Fred Jimenez v. U.S. General Accounting Office

Docket No. 77-701-01-86

Date of Decision: February 27, 1987

Cite as: Jimenez v. GAO (2/27/87)

Before: Kaufmann, Chair; Brown, Cappello, James, and Kaplan, Members

Stays

Indefinite Stays

Authority of PAB General Counsel

Remedies

ORDER

Pursuant to 4 CFR §28.107(c), the PAB General Counsel has requested that the reduction-in-grade of Petitioner Fred Jimenez be stayed until adjudication on the merits of the Petition for Review now pending before the Board.

4 CFR §28.107(c) sets forth the standards for issuance of a stay by 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 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.

(d) In the event that a stay is ordered pending adjudication of the merits of a personnel action the Presiding Member may vacate the stay if, after hearing the evidence presented by both sides on the factual allegations which formed the basis for granting the stay, the Presiding Member determines that the agency did not commit a prohibited personnel practice. On July 16, 1986 the General Counsel requested a 60-day temporary stay of the Agency's reduction of Petitioner's grade.

On July 17, 1986 Chairman Jaffe issued an order granting that stay, pursuant to §28.107(a) and (b).

On September 12, 1986, the General Counsel, pursuant to §28.107(c), requested an indefinite stay pending adjudication of Petitioner's appeal on the merits. The Board allowed an opportunity for the Agency to respond and then, on September 19, 1986 heard arguments on the request. At the conclusion of the hearing, we issued an order denying the General Counsel's request for the indefinite stay, noting the insufficiency of the evidence presented in support of the General Counsel's assertion of reasonable grounds to believe that the proposed reduction of Petitioner's grade was being taken as a result of prohibited personnel practices.

On December 5, 1986 the General Counsel filed a new request for an indefinite stay, which stay is the subject of this Order.

The General Counsel states that there are reasonable grounds to believe that the reduction-in-grade of Petitioner Jimenez was taken on the basis of a prohibited personnel act: discrimination on the basis of Petitioner's religion and national origin. 5 U.S.C. §2302(b)(1)(a). Specifically, the General Counsel states that the performance appraisals issued by Petitioner's project supervisors in December, 1985 and May, 1986 were discriminatory, and not supported by substantial evidence. The General Counsel further alleges that, since the Agency's reduction of Petitioner's grade was based on the discriminatory performance appraisals, then the reduction-in-grade must be reversed for lack of a proper predicate.

In ruling on requests for stays, we are governed by the standards enunciated in our decision in Ramey v. G.A.O., 1 PAB 365 (1984).

In that decision, we held that the showing necessary for issuance of a stay under §28.107(c) is less than the showing required to prevail on the merits of the allegations in the Petition for Review. Ramey, supra, at 368. In determining whether or not there are reasonable grounds to believe that Petitioner's reduction-in-grade was effected as a result of prohibited personnel practices, we are to interpret all disputed facts in the light most favorable to the Petitioner. Ibid., (citing In re Frazier, 1 MSPB 64, 67-68 1979).

Here, the General Counsel has placed several documents and affidavits on the record to support his allegations that there are reasonable grounds to believe that the performance appraisals in question had their genesis in prohibited discrimination. The Agency's response to these allegations and documents is in the form of a general denial, but the GAO has not placed any evidence on the record to refute the evidence of the General Counsel.

We have given careful scrutiny to the submissions of both parties in light of the standards enunciated above. If the allegations and evidence presented by the General Counsel--particularly the affidavits of Messrs. Artesiano and Oxford--are true, then there is substantial evidence to believe that the performance appraisals prepared by Bedwell and Faircloth are suspect. We especially note the failure of GAO to produce any direct evidence to refute the General Counsel's evidence, at least at this juncture. We, therefore, accept the record as establishing reasonable grounds to believe that the performance appraisals in question were the result, at least in part, of prohibited discrimination. And since the performance appraisals of Bedwell and Faircloth were the only reasons advanced for Petitioner's grade reduction, we can reasonably infer that the reduction-in-grade was made, at least in part, because of prohibited discrimination.

CONCLUSION

Therefore, the Board concurs in the General Counsel's determination that there are reasonable grounds to believe that the Petitioner's grade reduction was taken as a result of a prohibited personnel practice. Accordingly, the stay requested by the General Counsel is hereby GRANTED.

It is further ORDERED that:

(1) all actions of the GAO to effect the reduction-in-grade of Petitioner Fred Jimenez from a GS-12 to a GS-11 are hereby stayed, and Jimenez shall be reinstated to his former position as a GS-12 Evaluator in the Atlanta Regional Office.

(2) Within five (5) working days of this Order, the G.A.O. shall submit a report to the Board showing compliance with the order.