

Thomas Taydus v. U.S. Government Accountability Office

Docket No. 07-03

Date of Decision: January 13, 2009

Cite as: Taydus v. GAO, No. 07-03 (1/13/09)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Burden of Proof

Length of Service

Performance Appraisal System and Procedures

Prohibited Personnel Practice

Summary Judgment

DECISION ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Respondent U.S. Government Accountability Office (GAO or the Agency) has filed a Motion for Summary Judgment (Motion) and a Memorandum of Law in Support of Motion for Summary Judgment (Memorandum).¹ GAO's Memorandum includes a Statement of Undisputed Facts. Subsequently, Petitioner filed an Opposition to the Motion (Opposition), as well as Petitioner's Response to GAO's Statement of Undisputed Facts and Petitioner's Statement of Material Facts as to which there is a Genuine Issue (Pet. Statement). Thereafter, GAO filed a Reply in support of its Motion.

¹ At the time GAO filed its Motion, Petitioner had raised two types of claims: age discrimination claims and claims which have been referred to throughout this proceeding as the Five-Year claims. Subsequently, at the unopposed request of the Petitioner, his age discrimination claims were dismissed. *See* Decision on Petitioner's Motion to Admit Expert Report & Testimony into the Record (Nov. 25, 2008) at 5. Accordingly, the parties' arguments relating to the age discrimination claims are moot, and will not be set forth herein.

Additionally, at the time GAO filed its Motion for Summary Judgment, the Five-Year claims included both Petitioner's individual claim as well as a putative class claim. Subsequently, Petitioner's Motion for Class Certification was denied. *See* Decision on Petitioner's Motion for Class Certification, issued on Dec. 3, 2008. Accordingly, references in this Decision to the Five-Year claim refer only to Petitioner's individual claim.

For the reasons stated below, the Motion for Summary Judgment is granted.

II. POSITIONS OF THE PARTIES

Petitioner alleges that because he had more than five years of GAO service at the time that he received his performance appraisal rating for FY 2002, he was given a lower performance rating than he would have received if he had had less than five years of GAO service, and further contends that this action constituted a prohibited personnel practice under 5 U.S.C. §2302(b)(12). That provision makes it a prohibited personnel practice for an agency to take or fail to take any personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. §2301. The Government Accountability Office Personnel Act specifically incorporates the prohibited personnel practices enumerated in 5 U.S.C. §2302(b), making them clearly applicable to GAO.

In support of this claim, Petitioner contends that GAO violated Order 2430.1 (Performance Appraisal), which requires that employees be rated according to performance standards that accurately measure performance on the basis of job-related criteria, and GAO Order 2540.3 (Pay Administration in the Analyst Performance-Based Compensation System). As set forth in Petitioner's September 11, 2008 Response to the Board as to the Five-Year claims, the factual bases for this allegation are that "'GAO's own statistics . . . suggest that . . . when rating employees, calculating appraisal scores, calculating Standardized Rating Scores . . . placing employees in merit pay categories, and calculating merit pay, GAO improperly considered whether the employees . . . had worked at GAO for more or less than five years.'" Response at 7-8 (*quoting* Petitioner's Responses to Interrogatory No. 2 at 2).

GAO asserts that no genuine issue of material fact exists and that it is entitled to summary judgment as to this claim. In this regard, GAO asserts that it has submitted uncontroverted testimony showing that Petitioner's appraisal for FY 2002 reflected his supervisors' determinations of his performance for that period as measured by GAO's established rating standards and that GAO did not lower Petitioner's rating due to his years of GAO experience. GAO also contends that "Petitioner's performance actually improved once he had been at GAO for more than five years, and there is no evidence showing that Petitioner or any other employee had his/her rating lowered due to having more than five years of GAO experience." Memorandum at 2 (emphasis in original). In sum, GAO claims that "Petitioner cannot establish his prohibited personnel practice claims that GAO violated a law, rule, or regulation implementing or concerning a merit systems principle with respect to the issuance of his performance appraisal." *Id.*

In his Opposition to the Motion for Summary Judgment, Petitioner asserts that his "expert's report and GAO's own statistical data show that in FY 2002 employees with more than five years of GAO experience were rated significantly lower than those with less than five years of GAO experience. Thus, whether such employees actually were rated lower because of their length of GAO service, is a material fact [as] to which there is a genuine issue." Opposition at 5-6. The Petitioner also contends that GAO's assertion "that Petitioner's performance rating improved in 1999—after his fifth year at GAO—misses the point [because] [t]he issue here is whether

Petitioner was rated lower *in FY 2002* relative to other employees with less than five years of GAO experience at that time." *Id.* at n.6 (emphasis in original).

