

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

Docket No. 05-802-04-81

Date of Decision: December 1, 1981

Cite as: Kienzle v. GAO (12/1/81)

Before: Gallas, Chair; Bussey, Meagher, Simmelkjaer, and Taylor, Members

Unacceptable Performance

RECONSIDERATION of Kienzle v. GAO, M3 (September 21, 1981)

Background

Member Taylor issued the initial decision in this case on September 21, 1981. On October 19, 1981, the Board received a Motion to Reopen and Reconsider from the General Accounting Office (hereinafter referred to as "Respondent"). A Memorandum of Points and Authorities accompanied the motion. On November 4, 1981, the Board received the Petitioner's Response to Respondent's motion filed by the Board's General Counsel.

Contentions of the Parties

The Respondent, in an eight-point memorandum, attempts to refute the Board's determination on each of the three grounds originally relied upon by Respondent in denying the Petitioner's within-grade salary increase.

The Board's General Counsel replies to the motion and supporting memorandum by addressing each argument set forth in the eight-point memorandum.

Analysis

In essence, it is the Respondent's position that the Board improperly applied the statutes, regulations and GAO Orders applicable to this case.

Since Respondent's first, second and eighth points are explanatory rather than argumentative in nature, this analysis merely addresses points three through seven of Respondent's memorandum.

In point three, Respondent challenges the initial decision of the Board that abuse of leave is a conduct-based charge not a performance-based charge. Respondent contends that "total performance in the job" must be used in making a determination on acceptable level of competence. Citing GAO Order 2531.3, paragraph 9.a. and Federal Personnel Manual Bulletin Number 531-47, Respondent contends that reliability is a part of total performance in the job, and that:

"Certainly if an individual's leave usage is poor, the individual's reliability is questionable which in turn can lead to a negative acceptable level of competence determination."

Finally in this regard, Respondent concludes that the Board failed to provide case law to support its position and that the Board applied too narrow a scope of evidence in this case.

The Board disagrees with the position of Respondent on this issue in at least three respects. First, Respondent cannot reasonably argue that having authorized Petitioner's requests for leave, it can later discipline Petitioner for requesting and using the leave so authorized, particularly when paragraph 9.b.(5) of GAO Order 2531.3 is so explicit in this regard:

"The manner of the employee's application for and use of leave has, without reasonable justification, been such that it has impaired the value of the employee's services to the Office and has necessitated, after he/she was warned in writing and failed to effect substantial improvement, the imposition of formal restrictions on the use of leave or other disciplinary action."

Since Respondent authorized the leave and failed to warn Petitioner that his leave usage impaired his value to the agency, Respondent's argument is not reasonable. Second, the Board cites with approval the following Merit Systems Protection Board decisions for the proposition that leave abuse is a misconduct-based action rather than a performance-based action: Parker v. Defense Logistics Agency, 1 MSPB 489 (February 19, 1980), 80 FMSR 7008; Holt v. Department of the Navy, Decision and Order No. ATO75209296 (April 23, 1981), 81 FMSR 5296; Starkey v. Department of Air Force, Initial Decision No. DAO75209076 (January 10, 1980), 3 MSPB _____, 80 FMSR 5112; Swan v. Department of Defense, Initial Decision No. CHO75209005 (October 10, 1979); and Barner v. U.S. Postal Service, 1 MSPB 272 (November 15, 1979). See p. 10 of Petitioner's brief filed on July 28, 1981. Finally, the Respondent's position ignores the standards set forth in 5 U.S.C. §7701(a) and 4 C.F.R. §23.23(a):

"(1) Performance-based actions must be supported by substantial evidence; and

(2) All other adverse actions must be supported by a preponderance of the evidence."

Following Respondent's rationale would require the Board to apply a bifurcated evidentiary standard in acceptable level of competence cases which are based--at least in part--on conduct. That is, the conduct alleged would be evaluated under evidentiary standard (2) above, and the performance alleged would be evaluated under evidentiary standard (1) above. Moreover, if conduct were the sole basis for the performance action, it is unclear under Respondent's rationale which evidentiary standard to apply.

Accordingly, consistent with the rationale at pages 5-7 of the initial decision in this case and Parker v. Defense Logistics Agency, supra, the Board rejects the Respondent's arguments on Petitioner's alleged leave abuse.

Point four of Respondent's memorandum contests the initial decision's determination that Respondent was required by GAO Order 2531.3, paragraph 9.b. and c. to warn Petitioner prior to disciplining him for his untimely submission of work products. Respondent is contending that the initial decision erroneously interpreted GAO Order 2531.3 by imposing a warning notice as a condition precedent to a negative, acceptable level of competence determination.

On the contrary, as noted by Petitioner in his response to Respondent's motion, at page 3 thereof:

"Paragraph 9(b)(1) is only illustrative and is not a specific requirement in every case. However, analysis of the whole paragraph supports the Panel's interpretation. Advance warning of possible disciplinary action is inherent in every example. It is specifically required by subparagraphs (1), (2), (4), and (5). Constructive notice is clearly suggested by subparagraph (3)."

According to the evidence in the record and as noted in the initial decision at page 8 thereof and at page 4 of Petitioner's response to Respondent's motion, the timeliness of work products has not been previously used by Respondent to discipline employees for substandard work performance. In the absence of an announced change in that policy, it would be unfair and inequitable to permit Respondent to use timeliness of work products to discipline its employees, including Petitioner. Therefore, the Board rejects Respondent's argument at point four of its memorandum.

Point five of Respondent's memorandum states that the initial decision was inaccurate in observing that "petitioner could reasonably have been unclear as to which supervisor expected what level of performance from the petitioner." Even assuming the correctness of Respondent's assertion here, however, it is not germane to the Board's determination in this case.

Point six of the Respondent's memorandum relies on its argument in point four above to contest the initial decision's determination that Respondent could not discipline Petitioner on the basis of the quality of his final work product without first warning him that such a deficiency would lead to disciplinary action.

As the Board reads GAO Order 2531.3, Respondent was obligated to warn Petitioner before initiating any disciplinary action on deficiencies in his work product. There is no evidence in the record that Respondent had warned Petitioner in advance. The essence of that order is that fundamental fairness and sound personnel management dictate that an employee be warned--and even counseled if necessary--before that employee is subjected to any disciplinary action for poor performance. A contrary holding would be arbitrary and capricious as well. Therefore, the Board rejects point four of Respondent's memorandum.

Finally, there is point seven of the Respondent's memorandum. This is a reiteration of point five of that memorandum. Accordingly, the Board rejects point seven for the same reasons that it rejected point five above.

Decision

The Board, having considered the Respondent's Motion to Reopen and Reconsider the Board's initial decision in Kienzle v. GAO, M3 (September 21, 1981), and, based on the foregoing analysis, affirms its original decision. Accordingly, Petitioner is entitled to his within-grade salary increase, retroactive to October 5, 1980.