

COMMONWEALTH OF PENNSYLVANIA

DENNIS M. CASEY, t/d/b/a : BEFORE THE BOARD OF CLAIMS
DENNIS M. CASEY COMPANY :
 :
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 VS. :
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 :
 COMMONWEALTH OF PENNSYLVANIA, :
 PENNSYLVANIA TURNPIKE COMMISSION : DOCKET NO. 2300

FINDINGS OF FACT

1. Plaintiff, Dennis M. Casey, t/d/b/a Dennis M. Casey Company (hereinafter “Casey”), is an individual with a principal address at 1060 McKenna Avenue, Pittsburgh, Pennsylvania. Casey is a public relations consultant who enters into contracts with public and private entities for the purposes of providing public and community relations services and counseling services to his clients. (Stipulation, ¶1)

2. Defendant, Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission (hereinafter “PTC”), is an instrumentality of the Commonwealth of Pennsylvania with principal offices in Highspire, PA, with an address at P.O. Box 67676, Harrisburg, PA 17106-7676. (Stipulation, ¶2)

3. On or about August 24, 1992, the parties executed an Agreement setting forth the terms and conditions pursuant to which the work associated with the Agreement would be performed, carried out, billed and paid for by the PTC. A copy of the Agreement is attached in the Joint Exhibit Book as Joint Exhibit 1. Casey was engaged to perform consulting, public relations services, community relations services, and various other services and duties attendant thereto, with the objective of informing the public of facts about the proposed Mon Valley/Fayette Transportation Project, in Allegheny, Washington and Fayette Counties, Pennsylvania and Monongalia County, West Virginia. (Stipulation, ¶3)

4. Casey actually began work under this Project in March of 1992, without a written contract, under what is called an advance notice to proceed. (N.T. 13)

5. Casey began work without a written contract under the advance notice to proceed until Federal funds became available to pay him. (N.T. 48, 88)

6. Supplemental agreement numbers 1 and 2 were dated December 28, 1993, 3 days before Casey’s final day of work under this Project. (N.T. 16-17, 124-126; Joint Exhibits 2-3)

7. Under this Project, Casey submitted 22 monthly invoices numbered 1-23 with no number 21. (N.T. 21-22; Joint Exhibit 10) The amounts requested in invoice numbers 22 and 23 were not paid to Mr. Casey. (N.T. 23)

8. Louis W. Petulla, Assistant Chief Engineer of Expansions for PTC, wrote to Casey under date of August 13, 1993 saying that the Turnpike had a problem with the method of billing and was beginning an audit of Casey. (N.T. 24; Joint Exhibit 11)

9. Casey billed the Turnpike using the specific rate of compensation method rather than the cost plus method of billing. Casey thought he was using the correct method for billing. (N.T. 25)

10. Randall Lewis Mellinger is an internal auditor with the PTC. (N.T. 99)

11. Casey's billing was an honest mistake and he had no intent to bill the Commission in any criminal fashion. (N.T. 100)

12. Mr. Mellinger, as an operations auditor, could have interpreted this agreement in another way. It could have been interpreted as a specific rate of compensation method. (N.T. 109, 119-120, 124, 128)

13. When Casey began work on the Project, there were discussions with Mr. Petulla and others concerning the method of billing and rather than billing the direct amount that Casey would normally charge a client as a lawyer or an accountant does, Petulla asked Casey to bill under the formula that had been approved by the Federal Highway Commission. (N.T. 29-30)

14. At one of these meetings, there was a discussion of the hourly rate that would be charged. (N.T. 30)

15. The hourly rate schedule was not contained in the contract of August 24, 1992, but rather was inserted into supplement 1 of December 28, 1993. (N.T. 32, 106)

16. Under date of September 14, 1993, the PTC submitted a comparison of submitted billings to actual pay rates with adjustments due the Commission, covering invoices 1-17 setting forth that there was \$111,747.17 in over billings. (N.T. 34, 78-79)

17. Under date of October 6, 1993, Mr. Petulla directed a letter to Casey suspending all work by Casey. (N.T. 39; Joint Exhibit 16)

18. On October 7, 1993, at a meeting attended by twelve (12) Turnpike people and himself, Mr. Casey was threatened with a referral of this matter to the Attorney General for criminal prosecution for fraud. (N.T. 40)

19. Prior to this proceeding with the Board of Claims, Mr. Casey never mentioned any duress, coercion, or threat of criminal prosecution to Alphonse T. Lepore, Assistant Chief Counsel for the PTC. (N.T. 134)

20. A letter dated October 12, 1993 directed by Mr. Casey to John L. Sokol of the PTC, was dictated by an attorney for the PTC so that Mr. Casey could avoid criminal prosecution. In that letter, Mr. Casey agreed to repay to the Commission \$111,747.17. (N.T. 41-42) Mr. Casey did discuss the letter of October 12, 1993 with his attorney before signing it. (N.T. 85-86)

21. Mr. Casey offered to repay the \$111,747.17 in order to get payment for his invoices that they were holding back for \$69,000 as well as to be able to continue working on the contract. (N.T. 91)

22. Mr. Petulla accepted the repayment proposal under date of October 22, 1993. (Joint Exhibit 18)

23. Mr. Casey made one payment of \$9,312.26 under the repayment plan. (N.T. 43, 90-91)

24. Under date of February 22, 1994, Mr. Casey directed a letter to Mr. Petulla requesting payment for invoices number 22 and 23 in the total of \$72,765.85. (N.T. 44; Joint Exhibit 21) This amount has since been reduced to \$57,520.12. (N.T. 81-82, 92)

25. Mr. Casey filed suit December 26, 1995 in the Allegheny County Court of Common Pleas. (N.T. 92-93)

26. The above amount was not the total amount due Mr. Casey. He also is asking for additional monies on invoice numbers 1-17 in the amount of \$12,400.69. Thus, the total he is seeking is \$189,920.81 with interest of six percent (6%) from December 31, 1993. (N.T. 83, 93; P-29)

27. Although Mr. Casey began work under this Project in March of 1992, he did not submit his first invoice until about July of 1992. At that time, he submitted 4 invoices covering a four month period. (N.T. 48)

28. At some point after the initial invoices were submitted to the PTC, Mr. Casey threatened to quit because he had not been paid and the Commission's personnel informed him that he could not be paid without a contract. (N.T. 48)

29. Shortly thereafter, a contract was prepared that ultimately was executed on August 24, 1992. (N.T. 49)

30. The contract of August 24, 1992 was not a typical public relations contract, but rather a makeshift engineering contract. (N.T. 49-50)

31. Mr. Mellinger had never seen an agreement where public relations services were contracted for using an engineer's consultant agreement. It was rather unusual to see it being used. The reason this engineering consulting agreement was used was in order to get reimbursed by Federal funding, the Federal Government preferring to use a cost plus net fee agreement. (N.T. 120-121)

32. There was no reference in the contract of August 24, 1992 to a profit rate. (N.T. 52-53)

33. Supplement number 1 dated December 28, 1993 ratifies what was intended in the original contract and ratifies items that should have been clarified in the original contract. (N.T. 53-54)

34. Plaintiff's Exhibit 29 sets forth damages that Mr. Casey seeks from the PTC. (N.T. 78; P-29)

35. Mr. Casey was paid in full for invoices 18, 19 and 20 which were submitted in accordance with the rates insisted upon by the PTC. (N.T. 80)

36. Invoice number 22, in the amount of \$37,411.83 and invoice number 23, in the amount of \$20,108.29, were not paid to Mr. Casey. Invoice numbers 1-17 were paid, but the amounts are in dispute. There was no invoice number 21. (N.T. 79, 81)

37. Under the agreement of August 24, 1992, page 9, B1, it sets forth that "The method of payment for work covered under this Agreement shall be Specific Rate of Compensation as defined in Exhibit 'B', 'Article No. 2.'" Exhibit B, Article 2 says "The method of payment for services and work covered under a Work Order under this contract shall be actual cost plus a net fee." The contract on Page 3 also says that "The Consultant's personnel rates are subject to the maximum allowable limit for personnel rates and overhead as set forth by the Pennsylvania Department of Transportation". (N.T. 86-87, 106; Joint Exhibit 1)

38. On the invoices in the caption at the top, it sets forth "Pennsylvania Turnpike Commission, estimated progress report, cost plus net fee, open end." (N.T. 88)

39. Mr. Casey's method of billing allowed him to get his overhead twice. (N.T. 113)

40. The 16 invoices paid prior to the audit went through levels of review that involve review by the project manager, the engineering department, the accounting department and in some cases on to the Commission for approval. All these invoices were paid prior to the audit. (N.T. 129-130)

41. PTC has counterclaimed for \$44,914.79 with interest and costs which sum consists of \$111,747.17 alleged over billings on invoice numbers 1-17, less the Casey repayment of \$9,312.26, and the sums due Casey under invoice numbers 22 and 23 (\$57,520.12). (PTC Counterclaim)

42. On September 21, 1993, Casey wrote to PTC acknowledging the results of the audit and saying that he had sent the report to his accountant and instructed the accountant to advise him immediately regarding his findings of the report. (Joint Exhibit 13)

43. On October 1, 1993, Casey wrote PTC that his firm was creating a viable schedule of payments to retire this matter as promptly as is humanly and physically possible. (Joint Exhibit 14)

44. On October 4, 1993, Casey wrote to PTC saying that he had conferred with his attorney and accountant and would like another meeting before a final resolution is memorialized. (Joint Exhibit 15)

45. On January 12, 1994, Casey wrote to the Chairman of the Board of Commissioners thanking the Board for allowing his firm to have served the Commission, that he was proud of the work the firm did for the Commission and that it was a privilege to serve on the management team of the Project. (Joint Exhibit 20)

46. On March 18, 1994, an attorney for Casey wrote to PTC requesting payment of \$72,765.84. (Joint Exhibit 22)

47. On March 31, 1994, PTC Assistant Counsel, Alphonse P. Lepore, Jr., responded to Casey's attorney that "We are not prepared to accede to your demand" and "You should discuss those matters with Mr. Casey. After that any dialogue we have can be meaningful." (Joint Exhibit 23)

48. On June 12, 1996, a second attorney for Casey wrote to Mr. Lepore that Casey, "Fully believes that he is entitled to payment in full" and requesting a response regarding settlement or a formal denial letter outlining the basis for Mr. Lepore's position. (Joint Exhibit 26)

49. On June 18, 1996, Mr. Lepore responded to the second attorney, citing the agreement to repay, in effect denying the attorney's request for payment and threatening to counterclaim. (Joint Exhibit 27)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the parties as the subject matter of the claim pursuant to 72 P.S. §4651-4.
2. On August 24, 1992, the parties executed a binding agreement setting forth the terms and conditions pursuant to which work associated with the Agreement would be performed and billed by PTC.
3. The billing was to be done on a cost plus net fee basis.
4. The wording of the contract was ambiguous and the contract was an engineering contract rather than a public relations contract.
5. The invoices sent cited the cost plus net fee basis.
6. Mr. Casey acknowledged that he had received overpayment and made one (1) repayment pursuant to a written agreement.
7. Mr. Casey has not proven by a preponderance of the evidence that he is entitled to any damages.
8. Each invoice submitted by Mr. Casey went through three (3) levels of review by the Defendant yet the incorrect billing was not caught until approximately eighteen (18) months later.
9. Mr. Casey was permitted to begin work without a written contract and with no definitive agreement as to how he would be paid.
10. Defendant has not met its burden of proof that it is entitled to compensation on its counterclaim.
11. The claim was filed within applicable Statute of Limitations.

OPINION

This matter was called to hearing before the Board of Claim's hearing panel, composed of Frederick D. Giles, Esquire, Attorney Member, and Conrad E. Kambic, P.E., Engineer Member. The Panel Report has been submitted and reviewed.

The case comes before the Board of Claims based upon the Complaint of Plaintiff, Dennis M. Casey, t/d/b/a Dennis M. Casey Company, for compensation from the Defendant, Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission, for work performed by Plaintiff pertaining to public relations. Specifically, Plaintiff was engaged to perform consulting, public relations, community relations, and other services with the objective of informing the public of the facts about the proposed Mon Valley/Fayette Transportation Project.

Plaintiff began working on the Project in March, 1992, without a written contract. Plaintiff began submitting bills for the work using the specific rate of compensation in July, 1992. A written contract was entered into by the parties on August 24, 1992. The contract was not the normal type used for public relations. The specific rates were defined in the contract as the actual cost plus a net fee and the personnel rates were subject to the maximum allowances set by PennDOT. This contradicted the method of billing used by Mr. Casey until that time. Surprisingly, there is little testimony concerning any oral communications between the parties with respect to the rate structure prior to the entry of the written contract.

Each invoice submitted by Plaintiff went through several layers of review by Defendant. It was not until August 13, 1993, that Defendant first discovered what it thought to be an error in billing. Interestingly, the top of the invoices read "Pennsylvania Turnpike Commission,

estimated progress report, cost plus net fee, open end". They stated same even though the actually method of billing was quite different.

An audit performed by Defendant indicated that it had been overcharged One Hundred Eleven Thousand Seven Hundred Forty-Seven Dollars and Seventeen Cents (\$111,747.17) by Plaintiff. Plaintiff was notified of the overcharge on September 14, 1993, and after discussing it with his accountant, his attorney and the PTC, he wrote on October 1, 1993, that he would create a repayment schedule. On November 29, 1993, he made one (1) repayment of Nine Thousand Three Hundred Twelve Dollars and Twenty-Six Cents (\$9,312.26).

On June 12, 1996, a new attorney for Plaintiff wrote to Defendant disputing the overpayment. This was the first time Plaintiff had ever disputed the request. In fact, the only correspondence Defendant had received from Plaintiff during the interim period was a letter dated January 12, 1994, in which Plaintiff thanked Defendant for permitting him to do the work. Plaintiff also requested payment of unpaid invoices.

Plaintiff's Complaint is requesting One Hundred Eighty-Nine Thousand Nine Hundred Twenty Dollars and Eighty-One Cents (\$189,920.81) in damages. The figure went largely unexplained at the hearing. The contract did call for payment under the net cost plus method. The invoices sent by Plaintiff even stated on their face that payment was under the net cost plus method. Furthermore, the Plaintiff originally agreed to repay the overpayment after consulting with his attorney and accountant. He never filed any formal protest, either orally or in writing. He eventually made one (1) repayment. It was not until nearly three (3) years later, after speaking with a subsequent attorney, that he decided to dispute the overpayment.

The actions of the Plaintiff are simply not consistent with someone who would challenge the Defendant's claim that overpayment occurred. Therefore, the Board finds that Plaintiff has not proven his case by a preponderance of the evidence and his claim must be dismissed.

Defendant has filed a counterclaim for Forty-Four Thousand Nine Hundred Fourteen Dollars and Seventy-Nine Cents (\$44,914.79) which consists of One Hundred Eleven Thousand Seven Hundred Forty-Seven Dollars and Seventeen Cents (\$111,747.17) of alleged over billings on invoice numbers 1-17, less the Casey repayment of Nine Thousand Three Hundred Twelve Dollars and Twenty-Six Cents (\$9,312.26) and the sums due Casey under invoice numbers 22 and 23 (\$57,520.12). The Board is of the opinion that the Defendant has not met his burden of proof with respect to the Counterclaim. There was never any "meeting of the minds" with respect to the proper billing format, at least not until after substantially all of the work had been completed. It was only after direct threat and coercion that Plaintiff agreed to the net cost plus method. More importantly, each invoice submitted by Plaintiff went through three (3) levels of review; however, the incorrect billing was not caught until eighteen (18) months after the work began. Furthermore, the Plaintiff actually began the work without any written contract at all. The record is devoid of any conversations between the parties at this point in time concerning the pay scale.

The Board will not address the issue of the Statute of Limitations raised by the Defendant in its New Matter since the Board does not feel the statute is at issue.

ORDER

AND NOW, this day of June, 1999, after hearing and review of the Briefs in this matter, the Plaintiff's, Dennis M. Casey t/d/b/a Dennis M. Casey Company, claim is hereby **DISMISSED** and **DENIED**.

The Counterclaim of Defendant, Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission, is also hereby **DISMISSED** and **DENIED**. Both parties are to pay their respective Court costs and attorneys fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

James W. Harris
Citizen Member

Opinion Signed

June 25, 1999