

Alice Maurine Sekanick v. U.S. General Accounting Office

Docket No. 29-208-05-83

Date of Decision: May 2, 1984

Cite as: Sekanick v. GAO (5/2/84)

Before: Jaffe, Presiding Member

Reprisals for Whistleblowing

ORDER DISMISSING PETITION FOR REVIEW

The Petitioner, Alice Maurine Sekanick, filed a Petition for Review with the Board, dated January 20, 1984, appealing an Interim and Final Rating on Job Code 082122 and a Letter of Reprimand, dated August 29, 1983. The Petition for Review alleges that these actions by the Agency as well as a series of harassments were taken to discredit the Petitioner as part of "a cover up" of her findings and the non-response or untimely response of various Agency officials for referral of her findings to the GAO Fraud Task Force. The Petition further alleges that the Petitioner "was punished for blowing the whistle to an official of the audited agency." The Petitioner seeks as an appropriate remedy promotion to a GS-13 post; the Petitioner is employed at the Agency's Dallas, Texas office as a GS-12 Evaluator. Appended to the Petition for Review were numerous documents, including copies of her Initial and Final Ratings, her Letter of Reprimand, notes of telephone calls and meetings with officials of the audited agency and of GAO, and both internal and external memoranda relative to her survey of the NMFS. The Petitioner appeared pro se.

The Agency filed a Motion to Dismiss the Petition for Review on the basis that the Board lacks jurisdiction over the subject matter and that the Petition for Review fails to state a claim upon which relief may be granted. The Petitioner filed a letter responding to the Motion to Dismiss.

Section 4(h)(1) of the General Accounting Office Personnel Act of 1980 ("the Act"), 31 U.S.C. §753(a)(1), provides this Board with general appellate jurisdiction over Agency adverse actions "about a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days." The specific acts complained of in this case -- interim and final job ratings and a letter of reprimand -- are not included in the types of adverse actions within the Board's appellate jurisdiction under Section 753(a)(1). Thus, absent some other appealable basis pursuant to 31 U.S.C. §753, this Board would be without jurisdiction to entertain Petitioner's appeal.

Section 4(h)(2) of the Act, 31 U.S.C. §753(a)(2), provides as a second, independent basis of the Board's jurisdiction, consideration of appeals in cases involving "a prohibited personnel practice under section 732(b)(2) of this title." The Agency's contention that the Board should follow the precedent of the Merit Systems Protection Board and decline to entertain appeals over personnel actions which may be prohibited personnel practices but which are not in and of themselves appealable adverse actions is rejected. The Board has previously considered and rejected this argument in its Order in Patrick v. GAO, Docket No. 25-100-17-83 (October 4, 1983), wherein the Board held that:

. . . In both the executive branch and the GAO, employees enjoy the same substantive protections from prohibited personnel practices. "With these substantive protections guaranteed, Congress left to the PAB the discretionary task of formulating appropriate procedures . . ." GAO v. GAO PAB, 698 F.2d 516, 531 (D.C. Cir. 1983).

. . . [T]he Board has established through its rulemaking authority [and is vested pursuant to the terms of 31 U.S.C. Section 753] that any matter within its jurisdiction is subject to its appellate jurisdiction. [Unlike the MSPB whose statutory jurisdiction is more limited than that accorded to the Board by Congress] allegations of prohibited personnel practices need not be brought by the Board's General Counsel or arise in the context of otherwise appealable actions.

The Board in Patrick went on to note that the Court of Appeals for the District of Columbia Circuit has recognized that the Board need not "follow precisely the procedural models employed by executive branch boards and agencies."

The whistle-blower provisions of the Civil Service Reform Act, incorporated in our Act by reference, prohibit the taking of a "personnel action" in reprisal for whistle-blower activities; while not an "adverse action" [the definition of which is paralleled in Section 735(a)(1)], it is undisputed that the actions of the Agency complained of in this case are "personnel actions." The conclusion of the Board in Patrick that prohibited personnel practices are appealable whether or not the personnel actions also constitute adverse actions is particularly appropriate in "whistle-blower" cases in view of the statement by Congress that:

[T]he Committee included threatened reprisals, as well as actual reprisals, within the coverage of this section. The purpose of the section is to encourage employees to disclose agency wrongdoing or abuse, and threatened reprisals can be just as effective in frustrating this purpose. Legislative History of the Civil Service Reform Act of 1978, P.L. 95-454, 1978 U.S. Code and Cong. & Adm. News, 2723, 2744.

