

EDWARD G. HORVATH v. U.S. Government Accountability Office

Docket No. 12-02

Date of Decision: April 15, 2013

Cite as: Horvath v. GAO, Docket No. 12--02

Before: Robert F. Hermann, Administrative Judge

Headnotes:

Competitive Status

Motion to Dismiss

Mootness

Non-selection

Standing

Summary Judgment

DECISION ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Mr. Horvath lacked standing because his claims were in essence asserted on behalf of unnamed others. The Agency further asserted that the matter was moot because Ms. Sheppard had resigned, and Petitioner failed to reapply for the position when it was announced again. GAO acknowledged Ms. Sheppard was a *de facto* employee because she had been hired improperly initially. Nevertheless, GAO contended that Ms. Sheppard was eligible for the PT-III position because she had acquired “status” by completing more than one year of employment with GAO. *See* Motion to Dismiss (June 20, 2012) at 5-12. Petitioner filed a Response in opposition to Respondent’s Motion to Dismiss and Motion for Summary Judgment on June 27, 2012.

On July 20, 2012, GAO’s Motion was denied without prejudice in a Decision noting that discovery had not yet occurred, and that the record supporting the Motion to Dismiss was insufficiently developed to determine material facts and meaningfully evaluate whether the case could be disposed of as a matter of law. Decision of 7/20/12.

On August 17, 2012, GAO filed an Answer, and the parties began discovery. Following completion of discovery, on November 7, 2012, GAO filed the present Motion for Summary Judgment, Statement of Undisputed Material Facts, and Memorandum in Support of Motion for Summary Judgment (MSJ) with supporting Exhibits 1 through 10.¹ GAO’s renewed Motion

¹ GAO’s MSJ Exhibits consist of: 1) Petitioner’s responses to Interrogatory Nos. 1 through 8; 2) GAO’s April 15, 2011 letter in response to a Statement of Corrective Action Investigation from the Board’s Office of General Counsel (PAB/OGC); 3) April 21, 2011 letter from GAO’s Chief Administrative Officer to Ms. Sheppard; 4) July 28, 2011 e-mail from Mr. Horvath to Carolyn Taylor and Patricia Scanlon; 5) June 2, 2011 letter from Mr. Horvath to Federal Human Resource Specialists; 6) February 28, 2010 Office of Personnel Management (OPM) Standard Form 50 documenting Ms. Sheppard’s appointment; 7) November 8, 2012 executed copy of Patricia Waters’ November 7, 2012 declaration; 8) Office of Personnel Management website issuance entitled “Variations to Staffing Regulations”; 9) November 6, 2012 declaration of Kenneth Carroll and November 7, 2012 declarations of Linda Garcia and Trina Lewis; and 10) April 21, 2011 letter from GAO’s Chief Administrative Officer to Aileen N. Baker.

argues that Mr. Horvath's Petition is moot, and even if it is not, that GAO is nevertheless entitled to judgment because the undisputed facts establish, as a matter of law, that Ms. Sheppard was eligible for the position and that the Agency committed no prohibited personnel practices in selecting her for the vacancy.

On December 7, 2012, Mr. Horvath filed an Opposition to Respondent's Motion for Summary Judgment (Opposition), arguing that: 1) he had valid claims that were not moot; 2) relief remained available; 3) Ms. Sheppard was ineligible for the position; and 4) GAO committed violations of 5 U.S.C. §§2302(b)(4), 2302(b)(6), and 2302(b)(12) in selecting her. Mr. Horvath's Opposition was accompanied by supporting Exhibits labeled Tab 1 through Tab 6.²

On January 14, 2013, the Personnel Appeals Board Office of General Counsel (PAB/OGC) filed a request to intervene for the limited purpose of making an *amicus curiae* submission on the mootness issue. The parties were afforded an opportunity to address the PAB/OGC's request. Both made supplemental submissions that raised no objection to accepting the PAB/OGC's mootness submission, which expressed no view on the substantive issues presented by the Petition. Accordingly, the parties' submissions, together with the PAB/OGC's

² Mr. Horvath's MSJ Opposition Exhibits consist of: 1) GAO's April 15, 2011 letter in response to a Statement of Corrective Action Investigation from the PAB/OGC; 2) April 21, 2011 letter from GAO's Chief Administrative Officer to Ms. Sheppard; 3) personnel forms documenting GAO personnel actions relating to Ms. Sheppard; 4) GAO Guide to Processing Personnel Actions Table of "Authorities Relating to Conversions and Extensions of Appointments in [GAO]"; 5) Table from GAO Guide to Processing Personnel Actions dealing with noncompetitive appointments; and 6) Chapter 32 from OPM Guide to Processing Personnel Actions, entitled "Interim Relief Actions, Corrections, Cancellations and Replacement Actions for Cancellations."

amicus submission, have been accepted into the record and considered.³

Two principal issues are presented on the instant Motion for Summary Judgment. First, do the undisputed material facts establish that the Petition is moot and, second, if they do not, do they establish that Ms. Sheppard had the “status” required to compete for the PT-III position. For the reasons discussed below, the Petition is dismissed as moot. However, even if the Petition were not dismissed as moot, the undisputed facts establish that Ms. Sheppard was eligible for the PT-III position and GAO did not commit the prohibited personnel practices alleged in the Petition. Either way, GAO is entitled to summary judgment.

