

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of  
James W. Ancel, Inc.

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Under MTA  
Contract No. T-0705-0140

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Docket Nos. MSBCA 2976

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MEMORANDUM OPINION BY CHAIRMAN BEAM

Having read and considered the Maryland Transit Authority (MTA)'s Motion to Stay Proceedings, the Appellant's Opposition thereto, and after a hearing on June 13, 2017, thereon, the Board finds as follows.

The MTA's Motion requests that this Board stay the instant proceedings for 18 months while the Attorney General's Office investigates claims made by Appellant in this appeal under the recently enacted False Claims Act (MD CODE ANN., GEN. PROV., §§8-101, *et seq.*). The issue at this juncture, however, is whether the Board has the authority to grant the MTA the relief it seeks, irrespective of whether the Board may or may not be inclined to do so. In its Motion, the MTA contends that this Board has both the inherent and explicit authority to stay, or "suspend" these proceedings, although it conceded at the hearing that no such explicit authority exists. The only explicit authority to suspend proceedings vested in this Board is found in COMAR 21.10.06.25, which allows for suspension when the parties agree (inapplicable here), and in COMAR 21.10.06.29, which provides as follows:

In certain cases, appeals docketed before the Appeals Board are required to be placed in a suspense status and the Appeals Board is unable to proceed with the disposition of them for reasons not within its control. If the suspension has continued, or it appears that it will continue, for an inordinate length of time, the

Appeals Board may dismiss these appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Appeals Board acts within 3 years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

As is clear from the first sentence, this regulation contemplates circumstances in which this Board is *required* to suspend proceedings and is *unable* to proceed for reasons outside its control. In other words, it is not discretionary.

In support of its contention that this Board has the inherent authority to suspend these proceedings, by virtue of its right to manage its own docket, the MTA likened our authority to federal boards of contract appeals, which, at least in one case, suspended proceedings for three years to allow for the resolution of a pending action under the federal equivalent False Claims Act (31 U.S.C. §3729). *See, Kellogg Brown & Root Services, Inc.*, 13 BCA ¶35,243 at 173,022 (ASBCA Nos. 57530 & 58161, Feb. 20, 2013). In *Kellogg*, the Armed Services Board of Contract Appeals (ASBCA) denied the Government's motion to suspend the proceedings any longer, reinstating the appeals after it had previously dismissed them without prejudice, based on the authority granted to it under Rule 30, now Rule 18, of their procedural rules published at 48 CFR Chapter 2, Appendix A, Part 2. *See, Kellogg*, 16-1 BCA ¶36499 (ASBCA Nos. 57530 & 58161, July 25, 2016). While the ASBCA Rules are similar to the procedural rules governing this Board set forth in COMAR, notably, Rule 18(a) provides that the ASBCA "may suspend the proceedings by agreement of the parties for settlement discussions, or *for good cause shown*." (emphasis added). COMAR grants us no such discretion. The MTA argues that the ASBCA acted under inherent authority, but it is clear that the suspension/dismissal at issue in *Kellogg* was founded upon explicit authority promulgated by Rule 18.

The MTA also relies upon *Powell v. Breslin*, 430 Md. 52, 67 (2013) in support of its contention that this Board has inherent authority to stay these proceedings, in which the Court, in

*dicta*, explained that “[a] stay is a tool of equity that a court or administrative agency is authorized to grant for adjudicative economy.” (emphasis added). *Id.* *Powell*, a medical malpractice case, did not involve an administrative agency, and the brief discussion regarding a court’s authority to stay an action concluded that “[t]he power to stay administrative action is only inherent in the sense that it is a traditional power that equity courts could utilize without express statutory authorization.” (citing *Executors of Nelson H. Fooks v. Ghingher*, 172 Md. 612, 192 A. 782 (1937)). As we have stated previously, this Board is not a court of general jurisdiction and has no equitable power or equitable jurisdiction. *See, e.g., PHP Healthcare Corp.*, MSBCA No. 2159 (2000); *Scanna MSC, Inc.*, MSBCA No. 2096 (1998); *Arundel Engineering Corp.*, MSBCA No. 1929 (1997). It is important to emphasize, however, that the Board is not stating that it does not have the authority to “stay” or suspend certain proceedings—the issue here is whether the Board has the inherent authority and thus the discretion to suspend these proceedings as requested by MTA, or whether our authority is limited to the authority that we have been expressly authorized to exercise under the law.

Appellant, although silent on this issue in its Opposition to the Motion, reminded the Board at the hearing of a similar controversy that arose in the case of *Emergency Management Services, Inc. v. State Highway Administration*, 375 MD. 211 (2003), in which this Board’s decision to grant summary judgment was reversed. In discussing whether this Board had the authority to grant summary judgment, the Court compared the discretionary authority authorized under the Administrative Procedures Act, MD. CODE ANN., STATE GOVT., §10-206(b), which provides that agencies “may” adopt regulations to govern procedures and practice in administrative agency cases, with this Board’s enabling statute, MD. CODE ANN., STATE FIN. & PROC., §15-210, which “is a bit more direct and specific” and states that the Board “shall adopt

regulations that provide for informal expeditious, and inexpensive resolution of appeals before the Appeals Board.” (emphasis in original). *Id.* at 231.<sup>1</sup>

The *EMS* Court concluded that “the MSBCA violated the procedures set forth in its enabling statute when it proceeded to grant a summary disposition in [EMS] in the absence of adopted rules of procedure.” *Id.* at 235. The Court held that “procedural rules must be promulgated by formal rulemaking and cannot be made in ad hoc fashion through adjudication.” *Id.* at 232.

The *EMS* case serves as a distinct and important reminder of this Board’s charge, which is to ensure “the fair and equitable treatment of all persons who deal with the State procurement system,” as well as our responsibility to provide an “informal, expeditious and inexpensive resolution of appeals” without unnecessary delay. MD. CODE ANN., STATE FIN. & PROC. §§11-201(a)(2); 15-210; COMAR 21.10.05.02. Based on the foregoing, this Board declines to delay any further a case that has been ongoing since May 13, 2016, particularly absent any inherent authority or explicit authority under COMAR granting us the discretion to act in this way.

Accordingly, it is this 10<sup>th</sup> day of July, 2017:

ORDERED that the MTA’s Motion to Stay Proceedings is hereby DENIED.



Bethamy N. Beam, Esq.,  
Chairman

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<sup>1</sup> At the time this Board rendered its decision in EMS, COMAR 21.10.05.06D did not exist. In fact, it was the *EMS* case that prompted the promulgation of the regulation, which thereafter granted the Board the authority to resolve cases by summary decision.

I concur:

M. J. Stewart

Michael J. Stewart, Esq.

Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

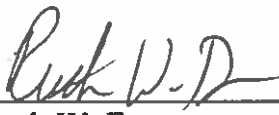
**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2976, Appeal of James W. Ancel, Inc., under MTA Contract No. T-0705-0140.

Dated:

7/17/17

  
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Ruth W. Foy  
Deputy Clerk