

GS-13/14 Management & Policy Advisory Council and Career Level Council v. U.S. General Accounting Office

Docket No. 116-600-GC-89

Date of Decision: July 25, 1990

Cite as: GS-13/14 Management & Policy Advisory Council v. GAO (7/25/90)

Before: Jonathan E. Kaufman, Member

Statutory Construction

Authority of PAB

Labor Management Relations

Timeliness

PAB Regulations

Standing

Motion to Dismiss

Exhaustion of Remedies

Ripeness

DECISION ON MOTION TO DISMISS

On October 13, 1989, Petitioners, represented by the PAB General Counsel, filed a Petition for Review challenging the validity of certain provisions of the GAO Labor Relations Order, Order 2711.1. On November 16, 1989, Respondent filed its Answer to the Petition for Review denying the allegations in the Petition for Review, and asserting that Petitioners are not entitled to relief in any form. After discovery was commenced, Respondent requested that discovery be held in abeyance in order that it could file a motion to dismiss. On February 9, 1990, Respondent filed a motion to dismiss the Petition for Review. Respondent contends: (1) that the PAB does not have jurisdiction to hear this case; (2) that even if the PAB does have jurisdiction over the subject matter of the Petition for Review, the Petition is untimely; (3) that the claims presented in the Petition for Review are not ripe for adjudication; and (4) that the Petitioners lack standing to present these claims, and have failed to exhaust their administrative remedies before filing with the Board.

Petitioners have duly filed their opposition to Respondent's motion to dismiss. By leave of the undersigned, Respondent has filed a reply to Petitioners' opposition to the motion to dismiss.

FACTS

Petitioners are chartered, authorized employee organizations at GAO. GAO Order 2711.1 provides that official employee groups such as Petitioners may bring policy issues regarding Order 2711.1 to the PAB for resolution. Order 2711.1 at para. 5.i. Petitioners have requested that this Petition for Review be processed pursuant to 4 CFR 28.12 of the PAB Rules and Regulations, which is the subsection of the Regulations dealing with PAB General Counsel procedures. Petitioners raise two policy issues in their Petition for Review. The first is whether the definition of a supervisor in GAO Order 2711.1 is inconsistent with 5 U.S.C. Sec. 7100 *et seq.*, which is the United States Code chapter dealing with labor-management relations under the Civil Service Reform Act of 1978. The second issue is whether the prohibitions in Order 2711.1 against GAO employees being represented by unions that represent other Federal employees is inconsistent with Chapter 71 of Title 5.

Petitioners contend that the definition of supervisor in GAO Order 2711.1 is inconsistent with 5 U.S.C. 7703 because it contains additional language raising a presumption that all GS-13 and above evaluators and evaluator-related positions are supervisors. The language defining supervisor in the GAO Order is as follows:

Supervisor" means an individual employed by GAO having authority in the interest of GAO to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievance, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment. All GS-13s and above performing auditing work who are not management officials as defined in subparagraph 3g below are presumed to be supervisors. This presumption is subject to rebuttal in individual cases. Order 2711.1, para.3f (emphasis supplied).

The language defining supervisor in Chapter 71 is as follows:

Supervisor" means an individual employed by an agency having authority in the interest of the Agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievance, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority. 5 U.S.C. Sec. 7103(a)(10).

Petitioners also allege that the provision in GAO Order 2711.1, para. 4.c. is inconsistent with the parallel provision in Chapter 71. The language in the GAO Order is as follows:

c. To avoid conflicts of interest and the appearance of conflicts of interest, employees classified as GAO Evaluators, employees otherwise classified who are performing comparable work, and employees classified as Attorney-Advisers shall not be represented by a labor organization which:

- (1) Represents other individuals employed by the Federal Government, or by state or local governments, or individuals employed in the private sector who work on programs or projects subject to GAO audit; or
- (2) Is affiliated, directly or indirectly, with a labor organization which represents employees mentioned in subparagraph 4c(1) above.

