



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 26, 2017

CBCA 5701

YRT ENTERPRISES LLC dba TOMPKINS INVESTIGATION SERVICES,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Yolanda R. Tompkins, President of YRT Enterprises, LLC dba Tompkins Investigation Services, Washington, DC, appearing for Appellant.

J. Todd Casey, Office of Chief Counsel, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **ZISCHKAU**, and **SULLIVAN**.

SULLIVAN, Board Judge.

Respondent, Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), moved to dismiss this appeal, asserting that the Board lacks jurisdiction to consider the claims of appellant, YRT Enterprises LLC (YRT), which seek compensatory and punitive damages, reinstatement of a security clearance and other forms of relief because of an alleged violation of Title VII of the Civil Rights Act. 42 U.S.C. §§ 2000e to 2000e-17 (2012). The Board grants ATF's motion and dismisses the appeal.

Background

In July 2014, ATF issued a contract to YRT to provide support to the ATF's personnel security branch (PSB) as a background investigator. Appellant's Statement of Genuine Issues ¶ 1(a). The contract had one base year and four option years. *Id.* ¶ 1(b). Option year 2 ran from December 1, 2015, through November 30, 2016. *Id.*; Appeal File, Exhibit 2.¹

On August 1, 2016, YRT advised the chief of the operations section of PSB that YRT had decided "not to renew [its] contract to work for the remaining option years." Appellant's Statement of Genuine Issues ¶ 2(a); Exhibit 3. The chief of operations acknowledged this notice the following day. Appellant's Statement of Genuine Issues ¶ 2(a).

On November 23, 2016, YRT received a letter from the contracting officer addressed to YRT's principal, Yolanda R. Tompkins, that advised:

On August 1, 2016, you notified the Personnel Security Branch (PSB) that you would be terminating your special investigator services contract with the Bureau of Alcohol, Tobacco, Firearms and Explosives effective at the end of the current option year which expires on November 30, 2016.

On November 21, 2016, through an unofficial note left in your workspace, the PSB management was made aware that after you departed ATF Headquarters on November 18, 2016, you would not be returning to finish the remainder of your contract services.

Since you left the facilities without properly notifying your Contracting Officer's Representative (COR), you did not complete the necessary separation actions. Accordingly, your Top Secret security clearance will be administratively withdraw[n], without an official debrief, and you are hereby notified that you must return your ATF issued credentials and Personal Identity Verification card to the PSB no later than November 30, 2016. Due to the sensitivity of these items, the PSB requests these items be returned via FedEx. To assist with the return of the ATF property, the PSB has enclosed FedEx account and instructions.

Thank you for your attention to this matter. If you have any questions, please contact your COR, [COR's name], at [phone number].

¹ All exhibits are found in the appeal file.

Exhibit 6. The “unofficial note” left in YRT’s workspace consisted of two pages which detailed the equipment that had been used by YRT and advised that anyone who wanted to use the work space should contact the person in charge of assigning work spaces. Exhibit 5. The first page was dated November 18, 2016. *Id.* Ms. Tompkins explains that she “made the notes for myself because I had one week left to work at ATF. I have witnessed that when Contract investigators try to leave PSB, they are plagued with issues concerning the equipment.” Appellant’s Statement of Genuine Issues ¶ 2(c).

On November 28, 2016, YRT sent an email message to the contracting officer, asking why the contract had been terminated before the termination date of November 30, 2016, and noting that YRT had not received any notice prior to the November 23, 2016, letter regarding problems on the contract. Exhibit 7. YRT further advised:

I never officially notified you or the Personnel Security Branch (PSB) management that I would be leaving ATF permanently after Friday, November 18th. I used leave for several days due to the Thanksgiving holiday. I planned on returning to work on Friday, November 25, 2016, to work until the end of my contract on November 30, 2016.

Id. In response the same day, the contracting officer suggested that YRT contact the COR or the operations director of PSB. *Id.* YRT did not contact the operations director until December 1, 2016, when she inquired by email what the basis was for the early termination of her contract. Exhibit 9.

On November 30, 2016, the contracting officer sent another letter to YRT, responding to the November 28, 2016, email message. The contracting officer explained that PSB personnel had concluded on November 21, 2016, that YRT would not be returning to work because the workspace had been cleared of all items except ATF-supplied computer equipment and ATF personnel found the notes regarding the equipment taped to the computer and the file cabinet. Exhibit 8. In addition, an internal calendar listed YRT as out of the office through November 30, 2016. *Id.*; Exhibit 4 (printouts from Microsoft Office calendar showing Ms. Tompkins would be out).² The contracting officer further explained that the earlier letter was not intended to be a contract termination as the result of any

² YRT disputes that the calendar shows Ms. Tompkins was scheduled to be out from November 21 through November 30, asserting that she only planned to be out two days for the Thanksgiving holiday. As support, YRT cites the November 28, 2016, email message to the contracting officer. Exhibit 7.

