

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED IN PART FOR LACK OF JURISDICTION;
REMAINDER DENIED: June 7, 2002

GSBCA 15691-ST

WILLIE CLARENCE LOGAN,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Willie Clarence Logan, pro se, Schiedam, The Netherlands.

Dennis J. Gallagher, Assistant Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **NEILL**, **HYATT**, and **DeGRAFF**.

DeGRAFF, Board Judge.

Pending is respondent's motion to dismiss parts of this appeal and for summary relief as to the remainder of the appeal. We lack jurisdiction to consider parts of the appeal because some of the issues appellant seeks to litigate were never presented to the contracting officer. Regarding the remainder of the appeal, there is no genuine issue as to any material fact and respondent is entitled to relief as a matter of law.

Findings of Fact

On July 29, 1997, the Department of State and Willie C. Logan entered into contract number S-NL80097P-H431. The contract provided that Mr. Logan would make his services available as a mail clerk at the American Embassy in The Hague, The Netherlands. The contract provided that State could terminate the contract "at any time upon at least 30 days' written notice by the Contracting Officer to the Contractor." Exhibit 3.¹ The parties amended the contract several times, eventually extending the term through July 31, 2001. Exhibits 5, 7, 9, 10, 11, 18. State considered selecting Mr. Logan to fill an opening for a mail clerk position as an employee of the Embassy, instead of continuing with him as a contractor. However, State never completed the steps necessary to appoint Mr. Logan as an employee. Exhibits 19-22, 32.

In a letter dated January 16, 2001, State told Mr. Logan that his employment with the Embassy would be terminated effective February 16, 2001. The letter said that Mr. Logan would be paid through February 16, although he was not required to return to work after January 16. State provided Mr. Logan with a copy of the letter on January 16, 2001. Exhibit 24. The letter was signed by Robert C. Wood, a warranted contracting officer who was authorized to act for the Embassy regarding its contracts. Exhibits 24, 31, 32. State paid Mr. Logan through February 16, 2001. Exhibit 32.

In a letter dated February 12, 2001, Mr. Logan submitted a claim to Christopher M. O'Connor, who was also a contracting officer at the embassy. Exhibits 27, 32. The claim states that the termination of the contract was unauthorized because Mr. Logan never received a termination notice from the contracting officer, because the termination was "without prior notice," and because the termination was based upon no valid reason. The claim goes on to say that, during the course of performance, State blamed Mr. Logan for not performing duties that he was not obligated to perform; never provided Mr. Logan with appropriate counseling regarding his performance; never appointed a contracting officer's representative to review his performance; allowed an unauthorized individual to evaluate his performance for a time that impermissibly overlapped two contract periods; had Mr. Logan escorted from the building on January 16, 2001, even though he had done nothing wrong; and failed to notify him in a timely manner that his contract would be extended, which resulted in his working without a contract for a period of time.² In addition, the claim says that the mail room supervisor attempted to modify Mr. Logan's duties without modifying the contract. Finally, Mr. Logan stated generally that he was treated unfairly. The claim requested that State continue the contract payments until the issues raised in the claim were resolved. Exhibit 27. State did not provide Mr. Logan with a response to his claim.

Proceedings at the Board

¹ The citations are to respondent's appeal file exhibits unless otherwise noted.

² Mr. Logan does not allege that State failed to pay him for his work during this period.

