

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lankford-Sysco Food Services, Inc.) ASBCA No. 52170
)
Under Contract No. SPO300-96-D-2901)

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON APPELLANT'S MOTION TO DISMISS WITHOUT PREJUDICE

Appellant filed this appeal to obtain an interpretation of certain contract terms affecting payment. According to appellant, the Department of Defense Inspector General (DoD IG) conducted an investigation into appellant's practices (app. reply at 3). Appellant requested a contracting officer's decision "that would demonstrate to the investigators that Appellant . . . [was] performing [its] government contracts lawfully" (*id.* at 4). When no decision was issued after repeated requests, this appeal, seeking interpretation of contract terms, was filed as from a deemed denial (*id.*). The pleadings are complete and the appeal is in discovery. Both parties agree that the DoD IG investigation is over (app. reply at 3-4; resp. br. at 2). According to respondent, the contract has expired (resp. br. at 2).

Appellant asserts that it has obtained the contract interpretation it sought through deposition testimony from respondent's employees and it now seeks to withdraw the appeal without prejudice (app. mot. at 1-3). Appellant seeks dismissal *without prejudice*

because, in the event of another DoD investigation, it would again seek an interpretation by the Board in its defense (app. reply at 4).^{*} Respondent has objected, claiming that it is prejudiced because dismissal would prevent it from conducting discovery while events are fresh in the minds of potential witnesses. It also argues that appellant has not shown good cause. (Resp. br. at 3-4)

Board Rule 30 provides:

Rule 30. Suspensions; Dismissal Without Prejudice

The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

We look to the Federal Rules of Civil Procedure and cases decided thereunder for guidance in applying our own Rules.

The granting of a motion to dismiss without prejudice “is within the sound discretion of the court, and its order is reviewable only for abuse of discretion.” *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976). The party filing an action may freely withdraw it without prejudice unless legal harm to the other party is shown, and a tactical advantage or threat of a future action will not bar such a voluntary dismissal. *Id.* In balancing the parties’ rights, certain matters may be considered.

Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff’s diligence in bringing the motion; any “undue vexatiousness” on plaintiff’s part; the

* Unlike the General Services Board of Contract Appeals, we do not have a rule specifically addressing voluntary dismissals. Thus, reinstatement within three years would not be foreclosed. *Cf. Bonneville Associates, Limited Partnership v. Barram*, 165 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 40 (1999).

extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss.

Zagano v. Fordham University, 900 F.2d 12, 14 (2d Cir. 1990), *cert. denied*, 498 U.S. 899 (1990).

The Board received appellant's appeal notice on 6 May 1999. Its dismissal motion was filed 11 April 2000. There is no complaint as to appellant's conduct. We are persuaded from the timing and the lack of complaint that appellant was diligent in bringing the motion and "vexatiousness" is not an issue. Further, we have no claim that respondent has incurred inordinate expense or that relitigation would involve duplicative expense. Indeed, respondent complains that it has not conducted enough discovery, leading us to infer the opposite. Finally, we find appellant's reason for seeking dismissal sufficient to meet the "good cause" standard. In this regard, there is no present controversy and the relief sought from the Board amounts to an advisory opinion which, according to appellant's explanation, is rendered unnecessary by disclosures obtained through discovery. We are persuaded that respondent will suffer no legal harm if we grant appellant's motion. Accordingly, the appeal is dismissed without prejudice.

Dated: 25 May 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 52170, Appeal of Lankford-Sysco Food Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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