

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
John L. Jones) ASBCA No. 56138
)
Under Contract Nos. NAFFB1-02-S-0004, *et al.*)

APPEARANCE FOR THE APPELLANT: Mr. John L. Jones

APPEARANCES FOR THE RESPONDENT: COL Anthony M. Helm, JA
Chief Trial Attorney
MAJ Timothy A. Furin, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMPLER
ON RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

This matter comes before us on respondent’s motion for summary judgment. The appeal is from a contracting officer’s final decision denying appellant’s claim. Respondent, the Fort Bragg Club System (FBCS), is a non-appropriated fund instrumentality (NAFI) of the Department of the Army. The Board has jurisdiction under the disputes clauses of the contracts and the contracts are not subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.¹

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 24 March 1980, the FBCS awarded Contract No. 521-80, an entertainment contract, to John L. Jones.² The contract was memorialized on a seven-page form and called for Mr. Jones to provide one musician or entertainer who would play a variety of music between 2030 and 2330 hours on 24 March 1980 at a location called the Cos Club. Mr. Jones would be paid a fixed price of \$50.00 in exchange for “satisfactory performance (as determined by the Contracting Officer or [his] designated representative)....” Paragraph three of the contract provided:

¹ The typical Disputes clause provides for a 90-day period to appeal to this Board and that our decision is final and not subject to further appeal. (*See, e.g.*, R4, tab 450 at 8-9; R4, tab 572, section I at 8)

² Mr. Jones sometimes performed under the name Master B. DJ’s Karaoke & Video.

3. HOURS/PERFORMANCE: Musicians/entertainers will perform continuously for 45 minutes after which time a break of 15 minutes is permitted. If entertainment is required beyond the scheduled hour(s) shown, and both parties are mutually agreed, the NAFI shall pay for each additional half hour of performance, the sum of \$_____. Musicians/entertainers will perform continuously for 45 minutes after which time a break of 15 minutes is permitted. [blank spaces and underlining appear in the original]

(R4, tab 1, ¶¶ 2, 3)

2. Over the next 26 years, the FBCS awarded Mr. Jones several hundred NAFI contracts to provide entertainment services at numerous clubs on Fort Bragg. Most of the contracts contained a provision similar to paragraph three of the original contract. (R4, tabs 2-628)

3. For several years, contracts awarded to Mr. Jones appeared on a four-page “ENTERTAINMENT CONTRACT” form containing the following provision: “3. Musicians/entertainers will perform continuously for 45 minutes after which time a break of 15 minutes is permitted. An intermission of 15 minutes shall also be taken.” The blank in the second sentence was marked out with “X”s in all but one contract. (R4, tabs 30-58) Later contracts awarded to Mr. Jones contained only the first sentence (R4, tabs 58-80).

4. Virtually all contracts from the 1980’s and 1990’s contained in the Rule 4 file are incomplete. Because complete contracts do not exist, we were unable to confirm the presence of a similar HOURS/PERFORMANCE clause in all of Mr. Jones’ contracts. For purposes of this motion, however, the FBCS concedes, as alleged by Mr. Jones, that a provision with language similar to the ones noted above did exist and was incorporated into all of Mr. Jones’ contracts. (FBCS mot. ¶ 7)

5. After every performance, an Entertainment Performance Checklist (EPC) was completed by the club manager on duty and submitted to the NAFI contracting officer as a receiving report for payment. There was a blank space where the contractor could sign the EPC as well. Mr. Jones signed many of these forms. There is no evidence that Mr. Jones ever reported any directions not to take a break or any violation of contract terms to the contracting officer via the EPCs. (R4, tabs 529A, 530A, 531B, 532A-539A, 540B, 541A-548A, 549B, 550A-554A, 555E, 556A-559A, 560B, 561A, 571A, 573A-584A, 585B, 586A, 588A-590A, 592A-595A, 596B, 599A-602A, 604B, 606A-607A, 609A-616A, 618A-620A, 622A-624A, 626A-628A; FBCS mot., ex. 2, declaration of Jonee Hobson ¶ 3 (Hobson decl.))