Mr. Logan filed this appeal on October 17, 2001. In his notice of appeal, Mr. Logan raised the issues that he raised in his February 12, 2001 claim, as set out above. In addition, he raised some issues that he had not mentioned specifically in the claim. Mr. Logan stated that the contracting officer failed to respond to his claim letter; the contracting officer allowed others to violate and misinterpret the contract in unspecified ways; the contract, as issued, was incomplete in several respects; the contracting officer managed the contract poorly; the contracting officer did not monitor Mr. Logan's performance; no cure notice was issued; and State did not honor a verbal agreement to hire him as an employee. The notice of appeal requested:

- a. Maximum monetary compensation for all of the following: the total duration of my contract for the period after I was illegally fired; on health insurance and life insurance, for all compensation pay that I was denied to have but should have received as a local hire over the period of my employment with the US Embassy; for being hired in the permanent position as I was told verbally and in writing; for grievance/damages caused by loss of employment/income, all cost involved in pursuing this case, i.e. seeking professional advice, telephone calls to the United States of America, use of computer, typing assistance, postage, copying cost, use of paper, time and material cost. All of the above at this point of time adding up to a total estimated amount of at least \$95,000.
- b. Assistance in finding similar type/suitable employment.
- c. Embassy employment record cleared.
- d. Written apologies from the Contracting Officer, Mr. Christopher M. O'Connor and the responsible authority the Ambassador of the United States in the Netherlands.
- e. An Embassy recommendation letter to help me in finding employment.

Notice of Appeal at 2-3.

On February 1, 2002, State filed a motion asking us to dismiss part of the appeal for lack of jurisdiction and part of the appeal for failure to state a claim, and to grant summary relief as to the remainder of the appeal. Respondent's Motion to Dismiss Appeal in Part and for Summary Relief in Part. Mr. Logan filed a response on March 22. State filed a reply on April 29, 2002. On June 4, 2002, Mr. Logan informed the Board that he had decided not to submit anything in response to State's April 29 reply.

Discussion

We lack jurisdiction to consider some of the issues raised in the notice of appeal because they were not presented to the contracting officer in the claim. We have jurisdiction to consider other issues raised in the notice of appeal to the extent that those issues overlap issues raised specifically in the claim. Finally, we have jurisdiction to consider issues raised both in the notice of appeal and in the claim. Regarding the issues as to which we have

jurisdiction, although Mr. Logan's appeal does not fail to state a claim upon which relief can be granted, State is entitled to summary relief.

Jurisdiction and failure to state a claim

The scope of our jurisdiction is limited by Mr. Logan's February 21, 2001 claim and we have the power to resolve only the issues raised in the notice of appeal that were also presented to the contracting officer in the claim. 41 U.S.C. § 607 (1994); Kinetic Builder's Inc. v. Peters, 226 F.3d 1307, 1312 (Fed. Cir. 2000); Dewey Electronics Corp. v. United States, 803 F.2d 650, 654-55 (Fed. Cir. 1986). Reading the claim broadly, it does not encompass several of the issues raised in the notice of appeal. Not surprisingly, the claim itself does not mention that the contracting officer failed to respond to the claim. The claim does not mention that the contract as issued was incomplete, that no cure notice was issued, or that State failed to honor a verbal agreement to hire Mr. Logan as an employee. Because these issues were raised only in the notice of appeal and were not raised in the claim, we dismiss them for lack of jurisdiction.

Other issues raised by the notice of appeal are whether the contracting officer allowed others to violate and misinterpret the contract, managed the contract poorly, and failed to monitor Mr. Logan's performance. To the extent that these issues overlap issues raised in the claim, we have jurisdiction to consider them and we do so, below. In addition, because these issues could form the basis for a breach of contract action, we do not dismiss them for failure to state a claim upon which relief could be granted.

The heart of Mr. Logan's appeal is his challenge to the termination of his contract. We have jurisdiction to consider this issue, because it was raised in the claim as well as in the notice of appeal.

Summary relief

Summary relief is appropriate if State can show that there is no genuine issue as to any material fact and that it is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of Mr. Logan at a hearing. Summary relief will be granted if State demonstrates that there is an absence of evidence to support an essential element of Mr. Logan's case. Although Mr. Logan is entitled to the benefit of the doubt as to the facts, he cannot rest his opposition upon allegations, conclusions, and denials contained in his pleadings. If State demonstrates the absence of a genuine issue as to any material fact, the burden shifts to Mr. Logan to set forth specific facts demonstrating that there is a genuine issue as to a material fact to be resolved at a hearing, and to support his position with affidavits, declarations, or appeal file exhibits. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Rule 108(g) (48 CFR 6101.8(g) (2000)).

