

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Premier Consulting & Management Services) ASBCA No. 54691
Under Contract No. N00033-04-P-9001)

APPEARANCE FOR THE APPELLANT: Ms. Merika Wright
President

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
Robert M. Elwell, Esq.
Ann Mabe, Esq.
Assistant Counsel

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
ON MOTION TO DISMISS FOR LACK OF JURISDICTION

The Department of the Navy moves to dismiss this appeal for lack of jurisdiction, asserting that the appeal was not filed timely. The 90-day appeal period ran until 28 July 2004. The postage meter reflects a date of 28 July 2004. The U.S. Postal Service cancellation stamp reflects a date of 29 July 2004. Sworn testimony states that the appeal was mailed on 28 July 2004. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 29 April 2004, the contracting officer (CO) notified the contractor by facsimile that its contract was terminated for cause (R4, tabs 2, 3). The contractor had ninety days from receipt of the final decision to appeal to this Board. The 90th day after 29 April 2004 was 28 July 2004.
2. Between 20 May and 8 July 2004 there were email communications between the contractor's president and the contracting officer. In those communications, the contracting officer indicated a willingness to reconsider the termination for default. (R4, tabs 3-7)
3. Nevertheless, the appellant appealed from the termination for default.* The appeal letter, received by the Board on Monday, 2 August 2004, was contained in an envelope with two postal markings. One was a red postage meter stamp dated 28 July 2004 with 37 cents

* Appellant mistakenly dated the letter to the Board as 28 April 2004, instead of 28 July 2004.

postage. The second mark was a round, black, U.S. Postal Service cancellation stamp, dated 29 July 2004, with the words “MARINA DEL REY CA.”

4. By correspondence dated 18 August 2004, the government moved to dismiss appellant’s appeal on the ground that appellant’s appeal is untimely and, therefore, the board lacks jurisdiction to consider the dispute.

5. The appellant responded that the appeal was mailed on 28 July 2004. According to appellant, the U.S. Postal Service uses regional post offices to consolidate mail from sectional post offices, and it was the regional facility – approximately 50 miles from appellant’s office – that processed the envelope and provided the 29 July 2004 cancellation stamp. The appellant asserted that this practice is normal for mail sent from a local post office late in the business day. The appellant further asserted, “Unless a specific request is made, mail is not normally date stamped by the local post office but is processed at the regional facility, in this case Marina del Rey, which sorts and cancels stamps for all mail processed.” (App. reply br. dated 17 Sept. 2004 at 2)

6. By letter dated 10 February 2005, the Board requested the following clarifying information from the appellant:

1. At what physical location (a postal meter under appellant’s control at appellant’s office or a postal meter at a U.S. Postal Facility) was the 37 cent postage meter stamp affixed to the envelope containing the notice of appeal sent to the Board?

2. When (date and time) and where (location of post office or mail box) and by whom, was the envelope, containing the notice of appeal sent to the Board, first placed under the control of the United Postal Service?

7. By sworn statements from Merika Wright and Stephanie Curiel, dated 18 February 2005 and 15 March 2005, respectively, appellant provided the following response to the Board’s 10 February 2005 request:

1. The physical location of the postage meter is:

Physical Office Location
PCMS
8645 Haven Avenue
Suite 600
Rancho Cucamonga, CA 91730

2. Date / Time: July 28, 2004 enveloped (sic) stamped after mail run about 3:00pm.

The mail was taken to the Post Office located at:
10950 Arrow Rte
Rancho Cucamonga, CA 91729-9998 by Stephanie Curiel, our Administrative Assistant on her way home from work according to the standard operating procedures for our office.

8. Based on the record before us, we find that the subject notice of appeal was placed within the custody and control of the U.S. Postal Service on 28 July 2004.

DECISION

The government moves to dismiss for lack of jurisdiction. According to the government, appellant's notice of appeal was not mailed within 90 days of receipt of the final decision, based on the date of the U.S. Postal Service cancellation stamp. The appellant argues that notwithstanding the Postal Service stamp, the appeal was deposited in the mail on 28 July 2004 and was thus timely.

Section 7 of the Contract Disputes Act of 1978, as amended (41 U.S.C. § 606), requires a contractor to appeal within 90 days from receipt of the contracting officer's final decision. This 90-day appeal period is a statutory jurisdictional requirement that may not be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982), *aff'g Cosmic Construction Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541.

