



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO PROSECUTE: January 22, 2009

CBCA 1322

CORNERS AND EDGES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

John E. Larson, Secretary of Corners and Edges, Inc., Hamilton, MT, appearing for Appellant.

Daniel J. Barry and Mogbeyi E. Omatete, Office of General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **KULLBERG**.

BORWICK, Board Judge.

Appellant refuses to prosecute this appeal until the Board provides it with a no-cost or nominal-cost copy of the hearing transcript of two consolidated earlier appeals--related to this appeal--that were decided adversely to appellant. The Board has refused to provide appellant with a copy of the transcript, since it is appellant's responsibility under the Board's Rules of Procedure to pay for its own copy of the transcript. The General Services Administration (GSA)--the executive branch administrative agency in which the Board is located--has also denied appellant's Freedom of Information Act (FOIA) request for a copy

of the transcript. In view of appellant's refusal to prosecute this appeal unless the Board accedes to appellant's demand for the transcript, we consider, *sua sponte*, whether we should dismiss this appeal for failure to prosecute. In these unusual circumstances we conclude that dismissal for failure to prosecute is warranted.

Background

This appeal, docketed on August 26, 2008, involves a claim for damages of \$3,551,770, plus interest, arising from alleged increased risk of bodily injury and the loss of appellant's patents due to the contracting officer's alleged breach of a courier contract entered into by appellant and respondent, the Department of Health and Human Services. Notice of Appeal.¹ The appeal resulted from the contracting officer's decision of May 28, 2008, denying appellant's claim of April 2, 2008. The presiding judge's docketing order required appellant to submit a complaint no later than September 26, 2008.

On September 23, 2008, the Board issued its decision in *Corners and Edges, Inc. v. Department of Health and Human Services*, CBCA 693, et al., 08-2 BCA ¶ 33,961. The claims in those appeals presented the same issues as the claim in this appeal, all involving a courier contract. In the two decided appeals, as well as this one, appellant claimed that respondent wrongfully reduced the number of courier work hours in a bi-lateral modification, breached the contract by restricting the van use of appellant's Secretary, Mr. John Larson, and wrongfully terminated the contract for convenience. After conducting a three-day hearing, we concluded that respondent did not breach the contract and that appellant was not entitled to recover any damages, including damages for alleged risk of bodily injury or the alleged loss of patents, the latter of which appellant had included at the last moment in its brief. *Corners and Edges*, 08-2 BCA at 168,020.

¹ Appellant alleges that the breach deprived appellant of sufficient funds to enable appellant to pay fees to domestic and foreign patent offices that were necessary to maintain the patents.

After the Board issued its decision in *Corners and Edges*, on October 3, 2008, appellant asked the presiding judge's senior legal staff assistant to provide appellant with a copy of the transcript in the those appeals. On October 6, 2008, appellant requested a one-month extension to submit its complaint in order to obtain a transcript of the hearing in those appeals. The Board granted the extension.

Appellant's request for the transcript was referred to board counsel. The deputy chief counsel denied appellant's request on November 5, 2008. She stated that Board Rule 22 provides that each party is responsible for paying for the cost of its transcript if one is prepared. In this way, she stated, court reporting companies are able to charge fair and reasonable rates, anticipating recovery of their costs by direct sale of their work product to all of the parties. A later FOIA request was also denied by GSA.

On November 5, 2008, with appellant not having filed a complaint in this matter, the Board issued an order requesting appellant to either file a complaint or to state whether it was proceeding with the appeal.

On November 19, 2008, appellant responded, stating:

Appellant is not continuing, in the venue of the Civilian Board of Contract Appeals, the prosecution of any claims docketed under CBCA 1332, [until] it has received, and has had [thirty] days to review the complete May 5-8, 2008 Hearing Transcript of CBCA Cases 693 and 762, then at which time appellant will file a complaint. Appellant's review of this transcript is as crucial to the outcome of CBCA 1322 as it was for CBCA 693 and 762.

Appellant's Response to Board Order.

On November 21, 2008, the Board issued an order for appellant to show cause by December 1, 2008, why the appeal should not be dismissed for failure to prosecute. As of the date of this opinion, appellant has neither responded to the show cause order nor submitted a complaint in this case.

Discussion

It is apparent that appellant has no intention of proceeding with this case unless the Board either changes its established policy regarding payment for transcripts, or makes a special exception for appellant, actions which the Board has repeatedly advised appellant it will not take. Board Rule 22 puts potential litigants at the Board on explicit notice that each party is responsible for purchasing its copy of the transcript.

Appellant questions the legitimacy of Rule 22. Appellant asks: “Did Congress **really** grant to the [Board] the power to contract out for the exclusive holding and sale of public documents to a single private enterprise...?” Appellant’s Response.

Board Rule 22 has the force of law. The Board’s Rules of Procedure are part of the regulatory scheme for handling Contract Disputes Act (CDA) appeals.² They are published at 73 Fed. Reg. 26947-52 (May 12, 2008) (referencing 72 Fed. Reg. 36,794-819 July 5, 2007)(to be codified at 48 CFR Part 6101)). Regulations have the force and effect of law when they are substantive rules affecting the rights and obligations of parties and are authorized by statute. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979). Although part of a set of rules of procedure, Board Rule 22 affects individuals’ rights and obligations as it requires each litigant to pay for its copy of the transcript. The Board’s rules are also authorized by statute. 41 U.S.C. § 608 (referencing the “rules of each agency board”).³

It has now been over one month since the Board issued its show cause order, with appellant failing to respond or to comply with earlier Board orders requiring the filing of a complaint. We can only take appellant’s contumacy and resulting inaction in complying with

² 41 U.S.C. §§ 601-613 (2000).

³ Appellant contrasts Board Rule 22 with Armed Services Board Rule 24, which unlike Board Rule 22, provides that an ordinary copy of a transcript shall be supplied to the appellant at an amount no greater than the cost of duplication. This difference simply reflects the exercise of reasonable and allowable regulatory policy choices in filling in a gap when the authorizing statute is otherwise silent. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

previous orders as an abandonment of this litigation. *Sykes Communications, Inc.*, ASBCA 54641, 06-1 BCA ¶ 33,188; *Todd M. Hueckman*, AGBCA 2000-128-1, 01-1 BCA ¶ 31,238 (2000). The Board will not permit litigants to dictate to the Board the terms under which they will proceed with the litigation.

Decision

This appeal is **DISMISSED** for failure to prosecute.

ANTHONY S. BORWICK
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

H. CHUCK KULLBERG
Board Judge