5 U.S.C. Sec. 7112 is the comparable Executive Branch provision. The pertinent language in that section is as follows:

Sec. 7112. Determination of appropriate units for labor organization representation

(a)....;

(b)A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1)except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2)a confidential employee;

(3)an employee engaged in personnel work in other than a purely clerical capacity;

(4)an employee engaged in administering the provisions of this chapter;

(5)both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6)any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7)any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c)Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1)which represents other individuals to whom such provision applies; or

(2)which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

ANALYSIS

In ruling on this motion to dismiss, we must first clearly state the legal standards to be applied. In deciding motions to dismiss, even where jurisdictional issues are at stake, the facts in the case must be viewed in the light most favorable to the party opposing the motion to dismiss. Scheuer v. Rhodes, 416 U.S. 232 (1974). A motion to dismiss shall be granted only if it appears beyond doubt that there is no set of facts upon which the Petitioners may be entitled to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); Gordon v. National Youth Work Alliance, 675 F.2d 356, 358 (D.C. Cir. 1982).

Since this matter involves construction of the General Accounting Office Personnel Act (GAOPA), I am also called upon to interpret the legislative intent of Congress as regards the purpose of the GAOPA, which created the Board, and gives us our mandate to operate. When interpreting the legislative intent of Congress, we must begin with the language of the statute itself. Jackson Transit Authority v. Amalgamated Transit Union, 457 U.S. 15, 23 (1981). Where the legislative intent is not plain, one must accord substantial deference to the interpretation of the agency charged with enforcing the statute. American Federation of Government Employees v. Federal Labor Relations Authority, 777 F.2d 751, 757 (D.C. Cir. 1985). Should there be any ambiguous provisions in a statute, they should be construed with reference to the statute's manifest purpose. Lawson v. Suwanee Steam Ship Co., 336 U.S. 198, 201 (1948).

With these standards in mind, I will now discuss, seriatim, Respondent's various arguments in favor of its motion. Respondent's first contention is that the PAB lacks subject matter jurisdiction to decide the Petition for Review because the GAOPA gives the Comptroller General exclusive authority to establish a labor-management relations program at GAO. Respondent urges that, as long as the GAO labor-management relations program is consistent with Chapter 71, the Comptroller General has complete discretion to design the program as he sees fit, and the PAB's jurisdiction in the program is limited only to those issues delegated to it by the Comptroller General. In this case, Respondent argues, the Comptroller General, through Order 2711.1, has limited the PAB's role to issuing policy statements only in those instances where the PAB is serving as an interpreter and administrator of GAO Order 2711.1.

Respondent's argument is not persuasive here. It is well-settled that the PAB was created and given authority under the GAOPA to provide GAO employees the same scope of protection as Executive branch employees receive under the combined umbrellas of the Equal Employment Opportunity Commission, the Merit Systems Protection Board, the MSPB Special Counsel, and the Federal Labor Relations Authority, and that, for the purposes of labor-management relations issues, our jurisdiction is comparable to that of the Federal Labor Relations Authority. See, General Accounting Office v. GAO Personnel Appeals Board, 698 F.2d 516 (D.C. Cir. 1983). In that same case, the U.S. Court of Appeals for the District of Columbia Circuit ruled that we are an independent agency, co-equal to the GAO in enforcing and adjudicating GAO employees' rights under the GAOPA, and that any interpretation we make of our authority under the GAOPA is to be given the special deference reserved for agencies charged with setting in motion the new machinery of their enabling legislation. Id. (Citations omitted). It is equally well settled that the FLRA, like the NLRB in the private sector, is vested with broad rulemaking and interpretive powers. See, American Federation of Government Employees v. Federal Labor Relations Authority, 716 F.2d 47 (D.C. Cir. 1983); National Treasury Employees Union v. FLRA, 701 F.2d 781 (D.C. Cir. 1983); Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir.), cert. denied, 455 U.S. 945 (1981). The FLRA must resolve issues in a manner that encourages Federal employees to exercise their rights under the [labor-management relations provisions of the Civil Service Reform] Act. American Federation of Gov't Employees v. FLRA, supra, 716 F.2d at 50-51. The Personnel Appeals Board must act in a similar manner, and GAO can delimit us only through a successful appeal to the courts. General Accounting Office v. General Accounting Office PAB, supra, at 523-24. If the manner in which we construe or interpret the GAOPA (which incorporates 5 U.S.C. Sec. 7100, by express reference) is reasonably defensible, then that construction or interpretation must be upheld. Department of Defense v. FLRA, supra, 657 F.2d at 1144. As part of its role in the Federal labor-management relations program, the FLRA has the authority to issue policy guidance decisions, where appropriate, and has exercised that authority many times. In light of our specific legislative mandate, the PAB has similar authority. GAO recognizes this in Order 2711.1, para. 5. That same Order also recognizes employee groups as among the entities that may request such policy guidance from the PAB. The Petitioners in this action are authorized employee organizations covered by the Order 2711.1. Based on this, the PAB has jurisdiction to issue a decision in this matter.

