ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Pacrim Pizza Company	)	ASBCA No. 51608
	)	
Under Contract No. 003-0693-0603	)	

APPEARANCE FOR THE APPELLANT: Robert M. Cambridge, Esq.
Arlington, VA

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Julius Rothlein, Esq.
Trial Attorney
Office of Counsel
Commandant Headquarters, USMC
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision terminating the captioned nonappropriated funds (NAF) contract for default. The contract, which was for fast food services, was terminated, *inter alia,* because of sexual harassment of women employees at appellant's place of business. The parties have elected the Board's Rule 11 procedure. We deny the appeal.

FINDINGS OF FACT

1. Contract No. 003-0693-0603 between Morale, Welfare and Recreation (MWF), "a nonappropriated fund instrumentality of the United States Government, located at Marine Corps Air Station, Iwakuni, Japan," and appellant, Pacrim Pizza Company, was executed on 24 June 1993. The service to be provided by appellant was a fast food operation specializing in pizza, deli sandwiches and pastries. Appellant was also given rights to an exclusive pizza delivery service. The period of performance was to be 10 years. Pursuant to clause 7.r.(1) a commission of 16 percent of total sales was to be paid to MWR by appellant. (R4, tab 1)

2. The inclusion of certain clauses was mandated by DoD (Department of Defense) Instruction 4105.67 (resp. br., enc. 1). In accordance with that regulation, the contract contained Clause 21, "Disputes," under which the contractor could appeal a contracting officer's decision to this Board; Clause 24, "Default"; and Clause 27, "Equal

Employment Opportunity" (EEO). The EEO clause prohibited discrimination in the workplace, made non-compliance grounds for cancellation, termination or suspension, and was "[a]pplicable to all purchases in excess of $10,000 unless otherwise exempt (FAR 22-810)." The "Default" clause, in relevant part, provided for termination of the contract:

> If the contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the contracting officer may authorize in writing) after receipt of notice from the contracting officer specifying such failure.

(R4, tab 1)

3. Clause 7.k.(8) provided:

> The operations hereunder and the contractor, its representatives, agents, or employees, will be subject to and abide by the provisions of all applicable MWR regulations now in effect or hereafter promulgated, including all regulations and directives of the military installation in effect or later promulgated.

(R4, tab 1)

4. Marine Corps Order 5300.10A was in effect at the time of contract execution and during performance. That Order described sexual harassment as a form of discrimination that "will not be tolerated or condoned," and it incorporated the following DoD definition of sexual harassment:

> Sexual harassment is a form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
>
> (1) submission to or rejection of such conduct is made either explicitly or implicitly a term of [sic] condition of a person's job, pay, career, or

> (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
>
> (3) such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.
>
> Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment.
>
> Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

(R4, tab 10 D)

5. Clause 7.k.(9) required appellant to "ensure that all representatives, agents or employees conduct themselves in an orderly manner." Clause 7.p. required the contractor to establish effective management and internal controls and "maintain accurate and current records of all financial transactions[.]" (R4, tab 1)

6. In October 1997 the U.S. Naval Criminal Investigation Service (CIS) began an investigation of appellant's "Pizza Inn" operation at Iwakuni, based on reports from a "cooperating witness." The witness asserted that appellant's manager, Alberto Mejia, was defrauding MWF by stealing from cash registers and employing his wife and step-daughter as "ghost" employees. (R4, tab 10 A)

7. An audit of appellant's system was undertaken by the Comptroller, United States Marine Corps. The review determined that appellant's cash register system (which was supplied by MWR) did not make a duplicate tape of transactions, so that when a copy was given to the customer, no paper record of the transaction was kept. While it was represented that the data was recorded on a computer linked to the registers, no detailed daily transaction records were produced. Thus, it was not possible to determine if all sales were properly recorded. The system also left open the possibility of charging store sales to delivery sales, on which there were no controls. The mobile truck driver was given a $50 change fund and at the end of the day turned in all funds to the store manager, who counted the funds, deducted $50, and rang the remainder as sales. There were no

daily beginning and ending inventories on the mobile pizza delivery sales. The record contains no evidence that this situation was ever corrected. Appellant did not have a time card system for employees and payroll records were kept on the cash registers. The manager, who had family members on payroll, could access and change payroll records. (R4, tabs 10 C, 122; Shimeall affidavit) An 8 January 1998 audit report concluded:

> The total lack of controls leaves the whole operation open to possible fraud by both manager and employees. If good controls are not implemented, MWR should seriously review contract agreement with Pizza Inn.

