BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of 11 Firstfield Road Limited Partnership	)	
	)	Docket No. MSBCA 1232
Under 11 Firstfield Road Limited Partnership Lease	)	

November 5, 1985

Motion For Reconsideration - The Board has inherent authority to re-open and to reconsider an appeal based on motions for reconsideration filed within thirty days of its decision and before any appeal is taken in the courts.

Motion for Reconsideration - The burden is on the party seeking reconsideration to establish that an error in the Board's decision has been caused by fraud, surprise, mistake or inadvertence. Mere disagreement with the Board's decision is not sufficient to warrant reconsideration.

Motion for Reconsideration - Appellant failed to demonstrate by a change in conditions or other different factors that an error was caused by fraud, mistake, surprise or inadvertence.

Motion for Reconsideration - Appellant failed to establish that the Board's decision was erroneous. Appellant was required to provide finished ceilings without limit and a complete HVAC system when the terms of the lease are read as a whole and given their plain meaning.

Motion for Reconsideration - Appellant did not sustain its burden of showing that the Board's decision was erroneous. Miscellaneous permit charges were not the State's responsibility as a renovation cost under the terms of the lease.

Motion for Reconsideration - Burden of Proof - Appellant was in charge of the entire renovation work and sought to obtain more rent by reducing the amount the State was entitled to as a rent credit for standard fit up item requirements work for which Appellant was responsible under the lease terms. Under these circumstances, Appellant had the burden of proving the labor cost amount to be allocated to the State for general renovation work leaving the remaining labor costs for standard fit up item requirements work to be applied as a State rent credit.

Motion for Reconsideration - Burden of Proof - Appellant did not demonstrate that the Board erred in finding that Appellant had failed to prove the amount of labor costs for which the State was responsible under the terms of the lease.

Motion For Reconsideration - DGS' motion for reconsideration is denied where it failed to demonstrate by new evidence or a change in conditions that the Board erred in its decision through fraud, surprise, mistake or inadvertence.

Motion for Reconsideration - Contract Interpretation - In determining the State's rent credit under the terms of the lease, it would be inappropriate for the Board to speculate regarding the costs that might be due Appellant in the event of termination of the lease at a future time.

Motion for Reconsideration - Contract Interpretation - Where a paragraph of the lease was found to be ambiguous, the Board did not err in considering all its subparagraphs as a whole in interpreting the meaning of the lease regarding the parties' responsibilities for renovation costs. Re-opening the record to permit additional testimony regarding one of the subparagraphs is not permitted where counsel at oral argument prior to close of the record mentioned the possibility of presenting additional testimony but otherwise did not make a proffer.

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MEMORANDUM OPINION

The Board issued a decision in the captioned appeal pursuant to Md. Ann. Code, Art. 21, §7-202(c) that sustained the appeal in part and denied the appeal in part. The Board's decision determined that the State was entitled to $142,254.13 as a rent credit under the terms of the lease. Both parties filed motions for reconsideration.

The appeal had been taken from the Department of General Services (DGS) procurement officer's final decision denying Appellant's claim for a reduction in the State's rent credit under the terms of a lease for a building located at 11 Firstfield Road, Gaithersburg, Md. Appellant executed the lease on October 31, 1983. The State subsequently executed the lease and sent a copy to Appellant by letter dated November 14, 1983. Exhibits prepared in accordance with Paragraph 24.4 of an addendum to the lease were approved by the State on November 22, 1983. They represented the construction, demolition and renovation required for the leased premises.

Paragraph 24 of the lease, which was the focus of the dispute, was agreed to on October 31, 1983. Paragraph 24 provides as follows:

> 24.1 Lessor shall, at Lessee's expense, make such modifications to the demised premises and the building of which the demised premises are a part as are required to make the facility comply with all local and state building codes and zoning requirements. In the event there are no local building codes, the Lessor shall comply with the national building codes as set out in the Department of General Services General Lease Specifications and Requirements.

24.2 It is agreed that the parties to this lease do not contemplate that the stated use of the demised premises will require the installation of a full sprinkler system. In the event a sprinkler system is required as a result of the State's unique use of the premises Lessor shall not be required to perform under this contract unless Lessor and Lessee mutually agree on who shall pay for the cost of installation of the sprinkler system.