No genuine issue as to any material fact

Our findings of fact were put forward by State in its statement of uncontested facts and are supported in full by the cited exhibits. In his opposition to State's motion, Mr. Logan

disagreed with two of the facts set out in State's statement of uncontested facts. As discussed in the following two paragraphs, Mr. Logan did not set forth specific facts demonstrating that there is a genuine issue as to either of the two facts with which he disagrees.

First, Mr. Logan disputed whether Mr. Wood was a contracting officer. Mr. Wood's status as a contracting officer is established by exhibits 31 and 32, relied upon by State in its statement of uncontested facts. Exhibit 31 is a Certificate of Appointment showing that Mr. Wood was appointed a contracting officer at The Hague in August 1997. Exhibit 32 is an affidavit signed by Mr. O'Connor stating that Mr. Wood was a warranted contracting officer in January 2001. Mr. Logan contends that Mr. Wood did not make it readily known that he was a contracting officer and was "deliberately hiding the fact that he was a contracting officer" because a list of embassy personnel did not show that Mr. Wood was a contracting officer. Appellant's Opposition to the Motion for Summary Relief at 8. The Certificate of Appointment and Mr. O'Connor's affidavit demonstrate that Mr. Wood was a contracting officer. Although we accept as true Mr. Logan's assertion that Mr. Wood did not make it known that he was a contracting officer, this is not sufficient to create a genuine issue as to Mr. Wood's status. Even if Mr. Wood did not advertise his status as a contracting officer, he held a certificate of appointment as a contracting officer.

Second, Mr. Logan disputed whether State considered selecting him to fill an opening for a mail clerk position as an employee of the Embassy, but never completed the steps necessary to appoint him as an employee. Exhibits 19-22 and 32, relied upon by State in its statement of uncontested facts, establish that State considered appointing Mr. Logan to an employee position, but never did so. Exhibit 19 is a message dated October 18, 2000, in which the Embassy asked State for the authority to hire two mail room employees to replace the contractors who worked in the mail room. The Embassy explained that contractors were not allowed to handle some transactions, such as those involving money, that employees were allowed to handle, and that all of those working in the mail room needed to be able to handle all aspects of the operation in order to ensure that the mail room ran smoothly. Exhibit 20 is a message dated October 31, 2000, in which State approved the Embassy's request. Exhibit 21 is an announcement issued by the Embassy to advertise the two newly-created positions. Exhibit 22 is a message dated November 22, 2000, in which the Embassy asked State for the authority to hire Mr. Logan for one of the positions. Exhibit 32 is Mr. O'Connor's affidavit, in which he says that State never completed the steps necessary to appoint Mr. Logan as an employee. Mr. Logan contends that State did, in fact, select him for one of the mail clerk positions. In addition to State's exhibits, none of which supports his contention, he relies upon Appellant's Exhibit 40, which consists of several pages from an application for employment that he signed on December 4, 2000, and Appellant's Exhibit 46, which is a section of the Foreign Affairs Manual that lists examples of jobs that can be filled by contractors or employees. Exhibits 19-22 and 32 demonstrate that State considered appointing Mr. Logan as an employee, but never did so, and Mr. Logan's exhibits do not create a genuine issue as to that fact.

Relief as a matter of law

Mr. Logan says that the termination of his contract was unauthorized because he never received a proper termination notice and because there was no valid reason for the termination. In support of his contention that there was no valid reason for the termination,

Mr. Logan says that State blamed him for not performing duties that he was not obligated to perform; never appointed a contracting officer's representative to review his performance; never provided him with appropriate counseling regarding his performance; allowed an unauthorized individual to evaluate his performance for a time that impermissibly overlapped two contract periods; had him escorted from the building on January 16, 2001, even though he had done nothing wrong; and did not notify him in a timely manner that his contract would be extended, which resulted in his working without a contract for a period of time. In addition, says Mr. Logan, the mail room supervisor attempted to modify his duties without modifying the contract. He also says that he was generally treated unfairly.

