

Janice F. Willis v. U.S. General Accounting Office and U.S. General Accounting Office Personnel Appeals Board

Docket No. 95-03

Date of Decision: April 22, 1996

Cite as: Willis v. GAO and GAOPAB (4/22/96)

Before: Paul G. Streb, Chief Administrative Law Judge, Merit Systems Protection Board (sitting in place of the Personnel Appeals Board)

Prohibited personnel practice

Reprisal

Suspension

Damages

Rescission

DECISION

INTRODUCTION

The Petitioner has filed a petition for review alleging that her 10-day suspension constitutes a prohibited personnel practice. She also has alleged that a performance appraisal she received constitutes a prohibited personnel practice. For the reasons stated below, I DISMISS the petition for lack of jurisdiction.

BACKGROUND

The Petitioner is employed as a Senior Trial Attorney at the Personnel Appeals Board (Board or PAB) of the General Accounting Office (GAO).¹ Petition for Review (PR), Ex. 16 at 1. On October 22, 1993, the General Counsel of the PAB proposed to remove her on the basis of three charges of misconduct. PR, Ex. 1. On December 15, 1993, the Board issued a decision

¹ When referring to the Personnel Appeals Board in its capacity as a Respondent, I will use the term "PAB." When referring to it in its capacity as the adjudicator of appeals such as this, I will use the term "the Board." As indicated below, I will refer to the Merit Systems Protection Board as "the MSPB."

sustaining one of the three charges and imposing a 10-day suspension in lieu of the removal that had been proposed. *Id.* Ex. 2.

The Petitioner filed a formal charge regarding her suspension with the General Counsel of the PAB on January 4, 1994. *Id.*, Ex. 9. In that document, she alleged that her suspension constituted reprisal for exercising her constitutional rights and for making disclosures protected under 5 U.S.C. §2302(b)(8), (9), and (11).² On November 4, 1994, she filed a second formal charge, in which she alleged that the performance appraisal she received from the General Counsel for the period from January 3, 1994, through June 30, 1994, constituted continuing reprisal for activities protected under 5 U.S.C. §2302(b)(8) and (9). *Id.*, Ex. 10. The two charges were investigated together, a report covering the two charges was issued, and the Petitioner was notified of her right to file a petition for review concerning the matters. *Id.*, Ex. 12.

The Petitioner filed the petition for review at issue here on October 2, 1995. *Id.* In that petition, she reiterated her previous allegation that her suspension constituted reprisal for exercising her rights under the Constitution and 5 U.S.C. §2302(b)(8), (9), and (11). *Id.* at 2.

The Board generally is responsible for adjudicating cases such as this one. See 4 C.F.R. §28.1(c). GAO's regulations provide, however, for assignment of those responsibilities to officials outside GAO when the person initiating such proceedings is an employee of the Board. See 4 C.F.R. §28.17(a), (b), (c). They provide further that adjudicatory responsibilities in such cases are to be assumed by an administrative law judge or administrative judge of the Merit Systems Protection Board (MSPB) if that agency consents to that arrangement, and that the decision of the judge is final and subject to the same judicial review as are other final decisions of the Board. 4 C.F.R. §28.17(c)(1), (c)(3); 4 C.F.R. §§28.86(e), 28.90(a). Because the Petitioner is an employee of the Board, and because the MSPB has entered into an agreement providing my services for these purposes, I am presiding over this matter.

On March 15, 1996, Respondent PAB filed a motion to dismiss the petition for lack of jurisdiction. In its motion, the Respondent asserts that it has rescinded the suspension and the performance evaluation that were the subjects of the investigation mentioned above. Motion to Dismiss at 4. It asserts further that the Petitioner will be provided with back pay covering the period of the suspension; that all references to that action and to the evaluation will be expunged from the Petitioner's personnel records; and that it will reimburse the Petitioner for attorney fees she incurred in connection with the suspension. *Id.* In light of these actions, the Respondent argues that it has returned the Petitioner to the *status quo ante*, that the petition is now moot, and that the mootness of the petition divests the Board of jurisdiction over the case. *Id.* at 5-6. The

² Section 2302 is not directly applicable to GAO. 5 U.S.C. §2302(a)(2)(C)(iii). Under 31 U.S.C. §732(b), however, personnel practices prohibited under 5 U.S.C. §2302(b) are prohibited with respect to GAO officers and employees.

