

Judy T. Lasley v. U.S. Government Accountability Office

Docket No. 08-02

Date of Decision: January 20, 2010

Cite as: Lasley v. GAO, No. 08-02 (1/20/10)

Before: Paul M. Coran, Member, for the Board; Mary E. Leary, Chair*

Headnotes:

Abuse of Discretion

Adverse Inference

Appeals to Full Board

Credibility

Disparate Treatment

Discovery

Prima Facie Case

Race Discrimination

Standard of Review

DECISION ON APPEAL FROM INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

This matter is before the Personnel Appeals Board (PAB or the Board) on Appellant Judy T. Lasley's appeal from the May 28, 2009 Initial Decision (ID), which found that Respondent Government Accountability Office (GAO or the Agency) did not discriminate based on race or age, or retaliate against her with regard to her out-of-cycle performance appraisal, non-promotion to Band II, end-of-year performance appraisal, and performance award. Appellant also challenged the ID's conclusion that these same actions constituted various prohibited personnel practices. Further, she appealed the Ruling on Motion to Compel dated August 8, 2008 (Ruling), which held that any discovery requests subsequent to the initial requests to the opposing party must come within the scope of additional follow-up discovery to

* Vice-Chair Steven H. Svartz, who wrote the Initial Decision, did not participate in the appeal herein.

the initial requests. Throughout these proceedings, Appellant has been represented by the Personnel Appeals Board Office of General Counsel (PAB/OGC).

The Board affirms both the ID and the Ruling, and finds that Appellant failed to demonstrate that either decision was arbitrary, capricious or an abuse of discretion, or otherwise inconsistent with law. Therefore, Appellant has established no basis to overturn the decisions of the Administrative Judge.

I. INTRODUCTION

A. Factual Background

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

Appellant, an African-American woman over 40, began her employment at GAO in 1986 as a GS-4 Management Assistant Co-op Student. Hearing Transcript (Tr.) 208; Petition, Answer at 2. Upon graduation from college she worked at GAO as a GS-7 Evaluator and was promoted to GS-9 shortly thereafter. Tr. 209-12. After GAO converted to a broad banded system in 1989, Ms. Lasley was designated as a Band ID (Developmental) Evaluator (now called Analyst); she was promoted to Band IF (Full Performance) within a year. Tr. 212. From 1993 through 2001, Appellant applied for promotion to Band II four times and was never selected. Answer ¶2; ID at 2.

Appellant worked on GAO's Acquisition and Sourcing Management (ASM) team as a Band IF Analyst during the times here at issue. The ASM team was established in 2001 and was headed by then-Managing Director Jack Brock, a white male. Tr. 898; Respondent's Exhibit (R. Ex.) 17. Mr. Brock served as the selecting official for promotions to the Band II positions in ASM. Tr. 907. At some point after not having been selected for promotion in 2001, Appellant complained to Mr. Brock and Ronald Stroman, then-Managing Director of GAO's Office of Opportunity and Inclusiveness (O&I), about the lack of African-American analysts and managers in ASM and the negative effect of ASM performance appraisal and promotion practices on African-Americans.¹

¹ As the AJ noted (at 3 n.3), the record is unclear as to the timing of Appellant's complaints to Messrs. Brock and Stroman:

[Appellant] testified that she did not know when she had the conversation with Mr. Brock about the lack of diversity in ASM management. Tr. 444-45. She also testified that she spoke with Mr. Brock and Mr. Stroman about her concerns at the end of the FY 2001 performance cycle. Tr. 228. She further noted that she "probably" began expressing her concern about the lack of diversity in ASM management with both individuals in 2001. Tr. 229. She also testified that she spoke with Mr. Stroman about the treatment of African-Americans in ASM sometime after the FY 2002 performance cycle, and had previously raised her concerns with Mr. Brock. Tr. 217-18. She further testified that she spoke to Mr. Stroman after not being promoted in 2002 and that he then talked to Mr. Brock. Tr. 283-84.

From January 1, 2002 to September 30, 2002, Appellant's Designated Performance Manager (DPM) was Michelle Macklin, a white female, who was a Band III Assistant Director in ASM. During that period, Appellant worked on several engagements, including the Postal Service Office Supply Contract engagement. Tr. 1005-06; R. Ex. 17.

