

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of WILLIAM E. McRAE)
) Docket No. MSBCA 1229
Under University of Baltimore)
Personal Services Agreement)

April 22, 1985

Jurisdiction - The Board of Contract Appeals does not have jurisdiction over disputes arising in the formation of contracts creating employee-employer relationships or over post award disputes involving contracts entered into by the State creating employee-employer relationships.

APPEARANCE FOR APPELLANT: Jonathan D. Smith, Esq.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Christine Steiner
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON
ON UNIVERSITY'S MOTION TO DISMISS

Respondent University of Baltimore (University) challenges the jurisdiction of this Board to entertain an appeal of a dispute arising from an agreement creating an employee-employer relationship as defined in Article 64A, §15A(a)(3) of the Annotated Code of Maryland entered into by the University with the Appellant. Neither party requested a hearing pursuant to COMAR 21.10.06.05.

Findings of Fact

1. In the summer of 1984, Appellant applied for a position as a film archivist with the University. The duties of the position were to perform services as described in the application for a grant given to identify, inventory, appraise, describe and preserve the Abell Newsfilm Collection, including related archival duties as assigned.

2. On October 17, 1984, Appellant signed an agreement entitled UNIVERSITY OF BALTIMORE PERSONAL SERVICES AGREEMENT for a one year term from October 1, 1984 to September 30, 1985.¹

¹The term as typed in the Agreement is for the period October 1, 1984 to September 30, 1984. We believe the parties intended the date of September 30, 1984 to be September 30, 1985.

3. The Agreement provides, in pertinent part, as follows:

Paragraph 16. General Conditions

- (a) The Employee shall be paid only for hours that he/she is required to work.
- (b) An "Employer-Employee relationship" shall exist.
- (c) All records, documents, work papers and work products developed in the performance of the contract shall be the property of and available to the State for its use without payment of royalty or additional cost and shall not be the subject of an application for a copyright or patent by, or on behalf of, the Contractual Employee.
- (d) Contracts are subject to the availability of funds as appropriated by the General Assembly of Maryland.

Paragraph 9. Termination for Convenience. The performance of work under this Agreement may be terminated by UB in accordance with this clause in whole, or from time to time in part, when the procurement officer shall determine that such termination is in the best interest of the State of Maryland or UB. UB will pay the Contractual Employee at the rate specified in paragraph 3(a) above up to the date of termination.

Paragraph 5. Disputes Clause. Any dispute or inquiries regarding the terms of this contract must be made in writing and referred to John G. Koenig, Jr., Director of Personnel.

Paragraph 10. Termination for Default. If the Contractual Employee fails to fulfill his/her obligations under this Agreement properly and on time, or otherwise violates any provision of the Agreement, UB may terminate the contract by written notice to the Contractual Employee. The notice shall specify the acts or omissions relied on as cause for termination. All finished or unfinished supplies and services provided by the Contractual Employee, shall at UB's option, become UB's property. UB shall pay the Contractual Employee fair and equitable compensation for satisfactory performance prior to receipt of notice of termination, less the amount of damages caused by Contractual Employee's breach. If the damages are more than the compensation payable to the Contractual Employee, the Contractual Employee will remain liable after termination and UB can affirmatively collect damages.

The Agreement refers to the Appellant as "Contractual Employee" and provides for payment of a bi-weekly salary of \$814.62 (Paragraph 3(a)) with a maximum total compensation for the term of the contract of \$21,180.29, withholding of social security contributions and reimbursement for travel expenses as governed by the standard State of Maryland travel regulations. The Agreement specifically provides that neither it nor the services to be rendered thereunder may be transferred by the contractual employee.

4. On October 11, 1984, Appellant received a memorandum from the Head of Special Collections on library stationary which stated:

In the two weeks that you have worked in the University of Baltimore Library Special Collections Department, I have received three complaints from department heads regarding your abrasiveness, rudeness and inability to communicate in a proper business-like manner. The most critical of these was an incident at the Enoch Pratt Audio-Visual Department where you alienated and intimidated Pratt staff members.

As we discussed on previous occasions, effective communication skills are essential in the performance of your job. The objectives of your position are outlined in the NHPRC grant and have been discussed and explained to you.

If this situation continues and your communication methods do not improve, you will be terminated from this position.

5. On December 3, 1984, Appellant received a notice of termination on library stationary from the Head of Special Collections stating as follows:

Since your last written warning (Oct. 11, 1984), there has been another incident at the Enoch Pratt Library and two incidents at the University of Baltimore in which you displayed rudeness, insulting language, and a lack of cooperation. As stated previously, good communications skills are essential in the performance of your job. In the past two months you have shown very poor communications skills as well as a lack of committment [sic] to the Abell Newsfilm Project.

