

Paul E. Roberts v. U.S. General Accounting Office

Docket No. 112-211-17-89

Date of Decision: November 13, 1989

Cite as: Roberts v. GAO (11/13/89)

Before: Kaplan, Member

Performance Appraisal

Performance Appraisal

Motions for Summary Judgment

DECISION

BACKGROUND

Petitioner is a GS-14 Economist in Respondent's Human Resources Division. On June 2, 1989, Petitioner filed a Petition for Review alleging that prohibited personnel practices were committed by Respondent in conjunction with a performance appraisal Petitioner received in February, 1989. Petitioner was rated borderline in one element of the subject performance appraisal, and unacceptable in two other elements. Petitioner alleges that the performance appraisal was administered in violation of the applicable GAO regulations, and, therefore, is a prohibited personnel practice in violation of 5 U.S.C. §2302.

Respondent replied to the Petition for Review on June 29, 1989, and after some preliminary discovery, Petitioner filed a motion for summary judgment on August 11, 1989. In support of his motion, Petitioner alleges the following facts as undisputed on the record:

1. It is a prohibited personnel practice for a GAO employee to execute a performance appraisal in violation of a law, rule, or regulation which implements or directly concerns a merit system principle.
2. This case involves a law: 5 U.S.C. §4302.
3. This case involves two rules or regulations: GAO Order 2430.1 and the BARS Manual.
4. GAO Order 2430.1 and the BARS Manual contain mandatory requirements that constitute enforceable rules or regulations which GAO must follow.
5. GAO Order 2430.1 and the BARS Manual implement or directly concern specific merit system principles (5 U.S.C. §2301(b)(3) and (6)).
6. 5 U.S.C. §4302 is a law that concerns or directly implements the above-cited merit system principles.
7. 5 U.S.C. §4302 is made applicable to GAO by 32 U.S.C. §732(d)(1).

8. Violation of 5 U.S.C. §4302 by any GAO employee would constitute a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(11).

9. The GAO Personnel Act requires GAO to develop one or more performance appraisal systems, which must establish and communicate performance standards.

10. GAO Order 2430.1 carries out the mandate of the GAOPA, and requires performance standards to be established, written, and communicated to each employee at the beginning of each rating period.

11. The BARS Manual requires that the performance standards be jointly agreed upon by the supervisor and employee in an "expectation-setting" process.

12. Expectations are set based on the Grade Level Role Definition and the Task Inventory as set forth in the BARS Manual.

13. Petitioner's supervisor did not follow the BARS Manual in setting expectations with Petitioner, as follows:

a. He did not use the BARS Manual, except to the extent that he made general reference to it during the meeting.

b. He did not use the Task Inventory from the BARS Manual as a "checklist" to identify "those tasks in the inventory that should be done during the assignment."

c. He did not use the Task Inventory to indicate to Petitioner which of his tasks were most important to accomplishing the objectives of the assignment.

d. He did not use the Performance Level Definitions to communicate performance standards to Petitioner.

e. He did not use the Performance Statements to communicate performance standards to Petitioner.

f. He did not use the Performance Level Definitions along with and as a cross-check to the Performance Statements to communicate performance standards to Petitioner.

14. The applicable provisions of the BARS Manual and GAO Order 2430.1 are mandatory.

15. The failure of Petitioner's supervisor to follow the BARS Manual regarding setting of expectations for performance standards violates 5 U.S.C. §4302 and GAO Order 2430.1.

Petitioner contends that, if it is found that the subject performance appraisal was not executed in conformance with the applicable statutes and regulations, then a prohibited personnel practice was, in fact, committed, and he is entitled to judgment, as a matter of law. Should summary judgment be granted in favor of Petitioner, Petitioner requests relief in the form of an order requiring Respondent to destroy the subject performance appraisal and expunge it from all records.

On September 18, 1989, Respondent filed its opposition to Petitioner's motion for summary judgment. Respondent claimed in its opposition to Petitioner's motion a complete denial of Petitioner's contentions of fact, making several arguments in the process. Respondent first argues that the BARS Manual does not constitute a mandatory rule which implements or directly concerns a merit system principle. Respondent

asserts that, instead, the BARS Manual is a procedural reference guide to aid Agency supervisors and employees in utilizing the performance appraisal process. Because the BARS Manual is suggestive, and not mandatory, Respondent contends, the Manual gives Agency supervisors broad discretion in carrying out its provisions as to setting expectations for employees' performances, but does not require that specific tasks be performed by the supervisor in setting expectations.

