

PSBCA 5356

APPEALS OF JOSEPH J. FANUCCHI, M.D. EMPLOYMENT CONTRACT

December 30, 2010

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OPINION OF THE BOARD [FN1]

In 2001, Respondent, United States Postal Service, hired Appellant, Dr. Joseph J. Fanucchi, under a five-year employment contract. Four years later Respondent terminated the contract on notice. Appellant made monetary claims, contending that Respondent failed to provide bonuses and other benefits called for in his contract, failed to give proper notice of its termination of the contract, and terminated the contract in violation of the Jury Systems Improvement Act of 1978. He also sought reinstatement. Respondent denied his claims and denied reinstatement, and Appellant appealed.

A hearing was held, and the parties have filed briefs. At the parties' election, both entitlement and quantum will be decided (Order, October 29, 2009; Order and Memorandum of Telephone Conference, December 30, 2009; Tr. I 7). [FN2]

FINDINGS OF FACT

1. On April 10, 2001, Appellant, a physician, and Respondent entered into an employment contract ("Employment Contract" or "Contract") authorized by 39 U.S.C. §1001(c), [FN3] under which Appellant was to provide medical services for Respondent as an Associate Area Medical Director in California. The Contract had a five-year term, expiring on April 9, 2006, and provided Appellant an annual salary of \$120,000 (Tr. I 22, 26 (Bachman), 173 (Fanucchi)). Respondent's Senior Area Medical Director, Western and Pacific Area Office ("SAMD"), who also was a physician, was the contracting officer. The handwritten notation "approved 4/19/01" and the signature of Respondent's Pacific Area Manager, Human Resources ("Area HR Manager"), followed the signatures of Appellant and the SAMD on the contract. [FN4] (Appeal File, Tab ("AF") 14; Stipulation ("Stip.") 1; Deposition of G. Sanchez, pages ("Sanchez") 14, 32; Tr. I 21 (Bachman), 167, 170 (Fanucchi)).

Benefits and Bonuses

2. The Contract provided,

During the term of this contract [Appellant] shall be eligible for performance awards and monetary incentive awards in addition to the basic salary as described in paragraph (3) above. This includes eligibility for a monetary incentive award in an amount equal to the exempt credit percentage, if any [sic] for EAS employees [FN5]] in the Pacific Area where he is currently assigned.

During the term of this contract [Appellant] shall be eligible for all leave and benefits provided to [Postal Service] EAS employees, including any improvements in such leave and benefits as may occur during the term of this contract. For purposes of this contract, benefits shall include coverage under the Federal Employees Retirement System (FERS).

(AF 14, Employment Contract ¶¶ (4), (5)).

3. During Fiscal Years ("FY") 2003 and 2004, Appellant's non-bargaining (EAS) employees in the Pacific Area were eligible for performance-based bonuses (Sanchez 34). These bonuses were calculated based on the performance of the employee's department relative to other departments and the performance of the employee relative to others in his department, and ranged from 0 to about 8% of salary. (Tr. I 187-189, 272 (Fanucchi); Tr. II 145-146, 148-149, 152-3 (Smith)). Not all employees received bonuses (Tr. I 86-87 (Bachman)). No doctors in the Pacific Area, including Appellant and the SAMD, received bonuses during 2001-2005 (Tr. I 18, 84, 137 (Bachman); Tr. II 66 (Saba), 89 (Byrne), 119 (Bachman)). The SAMD had never received a bonus while working for Respondent (Tr. I 18, 84 (Bachman)).

4. The Employment Contract provided,

For each year, adjustments to [Appellant's] basic salary shall be subject to an annual performance review based on evaluation criteria established by the National Medical Director and the Area Manager, Human Resources, Pacific Area Office.

(AF 14, Employment Contract ¶ (3); Stip. 3).

5. None of the doctors working in the Pacific Area received official performance evaluations from the SAMD during 2001-2005 (Tr. II 57 (Saba), 89 (Byrne)). Appellant received no formal performance evaluations from the SAMD (Tr. I 49, 150 (Bachman), 173 (Fanucchi)), but the SAMD had informal discussions with Appellant about his performance throughout Appellant's employment (Tr. I 25, 150 (Bachman)).

6. On May 12, 2004, Appellant's Employment Contract was amended to increase Appellant's salary to \$125,000 per year (Tr. I 22, 137 (Bachman), 173-174 (Fanucchi)). The increase was in the nature of a COLA (cost of living adjustment), to bring Appellant's pay to the level of other postal doctors around the country (Tr. I 85 (Bachman)). It was not a performance-based bonus (Tr. I 85-86 (Bachman)).

The Contract's Non-Cause Termination Provision

7. Appellant had the right to terminate the Employment Contract thirty days after providing Respondent with written notice of his intent to do so (AF 14, Employment Contract ¶ (9)).

8. The Contract provided, "As set forth in 39 U.S.C., Subsection 1001 (c), the Postal Service may, at its discretion and at any time, upon written notice to [Ap-

pellant], terminate his employment without cause." In the event of such termination, the Employment Contract provided that Appellant would be entitled, "in lieu of all contract rights," to 10 weeks of severance pay, and stated, "This contract shall be [Appellant's] sole remedy in the event of such termination." (AF 14, Employment Contract ¶ (10)).

