

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

**Docket No. 02-102-04-81**

**Date of Decision: December 1, 1981**

**Cite as: Shaller v. GAO (12/1/81)**

**Before: Gallas, Chair; Bussey, Simmelkjaer, and Taylor, Members**

**Probationary Period**

**Representation by PAB General Counsel**

**RECONSIDERATION of Shaller v. GAO, M1 (August 11, 1981)**

## **Background**

A panel of three Board Members issued the initial decision in this case on August 11, 1981. On September 9, 1981, the Board received a Motion to Reopen and Reconsider from the General Accounting Office (hereinafter referred to as "Respondent"). A Memorandum of Points and Authorities accompanied the motion. On October 1, 1981, the Board received the Petitioner's response, in the form of a Memorandum of Points and Authorities in opposition to the motion to reopen and reconsider, filed by the Board's General Counsel.

## **Contentions of the Parties**

The Respondent makes two assertions: (1) the Board's General Counsel does not have the authority to represent the claims of Respondent's employees, and (2) the Board's initial decision is based on an erroneous interpretation of the applicable statutes and regulations. Essentially, four arguments are offered by Respondent in support of its first contention and various authorities are attached to support its second contention.

The Board's General Counsel responds in the form of a six-pointed argument, the first five points of which address the first contention of Respondent. However, the General Counsel concludes that the Board should reopen and reconsider its original decision, but should nevertheless affirm that decision.

## **Analysis**

The initial argument under the first assertion of Respondent is that the Board's General Counsel is not authorized by statute to prosecute individual employee claims before the Board. The Respondent's memorandum does, however, recognize the General Counsel's authority to conduct investigations and to prosecute cases involving prohibited personnel practices or prohibited political activity. Additionally, Respondent argues that the Board exceeded its statutory authority in delegating such authority to its General Counsel by regulations. Finally, Respondent contends that the appointment and tenure of the Board's General Counsel, coupled with the expansive authority conferred on the General Counsel by the Board "carries with it sufficient grounds for questioning the objectivity of Board decisions..." (See page 1, Part 1 of Respondent's memorandum of September 9, 1981).

Implicit in the latter argument is the notion that the Board's plenary authority over its General Counsel subjugates the General Counsel to the will of the Board. As a corollary to this assertion, Respondent has questioned whether or not the Board exceeded its statutory authority when it conferred such powers upon its General Counsel. While Respondent raised other procedural and substantive challenges, these issues are at the heart of Respondent's arguments.

The Board is of the opinion that Respondent's arguments ignore the legislative history of Public Law 96-191 (February 15, 1980), set forth in title 31 of the United States Code. The genesis of this legislation was H.R. 5176, introduced in the U.S. House of Representatives on September 5, 1979. While the U.S. Senate held hearings on companion legislation, it essentially adopted the House proposal, particularly as to Section 4, which governs the Board and its General Counsel. Instructive in this regard are the following comments from the Report of the House Committee on Post Office and Civil Service:

"The cornerstone of H.R. 5176 is the creation of a GAO Personnel Appeals Board to handle appeals from such matters as adverse actions, prohibited personnel practices, union elections, determinations of bargaining units, unfair labor practices and discrimination appeals. In handling each of these types of cases, the GAO Personnel Appeals Board acts in the place of the Merit Systems Protection Board, the Federal Labor Relations Authority, or the Equal Employment Opportunity Commission, as applicable. The committee expects that the Board will refer to decisions of these agencies for guidance. The general counsel to the GAO Personnel Appeals Board acts in the place of the Special Counsel to the Merit Systems Protection Board. In this way, the employees of the GAO retain all the rights enjoyed by employees in the executive branch, while, at the same time, the conflict of roles is eliminated."

H.R. Rep. No. 494, 96th Cong., 1st Sess. 5-6 (1979).

Again, at 14-15 of this Report, supra, the Committee noted:

"Section 4(m) requires the Board to promulgate regulations providing for employee appeals consistent with the principles of chapter 77 of title 5, United States Code, and establishing its operating procedures. The committee intends that regulations providing for appeals shall be carefully drawn to ensure that 'GAO employees are entitled to the same rights and protections as employees in the executive branch.' For example, the burden of proof and the standard of proof should be the same in cases appealed to the Board as they are in similar cases appealed to the Merit Systems Protection Board; the same rights to a transcript and representation should attach; and the same right to recover back pay and attorney fees should be provided."

