

Rochelle Bryant v. U.S. Government Accountability Office

Docket No. 10-03

Date of Decision: July 11, 2011

Cite as: Bryant v. GAO, Docket No. 10-03 (7/11/11)

Before: Susan R. Winfield, Administrative Judge

Headnotes:

Merit System Principles/Violations

Merit System – Unfair Advantage

Motions Practice

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Work Assignments

DECISION ON MOTION FOR SUMMARY JUDGMENT

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

ROCHELLE BRYANT, Petitioner)	
v.)	Docket No. 10-03
U.S. GOVERNMENT ACCOUNTABILITY OFFICE, Respondent)	<u>July 11, 2011</u>

DECISION ON MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On December 29, 2010, Rochelle Bryant (the Petitioner) filed a Petition containing three counts alleging that her employer, the Government Accountability Office (GAO, the Agency or Respondent), committed three prohibited personnel practices when it declined to select her for promotion in 2010. On May 13, 2011, Respondent filed a Motion for Summary Judgment on all counts of the Petition in response to which Petitioner filed an Opposition on June 6, 2011. With permission from the Administrative Judge, Respondent filed a Reply on June 10, 2011.

Petitioner claims that in May 2010, GAO committed various prohibited personnel practices, as defined in 5 U.S.C. §§2302 (b)(6), (b)(10), and (b)(12), when her supervisor, India Jenkins, failed to select her for promotion from a PT-II Budget Analyst position to either of two vacant PT-III Budget Analyst positions in the Budget Office.

In Count I of the Petition, Petitioner contends that her supervisor, Ms. Jenkins, committed a prohibited personnel practice when she gave preferential treatment to one of two persons

selected for the position, in violation of 5 U.S.C. §2302(b)(6). Petitioner alleges that in 2008, Ms. Jenkins gave specific advice to one of Petitioner's co-workers, Sheila Patrick, on actions Patrick could take that would make her a better candidate for promotion, without giving similar advice to Petitioner.

In Count II, Petitioner avers that GAO committed a prohibited personnel practice when it failed to select her on the basis of conduct that did not adversely affect her or other individuals' work performance, in violation of 5 U.S.C. §2302(b)(10). Specifically, Petitioner alleges that Ms. Jenkins discriminated against her by not selecting her for the new positions, as retribution for challenges Petitioner raised to several of her prior performance appraisals that Ms. Jenkins had given to her. Petitioner also alleges that Jenkins did not select her because she was outspoken and asked questions in meetings.¹

In Count III, Petitioner avers that Jenkins failed to comply with a law, rule, or regulation, that implemented the merit system principle that "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition with equal opportunity afforded to all competitors," in violation of 5 U.S.C. §2302(b)(12).

Petitioner asks this Board to find that the Agency committed the above stated prohibited personnel practices and direct that the Agency promote Petitioner to a PT-III Analyst position retroactive to the time of her non-selection with appropriate back pay and make-whole provisions.

¹ Petitioner withdrew this allegation in her Opposition to the Motion for Summary Judgment at footnote 3.

II. BACKGROUND AND FACTS NOT IN DISPUTE

Based on the record, I find the following material facts are not in dispute²:

In August 2008, two PT-III Budget Analyst positions in the Budget Office became available for competitive applications. GAO Statement of Undisputed Facts #2; Pet. Statement of Material Facts #1. At that time, Petitioner was employed as a Budget Analyst in the PT-II Band, along with others, including Sheila Patrick. Petitioner had been employed as a Budget Analyst at GAO since 2005. Pet. Ex. 1 at 1.

In connection with the two newly posted positions, Ms. Patrick inquired of her supervisor, India Jenkins, the Budget Director, whether Ms. Jenkins thought she should apply for one of the positions. Resp. Ex. 5 at 35-36. Ms. Jenkins told her “no,” that she was not ready for such a promotion. In response to further inquiry by Ms. Patrick, Ms. Jenkins explained to Ms.

² Although Petitioner admits most of GAO’s Statement Of Undisputed Material Facts, she claims to deny certain statements, suggesting that she disputes them. However, upon review of many of these denials, it is clear that some of the statements that she denies are undisputedly established by a review of documents in the record. For example, she denies GAO’s Undisputed Fact #12 that reads: “The PD for the PT-III position specifically lists the following among the Knowledge, Skills and Abilities for a PT-III: mastery of GAO’s budgetary process and program goals and objectives, comprehensive knowledge and understanding of GAO operating programs, mission and strategic objectives, and ability to lead budget project teams.” Although Petitioner claims to deny this fact, the PD for the PT-III position contains the quoted language. Petitioner does not explain the basis for her denial. The same is true for her denial of GAO’s Undisputed Fact #13. To the extent that Petitioner claims to dispute a fact that GAO argues is undisputed, I have addressed the apparent dispute and the presence or absence of record evidence to support Petitioner’s claim in the text.