9. The Contract provided, "Any notice required or permitted hereunder shall be sent by registered or certified mail." (AF 14, Employment Contract ¶ (15)).

Appellant's Performance

10. Appellant, a physician, board certified in the field of occupational medicine (Tr. I 161 (Fanucchi)), was employed by the Pacific Area, although he was assigned to work directly with district offices (management units subordinate to the Pacific Area) (Tr. I 47 (Bachman)). Early in his tenure, Appellant worked with the San Jose and Sacramento Districts (Tr. I 194, 198 (Fanucchi)), but in 2004, he was assigned full time as the Associate Area Medical Director for the San Francisco District (Tr. I 205 (Fanucchi)). Thereafter, Appellant's major client was the San Francisco District's Human Resources Department, whose staff was involved with hiring, injury compensation, restoration of injured employees to work, and occupational health services (Tr. I 83-84 (Bachman)). From 2003 through 2005, the SAMD was Appellant's immediate supervisor (Tr. I 78-79 (Bachman)).

11. Appellant was well respected by his peer Postal Service doctors (Tr. II 57 (Saba), 73-75, 77, 84 (Byrne)), including the SAMD (Tr. I 135 (Bachman)). During the SAMD's absence from the Pacific Area from Fall 2002 through March 2003, Appellant was designated as the acting SAMD for the Pacific Area (Tr. I 23 (Bachman), 197 (Fanucchi)). His work was thought generally to be very good (Tr. I 201 (Fanucchi)). A number of postal employees who worked with him in the injured workers programs found him to be responsive to their inquiries, cooperative, helpful, and supportive of their work. (Tr. II 17-19 (Croteau), 101-102 (A. Sanchez), 143 (Smith)).

12. Nevertheless, before January 2005, the SAMD became aware of complaints, mostly oral, from some Postal Service employees who worked with Appellant regarding his availability for meetings and a dismissive attitude in some interactions with postal employees in the injury compensation program (Tr. I 64, 68, 91, 93-94, 130, 140, 143 (Bachman); Tr. II 113-114, 127 (Bachman)). As Appellant's supervisor, the SAMD was concerned about the complaints and had informal discussions with Appellant about the concerns, but more complaints followed (Tr. I 94-95, 103, 147, 149, 153 (Bachman); Tr. II 118-119 (Bachman)).

13. Based on the complaints, the SAMD drafted a written Performance Improvement Plan setting forth specific improvements he wished to see in Appellant's performance (Tr. I 90-92 (Bachman); Tr. II 115 (Bachman); AF 10, 12). In early January 2005, the San Francisco District Human Resources Manager reviewed and agreed with the draft Performance Improvement Plan (AF 10). The SAMD's intention was to discuss the Plan with Appellant, but he eventually decided to address the issues less formally, and he never presented the Plan to Appellant (Tr. I 51, 94, 100, 142 (Bachman), 206 (Fanucchi); Tr. II 121 (Bachman)). He never issued any written criticism of Appellant's work or gave Appellant an opportunity to respond to the specific complaints he had heard (Tr. I 49, 142, 150 (Bachman)), but he discussed informally with Appellant areas of Appellant's performance that the SAMD thought needed improvement, e.g., Appellant's availability for meetings and the need for Appellant to work cooperatively and collegially with the Postal Service employees he interacted with (Tr. I 68-69, 100-102, 149 (Bachman); Tr. II 115 (Bachman); contra Tr. I 207, 262-264 (Fanucchi)).

14. Since well before 2005, there were Postal Service budget issues that caused all offices to look continuously for ways to reduce costs (Tr. I 37, 129 (Bachman); Tr. II 65 (Saba); Sanchez 25). As part of its ongoing cost-cutting program, the Pacific Area continually reviewed positions, generally vacant, for possible elimination, and before 2005 had chosen not to fill some vacancies created when career (non-contract) doctors retired (Sanchez 25, 37- 38; Tr. II 16, 22 (Croteau)). The Area Human Resources office regularly reviewed 20 to 30 positions of all types per month over the entire Area for possible elimination and downsizing (Sanchez 39), and had reduced staffing and hiring considerably (Tr. II 22 (Croteau)). In 2005, the Human Resources Manager in the San Francisco District alerted her employees that there was a budget crisis that would require further downsizing (Tr. II 23 (Croteau)).

15. Reductions in medical service personnel, including doctors, had been considered in the past, and some reductions of such positions had occurred since 2001 (Sanchez 37; Tr. I 40, 81-82 (Bachman), 197 (Fanucchi)).

16. The process for eliminating the positions of doctors who worked under terminable contracts, such as Appellant's, was much simpler than that for downsizing by eliminating permanent career positions because Respondent had a "no-layoff" policy for career (non-contract) employees (Sanchez 64).

Appellant's Grand Jury Service

17. In April 2005, Appellant was summoned to serve on a federal grand jury and was subsequently appointed its foreman (Tr. I 214-215 (Fanucchi)). Within a short time thereafter, he notified the SAMD and the San Francisco District Human Resources Manager of his selection and that the grand jury service would require him to be away from the district office for 3 or 4 days per month for the next 18 months (Stip. 6; Tr. I 32, 110 (Bachman), 214, 217 (Fanucchi)).

