

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

Docket No. 40-209-17-83

Date of Decision: July 22, 1985

Cite as: Ramey v. GAO (7/22/85)

Before: Bowers, Chair; Brown, Feigenbaum, Jaffe and Ross, Members.

Interlocutory Appeals

Authority of PAB

Vacation of Stay Orders

Delegation of Powers

Stays

Grounds for Review

Standard of Review

ORDER

Petitioner has sought interlocutory review of an Order of the Presiding Member. On April 16, 1984, the full Board issued an order staying the removal of Petitioner pending adjudication of his claim that the removal action was taken as a result of a prohibited personnel practice. On March 6, 1985, while the hearing was still in progress, the Presiding Member issued an order vacating the stay.

In granting the stay, we stated: 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. (May 29, 1984 Opinion at 4-5)

In part I of the 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."

After receiving all of the evidence from both parties concerning these allegations, the Presiding Member, after weighing this evidence and making preliminary findings of facts, determined that reasonable grounds no longer existed to believe that a prohibited personnel practice had occurred. Consequently, she vacated the stay. Mr. Ramey has sought interlocutory reconsideration of that order by the full Board. We have determined to grant interlocutory review. The determination as to when the full Board will consider an appeal of an interlocutory order is discretionary and depends upon all of the relevant circumstances present in a particular case. It is sufficient to note for purposes of this case that the full Board was persuaded that interlocutory review was appropriate in view of the importance of the issues presented and the fact that this is a case of first impression.

Initially, Petitioner argues that the Presiding Member lacks authority to vacate a stay order issued by the full Board. We disagree. Section 4(h) of the GAO Personnel Act, 31 U.S.C. §753(a), provides, in part:

The General Accounting Office Personnel Appeals Board may consider, and order corrective or disciplinary action in a case arising from--

(2) a prohibited personnel practice....

Section 4(j) of the Act, 31 U.S.C. §753(b), states:

The Board may delegate to a member or a panel of members the authority to act under subsection (a) of this section. A decision of a member or panel under subsection (a) is deemed to be a final decision of the Board unless the Board reconsiders the decision under subsection (c) of this section.

Thus, the designation of a Presiding Member in this case, as in any case, constituted a delegation by the Board to that member of the power "to take any action within the scope of the Board's authority, subject to later reconsideration by the Board." 4 C.F.R. §27.1. See also, 4 C.F.R. §§28.21(c), 28.25.

The issuance of a stay clearly is within the scope of the Board's jurisdiction under 31 U.S.C. §753(a)(2) to adjudicate allegations of prohibited personnel practices. See 4 C.F.R. §28.101.

Section 28.107(c) of 4 C.F.R. 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, or is to be taken, as a result of a prohibited personnel practice]...." (Emphasis added.) It was pursuant to this provision that the full Board issued the stay in this case on April 16, 1984. It is clear from the above discussion, however, that the determination of whether to issue a stay under 4 C.F.R. §28.107(c) may be delegated by the Board to an individual member as the Presiding Member, and could have been so delegated in this case.¹

The reference in Section 28.107(c) to "the Board" does not preclude the application of Section 4(j) of the Act or of 4 C.F.R. §§27.1, 28.25, and 28.101 to stay determinations issued under Section 28.107(c). Stated somewhat differently, pursuant to Section 4(j) of the Act and the Board's regulations, the Board has delegated to Presiding Members the authority to act as "the Board" and this grant of authority includes the authority to vacate a stay regardless of whether that stay initially was issued by the "full Board" or by the Presiding Member in his or her capacity as "the Board."²

Thus, Petitioner is wrong in claiming that the Presiding Member lacked authority, under the Act or the Board's procedural regulations, to vacate the stay. Having concluded that the Presiding Member had the authority to issue the revocation order appealed herein, the next question presented is the scope of review which should be applied by the Board in the instant case. Section 28.25 of the Board's regulations states that:

- ...The Board may grant a motion to reopen and reconsider whenever it is established that:
- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
 - (2) The decision of the Hearing Officer is based on an erroneous interpretation of statute or regulation.

The Board is persuaded that this listing of grounds for reopening and reconsidering a decision issued by a Presiding Member is not exhaustive. The Board is further persuaded that implicit in the statutory scheme is the obligation of the Board to examine the decision of the Presiding Member, who after all is acting on behalf of the Board, with at least the same degree of scrutiny which the Courts apply to Board decisions on appeal. The relevant statutory standard, contained in 31 U.S.C. §755, provides that the Courts will not set aside the findings or conclusions of the Board unless the Board's decision is found to have been:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (2) not made consistent with required procedures; or
- (3) unsupported by substantial evidence.

If a decision of a Presiding Member, acting on behalf of the Board, is found by a majority of the Board to have been arbitrary, capricious, an abuse of discretion, not consistent with law, not made consistent with required procedures, or unsupported by substantial evidence, no persuasive basis has been advanced as to why that claim of "error" of a Presiding Member acting as the Board should not be corrected by the entire Board prior to having the Courts do so.

