

PSBCA 6150

APPEAL OF LEE ARON VANDYKE

Under Contract No. HCR 591L2

October 26, 2009

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OPINION OF THE BOARD [FN1]

Appellant, Lee Aron VanDyke, held a mail transportation contract with Respondent, United States Postal Service. In a telephone conversation with Respondent's contract specialist, Appellant used abrasive, profane language, and, as a result, the contracting officer terminated his contract for default. Appellant filed this appeal.

A telephonic hearing was held, and the parties have submitted briefs. Entitlement only is at issue (Order dated June 1, 2009; Transcript of Hearing, page ("Tr.") 4).

FINDINGS OF FACT

1. On March 23, 2006, Respondent awarded Appellant contract HCR 591L2 for transportation of mail between postal facilities in Montana. The contract term was from April 15, 2006, to September 30, 2009, at an annual rate of \$67,650. (Appeal File, Tab ("AF") 11).
2. The contract permitted Respondent to terminate the contract for Appellant's default and incorporated by reference Clause B-69, Events of Default (January 1997), which listed circumstances that would constitute a default under the contract (AF 11, Contract Clause 2.3.1 m and s (pp. 88-89)). [FN2]
3. The Events of Default clause included as a basis for termination of the contract if Appellant was "not reliable, trustworthy or of good character." (Clause B-

69, Events of Default (January 1997), subsection g).

4. The contract's Termination for Default clause provided, "If it is determined that the Postal Service improperly terminated this contract for default, such termination will be deemed a termination for convenience." (AF 11, Contract Clause 2.3.1 (p. 88)). The contract contained a Termination for the Postal Service's Convenience clause (AF 11, Contract Clause 2.3.3d (p. 92)).

5. In June 2007, C. Pierce, the operator of mail transportation contract HCR 59140, wished to be relieved of his contract for health reasons, and Appellant wished to take it over (AF 1 (pp. 17-19); Tr. 93-94, 102, 109).

6. Before approving a transfer (novation) of the Pierce contract to Appellant, Respondent required evidence of transfer of the vehicle used on HCR 59140 to Appellant, evidence of insurance on the vehicle, and the parties' execution of novation documents (AF 6; Tr. 16, 94, 110-114).

7. Typically, it takes 2 to 3 months or more to complete a novation (Tr. 16). Appellant and Pierce were anxious to conclude the transfer and believed from discussions with Respondent's personnel that it could be accomplished in 2 to 3 weeks. They submitted a number of documents required by Respondent, and in September 2007, the contract specialist emailed Pierce that Postal Service headquarters had approved the transfer. There remained, however, a few steps to complete before the contracting officer could officially approve the novation. (AF 1 (p. 24); Tr. 46-48).

8. It took longer than Pierce and Appellant expected for Respondent to obtain all of the information necessary to process the novation. Although they were responsible for some of the delays, Appellant blamed Respondent and became frustrated with the pace of the novation process. Appellant and the contract specialist in Seattle spoke on the telephone 10-12 times regarding the transfer, and on several occasions Appellant expressed his irritation about the slow pace of the process. However, he and the contract specialist generally got along, and Appellant never used profanity in those conversations. (AF 1 (pp. 12-15, 20-25), 6, 15, 16, 17; Tr. 13, 28-30, 40, 49, 94-95, 97, 103-104, 115-118, 131-132).

9. On October 15, 2007, the contract specialist received the final documents needed to conclude the novation (AF 15 (p. 161); Tr. 115-116). On October 17, 2007, the novation package was ready to be approved and signed by the contacting officer (Tr. 19, 27, 46-51; AF 1 (p. 27)).

10. On the afternoon of October 17, Appellant called the contract specialist. In a loud, profanity-laced diatribe, Appellant accused the contract specialist of lying. He called her an "f---ing liar" (Tr. 95) and yelled, "I want to jump through this phone and strangle you" (Tr. 96). The contract specialist did not use profanity (Tr. 96). The call lasted several minutes until Appellant hung up. The contract specialist was extremely upset and shaken by the call. (Stipulation 3; Tr. 20-21, 35, 37, 42, 96; AF 5 (pp. 38-39), 9 (p. 44)).

11. The next day, the contract specialist contacted the United States Postal Inspection Service, Respondent's organization responsible for security of facilities and employees, and reported the call (Tr. 21-23, 25, 33; AF 10 (p. 46)).

12. The assigned inspector interviewed the contract specialist, her co-worker who heard at least part of the call, and Appellant, all by telephone. The inspector

prepared an Investigative Memorandum detailing the results of the investigation and including the statements of those interviewed. A copy of the Investigative Memorandum was sent to the contracting officer. (AF 5, 8-10; Stipulation 4; Tr. 61).

13. Based on Appellant's outburst, the novation was denied. Pierce was released from performance of his contract on health grounds. (AF 4, 5; Tr. 121).

14. After reviewing the Investigative Memorandum, the contracting officer terminated Appellant's contract (HCR 591L2) for default on October 25, 2007, based on Appellant's "inappropriate and threatening remarks in a telephone conversation with a member of my staff." He based the termination on clause B-69 (g) (Finding 3), concluding that Appellant's threat of violence toward one of his staff demonstrated that Appellant lacked good character. He did not speak to Appellant or investigate Appellant's conduct further, beyond the Investigative Memorandum account of the October 17 incident. (AF 3; Tr. 61-64, 85-86, 93). Appellant appealed (AF 1).