18. The SAMD notified the Area HR Manager of Appellant's grand jury service and that Appellant would be away from the office a few days a month for the next 18 months (Tr. I 32-33, 110 (Bachman)). [FN6] The Area HR Manager expressed no adverse reaction when told of Appellant's jury duty requirement (Tr. I 111 (Bachman)), and he raised no concerns about any time off for jury service Appellant took in May 2005 (Sanchez 27).

Termination of the Contract

19. In April or May of 2005, the Human Resources Manager of the San Francisco District called the Area HR Manager and advised him that her office could save money by eliminating Appellant's contract position. She advised that her office could continue to perform the required services utilizing only the full-time, career doctor assigned to the District. (Sanchez 19, 24).

20. The Area HR Manager considered the District's proposal and concluded that the required services could be continued even if Appellant's position were eliminated. Certain of Appellant's former tasks could be redistributed, with the SAMD himself performing some of Appellant's duties. (Sanchez 19-26, 42-43, 63).

21. On or about June 3, 2005, the Area HR Manager orally authorized or directed the SAMD to terminate Appellant's contract because of complaints the Manager had received about Appellant from postal officials (Tr. I 33, 107, 127 (Bachman)) and for budgetary reasons (Tr. I 37, 107-109, 129 (Bachman); Sanchez 42-43). The Manager gave the SAMD nothing in writing about specific complaints or reasons for the termination (Tr. I 150 (Bachman)).

22. The SAMD was not happy about the decision, because Appellant was a friend and a very qualified occupational medicine physician (Tr. I 39-40, 119 (Bachman); Tr. II 129-130 (Bachman)). Appellant's jury service was not discussed by the SAMD and the Area HR Manager in regards to the termination of Appellant's Contract, and his jury service was not a factor in the decision to terminate his Employment Contract (Tr. I 110, 128 (Bachman); Sanchez 26-28, 66).

23. On or about June 6, 2005, the SAMD met with Appellant in Appellant's office and orally notified him that his contract would be terminated effective June 30, 2005 (Stip. 7; Tr. I 34, 41, 121 (Bachman), 219-221 (Fanucchi)). The SAMD told Appellant that the termination was for budgetary reasons (Tr. I 36, 43-46, 131-132 (Bachman), 220 (Fanucchi); AF 9). He said Respondent would pay Appellant the 10 weeks of severance pay authorized by the Contract (Finding 8) for a non-cause termination (Tr. I 35 (Bachman)).

24. By email dated June 9, 2005, to the SAMD, Appellant confirmed his understanding of the action taken. He discussed the transition of his work to others and stated,

I may have missed it when you were going through the logistics, but I'm presuming there will be a letter next week from you (or from [the Area HR Manager]?) formally notifying me that for budget reasons the Postal Service is terminating my contract prior to the end of its five-year duration. (Actually, that was the information I got from Personnel about "how it's usually done". I haven't reviewed the contract, but if I recall correctly it's not even necessary for the USPS to provide a reason). Then I can write back, acknowledging that I've received the notification and agree.

(AF 9; Tr. I 120 (Bachman)).

25. There followed on June 16, 2005, an email exchange between Appellant and the SAMD beginning with Appellant's note that the personnel office had not begun processing the termination (AF 7; Tr. I 223-225 (Fanucchi)). The SAMD replied, "Send me you [sic] resignatioin [sic] letter as well and I will talk with [the personnel office]." Appellant replied, "But I'm not resigning." [FN7] The SAMD responded,

Yes, but you want the form 50 [official notice of personnel action] to say you are resigning. I've fixed the process with [the personnel manager] to finalize the 10 weeks severance and the AL [annual leave] credit. She will input resignatiion [sic] as the reason for leaving.

(AF 7).

26. The SAMD believed that even in a non-cause termination it would be better for Appellant's future employment prospects if the official cause for Appellant's leaving the Postal Service were listed as his resignation and told Appellant so, although he also told him that he would still receive the 10 weeks of severance pay contemplated by the Contract (Tr. I 35-36, 41, 117- 118, 121 (Bachman)). Appellant understood he would receive the severance pay even if he resigned (Tr. I 256-257 (Fanucchi)).

27. In checking with staff of the Human Resources office, Appellant was told resignation was usually suggested in discipline cases and that he might not be eligible for unemployment compensation if he resigned. They advised him to wait for written notice before taking action. (Tr. I 190-191, 228-229, 230 (Fanucchi); Tr. II 21 (Croteau), 103, 106 (A. Sanchez)).

28. On June 16, 2005, the SAMD prepared a letter to Appellant, in which he stated,

The Pacific Area has determined that it will terminate your employment with the Postal Service effective 30 June 2005.

In compliance with Section 10 of your Employment Contract dated 10 April 2001 you will be paid 10 weeks severance pay beginning 1 July 2005.

(AF 6; Tr. I 114 (Bachman)). He sent the letter to Appellant by First-Class Mail (See AF 1; Tr. I 115, 134-135 (Bachman)), but Appellant did not receive it (Tr. I 222-223 (Fanucchi)).

