

# **Edward G. Horvath v. U.S. Government Accountability Office**

**Docket No. 10-01**

**Date of Decision: August 20, 2010**

**Cite as: Horvath v. GAO, Docket No. 10-01 (8/20/10)**

**Before: Mary E. Leary, Administrative Judge**

## **Headnotes:**

**Motion to Dismiss**

**Motions Practice**

**Standing**

## **DECISION ON RESPONDENT’S MOTION TO DISMISS**

### **I. INTRODUCTION**

Petitioner Edward Horvath filed four Petitions on May 6, 2010, which were joined for processing. Each Petition related to the hiring of one of four employees (Petitions A-D or Petitions) and alleged that Respondent, the Government Accountability Office (GAO or the Agency), committed prohibited personnel practices when it appointed four individuals (Aileen Baker, Adrienne Robinson, Valarie Sheppard and Sandra Shufelt) to GAO’s Human Capital Office (HCO) without allowing other individuals to compete for the positions. Petitioner asserts that these individuals were not properly appointed under applicable GAO policies and procedures and that said appointments constitute prohibited personnel practices under the Government Accountability Office Personnel Act (GAOPA), which specifically incorporates the prohibited personnel practices enumerated in 5 U.S.C. §2302(b).

Respondent filed a Motion for Leave to File Motion to Dismiss in lieu of Response and Motion to Stay Discovery on May 18, 2010. The Motion was denied with regard to the Answer and granted with regard to staying discovery until after a decision on the Motion to Dismiss. Respondent timely filed its Answer on May 26, 2010. The Agency simultaneously filed a Motion to Dismiss and a Memorandum of Law in Support of Motion to Dismiss (Agency Memorandum), which asserted that Petitioner did not have standing to file the Petitions since he failed to allege that he had been adversely affected by the Agency’s actions.

Petitioner filed Petitioner’s Response to Motion to Dismiss (Petitioner’s Response) on June 7, 2010. The Personnel Appeals Board Office of General Counsel (PAB/OGC) submitted a Motion for Leave to File an Amicus Brief on the issue of the appropriate legal standard for determining who is a “person who is claiming to be affected adversely” within the meaning of

4 C.F.R. §28.18(a), which was granted. On June 25, 2010, PAB/OGC filed its Amicus Brief. On July 2, 2010, GAO filed a Motion for Leave to File a Response to the PAB/OGC Amicus Brief along with said Response. The Motion was granted. On July 7, 2010, PAB/OGC moved for Leave to File Reply to GAO's Response to PAB/OGC Amicus Brief, which was denied.

For the reasons stated below, the Motion to Dismiss is granted.

## II. FACTS

Petitioner is currently employed as a Band III Workforce Relations Specialist in the HCO at GAO.<sup>1</sup> Petitions A-D at 1. He has been with GAO since December 2001. In February 2010, Patrina Clark, Chief Human Capital Officer, announced that James Wilson from the Federal Election Commission (FEC) would become the Director of HCO's Human Capital Consulting Center. She also announced that Mr. Wilson would be bringing four specialists with him from the FEC. *Id.* at 2.

After receiving the announcement, Petitioner sent an e-mail to Acting Comptroller General Gene Dodaro requesting his intervention regarding what he claimed was the unlawful hiring of these individuals. *Id.* at 2-3. Mr. Wilson and the four individuals from FEC arrived at GAO on March 1, 2010. According to Petitioner, he received an e-mail on the same day from Sallyanne Harper, Chief Administrative Officer, explaining that while the general practice is to "competitively announce all vacant positions at GAO, the Comptroller General does not have to follow competitive procedures if the circumstances warrant." *Id.* at 4.

## III. POSITIONS OF THE PARTIES

A. Petitioner asserts that Aileen Baker was designated as a PT-III Human Capital Specialist, effective February 28, 2010, having previously served at a GS-14 level in the FEC Excepted Service. Petition A at 5. He asserts that the maximum pay for positions at GS-14/10 is \$136,771, which is \$158 less than the maximum pay of the Band PT-III of \$136,929, and therefore, that movement to the PT-III from GS-14 should be considered a promotion. Petitioner contends that Ms. Baker is not eligible for a noncompetitive appointment to GAO at the PT-III level based on prior Federal experience as in the Excepted Service at the FEC and asserts that said experience does not convey competitive status. *Id.* at 6.

