

Personnel Appeals Board General Counsel v. Maurice J. Moortgat and Virginia Robinson

Docket Nos.: 83-209-GC-87 82-209-GC-87

Date of Decision: July 17, 1987

Cite as: PAB General Counsel v. Moortgat and Robinson (7/17/87)

Before: James, Presiding Member

Statutory Construction

Authority of PAB General Counsel

Authority of PAB General Counsel - Statutory Construction

Motions to Dismiss

Authority of PAB

PRESIDING MEMBER'S DECISION ON RESPONDENTS' MOTION TO DISMISS

This matter is before me pursuant to a motion made by the above named Respondents, Maurice J. Moortgat and Virginia Robinson, to dismiss the Complaints for Disciplinary Action filed by the General Counsel of the Personnel Appeals Board (the General Counsel) on October 31, 1986. In their motion to dismiss, Respondents assert three grounds as the basis for dismissal. Respondents argue that (1) the Personnel Appeals Board (PAB) lacks jurisdiction over the complaints; (2) the General Counsel of the PAB lacks independent authority to instigate disciplinary actions; and (3) as a matter of policy, the PAB should decline to exercise jurisdiction over these cases.

The complaints for disciplinary action were filed by the General Counsel pursuant to Section 753(a) of 31 U.S.C. and Section 28.105 of 4 CFR. Both complaints seek removal of the respective Respondents from their positions with the Accounting and Financial Management Division of the General Accounting Office (GAO) allegedly for violating Sections 2302(b)(1) and (b)(9) of 5 U.S.C. Specifically, the Respondents were charged with taking and recommending the taking of Personnel actions against a GAO employee, Alfred E. Ramey, because he filed an equal employment opportunity complaint against Respondents, GAO, and a former supervisory employee of GAO.¹

Factual Background

Factually, this case is more akin to and evolved as the mythical phoenix bird which died and from the ashes of its death new youthful life sprang. Here death, came in the form of a final decision rendered by the PAB in appeals filed by Alfred E. Ramey, captioned Alfred E. Ramey v. United States General Accounting Office (See PAB Docket No. 40-209-17-83). The appeals were filed by Alfred E. Ramey in 1983 and early 1984.

Ramey's appeals grew out of an initial decision made by GAO to deny Ramey a within-grade increase on May 18, 1983 and a subsequent decision to terminate Ramey's employment with GAO. Both personnel action were taken by GAO allegedly because of Ramey's unacceptable work performance, as determined by the Respondents. The Respondents were actively involved in GAO's decision to deny Ramey a within-grade increase, as well as the decision to terminate Ramey's employment with GAO.² One of Ramey's appeals was filed on December 19, 1983 and in it Ramey alleged that the denial of his within-grade increase and his subsequent termination were proposed by the Respondents because he had filed equal employment opportunity complaints against GAO and a former supervisory employee of GAO.

Following an investigation by the General Counsel and a lengthy hearing before a Hearing Officer, designated by the PAB, a decision was issued on October 23, 1985, finding no retaliation and sustaining the denial of the within-grade increase and the termination of Ramey. (See PAB Docket No. 40-209-183). The General Counsel then filed with the PAB exceptions to the Report of Findings of Fact and Recommendations of the Hearing Officer. In his exceptions, the General Counsel requested the PAB to reverse the decision of the Hearing Officer and on July 10, 1986, the PAB issued a decision in which it found that denial of the within-grade increase and the termination of Ramey were taken by GAO in reprisal for Ramey's exercise of protected activities. The PAB ordered that Ramey be reinstated with back pay. Three months thereafter (i.e. on or about October 31, 1986), the General Counsel filed complaints for disciplinary action against Respondents for their involvement in the denial of the within grade increase and the subsequent termination of Ramey. On February 2, 1987, Respondents through counsel, filed this motion to dismiss, citing the above stated grounds as the basis for their motion. The General Counsel responded to the Motion to Dismiss on February 19, 1987 and Respondents filed a rebuttal response on March 4, 1987. Oral Arguments were heard on the Motion to Dismiss on March 19, 1987. Hence, this case is ripe for a decision on the Motion to Dismiss.