29. In a memorandum dated June 16, 2005, to those working in the injury compensation program, the SAMD wrote of the need to reduce costs in the program. He advised how Appellant's former duties, which still needed to be done (Tr. I 55-57 (Bachman)), would be reassigned to others. The only specific mention of Appellant was, "It is with regret that I must inform you that [Appellant] will be leaving the Postal Service." (AF 8). The memorandum was not sent to Appellant (Tr. I 53-55 (Bachman)). No one was hired to replace Appellant. His work was taken over by other doctors remaining, including the SAMD (Sanchez 24; Tr. I 82-83, 130 (Bachman)).

30. On June 16, 2005, the SAMD sent a memorandum to the personnel office (with a copy to the Area HR Manager) advising,

[Appellant's] contract as Associate Area Medical Director, Pacific Area is being terminated effective 30 June 2005. He will be entitled to 10 weeks severance pay and accumulated annual leave time.

We will accept his resignation as the reason for leaving the Postal Service.

(AF 5; Tr. I 112-113 (Bachman); Tr. II 38-39 (Ishida)).

31. The San Francisco District personnel office prepared the official Notification of Personnel Action (PS Form 50) effecting the termination of Appellant's employment. The description of the action on the Form 50 was "Termination - Career Employee," and the comments section of the form included, "Contract Not Renewed." (AF 15; Tr. I 231 (Fanucchi)).

32. On June 27, 2005, the personnel office sent by Certified Mail (received by Appellant on July 2) information regarding continuation of his health benefits and conversion of his federal group life insurance policy to an individual policy after the end of his employment. The papers listed June 30, 2005, as Appellant's last day in pay status. (AF 16; Tr. I 232-233 (Fanucchi); Tr. II 39-41 (Ishida)).

33. Appellant worked through June 30, and did not work thereafter. [FN8] Respondent paid Appellant all salary to which he was entitled and for all annual leave he had earned up to and including June 30, 2005. Respondent paid him the 10 weeks of severance pay identified in the Employment Contract. (AF 4, 7, 9; Stip. 9, 10; Tr. I 256-258 (Fanucchi)). Appellant turned in his Postal Service identification badge on or about June 30, 2005 (Stip. 8; Tr. I 254 (Fanucchi)).

34. On October 14, 2005, the SAMD sent Appellant a letter by Certified Mail in which he stated, in full,

You were informed of the Postal Service's intention to terminate your contract as an Associate Area Medical Director for the Pacific Area in a direct meeting with me. You were given the opportunity of submitting your resignation so that the separation from the Postal Service would be resignation rather than termination. You

failed to take advantage of this opportunity.

Personnel was notified of the decision to terminate your contract on June 16 and a letter was directed to you on that date stating that your contract would be terminated on June 30, 2005. You have not worked for the Postal Service since June 30. You were paid for the two week period between June 16 and June 30. In compliance with your employment contract, you were also provided with the required 10 weeks severance pay as well as accrued annual leave pay.

You have confirmed that you were informed that your contract would be terminated. This letter is to inform you that it is the position of the U. S. Postal Service that you were provided with adequate and appropriate notice of the intention to terminate your contract, effective June 30, 2005.

(AF 4; Stip. 12). Appellant received that letter shortly after October 14 (Stip. 12).

35. In a letter to Respondent's law department dated December 27, 2005, Appellant's then-attorney asserted that Appellant was terminated because of his selection for grand jury service. He requested that Appellant be reinstated to his former position. (AF 3; Tr. I 234 (Fanucchi)). In a January 9, 2006 response from Respondent's counsel, the request for reinstatement was denied (AF 2; Tr. I 235 (Fanucchi)).

36. On April 14, 2006, Appellant submitted what the parties have considered to be his claim to the SAMD. He claimed that the termination was due to his grand jury service and, thus, violated 28 U.S.C. §1875. [FN9] Appellant sought payment of his salary and benefits through October 14, 2005, contending that Respondent's October 14, 2005 letter (Finding 34) was the first written notice of his termination meeting the requirements of the Employment Contract and that, accordingly, he was entitled to Contract pay and benefits through that date. He also claimed he was entitled to receive annual performance bonuses for Fiscal Years 2003 and 2004. (AF 17; Stip. 13).

37. By final decision dated May 12, 2006, the SAMD denied the claim. (AF 1; Stip. 14). Appellant filed a notice of appeal, which the Board docketed as PSBCA No. 5356.

The Appeals

38. In his Complaint, Appellant stated two causes of action:

In the First Cause of Action, Appellant alleged Respondent failed to give him written notice of his termination by Certified Mail in accordance with the Contract requirements. He sought damages of \$38,000 for salary and benefits up to October 14, 2005, the date he received the notice by Certified Mail, which was several months after his work for Respondent ended.

In the Second Cause of Action, Appellant alleged that Respondent terminated the contract because Appellant was selected for federal grand jury service. Appellant contended such termination was for an illegal reason because it violated the protections afforded jurors by 28 U.S.C. §1875. Appellant sought \$119,000 in damages, including earnings and benefits for the remainder of the five-year term stated in the Employment Contract.

