DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

UNFOLDMENT, INC.	)	
	)	CAB No. D-1062
Under Contract No. 7KGC09	)	

For the Appellant: Kemi Morten, Esq., and Brian Lederer, Esq. For the Appellee: Chad Copeland, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judges Monica C. Parchment, and Maxine E. McBean, concurring.

DECISION AND MEMORANDUM OPINION

Filing ID #51151706

This is a dispute action brought by Unfoldment, Inc. (Unfoldment or appellant) against the D.C. Child and Family Services Agency (CFSA or appellee) alleging bad faith failure to pay contract minimums, bad faith racial animus, and termination for convenience. The allegations pertain to appellant's 1997 contract with CFSA to provide residential group home services to District youth. The Board conducted a trial from March 23-31, 2010, eliciting testimony from over a dozen witnesses called by the appellant[1]. The District did not call any witnesses. Upon review of the entire record herein, and for the reasons set forth more fully below, appellant's claims are dismissed for lack of merit.

BACKGROUND

This case has a long and convoluted 15 year history of litigation before our Board, on appeal to the D.C. Court of Appeals, in federal district court, and back on remand to our Board. During this period, the parties have litigated numerous claims, and have also settled much of their original dispute[2]. Before the Board presently are appellant's three surviving claims. Although the history of this case has been set forth previously in *Unfoldment, Inc. v. D.C. Contract Appeals Bd.*, 909 A.2d 204 (D.C. 2006), such additional background and procedural posture as requires retelling for purposes of disposition is set forth below.

In June 1997, Unfoldment and CFSA[3] entered into a $1.8 million contract, the terms of

[1] The trial was conducted by a previous Board panel; none of whom are presently members of the Board. The present Board panel has reviewed the trial transcript, appeal file, appeal file supplement, hearing exhibits, post hearing briefs, and the entire record herein in rendering this decision.

[2] To date, the parties have settled appellant's original claims for unpaid invoices and contract minimums. Notice of Dismissal With Prejudice Regarding Unfoldment's Claim For Unpaid Invoices (Aug. 21, 2003); Notice of Dismissal With Prejudice Regarding Unfoldment's Contract Minimums Claim (Sept. 11, 2007).

[3] At all times material hereto, CFSA was an independent receivership of the D.C. government. On October 1, 2001, CFSA's status reverted back to an agency of the District government. *Appeal of Unfoldment*, CAB No. D-1062, 50

which required the appellant to provide continuing residential group home care services to District youth between the ages of nine to 21. *Unfoldment*, 909 A.2d at 206; Appeal File 1 (AF). The base year contract term was July 1, 1997, to June 30, 1998. *Id.* at 206, n.1. The contract included four possible one-year options. *Appeal of Unfoldment*, CAB No. D-1062, 50 D.C. Reg. 7404 (Mar. 20, 2002); AF 1, 16-17. After two brief contract extensions at the end of the base year, CFSA notified Unfoldment in an October 28, 1998, letter that "we will not renew the option to contract for further services through your agency effective 60 days from the date of this letter." 909 A.2d. at 207; AF 6. Unfoldment appealed CFSA's non-renewal (and other matters described below) to our Board on October 30, 1998. Appeal File Supplement (AFS) 137.

The enduring longevity of this case can be attributed to two central issues disputed by the parties from the very beginning. First, the parties have championed directly opposite theories regarding *how* their contract ended in 1998 (termination versus expiration). Second, the parties have contested the issue of whether monies were due on the contract for "unpaid invoices" at the time of the termination/expiration.

In particular, Unfoldment has consistently disputed that the parties' contract "expired" at the end of the base year. Appellant has always contended that its contract was terminated by CFSA for default after a June 1998 performance evaluation concluded that Unfoldment performed the contract poorly.[4] In this regard, appellant's key claims have been for default[5] and convenience terminations,[6] as well as for bad faith.[7] CFSA, on the other hand, has always asserted that the parties' contract expired under its own terms. Mot. To Dismiss The Compl., Or In The Alt., For Summ. J. 3, 6-10 (Nov. 30, 2001); Resp't District of Columbia's Trial Mem. 6, 31-34 (Aug. 2, 2010).

Further, from the very beginning, Unfoldment has asserted claims for unpaid invoices of two types: "actual" and "adjusted." By "actual" invoices, appellant refers to invoices it submitted during the contract period for services provided to youth *actually* placed in Unfoldment's care. The total amount claimed by appellant for these invoices fluctuated over time, but ranged from a low of "$100,000" to a high of "$350,000."[8] By "adjusted" invoices, appellant refers to invoices it submitted during the contract period for contract minimum payments.[9] Similarly, the amount claimed by appellant for adjusted invoices has fluctuated over

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D.C. Reg. 7404, 7405 (March 20, 2002).

[4] Compl. ¶ 40 (Dec. 4, 1998); Am. Compl. ¶¶ 15, 44, 45, 55 (Oct. 17, 2001); Third Am. Compl. ¶¶ 107-109, 120, 125 (Oct. 29, 2008).

[5] Compl. ¶40; Am. Compl. ¶21.

[6] Am. Compl. ¶80; Third Am. Compl. ¶140.

[7] Compl. ¶67; Am. Compl. ¶90; Third Am. Compl. ¶139.

[8] Appellant's claim letter alleged unpaid invoices and interest claims totaling $350,000. AFS 137. Appellant's initial complaint alleged unpaid invoices and interest totaling $220,000. Compl. ¶¶ 65, 67. Appellant's amended complaint alleged damages for unpaid invoices and interest "in an amount as yet undetermined in excess of $100,000". Am. Compl. ¶73.

[9] The Appellant's claim for adjusted invoices/ contract minimums is found as follows: Compl. ¶24; Am. Compl. ¶27; Third Am. Compl. ¶¶66, 67, 137(b); s*ee also* Appellant's Opp'n to Gov't Mot. to Dismiss, or, in the Alt., for Summ. J. ¶28 (Dec. 19, 2001); Appellant's Post Trial Br. 32-33. We use the terms "adjusted" invoices and "contract minimums" interchangeably herein. The appellant uses the terms interchangeably in its pleadings, and the Board's March 20, 2002, decision discusses "minimum contract payments" under the heading titled, "Adjusted invoices".

the years.[10] CFSA, on the other hand, historically denied that it owed payments on either invoice type (actual or adjusted). Agency Answer and Mot. To Dismiss 13 (Jan. 22, 1999).

In 2002, the Board took its first step toward resolving the case upon issuance of its decision in *Unfoldment*, 50 D.C. Reg. 7404. In *Unfoldment*, our ruling addressed both key issues, i.e., whether unpaid invoices were due appellant at the time the contract ended, and whether the parties' contract expired or was terminated by appellee. With respect to unpaid invoices, we ruled that Unfoldment had a right to pursue its claim for *actual* unpaid invoices, but not for the *adjusted* ones, i.e., the contract minimum invoices. *Id*. at 7409. With respect to appellant's adjusted invoices, the Board ruled that "the contract had no minimum, only a maximum, and the contract only permits payment for the actual number of youth who were placed in Unfoldment's facilities" *Id*.

With respect to contract expiration, we dismissed appellant's claims for default and/or convenience terminations, holding that "the contract expired under its own terms". *Id*. at 7409. In addition, we dismissed *all* of appellant's other claims, noting that "[n]o other claims which Unfoldment has presented hold any merit." *Id*. at 7411. Thus, appellant's bad faith claims and a host of marginal claims were dismissed as "irrelevant to what is material in the case." *Id*. at 7408-7410 (also dismissing appellant's claims for mitigation of damages, close out costs, refusal to pay settlement costs, defamation, interference with contractual relations, and attorneys' fees).

The immediate effect, therefore, of the Board's 2002 decision was to reduce appellant's entire action to a single claim for recovery of its "actual" unpaid invoices. The Board's simplification of claims was only temporary, however, because Unfoldment filed an immediate petition for review with the D.C. Court of Appeals. The case remained on appeal for the next four years. While pending appellate review, the parties settled appellant's "actual" invoices claim but not its claims for the adjusted invoices, contract termination, and bad faith.[11]

In 2006, the D.C. Court of Appeals issued a twofold ruling on the Board's 2002 decision. First, the court rejected our dismissal of appellant's contract minimum claim. 909 A.2d 204, 206. Second, the court *affirmed* our dismissal of appellant's remaining claims, including its claims for contract termination, and all of its bad faith claims except as to contract minimums. *Id.* ("we affirm the CAB's decision regarding Unfoldment's other claims"). As regards appellant's contract minimum claim, the Court remanded it to the Board to determine the exact minimum placement requirement under the 1997 contract, the compensation due appellant based on the minimum, and whether CFSA's failure to pay contract minimums amounted to bad faith.[12] In

[10] The adjusted invoices that appellant purportedly submitted to CFSA during the 17 month contract period averaged $108,554 per month. AFS 19-35. Appellant's post-hearing brief identifies $89,450/monthly as the minimum required payment under the contract. Appellant's Post Trial Br. 32-33.

