ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Corners and Edges, Inc.	)	ASBCA Nos. 55611, 55619
	)	55767, 56277
Under Contract Nos. 263-MO-608091	)	
263-99-C-7278	)	

APPEARANCE FOR THE APPELLANT: Mr. John E. Larson
Secretary

APPEARANCE FOR THE GOVERNMENT: Mogbeyi E. Omatete, Esq.
Trial Attorney
Department of Health and
Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN

On 16 July 2009, the Board received "Appellant's Motion/Request for Reconsideration of Board's 12 June 2009 Decision: Petition for Recusal of Board Judges and Petition for New Hearing" in the above-captioned appeals. Appellant seeks timely reconsideration of the Board's decision dated 12 June 2009, *Corners and Edges, Inc*., ASBCA Nos. 55611, 55619, 09-2 BCA ¶ 34,174; seeks a new hearing and the vacating of the Board's decision dated 14 August 2008, *Corners and Edges, Inc*., ASBCA Nos. 55767, 56277, 08-2 BCA ¶ 33,949; seeks a new hearing and the vacating of the Board's decision dated 24 November 2008, *Corners and Edges, Inc*., ASBCA No. 55767, 09-1 BCA ¶ 34,019; and seeks recusal of the Board's panel that issued these decisions. The government filed an opposition to appellant's motion.[1] Familiarity with our prior decisions is presumed.

[1] The government's opposition interprets the Board's 12 June 2009 decision in ASBCA Nos. 55611 and 55619 as "granting Respondent's motion for dismissal on grounds of res judicata and denying CEI's appeal [sic]" (opp'n at 1). The government is incorrect. The government did not file a motion for dismissal of these appeals on grounds of *res judicata*, or otherwise. Rather, in response to a Board Order, the government asked the Board to apply the principles of *res judicata* and/or *collateral estoppel* to these appeals. The Board's decision held that the principles applied to the appeals, and that appellant was barred from litigating certain issues. However, the Board's decision did not deny or dismiss the appeals. Rather, the decision provided that the Board planned to schedule a conference with the parties to address the need for further proceedings in view of the Board's decision,

Petition for Recusal of Board Panel

In *Liteky v. United States*, 510 U.S. 540, 555-56 (1994), the Supreme Court of the United States addressed the law of recusal in federal jurisprudence, stating, insofar as pertinent, as follows:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion [citation omitted]. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.... *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune. [Emphasis in original]

Moreover, allegations of unlawful bias or other unlawful conduct must be supported by evidence. Mere conclusory statements are insufficient. *Wilder v. United States*, No. 07-CV-723, 2009 WL 2882362 (Fed. Cir. Sept. 10, 2009); *Environmental Safety Consultants, Inc.*, ASBCA No. 54995, 06-2 BCA ¶ 33,321 at 165,213.

09-2 BCA at 168,924. Before this conference could be scheduled, appellant filed the subject motion.

Applying the law to appellant's petition, we conclude that appellant has shown no basis to recuse the Board panel or any of the individual judges on the panel in any of these appeals. Appellant fails to specify any examples of judicial remarks or actions that reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. It appears that appellant is dissatisfied with certain rulings of the Board in ASBCA Nos. 55767 and 56277 (*see* below). But as the Supreme Court has stated, judicial rulings are "proper grounds for appeal, not for recusal," and "only in the rarest circumstances evidence the degree of favoritism or antagonism required…when no extrajudicial source is involved." (*Id*.). Appellant failed to appeal these rulings. In addition, we believe that the Board's rulings were fully consistent with the law, as discussed below.

Accordingly, we deny appellant's petition to recuse the panel members that rendered the decisions in the subject appeals.

Motion for New Hearing and to Vacate Decisions in ASBCA Nos. 55767 and 56277

By decision dated 14 August 2008, the Board dismissed ASBCA No. 56277 for lack of jurisdiction on the grounds that appellant filed the appeal with this Board "almost one year after the CBCA [Civilian Board of Contract Appeals] had become the exclusive board forum to receive appeals from CO decisions of NIH" under the CDA, as amended. *Corners and Edges, Inc*., 08-2 BCA ¶ 33,949 at 167,970. This decision also held that the Board had jurisdiction over ASBCA No. 55767 from appellant's notice of appeal of the CO's failure to issue a decision on appellant's claim dated 4 October 2006 pursuant to the CDA, 41 U.S.C. § 605(c)(5). Appellant did not seek reconsideration of the Board's decision, nor did it appeal to the Federal Circuit.

Pursuant to the parties' agreement to submit ASBCA No. 55767 on the record under Board Rule 11 (*see* parties' agreement dated 22 May 2007), the parties made written submissions on the record. Thereafter, the Board issued a written decision dated 24 November 2008, denying the appeal on the merits. *Corners and Edges, Inc*., ASBCA No. 55767, 09-1 BCA ¶ 34,019. Appellant did not seek reconsideration, nor did it appeal this decision to the Federal Circuit.

Approximately 11 months after receipt of the Board's decision dismissing ASBCA No. 56277 for lack of jurisdiction, and approximately 7 months after receipt of the Board's decision denying ASBCA No. 55767 on the merits, appellant filed the subject motion, seeking a new hearing and the vacating of these decisions "to allow Appellant its right to re-appeal the claims of 55767/56277 with the ASBCA within the statute of limitations as set with the original filing of the claims of said ASBCA 55767/56277 cases, with impartial judges forming that tribunal" (mot. at 5).