negligence or malice. Exhibit 8. Instead, ATF was attempting to obtain return of ATF-issued credentials by the end of the contract performance period. *Id.*

On December 5, 2016, YRT sent a letter to the contracting officer detailing several actions it wanted ATF to undertake to resolve the dispute over the alleged early termination of YRT's contract. Exhibit 15. YRT sought payment of \$8064, which is described as the amount which could have been earned between November 25 and 30, 2016. It also asked that the contracting officer's November 23, 2016, letter and any related correspondence be removed from the contract file and that YRT be provided a letter of recommendation signed by the PSB division chief.

On January 18, 2017, YRT met with the ATF deputy assistant director for the office of professional responsibility and security operations to discuss the matter and YRT's concerns regarding the disparate treatment of contractors working in the PSB. Appellant's Statement of Genuine Facts ¶ 3(c); Exhibit 13 at 2. In conjunction with that meeting, YRT provided a written list of actions it wanted ATF to undertake to resolve its claims regarding the contract termination. In addition to the actions detailed in the December 5 letter to the contracting officer, YRT also inquired as to the status of the security clearance that had been granted to Ms. Tompkins, stating a belief that it "usually remains active for approx. 6 months, or until I am working again" when Ms. Tompkins has left an agency. Exhibit 11. YRT sought \$3080 (\$2240 regular time and \$860 overtime) for the time YRT was not permitted to perform after November 23, 2016. *Id.* at 2. The remaining amount (\$4984) was for emotional distress and disrespectful treatment from PSB management. *Id.*

On March 9, 2017, the contracting officer issued a final decision in response to YRT's January 18, 2017, claim. Exhibit 12. The contracting officer again explained that the letter YRT received on November 23, 2016, was not notice of termination of the contract and denied YRT's claims for compensation. Regarding the request for removal of the November 23, 2016, letter and any related correspondence, the contracting officer determined that the agency was required to keep these documents as part of the history of the contract, pursuant to Federal Acquisition Regulation (FAR) 4.801(b) (48 CFR 4.801(b) (2016)). The contracting officer further explained that Ms. Tompkins' security clearance was withdrawn as required by Executive Order 12968 because she no longer had need for it since the contract was completed. Finally, the contracting officer told YRT that it could request a letter of recommendation from ATF for work on the contract, but that there may be limits on what could be stated in such a letter due to ethics regulations.

On April 13, 2017, the Board docketed YRT's appeal of this decision.

Discussion

I. Standard of Review

The Board derives its jurisdiction from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. If jurisdiction cannot be established, the Board must dismiss the case. *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992). In considering a motion to dismiss, “a tribunal accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the [appellant].” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969. YRT “bears the burden of establishing [subject matter jurisdiction] by a preponderance of the evidence.” *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,602 (quoting *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

II. The Board Lacks Jurisdiction To Consider YRT’s Allegations of Improper Contract Termination

YRT alleges that its contract was terminated early when it received the letter “on November 23, 2016 demanding the immediate return of appellant’s credentials, effectively terminating Appellant’s employment.” Notice of Appeal at 1; Complaint ¶ 7. YRT asserts this letter was sent as retribution for complaints YRT had voiced regarding racism of PSB management toward YRT and this act of retribution violates title VII of the Civil Rights Act. *Id.*³ ATF moves to dismiss these allegations because YRT has failed to allege a connection between YRT’s actions and ATF’s alleged act of retribution that prevented YRT’s performance of the contract necessary to give the Board jurisdiction.

The Board lacks jurisdiction to consider allegations of violations of Title VII of the Civil Rights Act of 1964 because jurisdiction to consider such complaints resides exclusively with the U.S. district courts. 28 U.S.C. § 1343 (2012); *Bunch v. United States*, 33 Fed. Cl. 337, 341 (1995), *aff’d*, 78 F.3d 605 (Fed. Cir. 1996) (table); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,764. Regarding general claims of discrimination, the Board has jurisdiction only when the alleged violations had a specific and direct impact upon the performance of the contract

³ In response to the motion to dismiss, YRT describes two meetings with PSB management officials in 2016, during which YRT voiced concerns about disparate treatment of YRT and other contractors by PSB management. Appellant’s Response at 2-3; *see also* Exhibits 13, 18-19.

at issue. *Innovative (PBX) Telephone*, 07-2 BCA at 166,764. To satisfy this jurisdictional prerequisite, an appellant must allege specifically how unlawful acts of government personnel affected its ability to perform the contract. *Id.*