In view of this, it is the unanimous decision of the administrators of this project (Helen Cyr, James Watson and myself) that you be immediately removed from the project and terminated from your position as Film Archivist.

6. On December 19, 1984, Appellant protested the termination in writing to the University Director of Personnel as required by paragraph 5 of the Agreement, and requested reinstatement and damages.²

7. On January 3, 1985, the Director of Personnel upheld the termination from which action a timely appeal was noted with this Board on January 18, 1985.

²Appellant in his complaint filed with the Board on February 15, 1985 seeks the right to reinstatement, \$20,000 in alleged compensation due under the Agreement, \$476.37 for alleged unreimbursed interview expenses involving travel from Memphis, Tennessee to interview for this position and predecision interest.

8. The University filed a motion to dismiss the appeal on February 22, 1985 on jurisdictional grounds alleging that the employee-employer type agreement signed by Appellant is exempt from the applicability of the State Procurement Regulations and Article 21 of the Annotated Code of Maryland.

Discussion

The parties apparently do not dispute that the agreement in question constitutes an agreement creating an employee-employer relationship as defined in Article 64A, §15A(a)(3) of the Annotated Code of Maryland. Respondent affirmatively asserts that such a relationship exists in its Motion to Dismiss and Appellant does not dispute it in his Memorandum in Opposition to Motion to Dismiss. Article 64A, §15A(a)(3) provides:

(3) "Employer-employee relationship" means conditions of employment such that:

- (i) The State has the right to control and direct the performance of services, not only as to results but also as to details and means;
- (ii) The State has the right to discharge the employee; and
- (iii) The State furnishes necessary tools and a place to work.

The Board also is satisfied from its review of the record before it that an employee-employer relationship as defined in Article 64A was the intended and actual relationship of the parties. It appears, as required, that the University had the right to control and direct the performance of Appellant's services as to results, details and means; to discharge Appellant; and, furnished necessary tools and a place to work.

Where the parties to the appeal differ is over the legal consequences of such a finding to the jurisdictional prerequisites for this Board's entertaining the appeal. The University argues that this Board does not have jurisdiction over a dispute involving an agreement where the type of agreement is specifically exempted from the definition of contract in Article 21. Here we deal with an agreement that is specifically exempted from the definition of contract in Article 21 by the provisions of Chapter 172 of the Laws of Maryland, 1982 which state:

"Contract" does not include:

- (i) Collective bargaining agreements with employee organizations; and all agreements creating employee-employer relationships, as defined in Article 64A, §15A(a)(3) of the Code; (Underscoring added)

See Md. Ann. Code (1984 Cum. Supp.), Art. 21, §1-101(f)(2)(i); COMAR 21.01.03.01A(12).

Accordingly, the University argues that: "Because this contract, by its terms³ and by law, is not governed by Article 21 of the Annotated Code of Maryland or subject to review or adjudication by the Maryland State Board of Contract Appeals, the Board is without jurisdiction in this matter." Both parties agree, and the Board concurs, that the Board has no jurisdiction over a dispute arising in the formation of a contract creating employee-employer relationships, as defined in Article 64A, §15A(a)(3) of the Code. Appellant contends, however, that once such a contract has been awarded this Board does have jurisdiction over a post award dispute.

For the following reasons, we disagree with Appellant's assertion that this Board has jurisdiction to entertain an appeal involving a dispute arising after an agreement creating the requisite employee-employer relationship has been awarded.

An administrative agency, such as the Board of Contract Appeals, as a creation of the Legislature only possesses that authority which it is expressly given. See Del Maso v. County Commissioners, 182 Md. 200, 205, 34 A.2d 464 (1942); Mayor & Aldermen of the City of Annapolis v. Annapolis Waterfront Company, 284 Md. 383, 394, 396 A.2d 1080 (1979). As the Court of Special Appeals observed in Prince George's County v. Commission on Human Relations, 40 Md. App. 473, 487, 392 A.2d 105, 114 (1978):

Where the Legislature grants authority in certain enumerated areas, it cannot be presumed to intend that grant to apply to other areas which it has not chosen to specify. It is an elemental rule of statutory construction that 'expressio unius est exclusio alterius.' ['The expression of one thing is the exclusion of another']

Prior to July 1, 1976 contract actions against the State were barred by the doctrine of sovereign immunity. Calvert Associates v. Department of Employment & Social Services, 277 Md. 372, 357 A.2d 839 (1976); Chas. E. Brohawn & Bros. v. Board of Trustees of Chesapeake College, 269 Md. 164, 304 A.2d 819 (1973); University of Maryland v. Maas, 173 Md. 554, 197 A. 123 (1938). However, effective July 1, 1976, the Legislature waived sovereign immunity as a defense in actions based on written State contracts. Chapter 450 of the Laws of Maryland, 1976. The Board of Contract Appeals was established in response to the waiver of sovereign immunity to permit resolution of disputes involving State contracts as defined by and under the procedures set forth in Article 21.

