

**JANICE F. WILLIS v. U.S. General Accounting Office and U.S. General
Accounting Office Personnel Appeals Board**

Docket No. 95-03

Date Issued: February 23, 1996

Cite as: Willis v. GAO, Docket No. 95-03 (2/23/96)

**Before: Paul G. Streb, Chief Administrative Law Judge, Merit Systems Protection Board
(sitting in place of the Personnel Appeals Board)**

Headnotes:

Discovery

Dismissal

Evidence

Motion to Compel

Motion to Dismiss

Whistleblowing

ORDER

BEFORE CHIEF ADMINISTRATIVE LAW JUDGE PAUL G. STREB
U.S. MERIT SYSTEMS PROTECTION BOARD
SITTING IN PLACE OF THE U.S. GENERAL ACCOUNTING OFFICE
PERSONNEL APPEALS BOARD¹

JANICE F. WILLIS,
Petitioner

v.

U.S. GENERAL ACCOUNTING OFFICE,
and
U.S. GENERAL ACCOUNTING OFFICE
PERSONNEL APPEALS BOARD,
Respondents.

PAB DOCKET NUMBER
95-03

DATE: February 23, 1996

ORDER

Substitution of PAB as Respondent

The Petitioner in the case named above has filed a petition for review alleging that her 10-day suspension constitutes reprisal for protected disclosures she made. In her petition, she named as Respondents six officials of the Personnel Appeals Board (PAB or Board)² of the General Accounting Office (GAO),³ as well as GAO itself. The six named PAB officials have filed a

¹ I am presiding over this matter pursuant to 4 C.F.R. § 28.17(c) (1) and an interagency agreement.

² When referring to the Personnel Appeals Board in its capacity as a Respondent, I will use the term "PAB." When referring to it in its capacity as the adjudicator of appeals such as this, I will use the term "the Board." As indicated below, I will refer to the Merit Systems Protection Board as "the MSPB."

³ Those six officials are as follows: Jessie James, Jr., Beth L. Don, Nancy McBride, Alan Rosenthal, Leroy Clark, and Harriet Davidson.

motion to dismiss them as Respondents, and to substitute the PAB as Respondent in their place. PAB Motion at 1. The Petitioner has stated that she has no objection to this motion, Case File, Tab 16 (letter of Jan. 16, 1996), and Respondent GAO has not raised any objection.

In their motion, the six PAB officials mentioned above indicate that any actions on their part that are at issue in this case were taken in the course of their duties as officials of the PAB. PAB Motion at 1. They also state that the relief the Petitioner seeks consists of actions that would be taken by the PAB, rather than by them personally. *Id.* In addition, they state that failing to name the PAB as a separate Respondent would be inappropriate, since it would require the PAB to be represented by an agency that regularly appears before it in its adjudicatory role. *Id.* at 6 n.6. In light of these un rebutted assertions, and in light of the Petitioner's failure to object to the motion, I GRANT that motion. The six individual PAB officials who were named in the Petitioner's complaint are hereby DISMISSED from this action, and the PAB is substituted as a Respondent in their place.

Dismissal of Complaint as It Concerns GAO

GAO has filed a motion in which it asks that it also be dismissed as a Respondent. It acknowledges that the Petitioner has alleged that her suspension and the proposal to remove her that led to her suspension were submitted to GAO's Office of Personnel for review and approval. GAO Motion at 2. It asserts, however, that the Petitioner has not alleged that GAO or its Office of Personnel took any actions against her that constitute prohibited personnel practices; and it accordingly argues that the Petitioner's claim against it should be dismissed or, in the alternative, that summary judgment in favor of GAO be granted on the ground that the Board lacks subject matter jurisdiction over the claim as it concerns that agency. *Id.* Both Respondent PAB and the Petitioner oppose this motion. Case File, Tab 7 (Petitioner's response); *id.*, Tab 14 (PAB motion to dismiss at 7).

I find these arguments unpersuasive. Although the PAB operates with a substantial degree of independence from the rest of GAO,⁴ it remains a part of that agency. See, e.g., 31 U.S.C. § 751 (GAO "has a General Accounting Office Personnel Appeals Board"); 4 C.F.R. § 28.17(a) (certain provisions generally "apply in the same manner to employees of the [Personnel Appeals] Board as they do to other GAO employees") (emphasis added); Petitioner's Response to GAO Motion, Exs. 2, 4, 5, 6, 7 (standard forms 50 identifying location of Petitioner's position as "General Accounting Office, Personnel Appeals Board"). In fact, GAO admits that the Petitioner, although an employee of the PAB, is also an employee of GAO. GAO's Response to Motion to Compel at 7. Dismissing GAO as a Respondent therefore would be inconsistent with the Board's practice of treating GAO, rather than a component of that agency, as a party in cases involving appeals of GAO employees.⁵ Accordingly, I DENY GAO's motion.

Motion to Compel Discovery

Interrogatories Served on Respondent PAB

The Petitioner has filed a motion to compel discovery. In this motion, she has objected to the Respondents' failure to answer certain interrogatories and to produce certain requested documents. First, she has objected to Respondent PAB's failure to provide information regarding the following in response to

⁴ See *General Accounting Office v. General Accounting Office Personnel Appeals Board*, 698 F.2d 516, 523 (D.C. Cir. 1983) ("Congress ... sought to guarantee [GAO] employee rights by establishing an independent, internal board available to enforce and adjudicate those rights").

⁵ I know of no case in which the Board specifically addressed the issue of whether GAO, rather than a component of that agency, should be named as the respondent in a proceeding before the Board. I note, however, that GAO was named as a party in all but one of the decisions issued by the Board from 1981 through 1995 on appeals of GAO employees. Personnel Appeals Board Decisions Book, vols. I and II.

question 15 of the interrogatories she served on that party⁶ on December 22, 1995: All complaints the PAB, its members, and its staff had received concerning the performance and/or conduct of its General Counsel, and all documents in which the PAB or certain of its officials warned, reprimanded, admonished, or disciplined that official. She also has objected to that Respondent's failure to provide information regarding the following in response to question 16: Evaluations of the General Counsel's performance and documents concerning conversations held with that official regarding his performance and/or conduct. In support of her motion to compel responses to these questions, the Petitioner argues that the information she has requested "is relevant to why Petitioner blew the whistle in the first place." Motion to Compel Discovery at 4; see also *id.* at 6.

I need not determine, in this case, whether the General Counsel in fact engaged in the misconduct in which the Petitioner claimed he had engaged when she made her allegedly protected disclosures in October 1993. Instead, with respect to the nature of the Petitioner's disclosures, I am required only to determine whether the Petitioner disclosed information that she reasonably believed evidenced any of the following: A violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302(b)(8); see also *Ward v. Department of the Army*, 67 M.S.P.R. 482, 485-86 (1995) (employee need not prove that condition reported established any of the situations detailed under section 2302(b)(8), but must establish that reasonable person in his position would believe matter reported evidenced

⁶ The Petitioner's discovery requests were served on the six PAB officials who were named in the petition, rather than on the PAB itself. In light of the substitution of the PAB as a Respondent in this case, however, I have referred to the discovery requests served on those individuals as requests served on the PAB.

one of those situations).⁷ Furthermore, evidence unknown to the Petitioner at the time of her disclosure generally is unlikely to have a bearing on whether the Petitioner reasonably believed, when she made her disclosures, that the General Counsel had acted improperly. See *Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 123 (1994) (document employee acquired only recently could not have formed basis for an earlier reasonable belief that he made a protected disclosure).

I note, however, that some of the information the Petitioner seeks in questions 15 and 16 either may be relevant to the issue of whether she held the requisite reasonable belief, or may lead to the discovery of evidence relevant to that issue. See 4 C.F.R. § 28.41(a). First, any complaints the PAB, its members, and its staff had received concerning matters substantially the same as those that were the subject of the Petitioner's alleged disclosures might support the proposition that a reasonable employee in the Petitioner's position would have believed such matters constituted evidence of a kind covered under 5 U.S.C. § 2302(b)(8). See *Sanders v. Department of Justice*, 65 M.S.P.R. 595, 600-01 (1994) (in finding that the appellant did not have the required reasonable belief, Merit Systems Protection Board (MSPB) relied on testimony by other

⁷ I see no reason to decline to apply the Merit Systems Protection Board (MSPB) precedent cited here -- or that cited below -- to the present case. Although the Board is not bound by MSPB precedent, the U.S. Court of Appeals for the District of Columbia Circuit has stated that "Congress encouraged the PAB, at a minimum, to consider MSPB decisions and other executive agency precedent before deciding questions already settled in the executive personnel system." *General Accounting Office v. GAO Personnel Appeals Board*, 698 F.2d 516, 535 (D.C. Cir. 1983). Furthermore, the same court has noted that the Board carries out functions comparable to those of the MSPB. *Id.* at 518. Finally, as noted above, the Board's authority to order corrective action in a case arising from a prohibited personnel practice is based on the language of 5 U.S.C. § 2302(b), i.e., the same language the MSPB was construing in the decisions cited here and below. I therefore find that MSPB precedent concerning the matters addressed in these decisions should be applied to the present case.

employees regarding the propriety of actions of which the appellant had complained), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995).