For FY 2003, a new performance appraisal system for Analysts known as the "Competency Based Performance System" (CBPS) took effect. Tr. 631, 642. John Needham (a white male) was the Project Director during the development and validation of the CBPS. Tr. 631-32; R. Ex. 17. In late October 2002, Mr. Needham joined ASM as a Band III Assistant Director. Tr. 632.

Mr. Needham served as the DPM for Appellant and several other Analysts for FY 2003. Tr. 639-40. During November 2002, he met individually with each of these Analysts including Appellant, to set their expectations. Tr. 641-42. He also explained the performance standards under the CBPS and discussed how the standards had changed from those under the previous performance management system. Tr. 642. In so doing, he specifically explained that the new system was focused more on results than on simply following policies and procedures, and he told the Analysts that "there was a considerable raising of the bar in terms of what was expected for performance." Tr. 642-44.

In FY 2003, Appellant continued to work on the Postal Service Supply Contract engagement as well as other engagements, including the Small Business Size Standard engagement. Tr. 232, 304. For the Small Business engagement, David Cooper was the Director, Mr. Needham was the Assistant Director, Russ Reiter was the Analyst-in-Charge (AIC), and Ms. Lasley was the Analyst. Tr. 649.

In March 2003, GAO announced four mid-cycle Headquarters ASM promotion opportunities to Band II. Answer ¶1; R. Ex. 8. Appellant applied for promotion. Answer ¶10. Mr. Needham had planned to hold a mid-point feedback session with Appellant in late March 2003. Tr. 670. Shortly before the feedback session, Harold Howard, ASM's Human Capital Manager, told Mr. Needham that Ms. Lasley was applying for promotion and that Mr. Needham therefore needed to prepare a formal out-of-cycle appraisal for her as part of the application process. *Id.* Appellant was given a rating of "exceeds expectations" in one competency (Collaborating with Others), "meets expectations" in seven competencies, and "below expectations" in one competency (Thinking Critically). R. Ex. 5. Appellant did not receive a promotion during the Spring 2003 promotion cycle. Answer ¶10.

At the end of the rating period, Appellant received a rating of "meets expectations" in six competencies, "exceeds expectations" in one competency (Collaborating with Others), and "below expectations" in two competencies (Thinking Critically and Achieving Results). R. Ex. 19. As a result of her ratings "below expectations" in two competencies, she did not receive a performance award. Tr. 685.

The ID concluded that these discussions constituted protected activity for purposes of the retaliation claim, but that the "record does not contain sufficient indicia of nexus based on timing alone to establish this prong of the requisite proof of retaliation." ID at 32-33.

Appellant filed a Petition with the PAB on April 21, 2008 and a hearing was conducted from October 27 through October 31, 2008. The Initial Decision was issued on May 28, 2009 and Appellant timely appealed that Decision.

B. The Decisions Being Appealed

1. *The Initial Decision*

The ID found that Appellant failed to show by a preponderance of the evidence that GAO discriminated against her based on race, age, or in retaliation for her engaging in protected activity; or that the Agency committed prohibited personnel practices when it did not select her for promotion in April 2003, issued unsatisfactory performance appraisals to her in April 2003 and December 2003, and did not provide her a performance award.² Specifically, the ID concluded that Appellant failed to rebut the Agency's legitimate nondiscriminatory reason for its actions, that being Appellant's poor performance.³

The Agency successfully provided persuasive evidence through Appellant's supervisors that she had problems accomplishing her work with regard to the performance standards for the competencies of Thinking Critically and Achieving Results. For example, the narrative in Appellant's out-of-cycle performance appraisal describes the bases for the "below expectations" rating which include:

² The ID determined that Appellant's claims that the Agency had committed prohibited personnel practices could be analyzed under the discrimination and retaliation standards discussed in that Decision. ID at 49. Following that analysis, the ID found that Appellant had failed to prove that the Agency committed any prohibited personnel practices. ID at 49-53. Regarding claims of prohibited personnel practices, Appellant argues that "based on the reasons supporting her discrimination and retaliation claims, the Decision erred with regard to finding that GAO did not violate 5 U.S.C. §§2302(b)(1)(A) and 2302(b)(1)(B)." Appeal at 44-45. Further, "with regard to the retaliation claim under §2302(b)(9), the Appellant contends that [the AJ] erred in finding that her 2003 ratings, nonselection, nonreceipt of an award and lack of training and mentoring opportunities did not constitute prohibited personnel practices within §2309(b)(9)," and within §2302(b)(12). Appeal at 45. Appellant provided no other support for her contention that the ID should be reversed on these claims. Accordingly, the ID's conclusion that the Agency did not commit any prohibited personnel practices is also affirmed. ID at 49-53.

