

John E. Smith v. U. S. General Accounting Office

Docket No. 01-05

Cite as: Smith v. GAO (4/29/03)

Before: Jeffrey S. Gulin, Chair, for the Board; Anne M. Wagner, Vice-Chair; Michael W. Doheny, Member

Retaliation

Remedy

Work assignment

Performance appraisal

Burden of Proof

DECISION ON PETITIONER'S APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

This matter is before the Personnel Appeal Board (PAB or the Board) on Petitioner's timely appeal from the August 23, 2002 Decision denying his request for monetary relief arising from Respondent's alleged retaliation against him for engaging in protected activity in violation of 5 U.S.C. §2302(b)(9)(A).¹ Petitioner challenges the Decision on the grounds that the Administrative Judge (AJ) misinterpreted the nature of his claim, erred as a matter of law in requiring that he demonstrate entitlement to a *status quo ante* remedy in order to prevail on his retaliation claim, and improperly refused to reach the merits of that cause of action.

The Board affirms the Initial Decision insofar as it denies Petitioner's request for monetary relief and further finds that Petitioner failed to demonstrate that Respondent retaliated against him for engaging in protected activity in violation of 5 U.S.C. §2302(b)(9)(A).

I. Factual Background

Petitioner, John E. Smith, began his employment with the U.S. General Accounting Office (GAO) in 1980, serving in the Personnel Office (now known as the Human Capital Office (HCO)) until his retirement in January 2002. Hearing Transcript (Tr.) 7-8. During his last six

¹ 5 U.S.C. §2309(b)(9) makes it a prohibited personnel practice for an agency to "take or fail to take . . . any personnel action against any employee . . . because of—(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation. . . ."

years at GAO, Petitioner was one of four GS-14 Personnel Management Specialists in the Policy and Program Development Branch (PPDB) of the Personnel Office. Tr. 8, 113-14.

Each of the four Personnel Management Specialists was assigned to one of four areas of responsibility: position classification and related matters; compensation and personnel staffing; performance management, employee relations and appraisals; and leave and work/family issues and time and attendance. Tr. 31-36, 115-16. When Petitioner, who had prior experience at the Agency in employee classifications, initially transferred to PPDB, he was assigned responsibility for personnel staffing and classification. Tr. 30, 74-75.

In 1996 and 1997, Petitioner complained about his assignments to Lee Bassoff, Assistant Director for PPDB, Mr. Bassoff's successor—Richard Smith—and Patricia Rodgers, Director of Personnel, claiming that his duties were not comparable in quantity or quality to the assignments given his peers in PPDB. Tr. 33-34, 39. In 1996, he also filed two complaints with the Civil Rights Office (now the Office of Opportunity and Inclusiveness (OO&I)), protesting his assignment to PPDB, raising allegations of race discrimination and retaliation, and naming Patricia Rodgers as a responsible official.² Tr. 65-67; *see* Petitioner's Exhibit (P.Ex.) 8 at 1-2.

Again, in 1998 and 1999, Petitioner complained to Richard Smith about the insufficiency of his assignments and asked for work outside the classification area. Tr. 38-39, 49-50. Richard Smith began assigning duties outside the classification area to Petitioner in 1999. Tr. 39-48, 123.

In June 1998, Petitioner filed a charge with the Personnel Appeals Board Office of General Counsel (PAB/OGC) alleging that Richard Smith and Patricia Rodgers discriminated against him on the basis of his race and retaliated against him in making decisions about work assignments in PPDB.³ Petition for Review (PfR) ¶8. Both named officials were asked to give statements about the charge. Tr. 163-64.

For both the FY 1998 and FY 1999 performance appraisal cycles, Petitioner received the lowest rating given to any of the four Personnel Specialists in PPDB.⁴ Joint Exhibits (Jt.Exs.) 1, 4-6, 8-

² In the 1980s Petitioner was a plaintiff in a class action lawsuit that alleged racial discrimination against black employees in the Personnel Office at GAO; Patricia Rodgers was also a member of the class. Tr. 91-92. Petitioner filed complaints of discrimination with CRO in 1991 and 1992; Ms. Rodgers was aware of the latter complaint. P. Exs. 5, 6; *see* P.Ex. 7. In June and December 1993, Petitioner filed charges with PAB/OGC alleging prohibited personnel practices by the Agency. PfR ¶8.