Second, documents in which the PAB or certain of its officials warned, reprimanded, admonished, or disciplined the PAB's General Counsel for matters related to the Petitioner's alleged disclosures could be relevant to the issue of whether the General Counsel had a motive to retaliate against the Petitioner. See *Smith v. Department of Agriculture*, 64 M.S.P.R. 46, 65 (1994) (in finding that disclosures were contributing factor in personnel action, MSPB relied in part on evidence that one official responsible for personnel action knew that employee's disclosures had led to discipline of agency employees, and that another official felt that his career was threatened by disclosures). Third, although Respondent PAB has stated in its response to the Petitioner's motion that no evaluations of its General Counsel's performance exist, PAB Response to Motion at 5, it has made no such statement regarding documents related to conversations held with that official concerning his performance or conduct. Those documents could be relevant to the issue of motivation, to the extent that the documented conversations concern matters related to the Petitioner's alleged disclosures. See *Smith*, 64 M.S.P.R. at 65.

For the reasons stated above, I GRANT in part the Petitioner's motion to compel answers to questions 15 and 16. Respondent PAB shall provide the Petitioner, within 7 days of the date of this order, with any information in its possession that is covered by interrogatory question 15 and that concerns the following: (1) Any complaint concerning a matter substantially the same as one that was the subject of the Petitioner's alleged disclosures or (2) any document in which the PAB's General Counsel was warned, reprimanded, admonished, or disciplined for matters that are in any way related to the Petitioner's alleged disclosures. Within the same period of time, Respondent PAB shall provide the Petitioner with any information that is covered by question 16 and that concerns conversations with the General Counsel regarding matters that

are in any way related to the Petitioner's alleged disclosures. To the extent that questions 15 and 16 concern other documents, the Petitioner's motion to compel discovery with respect to them is DENIED.

The Petitioner also has objected to Respondent PAB's failure to provide information regarding the following in response to questions 46 and 55 of her interrogatories: (1) The PAB General Counsel's use of a government-issued American Express card and (2) any outside employment for remuneration in which the General Counsel had engaged during his tenure as General Counsel. Motion to Compel Discovery at 6, 10-11. In support of her motion, the Petitioner alleges that the Respondents "have colluded and conspired to deny Petitioner relevant information needed for presentation of Petitioner's case." *Id.* at 6. She also asserts that the information she seeks is relevant for the same reasons the information she seeks in questions 15 and 16 is relevant, i.e., that it is relevant to her allegations of wrongdoing on the part of the PAB General Counsel. See *id.* at 6, 11.

I find the Petitioner's assertions regarding the relevance of the information described above unpersuasive. While the Petitioner has asserted that she made disclosures concerning the General Counsel's alleged "conflict of interest," she has made no assertions indicating or even suggesting that this alleged conflict -- or any other matter the Petitioner disclosed -- concerned any misuse of government funds, any inappropriate outside employment, or any other financial wrongdoing on the part of that official. See generally Petition for Review; see also *id.*, Ex. 7. I find, therefore, that the Petitioner has failed to show that the information she has sought in questions 46 and 55 is relevant to any issues in this case, or that it appears reasonably calculated to lead to the discovery of admissible evidence. See 4 C.F.R. § 28.41(a). Accordingly, I DENY the Petitioner's motion as it concerns those questions.

The Petitioner has raised one other matter related to her interrogatories. In her motion, she sought to compel Respondent

PAB to respond to questions 51 through 54. Motion to Compel Discovery at 7-10. In its response to the motion, Respondent PAB has stated that it has withdrawn its objection to those questions. PAB Response at 2. Its response includes answers to each of those questions. *Id.* at 8-17. If the Petitioner raises no further objection with respect to this matter within 7 days of the date of this order, I will assume that the matter is moot.

Request that Respondent PAB Produce Documents

In a request for production of documents that was served on Respondent PAB on December 22, 1995, the Petitioner asked that she be allowed to inspect and/or copy the PAB General Counsel's federal and state income tax returns for the years 1992 through 1994. She argues in her motion to compel discovery that her request (with which Respondent PAB evidently refused to comply) is relevant to the conflict-of-interest allegations she has raised concerning the PAB's General Counsel, and she seems to indicate that it is related to her request for information concerning that official's outside employment. I have noted above, however, that the Petitioner has made no assertions suggesting that the alleged conflict of interest concerned any financial wrongdoing on the part of the General Counsel. I also have found that the Petitioner has failed to show the relevance of the information she has requested concerning the General Counsel's outside employment. Accordingly, I see no basis for finding that the General Counsel's income tax returns are relevant to any issue in this case, or that inspection or copying of those returns would appear reasonably calculated to lead to the discovery of admissible evidence. See 4 C.F.R. § 28.41(a). Accordingly, I DENY the Petitioner's motion to compel the production of documents from Respondent PAB.

