

Earl L. Patrick v. U.S. General Accounting Office

Docket No. 25-100-17-83

Date of Decision: October 3, 1983

Cite as: Patrick v. GAO (10/3/83)

Before: Gallas, Chair; Bowers, Bussey, Ross, and Simmelkjaer, Members

Prohibited Personnel Practices - Definitions

Prohibited Personnel Practices

Position Classification

Equal Pay

ORDER OF THE BOARD AFFIRMING THE PRESIDING MEMBER'S DENIAL OF RESPONDENT'S MOTION TO DISMISS

The General Accounting Office has moved for reconsideration by the full Board of the August 18, 1983, Order of the Presiding Member denying GAO's motion to dismiss the Petition for Review. For the reasons that follow, the Order of the Presiding Member is affirmed.

Earl L. Patrick filed a Petition for Review of the decision denying him reclassification as an assistant work leader in the mail room. (Petition, p.1). GAO moved before the Presiding Member to dismiss the petition on grounds that the Board lacks jurisdiction over the subject matter and that the petition fails to state a claim upon which relief may be granted.

Mr. Patrick contends that for a period from 1977 to 1981 he performed duties in the mailroom that materially exceeded those of a Motor Vehicle Operator, the position in which he was classified. GAO Order 2511.1, effective April 20, 1981, is entitled "Position Classification." Chapter 4 of that Order deals with classification appeals. Pursuant to the provisions of that Chapter, Mr. Patrick filed a classification appeal with the Director of Personnel. That appeal was denied on February 16, 1982. The Director of Personnel determined that Mr. Patrick was properly classified as a Motor Vehicle Operator. Pursuant to paragraph 8 of Chapter 4, Mr. Patrick then appealed the decision of the Director of Personnel to the Comptroller General. On April 5, 1983, Mr. Milton Socolar, on behalf of the Comptroller General, sustained the decision of the Director of Personnel and denied the classification appeal. Mr. Patrick petitioned this Board for review of that decision. The GAO argued that the petition involves only an appeal of a position classification, that 31 U.S.C. §753 defines the jurisdiction of the Personnel Appeals Board, that appeals of classification decisions are not enumerated in subsections (a)(1) through (7) of section 753, and that the Comptroller General has not exercised his authority under section 753(a)(8) to confer jurisdiction to the Board over classification appeals. The Presiding Member disagreed with GAO and denied its motion. She reasoned that 31 U.S.C. §753(a)(2) specifically gives the Board jurisdiction over personnel practices prohibited by 5 U.S.C. §2302(b); that it is a prohibited personnel practice under 5 U.S.C. §2302(b)(11) to "take or fail to take any... personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system

principles contained in section 2301 of [Title 5]"; that 5 U.S.C. §2301(b) provides:

Federal personnel management should be implemented consistent with the following merit system principles;

(3) Equal pay should be provided for work of equal value...;

that a position classification system, such as GAO Order 2511.1, and the proper classification of jobs within such a system, is a primary means of implementing the "equal pay" requirement; and that, therefore, failure to properly classify an employee's job so as to pay the employee less than the pay of substantially equal jobs is a prohibited personnel practice under 5 U.S.C. §2301(b)(11), over which the Board has jurisdiction.

In its motion for reconsideration by the full Board, GAO argues that a perceived violation of a merit system principle set forth in 5 U.S.C. §2301(b) is not enough to constitute a personnel practice prohibited by 5 U.S.C. §2302(b)(11); rather, that a law, rule, or regulation which implements or directly concerns a merit system principle must be violated in order to give rise to a prohibited personnel practice under section 2302(b)(11). GAO is correct. The merit system principles in section 2301(b) are not self-executing.¹ However, GAO Order 2511.1 on Position Classification is a regulation which implements the equal pay merit system principle. Chapter 1, paragraph 1(a) of that Order states:

Underlying this [classification] system are:

(2) The principle of equal pay for work of substantially equal value.²

Therefore, we agree with the Presiding Member that a violation of GAO Order 2511.1 which results in a substantial deviation from the equal pay principle may constitute a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(11), and under 5 U.S.C. §753(a)(2), the Board has jurisdiction over alleged prohibited personnel practices.

Nevertheless, GAO asserts that the MSPB, which has jurisdiction over prohibited personnel practices in the executive branch, has never accepted jurisdiction over the appeals of position classifications. GAO argues:

The Presiding Member in the instant case has shown ... an unrestrained willingness to "bootstrap" and extend the jurisdiction of the PAB beyond that jurisdiction which has been afforded to executive branch employees by the MSPB. This clearly offends the legislative purpose and intent of the GAO Personnel Act of 1980 which was enacted in order to furnish GAO employees with the same protections that have been furnished to executive branch employees. (Motion for Reconsideration, pp. 9-10; emphasis in original.)

GAO plainly is in error, and has not adequately considered the Court of Appeals decision in GAO v. GAO Personnel Appeals Board, 698 F.2d 516 (D.C. Cir. 1983). In both the executive branch and the GAO, employees enjoy the same substantive protections from prohibited personnel practices. "With these substantive protections guaranteed, Congress left to the PAB the discretionary task of formulating

appropriate procedures ..." GAO v. PAB, 698 F.2d at 531.

GAO is correct in stating that an employee in the executive branch may not raise a prohibited personnel practice in an appeal to the MSPB (except in connection with a petition for review of an otherwise appealable action). When an employee is the object of a personnel action that is not appealable to the MSPB, but which involves a prohibited personnel practice, the employee's only recourse is to the Special Counsel. If the Special Counsel fails to find reasonable grounds to seek corrective action from the Board, the employee cannot independently initiate an action before the MSPB.³

However, the Board has established through its rulemaking authority that any matter within its jurisdiction is subject to its appellate jurisdiction. Allegations of prohibited personnel practices need not be brought by the Board's General Counsel or arise in the context of otherwise appealable actions. GAO appears to take issue with the Board's regulations. "Implicit in GAO's argument is an extraordinary suggestion that the PAB must follow precisely the procedural models employed by executive branch boards and agencies." GAO v. PAB, 698 F.2d at 531.