(R4, tab 10 A at 4)

8. On 2 January 1998 Kazuhiko Takeno, the manager of the food court where the Pizza Inn is located, observed Ms. Tomoko Muranaka crying. She described an incident to him involving unwanted touching, kissing and attempted kissing by Mr. Mejia. Mr. Takeno reported the incident to his supervisor. (R4, tab 10 C) Ms. Muranaka reported the matter to the Military Police (MP), who recorded it as "indecent conduct" on the part of Mr. Mejia. The MP log of the incident also states she reported she had been "harassed by Mejia" but did not want to make a complaint. She was "referred to EEO for further guidance." (R4, tab 10 C; 78) After Ms. Muranaka reported the matter to the Military Police, Mr. Mejia refused to escort her to work. As she did not have a base pass, she was unable to work. (R4, tab 10 A)

9. On 2 January 1998 the contracting officer, Doyle Turner, faxed a letter to Warren Shimeall, appellant's president, informing him of a complaint of sexual harassment against Mr. Mejia. Mr. Shimeall was told the unnamed employee was at the Military Police station making a statement. The letter warned against any retaliation against the employee. Mr. Shimeall was reminded of the EEO clause. (R4, tab 6) A similar letter was given to Mr. Mejia on the same day (R4, tab 7). No action was taken on the complaint (R4, tab 8). However, an inquiry into "grievances raised by several employees of Pizza Inn" was ordered by the director of MWR by memorandum of 5 January 1998 (R4, tab 9).

10. On 5 January 1998 Mr. Shimeall telephoned Mr. Turner. He asserted that he had called the MP the day before and was told that the Mejia/Muranaka incident appeared to be a misunderstanding. According to Mr. Shimeall, Mr. Mejia had been harsh with Ms. Muranaka and made her cry. He attempted to console her by putting his arm around her and kissing her on the forehead. He was asked to respond to Mr. Turner's letter in writing. (R4, tab 8) There is no evidence of a written response to Mr. Turner's letter.

11. CIS received additional complaints of sexual harassment against Mr. Mejia during its investigation. The report of the investigation contains statements obtained from several Japanese women documenting incidents of unwelcome touching, including kissing and attempting to kiss and one incident involving Mr. Mejia placing his hand inside the skirt and on the thigh of a Japanese woman employee. (R4, tab 10 A, C, Uno, Muranaka and Kinoshita statements) The 2 January 1998 complaint (findings 8, 9) is also supported by the statement of Mr. Takeno (R4, tab 10 A).

12. CIS attempted to interrogate Mr. Mejia on 21 January 1998 regarding the sexual harassment and defrauding of MWR charges. Mr. Mejia called Mr. Shimeall, who advised him to remain silent. Mr. Mejia remained silent. By letter of 21 January 1998 from Colonel R. S. Melton, Commanding Officer, Mr. Mejia was denied access to the base because of sexual harassment of present and former employees.[1] Mr. Mejia was escorted from the base. On the way out, he stopped at Pizza Inn and, while there, informed Ms. Yuko Uno she was no longer assistant manager and told her to remove the name tag identifying her as an assistant manager. (R4, tab 10 A)

13. Mr. Shimeall telephoned Ms. Uno on 21 January 1998. According to Ms. Uno, he was angry and asked why she made up the story and "complain[ed] around." Ms. Uno represents he then said "Neither Tomoko [Muranaka] nor Ryoko [Kinoshita] complains, but you." According to Mr. Shimeall, he did not know Ms. Uno was a complainant on 21 January 1998. (R4, tab 10 A; Shimeall affidavit) However, one of the CIS investigators reported Mr. Shimeall told him that he was aware of Ms. Uno's complaint on 21 January 1998 (R4, tab 10 A).

14. Mr. Shimeall appointed Ms. Deborah Lacey acting store manager (R4, tab 12). Ms. Lacey found records concerning sales inadequate by MWR standards. She lowered employee discounts and made employees pay for food. (R4, tab 70) Mr. Shimeall informed Ms. Lacey in a 23 January 1998 letter that Ms. Uno's pay had been lowered to 650 yen per hour and her supervisory position had been changed to "regular employee" with no guarantee of 40 hours per week "last year" (R4, tab 14). However, payroll records show Ms. Uno was paid at the higher rate through 31 December 1997 (R4, tab 71) and Ms. Lacey reported Ms. Uno's hourly rate as $8.60 per hour vice 650 yen up to 21 January 1998 (R4, tab 70).