II. MATERIAL FACTS

The following undisputed material facts have been distilled from the record and the

³ The PAB/OGC’s *amicus* submission argues that: the PAB is not an Article III court; the PAB is not bound by “case or controversy” jurisdictional requirements applicable to Article III courts; the PAB is not constrained by case law regarding mootness; and the PAB should decide the merits of the Petition as a matter of policy. Finally, the PAB/OGC contends that a decision on the merits is warranted even if the mootness doctrine applies, because Mr. Horvath’s Petition is not moot since there is relief that can be granted. The PAB/OGC’s arguments are not persuasive. First, regardless of the fact that the PAB is not subject to the same jurisdictional constraints as Article III courts, the Board has long applied the mootness doctrine in adjudicating cases. *See, e.g., Smith v. GAO*, PAB Docket No. 01-05 at 6 (8/23/02); *Willis v. GAO*, PAB Docket No. 95-03 (4/22/96), *aff’d*, 98 F.3d 1359 (Fed. Cir.) (Table). The PAB/OGC has put forth no good reason why the PAB should reject established precedent that is consistent with precedent applied by analogous federal tribunals. Second, the PAB/OGC is incorrect in arguing that the PAB’s recent policy decision in *PAB/OGC v. GAO*, Docket No. 12-01 (7/23/12), supports finding that the PAB may adjudicate matters regardless of whether or not there is a live case or controversy. That Decision is inapposite; it was issued under 4 C.F.R. §28.155, which specifically authorizes issuance of statements of policy or guidance in accordance with criteria outlined in the regulation, which is facially inapplicable here. Finally, the PAB/OGC is incorrect in suggesting that the Orders in *Banks et al. v. GAO*, Docket Nos. 12-03, 12-04 & 12-05 (10/25/12, 11/14/12), can be read to support disregarding the mootness doctrine to reach the merits of a petition. Mootness was not discussed in *Banks* because it was not an issue in that case. The PAB/OGC’s alternative argument (*i.e.*, that Mr. Horvath’s Petition is not moot) is unconvincing because it ignores the Motion record. Argument that relief can hypothetically still be granted does not overcome facts establishing that Mr. Horvath lacks any real interest in the outcome and cannot benefit from relief sought on behalf of others whom he does not represent.

parties' submissions:

1. Chapter 3 of GAO Order 2315.1, Status, Tenure, and Trial Periods (10/1/80), defines excepted-conditional appointments, excepted appointments, and acquisition of competitive status in GAO as follows:

1. EXCEPTED-CONDITIONAL APPOINTMENT. Unless an applicant has completed the service requirement for career appointment in the [c]ompetitive [s]ervice, an applicant selected from a roster of eligibles for other than temporary or term employment will be given an excepted-conditional appointment.

2. EXCEPTED APPOINTMENTS. An applicant selected from a roster of eligibles for other than temporary or term employment will be given an excepted appointment if the applicant is a present or former Federal employee who has completed the service requirement for career appointment in the competitive service.

3. ACQUISITION OF COMPETITIVE STATUS. GAO employees acquire competitive status upon completion of 1 year of continuous service under a non-temporary appointment in GAO under the personnel system established by Section 3 of the GAO Personnel Act of 1980. GAO employees with competitive status may be appointed noncompetitively to any position in the competitive service for which they are qualified. (These appointments are subject to policies and procedures prescribed by OPM.)

2. GAO Order 2315.1, at Chapter 1 ¶6, CORRECTIVE ACTION, states:

An erroneous noncompetitive appointment may be corrected if the employee is eligible for appointment under some other authority. If the employee is not eligible for appointment under another authority, and no evidence of bad faith or fraud on the part of the employee is found, the case must be submitted to the Assistant Comptroller General for Administration for direction on an appointment action.

3. On February 28, 2010, GAO hired Ms. Sheppard as a Human Capital Specialist, PT-III, on a noncompetitive transfer appointment. Petition ¶21; MSJ ¶3. Prior to being hired by GAO, Ms. Sheppard held a GS-14 excepted service appointment with the Federal Election

Commission (FEC). When hired by GAO, Ms. Sheppard did not have competitive status (MSJ ¶3) and should not have been hired through a noncompetitive appointment. *See* Decision of July 20, 2012 at ¶2.

4. The SF-50 prepared by GAO to document Ms. Sheppard's initial appointment stated that Ms. Sheppard's appointment was subject to completion of a one year initial probationary period beginning on February 28, 2010; that Ms. Sheppard had service counting toward excepted tenure from November 3, 2008; and that under the provisions of 31 U.S.C. §732(G), an employee acquires competitive status for appointment to the competitive service based on one year of continuous service under a non-temporary appointment. MSJ Ex. 6.

5. When Ms. Sheppard was appointed by GAO, she did not engage in any fraud or misrepresentation. *See* Opposition at 14.

6. In March 2011, the Personnel Appeals Board Office of General Counsel (PAB/OGC) issued a Statement of Corrective Action Investigation to GAO in PAB/OGC Docket No. I-10-16 and thereafter met with GAO to discuss the matter on April 7, 2011. The PAB/OGC's Statement of Corrective Action does not appear in the Motion record, but the April 15, 2011 Response from GAO's General Counsel to the PAB/OGC, with copies to the Comptroller General, the Chief Administrative Officer/Chief Financial Officer (CFO), and the Managing Associate General Counsel, is in the record. MSJ Ex. 2. *See generally* 4 C.F.R. §28.130 *et seq.*

7. GAO's April 15, 2011 Response to the PAB/OGC indicates that the PAB/OGC concluded that the Agency committed prohibited personnel practices when it hired Ms. Sheppard and three other Federal Election Commission Human Capital Specialists via noncompetitive transfers because each lacked competitive status when they were hired. GAO's Response states

that the PAB/OGC recommended as corrective action that GAO use a competitive selection process to fill the positions occupied by the four Human Capital Specialists. MSJ Ex. 2 ¶1.

8. GAO's April 15, 2011 letter to the PAB/OGC summarized the corrective action the PAB/OGC recommended, together with the corrective action GAO proposed to take, as follows:

You recommended that GAO reconstruct the hiring process for the four specialists. . . . In response, GAO will reconstruct the hiring process for all four positions. The positions will be open to competition government-wide. All four specialists will be eligible to compete for the positions, based either on their prior government service in a competitive position or their acquisition of such status while a de facto employee at GAO. . . . The four specialists will remain in their positions during the selection process. Any of the four specialists not selected for one of the positions will be removed.

Id.

9. GAO's April 15, 2011 response further noted that the PAB/OGC had recommended that the Agency adopt a policy and procedure to ensure that the Comptroller General is provided with "complete and accurate information in connection with requests for waivers of GAO's regulations." GAO stated that it would implement a standard operating procedure (SOP) with specific requirements for the Human Capital Office to submit a documented written justification for any requested waiver to the Office of the General Counsel, Legal Services. *Id.* ¶3.