Similarly, a review of Petitioner’s statement of facts that she claims are in dispute, demonstrates that most of them are actually undisputed restatements of the law, or restatements of the language in GAO orders. *See, for example*, Petitioner’s Statement of Material Facts As To Which There Is A Genuine Issue (Pet. Stmt. of Facts) #3, 4, and 12. In other instances, Petitioner cites undisputed facts as being at issue, such as the fact that she applied for the position or that Ms. Jenkins was the selecting official. *See, for example*, Pet. Stmt. Of Facts ##5-9 and 13. Again, to the extent that I have found facts as undisputed that Petitioner claims are at issue, they will be discussed in the text.

Patrick what her shortcomings were that made her not ready for the advancement.³ *Id.*

Petitioner was also supervised by Ms. Jenkins at the time; however, she did not inquire about Ms. Jenkins' opinion of her suitability for the positions.

In April 2010, two additional Budget Analyst PT-III positions were posted for competitive applications in Vacancy Announcement (VA) GAO-10-CASO-0560-08.⁴ The PT-III positions were described in a Position Description.⁵ In addition to an on-line application, applicants were required to submit a resume and complete a questionnaire. Petitioner and four others, including Sheila Patrick, submitted applications and were deemed "best qualified" for the position. Ms. Patrick again asked Ms. Jenkins about her readiness for promotion. Ms. Jenkins advised Ms. Patrick that she (Jenkins) believed that Ms. Patrick was ready for a PT-III position. Pet. Ex. 7 at 211.

Petitioner was not selected for the position. On May 25, 2010, Ms. Jenkins selected two employees for the positions: Sheila Patrick and Donald Morrison, an individual who was first detailed to work at GAO in the Budget Office in August 2007. Pet. Statement of Material Facts #7. Before he began his detail, Mr. Morrison worked for over six years as an Analyst on two

³ GAO claims in its Statement of Undisputed Facts #6 that Ms Jenkins "did not tell Ms. Patrick what she was looking for in a PT-III or provide Ms. Patrick with steps she could take to secure promotion in the future." Petitioner denies this statement, suggesting that there is a material fact in dispute. However, she admits that she was not a witness to the conversation and argues only that: "Jenkins provided [Patrick] specific information on her shortcomings that made her not ready to be a PT-III." This does not establish a dispute about whether Jenkins told Patrick what she was affirmatively looking for in a PT-III or provide her with steps she could take to secure promotion in the future. There is a difference between identifying shortcomings and giving affirmative information on what to do to get a promotion. Petitioner does not specify facts in the record that support her claim that Jenkins told Patrick what she was looking for in a PT-III or what Jenkins told Patrick about steps the latter could take to secure a promotion.

⁴ See, Respondent's Exhibit 6, VA GAO-10-CASO-0560-08, appended to the Motion for Summary Judgment (hereinafter Resp. Ex. 6). Petitioner claims that the positions that were advertised in 2010 were the exact same positions that had been advertised in 2008, however, it appears that she means that the Position Descriptions were the same, not that the precise positions became vacant and available in both 2008 and 2010.

⁵ See, Resp. Ex. 9, PT-0560-III, Doc# 1090048.

GAO mission teams. Resp. Ex. 13 at 8-9. In 2009, Mr. Morrison's detail in the Budget Office ended and he became a PT-II Budget Analyst along with Petitioner and Ms. Patrick. *Id.*

During the selection process, Ms. Jenkins was the official responsible for making the selection decision. Pet. Statement of Material Facts #7. She was also the official with responsibility for making all work assignments for each direct hire. Pet. Ex. 7 at 42; Resp. Ex. 4 at 153-55. Ms. Jenkins acknowledges that she did not review the applicants' resumes or their responses to the VA questionnaire before making her selections. Pet. Ex. 7 at 131-33, 135. She likewise decided not to interview any of the applicants. The reason she gave was that she was the direct supervisor of all five candidates and was familiar with the body of work each had produced. *Id.*