In GAO v. PAB, the court rejected GAO's argument as to whether the Board had authority to fashion for its General Counsel a role that is different and substantially broader than that of the Special Counsel of the MSPB. The Court concluded that "[i]f Congress had intended the institutional structure of the PAB to mirror precisely the structures of the boards and agencies handling personnel cases in the executive branch, then the GAOPA could have been written simply to adopt the laws governing the MSPB, FLRA, Special Counsel and EEOC" (698 F.2d at 531). This conclusion is equally applicable regarding the Board's determination as to when its General Counsel need not be the moving party before it. The instant case, therefore, is properly within the Board's jurisdiction.

GAO also contends that the petition for review should be dismissed because it fails to state a claim upon which relief may be granted. It appears from the petition that Mr. Patrick is no longer performing the duties which he claims exceeded those of the position in which he is and has been classified. Therefore, if he prevails on his claim, there will be no occasion in this case for the Board to order, as a prospective remedy, that his position be reclassified for the future.

Furthermore, it appears that back pay for the period Mr. Patrick may have worked in a higher classification is not available as a remedy in cases of this kind. In United States v. Testan, 424 U.S. 392 (1976), a case arising under the Classification Act in the executive branch, the Supreme Court stated:

It long has been established, of course, that the United States, as sovereign, "is immune from suit save as it consents to be sued...and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit." ...[A] waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." ...We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications.

The situation...is not that Congress has left the respondents remediless...for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other.

424 U.S. at 399, 403. The Court also examined the Back Pay Act:

The Act does authorize retroactive recovery of wages whenever a federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U.S.C. §5596(b).

[T]he federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. 424 U.S. at 405, 406.

GAO Order 2511.1 likewise makes no express provision for back pay when an employee has performed duties of a higher grade. Our statute, the GAO Personnel Act, authorizes the Board to "order corrective or disciplinary action" in cases properly before it. 31 U.S.C. §753(a). Had Congress wanted GAO employees to receive back pay when their positions are misclassified, we believe it would have said so in express terms, particularly in view of Testan. We decline, therefore, to construe this provision in our statute as authorizing back pay in cases where an employee has been misclassified. The absence of a back pay remedy, and the inappropriateness of prospective reclassification in this case,⁴ do not mean, however, that no relief may be granted if Mr. Patrick prevails on the merits. In proper circumstances, a cease and desist order against future violations of the classification system may be warranted, particularly if it were shown that similar problems of a recurring nature existed. In addition, from a practical point of view, it may be important to an employee to prevail on an equal pay classification dispute even without back pay or prospective reclassification. An adjudication which declares that the employee was unlawfully misclassified may assist the employee by serving, for example, to satisfy prior experience and/or time-in-grade requirements for future promotion or other job opportunities. See Leopold v. Civil Service Commission, 450 F. Supp. 154 (E.D.N.Y. 1978).

The petition does state, therefore, a claim upon which relief may be granted.⁵

For the foregoing reasons, the Presiding Member's Order of August 18, 1983 is affirmed.

Notes

1. See House Com. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 1970 (Com. Print No. 96-2, 1979) ("the [merit system] principles themselves may not be made the basis of a legal action by an employee or agency").
2. Compare the Classification Act, 5 U.S.C. Chapter 51, and Chapter 511, subchapter 1 of the Federal Personnel Manual (OPM regulations implementing the Classification Act), both of which set forth the equal pay merit system principle as one of their basic purposes.
3. The cases cited by GAO were ones in which employees sought to appeal alleged prohibited personnel practices directly to the MSPB. It does not appear that the Special Counsel has had occasion to initiate a proceeding before the MSPB involving violation of the Classification Act and 5 U.S.C. §2302(b)(11), and there is, therefore, no decision suggesting how the MSPB would handle such a case when properly raised before it. The case before us apparently is one of first impression.

4. Of course, as the Supreme Court stated in Testan, prospective reclassification would be available if an employee were still performing duties of a higher classification.

5. We note that in this case the petitioner availed himself of the internal appeal procedures under GAO Order 2511.1 prior to seeking review by the Board. For future guidance, exhaustion of the appeal procedures in Chapter 4 of GAO Order 2511.1 is appropriate before petitioning the Board for review of an alleged violation of 5 U.S.C. § 2302(b)(11) based upon misclassification. Use of the internal appeal procedures has the benefit of permitting those agency officials knowledgeable in and responsible for position classification to first examine carefully the duties of the job in question and compare them with established standards and positions. Such examination will assist in the development of information necessary to the fact-finding process before the Board. (It is not necessary at this stage of this proceeding to determine the degree of deference, if any, which the Board should give to classification decisions made by GAO pursuant to the internal appeal procedures under Order 2511.1.) Requiring prior exhaustion of the classification appeal procedures is qualified in one respect, however. A petition may be filed with the Board within the time specified in 4 CFR § 28.11(b) after a final GAO decision on the classification appeal or at any time more than 80 days after filing an appeal with GAO under Chapter 4 of Order 2511.1 if GAO has not issued a final decision. Access to the Board must not be unduly delayed by agency inaction. In this case we note that Mr. Patrick filed his classification appeal on December 17, 1981, but did not receive a final agency decision until April 5, 1983.