

ANITA BANKS, et al. v. U.S. Government Accountability Office

Docket Nos. 12-03; 12-04; 12-05

Date of Decision: October 15, 2012

Cite as: Banks et al. v. GAO, Docket Nos. 12-03; 12-04; 12-05 (10/15/12)

Before: Robert F. Hermann, Administrative Judge

Headnotes:

Non-selection

Prohibited Personnel Practice

Summary Judgment

DECISION ON PETITIONER'S MOTIONS FOR PARTIAL JUDGMENT ON THE PLEADINGS

**PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.**

_____)	
ANITA BANKS,)	
Petitioner)	
v.)	Docket No. 12-03
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
Respondent)	
_____)	
)	
REGINA PARKS,)	
Petitioner)	
v.)	Docket No. 12-04
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
Respondent)	
_____)	
)	
REGINA SMITH,)	
Petitioner)	
v.)	Docket No. 12-05
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	<u>October 15, 2012</u>
Respondent)	
_____)	

**DECISION ON PETITIONERS' MOTIONS FOR
PARTIAL JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

On May 25, 2012, three separate Petitioners each filed a two count Petition alleging that Respondent, the United States Government Accountability Office (hereinafter referred to as GAO or the Agency) committed prohibited personnel practices when it filled two PT-III Human Capital Specialist positions for which they applied under competitive merit promotion

procedures.¹ Petitioners Anita Banks (Docket No. 12-03), Regina Parks (Docket No. 12-04) and Regina Smith (Docket No. 12-05) are each represented by the Personnel Appeals Board Office of General Counsel (PAB/OGC) in these proceedings. None of the three Petitioners was ranked among the best qualified candidates and none was among the candidates from which selections were made. For purposes of the Motions for Partial Judgment on the Pleadings, the cases are being consolidated.

The Petitions allege that GAO used an improper evaluation scheme which violated its mandated merit promotion procedures in the ranking and selection process, thereby violating 5 U.S.C. §2302(b)(12). The Petitions further allege that had GAO complied with the requirements of GAO Order 2335.6, Competitive Selection Plan for Administrative Professional and Support Staff (12/1/04) (APSS Hiring Order), Petitioners Banks, Parks, and Smith each would have been among the best qualified candidates from which selections were made.

After receiving extensions of time, GAO answered the Petitions on July 20, 2012. GAO's Answers acknowledge that the rating and ranking procedures it followed in filling the PT-III positions differed in certain respects from the procedures outlined in its APSS Hiring Order, but aver that the process it followed was substantively consistent with the merit promotion principles in that Order. The Answers deny that GAO violated 5 U.S.C. §2302(b)(12)² and assert that Petitioners were neither prejudiced nor harmed by GAO's failure to follow the letter of its Hiring Order.

¹ The exhibits attached to each Petition consist of Exhibit 1, GAO Order 2335.6 (12/1/04), Competitive Selection Plan for Administrative, Professional and Support Staff (APSS Hiring Order); Exhibit 2, Panel Training Materials; and Exhibit 3, The Crediting Plan. GAO has not disputed the authenticity of these documents or otherwise objected to their consideration.

² This provision makes it a prohibited personnel practice for an agency official "to take or fail to take any personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles."

On August 9, 2012, Petitioners each filed a Motion pursuant to 4 C.F.R. §28.21 and Federal Rule of Civil Procedure 12(c) for Partial Judgment on the Pleadings on Count 1 of their Petitions. Each Motion was accompanied by a supporting Memorandum of Points and Authorities (Supporting Memorandum) and an unopposed Motion for Stay of Discovery pending a ruling on the Motion for Partial Judgment on the Pleadings.

On August 10, 2012, Petitioners' Motions to Stay Discovery were granted, and a new end date for completion of discovery in these cases was set for 45 days from the date of this Decision.

On August 29, 2012, GAO filed an Opposition to each Petitioner's Motion for Judgment on the Pleadings on Count 1.

On September 10, 2012, Petitioners each filed an unopposed Motion for Leave to File a Reply to GAO's Opposition, together with a Reply. By Order dated September 11, 2012, the Motions were granted and each Petitioner's Reply was accepted into the record.