10. By letter dated April 21, 2011, with a copy going to the Comptroller General, GAO's Chief Administrative Officer informed Ms. Sheppard that the PAB/OGC found that GAO had improperly used a noncompetitive transfer to appoint her, as she was an excepted service employee at the Federal Election Commission, and therefore ineligible for hire via noncompetitive transfer. MSJ Ex. 3. The letter stated that GAO intended to reconstruct the hiring process for her position (as well as the three other similar positions that had been filled

through improper noncompetitive transfers) utilizing a competitive selection process, and GAO had determined that Ms. Sheppard was eligible to apply. The letter further stated that Ms. Sheppard would remain in her current position during the application and selection process, but that she would be removed from employment if she was not selected for one of the four positions. *Id.*

11. To implement the corrective action recommended by the PAB/OGC, in May 2011 GAO issued Vacancy Announcement GAO-11-HCO-0201-01 for two PT-0201-03/03 Human Capital Specialist positions, one of which was currently occupied by Ms. Sheppard. Motion to Dismiss (6/20/12) Ex. 1. The announcement stated that it was “open to current or former permanent Federal employees with status, as well as Veterans Employment Opportunity Act of 1998 Eligibles.”

12. Ms. Sheppard applied under the Vacancy Announcement. Motion to Dismiss, Ex. 2. At the time Ms. Sheppard applied, she had been a *de facto* employee with GAO for more than one year. *See* MSJ Ex. 2.

13. GAO took corrective action with the knowledge and consent of the Comptroller General, and the PAB/OGC was apprised in full before the Vacancy Announcement was issued. *See* MSJ at 11 n.6; MSJ Ex. 2. There is no indication that the PAB/OGC raised any objection to GAO’s corrective action, and PAB/OGC has not challenged Ms. Sheppard’s eligibility for the PT-III position.

14. GAO determined that Ms. Sheppard was eligible to apply for the position based on her completion of more than one year of *de facto* service with GAO. *See* MSJ Exs. 2, 3.

15. In May 2011, Mr. Horvath was a GAO employee with competitive status who held a

position in the Human Capital Office as a Workforce Relations Specialist, PT-0201 Band III. Petition ¶1. Mr. Horvath applied under Vacancy Announcement GAO-11-HCO-0201-01 for lateral reassignment to one of the two PT-III Human Capital Specialist positions announced in May 2011. Motion to Dismiss Ex. 2.

16. Both Mr. Horvath and Ms. Sheppard were included among the candidates determined to be “best-qualified,” and both were referred to the selecting official for consideration. *Id.*

17. Ms. Sheppard was selected for one of the positions. Mr. Horvath was not. Petition ¶¶7, 17. Another former FEC employee, who received notice about the re-posting of the vacancies, also applied for one of the positions; when she was not selected, she was removed from GAO employment. MSJ Exs. 7 ¶4; 10.

18. Ms. Sheppard continued to work in the PT-III position she was selected for until April 7, 2012, when she voluntarily resigned from GAO to accept a position elsewhere. Opposition at 18 ¶18.

19. The Standard Form 50 (SF-50), which GAO prepared to document Ms. Sheppard’s resignation, stated that Ms. Sheppard had completed one year of continuous service under a non-temporary appointment and that she had competitive status for appointment in the competitive service under 31 U.S.C. §732(G). Opposition Ex. 3.

20. On June 14, 2012, GAO issued a Vacancy Announcement to fill the PT-III position that Ms. Sheppard had vacated. Motion to Dismiss Ex. 3. Mr. Horvath could have applied for the position but did not. *Id.*; Opposition at 18 ¶19.

21. Mr. Horvath’s Petition states that he “requests no personal relief for himself.” Petition ¶30.

22. In discovery, Mr. Horvath stated that he intends “to retire from Federal service in the coming months.” MSJ Ex. 1 at 1; Petitioner’s response to GAO’s Statement of Undisputed Material Facts (Opposition ¶¶8-22) “clarifies” this discovery response to reflect that he has no firm plans to retire before June 7, 2013 and may seek phased retirement if that option is available to him. Opposition at 18-19 ¶20.

23. In discovery, Mr. Horvath stated that he does not seek as a remedy to be placed in the PT-III Human Capital Specialist position. *See* MSJ Ex. 1 at 16 (Petitioner’s response to GAO Interrogatory No. 4).

24. The remedies sought in Mr. Horvath’s Petition are that: 1) the “selection and improper conversion of Ms. Sheppard” be voided (Petition ¶24); 2) “personnel records and systems” related to Ms. Sheppard’s improper service be corrected (Petition ¶25); 3) there be a re-announcement or reconstruction of at least four Human Capital Specialist positions (Petition ¶26); 4) the intervention by the Legal Services Group of GAO’s Office of the General Counsel in Human Capital Office affairs be limited to technical matters of law (Petition ¶27); 5) “[i]f appropriate based on findings, [the PAB] refer [the] matter to GAO[’s] Inspector General to address possible violations of law that may constitute criminal activity, fraud, waste, or abuse” (Petition ¶28); 6) in the future, “GAO be required to offer fair and open competition for all mission support hiring and promotion”; and 7) “that all current and future GAO executives and managers [be required] to attend annual training on [m]erit [s]ystem [p]rinciples.” (Petition ¶29).

25. In response to an interrogatory from GAO, Mr. Horvath stated that, at the time of his response, he had not incurred any expenses. *See* MSJ Ex. 1 at 21 (Petitioner’s response to GAO Interrogatory No. 8).

III. POSITIONS OF THE PARTIES

A. GAO'S POSITION

GAO argues that the undisputed material facts establish as a matter of law that Mr. Horvath's claims are moot; that Ms. Sheppard had competitive status when she applied and was selected for the PT-III position; and that the Agency committed no prohibited personnel practices. MSJ at 1-2. Thus, GAO argues that the Petition should be dismissed either as moot or, in the alternative, because Mr. Horvath has not established any basis for finding that the Agency committed a prohibited personnel practice when it selected Ms. Sheppard for the PT-III position, in violation of 5 U.S.C. §2302(b)(4) (willful obstruction of competition for position), 5 U.S.C. §2302(b)(6) (giving an unauthorized privilege or advantage), or 5 U.S.C. §2302(b)(12) (personnel action in violation of law, rule, or regulation that implements or directly concerns merit system principles).

GAO argues that the matter is moot because the allegations in the Petition itself, Mr. Horvath's discovery responses, and additional evidence in the Motion record, establish that there is no relief that the PAB can grant under 5 U.S.C. §1214(g). GAO points to undisputed facts to establish that Mr. Horvath, through his own words and actions, has "forfeited his legal stake in the outcome of th[e] case" and that he does not have standing to pursue redress on behalf of the unnamed others who he says have been harmed by GAO's actions. MSJ at 8-11. GAO contends that Mr. Horvath's Petition is a continuation of a pattern of attempting to litigate claims as a representative of unnamed, allegedly affected third parties, who have not asserted claims on their own behalf. *Id.* at 8-9; *see Horvath v. GAO*, Docket No. 10-01 (8/20/10), (2/8/11).

GAO further argues that, even if Mr. Horvath's claims are not moot, undisputed facts establish that Ms. Sheppard had competitive status at the time she applied for the PT-III position and that she was therefore eligible for selection. MSJ at 11 & n.6. GAO submits that the competitive selection process it undertook at the behest of the PAB/OGC satisfied the corrective action requirements of GAO Order 2315.1. The Agency further argues that its conclusion that Ms. Sheppard had "status" and was eligible for the position is consistent with the GAO Personnel Act (GAOPA), 31 U.S.C. §731 *et seq.*, which provides 1) that GAO may appoint employees "without regard to those provisions of [T]itle 5 governing appointments and other personnel actions in the competitive service" if such appointments are based on merit and fitness for duty (31 U.S.C. §732(b)(4)); and 2) that a GAO employee "completing at least one year of continuous service under a non-temporary appointment . . . acquires a competitive status for appointment to a position in the competitive service" (31 U.S.C. §732(g)). MSJ at 12.

GAO argues that the fact that the PAB/OGC did not challenge Ms. Sheppard's eligibility to compete for the position furnishes additional support for the conclusion that the Agency acted properly. *Id.* at 12-20. GAO also points to Comptroller General and Merit Systems Protection Board (MSPB) decisions that arguably support a conclusion that a *de facto* employee, whose initial appointment is not statutorily barred or secured through fraud and/or misrepresentation, may acquire civil service status by working in a *de facto* capacity. *Id.* at 12-13.

Finally, GAO argues that even if Ms. Sheppard had not acquired status, Mr. Horvath has not produced sufficient evidence to establish that he was subjected to the prohibited personnel practices he alleges. *Id.* at 17. Thus, GAO asserts that Petitioner's 5 U.S.C. §2302(b)(4) claim fails because he did in fact compete for the position and was among those determined to be best

qualified; Petitioner's 5 U.S.C. §2302(b)(6) claim fails because the undisputed evidence establishes that GAO acted in good faith and there is no evidence to suggest it acted with any intention of affording Ms. Sheppard an unlawful preference; and Petitioner's 5 U.S.C. §2302(b)(12) claim fails because there is no evidence that GAO's selection of Ms. Sheppard violated a law, rule, or regulation that implements or directly concerns a merit system principle. MSJ at 18-24.

B. MR. HORVATH'S POSITION

Petitioner argues that GAO's Motion should be denied because he raises valid claims that are not moot. Mr. Horvath asserts that Ms. Sheppard was ineligible to be certified and selected for the PT-III position and that appropriate relief remains available to remedy GAO's alleged prohibited personnel practices. Opposition at 1-2.

Petitioner acknowledges that "several of his statements and responses to interrogatories reflect that he stated he is not seeking as relief his placement in the position for which he was not originally selected." *Id.* at 4. He argues, however, that his interest throughout the course of this litigation has been in "seeing fair and open competition" and asserts that no offer of placement in the position has ever been made or declined by him. Mr. Horvath further states that if GAO were to make such an offer in connection with vacating Ms. Sheppard's selection, he would accept such placement "as part of a resolution of issues." *Id.* Mr. Horvath also argues that his claims are not moot because he may cancel or postpone announced retirement plans, which he describes as tentative. *Id.* He contends that he has suffered compensable harm in the form of a lost opportunity to enhance his skill set, which he argues would make him more marketable for a

second career in retirement. *Id.* at 5.

Mr. Horvath characterizes Ms. Sheppard's original GAO appointment as erroneous rather than illegal and, consequently, voidable rather than void. *Id.* at 8. He contends that GAO should not have allowed the erroneous appointment to stand and that it has produced no evidence of any waiver of GAO Order, rule or regulation signed by the Comptroller General to legitimize the initial appointment or any subsequent personnel action associated with Ms. Sheppard. *Id.* at 9. Petitioner argues that Ms. Sheppard could not have acquired "status" through her period of *de facto* service with GAO under the erroneous initial appointment and that GAO's argument to the contrary is incorrect as a matter of law. *Id.* at 11-12. Mr. Horvath contends that, upon becoming aware of Ms. Sheppard's voidable initial appointment, GAO should have corrected the erroneous hiring by promptly initiating action to properly select Ms. Sheppard from a roster of eligibles. *Id.* In Mr. Horvath's view, GAO compounded its error by reconstructing the hiring process using a competitive selection process open only to applicants with civil service status, which Ms. Sheppard did not have. *Id.* at 11-12.

Petitioner argues that GAO should have issued an announcement open to "all sources," thereby properly including Ms. Sheppard in the field of applicants, rather than issue a Vacancy Announcement open only to applicants with "status." *Id.* at 11, 16. In Petitioner's view, by certifying Ms. Sheppard as eligible to compete and thereafter selecting her for a position open only to those with civil service status, GAO granted her an unauthorized preference in violation of 5 U.S.C. §2302(b)(6); willfully obstructed his competition for the position in violation of 5 U.S.C. §2302(b)(4); and violated 5 U.S.C. §2302(b)(12) by selecting Ms. Sheppard in violation of laws, rules or regulations implementing and/or concerning merit system principles.

