

In the Matter of Michael J. Wargo

Docket No. 92-05

Date of Decision: June 11, 1992

Cite as: In the Matter of Wargo, No. 92-05 (6/11/92)

Before: Roger P. Kaplan, Administrative Judge

Headnotes:

Corrective Action

Prohibited Personnel Practice

Removal

Senior Executive Service

REPORT OF INFORMAL HEARING

This matter has come to the Board on the Petitioner's request for an informal hearing pursuant to the PAB Rules and Regulations, 4 C.F.R. §28.141, and GAO Order 2920.1.

Petitioner is an ES-3, Special Assistant to the Assistant Comptroller General, Program Evaluation and Methodology Division. On May 22, 1992, Petitioner was notified by letter from Milton Socolar, Special Assistant to the Comptroller General, that effective June 22, 1992, Petitioner would be removed from his current position and placed in a Band III equivalent position as an Assistant Director in the Resource, Economic and Community Development Division.

The reason given for Petitioner's removal from the SES was unsatisfactory performance. The removal letter informed Petitioner that he had no basis to appeal the removal to the PAB, because the action was based on unsatisfactory performance, but that Petitioner could request an "informal hearing" before the Board.¹ On May 28, 1992, Petitioner requested an informal hearing pursuant to 4 C.F.R. §28.141.

The informal hearing was conducted by the undersigned on June 5, 1992. Petitioner, represented by the Acting General Counsel of the PAB, testified for himself, and introduced numerous documents related to the challenged performance appraisal. The PAB Acting General Counsel, in her opening remarks, stated that her investigation into

¹ On April 10, 1991, Petitioner initiated an appeal with the PAB General Counsel, alleging that GAO committed a prohibited personnel practice in administering Petitioner's 1991 performance appraisal (the appraisal upon which Petitioner's removal is based).

Petitioner's allegation had produced reasonable evidence to believe that the action to remove Petitioner was the result of a prohibited personnel practice. As relief, Petitioner requested that the Board recommend that the removal action be aborted, or in the alternative, delayed until Petitioner has had an opportunity to prove his charge of prohibited personnel practice.

The GAO contended that Petitioner's removal action was not based solely upon the 1991 performance appraisal, but based on a history of unsatisfactory performance exhibited by Petitioner since 1989. The GAO called three witnesses to support their contentions, and offered several exhibits into evidence.

No cross-examination was allowed, and the witnesses testified with a minimum of direction from counsel and questions from the Administrative Judge. Attached to this Report is the verbatim transcript taken of the hearing, and all exhibits submitted into evidence by the parties.

ANALYSIS

Appeals by members of the GAO Senior Executive Service are governed by the provisions of Subpart 4 of the PAB Rules and Regulations, 4 C.F.R. §§28.140, 28.141, and GAO Order 2920.1. These provisions are patterned after the statutory provisions of the Civil Service Reform Act. 5 U.S.C. §3592. See, 5 C.F.R. §359; §§120.141-142. Under the procedures governing SES members' appeal rights, the Board shall conduct an informal hearing if requested by the employee, but cannot, on the basis of the informal hearing, order GAO to take a specific corrective action. See, GAO Order 2920.1, Ch. 8(3) (f). The Board may, however, consider the arguments of the parties and recommend an appropriate corrective action if the record reflects a serious defect in the personnel action. Id.

Here, however, I decline to make a recommendation in this matter. Petitioner has made no showing of irreparable harm sufficient to persuade me that such extraordinary relief is necessary. Petitioner is not being removed from the rolls of GAO employees; he is being transferred from one position to another. Moreover, Petitioner will retain his current salary for a minimum of two years after the transfer. Nor is there any harm occasioned by Petitioner's removal from the SES for which Petitioner cannot be made whole through his formal appeal to the Board.

While I decline to recommend any corrective action on the part of the Agency as a result of the informal hearing, I must emphasize that this action is in no way intended to reflect on the merits of any formal appeal with which may come before the Board at a later date.