

PSBCA 6232

APPEAL OF LONNIE J. ALLBAUGH ORDERING AGREEMENT

June 26, 2009

APPEARANCE FOR APPELLANT: Lonnie J. Allbaugh, Esq.

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APPEARANCE FOR: RESPONDENT Michael F. Kiely, Esq.

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OPINION OF THE BOARD ON RESPONDENT'S MOTION TO DISMISS

Respondent, United States Postal Service, has filed a motion seeking dismissal of this appeal for lack of jurisdiction. Respondent and Appellant, Lonnie J. Allbaugh, entered into an ordering agreement, under which Appellant performed investigative services relating to complaints of discrimination filed by Respondent's employees. After being informed that Respondent would not assign him additional cases to investigate, Appellant filed this action.

FINDINGS OF FACT

1. On March 29, 2005, the parties entered into an ordering agreement under which Appellant was to perform investigative services for Respondent related to equal employment opportunity (EEO) complaints filed by Postal Service employees (Appeal File Tab (AF) 2).

2. The ordering agreement provided, in relevant part, at section 20:

This is an ordering agreement for EEO investigative services. An ordering agreement is not a contract, but is a written agreement negotiated between the USPS and a supplier that contains terms and conditions applying to future contracts (orders) between parties. A binding contract will come into effect only upon placement of an order. The USPS is under no obligation to place future contracts (orders) with the supplier (investigator)....

(AF 2, p. 23).

3. The terms and conditions of the ordering agreement provided, in an unnumbered

section:

Upon its acceptance by the Postal Service and the supplier, this document will constitute an ordering agreement for investigative services. An ordering agreement is not a contract, but it establishes terms and conditions applying to future contracts reflected in orders issued by the Postal Service and accepted by the supplier. A binding contract will come into effect only upon the supplier's acceptance of an order.

(AF 2, p. 26).

4. Section 3.5 of the ordering agreement, Claims and Disputes, provided that "This contract is subject to the Contract Disputes Act of 1978." It identified the claims process under the statute, including a statement that "Except as provided in the Act, all disputes arising under or relating to this contract must be resolved under this clause." (AF 2, p. 30-31).

5. Several other sections of the ordering agreement refer to the document as a contract, including section 2.2, which provided:

All orders are subject to the terms and conditions of this contract. If there is any conflict between an order and this contract, the contract is controlling.

(AF 2, p. 27).

6. From 2004 until late 2007, Appellant performed many investigations assigned by Respondent under the ordering agreement, and under a previous ordering agreement (AF 6 (Appellant's claim alleging 280 such investigations performed); AF 9).

7. Starting in November 2007 and continuing into January 2008, Appellant contacted Respondent on several occasions, seeking case assignments, but he was not provided a substantive response (AF 6).

8. On January 9, 2008, an official of Respondent responded to Appellant's inquiries by email, as follows: "We will not send you any more cases. We no longer need your services." (AF 6, p. 97).

9. On August 19, 2008, Appellant sent a letter to Respondent's Manager, National EEO Investigative Services Office (National EEO Manager), purporting to be a claim under the Contract Disputes Act (CDA). Citing the Claims and Disputes section of the ordering agreement, the letter requested a contracting officer's final decision. The letter asserted that Respondent breached an implied duty of good faith and fair dealing in failing to provide Appellant with adequate or timely notice of Respondent's intention not to issue him future case assignments under the ordering agreement, and asserted that the same actions amounted to intentional or fraudulent misrepresentation. The letter sought compensatory damages of \$11,000, consequential damages of \$19,250, punitive damages of \$50,000, and a demand for a neutral job reference. (AF 6, p. 69-75).

10. On October 3, 2008, Respondent's National EEO Manager, who is also a contracting officer, replied by declining to issue a contracting officer's final decision, contending that Appellant's claims under the ordering agreement did not relate to a contract within the purview of the CDA (AF 7).

11. Appellant filed a notice of appeal that was docketed on January 13, 2009 (AF 8).

12. On April 10, 2009, Respondent moved to dismiss this appeal for lack of jurisdiction, and on May 17, 2009, Appellant submitted his response.