On September 14, 2012, GAO submitted a Sur-reply along with an unopposed Motion for Leave to File a Sur-reply to each Petitioner's Reply. By Order dated September 17, 2012, GAO's Motions were granted, its Sur-reply was accepted into the record for each case, and the record was expressly closed on the Motion for Partial Judgment on the Pleadings.

After the close of the Motion record, Petitioners each filed a September 24, 2012 Motion, which GAO opposed, to reopen the record and accept a Response to GAO's September 14, 2012 Sur-reply. Petitioners' Motions to reopen the record and allow such filings are herewith denied. The parties had a full opportunity to address the issues before the record closed.

For the reasons set forth below, Petitioners' Motions for Judgment on the Pleadings with respect to Count 1 of each Petition are granted in part and denied in part.

II. UNDISPUTED FACTS³

1. In 2011, GAO posted vacancy announcement GAO-11-HCO-201-01 for two PT-III Human Capital Specialist positions. Banks Petition (P) ¶7; Answer (A) ¶7. The vacancy announcement advised applicants that “[t]o be credible, demonstrated experience must include expert knowledge of concepts, principles and methodologies of human capital management.”

P ¶25, A ¶25.

2. GAO’s December 1, 2004 APSS Hiring Order, Exhibit 1 to the Petition, established the competitive selection plan for administrative professional and support staff in GAO. P ¶10, A ¶10.

3. Prior to adopting the APSS Hiring Order, GAO provided employees with notice of the language in the proposed order and the opportunity to submit comments. P ¶11, A ¶11.

4. Petitioner Banks applied under the vacancy announcement but was not determined to be among the best qualified candidates, and consequently her name was not submitted to the selecting official for consideration for selection. P ¶¶8, 42; A ¶¶8, 42. Petitioner Parks applied under the vacancy announcement but was not determined to be among the best qualified candidates, and consequently her name was not submitted to the selecting official for consideration for selection. Parks P ¶¶8, 42; A ¶¶8, 42. Petitioner Smith applied under the vacancy announcement but was not determined to be among the best qualified candidates, and consequently her name was not submitted to the selecting official for consideration for selection. Smith P ¶¶8, 42; A ¶¶8, 42.

5. Carolyn Taylor, GAO’s Chief Human Capital Officer, was the selecting official for the two vacancies. P ¶5, A ¶5.

³ Unless otherwise specified, the undisputed facts, which are the same for each Petitioner, are compiled from Ms. Banks’ Petition and GAO’s Answer thereto.

6. Kenneth Carroll, GAO's Deputy Chief Human Capital Officer, was the chairperson of the rating panel convened to rate the candidates. When Mr. Carroll served as chairperson of the rating panel, he was unaware that the APSS Hiring Order required the use of a rate and ranking system. P ¶¶5, 19; A ¶¶5, 19.

7. Based on advice Ms. Taylor received from a Human Capital Specialist, she decided to utilize a category rating system rather than the Order mandated rate and ranking system to fill the two APSS positions. From the time Ms. Taylor opted to use this category rating system through the time she made selections, Ms. Taylor was unaware that the APSS Hiring Order required the use of a rate and ranking system. P ¶¶17, 18; A ¶¶17, 18.

8. Ms. Taylor created a one page crediting plan, a copy of which is attached to the Petition as Exhibit 3, which was used to evaluate and select applicants for the PT-III positions. P ¶23, A ¶23. The crediting plan established a three category rating system. *See* ¶17 *infra*.

9. Chapter 3, Section 3c(2)(a) of the APSS Hiring Order states that the "evaluation criteria used" during the evaluation process should be "expressed in a crediting plan resulting from a job analysis of the position to be filled." P ¶24, A ¶24. The Order specifies that "Candidates are rated on the extent to which they demonstrate possession of each KSA [knowledge, skill, or ability needed for the position]. Each rater independently rates each candidate on each KSA by reviewing all information provided and matching all information on each candidate with the appropriate level of each KSA in the crediting plan. The crediting plan assigns a score to each level and the combined scores on each KSA are added together to obtain a final score for each candidate." Ch. 3, ¶3c(2)(b).

