

Helen D. Fauntleroy; Clementine H. Rasberry; Jane D. Trahan v. U.S. General Accounting Office

Docket Nos.: 46-701-15-84; 47-701-15-84; 48-701-15-84

Date of Decision: March 24, 1986

Cite as: Fauntleroy, et al. v. GAO (3/24/86)

Before: Jaffe, Chair; Brown, James, and Kaufmann, Members

Conflict of Interest

Ex Parte Communications

PAB General Counsel

DECISION OF PAB

In this matter we consider the petitioner's response to our November 25, 1985 Order to Show Cause why the PAB Office of General Counsel should not be disqualified from further representation of petitioners before the Board because of a conflict of interest. Petitioners have made charges of improprieties on the part of the PAB's General Counsel to the effect that the General Counsel, among others, has conspired to violate the civil rights of the petitioners.

FACTUAL BACKGROUND

Petitioners Clementine H. Rasberry and Helen D. Fauntleroy are GAO evaluators, GS-347-13; Petitioner Jane D. Trahan is a GAO evaluator, GS-347-14. In August, 1983 petitioners were informed that they had not made the best qualified lists (BQL) under the Merit Selection Program (MSP) for GS-14 (Rasberry and Fauntleroy) or GS-15 (Trahan) in the Federal Personnel and Compensation Division. Petitioners filed discrimination complaints with the General Accounting Office (Agency) in October 1983 alleging racial discrimination and reprisal for involvement in the Fogle class action.

On August 23, 1983 a class action was filed against the Agency, Mason v. GAO. Mason was filed on behalf of all Black male professionals denied promotion because of the Agency's use of the MSP. Mason alleged both disparate impact and disparate treatment. The relief requested in Mason included validation of the MSP and promotion for each class member.

On November 3, 1983, Mason was amended to include Black women.

Petitioners invoked the jurisdiction of the Personnel Appeals Board (PAB or Board) on May 3, 1984. This was before the Agency issued its final decision on their complaints, but after 80 days had elapsed since they filed formal discrimination complaints. (The Agency issued its final decision on June 15, 1984, and found no discrimination.)

On March 27, 1985, the General Counsel filed a petition for review on behalf of petitioners, claiming discrimination because of denial of promotion, but no longer asserting reprisal. Relief requested was retroactive promotion, back pay and validation of the MSP.

On April 26, 1985, the Agency filed a motion to dismiss petitioners' individual claims, essentially on the basis that their individual claims were encompassed by Mason, which was being settled, along with Fogle.

On May 8, 1985, the General Counsel filed an opposition to the Agency's motion for dismissal, and on May 22, 1985 the Agency filed a reply to petitioners' opposition.

On July 30, 1985, the Presiding Member granted the Agency's motion to dismiss.

On August 29, 1985, through private retained counsel, petitioners filed an objection to the Mason/Fogle settlement. In that pleading, petitioners, at Paragraph 18, alleged that the General Counsel (Carl Moore) and Presiding Member Feigenbaum, *inter alia*, conspired to deny petitioners their due process rights by agreeing not to consider the issue of ineffective assistance of counsel, a central issue in petitioners' Objection to Settlement. On November 25, this Board issued a Show Cause Order, to which petitioners filed a response, to which the Agency filed a reply.

OPINION

Petitioners raised the issue of conflict of interest in their Objection to Settlement filed August 28, 1985. In that pleading, at Paragraph 18, petitioners accused PAB General Counsel Moore, the Presiding Member, and Mason/Fogle class counsel Kerry Scanlon of conspiring to violate their civil rights by agreeing not to consider the issue of ineffective assistance of counsel, which was a key issue in petitioners' opposition to the Agency's motion to dismiss their individual claims. The conspiracy is alleged to have occurred because of some *ex parte* communication between Moore, Feigenbaum and Scanlon. Once the allegations were raised, we issued our Order to Show Cause why the General Counsel and Deputy General Counsel should not be disqualified from representing petitioners.¹ In a subsequent letter from petitioner's private counsel, the allegations regarding the General Counsel (only) were withdrawn. The letter from private counsel was appended to petitioners' response to our Order to Show Cause.

The Agency has filed a Reply to petitioners' show cause response, but, evidently, seeks only to clarify the record and not to oppose petitioners' response, *per se*.

Disqualification of counsel is a serious matter, as it raises not only ethical considerations, but also the right of a party to select counsel of his choice. Here, the petitioners have raised the issue of conflict of interest, then elected to continue being represented by the Deputy General Counsel. For all intents and purposes, the Deputy General Counsel has sustained the burden of representing petitioners throughout this proceeding, and we do not now choose to terminate her relationship with petitioners. However, while we dissent from her assertion that she is wholly independent of the General Counsel,² we agree with her that to require petitioners to seek private counsel to carry this litigation would only further delay these already-protracted proceedings.

The important consideration is that petitioners have reaffirmed their desire to have the Deputy General Counsel represent them, and a party's choice of counsel will not be disturbed except in the occurrence of a specific impropriety. Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983). Disqualification is usually ordered in two types of cases: (1) When the attorney's conflict of interest also involves unethical conduct,

and (2) where the attorneys' prior representation or employment creates a situation of unfair advantage. Koller by and through Koller v. Richardson-Merrell, 737 F.2d 1038, 1055 (D.C. Cir. 1984). The conflict must be such that the Court's confidence in the attorney's ability to represent the client is seriously undermined. Id. at 1056. We find nothing in the record to indicate that petitioners' choice of the Deputy General Counsel should not be allowed, and our decision is particularly influenced by the fact that, in the face of an order by this Board that would disqualify representation of petitioners by the Office of General Counsel, the petitioners specifically filed a waiver of the issue and rescinded their Paragraph 18 accusations. The Board specifically notes there is no evidence of any impropriety by the General Counsel.

Accordingly, we hold that good cause has been shown why the Office of General Counsel should not be disqualified from further representing petitioners before this Board, and we so order.

Notes

1. We have reviewed the record regarding the allegations directed towards Feigenbaum, Scanlon and Moore, and find no error was committed in the ex parte communications referenced by petitioners. Due process forbids one adversary from privately communicating with decision-makers concerning the merits of the case. Camero v. U.S., 375 F.2d 777 (1967). Here, there was no prejudicial error because there was no attempt to influence the deciding official as to the merits of the claim, nor were the communications made in a manner secreted from the parties, and full disclosure of the communication was made immediately. See, Evans v. Department of the Navy, FMSR 845684, aff'd, 770 F.2d 180, cert. denied, ___ U.S. ___, No. 85-300 (1985); Ryder v. U.S., 585 F.2d 482 (Ct. Cl. 1978); Sullivan v. Department of the Navy, FMSR 837071.

2. It is important to note that the disqualification issue is as regards the Office of General Counsel, and necessarily, would imply the Deputy General Counsel and anyone else in that office.