³ Appellant also raised a claim that she was discriminated against when she was denied training, mentoring and performance feedback. The ID concluded that she did not prove that she had been denied training, mentoring, or feedback, or that terms, conditions, or privileges of employment were affected by any such denial. ID at 46. The AJ specifically concluded that Appellant took 14 training courses for 63 credits and 16 courses for 67 credits in 2002 and 2003 respectively; he also found that Petitioner "produced no evidence that anyone at GAO denied her training or discouraged her from seeking and obtaining training." ID at 47. Accordingly, the ID concluded that Appellant's "claims that GAO discriminated against her based on her race and age by denying her training, mentoring, and performance feedback lack merit." ID at 49. Appellant also contends that the ID did not address the claim that her lack of training, mentoring and feedback constituted reprisal for engaging in protected activities. Appeal at 15-16. We affirm the AJ's findings that Appellant has not provided any evidence that she was denied training, mentoring or feedback or that it affected the terms, conditions or privileges of her employment. ID at 46-49. Based on a review of the record, this reprisal claim must also fail.

the failure to develop a key issue regarding the proposed one-year certification rule, a lack of analysis or conclusions regarding databases, and a failure to be proactive in gathering information from routine sources. The appraisal's narrative established that Ms. Lasley had not analyzed various types of information to identify the full scope of issues or draw logical conclusions.

ID at 22; *see* R. Ex. 5 at 2. Regarding the FY 2003 end-of-year rating, Appellant was rated "below expectations" in the competency of Achieving Results because of the "poor quality of her written work and her failure to keep her AIC informed about important information relating to the engagement." ID at 45; *see* R. Ex. 19 at 4. The narrative of her 2003 performance appraisal also describes that in the competency of Thinking Critically she was inconsistent in "gathering and considering relevant information which led to an error in correspondence with an official from the Postal Service." ID at 45; *see* R. Ex. 19 at 4.

The evidence offered by Appellant included the April 2008 Ivy Report, which found there was a statistically significant difference between the performance ratings of African-American and Caucasian GAO employees. The bulk of the rest of the evidence offered by Appellant consisted of her own self-serving statements regarding her performance. The evidence provided was not sufficient to rebut the Agency's articulated reason and testimony to the effect that Appellant's performance was "below expectations" as to those two performance standards. *See* ID at 22-26.

Appellant also appeals the finding made in the ID that no adverse inference was warranted as a result of the Agency's failure to provide the application packages and merit selection files for the Spring 2003 Band II promotions in ASM. Despite having been told that a complaint was filed, GAO did not properly maintain the application packages for these promotions. As a consequence, Appellant requested that the Board:

should infer that the merit selection packages from the April 2003 promotion process would have shown her to be comparably qualified for promotion into one of the four vacant Band II positions in ASM as others who applied and/or were selected and placed into the two subsequently filled positions.

Appeal at 46. However, the AJ determined that Appellant did not present any evidence or even argue that the Agency acted in bad faith or intentionally destroyed the documents. ID at 36 n.34. He further concluded that "[e]ven assuming, without deciding, that an adverse inference may be warranted in some circumstances" absent bad faith or intentional destruction of documents, in this case Appellant failed to present "evidence to demonstrate that the missing documents . . . contained any information that would support her claim that she should have been promoted to Band II in the Spring of 2003."⁴ Accordingly, no adverse inference was warranted.

⁴ The AJ noted in particular that while the application packages themselves were not maintained, the record did contain a chart showing the Spring 2003 out-of cycle ratings for the ASM promotion applicants and selectees as well as their individual FY 2002 performance appraisals. These documents showed that Appellant's rating was significantly lower than those of the selectees. *See* ID at 38 n.37, 39.

