Leon Gill v. U.S. Government Accountability Office

Docket No. 08-07

Date of Decision: September 1, 2011

Cite as: Gill v. GAO, Docket No. 08-07 (9/1/11)

Before: Steven H. Svartz, Vice-Chair, for the Board, *en banc*; Mary Leary, Chair; Susan R. Winfield, Member; John L. Braxton, Member; William E. Persina, Member

Headnotes:

Comptroller General Decisions

PAB General Counsel

PAB Regulations

Standard of Review

Travel expenses

DECISION ON PETITIONER'S APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

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

LEON GILL,	)	
Petitioner/Appellant	)	
	)	
v.	)	**Docket No. 08-07**
	)	
UNITED STATES GOVERNMENT	)	
ACCOUNTABILITY OFFICE,	)	September 1, 2011
Respondent/Appellee	)	
	)	

DECISION ON PETITIONER'S APPEAL
FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

I. INTRODUCTION

This matter is before the Personnel Appeals Board (PAB or the Board) on Petitioner's appeal from the April 20, 2010 Initial Decision (ID) of the Administrative Judge (AJ). Petitioner is appealing only that part of the ID that denied his Motion for Reimbursement of Travel Expenses.

Petitioner filed his Appellant's Brief on October 6, 2010. The Government Accountability Office (GAO or the Agency or Respondent) filed its Opposition to Appellant's Brief on November 1, 2010. Petitioner filed his Reply to Respondent's Opposition to Appellant's Brief on November 10, 2010.

Appellant contends that the ID "erroneously interpreted statute and regulations. The Board thus should substitute its own conclusions of law in accordance with 4 C.F.R. §28.87(g)(2)." Appellant's Brief at 1. Upon review of the submissions of the parties and the record herein, the Board denies the appeal and affirms the AJ's conclusion.

A. Factual Background

The facts in this case relevant to the appeal are summarized below:

Leon Gill, through the Personnel Appeals Board Office of General Counsel (PAB/OGC), filed an Amended Petition on October 24, 2008. At that time, Petitioner was a GAO employee who was assigned to GAO's office in Huntsville, Alabama. The Amended Petition alleged that in proposing to suspend Petitioner without pay for two calendar days and ultimately issuing him a written reprimand, GAO discriminated against him on the basis of race in violation of 31 U.S.C. §732(f)(1); retaliated against him because he had opposed Respondent's allegedly discriminatory hiring practices in violation of 31 U.S.C. §732(b)(2); and committed prohibited personnel practices involving discrimination and retaliation in violation of 5 U.S.C. §2302(b)(1)(A).

During a status conference on December 11, 2008, the hearing was scheduled to commence on April 28, 2009. *See* Order of December 16, 2008.

On February 27, 2009, Petitioner retired from GAO.

On March 6, 2009, the AJ issued an order rescheduling the hearing to begin in Washington, D.C. on May 5, 2009. According to Petitioner, shortly after the scheduling order, the then-General Counsel of the PAB/OGC informed GAO that Petitioner would be appearing at the hearing as a witness on behalf of the PAB/OGC and requested GAO to authorize travel expenses for Petitioner. Appellant's Brief at 3.

On April 2, 2009, GAO notified the PAB/OGC that it would not authorize the expenditure of appropriated funds for Petitioner's travel. In GAO's view, such payment was precluded by law since Petitioner would no longer be a GAO employee at the time of the hearing. *Id.*

On April 15, 2009, the PAB/OGC requested the Board to issue a statement of policy or

guidance, pursuant to 4 C.F.R. §28.155, as to whether GAO "may lawfully refuse a PAB/OGC request to process a travel voucher for a witness to attend a hearing on behalf of the PAB/OGC in an action involving the prosecution of a prohibited personnel practice against GAO." Petition, *PAB/OGC v. GAO*, PAB No. 09-03.

The hearing was conducted by the AJ in Washington, D.C. on May 5, 6, and 7, 2009. Petitioner testified on May 5, 2009. Petitioner paid his own travel expenses and attended the full hearing. Two witnesses (GAO employees) located in Huntsville testified by video teleconference. ID at 1.