Analysis

The doorway or portal of proof through which Respondents must pass in order to carry their initial burden of proof and thereby have sustained, their Motion to Dismiss, requires a showing by Respondents that the General Counsel can prove no set of facts upon which he may prevail. Conley v. Gibson, 355 U.S. 41, 45 (1957); Gordon v. National Youth Work Alliance, 675 F.2d 356, 359 (D.C. Cir. 1962). In making a determination as to whether there does exist any set of facts upon which the General Counsel may prevail, I must review the facts of this case in the light most favorable to the General Counsel. Scheuer v. Rhodes, 416 U.S. 232 (1974).

As part of their effort to demonstrate that there does not exist any set of facts upon which the General Counsel may prevail, the Respondents have advanced three arguments as keys for unlocking the doorway to their portal of proof and the subsequent granting of their Motion to Dismiss. While Respondents' third argument is merely a policy argument which requires a somewhat limited examination of the PAB's statutory authority, Respondents' first and second arguments are very meaty, in that they are jurisdictional and question the very right of the General Counsel to prosecute independently the two complaints for disciplinary action and the PAB's authority to hear and decide whether Respondents have committed prohibited personnel practices. Respondents first argue that to the extent that the PAB has authority to order disciplinary action against individual employees under Sections 753(a)(1) and (2) of 31 U.S.C., the PAB's order must be made in connection with a case already before it. In other words, Respondents question the right of the PAB to adjudicate and the right of the General Counsel to prosecute an independent action for disciplinary action, when there is no companion action pending before the PAB.

Respondents second argument is the first cousin to or closely akin to the first, in that Respondents argue that when the PAB issued its final decision in the two appeals filed by Ramey, it lost any and all jurisdiction to consider complaints for disciplinary action against Respondents. Hence, Respondents' first two arguments demand a thorough analysis of the PAB's statutory authority as well as that of the General Counsel.

The first step in examining Respondents two assertions require examination and study of the language of the statute authorizing the General Counsel to prosecute disciplinary action cases and the PAB's authority to adjudicate such cases, for it is well established that the starting point for interpreting a statute is the language of the statute itself. Darsigny v. Office of Personnel Management, 787 F.2d 1555 (Fed. Cir. 1986). In studying the statute, I must determine the legislative intent of Congress and its mandate given to the General Counsel to prosecute disciplinary action cases and the PAB's authority to hear and decide such areas. Jackson Transit Authority v. Amalgamated Transit Union, 457 U.S. 15, 23, (1981) U.S. v. Turkette, 452 U.S. 576, 580 (1981); U.S. v. Oregon, 366 U.S. 643, 648, (1981); Reid v. Department of Commerce, 793 F.2d 277, 281 (Fed. Cir. 1986); General Accounting Office v. General Accounting Office Personnel Appeals Board, 698 F.2d 516 (D.C. Circuit, 1982). If the language of the statute is plain and unequivocal on its face, there may be no need for me to resort to a review of the legislative history underlying the statute. U.S. v. Oregon, 366 U.S. 643, 648 (1961). The statute should be enforced according to its literal reading, unless the literal reading of the statute would input to Congress an irrational purpose, U.S. v. Ryan 339, U.S. 323, 338 (1950) or would thwart the obvious purpose of the statute, Trans Alaska Pipeline Case, 436 U.S. 631, 643 (1978) or would lead to a result at variance with the policy of the legislation as a whole. In such cases, a review of the literal interpretation of the statute will be eschewed in favor of the legislative history to ascertain the intent of Congress. Reid v. Department of Commerce at 282. Therefore, my decision, in this case, shall be limited to enforcing the statute according to its terms, unless a literal interpretation would lead to an incongruous result.