24.3 Lessor shall, at Lessee's expense, make such modifications to the demised premises and the building of which the demised premises are a part, as are required to make the demised premises, the common areas leading to the demised premises, and the common facilities which may be used by the Lessee's employees or invitees accessible to the handicapped and aged. Such modifications shall comply with the Maryland Building Code for the Handicapped and Aged (MBCHA) as published by the Department of Economic and Community Development.

24.4 The Lessor shall, at Lessee's expense, prepare the demised premises in accordance with Exhibits to be prepared by the Lessor and approved by the Department of General Services. Said Exhibits to be attached hereto and made a part hereof.

24.5 The Lessee shall be entitled to reimbursement for certain fit up items which are the State's standard fit up requirements and the Lessee shall be entitled to a credit for these items:

a. 1 Lineal foot of finished partitioning per 15 square feet of leased space (Sound transmission class of 35).
b. 1 Lineal foot of sound conditioned partitioning (Sound transmission class of 50) for each 10 lineal feet of required partitioning.
c. 2 Doors for ingress and egress from each leased area on each floor.
d. 1 Interior door for each 25 lineal feet of partitioning required.
e. 1 duplex electric outlet per 100 square feet of leased space.
f. 1 telephone outlet per 150 square feet of leased space.
g. 1 220 volt electric outlet per floor.
h. Finished ceilings.
i. 50% of the cost of finished flooring.
j. A complete HVAC System.
k. Sufficient lighting to produce 50 foot candle power at desk level.
l. Renovations required to comply with codes, except the MBCHA.

24.6 It being the intention of the parties that the Lessee shall rent the space "as is", The District Court shall, upon completion and acceptance of the renovations provided for above, pay the total cost of said renovations, but the Lessor shall act as agent, without additional charge to assure that said renovations shall be completed. Since the cost of those renovations listed in paragraph 24.5 above is included (as an item of expense) in the rent and expenses provided for in paragraph

1.4.1, the District Court shall be entitled to a credit against the rent and expense payments, when due, for the actual cost of renovations attributable to the items listed in paragraph 24.5.

* * *

24.8 In the event termination of the agreement in accordance with paragraph 1.4.4 becomes necessary, the Lessee agrees to repay to the Lessor, the principal balance of the unamortized portion of the cost of the improvements listed in paragraph 24.5 existing at the time occupancy is terminated during the initial term. For this purpose, the cost of the improvements shall be amortized on a monthly payment schedule over a three year term at an interest rate of fifteen percent (15%) per annum. The Lessor shall, within 90 days of the commencement date of this lease, submit to the Department of General Services a certified statement of the actual costs incurred. In no event shall the cost of improvements exceed approximately $150,000.00. In addition, the Lessee shall pay Lessor an amount equal to $34,056.92 times the number of months the premises are occupied by the Lessee minus the sum of any rent payments and construction payments attributable to paragraph 24.5 made by Lessee up to the date of termination. (Underscoring added).

Under the terms of the lease, Appellant was to see that the leased premises were renovated for use as a court facility in accordance with the design approved by the State. Initially, the State was to pay the costs of renovation. However, the lease provided that the State "shall be entitled to reimbursement for certain fit up items which are the State's standard fit up requirements and the [State] shall be entitled to a credit for these items." (Lease, Para. 24.5).

Following completion of the renovation work and the State's occupancy of the leased premises, a dispute arose concerning the amount of the State's rent credit. The State sought a credit against rent in the amount of $225,080.75 for work it maintains was done to provide the standard fit up item requirements pursuant to Lease Paragraph 24.5 for which Appellant is responsible. Appellant, however, insisted that under the terms of the lease the State was entitled to a credit only for $67,669 for standard fit up item requirement work. The remaining costs were said to be the State's responsibility for the overall renovation work under Paragraphs 24.1, 24.3 and 24.4 of the lease. The issue in the appeal thus concerned the amount the State was entitled to as a rent credit pursuant to Paragraph 24.5 of the lease.

The issue regarding the allocation of costs, and thus determination of the State's rent credit, was compounded by the fact that the costs for the work done could be characterized as either standard fit up item requirement work for which Appellant was responsible, or as general renovation work for which the State was responsible. Under these circumstances, we found Paragraph 24 of the lease to be ambiguous.