In a *per curiam* decision issued on February 18, 2010, the Board denied the request for a statement of policy or guidance, "because the question of travel reimbursement for a retiree-Petitioner arose in the context of a pending case before the Board and because the specific criteria set forth in [4 C.F.R.] section 28.155 [had] not been met…." PAB No. 09-03 at 5-6 (2/18/10). That decision gave Petitioner 20 days to file a motion with the AJ for reimbursement of his travel expenses. *Id.* at 6. The PAB/OGC timely filed such a motion on Petitioner's behalf, and GAO timely filed an opposition to the motion.

On April 20, 2010, the AJ issued the ID dismissing Petitioner's claims and denying PAB/OGC's reimbursement motion. The AJ found that the reimbursement of Petitioner's travel expenses was not authorized by law. In this regard, the AJ stated:

> I am faced with the compelling logic of the [Comptroller General's decision in *Matter of: Gracie Mittelsted - Expenses of Travel to Attend Merit Systems Protection Board Hearing*, B-212292 (Oct. 12, 1984)], which plainly establishes that a non-government employee party-litigant, even when a former employee, is not eligible for travel and per diem expenses in these circumstances. I am unable to accept Petitioner's invitation to interpret the term "witness," in the aforementioned governing regulations, so broadly as to encompass a party-litigant. To do so would ignore the party-litigant's self-interest in the proceeding and would result in an incongruity under the regulations: the party-litigant would pay him/herself witness and travel fees and then seek to recoup those costs

> from the Agency if successful in the litigation. The correct scenario, as advanced by the Respondent, is that the party-litigant, if successful, seeks those expenses under a Back Pay Act remedy. Such does not encompass the Petitioner's situation.

ID at 22. Accordingly, the AJ concluded that "Petitioner has not provided sufficient legal basis for reimbursement of his travel expenses to attend the hearing in this matter." *Id.* at 23.

B. Parties' Arguments on Appeal

1. Petitioner

Petitioner asserts that: (1) in prosecuting claims of prohibited personnel practices, the PAB General Counsel "acts in the place of the Special Counsel to the Merit Systems Protection Board" and is "furthering the interest of the government"; (2) witnesses called by the PAB/OGC in its prosecution of such claims are also furthering the interest of the government and are providing a direct benefit to the government; and (3) consequently, such witnesses are entitled to travel reimbursement under the "invitational travel" statute, 5 U.S.C. §5703. According to Petitioner, the right to travel reimbursement under that statute "is not extinguished merely because the witness brought the underlying claim." Appellant's Brief at 2.

2. GAO

GAO asserts that PAB/OGC acted as counsel for Petitioner, rather than as an independent prosecuting authority, when it represented him before the AJ, and, therefore, "Petitioner was not performing a service for the government when he testified at the hearing." GAO Opposition at 2-3. According to GAO, Petitioner was "clearly testifying on his own behalf, in support of his individual claim," and he was not on "invitational travel" when he came to Washington, D.C. for the hearing. *Id.* at 3. Consequently, GAO contends that the AJ properly relied on GAO case law that prohibits GAO from reimbursing Petitioner in this case. *Id.*

II. DISCUSSION

A. Standard of Review

The Board's regulations provide that, in conducting its examination of an initial decision, the Board

> may substitute its own findings of fact and conclusions of law, but the Board generally will defer to demeanor-based credibility determinations made in the initial decision. In determining whether some action other than affirmance of the initial decision is required, the Board will also consider whether:
> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed;
> (2) The initial decision is based on an erroneous interpretation of statute or regulation;
> (3) The initial decision is arbitrary, capricious or an abuse of discretion, or otherwise not consistent with law;
> (4) The initial decision is not made consistent with required procedures and results in harmful error.

