

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
 Enrique (Hank) Hernandez ) ASBCA No. 53011  
 )  
 Under Contract No. 000000-00-0-0000 )

APPEARANCE FOR THE APPELLANT: Mr. Enrique (Hank) Hernandez  
San Angelo, TX

APPEARANCE FOR THE GOVERNMENT: Elliot J. Clark, Jr., Esq.  
Assistant General Counsel  
Defense Commissary Agency  
Fort Lee, VA

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves a claim for wrongful termination of an agreement to provide bagging and carryout services at the commissary at Goodfellow Air Force Base, San Angelo, Texas. Appellant Enrique (Hank) Hernandez contracted with the Defense Commissary Agency (DeCA) to acknowledge he was not a Government employee and agree that he would comply with certain requirements in performing bagging services in exchange for earning tips from commissary patrons. The Government removed Mr. Hernandez from his position, and he filed a claim. We have held that the Board has jurisdiction of an appeal of the deemed denial of appellant's claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. *Enrique (Hank) Hernandez*, ASBCA No. 53011, 01-1 BCA ¶ 31,220. Only entitlement is before us for decision.

FINDINGS OF FACT

1. DOD Directive 1344.7, "Personal Commercial Solicitation on DoD Installations," dated 13 February 1986, provides for authorization to enter DoD military installations to conduct personal commercial solicitation. In 1990, when appellant began as a bagger at Goodfellow, the Head Bagger told him he did not need a license to provide services at the commissary because his retired military status gave him privileges to enter the base and use the commissary. Since 1991 there has been a separate system for the licensing by the installation commander and the permission to bag in the commissary by the commissary officer. (AR4, tabs 8, 21, 22; tr. 17-20, 53-55, 59, 61, 109-11)

2. On 11 June 1993, appellant signed an Agreement as an independent contractor with the commissary facility at Goodfellow. The commissary officer signed the Agreement on behalf of DeCA. Mr. John G. Martin signed the Agreement in his capacity of

Head Bagger to certify that Mr. Hernandez was acceptable and his services were needed. (R4, tabs 1, 2; AR4, tab 21; tr. 29)

3. The contractor agreed that he had the required permission for personal commercial solicitation in the following term of the Agreement:

15. Bagger expressly acknowledges that he/she has obtained permission to lawfully enter the installation to perform bagging and carryout services. This permission is commonly referred to as a license. Bagger will notify Commissary if this license expires or is revoked by the installation commander or his designee.

(R4, tab 1 at 2; emphasis added) DOD Directive 1344.7 provides that the installation commander shall revoke permission to conduct commercial activities on the base if such action is in the best interests of the command. The grounds for taking such action include “[s]ubstantiated complaints or adverse reports regarding quality of goods, services, and commodities and the manner in which they are offered for sale” (AR4, tab 22 at 5).

4. The standards of conduct for baggers were stated in paragraph 12 of the Agreement as follows:

12. Bagger declares that while performing all services to be provided under this AGREEMENT, he/she will conduct himself/herself in an appropriate fashion with respect to Commissary, Commissary’s employees, and the patrons of the Commissary. Bagger will treat patrons with respect at all times, will not interfere with Commissary’s cashiers, will not engage in “horseplay” or disruptive conduct, will not use profane, abusive, or offensive language, will not destroy, damage, or abuse government property, and will not consume alcoholic beverages or use or possess illegal or unauthorized drugs, including marijuana, while performing service under this AGREEMENT. Bagger understands that the head bagger may impose minor discipline for infractions of the Bagger’s Standing Operating Procedure which includes a system of discipline adopted by a majority vote of the baggers and approved by the Commissary.

(R4, tab 1 at 2) No standard operating procedure was adopted by the baggers at Goodfellow (tr. 61, 78-79, 111).

5. Paragraph 16 in the Agreement gave the Government the right to terminate the Agreement for cause. It provided:

16. With reasonable cause, either party may terminate the AGREEMENT effective immediately upon the giving of reasonable notice of termination for cause. Reasonable cause shall include, but not be limited to, the following:

a. Material violation of this AGREEMENT.

b. Any willful or negligent act which exposes another person to injury or harm or results in property damage to any person, the Commissary of the installation, or exposes the Commissary to liability.

c. Revocation or expiration of the license granted by the installation commander to enter the installation for the purpose of performing bagging and carryout services.

d. A pattern of customer complaints regarding Bagger, such as deficiencies relating to Bagger's bagging and carryout services, demeanor or behavior, language, etc.

e. Any act which violates a federal, state, local or municipal law, and/or rules and regulation of the Commissary and/or the installation.