Respondent contends, therefore, that the BARS Manual is a set of non-binding procedural rules that do not have the effect of mandatory regulations for the Agency. Respondent buttresses its arguments with case law precedent, extractions of language from the BARS Manual, and letters of transmission from high-level Agency officials.

Respondent also disputes Petitioner's account of the methods by which expectations were set for Petitioner's performance during the subject appraisal period, and concludes by arguing that the undisputed facts show that Petitioner was a poor performer who understood exactly what was required of his performance, but simply failed to perform acceptably.

ANALYSIS

Rule 56 of the Federal Rules of Civil Procedure governs the standards for summary judgment. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Entry of summary judgment is mandatory when a party fails to make a showing sufficient to establish the existence of material facts essential to that party's case and upon which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party seeking summary judgment has the burden of proving the absence of any issue of material fact. Addickes v. S.H. Kress and Co., 398 U.S. 144, 157 (1970). In deciding whether any issue of material fact exists, the Board must accept the Agency's version of the fact, since the trier of fact is required to resolve all issues of fact in favor of the party opposing the motion for summary judgment. Bishop v. Wood, 426 U.S. 341, 347 and n. 11 (1976). In resolving the motion for summary judgment, the trier of fact must study the record, and if a review of the record resolving all issues of fact in favor of the nonmoving party leads to the belief that inferences adverse to those of the moving party might be permissible, then the motion for summary judgment must be denied. United States v. Diebold, 369 U.S. 654, 655 (1962). Thus, the first, and most important, inquiry in resolving a motion for summary judgment is the determination of whether there are any material facts in issue.

Summary judgment will lie only if there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are facts which might affect the outcome of the litigation under the law governing the issues of the litigation. Factual disputes which are irrelevant or unnecessary are not to be considered. Id. Thus, the moving party must not only make certain factual allegations which, standing alone, would permit judgment to be rendered in his favor, but must present undisputed evidence in support of those allegations to prove that judgment in his favor is warranted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248-49 (citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89 (1968)). At the summary judgment stage, the judge's function is not to himself weigh the evidence for the truth of the matter asserted, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is enough evidence favoring the nonmoving party for a jury to

return a verdict for that party. *Id.* Thus, the evidence must be so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-52.

Here, there are several issues of material fact, some of them crucial to the very outcome of this litigation. Petitioner contends that the BARS Manual, read in conjunction with GAO Order 2430.1, constitutes a set of mandatory Agency regulations binding on Respondent to the extent that, because they were not properly followed, a prohibited personnel practice has been committed. Respondent counters by asserting that the BARS Manual is not a rule or regulation, but a procedural reference guide to be used at the discretion of Agency supervisors. Moreover, Respondent argues that, even if the BARS Manual is found to be mandatory, its provisions were complied with, and therefore, there was no prohibited personnel practice committed.

The resolution of the issue of the legal status of the BARS Manual is indispensable to the merits of this case. It is also necessary to decide, regardless of the status of the BARS Manual, whether or not expectations were set for the Petitioner's performance in accordance with the procedures required by the BARS Manual, and applicable law. Petitioner argues that his supervisor failed to properly set expectations for Petitioner's performance. Petitioner alleges that only one expectation setting meeting was held, and that meeting took place over three months after the performance appraisal period began, and that during that meeting, the BARS Manual provisions on expectation setting were violated. Respondent disputes these issues, alleging that several meetings were held, both before and during the appraisal period, and that expectations were properly set. Respondent asserts that, at all times relevant to the subject appraisal period, Petitioner was aware of what was expected of his performance, and of the standards by which his performance would be appraised.

Clearly, there are a number of disputes regarding material facts which are critical to the outcome of this case. In my view, these issues cannot be resolved based on the evidence in front of me, but can only be decided after a hearing on the merits. Accordingly, the Petitioner's motion for summary judgment is denied.

Respondent also filed a motion in limine with its opposition to Petitioner's motion for summary judgment. Respondent's motion requests exclusion of all evidence and testimony concerning whether the procedures outlined in the BARS Manual were followed. For the reasons outlined above in this analysis, such evidence may be highly probative of the merits of this case. For that reason, Respondent's motion in limine is denied.

CONCLUSION

For the above reasons, Petitioner's motion for summary judgment is hereby DENIED, and, correspondingly, Respondent's motion in limine is hereby DENIED.

So ORDERED.

GAO/PAB-95-2 Personnel Appeals Board Decisions