

Edward Horvath v. U.S. Government Accountability Office

Docket No. 10-01

Date of Decision: February 8, 2011

Cite as: Horvath v. GAO, Docket No. 10-01 (2/8/11)

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

Headnotes:

Appeals to the Full Board

Burden of Proof

Prohibited Personnel Practices

Standing

**DECISION ON APPEAL FROM INITIAL DECISION OF THE
ADMINISTRATIVE JUDGE**

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

EDWARD G. HORVATH,
Petitioner/Appellant

v.

U.S. GOVERNMENT
ACCOUNTABILITY OFFICE,
Respondent/Appellee

Docket No. 10-01

February 8, 2011

**DECISION ON APPEAL FROM INITIAL DECISION OF THE
ADMINISTRATIVE JUDGE**

I. INTRODUCTION

Appellant, Edward Horvath, timely appeals from the August 20, 2010 Initial Decision (ID) of the Administrative Judge (AJ) granting a Motion to Dismiss the claims for lack of standing filed by the Government Accountability Office (GAO or the Agency). Appellant now seeks full Board review of the Initial Decision on the theory that it was “based on a faulty premise” and is “defective.”

The Board affirms the Initial Decision and finds that Appellant has not shown that the decision was based on an erroneous interpretation of law or was arbitrary, capricious or an abuse of discretion. Therefore, there is no basis upon which to overturn the decision of the Administrative Judge.

II. FACTUAL AND PROCEDURAL HISTORY

The facts of this case are set forth in greater detail in the Initial Decision and are incorporated herein by reference. They are summarized as follows:

Appellant, a Band III Workforce Relations Specialist,¹ has been employed in the Human Capital Office (HCO) at the Government Accountability Office since 2001. On May 6, 2010, Appellant, *pro se*, filed four Petitions that have been consolidated under the above-referenced docket number. He claims that in February 2010, he was informed by a GAO supervisor that a Mr. James Wilson of the Federal Election Commission (FEC) had agreed to become the new Director of the HCO Human Capital Consulting Center. Appellant learned that GAO was permitting Mr. Wilson to bring with him four specialists from the FEC.² Appellant complained that these four new employees did not compete for their positions at the Band II and III levels; nor were their positions announced for competitive bids by current GAO employees.

Appellant sent an email to Gene Dodaro, then Acting Comptroller General,³ contesting the impending appointments on the grounds that they were prohibited personnel actions and violations of law. Appellant complained that the proposed appointments would deny current GAO employees and qualified veterans an opportunity to compete for placement in, or promotion to, the affected positions. Appellant further argued that the four individuals, if appointed, would receive non-competitive promotions since the pay levels for their new positions at GAO were higher than what they were receiving at the FEC. Appellant stated that

¹ GAO claims that Appellant is employed as a Band III Human Capital Specialist, PT-0201. There is no need to resolve this discrepancy for purposes of this case.

² Each of the four consolidated complaints pertains to each of the four specialists. They include: Aileen Baker and Valarie Sheppard who were both GS-14 employees in the FEC Excepted Service and were both moving to Program and Technical Specialist (PT) Band III positions which paid \$158 more annually in salary; and Adrienne Robinson and Sandra Shufelt, who were both GS-13 employees at FEC and were both moving to PT Band II positions which paid a maximum of \$553 more in salary per year.

³ Mr. Dodaro has since been nominated and confirmed as the Comptroller General of the United States.

the pending appointments were “revolting, probably unlawful, and definitely unpatriotic.” He claimed to have identified at least 23 current GAO employees who would have been eligible to apply for promotion to the four positions. Petitions at 3. However, at no time did Appellant claim that he would have been eligible, or would have applied, for any of the four positions. He also did not claim to be a preference-eligible veteran.

Mr. Wilson and his four assistants began their employment at GAO on March 1, 2010. On that same date, Appellant received a response to his email from Sallyanne Harper, then Chief Administrative Officer and Chief Financial Officer of GAO. Ms. Harper explained that the appointments were proper because there had been “several staff losses” and that: “While it is generally [GAO’s] practice to competitively announce all vacant positions . . . the Comptroller General does not have to follow competitive procedures if the circumstances warrant.” Petitions at 4. According to the Petitions, Ms. Harper stated that the four new staff members were expected to be “positive additions to the HCO team” whose appointments were deemed lateral transfers because there was only a *de minimus* difference between their “current grade levels maximum earnings potential and [the] corresponding [GAO] band equivalents.” *Id.* at 4.