Petitioner has responded in opposition to the motion, and both she and Respondent PAB have filed further submissions regarding the matter. *Id.*, Tabs 36, 37, 38, 41.³

ANALYSIS

Applicability of MSPB Precedent

I know of no Board decision addressing the circumstances under which rescission of the underlying actions causes a case arising under 5 U.S.C. §2302(b) to be moot. Furthermore, the parties to this case have identified no such precedent. The MSPB, however, has addressed this issue.

As I noted in my order of February 23, 1996, the Board is not bound by MSPB precedent. As I noted further in that order, however, the U.S. Court of Appeals for the District of Columbia Circuit has pointed out that the Board carries out functions comparable to those of the MSPB, and the court has indicated that the PAB should at least consider MSPB precedent in deciding questions already decided by that agency. *See General Accounting Office v. GAO Personnel Appeals Board*, 698 F.2d 516, 518, 535 (D.C. Cir. 1983). For these reasons, I find that MSPB precedent concerning the effect of rescissions on a case arising under 5 U.S.C. §2302(b) is relevant here.

The MSPB has held that an agency's complete rescission of the action forming the basis for an appeal, so that the employee is returned to the *status quo ante*, divests the MSPB of jurisdiction over the appeal. *Ferguson v. Department of Justice*, 23 M.S.P.R. 55, 56 (1984); *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). It has applied these principles to cases similar to the one now before me, i.e., to individual-right-of-action (IRA) appeals, in which individuals allege that certain personnel actions constitute personnel practices prohibited under 5 U.S.C. §2302(b)(8). *See Taylor v. Department of Education*, 54 M.S.P.R. 406, 410 (1992); *Mulherin v. Department of the Air Force*, 45 M.S.P.R. 289, 291-92 (1990); *Godfrey v. Department of the Air Force*, 45 M.S.P.R. 298, 301-02 (1990).

The MSPB has indicated that the test to be applied in determining whether it still has jurisdiction over an IRA appeal is whether, "[b]y its complete cancellation of the actions, the agency has afforded the appellant relief equivalent to that which he could have received from the [MSPB]." *Mulherin*, 45 M.S.P.R. at 292; *see also Marren v. Department of Justice*, 51 M.S.P.R. 643, 645 (1991) (administrative judge acted properly in dismissing appeal, since

³ On March 27, 1996, I granted the Petitioner's and Respondent PAB's motions for leave to file these further submissions. Case File, Tab 39. Subsequently, Respondent PAB filed a supplement to its reply to the Petitioner's response, along with a motion for leave to make that submission. *Id.*, Tab 40. Because this submission raises matters relevant to this case, because it was filed 10 days before the previously set deadline for the Petitioner's submission of her reply, and because acceptance of the PAB submission therefore will not delay the disposition of this case or deny the Petitioner an opportunity to respond to arguments raised in the submission, Respondent PAB's motion is GRANTED.

agency's complete rescission of underlying personnel action left "nothing ... for the [MSPB] to 'undo'"); *Godfrey*, 45 M.S.P.R. at 302-04 (appeal of reprimand under 5 U.S.C. §1221 had become moot as a result of cancellation of that personnel action). In light of these rulings, and in the absence of any indications that the Board has ruled in a manner inconsistent with them, I will apply this test here in determining whether Respondent PAB's actions have rendered this case moot.

Rescission of Personnel Actions

I note first that rescission of the allegedly improper personnel actions would appear to be the appropriate remedy in a complaint such as this. *See, e.g., Marshall v. General Accounting Office*, Docket No. 92-04 (May 26, 1993) (as remedy for improper performance appraisal, Board ordered respondent to change performance ratings from "borderline" to "fully satisfactory," and to "make other necessary adjustments to the narrative statements in the appraisal"); *Ramey v. General Accounting Office*, Docket No. 40-209-GC-83 (July 10, 1986) (as remedy for improper removal, Board ordered employee reinstated with back pay). As indicated above, the PAB has rescinded the two actions that were the subject of the investigation that preceded this complaint, and it has stated that it will provide the Petitioner with back pay, that it will expunge references to the suspension and the evaluation at issue, and that it will reimburse the Petitioner for her attorney fees. The Petitioner has not contested those actions; instead, as indicated below, she argues that additional actions should be taken.⁴

Reassignment From Deputy General Counsel Position

The Petitioner opposes dismissal of her petition on the ground that she has not been restored to the *status quo ante*. Response to Motion at 3. She states in her response to the motion that she formerly occupied the position of Deputy General Counsel of the PAB; that the PAB General Counsel removed her from that position on October 15, 1993, in retaliation for disclosing information to the Chair of the PAB; and that she was officially reassigned from the Deputy General Counsel position to the position of Senior Trial Attorney effective October 17, 1993. *Id.* at 4. Under these circumstances, the Petitioner argues, "returning her to the position of Deputy General Counsel ... would place her, as nearly as possible, in the position she would have been in had the prohibited personnel practices not occurred." *Id.*

