

Helen D. Fauntleroy; Clementine H Rasberry; Jane D. Trahan v. U.S. General Accounting Office

Docket Nos.: 46-701-15-84; 47-701-15-84; 48-701-15-84

Date of Decision: July 30, 1985

Cite as: Fauntleroy, et al. v. GAO (7/30/85)

Before: Feigenbaum, Presiding Member

Motions to Dismiss

Hearing Procedures

Class Actions

Waiver

DECISION OF THE PRESIDING MEMBER

Background

Petitioners Clementine H. Rasberry and Helen D. Fauntleroy are GAO evaluators, GS-347-13; Petitioner Jane D. Trahan is a GAO evaluator, GS-347-14. In August 1983 petitioners were informed that they had not made the best qualified lists (BQL) under the Merit Selection Program (MSP) for GS-14 (Rasberry and Fauntleroy) or GS-15 (Trahan) in the Federal Personnel and Compensation Division. Petitioners filed discrimination complaints with the General Accounting Office (Agency) in October 1983 alleging racial discrimination and reprisal for involvement in the Fogle class action.

Petitioners invoked the jurisdiction of the Personnel Appeals Board (PAB or Board) on May 3, 1984. This was before the Agency issued its final decision on their complaints, but after 80 days had elapsed since they filed formal discrimination complaints. (The Agency issued its final decision on June 15, 1984, and found no discrimination.)

As a result of the investigation made by the PAB General Counsel, the claim concerning the alleged reprisal was dropped. On March 27, 1985, the General Counsel filed petitions for review on behalf of petitioners, claiming that their education and/or experience was superior to that of certain persons who had made the Federal Personnel and Compensation Division BQLs. Petitioners concluded that their failure to make the BQLs must have been as a result of discrimination because of race (Black). As remedy, petitioners requested that they be promoted retroactively, with backpay, to October 1, 1983, and that the MSP be validated.

On April 26, 1985, the Agency filed a motion to dismiss petitioners' claims, essentially on the basis that their claims are encompassed within a class action, Mason v. GAO, of which they are members and which is in the final stages of being settled. The Agency stated that Mason is being settled along with Fogle, that it covers both the 1983 and 1984 MSP promotion cycles, and that Mason, which was filed on August 23, 1983, on behalf of all black male professionals at GAO, present and future, was amended on November 3,

1983, to include black women. The Mason class action alleges both disparate impact and disparate treatment. The relief requested in Mason includes validation of the MSP and promotion for each class member.

The Agency's motion to dismiss asserted that petitioners did not opt out of the Mason class action although they each had two opportunities to do so, once in April/May, 1984, and once in February 1985. "As class members in Mason v. GAO, petitioners are bound to whatever adjudication, including settlement, is reached in Mason. Petitioners are not entitled [to] pursue their individual actions before the Personnel Appeals Board."

The Agency stated that final agreement on a settlement in Mason is expected shortly, and that with respect to the matter of validating the MSP:

The Comptroller General in his October 16, 1984 decision in Fogle v. GAO has already agreed to conduct a validation study of MSP in consultation with the class. Settlement negotiations in the Fogle/Mason actions included the process under which the validation study will take place. Such study may result in modifications to the operations and procedures of MSP.

Further, the Agency stated that, concerning the seeking of promotion as relief by petitioners, "... it should be noted that no promotions to any evaluators, black or white, were given in the 1983 round of MSP in the Federal Personnel and Compensation Division -- the division the petitioners alleged discriminated against them."¹ The Agency motion concluded that the petitioners' claims should be dismissed because their "... allegations stem from the same basis as those in Mason, and the relief they seek is also sought in Mason. Their retaliation claim, the only distinction their case had from the Mason case, no longer exists."

On May 8, 1985, the General Counsel filed an opposition to the Agency's motion to dismiss. The General Counsel's bases for the opposition were that:

1. The Agency's motion to dismiss is improper and untimely. EEO cases within the Board's jurisdiction are governed by 4 C.F.R. 28.41 et seq. §28.47(b)(2) allows a petitioner to file a petition with the Board if a period of more than 80 days has elapsed since a complaint was filed and the GAO has not issued a final decision, as was the fact in this case. Under §§28.49 and 28.15, the Agency is responsible for filing a response to a petition -- which includes a complete statement of its position to each issue raised by the petitioner -- within 20 days of receiving a copy of the petition. The agency was served with petitioners' three petitions for review on May 4, 1984. According to the General Counsel:

...[The Agency] did not file a substantive response until April 1985, i.e., the motion. The regulations are clear that the agency should file a response within 20 days. ... The agency has not acted in good faith by waiting a year to assert that petitioners' claims before the PAB should be dismissed. More significantly, they have not followed the regulations and should be required to go to hearing on the merits of the case. ...