(R4, tab 1 at 2-3)

6. Paragraph 18 provided that "This AGREEMENT shall remain in effect until revoked, terminated for cause, or terminated by mutual consent of the parties" (R4, tab 1 at 3). The Agreement does not include a termination for convenience clause or other similar clause providing the Government with the right to terminate the Agreement upon notice. Other relevant terms of the Agreement were addressed in the Board's prior decision in this appeal that is cited above. Familiarity with that decision is presumed.

7. DeCA Directive 40-1, effective 30 April 1993, gave the Government the right to suspend a bagger in lieu of termination. The directive provides in pertinent part:

g. Suspension by Commissary Officer. In addition to minor discipline imposed by the head bagger pursuant to the Standing Operating Procedures, and except for revocation or expiration of the license in sub-paragraph (5) above, the

Commissary Officer may impose a period of suspension of up to 30 calendar days in lieu of termination of the Agreement. The purpose of the suspension would be to give the bagger or head bagger an opportunity to correct the deficiency which gave rise to the suspension. Performance as a bagger or head bagger by the suspended individual is not permitted under any circumstance during the suspension period.

(R4, tab 2 at 4)

8. Appellant believes that he did not receive a license to provide bagging services at Goodfellow (tr. 111).<sup>1</sup> We find appellant had a license from the installation to provide commercial services on the basis of his acknowledgment in the Agreement.

9. On 8 May 1998, Ms. Susan Kelly, the DeCA zone manager for the Goodfellow commissary assigned to Fort Hood, Texas, was on site at Goodfellow to make an investigation of personnel matters unrelated to the baggers. Her investigation led to her termination of the commissary officer for failure to take action with respect to allegations of sexual harassment. While she was in the commissary, she overheard a cashier say, "How much longer are we going to have to put up with this" (tr. 64). She asked what was wrong and learned from the cashier that there was "a bagger issue" (*id.*). She discussed the matter with Ms. Jan Shaffer, Supervisor Customer Service and head cashier. The basic issue was that the baggers complained when customers, more commonly elderly customers, did not tip them well. The cashiers gave Ms. Kelly three names of baggers identified as causing the problem. She talked to different cashiers and other store workers to assess the truth of the complaint because she was aware that a personality conflict could have caused the one cashier to complain. She asked the others whether they had problems with the baggers. She requested that complaints be written in memoranda for record. This incident occurred at a time that Mr. Martin described as one of "great turmoil and distress" due to removal of personnel at the top management level. Ms. Kelly agreed that it was a difficult period. (AR4, tab 18; tr. 63-66, 77-78)

10. Ms. Kelly considered the complaints about three individuals serious enough to ask the Support Group Commander, Colonel Vance Justet, for his support to release the baggers.<sup>2</sup> Colonel Justet, who was in town at the time attending an air show, gave his permission in a telephone conversation to release the baggers indicating to her that the conduct she described was not wanted in baggers at the commissary on the base. He asked Ms. Kelly to inform the baggers of the action and tell them that they could make an appointment to see him about the situation. (Tr. 64-68, 70, 81) We find that Colonel Justet agreed that Ms. Kelly could release the baggers, but he did not revoke appellant's license (tr. 67, 82-83). Ms. Kelly then consulted with the Head Bagger since she did not know who the baggers were. Mr. Martin protested the action, and the proposed removal of

one bagger was withdrawn.<sup>3</sup> The second bagger, Mr. Ernest Ethington, was not at work. Only appellant was summoned to meet with Ms. Kelly. (AR4, tab 18; tr. 23, 65-66)

11. In a midday meeting on 8 May 1998, that Mr. Martin attended, Ms. Kelly informed appellant of his removal. He understood that he was suspended until an investigation of the complaints could be completed.<sup>4</sup> She had a folder that she told appellant held customer and employee complaints, but she refused appellant's request to see the complaints. At the meeting she said something to the effect, "if I can fire management I can sure fire a bagger" (AR4, tab 17; tr. 16). Ms. Kelly considered appellant's statement, made at the end of the meeting, to the effect of "[y]ou haven't heard the last from me" a threat (tr. 16, 74). Appellant was not aware of any customer complaints against him in the eight years he had been working at the commissary and believed he was an experienced, qualified bagger who knew how to treat customers and had not been rude or discourteous to customers. He did not intend to accept the removal. Appellant did not receive any information in May 1998 that his license to enter the installation to conduct personal commercial solicitation had been revoked. (AR4, tabs 17, 18; tr. 13-17, 22-23, 31-32, 43, 89, 97, 107)