The Board's regulations provide that a charging party shall identify "[t]he actions complained about," as well as the party's "reasons for believing the actions to be improper," in any petition for review. 4 C.F.R. §28.18(d)(3). In her petition for review, the Petitioner clearly identified her suspension and 1994 performance evaluation as actions that she had alleged, in charges filed with the General Counsel and subsequently investigated, constituted prohibited personnel practices. *See* PR at 7-8. In addition, with her petition she included copies of the charges she had filed concerning those actions; and in those charges she included specific requests that the

⁴ If the Petitioner wishes to contest the adequacy of the steps the PAB has taken in this regard, she may file a petition for enforcement. *See* 4 C.F.R. §28.88(c).

actions be canceled. *Id.*, Ex. 9 at 7, Ex. 10 at 2. The petition includes no similar statement or request, however, with respect to the Petitioner's reassignment. Although the Petitioner referred in her petition to her reassignment, *id.* at 3 n.3, 14 & n.30, 21; see also *id.*, Ex. 16 (memorandum from General Counsel informing Petitioner of change, and memorandum from Petitioner inquiring about authority to make change), the petition includes no specific allegation that the reassignment constitutes a prohibited personnel practice, and no request that that action be canceled.

The regulations also provide that a charging party should include the same information described above, i.e., "[t]he actions complained about" and the "reasons for believing the actions to be improper," in any charge presented for investigation by the Board. 4 C.F.R. §28.11(d)(3). There is no indication in the record that the Petitioner ever filed a charge alleging that the reassignment constituted a prohibited personnel practice. In one of the two formal charges mentioned above -- i.e., one of the documents that led to the investigation that preceded the filing of this petition -- the Petitioner referred to that action. PR, Exs. 9, 10; see also *id.*, Ex. 9 at 1 n.2. Neither charge, however, includes any specific allegation that the Petitioner's reassignment constituted a prohibited personnel practice or any request that the action be canceled. Furthermore, like the petition, the charges described above seem to raise the reassignment as evidence of retaliatory animus, rather than as a separate prohibited personnel practice whose cancellation the Petitioner sought. In addition, although the official who investigated the formal charges referred in her report to the reassignment, she indicated that the actions at issue in the investigation consisted only of the 10-day suspension and performance evaluation mentioned above. *Id.*, Ex. 12 at 3, 5-7.

I also note that the regulations provide that "[f]ailure to raise a claim or defense in the petition for review shall not bar its submission later unless to do so would prejudice the rights of the other parties or unduly delay the proceedings." 4 C.F.R. §28.18(e). I need not determine whether this provision generally allows an employee to raise a separate personnel action after the filing of her petition for review, and to have that action considered without the investigation that normally precedes the filing of a petition for review. See 4 C.F.R. §§28.11, 28.12, 28.18. Even if it does, allowing the Petitioner to include her reassignment among the personnel actions to be addressed in this case would, at this stage of the proceedings, be inappropriate. Relying on the fact that the Petitioner raised only two personnel actions, and on its conclusion that rescinding those actions therefore would remove the case from the Board's jurisdiction, Respondent PAB has canceled both those actions. There is no indication that it would have canceled the actions in the absence of this conclusion. Allowing the Petitioner to amend her petition at this point therefore would prejudice Respondent PAB.

I note further that the time period during which discovery was to be completed has ended, and that the only discovery matters that have remained unresolved until this time are the Petitioner's pending discovery motions and Respondent PAB's motion for a discovery-related protective order. Allowing the Petitioner to raise her reassignment would require the scheduling of a new discovery period. Accordingly, permitting this action would be inappropriate under the regulations in that it would "unduly delay the proceedings." 4 C.F.R. §28.18(e).

Finally, I note that there appear to be no significant equitable considerations that would favor allowing amendment of the petition at this stage. The Petitioner was well aware of her reassignment both at the time she filed each of her charges and at the time she filed her petition for review. In fact, her reassignment occurred even before the two actions raised in the charges and petition took place.

For the reasons stated above, I find that the Petitioner did not include her reassignment among the "actions complained about" when she brought her case, and that there is no sufficient basis on which to allow her to amend her petition to include that action. Even if the Petitioner were to substantiate the reprisal claims that are properly before me, therefore, cancellation of the reassignment would not be warranted. Respondent PAB's failure to rescind that action accordingly does not preclude a finding that the petition is moot.