10. While it does not concede that an answer to paragraph 12 of the Petition is required, GAO admits that it must follow the procedures in the APSS Hiring Order when using a

competitive selection process to fill an APSS position and avers: (1) that it “substantially complied with the APSS Hiring Order;” and (2) that its use of a category rating system neither prejudiced nor harmed Petitioners. P ¶12, A ¶12; Parks P ¶12, A ¶12; Smith P ¶12, A ¶12.

11. While it does not concede that an answer to paragraph 16 of the Petition is required, GAO admits that there is no Order permitting it to substitute a method other than the rate and ranking method described in the APSS Hiring Order when it uses a competitive selection process to fill an APSS position. GAO avers that it “substantially complied with the APSS Hiring Order” and that its use of a category rating system neither prejudiced nor harmed Ms. Banks (P ¶16, A ¶16), Ms. Parks (Parks P ¶16, A ¶16), or Ms. Smith (Smith P ¶16, A ¶16).

12. The members of the rating panel received category rating system training, described in the training materials attached to the Petition as Exhibit 2. There were no written GAO policies or procedures that described or provided direction on utilization of the category rating system; the training materials were the only written materials that described or provided direction on how to use the category rating system the rating panel employed to evaluate and select candidates for the PT-III positions. P ¶¶20, 21 A ¶¶20, 21.

13. GAO admits that it did not utilize the numerical rating system described in Chapter 3, Section 3c(2) of the APSS Hiring Order when it evaluated applicants for the PT-III positions, but avers that the category rating system which it did utilize did not prejudice or harm Petitioner Banks (P ¶22, A ¶22), Petitioner Parks (Parks P ¶22, A ¶22), or Petitioner Smith (Smith P ¶22, A ¶22).

14. GAO admits the APSS Hiring Order required that each panel member provide a numerical rating to reflect the extent to which each applicant demonstrated possession of each KSA required for the PT-III position, but avers that its failure to provide such numerical ratings

and utilize numerical scoring did not prejudice or harm Ms. Banks (P ¶¶26, 27; A ¶¶26, 27), Ms. Parks (Parks ¶¶26, 27; A ¶¶26, 27), or Ms. Smith (Smith P ¶¶26, 27; A ¶¶26, 27).

15. The rating panel placed each applicant who demonstrated “proficiency” in all five of the competencies described in the crediting plan in Category A; placed each applicant who demonstrated “proficiency” in four competencies in Category B; and placed each applicant who demonstrated “proficiency” in three or fewer competencies in Category C. P ¶28, A ¶28.

16. The crediting plan defined “proficiency” as “the ability of applicants to perform duties or tasks and apply their knowledge, skills or abilities to situations likely to be encountered in GAO.” P Ex. 3.

17. Each panel member assigned preliminary ratings to each applicant, after which the panel members met to discuss their preliminary ratings. During this meeting, two panel members changed their preliminary ratings for multiple applicants. P ¶30, A ¶30.

18. Chapter 3, Section 4 of the APSS Hiring Order provides that candidates be listed in descending order of the point scores they have been assigned under the crediting plan; that a cut-off score be established, with the “best qualified” candidates being those with scores at or above the cut-off score; and that the best qualified candidates be referred to the selecting official. P ¶32, A ¶32.

19. GAO admits that the rating panel did not use the numerical rating system outlined in Chapter 3, Section 4 of the APSS Hiring Order to determine the best qualified candidates for the PT-III positions but avers that its use of the category rating system did not prejudice or harm Petitioner Banks (P ¶31, A ¶31), Petitioner Parks (Parks P ¶31, A ¶31), or Petitioner Smith (Smith P ¶31, A ¶31).

20. In training, GAO instructed the rating panel members that in using the category

rating system they should reach a combined final recommendation in which all panel members agreed on a Category recommendation of A (90), B (80), or C (70) for each candidate. P ¶33, A ¶33. GAO further instructed rating panel members to shred materials upon completion of the screening process. P ¶39, A ¶39.

21. The rating panel assigned a final Category A rating to candidates who received three Category A ratings or two Category A ratings and one Category B rating. The rating panel assigned candidates who received any other combination of ratings a final rating of either B or C. P ¶34, A ¶34.