15. On 4 February 1998 Mr. Mejia's attorney filed a motion for an extension of time in his appeal from the denial of access. A 4 February 1998 affidavit from Mr. Shimeall was attached. In it, Mr. Shimeall declared:

---

[1] The letter does not mention and no action was ever taken regarding the allegations of theft, fraud and embezzlement (R4, tab 87).

> Neither I nor, to my knowledge, any person employed by PACRIM has received a written or verbal [sic] complaint about sexual harassment occurring at or in any way related to the . . . Pizza Inn . . . at any time while Mr. Mejia was an employee[.] . . . I know of no complaints [of sexual harassment or similar objectionable conduct] within [appellant's] business records about Mr. Mejia in any such respect.

(R4, tab 17)

16. On 2 March 1998 the contracting officer faxed a "CURE/SHOW CAUSE NOTICE" to Mr. Shimeall. The letter informed appellant that termination for default was under active consideration. The reasons stated were appellant's failure to take action in light of the complaints against Mr. Mejia, the reprisal (salary cut) against Ms. Uno, violation of clause 7.k.(9) (finding 5) for failure to investigate the sexual harassment complaint and inaction regarding "substandard business procedures and lack of accounting control." The letter notes that Mr. Shimeall's 4 February 1998 affidavit is "demonstrably false" with respect to Mr. Shimeall's assertion that he had no notice of sexual harassment claims against Mr. Mejia. The letter gave appellant 10 days to respond and demonstrate that its failure to perform "arose from causes beyond your control and without fault or negligence on your part. . . Your failure to present any excuses within this time may be considered as an admission that none exist." (R4, tab 21)

17. Mr. Shimeall orally requested a copy of the audit report from Mr. Turner on 9 March 1998, who informed him that he would have to submit a Freedom of Information Act (FOIA) request (R4, tab 22).

18. By letter of 13 March 1998 Mr. Shimeall asked for an extension until 25 March 1998 to respond to the cure/show cause letter. He cited as reasons a trip away from Japan, and requests for copies of the audit, EEO report and criminal investigation report. Mr. Shimeall stated "an extensive investigation has been made by the undersigned and will be reported by the extended deadline, if granted." The extension was granted. (R4, tab 29, 30)

19. In addition to the information supporting the sexual harassment charge, the record of the investigation includes Mr. Mejia's affidavit denying the sexual harassment charges, Mr. Shimeall's affidavit supporting Mr. Mejia, Ms. Lacey's affidavit stating she never observed unwanted touching by Mr. Mejia, and several other statements by employees stating they never saw Mr. Mejia engage in sexual harassment (R4, tabs 9, 10, 11, 12). The Staff Judge Advocate reviewed the case and in a 16 March 1998 memorandum concluded that Mr. Mejia had sexually harassed female employees and

reprised against Ms. Uno for complaining. The memorandum recommended to Colonel Melton that Mr. Mejia's denial of access remain in force (R4, tab 31). Thereafter, on 18 March 1998, Colonel Melton denied Mr. Mejia's appeal requesting revocation of the denial of access issued against him, finding that Mr. Mejia had sexually harassed female employees and that he and Mr. Shimeall had reprised against Ms. Uno (R4, tab 10 B).

20. By letter of 25 March 1998 Mr. Shimeall requested a further extension to 8 April 1998 to respond to the cure/show cause letter. He gave as his reason the failure to receive the investigation report. (R4, tab 33) However, Mr. Shimeall had not submitted a FOIA request (*see* finding 17) (R4, tab 41). The request for a further extension was denied by letter of 30 March 1998 (R4, tab 37). By letter of 31 March 1998 the contract was terminated for default. Four reasons were given for the default:

a. Failure to timely respond;
b. Inaction and failure to investigate sexual harassment complaints on and after 2 January 1998;
c. Reprisal against Ms. Uno; and
d. Failure to maintain accurate and current financial records, and inaction when informed of suspected irregularities and theft.

The letter also told appellant to cease operations within 14 days.

