

Service under the contract was to begin on March 23, 2002, and continue to June 30, 2005, at an annual rate of \$53,843.75. (Tr. 56; Appeal File, Tab ("AF") 1; Stipulation of Facts dated March 10, 2004 ("Stip.") 1).

2. The contract required Appellant, who has been a mail contractor for Respondent for 13 years, to "protect and safeguard the mail from loss, theft, or damage while it is in [his] custody or control and prevent unauthorized persons from having access to the mail." (AF 1, Contract Clause H.16, PROTECTION OF THE MAIL (Clause B-77) (January 1997)). Further, the contract provided that Appellant "shall not employ any individual who is . . . not a reliable and trustworthy person of good moral character." (AF 1, Section B.3.i (p. 20); Tr. 122).

3. The contract required that all hired drivers must be screened and obtain an appropriate identification badge:

"New hires/awards: Suppliers [Appellant] must complete and submit to the Administrative Official (AO), original Forms 2025, Contract Personnel Questionnaire, and FD-258, Fingerprint Card, for themselves and each of their employees who have mail handling responsibilities. Also, if the supplier or his/her employees are hired in a driving capacity, the supplier must obtain and provide a copy of each such individual's current driving record for the past five (5) years, and submit it to the AO with the completed forms referenced above. A Form 5139, Non-Postal Temporary Employee Identification Badge, will be issued to the supplier and each such employee until the screening procedure is completed. If results are satisfactory a Form 5140, permanent badge will be issued. If unsatisfactory, privileges will be revoked."

Once the forms were submitted, Respondent was to run a criminal background check and review the information to assure the suitability of Appellant's drivers. (AF 1, Section B.5 (p. 22); Tr. 58-60, 104-105, 125, 139).

4. Drivers under the contract were required to be at least 18 years of age and to have an appropriate driver's license (Tr. 125; AF 1, Section B.6.a (p. 23)).

5. Under the contract's Termination for Default provision, Respondent could terminate the contract if Appellant failed to complete the requirements of the contract within the time allowed or if Appellant failed to perform any of the other provisions of the contract (AF 1, Contract Section H.4, TERMINATION FOR DEFAULT (Clause B-13) (January 1997) (Modified), subsection a). Events of default included Appellant's "failure to perform service according to the terms of the contract" and "failure to properly account, deliver and pay over moneys, mail and other property pursuant to this contract." (AF 1, Contract Section H.5, EVENTS OF DEFAULT (Clause B-69) (January 1997) subsections a, f; see Contract Section H.6, ACCOUNTABILITY OF THE SUPPLIER (HIGHWAY) (Clause B-64) (January 1997), subsection c; Stip. 2).

6. The contract's termination for default provision provided, "If, after termination, it is determined that the supplier was not in default . . . the rights and obligations of the parties will be the same as if the termination had been issued for convenience." (AF 1, Contract Section H.4, TERMINATION FOR DEFAULT (Clause B-13) (January 1997) (Modified), subsection g).

7. In November of 2002, Appellant, upon recommendation of his hired route driver, employed Michael Lackey to assist in delivering the route. Appellant obtained from Mr. Lackey a signed Form 2025, Contract Personnel Questionnaire, a Fingerprint Card and a five-year driving record. Appellant signed the Form 2025 as contractor and sent all of the screening documents to the Llano Post Office. After about four weeks, Respondent issued Mr. Lackey a permanent identification badge, which he wore while performing his duties on the route. Mr. Lackey became the

main driver on the route in December 2002. (Tr. 90-91, 98, 114, 126-129, 137, 139, 143, 156, 175, 183-189; AF 10; Complaint Exhibit 3a, 3b; Stip. 6).

8. In March of 2003, at Mr. Lackey's request, Appellant hired Crystal Peterson to assist in driving the route. Ms. Peterson told Appellant that she was 18 years old, showed him a driver's license reflecting that she was 18, and completed the screening forms entering a birth date consistent with her being 18. Appellant asked a relative of Ms. Peterson's about her age and was told that Ms. Peterson was 18. In truth, Ms. Peterson was 16, but Appellant did not discover her true age until June 13, 2003. (Tr. 100-101, 165-166, 170-171, 193-194; Appellant's Exhibit 4).