The Board does not have jurisdiction to consider YRT's claims that its contract was terminated early as retribution for prior complaints. First, YRT alleges ATF's actions violated title VII, an allegation which the Board lacks jurisdiction to consider. Second, to the extent that YRT is making an allegation that the letter was an act of retribution, YRT cannot establish that the contracting officer's letter received on November 23, 2016, prevented it from continuing to perform the contract through November 30, 2016, because it was not a termination notice. The letter did not state that the contract was terminated. While the contracting officer sought return of credentials necessary to access workspace and perform the contract, the contracting officer only asked that the credentials be returned by November 30, 2016, the last day of the contract. Further, as YRT observed in its communications with the contracting officer, the letter gave no indication of performance problems on the contract, and YRT had received no notice of such problems, so the letter did not bear the indicia of a termination notice. 48 CFR 52.212-4; *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,900 (opportunity to cure required for commercial items contract).

Because this letter was not a termination notice, it did not prevent YRT from continuing to perform on the contract through November 30, 2016. Without a showing that YRT was prevented from performing the contract, YRT has not pled a specific action necessary to give rise to the Board's jurisdiction. Accordingly, this aspect of YRT's complaint is dismissed.

II. YRT Seeks Damages the Board Is Without Jurisdiction to Award

A. The Board Cannot Award Punitive Damages

YRT also seeks several types of damages that the Board is without jurisdiction to provide. YRT now seeks \$600,000 in punitive damages for "malicious, reckless and deliberate acts of discrimination practiced by PSB management." Complaint at 3. Punitive damages may not be recovered against an agency of the Federal Government absent the express consent of Congress. *Safe Haven Enterprises*, 15-1 BCA at 175,607. Because the CDA contains no such waiver, this aspect of the claim must be dismissed. *Id.*

B. Board Has No Jurisdiction To Adjudicate Security Clearance Withdrawals

YRT also seeks reinstatement of the security clearance that was administratively withdrawn as part of contract closeout at the end of performance. The Board does not have jurisdiction to review the decisions of executive branch agencies to grant or withdraw security clearances. *Department of the Navy v. Egan*, 484 U.S. 518, 528-30 (1988). Executive Order 12968 provides that access to classified information shall be terminated when an individual no longer has a need for access. Executive Order 12968, 60 Fed. Reg. 40,245 (Aug. 7, 1995). Because YRT's contract has concluded, there is no ongoing contract between the parties for which a security clearance is necessary.

C. The Board Cannot Grant Injunctive Relief

1. Contractor Performance Assessment Reporting System (CPARS) Entries

YRT requests that the Board direct the agency to undertake three actions all related to YRT's record of performance on the contract. The Board is without authority to direct any of these actions.

First, YRT asks the Board to direct ATF to remove any unfavorable performance ratings for the contract that may be in the CPARS. A claim challenging an unsatisfactory performance evaluation is subject to review by the Court of Federal Claims and boards of contract appeals. *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311-14 (Fed. Cir. 2011). A contractor "clearly [has] standing to sue [the Government] based on the substantive allegation that the government acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation." *Id.*, at 1316; *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,929. The Board, however, is not the proper forum for resolving every factual dispute between the contractor and the Government. *Orr*, 16-1 BCA at 177,930. Although the Board has jurisdiction to assess whether the evaluation was arbitrary and capricious, "[the Board] cannot direct the Government to revise [a performance evaluation] in a particular way through some form of injunctive relief." *Id.* (citing *Versar, Inc.*, ASBCA 56857, 10-1 BCA ¶ 34,437, at 169,959); *Colonna's Shipyard, Inc.*, ASBCA 59987, et al., 16-1 BCA ¶ 36,518, at 177,899.

It is not clear that ATF has entered a performance evaluation for the contract into the CPARS or whether that evaluation, if it exists, contains negative information. Instead, YRT asks the Board to direct ATF to remove any negative information, should it exist. The Board lacks jurisdiction to grant such relief, so the portions of YRT's notice of appeal and

complaint seeking such relief are dismissed. *CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662, at 178,538.

2. Contract File Materials

Second, YRT asks the Board to direct ATF to remove from the contract file the letter that YRT received on November 23, 2016, and any correspondence or documents related to that letter. With this request, YRT seeks injunctive relief that the Board does not have jurisdiction to grant. *Eyak Technology, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538, at 170,340. Moreover, as the contracting officer explained, these letters are part of the history of the contract that must be maintained in the contract file as required by regulation. 48 CFR 4.801(b)(2).

3. Letter of Recommendation

Finally, YRT asks the Board to direct ATF to issue a letter of recommendation for YRT. This request is another request for non-monetary injunctive relief that the Board is without the authority to provide. *See Roger Dean Barrett*, PSBCA 2490, 89-3 BCA ¶ 22,220, at 111,739.

Decision

ATF's motion is granted and the appeal is **DISMISSED FOR LACK OF JURISDICTION**.

MARIAN E. SULLIVAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge