



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO AMEND PROTECTIVE ORDER
AND REQUEST FOR SANCTION DENIED:
June 19, 2018

CBCA 4775, 5360

NVS TECHNOLOGIES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

James S. DelSordo of Argus Legal, PLLC, Manassas, VA, counsel for Appellant.

Marshall Caggiano and Christopher M. Kovach, Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

GOODMAN, Board Judge.

On September 7, 2017, respondent's counsel, Marion T. Cordova,¹ filed a motion entitled "Respondent's Motion to Amend Protective Order and Request for Sanction"

¹ The motion and the draft stipulated protective order attached to the motion were signed by Marion T. Cordova. Respondent's responses to the Board's inquiries are answered by separate submission from Mr. Cordova, who retired from federal civilian service in December 2017, and Christopher M. Kovach, who entered his appearance on behalf of respondent on April 21, 2017 and remains counsel of record for respondent. Mr. Cordova corresponded with Mr. DelSordo with regard to the drafting and finalization of the stipulated protective order. References to respondent's counsel in this decision are to Mr. Cordova, unless otherwise noted.

(respondent's motion). Appellant's counsel, James. S. DelSordo, filed an opposition to the motion on September 8, 2017. Both parties subsequently filed responses to the Board's inquiries dated January 8, 2018 (Board's inquiries). The Board denies the motion.²

Background

Request for Protective Order

During a telephonic conference with the presiding judge on Friday, December 2, 2016, Mr. Cordova stated respondent's need for a protective order in these appeals. By Board order and conference memorandum dated December 5, 2016, counsel for the parties were directed to draft a protective order to be issued by the Board.³ According to counsel for the parties, appellant's counsel, Mr. DelSordo, sent a draft protective order to respondent's counsel soon after the conference with the presiding judge.

On December 9, 2016, counsel agreed upon a final version to be submitted to the Board. Mr. DelSordo transmitted the final version to respondent's counsel via email dated December 9, 2016, which stated, "Once you sign it and return it to me I will send it to the Board for entry." Mr. Cordova states in response to the Board's inquiries that "I signed the [protective order] on December 9, 2016. I immediately sent the signed [protective order] to [appellant's counsel], and expected that he would file [it] with the CBCA as he stated that he would do multiple times."

In response to the Board's inquiries, Mr. DelSordo states that after counsel for both parties signed the final version of the protective order, even though he had "stated that it would be transmitted to the Board for entry," he "neglected to submit the proposed protective order to the Board."

Pre-Hearing Conference and Respondent's Allegation of Violation of the Board's Protective Order

The parties proceeded through discovery, and a hearing on the merits was scheduled to commence on Tuesday, September 12, 2017, with a telephonic pre-hearing conference

² As discussed herein, the Board partially resolved the motion in previous orders.

³ The procedure for issuance of a protective order is for counsel to submit a proposed draft order to the Board for review by the presiding judge, who then reviews the order, discusses clarifications or amendments if necessary with counsel, and thereafter issues the protective order as an order of the Board.

scheduled for Thursday, September 7, 2017. On September 5, 2017, respondent's counsel, Mr. Kovach, sent an email to the presiding judge's legal assistant, stating that a former government employee who had recently been deposed in these appeals had been contacted by a journalist, who claimed to have a copy of the individual's deposition.

On September 7, 2017, the presiding judge held the telephonic pre-hearing conference. During that conference, Mr. DelSordo stated that he had released documents to the journalist who had contacted the former government employee. He stated that the document release included an Office of Inspector (OIG) Memorandum. Mr. Cordova stated that because of the nature of the information contained in that document, the release of the OIG memorandum was a violation of a term of a protective order which the Board had issued in these consolidated appeals.

Mr. Cordova read a provision from a protective order during the telephone conference to support his contentions that the disclosure of the OIG memorandum had violated the protective order. Mr. DelSordo disputed the interpretation of the provision that was read, claiming the release of the OIG memorandum did not violate the protective order. The presiding judge stated that if respondent believed a protective order was violated, respondent must file a motion describing the violation. Another telephonic conference was scheduled for Monday, September 11, 2017, to discuss the issue further.

Respondent's Motion to Amend Protective Order and Request for Sanction

That same afternoon, respondent filed the instant motion, alleging that in May 2017 Mr. DelSordo had advised that he would transmit documents to the media if settlement negotiations were not initiated, and that during the pre-hearing conference that day, Mr. DelSordo "admitted that he provided numerous documents . . . to a reporter, [including] the OIG [memorandum] The full range of [the] disclosure is not yet clear." The motion further alleged that Mr. DelSordo's transmission of documents to the media was a violation of an undated document, entitled "Stipulated Protective Order," that was signed by Mr. Cordova and Mr. DelSordo and attached to the motion as Attachment 1. Above the signatures of counsel on the document was a blank signature line for the presiding judge.

Paragraph 1 of respondent's motion alleged that the "[t]he Board approved the Protective Order." The motion requested that the Board 1) clarify a specific term in the document by amendment; 2) include additional language in the document; 3) reprimand appellant's counsel for violating the terms of the document; 4) direct appellant's counsel to list all documents disclosed to the media; and 5) grant any other appropriate relief, "recognizing that some witnesses have had their reputations besmirched by this reckless disclosure."

After reviewing the motion and the attached document, the presiding judge asked the Clerk of the Board to review the receipt of submissions in these appeals and determine if the stipulated protective order had been filed with the Board prior to having been filed as an attachment to respondent's motion. The Clerk confirmed to the presiding judge that the stipulated protective order had not been received by the Board, either electronically via "e-filing" or facsimile, or physically by mail, third-party carrier, or hand-delivery.

On September 8, 2017, Mr. DelSordo filed an opposition to the motion, in which he admitted respondent's allegation that the Board had approved the protective order. The opposition stated that the motion involved the release of an OIG memorandum, dated March 13, 2015, which was attached to the motion as exhibit 1. However, the opposition also stated that "the referenced *documents* were not released to anyone outside of this litigation until after May 1, 2017." (Emphasis added). It was therefore unclear as to what documents had been released and when the release had occurred.

The Board Had Not Issued a Protective Order

On Monday, September 11, 2017, during the telephonic conference, the presiding judge asked about counsels' allegations that the Board had approved the Stipulated Protective Order. Mr. Cordova stated that he assumed Mr. DelSordo had transmitted it to the Board.⁴ Mr. DelSordo stated that he believed that he had e-filed the document with the Board.

⁴ Subsequently, in response to the Board's inquiries #3 and #4, as to counsel's belief that his allegation in his motion that "The Board approved the Protective Order," was factually accurate when the motion was filed, Mr. Cordova stated:

This was my first case before the CBCA, and I did not realize that even if the Parties signed a [protective order] that the Board still had to issue an order. I incorrectly assumed that the Board's role was to modify terms, or suggest modifications to terms, if it found necessary. Since we had not heard from the Board, I assumed the protective order was approved and binding. I attached the [protective order] signed by the parties without the Judge's signature because that was the only record I had available. Sufficient time had elapsed from the initial discussion of a Protective Order that it had become, in my mind, a settled matter that one was in place.

During the conference, Mr. DeSordo searched his email but could find no evidence that he had transmitted the document to the Board.⁵ It became clear to counsel at that time that neither had transmitted the signed protective order to the Board, and the Board had not approved the document.

The Board Issues a Protective Order

As the hearing on the merits was scheduled to begin at 9:30 a.m. the next morning, and it was clear from counsels' briefing of the motion that counsel disagreed as to the interpretation of the protective order they had drafted, the presiding judge could not adopt, approve, or amend the draft that counsel had executed. The presiding judge informed counsel that, immediately prior to the conference, the Board had received inquiries from non-parties, one identifying herself as a government contractor and the other as a journalist. The presiding judge therefore issued a protective order to accomplish what he perceived to be the parties' needs, based upon the parties' briefing on the motion to amend the protective order.⁶ By issuing the Board's protective order, the Board attempted to protect the alleged and stated interests of both appellant and respondent. Neither counsel commented or objected to the scope of the protective order during the pre-hearing conference.

