

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Kevin Anderson ) ASBCA No. 57738  
 )  
Under Contract No. ODIA-09-04-035 )

APPEARANCE FOR THE APPELLANT: Joey McCutchen, Esq.  
McCutchen & Sexton  
Fort Smith, AR

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
LTC Mark A. Ries, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S  
MOTION TO STRIKE AND FOR A PROTECTIVE ORDER

Mr. Kevin Anderson, formerly the Director of Intercollegiate Athletics at the United States Military Academy, West Point, New York, appeals from a contracting officer's final decision seeking liquidated damages after he resigned from his position. Mr. Anderson's complaint alleges that he is not obligated to pay the amount sought. The government has filed a motion to strike paragraphs six and seven of the complaint. It also seeks a protective order relieving it from any obligation to respond to discovery requests related to those paragraphs. For the following reasons, the requests are denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Mr. Anderson entered a contract with the Army Athletic Association to serve as Director of Intercollegiate Athletics at West Point, effective 1 March 2009 (R4, tab 1). Mr. Anderson resigned from that position on 7 September 2010 (compl. ¶ 2). By final decision dated 26 May 2011, the government sought \$166,667 in liquidated damages that it claims are owed under the contract by Mr. Anderson (R4, tab 5). Mr. Anderson has appealed that final decision.

2. The government now moves to strike paragraphs six and seven of the complaint, arguing that they are irrelevant and assert matters beyond our jurisdiction. Paragraph five of the complaint quotes from paragraph 1 of section 5.03.1 of the contract, providing that "[i]f permitted by applicable federal law and regulation," Mr. Anderson may be "afforded the opportunity to enroll his children" in the government's schools at West Point. The contract proceeded to commit the government to reimburse

Mr. Anderson for school tuition should access to the West Point schools be prohibited by law. (Compl. ¶ 5; R4, tab 1 at 8) Paragraph six then alleges that Mr. Anderson's children attended the West Point schools, but that he subsequently resigned in part because of a change to the education being provided (compl. ¶ 6). More specifically, paragraph seven explains that Mr. Anderson's children began attending the schools in 2005, but, beginning in 2008, the government barred access to the schools for both his own children and those of other contract personnel unless a parent was a government employee. Accordingly, it alleges that paperwork was provided to Mr. Anderson and other contract personnel establishing their spouses as government employees. (Compl. ¶ 7) As clarified in Mr. Anderson's opposition to the government's motion, parents allegedly were not actually providing legitimate services to the government under this program to enable their children to gain access to the schools, placing Mr. Anderson and those parents in legal jeopardy. Mr. Anderson also stresses that his required involvement in this practice as the supervisor of other personnel participating in it also placed him in legal jeopardy. Mr. Anderson contends that these allegations support a breach of contract by the government, relieving him of any contractual obligation to pay the damages sought by the government. (Compl. ¶ 7; app. opp'n ¶¶ 7-8)

### DECISION

The government's motion provides a detailed statement of alleged facts (gov't mot. at 2-9). It contends that its decision, finding the children of contractors like Mr. Anderson ineligible to attend its schools, was made prior to execution of Mr. Anderson's contract, and is therefore immaterial. It argues that the government never committed to provide access to its schools to Mr. Anderson's children, that Mr. Anderson's spouse voluntarily chose to accept government employment to permit their children school access prior to contract execution, and therefore any issues relating to the propriety of that process are irrelevant. (*Id.* at 9-14) The government also contends that the Board lacks jurisdiction to consider the legality of the conditions and processes it established for access to the schools, stating that only "DOD investigatory authorities" can consider those matters (*id.* at 14).

Striking pleadings is an extreme action. Such motions are disfavored and infrequently granted. *Stanbury Law Firm v. IRS*, 221 F.3d 1059, 1063 (8<sup>th</sup> Cir. 2000). To strike portions of a pleading, "the allegations being challenged must be...void of merit and unworthy of any consideration." *Nat'l Organization for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 n.28 (N.D. Ill. 1995); *see also First City Nat'l Bank & Trust Co. v. Federal Deposit Ins. Corp.*, 730 F. Supp. 501, 514 (E.D.N.Y. 1990) (finding that to strike pleadings they must have no bearing on the subject of the litigation). Though technically the respondent because of our procedural scheme, the government is in reality the claimant here, seeking compensation it claims is owed under the contract resulting from Mr. Anderson's resignation. Mr. Anderson defends, among other grounds, by contending that when he resigned the government had already breached its own

commitments under the contract to provide schooling for his children. Certainly, as a matter of law, Mr. Anderson's defense of a prior government breach bears upon the subject matter of the litigation. See *Long Island Savings Bank v. United States*, 503 F.3d 1234, 1251 (Fed. Cir. 2007) (recognizing that prior material breach can constitute a legal defense for nonperformance).