Ms. Jenkins explained to Petitioner, after she was not selected, that she (Jenkins) had been looking for candidates who "could serve as senior analysts who would work on areas across the office, and who had broad-based experience and exposure."⁶ Pet. Statement of Material Facts #10. Petitioner claims that Jenkins did not tell her staff prior to the selection or when the VA was posted what criteria she was looking for in a candidate. *Id.* Ms. Jenkins told Petitioner that she selected Ms. Patrick rather than Petitioner because she believed Ms. Patrick displayed more initiative, a higher level of productivity and better analytical skills than Petitioner did. Resp. Ex. 4 at 139-40, 143. Ms. Jenkins also stated that Ms. Patrick had better collaborative abilities and a broader knowledge of the budget process than Petitioner had. Ms. Jenkins states that she selected Mr. Morrison rather than Petitioner because he also displayed more initiative and was more analytical and methodical than Petitioner was. Resp. Ex. 4 at 138-39, 142. Ms. Jenkins also stated that Mr. Morrison was a better collaborator with a broader knowledge of budget matters than Petitioner had. *Id.* Ms. Jenkins stated that because of Mr. Morrison's

⁶ GAO does not dispute this assertion.

previous experience on a GAO mission team, he understood the “inner workings of GAO mission teams, giving him a valuable cross-cutting experience.” GAO Memorandum at 10; *see also* Resp. Ex. 4 at 145.

Before the 2010 selection decisions were made, Petitioner had challenged three prior performance appraisals that Ms. Jenkins had given to her. Resp. Ex. 1 at 68; Pet. Statement of Facts #13.

III. POSITIONS AND ARGUMENTS OF THE PARTIES

A. B(6) CLAIM –

1. Preferential Advice

Agency

The Agency argues that it is entitled to summary judgment on Count I of the Petition because there are no disputed facts that support a finding that Ms. Jenkins or GAO gave Ms. Patrick any advantage or preference when she was selected for the PT-III position. GAO Memorandum at 12-16. The Agency argues that the conversation between Ms. Jenkins and Ms. Patrick in 2008 about Ms. Patrick’s readiness for a promotion was nothing more than employment counseling or performance feedback to which every employee was entitled. *Id.* at 14-15. The Agency argues that there is no evidence that Ms. Jenkins purposely responded to Ms. Patrick’s inquiries in 2008 with the intention of helping her get a promotion two years later. Likewise, GAO claims there is no evidence proffered by Petitioner that the reason for Ms. Jenkins’ response to the request for feedback was to make Ms. Patrick more competitive or to provide her with an advantage over her colleagues in future promotion situations. The Agency argues that no inference of an intent to provide an advantage is permissible without something in

the record, besides Petitioner's speculation, to support it. As to Mr. Morrison's selection, Petitioner makes no claim that any advantage or preference was given to him.

Petitioner

Petitioner responds that Ms. Jenkins advised Ms. Patrick on actions the latter could take which would make her a better candidate for the position. SJ Opposition at 2. Petitioner states: "Ms. Jenkins provided [Ms. Patrick] specific information on her shortcomings that made her not ready to be a PT-III [in 2008]." *Id.* at 3. The only other statement that Petitioner makes is that: "Ms. Jenkins told Ms. Patrick that Ms. Patrick 'was ready for a PT-III' prior to the 2010 selection." *Id.* Petitioner concedes that intent is the critical issue to establish that Ms. Jenkins gave Ms. Patrick an advantage; however, she argues that "there is rarely direct evidence of intent, and in almost all situations, intent must be inferred from circumstantial evidence." *Id.* Petitioner then claims, without more, that she has shown "sufficient circumstantial evidence to create a genuine issue whether [the] conversation [between Ms. Jenkins and Ms. Patrick in 2008] was simply normal feedback or the giving of an unauthorized preference to Ms. Patrick." *Id.*

2. Preferential Assignments

Agency

GAO argues that there is no evidence that the selection process was improperly based on the candidates' work assignments. GAO Memorandum at 27. Moreover, GAO asserts that Petitioner acknowledges that she had high-profile assignments that provided her with opportunities to showcase her talents as a Budget Analyst. *Id.*; see Resp. Ex. 1 at 13.