The March 6, 1985 Order of the Presiding Member was based upon her determination that "there are no longer reasonable grounds to believe that GAO committed a prohibited personnel practice" by the Agency's termination of Petitioner, or the denial to him of a within-grade increase. The Presiding Member's Order vacating the stay must be affirmed so long as the state of the record, viewed as a whole at the time the Order was issued, did not require that the Presiding Member find that reasonable grounds existed to believe that a prohibited personnel practice has occurred. That determination was made following the completion, as of March 6, 1985, of approximately 15 days of hearing (with 2730 pages of transcript and 100 exhibits) and following the Presiding Member's having heard testimony from 19 witnesses.

Any stay order pursuant to Section 28.107, and particularly an indefinite Section 28.107(c) stay, is an extraordinary remedy. In determining whether to vacate a stay during or after the hearing on the merits, the Presiding Member is not viewing the record in the same manner as when a stay is granted under §28.107(c) prior to commencement of a hearing or, as was the case here, prior even to the filing of a petition for review with the Board. As we explained in our May 29, 1984 opinion concerning the April 16, 1984 stay order, when determining whether to grant a stay in such circumstances, the Board (or Presiding Member if so delegated) interprets the factual allegations (and they are only that at that stage of the

proceedings) made by the General Counsel "in a manner most favorable to a finding of reasonable grounds." When determining whether to vacate a stay, however, the Presiding Member has heard the evidence presented by both parties on the factual allegations which formed the basis for granting the stay. A determination to vacate a stay is based upon final (or, if the hearing is still in progress, preliminary) findings of facts. The record as it existed on March 6, 1985, when viewed as a whole, makes it clear that the Presiding Member acted within the scope of permissible discretion in determining that the stay should be lifted.³

Of course, the Presiding Member's decision was based upon preliminary fact-finding grounded in the then present state of the record and does not preclude her from concluding in her final decision on the merits that, based upon the entire record in this matter, the Petitioner's removal and/or the denial of his within-grade increase were the result of a prohibited personnel practice. Similarly, nothing in the Board's Order on this appeal should be construed as precluding review of the Presiding Member's determination contained in her final decision with respect to the prohibited personnel practice claims.

Petitioner further attacked the Presiding Member's actions on the basis of claims that she misconstrued the Board's May 29, 1984 opinion. We disagree. Specifically, Petitioner argued that the stay request and our issuance of the stay was based not only upon the allegations in parts I and II of the stay request, but also upon the other allegations made in the stay request as well. He argues, therefore, that the Presiding Member erred in vacating the stay based upon her adverse finding concerning just the allegations in parts I and II. We disagree. Although our May 29, 1984 opinion may not completely have disregarded the other allegations, it is clear that the stay was based primarily upon the parts I and II allegations, and it is equally clear that we would not have issued the stay absent the allegations in parts I and II.

Petitioner also complains that the Presiding Member required him to present witnesses out of his desired sequence in order to complete the record on the parts I and II allegations. We have reviewed the Presiding Member's procedural rulings in this regard and find no error in them. Most of the evidence concerning those allegations was already in the record at the time GAO's motion to vacate was made. This was conceded at the hearing. The hearing was expected by all parties to continue for quite sometime. It was well within the permissible discretion of the Presiding Member to require that a brief reordering of witnesses be made so that the record could be completed on the allegations which supported the Board's stay order. No due process rights of Petitioner were violated by the procedures followed.⁴

We also have carefully considered Petitioner's arguments concerning factual allegations other than those in parts I and II of the stay request, and his evaluation of such evidence. The Presiding Member's determination that such additional allegations do not lead 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 was supported by substantial evidence.

Accordingly, the March 6, 1985 Order of the Presiding Member vacating the indefinite stay of the termination of Mr. Ramey is affirmed.

Notes

1. To the extent that our reference to the "full" Board at page 2 of our May 29, 1984 opinion suggests otherwise, that reference is overruled.

2. Nor does the reference in §28.107(b) providing that "a Board member shall order a temporary stay under paragraph (a)" mean that the phrase "the Board" in §28.107(c) was intended to refer to the full Board only. The former phrase refers back to subsection (a)'s provision allowing the General Counsel to "request any member of the Board to order [an initial] temporary stay" Thus, an initial stay need not be obtained from the full Board, or a Presiding Member acting on behalf of the full Board, but rather may be obtained by the General Counsel from "any member."

3. It may be proper to vacate a stay while the hearing is still in progress if all of petitioner's evidence has been presented concerning the allegations which formed the basis for the Board's stay order, even though evidence is still being received concerning other allegations or issues in the case.

4. We have reviewed petitioner's other due process claims and find them without merit.