A reading of the language of §752(a) of 31 U.S.C. leads to the inescapable conclusion that the enabling statute of the PAB is at odds with Respondents' assertion that the PAB's enabling legislation does not confer on the PAB authority to hear independently disciplinary action cases, and that the PAB does not have rule making authority to grant to itself power over disciplinary action complaints. Section 752(a) of 31 U.S.C. states in pertinent part that the General Accounting Office, Personnel Appeals Board may consider and order corrective or disciplinary action in a case arising from ---

- (1) an officer or employee appeal about a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;
- (2) a prohibited personnel practice under §732(b)(2) of this title;
- (3) a prohibited political activity under §732(b)(3) of this title;
- (4) a decision of an appropriate unit of employees for collective bargaining;
- (5) an election or certification of a collective bargaining representative;
- (6) a matter appealable to the Board under the labor-management relations program under §732(e)(2) of this title, including a labor practice prohibited under §732(e)(1) of this title;

(7) an action involving discrimination prohibited under §732(f)(1) of this title; and

(8) an issue about Office personnel the Comptroller General by regulation decides the Board shall resolve.

The statute states that the PAB may consider and order corrective or disciplinary action in eight specific situations. There are no other limitations placed on the authority of the PAB to adjudicate disciplinary action cases. Of even more importance, is the fact that the statute makes no mention nor does it suggest that the PAB cannot adjudicate a case brought independently by the General Counsel for disciplinary action. Also, the statute does not exclude from the PAB's jurisdiction cases which are brought before it solely for consideration of disciplinary action. Thus, the plain language of the statute leaves little doubt that the PAB is authorized and empowered to consider and order corrective and disciplinary action in a case arising from a prohibited personnel practice as defined by 5 U.S.C §2302(b). In this case, the General Counsel's complaints allege a violation of §2302(b)(1) and (9), which bring the complaints squarely within the eight prescribed areas of jurisdictional requirement to be adjudicated by the PAB.

Moreover, if the PAB has statutory authority to adjudicate disciplinary action cases brought independently by the General Counsel, it certainly has authority to enact regulations to prosecute such cases. Under the provisions of 31 U.S.C. Section 752(d), the PAB is given the express authority to enact regulations governing its operations and the procedures for appeals taken before it. GAO v. GAO Personnel Appeals Board, 698 F.2d 516, 529-530 (D.C. Cir. 1983); Shaller v. GAO, Reconsideration Decision No. M1-B1 (decided August 11, 1981). Included in the PAB's power, is authority to define the role of the General Counsel in a manner which best effectuates the congressional mandate to the PAB of insuring that GAO employees have the same rights and protections as executive branch employees. Id.; See also 31 U.S.C. §752(3). It could also be argued that included in the PAB's authority under the provision of §752(d) of 31 U.S.C. is authority of the PAB to place further limitations on its right to adjudicate certain types of disciplinary action cases, as well as authority to place proscriptions on the types of disciplinary action cases which may be brought before it by the General Counsel. Id. However, a review of the regulations show that no such limitations have been enacted by the PAB itself or the General Counsel. Accordingly, Respondents' contention in this regard is rejected.

Respondents also argue that the PAB does not have jurisdiction over these complaints because the underlying matter, the appeal of the employee, Ramey, has reached a final decision and the PAB did not order disciplinary action in that final decision. Respondents' position is that §753(a) of the General Accounting Office Personnel Act (GAOPA) empowers the PAB to take disciplinary action only in connection with another case properly before it. The plain language of the statute, however, does not place such a restriction on the PAB's authority to adjudicate disciplinary action cases. See 31 U.S.C. 753.

The appeals, Ramey v. GAO, (Docket No. 40-209-17-83), were decided on the merits of the case presented to the PAB. As is well known, a number of causes of action can grow out of the same set of facts and a single personnel action. There could be a petition filed by the General Counsel for a stay of the initial personnel action, in which case, the stay could be litigated all the way to the appellate level. Another cause of action from the same personnel action could involve an appeal of the personnel action itself, whether on the jurisdictional basis of discrimination, denial of appropriate due process, or some other prohibited personnel practice. Neither of the above suggested causes of action, brought by the General Counsel or an individual employee, would preclude the General Counsel from prosecuting a complaint for corrective action. Likewise, a final decision on the stay request or a petition for corrective action would in no way preclude a complaint for disciplinary action by the General Counsel. In each of the

above causes of action, the PAB could issue a final, appealable order which would normally not affect other causes of action which may be pursued by the General Counsel. Under the framework of the statute, these are all separate proceedings and the procedures to pursue each and all are consistent with the procedure followed by the Merit Systems Protection Board (MSPB) and the office of Special Counsel on behalf of executive branch employees GAO v. GAO Personnel Appeals Board, 698, F.2d 516; See also Harvey v. MSPB Special Counsel, 84 FMSR 6044 (1984); Verrot v. MSPB Special Counsel, 84 FMSR 5039 (1984).