15. Appellant's performance under his contract was at all times satisfactory, and the sole basis for the termination was Appellant's conduct during the October 17, 2007 telephone conversation (Stipulation 5; Tr. 72, 74, 85). There were no similar incidents in Appellant's past contacts with Respondent's employees. He got along well with the postal employees he worked with on the post office docks. He had never threatened postal employees and had never been warned about past conduct with the contract specialist or with anyone else. (Tr. 72-73, 82, 98, 105, 107-108).

16. By final decision dated March 21, 2008, the contracting officer asserted a claim for \$44,732.71 in reprocurement costs against Appellant for service on the route from the date of the termination through September 30, 2009, the end of the contract term. The amount claimed included a \$3,179.70 credit against the reprocurement costs, reflecting Appellant's unpaid earnings for service in October 2007 before the termination, which Respondent had withheld. (AF 11 (p. 47), 12; Tr. 64-66, 71).

DECISION

Respondent argues that Appellant's vulgar language and what it characterizes as a threat of physical harm to the contract specialist demonstrated that Appellant was not a person of good character as required by the contract. Appellant argues that the October 17 incident was not typical of his behavior and was insufficiently serious to demonstrate a lack of good character and warrant termination of his contract.

In *Contract Master Services, Inc.*, PSBCA No. 273, 1978 WL 2523 (P.S.B.C.A.), February 28, 1978, aff'd, 225 Ct. Cl. 735 (1980), the Board addressed a contract provision requiring the contractor to be reliable, trustworthy and of good character and described "good character" as follows:

"Good character" refers to the moral quality of a person, one whose character is as it should be and morally sound, hence who will do what is right and his or her duty. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College Ed., 1962).

In *Banks Trucking*, PSBCA No. 3528, 96-1 BCA ¶ 28,132, we overturned a default termination that had been based on an alleged breach of the "good character" requirement. We determined that the contractor's use of profanity and engaging in an angry shouting match with a postmaster did not demonstrate that he lacked good character.

Respondent argues that the conduct at issue in Banks Trucking differs significantly from Appellant's because, unlike Appellant, the contractor in Banks Trucking did not curse anyone directly and did not threaten to harm a postal employee. According to Respondent, Appellant's conduct during the October 17 telephone conversation was more like the conduct at issue in *Lanterman v. United States*, 75 Fed. Cl. 731 (2007), in which the court upheld the termination of a mail transportation contract, relying, among other grounds, on a finding that the contractor lacked good character.

However, the contractor in *Lanterman* had a history of aggressive, hostile contact with postal employees. He had been warned in unmistakable terms that Respondent found his conduct unacceptable and would not tolerate continued misbehavior. When he failed to heed those warnings and made direct threats against a postmaster, his contract was terminated for default. That history of aggressive, hostile conduct and failure to correct his behavior after warnings distinguishes *Lanterman* from the facts of this appeal, which reveal a one-time deviation from Appellant's otherwise satisfactory conduct.

Moreover, we are not persuaded that Appellant's statements in the October 17 telephone conversation could reasonably be understood to convey a credible threat to harm the contract specialist. Aside from the literal impossibility of accomplishing the described act by jumping through the phone, stating that he wanted to reach through the phone and strangle her is not the same as saying he intended to do so. [FN3] Geographical distance between Appellant in Montana and the contract specialist in Seattle also suggests the language used did not constitute an immediate threat of harm. While Appellant's speech was a crude, offensive way of expressing his anger and frustration over the length of time the novation process was taking, the objective evidence in the record does not support a finding that Appellant credibly threatened to harm the contract specialist. See *Metz v. Department of the Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986). [FN4]

In considering all evidence in the record bearing on Appellant's character, we find on the positive side that Appellant had performed the contract satisfactorily; that he generally got along with the contract specialist in the past; and that he had not had problems working with other postal employees he encountered in performing his contract (Findings 8, 15). Against this stands the telephone call of October 17 (Finding 10). In that conversation, Appellant's use of abusive, profane language, while not a threat to harm the contract specialist, was rude and inexcusable. It was inconsistent with norms of civil, professional interaction to be expected between contractors and Postal Service employees. However, on balance, we conclude that Respondent has not met its burden of demonstrating by a preponderance of the evidence that the default termination of Appellant's contract was justified by Appellant's conduct during the October 17 telephone conversation. See *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Banks Trucking*, PSBCA No. 3528, 96-1 BCA ¶ 28,132. [FN5]

The appeal is granted. The termination for default is converted to one for Respondent's convenience (Finding 4). Respondent may not recover its claimed reprocurement costs, and Appellant is entitled to recover amounts withheld from his earned compensation on account of the termination (Finding 16).

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 consideration of this appeal.

FN2. The contract advised that clauses incorporated by reference were available in the Postal Service Purchasing Manual and on the Postal Service web site (AF 11 (p. 89)).

FN3. This contrasts with the directly threatening language used by the contractor in Lanterman (twice): "I'm going to take you down."

FN4. Respondent notes that in performing his contract Appellant interacted directly with Postal Service employees on a regular basis and argues that termination of the contract was justified, at least in part, to minimize the risk of harm to those employees. The evidence does not support this concern. Appellant's performance on the contract had been satisfactory; there had been no incidents between Appellant and postal employees; and Appellant got along well with them. (Finding 15). Respondent has not shown that Appellant's outburst indicated that postal employees with whom he worked were at risk of harm.

FN5. In reaching this conclusion, we have kept in mind the admonition that a default termination is a drastic sanction that should be sustained only for good grounds and on solid evidence. See *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431, 187 Ct. Cl. 45 (1969); *Banks Trucking*, PSBCA No. 3528, 96-1 BCA ¶ 28,132. We do not address in this decision any other steps that Respondent might have taken to deal with Appellant's misconduct.