Thus, if mere threatened reprisals were made appealable, then certainly actual action (whether or not an "adverse action") taken in reprisal for whistleblowing activities must be appealable.

The Agency further argued in its Motion to Dismiss that the Petitioner was advised of her right to utilize the Agency's Administrative Grievance Procedure, GAO Order No. 2771.1; that GAO Order No. 2771.1 specifically excludes from its coverage any decision appealable to the Board; and that, therefore the Board lacked jurisdiction over the actions in this case -- employee appeals of letters of reprimand and performance appraisals where no adverse action was taken. The Petitioner did not elect to pursue her claim through the Administrative Grievance Procedure. There was no claim that any election of remedies occurred in this case. The Agency's belief that the action in this case was encompassed in the Agency's Administrative Grievance Procedure cannot affect this Board's statutory jurisdiction to hear appeals of prohibited personnel practices. In any event, the Agency has not provided any persuasive legal or factual basis why in this case the Board should defer its adjudication in this case pending the exhaustion and completion of the Administrative Grievance Procedure.

Having concluded that this Board has appellate jurisdiction over prohibited personnel practices whether or not they also constitute adverse actions within the Board's more general appellate jurisdiction, the question is presented as to whether the facts contained in the Petition for Review state a prima facie case that a prohibited personnel practice occurred.

31 U.S.C. §732(b)(2) incorporates the definition of a prohibited personnel practice contained in the Civil Service Reform Act, 5 U.S.C. §2302(b). The Petition for Review alleges, in particular, that the Agency's actions in this case were in reprisal for her actions as a whistle-blower. The "whistle-blower" provisions of the Civil Service Reform Act, 5 U.S.C. §2302(b)(8), provide that:

- (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority --
 - (8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for --
 - (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --
 - (i) a violation of any law, rule, or regulation, or
 - (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
 - (B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences --
 - (i) a violation of any law, rule, or regulation, or
 - (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

In support of its contention that the conduct complained of by the Petitioner did not constitute a prohibited personnel practice, the Agency argued that the employee Petitioner allegedly blew the whistle on was an employee of NMFS, not GAO; that one of GAO's purposes is to investigate other agencies and report on mismanagement or any other practice contrary to law; that the Petitioner was just doing her job (conducting a survey) and not blowing the whistle; that, although the Petitioner's supervisors disagreed with her conclusions, she was given great leeway to draft her own report based on her findings and that this draft report was circulated within the GAO to see if the report should be issued; that, in fact, the case was ultimately referred to the Fraud Task Force for further action; and that there was no showing that any GAO officials were engaged in any action which constituted an attempt to "cover up" her evidence.

The fact that the investigated agency and employees were of another federal agency is relevant, but not dispositive, with respect to the question of whether a whistleblowing violation has occurred. A "disclosure" may be made to other personnel (including one's supervisors) within the employee's agency. The fact that a particular disclosure was an internal disclosure rather than a public type of disclosure is a relevant factor in the overall question of whether the inference of reprisal in a particular case is appropriate.

The fact that one of the functions of GAO is to investigate potential abuse in other federal agencies is not a defense to action which would otherwise constitute a prohibited personnel practice; recognition of this fact must be taken into account, however, in the evaluation of the entire record in this case. If it is proved that GAO personnel acted against the Petitioner in reprisal for her disclosure of the results of her investigation, then a prohibited personnel practice will have been shown. If, however, no such reprisal for any disclosure occurred, but instead the Agency merely counseled or disciplined an investigatory employee because of perceived deficiencies in the performance of her job, the fact that the job duties involved investigation of

potential government abuse will not insulate the employee from job related criticism and corrective action.