2. The Agency's notices of the pending class action were defective. The General Counsel stated that the opt out provisions did:

...not make it clear that Petitioners must opt out or suffer the loss of their ongoing litigation. The language of the notices suggests that inaction would result in barring future litigation, not automatic termination of existing suits.

Notice to petitioners was also defective in that it failed to apprise petitioners as class member of their rights, under FRCP 23(c)(2), to have counsel of their own choosing enter an appearance to protect their interests as class members. Kerry Scanlon was named as petitioners' representative in the October 1983 complaints filed with the Agency. When the Mason class was certified in March 1984, Mr. Scanlon also became the attorney for the class agent. Neither the April/May 1984, nor the February 1985, notices notified the petitioners, pursuant to FRCP 23(c)(2), that any class members who did not request exclusion could, if they desire, enter an appearance through their own counsel.

Class members may wish to enter an appearance through counsel if they are dissatisfied with the adequacy of their representation by the class representative. ...[Counsel] who file individual actions should enter an appearance in the class action in order to protect the individual interests of Petitioners. Because Mr. Scanlon neither entered an appearance on Petitioners' behalf nor withdrew as counsel for the Petitioners, they were denied their rights to participate in the class action to the full extent that the law allows.

3. Petitioners were denied due process and adequate representation in the class action and their rights can only be protected by the continuation of their individual claims before the Board.

Because Mr. Scanlon became counsel to the Mason class agent, petitioners did not receive effective assistance of counsel on their individual complaints.... Mr. Scanlon failed to advise petitioners regarding the opt out clause of the class action notice and led them to believe that the failure to get out would have no impact on their individual actions.

4. Petitioners filed their individual complaints of discrimination prior to the class action notice and are not barred from continuing to prosecute their individual actions. Petitioners have consistently indicated their intention to seek relief for their individual complaints and the Agency continued to process the individual complaints through the EEO process even after certification of the Mason class. The class notice was issued on April 10, 1984, with a 30 calendar day opt out period. Nevertheless, the Agency on May 8, 1984, requested additional investigation into petitioners' individual complaints on May 8, 1984, after the petitions for review were filed with the Board. The Agency had ample opportunity to oppose the petitions. Instead, they gave them credence by cooperating in their investigation of the petitions. The clearly expressed intention of petitioners, and the Agency's willingness to process their individual complaints, should relieve petitioners from the binding effect of a settlement in a class suit and allow them to continue their individual claims.

On May 22, 1985, the Agency filed a reply to petitioners' opposition to the motion to dismiss. The Agency's reply to the specific points made by petitioners follows:

1. Petitioners claim that the Agency's motion to dismiss is untimely and is based on a misconstruction of applicable regulations. The 20-day period referred to (§28.15) applies to a response which the agency may make (permissive, not mandatory) at the outset of the PAB General Counsel's investigation. A motion to dismiss would not be an appropriate filing were the agency to decide to provide a §28.15 response. Motions to dismiss are covered by §28.19 which applies to the prehearing stage, when the proceeding becomes adversarial. Section 28.19(b) makes it clear that the filing of motions is contemplated at the prehearing stage, not before. Also, §28.19(b) provides no precise deadline for the filing of a motion.

“Finally, petitioners have no basis for their assertion that the agency has not acted in good faith by waiting a year before the filing of the motion. Petitioners’ counsel herself, in her role of PAB investigator, had the case from June 1984 through March 1985, a period of 10 months in which she set the pace of the case and during which the agency continuously cooperated in the PAB investigation. Any "delay" was caused by petitioners’ counsel, certainly not by the agency.

2. The Mason class notice was not defective. The Mason case was processed under GAO Order No. 2713.2, "Discrimination Complaint Processing in the United States General Accounting Office." Petitioners’ reliance on FRCP 23(c)(2) is misplaced. Mason was processed under Order No. 2713.2 not FRCP 23(c)(2), and Order No. 2713.2 does not require notice that a class member may enter an appearance through counsel, see chapter 4(4).