4 C.F.R. §28.87(g).

Thus, the Board may review the record on appeal *de novo*, but ordinarily will not "overturn a finding of fact in the initial decision 'unless [it] is unsupported by substantial evidence in the record viewed as a whole'." *Pernell v. GAO,* PAB No. 01-03 at 8 (3/13/03) (*en banc)* (quoting 4. C.F.R. §28.87(g)). On appeal, "[t]he Board will also consider . . . whether the initial decision is based on erroneous interpretation of statute or regulation. . . ." *Id.; see, e.g., Turner v. GAO,* PAB No. 08-01 at 5-6 (9/18/09) (*en banc); Gaston v. GAO,* PAB No. 99-02 at 8 (7/18/03) (*en banc)*; *Madson v. GAO,* PAB No. 96-07 at 7-14 (12/2/97) (*en banc*). It is this second provision of §28.87(g)—that the Initial Decision is based on an erroneous interpretation of statute or regulation—that is invoked in the matter at hand.

B. Analysis and Conclusions

The issue on appeal is whether GAO was legally authorized to reimburse Petitioner for his travel expenses in the circumstances presented in this case. The AJ found that GAO did not have legal authority to do so.

Petitioner argues on appeal that he was entitled to reimbursement for his travel expenses under the so-called "invitational travel" statute, 5 U.S.C. §5703.[1] Appellant's Brief at 2.

Section 5703 of Title 5, United States Code, states:

> § 5703. Per diem, travel, and transportation expenses; experts and consultants; individuals serving without pay
>
> An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at $1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service.

Under section 5703, an individual (not a regular government employee) who provides a direct benefit to the government is eligible for reimbursement from the government of travel expenses that he or she incurred in providing that benefit.[2] *Matter of: DOD Section 6 School Board Members – Invitational Travel Orders*, B-260896 (1996), 1996 WL 615975 at 2 (Comp. Gen.). Invitational travel applies only to persons performing a

---

[1] GAO asserts that Petitioner "did not raise this argument before the AJ[.]" GAO Opposition at 2. Although Petitioner did not specifically cite 5 U.S.C. §5703 before the AJ, he essentially argued before the AJ that he was an invitational traveler by claiming that he was entitled to travel reimbursement as a witness for a "federal prosecutorial office." *See* Motion for Reimbursement of Travel Expenses at 3. Accordingly, we find that Petitioner did, in substance, raise this argument before the AJ. Parties are reminded and encouraged to present their arguments as fully as possible before the AJ in the first instance.

[2] For purposes of section 5703, the term "employee" means "an individual employed in or under an agency including an individual employed intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis and an individual serving without pay or at $1 a year[.]" 5 U.S.C. §5701(2).

direct service for the government, such as experts, consultants, or other advisors, to permit travel for such purposes as, for example, conferring with government officials in connection with the performance of that service. *Matter of Funding of Conferences*, 55 Comp. Gen. 750, B-166506 (1976); *see also* GAO, *Principles of Fed. Appropriations Law*, Vol. I, at 4-47 to 4-48 (3d ed. 2004). Invitational travel has been approved in situations where an individual was invited to speak at a conference; however, simply attending a conference was not sufficient to qualify for invitational travel. *Matter of: Mine Safety & Health Admin. – Payment of Travel Expenses at Seminars*, B-193644 (1979), 1979 WL 12354 (Comp. Gen.).

GAO and Petitioner dispute whether Petitioner's appearance as a witness in this proceeding provided a direct benefit to the government, thereby making him eligible for travel reimbursement under the invitational travel statute. Their disagreement centers on the role played by the PAB/OGC in litigating this matter.

Petitioner asserts that in representing him before the PAB, the PAB/OGC "act[ed] in a public, prosecutorial capacity. . . ." Petitioner's Reply at 6. Petitioner further asserts that he

> traveled at his own expense to Washington, D.C. to assist the PAB/OGC in its mandatory prosecution of prohibited personnel practice claims, and appeared as a witness on its behalf. The travel of [Petitioner] was reasonably necessary and contributed materially in carrying out an authorized government function of the PAB/OGC and hence directly benefited the government.

Id.

