

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Maria Lochbrunner) ASBCA Nos. 57235, 57236
)
Under Contract No. 00-018-04-051)

APPEARANCE FOR THE APPELLANT: Christopher A. Wolf, Esq.
Kurz Pfitzer Wolf
Stuttgart, Germany

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ John C. Dohn, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

On 18 May 2010 appellant appealed to the ASBCA from the contracting officer's (CO) 5 February 2010 final decision that denied appellant's "appeal" from the CO's default termination of, and its monetary claims under, the captioned contract. The Board docketed the default termination as ASBCA No. 57235 and appellant's monetary claim as ASBCA No. 57236. On 31 August 2010 respondent moved to stay the proceedings and to dismiss the captioned appeals on the ground that they were filed more than 90 days after appellant received the CO's final decision and so the Board lacks jurisdiction to entertain the appeals.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. On 26 March 2004 the Army and Air Force Exchange Services (AAFES) awarded concession Contract No. 00-018-04-051 (contract 051) to Maria Lochbrunner (appellant) to provide barber/beauty/nail services to AAFES patrons at Patch Barracks, Stuttgart, Germany (R4, tab 1).

2. Contract 051 includes a Disputes clause providing that the contract is subject to the Contract Disputes Act of 1978, as amended, and a Choice of Law clause providing that the contract shall be interpreted and governed by U.S. Government contract law as applied by the ASBCA and the U.S. Court of Federal Claims (R4, tab 1 at 12, 36).

3. The 23 March 2009 letter of AAFES CO Debbie Rogers notified appellant of the termination of contract 051, effective at the close of business 28 March 2009, citing the contract's general provision 8a, which provides for termination for breach of contract by the other party. The letter did not state that it was the CO's decision or notify appellant of its appeal rights. (R4, tab 10)

4. On 22 July 2009 appellant's attorney filed claims with AAFES in the amount of € 36.210,43, alleged "the improper early termination of the contract" and stated: "If you will not meet our [deadline of 7 August 2009], we will advise our client to proceed with legal measures and enforce her claims in court. We want to point out, that the district court in Stuttgart will be responsible, regardless of the choice of law in the contract." (R4, tab 15 at 2)

5. CO Rogers' 3 September 2009 decision replied to appellant's 22 July 2009 letter, summarized contract 051's provisions that AAFES contracts are interpreted and governed by U.S. Government contract law as applied by the ASBCA and the U.S. Court of Federal Claims, revised "the notice of termination, so that [appellant] will have a full opportunity to her appeal rights," identified four grounds for the default termination and advised appellant of its right to appeal to the ASBCA within 90 days of receipt of the decision (R4, tab 16).

6. The 17 November 2009 letter of appellant's counsel referred to CO Rogers' 3 September 2009 letter; alleged, under the heading "Appeal of Termination for default and Compensation for Damages," that, despite the terms of contract 051, it was a "labour contract" under German law and that "[a]ny alleged confessions to a wrongdoing of our client have already been appealed to in our letter of July 22nd 2009"; stated that appellant's € 36.210,43 claims would be enforced in "the Courts in Stuttgart Germany"; and did not state any intent to appeal to the ASBCA (R4, tab 17).

7. CO Rogers' 5 February 2010 final decision denied appellant's claims and advised appellant that it had 90 days from the date of receipt of that decision to appeal to the ASBCA, which decision appellant received on 8 February 2009 (R4, tab 18).

8. On 18 May 2010 appellant filed its appeal from the CO's 5 February 2010 decision to the ASBCA.

9. On 1 September 2010 the Board confirmed that respondent had sent appellant a copy of its 31 August 2010 motion to dismiss these appeals for lack of jurisdiction. On 2 September 2010 the Board ordered appellant to respond to that motion within 30 days, and repeated such order on 18 October and 9 December 2010.

10. Appellant's 14 January 2011 letter to the ASBCA stated that it had not received respondent's motion to dismiss and stated:

[W]e still see German jurisdiction applicable. The contract between [AAFES] and the appellant is under mandatory German laws to be considered as a labor contract. Therefore German law applies. Opposing contract terms are considered void under German law. We have sent a request to German statutory pension insurance scheme (Deutsche Rentenversicherung Bund) for evaluation on September 15th 2010. We have received no response yet.

If the German statutory pension insurance scheme will find mandatory German labor laws applicable, as we assume it will, we will file a lawsuit in Germany.