In each Petition, Appellant sought the following relief:

- An order vacating the appointment of the new employee;
- Recovery of all salary and benefit payments made to and on behalf of the employee;
- Disciplinary action against all GAO managers responsible for the challenged appointment;
- A referral to the GAO Inspector General for an investigation into possible violations of law if appropriate;
- A public apology by the Acting Comptroller General to all GAO employees;
- A decree that all future appointments be made only after fair and open competition and that GAO managers attend mandatory annual training on merit system principles;
- Promotion of Appellant to MS-II or PT-IV level in a position to serve on behalf of veterans at the maximum pay rate for the band “for the remainder of [his] federal service” retroactive to January 28, 2010;

- Financial compensation to Appellant in an amount equal to all compensation and benefits paid to the new employee from the date of the start of her service until she is separated from GAO;
- Attorneys' fees, expenses and costs.

The Agency responded to the four Petitions by filing an Answer and a Motion to Dismiss.⁴ In its Motion to Dismiss, the Agency argued that Appellant was not a person who suffered any tangible harm by the challenged hiring decisions of GAO and, therefore, he lacked standing to bring these claims under 4 C.F.R. §28.18(a).

Appellant responded to the Motion to Dismiss claiming that:

. . . conditions and circumstances no[t] only illustrate my proper standing to make and pursue these claims, but that I feel I am both compelled and obliged to do so under law and the spirit of protecting merit system principles in employment practices of GAO, in support of the United States Congress, and the trust of the American people.

* * *

I consider myself to be an advocate, capable administrator, and defender of merit system principles and lawful practices. . . . I consider any internal or external impairment to my ability to provide effective, appropriate, and legal service constitute [sic] serious harm to me personally, the integrity of GAO, and to the interests of the United States Government.

* * *

I have been and continue to be harmed every time my human resources colleagues comes [sic] to me in tears because the foundations they had been taught . . . seem to have been undercut or disregarded as they appear to have been involving actions related to the 4 individuals. I am harmed when as teacher and coach I can't provide a reasonable explanation that seems to be supportable under law or known guidance.

Appellant continued by claiming that he was personally harmed by his belief that eligible veterans were denied an opportunity to compete for the positions given to the four new employees. Indeed, he claimed that he was harmed when he missed sleep and lost time with his family and community while pursuing the instant claims. Finally, he claimed that he was

⁴ The Agency's Motion to File a Motion to Dismiss in Lieu of an Answer and Motion to Stay Discovery were granted in part and denied in part. The AJ ruled that the Agency was required to answer the Petitions, but stayed discovery until a motion to dismiss was filed and decided. Order of May 21, 2010.

harmed when he paid his taxes only to have them “support unlawful payments and benefits” for the four hired individuals. Petitioner’s Response to Motion to Dismiss at 1-4.

The PAB Office of General Counsel (PAB/OGC) filed an *Amicus* Brief contending that the definition in 4 C.F.R. §28.18(a) of who has standing to file a petition with the PAB should properly include not only persons who have been adversely affected in the past by GAO’s action or inaction, but also those “who have suffered a threatened injury.” *Amicus* Brief at 2, 4, 5. Thus, the PAB/OGC argued that both actual and imminent injuries should be conditions precedent to standing.

With permission from the AJ to respond to the *Amicus* Brief, GAO argued that the issue whether an adverse action includes threatened injury is irrelevant in the instant matter because Appellant did not claim any individual harm at all whether past or future. Moreover, what harm Appellant claimed on behalf of others is all past harm. Thus, GAO argued that the AJ should not address the issue presented by the *Amicus*.