3. Petitioners have alleged that the Mason class notice was also defective in that it did not make clear the impact of a failure to opt out of the action. This is not the case. Paragraphs F through H of the April 10, 1984, notice received by petitioners clearly informed them of the consequences, positive and negative, of becoming class members:

F. Persons who request exclusion will not share in the benefits of any judgment if it is favorable to the complainant. However, persons who fail to request exclusion will be bound by a judgment which is adverse to the complainant and, therefore, shall be precluded from pursuing an individual cause of action on the same issues.

G. Persons who have pending in the agency EEO complaints process an individual complaint of discrimination based upon the issues encompassed by this class complaint may continue to pursue their individual complaint by requesting exclusion from this case. Failure to request exclusion will result in merger into this case of all issues in the class member’s pending individual complaint which are within the matters ...[covered by the class complaint]. (Emphasis supplied.)

H. A decision in a class action determines the substantive rights of each and every class member who does not expressly elect to be excluded.

With their reprisal claims no longer in issue, petitioners fall precisely into the category specified in paragraph G of the notice.

4. The General Counsel cited the fact that the Agency requested additional investigation as proof of misleading action by the Agency. This action was not misleading but was due in part to the need to correct an error that had recently been discovered in the original investigation, that is, some of the performance appraisal documents reviewed by the investigator were for the wrong time period.

The fact that this occurred during the Mason opt out period is of no consequence. This correction would have had to be made whenever it was discovered, regardless of the time. ...Further, at that time, the beginning of May 1984, petitioners were putative rather than actual class members. To imply as petitioners have that the agency should have terminated an investigation without fully examining their claims makes no sense. ...

5. Petitioners were not denied adequate representation. Their claim that:

... Mr. Scanlon led [them] to believe that the failure to opt out would have no impact on their individual actions, is a bare claim unsubstantiated by affidavit of class counsel or any other proof. Even assuming petitioners were led to such a belief, such advice given at an early stage ... before the

PAB investigation had begun and prior to the time the reprisal claim was dropped, would not have been incorrect, and ... does not rise to the level of ineffective assistance.

...

Mr. Scanlon, class counsel in Fogle and Mason and individual counsel for petitioners, easily fulfills the legal definition of an adequate representative, one who represents a class with vigor, diligence and expertise.Mr. Scanlon is an attorney with the Washington Lawyer's Committee for Civil Rights Under Law, a successful public interest firm.

The Agency stated its view that the fact that Mr. Scanlon was individual counsel as well as class counsel indicated that petitioners' interests were well represented. It further stated that claims that petitioners' due process rights were violated is without merit:

...[A] lengthy certification hearing was held in Mason in which the typicality of claims, the adequacy of the class agent and of his legal representation were determined. ...

... Petitioners' interests are not antagonistic to those of Mason class agent, they have been adequately represented as class members and or individual petitioners, have received proper opt-out notices and have assurance that the Mason class was scrutinized by the hearing examiner prior to its certification. As well, they possess the right to file objections to the Fogle/Mason settlement when it is issued.

On May 31, 1984, Mr. Scanlon wrote to the Board and to the Deputy General Counsel asking that his response to the statements made concerning his representation of the petitioners be made part of the record. In essence, Mr. Scanlon's response was that petitioners' argument that he provided them with ineffective counsel was based "...on a badly twisted version of the facts... ." For reasons which will be apparent below, the specifics contained in Mr. Scanlon's response will not be discussed.

As a direct result of Mr. Scanlon's letter, Deputy General Counsel Willis provided affidavits from the petitioners dated June 18, 1985. The specifics of those affidavits, as they apply to the issues of the adequacy or effectiveness of Mr. Scanlon's counsel, particularly in relation to the matter of opting out, follow:

Ms. Fauntleroy - She had at least eight conversations with Mr. Scanlon about various aspects of her complaint between August 1983 and prior to March 11, 1985. At some point in 1983 Mr. Scanlon advised her "... that the agency pays little attention to individual discrimination cases and that by joining with Mason my case would have more weight." On March 11, 1985, she called Mr. Scanlon to discuss the General Counsel Report and Recommendations based on his investigation of her complaint. Mr. Scanlon had not seen the report. Ms. Fauntleroy gave him the gist of the report and said she was concerned that the reprisal issue would have to be dropped if the General Counsel was to take the case. When Mr. Scanlon said he wanted to read the report, she said she would call back in a few days and if he had not yet received copies of the reports for each of the petitioners, she would see that he got them. A few days later he called her to ask why she had not gotten the reports to him. She brought her report to him that day. "When I met Scanlon at his office, he said that he had forgotten about these three cases. He and the attorney from San Francisco reviewed the report and sat down with me to discuss the report... ." Mr. Scanlon advised Ms. Fauntleroy that he did not consider the reprisal issue to be significant to her case and they then discussed possible settlement.

