

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Teddy's Cool Treats) ASBCA No. 58384
Under Contract No. GOR 12-057)

APPEARANCE FOR THE APPELLANT: Mr. Terreance T. Perkins
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
LTC Peter H. Tran, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS ON THE GOVERNMENT'S
MOTION FOR SUMMARY JUDGMENT

Appellant Teddy's Cool Treats appeals the termination for default of a concession contract. The government moves for summary judgment, alleging that it is undisputed that appellant's owner made sexually explicit remarks and gestures to a female patron, bringing "discredit on the Exchange." The owner vehemently denies the allegations against him.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 26 July 2012, the Army and Air Force Exchange Service (Exchange)¹ awarded Contract No. GOR 12-057 in the amount of \$28,052.16 to appellant to operate a mobile ice cream truck at Ft. Gordon, Georgia. The contract was for a term of two years. (R4, tab 1)
2. The Special Provisions included the following clauses:

**10. CUSTOMER COMPLAINTS AND CLAIMS
(DEC 88)**

Concessionaire will adhere to the Exchange's policy of customer satisfaction guaranteed.... Any disagreement that cannot be resolved between concessionaire and the customer will be decided by the contracting officer....

¹ An enumerated activity under 28 U.S.C. § 1491.

....

**17. CONCESSIONAIRE AND CONCESSIONAIRE
EMPLOYEES (CONCESSION PERSONNEL)
(JAN 00).**

....

h. Concession personnel will abide by applicable regulations and directives and conduct themselves so as not to reflect discredit on the Exchange.

(R4, tab 1, ex. C at 4, 8-9)

3. The General Provisions included the following clauses:

8. TERMINATION (JUN 94)

Relative to termination of this contract, it is mutually agreed:

....

b. This contract may be terminated in whole or in part by either party upon thirty (30) days notice...in writing to the other party.

....

11 DISPUTES (APR 12)

a. All disputes arising under or relating to this contract shall be resolved under this clause.

....

c. ...A claim by the Exchange against the contractor shall be made by a written decision by the contracting officer.

....

f. ...[A] decision by the contracting officer shall be final and conclusive unless within 30 calendar days from the date of contractor's receipt of the final decision, the

contractor appeals the decision to the Armed Services Board of Contract appeals (ASBCA).

(R4, tab 1, ex. A at 3-4)

4. In a Memorandum for the Record dated 22 October 2012, the contracting officer (CO) memorialized that on 5 October 2012, the CO received five sworn statements from appellant's customers describing conduct by appellant that the CO described as "bring[ing] discredit upon the Exchange" (R4, tab 10).

5. Two of the statements relate to 11 September 2012:

Last week, around the 11th of September [name redacted] and I went to the ice cream truck together for her to buy something for herself. While we were waiting in line the driver of the ice cream truck began calling her "Baby." After saying it a few times [name redacted] told the driver "I am not your Baby, quit calling me that!" She was mad and is always uncomfortable going to the truck so we walked away. As we were leaving he continued to apologize and call her "baby."

Last week around the 11th or 12th [of September 2012] I went to the ice cream truck and Teddy the driver of the truck kept calling me baby. I told him to stop calling me that, because that was not my name. After paying for my stuff I walked away and Teddy started to yell out I love you [name redacted].

(R4, tabs 14(B), 14(C))

6. The other three statements relate to an incident or incidents that occurred on 17 September 2012. The statement at Rule 4, tab 14(A) alleges that the owner made sexually explicit comments to a female followed by unwanted sexual gestures. The last two statements allege that the owner made sexually explicit comments to male customers on the same date (R4, tabs 14(D), 14(E)).

7. On 25 October 2012, the CO terminated the contract for default, stating that:

Under the provisions of Clause Number 8.a, Termination, Exhibit A, General Provisions of the contract, **the contract is hereby terminated for default, effective close of business October 31, 2012.** Specifically, you:

- a. Made sexual remarks and gestures toward a female patron during business operation which brings discredit upon the Exchange in violation of Clause Number 17h of Exhibit C, Special Provisions.