Interrogatories Served on Respondent GAO

In questions 13, 14, 15, 16, and 17 of the interrogatories served on Respondent GAO on December 22, 1995, the Petitioner requested information concerning the following: (1) The process

by which the PAB General Counsel and four of the members of the PAB were appointed to their positions; and (2) the identity of documents related to those appointments. She asserts in her motion to compel discovery that this information is relevant to GAO's motion to dismiss that agency as a Respondent in this case. Because I have denied Respondent GAO's motion, and because the Petitioner has identified no other basis on which to find the requested information relevant to this case, I find that the Petitioner has shown no basis for compelling discovery of the information. I therefore DENY the Petitioner's motion as it concerns these questions.

In question 21 of her interrogatories, the Petitioner requested information concerning the General Counsel's use of a government-issued American Express card. As indicated above, however, the Petitioner has failed to show that that official's use of such a card is relevant to any issue in this case. I therefore see no proper basis on which to compel discovery of the requested information. Accordingly, I DENY the Petitioner's motion as it concerns question 21.

The Petitioner also requested that Respondent GAO be compelled to respond to three other questions, i.e., questions 11, 18, and 19. Motion to Compel Discovery at 12-13, 16-18. In its response to the Petitioner's motion, however, Respondent GAO has provided answers to those questions. GAO Response at 1-3. If the Petitioner raises no further objection with respect to this matter within 7 days of the date of this order, I will assume that the matter is moot.

In addition, in question 27, the Petitioner requested an accounting of money paid to the PAB's General Counsel. In its response to the Petitioner's motion to compel discovery, Respondent GAO provided information concerning the salary it had paid that official, and it stated that it understood that the Petitioner also was seeking information regarding "travel or other reimbursements." GAO Response at 4-5. It also stated that it had not yet determined whether it had information related to travel or other reimbursements paid to the General

Counsel, and that it had asked Respondent PAB whether it had any objection to providing this information. *Id.* at 4. Although Respondent PAB initially objected to providing the information at issue here, it subsequently advised Respondent GAO and the Petitioner that it had withdrawn that objection. PAB Response at 20-21; Case File, Tab 22 (memorandum from PAB counsel to GAO counsel, Feb. 20, 1996). Under these circumstances, I assume that GAO will provide the information at issue here to the Petitioner unless it determines that it does not have that information in its possession;⁸ if GAO makes such a determination, it must file notice thereof, both with me and with the other parties, within 5 days of the date of this order. If the Petitioner raises no further objection with respect to this matter within 7 days of the date of this order, I will consider the matter closed.

Request that Respondent GAO Produce Documents

Finally, the Petitioner has asked that Respondent GAO produce the official personnel folders of certain PAB officials (including the General Counsel and four members of the PAB) for inspection and/or copying. Motion to Compel Discovery at 21. GAO argues that the documents the Petitioner seeks to inspect and/or copy are not relevant to this case, and that this request raises privacy concerns. GAO Response at 9-10.

As noted above, the following could be relevant to issues in this case: (1) Any complaints the PAB, its members, and its staff had received concerning matters substantially the same as those that were the subject of the Petitioner's alleged disclosures; (2) documents in which the PAB or its officials warned, reprimanded, admonished, or disciplined its General Counsel for matters that are in any way related to the

⁸ In its response to the motion to compel discovery, Respondent PAB stated that the only information covered by question 27 that was in its possession was information regarding the General Counsel's salary, i.e., the information Respondent GAO has already provided. PAB Response at 21.

Petitioner's alleged disclosures; and (3) documents that are related to conversations held with the General Counsel concerning his performance or conduct, to the extent that the documented conversations concern matters related to the Petitioner's disclosures. If the official personnel folders of the five officials named in the Petitioner's request include any such documents, therefore, I find that the Petitioner is entitled to inspect and/or copy those documents. I find further, however, that the Petitioner has failed to show that any other documents in those folders are relevant to the issues in this case.

Accordingly, I GRANT the Petitioner's motion to the extent that it concerns complaints or other documents of the kind described in the preceding paragraph. Respondent GAO shall provide the Petitioner, within 7 days of the date of this order, with any such documents. To the extent that the motion concerns other documents, it is DENIED.

Designation of Representatives

Pursuant to 4 C.F.R. § 28.25(a), each Respondent should file a designation of representative within 10 days of the date of this order.