22. Instead of creating a best qualified list based on numerical ratings assigned to each candidate in each competency, the rating panel referred to the selecting official the names of those candidates who received a final Category A rating. P ¶35, A ¶35.

23. Selecting Official Taylor selected Valerie Sheppard and Matthew Myatt to fill the two PT-III positions. P ¶9; A ¶9.

24. In making her selections, Ms. Taylor did not consider Ms. Banks' application because Ms. Banks was not among the best qualified candidates submitted to her. P ¶42, A ¶42. In making her selections, Ms. Taylor did not consider Ms. Parks' application because Ms. Parks was not among the best qualified candidates submitted to her. Parks P ¶42, A ¶42. In making her selections, Ms. Taylor did not consider Ms. Smith's application because Ms. Smith was not among the best qualified candidates submitted to her. Smith P ¶42, A ¶42.

25. Each Petitioner alleges that had GAO complied with all of its APSS Hiring Order, she would have been among the candidates submitted for consideration by the selecting official. GAO, however, denies the allegation and avers that if it had fully complied with all of its APSS Hiring Order, neither Ms. Banks, Ms. Parks nor Ms. Smith would have been among the

candidates submitted to the selecting official for consideration. P ¶44, A ¶44; Parks P ¶44, A ¶44; Smith P ¶44, A ¶44.

III. POSITIONS OF THE PARTIES

A. PETITIONERS' POSITION

Each Petitioner's Motion asks that the Board "enter judgment in her favor on the First Count of the Petition." Petitioners essentially argue that they are entitled to judgment on the first Count because the pleadings establish that the selections were personnel actions; that GAO Order 2335.6 implements the merit system principle that employees be recruited and selected on the basis of merit after fair and open competition; that GAO was required to use Order 2335.6 in the selection process; and that GAO committed a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12) when it appointed Ms. Sheppard and Mr. Myatt to the PT-III positions through a method that did not comply with GAO Order 2335.6. Supporting Memorandum at 1-2.

Petitioners dismiss the significance of GAO's allegations that each was not prejudiced or harmed by the rating process the Agency used. Essentially, Petitioners argue that GAO's acknowledged use of a category rating system rather than the evaluation and selection method mandated in GAO Order 2335.6 constituted a prohibited personnel practice as a matter of law and that GAO's argument that Petitioners were neither harmed nor prejudiced by its actions is irrelevant to whether a prohibited personnel practice was committed. *Id.* at 9-10.

The Petitioners, however, do not address Count 1, ¶44 of each Petition, which alleges that if GAO had complied with GAO Order 2335.6 "[the Petitioner] would have been among the

candidates the rating panel submitted for consideration by the selecting official.” Since GAO’s Answer denies the allegation, it must be assumed for purposes of this Motion that the Petitioners would not have been included among the best qualified candidates even if GAO had scrupulously followed GAO Order 2335.6. *See Jones v. GAO*, PAB Docket No. 08-04 at 2 (12/18/08).

Petitioners point to GAO’s admissions (1) that GAO Order 2335.6 implements the merit system principle that it should recruit and select employees based on merit after fair and open competition and (2) that it did not utilize the selection method mandated by that Order when it selected two employees for appointment to the PT-III positions. Supporting Memorandum at 9. Petitioners assert that it is undisputable that these appointments constituted personnel actions under 5 U.S.C. §2302. *Id.* at 8. Petitioners further point to what they characterize as undisputed conclusions of law based on GAO’s admissions that it was required under 31 U.S.C. §§732(a) and 732(b)(1) to maintain a personnel management system that included 5 U.S.C. §2301(b)’s merit system principles; that GAO Order 2335.6 implements the merit system principle that employees should be recruited and selected based on merit following fair and open competition; and that in utilizing a competitive selection process to fill the APSS positions, it was obligated to use the procedures in GAO Order 2335.6. *Id.* at 7.