Petitioner

Petitioner claims: "there is a genuine issue as to whether Ms. Jenkins intentionally assigned her selectees work for the purpose of improving their chances of being selected." SJ

Opposition at 4. Petitioner cites as an example, the fact that Ms. Jenkins assigned Ms. Patrick to work on the Budget Office database, then cited that work as part of her reason for selecting Ms. Patrick for the new position. Petitioner argues that since Ms. Jenkins gave the work to Ms. Patrick and “never offered any other employee the opportunity to work on that database,” she intentionally gave Ms. Patrick an advantage for selection over her coworkers. *Id.* Similarly, Petitioner claims that Ms. Jenkins cited the number of assignments that Ms. Patrick had as a reason for selecting her. Again, she argues that since Ms. Jenkins was responsible for the number of assignments any employee had, she intentionally gave Ms. Patrick an advantage for promotion by giving her more assignments. Finally, Petitioner argues that Ms. Jenkins cited the number of suggestions that Mr. Morrison made based on his assignments. She contends that because Ms. Jenkins controlled the nature of the assignments given to the employees, she thereby controlled the opportunity that Mr. Morrison had to make suggestions that was not given to her. *Id.*

B. B(10) CLAIM –

Agency

The Agency argues that it is entitled to summary judgment on Count II because it fails to state a claim for which relief can be granted. GAO Memorandum at 16. GAO argues that the definition of a prohibited personnel practice under 5 U.S.C. §2303(b)(10) requires proof that there has been discrimination on the basis of an employee’s off-duty, non-job related conduct outside of the workplace. Since Petitioner alleges that she was discriminated against based on conduct at the workplace, this claim must fail. *Id.* at 17.

Petitioner

Petitioner responds that GAO misreads the prohibited personnel practice provision and the cases that interpret it. SJ Opposition at 4-5. She contends that there is no requirement that the conduct at issue occur outside of the workplace; rather the conduct must be off duty or unrelated to the employee's performance of her duties. She argues that since challenging her performance appraisals was not part of her job duties, retaliation on the basis of that conduct meets the requirements of a (b)(10) claim. Despite her argument, Petitioner cites *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569 (1991), as recognizing: "that 2302(b)(10) is designed to prohibit personnel practices that are taken in response to an employee's *off-duty conduct or interests that are unrelated to job performance.*" (Emphasis in original). *Id.* at 5-6.

C. B(12) CLAIM –

Agency

GAO contends that this claim cannot be established because Petitioner fails to cite any law, rule or regulation implementing a merit system principle that she claims was violated by Petitioner's non-selection. GAO Memorandum at 6-7. The Agency acknowledges that Petitioner, through counsel, advised that she is relying on alleged violations of GAO Order 2335.1 – Promotion and Internal Placement (September 30, 2005), Chapter 1, Paragraphs 4, 6 and 8 and GAO Order 2335.6 – Competitive Selection Plan for Administrative Professional and Support Staff (Dec. 1, 2004), Chapter 1, Paragraph 4; Chapter , Paragraph 4b; Chapter 5, Paragraph 5b. *Id.* at 19.

GAO concedes that one provision in GAO Order 2335.6 - ch.3 ¶ 5 (b) (1) - "could arguably be a law rule or regulation implementing, or directly concerning a merit system principle." *Id.* Paragraph 5(b) (1) requires that all candidates be considered for promotion

impartially in accordance with merit system principles. GAO concedes that this paragraph “arguably” implements the merit system principle that “selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition.” *Id.* at 20,

The Agency contends, nonetheless, that Petitioner has no evidence that Ms. Jenkins failed to consider all of the candidates impartially in making her selections in 2010. The Agency then cites the reasons that Ms. Jenkins gave for selecting the two whom she selected and why she did not select Petitioner. The Agency argues that Petitioner’s subjective belief that she was better qualified is insufficient as a matter of law to justify a finding that Ms. Jenkins violated Order 2335.6 and thereby committed a prohibited personnel practice. GAO argues that: “[o]nly Ms. Jenkins, not Petitioner, was in a position to weigh the relative strengths of all the applicants.” *Id.* at 24.

To the extent that Petitioner challenges the criteria used for selection and the lack of notice of those criteria given to the applicants, GAO argues that the VA was written based on the PD and was not required to list “every possible factor relevant to a selection . . . so long as the factors relied on for the selection were ‘encompassed within a broader and more general job description.’” *Id.* at 26 (citing, *Jackson v. Gonzales*, 496 F.3d 703, 709 (D.C. Cir. 2007); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1297 n. 15 (D.C. Cir. 1998)). The Agency claims that all of the factors that Ms. Jenkins considered in making her selections were encompassed in the VA and the PD drafted for the positions. *Id.* at 25-26.