IV. DISCUSSION

A. STANDARD FOR SUMMARY JUDGMENT

Under the Board's regulations, 4 C.F.R. §28.21(c)(3), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, if any, and other documents show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also* Fed. R. Civ. P. 56(c).

As the moving party, GAO bears the burden of demonstrating the absence of genuine issues of material fact, which can be met by showing an absence of evidence to support Mr. Horvath's case. *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994); *Madson v. GAO*, PAB Docket No. 96-07 (4/23/97), *aff'd en banc*, 12/2/97. Summary judgment must be granted if Mr. Horvath fails to come forward with sufficient evidence to establish that there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). Petitioner must come forward with specific facts showing that there is a genuine issue for trial to meet this test. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). More than merely showing "some metaphysical doubt" as to the material facts is required in order to create a triable issue. *Id.* at 586; *Gatlin-Brown v. GAO*, PAB Docket No. 00-02 (3/23/01), *aff'd en banc*, 11/9/01. If the evidence is "so one sided that one party must prevail as a matter of law," summary judgment is appropriate. *Anderson*, 477 U.S. at 251-52.

In deciding a question of summary judgment, any genuine disputes regarding the material facts must be resolved in favor of Mr. Horvath as the non-moving party. *Bishop v. Wood*, 426 U.S. 341, 347 n.11 (1976). Further, in reviewing the record, inferences must be drawn in the

light most favorable to Mr. Horvath. *Pa. Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare*, 402 F.3d 374, 379 (3d Cir. 2005). If there is disagreement over what inferences can reasonably be drawn from the facts, even if the facts are undisputed, summary judgment is not appropriate. *Nathanson v. Med. College of Pa.*, 926 F.2d 1368, 1380 (3rd Cir. 1991).

While Mr. Horvath disputes certain material facts put forth by GAO, his responses do not include references to evidence in the Motion record that raise genuine issues of fact for trial. *See* Opposition at 13-19. What Petitioner submits is argument rather than evidence. Even if leeway is afforded because of Mr. Horvath's *pro se* status, he has not relied on any evidentiary bases for disputing GAO's properly supported statements of material fact.⁴ Without Petitioner's clear articulation of how material facts proffered by GAO are in dispute, and without citation to support his position, Petitioner's counter-statement is insufficient to establish disputed issues of material fact. Nevertheless, I have reviewed Mr. Horvath's Opposition with supporting Exhibits, together with the rest of the Motion record, to determine the material facts that may fairly be characterized as undisputed and have afforded Petitioner the benefit to which he is entitled as the non-moving party.⁵

⁴ The Motion record reflects that in discovery Petitioner named an attorney who agreed to provide him legal services in this matter (MSJ Ex. 1 at 21), but no appearance by counsel has been entered in this case, and there is no indication that Mr. Horvath is actively represented by counsel. As noted in the July 17, 2012 Decision denying GAO's earlier Motion, while Mr. Horvath's *pro se* status can afford a certain amount of leeway on pleading and procedural requirements, it does not alter summary judgment standards or entitle him to special consideration with respect to the application of the law to the facts. *See, e.g., McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007); *Mendoza v. MSPB*, 966 F.2d 650, 653 (Fed. Cir. 1992).

⁵ The Exhibits, namely Tabs 1 through 6, to Mr. Horvath's Opposition do not contain evidence relevant to the mootness issue. While the Exhibits do contain evidence relevant to Ms. Sheppard's eligibility for the PT-III position, that evidence does not contradict the material facts put forth by GAO or otherwise establish that summary judgment is inappropriate on the eligibility issue, which turns on application of the law to facts which are not in dispute.

B. MOOTNESS

The mootness doctrine, which is predicated on judicial economy and a desire to preserve resources for resolution of real disputes, is jurisdictional in nature and stems from the “case or controversy” requirement in Article III of the Constitution. *Wheeler v. Dep’t of Defense*, 113 M.S.P.R. 376, 381 (2010); *see Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580-82 (Fed. Cir. 1995).

While neither the PAB nor the Merit Systems Protection Board (MSPB) is an Article III court, each is governed by similar statutory provisions that authorize the hearing and deciding of cases within its jurisdiction. *See* 5 U.S.C. §1204; 31 U.S.C. §753. The PAB, like the MSPB, applies established concepts of standing and mootness to determine if a petitioner is properly before it and presents an actual, justiciable case or controversy. *See, e.g., Smith v. GAO*, PAB Docket No. 01-05 at 6 (8/23/02); *Willis v. GAO*, PAB Docket No. 95-03 (4/22/96), *aff’d*, 98 F.3d 1359 (Fed. Cir.) (Table); *Horvath v. GAO*, PAB Docket No. 10-01 (8/20/10), *aff’d*, 2/08/11. The requirements that litigants have standing and litigate only “live,” ongoing controversies are based on firmly established legal principles, the rationale for which is not limited to Article III courts.

For a case to be justiciable, “an actual controversy must exist” on the date of review, “and not simply at the date the action is initiated.” *Roe v. Wade*, 410 U.S. 113, 125 (1973). A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome, or alternatively, when the party invoking . . . jurisdiction no longer has a personal stake in the outcome of the controversy.” *Boston & Maine Corp. v. Brotherhood of Maintenance of Way Employees*, 94 F.3d 15, 20 (1st. Cir. 1996) (internal

quotations omitted); *Wheeler v. Dep't of Defense*, 113 M.S.P.R. at 381. “A case is moot, and hence not justiciable, if the passage of time has caused it to completely lose its character as a present, live controversy of the kind that must exist if the court is to avoid advisory opinions on abstract propositions of law.” Laurence H. Tribe, American Constitutional Law §3-11, at 83 (2d ed. 1988).

The Supreme Court of the United States has described mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) (internal quotations omitted). Thus, there must be an actual, ongoing case or controversy for a case to be adjudicated. *Samsung Electronics Co. v. Rambus, Inc.*, 523 F.3d 1374, 1378 (Fed. Cir. 2008). This requirement exists at every stage of the process; an appeal must be dismissed when “an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party. . . .” *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *Totolo/King Joint Venture v. United States*, 431 Fed. Appx. 895, 2011 U.S. App. LEXIS 11422 (Fed. Cir. 2011) (nonprecedential) (“It is well settled that a party’s desire to press a particular legal position in order to benefit others is not enough to prevent a case from being moot when there is no continuing case or controversy between the parties before the court”).

Here, the prayer for relief in Mr. Horvath’s Petition affirmatively states that he “requests no personal relief for himself other than reimbursement for regular and reasonable expenses . . . and legal fees if qualified services are provided . . . after this [P]etition is filed. . . .” Petition ¶30. The Petition did, however, request other relief and that fact, together with his Opposition, was

considered sufficient to withstand GAO's earlier Motion to Dismiss for lack of standing and mootness. *See* Decision of 7/20/12. At this post-discovery juncture, the issue of mootness can be evaluated with a more complete record, which includes undisputed evidence that makes clear that Mr. Horvath has not incurred compensable expenses and lacks the requisite ongoing personal interest to continue to maintain this action.

In discovery, Petitioner affirmatively stated that he does not seek as a remedy to be placed in the PT-III Human Capital Specialist position.⁶ MSJ Ex. 1 at 16 (response to Interrogatory No. 4). Petitioner's own words suggest that he may only have applied for reassignment to the PT-III position for strategic reasons evolving out of his earlier challenge to Ms. Sheppard's initial appointment,⁷ which was dismissed for lack of standing. *See Horvath v. GAO*, PAB Docket No. 10-01 (8/20/10), *aff'd*, 2/8/11. This evidence cannot fairly be characterized as undisputed, however, and Mr. Horvath is entitled to the inference that he originally applied because he was genuinely interested in reassignment to the position. Nevertheless, assuming that Mr. Horvath originally applied for the PT-III position in good faith, his Petition and Opposition to GAO's current Motion effectively admit that the reason he is pursuing this matter is to improve his

⁶ Interrogatory No. 4 and the response thereto read as follows: "Do you seek to be placed in the PT-III Human Capital Specialist Position for which Ms. Sheppard was selected under vacancy announcement GAO-11-HCO-0201-01? No, I do not seek to be placed in that position as a remedy."

⁷ *See, e.g.*, Opposition at 2-3 ¶2 ("Petitioner's claims are intended to represent sincere efforts to apply his knowledge and experience in addressing these matters as he does in his normal work context to ensure that work of GAO's Human Capital Office is consistent with GAO's Core Values of Accountability, Integrity, and Reliability. . . . [I]t is difficult to associate a rational basis for GAO to continue to stand behind the actions of several of the parties who set in motion a maelstrom of destruction and injury to GAO's personnel administration"); MSJ Ex. 4 (Petitioner's letter to selecting officials stating that "[i]n large part my application . . . was motivated because of the extremely difficult barriers other parts of GAO have imposed upon HCO staff to monitor, question, suggest, and expect corrective actions to be taken in a timely manner as routine quality assurance management actions." *See also* MSJ at 7.

marketability in a second career in retirement and to advance the interests of others whom he does not represent.

Mr. Horvath's interrogatory response unequivocally states that he does not seek the PT-III position and he cannot now equivocate to avoid summary judgment on mootness grounds by claiming that he would "accept an offer of placement in that position" as part of "a package of remedies that included other corrective actions to the candidate evaluation and selection processes." Opposition at 19 ¶20; *see, e.g., Bradley v. Allstate*, 620 F.3d 509, 526-27 (5th Cir. 2010) (while an interrogatory response is not a binding judicial admission, it is evidence for assessing summary judgment; no genuine issue of fact exists where a party makes a concession in an interrogatory response and fails to adduce countervailing evidence in a summary judgment response); *RSBI Aerospace v. Affiliated FM Insurance*, 49 F.3d 399, 402 (8th Cir. 1995) (party cannot manufacture an issue of fact to defeat summary judgment by contradicting an earlier sworn statement); *cf. Russell v. United States*, 661 F.3d 1371, 1374-75 (Fed. Cir. 2011) (party cannot belatedly alter an interrogatory response to defeat a finding of mootness).

Under the GAOPA, GAO employees are entitled to remedies comparable to those available to Executive Branch employees. 31 U.S.C. §§731, 732; *GAO v. GAO PAB*, 698 F.2d 516, 535 (D.C. Cir. 1983). The Board has authority to "order corrective . . . action in a case arising from" a prohibited personnel practice. 31 U.S.C. §753(a)(2). The potential relief available for such a case is that provided for under 5 U.S.C. §1214(g), which may include the following corrective action: 1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and 2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel

expenses, [and] any other reasonable and foreseeable consequential damages. *See Smith v. GAO*, PAB Docket No. 01-05 at 6-7 (8/23/02).

The PAB's authority to award Petitioner consequential damages is limited and does not extend to damages for non-pecuniary losses. *Cf. Prichard v. Dep't of Defense*, 2012 U.S. App. LEXIS 9739 (Fed. Cir. 2012) (unpublished) (*citing Bohac v. Dep't of Agriculture*, 239 F.3d 1334, 1342 (Fed. Cir. 2001) and *Giove v. OPM*, 106 M.S.P.R. 53, 57 (2007)). Thus, there must be more than noncompensable non-pecuniary losses at stake to defeat a claim of mootness.

Because Mr. Horvath does not have ongoing interest in the PT-III position, the remedies he requests in his Petition and/or mentions in his Opposition papers are not themselves sufficient to defeat dismissal for mootness. He has no standing at this point to request that: Ms. Sheppard's selection be voided (Petition ¶24); Ms. Sheppard's personnel records be corrected (Petition ¶25); the selection process be re-announced and/or reconstructed (Petition ¶26); GAO be required to offer fair and open competition in the future (Petition ¶29); and the Agency send its executives and managers to training on merit system principles (Petition ¶29).

Other remedies Mr. Horvath requests are beyond the scope of corrective relief provided for under the law. Thus, even if actionable prohibited personnel practices were committed, there would be no basis for the PAB to enjoin and/or limit GAO's Office of the General Counsel from performing its duties (Petition ¶27) or to order that the matter be referred to the Inspector General for investigation of criminal activity, fraud, waste, or abuse (Petition ¶28).

