ARTHUR L. DAVIS v. U.S. General Accounting Office

Docket No. 01-04

Date Issued: December 7, 2001

Cite as: Davis v. GAO, Docket No. 01-04 (12/7/01)

Before: Jeffrey S. Gulin, Administrative Judge

Headnotes:

Failure to Prosecute

Show Cause Order

ORDER TO SHOW CAUSE

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

ARTHUR L. DAVIS,	)	
Petitioner	)	
v.	)	**Docket No. 01-04**
UNITED STATES GENERAL ACCOUNTING OFFICE,	)	
Respondent	)	December 7, 2001

ORDER TO SHOW CAUSE

A status conference on the record was held in this matter on Friday, November 16, 2001.[1] The purpose of the conference was to schedule an evidentiary hearing on the issues raised in the Petition for Review, filed by Petitioner *pro se* on February 8, 2001. The Agency was represented at the conference by Senior Attorney Michael E. Hatch. Petitioner, a party to the conference, was represented by Walter T. Charlton, Esq.[2]

At the conference, counsel for Petitioner made clear that he was not interested in a hearing on the merits of Petitioner's claim, stating: "we do not intend to have any substantive hearings on the merits of this case. . . . " Transcript at 3. Mr. Charlton repeated this position several times during the conference, maintaining, for example, that "we are not going to subject Mr. Davis to a demeaning and useless process before the Board" (transcript at 5), and "I don't

[1] The conference was commenced on Thursday, November 15, but upon the insistence of Petitioner's counsel that it be recorded, was rescheduled for the following day.

[2] Mr. Charlton entered an appearance on Petitioner's behalf on September 26, 2001.

intend for either myself or my client to go through the charade of a hearing. . . " (transcript at 5). Indeed, as the conference proceeded, counsel stated that if a hearing on the merits were scheduled, he would file for an injunction in U.S. District Court. Transcript at 17.

Throughout the discussion, Mr. Charlton expressed that he and Petitioner were only interested in a hearing on the previously filed motion for recusal of the Personnel Appeals Board, which the undersigned Administrative Judge denied on September 28, 2001. That Order found that Petitioner had "failed to demonstrate personal bias or any other disqualification that would require the Board or the presiding judge to withdraw from this matter."

By postmark of October 14, 2001, Petitioner filed an appeal of the denial of recusal. By Order of November 7, 2001, the interlocutory appeal was denied as untimely, since, under Board regulations, it would have been due by October 8, 2001. *See* 4 C.F.R. §28.81(c). In addition, the Administrative Judge noted that Petitioner had failed to show that the ruling at issue met the substantive conditions for interlocutory review. *See* 4 C.F.R. §28.81(a).

Discussion

In his Petition for Review, Petitioner asked the Personnel Appeals Board to:

> rescind a suspension improperly assessed as an incident to reprisal for asserting and participating in civil rights activities or other valid reasons, to increase performance ratings improperly assessed because of bias and reprisal, to hold a factual hearing with evidence presented requiring the GAO to support the assessment of underlying facts and evidence upon which GAO claims the suspension is based, and to determine the short and long term damages to Petitioner resulting from the illegal actions . . . , to reverse the removal of the Petitioner from the duties and positions previously held by him incident to EEO activities at GAO from which he was summarily removed and for . . . other relief.

Petition at 1 (emphasis added). Petitioner specifically requested "an evidentiary hearing on the merits in this matter after a short period of discovery." Petition at 14. The Agency filed its

Answer to the Petition on March 12, 2001, and the parties continued in the discovery phase of the proceedings for several months.

Following a motion to compel by Petitioner and related conference, by Order of June 5, 2001, the parties were instructed to contact the Board "to discuss scheduling the hearing-on-the-merits and related issues." Order at 1. Thereafter Petitioner filed another motion to compel, and a further conference was held on June 28, 2001. At that time the parties agreed to schedule the evidentiary hearing for February or March 2002. *See* Order of June 29, 2001 at 2.

On July 3, 2001, Petitioner filed another motion to compel as well as a "Motion and Suggestion that the Honorable Presiding Judge, and Indeed the Entire Personnel Appeals Board Should Recuse Itself from any Further Processing of This Case and Refer the Case to an Independent Agency for Processing." The motion to compel was disposed of by Order of August 24, 2001.

On September 17, 2001, before the Board had ruled on the motion for recusal, Petitioner, through counsel, filed a "Verified Petition/Motion for Reconsideration, or Alternatively Renewal of Motion to Recuse the Board and Issue a Right to Sue Letter."[3]

By Order of September 28, 2001 the Administrative Judge ruled that Petitioner had failed "to show any conduct on the part of the Administrative Judge or the PAB sufficient to overcome the presumption of honesty and integrity that inures to the Board's administrative judges." Order at 3; *see* 4 C.F.R. §28.23. Petitioner's Appeal to the Full Board of the Recusal Motion was denied on November 7, 2001, because it was untimely filed and failed to meet the regulatory criteria for filing an interlocutory appeal. Order at 2.

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[3] In addition to reiterating the request for the Board's recusal in this case, the September motion also sought reconsideration of the August 24, 2001 discovery order with respect to one particular request. By Order of September 28, 2001, the reconsideration request was denied on the merits.

Following the denial of interlocutory review, the November 16 telephone conference was held to set the calendar for the evidentiary hearing on the merits of Petitioner's claim. During the conference, counsel for Petitioner repeatedly declined the effort to schedule such a hearing and maintained that he would not participate if one were scheduled. Rather, he was willing to pursue a hearing solely on the asserted recusal issue. Twice during the discussion Petitioner affirmed his agreement with the position taken by his counsel. *See* Transcript at 15, 18. These repeated statements of Petitioner and his counsel at the conference evidence an intent to abandon the underlying claim. *See White v. Social Security Administration,* 76 MSPR 447, 465 (1997), *aff'd,* 152 F.3d 948 (Table). Under the circumstances, to calendar the hearing on the merits of the Petition filed on February 8, 2001 would be futile, an unnecessary burden and expense on this Board and the parties, and contrary to the interests of justice.

Petitioner's stated intent not to participate in a hearing on the merits of the underlying claim was unequivocal. Accordingly, Petitioner is ordered to show cause why his Petition for Review should not be dismissed with prejudice, for failure to prosecute the claim filed. *See* 4 C.F.R. §28.24(b). Petitioner shall submit his written response to this order **by 4:00 p.m. on Friday, January 4, 2002**.

SO ORDERED.

Date: 12-7-01

/s/
Jeffrey S. Gulin
Administrative Judge