GAO, on the other hand, argues that "PAB/OGC acted as [Petitioner's] personal counsel at the hearing, and [Petitioner] appeared as a witness solely on his own behalf." GAO Opposition at 4. Therefore, according to GAO, Petitioner

> was not performing a service for the government when he testified at the hearing. He was clearly testifying on his own behalf, in support of his individual claim, which he himself brought against GAO. He was not on "invitational travel" when he came to Washington, D.C. for his hearing.

Id. at 3.

The Government Accountability Office Personnel Act (GAOPA), 31 U.S.C. §§731-755, gives "the Board broad discretion to design appropriate procedures for appeals cases and to include in that design whatever role for the General Counsel it deems helpful in discharging its duties and powers." *GAO v. GAO/PAB,* 698 F.2d 516, 530 (D.C. Cir. 1983). Through its regulations, the Board has defined that role broadly to include representation of individuals in cases before the PAB. *See id.;* 4 C.F.R. §28.12(d)(1). Under the Board's regulations, "[i]f the [PAB] General Counsel determines that there are reasonable grounds to believe that the charging party's rights [under the GAOPA] have been violated, then the General Counsel <u>shall represent the charging party</u> unless the charging party elects not to be represented by the Office of General Counsel." 4 C.F.R. §28.12(d)(1) (emphasis added). This provision reflects the Board's view that such representation in cases which the PAB/GC finds meritorious is a means for the PAB General Counsel to "help the Board carry out its duties and powers" following completion of its investigative responsibilities as outlined in the GAOPA. 31 U.S.C. §752(b)(3); *see GAO v. GAO/PAB,* 698 F.2d at 530. The D.C. Circuit viewed this system as "facilitating an efficient adjudicative procedure for *all* petitions filed with the Board…." *Id.* (emphasis in original).

Under the Board's regulations, the rights of GAO employees are protected by having the PAB/OGC act as the individual's attorney in all matters within the Board's jurisdiction where that Office reasonably believes the claims have merit. Thus,

PAB/OGC represented Petitioner in pursing his claims as an individual who allegedly experienced discrimination and retaliation at the hands of one or more Agency officials.[3] An individual whose only role was as a witness who testified in support of the PAB/OGC's litigation of meritorious claims would be assisting the PAB/OGC in its function and thus arguably providing a direct benefit to the government, thereby appearing to qualify under the invitational travel statute. *See Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing,* 61 Comp. Gen. 654 at 655-56, B-202845 (1982); *To the Secretary of the Army,* 48 Comp. Gen. 644 (1969); *To the Administrator, NASA,* 48 Comp. Gen. 110 (1968).

But this does not end the inquiry, because it does not address the fact that Petitioner was both a party and a witness in this case. As the Comptroller General (CG) decisions have acknowledged, courts have commonly recognized distinctions between parties and witnesses. In *Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing*, the Comptroller General found the clear distinction between a party and a witness to be determinative. 61 Comp. Gen. at 656. In that case, the complainant, a federal employee of the Equal Employment Opportunity Commission (EEOC), had filed an EEO complaint as an applicant to another federal agency (NASA). The EEOC advised NASA that NASA was responsible for the travel expenses of the complainant to the EEO hearing. NASA sought a CG determination on the question.

In reviewing the matter, the Comptroller General requested the EEOC to submit its opinion, as the agency with "responsibility for administering and enforcing Title VII and other nondiscrimination and affirmative action requirements for Federal employment." *Id.* at 655.

---

[3] As the D.C. Circuit noted, in enacting the GAOPA, Congress "expected the [PAB] General Counsel's role to be far more various than that of the Special Counsel." *GAO v. GAO/PAB,* 698 F.2d at 531.