The time for filing a motion for reconsideration of these decisions, pursuant to Board Rule 29, has passed and we have no other board rule that expressly addresses the relief sought by appellant. Under such circumstances we may look to the Federal Rules of Civil Procedure for guidance, and we treat appellant's motion to vacate these decisions and for a new hearing as akin to a motion filed under FED. R. CIV. P. 60, "Relief from a Judgment or Order." *See Triad Microsystems, Inc*., ASBCA No. 48763, 00-1 BCA ¶ 30,876 at 152,438. We have long considered Rule 60-type motions at our Board consistent with our inherent authority to manage our docket and to reopen an appeal where demanded by justice and fairness. *Omni-Wave Electronics Corp.,* ASBCA No. 23465, 83-1 BCA ¶ 16,179 at 80,394.

Insofar as pertinent, FED. R. CIV. P. 60 provides:

> (b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Appellant contends that it was a judicial abuse of process or fraudulent for the Board to adjudicate its appeal under ASBCA No. 55767 based upon the failure of the CO to issue a decision on its claim, yet dismiss its appeal under ASBCA No. 56277 from the CO decision related to this same claim. Appellant's contentions are not correct. As we stated in the decision quoted above, the Board dismissed ASBCA No. 56277 because by the date appellant filed the appeal, the ASBCA no longer had jurisdiction under the CDA, as amended, to hear appeals from CO decisions under NIH contracts. Appellant has not

shown that this ruling was unlawful, or was the product of any improper conduct or bias against appellant. We believe the decision was wholly consistent with the law.

Appellant also contends that the Board's dismissal of ASBCA No. 56277 thwarted its rights to obtain review of the CO decision. We do not agree that appellant's rights were thwarted or prejudiced. This CO decision related back to appellant's claim dated 4 October 2006, and this very same claim remained before us under ASBCA No. 55767. Thus, appellant had a full and fair opportunity to have its claim addressed in ASBCA No. 55767.

Appellant's motion also asserts that the Board ignored appellant's request "to direct the Contracting Officer (CO) to provide Appellant with Respondent's Rule 4 File and Respondent Contracting Officer's Final Decision, and allowed Respondent to submit Appellant's claims in Respondent's Rule 4 File in a binder other than the one demarcated 'Claims'. This was done to allow Respondent to conceal from the record its outstanding costs related to a janitorial contract that was being contested under an OMB A-76 action" (mot. at 4).

Appellant does not identify the "request" it made to the Board that was allegedly ignored, nor does it explain the "OMB A-76 action" to which it refers, and the thrust of this contention is unclear. To the extent that appellant contends that the Board's "ORDER ON RULE 4 FILE" dated 29 May 2008 was issued to allow the government to conceal material information or for some other impermissible motive, appellant provides no evidence to support these allegations. Rather, as the Board's Order plainly provided, the Board ordered the government to re-organize and resubmit the Rule 4 file because the government's submission violated Rule 4.[2] Appellant did not object to this Order when it was issued. Instead, appellant proposed its own supplement to the government's revised Rule 4 file by cover letter dated 30 June 2008, which was accepted as part of the record by the Board.

[2] Insofar as pertinent, the Board's Order stated as follows:

> The government's Rule 4 file consists of multiple soft-back folders, many of which have unidentified multiple sections. Many of the folders have documents fastened in a confusing arrangement on each side of the folder. The documents are not numbered. There is no master index identifying the contents of the Rule 4 file, nor is there an index identifying the contents of each individual folder. Most documents are fastened in the folders, but others are merely clipped with a paper clip and some are loose.

We conclude that appellant has not provided any evidence of judicial wrongdoing to support its motion for a new hearing and for the vacating of the Board's decisions under ASBCA Nos. 55767 and 56277. Appellant's motion is denied.

Motion to Reconsider ASBCA Nos. 55611 and 55619

In *Corners and Edges, Inc.*, ASBCA Nos. 55611, 55619, 09-2 BCA ¶ 34,174, the Board held, *inter alia*, that appellant was barred from litigating the responsibility for the van accident at the facility; the propriety of the CO's decision to restrict the use of the van after the van accident, and whether appellant's use of a cart/dolly in lieu of the van caused the release of hazardous material on the grounds of *res judicata* and/or *collateral estoppel* stemming from a prior CBCA decision, *Corners and Edges, Inc. v. Dep't of Health and Human Services*, CBCA Nos. 693, 762, 08-2 BCA ¶ 33,961. Appellant alleges that the CBCA decision was issued on the basis of a feloniously tampered and doctored trial transcript and should not have been relied upon by the ASBCA (mot. at 2).

We agree that *res judicata* and/or *collateral estoppel* may only apply where the prior judgment relied upon was a valid judgment. However, appellant's challenge to the validity of the CBCA judgment is wholly unsupported. Appellant contends that there were unlawful "deletions" and "additions" to the trial transcript but provides no evidence of any alterations. We are also unaware that the CBCA has vacated its decision. Absent any evidence to support the motion for reconsideration, we must deny the motion.

CONCLUSION

For reasons stated, appellant's petition for recusal is denied; appellant's motion for a new hearing and for vacating of decisions in ASBCA Nos. 55767 and 56277 is denied; and appellant's motion for reconsideration in ASBCA Nos. 55611 and 55619 is denied. With respect to the latter appeals, the Board shall contact the parties to address the need for further proceedings.

Dated: 11 December 2009

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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. 55611, 55619, 55767, 56277, Appeals of Corners and Edges, Inc., rendered in conformance with the Board's Charter.

Dated:

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