Petitioner

Petitioner challenges the Agency’s conclusions and argues that there are genuine issues of material facts in dispute about the real reasons why Ms. Jenkins selected the two employees

for promotions. SJ Opposition at 7. Petitioner argues that Ms. Jenkins did not make her selections on the basis of merit and suitability for promotion, but rather on the basis of improper considerations. As proof of her claims, Petitioner asserts, *inter alia*, that some of Ms. Jenkins' stated reasons for selecting the two employees are inconsistent with other statements that she made and with the record of the candidates' relative strengths and weaknesses. For example, Petitioner states that Ms. Jenkins testified in her deposition that she selected Ms. Patrick in part because she volunteered for projects, while Petitioner did not. Petitioner claims, however, that "to her knowledge," Ms. Patrick never volunteered for any special projects, but simply did her routine assignments. At the same time, Petitioner claims that she was the one who routinely volunteered for special projects. *See, id.* at 9.

Petitioner challenges other reasons given by Ms. Jenkins for the selection as belied by the comparative work records of Ms. Patrick, Mr. Morrison and herself. *Id.* at 8-12. Petitioner claims that Ms. Jenkins made statements in support of her decisions that are inconsistent with statements that she made in Petitioner's performance appraisals and statements that she made in the appraisals of the selectees. Thus, she argues that there is a genuine dispute as to whether the articulated reasons given by Ms. Jenkins are false.

Petitioner also claims that the VA does not contain all of the qualification requirements on which candidates were evaluated. *Id.* at 13. She also asserts that the selecting official was obliged to review the resume and applicants' answers to the VA questionnaire before making a selection, as Ms. Jenkins admittedly did not do here. *Id.* at 15.

IV. DISCUSSION AND ANALYSIS

Summary judgment is appropriate to reduce the number of non-meritorious claims at the pretrial stage. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Nonetheless, summary judgment is a remedy of finality that should be sparingly granted only when the moving party establishes that there are no genuine issues of material fact in dispute and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby* 477 U.S. at 248-49.

In a motion for summary judgment, the burden of proving the absence of material factual disputes is on the moving party. *Tekeley v. GAO*, PAB No. 06-16 (Aug. 9, 2007) (citing *Conroy v. Reebok International, Ltd.*, 14 F.3d 1570, 1575 (Fed. Cir. 1994)); *Madson v. GAO*, PAB No. 96-07 (Apr. 23, 1997), *aff'd en banc*, Dec. 2, 1997. When the moving party has made an initial showing that there are no genuine issues of fact in dispute, the burden then shifts to the opposing party to establish that there is such a disputed fact. *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987).

The Administrative Judge must view the evidence in the light most favorable to the non-moving party. *Matsushita Electric v. Zenith*, *supra*, at 587; *Alamilla v. GAO*, PAB No. 94-01 at 5 (Mar. 17, 1995). However, mere conclusory allegations by the non-moving party are legally insufficient to avoid the entry of summary judgment. *Tekeley v. GAO*, *supra*, at 22 (citing *United States v. Newport News Shipbuilding & Dry Dock Co.*, 993 F.2d 996, 1000 (Fed. Cir. 1991)). The party opposing a motion for summary judgment in essence must produce enough evidence to make out a *prima facie* case in support of her position. *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 322-23. Summary judgment may be entered “if the evidence favoring the non-moving party is not

sufficient for the [fact-finder] to enter a verdict in his favor.” *Id.*; *Anderson v. Liberty Lobby*, *supra*, at 247-48. For purposes of this opinion and order, this Administrative Judge has viewed the facts and has drawn all reasonable inferences in the light most favorable to the Petitioner, the party opposing the motion for summary judgment.

A. B(6) CLAIM – Discussion

Preference

5 U.S.C. §2302(b)(6) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -- (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

The requisite elements of proof of this charge are that:

- a preference was given;
- the preference was not authorized by law; and
- the purpose or intent of the preference was to improve or injure someone’s prospects.

There are no material facts in dispute regarding this claim. Two years before the challenged selections, in 2008, Ms. Jenkins gave requested feedback about job performance shortcomings to one of the employees, Sheila Patrick, whom she supervised. The information given pertained to Ms. Patrick’s weaknesses and readiness at that time for advancement. There is no assertion that Ms. Jenkins advised Ms. Patrick what she needed to do to secure a promotion then or in the future, nor was there any assertion that anyone else, including Petitioner, requested similar advice, despite the fact that Ms. Jenkins also supervised Petitioner. There is no evidence proffered by Petitioner that what Ms. Jenkins did in 2008 gave Ms. Patrick any advantage in her quest for a promotion in 2010. Nor is there any evidence that Ms. Jenkins intended for her

feedback to give Ms. Patrick an advantage in 2010 when similar positions became available for competition.