Consequential Damages

The Petitioner also contends, in response to the motion to dismiss, that she has suffered severe mental anguish and serious emotional distress as the result of repeated acts of retaliation and harassment. Response to Motion at 4. In support of this contention, she describes actions that allegedly were taken in connection with events leading up to and following the suspension, and she asserts that those actions had consequences including humiliation and damage to her reputation and career. *Id.* at 4-5. She states further that she "seeks consequential damages in the amount of \$600,000.00 for serious emotional distress, severe mental anguish and damage to her professional career" *Id.* at 6.

Civil Rights Act of 1991

Although the Petitioner states that the damages she requests "have been calculated based on the compensatory damages available to victims of retaliation under the Civil Rights Act of 1991," Response to Motion at 6, it is clear that that act is not applicable to this case. This proceeding was not brought on the basis of that act, and the act's provisions for compensatory and punitive damages are applicable only in cases, unlike the instant case, where there is an issue of intentional discrimination. See Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1071, 1072-73.

Public Law 103-424

The Petitioner also appears to rely on 5 U.S.C. §1221(g)(1)(A)(ii), which provides that corrective action ordered by the MSPB in cases similar to this case may include "reasonable and foreseeable consequential changes." I need not determine whether section 1221(g) applies to Board proceedings in general.⁵ Even if it does, I find that it does not apply to this proceeding.⁶

⁵ As noted above, 5 U.S.C. §2302(b) has been made applicable to GAO by 31 U.S.C. §732(b). Section 732(b) does not expressly refer, however, to 5 U.S.C. §1221.

First, the provision on which the Petitioner relies was enacted as part of Public Law 103-424. Pub. L. No. 103-424, §8(b), 108 Stat. 4361, 4365 (1994). Section 14 of that act provides as follows: "The provisions of this Act and the amendments made by this Act shall be effective on and after the date of the enactment of this Act." *Id.*, §14, 108 Stat. 4368. The date of enactment of Public Law 103-424 was October 29, 1994. 108 Stat. 4368. The suspension at issue here, however, was effected on January 3, 1994, and the evaluation was provided to the Petitioner on October 5, 1994. See PR, Ex. 2 at 7; *id.*, Ex. 10 at 1-2. Those actions therefore were taken prior to the effective date of the statutory provision on which the Petitioner relies.

The Petitioner concedes that the provisions of Public Law 103-424 became effective "after the retaliatory notice of proposed removal, suspension, and negative performance appraisal actions currently before the Board." Apr. 8 Submission at 4. She argues, however, that she "has suffered the effects of these actions for the past two and one-half years, until just recently when they were rescinded" *Id.* For the reasons stated below, however, I find that the provisions of Public Law 103-424 that are relevant here cannot be applied to actions taken prior to the effective date of that act.

While I know of no Board decisions addressing the matter in question here, the MSPB has addressed this issue. In *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 352-54 (1995), a corrective action proceeding, the MSPB declined to give retroactive application to the same act's amendment broadening the definition of a "personnel action" under 5 U.S.C. §2302(a)(2)(A). Subsequently, in *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238-40 (1995), another corrective action proceeding, it held that a different provision of the same act should be given retroactive application. For several reasons, I find that the reasoning in *Caddell*, in *Scott*, and in the Supreme Court decision on which the MSPB relied in the relevant parts of those decisions, supports a conclusion that the consequential damages provision is not applicable to cases in which -- like the present case -- the personnel actions at issue were effected prior to the enactment of Public Law 103-424.

I note initially that Public Law 103-424 includes no provision regarding its effective date other than that quoted above; that the language of that section indicates that the section applies generally to all provisions of the act; and that the MSPB relied on that section both in *Caddell* and in *Scott*. See Pub. L. No. 103-424, § 14, 108 Stat. 4361, 4368 (1994); *Scott*, 69 M.S.P.R. at

⁶ Respondent PAB argues that, because the statutory provision at issue here refers to "consequential changes," rather than "consequential damages," "it is certainly not clear that this amendment authorizes the type of compensatory damages which Petitioner is now ... seeking." Mar. 29 Supplement at 3. The use of the word "changes" in place of the word "damages" may represent only a typographical error in the legislation in question. See 140 Cong. Rec. H11419, H11421 (daily ed. Oct. 7, 1994) (statement by Rep. McCloskey, during floor debate on legislation, that the "expanded provisions for consequential damages and attorney fees are intended to provide a realistic expectation that employees who prevail will recover their costs, the same as if a merit system reprisal had not occurred" (emphasis added)). In light of my finding that this provision is not applicable here, however, I need not address the merits of this argument.