In resolving the dispute,[1] the Board applied the rule that contract provisions should be read as a whole and given their plain meaning. Granite Const. Co., MSBCA 1011 (July 29, 1981); Kasten Const. Co., Inc. v. Rod Enterprises, Inc., 268 Md. 318, 301 A.2d 12 (1973). We found that items already existing in the building at the time the lease was entered into were to be allocated toward the standard fit up item requirements for which Appellant was responsible pursuant to Paragraph 24.5 of the lease. Appellant, thus, was responsible for the cost of standard fit up item requirements, to the extent that these items did not already exist in the building, up to the quantity listed as a ceiling for each of the standard fit up item requirements. On this basis, we determined that the State was entitled to $142,254.13 for the actual costs attributable to rectifying deficiencies in the building to meet the State's standard fit up item requirements. We also concluded that the lease specified a ceiling of $150,000 on the amount the State was entitled to as a rent credit for standard fit up item requirements.

On July 29, 1985, Appellant filed a "Motion for Reconsideration of Certain Credits Awarded to Appellee [State]." Appellant's motion seeks reconsideration of the Board's decision and raises the following issues:

a. Is the State entitled to a credit under the lease terms in the amount of $16,326.92 for repair or renovation of finished ceilings?

b. Is the State entitled to a credit of $2,055.00 for providing Heating, Ventilation, and Air Conditioning (HVAC) in connection with renovation work in the jail and storage areas since these areas were part of the conversion of the building for its specialized use as a court facility?

c. Is the State entitled to a credit for $7,209.00 for permit fees required by local codes?

d. Is the State entitled to $20,294.58 as a lease credit for labor costs attributable to demolition and partitioning work where Appellant failed to prove whether the labor costs billed to the State were associated with standard fit up item work, or renovation work for which the State is responsible?

e. Did the Board improperly allow the State a credit in the amount of $642.80 as profit on the cost of painting partitioning and $29.07 as profit on the cost of providing a 220 watt outlet?

On August 2, 1985, DGS filed, respectively, "Appellee's Motion For Reconsideration and Request To Reopen The Record," with an accompanying request for a hearing on the motion, and "Appellee's Opposition To Appellant's Motion For Reconsideration," with an accompanying request for a hearing. DGS's motion for reconsideration raises the following issues:

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[1]The parties elected to submit the case for decision on the record pursuant to COMAR 21.10.06.11 although the parties engaged in oral argument regarding how the issues should be decided.

a. Whether items existing in the building at the time of lease that met the description of standard fit up items described by Paragraph 24.5 appropriately were counted toward the standard fit up item requirements.

b. Whether it was improper to interpret the lease as establishing a $150,000 ceiling on the State's entitlement to a rent credit for standard fit up item requirements.

Since both Appellant and the DGS filed motions for reconsideration within thirty days of the Board's decision before any appeal, the Board has inherent authority to reopen and reconsider its decision. Brandt v. Montgomery County Commission on Landlord-Tenant Affairs 39 Md. App. 147, 160-61 (1979). In Eagle International, Inc., MSBCA 1121, Memorandum Opinion and Order . . ." (March 31, 1983) we said:

> ". . . a prerequisite to reopening or reconsidering an administrative decision, [is] a showing that an error has been caused by fraud, surprise, mistake or inadvertence. Zoning Appeals Board v. McKinney, 174 Md. 551, 564-566, 199 A. 540, 546-47 (1938). A mere change of mind by an agency, without any intervening change in conditions or other different factors, does not amount to fraud, mistake, surprise or inadvertence justifying a rehearing or reconsideration. Redding v. Bd. of County Comm's, 263 Md. 94, 111 (1971).
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> Eagle International Inc., supra, p. 2

Turning first to Appellant's motion, the issues raised in it point to several areas of disagreement with the Board's decision that actually constitute nothing more than a request for reargument of the issues relating to the terms of the lease which the Board found to be ambiguous. While Appellant quarrels with the Board's decision, it has proffered no new evidence, and has not demonstrated that a change in conditions or other different factors warrant reconsideration. Since the burden of proof is on the party seeking reconsideration, Redding v. Bd. of Co. Comm. for P.G. Co., supra, we deny Appellant's motion. However, it is important that we more specifically address some of the matters it raised.

Appellant contends that the Board held that the State is not entitled to a credit for any renovation costs required to convert the building for its specialized use as a court facility. It thus argues that the Board improperly allocated the State a credit for certain costs for finished ceilings and for HVAC costs. We reject this argument as being overly broad and inconsistent with our decision and the terms of the lease. We held that the State was responsible for the renovation costs, excluding standard fit up item requirements. In this regard, our decision allocated the entire costs of finished ceilings and the HVAC system to Appellant. This was based on the following language of Paragraph 24.5 which provided that these costs, without limit, were Appellant's responsibility.