12. There is no evidence of customer complaints against appellant (tr. 37).

13. There is no evidence of written complaints against appellant before the time of Ms. Kelly's action against him. Ms. Shaffer and four of the eight to ten cashiers working at the commissary prepared statements, none of which is legibly dated 8 May 1998, or earlier. The statements are vague as to when events occurred, their frequency, and the people involved. Two of the statements do not mention Mr. Hernandez. (R4, tab 5; tr. 22, 109) We find that Ms. Kelly misunderstood the situation in deciding that baggers' attitudes about tips and treatment of the cashiers amounted to rudeness to customers or otherwise affected customers' willingness to shop at the commissary (tr. 67).

14. After 8 May 1998, there was confusion about whether DeCA or the installation was responsible for responding to appellant's desire to continue bagging at the commissary. Appellant understood from Ms. Kelly that there would be an investigation of his removal from his bagging position, but no one contacted him. On 29 May 1998, he contacted Mr. Martin to ask about the status of the investigation. Mr. Martin directed an inquiry to Mr. Harnish, the acting commissary officer, who purportedly did not know of any baggers that had been suspended. When Mr. Harnish contacted Ms. Kelly, he learned that she considered an investigation to be the responsibility of the installation commander, or in the case of Goodfellow, due to the delegation of authority, the Support Group Commander. (AR4, tabs 17, 18; tr. 14)

15. On 3 June 1998, in response to his request, appellant received the following written statement from Mr. Don Rouse, the deputy commissary officer, addressed To Whom It May Concern:

Prior to 8 May 1998, I had not received any formal complaints against Enrique (Hank) Hernandez in my capacity as Deputy Commissary Officer.

(AR4, tab 2; tr. 14-15) Ms. Janie Reyes, a cashier, gave appellant a statement in September 2000, that appellant was “very professional and courteous” to customers and one of the best baggers at the commissary. She never heard any customer complaints against him. She understood the commissary officer wanted to try to get appellant back, and she wanted to help. (AR4, tab 16; tr. 112-14)

16. Appellant made further requests for information about the status of the investigation. On or about 5 June 1998, Colonel Huhn, who was then acting Support Group Commander, and then Colonel John N. Jasper, the Vice Wing Commander for the installation, began “an inquiry” into the removal of the baggers by contacting Ms. Kelly for information (tr. 84, 89). Colonel Huhn understood that appellant had appealed a revocation of his license by sending a letter to the Wing Commander. On the basis of appellant’s testimony and the Government’s failure to submit a copy of the letter, we find that appellant did not appeal, but was pursuing the promised investigation. (Tr. 43, 69, 81, 84, 88-89, 96, 101)

17. On 19 June 1998, appellant and Mr. Ethington met with Colonel Huhn and Colonel Jasper. Colonel Huhn had received copies of the written statements from the five cashiers. He also received a statement, dated 15 June 1998, from Ms. Kelly. In the meeting Colonel Jasper read parts of the statements to appellant and gave him an opportunity to reply to the complaints that had been made, but did not give appellant copies of the statements. According to Colonel Jasper, appellant neither admitted nor denied that he had engaged in the alleged improper behavior. Colonel Huhn and Colonel Jasper also interviewed Mr. Martin. They found that he confirmed the cashiers’ complaints that appellant was “gruff” with customers who did not tip well and tried to avoid bagging for them<sup>5</sup> (tr. 105). Colonel Huhn and Colonel Jasper told appellant at the end of the meeting that they planned to make a decision by that afternoon and would inform him of the results of their investigation. There is no documentation of the investigation that was conducted. (Tr. 15-16, 84-85, 91, 100, 103-06)

18. By letter dated 25 June 1998, Colonel Huhn informed appellant that after investigation of “complaints of discourteous service” he and Colonel Jasper had decided not to “reinstate” appellant to his “bagger position” (R4, tab 4; tr. 86). According to the Government, the action taken by the Air Force not to reinstate appellant was taken on behalf of the Air Force, not the commissary, in the interest of maintaining good order and

discipline. These designees of the installation commander had authority to revoke permission to conduct commercial activities on the base if there were substantiated complaints regarding the manner in which services were being provided. The letter did not, however, state that a license was revoked or appeal of revocation of a license was denied. Appellant did not receive any specific information in June 1998 that the installation commander had explicitly revoked his license. (Tr. 17, 86-87, 90, 102, 104-05) Appellant had notice of the action taken and considered himself “terminated” or “fired” (tr. 17).