EEOC advised the CG that it believed NASA was responsible for the payment of travel expenses for the complainant, under 5 U.S.C. §5703. As the CG noted, that statute "provides authority for agencies to authorize in appropriate circumstances the invitational travel of an individual serving without pay, and to pay the individual's travel or transportation expenses while away from his home or regular place of business." *Id.* Relying on CG precedent involving travel of witnesses to administrative hearings, the EEOC reasoned that the same rationale should apply to a complainant who is also a witness on his or her own behalf. Thus, EEOC took the position that the invitational travel provision should apply in the NASA case, since in its view "the complainant's travel expenses to the hearing would come within the scope of invitational travel to non-Government employees. . . ." *Id.*

The Comptroller General determined that nothing in Title VII required or authorized an agency to pay in advance the travel expenses of an outside applicant. The CG next rejected the EEOC's contention that the travel reimbursement for witnesses at agency proceedings authorized under 5 U.S.C. §5703 should be extended "to a complainant who is also a witness on his or her own behalf." *Id.* at 656. The Comptroller General concluded that "outside applicant/complainants" are not entitled to the payment of travel expenses on the same basis as non-government employees who are summoned as witnesses:

> The role of a complainant is clearly distinguishable from that of a witness. Unlike a witness, <u>a complainant has a direct interest in the proceeding</u>…. Since a complainant and a witness each have a distinctly different relationship to the outcome of the administrative proceeding we do not view a complainant as being entitled to reimbursement of travel expenses on the same basis as a witness.

Id. (emphasis added).

This view was affirmed in *Matter of Gracie Mittelsted: Expenses of Travel to Attend Merit Systems Protection Board Hearing,* B-212292 (1984), 1984 WL 46740 (Comp. Gen.).

Mittelsted involved an employee with the Department of Labor who was separated from her position through a reduction-in-force (RIF). *Id.* at 1. The MSPB ultimately found that the RIF was defective and awarded the employee backpay from the effective date of the RIF, January 19, 1982, to the end of her term appointment, March 30, 1982. The hearing took place in May 1982. *Id.* Since the hearing occurred after her term appointment ended, there was no basis for regarding Ms. Mittelsted as a federal employee at the time she attended the hearing. *Id.* at 2.

Like the Petitioner in the instant case, Ms. Mittelsted traveled to the administrative hearing "in order to testify on her own behalf, and she had a direct interest in the outcome of the proceedings." *Id.* at 3. Unlike the instant case, which involved only one Petitioner and his testimony solely in support of his own claims, the proceeding in *Mittelsted* involved claims by Ms. Mittelsted and 14 similarly situated employees and testimony by Ms. Mittelsted that related both to her appeal and to the appeals of the other employees. If Ms. Mittelsted had only been a witness in furtherance of the cases of the other employees, the CG's decision in *Matter of Expenses of Outside Applicant/Complainant* indicates that she would have been entitled to reimbursement as a witness. *See* 61 Comp. Gen. 654 at 655-56. However, the Comptroller General found dispositive the fact that Ms. Mittelsted testified on matters in which she had a direct interest as a party. Specifically, the CG stated that "[w]hile Ms. Mittelsted also may have testified on behalf of the other appellants, there is nothing in the record to show that she testified on matters unrelated to her own appeal, or that she incurred additional travel expenses because of such testimony." *Mittelsted,* at 3. The CG therefore concluded that "for the reasons stated in our decision in 61 Comp. Gen. 654, Ms. Mittelsted may not be reimbursed for travel expenses under the provisions of 5 U.S.C. 5703." *Id.*

As in those earlier Comptroller General decisions, Petitioner herein had a direct interest in the proceeding. As in *Mittelsted,* nothing in the record of this case indicates that Petitioner testified on matters unrelated to his appeal. PAB/OGC has not cited any case in which a party (as opposed to a non-party witness) who testified at an administrative proceeding like the one in this case received payment for travel expenses under 5 U.S.C. §5703.[4] Nothing in the PAB/OGC's arguments demonstrates either that the Comptroller General's decision in *Mittelsted* denying the party's travel expenses is inapplicable in the circumstances of this case or that it is legally incorrect.[5] The fact that Petitioner was represented by PAB/OGC and that his claim involved allegations of prohibited personnel practices does not demonstrate that payment of his

---

[4] In addition, Petitioner has not cited any regulation of the Office of Special Counsel or any other administrative agency authorizing payment of travel expenses in such circumstances.