³ From 1995-2000, Petitioner served as President of GAO's chapter of Blacks in Government (BIG). Tr. 14. His duties included monitoring EEO activities and programs within the Agency and assisting employees with grievances and CRO complaints. Tr. 20-26. Both Ms. Rodgers and Mr. Smith were aware of Petitioner's activities and role in BIG. Tr. 63, 68, 127.

⁴ In his original appraisal for FY 1999, Petitioner was rated as "Fully Successful" in seven job dimensions and "Exceeds Fully Successful" in one dimension. Jt.Ex. 1. As explained below, an amended appraisal was adopted on the eve of trial; this gave Petitioner a rating equivalent to that of the next closest performer in PPDB.

9, 11-12. All of the appraisals for those two fiscal years were prepared by Richard Smith and reviewed by Patricia Rodgers. *Id.*

Two of the four Personnel Specialists received monetary awards for their work in FY 1999; both had been given ratings of “Outstanding” in six job dimensions.⁵ Jt.Exs. 6, 9, 14, 15, 19, 20.

Petitioner retired from GAO on January 3, 2002 after a twenty-two year career with the Agency. Tr. 7. On January 15, 2002, less than two weeks after Petitioner’s retirement and less than two weeks prior to the hearing in this matter, the Agency amended Petitioner’s performance appraisal for FY 1999, raising his ratings in seven job dimensions from “Fully Successful” to “Exceeds Fully Successful” and resulting in a rating of “Exceeds Fully Successful” in all eight job dimensions in which he was rated. Tr. 185-86.

Petitioner communicated his satisfaction with those ratings to the Agency and indicated that he would not seek further adjustment to his FY 1999 appraisal. *See* Letter from Janice M. Reece, PAB General Counsel, to Joan M. Hollenbach, GAO Managing Associate General Counsel (Mar. 4, 2002).

II. Initial Decision

In his PfR, Petitioner claimed that his supervisors, Patricia Rodgers and Richard Smith, gave him fewer and lower level assignments than those given to the three other GS-14 employees in the Policy and Program Development Branch of the Personnel Office in retaliation for engaging in the following protected activities: (1) acting as a designated representative in a race discrimination case against GAO; (2) filing discrimination complaints with the Agency’s Civil Rights Office; (3) filing charges with the PAB/OGC; and (4) as President of GAO’s chapter of Blacks in Government, assisting other employees in exercising their employment rights and communicating with senior Agency management as to BIG’s opposition to a number of proposed GAO orders.

After amending Petitioner’s FY 1999 performance appraisal to “Exceeds Fully Successful” in all categories, GAO moved to dismiss the case, or in the alternative, for summary judgment, arguing that the claims were moot since Petitioner had received all the relief to which he was entitled. Opposing that motion, Petitioner argued that he had not received all the relief to which he was entitled because he had not been given a monetary award for FY 1999, and had not received relief for pain, suffering and damage to his reputation. Petitioner had also sought a retroactive salary increase.

The AJ withheld ruling on the Agency’s motion until after the hearing in this matter. That hearing took place on January 28, 2002, followed by post-hearing briefs submitted by both parties. In his Decision, the AJ found that because Petitioner alleged injury arising from the denial of a monetary award in FY 1999, the Agency’s “unilateral decision to revise the FY 1999

⁵ The remaining Personnel Specialist, who like Petitioner, did not receive an award for work in FY 1999, was rated as “Outstanding” in one dimension, “Exceeds Fully Successful” in six dimensions, and “Fully Successful” in one dimension. Jt.Ex. 12.

performance appraisal” did not provide him with all of the relief that he sought or to which he might be entitled. Decision at 11. For that reason, he concluded that Petitioner’s claims were not moot. The Agency did not file an appeal in this case.

However, the AJ did dismiss Petitioner’s claim for monetary relief. Specifically, he ruled as a matter of law that Petitioner was not entitled to money damages for his alleged pain, suffering and loss of reputation. Citing *Bohac v. Department of Agriculture*, 239 F.3d 1334 (Fed. Cir. 2001), he ruled that under applicable law, Petitioner could only recover consequential damages for pecuniary loss arising from the alleged injury. Because Petitioner failed to present any evidence of pecuniary loss stemming from the alleged pain and suffering, the AJ found that he was not entitled to this monetary remedy. Decision at 12-13.

The AJ also rejected Petitioner’s claim for a retroactive salary increase as wholly unsupported by the record in this case. Decision at 13. In this regard, he deemed it relevant that the PFR did not suggest—much less explicitly identify—that Petitioner sought this type of relief. He further found that there was no evidence in the record concerning competition for promotion or merit step increases. Absent such evidence, he concluded that consideration of Petitioner’s request would be inappropriate. Decision at 14.

