the penalty imposed upon them individually as undisclosed principals;⁵⁹ while a claim of lack of ownership or control by the guilty individuals was sustained as to one corporation in the same case, thus eliminating it from blacklist consideration.⁶⁰ Where control has in fact existed, the result has been contra.⁶¹

REFORMATION

In the case penultimately referred to, the change of title and direction seems to have taken place after the breaches of contract stipulations, and this leads to discussion of the effects of respondent's conduct during that period, and also pending the complaint proceedings. If he is not sanguine concerning the success of such matter in mitigation as has already been analyzed, he usually urges that he has already learned his lesson; he has expiated for past errors by restoring or tendering the underpayments to employees, and now studies compliance, offer-

55. Matter of Eastern Uniform Corp., decision of Administrator (Apr. 18, 1942) 5 Wage Hour Rep. 294, 2 C. C. H. Labor Law Serv. ¶38,104; Matter of Mercer Clothing Co., report of Examiner (1942) 5 Wage Hour Rep. 872; Matter of Pestcoe Mfg. Co., report of Examiner (1942) 5 Wage Hour Rep. 872.

56. Matter of Adjustable Engineers Cap Co., decision of Secretary (Oct. 12, 1942) 6 Wage Hour Rep. 35.

57. Matter of Art Fashion Clothes, Inc., decision of Administrator (Nov. 2, 1942) 5 Wage Hour Rep. 873.

58. Matter of Woodbine Borough Clothing Co., report of Examiner (1940) 3 Wage Hour Rep. 103.

59. Matter of S. D. Hoffman, decision of Administrator (Feb. 20, 1941) 4 Wage Hour Rep. 117, 2 C. C. H. Labor Law Serv. ¶38,022, decision of Secretary (June 19, 1942) 5 Wage Hour Rep. 489, 2 C. C. H. Labor Law Serv. ¶38,122.

60. Matter of S. D. Hoffman, supplemental decision of Administrator (Feb. 20, 1942) 5 Wage Hour Rep. 162.

61. Matter of Zwarico, report of Examiner (1943) 6 Wage Hour Rep. 124.

ing various more or less objective signs and guarantees to this effect. A considerable *locus penitentiae* is allowed by the decisions, but its limits seem to vary with the seriousness of violations, and are affected by other factors.

Since to make restitution is only to do what respondent promised in his contract, it is not much in the way of penance, and in some instances did not avail respondents who offered or paid restitution pending the proceedings.⁶² In the first *Lackawanna* case, however, and elsewhere it was at least partly responsible for the mitigation which was recommended,⁶³ and since all relief is conditional upon restitution unless it has been already made, it must be regarded as a favorable factor.⁶⁴ The like considerations apply to any voluntary coming into compliance by respondent before or during the complaint proceedings. Although the *Park Dale* case held the fact that violation had ceased was no substitute for faithful performance of past contracts, and the second *Lackawanna* case attributed current compliance to the force of an injunction invoked under the Fair Labor Standards Act instead of to any change of heart, other decisions have

62. Matter of B. and O. Mfg. Co., report of Examiner (1940) 3 Wage Hour Rep. 43, decision of Administrator (Jan. 19, 1940); Matter of Olga Knitting Mills, Inc., decision of Administrator (Aug. 15, 1942) 5 Wage Hour Rep. 687; decision of Secretary (Jan. 12, 1943) 6 Wage Hour Rep. 80, 2 C. C. H. Labor Law Serv. ¶38,168.

63. Matter of Montpelier Glove Co., Inc., decision of Secretary (Feb. 4, 1943) 6 Wage Hour Rep. 150 (relief had been recommended conditioned upon payment); decision of Administrator (Apr. 4, 1942) 5 Wage Hour Rep. 333; Matter of Nasco Awnings, Inc., report of Examiner (1942) 5 Wage Hour Rep. 999, decision of Administrator (Mar. 27, 1943) 6 Wage Hour Rep. 360; Matter of Lackawanna Pants Mfg. Co., supplemental decision of Administrator (Dec. 21, 1940) 4 Wage Hour Rep. 22; Matter of Bernard Greenberg Co., Inc., decision of Administrator (Apr. 13, 1942) 5 Wage Hour Rep. 317, 2 C. C. H. Labor Law Serv. ¶38,105; Matter of Mercer Clothing Co., report of Examiner (1942) 5 Wage Hour Rep. 872.