6. By letter dated 16 November 2006, Mr. Jones submitted a claim to the NAFI contracting officer at Fort Campbell, Kentucky, seeking \$145,382.43 as compensation under the standard HOURS/PERFORMANCE clause of the contracts “for all of those 15 minutes from April 1980-September 2006.” Mr. Jones contended that he “worked as a DJ with the full knowledge of all club managers that the 15 minute break was not being taken.” Mr. Jones cited two incidents as proof of his allegation that he was directed not to take his 15 minute breaks:

One weekend during the mid 80’s the NCO club manager Mr. William (Bill) Newton said that the DJ’s were going to have to begin taking the 15 minute break every hour. The 15-minute brake (sic) lasted one weekend because the customers complained so loudly about the music stopping until we were told to not take the break. All club managers at the NCO Club, Officer’s Clubs and Sports USA knew we were working without taking the permitted 15 minute break.

On one occasion at Sports USA in 2003 the club manager named Reynaldo (Ray) Farins called me in to inform me that the karaoke music stopped 10 minutes early. Even though all the customers had left Sports USA I assured Ray that I surely did not want to beat him out of any time. This is an example of the manager expecting 60 minutes of karaoke music without taking a 15 break [sic]. [Emphasis in original]

(R4, tab 629 at 1)

7. By letter dated 28 March 2007, Mr. Bruce Jones, the contracting officer (CO), sent Mr. Jones a questionnaire to obtain additional details and documents concerning the claim. By letter dated 2 April 2007, Mr. Jones provided a 5-page response. The pertinent questions asked and Mr. Jones’ responses were as follows:

Q: For each separate contract for which you are claiming: a copy of every letter or writing from Government/NAFI personnel directing that you work through your breaks.

A: there was no written correspondence given about working through the 15-minute break each hour...I (we) were given verbal instructions to not take the hourly break by the club manager, Mr. William (Bill) Newton....

Q: For each separate contract...a description of ever [sic] conversation with a Government/NAFI employee (and an

identification of the employee in which he was directed to work through contract breaks and a description of the language that was used indicating what steps, actions, or sanctions that would or could be taken by the Government/NAFI against yourself if you failed to work through breaks.

A: Again, there were no writings directing me or any other DJ's to work through breaks. It was simply a verbal statement by Mr...Newton to continue playing and not take the breaks....There were never any conversations of what steps, actions, or sanctions that would or could be taken by the Government/NAFI against me or any other DJ if I (we) failed to work through breaks. We simply continued to provide the music as directed by the club manager....

Q: [a] copy of every letter or other writing you provided to the Government NAFI contracting person notifying them that you were being improperly required to work through your breaks and requesting relief.

A: I did not write or send any letters to any Government NAFI contracting person notifying them that I was being improperly required to work through my breaks....

(R4, tab 639 at 2, 3)

8. By final decision dated 11 May 2007, the contracting officer denied appellant's claim in its entirety (R4, tab 640).

9. By letter dated 3 August 2007, appellant sent a notice of appeal to the contracting officer. The contracting officer forwarded it to this Board by letter dated 15 August 2007.

10. Mr. Jones states in his complaint that he "did not notice until going through [his] contracts during November 2006 that the 15-minute break was authorized." Mr. Jones states further:

I should have read my contract. But it is also true that Mr. Newton and the club managers who followed him had the same contract and they should have read the contract. One of the responsibilities of club managers is to make sure that the contractor is complying with the guidelines of the contracts....

...[I]f they knew the DJ's were not taking the 15-minute break than [sic] a reasonable person would assume they knowingly allowed DJ's to violate their contract....