III. DISCUSSION

As stated in *Tekeley v. GAO*, PAB Docket No. 06-16 (Aug. 9, 2007):

Summary judgment is appropriate under the guidelines of the Federal Rules of Civil Procedure if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Although the moving party bears the burden of demonstrating the absence of genuine issues of material fact, it can discharge this burden by showing an absence of evidence to support the nonmoving party's case. *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994). *See also, Madson v. GAO*, PAB Docket No. 96-07 (Apr. 23, 1997), *aff'd en banc*, Dec. 2, 1997. Thus, a party opposing summary judgment must do more than show "some metaphysical doubt" as to the material facts to create a triable issue. *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 1000 (Fed. Cir. 1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial'")); *Gatlin-Brown v. GAO*, PAB Docket No. 00-02 (Mar. 23, 2001), *aff'd en banc*, Nov. 9, 2001.

Tekeley v. GAO at 22 (emphases added). *See also* 4 C.F.R. §28.21(c)(3).

To establish a violation of 5 U.S.C. §2302(b)(12), three elements must be proved by a preponderance of the evidence: 1) a personnel action was taken or not taken; 2) the taking of or failure to take the action violated a civil service law, rule or regulation; and 3) the law, rule or regulation violated implements or directly concerns a merit system principle. *Special Counsel v. Brown*, 61 MSPR 559, 567 (1994); *Special Counsel v. Byrd*, 59 MSPR 561, 579 (1993); *see Turner v. GAO*, PAB Docket No. 08-01 (Sept. 25, 2008) at 17-19; *Davis v. GAO*, PAB Docket Nos. 00-05, 00-08 (Jul. 26, 2002) at 34, *aff'd*, Jul. 11, 2003.

In the matter at hand, based on the parties' submissions, I find the following to be material facts as to which there is no genuine issue:

1. Petitioner was a Band I Analyst who had been working for more than five years at GAO at the time of his FY 2002 performance appraisal.²

2. Beginning in 2002, GAO implemented a new appraisal system for Analysts called the Competency Based Performance System (CBPS). Under the CBPS, Analysts were to be given ratings in specified competencies based on supervisors' evaluations of each employee's individual performance of specified work activities measured against the established performance standards.

3. For Petitioner's FY 2002 appraisal, John Finedore, Assistant Director, Physical Infrastructure (PI), served as the rater and Peter Guererro, Director, PI, served as the reviewer, and the two of them reached consensus as to Petitioner's final appraisal. Resp. Ex. A. Petitioner was rated as "meets expectations" in five competencies (Achieving Results, Maintaining Client and Customer Focus, Presenting Information Orally, Presenting Information in Writing, and Facilitating and Implementing Change) and as "exceeds expectations" in four competencies (Thinking Critically, Improving Professional Competence, Collaborating with Others, and Representing GAO). Resp. Ex. G.

Although Petitioner disputes the accuracy and/or the materiality of several of GAO's other asserted "undisputed facts," I find that these matters do not concern material facts for purposes of summary judgment analysis. There is no dispute as to how the performance appraisal system was intended to work with respect to Petitioner's FY 2002 appraisal. Rather, the essence of Petitioner's Five-Year claim is his contention that his supervisors did not rate him solely on their application of his performance standards, but rather improperly took into account his years of GAO service and gave him a lower rating as a result of considering his length of GAO service. However, despite Petitioner's claim, the record contains no evidence demonstrating that Petitioner's rating was based in part or in whole on his length of GAO service. As such, GAO is entitled to summary judgment.

