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

Docket No. 01-04

Date of Decision: September 28, 2001

Cite as: Davis v. GAO, Docket No. 01-04 (9/28/01)

Before: Jeffrey S. Gulin, Administrative Judge

Headnotes:

Motions Practice

PAB Regulations

Recusal of Administrative Judge

ORDER

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	)	**September 28, 2001**

ORDER

Now pending in this matter are two motions filed by Petitioner. On July 3, 2001, Petitioner, *pro se*, filed 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 Agency filed a timely opposition to that motion on July 27, 2001. Before the Board had ruled on that motion, Petitioner, through counsel,[1] filed a "Verified Petition/Motion for Reconsideration, or Alternatively Renewal of Motion to Recuse the Board and Issue a Right to Sue Letter" on September 17, 2001. This latest submission, in addition to seeking the Board's recusal in this case, also requests reconsideration of a discovery order issued by the undersigned Administrative Judge on August 24, 2001. The Agency promptly filed its opposition to the latest submission on September 24, 2001.

[1] Counsel filed a formal Entry of Appearance on September 26, 2001.

Recusal of the Presiding Judge and the Personnel Appeals Board

Petitioner is seeking the recusal or disqualification of the Administrative Judge and the PAB. In support of the request, Petitioner, in the motion filed on July 3, 2001, cites the PAB's apparent lack of independence from GAO as a conflict of interest for the Board and further claims that he is "presently suing the PAB."[2] Request at 1. In his later pleading, Petitioner, through counsel, reiterates the lack of independence argument, giving as an example the Administrative Judge's adverse ruling on a discovery request by Petitioner. He further asserts that the PAB has failed to comply with its statutory mandate to ensure equal opportunity for GAO employees. Request at 5.

In its responses to the motions, the Agency correctly points out that the Board is not a party to the lawsuit in question and that the Petitioner has not been granted leave to intervene in the lawsuit. Response No. 1 at 2. In addition, the Agency argues that the Petitioner has offered "bare innuendo" that neither establishes any grounds for disqualification nor shows any bias on the part of the Administrative Judge or the Board toward Petitioner. Response No. 2 at 5. Finally, the Agency objects to Petitioner's renewal of his recusal motion as "inappropriate" given that there has not yet been a ruling on the initial motion. Response No. 2 at 4.

The section of the PAB's rules that govern disqualification or recusal of an administrative judge reads, in pertinent part:

> (b) Any party may file a motion requesting the administrative judge to withdraw on the basis of personal bias or other disqualification and specifically setting forth the reasons for the request.

[2] Petitioner is referring to the case of *Chenareddy v. Walker*, C.A. No. 87-3538 which is an age discrimination lawsuit filed in the U.S. District Court for the District of Columbia in 1987. In April 2000, counsel for Petitioner, who also represents the plaintiff in the District Court case, sought to add the PAB as a party defendant and renewed the previously-denied motion for class certification. In addition, counsel moved to add three additional "intervenors" to the lawsuit, among whom is Petitioner. There have been no rulings on those motions.

4 C.F.R. §28.23. The relevant language in the Board's regulations is very similar to that in the MSPB's regulations (5 C.F.R. §1201.42). That Board has adopted a well-settled legal framework for reviewing motions for disqualification:

> In making a claim of bias or prejudice, appellant must overcome a presumption of honesty and integrity which accompanies administrative adjudicators. There must be a substantial showing of personal bias to disqualify a hearing officer. And, of course, the mere fact that a hearing officer has ruled against a party in the past cannot be the basis for a claim of personal bias. *Oliver v. Dep't. of Transportation*, 1 M.S.P.R. 382, 386 (1980) (citations omitted); *In the Matter of John W. King*, 1 M.S.P.R. 146, 151 (1979).

Petitioner fails 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. The Board is not a party to any lawsuit involving Petitioner and, even if it were, disqualification is not required simply because a litigant sues or threatens to sue a judicial officer. *U.S. v. Grismore*, 564 F.2d 929 (10th Cir. 1977); *cert denied*, 435 U.S. 954. Moreover, as noted above, ruling against a party in the course of litigation does not establish bias on the part of a presiding judicial officer. Finally, Petitioner's concerns about the Board's relationship with GAO or how the Board fulfills its statutory mandates do not raise even the suggestion of bias toward this Petitioner on the part of the PAB or its Administrative Judges.

Accordingly, as Petitioner has failed to demonstrate personal bias or any other disqualification that would require the Board or the presiding judge to withdraw from this matter, Petitioner's motions for recusal are **denied**.

The Motion for Reconsideration

By Order of April 11, 2001, the parties had until May 11, 2001 to serve follow-up discovery requests, with discovery to be completed by June 1, 2001. Based upon GAO's representation that the requests served by Petitioner on May 5, 2001 were "voluminous," a brief extension of the time for responding to the outstanding requests--until June 11, 2001--was ordered on June 5, 2001.

By Order of June 29, 2001, the Administrative Judge denied Petitioner's motion to compel responses to interrogatories filed after the May 11 deadline for follow-up discovery requests. Petitioner filed a Motion to Compel Respondent to Answer Interrogatories on June 20, the Agency filed its opposition, and Petitioner filed a response to the Agency's submission. On June 29, 2001, a status conference was held; the parties reached agreement as to certain interrogatories, and Petitioner was allowed until July 3, 2001, to file a motion to compel with respect to any remaining disputes. Petitioner's further motion to compel, and the Agency's response to said motion, were the subject of an Order dated August 24, 2001. That Order discussed the disputed requests, resolving two requests in favor of the Agency and two partially for Petitioner and partially for the Agency.

Petitioner now seeks reconsideration of the August 24 Order with respect to Request No. 9, "the denial of discovery as to the mechanism, records and workings of the Executive Resources Board (ERB) at GAO, and its apparent successor organization, the Managing Directors (MD)." Request at 1. Petitioner's reconsideration request states, without support, that he believes "that the reprisals against him, the closing of the ACCR and his questioning of the age discrimination environment at GAO are not only related events, but such fact will be disclosed by the minutes of the ERB and/or the MD." Request at 3.

Petitioner once again fails to establish the relevance of the initial request, involving the ERB, to his claims. On the other hand, Respondent has submitted the governing GAO Order 2317.1 (Nov. 23, 1999), which defines the functions of the ERB as providing assistance to the Comptroller General with respect to management of the Senior Executive Service. *See* Order 2317.1, ch.1, ¶6. Petitioner has made no connection between the defined functions of the ERB and the claims in the Petition for Review pending before this Board. Moreover, as Respondent points out, the governing order has not been rescinded; Petitioner's attempt to secure information relative to the "apparent successor organization, the Managing Directors (MD)" reflects either a misunderstanding of this fact or an attempt to enlarge the discovery request well beyond the May 11 deadline for follow-up discovery to be served.

Accordingly, Petitioner has failed to show that the Order of August 24 denying his motion to compel with respect to Request No. 9 should be reversed. The Motion for Reconsideration is hereby **denied**.

SO ORDERED.

Date: 9-28-01

/S/
Jeffrey S. Gulin
Administrative Judge