

Alfred E. Ramey v. U.S. General Accounting Office

Docket No. 40-209-17-83

Date of Decision: May 29, 1984

Cite as: Ramey v. GAO (5/29/84)

Before: Ross, Chairman; Bowers, Feigenbaum and Jaffe, Members

Stays of Personnel Actions - Indefinite Stays

Stays of Personnel Actions - Grounds for

Stays of Personnel Actions - Initial

OPINION

On April 16, 1984, the Personnel Appeals Board issued a Stay Order staying the removal of Petitioner pending adjudication of the merits of the case before the Board. This Opinion sets forth the Board's rationale in issuing that Order.

4 CFR §28.107 sets forth the standards for issuance of a stay of the Board. That section provides:

“(a) If the General Counsel determines after an investigation under these rules that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice, the General Counsel may request any member of the Board to order a temporary stay of the personnel action for a period of not more than 60 days.

(b) A Board member shall order a temporary stay under paragraph (a) of this section unless the member determines that such a stay would not be appropriate. Unless denied, any temporary stay requested shall be granted within 3 working days after the date of request.

(c) The Board may grant a further temporary stay or a permanent stay if the Board concurs in the determination of the General Counsel and after an opportunity for oral or written comment by the General Counsel and GAO. A permanent stay by the Board is final and appealable in accordance with §28.27.

On January 27, 1984, at the request of the General Counsel, Chairman Ross issued a 20-day Stay Order pursuant to paragraph (b) of §28.107. That paragraph provides that a Board member shall grant a temporary stay unless the member determines that a stay would not be appropriate. Under paragraph (b), in granting or denying an initial stay request, the Board member's review is quite limited. The stay request is acted upon ex parte and the Board member's inquiry is limited to a determination whether the alleged facts and circumstances, on their face, appear to make the stay request so unreasonable that the granting of a stay would be inappropriate. Thus the Board's inquiry prior to granting an initial stay is one which grants great deference to the determination of the General Counsel "that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice."

The April 16 stay, however, was granted under paragraph (c) of section 28.107. In contrast to an initial stay, that paragraph provides that the full Board may grant a further stay if the Board concurs in the General Counsel's determination of reasonable grounds to believe that a prohibited personnel practice has

occurred, after taking into account the comments of both the General Counsel and the GAO. Thus, under paragraph (c), the Board's inquiry is more substantive than under paragraph (b), and requires an affirmative determination by the Board.

The question remains as to what standard the Board should employ under paragraph (c) in deciding whether or not it concurs in the General Counsel's determination. The relevant stay provisions of the Board's regulations, 4 CFR §28.107, substantially parallel the language contained in 5 U.S.C. §1208(a)-(c) governing the issuance of similar stays by the Merit Systems Protection Board ("MSPB"). The MSPB exercises increasingly strict scrutiny of the Special Counsel's determination "that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice" as the length of the requested stay increases. In cases where the Special Counsel seeks indefinite stays pursuant to 5 U.S.C. §1208(c)--a situation analogous to the stay requested in this case--the MSPB has stated that:

'... the Board has an affirmative statutory duty to exercise independent judgment in determining whether to concur in the Special Counsel's determination after considering the oral or written comments of the Special Counsel and the agency involved. In re Kass, Docket No. HQ 120800007 (May 9, 1980).

The Board is in agreement with the approach taken by the MSPB in In re Kass, *supra*. Review by the Board of all the surrounding facts and circumstances, including the comments of the GAO, is required prior to issuing an indefinite stay pursuant to 4 CFR §28.107(c).

As indicated by the plain language of 5 U.S.C. §1208 and 4 CFR §28.107, a stay is to be issued when the Board concludes that there are "reasonable grounds to believe" that a personnel action has been taken or will be taken as a result of prohibited personnel practice. This showing is a lesser showing than is needed to prevail ultimately on the prohibited personnel practice allegations of the Petition for Review. We further agree with the MSPB that "where a determination of 'reasonable grounds to believe' turns upon disputed issues of fact and where differing inferences may fairly be drawn from the facts as alleged, the Board will interpret the facts in a manner most favorable to a finding of reasonable grounds." In re Frazier, MSPB Docket No. SC-79-3, Opinion dated June 20, 1979, at 6 (footnoted omitted). *See also*, In re Kass, *supra*.

In the instant case, the General Counsel points to several alleged facts and circumstances which he feels provide reasonable grounds to believe that Mr. Ramey's termination was taken in retaliation for the exercise by Mr. Ramey of his appeal rights. If true, the termination would be a personnel practice prohibited by 5 U.S.C. §2302(b)(9). In response, GAO disputes certain of the factual allegations made by the General Counsel and asserts that the termination decision was based solely upon a judgment of Mr. Ramey's competence.

We carefully reviewed the submissions of both parties in light of the standards set forth above. Certain allegations made by the General Counsel, in particular those set forth in parts I and II of his March 29, 1984, Request, if true, reasonably could lead to an inference that the termination was made, at least in part, because of the exercise of appeal rights by Mr. Ramey. Therefore, we concur in the General Counsel's determination of reasonable grounds to believe that a prohibited personnel practice may have occurred.¹

Notes

1. We point out, of course, that we have made no determination (nor could we on the state of the present record) as to whether the facts alleged by the General Counsel are true, whether we would necessarily draw the same inferences from those facts if they are true, or whether GAO's competence allegations would sustain the termination in any event.