In a similar situation, under the provision of the Civil Service Reform Act (i.e. 5 U.S.C. §§ 1205, 1206, 1207, 1208, etc.), the Special Counsel could bring an independent complaint for disciplinary action before the (MSPB) for adjudication, with or without a complaint from an aggrieved employee, prior to or after a petition for corrective action and, at any time after completing an investigation. Special Counsel v. Rogelio Chapa, 12 MSPB 405 (1982); Special Counsel v. Department of Army, 9 MSPB 244 (1982); Special Counsel v. Paul D. Sullivan, 7 MSPB 239 (1981); In re Kass, 2 MSPB 251, (1980); See also 5 U.S.C. 1206. The General Counsel of the PAB is modelled after the Office of Special Counsel of the MSPB and the General Counsel of the National Labor Relations Board. GAO v. GAO Personnel Appeals Board, at 532, 533. Both the Special Counsel and the General Counsel of the FLRA have similar characteristics in that they provide for participation in the adjudicatory process before a board, prosecutorial authority to enforce laws and regulations, and substantial policy-making responsibility. The PAB General Counsel fits within this same framework or general design. Id. Therefore, because the powers of the Special Counsel of the MSPB and the PAB General Counsel are analogous, it seems reasonable that the PAB General Counsel would also have discretionary authority (i.e. as the Special Counsel) to prosecute a disciplinary action complaint independently of an action pending for adjudication before the PAB. This is especially true where the plain language of the statute makes no provision for such a requirement on the PAB or the General Counsel.

Respondents' second major contention is that the PAB General Counsel does not have authority to instigate independent disciplinary action complaints. As suggested above, the GAO Personnel Act has its genesis in the Civil Service Reform Act of 1978 (CSRA). The plain language of the GAO Personnel Act, like its counterpart, simply does not support Respondents' contentions that the PAB General Counsel cannot prosecute before the PAB independent disciplinary action complaints. The statute provides that the General Counsel shall:

(A) investigate an allegation about a prohibited personnel practice under § [3(b)(1)(B) of this Act] ... to decide if there are reasonable grounds to believe the practice has occurred, exists, or will be taken by an officer or an employee of the General Accounting Office;

(B) investigate an allegation about a prohibited Political activity under § [3(b)(1)(c) of this Act]...;

(C) investigate a matter under the jurisdiction of the Board if the Board or a member of the Board requests; and

(D) help the Board carry out its duties and powers.

Although Respondents concede that the General Counsel does have a prosecutorial role, they wrongly argue that the General Counsel cannot exercise that role independently, but can only do so in conjunction with an order from the PAB or in conjunction with another matter properly before the PAB. The statute, however, shows a clear intent on the part of Congress to give the General Counsel jurisdictional authority

to investigate and prosecute disciplinary action cases before the PAB which involve prohibited personnel practices, prohibited political activities and matters under the jurisdiction of the PAB when the PAB or a member of the PAB request investigation or prosecution. The statute provides for no other limitations on the investigative and prosecutorial role of the General Counsel.

In comparing the provision of 31 U.S.C. §§752(b)(3)(A), (B), (C) and (D), it appears from a reading of the statute that Congress gave the General Counsel both independent and non-independent investigative and prosecutorial authority. The General Counsel has authority to initiate a complaint for disciplinary action on his own initiative and upon an order from the PAB. See 31 U.S.C. §§752 (b)(3)(A), (B), (C) and (D).

