

Morris L. Shaller v. U.S. General Accounting Office

Docket No. 02-102-04-81

Date of Decision: August 11, 1981

Cite as: Shaller v. GAO (8/11/81)

Before: Meagher (Panel Chair), Taylor and Levan, Members

Probationary Period

Background

This case came before the Board by a Petition for Review and a Report filed by the Board's General Counsel on behalf of the Petitioner, Morris L. Shaller. On June 25, 1981, the Respondent, General Accounting Office, filed a Response to the Petition for Review and requested oral argument, which was scheduled on July 28, 1981. However, on July 24, 1981, counsel for Respondent filed a Motion to Stay and Motion to Disqualify the General Counsel of the Board. The Panel's Hearing Officer rejected the request and the hearing was held on July 28, 1981. At the hearing, counsel for Respondent renewed the request for a stay, which the Panel denied.

Facts

On March 10, 1980, Petitioner was given a career-conditional appointment, Procurement Agent, GS-1102-5/01, with the Defense Logistics Agency, Philadelphia, Pennsylvania. Effective May 4, 1980, Petitioner was given a career conditional appointment, Management Analyst, GS-343-7/01, with the General Accounting Office (GAO), Cincinnati, Ohio. Although Petitioner was selected from an Office of Personnel Management certificate of eligibles, his appointment was effected--without a break in service--by transfer. In this regard, see the Standard Form 52--Attachment "A" to the Report of the General Counsel--which states in Block 9: "Transfer Career Conditional." By letter dated March 10, 1981, the Director of Personnel at GAO informed the Petitioner of his termination, effective March 21, 1981. On March 25, 1981, the Petitioner appealed this termination to the Board.

Contentions of the Parties

Essentially, Petitioner contends that he was entitled to the procedural safeguards of 4 C.F.R. §7.6 with regard to his termination, since he had completed his one-year probationary period of Federal Service.

Respondent contends that, notwithstanding the SF-52, Petitioner was a probationary employee at the time of termination, pursuant to 5 C.F.R. §315.801(a)(1). Since the definition of "employee" under 4 C.F.R. §7.6 (and GAO Order 2752.1) is based upon the definition contained in 5 U.S.C. §7511(a) and that definition excludes individuals serving a probationary period, Petitioner is not subject to 4 C.F.R. §7.6.

Additionally, counsel for Respondent has raised as a procedural issue the disqualification of the Board's General Counsel to prosecute cases before the Board or to otherwise represent GAO employees before the Board.

Analysis

Due to the nature of the Panel's decision in this case, it is unnecessary to address the procedural issue of disqualification of the Board's General Counsel in this case.¹

The Panel has thoroughly reviewed the entire record in this case. Based upon the facts presented in the record, it is clear that this case is governed by 5 C.F.R. §§315.502(a) and 315.801(b). That is, since the Petitioner was transferred without a break in service, consistent with 5 C.F.R. §315.502(a), from the Defense Logistics Agency to GAO, under 5 C.F.R. §315.801(b) Petitioner was obligated to complete his probationary period in his new position with GAO. As of March 9, 1981, his probationary period was so completed. Although Respondent could presumably have appointed Petitioner from the certificate of eligibles without a transfer, it did not do so. Whether its failure to do so was by administrative error or oversight, nevertheless, the SF-52 in question is unequivocal in this regard. We find nothing in the cited OPM issuances or correspondence to the contrary.

Decision

Petitioner's request for retroactive reinstatement and backpay, in accordance with the relevant statute, to March 21, 1981, is, therefore, granted.

Notice

This decision will become final on September 11, 1981, unless, prior to that date, a Motion to Reopen and Reconsider is filed by one of the parties or unless the Board reopens on its own motion. A Motion to Reopen and Reconsider may be filed with the Board in person at the office of the Board (GAO building, Room 4057) or by certified mail addressed to the GAO Personnel Appeals Board, Room 4057, Washington, D.C. 20548, or by certified mail to the Personnel Appeals Board, P.O. Box 2496, Washington, D.C. 20013. The Motion to Reopen and Reconsider shall set forth objections to the decision, with references to applicable laws or regulations, and with specific reference to the Record. After providing the parties with an opportunity to respond, the Board may grant a Motion to Reopen and Reconsider when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Hearing Officer is based on an erroneous interpretation of statute or regulations.

Under 31 U.S.C. §52-3(1), any final decision of the Board under subsections (h)(1), (2), (3), (6) and (7) of the GAO Personnel Act may be appealed to the United States Court of Appeals for the circuit in which the petitioner resides or to the United States Court of Appeals for the District of Columbia, provided the petition to the court is filed no more than 30 days after receipt.

Report of Compliance

The agency is requested to furnish documentation of the required corrective action as specified at 4 C.F.R. §28.25(f) within 30 days after the decision becomes final.

Notes

1. This issue was not raised in a timely manner. To defer a decision regarding Petitioner's appeal would, in the opinion of the Board, prejudice Petitioner's right to timely resolution of his appeal. Additionally, other alternatives are available to Respondent should it wish to further pursue this issue of representation before the Board.