III. THE INITIAL DECISION

The ID, citing 4 C.F.R. §28.18(a),⁵ found that Petitioner was a GAO employee who had received a Right to Petition Letter from the PAB/OGC. The AJ found, however, that Petitioner did not allege that he would have applied for any of the positions at issue if they had been

⁵ 4 C.F.R. §28.18(a) states:

Who may file. Any person who is claiming to be affected adversely by GAO action or inaction that is within the Board’s jurisdiction under subchapter IV of chapter 7 of title 31, United States Code, or who is alleging that GAO or a labor organization engaged or is engaging in an unfair labor practice, may file a petition if one of the following is met:

- (1) The person has received a Right to Petition letter from the Board’s Office of General Counsel;
or
- (2) At least 180 days have elapsed from the filing of the charge with the Board’s Office of General Counsel and that Office has not issued a Right to Petition Letter; or
- (3) The person was separated due to a Workforce Restructuring Action and chooses to file a petition directly with the Board, without first filing with the Board’s Office of General Counsel, as provided in §28.13.

competitively posted; nor did he allege that he was a preference-eligible veteran. Thus, the AJ determined that Petitioner failed to allege that he was adversely affected or that he suffered a personal injury, whether actual or threatened. The AJ therefore concluded that Petitioner did not meet his burden of demonstrating that he had standing.⁶ ID at 5-7.

The AJ concluded that given the definition of a “personnel action,” Petitioner did not claim that he was personally aggrieved by an adverse personnel action taken or threatened against him. The AJ further concluded that Board regulations do not allow for a private right of action for individual employees to file claims on behalf of other employees. That role is reserved exclusively for the PAB/OGC. Accordingly, the AJ granted the Motion to Dismiss all of Petitioner’s claims. ID at 7.

IV. THE PARTIES’ ARGUMENTS

Appellant argues in his Petition for full Board review of the ID that he has met all of the requirements of 4 C.F.R. §28.18. He contends that he is a GAO employee with a Right to Appeal [Petition] letter from the PAB/OGC who has been adversely affected by GAO action or inaction. Appellant argues that his four Petitions identify “gross inconsistencies with Merit System Principles in the form of flagrant violations of a series of management initiated prohibited personnel [practices] affecting and effecting multiple appointments to GAO employment associated with the appointment of four individuals to GAO.” Petition for Full Board Review at 2.

Appellant next argues that he is not obliged to prove that he has standing. He cites the *Guide to Practice Before the Personnel Appeals Board* (the *Guide*) as not requiring proof of

⁶ The AJ further concluded that there was no need to decide the issue presented by the PAB/OGC concerning whether threatened injuries would be sufficient for standing, because in the instant case, the Petitioner did not allege that any personnel action was taken or threatened.

standing. He acknowledges that an obligation to prove standing “becomes an insurmountable burden for [him]” in the absence of discovery. *Id.* Thus, he appears to argue that he might be able to prove that he has standing, but only if discovery is allowed to proceed. Appellant then conflates the Agency’s burden of proof at a hearing on the merits of a petition with his burden of establishing standing as a prerequisite to bringing any action. He cites the statement in the *Guide* that reads:

Burden of Proof

In cases brought under merit system principles and involving an employee or applicant challenge to Agency action as violating any law, rule, or regulation, the Agency must prove that it was justified in taking the action.

He argues that this provision puts the burden of proof on the Agency, rather than on him.

Appellant finally argues that the requirement that he establish standing should not apply in a case, such as this one, involving merit system principles. *Id.*

GAO responds that Appellant does not challenge on appeal the AJ’s conclusion that he did not prove that he has standing to bring the instant claims. Appellant did not assert on appeal that the AJ erred in making this finding. GAO’s Response at 5.

The Agency argues on appeal that the only person who may properly file a Petition is an employee or applicant “who is claiming to be affected adversely by GAO action or action that is within the Board’s jurisdiction.” *Id.* at 3. The Agency cites several cases in which the full Board or presiding members of the Board have held that standing must be established by the claimant through allegations that he has personally suffered an injury in fact. *Id.*; see *Scott v. GAO*, Docket No. 53-701-11-84 at 4 (Oct. 24, 1985); *37 Named Petitioners v. GAO*, Docket Nos. 09-01; 09-05 through 09-41 at 14 (Mar. 31, 2010). The Agency argues that to the extent that Appellant here seeks to redress wrongs allegedly committed against other employees at GAO, he

violates the regulation that only the PAB General Counsel is authorized to sue in a representative capacity. *Id.* at 4; *see* 4 C.F.R. §28.131.