In a conference call in late March 1985, Mr. Scanlon informed petitioners "... that GAO was not favorable to settling the cases with three promotions. He said they would consider one promotion but not three." Petitioners and Mr. Scanlon also discussed the reprisal issue and whether Scanlon would continue to represent them. He "... said it would be a conflict and that he worked for someone else." Earlier during the week of March 18, 1985, petitioner met with the PAB General Counsel and Deputy General Counsel to discuss their options.

I accepted PAB representation as counsel for my complaint and therefore chose not to pursue the reprisal issue. On March 26, 1985, Scanlon called me and raised his concern that our individual cases are now similar to the Mason case and that if we chose to pursue the cases individually we may have to drop out of the Fogle/Mason settlement.

In response to Ms. Fauntleroy's question he told her that she could not drop out of Mason and stay in Fogle, because the settlement of the two cases had been joined and if she opted out of one she would have to opt out of both. She was concerned because this conversation occurred one day after her deadline for notifying the PAB whether she would accept General Counsel representation or use outside counsel.

Ms. Rasberry - she had at least three discussions with Mr. Scanlon about her claim in 1983. On April 10, 1984, she received the first Mason class notice.

We questioned the legality of the notice's statement on not being able to pursue individual cases already in process and called Kerry Scanlon. About the same time we talked to Ryan Yuille, CRO,² (per chance meeting in the hallway) as to what would happen if we did not opt out or if we took our case to the PAB prior to the opt out deadline since we did not have the agency's final report. To my recollection, Mr. Yuille was not certain what would happen in the first instance and if our cases were referred to the PAB, it would be out of GAO's administrative process. ... We informed Kerry Scanlon about the language of the opt out letter and Mr. Yuille's comments. To the best of my recollection, Mr. Scanlon did not advise us to opt out or remain in the Mason case. Because of the reprisal issue, he wasn't certain whether we had to opt out or not. And on the strength of Mr. Yuille's comments, Kerry suggested that we try the next step of going to the PAB.

Ms. Rasberry received the supplemental Mason class notices on February 2, 1985. Soon after she spoke with Ms. Willis.

At that time the PAB was still conducting its investigation and reprisal was still an issue. On this basis, our case was considered distinct from Mason and getting out would be premature. No decision had been made on the similarities of the Mason class action and our individual cases.

In early March, after the General Counsel had issued the Report and Recommendations regarding petitioners' claims, Ms. Fauntleroy met with Mr. Scanlon and posed certain questions which petitioners as a group had developed:

1. If Mason's case is solved in negotiation, does this affect our case?

Kerry's response: to my recollection Helen [Ms. Fauntleroy] indicated that Kerry was uncertain since we did not get out.

2. Will he be willing to represent us either in an assist role to Jan Willis or totally?

Kerry's response: Per Helen, Kerry would like to represent us in the reprisal issue. He would call Carl Moore and discuss the possibility of doing this.

Sometime during the period March 13-20, 1985, petitioners Rasberry and Trahan met with Mr. Scanlon. He told them that he believed that there would be two separate release documents in the Mason/Fogle settlement and that it would be possible to opt out of Mason and receive relief under Fogle.

When asked what his advice would be to us, Kerry said that it might be to our advantage (especially [Ms. Trahan]) to opt out of Mason. But, he was not sure that GAO would permit it at this late date. He indicated that we could pursue both but still remained uncertain and could not explain to us why our cases were not different than Mason's.

Mr. Scanlon said he would present petitioners' case to the GAO and try to negotiate a settlement. He later told Ms. Fauntleroy that "... GAO proposed one promotion but not three."

In a March 29 conference call with petitioners, Mr. Scanlon told them they needed to make a decision on opting out of Mason and they should meet to discuss the matter. During this call Ms. Trahan asked whether he would be willing to represent them.