2. *Ruling on Motion to Compel*

The August 8, 2008 Ruling on Motion to Compel was a result of a discovery dispute arising from Appellant having served Petitioner's Second Set of Interrogatories and Request for the Production of Documents upon GAO one month after the initial request was served. The supplemental requests were served four days after GAO's response to the initial request and five days before the close of discovery. The supplemental requests included a request for Agency-wide statistics and reports that Appellant could have sought as part of her first discovery request; they did not evolve from PAB/OGC's review of the response to initial discovery. Ruling at 8. Appellant's Motion to Compel Discovery was denied because it was determined that Appellant's supplemental discovery requests did not comply with Board regulation. Section 28.42(d) provides that "[a]ny discovery requests following the initial request shall be served within 10 days of the date of service of the prior response. . . ." 4 C.F.R. §28.42(d) (emphasis added). The Ruling concluded that the supplemental set of requests must be "follow-up" requests—*i.e.*, "based on the responses received" as a result of the initial discovery requests. Ruling at 7.

C. The Parties' Arguments

Appellant argues that the ID should be reversed on the grounds that the AJ: did not properly consider credibility issues; did not give the evidence the right weight; erroneously interpreted law; and abused his discretion.

Appellant argues that she successfully established a *prima facie* case of discrimination, retaliation and prohibited personnel practices regarding her performance appraisals, non-selection and failure to receive a performance award. She argues that the AJ did not properly consider the Ivy Report, gave improper weight to the Agency's witnesses, and did not make an adverse inference based on the Agency's failure to produce the ASM application packages from the Spring 2003 Band II promotion opportunity in ASM.

She further argues that the AJ's decision on her Motion to Compel should also be reversed. Specifically, she contends that the AJ's ruling is "not supported by the plain language of the regulation and is inconsistent with the practice under the prescriptive Federal Rules of Civil Procedure." Appeal at 48.

The Agency argues that Appellant's Brief merely disagrees with the AJ's findings and conclusions, without identifying "any findings unsupported by substantial evidence in the record or any errors of law" in the ID. Response at 9. In GAO's view, therefore, Appellant's arguments are insufficient to reverse the ID.

After careful review, we agree with the Agency and see no reason to reverse the very detailed, thorough, and legally sound ID.

II. DISCUSSION

Pursuant to the Board's regulations:

In conducting its examination of the initial decision, the Board may substitute its own findings of fact and conclusions of law, but the Board generally will defer to demeanor-based credibility determinations made in the initial decision.

4 C.F.R. §28.87(g). Further, the Board regulations state that in reviewing an initial decision the Board will consider whether:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed;
- (2) The initial decision is based on an erroneous interpretation of statute or regulation;
- (3) The initial decision is arbitrary, capricious or an abuse of discretion, or otherwise not consistent with law;
- (4) The initial decision is not made consistent with required procedures and results in harmful error.

Id.

A. The AJ's credibility determinations should be given deference.

Mere disagreement with the AJ's factual findings and legal conclusions does not warrant reversal of an initial decision. A review of the ID herein showed that the AJ did not ignore or dismiss any evidence but considered the record as a whole. Appellant argues that the AJ "erred in wholly accepting the self-serving testimony of GAO officials with regard [*sic*] Ms. Lasley's performance while summarily dismissing or ignoring the evidence that tended to show that its stated rationale was a pretext for unlawful discrimination." Appeal at 29. Appellant argues that the subjectivity inherent in assessing Critical Thinking, and inconsistency in how GAO officials actually viewed Appellant's performance, are sufficient to rebut the Agency's legitimate non-discriminatory reason—*i.e.*, Appellant's poor performance. Appeal at 30-34.