[5] Petitioner also asserts that "the AJ misread the legal standard [under 31 U.S.C. §1301(a)] for determining whether an expenditure is authorized by law…." Appellant's Brief at 4. However, section 1301(a) does not authorize specific expenditures; rather, it sets forth the requirement that expenditures be made only as authorized by law. For the reasons stated above, we also find unpersuasive Petitioner's challenge to the AJ's conclusion that GAO Order 0300.1 and the Federal Travel Regulations do not authorize reimbursement in this case. Petitioner would have the Board ignore the reasoning in Comptroller General case law on invitational travel pursuant to 5 U.S.C. §5703 to find that reimbursement to a non-employee party-litigant is authorized. Appellant's Brief at 10-11. Petitioner also cites section 28.26(c) of the Board's regulations, 4 C.F.R. §28.26(c), which states that witnesses who are not federal employees "are entitled to the same witness fees as those paid to subpoenaed witnesses under 28 U.S.C. 1821. The fees shall be paid, in the first instance, by the party requesting the appearance of the witness, subject to a subsequent decision otherwise in accordance with §28.89, concerning the award of attorneys fees and costs. . . ." He contends that this provision does not preclude payment of witness fees in these circumstances. *See* Appellant's Brief at 10-12. This argument also ignores that the reimbursement must be authorized—it is not sufficient to show that specific rules or regulations do not expressly bar reimbursement. As discussed, *supra*, based on the reasoning in *Mittelsted*, Petitioner was not merely a witness and cannot be reimbursed for his travel expenses to attend the hearing since he had a direct interest in the case. Moreover, to the extent that Petitioner argues that other administrative agencies have paid travel expenses to parties in similar circumstances, he has not presented any statutory, regulatory, or case law support for this contention. We thus affirm the AJ's decision to reject such argument. *See* ID at 20-22.

travel expense in these circumstances was authorized.[6]

Thus, the AJ's reliance on the reasoning in *Mittelsted* was correct.[7] We agree

---

[6] Petitioner's contention that the role played by the PAB/OGC in litigating this matter renders the reasoning in *Mittelsted* inapposite is not persuasive. In this regard, Petitioner asserts that the PAB/OGC serves the same representational role under the GAOPA as the Office of Special Counsel (OSC) does in the Executive Branch program. Appellant's Brief at 2, 9. However, while there are similarities between the two offices' representational roles, there are also substantive differences, as GAO points out in its brief. GAO Opposition at 3-9. Thus, for example, the OSC brings its petitions for corrective action before the MSPB in his/her own name "ex rel." the complaining employee; the employee can seek to intervene. 5 C.F.R. §1201.130(a). Under that framework, the Office of Special Counsel can settle a case without the employee's consent, and the employee can appeal such a settlement agreement to the Federal Circuit. *See, e.g., Special Counsel v. Department of the Interior,* 74 M.S.P.R. 14 (1997). In contrast, the PAB/OGC brings the PPP case in the employee's name as petitioner. The latter framework provides the GAO employee a greater degree of personal control over the litigation than occurs in a situation involving an Executive Branch employee and the OSC. The PAB regulations recognize the role of a petitioner in signing on to settlement of a case where the PAB/OGC is representing the petitioner. Specifically, 4 C.F.R. §28.12(h) states that when the PAB/OGC transmits a settlement "which has been agreed to by the parties, the settlement agreement shall be the final disposition of the case." (Emphasis added). Further, when a petitioner and the PAB/OGC do not agree on the course of litigation, or the PAB/OGC otherwise does not believe that continued representation is appropriate, the PAB/OGC withdraws representation of the individual. The petition may continue before the PAB either with the petitioner appearing *pro se* or with the petitioner obtaining different representation. In such circumstance, it is up to the GAO employee to determine whether withdrawal of the petition is in order. Moreover, even if the two offices' representational roles were the same in all material respects, this would not compel a conclusion that Petitioner would be entitled to travel expenses in this case because appropriate authorization for such reimbursement of travel expenses must exist. As noted above, PAB/OGC has not cited any case involving, or regulation of, the Office of Special Counsel which would authorize a party (as opposed to a non-party witness) who testified at an administrative proceeding like the one in this case to receive payment for travel expenses under 5 U.S.C. §5703.

