

GWENDOLYN BURTON POOLE v. U.S. General Accounting Office

Docket No. 98-01

Date of Decision: August 24, 1998

Cite as: Poole v. GAO, Docket No. 98-01 (8/24/98)

Before: Michael Wolf, Administrative Judge

Headnotes:

Evidence

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Opportunity to Improve Performance

Performance Ratings

Prohibited Personnel Practice

Removal/Termination

Timeliness - General

MEMORANDUM AND ORDER

**PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.**

GWENDOLYN BURTON POOLE,

Petitioner

v.

**UNITED STATES GENERAL
ACCOUNTING OFFICE,**

Respondent

Docket No. 98-01

MEMORANDUM AND ORDER

Pending before me is Respondent's Motion for Partial Dismissal of Petitioner's Complaint or, in the Alternative, Motion in Limine. Respondent's argument in support of dismissal is two-fold. First, Respondent contends that Petitioner's appeal of her performance appraisal of October 8, 1996 (for the rating period October 1, 1995 to September 30, 1996) is untimely. Second, Respondent contends that the PAB lacks subject matter jurisdiction to hear an appeal from the October 8, 1996 rating or from a subsequent performance appraisal issued on May 30, 1997 (for the period October 1, 1996 to April 28, 1997). Respondent argues, in the alternative, that all evidence relating to these two rating periods is irrelevant to Petitioner's removal and

should therefore be barred from admission into evidence at the hearing.

Petitioner opposes the motion in all respects. She contends that her allegations regarding the performance ratings are timely because she informally challenged their accuracy shortly after she received them and because the rating for the period October 1, 1995 to September 30, 1996 was part of a continuing violation. Petitioner also argues that this Board has jurisdiction because "[t]he merits of the September 1996 and April 1997 performance appraisals are part of the removal action or process. . . ." Opposition to Respondent's Motion at 7. Petitioner opposes the motion in limine for the same reasons as the motion to dismiss.

A. Background

Before deciding the jurisdictional issue, it is useful to recite a brief chronology of the events underlying the Petition.¹ During the times relevant to this case, Petitioner was employed in the Financial Institutions and Markets Issue Area in the General Government Division of GAO. She worked in the Chicago regional office. On October 8, 1996, Petitioner received her

¹This statement of the facts is presented solely for background purposes in the resolution of the pending motion. It is based on the pleadings and motion papers on file to date. In addition, for purposes of deciding a motion to dismiss, this Board must accept the allegations of the complaint as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). However, this recitation of the facts is not intended to pre-judge the ultimate fact issues to be presented at the hearing and does not preclude the parties from offering contrary evidence at the hearing with regard to these issues. The parties are nevertheless encouraged to enter into a pretrial stipulation which will avoid presentation of evidence relating to background facts that are undisputed.

performance appraisal for the one year period between October 1, 1995 and September 30, 1996. That appraisal did not contain any "unacceptable" ratings, although Petitioner was rated as "needs improvement" in two job dimensions. In her May 30, 1997 performance appraisal, Petitioner was rated as "unacceptable" in every dimension, except one. Petitioner has stated that, as to each of these two performance appraisals, she did not file a grievance pursuant to GAO Order 2771.1. However, she has also stated that she informally protested both these appraisals to her supervisors after she received them.

On June 10, 1997, Petitioner was given a notice that she was being placed in a 90-day performance improvement opportunity period, during which she was to endeavor to improve her performance in each of the five dimensions for which she had received an unacceptable rating. At the end of the opportunity period, on September 9, 1997, Petitioner was given another appraisal in which she was rated "unacceptable" in four job dimensions; in one dimension her performance had improved to the "needs improvement" rating. On September 26, 1997, Respondent issued to Petitioner a Notice of Proposed Removal. Petitioner requested a stay of the removal, which was granted by then Chair of the Personnel Appeals Board (PAB) Leroy Clark. After expiration of the stay, Petitioner was permitted to resign in lieu of facing an involuntary removal. Her resignation was effective January 16, 1998. The Petition for Review in this case rises out of the removal notice and the resulting resignation.