Finally, the AJ found that Petitioner was not entitled to a monetary award for his work during FY 1999. Eligibility for such a remedy, the AJ held, would require Petitioner to prove that the Agency had retaliated against him in violation of 5 U.S.C. §2302(b)(9) by lowering his performance appraisal and that such an award was necessary to make him whole, in other words to restore the *status quo ante*. The Administrative Judge concluded that he did not need to decide the first issue because, even assuming that Petitioner could prevail in proving the requisite retaliation, he would be unable to meet the second prong of the test—the need to restore the *status quo ante*. Decision at 15.

The Administrative Judge concluded that Petitioner’s amended FY 1999 performance appraisal (an appraisal that Petitioner considered as appropriate and not subject to further legal action), compared to those of his three colleagues, would not on its face have merited an award. Further, Petitioner had not provided the proof necessary to establish that with the amended appraisal he would have been likely to receive an award. The AJ found that the two employees in PPDB who received monetary awards for fiscal FY 1999 had appraisals that contained six “Outstandings,” ratings far higher than that of Petitioner’s appraisal that showed all eight of the job dimensions rated at the “Exceeds Fully Successful” level. The third employee, whose appraisal was similar to Petitioner’s amended one, did not receive a monetary award. The Administrative Judge concluded that based on the record before him he could not find that Petitioner was entitled to make-whole relief.

III. Analysis

The Board’s regulations provide that on appeal the full Board may review the record *de novo*. 4 C.F.R. §28.87(g). However, the Board will not ordinarily overturn a finding of fact in the initial decision “unless that finding is unsupported by substantial evidence in the record viewed as a whole.” *Id.* The Board will also consider whether new and material evidence is available; or the

initial decision is based on erroneous interpretation of statute or regulation; or the initial decision is arbitrary, capricious or an abuse of discretion or otherwise not consistent with law; or the initial decision is not made consistent with required procedures and results in harmful error. *Id.*

Petitioner raises four arguments on appeal: (1) the AJ misinterpreted the retaliation claim as limited to failure to receive a monetary award, when the PfR more broadly defined the claim as including the improper denial of work assignments; (2) the AJ incorrectly found that Petitioner's acceptance of the revised performance appraisal evidenced a tacit acceptance that the revision reflected what he would have achieved under a more equitable distribution of work assignments; (3) the AJ erred as a matter of law in requiring that Petitioner demonstrate entitlement to a *status quo ante* remedy in order to prevail on his retaliation claim; and (4) the AJ improperly refused to reach the merits of his claim of retaliation.⁶

A. Characterization of Petitioner's Claim

Petitioner argues that the Administrative Judge erroneously interpreted his claims of retaliation so as to limit the retaliation to an improper performance appraisal in Fiscal Year 1999 and the deprivation of an opportunity to receive an award. Petitioner's Brief on Appeal (Pet.Br.) at 2-3. Petitioner claims that the Agency also retaliated against him because of his protected activities by failing to give him work assignments comparable to the assignments given to the other GS-14 Personnel Specialists. *Id.* at 3. Petitioner further claims that as a result of these work assignments he was precluded from obtaining higher performance appraisals and awards. *Id.*

We agree with Petitioner that the retaliation claim, as defined in the PfR, extended to the denial of comparable work assignments. However, upon closer examination, it is clear that Petitioner's allegation of comparable work assignments was part and parcel of what he believed to be an inaccurate performance appraisal.⁷ For example, the PfR specifically stated that "his failure to receive assignments comparable to his peers had a direct impact on his FY 1999 appraisal ratings and his failure to receive an award." PfR ¶25. In another specification, the PfR alleged that because the lack of comparable assignments directly impacted his 1999 ratings, Petitioner was requesting that GAO rescind his ratings and replace them with minimum ratings of "Exceeds Fully Successful." PfR ¶29.

In short, Petitioner himself directly linked the performance appraisal with his work assignments. The Initial Decision does nothing more than reflect this more narrow focus, and as such, cannot be said to deviate so substantially from Petitioner's own characterization of his claim as to suggest harmful error. Moreover, in light of Petitioner's retirement, any claim relating to work

⁶ Petitioner did not appeal the Administrative Judge's dismissal of his damages claim or his denial of a retroactive salary increase. The Board affirms the AJ's dismissal for the reasons set forth in the Initial Decision.

