

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

Docket No. 97-01

Date of Decision: May 7, 1997

Cite as: Willis v. GAO and GAOPAB (5/7/97)

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

Prohibited personnel practice

Reprisal

Failure to prosecute

Removal

DECISION

INTRODUCTION

The Petitioner has filed a petition for review alleging that her 10-day suspension, effective November 18, 1996, constitutes a prohibited personnel practice. She also has requested that her removal, which had been proposed by the time she filed her petition, be stayed. For the reasons stated below, I DISMISS the petition with prejudice in part for lack of jurisdiction and in part for failure to prosecute it.

BACKGROUND

The Petitioner was employed until recently as a Senior Trial Attorney at the Personnel Appeals Board (Board or PAB) of the General Accounting Office (GAO).¹ Petition for Review (PR) at 5. On March 5, 1997, she filed with the Board a petition for review in which she referred to several actions that had been proposed, threatened, or taken against her, and she alleged that those actions constituted reprisal or evidence of reprisal against her for her protected disclosures and for her exercise of appeal rights. *Id.* at 1-4, 14-15, 17-20. As I indicated in an order I issued on March 19, 1997, the Board normally adjudicates petitions for review filed by GAO employees. Because the Petitioner is employed by the PAB, however,

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."

and because GAO has entered into an agreement under which my services are to be provided for this purpose, the petition was forwarded to me for adjudication. See 4 C.F.R. §28.17(c)(1).

ANALYSIS

Actions at Issue in Petition

In my order of March 19, 1997, I stated that the Petitioner appeared to be challenging only two actions directly in her petition for review, i.e., the 10-day suspension mentioned above and her proposed removal. Mar. 19 Order at 1. While I provided the Petitioner with an opportunity to object to this construction of her petition, *id.* at 5, she did not do so. Accordingly, I found in an order issued on April 14, 1997, that the only actions before me were the suspension and the proposed removal. Apr. 14 Order at 2. In light of that finding, I have considered only those two actions.

Proposed Removal

GAO's regulations provide that the Board has jurisdiction over personnel practices prohibited under 31 U.S.C. §732(b)(2). 4 C.F.R. §28.2(b)(2). Such practices include removals taken in reprisal for activity of a kind protected under 5 U.S.C. §2302(b). 31 U.S.C. §732(b)(2). The Petitioner alleges that the PAB proposed her removal in reprisal for such activity. PR at 18-19. She therefore contends, in effect, that her removal would constitute a prohibited personnel practice. The corrective action she seeks in connection with this matter is a stay of the proposed action. *Id.* at 20.

As I indicated in my March 19 order, GAO's regulations authorize the Board's General Counsel to request a stay of a proposed personnel action that, in his judgment, may constitute a prohibited personnel practice. 4 C.F.R. §28.133. Nothing in that provision or elsewhere in GAO's regulations, however, appears to authorize the employee herself to request that an action or proposed action be stayed. Moreover, Board precedent indicates that stays of personnel actions are extraordinary remedies that the Board has authorized only its General Counsel to seek. *Dowd v. General Accounting Office*, 2 PAB Decisions 116, 131 (1992).

In light of the regulatory provision and decision cited above, and in the absence of any indication that a request for a stay had been filed by the Board's General Counsel or any official acting for him in this case,² I noted in my March 19 order that I might not have the authority to consider the Petitioner's stay request. Mar. 19 Order at 4. I also ordered the Petitioner to show why I should not dismiss her request for lack of jurisdiction. *Id.* at 4-5. The Petitioner did not respond to that order. On April 14, 1997, therefore, I issued an order

² As noted in my order, the PAB Respondents have indicated that another official has been appointed to act in the General Counsel's place in this case. PAB Opposition at 2 n.1.

finding that the Petitioner had failed to show that the Board had jurisdiction over her request for a stay of her removal. For the reasons stated above, I reaffirm that finding.

Suspension

The Petitioner also alleges that her suspension constitutes reprisal for activity protected under 5 U.S.C. §2302(b)(8), (9), and (11), as those provisions have been incorporated into 31 U.S.C. §732(b)(2), and she has requested that corrective action be taken in connection with this matter. PR at 1-2, 15-16, 19-20. As I indicated in my March 19 order, the Board would appear to have jurisdiction over the subject matter of this allegation under subchapter IV of chapter 7, 31 U.S. Code. Mar. 19 Order at 2-3.

As I indicated further in that order, however, the Board has jurisdiction over a petition for review of such a matter only if the petitioner has received a right-to-appeal letter concerning the matter. 4 C.F.R. §28.18(a); PR at 2, 3. I noted in my order that, although the PAB Respondents had indicated that the Petitioner had received a right-to-appeal letter concerning the suspension at issue here, the record did not include a copy of any such letter. Mar. 19 Order at 3. I noted further that, because a petition for review could be filed concerning a matter such as this only within 30 days after service of the right-to-appeal letter upon the charging party, 4 C.F.R. §28.18(b), the absence of a letter, or of any evidence of the date on which such a letter was issued, precluded a determination as to whether the petition was timely filed. Mar. 19 Order at 3. Accordingly, I ordered the Petitioner to submit a copy of the right-to-appeal letter she appeared to have received in connection with her suspension. *Id.*

The Petitioner did not submit a copy of the letter described above or otherwise respond to my order. Consequently, I stated in my April 14 order that it appeared that the Petitioner might not be interested in pursuing her petition. I also ordered the Petitioner to show why, under these circumstances, I should not dismiss her petition with prejudice for failure to prosecute it. The Petitioner has not responded to that order.³

Under the circumstances described above, including the Petitioner's failure to respond either to my March 19 order or to my April 14 order, I find that the Petitioner has failed to prosecute her petition as it concerns the suspension, and that dismissal with prejudice of the part of the petition concerning that action is appropriate. See 28 C.F.R. §28.24(b).

³ The Petitioner telephoned my office shortly before the deadline for filing her response and advised a member of my staff that she wished to withdraw her proposed removal appeal. *See* Case File, Tab 14 (Memo for Record). It is not clear whether the Petitioner also wished to withdraw her appeal as it concerned her suspension. As the Petitioner was advised during this telephone conversation, however, withdrawal requests must be made in writing. *Cf.* 4 C.F.R. §28.20(b)(2) (parties must serve on each other copies of all pleadings other than initial petition for review). I have received no written response to my March 19 order. (Copies of the memorandum documenting the Petitioner's telephone call are being forwarded to the parties with this decision.)

CONCLUSION

I find that the Petitioner has failed to show that the Board has jurisdiction over her request for a stay of her removal. The petition as it concerns that proposed action therefore is **DISMISSED** for lack of jurisdiction. I also find that the Petitioner has failed to prosecute her petition for review of her suspension. The petition as it concerns that action accordingly is **DISMISSED** with prejudice for failure to prosecute.