MARIA VARGAS v. U.S. General Accounting Office

Docket Nos. 00-04; 00-06; 00-09; 01-01

Date of Decision: September 10, 2001

Cite as: Vargas v. GAO, Docket Nos. 00-04; 00-06; 00-09; 01-01 (9/10/01)

Before: Anne M. Wagner, Administrative Judge

Headnotes:

Hearing Procedures

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ORDER

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

MARIA VARGAS,	)	
Petitioner	)	
v.	)	**Docket No. 00-04** **Docket No. 00-06** **Docket No. 00-09** **Docket No. 01-01**
UNITED STATES GENERAL ACCOUNTING OFFICE,	)	
	)	September 10, 2001
Respondent	)	

ORDER

The Respondent has moved for the immediate release of the transcript from the first week of the hearing which took place from July 16-20, 2001. The Agency argues, primarily, that the delay in the resumption of the hearing will prejudice its ability to present its case unless the transcript is made available prior to recommencing the hearing on October 2, 2001. Petitioner opposes the Motion on the grounds that an early release of the transcript could undermine the sequestration order imposed in this case. The Board denies the Respondent's request for the following reasons.

The PAB regulation governing transcripts simply provides that "upon request, a copy of a transcript of the hearing shall be made available to each party." 4 C.F.R. §28.58(a). The regulation does not prescribe the timing for the release of a transcript, or any part thereof. Nevertheless, it is reasonably read as creating an entitlement to the transcript only at the conclusion of the evidentiary phase of the proceeding. References to "a" transcript and "the"

hearing plainly contemplate the provision of a single transcript upon the completion of the hearing in its entirety, and not to parts of a hearing on an *ad hoc* basis, as requested here.

Of course, the administrative judge in any PAB proceeding has "all powers necessary" to conduct a fair and impartial hearing, 4 C.F.R. §28.22(b), and could arguably exercise his or her authority in that regard by ordering the release of a transcript prior to the completion of the hearing. For example, the Board did release the transcript from the first half of the hearing in a 1998 removal case involving a non-attorney petitioner proceeding *pro se*.

No such circumstance exists here. Nor has Respondent presented sufficiently compelling grounds to warrant a departure from the presumption that a transcript is released at the conclusion of the hearing. Less than four weeks before the scheduled start of the hearing in this case, Respondent raised, for the first time, a concern that the anticipated week-long hearing would not be sufficient, and subsequently proposed that the initial phase of the hearing be limited to issues concerning the 1998 promotion and merit pay cycle, or alternatively, to continue the hearing until such time as a consecutive two-week period could be set aside. Rejecting the proposal, the Board directed that the hearing begin as scheduled, with Petitioner going forward with her case, and further indicated that, if it became necessary to continue beyond the scheduled five days of hearing, additional time could be set then.

The hearing began on July 16 and continued through July 20, 2001. At the conclusion of the five-day hearing, the petitioner had completed her case in chief, and the Respondent was well into the presentation of its case. It became clear during the course of the proceeding, however, that an additional five days would be required. The difficulty in setting the subsequent hearing dates was due, in no small part, to the unavailability of one or the other of Respondent's counsel. (It also served to reconfirm the Board's initial rejection of the Respondent's request to delay the

hearing until a consecutive two-week hearing schedule could be set.) Having accommodated these scheduling matters, the Board is surprised that Respondent now complains that the delay could prejudice its case.

Even so, the Board cannot discern any basis for the Respondent's concern. While the potential impact of a two-month delay on preparing cross-examination is readily apparent, such is not the case in preparing the direct, or even redirect, examination of a party's own witnesses. Moreover, the Respondent was represented by two attorneys who could observe the hearing in progress.

Conversely, there is no question but that access to the transcript could enhance Respondent's ability to frame its examination in ways that were not available to Petitioner in preparing her case. Thus, in the Board's view, the issue posed by Respondent's Motion is not, as the parties' assume, one of comparative prejudice, but rather one of unequal advantage. It is for this reason, rather than Petitioner's concern about potential comprise of the sequestration order, that the Board is denying the Respondent's request.

It is hereby **ordered** that the Respondent's Motion for Release of Hearing Transcripts is hereby **denied**.

SO ORDERED.

Date: Sept 10, 2001

/s/
Anne M. Wagner
Administrative Judge