Further, a review of the legislative history of the GAO Personnel Act supports the conclusion that Congress did not intend to exclude the General Counsel from prosecuting independent disciplinary action complaints before the PAB. In enacting the GAO Personnel Act, Congress never addressed the precise role of the General Counsel and instead, Congress chose to leave the formulation of the General Counsel's role to the discretion of the PAB. GAO v. GAO Personnel Appeals Board, 698 F.2d 516, at 530. Therefore, neither the statute nor the legislative history provide much discussion on the General Counsel. However, the GAO Personnel Act and the Civil Service Reform Act share a common purpose, and the legislative history of the PAB indicates that the construction of the PAB General Counsel's functions and authority, as discussed above, should follow those of the MSPB Office of Special Counsel and the General Counsel of the Federal Labor Relations Authority, as can be seen from this comment from the Report of the House Committee on Post Office and Civil Service:

The cornerstone of H.R. 5176 is the creation of a GAO Personnel Appeals Board to handle appeals from such matters as adverse actions, prohibited personnel practices, union elections, determinations of bargaining units, unfair labor practices and discrimination appeals. In handling each of these types of cases, the GAO Personnel Appeals Board acts in the place of the Merit Systems Protection Board, the Federal Labor Relations Authority, or the Equal Employment Opportunity Commission, as applicable. The committee expects that the Board will refer to decisions of these agencies for guidance. The General Counsel to the GAO Personnel Appeals Board acts in the place of the Special Counsel to the Merit Systems Protection Board the Federal Labor Relations Authority, or the Equal Employment Opportunity Commission, as applicable. The committee expects that the Board will refer to decisions of these agencies for guidance. The General Counsel to the GAO Personnel Appeals Board acts in the place of the Special Counsel to the Merit Systems Protection Board. In this way, the employees of GAO retain all the rights enjoyed by employees in the executive branch, while, at the same time, the conflict of roles is eliminated.

H.R. Rep. No. 494 96th Cong., 1st Sess. 5-6 (1979). See also, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1979).

Hence, the PAB was created by Congress to give GAO employees the same rights as those employees in the executive branch. As a result, the PAB is seen as a combined agency substitute for the MSPB, the EEOC, the Special Counsel and the FLRA, and in order to perform duties comparable to those of the MSPB, Special Counsel, EEOC, and FLRA, the PAB has had, from time to time, to amend its rules. It is the intent of Congress that the PAB seek guidance from the MSPB, the Special Counsel, the EEOC, and the FLRA in interpreting the GAO Personnel Act, but Congress left to the PAB the discretionary task of formulating appropriate procedures and a proper role for the General Counsel. GAO v. GAO Personnel Appeals Board, at 531; See Notes 69 and 72 accompanying the text. Thus, the PAB has proper discretion

to interpret its enabling legislation in the manner best suited to achieve its Congressional directive, that of ensuring that GAO employees have the same rights as executive branch employees. This includes "whatever sort of advocacy role for the [PAB] General Counsel the PAB determines is appropriate [to] help the PAB carry out its duties and powers...." Id. 529.

It is in the guise described above that the PAB, in its regulations at 4 CFR §28.105, has clearly stated that one of the roles the General Counsel should perform, in order to help it carry out its legislative mandate, is to prosecute disciplinary action complaints before it. The PAB did not see fit to exclude the General Counsel from prosecuting before it disciplinary action complaints brought independently by the General Counsel. In fact, to place such a restriction on the General Counsel may frustrate the PAB in meeting its congressional mandate. Therefore, Respondents' contention that the General Counsel does not have authority to instigate independent disciplinary action complaint is not consistent with either the statute or the legislative history. The General Counsel has authority, by statute from the powers granted to the PAB and by regulations from the PAB, to prosecute disciplinary action complaints before the PAB, by order of a member of the PAB and on his own initiations.