(R4, tab 43)

21. Thereafter Mr. Shimeall telephoned Mr. Turner on 31 March 1998 about the default. Mr. Turner refused to discuss the matter on the telephone and told Mr. Shimeall to submit his position in writing. Mr. Shimeall told Mr. Turner that he was going to call the Commander, U.S Forces, Japan, and that Mr. Turner's job was on the line. (R4, tab 45) On that same date, Mr. Shimeall submitted a FOIA request. By letter of 2 April 1998 the audit report was released, but the request for the CIS report was referred to that service. Other requested documents were withheld. (R4, tab 47)

22. The new Pizza Inn manager, Ms. Farkas, discussed the audit report with the auditor, Ms. Boyer, on 2 April 1998. Ms. Farkas informed Ms. Boyer that she had instituted changes which included daily financial reports. However, inventory control was still an issue. (R4, tab 48)

23. On 3 April 1998 Mr. Shimeall called Mr. Turner to tell him that Mr. Mejia resigned on 2 April 1998 at Mr. Shimeall's request. He also stated that he did not know Mr. Mejia had kept Ms. Uno's pay at $8.75 per hour into January 1998. (R4, tab 49) The record contains no explanation for the difference between the above hourly rate and the

$8.60 reported by Ms. Lacey. Payroll records show the rate as $8.48 on 31 December 1997. (R4, tab 71)

24. By letter of 7 April 1998, Mr. Shimeall belatedly responded to the cure/show cause letter. The letter states, in relevant part:

> Information developed by the undersigned not only from military but also independent sources has led to the following consensus on behalf of the Contractor:
>
> 1. Credible evidence exists that on occasions Mr. Mejia took unwelcome liberties with single, Japanese female employees of Pizza Inn. Although no known sexual conduct was involved, the actions were totally inappropriate, offensive and were violative of federal statutes and the Rules of Management Conduct of the Pizza Inn Corporation applicable to its licensed stores, and in violation of standards required to be enforced by store managers and supervisory employees.
>
> 2. The misconduct of Mr. Mejia was episodic and "selective": it did not extend to U.S., Philippine, nor any married female employees. Such misconduct was not known, nor reported to, any senior company official until January 2nd, 1998.
>
> 3. On January 2, 1998 (a Japanese National Holiday), the undersigned, Warren G. Shimeall, President, Pacrim Pizza Company, received a flash report from the Contracting Officer and immediately made telephonic contact with the Iwakuni Military Police Desk Sergeant and was told that a female Pizza Inn employee had made a complaint about Mr. Mejia. The police officer on duty stated that upon interrogation of the complainant it was not a sexual harassment matter but verbal abuse by Mr. Mejia, her employer. I asked for a copy of any statement or blotter entry made and was informed none had been made: the complainant had been told to file an EEO complaint.
>
> I reached Mr. Mejia by phone at the Pizza Inn and demanded to know what had happened. He related that the lady had shown up 1 1/2 hours late for work to drive the early

shift on the mobile truck. He had scolded her, perhaps excessively, and she began crying. He immediately realized he had over reacted and put his arms around her and tried to kiss her forehead to soothe her. At that moment a Japanese man heard and saw them and reported it, which resulted in them being taken to the MP desk.

I reached Mr. Turner, the Contracting Officer, at his home phone that evening and related the above to him. (He had provided his home phone to me in the flash message he sent).

4. I heard nothing further about the January 2, 1998 incident until January 21st. when I was informed that Mr. Mejia had received a PNG letter and was barred from the base for one year. Pizza Inn suddenly had no store manager. I reviewed the employee and supervisor list and appointed Ms. Debby Lacey as interim, acting manager. One of her first questions to me was: Ms. Yuko Uno wants to be manager! What shall I do? I knew Yuko had had many problems, other employees complained about her lack of work and her frequent absences for personal reasons, such as chain smoking, etc. Debby wanted clearly defined rules and asked I give her specific guidance, which I typed up and faxed to her that day. It simply kept Yuko in place: No advancement - no demotion. At that time I did not know Yuko Uno had been paid a higher amount. If I was wrong - so I was wrong. Later, Yuko resigned - see Debby's exit interview.

. . . .

6. The receipt of a courtesy audit from MWR Auditors dated 8 January 1998, on March 25, 1998, prompted me to seek immediate clarifications. Mrs. Farkas [the new manager] met with the auditor and thoroughly reviewed every phase of the audit, offering explanations and clarifications, which gave the auditor a much better, more accurate picture of the availability of records and record keeping, and also produced changes in the procedures used by Pizza Inn to provide promptly proof of the Pizza Inn's daily transaction.