The Board Directs Appellant's Counsel and a Former Government Employee to Describe their Disclosure of Documents to the Press and Others

As respondent's motion and appellant's opposition were not specific as to the documents which Mr. DeSordo had released outside of the litigation, or the communication from the former government employee to the press or others, the Board issued an order dated

⁵ Appellant's counsel stated in response to the Board inquiry #3:

At the time of that filing [of the opposition to the motion to amend protective order] the undersigned had forgotten that he had stated that he would request the Board to enter the agreed protective order. The undersigned had assumed that counsel for the Respondent had submitted the proposed order to the Board for entry and that the Board had entered it. . . . As time moved beyond December 9, 2016, the undersigned forgot to submit the order for entry and counsel for Respondent never raised the issue.

⁶ Respondent had alleged that a protective order was needed to protect the identities of individuals, and appellant had alleged that a protective order was needed to prevent release of its trade secrets and competitive information.

September 11, 2017, directing appellant's counsel and the former government employee to list the documentation, methodology of release, and identity of the recipients.

Mr. DelSordo's response, dated September 29, 2017, states that he wrote letters to Messrs. Kovach and Cordoba dated April 21, 2017, and May 1, 2017, advising that he intended to release to the media the OIG memorandum attached as exhibit 1 to appellant's opposition to respondent's motion (Appellant's Supplemental Appeal File (App.Supp.) 14) and two other documents, the associated timeline (App. Supp. 13) and briefing slides (App. Supp. 12). On August 10, 2017, he released these documents along with depositions of the former government employee and three other individuals and twenty-three other documents on a flash drive to the media. On August 18, 23, and 28, 2017, appellant's counsel released to the media all briefs relating to a motion for summary relief in CBCA 4775 and the pre-hearing briefs, witness lists, and exhibit list for both parties for the hearing on the merits.

The former government employee's response dated September 29, 2017, states: "After being contacted by the LA Times reporter . . . and told that he had all of the documents from the CBCA case pre-hearing filings and that he was writing an article about the case, I provided a high-level verbal description of my rationale for terminating the . . . contract, responses to his questions about my transition out of [the agency] and my retirement." The former government employee also provided a written statement to the reporter which he included in his response to the Board, and forwarded the OIG memorandum and other documents to "individuals who [he] believed had been defamed and slandered in documents associated with the case."

The Hearing on the Merits, Vacation of Protective Order, and Clarification

The hearing on the merits commenced on September 12, 2017. After preliminary matters were discussed, the hearing was adjourned while counsel and the parties engaged in settlement discussions. The case was not resolved, but parties agreed to proceed in alternative dispute resolution for a portion of the appeal, and the Board verbally vacated the protective order, for reasons stated on the record. The Board's subsequent order on proceedings, dated September 25, 2017, confirmed the vacating of the Board's protective order and further stated that the stipulated protective order entered into by counsel remained in effect, with its restriction on disclosure of information. The order further directed counsel to confer and advise the Board if they desire a protective order issued by the Board, and if

so, to submit it to the Board for review. As of this date, the parties have not requested a protective order.⁷

On October 3, 2017, the Board issued another order in response to appellant's counsel's request for clarification with regard to the stipulated protective order executed by counsel. That order stated in part the Board did not vacate or declare counsel's stipulated protective order of no effect.

Discussion

Resolution of Respondent's Motion to Amend Protective Order and Request for Sanction

The Board Cannot Clarify or Amend the Parties' Stipulated Protective Order

Respondent requests "that the Board immediately clarify that 'personally identifiable information' as that term is used in paragraph 18 [of the stipulated protective order] means the same as in 2 CFR 200.79." This relief was denied by the Board's Order dated October 3, 2017, which referred to the discussion of this issue during adjournment of the hearing on September 12, 2017, when the presiding judge stated that "it was apparent that counsel's minds had not met as to the meaning of that term, and . . . the Board could not clarify that term, as the agreement had been drafted and agreed to by counsel but never submitted to the Board." The agreement can only be clarified by the drafters, i.e., counsel for the parties.

