

**STEVEN COHEN v. U.S. General Accounting Office**

**Docket No. 90-04**

**Date of Decision: November 28, 1990**

**Cite as: Cohen v. GAO, Docket No. 90-04 (11/28/90)**

**Before: Isabelle R. Cappello, Administrative Judge**

**Headnotes:**

**Good Cause**

**Motions Practice**

**Motion to Dismiss**

**Performance Appraisal System and Procedures**

**Prohibited Personnel Practice**

**Timeliness**

**DECISION ON MOTION TO DISMISS**

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

STEVEN COHEN,

Petitioner,

v.

GENERAL ACCOUNTING OFFICE,

Respondent.

PAB No. 90-04

DECISION ON MOTION TO DISMISS

I. Factual Background

Petitioner filed a charge with the PAB General Counsel on April 3, 1990. The charge alleged that Respondent had committed prohibited personnel practices in violation of 5 U.S.C. Secs. 2302 and 4302 in conjunction with Petitioner's performance appraisal covering the period from June 16, 1989 to October 14, 1989. Subsequently, the PAB General Counsel, on behalf of Petitioner, filed a Petition for Review on September 13, 1990. The Petition for Review alleged that the wrong supervisor had prepared Petitioner's performance appraisal, that the appraisal was delivered to Petitioner more than 120 days late, and that the performance appraisal reviewer substituted his judgment for that of Petitioner's immediate supervisor without providing the appropriate narrative justification for the rating. Petitioner alleges that the above actions constitute a prohibited personnel practice because they violate the provisions of GAO Order 2430.1

(August 1, 1989), the GAO performance appraisal regulation. Petitioner alleges that, because GAO Order 2430.1 directly concerns, or implements a merit system principle, 5 U.S.C. Sec. 2302 (b)(11) has been violated.

Respondent filed an Answer to the Petition for Review on October 3, 1990, generally denying the averments of the Petition for Review.

Petitioner's original appeal to the Board did not conform to the requirements of PAB Rule 28.18 (d)(3), because it contained no relevant dates with respect to the actions complained of, and did not indicate whether Petitioner had taken any internal appeals. Accordingly, at a prehearing conference held in this matter on October 16, 1990, Petitioner was ordered to file an amended petition for review which fully complied with the Board's filing requirements.

On October 17, 1990, Petitioner filed an Amended Petition for Review, this time in compliance with the PAB Rules.

Respondent filed an Answer to the Amended Petition for Review on October 26, 1990. The averments and denials in Respondent's second Answer were substantially similar to Respondent's original Answer.

On November 2, 1990, Respondent filed a Motion to Dismiss this action on the grounds that the Petitioner failed to meet the mandatory time limits for filing a charge with the PAB General Counsel. Respondent contends that Petitioner was presented with his performance appraisal on February 22, 1990, and that the date

Petitioner filed his charge with the PAB General Counsel -- April 3, 1990 -- was twenty days late. Respondent argues that, because Petitioner's charge with the PAB General Counsel was late, that the Petition for Review must be dismissed, in accordance with PAB Regulations and caselaw precedent.

Petitioner filed his opposition to Respondent's Motion to Dismiss on November 20, 1990. In his opposition, Petitioner argues that Respondent's Motion to Dismiss should be denied because (1) the Petitioner's performance appraisal was not final until March 15, 1990, and thus, Petitioner's charge with the PAB General Counsel was timely; and (2) Respondent did not provide Petitioner with notice of his appeal rights at the time of delivery of the performance appraisal, and such failure to provide notice constitutes good cause for waiving the time limits for filing within the meaning of PAB Rule 4 CFR 28.4 (b).

## II. Analysis

In ruling on a motion to dismiss, the applicable law requires me to construe all relevant facts in the case in the light most favorable to the party opposing the motion. Scheuer v. Rhodes, 406 U.S. 232 (1974). A motion to dismiss can be granted only if it appears that the Petitioner can prove no set of facts on which he may be entitled to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Gordon v. National Youth Work Alliance, 675 F.2d 356, 358 (D.C. Cir. 1982).

The settled law with this Board holds that a Petition for Review cannot be accepted by the Board unless a charge is first

filed with the PAB General Counsel within twenty days (a) after the effective date of the action, or (b) after the charging party knew or should have known of the action. Pride v. GAO, Docket No. 44-701-17-84 (August 20, 1984); Harley v. GAO, Docket No. 23-201-17-83 (April 25, 1984). Where good cause is shown, however, the Board may waive the time limits for filing. Id.

Here, Petitioner not only alleges that there is good cause for waiving the time limits of Sec. 28.11(b), but that the facts show the charge was timely filed with the PAB General Counsel.

Petitioner alleges in a declaration accompanying his opposition to the motion to dismiss that he initially saw the performance appraisal around March 1, 1990, a time period that is within a few days of the time Respondent alleges that the performance appraisal was delivered to Petitioner. Petitioner further declares that, when he realized that the performance appraisal was inaccurate, incomplete, and not prepared by the appropriate supervisor, he refused to sign it, and then began a series of meetings with his supervisors to attempt to get the appraisal corrected. Petitioner declares that, after those meetings, it was agreed that Petitioner would add additional narrative to the performance appraisal to include the two months time that Petitioner spent as a supervisory evaluator, in order to improve his rating and make the appraisal itself more accurate.

Petitioner states that he then met with his most senior management official to discuss the narratives he was preparing

for inclusion in the appraisal. Petitioner states that during his conversation with his senior manager, the senior manager told him, in essence, that it would be fruitless to submit the narratives, because he did not feel that would be sufficient to change Petitioner's appraisal rating. Petitioner declares that that conversation occurred on March 15, and that it was that conversation with his senior manager that caused him to conclude that his only recourse would be to this Board. Petitioner states that he was on GAO travel from March 16 - 30, 1990, and that on April 2, 1990, he contacted the PAB General Counsel, and filed his charge on April 3, 1990.

I find that Petitioner's assertions are well-taken. Even assuming, arguendo, that Petitioner received his performance appraisal on February 22, 1990, GAO regulations clearly provide employees with a right to comment, in writing, on their appraisals, and such comments are considered part of the appraisal. GAO Order 2430.1, ch. 3(5)(2). Thus, the Order requires that employees will be given a reasonable opportunity to comment in writing on the appraisal. Clearly, then, the Order contemplates that the appraisal will not be final until a dissatisfied employee has had a reasonable period within which to comment on it. The fact that Petitioner met with his supervisors at all levels to discuss his dissatisfaction with the appraisal and notify them of the specific narrative comments he was preparing to add to the performance appraisal should have put Respondent on notice that Petitioner did not consider his

appraisal final, nor did he consider the possibility of changing the appraisal foreclosed. It was not until Petitioner met with his most senior supervisor that Petitioner states that he felt the issue of changing the appraisal was foreclosed.

Construing the above facts in the light most favorable to the Petitioner, Scheuer v. Rhodes, supra, I find that Petitioner's performance appraisal was not final until March 15, 1990, the date Petitioner was told by his senior supervisor that Petitioner's narrative comments would be given no weight in Petitioner's efforts to have his appraisal changed to more accurately reflect his duties and to be corrected to conform to GAO regulations.

Accordingly, it is ORDERED, that Respondent's motion to dismiss is hereby DENIED.

It is further ORDERED, that this matter shall be set down for a hearing on the merits.

Date: 11/28/90

/s/  
Isabelle R. Cappello  
Administrative Judge