64. In addition to the cases just cited, see, Matter of Consolidated Stone and Sand Co., decision of Secretary (May 31, 1941) 4 Wage Hour Rep. 314, 2 C. C. H. Labor Law Serv. ¶38,031; Matter of Cohen-Fein Co., decision of Administrator (June 14, 1940) 3 Wage Hour Rep. 264; Matter of Davis Box Toe Co., Inc., decision of Administrator (Dec. 30, 1940) 4 Wage Hour Rep. 13; Matter of Daniel Duskis, Inc., decision of Administrator (Mar. 20, 1941) 4 Wage Hour Rep. 189, 2 C. C. H. Labor Law Serv. ¶38,026; Matter of Sigmund Eisner Co., decision of Secretary (Sept. 30, 1939) 2 Wage Hour Rep. 442; Matter of Brown Knitting Co., decision of Administrator (Apr. 25, 1941) 4 Wage Hour Rep. 288, 2 C. C. H. Labor Law Serv. ¶38,028; Matter of Ross Galvanizing Works, Inc., decision of Administrator (Aug. 5, 1941) 4 Wage Hour Rep. 479, 2 C. C. H. Labor Law Serv. ¶38,033; Matter of Presto Gas Mfg. Co., decision of Administrator (Aug. 11, 1941) 4 Wage Hour Rep. 479; Matter of Pestcoe Mfg. Co., report of Examiner (1942) 5 Wage Hour Rep. 872.

allowed the compliance to weigh in respondent's favor.⁶⁵ A disposition by respondent not to contest the Departmental position as to the Act and the violations has played a part in persuading relief,⁶⁶ as in a case where the right to contest the official "split-time" rule was waived, respondent's appeal in a suit filed to enjoin the Secretary and Comptroller General from putting Section Three into effect was dismissed, and respondent agreed to abide by the Secretary's decision as to damages.⁶⁷

Rarely, the contractor's conduct pending the proceedings is the reverse of reformation. Where he intimidated Government witnesses under subpoena, blacklisting was recommended on that and other grounds,⁶⁸ and we have already noted the unfavorable effect of discrimination against employees for testifying in the case.⁶⁹

IV

In determining whether the respondent should receive the grace which will enable him to continue participation in Government contract awards, any tendencies to recidivism must be reckoned. Besides the approaches already explored, the review of respondent's history as an employer and his experiences with labor legislation is useful; and this is usually undertaken by the Secretary or Administrator on his own initiative.

If respondent has been guilty of previous violation of the Act itself, as in the second *Lackawanna* case, that fact would argue most strongly against interfering with the penalty, and is gen-

65. Matter of Ross Galvanizing Works, Inc., decision of Administrator (Aug. 5, 1941) 4 Wage Hour Rep. 479, 2 C. C. H. Labor Law Serv. ¶38,033; Matter of Nasco Awnings, Inc., report of Examiner (1942) 5 Wage Hour Rep. 999; Matter of Spriesch Tool and Mfg. Co., report of Examiner (1941) 4 Wage Hour Rep. 555; cf. Matter of Lane Cotton Mills Co., supplemental decision of Administrator (Jan. 23, 1941) 4 Wage Hour Rep. 45 (reinstating).

66. Matter of Daniel Duskin, Inc., decision of Administrator (Mar. 20, 1941) 4 Wage Hour Rep. 189, 2 C. C. H. Labor Law Serv. ¶38,026.

67. Matter of Lane Cotton Mills Co., supplemental decision of Administrator (Jan. 23, 1941) 4 Wage Hour Rep. 45 (reinstating).