B. The Jurisdiction Question

Although Petitioner's notice of removal triggered her Petition for Review, she has claimed a right to appeal the substance of the performance appraisals of October 8, 1996 and May 30, 1997. Specifically, she challenges her ratings on those two dates as being grossly inaccurate or unfair. Challenges to performance appraisals in and of themselves, however, do not constitute separate claims cognizable under the Board's jurisdiction. See 31 U.S.C. §753. The appropriate channel through which to challenge the accuracy or fairness of a performance appraisal is the Agency's grievance mechanism for appeals from performance ratings, as provided for in GAO Order 2771.1.

A particular performance appraisal may come within the Board's jurisdiction if an employee alleges that the appraisal involves a prohibited personnel practice under 31 U.S.C. §732(b)(2). See 31 U.S.C. §753(a)(2). However, the Petition for Review in this case makes no such claim.² Petitioner challenges her ratings in the October 1996 and May 1997 appraisals as being grossly inaccurate or unfair, but does not allege that the ratings violated any law, regulation or GAO order, as is required for a claim of prohibited personnel practice.

²The Petition for Review actually incorporates an earlier letter from Petitioner to former Board Chair Clark (dated February 13, 1998). That letter contains the substantive allegations currently before the Board.

Accordingly, the ratings given to Petitioner in the October 1996 and May 1997 appraisals may not be independently appealed to the PAB.³ See Manley v. Dept. of Air Force, 91 F.3d 117 (Fed. Cir. 1996).

The Board does have jurisdiction over appeals from actions involving "a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days." 31 U.S.C. §753; 4 C.F.R. §28.2(b)(1). For that reason, the performance appraisal of September 9, 1997 stands on a different footing from the earlier appraisals. That appraisal led to the Notice of Proposed Removal at issue in this case. Because the unacceptable ratings in that appraisal provided the basis for the proposed removal, the PAB does have jurisdiction to review those ratings.

C. An Order Restricting Petitioner's Evidence is Inappropriate

Although the October 1996 and May 1997 performance appraisals are not appealable to the Board in and of themselves, this conclusion does not imply that those ratings are wholly irrelevant to this proceeding. Respondent is entitled to rely upon any evidence within the one year period prior to September 26, 1997 to show Petitioner's unacceptable performance. GAO Order 2432.1 at ¶12.c. Theoretically, Respondent could make the ratings issued in October 1996 and May 1997 part of its evidence.

³In view of the conclusion that the Board lacks jurisdiction over a challenge to the accuracy or fairness of the October 1996 and May 1997 appraisals, it is unnecessary to address the argument that the current Petition for Review is untimely with respect to those appraisals.

See Addison v. HHS, 945 F.2d 1184 (Fed. Cir. 1991); Martin v. FAA, 795 F.2d 995 (Fed. Cir. 1986). However, even if Respondent chooses not to utilize evidence from the full one year period preceding the proposed removal, there is nothing in the statutes or GAO Order 2432.1 to preclude Petitioner from offering evidence from the same time period--as long as it is relevant to the ultimate issue of her removal. Cf. Golden v. Dept. of Army, 41 MSPR 501 (1989) (communication of performance standards and critical elements prior to period which formed basis for removal); Franco v. HHS, 32 MSPR 653 (1987) (previous supervisor from before one year period could testify as expert on employee's performance).

At this juncture it is impossible to determine the relevance of evidence that Petitioner has yet to offer. That determination can only be made at the hearing and must be made in the context of the other evidence that the parties put forward. Accordingly, it would be inappropriate to grant the motion in limine at this time, notwithstanding the fact that this disputed evidence cannot lead to a rescission or alteration of the October 1996 or May 1997 ratings. This evidence may be relevant to other aspects of Petitioner's case. Accordingly, Petitioner will be given the opportunity to present such evidence at the hearing, with the understanding that the evidence must still be relevant to an issue within the PAB's jurisdiction. Any evidence that Petitioner offers that is irrelevant will be excluded from the record.

Based on Respondent's Motion for Partial Dismissal of Petitioner's Complaint or, in the Alternative, Motion in Limine, and Petitioner's opposition thereto, and based on the foregoing discussion, it is hereby

ORDERED that Respondent's motion to dismiss is **granted** to the extent that it seeks review of the October 1996 or May 1997 performance appraisals, and it is further

ORDERED that Respondent's motion in limine is **denied** to the extent that it seeks to preclude Petitioner from offering evidence relating to the October 1996 and May 1997 performance appraisals.

SO ORDERED.

Date:

Aug 24, 1998