9. Appellant obtained from Ms. Peterson a signed Form 2025, Contract Personnel Questionnaire, a Fingerprint Card and a two-year driving record. Appellant signed the 2025 as contractor and sent all of the screening documents to the Llano Post Office.¹ After about five weeks, Respondent issued Ms. Peterson a permanent identification badge, which she wore while performing her duties on the route. (Tr. 91, 114, 132, 137, 140, 146, 175, 192-195; Complaint Exhibit 4a, 4b; Stip. 5).

10. In April or May 2003, Appellant discovered that Mr. Lackey's driver's license had been revoked. Appellant told Mr. Lackey that he could not drive on the route until he got his license back but that he could assist Ms. Peterson on the route so long as he did not drive. (Tr. 145-147).

¹ The Litterock Postmaster was identified in the contract as the Administrative Official (AF 1 (p. 12)), but at the relevant times for Mr. Lackey's and Ms. Peterson's screening the Llano Post Office was performing the driver screenings (Tr. 73-74).

11. June 13, 2003, was to be the last day on the route for Mr. Lackey and Ms. Peterson. Ms. Peterson had told Appellant earlier in the week that she was quitting as of June 13. Although Mr. Lackey wanted to continue, Appellant had advised him he could not run the route because he had no driver's license and because Appellant had received some complaints about him from customers on the route. (Tr. 147-151).

12. On June 13, 2003, Mr. Lackey and Ms. Peterson failed to complete the route, returning the mail they should have delivered that day to the Llano Post Office. The post office notified Appellant that the mail had been returned, and he and his wife delivered the mail that afternoon and evening. Mr. Lackey and Ms. Peterson thereafter were no longer employed by Appellant and had no further involvement with the route. After June 13, 2003, and until the contract was terminated, the route was performed satisfactorily by another driver hired by Appellant. (Tr. 80, 106-107, 120, 149, 157-161, 171, 201; AF 3 (p. 8)).

13. On June 13, 2003, the Llano Post Office Officer-in-Charge found six riffled (opened) greeting cards among personal belongings of Mr. Lackey left at the post office. She reported her discovery to the Postal Inspection Service. The cards were apparently outbound mail picked up from customers along the route. Additionally, a tray of undelivered and outbound mail from previous days in early June, some of which had been opened, was found in a residence recently vacated by Mr. Lackey and Ms. Peterson. This mail was recovered by Appellant, who promptly turned it in to the Llano Post Office. (Tr. 19, 22, 43, 115; AF 3 (p. 8); Stip. 8).

14. By fax dated June 17, 2003, Appellant notified the contracting officer's staff that his two drivers had been involved in mail theft and had failed to deliver the mail on June 13, 2003 (Tr. 172-173; Complaint Exhibit 5a).

15. A postal inspector prepared an investigative memorandum reporting the events surrounding the rifled mail and the results of her investigation, including memorandums of interviews with Mr. Lackey and Mr. Noble. The report reflected that Mr. Lackey and Ms. Peterson no longer worked on the route after June 13, 2003. The inspector sent the report to the contracting officer on or about July 24, 2003. (Tr. 32; AF 3; Stip. 11).

16. By letters dated August 5, 2003, to Mr. Lackey and Ms. Peterson the contracting officer denied them access to the mail and driving privileges on the route (Tr. 68; AF 4, 5; Stip. 12).

17. By final decision dated September 26, 2003, the contracting officer, without any contact with Appellant and relying substantially on information from the memorandum of Mr. Lackey's unsworn interview, terminated Appellant's contract for default, effective October 3, 2003. The grounds given were that Appellant had failed to perform service according to the terms of the contract and failed to supervise the operations of the route. The contracting officer identified rifling of mail, the hiring of an underage driver, failure to screen Mr. Lackey and Ms. Peterson and allowing Mr. Lackey to drive without a driver's license as specific grounds for the termination. (Tr. 62, 164; AF 7; Stip. 13).

18. Appellant filed a timely appeal (AF 9; Stip. 14).

DECISION

Although Appellant submitted the appropriate driver screening forms, according to Respondent he failed to ensure that the information on the forms was accurate and that his drivers were reliable and trustworthy and of good moral character. Respondent argues that Appellant is responsible for the actions of his employees and that their misconduct and his failure to provide dependable drivers justified the termination of the contract.

Appellant contends that he fully complied with the contract's driver screening requirements and that he had no reason to suspect that his employees were dishonest or that they had taken or rifled mail. He further argues that the contracting officer failed to investigate adequately or give Appellant an opportunity to explain the circumstances surrounding the termination. He claims that the default termination was not justified.

Through the actions of his employees, Appellant failed to comply with the requirements of the contract to "protect and safeguard the mail from loss, theft, or damage" (Finding 2) and failed to "perform service according to the terms of the contract" and "to properly account, deliver and pay over moneys, mail and other property" required under the contract (Finding 5). These are serious defaults of Appellant's contractual obligations. Nevertheless, the Termination for Default provision does not require Respondent to terminate on a finding of default, but merely gives it the discretion to do so, and that discretion must be reasonably exercised. See Darwin Constr. Co. v. United States, 811 F.2d 593, 596 (Fed. Cir. 1987). Not every contract violation justifies the drastic sanction of a default

termination, Carla Martin, PSBCA No. 4157, 00-1 BCA ¶ 30,592; Douglas Cremer, PSBCA No. 3108, 93-2 BCA ¶ 25,565, and we must review the totality of the circumstances to ascertain whether the termination of Appellant's contract was a reasonable exercise of the contracting officer's discretion. See Carla Martin, PSBCA No. 4157, 00-1 BCA ¶ 30,592.


We are not persuaded that the contracting officer acted reasonably in terminating Appellant's contract under the circumstances of this appeal. While Appellant remains ultimately responsible for the actions of his employees, he was not shown to have had any involvement in their mishandling of the mail. In fact, it was Appellant who turned in the recovered tray of mail (Finding 13) and first brought the misconduct of his employees to the attention of the contracting officer's staff (Finding 14).

Further, Respondent has not shown that Appellant acted unreasonably in hiring the two employees or entrusting delivery of the mail to them. There was no showing that Appellant knew or should have known of reasons why Mr. Lackey and Ms. Peterson should not have been allowed to deliver the route. Appellant obtained the proper forms and fingerprint cards from each and submitted them to Respondent, and Respondent issued each a permanent identification badge (Findings 7, 8). We can find no fault with Appellant's screening process, and Respondent's screening also did not reveal that Mr. Lackey and Ms. Peterson were not reliable, trustworthy persons. While Ms. Peterson was too young to be a driver on the route (Findings 4, 9), Appellant reasonably relied on the information he received before hiring her (Finding 9), and there is no showing that he knew or


should have known that she was not 18. When Mr. Lackey's driver's license was revoked, Appellant told him he could not drive on the route and there is no showing that he did thereafter (Finding 10).

Moreover, by the time the contracting officer terminated the contract on September 26, 2003 (Finding 17), the incidents were more than three months in the past, the unreliable employees had not been involved with the route since the June 13 discovery of their misconduct (Findings 12, 16), and the contract had been performed satisfactorily by another employee of Appellant since June 13 (Finding 12). Without minimizing the seriousness of the contract violations perpetrated by Appellant's employees, we find that under the totality of the circumstances of this appeal, the contracting officer abused his discretion in terminating the contract for default.

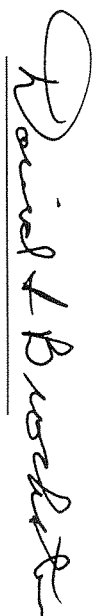
Accordingly, the appeal is sustained, and the termination is converted to one under the terms of the contract's Termination for Convenience clause.


Norman D. Melegat
Administrative Judge
Board Member

I concur:


James A. Cohen
Administrative Judge
Chairman

I concur:


David I. Brochstein
Administrative Judge
Vice Chairman