Petitioners further argue in reply to GAO’s Opposition that GAO has misstated the burden of proof applicable to their claims and improperly sought to introduce a document attached to its Opposition as Exhibit 1, described as the Rating Sheet for Vacancy Announcement GAO-11-HCO-201-01. Reply at 2-4. Petitioners contend that they have met their burden of proof under 4 C.F.R. §28.61(c) by a preponderance of the evidence on the prohibited personnel practice claim and that they are not required, as GAO contends, to also

disprove the Agency's assertion of harmless procedural error to establish liability. *Id.* at 3. With respect to Exhibit 1 to GAO's Opposition, Petitioners object to the document as extrinsic, unauthenticated, redacted hearsay which should not be considered in adjudicating this Rule 12(c) motion directed at the pleadings. *Id.*

B. GAO'S POSITION

GAO asserts that the allegations in its Answers must be accepted as true and that it must be afforded the benefit of all reasonable inferences in evaluating Petitioners' requests for judgment on Count 1 of the Petitions. Opposition at 3.

GAO acknowledges that it did not follow "certain discrete provisions" in GAO Order 2335.6 in the instant promotion actions but argues that Petitioners are not entitled to partial judgment on Count 1 for several reasons. *Id.* at 2. First, the Agency argues that any error which occurred was harmless error and that there is no evidence that the outcome of the selection process would have been different in the absence of error. *Id.* at 8. Second, GAO asserts that there is no evidence that Petitioners suffered any harm as a result of its use of a category rating system. *Id.* at 8-9. GAO argues that the rating system it used did not disadvantage any of the applicants and that they were all fairly evaluated on the basis of their qualifications. *Id.* at 7.

Much of the argument in GAO's August 29, 2012 Opposition is supported by references to an attached Exhibit 1, which is described as the Rating Sheet for Vacancy Announcement GAO-11-HCO-201-01. Petitioners object to GAO's introduction of this unauthenticated document, which they argue is extrinsic material that should not be considered in adjudicating a Rule 12(c) motion directed at the pleadings.

According to GAO, its use of a category rating system rather than the system detailed in GAO Order 2335.6 amounted to harmless procedural error. The Agency alleges that the burden to show otherwise is on Petitioners and that they have failed to produce any evidence to establish harmful error. GAO asserts that the category rating system it used operated in virtually the same way as the numerical rating system; all candidates, including Ms. Banks, Ms. Parks, and Ms. Smith, were fairly and impartially considered; and only the most qualified candidates were submitted to the selecting official. GAO submits that there is nothing in the Motion record to support Petitioners' claims that they would have been on the best qualified list if the Agency had used a numerical rather than a category rating system. GAO alleges that Petitioners would not have made the best qualified list if it had used the numerical rating system specified in GAO Order 2335.6. Opposition at 4, 7.

GAO states that each candidate's qualifications were compared by each of the three panel members against the five knowledge, skills, and abilities (KSAs) outlined in the crediting plan, and each candidate was scored as either proficient or not proficient in each KSA. A candidate was rated as Category A if he/she was scored proficient in all five KSAs, Category B if he/she was scored proficient in four of the five KSAs, and Category C if he/she was scored proficient in three or fewer of the five KSAs. *Id.* at 6.

GAO claims that there is no explicit requirement in Order 2335.6 that scores be numeric and argues that the method it utilized was virtually identical to that described in Chapter 3, section 3(c)(2) of the Order except that it assigned alphabetic rather than numeric scores. *Id.* at 8.

GAO concedes that the panel also deviated from the Order when it met as a group to assign the candidates' final ratings and determine which candidates should be referred to the selecting official as the best qualified candidates.

The Order required that the panel assign numerical points to each candidate, list the candidates in descending point order, and establish a cut off to identify the best candidates. But, the panel members here determined that candidates who received either three A ratings or two A ratings and one B rating would receive a final rating of Category A and be referred to the selecting official as best qualified. Candidates with any other combination of initial ratings were assigned final ratings of either Category B or Category C and were not referred to the selecting official. Opposition at 5-6.

Under this method, Ms. Banks, who received initial ratings of Category C from each of the panel members, was assigned a final rating of Category C and was not referred to the selecting official. Ms. Parks and Ms. Smith, who received initial ratings of one B and two Cs, also were given a final rating of Category C under this process. *See* Oppositions at 3, 7.

GAO argues that the most qualified candidates were the ones referred to the selecting official and that the system it utilized did not in any fashion compromise the merit system principle that recruitment and selection be based on merit after free and open competition. GAO submits that the panel would have produced identical results using the numerical procedure set out in its Hiring Order. Opposition at 4.