Kerry replied that he worked for the Washington Lawyers' Committee, and, decisions concerning case assignments are made by someone else in the organization. He would have to get approval of this person to work on our case before the Board.

On April 1, 1985, petitioners met with Mr. Scanlon and a Mr. Jacobson. Mr. Scanlon told petitioners that:

- The Fogle and Mason cases were merged; and we could not opt out of one part.
- May be too late to opt out. Agency probably would deny us the opportunity now.
- We had a chance to refute the class action settlement.
- Since each of us sought promotions and the agency was only willing to provide one or just money, he stopped trying to negotiate our cases.
- Suggested that we might still be able to maintain our individual cases and that we should get the PAB to make a legal decision on the commonality of our cases and Mason's as it had done in the Art Davis case.

Ms. Trahan - She had one telephone conversation with Mr. Scanlon in late 1983 and also called him in April 1984, a few days after receiving the first Mason class action notice. In the latter conversation she asked why she could not continue her individual claim and stay in Mason. He told her she could not have both but did not tell her why. He did not advise her of any impact if she did not opt out of Mason but only suggested that she should not opt out. She had no contact with Mr. Scanlon concerning the several opt out notices.

Mr. Scanlon attended a meeting with Ms. Trahan and the PAB General Counsel staff in June or July 1984. There was little or no further contact with him until March 15, 1985, when she and Ms. Rasberry met with Mr. Scanlon to discuss their recently received Reports and Recommendations from the PAB General Counsel. Mr. Scanlon told them that the Fogle/Mason settlements provided for some promotions to the GS-13 and GS-14 levels, but they would be made competitively and there was no guarantee that petitioners Fauntleroy and Rasberry would receive them. He told Ms. Trahan that no promotions to GS-15 were provided for in the settlement. He said that it could be to her advantage to continue her individual claim, however, he was not sure whether GAO would permit opting out or would say that it was too late to do so. He stated that he would try to negotiate a settlement of all petitioners' claims with GAO.

A week or so later he spoke with petitioners in a conference call. He said GAO was willing to offer one promotion but not three, and had "... wanted to know why we are processing individual cases when we are part of Mason." Ms. Trahan asked if he would represent petitioners on both the reprisal and discrimination case.

He said he could not and that he really worked for someone else. He went on to say that we didn't really need to address the reprisal issue and that to drop the reprisal issue would not take away from the case. ... When Mr. Scanlon advised us that dropping the reprisal issue would make no difference, he did not state or suggest that by dropping the reprisal issue, I would then need to elect between staying in Mason or continuing my individual case. ... [I]t was after the reprisal issue was dropped that he began discussing with the petitioners the need to elect whether to opt in or out of Mason.

Mr. Scanlon never told her that while he would continue to act as class counsel in Mason, he could not continue as counsel in their individual cases because that would involve a conflict. At an April 1, 1985, meeting with the petitioners, Ms. Willis, Mr. Scanlon and Mr. Jacobson, Ms. Willis stated that the Mason case involved disparate impact and that of the petitioners involved disparate treatment.

Neither Mr. Scanlon nor Mr. Jacobson argued against this. ...[T]oward the end of this meeting Mr. Scanlon suggested to Ms. Willis that the first thing she should do is request a decision by the GAO Personnel Appeals Board as to whether the issue in the petitioners' case and the Mason case were the same. Mr. Scanlon never made it clear to me whether opting out after the reprisal issue had been dropped was even possible. He told us that ... GAO may say it is too late for us to opt out. ... Mr. Scanlon told us that if we opted out of Mason we also opt out of Fogle and this made very little sense to me. Fogle was a totally separate case. Thus, I never understood based on our discussion with Mr. Scanlon (1) whether we could even opt out at this stage if we wanted to or (2) what opting out of Mason really meant, particularly in regard to our rights under Fogle.

Ms. Trahan never discussed either of the opt out notices with any of the PAB General Counsel staff. Her only discussions re opting out with members of that staff occurred after the reprisal issue was dropped. Mr. Scanlon never told her what the impact of failure to get out of Mason would have on her individual case.

DISCUSSION

It is undisputed that petitioners are class members in Mason v. GAO, and that they did not opt out of that class despite receiving two class notices, one in 1984 and one in 1985. The dispute concerns whether the petitioners' individual cases should be heard by the PAB nevertheless.

