

State of New Jersey Department of Human Services

PHILIP D. MURPHY Governor

TRENTON NJ 08625-0700

Carole Johnson Commissioner

Sheila Y. Oliver Lt. Governor

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Petitioner

STATE OF NEW JERSEY

DEPARTMENT OF HUMANS SERVICES COMMISION FOR THE BLIND AND

VISUALLY IMPAIRED

ADMINISTRATIVE ACTION

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COMMISION FOR THE BLIND AND VISUALLY IMPAIRED.

Respondent

FINAL AGENCY DECISION OAL DKT NO HCB 10835-18 (Remand of HCB 03002-18)

The Acting Executive Director of the Commission for the Blind and Visually Impaired (the Commission) has reviewed the record in this matter consisting of the Initial Decision of the Honorable Ellen S. Bass, A.L.J., including the compact disc with the recording of the settlement agreement, and the documents presented to the Office of Administrative Law (OAL). The Acting Executive Director has also reviewed the Exceptions submitted by N M , Pro Se Petitioner, and Deputy Attorney General Gregory Sullivan on behalf of Respondent, the Commission.

Statement of the Case and Procedural History

This case involves a remand of HCB 03002-18 regarding the suspension of Petitioner's business-manager license which was resolved by settlement agreement. Petitioner is seeking the enforcement of the terms of the agreement. Respondent asserts that it has substantially performed the terms and obligations of the settlement agreement.

On April 24, 2018 a settlement agreement between Petitioner and Respondent¹, in the matter of HCB 032002-18, was placed on the record before Judge Bass to resolve a dispute regarding the suspension of Petitioner's business-manger license. At the time of the settlement, Judge Bass conducted a voir dire to ensure that Petitioner understood the terms of the settlement agreement. The following day Petitioner's counsel submitted a letter to the OAL withdrawing the HCB 03002-18 appeal.

This petition of appeal was filed on or about June 22, 2018, and was transmitted to the OAL as a contested case on July 27, 2018. On August 13, 2018, the Petitioner filed a Motion for Summary Decision. A day later on August 14, 2018, the parties appeared for an in-person prehearing conference. Attempts at settlement were not successful so the parties agreed to proceed with the matter through the submission of Cross-Motions for Summary Decision. Respondent filed its motion on August 16, 2018. Petitioner submitted a reply on August 30, 2018.² The record was closed on September 4, 2018. The Initial Decision was filed by Judge Bass on September 17, 2018. Petitioner submitted Exceptions on September 27, 2018. D.A.G. Sullivan submitted a response on behalf of Respondent on September 28, 2018. The Petitioner filed a reply on October 1, 2018.

Statement of Facts

Petitioner is seeking the enforcement of the terms of the settlement agreement. Respondent asserts substantial performance of the terms and obligations of the agreement. The facts are summarized from the findings of the Administrative Law Judge.

The settlement agreement provided that the Petitioner would be temporarily placed at the Martin Luther King (MLK) Federal Courthouse in Newark, N.J. (Initial Decision, p. 3) This placement would not be a contract award for that location but it would restore Petitioner's license to active status. (Initial Decision, p. 3). An active license would provide for a more favorable position for bidding on future vending

¹ Napoleon Truesdale, Supervising Community Program Specialist of the Commission, was present at the Office of Administrative Law on April 24, 2018.

² The Procedural History in the Initial Decision notes that Petitioner replied on September 4, 2018 but the Office of Administrative Law received stamp indicates August 30, 2018 as the filed date.

contracts, including a contract Petitioner was interested in at the Hudson County Courthouse which would be more lucrative and longer term. (Initial Decision, p. 3). The anticipated release for the Hudson County Courthouse vending contract was May 2018. (Initial Decision, p. 3). Ultimately, the goal of the settlement agreement was to reactivate Petitioner's license.

On April 24, 2018, subsequent to the finalization of the settlement agreement, Napoleon Trusedale,³ Supervising Program Specialist of the Commission, emailed a representative of the MLK Federal Courthouse about Petitioner receiving building clearance to return as a vendor on a short-term basis. (Initial Decision, p. 3). The MLK Federal Courthouse property manager, Jim Lockwood, informed Mr. Truesdale that Petitioner did not have the necessary HPD-12 security clearance needed to work in the building. (Initial Decision, p. 3). Mr. Truesdale expressed to the OAL that he was not aware at the time the settlement agreement was finalized that Petitioner did not have the necessary federal security clearances to return to the MLK Federal Courthouse. (Initial Decision, p. 3). He further expressed that the federal security clearance was outside of the Commission's control. (Initial Decision, p. 3).