In accordance with the foregoing, the Petition is subject to dismissal as moot.⁸

⁸ In reaching the conclusion that the Petition is moot, the Board accepts that Petitioner's efforts are premised on interest in the preservation of the merit principles. *See, e.g.*, Petition ¶6.

C. MS. SHEPPARD'S ELIGIBILITY FOR SELECTION

Even if Mr. Horvath's Petition were assumed not to be moot because it raises prohibited personnel practice claims for which some remedy is theoretically possible despite his lack of ongoing personal interest in the case, GAO would still be entitled to summary judgment. Application of the law to the undisputed material facts establishes that Ms. Sheppard was eligible for the PT-III position and that GAO did not commit the prohibited personnel practices alleged in the Petition.

Petitioner's claim is centered on the acknowledged fact that Ms. Sheppard was a *de facto* employee whose initial appointment at GAO via noncompetitive transfer was erroneous and voidable because, prior to being hired, she held an excepted service position at the Federal Election Commission. Material Facts, *supra*, ¶3. The issue comes down to whether the action, which GAO implemented after the PAB/OGC recommended that the Agency take corrective action to deal with the initial improper hiring process, corrected the problem or compounded it. Mr. Horvath's argument that GAO compounded the problem and committed prohibited personnel practices by improperly affording Ms. Sheppard "status" to compete ignores the surrounding facts and circumstances and the applicable law.⁹

The starting point is the GAOPA, which created a personnel management system for GAO independent of the regulation and oversight of the Office of Personnel Management.

Alamilla v. GAO, PAB Docket No. 94-01 at 5 (3/17/95), *aff'd*, 3/03/95; *see also Shaller v. GAO*,

⁹ Petitioner's argument that GAO should have issued an announcement open to "all sources" rather than to those with "status" (Opposition at 11) would, in theory, have broadened the field of potential competitors for the PT-III position, and would have obviated the issue of Ms. Sheppard's eligibility, but would not have benefitted Mr. Horvath or other interested GAO employees with status.

PAB Docket No. 02-102-04-81 at 7 n.6 (4/18/83), *aff'd sub nom. GAO v. Shaller*, 707 F.2d 1559 (D.C. Cir. 1983). GAO has statutory authority under the GAOPA to hire employees without regard to the Title 5 provisions that apply to appointments in the Federal competitive service.¹⁰ MSJ at 12; *see* 31 U.S.C. §732(b)(4). Furthermore, the GAOPA provides that a GAO employee who completes at least a year of continuous service under a nontemporary appointment acquires competitive status for appointment to a position in the competitive service.¹¹ 31 U.S.C. §732(g).

These statutory provisions are part of a “self-contained, autonomous [personnel] system exclusively for GAO employees.” *GAO v. GAO PAB*, 698 F.2d 516, 523 (D.C. Circuit 1983). Under the GAOPA, GAO is granted “greater flexibility in hiring and managing its workforce without regard to civil service laws. . . .” *Id.* (*quoting* S. Rep. No. 450, 96 Cong., 1st Sess. 3 (1979)). Toward this end, the Comptroller General has “wide discretion . . . in designing [an independent] . . . personnel management system.” *GAO v. GAO PAB*, 698 F.2d at 523 (*quoting* H.R. Rep. No. 494, 96th Cong., 1st Sess. 4 (1979)).

The initial problem, created when GAO hired Ms. Sheppard into the PT-III position, was that she was given a noncompetitive appointment when she should have been required to

¹⁰ The statutory provision does, however, require that officers and employees be appointed “only on the basis of merit and fitness.” 31 U.S.C. §732(b)(4).

¹¹ 5 C.F.R. §1.3(c), the civil service rule administered by OPM, defines “competitive status” as follows:

“Competitive status” shall mean eligibility to be noncompetitively selected to fill a vacancy in a competitive position. A competitive status shall be acquired by career-conditional or career appointment through open competitive examination upon satisfactory completion of a probationary period, or may be granted by statute, executive order, or the Civil Service Rules without competitive examination. A person with competitive status may be promoted, transferred, reassigned, reinstated, or demoted without taking an open competitive examination, subject to the conditions prescribed by the Civil Service Rules and Regulations.

compete. Had GAO selected Ms. Sheppard from a roster of eligibles rather than appointing her through a noncompetitive transfer, her appointment would have posed no problem and there would have been no need for the corrective action that gave rise to the instant Petition. The problem that occurred is that Ms. Sheppard was not appointed in accordance with GAO Order 2315.1, dealing with status, tenure, and trial periods.

Petitioner does not contend that there was any legal prohibition on Ms. Sheppard being hired by GAO. Nor does he allege that she procured her initial appointment through fraud or bad faith. *See* Opposition at 14 ¶10. Significantly, Ms. Sheppard's initial appointment was not void, it was merely voidable. *See, e.g., In the Matter of Victor M. Valdez*, 58 Comp. Gen. 734 (1979); *Matter of Sidney P. Arnett, Mary Ann Barron*, B-220720, B-220791 (Sept. 8, 1986), 1986 WL 64070 (Comp. Gen.) (discussing distinction between void and voidable appointments and extending service credit for period of voidable appointment).

The undisputed facts establish that at the behest of the PAB/OGC, GAO issued a Vacancy Announcement for the PT-III position encumbered by Ms. Sheppard in an effort to correct the initial appointment, which the PAB/OGC had concluded was improper and involved a prohibited personnel action. That GAO took this action, and the PAB/OGC acquiesced in this step, implies that both entities believed that the corrective action would satisfactorily resolve the matter at hand. Nevertheless, the fact that GAO undertook the action in a good faith effort to rectify the initial voidable appointment is to no avail if, by so doing, it committed any additional prohibited personnel practice.

GAO Order 2315.1 refers to selections for excepted and excepted-conditional appointments being made from "a roster of eligibles." *See* Ch.3. The provision on excepted-

conditional appointments states:

Unless an applicant has completed the service requirement for career appointment in the [c]ompetitive [s]ervice, an applicant selected from a roster of eligibles for other than temporary or term employment will be given an excepted-conditional appointment.

