

Richard B. Kienzle v. U.S. General Accounting Office

Docket No. 05-802-04-81

Date of Decision: September 21, 1981

Cite as: Kienzle v. GAO (9/21/81)

Before: Taylor, Presiding Member

Authority of PAB General Counsel - Prosecution of Complaints

Denial of Within-grade Increase

Background

On April 28, 1981, a Petition for Review was filed with the Board by Richard G. Kienzle. After completion of his investigation, the General Counsel submitted to the Board his Petition for Review and Report and Recommendations, in accordance with 4 C.F.R. §28.17. By letter dated June 29, 1981, the parties were notified of the Board's receipt of the Report of the General Counsel and were given 30 days from receipt of the notice to furnish further argument to the Board. The petitioner's Brief in Support of Petition for Review was filed on July 28, 1981. Respondent's response thereto was filed with the Board on July 30, 1981, along with a Motion to Disqualify Personnel Appeals Board General Counsel and Motion to Stay. This latter motion document relied upon the Memorandum of Points and Authority submitted by the respondent in Shaller v. GAO, Docket No. 02-102-04-81. On August 5, 1981, the Board received the General Counsel's response to the respondent's Motion. Since no request for a hearing was made by either side in this case, the Panel's Decision is based solely on the record submitted to the Board.

Findings of Fact

Petitioner is a GS-13 Evaluator with the Detroit Regional Office of the respondent. By memorandum dated September 25, 1980, the Detroit Regional Manager advised the petitioner that his within-grade salary increase due on October 5, 1980, would be denied because his performance was not of an acceptable level of competence. Three areas of deficiency were cited in the memorandum of September 25th: (1) non-availability for duty; (2) petitioner's failure to meet completion dates for project assignments; and (3) deficiencies in petitioner's written work products. On October 16, 1980, the petitioner submitted a grievance to the Comptroller General concerning the denial of his within-grade salary increase. However, since the negative determination was not made at least 60 days in advance of October 5th, petitioner was given 60 days from the date of the original notice to demonstrate improvement in his performance. Subsequently, a new determination was made on December 4, 1980, reaffirming the original, negative determination. On December 18, 1980, Mr. Clarence L. Jenney was appointed by the Office of the Comptroller General as Grievance Examiner and an administrative proceeding was conducted by him. The Grievance Examiner submitted his Report of Finding and Decision to the Comptroller General on February 5, 1981, concluding that the three deficiencies cited by management had no merit and did not serve as an adequate basis for denial of the petitioner's within-grade salary increase. By letter dated March 25, 1981, the Acting Comptroller General advised the petitioner of his decision to reject the Grievance Examiner's recommendation, thereby upholding the negative determination and denying petitioner's within-grade salary increase. Consistent with Comptroller General Order 2531.3

(December 1, 1980), the petitioner appealed the Acting Comptroller General's negative determination on his within-grade salary increase to the Board.

Contentions of the Parties

Petitioner contends, through the General Counsel, that he is entitled to have his within-grade salary increase granted retroactively to October 5, 1980. In his brief, the General Counsel concludes that management's decision to withhold the petitioner's within-grade salary increase is not supported by substantial evidence on the record as a whole. Specifically, on the issue of petitioner's excessive use of leave/non-availability for duty, the General Counsel contends that since leave use/abuse does not relate to job performance, it is an inappropriate basis to make a negative determination on an employee's within-grade salary increase. Additionally, the General Counsel contends that even if this is a proper basis for a negative determination, the evidence in this case does not support that determination under the substantial evidence test as cited by the General Counsel.

With regard to the second ground for the negative determination, i.e., petitioner's failure to meet completion deadlines, the General Counsel concludes that this was an arbitrary and capricious basis to deny the within-grade salary increase. Essentially, he argues that, generally speaking, the delays in completion of the three reports cited by management are justifiable and that the decision to discipline an employee for failure to meet such deadlines constitutes a new, hard policy by management which management had not communicated to employees, including the petitioner.

Finally, regarding the third ground for the negative determination, i.e., the quality of petitioner's writing, the General Counsel contends that the record on the whole contains contradictory evidence on this point. Further, the General Counsel contends that the record only minimally supports this ground; hence, he concludes that there is not substantial evidence on the record as a whole to support the third ground cited by management.