The AJ relied on the testimony of GAO officials who appeared at the hearing and he credited their testimony. In particular, the AJ credited the testimony of Mr. Needham, Appellant's DPM who gave Appellant her performance ratings. ID at 25-27. The ratings were based in part on discussions that Mr. Needham had with individuals who worked with Appellant, including Michele Mackin (white female over 40), a Band II Assistant Director in ASM who had worked with Appellant during the start of the rating period on the Postal Service engagement (Tr. 673-74, 1015); Penny Berrier (white female under 40), the AIC in Boston who had worked with Ms. Lasley on the same engagement (Answer ¶6); and Russ Reiter (white male over 40), the AIC on the Small Business engagement (Tr. 670-71, 833-34); *see* ID at 26. Appellant argues that the AJ should have given credence to the statements of Mr. Reiter, who allegedly did not agree with Mr. Needham giving Appellant a rating of "below expectations." Appeal at 31. However, Mr. Reiter did not testify at the hearing and there is no indication that his testimony

would have supported Appellant's arguments even if he had testified.⁵ Further, Mr. Needham testified that he discussed and resolved this issue with Mr. Reiter at that time. Tr. 833-34. Appellant failed to provide any other evidence or testimony that would cast any doubt on the credibility of the GAO officials who did testify at the hearing. Thus, we have no reason to doubt or second-guess the AJ's findings of credibility.

B. Appellant has not proven abuse of discretion in the conclusion that she failed to establish a *prima facie* case of discrimination.

Appellant contends that the AJ should have found that she established a *prima facie* case with respect to her allegations of discrimination.⁶ Appeal at 20. The ID assumed that Appellant established a *prima facie* case of race and age discrimination regarding her performance appraisals as well as her 2003 awards claims. ID at 21, 44. It found that Appellant had failed to establish a *prima facie* case with respect to her other claims. However, even then, the ID thoroughly considered and discussed Appellant's allegations with the assumption that she had met the elements of a *prima facie* case and concluded that Appellant failed to rebut the Agency's legitimate non-discriminatory reason. Appellant argues that an inference of discrimination should have been made based on a Report issued by the Ivy Group, which found that there was a statistical difference between the performance appraisal ratings of African-American and Caucasian employees at GAO. Appeal at 30-31, 34-36. She argues that the inference should be made in order to prove a *prima facie* case of discrimination or to show pretext of discrimination.

However, the issue of whether a *prima facie* case of discrimination was established became moot once the Agency articulated a legitimate non-discriminatory reason for its actions. *Jagiello v. Wolfe*, 2009 WL 3126171 at 7 (D.D.C.) (Aug. 13, 2009) (because defendant proffered legitimate, nondiscriminatory explanations for challenged actions, the issue of whether he had established *prima facie* case was moot) (citing *U.S.P.S. v. Aikens*, 460 U.S. 711, 716 (1983) ("Where the defendant has done everything that would be required . . . if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant")). Once the Agency has articulated a legitimate non-discriminatory reason for its actions, the burden is then on Appellant to show that the articulated reason is a pretext for discrimination. Even assuming that the AJ incorrectly determined that Appellant failed to establish a *prima facie* case, the error would be harmless because the AJ did assume that a *prima facie* case was established and discussed each allegation and whether Appellant had successfully rebutted GAO's proffered

⁵ Mr. Reiter was not included in Petitioner's list of proposed witnesses submitted prior to the hearing and Appellant did not ask to call him as a rebuttal witness.

⁶ Appellant incorrectly characterizes the ID by arguing that the AJ "also erred in requiring comparator evidence," *i.e.*, evidence comparing Appellant's performance and appraisal to that of a similarly situated employee not in Appellant's protected class. Appeal at 37. However, the AJ did not state such a requirement. The ID states that "Petitioner has not shown that her ratings were erroneous or that similarly situated employees received higher ratings. . . . [S]he did not offer any testimony, other than her own, to attempt to show that her ratings were erroneous. An employee cannot establish pretext simply based on the employee's own assessment of his or her performance." ID at 23 (citations omitted). The AJ concluded that Petitioner had failed to provide any evidence that she was not given accurate performance ratings, not that she was required to have "comparator evidence."

reasons. ID at 21-32, 34-35, 38-46. After a thorough analysis of each of the allegations, the AJ concluded that she had not.

Appellant argues that the AJ erred in concluding that the Ivy Report does not support her claim that her alleged poor performance in Thinking Critically and Achieving Results was a pretext. Appeal at 34-36. She vigorously argues that the statistics in the Ivy Report raise an inference of discrimination; however, the ID concluded that those statistics were not sufficient to raise an inference nor were they sufficient to rebut the Agency's legitimate non-discriminatory reason that Appellant's poor performance resulted in the lower performance appraisal rating. ID at 24-25. The Ivy Report does not conclude that there was discrimination. The AJ found that the Report "contain[ed] no proof" regarding Ms. Lasley's performance or her ratings. ID at 25. Appellant's disagreement with the weight given to the Ivy Report by the AJ does not support reversal of the ID.