(Compl. at 3)

11. Shortly after Mr. Jones' appeal was filed, Ms. Sheila Blue, a NAFI purchasing agent, determined that the contracting files at Fort Campbell only contained Contract No. NAFFB1-02-S-0004, Mr. Jones' last contract. As a result, Ms. Blue contacted Ms. Jonee Hobson, a contract specialist at Fort Bragg to locate additional documents. Despite contacting current club managers and former contracting officials, Ms. Hobson was unable to locate any records that existed before 1997 because they had been destroyed after they had passed the records retention date as "specified in the Army's Modern Army Recordkeeping System." Ms. Hobson sent copies of all the records she found to Ms. Blue and Mr. Jones. Those records were ultimately incorporated into the Rule 4 file. (FBCS mot., exs. 1, declaration of Sheila Blue ¶ 3 (Blue decl.); 2, Hobson decl. ¶ 5)

12. Ms. Blue also contacted Mr. Jones, explaining that the contracting office had very little information for the time period 1985 through 1997. Ms. Blue asked whether he had any information for the time period in addition to the contracts from the 1980's he had attached as exhibits to his claim. In January 2007, Mr. Jones sent several packages of information responding to Ms. Blue's request including 17.50 pounds of contract documents from the time period 1985 through 1997. However, most of the contracts from the 1980's and 1990's were incomplete. All of the files provided by Mr. Jones are included in the Rule 4 file. (R4, tab 632; FBCS mot., ex. 1, Blue decl. ¶ 4)

13. In a 17 December 2007 declaration submitted by the respondent, Mr. Newton, who served as a NCO Club Manager (*see*, SOF ¶¶ 6, 7) asserts that he knows the appellant "very well" and Mr. Jones often performed several times a week. Mr. Newton's recollection is, in pertinent part, as follows:

4. I am aware that Mr. Jones' entertainment contracts authorized him to take a 15 minute break after performing for 45 minutes. I am also aware of his allegation that I told him in the mid-1980's to take his 15 minute break and then told him not to take any breaks because customers were complaining. Because of the passage of time, I do not recall these specific conversations. Nor do I recall ever having any general conversation where breaks were the topic of discussion.

5. I do recall, however, Mr. Jones used an assistant disc jockey when performing most of the time during the early 1980's.... I

do remember Mr. Jones walking around the club and taking breaks on evenings when he performed.

(FBCS mot., ex. 3, declaration of William Newton ¶ 4 (Newton Decl.))

14. Mr. Jones, in his response to the motion, contends that he sometimes paid other DJ's to work with him so they would work while he took his breaks. Mr. Jones did not provide any statements from DJ's that he hired to work with him. Mr. Jones interviewed other DJ's that worked at Fort Bragg regarding whether they were aware of the 15 minute break and whether they took the break. Mr. Jones attached exhibits to his reply to the motion regarding these interviews³. Mr. Jones also provided as an exhibit a signed but unsworn statement from Ms. Tina Turner Jones, who states that she was a regular customer at the clubs where Mr. Jones performed between 1984 and 2004 and that for one week, breaks were taken but discontinued because of customer dissatisfaction. (App. reply. at 1, exs. 2, 7)

15. The record contains many designations of club managers as Contracting Officer's Representatives. None of the designations authorized any representative to change the contracts in any respect. While none of the designations appoint Mr. Newton as a representative, we assume for the purposes of the motion that he was appointed, with the same authority as the other club managers. (R4, tabs 451, 493, 495, 511, 516, 517, 521)

16. As stated above, we do not have the complete copy of most of the contracts in the record. There are, however, examples of clauses dealing with contracting authority in some of the contracts portions we have:

EXTRAS: Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor [sic] have been authorized in writing by the Contracting Officer.

(R4, tab 12 at 5)

G.1. A Contracting Officers' Representative (COR) shall be appointed for this contract. Duties are as follows: (1) inspection and acceptance of services rendered; (2) notification to the Contracting Officer of any deficiencies with recommendations as to corrective actions; (3) only the

³ These exhibits are Mr. Jones' unsworn typewritten summaries of conversations he had with a number of disc jockeys regarding whether they were aware of the 15-minute break provision and whether they took the breaks.

Contracting Officer has the authority to issue a change order modifying performance; ...

(R4, tab 450 at 8)

CONTRACT CLAUSES
(NONAPPROPRIATED FUND SUPPLY AND SERVICE
CONTRACTS)

....