Petitioner fails to proffer even circumstantial evidence of Ms. Jenkins' intent when she responded to Ms. Patrick's request for feedback. Thus, although Petitioner is correct when she says that intent is difficult to prove directly, there must be something, other than her bare conclusion, that intent can be inferred from circumstantial evidence. It is true that intent may be inferred, but Petitioner does not proffer the circumstantial evidence from which Ms. Jenkins' intent to provide an advantage for Ms. Patrick or a disadvantage for her can be inferred. Without proof of intent, this claim must fail. *Special Counsel v. Byrd*, 59 M.S.P.R. 561 (1993); *Poel v. GAO*, PAB No. 15-209-17-82 (2/7/84).

Assignments

Petitioner again fails to demonstrate that there was any intention on the part of Ms. Jenkins when she gave assignments to provide an advantage or disadvantage to any employee. She merely argues that the assignments that Ms. Patrick received from Ms. Jenkins made it more likely that she would be promoted. She does not proffer facts from which one could infer an intent to provide a preference for or against anyone. Indeed, the only argument she makes is that: (1) Ms. Jenkins cited her selectees' assignments as one of the reasons they were selected and (2) Ms. Jenkins gave them their assignments. More is required to make out a case of preference. Petitioner's subjective sentiments about her assignments are not sufficient. *See Gatlin-Brown v. GAO*, PAB No. 00-02 (3/23/01).

Petitioner argues that Ms. Jenkins gave Mr. Morrison a preference in that she gave him assignments and duties that allowed him the opportunity to make more helpful suggestions on the job than Petitioner could. Petitioner provides literally no evidence of how to quantify the

number of suggestions one can make based on one assignment versus another. Petitioner cites Ms. Jenkins' claim that she selected Mr. Morrison in part on the basis of the number of suggestions he made and that this was due, to some extent, to the nature of his jobs/assignments, but, Ms. Jenkins testified:

even aside and apart from that, in sitting in meetings with the staff as we talk about different things that could be done, that should be done, often, when there are suggestions made, even when they're made by the staff – say, other than Donald [Morrison], most people don't step up and say, yes, I'll take the lead and go ahead and see what I can do to get that done.

Q: And Rochelle [Bryant, Petitioner] doesn't do that?

A: No, Rochelle does not do that.

Thus, the only evidence on this point is that Ms. Jenkins believed that Petitioner did not step up to volunteer or to make suggestions when she had the opportunities to do so. None of this suggests a basis from which intent to provide a preference can be inferred.

B. B(10) CLAIM – Discussion

22 U.S.C. §2302(b)(10) proscribes any act by an employer that:

discriminate[s] for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.

The Agency and Petitioner disagree on what the applicable law requires to establish this claim. Both, however, rely on the same cases for their positions. GAO claims that this prohibited personnel practice requires proof of adverse action based on an employee's off-duty conduct unrelated to the employee's job performance. Petitioner argues that the claim is made if an adverse action is taken against her based on her activity at the job site, so long as it is based on her actions outside of her job duties. She claims that Ms. Jenkins discriminated against her by not selecting her because she (Petitioner) challenged performance appraisals that Ms. Jenkins gave her. Petitioner argues that although this activity on her part was at the job site, it was not

part of her job duties to challenge her performance appraisal; therefore, an adverse action based on this activity is a prohibited personnel practice.

Thompson v. Farm Credit Administration, supra, 51 MSPR at 585 states:

The administrative judge erred in finding that the appellant proved that the agency violated 5 U.S.C. § 2302(b)(10).

In *Merritt v. Department of Justice*, 6 M.S.P.R. 585 (1981), the [MSPB] examined the legislative history of 5 U.S.C. § 2302(b)(10). During a mark-up session, Representative Harris, who moved for the adoption of § 2302(b)(10), . . . explained:

The amendment adds to the prohibited practices this provision which would bar an official from taking action against any employee or applicant for employment as a reprisal for non-job related conduct. I think it is clear to prohibit discrimination against activities that have no bearing on one's job. Psychiatry, outside interests, a member of "NOW" or "Taxpayers Alliance" or what have you. . . .

The MSPB continued:

The Board is persuaded by the legislative history of § 2302(b)(10) and by judicial interpretation of that provision that it is intended to apply to *off-duty, non-job related conduct*. Thus, we find that the administrative judge erred in finding a violation of § 2302(b)(10) in this case. The conduct for which the agency retaliated against the appellant occurred during the performance of his duties.