[11] In 2003, appellant's claims for the actual unpaid invoices and interest were dismissed by the Board with prejudice following settlement by the parties. Notice of Dismissal with Prejudice Regarding Unfoldment's Claim for Unpaid Invoices (Aug. 21, 2003).

[12] Explaining its reasoning, the court noted the following: "It is clear from these documents [RFP, etc.], which are incorporated into and made part of the contract, that the contract stated a minimum placement requirement, that CFSA was bound to pay Unfoldment at least for that minimum, and that CFSA should have obligated the amount of budget authority needed to cover the minimum placement requirement. Failure to pay the minimum during the initial one-year period of the contract constitutes a breach of Unfoldment's contract". 909 A.2d at 212.

2007, the parties settled the contract minimum claim, but expressly excluded its bad faith component from the settlement.[13] As a result, the sole remand issue before our Board as of 2007 was whether CFSA's failure to pay the contract minimum amounted to bad faith.

In 2008, however, the appellant filed a third amended complaint containing five counts of alleged breach by appellee. Appellant's Third Am. Compl. (Oct. 29, 2008). Since appellant's third amended complaint largely reasserted claims already dismissed by the Board in 2002, we dismissed most of the counts as either previously "settled," "abandoned," or "dismissed" by the Board … and affirmed by the Court [of Appeals]." Order on The District's Mot. to Dismiss Unfoldment's Third Am. Compl., CAB No. 1062, September 24, 2009. However, the Board allowed appellant to revive two previously dismissed claims: convenience termination and bad faith breach of contract. As to each, we ruled that new evidence not available prior to 2008 warranted an additional review. *Id*.

The "new evidence" allegedly uncovered by appellant in 2008 consisted of two types. The first category of new evidence related to appellant's contract termination claim. As to such, appellant contended that two December 2000 CFSA staff documents and a 2008 affidavit by CFSA's former Deputy Receiver corroborated its theory of a default termination that was later converted by CFSA into a convenience termination. Appellant's Opp'n to Gov't Mot. to Dismiss, Mot. for Partial Summ. J. and Mem. of P. & A. in Support Thereof and Mot. for Rule 11 Sanctions 5 (Dec. 20, 2008) (hereafter "Appellant's Opp'n to Gov't Mot. to Dismiss"). Appellant contended that the above information became available for the first time in 2008.[14]

The second type of "new evidence" relied upon by the appellant pertained to its previously dismissed bad faith claims. As to such, appellant contended that two white former CFSA contract officials with responsibility for Unfoldment's contract acted with "racial animus" toward it. Appellant's Opp'n to Gov't Mot. to Dismiss 8. Appellant asserted that it discovered the alleged racial animus sometime "[f]ollowing the Court of Appeals remand" through the case of *Mintz v. D.C.*, C.A. No. 00-0539 (D.D.C. May 30, 2006).[15] Appellant's Opp'n to Gov't Mot. to Dismiss 8. Appellant asserted that Mintz established that the two officials were found to have held "racial animus" against two of their African American co-workers in an unrelated employment discrimination lawsuit. *Id*. As a result, the Board allowed Unfoldment's renewed bad faith claim and noted that the question of whether there was a nexus between the allegations in *Mintz* and the alleged racial animus instantly would be resolved by the Board as part of the merits disposition.[16]

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[13] Notice of Dismissal With Prejudice Regarding Unfoldment's Contract Minimums Claim (Sept. 11, 2007).

[14] Appellant's Opp'n to Gov't Mot. to Dismiss 5 ("Unfoldment obtained evidence that [CFSA] terminated Unfoldment's contract for cause; namely for failing to cure the deficiencies cited by John Oppedisano [and] … [i]n September 2008, Unfoldment learned for the first time that [CFSA] converted the default termination to a termination for the government's convenience".) The two CFSA staff documents were written by "Yolanda McKinley" (management analyst to the CFSA Deputy Receiver), and according to appellant were not known until "a December 5, 2008, documents request" to CFSA. *Id*. at 6. The affidavit from the former CFSA Deputy Receiver was executed on September 16, 2008. AFS 109.

[15] *See* http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_00-cv-00539/pdf/USCOURTS-dcd-1_00-cv-00539-0.pdf.

[16] Specifically, the Board stated that "(1) [it] would consider whether the decision in the [*Mintz* case] has any estoppel or preclusive effect on the question of racial discrimination or animus on the part of [the CFSA contract officials], and (2) the District is not precluded from offering evidence to refute any preclusive effect from the Mintz case…" Order on The District's Mot. to Dismiss Unfoldment's Third Am. Compl., *Appeal of Unfoldment, CAB*

Therefore, in summary, there are now *three* claims pending before the Board relative to Unfoldment's 1997 contract with CFSA. The first issue (on remand) is whether the appellee's failure to pay mandatory contract minimums amounts to bad faith. The second issue is whether "new evidence," principally the two referenced December 2000 CFSA staff documents, shows that the parties' contract was terminated for convenience as opposed to expiring under its own terms. The final issue is whether CFSA engaged in bad faith racial animus regarding its monitoring, evaluation, and payment under the parties' contract.

DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code § 2-360.03(a)(2) (2011).[17]

The recitation of facts stated in the background, discussion, and conclusion sections constitutes the Board's findings of fact in accord with D.C. Mun. Regs. tit. 27, § 214.2 (2002). Additionally, rulings on questions of law, and mixed questions of fact and law are set forth throughout our decision.

I. Appellant's Remand Claim for Bad Faith Non-Payment of Contract Minimums

On remand from the decision of the D.C. Court of Appeals in *Unfoldment v. D.C.*, the remaining issue is whether appellee's failure to pay the contract minimum amounts to bad faith. Appellant's essential argument is that CFSA refused to pay the contract minimum because of "racial animus." Our review on remand, therefore, focuses solely on whether appellant has established that the government acted with bad faith racial animus in failing to pay contract minimums.

The general rule is that public officials are presumed to act in good faith in the performance of their duties. *See, e.g., AMI Risk Consultants, Inc.*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012); *C&E Services, Inc.*, CAB No. P-0874, 2011 WL 7402965 (May 19, 2011); *Goel Services, Inc.*, CAB No. P-0862, 2010 WL 5776589 (Sept. 24, 2010). Proof of a public official's bad faith requires "well nigh irrefragable evidence," which requires a showing of some specific intent to injure the appellant. *Goel*, CAB No. P-0862; *C&E*, CAB No. P-0874. Moreover, recovery for bad faith *under a contract* also requires that a contractor show a "direct connection between the alleged bad faith action and an express or implied contractual obligation or contract term." *Innovative (PBX) Tel. Servs., Inc. v. Dep't of Veterans Affairs*, CBCA 44, CBCA 45, CBCA 46, CBCA 576, 08-1 BCA ¶ 33,854 (Apr. 30, 2008); *Innovative (PBX) Tel. Servs., Inc. v. Dep't of Veterans Affairs*, CBCA 12, 07-2 BCA ¶ 33,685 (Sept. 27, 2007). So long as a genuine, reasonable difference exists between the parties, it cannot be said that one party or the other is acting in bad faith. *Innovative Tel Servs.*, 08-1 BCA ¶ 33,854 (addressing allegations that government officials denied payment to contractor in bad faith and for racially discriminatory reasons).

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[17] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001). Prior to 2001, the Board would have exercised jurisdiction pursuant to D.C. Code § 1-1189.3 (1981).

The burden with respect to proving bad faith is on the appellant and well nigh irrefragable proof, is required to rebut the presumption of governmental good faith.[18] *Goel*, CAB No. P-0862; *C&E*, CAB No. P-0874; *Kora and Williams Corp.*, CAB No. D-839, 41 D.C. Reg. 3954, 4120 (Mar. 7, 1991). Well nigh irrefragable proof amounts to clear and convincing evidence. *Sword & Shield Enterprise Security, Inc. v. Gen. Servs. Admin*., CBCA 2118, 12-1 BCA ¶ 34,922 (Aug. 19, 2011) (citations omitted). Clear and convincing evidence is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is "highly probable." *Sword & Shield*, 12-1 BCA ¶ 34,922; *Innovative (PBX) Tel. Servs*., 08-1 BCA ¶ 33,854.

We turn now to appellant's contention that CFSA's refusal to pay contract minimums during the contract period was due to racial animus. Appellant's evidence in this regard is threefold. First, appellant contends that the two white CFSA contract officers denied Unfoldment's bid on a separate and unrelated 1997 contract due to "race." Appellant's Post Trial Br. 32-33. Second, appellant contends that CFSA paid contract minimums to a white vendor in an unrelated contract for youth assessment services. *Id*. at 32-33. Finally, the appellant cites the racially discriminatory conduct attributed to the two CFSA contract officers in the *Mintz* decision, as well as co-worker testimony that the two men were heard using racially derogatory remarks toward CFSA's African American employees. *Id*. at 9-11, 21-22. We have reviewed the record herein and find that appellant's racial animus evidence is not sufficient to rebut the presumption of good faith as regards the remand claim. We address appellant's three contentions below.

First, Unfoldment contends that CFSA's racial animus is demonstrated by its 1997 award to five white vendors of a contract to provide therapeutic foster care to teen mothers and their babies. Appellant's Post Trial Br. 32-33. In this regard, Unfoldment's Executive Director testified that CFSA awarded the teen mothers contract to five lower ranked white vendors, despite Unfoldment having submitted the "number one ranked" and "best value" bid. Hr'g Tr. vol. 6, 1628:13-1629:13, Mar. 31, 2010. According to appellant, the reason for the award to the white vendors was "racial animus" and "bad faith." *Id*. This argument is completely devoid of merit, as the record does not support a finding that Unfoldment submitted the highest ranked proposal in the teen mothers' procurement.

John Oppedisano, a CFSA contracting official, testified that Unfoldment's proposal made the competitive range and warranted further BAFO (best and final offer) review. Hr'g Tr. vol. 4, 1226:14-1229:9, Mar. 29, 2010. Oppedisano's testimony is consistent with appellant's contemporaneous characterization of its proposal as being "within the competitive range" and noting that CFSA requested that it submit a "best and final offer." Compl. ¶5, fn. 1, Dec. 4, 1998.

[18] Appellant's reliance on *Tecom v. U.S*, 66 Fed. Cl. 736 (2005) is misplaced. Appellant's Post Trial Br. 14-15. *Tecom* held, inter alia, that irrefragable proof is required to prove bad faith only where the government official's alleged conduct is fraudulent or quasi-criminal. *Tecom* at 769. Tecom suggested that all other types of governmental bad faith could be proven by the lower "substantial evidence" test. *Id*. The federal claims court is not an appellate authority over our Board, and numerous post-2005 Board cases have not lowered the evidentiary standard in cases alleging bad faith. *See AMI Risk Consultants, Inc.*,; *C&E Services, Inc.*,; *Goel Services, Inc.* (cited *supra*). Additionally, the federal Civilian Board of Contract Appeals does not follow *Tecom* on this point. *See, e.g*., *AFR v. HUD*, CBCA 946, 09-2 BCA ¶ 34,226.

Further, in Unfoldment's formal protest of the teen mothers award, the Board's decision noted that while Unfoldment's proposal was initially ranked within the competitive range, its "BAFO appears to show a reduction in the number of units being offered from 24 to 12" resulting in Unfoldment's non-selection by CFSA. *Unfoldment, Inc.*, CAB No. P-0843, 2010 WL 8444974 (Nov. 2, 2010). Thus, appellant's argument is devoid of such supporting evidence as meets the "clear and convincing" standard required to rebut the presumption of good faith herein.

Unfoldment next contends that CFSA's racial animus is demonstrated by its approval of contract minimum payments of $41,458.33 per month to a white vendor (Managed Health Services) under a separate contract. Appellant's Post Trial Br. 32-33. This argument is both unsupported by the record, and premised upon a false analogy. There is nothing in the record before the Board that demonstrates that CFSA paid Managed Health Services a monthly minimum of $41,458.33 (or any amount). Appellant did not offer *any* testimony on this issue at the hearing.[19] The exhibits to which appellant cites on this point do not address the issue and were apparently cited in error.[20]

Moreover, it is irrelevant to the instant matter that Managed Health Services may have received contract minimum payments. The Managed Health Services contract was a different procurement than the instant group home contract. As represented in appellant's brief, CFSA's Managed Health Services contract entailed conducting assessments of CFSA youth placed in out-of-state residential facilities. Appellant's Post Trial Br. at 32-33. Appellant's comparison of two different contracts without first establishing that each contained the same (or substantially similar) contract minimum clause(s) is meaningless, and falls well below the required "clear and convincing" standard.

Finally, Unfoldment contends that CFSA's racial animus is demonstrated by the allegedly discriminatory conduct of Jim Osborne and John Oppedisano. Appellant's Post Trial Br. 20-21. Osborne and Oppedisano were CFSA staff assigned to the Unfoldment contract. Osborne was hired by CFSA in 1997 and served as contract specialist for the Unfoldment contract. Hr'g Tr. vol. 2, 371:5-373:20, Mar. 24, 2010. Oppedisano was hired by CFSA in September 1996 as a contract specialist on the Unfoldment contract, and served as contract administrator, contract chief, and contract director before leaving CFSA around May 1, 1998. Hr'g Tr. vol. 4, 989:18-20, Mar. 29, 2010; Hr'g Tr. vol. 4, 989:20-990:8, Mar. 29, 2010; Hr'g Tr. vol. 4, 996:7-10, Mar. 29, 2010; Hr'g Tr. vol. 2, 373:15-374:9, Mar. 24, 2010. Appellant contends that due to racial animus, "Oppedisano (and later Osborne) refused to approve the minimum order invoices, insisting that Unfoldment [sic] invoice was entitled to payment only for the actual number of client referrals." Appellant's Post Trial Br. 20-21, 32-33.

To substantiate its claims that the two officials acted with racial animus, the appellant cites (1) the hearing testimony of Christine Wheeler (Wheeler) and Mary Jo Childs (Childs), and (2) the racial animus allegations lodged against Oppedisano and Osborne in *Mintz v. D.C.*, an

[19] The only testimony of record regarding Managed Health Services pertains to whether CFSA paid it $77,500 for start-up costs. Hr'g Tr. vol. 1, 87:14-88:8, Mar. 23, 2010. The issue of CFSA funding start-up costs for Managed Health is irrelevant to the three issues presently before the Board.

[20] Appellant erroneously cites "AFS 168:1662¶A" as support. Appellant's Post Trial Br. 32. The cited reference is a three page report on a meeting held between CFSA officials and Unfoldment to resolve the instant matter. AFS 168. The report does not mention Managed Health Services.

unrelated employment discrimination lawsuit. Appellant's Post Trial Br. 20-21, 32-33. Wheeler and Childs served as contract administrator and compliance officer, respectively, during the period of Unfoldment's contract. Hr'g Tr. vol. 1, 201:22-202:1, Mar. 23, 2010; Hr'g Tr. vol. 2, 349:1-13, Mar. 24, 2010. Neither witness, however, offered testimony that substantiates Unfoldment's contention that Oppedisano and Osborne acted with racial animus toward African Americans generally, or toward Unfoldment in particular.

Wheeler testified that she became a contract manager at CFSA sometime in 1997 after Unfoldment had already been awarded the instant contract. Hr'g Tr. vol. 2, 362:10-363:11, Mar. 24, 2010. During her employ as contract manager, Ms. Wheeler supervised two contract specialists (neither of whom had any responsibility for the Unfoldment contract). Hr'g Tr. vol. 2, 363:16-364:18, Mar. 24, 2010. Likewise, Ms. Wheeler did not herself have any responsibility for the Unfoldment contract although she was familiar with it. *Id*.; Hr'g Tr. vol. 2, 362:19-21, Mar. 24, 2010. Wheeler testified that she did not have "firsthand knowledge" of any CFSA officials that either "negatively targeted" Unfoldment or treated it differently because of race. Hr'g Tr. vol. 2, 579:13-580:1, Mar. 24, 2010. Wheeler also testified that during her tenure working with the two men, "[she] did not hear them ever use any inappropriate language." Hr'g Tr. vol. 2, 405:19-406:4, Mar. 24, 2010. Childs testified that she did not see any evidence of racial animus by Osborne, and that she started working at CFSA after Oppedisano had already left the agency. Hr'g Tr. vol. 1, 300:18-20, Mar. 23, 2010. Thus, neither witness' testimony rebuts the presumption of good faith herein, nor substantiates Unfoldment's racial animus contention.

Although neither witness had personal knowledge of any racial misconduct by the two officials, both Wheeler and Childs testified that they were aware of racial animus allegations against the two by third parties. Wheeler testified that she heard one CFSA employee assert that Oppedisano/Osborne had racial animus. Hr'g Tr. vol. 2, 407:2-409:18, Mar. 24, 2010. Childs also testified that she heard "murmurings" about racial animus by Oppedisano and Osborne, and "rumors" of their "bias" against CFSA's African American employees. Hr'g Tr. vol. 1, 284:19-285:6, Mar. 23, 2010; vol. 1, 299:4-7. *See also* Appellant's Post Trial Br. 21. These hearsay accounts do not constitute clear and convincing evidence of racial animus.

Although hearsay can be used to meet the higher "clear and convincing" evidentiary burden required to demonstrate bad faith, the expectation in this jurisdiction is that the hearsay will be "buttressed by otherwise admissible evidence to meet the standard."[21] *Lynch v. U.S.*, 557 A.2d 580, 582 (D.C. 1989). Under the guidance of *Lynch*, we find that the hearsay testimony of Wheeler and Childs fails to establish by clear and convincing evidence that Oppedisano and Osborne exhibited racial animus towards Unfoldment. The hearsay statements were contradicted by live testimony, were not corroborated, and were not sworn. First, Oppedisano testified that he neither treated Unfoldment differently than other contractors nor targeted it. Hr'g Tr. vol. 4,

[21] In administrative proceedings where the evidentiary burden is substantial evidence, hearsay may meet the required burden depending upon "whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn". *Compton v. District of Columbia Bd. of Psychology*, 858 A.2d 470, 477 (D.C. 2004)(citations omitted). As noted, however, the evidentiary burden required to prove a public official's bad faith is "clear and convincing."

1209:11-1210:4, Mar. 29, 2010. Second, the hearsay statements were not corroborated, as even Wheeler and Childs did not view Oppedisano and Osborne as having racial animus. Third, the hearsay statements were not sworn, having been described by Childs as "murmurings" and "rumors." Under these circumstances, the hearsay statements are not buttressed by otherwise admissible evidence, and do not meet the required clear and convincing evidentiary standard.

Appellant's final contention as to Wheeler's testimony is that it shows CFSA's bad faith by demonstrating that Oppedisano and Osborne held an "unreasonable hostility" toward Unfoldment. Appellant's Trial Br. 21. We disagree. Wheeler's testimony at the trial on this matter was very inconclusive and short of the required clear and convincing evidentiary standard. At trial, Wheeler adopted a statement in her pretrial affidavit[22] wherein she characterized Oppedisano and Osborne as holding an unreasonable hostility toward Unfoldment. Hr'g Tr. vol. 2, 531:15-16, Mar. 24, 2010. However, Wheeler contradicted herself by also testifying that neither Oppedisano nor Osborne were hostile to Unfoldment. Hr'g Tr. vol. 2, 516:4-10; 532:17-536:4. Wheeler further testified that the hostility her affidavit referred to was manifested in a notice to cure letter to Unfoldment written by a CFSA contract monitor[23] in February 1998. Hr'g Tr. vol. 2, 511:15-516:19, Mar. 24, 2010. In response to a question from the Board, Wheeler further explained that "when I say hostility, I kind of felt as though they [Oppedisano and Osborne] weren't listening." Hr'g Tr. vol. 2, 531:15-533:5. Taken as a whole, Wheeler's numerous and contradictory statements regarding "unreasonable hostility" are not clear and convincing evidence that Oppedisano, Osborne or other CFSA officials exhibited bad faith "unreasonable hostility" toward appellant.

Finally, Unfoldment contends that Oppedisano's and Osborne's racial animus was established in the case of *Mintz v. D.C.*, and that the District is collaterally estopped from refuting the findings.[24] Appellant's Post Trial Br. 21-22. We do not find Unfoldment's argument persuasive, and hold that the doctrine of collateral estoppel does not apply instantly.

In Mintz, two African American CFSA contract specialists alleged that Oppedisano and Osborne engaged in vulgar sexual and racial workplace conduct and retaliation, creating a hostile work environment. *Mintz*, C.A. No. 00-0539 at 1-4 (D.D.C. May 30, 2006). Both employees reported the behavior to Oppedisano's direct supervisor. *Id*. Reginald Mintz, hired by CFSA in September 1996, served as the key complainant and eventually filed a formal EEO complaint. *Id*. 4. Mintz was subsequently terminated by CFSA on November 21, 1996; while still in his three-month probationary period. Mintz filed suit against CFSA in 2000, and later amended the suit in 2004 to name the District as a defendant. Mintz's amended complaint contained counts for racial discrimination and retaliatory termination. *Id*.

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[22] AFS 110 16, ¶90.

[23] At all times material to Unfoldment's claim, Marvarene Williams served as a CFSA contract monitor assigned to the Unfoldment contract. Hr'g Tr. vol. 3, 903:14-905:7, Mar. 25, 2010. Her duties included, inter alia, conducting weekly inspections of Unfoldment's group homes. Hr'g Tr. vol. 3, 909:3-15, Mar. 25, 2010. Although Wheeler initially testified that Williams' exhibited "hostility", she later re-characterized Williams' report language as "harsh". Hr'g Tr. vol. 2, 493:8-496:10; 518:19-519:4.

[24] Appellant also asserts that the "Board ruled [at a March 2010 pretrial conference] that the Mintz Court's findings of racial animus … are binding under the theory of collateral estoppel" and CFSA is "precluded from refuting them". Appellant's Post Trial Br. 11. We have reviewed the record, but have not found any such Board ruling.

Selwyn Darbeau was the second CFSA employee and he brought several tort and contract claims alleging that he was retaliated against for supporting Mintz in the alleged workplace incidents. *Id*. 5. In 2005, both plaintiffs moved for summary judgment, and filed the required Statement of Material Facts Not in Dispute containing numerous vulgar racial and sexual comments attributed to Oppedisano and Osborne.[25] *Id*. 1.

The District filed both an opposition to the plaintiff's motion, and its own cross-motion for summary judgment. The District's opposition, however, failed to include a contravening statement of facts in dispute as required by D.D.C. Local R. Civ. P. 56(e).[26] The court construed appellee's failure to file an opposing statement of facts as an admission that Oppedisano and Osborne uttered the racially and sexually reprehensible comments, and granted summary judgment to Mintz on the racial discrimination count. *Id*. 1, 7. Thusly, appellant now seeks to use its favorable *Mintz* summary judgment ruling for preclusive effect herein.

The collateral estoppel doctrine "renders conclusive in the same or a subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *K.H., Sr. v. R.H.*, 935 A.2d 328 (D.C. 2007) (citations omitted). Where a *plaintiff* seeks to estop a defendant from relitigating issues which the defendant previously litigated and lost against another plaintiff, the doctrine is referred to as *offensive* collateral estoppel. *Id*. at 333 (citing *Newell v. D.C.,* 741 A.2d 28, 36 (D.C. 2009) (other citations omitted). Application of the offensive collateral doctrine requires a two-step inquiry. First, the trial court must determine whether a case meets the traditional requirements for invoking collateral estoppel. *Modiri v. 1342 Rest. Grp., Inc*., 904 A.2d 391, 395 (D.C. 2006). In so doing, the previously resolved issue must be identical to the one presented in the current litigation; similarity between issues is insufficient. *Hutchinson v. D.C. Office of Emp. Appeals,* 710 A.2d 227, 236 (D.C. 1998).

In the second step of the analysis, the court considers the fairness of applying collateral estoppel to the facts of the case. *Modiri*, 904 A.2d at 395. While non-mutual collateral estoppel is permitted in the District, the doctrine is applied with some caution because "it presents issues relating to the potential unfairness to a defendant." *Newell*, 741 A.2d at 36 (citations omitted). In considering whether the doctrine is being applied fairly, the District has developed a variety of factors for consideration:

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[25] For example, Oppedisano is revealed to have used a racial slur to refer to Mintz specifically and to blacks generally. *Mintz*, C.A. No. 00-0539 at 2 (D.D.C. May 30, 2006). Osborne and Oppedisano are also alleged to have made vulgar sexual and pedophilic comments to Mintz. *Id*.

[26] "[…] When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

(1) whether the first suit was for a trivial amount while the second was for a large amount;

(2) whether the party asserting the estoppel could have effected joinder between himself and his present adversary, but did not do so;

(3) whether the estoppel is based on one of conflicting judgments, another of which is in defendant's favor;

(4) whether there are significantly different procedural advantages available to the defendant in the second suit which could affect the outcome;

(5) whether application of the doctrine would be unfair to the defendant under the circumstances;

(6) whether the defendant had a full and fair opportunity to litigate;

(7) whether the defendant had the incentive to defend vigorously in the first suit;

(8) whether the defendant had the ability to foresee additional litigation;

(9) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(10) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(11) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(12) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(13) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

K.S., Sr. v. R.H., 935 A.2d 328, 333-334 (D.C. 2007) (*citing Ali Baba, Inc. v. WILCO, Inc.*, 482 A.2d 418, 423 (D.C. 1984); Restatement (Second) of Judgments, § 29 (1982)) (other citations omitted).

Based on consideration of the above, the *Mintz* summary judgment ruling is not entitled to preclusive effect in the instant matter. The traditional requirements for invoking collateral estoppel have not been met, and it would be unfair to apply the doctrine on the facts of this case. First, the issues in the present litigation are not identical to those in *Mintz*. In *Mintz*, the court decided whether Oppedisano and Osborne engaged in employment discrimination against Mintz and Darbeau from September 1996 to November 1996. In the instant matter, the issue is whether the CFSA officials exhibited racial animus against Unfoldment from July 1, 1997, to October 1998, as relates to contract termination, payment, and administration. Neither the facts, the timelines, nor the legal issues in the two cases overlap. In addition, it would be unfair to apply collateral estoppel instantly because the Mintz Court's racial discrimination finding against Oppedisano/Osborne was based on a procedural technicality (i.e., the District's failure to file a Statement of Material Facts In Dispute with its opposition). For these reasons, we rule that the doctrine of collateral estoppel does not apply instantly.

In summary, the appellant has failed to establish that CFSA's non-payment of contract minimums (through its two contract officials) was due to racial animus. Therefore, we conclude that appellant's evidence regarding the teen mothers and babies contract award, its allegations that white vendors received contract minimum payments, its reliance upon the hearsay testimony of Wheeler and Childs, and its failed attempt to apply collateral estoppel through *Mintz*, are insufficient to rebut the presumption of good faith by CFSA. Moreover, as we note below, it appears from our record that CFSA's non-payment of contract minimums was likely based not on "racial animus," but rather on a *genuine* belief that the parties' contract did not include a minimum payment requirement. In other words, a genuine, reasonable interpretation difference appears to have existed between the parties, and neither party was acting in bad faith when pursuing its own understanding of the contract. *Cf. Innovative Tel Servs.*, 08-1 BCA ¶ 33,854.

With respect to contract payment, we note that the parties' agreement included the following Article XIV:

> **ARTICLE XIV. CONTRACT TYPE AND PRICE**
> **A. This is an indefinite quantity contract with fixed unit pricing and a maximum contract ceiling amount, with payments based on the documented delivery of the specified units of service.**
>
> **b. The specified unit of service shall be a child/day for which the Contractor shall be paid a fixed per diem rate for each day that a child is in residence at the Contractor's facility.**

AF 1.

CFSA interpreted the above language to impose a "maximum," but not minimum order requirement. *See, e.g.*, Agency Answer and Mot. to Dismiss 14, (Jan. 29, 1999). Oppedisano testified that he did not know what the minimum payment invoices alluded to. Hr'g Tr. vol. 4, 1097:20-1099:5, Mar. 29, 2010. Similarly, Osborne testified that he was not sure what was

meant by the phrase minimum contractual payment.[27] Hr'g Tr. vol. 4, 1278:22-1279:5, Mar. 29, 2010. That CFSA (Oppedisano/Osborne) did not interpret Article XIV to impose a contract minimum is reasonable, as payments thereunder are expressly tied to the actual performance of services (i.e. "the documented delivery of the specified units of service"). *See also, Unfoldment,* 909 A.2d at 211 (stating that the parties' *contract* "does not mention a minimum placement requirement") (emphasis added).

However, CFSA was not alone in interpreting the instant contract to require payment for *actual* services only. The record suggests that Unfoldment appeared to share this same interpretation. This is evident through Unfoldment's interpretation of the parties' contract to require a "modification" in order for minimum payments to be made. Two letters written by Unfoldment's Executive Director on February 11, 1998, evidence such an interpretation.

In the first letter, Unfoldment's Executive Director asks the agency to "favorably consider a request that will allow us to receive a minimum payment, irrespective of the number of CFSA referrals" pursuant to an attached modification request. AFS 65. The second Unfoldment letter (i.e., the referenced attachment) specifically proposes a "modification of our contract" on terms that would have allowed Unfoldment to bill a minimum monthly order of "80% of the maximum slots or 24 youth". AFS 66. The attachment also notes that the parties' existing contract permits "payments based on the documented delivery of the specified units of service times a fixed per diem rate of $157.89." *Id.* These two letters suggest that Unfoldment did not believe it was entitled to minimum payments under the parties' existing contract, but could receive such payments *if* a modification were approved by CFSA.[28] It follows then, that CFSA's non-payment of contract minimums was consistent with both parties' understanding of their contract *at the time*.[29]

Although the Court of Appeals later found a legal duty to pay contract minimums, the duty arose not from clear language in the parties' contract, but from a synthesis of contract minimum language appearing in several disparate documents incorporated into the contract by the standard contract provisions. *Unfoldment,* 909 A.2d at 209-213. More specifically, these externally incorporated documents included CFSA's Request for Proposals (RFP) language requiring a "minimum number of … one hundred [children]… for the Continuing Care Group Home" at § A.3.b, and appellant's BAFO of "not less than 18 male youth ages 11-21." *Id.* 211. Other source documents that were incorporated into the parties' contract and found to undergird the requirement for a minimum payment included (1) the parties' Standard Contract Provisions, (2) the CFSA Policy Handbook § 10220.00, and (3) the District's procurement regulations at

[27] That Oppedisano and Osborne may not have been knowledgeable regarding the minimum payment requirement is not completely surprising. Ernestine Green, the CFSA General Receiver at all times material hereto, testified further that the decision regarding whether minimum payments were made to Unfoldment was not Oppedisano's [or Osborne's], but rather Milton Grady (the agency Deputy Receiver). Hr'g Tr. vol. 1, 91:10-92:16, Mar. 23, 2010.

[28] There is neither an indication in our record, nor a contention by the appellant, that CFSA ever approved the modification.

[29] At the hearing, neither party fully explored the impact of the February 11, 1998, letter on appellant's claim that bad faith was the reason for CFSA's non-payment of contract minimums. CFSA's then General Receiver was cross-examined by Unfoldment regarding the letter, but Unfoldment's questions pertained to whether Oppedisano had authority to approve the modification request. Hr'g Tr. vol. 1, 90:3- 92:16, Mar. 23, 2010.

D.C. Mun. Regs. tit. 27, §§ 2103.3, 2416.10, 2416.11. *Id.* [30]

Thus, we conclude that Unfoldment has not established that appellee's non-payment of the contract minimums was done in bad faith. Accrediting CFSA its presumption of good faith and not finding clear and convincing evidence to the contrary, we dismiss appellant's remand claim for bad faith non-payment of contract minimums.

II. New Evidence Regarding Whether CFSA Terminated the Contract For Convenience

The next issue we consider is whether "new evidence" shows that the appellant's contract was terminated for convenience. The Board's March 20, 2002, decision rejected appellant's termination claim and was affirmed in *Unfoldment*, 909 A.2d 204. Thus, the doctrine of res judicata[31] would normally preclude relitigation. Appellant's contention, however, that "new evidence" supports its termination claim has resulted in the Board's reconsideration of this issue.

We construe the Board's Order granting appellant leave to renew its termination claim as an exception to res judicata pursuant to D.C. Mun. Regs tit. 27, § 117.1(b) (2002).[32] Although there is no record of appellant having filed a motion to reconsider based on the newly discovered 2008 evidence, the Board's renewed jurisdiction over previously dismissed claims is properly considered as relief under a Rule 117.1(b) motion. *Cf. Forgotson v. Shea*, 491 A.2d 523, 528 (D.C. 1985).

The legal standard associated with newly discovered evidence requires that by due diligence the evidence could not have been presented to the Board prior to the rendering of its decision. Order on Mot. for Reconsideration, *Unfoldment, Inc.*, CAB No. D-1062, 2002 WL 1839991 (July 30, 2002).[33] Newly discovered evidence does not encompass evidence not previously discovered because of "lack of due diligence" or evidence that "was readily capable of being learned ... in the course of conducting pretrial discovery...." *Forgotson*, 491 A.2d at 528 (citations omitted).

Based on the legal standard noted above, the only evidence proffered by appellant that qualifies as "new" is the two CFSA staff memoranda produced for the first time in discovery in 2008. These memoranda pertain to a December 11, 2000, meeting between the parties, and were cited by the appellant in persuading our Board to allow limited relitigation of appellant's

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[30] These provisions pertain to indefinite quantity contracts, and generally require (1) the District to order the minimum stated in such contracts, and (2) required the contract officer to obligate sufficient budget authority to cover the minimum requirement.

[31] Res Judicata provides that "a final judgment on the merits of a claim bars relitigation in a subsequent proceeding of the same claim between the same parties or their privies." *EDCare Management, Inc. v. DeLisi*, 50 A.3d 448 (D.C. 2012). The doctrine applies to administrative agency proceedings that are the equivalent of judicial proceedings. *Oubre v. D.C. Dep't of Emp't Servs.*, 630 A.2d 699, 703-704 (D.C. 1993). The Board's proceedings are judicial in nature. *See, e.g.*, Board rules authorizing motions practice, discovery, subpoenas, hearings, decisions, and remedies (inter alia). D.C. Mun. Regs. tit. 27, §§110, 112, 114, 211, 214, 314.

[32] The Board rule is analogous to D.C. Super. Ct. R. Civ. P. 60(b). In construing D.C. Mun. Regs. tit. 27 §117(b) therefore, the Board is guided by our own precedent as well as precedent of the District of Columbia courts construing its analogous rules. D.C. Mun. Regs tit. 27, §100.6 (2002).

[33] The cited Order pertains to appellant's 2002 reconsideration motion regarding the Board's dismissal of the instant claims.

termination claim.[34] Accordingly, we address Unfoldment's contention that the two CFSA staff documents prepared by Yolanda McKinley (McKinley) demonstrate that Unfoldment's contract was terminated for convenience. The remainder of appellant's proffered evidence will not be considered.[35]

Thus, we address only Unfoldment's contention that the two CFSA staff documents prepared by McKinley demonstrate that Unfoldment's contract was terminated for convenience. McKinley was a management analyst for the CFSA Deputy Receiver, whose duties included taking minutes of certain meetings. Hr'g Tr. vol. 3, 709:12-710:12, Mar. 25, 2010. McKinley took notes of a December 11, 2000, meeting between CFSA officials and Unfoldment. Hr'g Tr. vol. 3, 711:8-16, Mar. 25, 2010. McKinley did not testify at the trial.