39. The Board dismissed the Second Cause of Action because Appellant had not first submitted a certified claim to the contracting officer (Joseph J. Fanucchi, M.D., PSBCA No. 5356, 08-1 BCA ¶ 33,809).

40. On May 1, 2008, Appellant submitted a certified claim for \$119,000, comprising "\$89,000, plus benefits, for the period July 1, 2005 through April 30, 2006," alleging Respondent terminated Appellant's Contract "in violation of 28 U.S.C. §1875, due to his federal grand jury service." (AF 18). In a July 10, 2008 letter, Respondent's successor Pacific Area Manager, Human Resources, denied the claim (AF 19). Appellant filed a notice of appeal from that letter, which the Board docketed as PSBCA No. 6186. The two appeals were consolidated.

41. In an amended Complaint in PSBCA No. 6186, Appellant restated his Second Cause of Action from PSBCA No. 5356 (illegal termination because of federal grand jury service), and amended his First Cause of Action (lack of timely notice of termination by Certified Mail) to add claims for annual bonuses equivalent to those received by Respondent's EAS employees in the Pacific Area, which he contended were 8% of salary, bringing the total sought under the First Cause of Action to \$65,000. (Complaint in PSBCA No. 6186).

DECISION

Adequacy of Notice of Termination

Appellant argues that Respondent's failure to give him written notice of the termination by Certified or Registered Mail in accordance with the Contract requirements (Findings 9, 28) rendered the June 30, 2005 termination date ineffective. As Appellant did not receive notice complying precisely with the Contract requirements, i.e., sent by Certified or Registered Mail, until on or about October 14, 2005 (Finding 35), he claims entitlement to Contract pay and benefits from June 30 to October 14, 2005.

Appellant was informed unequivocally on June 6, 2005, that his Contract was terminated effective June 30, 2005, and he understood what he was told (Findings 23-25). The termination was confirmed in Appellant's June 16 email exchange with the SAMD (Finding 25), and again in correspondence (sent by Certified Mail) that Appellant received on July 2 regarding continuation of his health benefits beyond the June 30, 2005 date his employment was to end (Finding 32). Appellant turned in his badge on or about June 30 and did no further work for Respondent thereafter (Finding 33). On these facts, that the June 6, 2005 notice of termination was oral instead of in writing sent by Certified or Registered Mail is not fatal to the effectiveness of the termination.

While Respondent failed to comply precisely with the Contract's notice requirements, Appellant received unequivocal, actual notice that his Contract was terminated, and he has not alleged, and the record does not reflect, that the notice irregularities misled or prejudiced him in any way. This deviation from the Contract's notice requirement did not constitute a material breach by Respondent entitling Appellant to damages or to relief from the termination. See Paul A. Mason, PSBCA No. 1187, 84-3 BCA ¶ 17,572 at 87,567, recon. denied, 85-1 BCA ¶ 17,735; Robert P. Neathery, DOT BCA No. 4177, 04-2 BCA ¶ 32,649; Rafael Francis, DOT CAB No. 1566, 85-3 BCA ¶ 18,339; Porter Constr., Inc., ASBCA No. 16178, 72-1 BCA ¶ 9372 (default termination upheld notwithstanding minor, non-prejudicial notice irregularities); Fantastique' Ultimatique' Nautique', PSBCA No. 3652, 96-1 BCA ¶ 28,150 (same); see, also, Oregon Portland Cement Co. v. E.I. Du Pont de Nemours & Co., 118 F. Supp. 603, 607 (D. Or. 1953).

Termination of Appellant's Employment Contract

Appellant's Employment Contract included mutual termination rights, authorizing either party to terminate the Contract by giving notice to the other. (Findings 7, 8). Specifically, Respondent could, "at its discretion and at any time, upon writ-

ten notice to [Appellant], terminate [Appellant's] employment without cause." (Finding 8). [FN10] The Contract provision states no limitation on Respondent's exercise of this right to terminate. See Christine Turner, ASBCA No. 26900, 84-1 BCA ¶ 17,138. Under such a mutual termination provision, Respondent's election to terminate on a non-cause basis will be upheld unless it was exercised in bad faith or constituted a clear abuse of discretion. Swearingen Servs., Inc., PSBCA No. 3718, 96-2 BCA ¶ 28,398; see Elton T. Colvin, Jr., PSBCA Nos. 6220, 6241, 09-2 BCA ¶ 34,310; Erol A. Guvenoz, PSBCA Nos. 5150, et al., 06-2 BCA ¶ 33,423, recon. denied, 08-2 BCA ¶ 33,960.

Bad Faith

In order to demonstrate that the termination of his Employment Contract was the product of bad faith on the part of Respondent's officials, Appellant must show by clear and convincing evidence that the contracting officer and/or other postal officials acted with malice or specific intent to harm him. See Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1240 (Fed. Cir. 2002); Michelle R. P'Pool, PSBCA No. 5294, 08-1 BCA ¶ 33,824. The record is bereft of such evidence, and Appellant has fallen far short of the "clear and convincing" showing required. [FN11]

Abuse of Discretion

In Elton T. Colvin, Jr., PSBCA Nos. 6220, 6241, 09-2 BCA ¶ 34,310, at 169,485, we addressed the proof required to demonstrate a clear abuse of discretion:

Analysis of clear abuse of discretion involves four considerations:

- (1) whether the contracting officer acted with subjective bad faith;
- (2) whether the contracting officer had a reasonable basis for the decision;
- (3) the degree of discretion vested in the contracting officer; and
- (4) whether a statute or regulation was violated.