(R4, tab 11)

8. On 6 November 2012, CSM Sean T. Fallon, USA, and LTC Louis R. Manning, Commanding, issued a memorandum to “whom it may concern” regarding the incident which stated, in part, as follows:

On 17 September 2012...it was reported that one of the...ice cream vendors...allegedly made inappropriate comments to some of our...students. The alleged incident was reported up through the chain of command, and the vendor was confronted by the chain of command concerning this incident.... We have not received any other issues or reports concerning this vender following this isolated incident.

Mr. Teddy provides a valued service to our students. Additionally, he has acted in a professional manner ever since he was confronted by the chain of command. We have no issues with this vender at this time.

(Bd. corr. file, attach. to Notice of Appeal)

9. On 6 November 2012, SGM Maldonado, Jr., and Mr. Jack London, GS-13, BCSD Director, also issued a memorandum regarding the incident: The memorandum stated, in part, as follows:

On 17 September 2012...it was reported that one of the...ice cream vendors, “Mr. Teddy” allegedly made inappropriate comments to some of the students, which were sexual in nature. The alleged incident was reported up through the chain of command and the vender was spoken to in reference to the incident. After discussions with the vendor and identified Soldiers, we did conclude that the incident that occurred did not warrant a written reprimand or termination. The vendor was made aware that the command has zero tolerance for matters of this nature. [N]o further reports of alleged misconduct [have been received].

(Bd. corr. file, attach. to Notice of Appeal)

10. Appellant's notice of appeal, received by the Board on 13 November 2012, states as follows:

On September 19, 2012, I was asked to report to the office of Command Sergeant Major Fallon, SGM Nelson Maldonado and SFC Bell. I complied and was promptly informed that two days earlier, it had been reported that I had allegedly engaged in some conversations with male patrons that were deemed inappropriate. After learning of these allegations, I was completely forthcoming in my responses and admitted that I may have engaged in a conversation that occurred between other male patrons. This conversation, while insensitive and in poor taste was not with malice. At the conclusion of our meeting, I was told to keep my working relationship with my patrons professional and we concluded that I would do just that. There were no other findings.

I continued to work as I had been in the past until I was presented with a letter of termination dated October 25, 2012 and effective October 31, 2012. The reasons stated for termination was violation of Clause Number 17h which includes "making sexual remarks and gestures toward a female patron during business operation". I was completely shocked at the allegation.

At no time have I ever made sexual remarks or gestures to any female patrons. My principle contention is that the termination of Contract No. GOR 12-057 was tainted by lack of due process. I never received a reasonable opportunity to present evidence on my behalf nor was I ever questioned about the alleged incident or allegations that occurred on September 17, 2012.... I find this process troubling for the Exchange to make a major decision of terminating my contract for default without taking my long history over ten consecutive years in good standing and performing admirably into consideration.

11. We docketed the appeal as ASBCA No. 58384 on 14 November 2012.

12. On 1 May 2013, the government moved for summary judgment, alleging that there are no disputed issues of material fact and that it is entitled to summary judgment as a matter of law. Appellant opposes the granting of summary judgment.

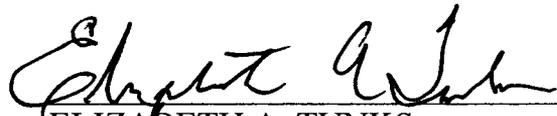
DECISION

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of proof and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

In our opinion, there are two issues that preclude summary judgment. First, appellant's vehement denial of the allegations against him, in and of itself, raises a disputed issue of material fact sufficient to preclude summary judgment. Second, there is a disputed issue of material fact as to whether the owner's conduct actually brought discredit on the Exchange such that a termination for default was appropriate.

The government's motion for summary judgment is denied.

Dated: 3 December 2013



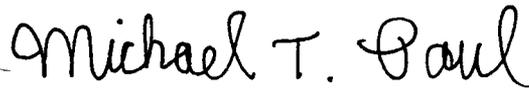
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



MICHAEL T. PAUL
Administrative Judge
Acting 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. 58384, Appeal of Teddy's Cool Treats, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals