

PAB/OGC v. U.S. Government Accountability Office

Docket No. 09-03

Date of Decision: February 18, 2010

Cite as: PAB/OGC v. GAO, No. 09-03 (2/18/10)

Before: Per Curiam

Headnotes:

Motions Practice

PAB General Counsel

PAB Regulations

Statements of Policy and Guidance

DECISION ON REQUEST FOR A STATEMENT OF POLICY OR GUIDANCE

The Personnel Appeals Board Office of General Counsel (PAB/OGC) has filed a Request for a Statement of Policy or Guidance (Request) under section 28.155 of the Board's Regulations (4 C.F.R. §28.155). The PAB/OGC requests that the Board issue a statement of policy or guidance as to whether the Government Accountability Office (GAO or the Agency) “may lawfully refuse a PAB/OGC request to process a travel voucher for a witness [who was the named Petitioner and a retired GAO employee] to attend a hearing on behalf of the PAB/OGC in an action involving the prosecution of a prohibited personnel practice against GAO.” Request at 1. For the reasons set forth below, the Board denies the Request.

Positions of the Parties

PAB/OGC

PAB/OGC notes that its Request for a Statement of Policy or Guidance arises out of a pending Petition in *Gill v. GAO*, Docket No. 08-07 (*Gill*), alleging that GAO committed certain prohibited personnel practices against the Petitioner in that case. According to the Request, GAO refused to authorize the expenditure of appropriated funds for Petitioner's travel to Washington, D.C. to testify at the hearing in his case.

In asserting that GAO is required to pay Petitioner's travel expenses, PAB/OGC relies on section 28.26(d) of the Board's regulations¹ and asserts that payment of travel expenses in the circumstances presented would be consistent with the practices of the Office of Special Counsel (OSC) and the Federal Labor Relations Authority (FLRA). Request at 2-3. Additionally, PAB/OGC contends that because the claims at issue arose during the course of Petitioner's employment, his subsequent retirement prior to the hearing should not affect the authority of the PAB/OGC to pay for travel expenses. *Id.* at 4. Further, PAB/OGC alleges that GAO's refusal to pay Petitioner's travel expenses "threatens the independence of the operation of the [PAB/OGC's] office" and that having GAO decide "whether to pay the litigation expenses of the [PAB/OGC] in a case where GAO is the respondent is plainly a conflict of interest[.]" *Id.* at 4-5.

According to the PAB/OGC, a statement of policy or guidance "is warranted because there are no other means to address the important question presented here and issuance of a policy statement by the Board will promote the purposes of the GAO Personnel Act [GAOPA]." Request at 5 (citing 4 C.F.R. §§28.155(a) and (f)). The PAB/OGC argues that GAO's "assertion of control over [PAB/OGC's] prosecutorial function, by necessity, impedes the Board's independent exercise of jurisdiction over this prohibited personnel practice claim as contemplated by the [GAOPA]," and that resolution of the pending question is necessary to ensure that the Agency "does not improperly interject itself into the operation of the PAB and its General Counsel." *Id.* at 5.

¹ Section 28.26 of the Board's regulations (4 C.F.R. §28.26) states:

Section 28.26 - Witness fees.

The costs involved in the appearance of witnesses in any Board proceeding shall be allocated as follows:

(a) Persons employed by the GAO shall, upon request by the administrative judge to GAO, be made available to participate in the hearing and shall be in official duty status for this purpose and shall not receive witness fees. Payment of travel and per diem expenses shall be governed by applicable laws and regulations.

(b) Employees of other federal agencies called to testify at a Board hearing shall, at the request of the administrative judge and with the approval of the employing agency, be in official duty status during any period of absence from their normal duties caused by their testimony, and shall not receive witness fees. Payment of travel and per diem expenses shall be governed by applicable laws and regulations. A party planning to call an employee of another federal agency as a witness shall promptly notify the administrative judge of the need to submit to the federal agency a request that the employee be granted official duty status. In the event that the employing agency refuses the request to release the employee-witness in an official duty status, the employee-witness may be paid a witness fee in accordance with paragraph (c) of this section.

(c) Witnesses who are not covered by paragraphs (a) or (b) of this section are entitled to the same witness fees as those paid to subpoenaed witnesses under 28 U.S.C. 1821. The fees shall be paid, in the first instance, by the party requesting the appearance of the witness, subject to a subsequent decision otherwise in accordance with §28.89, concerning the award of attorneys fees and costs. Such fees shall be tendered to the witness at the time the subpoena is served, or, when the witness appears voluntarily, at the time of appearance. A federal agency or corporation is not required to tender witness fees in advance. Payment of travel and per diem expenses shall be governed by applicable law and regulation.

(d) When the General Counsel is the petitioner or is representing the petitioner, the General Counsel shall pay the witness fees and arrange for the travel and per diem expenses that are required by paragraph (c) of this section.

Further, citing 4 C.F.R. §28.155(c), the PAB/OGC contends that resolution of this question will have general applicability. According to the PAB/OGC, resolution of this question "should preclude any future disputes when the [PAB/OGC] seeks travel expenses for nonfederal witness petitioners[.]" although the PAB/OGC acknowledges that *Gill* "is apparently the first case in which this question has arisen[.]" *Id.*

GAO

GAO states that "the impetus" for the filing of the Request "was a disagreement between GAO and the PAB/OGC over payment of [Petitioner's] travel expenses" in *Gill*. Response at 2. GAO asserts that "[t]he question before the Board is whether it is legal to pay the travel expenses of a Petitioner who is not a federal employee to attend a hearing on the merits of his claim at which he will testify on his own behalf." *Id.* at 1. According to GAO, "it is illegal to pay the travel expenses associated with a Board hearing for a Petitioner in [these] circumstances[.]" *Id.* at 2.

Relying on a decision by the Comptroller General in *Matter of: Gracie Mittelsted—Expenses of Travel to Attend Merit Systems Protection Board Hearing*, B-212292 (Oct. 12, 1984) (*Mittelsted*), GAO believes that it is precluded from paying the travel expenses of a non-federal employee in his own case against the Agency. Response at 3-4. GAO also contends that its view is supported by section 28.26 of the Board's regulations, and that the procedures of the OSC and the FLRA relied on by the PAB/OGC do not authorize GAO to pay Petitioner's travel expenses. *Id.* at 4-6. Finally, with respect to PAB/OGC's conflict-of-interest claim, GAO asserts that "any potential conflict of interest created by this matter has been resolved" because, after PAB/OGC filed its Request, "GAO provided the Board with a separate budget allocation for travel expenses for th[e] fiscal year [and] GAO intends to continue this practice in the future." *Id.* at 2 n.2.

GAO's Response does not address the criteria set forth in 4 C.F.R. §28.155 that are to be used by the Board in determining whether to issue a statement of policy or guidance.

Discussion

Under 4 C.F.R. §28.155, the Board may issue a statement of policy or guidance, upon petition of a person or on its own motion. The regulation states that, in determining whether to issue such a statement, the criteria to be considered by the Board will include, but not be limited to, the following:

- (a) Whether the question presented can more appropriately be resolved by other means;
- (b) Where other means are available, whether a Board statement would prevent the proliferation of cases;
- (c) Whether the resolution of the question presented would have general applicability;
- (d) Whether the question currently confronts the parties as part of their employee-management relationship;

- (e) Whether the question is presented jointly by the parties involved; and
- (f) Whether the issuance by the Board of a statement of policy or guidance would promote the purposes of the [Government Accountability] Office Personnel Act.

The instant Request for a Statement of Policy or Guidance is the first such request made since section 28.155 of the Board's regulations was promulgated in 1993. *See* 58 Fed. Reg. 61988, 61992 (Nov. 23, 1993). In considering the Request, the Board will first address the criteria specifically set forth in the regulation.

The first criterion in section 28.155(a) is whether the question presented can more appropriately be resolved by other means. The question presented is, in essence, whether GAO has the legal authority to pay the travel expenses of a petitioner in a PAB proceeding incurred in connection with his appearance as a witness in his administrative hearing at the Board, when the petitioner is no longer a federal employee.

This question can more appropriately be resolved in the pending proceeding before the Board that gave rise to the Request for a Statement of Policy or Guidance. That proceeding provides the parties with a full opportunity to present their legal positions concerning this question in the context of the particular facts of that proceeding.² As such, consideration of this criterion does not support granting the Request for a Statement of Policy or Guidance.

The second criterion, set forth in 4 C.F.R. §28.155(b), requires consideration of, where other means are available, whether a Board statement would prevent the proliferation of cases. There is nothing to suggest that a Board statement on this issue would prevent a proliferation of cases. Indeed, this appears to be the first time that this issue has been presented before the PAB in its 29-year history. Accordingly, consideration of this criterion does not support issuance of a Board statement.

The third criterion in the regulation is whether the resolution of the question presented would have general applicability. 4 C.F.R. §28.155(c). It is possible that resolution of the question presented could have general applicability. However, even if the resolution of the question presented could set forth generally applicable legal principles and even assuming that those principles permitted payment of travel expenses in certain circumstances, those principles would nonetheless have to be applied in particular factual contexts that would have to be considered before a determination could be made as to whether a specific travel voucher should be processed.

The fourth criterion is whether the question confronts the parties as part of their employee-management relationship. *Id.* at §28.155(d). The question presented in this case specifically concerns an individual who has retired and is no longer a GAO employee. Accordingly, because there is no current employee-management relationship, the question cannot confront the parties as part of such a relationship.

² We take administrative notice that the hearing has been held in *Gill*, that the Petitioner traveled to and testified at the hearing, and that the case is pending decision before the Administrative Judge.

The fifth criterion is whether the question is presented jointly by the parties. *Id.* at §28.155(e). In this case, the question has not been presented jointly by the parties.

Finally, the last criterion specifically set forth concerns whether a statement would promote the purposes of the GAOPA. *Id.* at §28.155(f). Although the PAB/OGC argues that the “issuance of a policy statement by the Board will promote the purposes of the [GAOPA,]” Petition at 5, the PAB/OGC has not demonstrated that the purposes of the GAOPA would be promoted by the issuance of a policy statement. In this regard, the Request for such a statement concerns a procedural and fiscal matter regarding the logistics of a hearing and does not address the essence of the personnel issues raised by the GAOPA. Accordingly, there has been no demonstration that the issuance of a statement on this issue would promote the purposes of the GAOPA.

In sum, upon consideration of the enumerated criteria under section 28.155, we conclude that application of those criteria does not warrant the issuance of a statement of policy or guidance.

Additionally, as referenced above, 4 C.F.R. §28.155 states that in determining whether to issue a statement of policy or guidance, the Board is not limited to considering the specific criteria listed in the regulation. In the circumstances presented, we also note the following relevant consideration.

The specific criteria set forth in 4 C.F.R. §28.155 closely track the criteria used by the FLRA in determining whether issuance of a statement of policy or guidance is appropriate regarding the matters within its jurisdiction. *Compare* 4 C.F.R. §28.155(a) – (f) *with* 5 C.F.R. §2427.5(a) – (f). In addition, the FLRA's regulations provide that the FLRA "ordinarily will not consider a request related to any matter pending before the Authority, General Counsel, [Federal Service Impasses] Panel or Assistant Secretary [of Labor for Labor Management Relations]." 5 C.F.R. §2427.2(b).

In our view, the Board's exercise of its discretion to issue statements of policy or guidance should also be governed by the principle, expressly stated in the FLRA regulations with respect to FLRA proceedings but not specifically enunciated in the PAB regulations for Board proceedings, that the adjudicative agency “ordinarily will not consider a request related to any matter pending” before it. *See* 5 C.F.R. §2427.2(b). Application of this principle provides for efficient administrative case processing, in that requests arising out of particular matters pending in other existing administrative proceedings are best addressed in those proceedings and not in separate inefficient and potentially duplicative proceedings. This principle is also supportive of, and consistent with, the first criterion in both the PAB and the FLRA regulations—namely, that a statement of policy or guidance is not warranted where the question presented can more appropriately be resolved by other means.

The Request for a Statement of Policy or Guidance now pending clearly developed from a matter that is in litigation before the Board—specifically, *Gill*. The opening paragraphs of both PAB/OGC's Request and GAO's Response set forth the origin of the Request: GAO's decision not to authorize appropriated funds for travel of the Petitioner to testify at the hearing in *Gill* because he has retired. Under the circumstances, because the question of travel reimbursement for a retiree-Petitioner arose in the context of a pending case before the Board and because the

specific criteria set forth in section 28.155 have not been met, we believe that this matter does not warrant issuance of a statement of policy or guidance.

Finally, we note that there is nothing in the instant Request for a Statement of Policy or Guidance that alleges that the Petitioner was unable to raise, or was prevented from raising, in his pending case before the Board the issue regarding his ability to be reimbursed for his travel expenses to testify at the hearing in his case. Nonetheless, in light of the denial of the Request for a Statement of Policy or Guidance and absent any other resolution of this matter, the Petitioner is granted 20 days from the date of this Decision to file a motion with the Administrative Judge in his case relating to reimbursement of his travel expenses. If Petitioner timely files such a motion, GAO shall be given a reasonable period of time, to be determined by the Administrative Judge, to file a response if it so chooses. In ruling upon such a motion, if filed, the Administrative Judge, in his discretion, may issue a separate order or decide that question as part of his decision on the merits.

CONCLUSION

For the reasons stated above, the Request for Statement of Policy or Guidance is denied.

SO ORDERED.