The determination of whether or not a prohibited personnel action occurred will not depend upon a showing of actual government wrongdoing uncovered by the Petitioner. Stated somewhat differently, whether officials of the NMFS acted inappropriately is not dispositive herein. All that is required for a prohibited personnel practice to be shown is that an act of reprisal occurred due to a disclosure of information which the employee "reasonably believes evidences a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, [or] an abuse of authority. . . ." (emphasis added) There is no question that the Petition for Review supports a finding of reasonable belief by the Petitioner that unlawful conduct or an abuse of authority occurred.

As noted above, the record further supports that "personnel action" was taken against the Petitioner and that a "disclosure" occurred. The only remaining question is whether the Petition for Review, including the evidence submitted with that Petition, even if assumed to be true, constitutes a prima facie case that the personnel action taken against the Petitioner was caused by her disclosure.

Much of the submission by the Petitioner appeared designed to persuade the Board of the correctness of her conclusion that she had uncovered "a mini-EPA" situation. The degree of proof of wrongdoing uncovered by the Petitioner is a relevant factor in ascertaining whether or not a cover up by GAO personnel and a prohibited reprisal occurred. The proof submitted by the Petitioner in this case falls far short of supporting an inference that GAO personnel were motivated to cover up the results of the Petitioner's investigation or punish her for engaging in protected activities.

Even if one assumes the truth of all of the evidence contained in the Petitioner's submission, that evidence fails to establish a prima facie case of reprisal in violation of the whistle-blower provisions of the Act. The numerous documents appended to the Petition for Review in this case, when viewed as a whole, indicate that the Petitioner and a number of Agency supervisory employees held different views concerning a) the results of her investigation; b) the most appropriate manner in which to proceed with and conclude her investigation, including the identity of witnesses to be contacted and the treatment to be afforded those persons who were and would be contacted; c) the appropriate type of report to be submitted; and d) whether and when the matter should be referred to the GAO Fraud Task Force.

The record evidence, even when viewed in the light most favorable to the Petitioner, establishes only that various GAO supervisory employees and officials criticized the Petitioner's surveying techniques and conclusions in this case; that there were a number of resultant disagreements (oral and written) between the Petitioner and various GAO supervisory personnel related to that criticism; and that the Letter of Reprimand and the areas of the Interim and Final Ratings which were complained about herein were the result of the Petitioner's conduct on her survey and the manner of her response to this criticism.

There was not an iota of evidence which indicated that those GAO personnel who were alleged by the Petitioner to be involved in a cover-up had any conflicting interest in the subject of the Petitioner's survey. There was simply no evidence upon which one could reasonably infer that a number of GAO supervisory officials conspired for no apparent reason to retaliate against the Petitioner because of her work on Job Code 082122. The results of that investigation were not sufficiently spectacular in nature to infer any motive to cover-up the findings. The Petitioner's disclosure in this case was purely internal in nature. There was no specific evidence that the Interim and Final Rating or the Letter of Reprimand were affected by or motivated by a desire to cover up the Petitioner's investigation or retaliate against her because of any protected disclosure.

The mere fact that a GAO employee is engaged in auditing or survey duties does not mean that the employee is entitled to pursue any and all beliefs of government wrongdoing without regard to legitimate supervisory directives. Presumptively legitimate supervisory directives (the legitimacy of which may be rebutted in a particular case) include decisions such as when to stop work on a particular assignment, how to perform particular investigative work, how to satisfactorily complete particular reports, and whether or not to refer particular matters to other areas for further investigation. The fact that an Agency employee is engaged in investigative work does not insulate that employee from otherwise appropriate action as a result of employee failure to follow legitimate supervisory directives.

For all of the foregoing reasons, I am not persuaded that, even assuming that truth of the information submitted by the Petitioner, a prima facie case of a prohibited personal practice has been shown. At most, what appears to have occurred is that the Agency believed the Petitioner had not fulfilled some of her job obligations in a satisfactory manner and took personnel action as a result of that belief. Nothing herein should be construed as passing judgment as to whether those actions were warranted; the only question presented which is within the Board's jurisdiction in this case is the question of whether the Agency's actions were imposed in retaliation against the Petitioner for whistleblowing activity. I have concluded that there is insufficient record evidence upon which an inference of unlawful retaliation may be made. Accordingly, the Agency's Motion to Dismiss the Petition for Review in this case is granted.