We read Mr. Anderson to essentially allege that, during the term of this contract, the government required a member of his family to participate in an improper employment practice as a condition of his children's enrollment in the West Point schools. He was also allegedly required to cooperate with the application of this practice to personnel he supervised. Given the contract provided for Mr. Anderson's children to have access to the government's schools if permitted by law, as well as that Mr. Anderson comply with applicable federal regulations, we cannot say with certainty that, if true, such requirements could not plausibly constitute a material breach by the government (R4, tab 1 at 5, 8). The contention is not "unworthy of any consideration."<sup>1</sup> The government's denials, arguments about the limitations of its obligations, and detailed contentions about the nature of the facts, seek us to resolve the merits of the dispute through a motion to strike. We will not do that.

We also do not agree with the government's position about jurisdiction, which amounts to contending that we possess jurisdiction to rule upon its claim that Mr. Anderson has failed to perform, but cannot consider the legal issues presented by Mr. Anderson's defense that the government failed to perform. According to the government, Mr. Anderson's allegations would require us to consider the legality of its alleged employment practices as they relate to providing school access to the children of contract personnel, and it implicates the government's decision to restrict eligibility to the children of government employees. The government claims that, because these matters are governed by federal statute, they have nothing to do with the contract and therefore we cannot address them. (Gov't mot. at 14-16) However, the contract expressly conditions the extent of the children's access to the schools upon the content of "federal law and regulation." It also requires Mr. Anderson to comply with such regulations. (R4, tab 1 at 5, 8) Thus, it appears that those statutes and regulations have everything to do with the contract. Moreover, the government cites no authority supporting its suggestion that we are deprived of jurisdiction to consider the content of federal statutes and regulations when necessary to determine the obligations of contracting parties, or more broadly as part of our resolution of contractual disputes, and we are unaware of any.

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<sup>1</sup> In contrast, both of the cases relied upon by the government, *Joiner Systems, Inc.*, ASBCA No. 57097, 11-2 BCA ¶ 34,782, and *LGT Corp.*, ASBCA No. 44066, 93-3 BCA ¶ 26,184, involved the Board striking allegations that were not contained in the appellants' initial claims, or otherwise did not present any issues relevant to their claims. Here, it is the government asserting a claim, and the appellant has raised a defense that is at least plausibly relevant.

*See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 615 (2000) (analyzing statutes and regulations that established the rights of parties to a government contract). Accordingly, we deny the government's motion to strike paragraphs six and seven.

The government's motion for a protective order, seeking relief from discovery regarding the issues in paragraphs six and seven, is premised upon the merits of its motion to strike those portions of the complaint (gov't mot. at 16-17). Given that we reject the motion to strike, we also reject the request for a protective order on those general grounds.

Tangentially, the government also complains that much of the material responsive to Mr. Anderson's discovery "would include personally identifiable information...including individual background checks, weekly timecards and performance evaluations..." (gov't mot. at 17). Presumably, the government is suggesting that independent concerns arise respecting the production of specific material. We cannot address those specifics on the basis of such vague assertions. Similarly, given, as we understand it, that the government has not yet responded to Mr. Anderson's written discovery, it would be premature for us to entertain his arguments that any objections the government might assert are invalid. We expect the parties to attempt to resolve any such matters between themselves, like all other discovery issues, before raising them with the Board.

#### CONCLUSION

The government's motions to strike, and for a protective order, are denied.

Dated: 18 July 2012




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

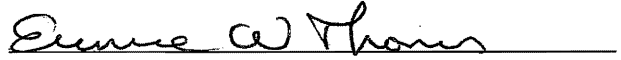
(Signatures continued)

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 No. 57738, Appeal of Kevin Anderson, rendered in conformance with the Board's Charter.

Dated:

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