I-1 DEFINITIONS (Sep 1984)

....

(B) "Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts on behalf of the nonappropriated fund instrumentality which is a party to this contract and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(R4, tab 450 at 9)

G.1.3 Only the Contracting Officer has the authority to issue a change order modifying performance.

(R4, tab 572 at G-1)

17. The record contains at least one letter from the contracting officer to Mr. Jones advising him that "...the Contracting Officer's Representative is not authorized to change any of the terms and conditions of the contract." (R4, tab 629 at 36)

DECISION

Summary judgment may be granted where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Board resolves all inferences in favor of appellant, as the party against whom the

motion is directed. *JT Construction Co.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,464.

The FBCS moves for summary judgment on the ground that there are no genuine issues of material fact and that appellant's claim relies on an unreasonable interpretation of the contracts. As a second ground, the FBCS moves for summary judgment on the basis of *laches*. Appellant opposes the motion on the grounds that the FBCS breached the contract by Mr. Newton's direction not to take the 15-minute breaks and by failing to require Mr. Jones to take his 15-minute breaks.

The HOURS/PERFORMANCE clauses at issue in the appeal all contain unambiguous language that plainly permits the contractor to take a 15 minute break after playing 45 minutes. No provision of the contracts obligated the FBCS to ensure Mr. Jones took his authorized 15 minute breaks. Because we are deciding a motion for summary judgment, in our Statement of Facts we credited appellant's facts and resolved all inferences in his favor.⁴

Appellant relies solely on two instances to establish that he was directed not to take his contractually permissible breaks. The first is an allegation that during the mid-80's, Mr. Newton directed him not to take breaks (*see*, SOF ¶¶ 6, 7). Mr. Newton denies this (SOF ¶ 13), but for these purposes, we can credit Mr. Jones' allegation.⁵ It has not been alleged, however, and there is no proof at all in the large record in this appeal, that Mr. Newton had any contracting authority whatsoever.⁶ He was an NCO club manager (*see*, SOF ¶¶ 6, 7, 13). Therefore, any direction Mr. Jones received changing the terms of the contract by deleting his contractual right to 15 minute breaks was from an unauthorized individual. *Winter v. CATH-dr/BALTI, Joint Venture*, 497 F.3d 1339, 1344-45 (Fed. Cir. 2007). The rather large record in this appeal does not reveal that Mr. Newton had any contractual authority. We conclude that the FBCS is entitled to summary judgment as a matter of law as to any directions Mr. Newton may have given with respect to the 15-minute breaks.

⁴ We note that appellant has submitted unsworn statements and statements containing gross hearsay. *See*, FRCP 56(e). We could require Mr. Jones (appearing *pro se*) to refile his statements in affidavit or declaration form, but decline to do so because none of them, if sworn, would change the result.

⁵ Appellant's evidence and argument leaves unexplained how he was directed not to take breaks in the 1980's but remained unaware of the breaks until 2006. (*Compare*, SOF ¶¶ 6, 7 with ¶ 10).

⁶ Appellant leaves unexplained how Mr. Newton's direction on one contract could serve as a direction on hundreds of separate contracts, many of which Mr. Newton had no responsibility for.

Mr. Jones' second instance (*see*, SOF ¶ 6) involves another club manager speaking to him about karaoke music ending 10 minutes early. Even if appellant had provided enough information concerning the incident so we could determine it was relevant to the issue before us, it would suffer from the same authority difficulty as Mr. Newton's direction. The FBSC is entitled to summary judgment as a matter of law with respect to this matter.⁷

Since appellant has not established that anyone with authority changed any of the contracts, respondent is entitled to summary judgment.

CONCLUSION

The FBSC's motion for summary judgment is granted. The appeal is denied.

Dated: 18 June 2008

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

I concur

I concur

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

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

⁷ Because of the result we reach, we do not consider respondent's *laches* defense.

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. 56138, Appeal of John L. Jones, rendered in conformance with the Board's Charter.

Dated:

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