Respondent requests that the Board amend paragraph 20 of the stipulated protective order to include additional language as to notice of release of documents and marking of documents. The Board denies respondent's request to add additional language to the document, as it is not a Board order. However, appellant's counsel, in the opposition to the motion, stated that "[a]ppellant has no objection to the proposed modification." The parties are free to adopt the proposed language in the stipulated protective order, as it remains in effect. However, as stated previously, the parties were directed by the Board's order dated September 25, 2017, to submit a protective order to the Board if they wished one to be issued, and they have not.

⁷ On December 5, 2017, the Board advised counsel that an individual had requested to review the record in these appeals, as no protective order was in place. Counsel for both parties replied that they had no objection to the record being reviewed.

The Board Cannot Find that the Stipulated Protective Order has been Violated,
As the Board Will Not Interpret the Agreement

Respondent requests that the Board, in accordance with CBCA Rule 33 (48 CFR 6101.33(2017)), reprimand appellant's counsel for violating the stipulated protective order.

Board Rule 33 reads:

Sanctions. When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions.

Appellant's counsel cannot be reprimanded for violating the stipulated protective order, as it was not an order of the Board. Additionally, counsels' disagreement as to the interpretation of the stipulated protective order which they drafted raises issues as to the intended meaning of the provision that respondent's counsel asserts was violated. The Board will not interpret the parties' agreement, and this issue will not be resolved by the Board.

Sanctions for Release of the OIG Memorandum are Denied

Respondent further requests that the Board "take appropriate action regarding Appellant's counsel using the threat of selective document release to coerce a settlement." Respondent does not specify what "appropriate action" the Board might take. This request apparently refers to Mr. DelSordo's letters to Messrs. Kovach and Cordoba dated April 21, 2017, and May 1, 2017, advising that he intended to release the OIG memorandum to the media. Apparently, that document had been produced to appellant's counsel before April 21, 2017. Even though the stipulated protective order was never submitted to the Board to be issued as a protective order, it is relevant that the document contained a specific agreement by counsel to designate a document as "protected," if a party believed the information contained therein was protected information. There is no indication that respondent designated the OIG memorandum as "protected" when it was produced to appellant. Also, appellant submitted the document on August 22, 2017, as an exhibit in its supplemental appeal file without marking it as protected, and respondent did not object that the document was not marked protected nor confirm the existence of a protective order.

The OIG memorandum and other documents were sent to a reporter in August 2017. Thus, the alleged "threat" to release it to the media was made four months before the document was released and respondent's motion was filed. In the interim, counsel failed to

confirm that their stipulated protective order had been filed with the Board, while disagreeing as to its interpretation. Mr. Cordova asserts that he did not bring this matter to the attention of the Board because he assumed the protective order was in place. He offers no explanation why, if he believed appellant's counsel's communication raised the issue of a possible violation of the protective order, that he failed to confirm that a protective order had been issued by the Board. In light of respondent's counsel's failure in this regard, we deny the request for relief. *See, Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480 (2009) (failure to take prompt affirmative action to prevent disclosure of protected or privileged information results in waiver of privilege or protection of the information).

Appellant's Counsel and the Former Government Employee Have Listed Documents They Have Disclosed

Respondent requests that the Board have appellant's counsel provide a list of all documents that he has provided to anybody not admitted to the protective order, "as DHS may consider this a reportable 'Privacy Incident' under the Privacy Act." As discussed previously, the Board issued an order on September 11, 2017, granting respondent's request that appellant's counsel list all documents that he disclosed, and also directing the former government employee to list documents he disclosed. Appellant's counsel filed his response on September 22, 2017, and the former government employee filed his response on September 29, 2017.

The Board Denies Further Relief

Respondent requests that the Board grant "any other relief that the Board deems to be fair and equitable in this situation, recognizing that some witnesses have had their reputations besmirched by this reckless disclosure, without any opportunity to rebut or explain the circumstances surrounding such records."

In response to the Board's inquiries, Mr. Cordova states that this request for relief was based upon his conversations with a former government employee whose name is mentioned in the OIG document, "who believes that his reputation and that of other individuals named in the OIG document have been impacted." Mr. Cordova states further that he has communicated with the former government employee only, and not with other individuals.⁸

⁸ Mr. Cordova does not represent the former government employee or the other individuals.

