

R. ROCHELLE BURNS v. U.S. General Accounting Office

Docket No. 91-02

Date of Decision: May 22, 1991

Cite as: Burns v. GAO, Docket No. 91-02 (5/22/91)

Before: Alan S. Rosenthal, Presiding Member

Headnotes:

BARS Performance Appraisal System

Jurisdiction

Prohibited Personnel Practice

MEMORANDUM AND ORDER

February 13, 1990 but maintains that the processing of the appraisal and its delivery on that date was in accordance "with all applicable laws, rules, and regulations." In addition, as a first defense, the agency asserts without illumination that "[t]he Board lacks jurisdiction over the subject matter of this action."

I found the assertion of that defense most puzzling. On the one hand, I had to assume that the defense had been advanced in the good faith belief--arrived at following a close analysis of the matter--that Board subject matter jurisdiction is lacking. Such an assumption is, of course, especially appropriate in the case of counsel employed by the United States and its departments and agencies. Government lawyers have a particular obligation to turn square corners in the representation of their client before adjudicatory tribunals and, consequently, can be expected to avoid burdening those tribunals with boilerplate assertions that they know or should know have no substance in the context of the specific case at bar.

At the same time, however, I was confronted with the fact that agency counsel had not taken to the full Board the November 19, 1990 decision of Judge Weinstein in Hendley v. GAO, Docket No. 120-211-02-89. In that decision, Judge Weinstein ordered the destruction of a performance appraisal on the ground that the delivery of the appraisal to the employee was untimely and, thus, amounted to a prohibited personnel practice within the meaning of 5 U.S.C. §2302(b)(11). Had the agency believed that this Board

lacked jurisdiction to entertain Hendley's claim and to grant the relief sought by her, it is reasonable to suppose that, once Judge Weinstein had ruled in her favor on the merits, full Board reconsideration would have been promptly sought.¹ Hence, at least at first blush, there appeared to be an inconsistency between the agency's election not to challenge the Hendley decision and the bald assertion of a lack of subject matter jurisdiction in its answer in the instant case.

In the circumstances, at the May 8 status conference I felt constrained to call upon agency counsel to file a brief addressed exclusively to the jurisdictional claim put forth in the answer. Although, quite apart from the agency's seeming acquiescence in the Board's assumption of jurisdiction in Hendley, I could see no merit to that claim, there remained the possibility that I had overlooked some crucial consideration. If so, and subject matter jurisdiction is indeed lacking notwithstanding Hendley, an expeditious ruling to that effect would spare the parties unnecessary expenditures of time in preparing for the evidentiary hearing currently scheduled for July 9, 1991.

The agency's brief is now in hand. In a word, it is wholly unpersuasive. Among other things, it reflects a seeming lack of

¹Inasmuch as jurisdictional defenses cannot be waived, this step would have been possible despite the fact that, insofar as his opinion reflects, Judge Weinstein had not been asked to dismiss Hendley's petition for review for want of subject matter jurisdiction. (Of course, even in the absence of a motion to dismiss, Judge Weinstein had to be satisfied that he possessed such jurisdiction before moving on to decide the merits of Hendley's claim.)

understanding of the significant difference between a want of jurisdiction over the subject matter of an action and the failure to state a claim upon which relief can be granted.²

Reduced to its essentials, the agency's position comes down to an insistence that the allegations of the petition for review do not establish the existence of a "prohibited personal practice" coming within the corrective jurisdiction of this Board. That insistence necessarily rests on the articulated premise that here, unlike in Hendley, the alleged and conceded several months delay in providing the employee with the performance appraisal did not constitute a "prohibited personnel practice" within the meaning of 5 U.S.C. §2302(b). That premise may or may not be valid--i.e., it may or may not be that, as the agency insists, Hendley is distinguishable on the ground that there the so-called "20 day provision" appeared in a GAO order, while here the provision is to be found instead in the BARS Manual. Whether that suggested distinction is substantial remains to be decided.³ Be that as it may, the application of

²In its answer to the petition for review, the agency asserted both the lack of subject matter jurisdiction and the failure to state a claim upon which relief can be granted, thus evincing an awareness that there is a difference between the two concepts.

³So too, I must leave for another day a determination whether, as the agency also maintains, Hendley is further distinguishable because here there is a question whether the management had justification for not satisfying the 20-day provision in the BARS Manual. That issue, on which presumably the agency has the burden of proof (or at least of going forward), relates to the merits and not jurisdiction.

Hendley to this proceeding has nothing whatever to do with subject matter jurisdiction (as distinguished from whether the allegations of the petition state a claim upon which relief can be granted). It is manifestly enough for jurisdictional purposes that the petition alleges, as did the Hendley petition, that a prohibited personnel practice was involved in the conceded failure of the agency to provide the employee with his performance appraisal within 20 days after the rating period in question closed. Whether, in the final analysis, that question is one of fact or of law (or a mixture of both), this much is clear: it simply cannot be regarded as jurisdictional.⁴

As a second reason for asserting its entirely untenable jurisdictional defense, the agency maintains that prudence dictated such a course. In this regard, the agency points to 4 C.F.R. §28.19(b) and insists that that provision in our Rules of Practice might preclude it from presenting a jurisdictional challenge at a later time should a basis for such a challenge then surface.

There are two dispositive answers to that thesis. First, there is never justification for asserting a lack of subject matter jurisdiction in circumstances where, at the time that that defense is advanced, counsel has no basis for believing that such jurisdiction is in fact wanting. Second, the agency's

⁴Because the petition for review plainly alleges sufficient facts to establish this Board's jurisdiction, there is no present relevance to the authorities cited at page 7 of the agency's brief for the proposition that a judicial complaint must undertake that burden.

reading of section 28.19(b) is, viewed charitably, extremely strained. The section provides:

Failure to raise a claim or defense in the response shall not bar its submission later unless to do so would prejudice the rights of other parties and unduly delay the proceedings.

Patently, those terms cannot be reasonably taken as cutting against the universally accepted principle that jurisdictional challenges may be raised at any time during the course of the proceeding.

In short, while not prepared to conclude that the jurisdictional defense was interposed in this proceeding in bad faith, I do find it entirely without substance. Accordingly, it should be, and it is hereby, summarily stricken from the answer sua sponte.⁵ Further, the agency is admonished not to assert a lack of subject matter jurisdiction in future proceedings before me unless it is able to offer a colorable foundation for the assertion at the first status conference.

SO ORDERED.

15/
Alan S. Rosenthal
Administrative Judge

Date: 5/22/91

⁵This action is without prejudice to the reassertion of the defense in the unlikely event that subsequent developments should suggest a lack of subject matter jurisdiction.