On April 26, 2018, Mr. Truesdale advised Petitioner of the federal security clearance issues which impacted his ability to conduct vending services in the MLK Federal Courthouse. (Initial Decision, p. 4). Petitioner asserted that the Respondent assisted him with clearances when he first started vending at the Courthouse so Respondent should have provided assistance for any additional clearances needed to remain in that location. (Initial Decision, p. 4). Respondent did assist Petitioner in 2013 with his initial paperwork and criminal background check, but in 2016 Petitioner handled a clearance issue with Jim Lockwood from the Courthouse directly. (Initial Decision, pgs. 5-6). Mr. Lockwood was the same individual that alerted the Commission that Petitioner did not have the necessary HPD-12 clearance to work in the Federal Courthouse. (Initial Decision, p. 5).

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³ Petitioner asserted that Mr. Truesdale failed to reach out to the MLK Federal Courthouse promptly because Mr. Truesdale disliked Petitioner and treated him unfairly. The ALJ found no support for these arguments. Mr. Truesdale's email on April 24 clearly shows he immediately attempted to place Petitioner in the agreed upon location. (Initial Decision pg. 3, fn. 4).

Petitioner asserted that he returned to work at the MLK Federal Courthouse after his OAL appearance with no problem. (Initial Decision, p. 4). However, when the security clearance issue arose, Petitioner's former counsel sent correspondence to Respondent's Counsel requesting Petitioner's immediate placement in the MLK Federal Courthouse. (Initial Decision, p. 5). Respondent's Counsel responded with correspondence dated May 8, 2018 from Mr. Lockwood that stated "[t]o the best of my knowledge Mr. M only has an unofficial background check done by USMS. I have not permitted him to remain on site without an escort and will not permit him to just show up and conduct business." (Initial Decision, p. 5). The ALJ found "that the MLK Federal Courthouse is not available to M due to a security clearance issue that is beyond the Commission's control." (Initial Decision, p. 5).

In June of 2018, Mr. Truesdale offered Petitioner two alternative temporary vending options, the Kendall Park Post Office and the Somerset Post Office. (Initial Decision, p. 4). Either option would have reactivated Petitioner's license to bid on the Hudson County Courthouse contract which was not released in May as anticipated during the settlement. (Initial Decision, p. 4). Mr. Truesdale represented that he offered Petitioner options with a new anticipated date of mid to late June for the release to the Hudson County Courthouse contract bid. (Initial Decision, p. 4). Petitioner stated that the Hudson County Courthouse contract had not been released for bidding. (Initial Decision, p. 4). The ALJ found that timely alternatives were offered. (Initial Decision, p. 4).

Petitioner declined the alternative placement options. (Initial Decision, p. 4). He also failed to bid on three other opportunities that opened up after the settlement agreement was executed all of which would have activated Petitioner's license. (Initial Decision, p. 4). Petitioner's contention was that the alternatives were less lucrative, posed travel obstacles, required different inventory than what he had at the time, and they would not provide the opportunity for Petitioner to clear his name at the MLK Federal Courthouse. (Initial Decision, p. 4).

Lastly, Petitioner claimed that Respondent would not return his money and inventory from the MLK Federal Courthouse and the Paramus Veterans Home. (Initial Decision, p. 5). Respondent informed Petitioner that his inventory from both locations

had been placed in storage at the Paramus Veterans Home and the money was secured in safes at the Joseph Kohn Training Center in New Brunswick and the Newark fiscal unit of the Commission. (Initial Decision, p. 5). Petitioner had been advised that arrangements needed to be made to pick up the money and inventory. He had not made arrangement to retrieve his belongings. (Initial Decision, p. 6).

Summary of Exceptions and Replies

Petitioner's Exceptions reassert substantially the same arguments he presented in his August 30, 2018 Cross Motion for Summary Decision. Specifically, he asserts that he did not accept the alternative vending contract options because of transportation and distance challenges. (Petitioner's Exceptions #2, #6, & #16). He did, however, state that a northern location was offered to him before the pre-hearing conference but he declined that option because he wanted to return to the MLK Federal Courthouse location. (Petitioner's Exception #10). Petitioner also argued that his prior work experience at the MLK Federal Courthouse, his inclusion on an email list associated with the Courthouse, and the Respondent's offer to place the Petitioner at other Federal locations showed that he had the necessary security clearances to work at the MLK Federal Courthouse in accordance with the settlement agreement. (Petitioner Exceptions #4 & #5). Petitioner argues that his inability to return to the MLK Federal Courthouse location and the delay in the release of the Hudson County Courthouse contract in May of 2018 went against the agreed upon terms of the settlement agreement. (Petitioner Exception #7, #13 and #17). He also reasserts the claim that the Commission failed to return his money and inventory from both the Paramus Veterans Home and the MLK Federal Courthouse. (Petitioner Exceptions #14-#15).