The clear impact of the cited provisions is that the Board (and implicitly its General Counsel) must be a multi-functioning entity, with the responsibilities of the MSPB, FLRA, Special Counsel and EEOC being lodged in a single body. Consequently, the Board and its General Counsel must perform many roles. For example, the prosecutorial and investigative functions of the General Counsel of the FLRA must perforce be placed in the hands of the Board's General Counsel in addition to his responsibilities as Special Counsel for Respondent's employees.

Similarly, this enabling legislation provided in Section 4(m) that the implementing regulations of the Board provide employees of Respondent with "the same rights and protections as employees in the executive branch." The Board was delegated broad discretion by Congress for this purpose. Moreover, the regulations promulgated by the Board were adopted only after a thorough examination of all the alternatives seemingly available to the Board.

While the Board accorded consideration to Respondent's reservations in this area as expressed in its comments on the Board's interim rules, the ultimate responsibility clearly rested with the Board; a fact which Respondent recognized in its comments. A contrary interpretation would have ignored the Congressional mandate that the Board be independent of Respondent in evaluating and deciding cases brought before it. After due deliberation and consistent with the intent of Congress, the Board adopted its present regulatory framework. That scheme delegates broad authority to the principal full-time employee of the Board--its General Counsel.

The arguments espoused by Respondent in its memorandum in support of its motion do not persuade the Board that its present regulatory framework for processing appeals to the Board, particularly the broad delegations of authority to the General Counsel, exceeds the Board's statutory authority. In fact, the rights and protections accorded Respondent's employees by the new law, when set within the context of the unique and singular body created by Congress as the ultimate administrative forum for those rights and protections, militates against a lesser role for the Board's General Counsel.

The analogies with the executive branch offered by Respondent to support its position are not considered relevant here. In fact, tracing Respondent's argument here to its infinite limits, all executive branch employees ultimately work for the chief executive. Marbury v. Madison, 5 US 137 (1803). More importantly, if the Board is to be independent of Respondent and the Comptroller General for this purpose, and considering that the Board is a legislative branch agency, then its General Counsel must be appointed by the Board. Finally, regarding tenure, if Congress had intended that the General Counsel be appointed for a fixed term, it would have so provided, as it did for the members of the Board.

Similarly, which Section 4(m) of the new law requires the Board to promulgate regulations consistent with the principles of 5 U.S.C. §§7701-7702, these latter provisions pertain to employee rights, not the role of the Special Counsel of the MSPB.

Lastly, with respect to the alleged influence of the Board over its General Counsel, pages 12-15 of the latter's memorandum of October 1, 1981, note that the Board considered at least five options to implement Section 4 of the new law. While the appearance of conflict of interest between the Board and its General Counsel varies with each option, the "potential" for conflict was not the sole criterion utilized by the Board in adopting option five. Although the Board concluded that option five created the least conflict of interest, the overriding consideration was the Congressional mandate that the Board adopt a regulatory scheme embodying at least four distinct executive branch agencies and provide employees of Respondent the same procedural safeguards set forth in 5 U.S.C. §7701-7702.

Nothing presented by Respondent dissuades us from the propriety of the regulations adopted by the Board. Accordingly, the first contention of Respondent is rejected.

As a corollary to these arguments on the authority of the General Counsel to represent individual employees in claims before the Board, Respondent questions the three grounds relied upon by the Presiding Member at the hearing on July 28, 1981, in rejecting Respondent's original motion to disqualify the Board's General Counsel:

(1) The motion was not timely filed;

(2) Deferral would prejudice the Petitioner's rights; and

(3) Other alternatives are available to contest the authority of the Board's General Counsel to represent Respondent's employees before the Board.

Addressing the first ground cited, Respondent did not raise this issue until July 24, 1981, four days before the scheduled hearing, even though Respondent was made aware by the Petition dated May 29, 1981, that the Board's General Counsel intended to represent the Petitioner. In point of fact, the motion was presented only two work days before the scheduled hearing or nearly eight weeks after the Petition was filed with the Board.

Respondent asserts in its memorandum that it actually raised the issue on May 1, 1981, as part of its overall comments on the Board's interim regulations. However, as pointed out earlier in this analysis, raising this point as part of Respondent's general comments on the interim regulations is in no way equivalent to a motion to disqualify. Therefore, this argument is considered to be without merit.

Addressing the second ground for denial of the original motion, i.e., prejudice to the Petitioner, Respondent asserts that Petitioner's temporary loss of employment status and compensation is less harmful than the "far greater harm" to Respondent. (See page 6 of Respondent's memorandum.) The Board disagrees with Respondent's position for the reasons which follow. First, no compelling or persuasive arguments are offered in support of this assertion. Second, failure to accept the Petition would have resulted in direct and immediate harm to the Petitioner--loss of employment status and pay--versus the potential for some unidentified harm to the agency. Clearly, due process considerations outweigh any potential but unarticulated injury to Respondent. Third, while direct and immediate prejudice to Petitioner would have followed the granting of the motion to disqualify, there has been no showing of direct or immediate prejudice to Respondent by the Board's denial of that motion.

Focusing on the third ground for denying Respondent's motion, i.e., other alternatives are available to Respondent to challenge the authority of the Board's General Counsel, the essence of Respondent's position is the appearance of a conflict of interest and the authority of the Board to delegate such powers to its General Counsel. These arguments have already been addressed in this analysis. Additionally, Respondent has not offered any evidence to support this assertion. Accordingly, the Board also rejects Respondent's argument on the third ground relied upon by the Board's Presiding Member in denying Respondent's motion to disqualify.

The second contention offered by Respondent in its motion to reopen and reconsider is that the Board's initial decision ignored time-after-competitive-appointment and time-in-grade restrictions applicable to Petitioner's appointment.

Respondent argues that the Board ignored the restrictions set forth in Chapters 330 and 300, respectively, of the Federal Personnel Manual, in its decision of August 11, 1981. Moreover, Respondent asserts that an entry on Petitioner's SF-52 was the controlling factor in the Board's determination that the Petitioner was entitled to the procedural safeguards of 4 C.F.R. §7.6 prior to his termination. Administrative and judicial authority are then cited in support of this position.

The controlling regulations in this case are set forth in Subpart H of 5 C.F.R Part 315 entitled, "Probation on Initial Appointment to a Competitive Position." Specifically, section 315.801 states in pertinent part that:

"(a)The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period when the employee:

(1)Was appointed from a register;

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(b)A person who is:

(1)Transferred under §315.501; or

(2)Promoted, demoted, or reassigned; before he completed probationary period in the new position."

Additionally, section 315.802 states that:

"(a)The probationary period required by §315.801 is 1 year.

(b)OPM shall publish in the Federal Personnel Manual a statement of the conditions under which prior service is counted toward completion of a probationary period."

Thus, if Petitioner was given an appointment from a register (certificate of eligibles) under section 315.801(a)(1), the Petitioner would be required to serve a one-year probationary period from the date of that appointment. Contrastingly, if Petitioner was transferred under section 315.501 before he completed the one-year probationary period, then Petitioner would merely have to complete that one-year period in the new position rather than serve another year in the new position to satisfy the probationary period requirements. Finally, with respect to who may be transferred for this purpose, section 315.501 cited above states that:

"An agency may appoint by transfer a career or career-conditional employee of another agency."

Thus, if Petitioner in this case was appointed by transfer as a career-conditional employee, under section 315.801(b)(1), he would not have to serve a new, one-year probationary period. However, if Petitioner was given his career-conditional status under his appointment to Respondent from the certificate of eligibles, under section 315.801(a)(1), he would have to serve a new, one-year probationary period with Respondent.

Essentially, Respondent argues that the time-after-competitive- appointment restriction (found at Chapter 330, Subchapter 5, Paragraph 5-1.b of the Federal Personnel Manual) and the time-in-grade restriction (found at Chapter 300, Subchapter 6, Paragraph 6-2.b) prevented Respondent from legally appointing Petitioner by transfer. That is, since Petitioner was given a promotion to the GS-7 level when appointed by Respondent after having served less than one year at the GS-5 level with his former agency, and since a transfer is a noncompetitive procedure, if Respondent's appointment of Petitioner had been purely a transfer, then Petitioner's appointment would have violated two OPM competitive appointment principles: time-after-competitive-appointment and time-in-grade restrictions.

The difficulty with Respondent's argument is that Petitioner's appointment was neither a pure transfer nor a pure competitive appointment. As noted at pages 3-4 of the Petitioner's supplemental brief dated July 31, 1981, and cited at page 19 of its memorandum of October 1, 1981, Petitioner's appointment was a two-step process:

(1) His name was selected from a certificate of eligibles; and

(2) His appointment was effectuated by transfer from the Defense Logistics Agency to Respondent without a break in service.

Step (1) is a competitive procedure. Step (2) is a non-competitive procedure. Therefore, the issue is whether the appointment of a career-conditional employee by transfer after selection from a certificate of eligibles violates either of the OPM restrictions cited above.

The answer is found at: Chapter 300, Subchapter 6, Paragraph 6-4.a of the Federal Personnel Manual, which states that the time-in-grade restriction does not apply to a person who is within reach on a civil service register for a career or career-conditional appointment; Chapter 330, Subchapter 5, Paragraph 5-1.b of the Federal Personnel Manual, which states that the time-after-competitive-appointment restriction applies only to promotions within an agency; and Chapter 300, Subchapter 5, Paragraph 5-2.a of the Federal Personnel Manual, which states that the time-after-competitive-appointment restriction does not apply to a person who is within reach on a civil service register for a career or career-conditional appointment. Thus, Petitioner's appointment by transfer from the Defense Logistics Agency to Respondent--itself a non-competitive process as noted above--was legal since the Petitioner was first selected from a certificate of eligibles. Consequently, as noted at page 11 of the report of the General Counsel accompanying the Petition in this case, under Paragraph 8-2 of Subchapter 8 of Chapter 315 of the Federal Personnel Manual:

"(a)...If an agency selects an employee from a certificate of eligibles, but appoints him/her non-competitively by...transfer...the agency follows the instructions on probation in paragraph...e below...

(e)The...transfer of a...career-conditional employee before he has completed probation is subject to satisfactory completion of the probationary period in the new position. The employee does not have to serve a new probationary period after...transfer regardless of a change in his line of work."

Thus, the quoted language from Chapter 315 is merely an elaboration upon the regulation which specifically governs this case -- 5 C.F.R. §315.801(B)(1) quoted earlier in this analysis:

(b)A person who is:

(1)Transferred under §315.501...before he completed the probationary period in the new position."

This Petitioner was given a career-conditional appointment on March 10, 1980. Effective May 4, 1980, he was given a career-conditional appointment by transfer to Respondent. Thus, on March 9, 1981, Petitioner completed his probationary period. One day later, he was informed of his termination by a letter from the Respondent's Director of Personnel. Since that termination was not effected pursuant to 4 C.F.R. §7.6, a panel of three Board Members ordered Respondent to reinstate Petitioner retroactively and with backpay.

The foregoing analysis confirms the validity of the initial decision.

While Respondent has also asserted that the Board should accept the statement of an OPM official regarding the proper interpretation of certain provisions of the Federal Personnel Manual, that interpretation is contrary to the plain and unambiguous language of Chapters 300, 315 and 330 of that Manual. Although Respondent made this argument in its original submissions to the Board, it has provided no new evidence or legal authorities in its memorandum in support of its motion to reopen and reconsider. Therefore, we reject this contention too.

Finally, Respondent contends that the original decision of the Board in this case erroneously relied upon certain entries on Petitioner's SF-52. Citing National Treasury Employees v. Reagan, Civ. Action No. 81-1297 (D.C. Cir., August 11, 1981), Respondent argues that since entries on SF-50 and SF-52 forms are purely ministerial acts, an administrative error made in such entries would constitute harmless error. However, the argument and the case cited in support of that argument are not relevant to this case. Reagan, supra, can be distinguished from Petitioner's case on several grounds. First, the plaintiffs in Reagan were applicants for Federal employment; Petitioner was a career-conditional employee of Respondent at the time this dispute arose. Second, the entries on the SF-50 and SF-52 forms pertaining to the plaintiffs in Reagan were pertinent to the determination as to when the appointment of each plaintiff in that action was to be legally effective; the relevant entries on the SF-52 for Petitioner's appointment pertain to the nature of his appointment, not to when it was effective. Third, the court in Reagan apparently concurred in the plaintiffs' argument that entries on SF-50 and SF-52 forms are purely ministerial acts; the entries on Petitioner's SF-52 relevant here relate to the nature of his appointment, not whether that appointment action was legally completed by the mere execution of the SF-52 (and SF-50) forms as in Reagan. Therefore, the court's holding in Reagan is not dispositive of Petitioner's case.

Respondent has also misconstrued the quoted language from the Board's initial decision in this case. Respondent, as noted by the Board's General Counsel at page 21 of his memorandum in opposition to the Respondent's Motion to Reopen and Reconsider, has two options in appointing the Petitioner. Respondent elected to effect that appointment by transfer after selection from a certificate of eligibles. Respondent cannot at this late date decide that its original appointment decision was the wrong option. If the Board were to permit such a course of action by Respondent, it would be condoning arbitrary and capricious agency action, particularly when such action would be to the detriment of the Petitioner. Accordingly, the Board rejects this argument as well.

## **Decision**

The Board, having considered the Respondent's Motion to Reopen and Reconsider the Board's initial decision in Shaller v. General Accounting Office, M1 (August 11, 1981), and, based on the foregoing analysis, affirms its original decision. Accordingly, Petitioner is entitled to retroactive reinstatement to the position of Management Analyst, GS-343, at the grade level of a GS-7, Step 2, from March 21, 1981.