**ROBERTA H. GASTON v. U.S. General Accounting Office**

**Docket No. 99-02**

**Date Issued: August 11, 2004**

**Cite as: Gaston v. GAO, Docket No. 99-02 (8/11/04)**

**Before: John P. Mahoney, Administrative Judge**

**Headnotes:**

**Attorney Fees**

**Back Pay**

**Compliance**

**Discretion of Administrative Judge**

**ORDER**

**PERSONNEL APPEALS BOARD**
**U.S. GOVERNMENT ACCOUNTABILITY OFFICE**
**WASHINGTON, D.C.**

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| **ROBERTA H. GASTON,** | ) | |
| **Petitioner** | ) | |
| **v.** | ) | **Docket No. 99-02** |
| **UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE,** | ) | |
| **Respondent** | ) | August 11, 2004 |

## ORDER

On July 27, 2004, this Board issued a Final Decision on Cross Appeals from the March 30, 2004 Opinion and Order on Compliance. Pursuant to that Decision, the Agency was ordered to pay back pay and interest for the periods between Petitioner's termination and reinstatement and for the duration of her two suspensions in 1996, as well as to pay $5,000 in compensatory damages by August 17, 2004.[1] In addition, GAO was ordered to file a compliance report within 10 days as to specific steps taken to facilitate Petitioner's obtaining her retirement annuity through OPM. Finally, the stay of the attorney's fees request was lifted, thereby requiring the Agency to file a response to the fee request by August 17, 2004.

On August 6, 2004, GAO filed its Compliance Report and Motion to Stay Payment. In that submission, the Agency states that as to back pay it "is ready to immediately process and issue payment consistent with the [attached] Summary and in accordance with the July 27, 2004

[1] GAO was given twenty days to provide that relief, but because service of the Decision was not perfected until July 28, 2004, the compliance dates have been adjusted to reflect one additional day.

Decision on or before September 6, 2004."[2] The Agency goes on to request a stay of back pay and compensatory damages "until all appeals are filed and exhausted; and if no appeals are filed, a stay of any payment until September 6, 2004." As a basis for the request, GAO states that requiring it to make payment prior to exhaustion of an appeal would be "unduly harsh," posing the possibility of further legal action to recoup payment should a final appellate decision result in a different outcome. The Agency also states that if neither party appeals from the July 27, 2004 Decision, it "will immediately comply with the PAB's decision and ensure that payment is processed" by September 6, 2004.

As to attorney's fees, the Agency states that it "will not contest the amount being sought." Nevertheless, GAO requests a stay of the fees "until all appeals, if any, are filed and exhausted," noting that absent any appeal, it would process fee payment by September 6, 2004.

Finally, the Agency states that Petitioner "is still deliberating whether to appeal the July 27, 2004 Decision and that she does not object to staying payment at this time." The Agency's submission does not state its own plan with respect to filing an appeal to the Federal Circuit.

The Board's discretion to stay enforcement of its Final Decision pending judicial review involves consideration of the likelihood of success on appeal; irreparable harm to the applicant absent a stay; substantial harm to the other interested parties and the public interest. The Board balances the likelihood of success on appeal against the other three factors. If the latter three factors favor a stay one will be granted if a serious legal question is present on the merits. *See Briggs v. National Council on Disability*, 68 MSPR 296 (1995); *Special Counsel v. Campbell*, 58 MSPR 455 (1993).

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[2] GAO offers no explanation as to the significance of the September 6 date.

Upon consideration of the Agency's request, and all the surrounding circumstances referenced in the July 27 Decision, the payment of the back pay award, compensatory damages, and attorney's fees in this case is hereby stayed until **September 6, 2004**. The request to stay payment pending the exhaustion of any appeals is **denied**. The Agency has failed to establish sufficient grounds for further delay in this case. *See Alexander v. OPM*, 70 MSPR 448 (1996).

**SO ORDERED.**

For the Board:

Date: August 11, 2004

/S/
John P. Mahoney
Administrative Judge