B. Petitioner asserts that Adrienne [Aileen] (sic) Robinson was designated as a PT-II Human Capital Specialist, effective February 28, 2010, having previously served at a GS-13 level in the FEC Excepted Service. Petition B at 5. He asserts that the maximum pay for positions at GS-13/10 is \$115,742, which is \$553 less than the maximum pay of the Band PT-II of \$116,295, and therefore, that movement to the PT-II from GS-13 should be considered a promotion. Petitioner contends that Ms. Robinson is not eligible for a noncompetitive appointment to GAO at the PT-II level based on prior Federal experience in the Excepted Service at the FEC and asserts that said

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<sup>1</sup> Petitioner asserts he is a Workforce Relations Specialist, PT-0202 Band III in HCO. Petitions A-D at 1. GAO acknowledges he is employed in HCO, but asserts that while he is a Band III, he is employed as a Human Capital Specialist, PT-0201. Agency Memorandum at 3.

experience does not convey competitive status. He also contends that any promotions under the former Excepted Service positions at FEC that are not under an Interchange Agreement with the U.S. Office of Personnel Management (OPM) are not eligible for noncompetitive transfer at the grade or band level equivalent herein. *Id.* at 6.

C. Petitioner asserts that Valarie Sheppard was appointed as a PT-III Human Capital Specialist effective February 28, 2010, having previously served at a GS-14 level in the FEC Excepted Service. Petition C at 5. He asserts that the maximum pay for positions at GS-14/10 is \$136,771, which is \$158 less than the maximum pay of the Band PT-III of \$136,929, and therefore, that movement to the PT-III from GS-14 should be considered a promotion. Petitioner contends that Ms. Sheppard is not eligible for a noncompetitive appointment to GAO at the PT-III level based on prior Federal experience in the Excepted Service at the FEC and asserts that said experience does not convey competitive status. *Id.* at 6.

D. Petitioner asserts that Sandra Shufelt was designated as a PT-II Human Capital Specialist effective February 28, 2010, having previously served at a GS-13 level in the FEC Excepted Service. Petition D at 5. He asserts that the maximum pay for positions at GS-13/10 is \$115,742, which is \$553 less than the maximum pay of the Band PT-II of \$116,295, and therefore, that movement to the PT-II from GS-13 should be considered a promotion. Petitioner contends that Ms. Robinson is not eligible for a noncompetitive appointment to GAO at the PT-II level based on her prior Federal experience in the Excepted Service at the FEC and not under an approved interchange agreement with OPM. Petitioner asserts that said experience does not convey competitive status. Petitioner states that Ms. Shufelt had prior GAO experience, which would have made her eligible for noncompetitive reinstatement at the PT-I level. He acknowledged prior service in the competitive service at the U.S. Department of Agriculture (USDA) and the National Endowment for the Arts and that Ms. Shufelt's USDA experience qualified her for competitive status. However, Petitioner contends that Ms. Shufelt does not appear to be eligible for noncompetitive appointment at GAO to the PT-II level based on GAO and other prior Federal service. *Id.* at 5-6.

Petitioner alleges that had GAO used competitive procedures, at least 23 Agency employees would have been eligible to apply for promotion to the positions that were filled noncompetitively by the four former FEC Excepted Service employees. Petitions A-D at 3. Petitioner cites generally to the merit system principles and further contends that GAO's failure to use competitive procedures potentially deprived veterans of their rights. He claims generally that his ability to provide appropriate guidance and service was harmed by the alleged prohibited personnel actions, as were the integrity of GAO, and the interests of the Federal government. Petitioner's Response at 2.

Petitioner asserts he is harmed when his colleagues come to him "in tears" when merit system principles seem to be disregarded; when "as a teacher and coach" he "cannot provide a reasonable explanation" supported by law; when he knows that highly qualified individuals "did not have an opportunity to compete;" when veterans and other preference eligible candidates did not have an opportunity to be considered; when he and others cannot do the work they are paid to perform in the Agency's HCO; and, for other reasons related to his personal loss of sleep and

lack of attention to family and community, and for having to pay taxes for payments and benefits for the individual appointees. Petitioner's Response at 3-4.

As a remedy, Petitioner seeks to be promoted to the PT-IV level or to a Managerial and Supervisory (MS-II) position at the maximum applicable pay rate for the remainder of his Federal service retroactive to January 28, 2010; other financial compensation; and costs. Petitioner does not allege that he suffered any loss in pay, benefits or status.<sup>2</sup> Petitions A-D at 7-8. He does contend that veterans may have lost the opportunity to compete for the positions held by the former FEC employees, but does not assert that he is a preference eligible veteran.

GAO asserts that Petitioner was not adversely affected by the actions of which he complains, and therefore, does not have standing to bring this case. Agency Memorandum at 5. The Agency contends that the allegations contained in the Petitions demonstrate that the transfer of the four employees did not result in any tangible harm to Petitioner and, therefore, that no remedies are available to him. *Id.* at 7-8. GAO asserts that, as such, Petitioner lacks standing to bring this action and his claims must be dismissed.

GAO did not address Petitioner's claims that it did not follow applicable laws and regulations in appointing the former FEC employees. In its Response, the Agency contends that it was not necessary to address the merits of the case, because the merits of Petitioner's claims are not relevant to whether Petitioner himself is a proper party before the Board. In support of this position, GAO cites *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (noting that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"). Agency Memorandum at 1 n.1.

In its Amicus Brief, without taking a position on the merits of this case, PAB/OGC asserts that the plain language of 4 C.F.R. §28.18(a) does not require that an injury or cognizable harm must already have occurred before a person has standing. Rather, PAB/OGC asserts that the appropriate legal standard is "whether the person has suffered some threatened or actual injury." Amicus Brief at 2.

### III. DISCUSSION

In a motion to dismiss, the facts in the case must be viewed in the light most favorable to the party opposing the motion. *GS-13/14 Management & Policy Advisory Council & Career Level Council v. GAO*, Docket No. 116-600-GC-89 (July 25, 1990) [hereinafter *GS-13/14 Management Council*] (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). A motion to dismiss should be granted only if it appears beyond doubt that there is no set of facts upon which the Petitioner may be entitled to relief. *Id.* (citations omitted). For purposes of this Motion, therefore, I will view the facts in the light most favorable to Petitioner.

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<sup>2</sup> When an employee successfully prevails on a prohibited personnel practice claim, the available remedy is the return of that employee to the *status quo ante* or the placement of that employee, as nearly as possible, in the position he or she would have been in had the alleged prohibited personnel action not occurred. See *Davis v. GAO*, Docket Nos. 00-05, 00-08 (7/26/02).

Pursuant to 4 C.F.R. §28.18, the PAB hears cases from GAO employees, or applicants for employment, who claim to be adversely affected by the Agency taking, or failing to take, a personnel action. Petitioner alleges that the noncompetitive appointments of former FEC employees to positions at GAO constitute prohibited personnel practices. The appointments at issue involve positions in HCO as a PT-III Management and Program Analyst, two appointments to PT-II Human Capital Specialist positions, and an appointment as a PT-III Human Capital Specialist. Petitioner currently fills a PT-III band position in the HCO and does not allege that he would have applied for any of the positions at issue if they had been competitively posted.

GAO acknowledges that Petitioner has met the first and third requirements of 4 C.F.R. §28.18(a),<sup>3</sup> as he is a current employee of GAO and subsequent to filing a charge received a Right to Petition Letter from PAB/OGC. Agency Memorandum at 5. GAO asserts, however, that Petitioner was not “affected adversely” by a GAO action or inaction (citing *Warth v. Seldin*, *supra*). *Id.* at 4-5. In *Warth* the issue was whether the petitioners had met the threshold requirement to have standing in Federal court. The Court therein held that a complainant must “clearly 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” within the meaning of Article III of the Constitution.<sup>4</sup> *Warth v. Seldin*, 422 U.S. at 518. To be a proper party, “the plaintiff [] must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.” *Id.* at 501. This requires the party not only to allege a personalized injury, but also to show that the injury occurred as a result of some activity by the defendant that violated the constitution or a Federal statute that allowed the party a private right of action. *GS13/14 Management Council* (citing *Flast v. Cohen*, 392 U.S. 83 (1968), and *Warth v. Seldin*, 422 U.S. 490 (1975)) at 6.

The Board has previously clarified that Article III of the United States Constitution “provides a much different jurisdictional base for standing before the Federal courts than that required by the

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<sup>3</sup> 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.

<sup>4</sup> Article III of the Constitution invokes the Federal court’s jurisdiction when the plaintiff has made out a “case or controversy” between himself and the defendant. This is the threshold question in every Federal case, determining the power of the court to entertain the suit. *Warth*, 422 U.S. at 499.

Civil Service Reform Act for standing before the FLRA, and hence, than the GAOPA provides for standing before the PAB.”<sup>5</sup> *Id.* at 6.