Summary relief is appropriate regarding Mr. Logan's challenge to the propriety of the termination notice. The contract provided that State could terminate its contractual relationship with Mr. Logan so long as he received thirty days' written notice from the contracting officer. Mr. Logan received a termination letter signed by Robert C. Wood, who is a warranted contracting officer and who was authorized to act for the Embassy regarding its contracts. Mr. Logan received that letter on January 16, thirty days before the effective date of the termination of the contract. State fulfilled its contractual obligation to Mr. Logan when the contracting officer provided him with thirty days' written notice that the contract would be terminated, and when it paid Mr. Logan for those thirty days. Thomas L. Conlon, ASBCA 44588, 93-3 BCA ¶ 26,127.

Summary relief is also appropriate regarding Mr. Logan's challenge to the validity of the termination of the contract. Mr. Logan contends that there was no valid reason for the termination and goes on to recount several events that allegedly occurred during performance which, in his view, show that he is not to blame if State was dissatisfied with his performance. The facts surrounding the events described by Mr. Logan are not material to our decision, however, because State's termination letter did not say that State terminated Mr. Logan's contract for cause. The termination letter does not give any reason for the termination. The contract reserved to State the right to terminate its relationship with Mr. Logan upon thirty days' written notice, regardless of whether it had cause to do so, and that is the action it took.

In his response to State's motion, Mr. Logan asserts that State acted in bad faith, which should overturn what was in effect a termination for the convenience of the agency. He says that State regarded him as a "problem" because he would not perform duties that he was not contractually obligated to perform and because he would not allow unauthorized personnel to modify his duties. In addition, he says that State advertised for a mail room clerk and hired someone else to fill that position. He also says that he was treated unfairly by State. Appellant's Opposition to the Motion for Summary Relief at 11, 15. Good faith conduct by government officials is presumed and clear and convincing evidence, such as evidence of malice or a specific intent to injure, is needed in order to overcome this presumption. Am Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002); Krygoski Construction Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996), cert. denied, 520 U.S. 1210 (1997); Kalvar Corp. v. United States, 543 F.2d 1298, 1302, cert. denied, 434 U.S. 830 (1977). Although Mr. Logan had not previously made an allegation of bad faith, we will consider this issue to the extent that it is based upon the same operative facts as he presented to the contracting officer in the claim.

Mr. Logan has not established that State acted in bad faith when it terminated his contract. The term of the contract was extended several times and eventually spanned more than three years, and State ended the contractual relationship when it decided to hire employees, instead of contractors, to work as mail clerks. State's decision to discontinue its use of contractors applied to any contractor who worked in the mail room, not exclusively to Mr. Logan, and was made in order to ensure that the mail room functioned smoothly. The record does not show that State intended to dishonor the contract from the outset or that State decided to use employees in its mail room in order to harm Mr. Logan. Mr. Logan's belief that State regarded him as a "problem" and his general statement that he was treated unfairly do not constitute the degree of proof needed to overcome the presumption that State acted in good faith when it terminated the contract. Considering the terms of the contract and the circumstances surrounding the termination, there is no basis for concluding that State acted in bad faith when it terminated the contract with Mr. Logan. Dr. Richard L. Simmons, ASBCA 34049, 87-3 BCA ¶ 19,984; James W. Frey, ASBCA 20258, 76-2 BCA ¶ 12,060.

Decision

The appeal is dismissed in part for lack of jurisdiction. As to the remainder of the appeal, the motion for summary relief is granted and the appeal is denied.

MARTHA H. DeGRAFF
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge