

Thomas A. Quarry v. U.S. General Accounting Office

Docket No. 08-701-17-81

Date of Decision: December 21, 1981

Cite as: Quarry v. GAO (12/21/81)

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

Timeliness of Discrimination Complaint

RECONSIDERATION of Quarry v. GAO M5 (October 13, 1981)

Background

A panel of three Board Members issued the initial decision in this case on October 13, 1981. The Board received a Motion to Reopen and Reconsider on October 30, 1981, from the Petitioner. The Board received from the General Accounting Office (hereinafter referred to as "Respondent") a Response to Motion to Reopen and Reconsider.

Contentions of the Parties

The Petitioner attacks the initial Board decision on eight grounds. The Respondent replied by addressing the arguments set forth in Petitioner's motion and recommends that this Board deny Petitioner's motion.

Analysis

A motion to reopen and reconsider under 4 C.F.R. §28.25(c) must be supported by "new and material evidence" or it must be shown that the initial decision was "based on an erroneous interpretation of statute or regulation." Since Petitioner has not offered any new evidence, the Board can only evaluate Petitioner's motion on the second basis for review set forth in section 28.25(c).

Petitioner first contends that the Panel's failure to grant his request for a hearing violates 4 C.F.R. §28.19. However, the right to a hearing under section 28.19 presupposes that the petition is within the Board's "jurisdiction" under 4 C.F.R. §§28.3(i) and 28.11(a), and has been timely filed under 4 C.F.R. §§28.11 and 28.17. Since the Panel ruled in its initial decision (see page 5) that the Petitioner did not timely file his complaint of discrimination within 30 days after he became aware of the alleged act of discrimination in 1979 and that Petitioner did not show good cause for the Board to waive its time limits, the Panel--in effect--concluded that it lacked jurisdiction over this petition. Therefore, the Panel properly denied Petitioner's request for a hearing.

Petitioner next contends that under Arnett v. Kennedy, 416 U.S. 134 (1974), the Panel's failure to grant his request for a hearing violated his right to due process of law under the Fifth Amendment to the United States Constitution. The Board rejects this contention as well, since the right to a post-termination hearing under Arnett v. Kennedy, supra, presupposes that Petitioner filed his petition for review and a hearing on a timely basis, contrary to the case at bar.

Third, Petitioner contends that the Panel violated provisions of the Civil Service Reform Act and the Board's regulations by not ruling on Petitioner's Motion to Open Hearing. Since 4 C.F.R. §28.21(k) relates to intervenors, Petitioner has made an incorrect reference here. Nevertheless, in addressing Petitioner's contention here we note that the legal effect of the Panel's determination to grant the Respondent's Motion to Dismiss Appeal was to negate the entire proceeding, including all pending motions. However, even assuming the validity of Petitioner's argument, the Panel's failure to rule specifically on this motion would be a de minimis error under the circumstances and thus would not change the Panel's determination in this case.

Fourth, Petitioner contends the Panel contradicted itself by appearing to reject timeliness as an issue (at page 4 of the decision), yet deciding the case (at page 6 of the decision) on that point. Petitioner misconstrues the Panel's decision here. The panel, in essence, stated (at pages 4 and 6 of the decision) that because this case was to be decided on procedural grounds, i.e., timeliness, it was not necessary to consider the merits of the case or the various arguments proffered by Petitioner or Respondent. Accordingly, there is no inconsistency between the Panel's statements at pages 4 and 6 of the initial decision. Stated differently, the Panel concluded that it lacked jurisdiction to consider this case on the merits, having decided it on procedural grounds by granting the Respondent's motion.

Fifth, Petitioner argues that the Panel erroneously relied upon a decision of the Merit Systems Protection Board in Hilberto Alonzo, et al., Decision and Order No. DA075209013; SF075209012; and SF075209018 (November 24, 1980), 80 FMSR 7032, in deciding this case. Petitioner also asserts that the Board cannot adjudicate his case without first granting a hearing and considering all the evidence. The Panel relied upon Alonzo, supra, because it sets forth the general standards for determining whether good cause has been shown to justify a waiver of a time limitation. As noted in that case, relevant criteria for making that determination include the following:

"...the length of the delay; whether appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his ability to comply with the time limits; the degree to which negligence by the appellant has been shown to be present or absent; circumstances which show that any neglect involved is excusable neglect; a showing of unavoidable casualty or misfortune; and the extent and nature of the prejudice to the agency which would result from waiver of the time limit." Alonzo v. Department of Air Force, supra.

A review of the record in this case and the Panel's decision persuade the Board that, contrary to the assertion of Petitioner, the Board did view the facts here in the most favorable light to the Petitioner. Moreover, if, as here, Petitioner has been unable to make such a showing, then there is no basis for granting the hearing requested by Petitioner. Accordingly, the Board rejects Petitioner's arguments here.

Sixth, the Petitioner contends that the Panel's Findings of Fact were erroneous as to Respondent's alleged efforts to have Petitioner undergo a psychiatric examination. Petitioner evidently disputes the Panel's summary of the facts at pages 2-3 of the initial decision. That summary was based upon the Panel's view of the record before it. Even assuming arguendo that Petitioner's assertion is correct here, the finding of fact in question is not relevant to the Panel's determination that Petitioner did not timely file his original EEO complaint with Respondent. Thus, the Board must reject this assertion of the Petitioner.

Seventh, the Petitioner contends that the Panel erroneously stated in its decision that the Petitioner had filed a Motion to Strike a list of witnesses. Again, even assuming arguendo that Petitioner's assertion is correct, this is not relevant to the Panel's determination that Petitioner did not timely file his original EEO complaint with Respondent.

Eighth, the Petitioner asserts that the Panel failed to rule on his Motion for Ruling under Consent Decree from Smith v. Staats, Civil Action No. 78-0098 (D.D.C. March 23, 1979). Again, Petitioner seems to miss the legal consequences of a determination on procedural grounds as occurred in his case. Whether or not Petitioner is within the class of plaintiffs entitled to the protections of that consent decree, his failure to timely file his EEO complaint in 1979 rather than 1981 precludes the Board from considering the applicability, if any, of Smith v. Staats, supra, to Petitioner's case here. Therefore, the Board also rejects this argument of Petitioner.

Decision

The Board, having considered the Petitioner's Motion to Reopen and Reconsider the Board's initial decision in Quarry v. GAO, M5 (October 13, 1981), and based on the foregoing analysis, affirms its original decision. Accordingly, Petitioner's EEO complaint filed with Respondent on May 7, 1981, was not timely filed.