Finally, GAO's Sur-reply argues that its harmless error defense is a recognized defense to an alleged prohibited personnel practice and does not improperly shift the burden of proof. GAO asserts that each Petitioner has the burden of proving her allegations by a preponderance of the evidence under 4 C.F.R. §28.61(c) and that this burden necessarily includes presenting evidence to rebut a harmless error defense in order to be entitled to judgment. Sur-reply at 2-3. GAO further argues that Petitioners' claim that Exhibit 1 to its Opposition should be excluded is not well taken; that Petitioners have long had the Exhibit in their possession and know that it is a

genuine document key to the promotion action, and that the Exhibit should be considered. *Id.* at 3-5.

IV. DISCUSSION

First, this Motion is being disposed of on the pleadings. It is therefore unnecessary to resolve the parties' disagreement about whether Exhibit 1 to GAO's August 29, 2012 Opposition should be considered or stricken. The document is not part of the pleadings. It has not been considered or relied upon.

Second, the parties' dispute over the burden of proof, the allocation of that burden, and what is ultimately required to show entitlement to relief in a prohibited personnel practice case will need to be addressed, but need not be resolved in the instant Motion. The cases the parties cite do not relate to motions addressed to and decided on the pleadings, and it does not appear that any of the cases are controlling authority.

Rule 12(c) provides: "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."⁴ Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). Judgment under Rule 12(c) should not be granted unless "the movant clearly establishes there are no material issues of fact, and [she] is entitled to judgment as a matter of law." *Sikirica v. Nationwide Ins. Co.*, 416

⁴ While the Board's rules do not specifically reference Rule 12(c), and the Federal Rules are considered to be guidance rather than binding on the Board, the Board has consistently followed the Federal Rules in dealing with motions to dismiss as well as motions for summary judgment. *See* 4 C.F.R. §28.1(d). The standards governing motions under Federal Rule of Civil Procedure 12(c) are being applied to this Motion.

F.3d 214, 220 (3rd Cir. 2005).

For purposes of this Motion, the allegations in GAO's Answer must be accepted as true, while the allegations in the employees' Petitions that have been denied in GAO's Answer must be assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). Thus, the standard to be applied on this Rule 12(c) Motion mirrors a motion to dismiss under Rule 12(b), in that the pleadings must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in that party's favor. *Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989); see *Bryant v. GAO*, Docket No. 10-03 at 14 (7/11/11).

Count 1 of the Petition alleges that GAO violated 5 U.S.C. § 2302(b)(12), which makes it a prohibited personnel practice for an agency to:

take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

A prohibited personnel practice claim under 5 U.S.C. §2302(b)(12) must include three elements:

(1) there must be a personnel action (or a failure to take a personnel action); (2) the personnel action or the failure to take a personnel action must violate a law, rule or regulation; and (3) the law, rule or regulation violated must be one which implements or directly concerns a merit system principle. *37 Named Petitioners v. GAO*, PAB Docket Nos. 09-01 & 09-06 through 09-41 at 10 (3/31/10) (citing *Special Counsel v. Byrd*, 59 MSPR 561, 579 (1993), *aff'd*, 39 F.3d 1196 (Fed. Cir. 1994) (Table)).

A provision is a "rule or regulation" for purposes of 5 U.S.C. §2302(b)(12) if it meets the definition of "rule" in 5 U.S.C. §551. *Davis v. GAO*, PAB Docket Nos. 00-05 & 00-08 at 12 (7/11/03) (*en banc*) (citing *Special Counsel v. Byrd*, 59 MSPR at 580 n.18).

Thus, whether the Petitioners have been aggrieved by an actionable prohibited personnel practice under 5 U.S.C. §2302(b)(12), depends on whether GAO took or failed to take a personnel action against them which violated a law, rule or regulation that implemented or directly concerned a merit system principle. The issue comes down to whether the undisputed material facts appearing on Count 1 of the pleadings establish as a matter of law that the Petitioners are entitled to a judgment.