DECISION

This Board lacks CDA jurisdiction over disputes unless they are "relative to a contract made by [the Postal Service]." 41 U.S.C. § 607(c). Therefore, for the Board to possess jurisdiction over this appeal, the ordering agreement on which Appellant's claims are based must constitute a contract within the meaning of the CDA. See Julian Freeman, ASBCA No. 46675, 94-3 BCA ¶ 27,280.

Precedent abounds for the proposition that an ordering agreement without a minimum ordering requirement, as here (see Finding 2), does not establish a contractual relationship due to lack of consideration. See Sarah M. Mitchell, PSBCA No. 6173, 09-1 BCA ¶ 34,107; Ronald L. Johnson, PSBCA No. 5282, 06-1 BCA ¶ 33,234; Julian Freeman, supra. In Sarah M. Mitchell, supra, this Board ruled that under such an agreement, neither party had enforceable rights against the other except to the extent Respondent directed Appellant to provide and Appellant did provide services. Similarly, in Ronald L. Johnson, supra, this Board held that an EEO services ordering agreement is not itself a contract, and we lack jurisdiction over claims based on failure to comply with the ordering agreement itself. Accordingly, the Board lacks jurisdiction over Appellant's claims if those claims are based on Respondent's alleged failure to comply with the ordering agreement, as opposed to contract orders performed thereunder. See *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061-62 (Fed. Cir. 2002); *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 202-04 (Fed. Cir. 1992).

Appellant acknowledges that Respondent was not obliged to issue him case assignment orders. Appellant does not contest any actions of Respondent relative to specific case assignment orders it issued or which were performed by Appellant, which would constitute contracts within the Board's purview. Rather, Appellant's claims challenge Respondent's delay in notifying him of Respondent's intention not to issue him further case assignments. (Finding 9). Such claims solely involve administration of the ordering agreement itself, as opposed to any contract that results therefrom, and are outside our CDA jurisdiction. See Sarah M. Mitchell, supra.

Appellant argues, however, that Respondent's inclusion in the ordering agreement of the Claims and Dispute section, which specifies that "the contract is subject to the Contract Disputes Act" (Finding 4), reflects its intention that the ordering agreement is a contract, and should result in the Board exercising jurisdiction. In addition, although not argued by Appellant, several other sections of the ordering agreement refer to it as a contract, including section 2.2, which distinguishes between an "order" and "this contract." (Finding 5).

Respondent argues that the more precisely drafted sections of the ordering agreement describing it specifically as "not a contract" and describing its purpose as establishing terms and conditions for future contracts reflected in work orders (Findings 2-3), demonstrate that the ordering agreement is not itself a contract. Respondent focuses on the lack of consideration, and argues that inclusion of the Claims and Disputes section represents a legally ineffective scrivener's error.

The jurisdiction of the Board under the CDA is a question of law based on statu-

tory construction. See *Ridge Runner Forestry*, supra, 287 F.3d at 1061. The Claims and Disputes section would appropriately be included in contracts resulting from issuance and performance of case assignments for investigations. See *Julian Freeman*, supra. The awkward presentation of the section as well as the repeated references to the ordering agreement as a contract may have been intentional or may have been the result of thoughtless draftsmanship. Regardless, such language cannot provide CDA jurisdiction, which the parties are powerless to confer. See *United Pacific Ins. Co. v. Roche*, 380 F.3d 1352, 1356 (Fed. Cir. 2004); *Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1370-71 (Fed. Cir. 2002); *Logan Machinists, Inc. v. Federal Prison Industries, d/b/a Unicor*, DOTCAB No. 4184, 05-1 BCA ¶ 32,894.

As we conclude that the ordering agreement is not a contract within the purview of the CDA, jurisdiction is not statutorily authorized. [FN1] The appeal is dismissed for lack of jurisdiction.

Gary E. Shapiro

Administrative Judge

Board Member

I concur:

William A. Campbell

Administrative Judge

Chairman

I concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. Insofar as Appellant's fraudulent misrepresentation claim rests on tort principles, it is beyond the Board's jurisdiction for that reason as well. See *Donald E. Skaggs*, PSBCA Nos. 4486-4487, 00-2 BCA ¶ 30,933, recon. denied, 00-2 BCA ¶ 31,109.