Ch. 3, ¶1 (emphasis added). Excepted appointments take place under the following circumstances:

An applicant selected from a roster of eligibles for other than temporary or term employment will be given an excepted appointment if the applicant is a present or former Federal employee who has completed the service requirement for career appointment in the competitive service.

Ch. 3, ¶2 (emphasis added). In the third paragraph of Chapter 3, the Order speaks of GAO employees acquiring competitive status under GAO's personnel system "upon completion of 1 year of continuous service under a nontemporary appointment in GAO. . . ."

GAO Order 2315.1 further provides that an erroneous noncompetitive appointment "may be corrected if the employee is eligible for appointment under some other authority." Ch. 1, ¶6. Under Order 2315.1, if the employee is not eligible for appointment under another authority, and there is no evidence of bad faith or fraud on the part of the employee, the matter "must be submitted to the Assistant Comptroller General for Administration for direction on an appointment action."¹² *Id.*

Thus, under the GAOPA and GAO's internal operating Order there were two possible

¹² Notice is herewith taken of the fact that the Assistant Comptroller General for Administration position does not currently exist at GAO and did not exist during the relevant time period. However, since the actions taken were negotiated by GAO's General Counsel with the PAB/OGC and taken with the knowledge and approval of both the Comptroller General and the Chief Administrative Officer, any direction or approval requirement under GAO Order 2315.1 was effectively satisfied. *See* MSJ at 11 n.6; MSJ Exs. 1, 2. The Agency would be well served to revise this important provision forthwith to reflect changes in GAO management structure.

means for GAO to correct Ms. Sheppard's erroneous initial appointment. Either Ms. Sheppard could have been appointed under an authority for which she was eligible, or some other appointment action could have been taken at the direction of the appropriate GAO official. Regardless of which prong of GAO Order 2315.1 is considered applicable, GAO did not violate the law in taking the corrective action as to Ms. Sheppard's appointment.

The steps taken to enable the individuals who had been improperly hired via noncompetitive transfer to compete for the vacancies that were posted in May 2011 appear in the nature of a limited waiver of status requirements, because these individuals were deemed eligible to compete, but subject to dismissal if not selected for one of the vacancies. *See* MSJ Exs. 2, 3, 4. As noted above, this action was taken with the knowledge of the Comptroller General and the Chief Administrative Officer/CFO. *See* Material Facts, *supra*, ¶¶10, 13. Thus, GAO determined that the individuals who had been noncompetitively transferred from FEC had status to compete, based upon their completion of one year of employment at GAO. Because of GAO's limitation on that status—*i.e.*, subject to dismissal if not selected—it was short of full competitive status in the Federal service. Nevertheless, that status was sufficient for the purposes at hand.

Given the undisputed facts and the controlling law, it would elevate form over substance and ignore both the operative facts and the existence of the GAOPA to conclude that GAO committed a prohibited personnel practice in determining that Ms. Sheppard was eligible to compete for the PT-III position when the position was re-posted to correct the initial error.

While summary judgment is warranted on the Petition here at issue, this case highlights the need for GAO to revise its governing Order on Status, Tenure, and Trial Periods, so that there is a clear procedure to follow, should there be any future need for corrective action on an

erroneous noncompetitive appointment, with references to the current management structure at the Agency. In addition, the underlying Corrective Action also raised concern about the use of waivers in connection with appointments at GAO. GAO's response to the Statement of Corrective Action Investigation stated that the Agency

will implement a standard operating procedure (SOP), which will require HCO to submit a written justification for any waiver to the Office of General Counsel, Legal Services at least 5 business days before the waiver is to be acted upon. HCO must state with particularity the rule or regulation for which waiver is requested and the critical mission or administrative need to be addressed by the waiver. The waiver request must include documentation supporting the reason for the waiver and any factual assertions made in the request.

MSJ Ex. 2 ¶3. Compliance with this statement is beyond the purview of the pending Petition, but implementation of such a policy would further the underlying interest in maintaining consistency with merit system principles in the governing policies at GAO.

CONCLUSION

In accordance with the foregoing, GAO's Motion for Summary Judgment is granted. Accordingly, the Petition is herewith dismissed.

SO ORDERED.

Date: 4/15/13

/s/
Robert F. Hermann
Administrative Judge

NOTICE—BOARD REVIEW

This Decision will become final on May 15, 2013 unless a request for review by the full Board is filed by one of the parties within fifteen (15) days of service of this Decision [by April 30, 2013], or unless the full Board, prior to May 15, 2013, decides to review the Decision on its own motion. *See* 4 C.F.R. §§28.87, 28.4.

In the alternative, either party may, within ten (10) days of service of this Decision [by April 25, 2013], file and serve a request for reconsideration with the Administrative Judge who rendered this Decision. The filing of such a request will toll the commencement of the fifteen-day period for filing a notice of appeal with the full Board, pending a decision by the Administrative Judge on the request for reconsideration.

The original and five copies of a notice of appeal requesting review by the full Board shall be filed with the Board in person or by commercial carrier at the office of the Board, or by mail (address listed below). When filed by mail, the postmark shall be deemed to reflect the date of filing. The party filing the request shall serve a copy of the notice of appeal on all other parties. Within twenty-five (25) days following the filing of a notice of appeal requesting review by the full Board, the appellant shall file and serve a supporting brief. The brief shall identify with particularity those findings or conclusions in the Initial Decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error. The responding party shall have twenty-five (25) days, following service of appellant's brief, to file and serve a responsive brief. Within ten (10) days of service of appellee's responsive brief, appellant may file and serve a reply brief.

The Board may grant a request for review when it finds that:

1. The findings in the Decision are unsupported by substantial evidence in the record viewed as a whole; or
2. New and material evidence is available that, despite due diligence, was not available when the record was closed; or
3. The Decision is based on an erroneous interpretation of statute or regulation; or
4. The Decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or
5. The Decision is not made consistent with required procedures and results in harmful error.

See 4 C.F.R. §28.87.

ADDRESS (Postal Service or Delivery)
Personnel Appeals Board
U.S. Government Accountability Office
Room 1566
441 G Street, N.W.
Washington, DC 20548