238; *Caddell*, 66 M.S.P.R. at 352-53. I therefore find that the language quoted above applies to the consequential damages provision just as it does to the provisions the MSPB addressed in *Caddell* and in *Scott*, and that the MSPB's interpretation of that language is relevant here.

I note further that the *Caddell* and *Scott* holdings are based largely on the Supreme Court's decisions in *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1504 (1994), and *Rivers v. Roadway Express*, 114 S. Ct. 1510 (1994). Under *Landgraf*, the MSPB noted, the first task in determining whether a statute should be applied retroactively was to determine whether Congress had expressly prescribed the statute's proper reach. *Caddell*, 66 M.S.P.R. at 353 (citing *Landgraf*, 114 S. Ct. at 1505); see *Scott*, 69 M.S.P.R. at 238. If Congress had not done so, the next task would be to determine whether the new statute would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Caddell*, 66 M.S.P.R. at 353 (quoting *Landgraf*, 114 S. Ct. at 1505); see *Scott*, 69 M.S.P.R. at 238. There was a presumption under *Landgraf*, the MSPB noted, that the statute did "not govern [retroactively] absent clear congressional intent favoring such a result," *Caddell*, 66 M.S.P.R. at 353 (quoting *Landgraf*, 114 S. Ct. at 1505); see *Scott*, 69 M.S.P.R. at 238.

The MSPB found in *Caddell* and *Scott* that Congress had not expressly prescribed the proper reach of Public Law 103-424. *Scott*, 69 M.S.P.R. at 239; *Caddell*, 66 M.S.P.R. at 354. In *Caddell*, it also found that "the 'traditional' presumption against applying a statute retroactively should be applied [there] because the change [at issue] would 'operate "retrospectively"' if it were applied to conduct occurring before" the date on which Public Law 103-424 was enacted. *Caddell*, 66 M.S.P.R. at 354 (quoting *Landgraf*, 114 S. Ct. at 1506). It noted further that the amendment at issue there affected "substantive rights, liabilities, or duties," and it indicated that applying the amendment retroactively would "attach[] new legal consequences to events completed before its enactment" and would "enlarge[] the category of conduct" that would be prohibited under 5 U.S.C. §2302(b). *Caddell*, 66 M.S.P.R. at 354 (quoting *Landgraf*, 114 S. Ct. at 1499, and citing *Rivers*, 114 S. Ct. at 1515). Finally, although it acknowledged that retroactive application of the amendment might "vindicate [the amendment's] purpose more fully," it found that that consideration was insufficient to rebut the presumption against retroactivity, and that none of the exceptions to that presumption described in *Landgraf* were applicable. *Caddell*, 66 M.S.P.R. at 354.

As noted above, the MSPB applied the provision at issue in *Scott* retroactively. In doing so, however, it relied on the same Supreme Court decisions on which it had relied in *Caddell*. In *Scott*, the MSPB was addressing the applicability of a provision that an employee might demonstrate that the disclosure at issue was a contributing factor in the personnel action at issue by presenting evidence (1) that the official taking the action knew of the disclosure and (2) that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Scott*, 69 M.S.P.R. at 238 (citing Pub. L. No. 103-424, § 4(b), 108 Stat. 4361, 4363).

The MSPB found that the provision at issue in *Scott*, unlike the one at issue in *Caddell*, was not directed at regulating the primary conduct of the parties; that it instead effected a procedural

change related to the MSPB's "contributing factor" analysis; and that the provision "sp[oke] more 'to the power of the court, rather than to the rights or obligations of the parties.'" *Scott*, 69 M.S.P.R. at 239 (quoting *Landgraf*, 114 S. Ct. at 1502). It also noted, citing *Landgraf*, that changes in procedural rules often might be applied in cases arising before enactment of the changes. *Id.* at 239 (citing *Landgraf*, 114 S. Ct. at 1502). In addition, while it stated that the amendment might "affect the secondary conduct of the parties by modifying the emphasis they place[d] on the evidence they present[ed] to the [MSPB]," it indicated that, both before and after the enactment of the amendment, knowledge and timing were relevant factors that could support a finding that a disclosure was a relevant factor. *Id.* The MSPB found, therefore, that parties would likely present the same kinds of evidence following enactment of the amendment that they presented before, and that applying the amendment retroactively therefore did "not raise concerns about fair notice, reasonable reliance, and settled expectations." *Id.* (citing *Landgraf*, 114 S. Ct. at 1499, 1506). Finally, the MSPB noted that the provision at issue there did "not impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 240.