68. Matter of Riverside Underwear Corp., decision of Administrator (Apr. 24, 1940) 3 Wage Hour Rep. 182.

69. Matter of Sigmund Eisner Co., decision of Secretary (Sept. 30, 1939) 2 Wage Hour Rep. 442.

"If an employee who testified at a hearing in a matter of alleged violations of the provisions of the Public Contracts Act is discriminated against or refused employment after such hearing, the fact will weigh heavily in the consideration of whether or not the Secretary of Labor will intervene to prevent the operation of Section 3 . . ." *Rulings and Interpretations* No. 2, September 29, 1939.

erally decisive.⁷⁰ As also indicated there, violations of other labor laws are considered material, and mitigation will not be recommended if defendant's labor record shows violation of the Fair Labor Standards Act,⁷¹ even "difficulties" with it being taken into account;⁷² or if it shows violations of State labor laws.⁷³ Failure to rebut allegations that respondent had violated the National Industrial Recovery Act and the National Labor Relations Act has been enigmatically termed "significant."⁷⁴

V.

The sweep of the Secretarial search for factors from which to fashion a sound decision is not limited to respondent's conduct and his record; obviously, additional considerations must condition any recommendation purposed to further the public policy and safeguard those interests of the Government, employees and competitors which the Act was designed to protect. The effects of the forming decision on them as well as on respondent need weighing, and this requires not only review of relevant facts

70. Matter of Lackawanna Pants Mfg. Co., decision of Administrator (Apr. 29, 1942) 5 Wage Hour Rep. 354, decision of Secretary (July 20, 1942) 5 Wage Hour Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125; Matter of Anthracite Overall Mfg. Co., decision of Administrator (May 22, 1942) 5 Wage Hour Rep. 439, 2 C. C. H. Labor Law Serv. ¶38,124; cf. Matter of Long Wear Mfg. Co., decision of Administrator (June 6, 1941).

71. Matter of Lackawanna Pants Mfg. Co., decision of Administrator (Apr. 29, 1942) 5 Wage Hour Rep. 354, decision of Secretary (July 20, 1942) 5 Wage Hour Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125; Matter of Dependable Clothing Co., report of Examiner (1940) decision of Administrator (Dec. 12, 1941) 5 Wage Hour Rep. 6, 2 C. C. H. Labor Law Serv. ¶38,080, supplemental decision of Administrator (Feb. 12, 1942) 5 Wage Hour Rep. 149, 2 C. C. H. Labor Law Serv. ¶38,090, decision of Secretary (Mar. 19, 1942) 5 Wage Hour Rep. 253, 2 C. C. H. Labor Law Serv. ¶38,101; Matter of Park Dale Clothes, Inc., decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236, decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441; Matter of Promenade Clothes, Inc., decision of Administrator (July 17, 1942) 5 Wage Hour Rep. 573, 2 C. C. H. Labor Law Serv. ¶38,127, decision of Secretary (Sept. 14, 1942) 5 Wage Hour Rep. 755; Matter of Art Fashion Clothes, Inc., report of Examiner (1942) 5 Wage Hour Rep. 646, decision of Administrator (Nov. 2, 1942) 5 Wage Hour Rep. 873, decision of Secretary (Dec. 30, 1942) 6 Wage Hour Rep. 36.

72. Matter of Anthracite Overall Mfg. Co., decision of Administrator (May 22, 1942) 5 Wage Hour Rep. 439, 2 C. C. H. Labor Law Serv. ¶38,124.

73. Matter of Art Fashion Clothes, Inc., report of Examiner (1942) 5 Wage Hour Rep. 646, decision of Administrator (Nov. 2, 1942) 5 Wage Hour Rep. 873, decision of Secretary (Dec. 30, 1942) 6 Wage Hour Rep. 36. (N. Y. Statute requiring permit to employ homeworkers).

74. Matter of Lane Cotton Mills Co., decision of Administrator (July 15, 1940) 3 Wage Hour Rep. 313. By the time of the decision, the former statute had been held unconstitutional by the United States Supreme Court.

in the particular record, but on occasion, the addition thereto of data and statistics within the Departmental ken concerning economic conditions, labor supply, Government demand and other matters, and the application to the whole of professional skill in drawing conclusions. The drawing in of such things dehors the record seems amply justified; it is no more than that utilization of a fund of foregathered knowledge and techniques which is an expected element of the administrative expertise.