The two McKinley memoranda were written following the December 11, 2000, meeting between the CFSA Deputy Receiver, Unfoldment's Executive Director, and members of their respective staffs. The first memorandum is dated December 11, 2000, and is titled, "Meeting Synopsis Report." The memorandum indicates that the meeting was called at the request of Unfoldment to reach agreement to "withdraw her complaint [in CAB No. 1062] filed with the DC Contract Appeals Court" in exchange for CFSA's agreement to "reinstate her [group home] contract with the Agency and pay a revised settlement amount balance of $680,000 to Unfoldment." AFS 168, ¶¶ 3, 5. The background section of the synopsis states, in pertinent part, that the group home contract was "not renewed at an option point, and … later terminated for the convenience of the government [on October 31, 1998]." *Id*. 1.

The second McKinley memorandum references the December 11 meeting and requests that a CFSA staffer schedule a follow-up meeting with the Unfoldment Executive Director to "discuss program services that she is capable of delivering to our client population." AFS 169. This second memorandum states that "[CFSA] terminated the Unfoldment … contract on October 31, 1998, for the convenience of the government." *Id*.

We have reviewed the McKinley memoranda and appellant's arguments relating thereto, and find that they do not meet the evidentiary test as regards appellant's convenience termination claim.[36] The December 11 synopsis is an inadmissible settlement proposal, and the December 12

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[34] *See* Appellant's Opp'n to Gov't Mot. to Dismiss 5, 8 and discussion *supra* at p.4.

[35] The appellant's post-hearing brief attempts to support its convenience termination claim with numerous documents/affidavits that were available to it *prior* to the Board's March 20, 2002, dismissal decision. Appellant's Post Trial Br. 7-8. We do not consider such as "new evidence," and find that they exceed the scope of our September, 24, 2009, Order ("[w]e will consider Unfoldment's claim that new evidence shows that the contract was terminated for convenience."). Order on the District's Mot. to Dismiss Unfoldment's Third. Am. Compl. 3. For example, appellant has attempted to support its convenience termination claim with affidavits from one of its own attorneys, litigation documents from a lawsuit to which it was a party (*This End Up*), checks made payable to Unfoldment by CFSA, correspondence between CFSA and Unfoldment, and numerous other documents that were either available before our 2002 dismissal decision, or could have been available with due diligence. Thus, except as noted herein, none of the documents referenced in Appellant's Post Trial Br. at 7-8 qualify as "new evidence" under Board Rule 117.1(b). These include AFS 111, 112, 135, 137-139, 141-144, 146-147, 148, 149, 150, 151, 153, 155-159, 160, 161-163.

[36] Although appellant's bad faith claims must be established by clear and convincing evidence, its convenience termination claim need only meet the lower preponderance of the evidence standard. D.C. Mun. Regs. tit. 27,

memorandum is of little probative value. Accordingly, appellant's "new evidence" fails to establish that CFSA terminated Unfoldment's contract for default and later converted it to a convenience termination.

It is well settled that a settlement proposal cannot be used to prove liability for a claim or its amount. *Unfoldment v. CAB*, 909 A.2d at 213; *Goon v. Gee King Tong, Inc*., 544 A.2d 277, 280 (D.C. 1988) (other citations omitted). In addition, "statements made by a party during compromise negotiations should also be excluded to encourage unfettered dialogue in such negotiations, as to further the underlying policy favoring out-of-court settlement of disputes." 544 A.2d at 280 (*citing Pyne v. Jam. Nutrition Holdings Ltd.*, 497 A.2d 118, 128 (D.C. 1985). Finally, the substance of the inquiry to determine whether a document is inadmissible is whether the document and the statements therein are made in the context of an "apparent dispute" or "apparent difference of view" as to either the validity or amount of a claim. *Id*.

The December 11 "synopsis" meets all of the criteria of an inadmissible settlement offer, including the fact that the meeting occurred in the context of a very clear "dispute" (i.e., the instant Unfoldment claim filed with our Board on October 30, 1998). In addition, the meeting was convened at Unfoldment's request to explore "resolution of pending claim … for monetary damages and restoration of terminated contract." AFS 168. During the meeting, Unfoldment offered to *withdraw* its Board claim in *exchange* for contract reinstatement and a monetary payment. *Id*. 2 ¶¶ 3,5. Thus, the synopsis records a very clear Unfoldment settlement offer and is not admissible.

The December 12 memorandum does not contain a settlement offer or proposal. The memorandum requests that a CFSA staffer meet with Unfoldment to discuss contract opportunities with the agency, particularly as pertains to "boys with special needs". AFS 169. The memorandum notes the December 11 meeting between CFSA and Unfoldment (discussed above), and states that "the Agency terminated the Unfoldment, Inc. contract on October 31, 1998, for the convenience of the government". *Id*. The statement in the memorandum that the Unfoldment contract was "terminated for convenience" is unsubstantiated and of little probative value.

In determining what weight to give to a piece of evidence, we first assess its probative value, i.e., whether the evidence is reliable and trustworthy. One way to make this determination is to see if there is any contemporaneous documentary evidence corroborating the evidence. In this regard, unsubstantiated assertions do not constitute proof or evidence. *See, e.g., In re* Maggie's Landscaping, Inc., ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 at 161,569 (June 2, 2004); M.A Mortenson Co., ASBCA Nos. 53105, et al., 04-2 BCA ¶ 32,713 at 161,845 (Aug. 17, 2004); Technocratica, ASBCA Nos. 46567, et al., 99-2 BCA ¶ 30,391 at 150,226 (May 4, 1999); Grady & Grady, Inc., ASBCA No. 48629, 96-1 BCA ¶ 28,025 at 139,917 (Oct. 27, 1995).

We note that McKinley's December 2000 memorandum is not a contemporaneous document, and was written over two years after CFSA's "termination for convenience" allegedly

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§120.1 (2002).

occurred (i.e., October 31, 1998). Moreover, there is no contemporaneous *written* record of (1) Unfoldment ever submitting a convenience termination claim to a CFSA contracting officer, or (2) a CFSA contracting officer issuing a final convenience termination decision. The Board noted in 2001 that Unfoldment never submitted a claim to the CFSA contracting officer. Order on Mot. To Dismiss, *Unfoldment*, CAB No. D-1062 (October 23, 2001) (holding that Board jurisdiction herein did not require that Unfoldment first submit claims to the CFSA contracting officer because "it is quite clear [that] the decision would be "unfavorable"). Additionally, the contracting officer alleged by Unfoldment to have converted its default termination testified that he did not prepare a *written* decision nor was he aware of a written decision. H'rg Tr. vol. 3, 713:19-714:16, Mar. 25, 2010. These record gaps in contemporaneous documentary evidence diminish the probative value of McKinley's December 12 memorandum, and severely undermine its conclusory statement that "the Agency terminated the Unfoldment, Inc. contract on October 31, 1998, for the convenience of the government."

Finally, we note that the appellant called the purported contracting officer to testify at the hearing (former Deputy General Receiver Milton Grady) (hereafter Deputy Receiver). The Deputy Receiver testified that appellant's contract was terminated for default on October 31, 1998, by a letter from CFSA's General Receiver. Hr'g Tr. vol. 3, 688:22-690:20, Mar. 25, 2010. He testified further that he converted the default into a convenience termination sometime on or around December 12, 1998. Hr'g Tr. vol. 3, 688:22-690:5, Mar. 25, 2010; Hr'g Tr. vol. 3, 690:10-692:20; Hr'g Tr. vol. 3, 703:15-704:13. We are neither persuaded by the Deputy Receiver's testimony that Unfoldment's contract was terminated for default, nor convinced that a later conversion to a convenience termination ensued.

First, there is no probative evidence that Unfoldment's contract was terminated for default. The General Receiver[37] testified that she allowed the contract to expire on its own terms. Hr'g Tr. vol. 1, 128:6-140:16, Mar. 23, 2010. The General Receiver's testimony is supported by a contemporaneously issued October 28, 1998, letter bearing her signature, which states that "[W]e will not renew the option to contract for further services through your agency effective 60 days from the date of this letter." *Unfoldment*, 909 A.2d at 207: AFS 98. The General Receiver's letter is clear by its own terms, and was undertaken pursuant to Article XVI(A) of the parties contract (setting a one year contract term and authorizing, but not compelling, the exercise of options thereafter). AF 1, 16-17. By comparison, the Deputy Receiver was on extended sick leave at the time of contract expiration and was not directly involved in CFSA's non-renewal decision. Hr'g Tr. vol. 3, 798:11-17; 803:12-14, Mar. 25, 2010. The Deputy Receiver *would have* recommended renewal had he not been on leave, Hr'g Tr. vol. 3, 817:8-818:7, Mar. 25, 2010, but the decision to allow the contract to expire was taken by his superior, the agency's General Receiver. Hr'g Tr. vol. 1, 128:6-140:16, Mar. 23, 2010.