I find that the reasoning in both *Scott* and *Caddell* supports a conclusion that the provision at issue here should not be applied retroactively. First, as in *Scott* and *Caddell*, Congress has not expressly prescribed the proper reach of this provision. Second, as in *Caddell*, the provision affects "substantive rights, liabilities, or duties." Although it would not "enlarge[] the category of conduct" that would be prohibited under 5 U.S.C. §2302(b) or elsewhere, it would -- as in *Caddell* -- "attach[] new legal consequences to events completed before its enactment." That is, it could result in liability that would not have existed but for the enactment of Public Law 103-424.⁷ Unlike *Scott*, the effect of the amendment is not limited to nonsubstantive procedural matters that "speak more 'to the power of the court, rather than to the rights or obligations of the parties,'" and that raise no "concerns about fair notice, reasonable reliance, and settled expectations." I see nothing in *Caddell*, in *Scott*, or in *Landgraf* that suggests that any exception to the general presumption against retroactivity is applicable here.

It could be argued that both *Caddell* and *Scott* are distinguishable from the case now pending before me. The petition in the present case, unlike the appeals in *Caddell* and *Scott*, was filed after Public Law 103-424 was enacted, and in *Caddell* and *Scott* the MSPB did not specifically address the issue of whether that legislation's provisions could be applied to cases that were brought after the legislation's enactment but that concerned personnel actions effected before that enactment. The reasoning in *Caddell*, *Scott*, and *Landgraf*, however, indicates that it is the

⁷ As noted above, Respondent PAB has expressed doubt about whether the provision for "consequential changes" makes employers liable for the type of compensatory damages the Petitioner is seeking. In any event, however, it is clear that, in enacting Public Law 103-424, Congress indicated an intent to expand the kinds of relief available to employees subjected to prohibited personnel practices. See 140 Cong. Rec. H11419, H11421 (daily ed. Oct. 7, 1994) (statement by Rep. McCloskey, during floor debate on legislation, that the "expanded provisions for consequential damages and attorney fees are intended to provide a realistic expectation that employees who prevail will recover their costs, the same as if a merit system reprisal had not occurred" (emphasis added)).

date of the personnel action underlying the proceeding -- and not the date on which the proceeding is brought -- that determines whether the legislative changes should be applied retroactively or prospectively, and whether, therefore, the presumption against retroactivity should be applied. See, e.g., Caddell, 66 M.S.P.R. at 353 (in the absence of an "express command [regarding retroactivity], the court must determine whether the new statute would have retroactive effect, i.e., whether it would 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed") (quoting *Landgraf*, 114 S. Ct. at 1505) (emphasis added); *id.* at 354 (a change "would 'operate 'retrospectively'" if it were applied to conduct occurring before" the date of enactment) (quoting *Landgraf*, 114 S. Ct. at 1506) (emphasis added); *id.* (legislative change, if applied in *Caddell*, would "attach[] new legal consequences to events completed before its enactment") (quoting *Landgraf*, 114 S. Ct. at 1499) (emphasis added); *id.* (applying amendment in *Caddell* would "enlarge[] the category of [prohibited] conduct") (citing *Rivers*, 114 S. Ct. at 1515) (emphasis added); *Scott*, 69 M.S.P.R. at 238-40.

Finally, as indicated above, MSPB precedent, although not binding on the Board, is appropriate for consideration in deciding questions such as this. Because the MSPB's reasoning in *Caddell* and *Scott* is persuasive and consistent with the Supreme Court precedent cited above, I find that it should be applied here. I also find, therefore, that 5 U.S.C. §1221(g)(1)(A)(ii) (1994) does not authorize payment of the consequential damages the Petitioner requests.

Relief Based on Equitable Principles

The Petitioner seems to argue that the Board has the authority to grant the relief she requests (or perhaps some other, unspecified relief) on the basis of its authority to "invoke equitable principles in fashioning an appropriate remedy to compensate" her. Apr. 8 Submission at 3 (quoting *Davis v. General Accounting Office*, Docket No. 95-01 (Dec. 28, 1995)). The authority on which she relies, however -- a memorandum and order declining to reconsider an initial decision -- was vacated two months after its issuance, based on an agreement to settle "all matters at issue in the case." *Davis v. General Accounting Office*, Docket No. 95-01, Feb. 27, 1996. Any precedential effect the memorandum and order might have had on this case therefore has been eliminated. See 91 C.J.S. *Vacate* (1955) ("as applied to judgments, orders, or the like, 'to vacate' means ... to deprive of force; to make of no authority or validity") (footnotes omitted).