Respondent agrees that the Board may issue policy guidance on labor-management relations issues, but argues that the Board's authority is subject to the dictates of the Comptroller General. This argument is inconsistent with both the legislative history and the case law development of the GAOPA. Congress intended that GAO employees enjoy the same rights and protections under the GAOPA as executive branch employees have under the Civil Service Reform Act of 1978. See discussion at 698 F.2d 528-32. Moreover, the intent of Congress was not that the PAB be subject to the veto power of the Comptroller General, or have the powers of the PAB under the GAOPA circumscribed by the authority of the

Comptroller General, but to give the PAB the same "wide discretion" as the Comptroller General in contributing to the establishment of the GAO's independent personnel system. Id. at 531-32. Any contrary interpretation of the authority of the Board would be inconsistent with Congressional intent as to the division of functions between the PAB and the GAO. 698 F.2d at 532. Thus, Respondent's motion to dismiss as regards the jurisdiction of the PAB to issue policy decisions regarding the interpretation of labor-management relations issues under GAO Order 2711.1 is denied.

With respect to the timeliness issue, Respondent argues that Petitioners' claims are time-barred because, while the PAB Rules and Regulations require that all non-EEO Petitions for Review must be filed within twenty days of the effective date of the cause of action, Petitioners are not bringing their challenge to Order 2711.1 until over eight years after it was issued. Respondent further argues that, even if the Petition for Review were filed under the Unfair Labor Practices procedures of the PAB Rules and Regulations, Petitioners would still be out of time because that section requires that appeals be filed within nine months for the PAB to assume jurisdiction.

The fact that an agency may have promulgated regulations a number of years before an appeal is filed challenging those regulations does not immunize those regulations from attack, even where there is a statutory limitations period that has expired. Parties may challenge regulations on the basis that the agency exceeded its statutory authority in issuing the regulations, that the regulations were adopted in a procedurally defective manner, that the rule has a substantive defect other than the agency's lack of authority to issue the rule, or that the rule or regulation conflicts with the statute from which its authority is derived or upon which the rule is based. See, National Labor Relations Board v. Federal Labor Relations Authority, 834 F.2d 191 (D.C. Cir. 1987).