(Citations omitted); accord James Hovanec, PSBCA No. 4767, 04-2 BCA ¶ 32,805, aff'd, Hovanec v. Potter, 170 Fed. Appx. 129 (2006) (unpublished). We consider these four elements below.

(1) Bad Faith

As discussed above, there has been no showing of subjective bad faith.

(2) Reasonable Basis for the Termination

Respondent argues that the termination of Appellant's Contract stemmed from Respondent's budgetary concerns as well as concerns among some of Respondent's employees about Appellant's performance. Appellant argues that Respondent has falsely asserted those grounds to conceal the real reason for termination of his contract: Appellant's grand jury service. He argues that inconsistencies and contradictions in Respondent's evidence demonstrate that budget and performance issues were not the reasons for the termination.

He argues that there were no budget concerns in 2005; if there had been, he asserts, Respondent would not have granted bonuses to its non-contract employees (Finding 3) and it would not have granted him a \$5,000 salary increase the year before (Finding 6). However, the evidence in the record demonstrates there were con-

stant budget/cost concerns within Respondent's management in the Pacific Area (Findings 14, 15) and that the prospect of reducing costs by eliminating Appellant's position in the San Francisco District was a motivating factor in the decision to terminate his Employment Contract (Findings 19, 20).

Appellant challenges Respondent's reliance on performance issues as a basis for terminating the Employment Contract, pointing out that many postal employees found him cooperative and helpful, that he developed particularly helpful methods of analyzing workplace ergonomic requirements, that he was an extremely capable occupational medicine physician, and that the services he provided were still required after his employment ended (Findings 11, 22, 29). Respondent does not dispute these points. Nevertheless, the contracting officer (SAMD) had received some complaints about Appellant's performance and had taken steps to resolve them with Appellant (Findings 12, 13).

Appellant argues that Respondent never told him of any performance issues, leading him to the conclusion that performance as a basis for the termination is a fabrication. Appellant never received the Performance Improvement Plan (Finding 13), never received formal performance evaluations (Finding 5), and he testified that he did not recall having discussions with the SAMD about any complaints about his performance or a need for improvement (Tr. I 262-263). While Appellant may not recall such discussions, after observing the testimony of the witnesses and evaluating the evidence in the record, we have credited the SAMD's testimony that such discussions took place (Finding 13). We are not persuaded that either person testified untruthfully, but we conclude that performance concerns were raised with Appellant orally before and after January 2005. [FN12]

Appellant pointed out that in a June 25, 2008 declaration in support of Respondent's motion to dismiss, the SAMD stated that the reason for the termination was budget/cost concerns and did not mention any performance issues (Tr. I 44-45). From this he argues that the performance issues were fabricated for purposes of this litigation. However, the preparation of the Performance Improvement Plan in January 2005, even though it was not given to Appellant, adequately rebuts the inference of recent fabrication Appellant would have us draw. The SAMD's preparation of a Performance Improvement Plan and his discussion of it with the Human Resources Manager of the San Francisco District (Finding 13) demonstrate that he had concerns about Appellant's performance well before the termination and well before he was advised of Appellant's grand jury service (Finding 17).

Appellant argues that the SAMD's urging Appellant to resign in lieu of having his contract terminated demonstrates that the grounds given by Respondent for the termination were false. The SAMD believed that Appellant's later job prospects would be improved were he to resign (Findings 25, 26). There is no showing that it was the SAMD's intent to deprive Appellant of unemployment compensation or that his suggestion reflected malice or any intention to harm Appellant. [FN13] The SAMD thought highly of Appellant professionally and considered Appellant a friend (Finding 23). Appellant provided no evidence that would indicate otherwise. The SAMD bore no animosity toward Appellant, and whether he was right or wrong about the wisdom of Appellant resigning in lieu of having his Contract terminated on a non-cause basis, there is no evidence that he intended harm by his recommendation, and it in no way diminishes or contradicts the reasons Respondent offered for the Contract termination.

Appellant asserts that entering "Contract Not Renewed" in the comments section of the official Form 50 noting the conclusion of his employment with Respondent (Finding 31) undercuts Respondent's argument that performance and budget issues drove the termination. Although we recognize that comment was erroneous, we see no significance to the entry.

Finally, it is not the province of the Board to determine whether termination of

Appellant's Contract was the wisest course for the Postal Service. See *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990); *Stephen Zucker, Packages Servs. Plus*, PSBCA Nos. 3396-3398, 96-2 BCA ¶ 28,282. The San Francisco District Human Resources Manager, Appellant's primary client, determined that her office could continue to provide the necessary support, including the services formerly performed by Appellant, for her programs without Appellant's position being filled, utilizing only the full-time, career doctor assigned to her office and could reduce costs thereby (Findings 10, 19). The Area Office was always on the lookout for positions that could be eliminated to save costs for the Postal Service, and as a contractor Appellant could be let go on a "convenience" termination basis, in contrast to career employees who could not be laid off under Postal Service policy (Findings 14-16). The Area HR Manager, with input from the San Francisco District Human Resources Manager, determined that Appellant's services would not be needed (Findings 20, 21), which led to the termination of the Employment Contract. These were business judgments, and we do not evaluate Respondent's business decisions that led to the termination to see whether we would have reached the same conclusions. See *Id.*; *Elton T. Colvin, Jr.*, PSBCA Nos. 6220, 6241, 09-2 BCA ¶ 34,310; *Jared Paul Carlson D/B/A The Roasted Coffee Bean*, PSBCA No. 4006, 98-2 BCA ¶ 39,847; *Corners and Edges, Inc., v. Dep't of Health and Human Services*, CBCA Nos. 693, 762, 08-2 BCA ¶ 33,961.

(3) Degree of Discretion

As discussed above, the Contract's non-cause termination provision (and the statute on which it was based) (Findings 1 (n. 3), 8) could hardly have been written to grant broader discretion to the contracting officer.

(4) Was a statute or regulation violated?

Appellant asserts in his Second Cause of Action that Respondent violated the Jury Act by terminating his Employment Contract because he was selected to serve on a federal grand jury (Findings 38, 40). Although the Board is not authorized to provide relief directly under 28 U.S.C. §1875, Appellant argues that termination of his Contract in violation of the substantive requirements of that provision, i.e. "by reason of" Appellant's grand jury service, constituted an abuse of the contracting officer's discretion entitling Appellant to breach damages. As relief, Appellant seeks the pay and benefits he would have received had he been permitted to continue his service until the expiration of the Contract on April 9, 2006. Respondent denies that Appellant's grand jury service was a factor in its decision to terminate the Contract. [FN14]

There is no direct proof in the record that Appellant's grand jury service played any role in the decision to terminate his contract. However, Appellant analogizes this case to Title VII discrimination cases [FN15] and urges the Board to find that the temporal proximity of Respondent's receipt of notice of Appellant's grand jury selection (which Appellant likens to "protected activity" under Title VII) and its decision to terminate Appellant's employment is enough to place the burden on Respondent to demonstrate the termination would have occurred without regard to Appellant's grand jury service. There is contrary authority, however, holding that, unlike the complainant in a Title VII case, the victim of a Jury Act violation must show that his jury service was the motivating factor behind the employer's adverse action. See *Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D.D.C. 2009); cf. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961- 962 (7th Cir. 2010).

However, we need not determine which standard applies because we have found as a fact, based on the record, that Appellant's jury service played no role in the decision to terminate his Contract (Finding 22). The only evidence Appellant offered to demonstrate that his Contract was terminated "by reason of" his jury service was that the termination occurred within two months of when he notified Respondent that

he would be serving on the grand jury. That lone piece of circumstantial evidence is not sufficient to overcome the contracting officer's and Area HR Manager's credible testimony that Appellant's grand jury service had nothing to do with the decision to terminate Appellant's Contract and substantial record evidence that other causes were behind the termination. Accordingly, Appellant has failed to show that the contracting officer's termination of his Contract was an abuse of discretion. That being the case, Appellant's recovery is limited to the severance pay provided by the Contract, see Paul A. Mason, PSBCA No. 1187, 84-3 BCA ¶ 17,572, recon. denied, 85-1 BCA ¶ 17,735, which he has received (Findings 8, 23, 25, 26, 30, 33).

Bonuses

Appellant claims entitlement to bonuses for FY 2003 and 2004 at the rate of 8% of his salary. He argues that his Contract entitled him to the same performance based bonuses that were given to non-bargaining (EAS) employees under Respondent's then-applicable pay-for-performance program (Finding 2).

However, the scope and details of that program were not developed in the record. The witnesses who testified regarding its applicability knew that they personally had received bonuses of a certain percentage of salary, but none knew how the program would have applied to Appellant. The bonuses were not automatic, and they varied in amount depending on the employee's performance and on his department's performance, some employees receiving no bonus and others receiving amounts ranging up to 8% of salary. No other doctors, including the SAMD, received bonuses during the period in question. (Finding 3).

At the parties' election, both entitlement and quantum were at issue in these appeals. It was Appellant's burden to demonstrate the amount of damages, i.e., the bonuses, he would be entitled to receive if the Board were to find that Respondent breached a duty under the Contract to consider Appellant for bonuses. Appellant "bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Willems Indus., Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961); see *R.G. Wood and Assocs., Ltd.*, PSBCA Nos. 1059, 1229, 85-1 BCA ¶ 17,898, at 89,630.

On this record, the Board has no basis for determining whether Appellant, even if he had been considered under Respondent's EAS employee bonus program, would have received a bonus and, if he did, of what amount. Under these circumstances, assuming, without deciding, that Respondent's failure to consider Appellant for a performance bonus was a breach of duty under the Employment Contract, Appellant has not met his burden of proving the amount of bonus, if any, he would have received. [FN16]

Accordingly, Appellant's claim for bonuses is denied.

