

Robert D. Outerbridge v. U.S. General Accounting Office

Docket No. 30-202-17-83

Date of Decision: September 30, 1984

Cite as: Outerbridge v. GAO (9/30/84)

Before: Simmelkjaer, Presiding Member

Prohibited Personnel Practices - Performance Appraisal System

DECISION OF THE PRESIDING MEMBER

Petitioner, Robert D. Outerbridge, a GS-12 evaluator, alleges that prohibited personnel practices were committed in connection with two performance appraisals he received in June 1982. One appraisal, for a Military Reserve Retirement System job, rated him from 10 to 15 percent "borderline" on three of the six appraisal categories. The other appraisal, for a review of "Look-Back" provisions used to compute military retirement pay, rated him from 10 to 30 percent "borderline" on five of the six categories. Petitioner alleges that applicable GAO regulations require that appraisal ratings be given by the evaluator's immediate supervisor on the job in question; that the "borderline" ratings in question were not given by his supervisor, but rather by the Group Director (his supervisor's superior); and that such irregularities constitute prohibited personnel practices.

The Civil Service Reform Act defines eleven prohibited personnel practices. 5 U.S.C. §2302(b). The statute that withdrew the GAO from coverage of the Civil Service Reform Act requires that GAO establish a personnel management system that incorporates the provisions regarding prohibited personnel practices from the Reform Act. 31 U.S.C. §732(b)(2). By regulation GAO has reiterated the eleven prohibited personnel practices at 4 CFR §2.5.

In order for a prohibited personnel practice to exist, it must involve the taking or failure to take a personnel action. 5 U.S.C. §2302(b). The definition of "personnel action" includes "a performance evaluation under chapter 43" of title 5. 5 U.S.C. §2302(a)(2)(A)(viii). The appraisals at issue in this case were made pursuant to the GAO evaluation system that is comparable to 5 U.S.C. Chapter 43. See GAO Order 2430.1, Performance Appraisal Program (November 30, 1981)(Pet. Ex. 7). Therefore, the complained of actions in this petition constitute a "personnel action" for purposes of defining a prohibited personnel practice.

The prohibited personnel practice at issue in this case is found at 5 U.S.C. §2302 and is stated as follows:

“(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(11) Take or fail to take any other 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 this title.

The GAO Performance Appraisal Order implements or directly concerns the following merit system principles set forth at 5 U.S.C. §2301:

‘(3) [A]ppropriate incentives and recognition should be provided for excellence in performance.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

Chapter 1, paragraph 3 of the Order provides: "As required by the GAO Personnel Act of 1980, GAO must develop one or more performance appraisal systems...and use the results of performance appraisals as a basis for personnel actions such as promoting, training, retaining, rewarding, reassigning, reducing in grade and removing employees...." Thus, the GAO Performance Appraisal Order is designed to implement both of the merit system principles quoted above, or, at a minimum, it at least directly concerns both of them. Therefore, a substantial violation of the Performance Appraisal Order would constitute a prohibited practice.

The Performance Appraisal Order -- GAO Order 2430.1 -- provides in Chapter 2, paragraphs 3 and 4, in relevant part, as follows:

“3. RESPONSIBILITIES OF RATING OFFICIALS. The rating official is that person designated as the employee’s immediate supervisor and is responsible for preparing the appraisal form. Specifically these responsibilities include:

d. Appraising performance at the end of the appraisal period in accordance with previously established performance standards.

4. RESPONSIBILITIES OF REVIEWING OFFICIALS. Reviewing officials are to review performance appraisal forms to ensure sufficient documentation and compliance with performance appraisal policy. Reviewing officials are specifically responsible for:

b. Reviewing the narrative justifications (for those systems that require a narrative) supporting the overall assessment ratings, and requesting additional justification if the narrative is unclear or inadequately supports the overall ratings. If the reviewing and rating official cannot agree to additional justification, the reviewing official should state his/her views in an addendum to the appraisal. Reviewers are NOT to change nor direct raters to change their adjective ratings. **IT IS NOT THE PURPOSE OF THE REVIEWER TO CHANGE THE RATING BUT RATHER TO ENSURE IT IS ADEQUATE AND SUPPORTABLE.** (Pet. Ex. 3, pp. 7-8, emphasis in original.)

On the Military Reserve Retirement System job, Petitioner’s immediate supervisor signed the performance appraisal form (GAO Form 563) on June 30, 1982, as the "rater", consistent with paragraph 3 of Chapter 2 of the Order, quoted above. Petitioner also signed the form on June 30, the day it was discussed with him by his supervisor. The Group Director signed as the "reviewer" on July 28, 1982. (Resp. Ex. 1.)¹

The testimony establishes that prior to the appraisal form being in final and signed by the immediate supervisor on June 30, a draft of the appraisal was requested by the Group Director, who testified that he changed the adjective rating made by the supervisor for the "data analysis" category from 100% "proficient" to 90% "proficient" and 10% "borderline." This change directly contravenes the Performance

Appraisal Order, which provides: "Reviewers are NOT to change nor direct raters to change their adjective ratings."

Petitioner also alleges that the Group Director changed the supervisor's adjective ratings on the Military Reserve Retirement System job for the "data gathering and documentation" and "maintaining effective working relationships" categories to 15% and 10% "borderline", respectively. The Group Director denied changing the supervisor's ratings for those two categories and the supervisor's testimony was inconclusive on those questions. I do not find, therefore, that Petitioner has shown by a preponderance of the evidence that the Group Director changed those ratings in contravention of the Performance Appraisal Order.

On the "Look-Back" job, Petitioner's immediate supervisor signed the performance appraisal form on June 30, 1982, as a "rater". Petitioner signed it on the same date. On July 28, 1982, the Group Director also signed the form on the line denominated "rater". The Deputy Associate Director then signed the performance appraisal as the "reviewer" on July 29.

The Group Director testified that he lowered several of the ratings initially made by the immediate supervisor on the "Look-Back" job appraisal to partially "borderline".² However, the Group Director also testified that a draft report of the "Look-Back" project had been submitted to him by the supervisor in June 1981, that after making review notes he returned the draft to the supervisor for revision, that the supervisor made some changes and returned the draft to him in late June 1981, and that he felt more changes were still necessary. The Group Director was not satisfied with the supervisor's job and determined that he should directly involve himself in completing the report. Therefore, he began to work directly with Petitioner in the development of new data. Although work was not continuous, the Group Director's direct supervision of Petitioner's work during this phase of the project lasted for a period of several months. During this period Petitioner devoted two or three weeks of work to the project, and the Group Director also worked with materials prepared by Petitioner in the earlier phases of the project. During this period, the immediate supervisor had no further actual responsibility for the job, although his name formally remained in the agency's records as the first-line supervisor.³

In these circumstances, where Petitioner was directly supervised on the "Look-Back" job at different times by both his immediate supervisor and the Group Director, I do not find that there would have been any violation of the Performance Appraisal Order if they had truly collaborated as "co-raters", agreed on the ratings, and communicated to Petitioner that the ratings were made jointly. Likewise, two appraisals could have been prepared, one by the immediate supervisor for the period he actually supervised Petitioner on the project, and one by the Group Director for the time he supervised Petitioner directly.⁴ The testimony convinces me, however, that the three ratings changed by the Group Director were not jointly agreed to, but rather were solely the product of the Group Director.

Thus, Petitioner really has not received a rating from the immediate supervisor; he has been rated only by the Group Director. The Order requires, however, that an employee's immediate supervisor is responsible for preparing an appraisal form. Petitioner's initial supervisor on the "Look-Back" job did prepare such an appraisal, but it was effectively nullified by the Group Director's actions. Under these circumstances, I find that the Order has been violated. I add, however, that I do not believe it was violated in bad faith, but rather that the Group Director was attempting to deal with an unusual and difficult situation in a manner that would comply with the spirit of the Performance Appraisal Order.

Remedy

For the violation concerning the Military Reserve Retirement System job, the agency is directed to correct the performance appraisal of Petitioner to reflect a 100% "proficient" rating for the "data analysis" category.

For the violation concerning the "Look-Back" job, the agency is directed to execute two performance appraisal forms: one signed by the Group Director as "rater", covering the period for which he directly supervised Petitioner, containing adjective ratings the same as those appearing on the existing appraisal (Pet. Ex. 2), and one signed by the immediate supervisor as "rater," covering the period for which he directly supervised Petitioner, containing adjective ratings the same as those appearing on the existing appraisal, except that the categories "data analysis", "oral communication", and "maintaining effective working relationships and an equal opportunity environment" shall each be rated 100% "proficient". Narrative justifications shall be provided in accordance with the requirements of GAO Order 2430.1.

Notes

1. The role of the Group Director as the "reviewer" is consistent with a memorandum from the Director, Federal Personnel and Compensation Division (where petitioner was employed at the time in question) on implementation of the performance appraisal system (Pet. Ex. 7), which states: "Employees' immediate supervisors...should complete the form 563.... The form 563 must be reviewed and signed by Group Directors to whom raters are assigned, after raters have discussed the appraisal contents with staff members."
2. The Group Director testified that he changed the ratings for the "data analysis", "oral communication" and "working relationships" categories. He denied changing the ratings for the "data gathering" and "written communication" categories. I do not find that petitioner has established by a preponderance of the evidence that the final ratings in these latter two categories were made by anyone other than the immediate supervisor.
3. The Group Director testified that in a similar situation a supervisor probably would have been formally removed from the project. However, because of extenuating circumstances relating to this particular supervisor, a decision was made not to formally remove him from the job.
4. The situation here of successive direct supervisors does not appear to have been contemplated by the Order and thus the situation is not addressed directly in the Order. Chapter 4, paragraph 1 of the Order deals with situations different from that presented here.