

PSBCA 5356

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

August 12, 2009

APPEARANCE FOR APPELLANT: Mary Dryovage, Esq.

600 Harrison Street, Suite 120

San Francisco, CA 94107

APPEARANCE FOR: RESPONDENT: Stephen D. Lobaugh, Esq.

Office of the General Counsel

United States Postal Service

475 L'Enfant Plaza SW, Room 6425

Washington, DC 20260-1127

OPINION OF THE BOARD ON MOTION TO DISMISS [FN1]

In 2001, Respondent, United States Postal Service, hired Appellant, Dr. Joseph J. Fanucchi, under an employment contract authorized by 39 U.S.C. §1001(c). After Appellant's employment ended, he made monetary claims against Respondent based on his employment contract and its eventual termination, which Respondent denied. Appellant appealed the denials of his claims to the Board.

Respondent filed a motion to dismiss the appeals for lack of jurisdiction, arguing that Appellant was appointed to his position with the Postal Service, that he enjoyed the benefits of postal employment by virtue of his employment status, and that, therefore, he did not have contract rights enforceable against Respondent. Without a contract between Appellant and the Postal Service, according to Respondent, the Board does not have jurisdiction over Appellant's claims.

The following findings of fact are made for purposes of deciding the motion.

FINDINGS OF FACT

1. On April 10, 2001, Appellant and Respondent's Senior Area Medical Director, Western and Pacific Area Office ("SAMD"), executed a document titled "Employment Contract" under which Appellant was to serve as an Associate Area Medical Director for Respondent for a five-year period. Handwritten "approved 4/19/01" and the signature of Respondent's Area Manager, Human Resources, followed the signatures of Appellant and the SAMD. [FN2] (Appeal File, Tab ("AF") 14).

2. The Employment Contract recited, "This contract is entered into under the authority of 39 U.S.C., Subsection 1001 (c)." (AF 14, Employment Contract, ¶ 1).

3. The Employment Contract established Appellant's annual salary at \$120,000, subject to annual adjustments based on performance reviews (AF 14, ¶ 3), and provided,

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, ¶ 5). The Employment Contract reflected that deductions from his pay would be made for "taxes, retirement, life insurance, and health insurance premiums and, if applicable, Thrift Savings Plan Contributions." (AF 14, ¶ 3).

4. During the course of his service, Appellant signed up for the Federal Employee Health Benefits Program (Exhibits attached to Motion to Dismiss ("Motion, Exhs.") 5, 10) and Federal Employees Group Life Insurance (Motion, Exh. 5). Respondent made contributions to the Federal Employees Retirement System in his behalf (Motion, Exh. 3).

5. Respondent prepared a PS Form 50, Notification of Personnel Action, reflecting Appellant's employment effective May 1, 2001. The Form 50 identified his position title as "Physician (Contract)" and in the remarks section mentioned he served under a contract of employment for a five-year period. (Motion, Exh. 3).

6. On April 30, 2001, Appellant signed the "Applicant" block of an "Appointment Affidavit," in which he responded to questions on the form about prior criminal convictions, whether he had been fired from previous employment, Selective Service System status, etc. That section of the form was to be completed during the interview or job offer stage. The form contained a separate section with an "Appointee" signature block reflecting the signer's certification of the Oath required of appointed employees. Appellant did not sign that section. (Motion, Exh. 4).

7. Citing 39 U.S.C. §1001(c) as authority, the Employment Contract provided that Respondent could terminate Appellant's employment upon written notice (AF 14, ¶ 10). 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, ¶ 10). The Employment Contract provided, "Any notice required or permitted hereunder shall be sent by registered or certified mail." (AF 14, ¶ 15).

8. In 2005, Respondent notified Appellant that his employment was terminated. Appellant received no salary after July 1, 2005, but Respondent paid him the 10 weeks of severance pay identified in the Employment Contract. (AF 4, 7, 9; Appellant's Declaration dated August 2, 2006, ¶¶ 6, 12).

9. Appellant submitted a request that he be reinstated to his position (AF 3). In

a January 9, 2006 response from Respondent's counsel, the request was denied (AF 2).

10. On or about April 14, 2006, Appellant submitted what the parties have considered to be his claim to the SAMD, who had signed his Employment Contract. Appellant sought payment of his salary for 16 weeks beyond that paid by Respondent based on his contention that the notice of termination given him was inadequate under the contract and ineffective because it had not been sent by certified or registered mail. Appellant's claim amounted to \$38,462. (Appellant's October 27, 2006 Opposition to Respondent's Motion to Dismiss, Exhibit C).