The only evidence submitted by either party that specifically and individually addresses the Petitioner's FY 2002 performance appraisal shows that the appraisal did not take into account Petitioner's length of GAO service. Petitioner's appraisal was prepared by his Designated Performance Manager, John Finedore, and reviewed by Peter Guerrero, a Director on GAO's Physical Infrastructure team. GAO submitted a Declaration from Mr. Finedore in which he describes the rating process and states the following:

When preparing Mr. Taydus' FY 2002 appraisal, I evaluated his performance against the established rating standards and placed checkmarks in the appropriate ratings categories based solely on my evaluation of how Mr. Taydus performed in

² I note that included among "Petitioner's Statement of Material Facts as to which there is a Genuine Issue" is the following statement: "At the time Petitioner received his performance rating for FY 2002, he had over five years of GAO experience." Pet. Statement at 6. Inasmuch as GAO acknowledges that "Petitioner had been a Band I for ten years by the end of fiscal year 2002[.]" (see Memorandum at 3), I find that, contrary to Petitioner's statement, there is no genuine issue as to the material fact that Petitioner was a Band I Analyst who had been working for more than five years at GAO at the time of his FY 2002 performance appraisal.

light of those standards during the rating period. I did not give Mr. Taydus a lower appraisal than his performance merited due to his years of GAO experience as a Band I. I am not aware of any GAO policy or practice (whether formally established or informally applied) that calls for employees with more than five years of GAO experience to be rated lower than employees with less than five years of experience. No one has ever told me to take such a factor into account, and I have never heard of any other individual considering such a factor in preparing or reviewing a performance appraisal. I am not aware of Mr. Guerrero, who is now retired from GAO, ever taking such a factor into consideration for Mr. Taydus or anyone else.

Respondent's Exhibits to its Opposition to Motion for Class Certification and its Motion for Summary Judgment, Exhibit A at 2-3.

Petitioner describes Mr. Finedore's Declaration as "self-serving" (Opposition at 5), but has not presented any evidence to dispute Mr. Finedore's assertions as to how he prepared Petitioner's appraisal. In this regard, when asked by GAO's Interrogatories to identify the persons who created and/or implemented the alleged practice of assigning lower appraisal scores to employees who had been employed by GAO for over five years, and to identify all persons with knowledge of the facts relating to the alleged practice, Petitioner did not identify any such persons. Similarly, Petitioner did not identify any such persons in his Deposition and did not supplement his discovery responses.

Petitioner had not deposed any individuals in this case as of the date of the filings here at issue, and has not submitted any affidavits or other materials that address specifically and individually the preparation of his own FY 2002 appraisal. Rather, as identified in paragraph 39 of Petitioner's Statement (at 5), the entirety of Petitioner's evidence in support of his claim consists of three documents: 1) his expert's report; 2) a "Summary of CBPS Appraisal and Merit Pay Category Results, Analyst & Specialist Staff – Fall 2002 Cycle," prepared by GAO ("Summary"); and 3) an April 9, 2008 Memorandum from the Acting Comptroller General to all GAO employees, entitled "Upcoming Project to Engage You in Reviewing GAO's Performance Appraisal System."³ None of these documents demonstrates that Petitioner was rated lower on his FY 2002 performance appraisal because he had more than five years of GAO service.

First, with respect to the expert's report, the expert concluded, as relevant here, that "there is a statistically significant difference in the average performance ratings between those employees with more than five years at GAO and those with less than five years, with the more senior employees receiving lower ratings." Petitioner's Exhibit 1 at 1.⁴ However, the expert did not specifically address Petitioner's FY 2002 performance appraisal or make any findings with

³ Petitioner also submitted as an exhibit the April 25, 2008 Final Report of the Ivy Planning Group entitled "Government Accountability Office African American Performance Assessment Study." *See* Opposition, Exhibit 3. Petitioner cited this exhibit only in connection with his age discrimination claims (see Opposition at 3-4), which he subsequently withdrew.

⁴ The expert's report was admitted into the record by Decision of Nov. 25, 2008, subject to certain conditions. For purposes of this Decision, the report is considered part of the record.

respect to it. Moreover, even as to the appraisals in general, the report made no findings or conclusions as to any possible reasons for the difference in the average performance ratings. The mere statement in the report that there is a difference in the average performance ratings does not constitute evidence showing that Petitioner's performance appraisal rating was lowered as a result of his length of GAO service, and, therefore, does not demonstrate that GAO violated 5 U.S.C. §2302(b)(12) by taking or failing to take a personnel action in violation of a law, rule, or regulation implementing or directly concerning the merit system principles.

