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# Ramey, Alfred E. v. General Accounting Office

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**Docket No. 40-209-17-83**

**Date of Decision: March 6, 1985**

**Cite as: Ramey v. GAO**

**Before: Bowers, Presiding Member**

**Stays of Personnel Actions – Criteria for Granting**

**Stays of Personnel Actions – Indefinite Stays**

**Stays of Personnel Actions – Vacation of Stays**

**Orders – Hearing Procedures**

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## **ORDER**

On April 16, 1984, the Board issued an order staying the removal of Alfred E. Ramey. GAO has moved for an order vacating the stay. The stay order was issued pursuant to 4 CFR §28.107(c), which provides:

The Board may grant a further temporary stay or a permanent stay if the Board concurs in the determination of the General Counsel [that there are reasonable grounds to believe that a personnel action was taken as a result of a prohibited personnel practice] and after an opportunity for oral or written comment by the General Counsel and GAO....

In a May 29, 1984, opinion explaining its April 16 stay order, the Board held that the showing necessary for issuance of a stay under §28.107(c) “is a lesser showing than is needed to prevail ultimately on the prohibited personnel practice allegations of the Petitioner for Review.” (Slip opinion at 4). The Board explained:

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.” Ibid.

Applying that standard, the Board found that “[c]ertain allegations made by the General Counsel, in particular those set forth in parts I and II of his March 29, 1984, [Stay] 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.” (Id. At 4-5). Thus, the Board concurred in the determination of the General Counsel that there were “reasonable grounds to believe” that Mr. Ramey’s removal was based upon a prohibited personnel practice, that is, retaliation for his exercise of appeal rights in a prior proceeding before the Board and for his maintenance of legal proceedings in federal court against GAO and his former supervisor.

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# Ramey, Alfred E. v. General Accounting Office

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It is pointed out that the standard for granting a stay under §28.107(c) requires a lesser showing than is ordinarily required in judicial proceedings for the granting of a preliminary injunction pending adjudication on the merits. The showing under §28.107(c) is not based upon a preliminary weighing of the evidence. The General Counsel is not required to establish, in seeking a stay, a likelihood of prevailing on the merits. Rather, the standard for granting a stay is more akin to that necessary to survive a motion to dismiss in judicial proceedings, that is, assuming the facts as alleged are true, will the allegations support a finding of a prohibited personnel practice.

At its regular meeting in February 1, 1985, the Board, with all members present, resolved that, with respect to stays issued by the Board under §28.107(c), the Presiding Member has authority “to terminate a stay upon issuance of the Presiding Member’s decision on the merits of the case, or to terminate the stay at all earlier stage of the hearing procedure if the Presiding Member becomes convinced that there are no longer reasonable grounds to believe that a prohibited personnel practice has occurred.” (Minutes of February 1, 1985, Board meeting).

In part I of his March 29, 1984, stay request, the General Counsel alleged, in support of an inference that Mr. Ramey’s removal was taken in retaliation for the exercise of his appeal rights, that his immediate supervisor, Maurice Moortgat, initially prepared draft documents approving a within-grade salary increase in July 1983, that the within-grade in fact was denied, and that Moortgat denied having prepared draft documents approving the within-grade. In part II, the General Counsel alleged that the Associate Director, Virginia Robinson, attended a meeting to discuss whether, after the within-grade was denied, Mr. Ramey should be given a 90-day opportunity to improve his performance or be removed, and had written in her notes of that meeting: “Maybe this will precipitate action to get suit dismissed against Kearns and then he’ll stop threatening to add each succeeding supervisor to the list.”

The hearing in this case is now in progress. Much testimony and documentary evidence have been presented. The parties both have stated that they have presented all evidence presently available to them on the issues raised in parts I and II of the General Counsel’s March 29, 1984, stay request.<sup>1</sup>

I have reviewed carefully the evidence presented in support of and in opposition to the issues raised in parts I and II of the General Counsel’s stay request, upon which the Board based its stay order. My findings are based upon a weighing of the evidence, but they are, of course, nevertheless preliminary. Final findings on all issues will not be made until the record is complete.

Based upon the present record, I do not draw any inference from Ms. Robinson’s notes of the July 25, 1983, meeting that GAO was motivated by reprisal in

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<sup>1</sup> On February 20, 1985, the cross-examination of Mr. Ramey was suspended so that petitioner could call his remaining witnesses on these issues.