One important consideration is the effect of ineligibility upon respondent's employees, and it is almost invariably urged that this will be harmful. Where this position is accepted it presses toward relief, as in the first *Lackawanna* and (apparently) *Eisner* cases, and elsewhere.⁷⁵ More often, however, as where there is no direct showing as to what extent employment in the area depends upon respondent's operations, or that he will be forced to abandon or curtail personnel, it is rejected.⁷⁶ The Department is naturally in a position to know officially the current conditions and trends in particular occupations and localities, and if it is probable that the workers will be able if necessary to obtain other employment, the blacklist will not be relieved against.⁷⁷ A similar tendency exists where, as in the *Maykitt* case, the employees involved have not had a long tenure with respondent (the claim of reliance upon him for employment being correspondingly weakened),⁷⁸ or his labor practices have been so unfairly substandard that to render their continuance possible is hardly in the employees' interest.

A frequent contention is that ineligibility will remove a producing unit from Government supply, from the defense program and from the war effort. Where respondent's plant was one of

75. Matter of Lane Cotton Mills Co., supplemental decision of Administrator (Jan. 23, 1941) 4 Wage Hour Rep. 45.

76. Matter of Ulmer and Wagner Mfg. Co., decision of Administrator (July 27, 1940) 3 Wage Hour Rep. 346.

77. Matter of Mid City Uniform Cap Co., supplemental decision of Administrator (Feb. 13, 1942) 5 Wage Hour Rep. 176; Matter of Maykitt Garment Co., Inc., decision of Administrator (Nov. 19, 1941) 4 Wage Hour Rep. 676, 2 C. C. H. Labor Law Serv. ¶38,069, decision of Secretary (Jan. 29, 1942) 5 Wage Hour Rep. 130, 2 C. C. H. Labor Law Serv. ¶38,091; Matter of Promenade Clothes, Inc., decision of Administrator (July 12, 1942) 5 Wage Hour Rep. 573, 2 C. C. H. Labor Law Serv. ¶38,127, decision of Secretary (Sept. 14, 1942) 5 Wage Hour Rep. 755; Matter of Olga Knitting Mills, Inc., decision of Secretary (Jan. 12, 1943) 6 Wage Hour Rep. 80, 2 C. C. H. Labor Law Serv. ¶38,168.

78. Matter of Ulmer and Wagner Mfg. Co., decision of Administrator (July 27, 1940) 3 Wage Hour Rep. 346.

a few equipped to handle materials essential to the Navy's ship-building program,⁷⁹ or was making bomb parts and racks obviously vital to defense,⁸⁰ these facts seem clearly to have influenced the relief recommended. In at least four cases such contentions, including one that a monopoly which charged the Government higher prices had been broken by respondent's efforts, were rejected as unfounded or outweighed.⁸¹

Sometimes, as in the *Park Dale* case, respondent stresses the hardship which he says the penalty will work on him⁸² and his creditors and others, even urging that he will be incapacitated from restoring underpayments to his employees,⁸³ or claims that he has been already sufficiently punished, but the treatment there is typical, and this is true of all the hardship theories. As said in the unquoted portion of the *Maykitt* opinions, Section Three is not solely penal; it is intended to protect others and deter violation,⁸⁴ and with full realization of the fact that "dislocation of employment results from any application of the blacklist penalty" and "at a time when economic conditions stressed the need for safeguarding employment even more than at present," Congress determined that operation of the sanction was necessary to the enforcement of the Act.⁸⁵ These considerations usu-

79. Matter of Ross Galvanizing Works, Inc., report of Examiner (1940) 3 Wage Hour Rep. 500.

80. Matter of Spriesch Tool and Mfg. Co., report of Examiner (1941) 4 Wage Hour Rep. 555.

81. Matter of Park Dale Clothes, Inc., decision of Administrator (Mar. 16, 1942) 5 Wage Hour Rep. 236, decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441; Matter of Mid City Uniform Cap Co., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123; Matter of Promenade Clothes, Inc., decision of Administrator (July 17, 1942) 5 Wage Hour Rep. 573, 2 C. C. H. Labor Law Serv. ¶38,127, decision of Secretary (Sept. 14, 1942) 5 Wage Hour Rep. 755; Matter of Olga Knitting Mills, Inc., decision of Secretary (Jan. 12, 1943) 6 Wage Hour Rep. 80, 2 C. C. H. Labor Law Serv. ¶38,168.