19. At the end of June 1998, 61 customers at the commissary signed a petition at appellant’s request for his reinstatement. A commissary official then told appellant to leave the parking lot allegedly because of customer complaints. (AR4, tab 19; tr. 36-37)

20. By letter dated 11 February 1999, Colonel Eugene H. Quintanilla, Support Group Commander, denied a request from appellant to speak to customers and confirmed to appellant that “[t]he decision to remove you from your current position is final” (AR4, tab 8). This letter stated:

We appreciate your eight years of service to our Commissary as a bagger.

(*Id.*)

21. Appellant filed a complaint with the Goodfellow Inspector General that Colonel Huhn abused his authority by removing him from his position as a bagger at the commissary. The Inspector General responded in a letter, dated 7 March 2000, that stated:

Based on the information you provided, you were terminated at the direction of Mrs. Susan Kelly, HQ DECA, Zone 6 Manager due to your abusive language and the way you treated customers.

(AR, tab 11) His office did not take action on the complaint because of the absence of a reasonable belief or any credible information of wrongdoing on the part of Colonel Huhn. The letter recommended that appellant contact the DeCA Inspector General because the allegations did not refer to an Air Force agency. (*Id.*, tr. 94-96, 98-99)

22. Appellant proceeded to perfect his appeal to the Board.<sup>6</sup>

23. In his complaint appellant claimed damages for breach of contract in the amount of \$90,000.00 for lost income, consultant fees, investigation fees, and out of pocket expenses (*i.e.* duplication costs, postage, and long distance phone calls).

## POSITIONS OF THE PARTIES

Appellant maintains that the commissary violated the terms of the Agreement in suspending him for 45 days and removing him from his bagging position when there were no customer complaints against him and he had not engaged in rude or discourteous service to customers. Appellant further argues that the decision that he would not be reinstated to his bagging position is without support because there is no documentation of the investigation by the installation. Appellant maintains that the Government has not shown reasonable cause for the action that was taken against him.

The Government argues that it did not breach the Agreement because the Agreement terminated immediately upon notice that Colonel Justet, acting on behalf of the installation commander, revoked appellant's license issued for the purpose of bagging groceries. The Government has not presented any other justification for termination of the Agreement. The Government did not reinstate appellant after his "appeal" because of a determination made on behalf of the installation commander that he had engaged in "rude and discourteous conduct" (Gov't br. at 8). The action against appellant was allegedly taken on behalf of the Air Force to maintain good order and discipline on the base.

## DECISION

In order to recover on a breach of contract theory, appellant must show an obligation or duty of the Government arising out of the contract, a breach of that duty, and damage caused by the breach that was reasonably foreseeable at the time of contract award. *San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989); *TRS Research*, ASBCA No. 51712, 01-1 BCA ¶ 31,149.

The Government breached the Agreement by terminating it unless the termination was valid under the terms of the Agreement. *Christine Turner*, ASBCA No. 26900, 84-1 BCA ¶ 17,138. The Agreement specified reasonable cause for the commissary, which was party to the Agreement, to terminate upon the giving of reasonable notice. The Agreement provided that revocation of a bagger's license by the installation commander was cause for termination. On 8 May 1998, Ms. Kelly, acting for the commissary, removed appellant from his position as a bagger. We have found, based on witness credibility, that her action was not taken with respect to a license (finding 10). Colonel Justet only responded to Ms. Kelly's active efforts to obtain support for her decision, made on behalf of the commissary, to prevent appellant from performing his contract. We cannot conclude that the involvement of Colonel Justet in the removal of appellant from his bagging position was a revocation of appellant's license to provide commercial services that served to terminate the Agreement automatically as the Government has asserted.

The Government did not argue that deficiencies related to appellant's performance of bagging services justified the termination, but we have considered whether there were