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# Ramey, Alfred E. v. General Accounting Office

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removing Mr. Ramey. I believe her testimony that she was noting a statement made by Dean Mosher, Group Manager, Personnel Legal Services and Appeals Group, Office of General Counsel, and Mr. Mosher's testimony concerning the context and meaning on his remark<sup>2</sup> Mr. Mosher's explanation is consistent, plausible and does not lead to an inference that he or anyone else in management were acting in reprisal against Mr. Ramey.

Considerably more evidence has been presented concerning the alleged decision by Mr. Ramey's immediate supervisor, Mr. Moortgat, to recommend granting a within-grade increase in July 1983, the failure to grant that increase, and Mr. Moortgat's denial that he recommended or planned to recommend an increase.<sup>3</sup>

In May 1983, when GAO was considering denying a within-grade salary increase to Mr. Ramey, he was given a required 60-day period in which to demonstrate improved performance. The 60-day period was to expire on July 18, 1983. On July 20, he was notified that his performance was not satisfactory and the within-grade was denied.

Petitioner has introduced into evidence two documents, each unsigned, each labeled as a draft, and each dated July 14, 1983, which state that Mr. Ramey's performance is on an acceptable level of competence and that he is being granted the within-grade.<sup>4</sup> In brief, Mr. Ramey testified that on July 14, he discovered a copy of each document in a folder on Mr. Moortgat's desk during the latter's absence from his office, and that he made photocopies of each before returning the originals to the folder. (Tr. 1980-87, 2389-2417, 2453-61, 2603-08.) Gloria Gatewood, secretary to Virginia Robinson (the Associate Director and Mr. Moortgat's immediate superior), testified that she typed the two documents at the request of Mr. Moortgat from drafts handwritten by him. She also testified that on the same day, July 14, after she typed the documents, she overheard a portion of a phone call between Mr. Moortgat and Ms. Robinson (who was out of the office), in which Mr. Moortgat said something to the effect of "Anna Dulaney says that if we do this, we will not ever be able to withhold his salary increase again." (Ms. Gatewood's testimony appears at pp. 1754-1797 of the transcript.)<sup>5</sup>

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<sup>2</sup> Transcript p. 304-305, 411-414 (testimony of Virginia Robinson), pp. 1388-1410 (testimony of Dean Mosher).

<sup>3</sup> I have reviewed that evidence carefully, particularly the testimony of Mr. Ramey, Gloria Gatewood, Alfred Hack, Mr. Moortgat, Ms. Robinson, Anna Dulaney, Wilbur Campbell, and Daniel Schwimer. Specific references to the most pertinent testimony are made in the discussion which follows.

<sup>4</sup> P. Ex. 10 is addressed to the Director of Personnel from Mr. W.D. Campbell, Acting Division Director, and P. Ex 17 is addressed to Ramey from Campbell.

<sup>5</sup> At the request of the General Counsel during his investigation, Ms. Gatewood voluntarily took a polygraph examination. Alfred Hack, retained by the General

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# Ramey, Alfred E. v. General Accounting Office

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Mr. Moortgat testified that he had no recollection of having drafted Petitioner's Exhibits 10 or 17, and that he at no time during this period concluded that Mr. Ramey's performance was satisfactory and warranted a within-grade increase.<sup>6</sup> Mr. Moortgat further testified that during the 60-day period he requested and received from the personnel office samples of letters both granting and denying within-grade, that the sample granting an increase was short and quite simple, and that he could not see why he would have drafted letters granting Mr. Ramey a within-grade in his own handwriting (as testified to by Ms. Gatewood) when the sample provided merely needed to have minor changes made if the decision was to grant the increase. (Tr. 538-542, 846-862, 2641-2668.) Neither Mr. Moortgat nor Ms. Robinson recalled discussing Mr. Ramey's within-grade during their phone conversation on July 14, 1983. (Tr. 301-04-, 542-43, 2654-55, 2660-64.)<sup>7</sup>

For present purposes, I assume that the events described by Mr. Ramey and Ms. Gatewood occurred in accordance with their testimony. The petitioner infers from this that Mr. Moortgat must be lying; that he in fact evaluated Mr. Ramey's performance as satisfactory and recommended that the within-grade be granted; that he was overruled by higher management (Robinson and/or Campbell); and that management's decision to deny the within-grade was not based on Mr. Ramey's performance, but rather was made in furtherance of management's intention to discharge him in reprisal for his appeal activities.