11. On 19 January 2011 the Board sent appellant a copy of respondent's motion.

12. Appellant's 7 February 2011 letter responding further to the motion to dismiss stated that the issues under contract 051 "are governed under German jurisdiction"; despite its classification "as a concession contract" it actually is a labor contract; "[u]nder mandatory German law, and under ruling of the Federal Labor Court, [appellant] qualifies as employee regardless any other clauses in the contract"; appellant was an AAFES employee under German jurisdiction pursuant to Article 56 of the 19 June 1951 NATO Status of Forces Agreement, as amended 18 March 1993; and thus the ASBCA should postpone deciding the motion until a "German statutory pension insurance scheme qualifies the contract as a labor contract" which will make an ASBCA decision "non-binding and irrelevant."

13. The Board's 14 February 2011 order gave respondent 30 days to address the legal implications of the statement "Appeal of Termination for default and Compensation for Damages" in appellant's 17 November 2009 letter to the CO, and the CO's statement in her 5 February 2010 decision, "[i]n regard to your appeal of Termination for default and compensation for damages in [appellant's] letter of 17 November 2009."

14. Respondent's 16 March 2011 response to the Board's 14 February 2011 order asserted that appellant's 17 November 2009 letter expressed no unequivocal intent to appeal to the ASBCA, but rather its intent to litigate in a German court, and hence is not within the precedents for appeals filed with contracting officers. Respondent states that appellant has sought recourse on its claims by initiating proceedings before the German statutory pension insurance scheme. (Gov't br. at 3-4, encl. 2)

15. The Board's 17 March 2011 order directed appellant to respond within 30 days to the government's 16 March 2011 supplemental brief, and reiterated that order on 25 April 2011, extending appellant's response to 16 May 2011. Appellant has not responded to the Board's order.

DECISION

Title 41 U.S.C § 7102(a) provides that the Contract Disputes Act of 1978 (CDA) applies to contracts of non-appropriated fund activities described in 28 U.S.C § 1491. AAFES is a non-appropriated fund activity described in 28 U.S.C. § 1491(a)(1). The CDA and contract 051's Disputes clause (SOF ¶ 2) provide the Board with jurisdiction of these appeals. *See Chum Hooper T/A Eye 4Sports*, ASBCA No. 56755, 09-2 BCA ¶ 34,211 at 169,121.

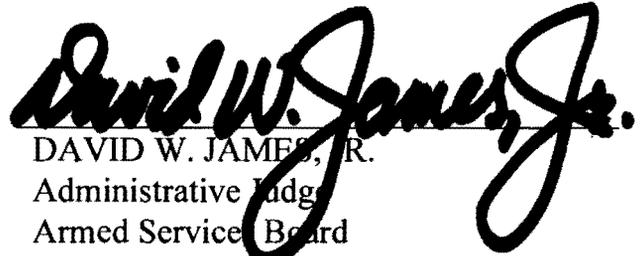
The CDA, 41 U.S.C. § 7104(a), provides: "A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title." That 90-day period in which to appeal to an agency board is part of a statute waiving sovereign immunity which must be strictly construed and which cannot be waived by a board. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). Appellant first appealed to the ASBCA on 18 May 2010, 99 days after it received the CO's 5 February 2010 final decision (SOF ¶¶ 7, 8). That appeal was plainly untimely.

Appellant's 17 November 2009 letter to the CO expressed no unequivocal intent to appeal to the ASBCA, but rather appellant's intent to litigate in a German court (SOF ¶ 6). *See Stewart-Thomas Industries, Inc.* ASBCA No. 38773, 90-1 BCA ¶ 22,481 at 112,836 (notice of appeal must express an election to appeal to this Board). Therefore, appellant's 17 November 2009 letter did not come within the "misdirected appeal" rule in *Contraves-Goerz Corp.*, ASBCA No. 26317, 83-1 BCA ¶ 16,309 at 81,080 (valid timely appeal to the agency CO is tantamount to an appeal to the ASBCA).

Appellant's responses to the motion do not explicitly address the timeliness of its 18 May 2010 notice of appeal to the ASBCA, and tacitly concede that such appeal was untimely.

Accordingly, we grant respondent's motion and dismiss the appeals for lack of jurisdiction.

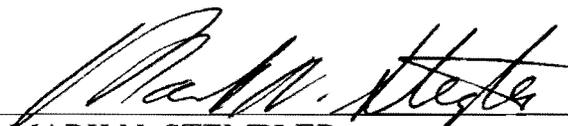
Dated: 13 June 2011



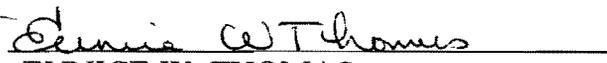
DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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 Nos. 57235, 57236, Appeals of Maria Lochbrunner, rendered in conformance with the Board's Charter.

Dated:

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