Furthermore, the reasoning in the memorandum and order is not applicable here. The case in which it was issued apparently involved a constructive removal that was found to have resulted from an improper performance rating. See *Davis*, Memorandum at 1-3. The part of the memorandum on which the Petitioner relies concerns the prior decision to order not only that the employee be reinstated, but also that he be promoted. *Id.* at 7-8. The basis for this relief is said in the memorandum to have been "the Board[']s implicit[] assum[ption] that it could invoke equitable principles in fashioning an appropriate remedy to compensate petitioner for the deprivation of rights guaranteed to him by both statute and agency regulation." *Id.* at 7. The memorandum indicates further, however, that the Board's authority to provide such relief "was not entirely free from doubt." *Id.*

More important, the relief granted in *Davis* is not comparable to that sought here. Not only was the allegedly improper action at issue in that case -- i.e., the employee's performance rating -- found to have resulted in the employee's separation, but the Board also found that there "seem[ed to be] more than a reasonable possibility" that the employee would have been promoted in the absence of the rating. *Id.* The promotion of an employee who would have been promoted in the absence of a personnel action found to have been improper is an equitable remedy that would appear to be well within the scope of remedies the Board is authorized to order. See *Hubbard v. Administrator, Environmental Protection Agency*, 982 F.2d 531, 532-33 (D.C. Cir. 1992) (although classic remedy for loss of income attributable to denial of employment is money damages, reinstatement is specific relief, i.e., equitable remedy, for that deprivation); *Marshall v. General Accounting Office*, Docket No. 92-04 (Sept. 30, 1993) (Board ordered employee's retroactive placement in higher pay band based on finding that prohibited personnel practices had prevented employee from receiving fair consideration for placement). Furthermore, any payment of back pay in connection with such an order would appear to be authorized by the Back Pay Act, 5 U.S.C. §5596. See 5 U.S.C. §5596(b)(1) (employee found to have been affected by unjustified or unwarranted personnel action that has resulted in reduction in employee's pay is entitled, on correction of action, to receive pay employee would have earned in absence of unjustified action);⁸ see also *Marshall*, Docket No. 92-04 (Board ordered "appropriate back pay adjustments" in connection with order that employee be placed retroactively in higher pay band). I see no basis, however, for finding that payment of the monetary damages the Petitioner seeks in the present case is authorized by that act.

I note further that monetary liability may not be imposed against a federal agency unless Congress has clearly waived sovereign immunity. *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 168 (D.C. Cir. 1982), citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267-68, 95 S. Ct. 1612, 1626-27 (1975); see also *Patrick v. General Accounting Office*, Docket No. 02-102-04-81 (Sept. 1, 1983) (Board found back pay unavailable in cases of erroneous position classification, based on absence of express waiver of sovereign immunity). Waivers of sovereign immunity are to be construed strictly, see *Hubbard*, 982 F.2d at 532, and a waiver may not be found unless Congress's intent is unequivocally expressed in the relevant statute, see id., citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980), or unless "a waiver can be found ... by 'necessary implication from the statutory context in which [the] ... provision arises,'" *In re Frazier*, 672 F.2d at 168, quoting *N.A.A.C.P. v. Civiletti*, 609 F.2d 514, 516-17 (D.C. Cir. 1979), *cert. denied sub nom. Andrulis v. United States*, 447 U.S. 922 (1980). To meet this test, "a 'legislative intent ... so clear and explicit as to brook no reasonable doubt'" must be demonstrated. See *Hubbard*, 982 F.2d at 532-33, quoting *In re Perry*, 882 F.2d 534, 544 (1st Cir. 1989).

⁸ An early Board decision indicated uncertainty regarding the applicability of the Back Pay Act to GAO employees. See *Shaller v. General Accounting Office*, Docket No. 02-102-04-81 (Sept. 1, 1983) (Board did not reach "the question of the applicability of Back Pay Act to GAO"). However, the Board subsequently indicated that the act's provisions were applicable to those employees. See *Ramey v. General Accounting Office*, Docket No. 40-209-GC-83 (July 10, 1986) (Board ordered "back pay as provided for by the Back Pay Act").