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Counsel, performed the examination. He testified at trial (Tr. 1514-1629) and stated his conclusion that Ms. Gatewood was truthful in her recounting of the events. GAO has pending a motion opposing the admission of the polygraph test results and accompanying testimony on the grounds that polygraph test results, in general, are not reliable. Although GAO's argument may more properly go to the weight to be accorded such evidence, rather than its admissibility per se, I do not need to resolve that question in this case, at least not at this time. Upon cross-examination of Mr. Hack, several discrepancies appeared in the reading and interpreting of the polygraph test results and the technique of its administration. Thus, with respect to the specific polygraph test in this case, I find that there is sufficient doubt as to its reliability that I afford it no probative value.

<sup>6</sup> I note that Mr. Ramey testified that two office secretaries, Carrie Thomas and Alice Graves, told him shortly before July 14 that he was going to be granted a within-grade (Tr. 2616); that Mr. Moortgat denied having told them that (Tr. 2650-52); and neither Ms. Thomas nor Ms. Graves was called to testify

<sup>7</sup> Anna Dulaney testified that she never told Mr. Moortgat that if GAO then denied a within-grade to Mr. Ramey, that it could never deny other within-grades in the future. She testified that she would not have given Mr. Moortgat such erroneous advice –granting a within-grade based on performance during one waiting period does not preclude denying a within-grade based on performance during a subsequent waiting period. (Tr. 989-990; see also Tr. 2656.)

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# Ramey, Alfred E. v. General Accounting Office

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I do not draw the inference sought by the petitioner. Mr. Moortgat's testimony is both plausible and not in conflict with the testimony of Mr. Ramey or Ms. Gatewood, or the existence of the two July 14 drafts.

First, neither Mr. Moortgat nor Ms. Robinson recall discussing Mr. Ramey during their July 14 phone conversation. That does not preclude such discussion, however, it is unlikely that the snippet that Ms. Gatewood may have overheard went as she recalls it. I believe that Ms. Dulaney never gave Mr. Moortgat such advice, because, as she testified, such advice clearly would have been erroneous.

Second, if Mr. Moortgat did draft the two July 14 documents, I do not infer from them that he in fact had evaluated Mr. Ramey's performance as satisfactory and hence in fact recommended that the within-grade be granted. Mr. Moortgat testified that he had obtained from Ms. Dulaney samples of letters both granting and denying within-grade increases, so that he would be prepared, when the end of the 60-day review period arrived, for a decision either way. He may well have prepared letters granting a within-grade so as to have them available if the decision were favorable to Mr. Ramey. He does not recall doing so, but he did not deny that it may have happened. If it did, I find that a status of being prepared for that contingency is more plausible than that he had, by July 14, made a determination that Mr. Ramey's performance was satisfactory. Mr. Moortgat consistently testified that he made no final evaluation of Mr. Ramey's performance until the July 18 expiration of the review period. Mr. Moortgat has also testified at length that he found this performance unsatisfactory.

I note also that both Ms. Robinson and Mr. Campbell testified that Mr. Moortgat did not recommend to either of them that the within-grade be granted (Tr. 299-300, 1135-36.)

I further note that, on the present state of the record, there is considerable evidence that Mr. Ramey's performance during this period in fact was deficient (including the testimony of a disinterested expert hired by the General Counsel). I realize, of course, that although GAO has rested its case, petitioner still has several witnesses yet to call. Nevertheless, the evidence so far supports a finding that Mr. Moortgat never determined that Mr. Ramey's performance was satisfactory nor ever recommended to higher management that the within-grade be granted.

Third, I cannot infer that high management's motive in denying the within-grade was reprisal. Aside from what petitioner seeks to make of his own testimony and that of Ms. Gatewood, which, as I have preliminarily found, is not in direct conflict with the testimony of Mr. Moortgat, there simply is no evidence in the record that credibly leads to an inference that management's actions in denying the within-grade and in terminating Mr. Ramey were motivated by a desire to retaliate against him for his exercise of appeal rights.

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# Ramey, Alfred E. v. General Accounting Office

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Accordingly, I find that there are no longer reasonable grounds to believe that GAO committed a prohibited personnel practice when it denied Mr. Ramey a within-grade salary increase or when it subsequently terminated him.<sup>8</sup> The indefinite stay of the termination of Mr. Ramey is vacated, effective with the close of business on March 8, 1985. Petitioner presently may appeal this Order, if he so chooses, to the full Board.

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<sup>8</sup> This finding that no prohibited personnel practice occurred is of course, a preliminary one, subject to change after the record is complete and both parties have had an opportunity to argue their respective cases in their entirety. In addition, nothing in this order purports to make any findings with respect to whether GAO has met its burden of establishing that Mr. Ramey's termination was made for such cause as will promote the efficiency of the service.