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ADMINISTRATIVE LAW—GOVERNMENT CONTRACTS—REVIEW BY
THE COURTS

Action by the plaintiff against the United States to recover upon a government contract to build a dam, which contract contained an article that all disputes involving questions of fact should be decided by the contracting officer, with right of appeal to the head of the department whose decision shall be final and conclusive upon the parties thereto. The Court of Claims set aside as "arbitrary, capricious and grossly erroneous," a decision of the Secretary of Interior upon a dispute concerning a question of fact arising under the contract. 117 Ct. Cl. 92 (1950). The Supreme Court in a 6-3 decision reversed on the ground that the administrative decision could be challenged only upon allegation and proof of fraudulent conduct, i.e. "conscious wrongdoing, an intention to cheat or be dishonest." *U. S. v. Wunderlich et al.*, 72 S. Ct. 154 (1951).

The rule has long been established in private contract law that parties to a contract may agree in advance to be bound by the decision of some person rather than the courts in the event disputes of fact arise. *Martinburg & Potomac RR. Co. v. March*, 114 U. S. 549 (1884); *Chicago, Santa Fe & Calif. RR. Co. v. Price*, 138 U. S. 917 (1891).

The same rule has been carried over to government contracts, and parties to the contract can provide that decision of a government agent (usually a department head) as to disputes of facts will be binding and conclusive upon the parties. *U. S. v. Mason & Hanger Co.*, 260 U. S. 323 (1922). It is the duty of trial courts to recognize the rights of parties to make and rely upon such mutual agreement. *U. S. v. Moorman*, 338 U. S. 457 (1949). Such a contract provision for the settlement of disputes is commonly known as Article 15, and will here be referred to as such.

As early as 1878, the Supreme Court emphatically authorized enforcement of a contractual provision vesting final power in a District Quartermaster to fix distances, not clearly defined in the contract, on which payment for transportation was based. *Kihlberg v. U. S.*, 97 U. S. 398 (1878). A few years later the court again upheld a government contract providing that payments for construction of a way should not be made until an army officer or other agent designated by the United States had certified after inspection that it was in all respects as contracted for. *Sweeney v. U. S.*, 109 U. S. 618 (1883). As recent as 1949 the Court in the *Moorman* case, *supra*, held that the foregoing cases (referring to the *Kihlberg* and *Sweeney* cases) had never been departed from, and that they stand for the principle that parties competent to make contracts are also competent to make such agreements.

RECENT DECISIONS

The purpose of such provisions is to avoid the expense and delay of litigation. Obviously, the purpose is defeated if the parties who agree to the contract terms can nullify them because they are dissatisfied with a decision rendered pursuant thereto. Nevertheless, the Court has recognized qualifications to Article 15 dispute clauses and it was early held that a final decision of a designated official was reviewable by the courts on the grounds of fraud, bad faith, or a failure to exercise an honest judgment. *Kihlberg v. U. S.*, *supra*, at 402; *Sweeney v. U. S.*, *supra*, at 620; *Martinburg & Potomac RR. Co., v. March*, *supra*, at 554; and *U. S. v. Gleason*, 175 U. S. 588, 607 (1899).

The Court in the *Moorman* case, *supra*, reiterated that the findings of such a contractually designated agent will be conclusive unless impeached on the ground of "fraud, or such gross mistake as necessarily implies bad faith." Thus the Court recognized that a party to a contract containing an Article 15 dispute clause does not contract away his rights to fair treatment by the administrative officer. "But the very extent of the power and the conclusive character of his (administrative agent) decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently but reasonably and with due regard to the rights of both the contracting parties." *Ripley v. U. S.*, 223 U. S. 695, 701 (1911).

On the other hand, the Court would not review a decision of an agent pursuant to an Article 15 dispute clause, where there was merely a disagreement in matters involving judgment, or to put it positively, the court must find *gross* mistake such as excluded the possibility of the exercise of an honest judgment. *Ripley v. U. S.*, *supra*, at 704. In this regard the fraud or bad faith need be pleaded and proved. *Kihlberg v. U. S.*, *supra*, at 401; *Sweeney v. U. S.*, *supra*, at 618. These decisions recently reviewed by the Court in the *Moorman* case, have been understood to deny the right to have the cause litigated on its merits and to confine the case to the question of the contracting officer's "fraud or gross mistake implying bad faith."

In the principal case, the majority held that "fraud is in essence the exception" to the conclusiveness of administrative decisions under an Article 15 dispute clause. "By fraud we mean conscious wrongdoing, an intention to cheat or to be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." (at 155).

If this means that the exception is to be whittled down to actual fraud on the part of the administrative officer making the decision as the only ground for appeal to the courts, then, it is submitted, it gives every contracting officer *carte blanche* in disposing of disputes, at a time when allegations of corruption in

government are so prevalent. As Mr. Justice Douglas put it, (in dissent at 156): "It makes a tyrant out of every contracting officer" at a time when the government controls an ever increasing share of the national product.

It seems doubtful, however, that the majority meant to rule out of the exception "gross mistake implying fraud." The majority opinion preceded its definition of the exception by stating "gross mistake implying bad faith is equated to fraud." If this has any purpose it must indicate that the Court is not eliminating review by the courts where there is gross mistake of such a nature that it implies bad faith. Furthermore, considering the findings of the Court of Claims, which went only so far as to say the decision of the department head was "arbitrary, capricious, and grossly erroneous," it appears that the Supreme Court was only restricting the exception to cases where fraud or gross mistake implying fraud was pleaded and proved. If this be so, then the Court is merely pouring old wine into old bottles and simply repeating what is said in *Ripley v. U. S.*, 222 U. S. 144 (1911), the court must find "gross mistake such as excluded the possibility of the exercise of an honest judgment," and make "a direct and unequivocal finding as to . . . bad faith." In any event, the Court has not clarified the rule which created an exception to the conclusiveness of such administrative decisions (the reason for granting certiorari) and it will undoubtedly face the problem again.

John A. Krull

CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO COUNSEL

Petitioner filed a writ of habeas corpus alleging a violation of due process in that he was convicted by a Pennsylvania court on a plea of guilty without the benefit of counsel. Petitioner claimed that circumstances existed which deprived him of an opportunity and the capacity to defend himself adequately since: (1) he did not understand the nature of the charge of robbery when his guilty plea was entered and (2) that he was a "young, irresponsible boy," having spent several years in a mental institution. The petition was dismissed without a hearing. The United States Supreme Court reversed (5-4): and held that special circumstances were present which showed that without a lawyer, this defendant could not have had an adequate and fair defense. Two elements were stressed. First, that incarceration as a boy for imbecility, followed by repeated criminal offenses, indicates that the petitioner did not have the mental capacity to protect himself in the give and take of a courtroom trial. Second, that statements by officials, that the charged crime was only "breaking and entering," would make petitioner a victim of deception, inadvertent or intentional, when he pleaded guilty. *Palmer v. Ashe, Warden*, 342 U. S. 134 (1951).

The Sixth Amendment of the United States Constitution guarantees to an