ASBCA Rule 1(a) provides that a notice of appeal "shall be in writing and mailed or otherwise furnished" to the Board. We have consistently interpreted "mailing" to require a proper address, sufficient postage, and transfer of the notice of appeal into the custody of the U.S. Postal Service. *Astro Industries, Inc.*, ASBCA No. 19082, 74-2 BCA ¶ 10,921; *Micrographic Technology, Inc.*, ASBCA No. 25577, 81-2 BCA ¶ 15,357 at 76,070.

The notice of appeal in this case was properly addressed and was affixed with sufficient postage. Thus, the issue raised by the motion to dismiss is whether the notice of appeal was deposited in the U.S. Postal Service on 28 July 2004 or 29 July 2004.

When the notice of appeal is furnished to the Board by mailing, the appellant has the burden of establishing that the notice of appeal was timely placed into the custody of the U.S. Postal Service. *Micrographic Technology, Inc.*, ASBCA No. 25577, 81-2 BCA at 76,070; *Astro Industries, Inc.*, ASBCA No. 19082, 74-2 BCA at 51,970-71. Appellant has provided two sworn statements that the envelope was prepared after the 3:00 p.m. mail run on 28 July 2004. Ms. Curiel has sworn that she took the envelope to the Rancho

Cucamonga post office on her way home on 28 July 2004. That evidence is not controverted.

The government argues that the U.S. Postal Service stamp is controlling with respect to the time at which the notice of appeal was placed in the custody of the U.S. Postal Service. The government relies on the case of *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232. Wherein we said at 149,569:

In computing the 90-day timeframe, the Board has long held that the date of filing of an appeal is the date of transfer to U.S. Postal Service (i.e., the postmark date).

The respondent is correct that we have often indicated, as we did in *Thompson Aerospace*, that the date of the postmark is considered the date of mailing or the date of filing or transfer to the custody of the U.S. Postal Service. *E.g.*, *Hugo Auchter GmbH*, ASBCA No. 39642, 91-2 BCA ¶ 23,777. But we have done so in such cases when there was no evidence that custody of the notice of appeal transferred at an earlier date.

However, we have held that the date of mailing – or transfer of custody – can be established by other credible evidence. *Dawson Construction Company, Inc.*, ASBCA No. 29447, 85-1 BCA ¶ 17,862 (postage meter date-stamp and affidavit of mailing); *Micrographic Technology, Inc.*, ASBCA No. 25577, 81-2 BCA at 76,070 (original notice of appeal was lost in the mail). We have held to the same effect with respect to mailing a motion for reconsideration. *CS&T General Contractors, Inc.*, ASBCA No. 43657, 94-1 BCA ¶ 26,314. The respondent argues that affidavits are not sufficient evidence in cases where there is a U.S. Postal Service cancellation stamp.

We have found that unsworn statements, or sworn statements that fail to establish that the notice was placed in the mails, are insufficient evidence. *See, Page Construction Company*, ASBCA No. 41206, 91-1 BCA ¶ 23,434 (an unsworn conclusory statement was not credible). *See also, Bluebonnet Homes, Inc.*, ASBCA No. 35046, 88-2 BCA ¶ 20,693 (on reconsideration of 88-1 BCA ¶ 20,344) (affidavit not clear as to when or by whom the appeal notice was mailed where the time lapse between date of letter and receipt by the Board was seven months).

However, where there is a U.S. Postal Service cancellation stamp, the question to be decided is not when the postmark or cancellation stamp was affixed, but when did the transfer of custody take place. The transfer of custody takes place when the notice of appeal is deposited in the mails. We have held that the postmark creates a presumption that the transfer of custody took place on the date of the postmark. We have also held that the postmark is *prima facie* evidence that transfer had occurred by that date; but, it does not establish that the transfer could not have taken place on an earlier date.

On this issue we have accepted sworn statements to establish that the transfer of custody preceded the date of the U.S. Postal Service cancellation stamp. In our precedents we have long held that a sworn statement or testimony to the effect that the transfer occurred on an earlier date is credible evidence. *Boyd Contracting Company*, ASBCA No. 2243, 1955 WL 8837 (postmarked 13 May but mailed 10 May); *Allied Contractors, Inc.*, ASBCA No. 5254, 59-1 BCA ¶ 2143 (postmarked 2 October but mailed 27 September).

CONCLUSION

The appeal was timely filed. We have jurisdiction. The motion to dismiss is denied. Appellant shall have 30 days from receipt of this decision to file its complaint. The government shall file a complete Rule 4 within 30 days.

Dated: 28 April 2005

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

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. 54691, Appeal of Premier Consulting & Management Services, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals