

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

**Docket No. 12-02**

**Date of Decision: July 20, 2012**

**Cite as: Horvath v. GAO, Docket No. 12-02 (7/20/12)**

**Before: Robert F. Hermann, Administrative Judge**

**Headnotes:**

**Competitive Status**

**Mootness**

**Motion to Dismiss**

**Non-selection**

**Standing**

**Summary Judgment**

**DECISION**



additional time to perfect the Motion. By order dated June 11, 2012, GAO was granted until June 20, 2012 to file its Motion. Ruling on the request to stay discovery was reserved until after the motion was filed and Petitioner was afforded the opportunity to respond.

On June 20, 2012, GAO filed a Motion to Dismiss or, in the alternative, for Summary Judgment, together with a supporting Memorandum with annexed exhibits (Motion to Dismiss).<sup>2</sup>

On June 27, 2012, Mr. Horvath filed a Response opposing a stay of discovery and opposing GAO's Motion to Dismiss and/or for Summary Judgment.

The Motions are ripe for adjudication. For the reasons set forth below, GAO's Motion to Dismiss and/or for Summary Judgment is denied. The stay of discovery is lifted. Discovery limited to the matters properly before the Board shall proceed forthwith and be completed within 65 days of the date of this Decision.

## **II. PERTINENT FACTS**

1. At all relevant times, Mr. Horvath had competitive status and was employed by GAO as a Workforce Relations Specialist, PT-0201 Band III.

2. On February 28, 2010, GAO hired Valarie Sheppard as a Human Capital Specialist, PT-III, on a non-competitive appointment. Prior to being hired by GAO, Ms. Sheppard held a GS-14 excepted service appointment with the Federal Election

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<sup>2</sup> Exhibits 1 through 4 to GAO's Motion papers consist of the following indicated documents: 1) Announcement No. GAO-112-HCO-0201-01; 2) Selection Certificate; 3) Job Announcement No. GAO-12-HCO-0201; and 4) GAO Order 2315.1. The exhibits have not been authenticated, but Mr. Horvath has not objected to their consideration. Therefore, the exhibits have been accepted into the Motion record and considered.

Commission. When Ms. Sheppard was hired by GAO, she did not have competitive status and was ineligible for non-competitive appointment. *See, infra*, at 12-14. Her appointment was therefore erroneous and her status with GAO was that of a *de facto* employee. Motion to Dismiss at 10.

3. GAO Order 2315.1, Status, Tenure, and Trial Periods (10/1/80), Chapter 3 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 Competitive Service, 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 nontemporary 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.)

4. 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.

5. On or about May 26, 2011, GAO issued vacancy announcement GAO-11-HCO-0201-01 for two PT-0201-03/03 Human Capital Specialist vacancies. The announcement stated that it was “open to current or former permanent Federal employees with status...” Motion to Dismiss, Ex. 1.

6. Petitioner applied for reassignment under the vacancy announcement. *Id.* at 3.

7. Ms. Sheppard and others also applied under the vacancy announcement. *Id.* at 3, Ex. 2.

8. Nine candidates, including Mr. Horvath and Ms. Sheppard, were certified as “best qualified” and their names were submitted to the selecting official. Ms. Sheppard and another candidate, Matthew Myatt, were selected for the vacancies on August 11, 2011. No issue is raised regarding Mr. Myatt’s selection. *Id.*

9. After being selected for the position, Ms. Sheppard continued to work for GAO until she voluntarily resigned in 2012. Following Ms. Sheppard’s resignation, on June 14, 2012 GAO issued a vacancy announcement (*i.e.*, GAO-12-HCO-0201-04) to refill the position. The announcement stated the following applicants could be

considered: “[c]urrent or former permanent Federal employees with competitive status (includes career and career-conditional employees and employees with reinstatement rights).” *Id.* at 4, Ex. 3.

### **III. POSITIONS OF THE PARTIES**

#### **A. GAO’S POSITION**

GAO argues that Mr. Horvath lacks standing to maintain his claim because he has failed to allege how he was harmed or affected by the challenged actions. GAO cites the fact that Mr. Horvath’s *pro se* Petition states under the heading “Remedies Sought” that “[he] requests no personal relief for himself....” Motion to Dismiss at 5.

GAO further alleges that Mr. Horvath’s claim is moot because GAO reannounced the position following Ms. Sheppard’s resignation. GAO argues its action made Petitioner whole for any arguable harm he might have suffered because he was again afforded the opportunity to compete for the position. Citing Merit Systems Protection Board (MSPB) cases, GAO argues the Petition must be dismissed as moot because it has provided Mr. Horvath with all the relief which could be available under 5 U.S.C. §1214(g). *Id.* at 6-9.

Finally, GAO submits that even if Petitioner has standing and the matter is not moot, there is no basis for his claims. GAO argues that Ms. Sheppard’s selection was proper because she had competitive status at the time she was selected. GAO relies upon Comptroller General decisions which have held that a *de facto* employee may accrue annual and sick leave unless their erroneous appointment was made in violation of an absolute statutory prohibition. GAO argues the logic underlying these decisions dictates

that *de facto* service is also creditable for the purpose of acquiring competitive status. *Id.* at 9-12.

GAO points out that the GAO Personnel Act (GAOPA), Public Law No. 96-191, provides “greater flexibility in hiring and managing [GAO’s] workforce without regard to civil service laws governing such matters as appointments....” S. Rep. No. 96-540, at 52 (1979). The Agency also points to the fact that in 31 U.S.C. §732(g), the Statute provides that GAO employees “completing at least one year of continuous service under a non-temporary appointment...acquire[] a competitive status for appointment to a position in the competitive service.” *Id.* at 12.

GAO cites MSPB authority for the proposition that *de facto* employees are entitled to the same rights and benefits as all other Federal employees under Title 5. It relies upon MSPB cases holding that *de facto* employees enjoy the same adverse action procedural rights as other employees and claims that *de facto* GAO employees are therefore entitled to the same rights and benefits as all other GAO employees, including the right to acquire competitive status upon completion of one year of continuous service under a non-temporary *de facto* appointment. *Id.* at 10-11.

## **B. PETITIONER’S POSITION**

Mr. Horvath argues his *pro se* status should be taken into account in evaluating GAO’s Motion, and that the Motion should be denied.<sup>3</sup>

Mr. Horvath does not specifically dispute GAO’s statement of undisputed facts or provide a counter statement of material facts. But he argues he has standing since he

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<sup>3</sup> This summary is distilled from Mr. Horvath’s Petition and June 27, 2012 Response to GAO’s Motion.

applied for the position, was among the best qualified candidates referred to the selecting official, and was not selected. He claims his name should have been submitted to the selecting official on a separate non-competitive certificate. Response at 8. Mr. Horvath says he applied for the position with the hope of changing the focus of his work, alleviating stress levels and for health and personal needs. He argues that he does have a personal stake in the outcome. *Id.* at 8-9.

Petitioner further argues the issues raised in his Petition are not moot and have ongoing significance to him as an aggrieved party. He says Ms. Sheppard's voluntary departure and the re-announcement of the position did not restore the *status quo ante*. Mr. Horvath argues there are ongoing issues regarding the legality of Ms. Sheppard's selection which impact him. Mr. Horvath alleges that those aggrieved have a right to have the issues regarding the selection resolved lest they arise again in the future. *Id.* at 11. Among the remedies Mr. Horvath requests is that GAO be directed to "[r]eannounce or reconstruct the evaluation of qualifications, certification of candidates, and selection...." Petition at 14.

Mr. Horvath's Petition alleges GAO committed prohibited personnel practices. He asserts (1) that GAO's selection of Ms. Sheppard constituted the granting of an unauthorized privilege or advantage in violation of 5 U.S.C. §2301(b)(6); that GAO committed unspecified violations of the GAO Personnel Act and GAO Orders; and (3) that GAO willfully obstructed his competition for the position, in violation of 5 U.S.C. §2302(b)(4). *Id.* at 7.

Mr. Horvath argues that Ms. Sheppard was initially noncompetitively hired by GAO in violation of law; that she was a *de facto* employee with no competitive status at

the time she applied for and was selected for the instant position; and that GAO's claim, that she was eligible for selection by virtue of having served as a *de facto* employee for more than one year, is legally wrong. He argues "*de facto* employment is not service on a legal appointment" and that Ms. Sheppard could not capitalize on her service in such an illegal appointment to obtain the required competitive status. Response at 10; *see also* Petition at 6.

#### **IV. DISCUSSION**

While GAO refers to its Motion as one to dismiss the Petition or, alternatively, for summary judgment, the Motion is clearly predicated on matters outside the pleadings and is therefore appropriately analyzed under summary judgment standards.

Title 4 C.F.R. §28.21(c)(3) authorizes the grant of summary judgment "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(a).

The moving party 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 the nonmoving party'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 the nonmoving party fails to come forward with sufficient evidence to establish that there is a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). The party opposing summary judgment must come forward with specific facts showing that there is a genuine issue for

trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). It is necessary to do more than show “some metaphysical doubt” as to the material facts 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*, 475 U.S. at 251-52.

All disputes regarding the material facts must be resolved in favor of the non-moving party. *Bishop v. Wood*, 426 U.S. 341, 347 n.11 (1976). And, in reviewing the record, inferences are to be drawn in the light most favorable to the non-moving party. *Pa. Prot. & Advocacy, Inc. v. Pa. 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 they are undisputed, summary judgment is inappropriate. *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1380 (3<sup>rd</sup> Cir. 1991). Summary judgment should not be granted on a meager record with insufficient facts upon which to conclude that the moving party is entitled to prevail as a matter of law. *See DeGraff v. District of Columbia*, 120 F.3d 298, 302 (D.C. Cir. 1997).

It is well established that a *pro se* litigant like Mr. Horvath is to be afforded some leeway with respect to pleading and procedural requirements. *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).

Also, it is important to note that a motion for summary judgment at the outset of litigation may be premature. Such motions are frequently deferred because discovery is often needed to present a properly supported motion, or to defend against such a motion.

Here, in reviewing GAO's Motion, consideration must be given to the fact that Petitioner has requested that discovery proceed and has had no opportunity for discovery. *See, e.g., Metropolitan Life Insurance Co. v. Bancorp.*, 527 F.3d 1330, 1336-38 (Fed. Cir. 2005); *Farmer v. Brennan*, 81 F.3d 1444, 1450-51 (7<sup>th</sup> Cir. 1996); *Burnside–Ott Aviation Training Ctr. v. US*, 985 F.2d 1574, 1582 (Fed. Cir. 1993).

#### **A. STANDING**

Title 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...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.

While Mr. Horvath's Petition is not a model of clarity, there is no good basis for concluding that he has failed to make a sufficient showing that he was adversely affected by GAO's challenged actions. A fair reading of the Petition as a whole indicates that Mr. Horvath has sufficiently pled that he was adversely affected. The fact that paragraph 30 of the Petition indicates that Mr. Horvath is not requesting personal relief for himself cannot be read as a concession that he has not been adversely affected, particularly when other paragraphs (*e.g.*, Petition at ¶¶ 25 and 26) request that corrective actions be taken to rectify harm allegedly suffered by those aggrieved by the selection.

It is undisputed that Petitioner applied for and was determined to be among the best qualified candidates for the Human Capital Specialist vacancy, which was to be filled through merit promotion procedures; that he was not selected in favor of a candidate whom he alleges was legally ineligible for the position; and that he has

received a right to petition letter. Mr. Horvath's Petition alleges that GAO committed prohibited personnel practices which are incorporated into the GAOPA and properly raised in his Petition.

This is sufficient to establish standing. Mr. Horvath has pled sufficient facts to establish standing in that he was eligible for selection and there is no basis for concluding at this juncture that he was not adversely affected by the selection of the allegedly ineligible Ms. Sheppard. *See, e.g., Scott v. GAO*, Docket No. 53-701-11-84 at 4 (10/24/85); *37 Named Petitioners v. GAO*, Docket Nos. 09-01; 09-05 through 09-41 at 14 (3/31/10).

## **B. MOOTNESS**

Mr. Horvath's claims were not rendered moot when Mr. Sheppard resigned and GAO issued a new vacancy announcement for the position after Mr. Horvath's Petition was filed with the Board. That Petitioner has been afforded an opportunity to again apply and be considered for the job does not constitute full relief.

Dismissal of an appeal as moot amounts to a dismissal for lack of jurisdiction. *Haskins v. Dept. of the Navy*, 106 M.S.P.R. 616, 624 (2007), review dismissed, 267 Fed. Appx. 934 (Fed. Cir. 2008). Once jurisdiction attaches, it cannot be divested based on mootness unless it is impossible for the Board to grant the appellant any further relief. *Currier v. United States Postal Service*, 72 M.S.P.R. 191, 195 (1996). Thus, to be deemed moot an appellant must have received all the relief which could have been granted had the matter been adjudicated and had he/she prevailed. *Fernandez v. Dept. of Justice*, 105 M.S.P.R. 443, 446 (2007); *Haskins*, 106 M.S.P.R. at 624. In dealing with

individual right of action appeals involving alleged prohibited personnel practices, the MSPB has stated the test to determine mootness is whether “[b]y its complete cancellation of the actions, the agency has afforded the appellant relief equivalent to that which he could have received from the [MSPB].” *Mulherin v. Dept. of the Air Force*, 45 M.S.P.R. 289, 292 (1990), *superseded by statute*, 5 U.S.C. §1221(g)(1)(A), *as recognized in Durr v. Dept of Veterans Affairs*, 99 M.S.P.R. 283, 286 (2005);<sup>5</sup> *Hudson v. Dept. of Veterans Affairs*, 104 M.S.P.R. 283, 289 (2006) (IRA appeal not rendered moot by agency rescission of performance improvement plan where further relief could be ordered).

Under the GAOPA, GAO employees are entitled to remedies comparable to those available to Executive Branch employees. 31 U.S.C. §§731, 732; *see also GAO v. GAO/PAB*, 698 F.2d 516, 357, 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). The potential relief available 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.

Thus, there is make whole relief available and it could include retroactive reassignment to the position if it were established that but for prohibited personnel practices, Mr. Horvath would have been selected for the position.

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<sup>5</sup> The *Mulherin* decision was overturned by a statute which gave employees additional remedies; however, the test for whether a case is moot remains the same. *Durr*, 99 M.S.P.R. at 286-87.

### **C. MS. SHEPPARD'S ELIGIBILITY FOR SELECTION**

While GAO's unchallenged statement of undisputed facts is accepted for purposes of analyzing the Motion for Summary Judgment, Mr. Horvath must be given the benefit of all reasonable inferences. Here, the undisputed facts are insufficient to warrant granting judgment as a matter of law. The record is insufficiently developed, and doubt remains about facts which may bear on whether Ms. Sheppard had the required competitive status when she was selected for the position. Thus, at this juncture, it cannot be concluded as a matter of law that Ms. Sheppard had "status" and was eligible to be selected for the Human Capital Specialist position.

The record is bereft of facts regarding the circumstances surrounding Ms. Sheppard's initial appointment with GAO. What is known is that she was hired through a non-competitive transfer on February 28, 2010 and that she did not have competitive status at the time she was hired. While GAO's argument indicates Ms. Sheppard's appointment was erroneous and that her status was that of a *de facto* employee, no facts are provided to elucidate what, if anything, was done to correct the erroneous appointment. The Motion record does not indicate if Ms. Sheppard was eligible for appointment under some other authority and, if so, whether corrective action was taken under GAO Order 2315.1, ch. 1, ¶6. Alternatively, if Ms. Sheppard was not eligible for appointment under another authority, there is no information in the record regarding whether the matter was submitted to the Assistant Comptroller General for direction on an appointment action, or whether there was any evidence of bad faith or fraud on the part of the employee.

From the material facts, we know that Ms. Sheppard continued to work for GAO following the erroneous appointment; that in or around May 2011 she applied for two Human Capital Specialist openings under a GAO vacancy announcement open to “employees with status”; that she was placed on the best qualified list; and that she was selected for one of the positions.

But there are no facts in the Motion record regarding the qualification and ranking process which was followed and nothing to indicate how Ms. Sheppard’s eligibility was determined, or on what basis.

GAO concedes that Ms. Sheppard received an erroneous appointment when she was hired as a transfer from the Federal Election Commission, where she was an excepted service employee. Motion to Dismiss at 10. The real question, assuming GAO took no corrective action when it discovered that the appointment was erroneous, is whether Ms. Sheppard acquired competitive status simply by working for one year under an appointment which should not have been made. The authority GAO points to is not directly on point and the reasoning underlying the Comptroller General and MSPB cases it cites does not dictate the legal conclusion that Ms. Sheppard acquired competitive status. *Id.* at 9-12.

OPM guidance regarding variations to staffing regulations deal with what can and should be done to correct an erroneous appointment. OPM instructs that an agency should attempt to regularize the appointment and make it legal. According to OPM, if this is done, the employee gets credit for the *de facto* service employment for all purposes **except career tenure and time in grade**. If it is not possible for an agency to regularize the appointment, an agency may request that OPM grant a variation to avoid unnecessary

hardship to the employee. If this is necessary and OPM grants a variation, the employee would only begin to earn service credit for career tenure and time in grade from the date the variation is granted. U.S. Office of Personnel Management, Variations to Staffing Regulations;<sup>6</sup> *see also* 5 C.F.R. §5.1.

In addition, there is authority consistent with the OPM guidance to support a conclusion that Ms. Sheppard's time as a *de facto* employee is not creditable. *See, Pinckney v. United States*, 227 Ct. Cl. 718, 722 (1981); *Igyarto v. Dept. of the Army*, MSPB Docket No. DC-0752-11-0537-I-1, 2011 MSPB LEXIS 4755 (8/3/11); *Weed v. Department of the Army*, MSPB Docket No. CH-0752-12-0022-I-1, 2012 MSPB LEXIS 485 (1/25/12); *cf. Lee v. Dept. of Agriculture*, 200 Fed. Appx. 993, 2006 U.S. App. LEXIS 25591 (Fed. Cir. 2006) (unpublished) (employees who were appointed illegally to career-conditional positions and later given legal competitive appointments were not entitled to service credit for period of service under illegal appointment).

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<sup>5</sup> Available at <http://www.opm.gov/employ/var/wrk.asp>.

**V. CONCLUSION**

In accordance with all of the foregoing, GAO's Motion to Dismiss is denied. GAO's Motion for Summary Judgment is denied without prejudice. The stay of discovery is lifted.

**SO ORDERED.**

Date: 7/20/12

/s/  
Robert F. Hermann  
Administrative Judge