11. By letter dated May 12, 2006, the SAMD, in what the letter stated was a final decision, denied the claim. He signed the letter as "Contracting Officer" and advised Appellant that he could appeal the decision to the Postal Service Board of Contract Appeals. (AF 1). Appellant filed a notice of appeal, which the Board docketed on August 10, 2006, as PSBCA No. 5356.

12. 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 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.

13. The Board dismissed the Second Cause of Action on February 11, 2008, because Appellant had not first submitted a certified claim (Joseph J. Fanucchi, M.D., PSBCA No. 5356, 08-1 BCA ¶ 33,809).

14. Appellant subsequently submitted a certified claim for \$119,000. [FN3] In a July 10, 2008 letter, Respondent's Area Manager, Human Resources, Pacific Area, acknowledged receiving a May 1, 2008 letter from Appellant seeking \$119,000 for wrongful termination alleged to have been because of Appellant's service on a federal grand jury. The Manager denied the claim. He did not sign his denial letter as "contracting officer," and he stated, "Dr. Fanucchi was an appointed employee, not a contract physician. Therefore, his employment contract is not covered by the Contract Disputes Act as your letter indicates." (Complaint in PSBCA No. 6186, Exh. A). Appellant filed a notice of appeal from that letter, which the Board docketed as PSBCA No. 6186. The two appeals were consolidated.

15. 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 benefits and annual bonuses equivalent to those received by Respondent's employees in the Pacific Area, bringing the total sought under the First Cause of Action to \$65,000. (Complaint in PSBCA No. 6186).

DECISION

Was Appellant an Appointed or Contract Employee?

In its motion, Respondent argues that the Board has no jurisdiction over Appellant's claims because Appellant was an appointed employee of the Postal Service, with no contractual rights against Respondent that would give the Board jurisdiction over his claims. Appellant argues that calling the document establishing his employment an "Employment Contract," designating the denial of Appellant's claim as a contracting officer's final decision and including the denial of his right to appeal the decision to the Postal Service Board of Contract Appeals, as well as the many references in correspondence to his employment "contract" establish that Appellant had a contract with Respondent that he can seek to enforce before the Board.

Respondent correctly points out that there is a

well-established principle that, absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government.

Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985). "Their entitlement to pay and benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles." *Adams v. United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004) (quoting *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983) (Brackets in *Kizas* quote)). This principle generally applies to Postal Service employees serving in their positions by appointment as well. See *Vincent D'Orazio*, PSBCA No. 6165, 09-1 BCA ¶ 34,131; *Reeder v. Frank*, 813 F.Supp. 773, 778- 779 (D. Utah 1992), *aff'd*, 986 F.2d 1428 (Table). The presumption is that a federal employee serves by appointment, *Darden v. United States*, 18 Cl. Ct. 855, 859 (1989).

Nevertheless, "a contract between the government and an individual employee is possible [if it is] specifically spelled out as a contract by a person having authority to do so." *Federico v. United States*, 70 Fed. Cl. 378, 384 (Fed. Cl. 2006). As recognized by the Court in *Chu v. United States*, above, Congress may by specific legislation define the nature of the relationship between a federal employee and his employing agency in a way that diverges from the above general principle. Subsection 1001(c) of Title 39, United States Code, is "specific legislation" that authorizes Respondent to hire employees under employment contracts and was the cited authority for Respondent's employment of Appellant. (Finding 2).
[FN4]

Respondent argues that notwithstanding the statute's authorization of employment contracts, Postal Service employees hired under subsection 1001(c) serve by ap-

pointment and not by contract. Respondent points to indicia of federal employment by appointment found significant in other cases concluding, on the basis of their facts, that the federal employees bringing the action did not have enforceable contract rights against their employing agency: preparation of a Form 50 (Calvin v. United States, 63 Fed. Cl. 468 (2005)), and the employee's execution of an Appointment Affidavit (Calvin v. United States, 63 Fed. Cl. 468 (2005); Vincent D'Orazio, PSBCA No. 6165, 09-1 BCA ¶ 34,131). Here, Respondent created a PS Form 50 for Appellant, but the form identified his position as "Physician (Contract)" (Finding 5). Respondent also presented a copy of Appellant's Appointment Affidavit. However, Appellant signed only the "Applicant" section of the Appointment Affidavit and not the "Appointee" section, and there is no evidence he took the Oath of employment (Finding 6). Finally, Respondent points to Appellant's receipt of employment benefits common to other (appointed) Postal Service employees. However, unlike those appointed to their positions, Appellant received those benefits because the Employment Contract itself afforded them to him (Findings 3, 4). Were Appellant appointed to his position with the Postal Service, there would have been no need to provide in an employment contract the benefits all appointed employees receive simply by virtue of their appointment to positions with the Postal Service.