In *GS-13/14 Management Council*, the Board determined that the traditional rule of standing evolved and did not require an injury in fact but “merely a showing of immediate adverse effects” as a result of the alleged prohibited personnel practice. *Id.* The Board held that petitioners had standing pursuant to Order 2711.1 that gives employee groups the express right to request a statement of policy and guidance from the Board on labor-management relations matters. The Board found that the immediate adverse impact was the chilling effect of language in Order 2711.1 with the threatened injury being the preclusion of the respective organizations’ employees/members from the rights and benefits of collective bargaining.

In another case, *Scott v. GAO*, Docket No. 53-701-11-84 (10/24/85), which involved a challenge to the standing of an individual employee, the Board asserted jurisdiction over the petitioner’s claim of reprisal involving the receipt of a low score on one of eight job dimensions in his performance appraisal. As to petitioner’s other allegations in that case, the Board concluded that there was no indication that any personnel actions were taken against him; thus, the Board emphasized the lack of Agency action against petitioner in *Scott*.

For purposes of prohibited personnel practice jurisdiction, the Civil Service Reform Act defines “personnel action” to include: (i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of [Title V (adverse action)]; (iv) a reinstatement; (v) a restoration; (vi) a reemployment; (viii) a performance evaluation under chapter 43 of [Title V]; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and (x) any other significant change in duties or responsibilities which is inconsistent with the employee’s salary or grade level. 5 U.S.C. §2302(a)(2)(A). These are incorporated by reference into the GAOPA.

PAB/OGC argues that the applicable standard to allow Petitioner to assert standing is whether he has suffered some threatened or actual injury.<sup>6</sup> However, as in *Scott*, Petitioner must also allege that the Agency took or failed to take, or threatened to take or fail to take, a personnel action

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<sup>5</sup> The Civil Service Reform Act of 1978 established a complex network of Federal personnel agencies over which GAO had auditing duties. Pub. L. No. 95-454, 92 Stat. 1111 (1978). Because of the potential for conflict of roles between officials in GAO and officials in the Federal agencies subject to GAO oversight, the General Accounting Office Personnel Act was enacted, which established a personnel system at GAO that was independent of the Executive branch. 31 U.S.C. §731 *et seq.*; *see also General Accounting Office v. GAO Personnel Appeals Board*, 698 F.2d 516 (D.C. Cir. 1983).

<sup>6</sup> PAB/OGC asserts that the appropriate legal standard is “whether the person has suffered some threatened or actual injury” and requests the Board to issue a policy statement regarding what the legal standard is for determining whether an employee has standing to bring a claim against GAO. Amicus Brief at 2. However, the issue raised by PAB/OGC can be more appropriately resolved by other means. It is more properly addressed in the context of a case rather than in a request for policy decision. *See PAB/OGC v. GAO*, Dkt. No. 09-03 (2/18/10). It is unnecessary to reach the broader issue in this instance because there is sufficient basis to resolve the issues in this case without issuing a policy decision.

against him personally for a prohibited reason. In this case there is no need to address the issue of whether Petitioner has suffered a threatened or actual injury, which is necessary for standing, since he failed to allege that a personnel action was taken against him.

Petitioner herein has failed to allege that he was adversely affected by GAO either (1) taking or failing to take, or (2) threatening to take or to fail to take, any prohibited personnel action against him. The alleged injury to him does not derive from a personnel action of the type encompassed by the statute. Petitioner alleged improper appointments of four new HCO employees. He failed, however, to allege any prohibited personnel action by GAO that adversely affected him with either an actual injury or a threatened injury. Board regulations do not give individual employees the authority to file petitions premised on potential harm to other persons. Rather PAB/OGC has the authority to investigate matters when “information comes to the attention of the General Counsel suggesting that a prohibited personnel practice may have occurred, exists or is to be taken.”<sup>7</sup>

### CONCLUSION

Based on the foregoing, I conclude that Petitioner lacks standing in this matter since he failed to satisfy 4 C.F.R. §28.18(a) as he did not allege any claim that he was adversely affected by the GAO action or inaction or threatened action or inaction that is within the Board’s jurisdiction.

Accordingly, the Motion to Dismiss is granted.

**SO ORDERED.**

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<sup>7</sup> The regulations provide for the General Counsel to prepare a report and take other appropriate action, if necessary, under 4 C.F.R. §28.131(b)-(d). *Scott, supra*, at 4.