The Agency also argues that Appellant does not assert that he has been personally affected by the actions of GAO. He does not contend that he would have applied for a demotion to the two PT-II positions or for a transfer to either of the two PT-III positions, since he is currently serving in the PT-III Band. Moreover, Appellant does not argue that he is a preference-eligible veteran or that he has suffered any loss in pay, benefits or status. In addition, the Agency contends that there is no remedy available to this Appellant; and for that reason as well, he does not have standing. GAO's Response at 5, 6 & n.2.

Finally, the Agency argues that Appellant's claim that violations of merit system principles do not require that he prove standing is simply wrong as a matter of law. GAO contends that a violation of a merit system principle does not serve as an independent cause of action. *Brown v. Department of Defense*, 12 M.S.P.R. 343 (1982). To the extent that Appellant argues for an exception to the requirement that he establish that he has standing, the Agency contends that there is no legal basis for this Board to do so. GAO's Response at 8. GAO argues finally that Appellant cites an inapplicable section of the *Guide* when he quotes the provision assigning a burden of proof to the Agency at a hearing on the merits. *Id.* at 7.

V. DISCUSSION

When the full Board reviews an initial decision of an Administrative Judge, the Board will 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).

Because the ID resolved a Motion to Dismiss, we review to determine whether this decision is based on a correct interpretation of law and whether there is any set of facts upon which Petitioner may prevail.

The AJ correctly recognized the applicable legal standard when deciding a motion to dismiss a complaint – that is, the facts presented by the complainant/appellant are to be viewed in the light most favorable to appellant, the party opposing the motion. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *GS-13/14 Management & Policy Advisory Council v. GAO*, Docket No. 116-600-GC-89 at 3 (Jul. 25, 1990). A motion to dismiss should be granted only if it appears beyond doubt that there is no set of facts upon which the appellant may be entitled to relief. *Hughes v. Rowe*, 449 U.S. 5, 10 (U.S. 1980); *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In making this determination, “the allegations of the complaint are generally taken as true for purposes of a motion to dismiss.” *Id.*, 449 U.S. at 10.

There are few material facts in dispute in the instant case. The AJ recognized that Appellant is a GAO employee who received a Right to Petition Letter from the PAB Office of General Counsel, but found that he is not a person claiming to be directly affected adversely by the GAO hiring decisions at issue. These are not erroneous factual findings.

Appellant, moreover, does not challenge the AJ’s factual findings at all but concedes that he has not established standing to bring the instant Petitions when he states that the burden to do so is “insurmountable.” Instead he contends that because he felt “compelled” to challenge what

he believed to be prohibited personnel practices, the law ought to either confer standing on him or exempt him from having to establish standing in order for him to bring these claims.

Appellant explains that he was involved in drafting what became the GAO Personnel Act of 1980 (GAOPA) and that he advocated for prohibited personnel practices and merit system principles to be included in the Act. As such, he argues that he ought to be recognized as an “authorized legal representative” of those employees whom he claims were injured by the challenged GAO actions. He states:

I consider myself to be an advocate, capable administrator, and defender of merit system principles and lawful practices. I was an active advocate for the inclusion of merit system principles and the inclusion of prohibited personnel practices protections for GAO employees during the consideration of legislation which was enacted as the GAO Personnel Act of 1980. *I consider any internal or external impairment to my ability to provide effective, appropriate, and legal service constitute[s] serious harm to me personally, the integrity of GAO, and to the interests of the United States Government.*

Petitioner’s Response to Motion to Dismiss at 2 (emphasis added).

Notwithstanding Appellant’s claims that the AJ should either declare that he has standing or carve out an exception to the standing requirement for him, the AJ recognized that under applicable regulations and case law, every individual employee must establish his or her standing as a precondition to filing a petition. This was not an erroneous interpretation of the applicable law. 4 C.F.R. §28.18(a) provides:

Any person who is claiming to be affected adversely by GAO action or inaction that is within the Board’s jurisdiction under sub-chapter IV of chapter 7 of title 31, United States Code, or who is alleging that GAO or a labor organization engaged or is engaging in an unfair labor practice, may file a petition if one of the following is met:

(1) The person has received a Right to Petition Letter from the Board’s Office of General Counsel . . .