Respondent's counsel, in further support for this request, states that:

Mr. DelSordo was quoted by the LA Times as stating that NVS had been victimized by government "mismanagement and a campaign to harm its business which culminated in the inappropriate termination of the contract." An unsupported allegation that anybody in DHS engaged in a "campaign to harm" NVS is damaging to the reputation of [the former government employee]."

Mr. DelSordo's statement quoted in the LA Times is from appellant's pre-hearing brief filed with the Board—it does not name specific individuals. There is no evidence that the former government employee or other individuals named in the OIG memorandum have been identified by the press to the public. Respondent does not specify any relief that can be offered by the Board to non-parties to these appeals. The Board makes no determination as to whether "some witnesses have had their reputation besmirched," and this request for relief is denied.

Counsels' Actions Have Been Disruptive to the Proceedings in these Appeals

Both Mr. DelSordo and Mr. Cordova have shown lack of diligence and inattentiveness to Board procedure. As their agreed draft stipulated protective order contained a signature line for the presiding judge, it is apparent that both expected that the presiding judge would sign the order as drafted or otherwise communicate with them once the document was filed with the Board. From December 2016 until respondent filed its motion in September 2017, neither received a signed copy of the order or communication from the presiding judge regarding the order, yet they did not inquire whether the order had been approved by the Board.

Mr. Cordova states that "[s]ince we had not heard from the Board, I assumed the protective order was approved and binding." This excuse lacks merit. The lack of a signed copy of the order or other communication from the Board suggests the opposite assumption—that the proposed order had not been approved. In May 2017, when Mr. DelSordo raised an issue of disclosure which Mr. Cordova interpreted as a threat to release protected information which would result in a violation of the stipulated protective order, Mr. Cordova again did not confirm that the order had been received or approved by the Board. He continued to assume that the order had been approved, even though he did not have an order from the Board.

When Mr. Cordova filed respondent's motion in December 2017, he attached a copy of the stipulated protective order signed only by counsel and represented to the Board that

the order had been “approved by the Board.” He explains why he attached this copy of the order to his motion, stating it was the only copy he had. This does not explain or justify his failure to inquire in the previous months as to whether the order had been approved by the Board, his assumption that the order had been approved, or his unintentional misrepresentation that the order was approved by the Board.

Mr. DelSordo is equally at fault. After stating to Mr. Cordova that he would transmit the stipulated protective order to the Board, he failed to do so. His explanation as to why he then forgot—because his understanding was that the usual procedure was for respondent’s counsel to transmit a protective order—also lacks merit, as his explanation is contrary to his representation to Mr. Cordova that he would transmit the order to the Board. Further, Mr. DelSordo’s statement—“[a]s time moved beyond December 9, 2016, [I] forgot to submit the order for entry and counsel for Respondent never raised the issue”—does not justify his inattentiveness to Board procedure and failure to fulfill his agreement with respondent’s counsel to file the stipulated protective order with the Board. His admission of respondent’s erroneous allegation that the Board had approved the stipulated protective order was in itself erroneous. Mr. DelSordo’s actions and explanations do not justify his failure to inquire in the previous months as to whether the order had been approved by the Board, his assumption that the order had been approved, or his unintentional misrepresentation that the order was approved by the Board.

In filing the motion and opposition, neither counsel included support that the stipulated protective order, undated and not bearing any indication of Board approval, had been submitted to the Board and subsequently approved or issued by the Board. It was not until the presiding judge inquired on Monday, September 11, 2017, during the pre-hearing conference that they stated that they realized their executed document had not be filed with the Board.

Mr. Cordova’s and Mr. DelSordo’s failure to submit their stipulated protective order to the Board, their failure to ascertain whether the document had been received and approved by the Board, and their erroneous, unsupported allegations concerning the Board’s alleged approval of the document, demonstrate lack of diligence and disrespect to the Board. The resulting circumstances—the Board’s issuance of a protective order in an attempt to protect the parties’ interest, the subsequent vacation of that protective order, and the necessity for the Board to resolve this motion—have been disruptive to the proceedings in these appeals. Counsel are cautioned to act with diligence and respect in proceedings before the Board.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge