

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Harry Richardson ) ASBCA No. 57582  
 )  
Under Contract No. EDWA-F-11C0008 )

APPEARANCE FOR THE APPELLANT: Mr. Harry Richardson  
Rosamund, CA

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Jared D. Minsk, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK  
DISMISSING THE APPEAL FOR LACK OF JURISDICTION

This appeal challenges a termination for convenience of a services contract with a Non-Appropriated Fund Instrumentality (NAFI) of the United States Air Force. In lieu of filing an answer, the government moved for summary judgment, contending that the termination was proper. Appellant, Mr. Harry Richardson, never responded to the government’s motion, although he was given two opportunities to do so. Because the Board’s review of the record failed to reveal evidence that Mr. Richardson submitted a claim to the contracting officer, we invited the parties to file submissions addressing that matter and its implications upon the Board’s jurisdiction to entertain the appeal. Appellant has not responded. The government has responded, and now requests dismissal of the appeal for lack of jurisdiction on the ground that no claim or contracting officer’s final decision exists. We agree, and dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Edwards Aero Club is a NAFI located at Edwards AFB, California (R4, tab 1). Ms. Constance Farmer serves as the manager of the Edwards Aero Club (compl. at 1).<sup>1</sup>

Ms. Farmer and Mr. Richardson have been in a “domestic partnership” since 1993 (compl. at 2).

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<sup>1</sup> We have deemed Mr. Richardson’s notice of appeal and attachments to constitute the complaint.

In November 2010, Edwards Aero Club entered into Contract No. EDWA-F-11C0008 with Mr. Richardson to provide services as an air frame and power plant mechanic from 22 November 2010 until 21 November 2011. The contract contains several clauses listed under "GENERAL PROVISIONS." The clause entitled "TERMINATION FOR CONVENIENCE (JAN 2005)" states in pertinent part:

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the NAFI... To the extent that this contract is for services and is so terminated, the NAFI shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination....

(R4, tab 1 at 6) The contract also contains the clause entitled "DISPUTES (NOV 2005)." It designates this Board to hear appeals from contracting officer final decisions and states in relevant part:

Except as otherwise provided in this contract, any dispute or claim concerning this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall state his decision in writing and mail or otherwise furnish a copy of it to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Armed Services Board of Contract Appeals, and the decision of the Board shall be final and conclusive; provided that if no such appeal is filed, the decision of the Contracting Officer shall be final and conclusive.

(R4, tab 1 at 5)

On 7 March 2011, Ms. Carolyn Duny, Chief of Resource Management, held a meeting with Ms. Farmer. Ms. Farmer was asked directly if she was engaged in a domestic relationship with Mr. Richardson. Ms. Farmer answered in the affirmative. Ms. Duny informed Ms. Farmer that Mr. Richardson's contract would be terminated. (Compl. at 2)

On 9 March 2011, the contracting officer issued a contract modification which terminated for convenience Edwards Aero Club's contract with Mr. Richardson (compl. at 2).

Mr. Richardson appealed the termination for convenience of his contract by notice of appeal dated 31 March 2011, stating the following:

After reviewing the contract and all of the attachments I can not [sic] find good cause for the termination of the contract. I am therefore requesting that my contract be reviewed and a determination be made as to the validity of the reason for the termination, since no where [sic] in any of the contract or in any of its attachments does it refer to relationships between coworkers being a reason for contract termination nor does it state that such relationships are forbidden. Additionally, I have not been paid the funds that are owed to me for services performed under the contract for the period of February 2011 and March 2011.

Mr. Richardson requested that his contract be reinstated. (R4, tab 3 at 2)

There is no indication in the record that, prior to filing his notice of appeal, Mr. Richardson submitted a claim to the contracting officer pursuant to the Disputes clause of the contract, or 41 U.S.C. § 7103(a)(1). There is also no indication of a contracting officer's final decision upon any claim.

#### DECISION

Historically, we have not treated disputes involving contracts with most NAFIs to be within the jurisdiction conferred upon us by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101 *et seq.* *Commercial Offset Printers, Inc.*, ASBCA No. 25302, 81-1 BCA ¶ 14,900 at 73,707 (concluding that, under 41 U.S.C. § 602, which is now recodified at 41 U.S.C. § 7102(a), only contracts with those NAFIs described in sections 1346 and 1491 of Title 28, which are military exchange activities, are subject to the CDA); *see also Mid-America Officials Ass'n*, ASBCA No. 38678, 89-3 BCA ¶ 22,231 at 111,775; *San Antonio Foam Fabricators*, ASBCA No. 36637, 88-3 BCA ¶ 21,058 at 106,352. However, in addition to CDA appeals, our charter also permits us to entertain appeals "pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative." Armed Services Board of Contract Appeals Charter, 48 C.F.R. ch. 2 app. A ¶ 1(b) (2010). Under this authority, we have frequently exercised jurisdiction over NAFI contract disputes pursuant to the terms of the contracts' Disputes clauses. *San Antonio Foam Fabricators*, 88-3 BCA ¶ 21,058 at 106,352; *Commercial Offset Printers*, 81-1 BCA ¶ 14,900 at 73,707. Recently, a question has arisen as to whether the doctrine barring us from exercising CDA jurisdiction over contracts with most NAFIs remains

valid. *See Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc) (invalidating the NAFI doctrine's restrictions upon the jurisdiction of the United States Court of Federal Claims).

We do not have to decide here whether our jurisdiction respecting NAFI contract disputes remains defined as it has historically, or whether the CDA now applies. Regardless of whether our jurisdiction is governed by the contract's Disputes clause or by the CDA, a prerequisite to entertaining Mr. Richardson's challenge to the termination for convenience, and his claim for contract payments, is his submittal of a claim to the contracting officer, followed by a contracting officer's final decision. There is no evidence he has submitted a claim upon that matter to the contracting officer for a decision.

The Disputes clause in this contract provides that any claim that is not resolved by agreement "shall be decided by the Contracting Officer." It is that decision that may then be appealed to this Board. (R4, tab 1 at 5) In *Terry Wray*, ASBCA No. 40577, 91-1 BCA ¶ 23,556, the Board was presented with the very circumstances existing here. There, appellant entered into two service contracts with a NAFI that essentially contained the same clauses for their termination for convenience, and governing disputes, that are present here. After the NAFI "cancelled" the contracts, the appellant filed an appeal with this Board, seeking damages for breach of contract. In dismissing the appeal for lack of jurisdiction, the Board explained:

The "Disputes" clauses require that contractor claims must be decided by the contracting officer, in writing. The record indicates that appellant did not request or receive a contracting officer's decision prior to taking an appeal to the Board. Moreover, the mere cancellation of the contracts was not a decision concerning a claim from appellant, nor was it a decision asserting a Government claim against appellant. [Citations omitted]

Accordingly, the appeal is dismissed for lack of jurisdiction.

*Id.* at 118,106. Thus, under *Terry Wray*, in the absence of a claim and final decision the Board lacks jurisdiction over an attempt to directly appeal a NAFI's cancellation of a contract. Very recently, the Board reiterated this principle in *Charles Mullens*, ASBCA Nos. 56927, 57432, slip op. at 8 (13 Oct. 2011), where an attempt to directly appeal from a NAFI's No Fault termination of a contract, instead of from a decision upon a contractor claim, was dismissed for lack of jurisdiction.

Similarly, under the CDA, the linchpin of the Board's jurisdiction over any appeal is the initial submittal of the claim to the contracting officer, followed by a final decision. 41 U.S.C. §§ 7103-04. In a recent appeal of the termination for convenience of a contract subject to the CDA, the Board reiterated that "[a]bsent a claim submitted to the contracting officer, the Board has no jurisdiction over [the appellant's] challenge to the termination for convenience." *CME Group, Inc.*, ASBCA No. 57446, 11-2 BCA ¶ 34,792 at 171,252. Consequently, whether our jurisdiction is governed by the CDA, or only by the Disputes clause, because Mr. Richardson has not submitted a claim to the contracting officer upon the subject of this appeal, we lack jurisdiction to entertain it, and it should be dismissed.

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

Dated: 9 December 2011



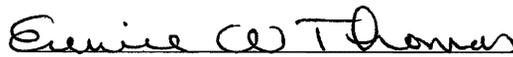
MARK A. MELNICK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur



MARK N. STEMPLER  
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. 57582, Appeal of Harry Richardson, rendered in conformance with the Board's Charter.

Dated:

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