Further, even assuming the "public prosecutor" aspect of his representation, the PAB/OGC did not establish that declining to award travel expenses to the Petitioner herein harms his ability to carry out that role. Indeed, as we state at note 8, i*nfra*, the record does not establish that Petitioner's travel was necessary in order for him to testify in this proceeding. Accordingly, the similarity in roles between the OSC and the PAB/OGC is not dispositive and does not render inapplicable the reasoning in *Mittelsted*. Rather, for the reasons stated above, it is the status of the Petitioner as a party-witness with a direct interest in the proceeding that is determinative. As the D.C. Circuit has held, the OSC's and employee's interests will many times "converge" in corrective action cases. *Frazier v. MSPB,* 672 F.2d 150, 163 (D.C. Cir. 1982). As this case shows, the Petitioner before the PAB—represented by the PAB Office of General Counsel—has significant motivation to appear and bear his own travel costs. Therefore, it is appropriate to apply the witness/party distinction from *Mittelsted*, even if the representation roles in this case and *Mittelsted* are distinguishable.

[7] Because we agree with the reasoning applied by the Comptroller General in making his determination in *Mittelsted*, we need not address an issue raised by GAO—namely, to what extent is a Comptroller General decision binding on the legislative branch? *See* GAO Opposition at 1 n.1.

with his conclusion that Petitioner's interpretation of the term "witness"—and by extension to the argument on appeal the term "invitational travel"—is too broad. Petitioner has failed to establish that reimbursement of his travel expenses was authorized in this case by 5 U.S.C. §5703 or by any other provision. To allow reimbursement in these circumstances, where Petitioner did not testify on matters unrelated to his own claims, "would ignore the party-litigant's self-interest in the proceeding…." ID at 22. We agree with the AJ that "[t]he correct scenario, as advanced by the Respondent, is that the party-litigant, if successful, seeks those expenses under a Back Pay Act remedy." *Id.*

The appeal is, accordingly, denied.[8]

SO ORDERED.

For the Board:

Date: September 1, 2011

Steven H. Svartz
Administrative Judge

[8] In light of the determination that Petitioner was not entitled to any travel reimbursement as a result of his status as a party, it is unnecessary to address two other matters raised by GAO: (1) whether Petitioner's travel to Washington, D.C. was necessary in order for him to testify in this proceeding, since Petitioner "called two witnesses who testified via videoteleconference from Huntsville, Alabama, where [Petitioner] lives [and Petitioner] has never claimed that he was unable to testify via videoteleconference as well[]"; and (2) the extent of reimbursement that would have been warranted in light of the fact that Petitioner incurred expenses for several days during his stay in Washington, D.C., even though his testimony was completed on the first day of the 3-day hearing. GAO Opposition at 10 n.6.

NOTICE

RIGHT TO JUDICIAL REVIEW

This is a final decision of the Personnel Appeals Board and, pursuant to 31 U.S.C. §755, any final decision of the Board under subsections (1), (2), (3), (6) or (7) of 31 U.S.C. §753(a), may be appealed to the United States Court of Appeals for the Federal Circuit. The petition for review must be filed with the Federal Circuit by the 30th day after the party seeking review receives notice of the Board's final decision.

CERTIFICATE OF SERVICE

This is to certify that on September 1, 2011 the foregoing Decision in the case of *Gill* v. *GAO*, Docket No. 08-07, was sent to the parties listed below in the manner indicated.

Attorney for Petitioner:

Stuart Melnick
General Counsel
Personnel Appeals Board
820 1st Street, N.E.
UCP II, Suite 580
Washington, D.C. 20002

FAX: 202-512-7522

(Hand Delivery)

Attorney for Respondent:

Joan M. Hollenbach
Managing Associate General Counsel
U.S. Government Accountability Office
441 G Street, N.W.
Suite 7838
Washington, D.C. 20548

FAX: 202-512-8501

(Fax and Interagency Mail)

Date: _____

_____
Patricia V. Reardon-King
Clerk of the Board