Similarly, the GAO Summary does not specifically address Petitioner's FY 2002 performance appraisal or make any findings with respect to it, and makes no findings or conclusions as to any possible reasons for any difference in average performance ratings based on whether employees had more than five or less than five years of GAO service. As GAO correctly points out, without contravention by Petitioner, "[t]here are numerous innocent causes that could have created any potential disparity in ratings reflected in the chart." Memorandum at 17. Without any evidence supporting Petitioner's individual claim, "[s]tatistics relating to the entire Band I population do not create a disputed factual issue as to Mr. Finedore's individual motivations and actions when rating Petitioner." Reply at 5-6.

Further, nothing in the April 9, 2008 Memorandum from the Acting Comptroller General contains any support for the claim that Petitioner was rated lower on his FY 2002 performance appraisal because he had more than five years of GAO service.

The Agency is correct in arguing that the proof required in this action based on 5 U.S.C. §2302(b)(12) is different from that in a discrimination case alleging disparate treatment. *See* Respondent's Reply at 5. In a discrimination case, when certain conditions are met, a plaintiff who is a member of a protected class is entitled to an inference of discrimination, subject to rebuttal by the employer. *See McDonnell Douglas v. Green*, 411 U.S. 792, 801-02 (1973). The provision here at issue requires evidence that GAO took or failed to take a personnel action in violation of a law, rule, or regulation implementing or directly concerning the merit system principles. As with the part-time employee theory in *Stern v. FTC*, 46 MSPR 328, 338-39 (1990), employees with more than five years of service do not constitute a protected class entitled to any inference of proof based on a protected characteristic. There is no inference of illegality to be drawn from Petitioner's falling within a group of employees with more than five years of experience, which as a group experienced somewhat lower performance ratings than relative newcomers. The statistics alone, even with the expert's opinion that they are statistically significant, cannot make out a violation of 5 U.S.C. §2302(b)(12). I agree with the Agency that "Petitioner had the burden of showing that he—specifically and particularly—improperly had his ratings lowered in violation of a law, rule, or regulation implementing or concerning a merit systems principle. Statistics relating to the entire Band I population do not create a disputed factual issue as to Mr. Finedore's individual motivations and actions when rating Petitioner." Respondent's Reply at 5-6.

The Personnel Appeals Board recognizes that when summary judgment is under consideration, the nonmoving party's evidence is to be believed, and that party is entitled to "all justifiable inferences" in his or her favor. *Turner v. GAO*, PAB Docket No. 08-01 (9-25-08) at 2. In an appropriate case, the Personnel Appeals Board has found that a manager's actions were

“probative evidence that his later involvement in Petitioner’s performance appraisal was tainted by considerations that were irrelevant to Order 2430.1 and that were antithetical to an objective performance appraisal system.” *Davis v. GAO*, Nos. 00-05 and 00-08 at 39.

In the case at hand, however, there is no justifiable inference to be drawn from the evidence proffered by Petitioner; the Agency’s evidence remains unrebutted. Unlike in *Davis*, Petitioner here has presented no evidence concerning his supervisors’ evaluation of his performance, so as to permit the drawing of a justifiable inference in support of the Five-Year claim. Based on this record, Petitioner has not met the standard of showing “more than a metaphysical doubt” as to his theory.⁵ See *United States v. Newport News Shipbuilding*, 933 F.2d at 1000.

Accordingly, I find that there is no genuine issue of material fact and that GAO is entitled to summary judgment as a matter of law.

Because of the conclusion reached as to summary judgment, this constitutes the Initial Decision in this matter. See 4 C.F.R. §28.87.

Petitioner’s Motion for Certification of an Interlocutory Ruling for Appeal to the Full Board, filed on December 15, 2008, is currently pending in this matter. In view of the decision herein, that Motion is rendered moot.

SO ORDERED.

⁵ I note that Petitioner has not cited any administrative or judicial cases to support the proposition that general statistical evidence of the nature submitted herein is sufficient in and of itself to demonstrate that an agency has violated 5 U.S.C. §2302(b)(12), where, as here, the Agency has presented unrebutted evidence that the particular employee's performance appraisal was based solely on the application of the employee's performance standards.