⁷ Moreover, this is consistent with the Order governing incentive awards, which must be based on "performance and contributions." Order 2451.1, Incentive Awards Program (Interim Change, Feb. 1, 1998) (Jt.Ex. 22 at ch. 3 ¶5.b(1)).

assignments, apart from the impact on his previous performance appraisal and monetary award, would clearly be moot. *See Occhipinti v. Department of Justice*, 61 MSPR 504, 507-08 (1994).

B. Impact of Revised Performance Appraisal

Petitioner contends that the AJ erred in finding that his failure to contest the amended FY 1999 performance appraisal signified an implicit agreement that the rating accurately reflected what he would have received had he been given better assignments. Pet.Br. at 4. He asserts that accepting the amended appraisal did not compromise his claim that he had been denied work assignments, and consequently awards and higher performance appraisals, in retaliation for engaging in protected activities. *Id.*

The Board agrees. By accepting the amended appraisal, Petitioner merely assented to the proposition that it accurately reflected what he deserved for the assignments that he actually performed, not what he would have achieved with access to the same quantity and quality of assignments as those given to his peers. However, in light of our conclusion that Petitioner failed to prove that he was denied such access in retaliation for exercising his statutory appeal rights, *infra*, the Board cannot ascribe harmful error to the AJ's assumption regarding the significance of the uncontested revision. *See Frank v. Barnhart*, 2003 U.S.App. LEXIS 5773 at 11 (5th Cir. Mar. 25, 2003); *Karapinka v. Department of Energy*, 6 MSPR 124, 127 (1981).

C. Burden of Proof for Retaliation Claim

Since Petitioner's claim of retaliation extends to the issue of work assignments—albeit linked to the performance appraisal and monetary award—we deem the “ultimate questions” before the Board to be whether the Agency retaliated against Petitioner by failing to provide him with comparable work assignments⁸ and whether he would have received a monetary award if his work assignments were comparable to those given to his co-workers.

⁸ Even while reaching the issue of retaliation, the Board rejects Petitioner's claim that the AJ's decision in this instance not to reach that issue was error. The AJ did identify all material issues of fact and law, summarized evidence, and included conclusions of law and his legal reasoning as well as the authorities on which that reasoning rests. Petitioner relies on three MSPB decisions in support of his position. The reliance is misplaced. *See* Pet.Br. at 7 (*citing Qatsha v. Department of Defense*, 86 MSPR 121, 123 (2000); *Jones v. Department of the Army*, 68 MSPR 398, 402-03 (1995); *Spithaler v. OPM*, 1 MSPR 587, 588-89 (1980)).

Unlike the cases that Petitioner cites, the Initial Decision in the matter at hand clearly states the reason for not addressing the issue of retaliation. The AJ explained that it was not necessary to address the issue of whether Petitioner was subjected to retaliation, because Petitioner failed to show that there was any relief to which he would be entitled. Decision at 14-15. The AJ clearly laid out his reasoning for why Petitioner was not entitled to the remedy he requested, *i.e.*, Petitioner failed to adequately prove that he should have received an award for his performance during FY 1999. *Id.* at 15.

Furthermore, the cases cited by Petitioner all involve situations where the individuals would have been entitled to some relief if they had proven their cases. However, in the instant case, Petitioner has failed to prove that he would be entitled to relief even if he were to establish that the Agency had retaliated against him.

As Petitioner himself recognizes (Pet.Br. at 6), in order to prevail on his claim of retaliation under 5 U.S.C. §2302(b)(9), he had to demonstrate, by a preponderance of the evidence,⁹ that (1) he was engaged in a protected activity; (2) that the official or officials taking the action knew of his protected activity; (3) that he was not given work assignments comparable in quantity and quality to those of his peers; and (4) there is a genuine nexus between the work assignments and his appeal activity. See *Warren v. Department of Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Cooney v. Department of Air Force*, 37 MSPR 240, 242 (1988), *aff'd* 883 F.2d 1027 (Fed. Cir. 1989) (Table); *Willis v. GAO*, PAB Docket No. 98-02 at 32-33 (Oct. 8, 1999), *aff'd* 250 F.3d 757 (Fed. Cir. 2000) (Table).