The respondent, through counsel, contends that the recommendation contained in the Grievance Examiner's Report of Finding and Decision is inconsistent with the Examiner's findings. The Respondent contends that as to each of the three grounds cited by management in making its negative determination, the findings of the Grievance Examiner are inconsistent with his recommendation. Next, the respondent contends that because of these inconsistencies as well as numerous others in the Grievance Examiner's Report, the Acting Comptroller General upheld management's negative determination and sustained the denial of a within-grade salary increase for petitioner.

Analysis

The parties have raised two procedural issues in this case.

First, regarding the respondent's Motion to Disqualify Personnel Appeals Board General Counsel and Motion to Stay, that Motion is denied, consistent with the Board's decision in Shaller v. GAO, Docket No. 02-102-04-81 (August 11, 1981).

Secondly, the General Counsel's Brief in Support of Petition for Review at pages 5-6 thereof suggests that GAO Order 2531.3, supra, denies a substantial due process right to GAO employees by denying employees the right to a hearing before the Board on appeals of reconsideration determinations on within-grade salary increases. However, since the petitioner did not request a hearing in this case, it is not

necessary to address this issue in this case.

The threshold issue to be resolved in this case is the evidentiary standard to be applied by the Board on appeals involving denial of a within-grade salary increase. Section 23.23(a) of our Regulations states that agency action must be sustained by the Board, consistent with 5 U.S.C. §7701(a), if:

"(1) It is performance-based action and is supported by substantial evidence; or

(2) It is brought under any other provision of law, rule or regulation as defined by 5 U.S.C. §7701(a) and is supported by a preponderance of evidence."

This Regulation is derived from subsection (c)(1) of 5 U.S.C. §7701. Applying the Board's standards of review promulgated under the afore-referenced statute, adverse action and other adverse personnel determinations are governed by the preponderance of evidence standard, while performance-derived personnel actions are reviewed utilizing the substantial evidence test. Therefore, the first issue to be resolved is whether the denial of a within-grade salary increase is a performance-based action for which the substantial evidence test applies or an action requiring application of the preponderance of evidence test.

Since the Board is mandated by its statute and regulations to observe the standards set forth in 5 U.S.C. §7701, interpretations of this statute by the agency charged with its administration--the United States Merit Systems Protection Board --are instructive in this regard. The leading decision of the U.S. Merit Systems Protection Board is Parker v. Defense Logistics Agency, 1 MSPB 489 (February 19, 1980). The MSPB concluded in a well-reasoned decision that a management determination on the denial of an employee's within-grade salary increase (the so-called acceptable level of competence determination) is a performance-based action. Consequently, the MSPB determined that the substantial evidence test applied to the MSPB's review of such a determination. Citing the Supreme Court's decision in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the MSPB defined the substantial evidence standard as follows:

"... requires only evidence of such quality and weight that reasonable and fair minded persons in exercising impartial judgment might reach different conclusions. This standard precludes the Board's presiding official from substituting his or her own judgment for that of the agency. It obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's decision (even though other reasonable persons including the presiding official might disagree with that decision)."

The Board concurs in the position of the General Counsel that acceptable level of competence determinations are performance-based actions and therefore must be supported by substantial evidence on the record as a whole. Thus, the agency action to deny an employee's within-grade salary increase must be sustained if it is a performance-based action and is supported by substantial evidence on the record as a whole.

Turning to the instant case, the first ground relied upon by management to deny petitioner's within-grade salary increase is premised on the petitioner's use/abuse of annual leave during the period between January 1978 and 1980. Due to the nature of the Board's finding on this ground, it is unnecessary to address the evidentiary merits of this ground. The Board finds that issues involving an employee's use/abuse of leave relate to an employee's misconduct on the job, not the employee's job performance. Carried to its logical extreme, total absence from the job would make it impossible for management to

ever evaluate the performance of the employee. In fact, total absence from employment for an extended period of time generally results in a charge of abandonment of position being leveled against the offending employee. This is clearly a misconduct charge. Moreover, the decisions of the former United States Civil Service Commission and judicial review of those decisions have uniformly determined that absence from work and leave abuse constitute misconduct. Since acceptable level of competence determinations are performance based, the first ground relied upon by management to deny the petitioner's within-grade salary increase is rejected as inapplicable to a performance-based determination.

The second ground for management's determination to deny the petitioner's within-grade salary increase was his alleged failure to meet completion deadlines in submitting certain reports to the agency. Three distinct assignments given to petitioner are cited. As we read the record, the petitioner does not dispute that the assignments were completed beyond the established deadlines, but cites numerous arguments in mitigation of failure to meet these deadlines. We note that the Report of Finding and Decision of the Grievance Examiner indicates that failure to meet assigned work deadlines is a serious problem in the General Accounting Office. Nevertheless, the petitioner's brief to the Board contends that:

"However, before timeliness is used in discipline, employees should be warned of a policy change and the new policy should be uniformly enforced. There is no evidence of such a policy change and no evidence that other employees are being dealt with similarly."

Petitioner's brief then argues that each of the three cited examples of untimeliness were de minimis, particularly because of the quality of the final work product. Since management's second ground for its negative determination did not challenge or question the quality of the petitioner's work product on the three assignments in question, the quality of the work assignments is not the relevant consideration here. Furthermore, while the disciplining of the petitioner for his untimeliness in submitting work assignments may constitute a new policy of the respondent which had not been communicated to the petitioner or other agency employees--indeed, the record is devoid of any such evidence--we need not decide that issue here.

Rather, we hold that the petitioner's rating supervisor(s) violated GAO Order 2531.3 (December 11, 1980) in relying on the lateness of these submissions as a justification for the negative determination. Specifically, paragraph 9 of that order states the requisite for a supervisor making such a determination. Subparagraph b. of that paragraph lists five such grounds, the first of which is applicable here:

"(1) A warning that his/her work, if not improved, would be the basis for disciplinary action..."

Further, subparagraph c. of the same paragraph states that the determination must be:

"(1) Based on the 'essential performance requirements of the employee's posture:'

(2) Made as of the 'completion of the waiting period;' and

(3) Based on the 'employee's performance during the waiting period.'"

The record does not contain any evidence that petitioner was counseled or warned during the waiting period in question that his submission of work products was chronically late; that if he did not submit work products more timely he would be disciplined; or that timely submission of work products was an essential performance requirement of his position. Moreover, for the most recent performance appraisal of petitioner's duties and responsibilities included in the record, the rating was prepared by someone other

than the Team Leader and was then signed by the third level supervisor (the Regional Manager) rather than the second level supervisor (the Assistant Regional Manager) who signed petitioner's 1978 and 1979 performance appraisals. Hence, petitioner could reasonably have been unclear as to which supervisor expected what level of performance from the petitioner. Consequently, we reject the second ground relied upon by respondent to deny the petitioner's within-grade salary increase.

The third ground relied upon by management to deny the petitioner's within-grade salary increase was that petitioner's written work product was frequently not of an acceptable quality to management. In this regard, the record clearly establishes that in each of the petitioner's three most recent performance appraisals, the petitioner was cited for written work product not of an acceptable quality for a GS-13 Evaluator. The record further reveals that the Report of Finding and Decision of the Grievance Examiner found an inconsistency between the testimony of the petitioner's team leaders and the higher level management of the Detroit Regional Office regarding petitioner's writing ability. Concluding that the team leader supervisors were in a better position to evaluate the quality of the petitioner's writing ability, the Grievance Examiner rejected the third ground cited by management in denying the petitioner his within-grade salary increase. The record also reveals, however, that the only warning allegedly given to petitioner concerning the "poor quality" of his work product was a May 25, 1979, memorandum to record signed by the Assistant Regional Manager. Additionally, the record shows that petitioner never received a copy of this memorandum and that petitioner denied ever being officially warned that if his work product did not substantially improve, he would be disciplined by management. Since the record does not demonstrate that petitioner actually received such a warning during the waiting period in question, this ground relied upon by respondent also violates paragraph 9 b. and c. of GAO Order 2531.3 (December 11, 1980). While we need not decide this issue on the basis relied upon by petitioner, we note the lack of any clear delineation of supervisory responsibility over the day-to-day activities of petitioner and presumably other employees similarly situated in the Detroit Regional Office. If, as we suspect, this pattern exists throughout the agency, management could assist both employees and supervisors by more clearly establishing the appropriate chain of command for supervising and evaluating the day-to-day activities of employees.

Decision

Petitioner's request for retroactive granting to October 5, 1980, of his within-grade salary increase is hereby granted. The respondent is directed to provide petitioner with his within-grade salary increase retroactive to October 5, 1980, and to provide petitioner with back pay for the period in question. Agency records should be corrected consistent with this Decision.