Respondent's response to Petitioner's Exceptions reiterates that it substantially performed the terms of the contract. (Respondent Reply, p. 2). Respondent acknowledges that the terms the settlement agreement included temporarily placing Petitioner in the MLK Federal Courthouse which would have returned his license to active status that so he would be in a better position to bid on other vending contracts. (Respondent Response, p. 2). However, when the Respondent became aware that Petitioner did not have the necessary security clearance and the MLK Federal

Courthouse was no longer an option they provided the Petitioner with alternatives to allow him to still achieve active license status. The active license status was consistent with goals and intent of the settlement agreement. (Respondent Response, pg. 2) Respondent contends that Petitioner's remaining claims were properly dismissed. (Respondent Response, p. 2-3).

Petitioner submitted a reply were he asserts that he has federal clearance but the email attachment from 2016 does not specify that he has the HPD-12 clearance needed to work at the MLK Federal Courthouse. (Petitioner's Reply p. 1). He also reasserts that the issue with his inability to return to MLK Courthouse was because Mr. Truesdale disliked Petitioner and treated him unfairly. (Petitioner Reply, p. 1). However, the federal security clearance issue is not under the control or authority of Mr. Truesdale. It is a federal requirement that is beyond the control of the Commission.

Analysis and Decision

The issue presented is whether the Respondent substantially complied with the terms of the settlement agreement. Settlement agreements are highly regarded in New Jersey public policy where the parties decide how to resolve a disputed matter in a way that is the least disadvantageous to all involved. See Dep't of Publ. Advocate v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985); see also Brundage v. Estate of Carambio, 195 N.J. 575, 601-602(2008). Settlement agreements are governed by principals of contract law. See Brundage v. Estate of Carambio, 195 N.J. at 601 quoting, Thompson v. City of Atl. City, 190 N.J. 359, 379 (2007); see also Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). The parties voluntarily entered into the April 24, 2018 agreement resolving HCB 032002-18 on the record before Judge Bass.

According to the terms of the settlement agreement, Respondent was supposed to temporarily place Petitioner in the MLK Federal Courthouse. Respondent took affirmative steps to execute the terms of the agreement by contacting the property manager at MLK Federal Courthouse to get clearance for Petitioner to return to the building and continue vending services for a short period of time. However, the Respondent was informed that Petitioner did not have the necessary federal security

clearance to return to work in the federal courthouse. Respondent has no control or authority with regard to the issuance of the required federal security clearance.

"Substantial performance is compliance in good faith with all important particulars of the contract." <u>Jardine Estates, Inc. v. Donna Brook Corp.</u>, 42 N.J. Super. 332, 337 (App. Div. 1956). Where a party performs the essential functions of the contract such that the other party substantially obtains what the contract terms sought to fulfill there is substantial performance. <u>See generally, Id.</u> at 337. The purpose of placing the Petitioner at the MLK Federal Courthouse was to provide Petitioner with the opportunity to reactive his license for the potential to bid on other vending contracts.

After being informed that Petitioner did not have the necessary security clearances for the Federal Courthouse, Respondent offered Petitioner alternative vending locations at the Kendall Park Post Office and the Somerset Post Office. Although the post office placements were federal locations, it is possible that these locations did not require the same security clearance the Federal Courthouse. As such, these alternatives would have fulfilled an essential function or goal of the settlement agreement by restoring Petitioner's license to active status so he could bid on other vending contracts, including the anticipated opening at the Hudson County Courthouse. Petitioner, however, declined the alternative locations and failed to act on other contracts that became available after the execution of the settlement agreement. I agree with the ALJ's conclusion that "the Commission showed substantial performance with the spirit of the settlement agreement even though the end result deviated from the exact terms of the agreement." (Initial Decision, p. 8).

I also agree with the ALJ's dismissal of Petitioner's claim regarding the return of the money and inventory from the Paramus Veterans Home and the MLK Federal Courthouse. (Initial Decision, p. 8) Petitioner did not remove his inventory from the MLK Federal Courthouse when requested by Respondent. Thereafter, Respondent placed the inventory in storage at the Paramus Veterans Home and secured the funds in two of the Commission's safes which are available to the Petitioner to arrange to retrieve them.

⁴ Petitioner was not guaranteed a contract at the Hudson County Courthouse but reactivating his license would have put him in a better position to bid on that location.

Based upon a full review of the record, the Commission hereby **ADOPTS** the Initial Decision of the Administrative Law Judge in granting Respondent's Cross Motion for Summary Decision, dismissing the Petition of Appeal and denying Petitioner's Cross Motion for Summary Decision.

Petitioner has the right to appeal this Final Order within 45 days to the New Jersey Superior Court, Appellate Division, Richard J. Hughes Justice Complex, P.O. Box 006, Trenton, New Jersey 08625.

THEREFORE, it is on this 1st day of November, 2018,

ORDERED:

That the Initial Decision of the Administrative Law Judge is hereby **ADOPTED**.

Bernice Davis

Acting Executive Director, Commission for the Blind and

Visually Impaired