Second, we have noted the dearth of contemporaneous documentary evidence corroborating the Deputy Receiver's testimony. There is no written default termination. There is no written conversion of the alleged default termination. The CFSA's October 28th non-renewal letter evinces no indicia of having been issued by CFSA as a default termination. AFS 98. For

[37] The General Receiver's official title was "Federal Court Appointed Receiver". Hr'g Tr. vol. 1, 41:9-11, Mar. 23, 2010.

example, it was not preceded by a cure notice, does not use "termination for default" phraseology, and does not reference Article XXII of the parties' contract.[38]

Finally, we note that the Board's jurisdiction over the instant claim vested on October 30, 1998; a full month before the date the Deputy Receiver testified that his determination was made. It is well settled that a contracting officer lacks the jurisdiction to issue a final decision on a claim after it has been appealed to the Board. *See*, *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012) (noting that the Federal Circuit has held that filing an appeal divests contracting officers of the jurisdiction necessary to issue a final decision) (*citing Sharman Co. v. U.S.*, 2 F.3d 1564 (Fed. Cir. 1993) (other citations omitted); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13,082. In the instant case, it is conceded that if appellant ever submitted its purported convenience termination claim to CFSA, it occured "*after* Unfoldment's complaint had been filed with the Board" (emphasis added). Hr'g Tr. vol. 6, 1619:20-1620:6, Mar. 31, 2010. Additionally, it is conceded that the CFSA contracting officer made his purported favorable decision thereon after Board jurisdiction vested.[39]

Thus, we have reviewed appellant's termination claim in light of its proffered "new" evidence, and nonetheless find that the parties' contract expired under its own terms. The General Receiver testified that she allowed the contract to expire on its own terms. Hr'g Tr. vol. 1, 128:6-140:16, Mar. 23, 2010. The General Receiver's testimony is supported by a contemporaneously issued October 28, 1998, letter bearing her signature, which states that "[W]e will not renew the option to contract for further services through your agency effective 60 days from the date of this letter." *Unfoldment*, 909 A.2d at 207. The General Receiver's letter is clear by its own terms, and was undertaken pursuant Article XVI(A) of the parties' contract (setting a one year contract term and authorizing, but not compelling, the exercise of options thereafter). AF 1, 16-17.

We find that the two December 2000 CFSA letters do not establish by a preponderance of the evidence that Unfoldment's contract was default terminated and later converted into a convenience termination. Furthermore, we find that the Deputy Receiver's testimony also does not establish that Unfoldment's contract was default terminated and later converted by him into a convenience termination. The parties' contract expired under its own terms.

III. Bad Faith/Racial Animus Claims Pertaining To Contract Payment, Management and Monitoring

Finally, we consider whether CFSA engaged in bad faith racial animus and/or bad faith hostility regarding its monitoring, evaluation, and/or payment under the parties' contract. The Board's September 24, 2009, Order provided that we would consider these allegations pleaded in Unfoldment's third amended complaint expressly as provided below:

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[38] Article XXII is titled, "TERMINATION FOR DEFAULT OR CONVENIENCE". AF 1, at 20. The Board expects that the General Receiver would have referred to the contract's default termination clause if she had intended the October 28 letter to be a default termination.

[39] Appellant's third amended complaint alleged that CFSA issued its convenience termination decision on October 13, 2000. Appellant's Third Am. Compl. 13, ¶¶ 125-126.

> 1. Paragraph 139 subparts (a), (b), (c) and (d);
> 139. The Agency exhibited bad faith in its dealings with Unfoldment, as evidenced by…
>
> a. CFSA and its personnel unreasonably exhibited hostility, bad faith and racial animus against Unfoldment;
>
> b. CFSA and its personnel abused their discretion in issuing, managing, monitoring, evaluating and terminating/not renewing Unfoldment's contract;
>
> c. CFSA and its personnel in bad faith issued a legally insufficient and improper cure notice and unreasonably suspended client referrals to Unfoldment;
>
> d. CFSA and its personnel refused to pay Unfoldment's invoices in bad faith creating severe financial hardship for Unfoldment;

As we have noted, public officials are presumed to act in good faith and well-nigh irrefragable proof is required to rebut the presumption. *AMI Risk Consultants, Inc.*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012). We have reviewed appellant's allegations and record evidence in light of the required evidentiary standard, and find that appellant's additional bad faith claims are without merit. We address each allegation below.

CFSA and its Personnel Unreasonably Exhibited Hostility, Bad Faith and Racial Animus against Unfoldment

We have previously noted that the evidence herein does not establish that CFSA officials committed bad faith toward Unfoldment through either racial animus or unreasonable hostility. *See* discussion *supra* pp. 7-12. We will not repeat our discussion here, but affirm our earlier discussion and holding in this regard.

CFSA and its Personnel Abused their Discretion in Issuing, Managing, Monitoring, Evaluating and Terminating/Not Renewing Unfoldment's Contract

1. Bad Faith Issuance of Unfoldment's Contract

In this regard, the appellant alleges that CFSA (through Osborne) added more onerous provisions to Unfoldment's contract than those of white vendors. Appellant's Post Trial Br. 27, 29. The appellant does not cite to the transcript to identify testimony in support of this assertion. Apart from appellant's conclusory statements, we do not find evidence that CFSA treated the appellant differently than white vendors. Absent clear and convincing evidence to the contrary, the presumption of good faith accorded CFSA prevails.

2. Bad Faith Monitoring of Unfoldment's Contract

Appellant also alleges that CFSA ordered its contract monitor (Marvarene Williams) to conduct weekly, unannounced inspections of Unfoldment's Anacostia group homes. Appellant's Post Trial Br. 38, 39. Appellant further contends that the monitor held a "racial/cultural" bias because she believed that wards should not be placed in "public housing communities." Appellant's Post Trial Br. 38. We do not find in the record before the Board that the appellant has established that CFSA monitored its contract in bad faith. The parties' contract specifically permits CFSA to conduct "announced or unannounced" visits to Unfoldment's facility. AF 1, Article VIII (B). In addition, the parties' contract provides that CFSA "will make routine and random site visits to the Contractor's facilities to check to see that they are maintained in a material condition conducive to the operation as a home" for District children. AF 1, Article IV (D). While weekly monitoring visits probably took place, CFSA (through Oppedisano) testified that it was not unique to Unfoldment. Hr'g Tr. vol. 4, 1112:6-1113:15, Mar. 29, 2010.

3. Bad Faith Evaluation of Unfoldment's Contract

Appellant also alleges that Oppedisano approved bad faith performance evaluations prepared by subordinate CFSA employees Chainie Scott [and others] in April 1998 and June 1998. Appellant's Post Trial Br. 35. Further, appellant alleges that Oppedisano inserted a false April 9, 1998 Evaluation Report into Unfoldment's file. Appellant Post Trial Br. 59. The falsity alluded to by appellant was an alleged paragraph finding that that Unfoldment "consistent[ly] fail[ed] to timely submit Unusual Incident Reports" regarding youths. Appellant's Reply Trial Br. 10. We find that these allegations are not supported in our record. The appellant has not provided clear and convincing evidence to support this allegation. We also note that appellant's post-hearing brief does not direct the Board to transcript testimony or other evidence supporting this allegation.

4. Bad Faith Terminating/Not Renewing Unfoldment's Contract

As noted herein, appellant's longstanding theory of this case is that CFSA terminated its contract for failure to cure deficiencies highlighted in a June 1998 Performance Evaluation Report. Appellant's Post Trial Br. 7-8. We previously dismissed this claim in 2002. In 2006, the Court of Appeals affirmed our dismissal of this claim. In this decision, we have already discussed and concluded that appellant's "new evidence" does not establish that the parties' contract was default terminated. As we noted, the parties' contract expired on its own terms. Similarly, we have concluded that appellant's circumstantial and hearsay evidence does not establish that Oppedisano and Osborne exhibited bad faith racial animus toward Unfoldment. Therefore, we affirm our discussion and holding herein, and conclude that the evidence is not clear and convincing that appellant's contract was terminated in bad faith.

CFSA (and its Personnel) in Bad Faith issued a Legally Insufficient and Improper Cure Notice and Unreasonably Suspended Client Referrals to Unfoldment

1. Legally Insufficient and Improper Cure Notice

As regards the instant allegation, appellant argues that CFSA (acting through

Oppedisano) issued a bad faith cure notice to Unfoldment on February 26, 1998, which contained a number of already corrected deficiencies, 67 deficiencies fabricated by Oppedisano, and false accusations that Unfoldment failed to timely file Unusual Incident reports pertaining to two youth.[40] Appellant's Reply Trial Br. 2-3, 6, 10-11, 40, 55. The appellant further contends that the bad faith information in the cure notice was later incorporated into two adverse Performance Evaluations[41] recommending the non-renewal of Unfoldment's contract. Appellant's Reply Trial Br. 2-3, 6, 10-11. In addition, appellant contends that once it corrected all deficiencies, Oppedisano did not rescind the letter or notify Unfoldment that it was in compliance. Appellant's Post Trial Br. 58.

To charge CFSA with manipulating the cure notice process to further a purported hidden agenda of forcing Unfoldment into default is to charge CFSA with bad faith. Per our discussion herein, such a showing requires "well nigh irrefragable proof." In this case, the evidence does not meet the required standard. Apart from Unfoldment's conclusory statement that deficiencies were "fabricated," etc., the record provides no evidence to support Unfoldment's theory of a bad faith termination launched by a hidden agenda cure notice. In this regard, Oppedisano testified that he issued a cure letter in February 1998 with the intent of terminating Unfoldment's contract *if* the deficiencies were not cured. Hr'g Tr. vol. 4, 1006:22-1007:16, Mar. 29, 2010. The deficiencies were cured, however, and Oppedisano did not take steps to terminate Unfoldment's contract during his employment with CFSA. Hr'g Tr. vol. 3, 795:11-796:6, Mar. 25, 2010. Before leaving CFSA employment around May 1998, Oppedisano informed his superiors that Unfoldment had corrected all deficiencies. Hr'g Tr. vol. 3, 795:11-796:6, Mar. 25, 2010.

2. Unreasonable Suspension of Client Referrals To Unfoldment

Appellant also alleges that Oppedisano ordered a freeze in contract referrals in February 1998 and did not lift the freeze until after deficiencies were corrected on March 30, 1998. Appellant's Post Trial Br. 54, 63. Again, there is no record evidence to support a finding of bad faith refusal by Oppedisano to refer clients to Unfoldment during the contract period. In fact, the evidence indicates that a separate CFSA official made program decisions regarding the placement of children with group homes. Sondra Jackson testified that she was the Deputy Receiver for Programs during Unfoldment's contract period, and that she supervised social workers and had responsibility for the placement of children. Hr'g Tr. vol. 1, 163:12-164:3, Mar. 23, 2010. Ms. Jackson testified that she could not remember if she suspended referrals to Unfoldment in 1998. Hr'g Tr. vol. 1, 167:21-168:1, Mar. 23, 2010. There is no evidentiary support for a bad faith finding as to this allegation. We also note that appellant has not directed the Board to the transcript testimony supporting its allegation of bad faith suspension of client referrals.

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[40] There were two incidents as to which CFSA contended Unfoldment failed to submit timely reports. The first incident involved a youth allegedly "scratched" by a dog in August 1997. Appellant's Post Trial Br. 40. The second incident involved a youth who was alleged to have been abused sexually by another youth. Appellant's Reply Trial Br. 10. Both the cure notice and the two performance evaluations noted that Unfoldment failed to submit timely reports following the incidences. Whether Unfoldment submitted its incident reports timely was disputed at the hearing. There was no evidence, however, that CFSA's mention of the deficiency in the cure notice and the annual performance report was the product of bad faith.

[41] The adverse evaluation reports were issued on April 9, 1998, and June 9, 1998, respectively.

CFSA and its Personnel Refused to Pay Unfoldment's Invoices in Bad Faith Creating Severe Financial Hardship for Unfoldment

Appellant also alleges that Osborne and Oppedisano ignored requests pertaining to, and failed to pay invoices for, specialized wrap around services for behaviorally challenged youth. Appellant's Post Trial Br. 28, 51; Appellant's Reply Trial Br. 2. We find that the record does not support the allegation that CFSA non-payment of invoices was done in bad faith. Ms. Jackson testified that all of CFSA's vendors were not being paid timely. Hr'g Tr. vol. 1, 170:19-20, Mar. 23, 2010. Similarly, CFSA's General Receiver (Ernestine Green) testified that CFSA's problem with timely payments was agency-wide and not unique to Unfoldment. Hr'g Tr. vol. 1, 156:16-157:7, Mar. 23, 2010. In fact, Ms. Green testified that her tenure resulted in CFSA setting up a process to pay all vendors in a more timely manner. *Id*. Thus, there is no evidence that CFSA targeted Unfoldment for the non-payment of invoices.

With respect to appellant's specific contention that "wraparound services" were not paid, the record is equally void of support for a finding of bad faith. The former CFSA Administrator (Jesse Winston) testified that "wraparound services" are akin to one-on-one babysitting type services for a certain number of hours per day. Hr'g Tr. vol. 3, 888:21-889:8, Mar. 25, 2010. The CFSA Administrator testified that "wraparound services" were not included in Unfoldment's group home contract. Hr'g Tr. vol. 3, 889:17-891:7; Hr'g Tr. vol. 4, 1147:6-8, Mar. 29, 2010 (testimony of Oppedisano corroborating that group home contracts did not include a provision for wrap around services). We find no reference to wraparound services in the parties' contract. AF 1. Thus, to the extent that wraparound invoices were not paid herein, we do not find that bad faith caused the non-payment.

IV. Miscellaneous Claims

In addition to the above, the appellant's post-hearing briefs assert numerous other bad faith claims that are not properly before our Board. Each of the additional claims was pleaded in one or more of appellant's previous complaints and rejected by our Board's September 24, 2009, Order:

> Paragraph 137, containing subparts (a)-(n), constitute Count 1 of Unfoldment's third amended complaint. Unfoldment agrees that the allegations in these subparts have appeared in its original and first amended complaints and that the allegations have either been previously settled or dismissed by the Board in its March 20, 2002 decision and affirmed by the Court of Appeals. To the extent that some of the allegations found in these subparts were raised only in the original complaint and not in the first amended complaint, those allegations were abandoned by Unfoldment and cannot be resuscitated now, 10 years later.

Order at 3. Accordingly, we will not consider numerous allegations that appellant has raised in its briefs. We find that these allegations were either previously settled, dismissed by the Board and affirmed by the Court of Appeals, or abandoned. Therefore, we will not consider the following allegations raised by the appellant:

(1) Osborne forwarded the cover letter of Unfoldment's contract for signature, but failed to include the Articles containing the scope of work, thus depriving appellant of the opportunity to "negotiate" contract terms. Appellant's Post Trial Br. 30. This previously dismissed allegation was pleaded in ¶137(a) of appellant's third amended complaint, and ¶10 of its original complaint.

(2) Osborne refused to pay Unfoldment's start-up costs while paying a white vendor's $77,500 in start-up costs. Appellant's Post Trial Br. 31, 32. This previously dismissed allegation was pleaded in ¶137(i) of appellant's third amended complaint.

(3) Oppedisano refused to modify Unfoldment's contract to allow it to offer group home services at an eight-bed Virginia location after one of its DC properties was damaged by fire. Appellant's Post Trial Br. 33. We find that this allegation is beyond the scope of the Board's September 24, 2009, Order.

(4) CFSA failed to hold mandatory pre-placement conferences and evaluations concerning youth placed in its care. Appellant's Post Trial Br. 42-43. This previously dismissed allegation was pleaded in ¶137(g) of appellant's third amended complaint, ¶90 of its first amended complaint, and ¶16 of its original complaint.

(5) CFSA placed underage children with Unfoldment requiring specialized treatment without providing necessary services and refused to pay invoices for approved specialized services. Appellant's Post Trial Br. 44. This previously dismissed allegation was pleaded in ¶¶137(d) and 137(j) of the appellant's third amended complaint.

(6) Oppedisano breached the Contract Performance Standards provision and imposed unfair performance standards without Unfoldment's knowledge. Appellant's Post Trial Br. 45. This previously dismissed allegation was pleaded at ¶ 27 of appellant's amended complaint, and exceeds the scope of the Board's September 24, 2009, Order.

(7) CFSA failed to provide "new vendor" training and technical assistance offered to other vendors. Appellant's Post Trial Br. 47. Appellant's previously dismissed "new vendor" training allegation was pleaded at ¶16 of its complaint. Appellant's "technical assistance" allegation exceeds the scope of the Board's September 24, 2009, Order.

(8) Oppedisano retaliated for Unfoldment's request for wraparound services by requesting authority to issue a default termination. Appellant's Post Trial Br. 51. This previously dismissed allegation was pleaded at ¶ 67 of appellant's complaint.

(9) CFSA required Unfoldment to spend $14,000 to replace sound windows and doors. Appellant's Post Trial Br. 56. This previously dismissed allegation was pleaded in appellant's complaint at ¶19 and its first amended complaint at ¶42.

(10) Oppedisano cited Unfoldment for hiring staff with criminal records for whom he'd previously granted waivers. Appellant's Post Trial Br. 60. This allegation is beyond the scope of the Board's September 24, 2009, Order.

(11) spoiliation, retaliation, and equal access to justice act attorneys' fees claims. Appellant's Post Trial Br. 73-75. These previously dismissed allegations were pleaded at ¶¶ 25-26 and 107 of appellant's amended complaint, and/or were previously dismissed by the Board. In addition, these allegations are beyond the scope of the Board's September 24, 2009, Order.

V. Conclusion

We dismiss appellant's claims with prejudice. The appellant has not established that CFSA's non-payment of contract minimums was due to bad faith. The appellant's new evidence, and the record before the Board, does not establish that CFSA terminated appellant's contract for default, and later converted the default into a convenience termination. Rather, the record shows that the parties' contract expired under its own terms. Finally, the appellant did not establish that CFSA acted in bad faith as alleged in ¶139 (a)-(d) of the appellant's third amended complaint.

SO ORDERED.

DATED: March 14, 2013

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

CONCURRING:

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

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