(R4, tab 57)

25. Mr. Turner analyzed Mr. Shimeall's letter in an 8 April 1998 memorandum for record and concluded there was no basis to set aside the termination for default (R4, tab 59). There is no evidence of a written response to Mr. Shimeall's letter.

26. The termination for default was appealed by letter of 24 June 1998 (R4, tab 72).

27. In a 9 March 2000 affidavit prepared for this litigation, Mr. Shimeall asserted that information on daily transactions, while admittedly not kept on register tapes, is kept in a computer. According to Mr. Shimeall, it is "beyond belief" that the auditor could have been concerned that the information on all transactions was not captured. He also states that he monitored percentages of costs versus sales, which were always acceptable, and if Mr. Mejia was skimming or had "ghost" employees, he would have known from those percentages. He also stated that the employees never suggested to him that there was any fraud or embezzlement by Mr. Mejia. Mr. Shimeall believes that by monitoring percentages and determining that the operation was profitable he "investigate[d] in the most efficient and conclusive way that it could be done." He is not aware of anything additional he could have done to investigate the fraud and embezzlement charges. As to the sexual harassment complaints, he believed Mr. Mejia's actions on 2 January 1998 had been misunderstood. As to later allegations, he asserted that he talked to Ms. Lacey who said she had never seen Mr. Mejia "act or speak in a way that was sexual harassment[.]" Mr. Shimeall further stated that he was unaware at the time of the complaints of Ms. Muranaka and Ms. Kinoshita and "I believe that had I known of the allegations of rubbing a thigh, I would have counseled [Mr. Mejia] to refrain from treating employees like that." As to Ms. Uno, he stated, in effect, that she was a troublesome employee and that at the time of the 23 January 1998 letter, he did not know Ms. Uno had been paid more than the amount in the letter. As to his investigations of sexual harassment, the 2 January 1998 incident was represented to him by the Military Police as not involving sexual harassment. As to other incidents, he claimed he was "totally in the dark" because of his inability to get copies of statements. He maintained that the statement in the 7 April 1998 letter as to the existence of "credible evidence" of Mr. Mejia's behavior was not based on personal knowledge, but a statement intended to placate Mr. Turner. (Shimeall affidavit)

DECISION

Appellant argues that appellant had no duty to investigate under the contract; that, in any case, appellant did adequately investigate; that the termination was procedurally defective; and that appellant was not in default of any contract provision. Respondent argues that the relevant procedures were followed and that the evidence amply supports the default. At the outset, we note that we have held that NAF contracts such as this one are not subject to either the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as

amended (*Computer Valley International, Ltd.*, ASBCA Nos. 39658, 40496, 94-1 BCA ¶ 26,297) or the FAR (*Cellular 101, Inc.*, ASBCA No. 51578, 00-1 BCA ¶ 30,582).

The burden of proof is on the Government to show that a default termination is justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). In this NAF contract, the Default clause may be invoked if the contractor fails to perform any contract provision and does not cure the failure within 10 days (finding 2). The contract contained an EEO clause and clause 7.k.(8) which made the contractor subject to all regulations and directives of the military installation (findings 2, 3). One of those was Marine Corps Order 5300.10A, which contained the DoD definition of sexual harassment (finding 4). Both clauses preclude sexual harassment of employees. If sexual harassment was occurring at appellant's facility, it was in violation of a contract provision. One of appellant's managers was accused of sexual harassment of women employees and, after an investigation and due consideration by the installation's commanding officer, was found to have sexually harassed women employees (finding 19). Based on the record before us, we conclude that appellant was not in compliance with the contract's provisions regarding discrimination and sexual harassment. *See Robert Earl Lanier*, PSBCA No. 3143, 94-2 BCA ¶ 26,693.

