U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

CASE NO. 89-OFC-41

DATE: February 5, 1997

PLAINTIFF,

v.

ROWAN COMPANIES, INC., MARINE DIVISION,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

Plaintiff, the Office of Federal Contract Compliance Programs (OFCCP), alleges that Defendant Rowan Companies, Inc. (Rowan) violated section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C § 793 (Supp. V 1993) (section 503), when it rejected applicants for entry level laborer positions on Rowan's offshore oil drilling rigs because the applicants did not meet various physical standards. The Administrative Law Judge (ALJ) submitted two recommended decisions, one addressing whether Rowan is covered by section 503 on the facts in this case (2d R. D. & O.), and the other addressing the merits (R. D. & O.). The ALJ found that Rowan was covered by section 503 with respect to some of the applicants involved in this case, but that Rowan did not discriminate against these applicants when it rejected them for failure to meet its medical standards. Rowan excepted to the finding of coverage and OFCCP excepted to the ALJ's recommendation that this case be dismissed on the merits.

[1/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

Background

Rowan contracts to provide drilling services to third parties holding oil and gas leases on submerged lands on the outer continental shelf (OCS) under the Outer Continental Shelf Lands Act, as amended, (OCSLA) 43 U.S.C. §§ 1331-1356 (1982). T. (July 24) 20;[2] *see, e.g.,* Exhibit B, Oil and Gas Lease OCS-G 5966, to OFCCP's Motion for Summary Judgment dated Nov. 1, 1995. Almost all new employees on Rowan's off-shore drilling rigs are hired in the entry level laborer position of roustabout, T. (July 24) 147-48, D (Rowan's Exhibit) 2 (roustabout job description), which the ALJ found is in the "'very heavy' range." R. D. & O. at 7, n.12. All applicants qualified for roustabout positions must take a pre-employment physical examination which includes a medical history and back x-ray. *See, e.g.,* P (OFCCP's Exhibit) -1; T. (July 24) 160-61. The examining physician must reject applicants who do not meet any of Rowan's physical standards, which are listed in the Physical Examination section of the application form, T. (July 24) 155-56; *see, e.g.,* P-1, p.2. Rowan also provides the doctor a "Pre-employment Back X-ray Grading Guide," P-35, which categorizes over 35 back conditions into five classes. The guide requires rejection of all applicants in Classes IV and V and permits hiring applicants in Class III only "at the discretion of the examining physician . . . ."

Coverage

Before being amended in 1992, section 503 required government contractors, "in employing persons to carry out [the] contract," to take affirmative action for qualified handicapped individuals.[3] Since the decision in *Washington Metro. Area Transit Auth. v. DeArment,* 55 Empl. Prac. Dec. [CCH] ¶ 40,507 (D.D.C. 1991), it has been an element of OFCCP's case to prove that the employee or applicant allegedly discriminated against was or would have been employed to carry out a government contract. The question here is whether Rowan, in conducting drilling for holders of government leases of lands on the OCS, is a government subcontractor as defined in 41 C.F.R. § 60-741.2 (1995). The regulations define a government subcontract as:

> any agreement or arrangement between a contractor and any person . . .
>
> (1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or
>
> (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

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[2] The hearing covered six days in July and August 1990, but the transcript was not consecutively numbered. References to the transcript refer to the page numbers in the separate volumes for each day of the hearing.

[3] Congress deleted that phrase, among other changes, in 1992 amendments to the Rehabilitation Act. Pub. Law 102-569, § 505(a)(2).

In other words, the applicants would be covered only if they would have been employed by Rowan to perform services necessary to the performance of a government contract, or if Rowan performed an obligation of the prime contractor pursuant to the lease.

Rowan argues that the plain language of section 503 precludes coverage of OCS lessees and, *a fortiori*, of their subcontractors because it only covers "contract[s] for the procurement of personal property and nonpersonal services for the United States." 29 U.S.C. § 793(a). Because the government does not obtain personal property or receive nonpersonal services under the OCS leases, Rowan asserts these agreements are not covered contracts under section 503. Rowan also argues that because the leases themselves do not require the lessee to drill, the drilling services provided by Rowan are not "necessary to the performance of" a government contract. 41 C.F.R. § 60-741.2. Finally, Rowan relies on a recommended decision of an administrative law judge in another section 503 case for the proposition that OFCCP had no authority to conduct a compliance review here because no individual complaint was filed. We reject the latter argument at the outset. The Assistant Secretary for Employment Standards rejected that argument, among others, in *OFCCP v. American Airlines*, Case No. 94-OFC-9, Ass't. Sec'y. Dec. Apr. 26, 1996, slip op. at 25, and we deny this exception for the reasons set forth in that decision.

After careful consideration of the Outer Continental Shelf Lands Act (OCSLA), its implementing regulations and a sample lease and other related documents, we have concluded on the basis of the record made in this case that drilling was not necessary to the performance of the offshore oil lease, or any extension or modification of that lease. We also find that drilling was not an obligation of any of the government contractors, the lessees of OCS leases. We do not agree with Rowan that a lease is not a government contract; as any other agency, we are bound by the Department of Labor regulations which include leases in the definition of government contracts, 41 C.F.R. § 60-1.3. But, as the Secretary held in *OFCCP v. Loffland Brothers Co.*, Case No. OEO 75-1, Sec'y Dec. Apr. 16, 1984, slip op. at 7, "lessees [of federal oil and gas leases] have no obligation to perform any drilling on the leased land." Specifically with respect to oil and gas leases under the OCSLA, the Supreme Court made it clear that "the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." *Secretary of the Interior v. California*, 464 U.S. 312, 336 (1984). Further, the court held that "the purchase of a lease entails no right to proceed with full exploration, development, or production" *Id.* at 338. Concomitantly, it follows that a lessee has no obligation to conduct drilling and that drilling is not necessary to the performance of the lease contract.

OFCCP argues that, even if the lease itself does not require drilling, other documents submitted by the leaseholders in this case constitute either a modification of the lease or a new contract which requires drilling. Before the holder of an OCS lease explores for and removes oil and gas, it must submit an exploration plan, and a development and production plan, for approval to the Secretary of the Interior. That submission is to include, among other things, "a schedule of anticipated exploration activities," 43 U.S.C. § 1340(c)(3)(A), and the "expected rate of development and production and a time schedule for performance . . . ." 43 U.S.C. § 1351(c)(5).

However, the primary thrust of Department of the Interior regulations implementing the OCSLA is directed at protection of the environment and, to a lesser extent, protection of the

infrastructure of affected adjacent states and of archeological and cultural resources in the leased area. *See* 30 C.F.R. §§ 250.33 and 34. We have found nothing in the regulations indicating that the lessee has an obligation to drill. The regulations only require that if drilling is conducted, it must meet protective standards. The regulations provide that "[w]henever the lessee . . . fails to comply with an approved [development and production] plan, the lease may be canceled [in accordance with certain provisions of the OCSLA and the regulations]." 30 C.F.R. § 250.34(r). If the lessee determines that drilling for exploration and development is not economically feasible, it can abandon its plan and suffer only cancellation of the lease. This is not sufficient to find that an OCSLA leaseholder has a contractual obligation to the government to perform drilling or that drilling is necessary to the performance of the lease.

Finally, OFCCP asserts that, under a well accepted rule of oil and gas law, a lessee of oil and gas rights has "an implied covenant to develop the tract with reasonable diligence." *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 278 (1934). Such development would necessarily include drilling. However, OFCCP has not directed our attention to, nor have we discovered, any cases applying that principle to federal oil and gas leases. Where a statute, the OCSLA, and regulations, 30 C.F.R. Part 250, set forth extensive requirements for development of federally owned offshore oil and gas resources without clearly establishing such an obligation on the part of leaseholders, we are reluctant to import such an obligation derived from the law of private contracts.

Thus we cannot conclude on the basis of the record presented that the leases in question effectuate coverage under Section 503 of the Rehabilitation Act of 1973 as written before the 1992 amendments to that Act. Accordingly, the complaint in this case is **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member