The Respondents' final argument on the Motion to Dismiss is that the PAB, on policy grounds, should decline to exercise jurisdiction over these complaints. Respondents cite no legal precedent to support their request in this regard, but instead cite the following reasons as basis for me to decline to exercise jurisdiction in these cases:

1. There is a compelling interest in repose in these cases, such that the lapse of time makes these proceedings contrary to everyone's interests, and such that laches should bar the actions;
2. There is a question as to whether or not the Respondents have been arbitrarily singled out for punishment in these actions, given the large number of cases the PAB has heard involving allegations of misconduct on the part of other supervisory employees;
3. Since the PAB was involved in hearing the Ramey case on the merits, there is a question whether the Board can act as a fair and impartial tribunal in these disciplinary actions; and
4. The role of the General Counsel, as advocate for Ramey in the employee appeal raises an issue of whether or not the General Counsel should be disqualified from prosecuting these disciplinary actions. Respondents allege that certain actions of the General Counsel during the litigation of the employee appeals raise questions of possible misconduct.

Briefly, I will deal with each of these points. There is no substance to Respondents' laches argument. The General Counsel filed his complaints for disciplinary action less than three months after the PAB's decision in the Ramey case became final, and at a time when the GAO's appeal of the PAB's decision was still pending in the United States Court of Appeals for the District of Columbia Circuit. At that time, the controversy underlying these complaints was still alive. Respondents do not point me to any evidence in the record which suggest that the General Counsel engaged in any undue delay in prosecuting either of the two complaints that may have prejudiced the ability of the Respondents to defend themselves. Nor do I think it would have been any more appropriate for the General Counsel to prosecute these complaints at a time when the PAB was still deliberating the merit of the employee appeal. The doctrine of laches is clearly not applicable here.

Nor do I think there is any merit to the argument that Respondents have been arbitrarily singled out for discipline. The PAB has vested the General Counsel with the discretion to prosecute disciplinary action complaints against individuals he believe have committed, inter alia, prohibited personnel practices. Whether the filing of the instant complaints constitutes an abuse of discretion, or is arbitrary and constitute an abuse of discretion, or is arbitrary and capricious, is a factual determination that must be determined from a review of the entire record. There is presently no evidence in the record to support Respondents' contentions in this regard. Additionally, the position Respondents find themselves in is no different from that of executive branch federal employees. Accordingly, this contention is also rejected.

Respondents' assertion that the PAB was involved in the employee appeal of this matter raises questions as to the PAB's impartiality, and is equally without merit. It is the PAB's responsibility to adjudicate all matters before it, in a fair and impartial manner. I have no reason to believe that adjudication of these complaints presents any circumstances that would render the PAB or me unable to objectively fulfill its duties in this matter. Again, the procedure followed, here, by the General Counsel in prosecuting these complaints is the same as that faced by employees who appear before the MSPB. At the time Congress gave life to the PAB, it could have modified this procedure but chose not to do so. Therefore, I see no bases for a modification by me.

Similarly, the General Counsel has a charge to carry out the duties of his office and assist the PAB in carrying out its legislative mandate in a fair and impartial manner. Again, there are no facts before me which suggest that the General Counsel cannot act in a fair and impartial manner in these complaints. If there are any facts which mitigate in favor of disqualifying the General Counsel from prosecuting these complaints, those facts should be brought out during a proceeding on the merits and if raised would lead to a factual determination for me to address at that time. The mere fact that the General Counsel prosecuted the petition for corrective action, standing alone, does not preclude him from pursuing a disciplinary action complaint and certainly will not sustain a Motion to Dismiss. To make such a ruling would preclude the PAB from carrying out its congressional mandate to consider and order disciplinary action. Also, such a ruling would not provide employees of GAO with the same protection as executive branch employees, and would, therefore, be in clear violation of the congressional mandate to the PAB.

For the above reasons, Respondents' argument that the PAB should decline to hear these complaints on policy grounds is also rejected.

Decision

Thus, construing the facts of this case in the light most favorable to the General Counsel, it is my determination that Respondents have failed to carry their burden of proving that there is no set of facts upon which the General Counsel may prevail. Therefore, Respondents' motion to dismiss is hereby DENIED.

Notes

1. Section 2302(b)(1) of 5 U.S.C. states in part that:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority:

(1) discriminate for or against any employee or applicant for employment,

A. On the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

B. On the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

C. On the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C.);

D. On the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

E. On the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation; Section 2302(b)(9) states that:

take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule or regulation.

2. The actual involvement of Respondents in the denial of Ramey's within-grade increase and the decision to terminate Ramey has not been fully developed.