51 M.S.P.R. at 585-86. (Emphasis added).

Petitioner's interpretation of these cases is misplaced. The conduct in response to which adverse action is taken must be off-duty, non-job related conduct to justify a finding of a prohibited personnel practice. Petitioner also relies on *Davis v GAO*, PAB Nos. 00-05 and 00-08 (July 26, 2002) in support of her claim. However, a careful reading of this case confirms that it supports GAO's argument. In *Davis* (p.34), this Board held:

This provision [(b)(10)] "is designed to prohibit personnel practices that are taken in response to an employee's off-duty conduct or interests that are unrelated to job performance." *Thompson v. Farm Credit Administration*, 51 MSPR 569, 585 (1991) (citing *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cir. 1988)). *See also*

Harvey v. MSPB, 802 F.2d 537, 551 (D.C. Cir. 1986) (“[S]ection 2302(b)(10) speaks only to an employee’s conduct totally unrelated to his job performance, such as a conviction for crime or sexual propensity.”)

There is no dispute that the conduct that Petitioner cites in support of her claim of retaliatory non-selection occurred while she was on duty and was job related. Her complaints about her prior performance appraisals were as job-related as was the whistleblowing in *Thompson* and *Davis*, but were not off-duty conduct as was the use of marijuana in *Merritt*. Accordingly, Petitioner cannot prevail on this claim.

C. B(12) CLAIM – Discussion

Section 2302(b)(12) of Title 5 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.

GAO argues that the Petition is devoid of evidence of any violation of a law, rule, or regulation implementing merit system principles. GAO Memorandum at 19. Petitioner states only that: “the gravamen of Petitioner’s (b)(12) claim is that GAO violated laws, rules and regulations implementing [a] merit system principle.” SJ Opposition at 7. Petitioner then cites 4 C.F.R. §2.4(c)(1) that states that selection and advancement should be based on “relative ability, knowledge, and skills, after fair and open competition....” But, 4 C.F.R. §2.4(c)(1) merely reiterates the merit system principle of 5 U.S.C. §2301(b)(1). Citing to it, does not identify the law, rule or regulation that implements a violated merit system principle.

Petitioner next cites GAO Order 2335.1 at paragraphs 4 and 6a that appear to implement the merit system principle that “selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that

all receive equal opportunity.” The cited Order requires that all employees be appointed, promoted, and assigned on the basis of merit and fitness.

Despite its argument, GAO appears to concede that Petitioner’s reference to GAO Order 2335.6, Chap. 3, ¶ 5(b)(1)⁷ implements the cited merit system principle by requiring that a “selection process be done as expeditiously as possible and [after] consider[ation of] all candidates impartially in accordance with merit principles.” GAO Memorandum at 20.

Leaving aside this technicality, GAO argues that the evidence is clear and uncontradicted that there was no violation of Order 2335.6. After careful review of the record, however, I conclude that there are disputed facts about the reasons why the two selectees were chosen and why Petitioner was not. Petitioner points out facially inconsistent statements made by the selecting official in her deposition and her affidavit and somewhat conflicting appraisal statements in Petitioner’s performance folder. One example is Ms. Jenkins’ statement that she selected Ms. Patrick for her volunteerism, which Petitioner claims is not justified by the facts. Petitioner also argues that Ms. Jenkins failed to take into consideration the accolades she herself gave to Petitioner in her performance appraisals for her volunteerism. Similarly, it appears that Ms. Jenkins relied on the results achieved by her selectees, yet Petitioner was commended for “achieving results.”

Ms. Jenkins stated that she selected Ms. Patrick and Mr. Morrison for their initiative, yet Petitioner was commended for the initiative that she took to develop an alternative method of allocating travel funds that was adopted Agency-wide. At the same time, Ms. Jenkins claimed that one of the reasons Petitioner was not selected was that she did not consider the broader Agency-wide implications of her work.

⁷ See, Competitive Selection Plan for Administrative Professional and Support Staff, Order 2335.6, Chap. 3, ¶5(b)(1) (Dec. 1, 2004).

Ms. Jenkins claimed that she selected Mr. Morrison because he was able to collaborate across organizations, yet Petitioner was repeatedly commended in her performance appraisals for her ability to collaborate well. Because there are material facts in dispute on the question of the reasons for the selections and Petitioner's non-selection, summary judgment is not appropriate on Count III.