The language of subsection 1001(c) expresses Congress' intention that the contract rights associated with Appellant's Employment Contract under that subsection be preserved. While Respondent could remove Appellant at any time (39 U.S.C. §1001(c)), it did so "without prejudice to his contract rights." In light of Congress' specific preservation of Appellant's contract rights in 39 U.S.C. §1001(c), we are not persuaded that under the circumstances of these appeals, Appellant is without contract rights against Respondent. Cf. Hayes v. United States Postal Service, 859 F.2d 354, 356 (5th Cir. 1988).

Contract Disputes Act

As discussed above, we have found there to be a statutorily-recognized contract between Appellant and the Postal Service. Appellant is thus a "contractor" within the meaning of the Contract Disputes Act, which defines the term to mean "a party to a Government contract other than the Government," and has met the basic precondition to pursuing his claims under the Contract Disputes Act. 41 U.S.C. §601(4); see Hayes v. United States Postal Service, 859 F.2d 354, 356 (5th Cir. 1988); see also Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217, 1220 (Fed. Cir. 1998).

Respondent argues, however, that even if Appellant is found to have a contractual relationship with Respondent, he may not proceed under the Contract Disputes Act because any contract between Appellant and Respondent would not be a contract for the procurement of services, as defined by 41 U.S.C. §602 (a) (2). [FN5] Respondent cites Monte and Kathy Kentta, AGBCA No. 85-161- 1, 87-1 BCA ¶ 19,342, in support of its position and points out that, as in that case, the process that resulted in Appellant's hiring was not pursuant to Respondent's procurement regulations but rather was accomplished through the recruiting and hiring procedures of Respondent's Human Resources offices (Finding 1).

Respondent's reliance on 41 U.S.C. §602 is misplaced. The section, and any juris-

dictional limitation therein, applies to executive agency contracts, and Respondent has not shown that the United States Postal Service is an executive agency within the meaning of that section. The relevant part of the Contract Disputes Act ("CDA") definition of "executive agency" in §601(2) includes "an independent establishment as defined by section 104 of title 5, United States Code." The definition of "independent establishment" in 5 U.S.C. §104(1) specifically excludes the United States Postal Service. Therefore, Postal Service contracts are not among those addressed in 41 U.S.C. §602. [FN6]

Authority to Sign the Employment Contract and Issue a Final Decision

Respondent argues that the SAMD was not a contracting officer for purposes of entering the Employment Contract and issuing the May 12, 2006 final decision letter (Finding 10) because he did not have a contracting officer warrant issued pursuant to Respondent's procurement rules. Therefore, according to Respondent, the Employment Contract was not valid and the SAMD had no authority to issue the May 12, 2006 final decision from which Appellant appealed, and, consequently, the Board has no jurisdiction to address Appellant's claims. [FN7]

However, someone in Respondent's organization must have had authority to sign employment contracts authorized by 39 U.S.C. §1001(c). Throughout the four years of Appellant's performance of services under the Employment Contract, Respondent apparently believed itself bound by the SAMD's signature. It honored its obligations recited in the Employment Contract and never sought to declare it invalid until this proceeding. Respondent presumably paid Appellant the salary provided in the agreement (Finding 3), paid the specified severance pay upon termination (Finding 8), and provided Appellant benefits equivalent to a postal EAS employee (Finding 3). Respondent has not pointed us to any Postal Service regulations addressing the procedures and authorities regarding such employment contracts. Respondent has not demonstrated that by practice, by regulation, or otherwise, only a procurement contracting officer with a warrant may sign employment contracts under 39 U.S.C. §1001(c). See Enrique (Hank) Hernandez, ASBCA No. 53011, 01-1 BCA ¶ 31,220 at 154,104.