While the "consequential changes" provision of Public Law 103-424 would appear to meet the test described above, I have found that it is not applicable to this case. I also have found that the Back Pay Act does not authorize the additional relief requested here. In addition, the Petitioner has identified no other basis for finding that the Board is authorized to provide the additional relief she requests.

Finally, it could be argued that the Board's general authority to "order corrective ... action in a case arising from ... a prohibited personnel practice" is a remedial provision that, like other remedial measures, should be construed broadly. It is true that statutory provisions that are designed to "introduce regulations conducive to the public good" generally are to be "interpreted liberally to embrace all cases fairly within their scope, so as to accomplish the object of the legislature, and to effectuate the purpose of the statute by suppressing the mischiefs and advancing the remedy" 82 C.J.S. *Statutes* §388. This principle, however, "should never be applied so as to extend the application of statutes to cases not within the contemplation of the legislature" *Id.* Furthermore, as I have noted above, the waiver of sovereign immunity that is needed if the Board is to order the additional monetary relief requested by the Petitioner in this case cannot be found unless Congress's intent is unequivocally expressed in the relevant statute.

In the absence of any indication that there has been an unequivocal expression of intent to waive sovereign immunity, I find that the Board does not have the authority to award the relief the Petitioner has requested. I conclude, therefore, that the Petitioner would not be entitled, on a showing that the actions at issue constituted reprisal for protected disclosures, to receive that relief. Respondent PAB's failure to provide it to her therefore does not preclude a finding that this case is moot.

Other Bases for Opposing Dismissal

The Petitioner appears to be basing her opposition to the motion to dismiss primarily or entirely on the grounds addressed above. She also refers, however, to her having "had to file three additional prohibited personnel practice Charges to protect her job." Response to Motion at 5; see also Apr. 8 Submission at 4-5. To the extent that this assertion is intended to provide an additional basis for denying the motion to dismiss, I find it unpersuasive. Any relief to which the Petitioner might be entitled as a result of her filing of charges not covered in this proceeding must be provided elsewhere, in a proceeding addressing those charges.

The Petitioner also refers to her having "inadvertently omitted a standard clause for relief routinely incorporated in a Petition for Review or Complaint," *i.e.*, a clause requesting "any other relief deemed appropriate." Response to Motion at 2 n.2; see also *id.* at 6-7. I need not determine whether the omission of this clause has any bearing on the issue of whether the petition should be dismissed. Even if the Petitioner had included in her petition for review all the claims for relief that she has subsequently presented, the inclusion of those claims would not, as I have found above, preclude dismissal of the petition.

Finally, the Petitioner seems to argue that cancellation of the personnel actions at issue in her petition would not eliminate the basis for Board jurisdiction over her case because she "had no right of appeal to the Board based solely on the personnel actions, *e.g.* 10-day suspension and

performance appraisal," and because "[i]t is the prohibited personnel practices[,] *i.e.*, retaliation, reprisal, and violation of Constitutional rights, which provide the bases for the Board's jurisdiction." Apr. 8 Submission at 2. She asserts, in connection with this apparent argument, that the rescission of her suspension and performance appraisal "does not deprive [her] of her right to a hearing and appropriate relief pursuant to 4 C.F.R. § 28.2(b)(2)." *Id.*

I find this argument unpersuasive. The term "prohibited personnel practice" is defined, in effect, as covering certain personnel actions, including actions taken in reprisal for protected disclosures. See 5 U.S.C. § 2302. While the actions at issue in the Petitioner's petition may not have been appealable in the absence of her allegations of reprisal, the allegations of reprisal could not have been subject to review under the authorities cited above in the absence of the personnel actions. Moreover, there would appear to be no purpose in holding a hearing when, even if the Petitioner were to prevail on the merits, no further relief could be granted. *Cf. Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (the right to a hearing does not require an evidentiary hearing when there is no factual dispute and the proceeding involves only a question of law).

CONCLUSION

I find that Respondent PAB has afforded the Petitioner relief equivalent to the relief she could have received by prevailing in this proceeding. Accordingly, I find that the petition has been rendered moot, and that the Board therefore has been divested of jurisdiction over it.⁹ The petition for review is DISMISSED for lack of jurisdiction.

⁹ In light of this conclusion, Respondent PAB's March 11 motion for a protective order and the Petitioner's February 29 and March 18 motions for discovery orders also are moot. Because the document forwarded with the March 11 motion (a letter from N. McBride to J. James dated September 6, 1995) was provided to me only for an *in camera* review, I am returning it to Respondent PAB. However, that respondent must retain the document for purposes of possible judicial review.