

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

R. J. GRIFFIN,

Claimant and
Counter-

Respondent,

-and-

J.E. DUNN
CONSTRUCTION
COMPANY,

Respondent
Counter-

Claimant.

Case No. 30 166 00209 11

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties and having been duly sworn, and having heard the evidence and reviewed exhibits admitted on November 15 through 18, 2011, and having considered the contentions of the parties, AWARD as follows:

FINDINGS

1. R. J. Griffin, Jr. ("Griffin") entered into an Employment Agreement with Dunn Southeast, Inc. ("Dunn") dated July 26, 2006 (the "Employment Agreement").

2. The Employment Agreement was to terminate on May 31, 2011, unless Dunn exercised an option to extend the term for an additional two years. Dunn was required to give notice of exercise of the option to extend on or before May 31, 2011.

3. The Employment Agreement contains a non-disclosure covenant. The Employment Agreement also contains covenants not to solicit customers, clients or employees during employment and, upon a voluntary termination by Griffin or a termination for Cause by

Dunn, for a period of two years after the termination of employment. Upon termination of Griffin's employment without Cause by Dunn, the non-disclosure covenant obligation continued, but the non-solicitation covenant ceased.

4. Griffin and Dunn also entered into a letter agreement dated July 26, 2006, that established the formula for the payment of incentive bonuses to Griffin.

5. The Employment Agreement was amended as of September 22, 2008 and Griffin resigned from the Board of Directors. Following the September 22, 2008 amendment, Griffin had no official duties and had no authority to bind Dunn. Griffin was to consult with or provide goodwill on behalf of Dunn when called upon.

6. Dunn did not exercise the option to extend the term of Griffin's Employment Agreement on or before May 31, 2010.

7. Effective June 1, 2010, Griffin's annual base salary was adjusted to \$294,030.90.

8. Griffin's son, Justin Griffin, and son-in-law, Hank Maxwell, each had been employees of Dunn (and its predecessors) for many years. On August 25, 2010, Dunn terminated the employment of Justin Griffin and Hank Maxwell because of economic conditions.

9. Between September 17, 2010 and October 23, 2010, Griffin sent internal Dunn marketing reports to Justin Griffin and Hank Maxwell. Dunn's Chairman testified that he did not consider the marketing reports to be confidential.

10. On October 7, 2010, Griffin sent an internal Dunn bid list to Justin Griffin and Hank Maxwell. This document was considered confidential by Dunn.

11. Between the termination of Justin Griffin and Hank Maxwell's employment with Dunn, and November 2, 2010, Griffin did provide assistance to Justin Griffin and Hank Maxwell in their efforts to establish a construction company that would compete with Dunn.

12. Some of the materials evidencing the assistance to Justin Griffin and Hank Maxwell reflect that Griffin was planning to be a part of the new business, but not until after his Employment Agreement expired by its term at the end of May 2011.

13. By a letter dated November 2, 2010, Dunn gave Griffin notice of alleged breach of the Employment Agreement and provided Griffin with thirty days to cure the alleged breaches.

14. During the cure period, Griffin took steps to address the alleged breaches, and sought clarification from Dunn as to the steps necessary to effectuate a cure.

15. Griffin's requests for clarification were not meaningfully responded to by Dunn. Dunn declined Griffin's requests for a meeting to discuss the matter.

16. With respect to the bid list considered confidential by Dunn, Griffin committed that neither Justin Griffin nor Hank Maxwell would take any action to pursue the business

contained on the bid list. Dunn's Chairman acknowledged that this was an adequate cure of that issue.

17. On December 2, 2010, Dunn gave Griffin notice that his employment was terminated; asserting that the termination was for Cause and therefore Griffin would continue to be bound by the non-solicitation covenants in the Employment Agreement for a period of two years and was entitled to no further compensation.

18. Griffin presented evidence that he had not yet been paid \$55,207 as part of his 2009 bonus, alleging that his bonus had been reduced as a result of an improper charge for 2008 bonuses paid to other employees in 2009.

19. Dunn presented evidence that the 2009 bonus for Griffin was computed consistently with the July 26, 2006, letter agreement.

20. The uncontroverted evidence presented was that, but for the termination of Griffin's employment allegedly for Cause, Griffin's 2010 bonus would have been \$290,470.

21. There was no evidence presented as to what Griffin could have earned between the time of the expiration of Employment Agreement and the time of this Award.

CONCLUSIONS

22. There was no evidence presented that Griffin breached the non-solicit covenants in the Employment Agreement.

23. To the extent Griffin breached the non-disclosure covenant in the Employment Agreement, or any company policy, Griffin adequately cured those breaches.

24. The evidence presented established that, while Griffin was planning and preparing to compete with Dunn following the termination of the Employment Agreement, Griffin did not go beyond mere planning and preparation and actually begin competing with Dunn. Griffin therefore did not breach the duty of loyalty.

25. Based on the evidence presented and the relevant legal authorities, I conclude that Cause did not exist for the termination of Griffin's employment. As a result, the termination of Griffin's employment must be considered as Without Cause.

26. Griffin is entitled to his base salary and benefits in the amount of \$152,589 as they would have been due under the Employment Agreement.

27. Griffin is entitled to a 2010 bonus in the amount of \$290,470 as of the date the bonus would have been paid.

28. Pursuant to R.S.Mo. §408.020, Griffin is entitled to prejudgment interest in the amount of 9% per annum from the date the payments otherwise would have been due to the date

of this Award. The parties are directed to confer regarding a computation of interest based upon the Award. If the parties cannot agree upon an amount, the Arbitrator shall re-open the matter for further hearing.

AWARD

Therefore, based on the above findings and conclusions, Griffin's claim is GRANTED in part and DENIED in part, and Dunn's claim is DENIED, and Dunn shall pay to Griffin the sum of \$443,059.00, plus prejudgment interest through the date of this Award. Each party shall bear his/its own attorney's fees and expenses.

The administrative fees and expenses of the American Arbitration Association totaling \$11,450.00 and the compensation and expenses of the Arbitrator totaling \$ 17,000.00 shall be borne by J.E. Dunn Construction Company.

All claims not expressly granted in this Award are hereby DENIED.

This award and the prior Orders of the Arbitrator are in full settlement of all claims and counterclaims presented in this arbitration.

This 16th day of December, 2011



PHILLIP A. BRADLEY, ARBITRATOR

I, Phillip A. Bradley, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

12/16/11

Date



Phillip A. Bradley