other grounds constituting reasonable cause under paragraph 16 of the Agreement that existed for termination of appellant's Agreement. Either a suspension or termination that occurred on 8 May 1998 was based on an incident of disgruntled commissary employees complaining to Ms. Kelly, a visiting commissary zone manager, that was misunderstood by Ms. Kelly. Appellant was not engaged in rude and discourteous behavior to customers or substantial interference with commissary operations. Appellant was a qualified, experienced bagger who knew how to treat customers, including elderly patrons who did not give large tips for bagging and carrying out their groceries. The evidence shows satisfaction with appellant's services rather than any oral or written customer complaints directed at appellant (findings 15, 19). Any comments made among baggers and cashiers about tipping would be inevitable in the system DeCA operates to provide these services without payment of wages to baggers and without requiring cashiers to do the bagging. We are not persuaded by the Government's evidence that such comments amounted to abusive or offensive language or were overheard by customers. Whatever may have been considered deleterious to the successful operation of the commissary, if anything, should not have been ascribed to appellant. We have not found that the alleged improper conduct was "ongoing" over a year in the absence of any evidence of disciplinary action taken against any of the baggers before May 1998. The Government did not substantiate that termination of appellant's agreement was based on a pattern of customer complaints against appellant, negligent conduct exposing persons to injury, or improper behavior that was cause for termination under the terms of the Agreement by DeCA. The Government is, therefore, liable, and appellant is entitled to compensatory damages for the breach of contract that occurred on 8 May 1998.

Appellant is not entitled to recover damages for breach of contract following 25 June 1998. On that date a determination was made on behalf of the installation commander that appellant would not be reinstated to his bagging position. We conclude that that determination by Colonel Huhn and Colonel Jasper was effective to revoke appellant's license (finding 18). Revocation of the license constituted reasonable cause for termination of the Agreement. Appellant has challenged the validity of the investigation, but we consider it to have been reasonably conducted with opportunity for appellant to be heard. The determination was properly made on basis of adverse reports of the manner in which appellant was providing services. We question the validity of the complaints made about appellant, but will not substitute our judgment for that of the installation in the absence of evidence of an abuse of discretion. No question has been raised as to the authority of the Support Group Commander's representatives to grant or deny permission to conduct personal commercial solicitation. Moreover, the action on 25 June 1998 was later ratified by the Support Group Commander (finding 21).

The purpose of damages for breach of contract is to compensate the injured party for the loss caused by the breach. The rules for determining damages are intended to give the injured party the benefit of its bargain by awarding a sum of money that will place that party in as good a position as it would have been in had the contract been fully performed. *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996), *cert. denied*, 520

U.S. 1116 (1997); *Cramer Alaska, Inc.*, ASBCA No. 47725, 96-1 BCA ¶ 27,971. It was within the contemplation of the parties at the time of contracting that the wrongful termination of the Agreement would naturally and inevitably cause appellant to lose earnings from tips that would otherwise have been received from commissary patrons. Appellant's lost income was foreseeable. We are considering entitlement only and not quantum in this phase of the appeal and conclude only that some damage was incurred. *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000); *Gap Instrument Group*, ASBCA No. 51658, 01-1 BCA ¶ 31,358. Having established all the elements for proving breach of contract, appellant is entitled to damages in the form of lost earnings during the period 8 May 1998 to 25 June 1998 caused by the Government's breach of his Agreement with the commissary.

The appeal is sustained. The matter is remanded to the parties for determination of quantum.

Dated: 25 July 2001

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LISA ANDERSON TODD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

NOTES

1 The Government did not submit evidence of appellant's bagger's license. The Government could not identify a bagger's license. According to the Government, it would vary with the installation and was not necessarily "an actual piece of paper" (tr. 55).

2 The installation commander at Goodfellow has delegated the authority to issue permission to individuals to enter the installation and conduct personal commercial solicitation on the base to the Support Group Commander. The Support Group functions as a city manager would with responsibility for municipal functions, including the maintenance of good order and discipline on the base. (Tr. 81-83, 102)

3 If Colonel Justet had revoked this bagger's license as a separate, independent action, the commissary could not have permitted him to continue bagging.

4 We find appellant's account of the meeting, which was corroborated by Mr. Martin's sworn statement, more credible than Ms. Kelly's recollection of what occurred. We discredit her testimony that she only communicated a revocation of appellant's license and told him he could appeal the Support Group Commander's decision (tr. 67-68).

5 We find from Mr. Martin's statement, prepared after February 1999, undated and later sworn, that he did not confirm the information in the written statements from which Colonel Huhn and Colonel Jasper concluded that appellant had engaged in rude and discourteous service to customers. He had no knowledge of customer complaints and disagreed with Ms. Kelly's opinion about rudeness. He observed that appellant had an excellent relationship with many customers. (AR4, tab 18; tr. 100)

6 See *Enrique (Hank) Hernandez, supra*, and *Enrique Hernandez*, ASBCA No. 51763, 00-1 BCA ¶ 30,736, for discussion of appellant's claim and the responses thereto.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53011, Appeal of Enrique (Hank) Hernandez, rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals