

No.

SUPREME COURT OF THE UNITED STATES

Pyrotechnic Specialties, Inc.,

Petitioner,

v.

Secretary of Defense,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. Questions Presented

1. Is a litigant entitled to have the correct standard of law applied by the Armed Services Board of Contract Appeals or does a “right for any reason” doctrine apply?

2. Is a litigant entitled to have the scope of fact and law determined prior to an evidentiary hearing; or may a tribunal hold an evidentiary hearing, exclude evidence, thereby deterring the proffer of additional evidence on an issue, only to later determine the evidence was admissible while simultaneously refusing additional proffers of evidence on the issue in question?

3. Is it appropriate for the United States Court of Appeals for the Federal Circuit to affirm a ruling without an opinion pursuant to Fed. Cir. R. 36, when both the United States Court of Appeals for the Federal Circuit and the Government acknowledge that the wrong standard of review was applied by the Armed Services Board of Contract Appeals?

CORPORATE DISCLOSURE STATEMENT

In accordance with the United States Supreme Court Rule 29.6, Petitioner makes the following disclosures:

Petitioner does not have any parent companies nor do any publicly held companies own ten percent or more of Petitioner's stock.

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IV. Petition for Writ of Certiorari

Petitioner Pyrotechnic Specialties, Inc., a Georgia Domestic Profit Corporation, by and through Michael Devlin Cooper, a licensed attorney in the State of Georgia and member of the Bar of the United States Supreme Court, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

V. Opinions Below

On March 13, 2017, the Armed Services Board of Contract Appeals entered judgment in Case Nos. 57890, 58335, 59103. Appx3-94. On February 4, 2021, the United States Court of Appeals for the Federal Circuit affirmed the decision of the Armed Services Board of Contract Appeals in Case No. 19-2024. Appx1-2. On March 23, 2021, the United States Court of Appeals for the Federal Circuit denied a Petition for Panel Rehearing. Appx95-96.

VI. Jurisdiction

Pyrotechnic Specialties, Inc. appealed to the United States Court of Appeals for the Federal Circuit, and that court affirmed the ruling of the Armed Services Board of Contract Appeals. Pyrotechnic Specialties, Inc. seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this Petition for a Writ of Certiorari within one hundred and fifty days of the Court of Appeals' denial of the Petition for Panel Rehearing.

VII. Federal Laws Involved

Fed. Cir. R. 36:

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

1. the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
2. the evidence supporting the jury's verdict is sufficient;
3. The record supports summary judgment, directed verdict, or judgment on the pleadings;
4. The decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
5. a judgment or decision has been entered without an error of law.

VIII. Statement of the Case

On September 27, 2004, the Department of the Army, Rock Island Contracting Center (herein, "the Government") awarded Contract No. W52P1J-04-C-0098 (herein, "Contract") to Pyrotechnic Specialties, Inc., (herein, "PSI"). Appx

97. The Contract included, in part, the manufacture and delivery of MK124, Mod 0 Smoke & Illumination Signals (hereinafter "Signals"). Appx554-556. Signals are metal tubes capped and crimped on each end. When activated, one end produces a flare for night signaling; the other end produces a smoke signal for day signaling. Appx183.

1. Bad Faith

The Defense Contract Management Agency (herein, "DCMA") was responsible for administering the Contract. Appx766. DCMA provided Quality Assurance

Representatives (herein, “QARs”) to oversee contract compliance and to observe testing procedures performed at PSI’s facilities. Appx704-705. In addition, the QARs were responsible for issuing Corrective Action Reports (herein, “CAR”) if test samples did not meet certain Contract specifications. Appx703-707.

Unfortunately, rather than performing their contractual duties in a fair and unbiased manner, the QARs maliciously and wrongfully attempted to persecute and prosecute PSI for fraud. Appx818-825. Indeed, a disinterested witness and agent of the Government testified, from his personal knowledge, that the QARs’ treatment of PSI was unfair and biased. Appx262-267. There was an abundance of evidence presented before the Armed Services Board of Contract Appeals (hereinafter, “ASBCA”) that the QARs treated PSI unfairly. Appx818-825, Appx826, Appx260-268, Appx371-372, Appx174-184.

2. Technical Data Package (TDP)

The Contract includes a very intricate and detailed Technical Data Package (herein, “TDP”). The TDP is a blueprint to manufacture the Signals, and it contains strict requirements and specifications with which PSI had to comply in its production of Signals. Appx554, Appx777. There is overwhelming evidence demonstrating that the TDP was deficient and that a manufacturer adhering strictly to the TDP could not have produced the desired product. Appx139, Appx256. Such issues plagued other prior producers of the Signals as well. Appx532-535, Appx140, Appx829.

On September 26, 2011, the Government terminated the Contract for default. Appx810-817. Despite that decision, PSI contends that the Contract was terminated

as a result of the QARs' bad faith and due to the inherent defects of the TDP that PSI was required to follow. Indeed, the end customer, the U.S. Navy, which was intimately familiar with the Signal and the quality of PSI's production lots (including firsthand knowledge of the test results for Lot 004-002 and Lot 004-003), disagreed with the Government's decision to terminate for default. Appx827.

3. ASBCA's Errors of Law

PSI appealed the termination for default to the ASBCA. The ASBCA held a four-day evidentiary hearing from October 21 through October 24, 2014, during which PSI proceeded *pro se*.¹ On the first day, PSI continuously attempted to proffer evidence concerning the Government's bad faith, but the ASBCA did not admit the bad faith evidence on the basis that it was irrelevant to the appeal. Appx185, 188, 224-226, 232, 235. Having been wholly prevented from admitting evidence on bad faith, PSI, ceased its attempts to proffer the rest of their evidence on bad faith due to the ASBCA's erroneous rulings that the evidence was inadmissible.

Almost three years later, on March 13, 2017, the ASBCA finally issued its ruling in favor of the Government. In the same ruling, the ASBCA acknowledged that the evidence on bad faith was in fact relevant and admissible but that insufficient evidence on bad faith had been submitted to make a finding of bad faith. Appx84.

Critically, the ASBCA did not permit PSI to make additional proffers of evidence of bad faith after the evidence was ruled to be relevant and admissible, and

¹ David Karlson and Robert Hirst, Petitioner's President and Vice President, respectively, represented PSI before the ASBCA. Neither Mr. Karlson nor Mr. Hirst have any legal training, formal or informal, and were subjected to the constant, harassing, and legally erroneous objections of the Government's attorneys in an attempt to preclude relevant and admissible evidence.

given their *pro se* status, the ASBCA should have permitted such proffers and probably instructed PSI to perfect the record for such evidence to ensure that the evidence would be within the record when the ASBCA issued its order three years later as well as on the record for purposes of appeal.

Additionally, in its March 13, 2017 Order, the ASBCA applied the traditional arbitrary and capricious review like that found under the Administrative Procedure Act instead of the correct four prong review provided under *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 622, 630 (Ct. Cl. 1982). Critically, the first prong of the correct standard of review is “evidence of subjective bad faith on the part of the government official.” *Id.* Of course, as discussed above, the ASBCA refused to admit such evidence of bad faith and even actively discouraged PSI from attempting to admit the critical evidence.

4. United States Court of Appeals for the Federal Circuit’s Errors of Law

On June 13, 2019, PSI filed a timely petition for review of the ASBCA’s decision. The ASBCA had jurisdiction pursuant to the Contract Disputes Act of 1978 (“CDA”), 41 U.S.C. §§ 7101-7109. The ASBCA’s decision was final, and an appeal was ripe. The United States Court of Appeals for the Federal Circuit (hereinafter, “Court of Appeals”) had jurisdiction over the appeal pursuant to 41 U.S.C. § 7107(1)(A).

The appeal was briefed by both PSI and the Government, and the Court of Appeals held oral argument on February 2, 2021. Two days later, on February 4, 2021, the Court of Appeals affirmed the ASBCA’s decision, citing Federal Circuit Rule 36. Rule 36 allows the Court of Appeals to enter a judgment without an opinion where the

judgment of the trial court is based on findings that are not clearly erroneous, the evidence supporting the jury verdict is sufficient, the record supports the trial court's ruling, the decision of the administrative agency warrants affirmance under the appropriate standard of review, or the judgment or decision is without an error of law.

During oral arguments, the panel of judges for the Court of Appeals acknowledged that the wrong standard of review was applied by the ASBCA. The Government also admitted the same, both in its response brief and again during oral argument. Appx875-877. As a result, the judgment was not without error of law. No trial court was involved in this matter. No jury was empaneled at any time. No administrative agency rendered a decision. Critically, the ASBCA did not apply the appropriate standard of review, meaning it cannot be the basis for affirmance, and even if it were, as is explained below, the application of the wrong standard by the ASBCA prevented the introduction of evidence necessary for a just ruling and a ruling based on facts that are not clearly erroneous.

The record cannot support the trial court's ruling because the application of the wrong standard of review below prevented the admission of evidence necessary to justly develop and review the record. This means that the basis on which the Order issued under Rule 36 was issued must have been that the ruling was based on facts that were not clearly erroneous. This is critical, because the application of the wrong standard of review prevented the ASBCA from ever considering the evidence necessary to issue an informed ruling. Thus, the ASBCA could not issue a ruling

based on facts that are not clearly erroneous because the ASBCA failed to even consider or admit the relevant facts.

The Court of Appeals should not be able to uphold a ruling in which the ASBCA explicitly failed to consider an entire prong of the applicable standard of review. That is, particularly because the application of the wrong standard impacted both the legal review and the facts admitted upon which that review was made. The ASBCA's decisions prevented a full record from being developed, thus preventing the ASBCA, the Court of Appeals, and this Court from considering all of the facts underlying the original termination.

PSI filed a Motion for Rehearing with the Court of Appeals on March 5, 2021, and the Court of Appeals denied that Motion on March 23, 2021.

IX. REASONS FOR GRANTING A WRIT OF CERTIORARI

A. The ASBCA's Application of the Wrong Standard Deprived PSI of the Ability to Effectively Present its Case and Denied it the Opportunity to Present Relevant Admissible Evidence.

It is necessary for this Court to remand this matter to the ASBCA for a new evidentiary hearing to correct the ASBCA's error of law, and to allow PSI an opportunity to present relevant evidence for the first time.

A litigant is entitled to have their case reviewed under the correct standard of law. *Giles v. West*, 178 F.3d 1313 (Fed. Cir. 1999) ("Because the Court of Veterans Appeals applied the clearly erroneous standard of review to the legal issues presented by [the petitioner], we must vacate its decision.") This is especially true in instances, such as this, where the applied standard of review substantively affects

evidentiary decisions and results in a stunted record preventing litigants from proving their case.

Critically, as both the Government and the United States Court of Appeals for the Federal Circuit acknowledged, the ASBCA used the wrong standard of review. The ASBCA used the arbitrary and capricious standard of review under the APA. However, the ASBCA was required to review the termination of the contract under a four-part test in determining whether the termination was an abuse of discretion. This test required the ASBCA to examine (1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation. *United States Fid. & Guar. Co.*, 676 F.2d at 630.

The ASBCA's application of the wrong standard of review prevented it from ever considering the evidence necessary to issue a just ruling. Thus, the ASBCA could not issue a ruling based on facts that are not clearly erroneous because the ASBCA failed to admit evidence as to the relevant facts and one of the controlling elements of the proper standard of review. The application of the wrong standard impacted both the legal review and the admitted facts necessarily underlying that review. The ASBCA's decisions prevented a full record from being formed, thus preventing the ASBCA, the Court of Appeals, and this Court from considering all the facts underlying the original termination by default.

It is necessary for this Court to remand this matter back to the ASBCA for a new evidentiary hearing during which the ASBCA should apply the appropriate standard of review and permit the introduction of evidence relating to the elements of that standard.

B. The Use of the Wrong Standard of Review Prevented the Admission of Necessary Evidence.

Not only was the failure to use the correct standard of review a substantial violation of PSI's rights, but the failure to use the correct standard of review also substantially and adversely impacted PSI's ability to introduce evidence before the ASBCA.

During the hearing, the Government argued at length that bad faith evidence was "irrelevant" to the ASBCAs review. Appx185, 188, 224-226, 232, 235. However, the first prong under the correct standard of review requires the ASBCA to review "evidence of subjective bad faith on the part of the government official." *United States Fid. & Guar. Co.*, 676 F.2d at 630. While the Government argued on appeal that this evidence was admitted, a review of the transcripts demonstrates that it was not. The Government would object based on relevance, the ASBCA would withhold its ruling and then soon after in the hearing (several pages later in the transcript) the ASBCA would uphold the Government's objections concluding that bad faith evidence was irrelevant and inadmissible. Appx185, 188, 224-226, 232, 235. It was these strong-arm tactics of the Government's attorneys dealing with a *pro se* litigant that resulted in the application of the wrong legal standard and the exclusion of relevant and important evidence of the Government's bad faith.

Moreover, it was not until years after the hearing was held that the ASBCA recognized that bad faith was relevant to the inquiry and a matter over which the ASBCA had jurisdiction to consider. Appx84. This means that the ASBCA failed to realize it had to consider key evidence until after PSI's only opportunity to admit that evidence had passed. The ASBCA never offered PSI the opportunity to submit evidence of bad faith, even after the ASBCA finally determined that bad faith was something it could and should consider. Moreover, the ASBCA never recognized that, not only was bad faith relevant to the inquiry, but bad faith was also a mandatory factor that it had to consider.

PSI was denied the correct standard of review and the application of the incorrect standard adversely impacted PSI's ability to present critical, relevant, and admissible evidence as a *pro se* litigant. As a result, PSI was prevented from introducing the evidence necessary for the ASBCA's opinion to be supported by substantial evidence, as the ASBCA excluded the very evidence it was required to base its ruling upon.

C. The Court of Appeals Erred in Affirming the Ruling Pursuant to Fed. Cir. R. 36 After Acknowledging that the Tribunal Below Applied the Law Incorrectly.

Federal Circuit Rule 36 allows the Court of Appeals to issue one-word rulings of "Affirmed" and relieves the Court of Appeals of the obligation to issue an opinion. This rule can help streamline the Court of Appeals' docket, but it also has the impact of undermining the judicial appellate system by hiding the basis of the Court of Appeals' ruling, especially considering that a Rule 36 ruling can be based on five

different and independent grounds. The Court of Appeals uses this rule to determine the outcome of a huge number of cases in its docket each year.

This is especially problematic in instances such as the instant case, where the Court of Appeals and the opposing party acknowledged in briefs and during oral argument that the lower tribunal applied the wrong standard of law. *The original panel recognized during oral argument, and the government admitted in its response brief and again during oral argument, that the wrong standard of review was applied by the ASBCA. As a result, the judgment was not without error of law.* The appropriate standard of review was not applied by the ASBCA meaning it cannot be the basis for affirmance. And, even if it were, as explained at length above, the application of the wrong standard of review prevented the introduction of evidence necessary for a developed record and a just ruling. The record cannot support the tribunal's ruling because the application of the wrong standard of review below prevented the admission of evidence necessary to create a developed and just record. The only basis on which the Fed. Cir. R. 36 order could have been issued was that the ruling was based on facts that were not clearly erroneous.

This is critical, because the application of the wrong standard of review by the ASBCA prevented the ASBCA from ever considering the evidence on a mandatory element. Thus, the ASBCA could not issue a ruling based on facts that are not clearly erroneous because the ASBCA refused to consider or admit the relevant facts. The Court of Appeals should not be able to uphold a ruling in which the ASBCA applied the wrong standard of review, particularly when the application of the wrong standard

impacted both the legal review and the facts admitted upon which that review was made. The ASBCA's decisions prevented a full record from being formed and thereby prevented any court on appeal from considering whether the tribunal correctly applied the law to all of the facts underlying the original contract termination.

Regardless of whether this Court would agree with the Court of Appeals' decision had the Court of Appeals issued a full opinion, it is in the best interest of the public's confidence in the judicial system that such one-word opinions be limited to cases without openly acknowledged legal error, especially when that error effects the facts upon which the ruling is based and where there is no clear or apparent legitimate basis on which to issue the Rule 36 opinion. Otherwise, the opaque shield of the one-word affirmance may result in a less robust legal system and lowered public confidence in the judicial system as a whole.

X. CONCLUSION

For the foregoing reasons, Petitioner Pyrotechnic Specialties, Inc. respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted, this 18th day of August, 2021.

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