While Mr. Shimeall maintains that he did not demote Ms. Uno as a reprisal for filing a sexual harassment complaint, we simply do not believe him. The circumstances of his action and the lack of corroboration for his assertion that he did not know Mr. Mejia had failed to follow his instructions to demote her "last year" (findings 13, 14) undermine his credibility. "Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted opinion testimony." *Joseph Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968). Such is the state of the record here. By demoting Ms. Uno, Mr. Shimeall condoned Mr. Mejia's behavior and engaged in conduct which falls within the DoD definition of sexual harassment (finding 4). Sexual harassment is proper grounds for termination for default. *Robert Earl Lanier, supra.*

Regarding the failure to maintain effective accounting controls, the lack of control on the mobile pizza deliveries was violative of clause 7.p. (finding 5). There were no beginning and ending inventories and no accounting for individual sales. Appellant was required by the contract to "maintain accurate and current records of all financial transactions" (*id.*). Appellant did not do so, and did not take action or propose to bring its operation into contractual compliance. Indeed, inventory problems continued after the default (finding 22).

The contracting officer followed the procedural requirements of the Default clause. He afforded appellant the opportunity to respond within 10 days, and then, at

appellant's request, extended the response period (findings 16, 18). When appellant sought a second extension, the request was denied. As appellant had not responded within the allotted period, the contract was terminated for default. (Finding 20) We conclude that respondent has met its burden of proof.

The burden now shifts to appellant to establish that its failure to meet contract requirements was justified or excusable. *Kingston Plastics Company*, ASBCA No. 47550, 96-1 BCA ¶ 28,152. Although the EEO clause is included in the contract and mandated by DoD Instruction 4105.67 governing NAF contracts (finding 2), appellant contends that the contract is exempt from the EEO clause. That clause states it is applicable to purchases over $10,000 "unless otherwise exempt (FAR 22-810)." (Finding 2) Appellant cites FAR 22.807(b), exempting certain foreign contracts, as a reason to exclude the EEO clause. The flaw in appellant's argument is that the FAR does not apply to this NAF contract and, while the clause itself references FAR 22.810, that FAR provision does not contain a reference to FAR 22.807(b). Accordingly, appellant's argument is without merit. Assuming, *arguendo*, the EEO clause does not apply, appellant's actions would still violate the contract because Clause 7.K.(8) precludes discrimination by sexual harassment.

Appellant argues that appellant had no duty to investigate the contract violations set out in the cure/show cause letter and, alternatively, that appellant did investigate. This argument evades the issue. Appellant was in violation of the contract and was obligated to cure those violations under the Default clause and respondent's cure/show cause letter. It did not timely respond. Appellant complains that the procedures of FAR 3.9, dealing with whistleblower protections, were not followed by the Government. As noted previously, this contract is not covered by the FAR.

Appellant also argues that it was not given timely access to the audit or the CIS investigation reports. That argument is unpersuasive since Mr. Shimeall failed to timely request the reports. Moreover, there were means to address the sexual harassment and financial control issues at his disposal without those reports. He certainly could have talked to present and past employees about the sexual harassment charges and proposed training or procedures to help in the prevention of future incidents.[2] Instead, he also engaged in the prohibited conduct when he demoted Ms. Uno, an act which, in the circumstances, constituted sexual harassment under the DoD definition.

---

[2] Mr. Shimeall's affidavit states "I believe that had I known of the allegations of rubbing a thigh, I would have counseled [Mr. Mejia] to refrain from treating employees like that." (Finding 27) Even if he had actually taken that action, it hardly amounts to an enlightened, effective means of curing sexual harassment within his organization.

With respect to the financial controls issue, the lack of accounting controls was at least partially apparent to Ms. Lacey, who replaced Mr. Mejia. There is no indication Mr. Shimeall made any attempt to ascertain where problems existed by talking to her or Mr. Mejia. The essence of the response in his affidavit is that so long as the bottom line was within certain percentages (finding 27), it was unnecessary to do more. Indeed, appellant chose to ask for extensions, while asserting "an extensive investigation has been made," rather than taking steps toward curing the problems (finding 18).

Appellant did not obtain Mr. Mejia's resignation, even though he was barred from the base, until after the default, and appellant's response to the cure/show cause letter was untimely. However, even in that letter (finding 24), Mr. Shimeall does not address a cure for the problems, and his "If I was wrong - so I was wrong" (*id.*) statement as to the reprisal against Ms. Uno is reflective of a lack of concern about sexual harassment and its consequences at his company. The letter neither establishes excusability nor proposes a cure. Even if it had been timely, it was inadequate.

Appellant has not met its burden of proof. The default termination is sustained and the appeal is denied.

Dated: 16 May 2000

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

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
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 Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51608, Appeal of Pacrim Pizza Company, rendered in conformance with the Board's Charter.

Dated:

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