> "The Lessee shall be entitled to reimbursement for certain fit up items which are the State's standard fit up requirements and the Lessee shall be entitled to a credit for . . .
>
> h. Finished ceilings."

* * *

j. A complete HVAC system. (Underscoring added).

For purposes of clarification, then, our decision should be understood as granting the State a credit for the entire cost of providing finished ceilings and a complete HVAC system in accordance with the plain meaning of Paragraphs 24.5 (h) and 24.5 (j) of the lease. These particular provisions were not ambiguous and placed no upper limit on these two standard fit up item requirements. Appellant was required to provide finished ceilings without limit, and a complete HVAC system.

Appellant next contends that the Board erred in awarding $7,209.00[2] to the State as a rent credit for fees required by local codes. Appellant argues that the Board's decision required these fees be awarded to Appellant based on the following Board findings:

> Thus DGS contends that if local government requirements required permit fees to implement the State's design under Paragraph 24.4, these fees are 'renovations required to comply with Codes' and it should be reimbursed pursuant to Paragraph 24.5L. We do not find DGS's argument reasonable. (Opinion, Page 13).
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> Under the terms of the lease, the State clearly was responsible for the cost of renovations described by Paragraphs 24.1, 24.3 and 24.4 consistent with the manifest purpose of the lease to have an office facility converted for the specialized use of the District Court. The fact that the parties intended that the State absorb directly the costs attributable to the court conversion renovations also is supported by the express terms of the lease providing for the State to remove the specialized renovations at the end of the lease term at Appellant's discretion. [sic] (Findings of Fact No. 10). (Opinion, Page 10)."

Appellant thus argues that we held that the State was responsible for all such renovation costs required to convert the office building for the specialized use of the District Court, and that we specifically rejected DGS's argument that the State was entitled to a rent credit for these permit fees. This is incorrect. As to the $7,209.00 for various fees, we held that "these costs are Appellant's responsibility because the terms of the lease do not provide that the State is responsible for such costs, the State ordinarily does not pay such

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[2]This amount consists of the following:

Demolition Permit, No. 17020 (City of Gaithersburg)	$ 15.00
Building & Occupancy Permit No. 17275 (City of Gaithersburg)	1,850.00
WSSC Water Permit	5,344.00
Total	$7,209.00

costs, or because the lease did not provide that these costs were to be allocated to the State under Paragraphs 24.1, 24.3, or 24.4." Board Decision, p. 21. In other words, we essentially determined that Appellant was not entitled to reimbursement for the above charges, and placed them in a separate category of miscellaneous charges because Appellant did not demonstrate clearly to us, as was its burden, that these costs properly fell within Paragraph 24.1 (permit fees for renovation for which the State is responsible) and it could not be determined that they fell under 24.5 L (code renovation costs for which Appellant is responsible).

Appellant next contends that the Board erred in awarding the State a rent credit for labor costs in the amount of $20,294.58. Board Decision, pp. 22-23. The amount questioned is computed as follows:

Labor Cost - $16,634.75 Stipulation, Exh. 4, (Voucher (1-5-84) (The State stipulated that it was entitled to a credit only for 50% of this amount. The Board awarded the State a credit of $8,317.37 leaving Appellant entitled to $8,317.37 as a labor cost not disputed by the State.)	$ 8,317.37
Labor Cost - $10,132.25 Stipulation, Exh. 4, Voucher (2-8-84)	10,132.25
Total Labor	$18,449.62
Profit Paid to Contractors	1,844.96
Total	$20,294.58

Appellant maintains that the labor costs were incurred in connection with demolition and repartitioning work which was the State's responsibility as general renovation work. It also argues, in the alternative, that we should apportion these costs on a fifty-fifty basis since the State had stipulated that it would pay fifty percent of the labor costs on one of the labor cost items. We find neither argument persuasive. There is no evidence in the record which demonstrates that these labor costs were incurred doing general renovation work for which the State is responsible. The fact that DGS may have stipulated that the State would be responsible for fifty percent of one of a number of labor cost items in dispute, is not a sufficient reason for allocating all labor costs between Appellant and the State on this basis. Appellant's unsupported assertions thus fail since it has not sustained its burden of proof.