Finally, on the issue whether the VA violated GAO Order 2335.1, Petitioner argues generally that GAO was obligated to develop a promotion plan that ensured fair consideration and merit selection of candidates and that stated clearly the requirements to which all promotion plans must conform. Although this Order reads as Petitioner states, there is no claim in this case that the promotion plan, *qua* plan, is deficient or in any way violative of a law, rule, or regulation. The only issue Petitioner raises is whether the VA contained sufficient information to give adequate notice to candidates for promotion to render the selection process fair.

Petitioner accurately cites GAO Order 2335.6, Chap. 3, ¶1 that provides:

A vacancy announcement must contain, at a minimum, . . . (4) qualification requirements, including any selective placement factors and/or quality ranking factors, . . . [and] (5) the knowledge, skills, and abilities (KSAs) on which candidates will be evaluated.

Res. Ex. 6. The VA in this instance specifies that the major duties of the PT-III Budget Analyst position are:

-- Provides authoritative budget advice and/or develops authoritative budget policy statements. Advises managers and other officials on requirements for the preparation, documentation, and submission of budget requests. Evaluates budgetary submissions received from subordinate organizational components in order to determine the accuracy and adequacy of budget amounts submitted for approval.

-- Prepares, reviews, analyzes, and consolidates program budgets and operating plans to ensure that submissions are consistent with GAO objectives. Prepares narrative justifications and projected funding need statements, ensuring that data is accurately documented. Collaborates with GAO teams and operating

offices as required. Coordinates and integrates findings with overall budget process.

-- Collaborates with and leads management in the change process of implementing revised budgeting processes.

-- Leads budget project teams established to develop guidance and implement new or revised budget program requirements agency wide. Prepares authoritative budget policy directives. Consolidates budgetary work of program managers, subject-matter experts, staff officials and subordinate budget analysts. Presents the budget for the organization to managers and to budget officials at the next higher level within the organization.

The VA also states the qualifications necessary for the position. It provides:

Applicants must have at least one year . . . of specialized experience at the PT-II (or equivalent) level. The experience must have equipped the applicant with the knowledge, skills and abilities to successfully perform budgetary functions and duties associated with budget formulation, justification, presentation, and execution.

Attached to the VA was a questionnaire that recited some of the above job duties and qualifications and asked the applicant if s/he had such experience and qualifications. The questionnaire reads in part:

(2) This position requires expert knowledge of all budgetary phases, . . . (3) . . . expert knowledge of applicable laws, regulations, policies, precedents, and budget techniques used in the federal government and the ability to apply this knowledge to a wide range of assignments. . . . (5) . . . experience in using various financial and budgetary systems to support budget development, presentation, and execution. . . . (6) Incumbents of this position are often required to serve as a budget advisor or liaison and to work collaboratively with one or more GAO teams, units or independent agencies.

Despite Petitioner's claim that the VA did not give adequate notice of what was required, a review of the VA establishes otherwise.⁸ Whether or not Ms. Jenkins considered the answers

⁸ Petitioner denied, for example, GAO's Statement of Undisputed Material Facts #11 that stated: Ms. Jenkins was looking for candidates who not only had shown an ability to perform well as a PT-II, but who had demonstrated a deep understanding of budget issues on an agency-wide level, and would be able to collaborate with a large number of people and teams, take a high level of initiative, and work more independently.

to the questionnaire, the major duties and the qualifications sections of the VA inform candidates in great detail what was expected of the selectees and what criteria were being considered. Petitioner cannot prevail on her claim that the VA violated any law, rule or regulation or GAO Order 2335.6.

CONCLUSION

Summary judgment is hereby entered in favor of GAO on Counts I and II and that portion of Count III pertaining to the contents of the Vacancy Announcement. Summary judgment is otherwise denied as to Count III.

SO ORDERED.

Date: July 11, 2011



Susan R. Winfield
Administrative Judge

Despite her denial, this is precisely what the VA states. *See* Resp. Ex. 6. Likewise, Petitioner claims that Ms. Jenkins did not inform her staff, until after the selections were made, that she was looking for “candidates who could serve as senior analysts who would work on areas across the office and who had broad-based experience and broad-based exposure.” Again, a review of the VA makes clear that this is precisely what was sought in a selectee. Thus, whether or not Ms. Jenkins articulated this criterion to her staff, the VA put them on notice of it.

CERTIFICATE OF SERVICE

This is to certify that on July 11, 2011, the foregoing Decision in the case of *Bryant v. GAO*, Docket No. 10-03, was sent to the parties listed below in the manner indicated.

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