There is no question that the selections for the PT-III positions were personnel actions. Nor is there any doubt that the evaluation and ranking process GAO used in the PT-III promotion action was not in compliance with GAO Order 2335.6. Finally, there appears to be no doubt that GAO Order 2335.6 qualifies as a rule or regulation that implements and directly concerns merit system principles. *See, e.g., Marshall v. GAO*, Docket No. 92-04 at 12-13 (9/30/03) (*en banc*); *Pernell v. GAO*, Docket No. 01-03 at 18-19 (8/15/02) (APSS Manual); *Bryant v. GAO*, Docket No. 10-03 at 18-19 (GAO Order 2335.6 implements merit system principles).

The pleadings establish that GAO used a rating and ranking process that failed in certain respects to comply with its stated policies. But, without a more fully developed record, the pleadings alone are insufficient to permit informed analysis of the full extent of the noncompliance, its implications for the merit promotion system, and how it affected personnel actions taken or not taken with respect to these Petitioners.

What we do know is that GAO Order 2335.6, Ch. 3, ¶3, §c(2) requires that candidates are to be “rated on the extent to which they demonstrate possession of each KSA” (*i.e.*, knowledge, skill and ability) (emphasis added); that it further requires that “[e]ach rater independently rate[] each candidate on each KSA” (emphasis added); and that §4 requires that “[a]fter all candidates

have been assigned points under the crediting plan, they are listed in descending order of their point scores,” and a cut-off score be determined to identify the best qualified. The Motion record establishes that GAO did not rank each candidate on each KSA. Instead, the panel placed each candidate in one of three categories based on an assessment of whether the candidate was proficient in each KSA. We also know that not all rating was conducted independently and that the list of “best qualified” was based upon the category assignment as determined by the panel, rather than a tally of total points assessed. In taking these actions to fill the vacancies at issue, GAO did not comply with the written requirements of its own Hiring Order. However, there are no facts at this juncture demonstrating that the individual Petitioners were disadvantaged by GAO’s action or that the outcome would have been different if the Agency had fully complied with the Hiring Order.

Under the standards that govern this Motion, GAO’s Answer denying that Petitioners would have made the best qualified list even if it had followed all of the terms of its Hiring Order must be accepted as true. As a result, we must assume that, regardless of the nature and extent of GAO’s noncompliance, Petitioners would not have been eligible for selection even if the ranking and selection process had been completed entirely by the book.

If, as GAO asserts, its complained of conduct is not the proximate cause of Petitioners’ non-selection, there is a legitimate question about whether Petitioners are aggrieved by a personnel action under 5 U.S.C. §2302(b)(12).

Without fuller development of the record, it is not possible to determine how candidates were affected by GAO’s erroneous use of a category rating system rather than the system required by its own Order. While this category system was utilized to rate all candidates and to determine the best qualified list, there are no undisputed facts to establish how the candidates

would have fared if the proper rating system had been utilized. Nor are there facts to establish that Petitioners (or any other unsuccessful candidate) were minimally qualified for the PT-III position, or that their application materials demonstrated that they possessed the KSAs required for the position.

In these circumstances, it can only be determined that in filling the vacancies here at issue GAO violated a law, rule or regulation that implements a merit system principle and thus committed a prohibited personnel practice. Thus, as to ¶45 of the Petition, Petitioners are entitled to judgment that the Agency committed a prohibited personnel practice in not following its own Order governing the selection process. As to the remaining allegations of Count I, however, it has not been clearly established that there are no material issues of fact in dispute and it cannot be concluded as a matter of law that Petitioners are entitled to judgment on the pleadings on the remaining allegations contained in Count 1 of the Petition. *See Marshall v. GAO*, Docket No. 92-04 at 15.

V. CONCLUSION

In accordance with all of the foregoing, Petitioners' Motions for Partial Judgment on the pleadings are granted in part and denied in part. The stay of discovery is lifted and the end date for discovery is now November 29, 2012

For purposes of efficiency of Board resources, the Board has considered the Motion for Partial Judgment on the Pleadings in these three related but separate cases in this one Decision.

The parties are herewith ordered to show cause why the Petitions should not be consolidated going forward in the Board process. Any objection to consolidation must be filed by [date 14 days from decision].

SO ORDERED.

Date: 10/15/12

/s/
Robert F. Hermann
Administrative Judge