We have absolutely no doubt that the Legislature may prescribe what type of contracts with the State may properly be within the ambit of this Board's jurisdiction,⁴ since the Legislature may set the terms under which it waives sovereign immunity. See Dunne v. State, 162 Md. 274, 159 A. 751 (1932), cert. denied and appeal dismissed, 287 U.S. 564 (1932). See also, Lohr v. Potomac River Commission, 180 Md. 584, 26 A.2d 547 (1942); Public

³The Board need not discuss the relevance of the absence of a clause in the Agreement specifically conferring a right to appeal to this Board, because the parties cannot confer jurisdiction nor may this Board otherwise assert jurisdiction that has not been conferred by the legislative branch.

⁴See Jorge Company, Inc., MSBCA 1047 (July 7, 1982).

Service Commission v. Kobb's Bakery & Dairy, Inc., 176 Md. 191, 4 A.2d 130 (1939). The instant agreement is specifically declared by the Legislature not to constitute such a contract: "Contract" does not include . . . agreements creating employee-employer relationships, as defined in Article 64A, §15A(a)(3) of the Code. . . ." Article 21, §1-101(f)(2)(i). (Underscoring added). This Board only has jurisdiction to "hear and decide all appeals arising under the provisions of §7-201(d) of this article." Article 21, §7-202(c)(1). Section 7-201(d) provides in relevant part: "within 30 days of receipt of notice of a final action disapproving a settlement or approving a decision not to settle a dispute relating to a contract entered into by the State, the contractor may appeal to the Maryland State Board of Contract Appeals." (Underscoring added). While the appeal before us involves a dispute arising from a contract entered into by the State, it is not a dispute involving a contract entered into by the State under Article 21 and, therefore, the Board lacks jurisdiction. Further, the language of Chapter 172 excluding certain employee-employer relationships from the definition of contract is clear and unambiguous and makes absolutely no distinction between a contract in the preaward stage and one in the post award stage, and we, therefore, construe such statute according to the natural import of its language. See Smelser v. Criterion Ins. Co., 293 Md. 384, 444 A.2d 1024 (1982).

Nor does the legislative history of Chapter 172 (House Bill 463) of the Laws of Maryland, 1982 suggest the dichotomy urged by Appellant between contract formation and awarded contracts in terms of this Board's jurisdiction. House Bill 463 was sponsored as Departmental legislation of the Board of Public Works of Maryland. Written testimony submitted to the House Constitutional and Administrative Law Committee by Dennis H. Parkinson, Chairman of the then Procurement Advisory Council, on behalf of the Board of Public Works stated, in relevant part:

"House Bill 463 amends Section 1-101(f) of Article 21 (Procurement) to exclude employment contracts from the coverage of Article 21.

State employment of individuals, whether Merit System, non-Merit System or contractual employment is governed by other State laws. Therefore, regulation under Article 21 is duplicative, confusing and unnecessary."

Appellant finally contends that unless this Board has jurisdiction, he has no practical remedy to redress the alleged breach of his contract with the University since his "sole remedy is to appeal to the person who authorized the breach of the Agreement." This result, Appellant urges would violate his rights to due process, and, therefore, this Board should assert jurisdiction over the appeal.

We must reject Appellant's contention. Maryland courts steadfastly have enforced the doctrine of sovereign immunity absent legislative waiver. Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979); Board v. John K. Ruff, Inc., 278 Md. 580, 584, 366 A.2d 360, 362 (1976); University of Maryland v. Maas, 173 Md. 554, 559, 197 A. 123, 125 (1938). The extent to which a party may obtain redress from the State and the procedures governing any such redress are solely within the

purview of the Legislature to prescribe. Dunne v. State, 162 Md. 274, 289-90, 159 A. 751, 757 (1932), cert. denied and appeal dismissed, 287 U.S. 564 (1932). Cf. Lohr v. Upper Potomac River Commission, 180 Md. 584, 26 A.2d 547 (1942). Further, where the Legislature waives the defense of sovereign immunity, the conditions of the State's consent to judicial or quasi-judicial action are to be strictly construed. See Maryland Port Administration v. C. J. Langenfelder & S., 50 Md. App. 525, 438 A.2d 1374 (1982). It is not appropriate for this Board to speculate as to whether Appellant may have the right to appeal the termination of his agreement in some other forum. We may only determine whether or not this Executive Branch agency has jurisdiction over the appeal. Having concluded that it does not, the Appellant's appeal must be dismissed.

For the foregoing reasons, we grant Respondent's Motion to Dismiss and dismiss Appellant's appeal with prejudice.