There is no dispute that Petitioner engaged in protected activity and that his supervisors were aware of it. Tr. 14-27, 68-70, 92; P.Exs. 1-6. As to the third element of his cause of action, Petitioner failed to establish that the quantity and quality of his work assignments were not comparable to that of his peers. Petitioner testified that the other three Personnel Specialists received more assignments than he did and that two of them received assignments in areas with more activity than his. Tr. 61-62. However, he called none of these Specialists to testify at the hearing as to the number and type of assignments they had, or how they got their assignments during the relevant time. The supervisor, Richard Smith, presented a contrary view to Petitioner's on the nature of the assignments, stating that classification work was "like the others. It's up and down sometimes." Tr. 117. When asked if Petitioner's area—classifications—could be characterized as "dead" during the relevant time, Richard Smith answered in the negative and characterized the work in the area as "ongoing." Tr. 119. He also testified that the general areas of assignments pre-dated his 1997 arrival in PPDB (Tr. 116), and that special projects were assigned by the Director of Personnel (Tr. 120-21), whom neither party called to testify. Based on this record, Petitioner has failed to meet his evidentiary burden with respect to the third element of his retaliation case. We therefore do not reach the question of nexus. See *McMillan v. Department of Army*, 84 MSPR 476, 483 (1999).

D. Monetary Award

Even if the Board found that Petitioner had met his burden of proof on the retaliation claim, we would nevertheless affirm the Initial Decision on the grounds that Petitioner otherwise failed to demonstrate that he would have received a monetary award for his FY 1999 performance. Specifically, where, as here, there is no statutory or regulatory entitlement basis for a performance or incentive award, an employee must clearly establish by a preponderance of the evidence that he would in fact have received such a benefit. See *Blackmer v. Department of Navy*, 47 MSPR 624, 632 (1991).

Consequently, in order to prevail on his request for a monetary award, Petitioner would have had to show that the other Personnel Specialists were similarly situated, had received more and better assignments, and received an award. See *Bullock v. Department of the Air Force*, 93 MSPR 217, 221 (2003). No such showing was made in this case.

⁹ See 4 C.F.R. 28.61(c). Preponderance of the evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not. 4 C.F.R. 28.61(d).

Petitioner failed to prove that the type of work he was performing was not comparable to that of his co-workers or that the type of work was a negative consideration in either his performance appraisal or the decision not to give him an award. Other than Petitioner's own testimony, there was no evidence that the type of assignment was considered in rating employee performance or giving an award in PPDB. In fact, Richard Smith testified that the "importance of the work" was not a consideration in the appraisal of John McGrath, one of the Personnel Specialists who did receive an award. He stated that what he did consider was "the performance of his assignments in relationship to the individual dimensions that comprised the appraisal." Tr. 157. Further, Mr. Smith stated that someone assigned to Petitioner's type of work, *i.e.* classifications, would not be precluded from receiving an award. Tr. 133. Thus, there was no evidence to show that Petitioner could not have received an award doing classification work.

Petitioner rested primarily on his own assertion that with comparable assignments, he would have achieved at least an "Exceeds Fully Successful" rating and would have received an award. Pet.Br. at 2-3. He did not provide any evidence, other than the performance appraisals,¹⁰ to support this otherwise speculative premise. As discussed in the Initial Decision, Petitioner was one of four Personnel Specialists in PPDB. Decision at 15. Only two of the four employees received performance awards. Jt.Exs. 14-15, 19-20. Therefore, one other employee, besides Petitioner, did not receive an award. That employee, like Petitioner, received an average score of "Exceeds Fully Successful," although the individual categories reflected one dimension at the "Outstanding" level and one dimension at the "Fully Successful" level. Jt.Ex. 12. According to Petitioner the other three Specialists received more assignments than he did. Tr. 61-62. While all three of the other Personnel Specialists were on his witness list as possible rebuttal witnesses, during the hearing Petitioner did not call any of them to testify regarding their assignments (type of assignments and how they were made), appraisals, or awards. *See* Petitioner's Proposed Witness List (Nov. 16, 2001). Nor did he provide any explanation regarding why this other employee did not receive a performance award and whether she received work assignments comparable to those employees who received awards. He also failed to prove that he would have performed work at a higher level than this employee, such that he would have received an award but she would not have. In fact, his revised appraisal—to the minimum level he requested—placed him on a par with the other employee who did not receive an award rather than on a par with those who qualified for awards. Accordingly, we find Petitioner failed to meet his burden of proof that he was entitled to an award.

IV. Conclusion

For the foregoing reasons, the Decision of the Administrative Judge is affirmed.

SO ORDERED.

¹⁰ Petitioner also objects that the AJ incorrectly concluded that "awards were based solely on performance appraisals." Pet.Br. at 3. But the AJ's singular reliance on appraisals is not surprising given that this was the only evidence proffered by Petitioner in support of his claim for monetary relief.