As discussed in the ID, statistical evidence, standing alone, is insufficient to prove an individual claim of disparate treatment. ID at 25. As the AJ noted, "'individual *disparate* treatment cases, statistical evidence is less significant because the ultimate issue is whether the *particular* plaintiff was the victim of an illegitimately motivated employment decision'." ID at 25 (quoting *Davis v. Ashcroft*, 355 F.Supp.2d 330, 343 (D.D.C. 2005) (emphases in original) (internal citation omitted)). An individual must still meet the well-established standards set out by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), in order to show that discrimination or retaliation occurred. The ultimate burden remains with Appellant to prove that the Agency discriminated against her. The AJ relied on the testimony of GAO officials who supervised Appellant. ID at 29-32. Appellant provided no evidence to support her allegations that the performance ratings or denial of an award were based on discrimination, retaliation or prohibited personnel practices, or that they were even made erroneously. Appellant, therefore, failed to prove the Agency's articulated reason was pretext and that the AJ abused his discretion in not finding that Appellant established a *prima facie* case.

C. Appellant has not proven that the AJ abused his discretion in denying an adverse inference.

Appellant contends that the AJ abused his discretion in deciding not to draw an adverse inference against GAO because the Agency failed to produce the application packages and merit selection files for the Spring 2003 Band II promotion opportunity in ASM. Appeal at 46-47. Appellant does not cite to any error of law or abuse of discretion by the AJ. She fails to point to any law, rule or regulation which would require the AJ to draw an adverse inference against GAO. As fully discussed in the ID, there is no evidence that the records were intentionally destroyed. ID at 36-38; *see also* ID at 37 n.36. Nor is there any doubt, as the AJ noted, "that GAO should have maintained the records . . . and that its failure to produce them deprives the PAB of relevant material in this proceeding." ID at 37. Even assuming that the records were destroyed in bad faith, Appellant has not stated that the application files contained any other documents or information that would support her claim. In fact, the Agency produced documents from the Human Capital Office regarding the applicants and selectees, including their performance ratings for FY 2002 and a chart containing the FY 2003 out-of-cycle ratings for the ASM promotion applicants and selectees. These documents support the conclusion that Appellant was not better qualified than the selectees. ID at n.37; R. Exs. 11, 12. Accordingly, Appellant has failed to

prove that the AJ abused his discretion when he did not draw an adverse inference from GAO's failure to produce the application packages.

D. The AJ did not erroneously interpret statute or regulation.

Appellant also alleges that the AJ erred when he denied her Motion to Compel the Agency to respond to Appellant's supplemental discovery requests. Appellant claims that the AJ's interpretation regarding the PAB's discovery regulations was inconsistent with law. Appeal at 49-50. The AJ found that the regulation allows parties to submit discovery requests after the initial requests were served only as "follow-up" requests. As fully explained in the Ruling on Motion to Compel, the Board's regulations were intended to be consistent with those of the Merit Systems Protection Board (MSPB) in this regard as detailed in the history of the PAB's regulations. Ruling at 5. The MSPB has consistently held that follow-up discovery requests refer only to those which are in response to the discovery responses received. Ruling at 5-7. This view is also consistent with the Board's own *Guide to Practice Before the Personnel Appeals Board* (PAB Guide) which states that "[f]ollow-up discovery requests must be served within 10 days of service of the prior response." PAB Guide at 12. Accordingly, we find the AJ's ruling to be consistent with Board regulations and we affirm the conclusion that "section 28.42(d)'s reference to 'discovery requests following the initial request' applies only to those supplemental discovery requests that are based on the responses received to the initial requests." Ruling at 7.

CONCLUSION

Based on the foregoing, the Initial Decision is supported by substantial evidence in the record viewed as a whole. Appellant has failed to show that the Initial Decision was arbitrary, capricious or an abuse of discretion, or otherwise inconsistent with law. Accordingly, the Initial Decision is affirmed. We also affirm the August 8, 2008 Ruling on Motion to Compel.

SO ORDERED.