ANGEL 'LA V. GARNER v. U.S. General Accounting Office

Docket No. 90-02

Date of Decision: May 18, 1990

Cite as: Garner v. GAO, Docket No. 90-02 (5/18/90)

Before: Isabelle R. Cappello, Administrative Judge

Headnotes:

Exhaustion of Remedies

Motion to Dismiss

Prohibited Personnel Practice

Temporary Appointments

ORDER

O.F. ✓

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

Angel'la V. Garner, Petitioner, v. United States General Accounting Office, Respondent.	Docket No. 90-02

ORDER

On February 21, 1990 Petitioner filed a "Petition for Review of Recommendations of the General Counsel for the Personnel Appeals Board" (hereinafter Petition for Review). The Petition for Review alleges that improper actions were taken by GAO in that the Petitioner was terminated on September 30, 1989, "because there was no need for [her] services and the office was overstaffed." Subsequently, in December 1989, the manager hired a new employee to fill the position held by the Petitioner. The new employee was hired on a permanent, full time basis.

On March 14, 1990, Respondent filed "Respondent's Motion to Dismiss Petition for Review" (Motion) on the grounds that the Board lacks jurisdiction over the subject matter of this case and because Petitioner has failed to state a claim upon which relief

can be granted. Respondent attached a document entitled "Notification of Personnel Action" which indicates that Petitioner's service date began on September 15, 1985, and that she was terminated on September 30, 1989, because her assignment had been completed. Respondent claims that Petitioner held a temporary appointment which had simply expired on September 30, 1989, and that this Board has no jurisdiction over this Petition under 31 U.S.C. Sec. 753(a)(1)(1988), relating to removal of employees. As to the Board's jurisdiction under 31 U.S.C. Sec. 753(a)(2)(1988) over prohibited personnel practices under 31 U.S.C. Sec. 732(b)(2)(1988), Respondent argues that even if Petitioner's allegations are true, they do not constitute a cause of action upon which relief could be granted and that as a temporary employee, whose term of appointment had expired, Petitioner has no right to be hired by GAO as either a temporary or permanent employee at a later date.

Following a telephone conference with the parties on April 9, 1990, I set a hearing for May 30, 1990, on Respondent's Motion, in order to allow proof to be adduced as to the exact nature of Petitioner's appointment.

Following the telephone conference, a copy of "Petitioner's Opposition to Respondent's Motion to Dismiss" (Opposition) was received. The Opposition clarifies and amplifies the allegations in the Petition by alleging that "an improper personnel practice was conducted in violation of 31 U.S.C. Sec. 732(b)(2)" and the evidence to be adduced will show that "improper, and, in fact,

discriminatory action was taken against the Petitioner, because of race and/or sex of the Petitioner, and/or was a violation of permissible employment practices."

Thus even assuming that, as Respondent argues, Petitioner held a temporary appointment, and thus was not subject to the Board's jurisdiction over removal, there are factual allegations that could support an action under the Board's jurisdiction over prohibited personnel actions. For example, was her appointment not renewed because of her race and/or sex? See 5 U.S.C. Sec. 2302(a)(2)(A)(vii) (1988) (listing "reemployment" as a type of personnel action which must be free of the taint of discrimination). Or was she "deceive[d]" as to her right to compete for employment for the permanent position filled in December 1989 when she was led to believe that the office was overstaffed. See 5 U.S.C. Sec. 2302(b)(4) (1988)

With such factual issues to be resolved, a dismissal at this stage of the proceeding would not be appropriate.

By alleging discrimination, however, petitioner raises another problem. Under the Board's rules, when both EEO and non-EEO issues are raised in a proceeding the petitioner must file a complaint with GAO, in accordance with GAO Order 2713.2 before invoking the Board's procedures. See 4 C.F.R. Sec. 28.47(a) and (c) (1989) (renumbered as Sec. 28.98, see 54 Fed. Reg. 24138 (6/6/89)). Furthermore, the Board's Rules require that a petitioner plead whether or not any internal appeals to GAO have been processed. See 4 C.F.R. Sec. 28.18(d)(3) (1989).

Petitioner has not so pled.

The aforesaid premises having been considered, it is hereby ORDERED, pursuant to a telephone status conference with the parties on May 17, 1990, that:

1. If issues of discrimination in violation of 5 U.S.C. Sec. 2302(b)(1) are to be tried in this proceeding, they must be specifically raised in an amended Petition for Review, so that a proper response may be made. Petitioner has until May 25, 1990, to file such amended Petition. If such issues are not raised in an amended Petition for Review, they will not be tried in this proceeding.

2. Also by May 25, Petitioner shall file an amended Petition for Review complying with the Board's rule that all appeals state whether internal appeals have been taken and, specifically, whether any have been taken in accordance with GAO Order 2713.2. See 4 C.F.R. Sec. 28.18(d)(3) (1989).

3. Respondent shall respond to the Petition for Review, and any amended petition, by June 20.

4. Respondent's Motion to Dismiss filed on March 14, 1990 is denied.

5. The hearing set for May 30 is cancelled.

6. The hearing on the merits is set for August 1 and 2, to commence at 10:00 A.M., at a place to be later noticed.

7. All discovery shall be completed ten working days prior to the commencement of the hearing.

8. Copies of all exhibits to be offered into evidence, the

prehearing briefs, and the proposed orders to be entered in this case shall be exchanged five working days prior to the commencement of the hearing. A copy of these documents for the use of the Administrative Judge shall be delivered to the offices of the Personnel Appeals Board on the same date as the exchange between the parties.

9. Before the start of the hearing, a typed witness list, and a typed list of acronyms expected to be used by the witnesses (e.g., "NTE"), with an explanation of each, shall be exchanged by the parties, with copies given also to the court reporter and the Administrative Judge. The list of acronyms shall be received into evidence as an exhibit.

May 18, 1990

/s/
Isabelle R. Cappello
Administrative Judge