Reinstatement

Even if Appellant had established entitlement to relief, the Board has no authority to order the contracting officer to reinstate Appellant's Contract. See Gary W. Noble, PSBCA No. 4094, 99-2 BCA ¶ 30,413, n. 4; Paul A. Mason, PSBCA No. 1187, 84-3 BCA ¶ 17,572, at 87,566-567, recon. denied, 85-1 BCA ¶ 17,735.

Conclusion

The appeals are denied.

Norman D. Menegat

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative

Chairman

I Concur:

David I. Brochstein

Judge Administrative Judge

Vice Chairman

FN1. Administrative Judge Gary E. Shapiro took no part in the Board's consideration of this appeal.

FN2. The hearing lasted two days. References to the testimony on the first day will be to the transcript for that day (abbreviated as "Tr. I") followed by the page number. References to the transcript for the second day of testimony will be to "Tr. II." The testifying witness' name follows the page citation.

FN3. Subsection 1001(c) of Title 39, United States Code, provides,

The Postal Service may hire individuals as executives under employment contracts for periods not in excess of 5 years. Notwithstanding any such contract, the Postal Service may at its discretion and at any time remove any such individual without prejudice to his contract rights.

FN4. In a motion to dismiss, Respondent contended, among other things, that neither the SAMD nor the Area HR Manager had contracting officer authority. The motion was denied. While reserving its right to raise the issue on appeal, Respondent does not contest the SAMD's contracting authority at this stage of the proceeding (Stip. 19).

FN5. EAS is an acronym for Executive and Administrative Schedule employees, who are career, non-bargaining postal employees. Postal Service Publication 32, Glossary of Postal Terms.

FN6. There remained only about 10 months of his Contract at that time.

FN7. Appellant did not resign his position (Stip. 5; Tr. I 192, 226, 256 (Fanucchi)).

FN8. Appellant performed some minor follow-up after July 1 on matters he had been working on before his termination, but he does not seek payment for that work (Stip. 10; Tr. I 235-239 (Fanucchi)).

FN9. Section 1875 of Title 28, United States Code, enacted as part of the Jury Sys-

tems Improvement Act of 1978 ("Jury Act"), creates statutory protection for employees summoned to federal jury service:

No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States.

28 U.S.C. §1875(a). Under the statute, a juror is entitled to damages for any loss of wages or other benefits suffered due to his employer's violation (28 U.S.C. §1875(b)(1)), and the court may reinstate an employee terminated in violation of the statute (28 U.S.C. §1875(b)(2)).

FN10. This clause is consistent with the language of 39 U.S.C. §1001 (c). See n. 3, above.

FN11. Appellant complains that the Board excluded evidence of malice; namely, that negative information placed in his personnel file sometime after the termination caused a public agency to withdraw a job offer in 2006 (Appellant's Issues of Fact, ¶¶ 25-29). The proffered evidence was excluded for a number of reasons. First, Appellant did not include on its pre-hearing witness list or otherwise propose a competent witness from the public agency or elsewhere who could testify to the events alleged. Second, the documents Appellant proffered to explain the 2006 incident had not been identified or provided to Respondent or the Board prior to the hearing as required by Board Order. Finally, the 2006 incident, even if proved, did not tend to make it more or less likely that Appellant's Contract was terminated in 2005 because of his selection for grand jury service or that the 2005 termination was tainted by malicious intent on Respondent's part.

FN12. Additionally, there was no requirement that the contracting officer first notify Appellant of unsatisfactory performance before terminating the Contract on a non-cause basis. See *On Time Postal Servs., Inc.*, PSBCA No. 2528, 90-2 BCA ¶ 22,698, recon. denied, 90-3 BCA ¶ 23,113.

FN13. The SAMD assured Appellant that he would still receive the 10 weeks severance pay if he resigned (Findings 23, 25), and so advised the personnel office in his referral letter when he thought Appellant was going to accept his suggestion to offer his resignation (Finding 30).

FN14. Respondent also argues that sovereign immunity precludes application of §1875 to actions of the Postal Service, citing *Gleason v. Dep't of Homeland Security*, No. 06 Civ. 13115DLC, 2007 WL 1597955 (S.D.N.Y., June 1, 2007). See 39 U.S.C. §410(a). We need not address that issue or Appellant's revival of his argument that the Board may enforce violations of the Jury Act because we have determined that the Board is not the forum authorized to administer the statute or, for that matter, to determine its applicability to the Postal Service. Enforcement of the Jury Act is assigned to the district courts. *Joseph J. Fanucchi, M.D.*, PSBCA Nos. 5356, 6186, 09-2 BCA ¶ 34,230 (Opinion of the Board on Motion to Dismiss).

FN15. Title VII of the Civil Rights Act of 1964, makes it an "unlawful employment practice for an employer ... to discriminate against any individual ..., because of such individual's race, color, religion, sex, or national origin." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93 (2003).

FN16. In a December 30, 2009 Order and Memorandum of Telephone Conference, more than a month before the hearing, the Board noted, "As the parties have elected that both entitlement and quantum be addressed, the Board will expect evidence regarding the calculation of any damages claimed."