Whether the SAMD had authority to sign the Employment Contract and, if not, the corollary issue of whether Respondent ratified the Employment Contract are issues of fact, see *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007). We conclude that the record at this stage is insufficiently developed to address this issue, and accordingly, we will not grant Respondent's motion to dismiss on this ground.

Grand Jury Service

Finally, Respondent argues that the Board does not have jurisdiction to provide relief under 28 U.S.C. §1875 on Appellant's claim that his employment was terminated because of his service on a federal grand jury (Findings 12, 14, 15). [FN8] Respondent is correct. Enforcement of remedies under that provision is assigned to the district courts. See 28 U.S.C. §1363; *In re a Member of a Special Grand Jury: Darren Blake*, 485 F.Supp. 2d 892, 895 (N.D. Ill. 2007). However, Appellant argues

that termination of Appellant's employment in violation of law constitutes bad faith and an abuse of discretion (Appellant's Supplemental Opening Brief re Respondent's Motion to Dismiss (August 15, 2007), p. 5; Appellant's Reply Brief re Respondent's Motion to Dismiss (Supplemental Briefing) (August 24, 2007), p. 4). Appellant alleges that a bad faith breach of Respondent's contractual duties entitles him to damages (the Second Cause of Action). Such an alleged breach of contract is within the Board's jurisdiction. See *D's Nationwide Industrial Services, Inc.*, PSBCA No. 3071, 93-1 BCA ¶ 25,454.

Appellant's Claims

Appellant's contract claims relate to two issues. First, Appellant contends Respondent failed to give him the written notice of termination by certified mail as required by the Employment Contract. As a result, he seeks pay and benefits he claims accrued between the time his pay and work for Respondent ended and when Respondent finally gave him the written notice by certified mail that he claims was required under the Employment Contract. Second, he claims that the termination was for an improper purpose and was done in bad faith as it violated the juror protections under 28 U.S.C. §1875. While we express no view as to whether they entitle Appellant to recover, these claims relate to requirements established in the Employment Contract, and are within the jurisdiction of the Board.

The Motion to Dismiss is denied.

Norman D. Menegat

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

David I. Brochstein

Administrative Judge

Vice Chairman

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

of this motion.

FN2. There appears to be another signature on the signature page, but it is not legible on the copy in the appeal file (AF 14, p. 28).

FN3. Appellant's then-counsel represented to the Board in a May 15, 2008 telephone conference that Appellant had submitted a certified claim to the contracting officer regarding the Second Cause of Action. A copy of the claim is not in the record, but as Respondent's motion is not based on a lack of submission of a claim or claim certification, we assume for purposes of addressing the motion to dismiss that such a claim was submitted.

FN4. Chapter 10 of Title 39, United States Code, governs employment within the Postal Service. Section 1001 of that title provides, in relevant part,

(a) Except as otherwise provided in this title, the Postal Service shall appoint all officers and employees of the Postal Service.

(b) Officers and employees of the Postal Service (other than those individuals appointed under sections 202, 204, and 1001(c) of this title) shall be in the postal career service, which shall be a part of the civil service. Such appointments and promotions shall be in accordance with the procedures established by the Postal Service.

(c) 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.

FN5. Section 602 provides, in pertinent part,

(a) Executive agency contracts. Unless otherwise specifically provided herein, this Act applies to any express or implied contract . . . entered into by an executive agency for-

* * *

(2) the procurement of services;

FN6. Formerly, the CDA specifically listed the Postal Service within the definition of "executive agency" in Section 2(2). E.g. Hayes v. United States Postal Service, 859 F.2d 354, 356 (5th Cir. 1988). However, the provision was stricken by Congress in Section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, which created the Civilian Board of Contract Appeals and established the Postal Service Board of Contract Appeals.

FN7. The lack of an authorized final decision does not necessarily defeat the Board's jurisdiction. In appropriate circumstances we have found that a failure to issue a decision on a contractor's claim is a deemed denial which provides a basis

for jurisdiction under the CDA. See 41 U.S.C. §605 (c) (5); Lee Ann Wuskiver, PSBCA No. 3621, 94-3 BCA ¶ 27,118. A proper CDA claim followed by an unauthorized final decision may become a deemed denial of the claim after the 60 days provided in the CDA for issuance of a contracting officer's final decision.

FN8. Section 1875 of Title 28, United States Code, bars employers from taking certain adverse action against an employee "by reason of such employee's jury service" in federal court and provides damages and penalties against an employer who does so.