82. Matter of Ulmer and Wagner Mfg. Co., decision of Administrator (July 27, 1940) 3 Wage Hour Rep. 346; Matter of Mid City Uniform Cap Co., supplemental decision of Administrator (Feb. 13, 1942) 5 Wage Hour Rep. 176.

83. Matter of Promenade Clothes, Inc., decision of Administrator (1942) 5 Wage Hour Rep. 573, 2 C. C. H. Labor Law Serv. ¶38,127.

84. Decision of Administrator (Nov. 19, 1941) 4 Wage Hour Rep. 676, 2 C. C. H. Labor Law Serv. ¶38,069.

85. Matter of Park Dale Clothes, Inc., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 441; Matter of Mid City Uniform Cap Co., decision of Secretary (May 29, 1942) 5 Wage Hour Rep. 440, 2 C. C. H. Labor Law Serv. ¶38,123; Matter of Lackawanna Pants Mfg. Co., decision of Secretary (July 20, 1942) 5 Wage Hour Rep. 572, 2 C. C. H. Labor Law Serv. ¶38,125; Matter of Promenade Clothes, Inc., decision of Secretary (Sept. 14, 1942) 5 Wage Hour Rep. 755.

ally override the group of mitigatory pleas that is dubbed officially "the conventional approach."⁸⁶

VI

All that remains is recension. Placing the developed pattern of Departmental discretion within the frame of reference constructed at the beginning of part II, we find it scarcely a snug fit; those earlier conclusions represented an extreme of theoretical rigor which is not enforced in practice. Legal liability for the damages resulting from violation is seldom used as the test of responsibility to be blacklisted, and equitable principles are applied instead. Realistically considered, the situation as to burden of persuasion on the question of mitigation is almost the reverse of the theory. Although any breach of contract stipulations is a legally sufficient basis for the penalty, relief will generally be granted unless the violations are serious and flagrant or wilful (as in the case of falsification of records), or respondent has an unfavorable labor record. Even in such cases, his regeneration, or considerations of policy, may enable him to obtain mitigation. If the application of Section Three is justified under these newer, specific rules, however, our hypothesis that the blacklist should be imposed unless the situation is in some way unusual still stands.

These departures from the ultimate limits of enforcement seem clearly to be in accord with the intent of Congress in providing for recommendations by the Secretary; to hew to the legal line would be to abdicate the discretion thus confided. Broadly, the explanations of these leniencies are rooted in the drastic, sometimes ruinous nature of the blacklist penalty and its wide circle of possible attendant harms to innocent third parties. Nevertheless, if the cases be chronologically consulted, an increasing rigorousness of enforcement is discernible. When the Act was new and unfamiliar to contractors, that fact inclined toward melioration; but by 1940 the Department considered the educational phase of administration to be ended, and has made attitudinal alterations to correspond.

It might be interesting to speculate on other, future changes: the plea of respondent's essentiality to Government supply will

86. In Matter of Olga Knitting Mills, Inc., decision of Secretary (Jan. 12, 1943) 6 Wage Hour Rep. 80, 2 C. C. H. Labor Law Serv. ¶38,168.

likely lose much force after the war, in view of the then probable plethora of plant and labor; this may be balanced by the increased possibility of showing unusual hardship on employees, when labor supply is swollen by demobilization and fewer jobs may be available. But these are changes of fact and circumstance, and beyond our scope here. The principles of blacklisting will undoubtedly undergo slower changes, and grow in the original direction, along equitable lines toward just effectuation of the purposes of the Act and the advancement of the public interest.

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