Prehearing Conference

I will hold a prehearing conference in the near future. Among the topics to be addressed at that conference will be scheduling, the hearing procedures, and the possible settlement of this case.⁹ Margaret Fisher of my staff will contact the parties regarding the scheduling of this conference.

⁹ If the parties settle this matter, they may request that the settlement agreement be entered into the record and be approved by me. If I approve the agreement, it will be subject to the enforcement provisions of 4 C.F.R. § 28.88. If the parties do not wish the agreement to be subject to those provisions, they should not request approval of the agreement; rather, they should jointly move for dismissal on the basis that they have reached a settlement.

The hearing procedures will be governed by the following provisions, in addition to the procedures in 4 C.F.R. part 28:

(1) Not later than a date to be set during the prehearing conference, each party must file:

(a) A witness list setting forth a summary of each witness's expected testimony;

(b) An index of proposed exhibits; the parties must also exchange copies of all exhibits (marked as P-1, R-1, etc.), but they should not submit the exhibits to me until the hearing;

(c) A prehearing brief setting forth the issues and the applicable law and facts; the Petitioner's brief must include the corrective action or relief being sought in this matter.

(2) Not later than a date to be set during the prehearing conference, the parties must confer and attempt to reach stipulations on the admissibility of exhibits and other matters.¹⁰

(3) Not later than a date to be set during the prehearing conference, the parties must file:

(a) A statement setting forth any stipulations;
and

(b) All prehearing motions,¹¹ including any motions for subpoenas.

A motion for a subpoena must be accompanied by a subpoena prepared for my signature. GAO is ordered to make those of its employees who are listed on a party's witness list available to testify at the hearing without the need for subpoenas. See 4

¹⁰ Depending on the nature and complexity of the case, the parties should attempt to stipulate to matters such as the titles, duties, and educational and employment histories of witnesses; the identities and positions of persons involved in the events in question; and the sequence of uncontested events.

¹¹ A party filing a procedural motion, such as a motion for an extension of time, should contact the other parties prior to filing and should state in the motion whether there is any opposition. Any such motion must be accompanied by a proposed order prepared for my signature.

C.F.R. § 28.26(a). Other federal agencies employing persons listed on a party's witness list are requested to make those persons available to testify at the hearing on the same basis.¹² See 4 C.F.R. § 28.26(a), (b).

(4) The hearing in this matter will be held at a time, and in a location, to be set during the prehearing conference.

(5) The hearing procedures are as follows:

- The Petitioner will present her case. Then the Respondents will present their cases, beginning with the PAB.

- Each party will be permitted to present evidence that is relevant and not unduly repetitious. 4 C.F.R. § 28.66. Application of the Federal Rules of Evidence is not required, but those rules may serve as guidance in my rulings. 4 C.F.R. § 28.56. For example, Rule 403, which permits the exclusion of relevant evidence on several grounds, will be applied. Rule 802, which prohibits hearsay, will not be applied.

- The parties shall offer their exhibits into evidence, and they shall have copies available for use by the witnesses.

- Co-counsel shall follow the "one attorney-one witness" rule.

- The hearing is public, but witnesses other than parties are excluded from the hearing room prior to testifying. The parties should have sufficient witnesses available at the hearing site to ensure that the proceedings are not delayed.

- The parties and witnesses should not engage in conversations with me outside the hearing room or when one of the parties is not present.

- At my discretion, the parties will be permitted to make closing arguments, file briefs, or file proposed decisions (accompanied by a computer disc, if possible).

¹² This general order may be rescinded as to any witness whose proposed testimony is determined by me to be irrelevant or repetitious.

(6) Future pleadings and communications should be addressed to me at:

Office of the Administrative Law Judge
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 800
Washington, DC 20419
Phone: (202) 653-7980
FAX: (202) 653-7655

If a pleading or other communication is filed by facsimile, no additional copies should be submitted to me.

Service of GAO's Answer on Other Parties

Finally, I note that the Board's regulations require that the parties serve on each other a copy of all motions and other pleadings, other than the initial petition for review. 4 C.F.R. §§ 28.20(b)(2), 28.21(b). They also require that each motion or pleading be accompanied by a certificate of service specifying how and when service was made. *Id.*

Neither Respondent GAO's answer to the petition for review nor its motion to dismiss that agency as a party to this case was accompanied by the required certificate of service. Because both Respondent PAB and the Petitioner have responded to the motion to dismiss, it is clear that copies of that motion were served on them. If Respondent GAO did not serve copies of its answer to the petition on the other parties, it should do so immediately.

Paul G. Streb
Chief Administrative Law Judge
Merit Systems Protection Board

Washington, D.C.