In this regard, Appellant maintains that it met its burden of proof when it submitted vouchers to the State indicating the costs of labor to renovate the building and the amount it proposed as the State's rent credit. It thus argues that the State had the burden of going forward with the evidence to show any additional costs for labor that the State was entitled to as a rent credit for standard fit up item requirements. We disagree.

Appellant seeks to obtain more funds from the State by reducing the amount the State is entitled to as a credit against rent for standard fit up item requirements. In addition, Appellant was in charge of the renovation work on the State's behalf, and thus had all the information regarding the

labor costs within its possession. Under these circumstances, we find Appellant had the burden of proof to show the labor costs to be allocated to the general renovation work for which the State was responsible, thereby leaving the remaining labor costs allocable to the State as a rent credit. Compare Hensel Phelps Construction Co., MSBCA 1167 (Memorandum Opinion) (January 20, 1984). Appellant did not meet this burden by merely submitting to the State the amount of rent credit it thought the State was entitled to.[3]

Turning to DGS's motion, it suffers from the same deficiencies as Appellant's motion. It has not demonstrated that the Board's decision was in error through fraud, surprise, mistake or inadvertence. In this regard, nothing new is being brought to the Board's attention; rather, DGS is attempting, again, to persuade the Board that it should interpret the ambiguous lease provisions in accordance with DGS's views which were set forth in the original presentation of its case.

Although we deny DGS's motion, we will address certain arguments it has raised. DGS contends that the Board erred in finding that items existing in the building at the time the lease was executed should not be counted toward the standard fit up item requirements in determining DGS' rent credit. Concomitantly, DGS maintains that it is inequitable to interpret Paragraph 24.8 of the lease as establishing a $150,000 ceiling on standard fit up item requirements costs. It is said that, in the event of termination of the lease, this limit and our interpretation that items existing in the building should be counted toward standard fit up item requirements would require the State to reimburse Appellant for standard fit up items for which Appellant did not incur a cost. DGS requests that the record be re-opened for additional testimony on this last point, since neither Appellant nor DGS argued that Paragraph 24.8 established a ceiling on the costs for standard fit up item requirements.

We reject DGS's motion on these grounds. First, it is premature to speculate at this juncture as to the allocation of termination expenses under the lease should the lease be terminated at some future time. Assuming, arguendo, that Paragraph 24.8 is not in conflict with any mandatory termination clauses applicable to this lease, the issue for resolution under Paragraph 24.8, in the event of such termination, would be the costs Appellant might be entitled to under the terms of the lease.

Second, the issues in this appeal concern the amount of rent credit due the State for standard fit up item requirements pursuant to Paragraph 24.5 as compared to the renovation costs for which the State was responsible pursuant to Paragraphs 24.1, 24.3 and 24.4. Resolution of these issues required the Board to interpret all provisions of Paragraph 24 of the lease.

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[3]Appellant also maintains that we improperly allocated an additional credit for profit on the painting costs that already had profit included, and additional profit on the cost of a 220 watt electrical outlet which also included profit. We disagree. For example, the record clearly indicates that one of the cost figures of $4,581.36 we used to determine the costs for painting partitioning did not include profit. See Stipulation, Exhibit 4, Voucher dated January 5, 1983 [sic], unnumbered page 3, and attached letter dated January 8, 1983 [sic]. Similarly, the record does not show that the amount of $2,341.78 for painting partitioning and the amount of $290.75 for the 220 volt outlet included profit.

At the oral argument, the parties were questioned about Paragraph 24.8 and how Paragraph 24.8 affected interpretation of the related provisions of Paragraph 24.5. (Tr. 60). While counsel for DGS mentioned the possibility of presenting evidence regarding Paragraph 24.8, if the Board so desired (Tr. 60), the Board made no such request. DGS otherwise did not make an appropriate proffer on this point. Accordingly, DGS's request to reopen the record on this ground is tardy and will not be granted.[4]

For the foregoing reasons, therefore, the Board denies, respectively, Appellant's motion for reconsideration and DGS's motion for reconsideration.

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[4]DGS also maintains that "the record does not establish a basis for the Board to rule that the entire Building was to be converted from an office use to a 'specialized use.'" However, our use of this term was in the context of deciphering Paragraph 24 of the lease and its subpart, Paragraph 24.5. We necessarily had to determine those costs the State clearly agreed to assume in order to convert the building for use by the District Court and those costs the State clearly did not agree to assume for rectifying deficiencies in a used building to bring it up to certain specified standards.