

George Jones v. U.S. Government Accountability Office

Docket No. 08-04

Date of Decision: December 18, 2008

Cite as: Jones v. GAO, No. 08-04 (12/18/08)

Before: Mary E. Leary, Administrative Judge

Headnotes:

Summary Judgment

Non-selection

MEMORANDUM AND ORDER

The Respondent, Government Accountability Office (GAO), filed a Motion for Partial Summary Judgment on October 10, 2008. Petitioner filed an Opposition on October 31, 2008. GAO filed a reply on November 7, 2008. On December 10, 2008, Petitioner filed an Unopposed Motion for Continuance of the hearing originally scheduled to begin on January 26, 2009. For the reasons set forth below, the Motion for Partial Summary Judgment is denied. The Motion for Continuance is granted. Both parties should be prepared for hearing beginning March 2, 2008, in accordance with the schedule set below.

The Motion for Partial Summary Judgment

Respondent argues that it is entitled to summary judgment on the following claims:

Counts I and III – GAO failed to select Petitioner as the result of reverse race discrimination in violation of Title VII of the Civil Rights Act of 1964 and 5 U.S.C. §2302(b)(1)(A);

Counts II and IV – Petitioner’s non-selection was the result of age discrimination in violation of the Age Discrimination in Employment Act (“ADEA”) and 5 U.S.C. §2302(b)(1)(B);

Count V – GAO willfully obstructed Petitioner’s right to compete for the GS-15 promotion in violation of 5 U.S.C. §2302(b)(4); and

Count VIII – GAO violated a law, rule, or regulation implementing or directly concerning the merit systems principles in not selecting Petitioner in violation of 5 U.S.C. §2302(b)(12).

Noteworthy is the fact that the Agency did not move for summary judgment on the remaining Counts VI and VII which allege that the Agency committed a prohibited personnel practice when it, in an arbitrary, capricious and discriminatory manner, pre-selected “the successful candidate for the GS-15 Audit Forums Manager position” and when it decided “to define the scope and manner of competition, as well as the eligibility requirements for the GS-15 Audit Forums Manager, to the detriment of the Petitioner.”

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Cateret*, 477 U.S. 317, 322 (1986). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

In this case, I find that there is an insufficient basis for granting summary judgment because there are still issues regarding the allegation that the Agency pre-selected Mr. Escalante for the GS-15 Audit Forums Manager position. While not fully analyzed by Petitioner in his Opposition, there appears to be some question regarding when Mr. Escalante was placed into the GS-15 position and when he took on the duties of the Audit Forums Manager on a full-time basis, specifically, whether he was selected for the position by Elliot Smith prior to the announcement being posted in December 2001. *See e.g.*, Resp. Ex. 5 at 52. Further, I find that the selection of Mr. Escalante by Gloria Jarmon was based mainly on subjective criteria and thus requires weighing witness credibility rather than solely relying on pleadings and affidavits.

While not conclusive for denying the Agency’s Motion for Summary Judgment, the fact that the Agency did not move for summary judgment on the two allegations regarding pre-selection indicates that the Agency found that those issues are not ripe for summary judgment. Since the remaining issues regarding whether Mr. Escalante was pre-selected may be related to the other claims alleged in Petitioner’s case — *i.e.*, whether Mr. Escalante was selected based on race and age, whether Petitioner was deceived or obstructed from competing for the GS-15 position, whether Mr. Escalante’s selection was in violation of a law, rule or regulation implementing the merit systems principles — I find that these issues bear further development and may involve questions of witness credibility which can best be resolved in the context of an evidentiary hearing. They are not suited to resolution based upon the pleadings and supporting papers alone.

Accordingly, the Respondent’s Motion for Partial Summary Judgment is hereby **denied**.

Case Schedule

The Petitioner’s unopposed motion for a continuance is granted as follows. The parties shall proceed to meet the following schedule:

A pre-hearing conference will take place by telephone on **Monday, February 23, 2009 at 1:00 p.m. (EST)**.

Pre-hearing submissions must be filed by **Wednesday, February 18, 2009**, with simultaneous service on the opposing party. To the extent possible, the parties are encouraged to submit joint filings. The pre-hearing submissions include:

1) List of Proposed Witnesses—The list shall include a brief summary of the subject matter of the proposed testimony of each witness, along with each witness' address, telephone number and, if applicable, current employer.

2) List of Proposed Hearing Exhibits and Binders of Exhibits—The exhibits should meet the requirements set forth in the Board's regulations, 4 C.F.R. §28.56. Each party must supply the Board with four copies of the exhibits, which includes a copy for presentation to witnesses during the course of testimony.

The evidentiary hearing will commence at 9:30 a.m. on **Monday, March 2, 2009** and continue as necessary on consecutive business days. The hearing will take place in the hearing room of the Personnel Appeals Board, 820 1st Street, NE, Suite 560, Washington, DC.

SO ORDERED.