(Emphasis added.) A plain reading of this regulation establishes that a prerequisite to invoking the jurisdiction of the PAB is proof that the Petitioner has suffered an adverse effect by the challenged action or inaction of GAO.

Although the GAOPA does not define the term “adversely affected,” the AJ properly relied on previous decisions of this Board in reaching her conclusion that an adverse effect must, at a minimum, be directed at, or experienced directly by, the person bringing the claim.⁷

The AJ also reasoned that the definition of personnel actions subject to review under the Civil Service Reform Act of 1978, 5 U.S.C. §2302(a)(2)(A), which has been incorporated into the GAOPA, includes, *inter alia*:

- an appointment;
- a promotion;
- a Title V adverse action;
- reinstatement;
- restoration;
- reemployment;
- performance evaluation under Title V;
- a decision concerning pay, benefits, or awards, or concerning certain education or training opportunities;
- or any other significant change in an employee’s duties or responsibilities which are inconsistent with the employee’s grade level or salary.

Thus, a prohibited personnel action involves a prohibited action involving one of the above aspects of employment. The AJ properly concluded that because Appellant did not assert that any of the above personnel actions were taken against him, he therefore was not a proper person to challenge the hiring decisions of GAO as prohibited personnel actions and, in turn, he did not have standing to bring these claims.

⁷ Although the PAB/OGC as *Amicus* asked the AJ to find that standing before the PAB requires either an actual or a threatened injury, the AJ concluded that it was not necessary to reach this issue because Appellant failed to allege either an actual or a threatened injury. We agree that on the facts presented in this case, it is unnecessary to address the question presented by the PAB/OGC.

In *Scott v. GAO, supra*, this Board held that an employee or applicant for employment must establish that he or she has standing, failing which, the Petition will be dismissed. Docket No. 53-701-11-84 at 4; *see also, 37 Named Petitioners v. GAO, supra*, at 13-14. It is well-settled that without standing, an individual may not invoke the jurisdiction of the PAB in a matter that does not directly involve him.

The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Warth v. Seldin, 422 U.S. 490, 517-18 (1975). The issue of standing is basic to our legal jurisprudence, even though constitutional standing principles are somewhat more constricted than what is permitted before the PAB. The fundamental principle obtains that one may not seek resolution of a claim unless he presents threshold evidence that the claim arises from a controversy that directly affects him, or unless he has been given a specific private right of action. *Id.*; *GS-13/14 Management & Policy Advisory Council v. GAO, supra*.

Appellant argues that the GAO hiring decisions have adversely affected him emotionally. However, Appellant's concerns for his colleagues who "come to him in tears," his worry about his inability as a "coach" to help his co-workers understand the decisions of GAO, and his distress over lost sleep and paid taxes based upon personnel actions allegedly affecting his colleagues do not result in a personnel action taken against him. The AJ properly concluded that these claims are insufficient to prove standing.

Appellant's argument that he should be excused from the obligation to establish that he had standing to bring his claims was likewise considered and properly rejected by the AJ. There is no case law, statute or regulation that would permit a member of this Board to excuse any

petitioner's obligation to establish that he is a proper party to bring a claim. Finally, Appellant's reliance on the *Guide's* statement concerning burden of proof in a merit system case is misplaced; it remains his burden to establish standing under 4 C.F.R. §28.18(a).

VI. CONCLUSION

Based on the foregoing, we conclude that the Initial Decision applied the proper legal standard and properly concluded that there is no set of facts which would entitle Appellant to prevail. Appellant has failed to show that the Initial Decision was arbitrary, capricious, or an abuse of discretion, or otherwise was inconsistent with law. Accordingly, the Initial Decision is affirmed.

SO ORDERED.

For the Board: *



Susan R. Winfield
Administrative Judge

Date: February 8, 2011

* Administrative Judge Mary E. Leary, who wrote the Initial Decision, did not participate in the appeal herein.