Petitioners are not filing an unfair labor practice charge, nor are they filing a complaint, per se; they are requesting policy guidance. The mere fact that the provisions for policy guidance requests appear in the Order 2711.1 indicates that the Agency thought such requests would be viable many years after the comment period of the Order (Rule). Moreover, both the PAB Rules and Regulations and the Order 2711.1 are silent as to time limitations for policy guidance requests. Therefore, under the standards applicable to motions to dismiss, we can interpret the Regulations in the manner most beneficial to the Petitioners' claims. The key issue is that as long as the objectionable regulation is in effect, a Petitioner, with standing, may challenge the regulation, or any part thereof. See, National Labor Relations Board v. FLRA, supra; National Treasury Employees Union v. Divine, 577 F. Supp. 738 (D.D.C. 1983), aff'd, 733 F.2d 114 (D.C. Cir. 1984). This is especially true regarding the supervisor issue. A person who was a GS-7 at the time the Order 2711.1 was promulgated did not have the standing to challenge the rule in 1981. Only after that person was promoted to GS-13, possibly many years later, would he or she be aggrieved by the Order. And only then would the issues of ripeness and justiciability affect that same employee. National Labor Relations Board v. FLRA, supra. Clearly, therefore, there is a set of facts upon which the Petitioners' claims can be considered timely.

As regards the issue of ripeness, the Respondent argues that, since the provisions of Order 2711.1 at issue have never been presented to the Comptroller General for interpretation, application or enforcement, they are not "fit" for review. However, Order 2711.1 is a final order of the Comptroller General, and as such, it is binding on all persons within GAO. To my knowledge, all GAO Orders relevant to the GAOPA impose obligations and fix some legal relationship for employees at GAO as a consummation of the administrative process. Thus, the Order is reviewable, even in a court of law. C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 112-13 (1948). Moreover, the traditional tenets of ripeness and

justiciability should not apply in instances where, as here, the parties are given the express right to present their requests for policy guidance without resort to filing a formal grievance or appeal. See GAO Order 2711.1, para.20.a. Finally, ripeness is a doctrine primarily concerned with ensuring that issues are in a proper posture for judicial review. See Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232 (1980). Here, the Petitioners are requesting a policy decision of an administrative agency (the PAB) which is given both the authority and the responsibility to make such decisions. Similarly, the finality doctrine Respondent refers to in its argument is a doctrine reserved for the prevention of judicial incursion into ongoing agency proceedings. Id. However, even under the standards applied for judicial review, this action is proper. A rule is a final agency action where that rule, as here, interprets, implements or prescribes law or policy, and a challenge to the rule presents "a legal issue...fit for judicial resolution." Federal Trade Commission v. Standard Oil Co., 449 U.S. 232, 238-40 (1980) (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967)). See also, International Union, UAA v. Brock, 783 F.2d 237, 247 (D.C. Cir. 1986). Again, it has not been conclusively shown by Respondent that there is absolutely no set of facts upon which Petitioners would be entitled to relief.

Respondent asserts that Petitioners lack standing to bring this action for two primary reasons: (1) Petitioners are unable to show that they have been injured or otherwise adversely affected by the Order 2711.1, and (2) the provisions of the Order have yet to be enforced or applied in any way against Petitioners. Because of their inability to demonstrate standing, Respondent avers, Petitioners cannot show that a PAB decision in their favor would benefit them in any way, such that the Petition for Review is based purely on speculation. Therefore, Respondent urges that the Petition for Review should be dismissed because Petitioners have failed to state a claim upon which relief can be granted. The Respondent's argument on this issue, and the cases cited in its argument, are inapposite because they deal with standing as interpreted under Article III of the United States Constitution. The Constitution provides a much different jurisdictional base for standing before the Federal courts than that required by the Civil Service Reform Act for standing before the FLRA, and hence, than the GAOPA provides for standing before the PAB. With respect to the GAOPA, Order 2711.1 gives employee groups the express right to request a statement of policy and guidance from the Board on labor-management relations matters, and the Board may issue such statements, or, for that matter, take whatever other actions are necessary, to effectively administer the provisions of the GAO labor-management relations program. Thus, for the purposes of Order 2711.1, Petitioners clearly have standing to request the relief they seek.

Even under Article III prerequisites, however, Petitioners would have standing. The fundamental rule on standing is that a person may not invoke the power of the Federal courts to adjudicate a matter unless the litigant can show that he or she has a sufficient personal interest in the outcome of the litigation, or is an appropriate representative of other interested persons, to warrant giving him or her the relief requested. Thus, traditional Article III Constitutional standing focuses on the party seeking relief, and not on the issues he wishes litigated; that is, whether the party seeking relief can properly request adjudication of the issue in question. See, Flast v. Cohen, 392 U.S. 83 (1968). This required the party to not only allege a personalized injury, but show that the injury occurred as a result of some activity by the defendant that was violative of either the Constitution or some Federal statute that allowed the plaintiff a private right of action. Id.; Warth v. Seldin, 422 U.S. 490 (1975).

The traditional rule of standing has more recently evolved to one that no longer requires an injury in fact, but merely a showing of immediate adverse effects as a result of the action complained of. See, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). And, in almost all such situations, the courts have allowed organizations standing to represent their members, where the other

Article III prerequisites are met. Cf., Hunt v. Washington State, 432 U.S. 333 (1977); NAACP v. Alabama, 357 U.S. 449 (1958). Thus, under the facts herein, and construing all facts alleged in favor of Petitioners, Warth v. Seldin, 422 U.S. at 501-02, the GS-13/14 Council Petitioners, especially, can show particular harm from the Order 2711.1, because the presumption raised by Order 2711.1 makes them ineligible to collectively bargain for their employment rights, and all members of the Council would be affected by any ruling of the PAB with respect to the legality of the Order's provision making them ineligible for union affiliation. Therefore, the 13/14 Council has the right to represent its members in this action. See, International Union, UAA v. Brock, *supra*; NAACP v. Alabama, *supra*. The Petitioners need only assert, as they have done here, that one or more of their members are suffering immediate or threatened injury. The immediate injury is the chilling effect of Order 2711.1. The threatened injury is that the Petitioners may never be able to collectively bargain because of the preclusive effect of the Order's provisions regarding who may join a union, and what unions are allowed on the GAO premises. Thus, Petitioners satisfy the last requirement for Article III standing--that the relief requested would, in fact, redress their injury. See, Bryant v. Yellen, 447 U.S. 352, 368 (1980) (standing found where it was only "likely" that relief requested would provide the hoped-for benefit). Federal courts are generally urged to confer standing if a favorable decision will benefit the plaintiff in even a small way by remedying or preventing the injury alleged. International Ladies Garment Workers Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1975).

The Petitioners, therefore, have standing, even under the Article III analysis, to request a policy decision from the Board as regards the legality of the challenged provisions of Order 2711.1.

Respondent's final argument concerns whether Petitioners have failed to exhaust their administrative remedies, and therefore, are precluded from bringing this action. A plain reading of Order 2711.1 shows that employees and employee groups are "encouraged" to bring their requests for modification of the language of the order to the Respondent (see para.20.a.), but there is no language in the Order which requires such action. Additionally, Petitioners have represented in their brief that they, in fact, brought the instant questions to the Respondent, but with no success, and it was the failure of Respondent to address Petitioners' concerns at the agency level which prompted this Petition for Review. And, as is clearly established in the case law, the doctrine of exhaustion is neither jurisdictional nor absolute. See, Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984).

Based upon the above reasons, the Respondent's motion to dismiss the Petition for Review is denied. In so ruling, however, it is hoped that the parties will bear in mind several points which I believe are very salient here. First, since the Respondent's motion is dispositive, the denial is without prejudice, and can be raised again at any time. The second is that, one of the primary reasons that policy decisions are provided for in labor relations is because there are frequently issues for which, as in this case, there is no existing precedent. Finally, because this issue is so novel and important, no final decision on the matter should be issued without the matter being completely briefed. It is hoped that, in preparation for hearing, the merits of the parties' arguments will be completely fleshed out and presented to the Board.

CONCLUSION

The Respondent's motion to dismiss is hereby denied, without prejudice. The parties are directed to proceed with the further prehearing matters in the case, including the immediate commencement and completion of discovery.

SO ORDERED.