In their opposition to the motion to dismiss, petitioners cite five reasons why their case should not be dismissed. Each will be examined in turn.

1. The Agency's motion to dismiss is improper and untimely. Petitioners' argument here is based on the provisions of 4 C.F.R. §28.49 and, by reference, §28.15. Their reliance on these sections is misplaced. Section 28.15 clearly refers to the action to be taken by the Agency after it receives a copy, from the Board's General Counsel, of a petition for review under §28.11. This is at the very beginning of the General Counsel's investigatory procedure. At this time there is no presiding member appointed to whom a motion to dismiss may be directed. In an EEO case, the statement of the Agency's position required by section 28.15, is made permissive, not mandatory. See §28.49 (a).

The applicable provision with respect to the timeliness of the Agency's motion to dismiss, is §28.19, see §28.49(b). Under §28.19(b), motions of parties are to be made to the presiding member and served simultaneously on the other parties. There are no time limits for the filing of such motions.

2. The Agency's notices of the pending class action were defective. The first defect claimed by petitioners is that the opt out provisions of the notices did not make it clear that a failure to opt out would result in loss of their individual complaint. Petitioners' claim that the notices suggest that inaction would result in barring future litigation, but not in automatic termination of existing suits.

I cannot agree. Paragraphs F and G of the first notice in no way suggest that failure to opt out would impact only on future actions. In fact, paragraph G specifically indicates that it applies to pending EEO complaints in the agency process. Petitioner Fauntleroy received her copy of the notice on May 2, 1984, petitioner Trahan on April 14, 1984, and petitioner Rasberry on April 13, 1984. At that time all three complaints were still in the agency complaints process; they filed their petitions for PAB review on May 3, 1984.

There was nothing in the notice to give petitioners reason to believe that movement to the PAB process negated the opt out provisions of the notice. In fact, the affidavits of petitioners Rasberry and Trahan make it clear that they were concerned about the impact of the opt out provision on their cases. Indeed Ms. Rasberry's affidavit states that "[w]e questioned the legality of the notice's statement on not being able to pursue individual cases already in process..." (Emphasis supplied). Ms. Trahan's affidavit states that when she received the first notice she called Mr. Scanlon and asked why she could not both stay in Mason and pursue her individual claim. Petitioners were sufficiently concerned and alerted that they spoke to Mr. Scanlon and Mr. Yuille about this matter. No one told them, as best I can tell, nor did the first notice state or imply, that a failure to opt out of Mason would have no effect on their individual cases.

The second class notice is less specific than the first, but it clearly states that members of the Mason class will be bound by any decision or settlement reached "... unless you choose to be excluded from the class." Petitioner Rasberry's affidavit states that she raised the issue of opting out of the class with Deputy General Counsel Willis after receiving the second notice.

It is my view that the class notices were not defective or ambiguous with respect to informing class members about their right to opt out and the effect of a failure to do so. The second claimed defect in the notices is that they failed to inform class members of their right, under FRCP 23(c)(2), to be represented by counsel of their own choosing. It is true that there is no notification of such a right in either of the notices. However, as pointed out by the Agency, Chapter 4, paragraph 4.b of GAO Order 2713.2, which governs the issuance of class notices, does not require such notification. The provisions of GAO Order

2713.2 are applicable to this case. As stated in chapter 1, paragraph 1 of the Order, it "... sets forth the procedures by which individuals or classes of people may pursue discrimination complaints ... within GAO and through appeals to the GAO Personnel Appeals Board."

3. Petitioners were denied due process rights and adequate representation. The essence of petitioners' claim in this regard is that after Mr. Scanlon became counsel to the Mason class agent he failed to provide them with effective assistance on their individual complaints, and also that he failed to advise them "... regarding the opt out clause of the class action notice and led them to believe that the failure to opt out would have no impact on their individual actions."

I have carefully studied the petitioners' affidavits on June 18, 1985, which were offered by the General Counsel as support for this claim. Even limiting my review to the affidavits, and ignoring anything that Mr. Scanlon might state on his behalf, I find no ground to support an assertion of inadequate and/or ineffective representation by Mr. Scanlon.

According to petitioners, Mr. Scanlon became Mason class representative in March 1984. At that time their complaints were still being reviewed by the Agency's Civil Rights Office. In early May, petitioners, with Mr. Scanlon's encouragement (Rasberry affidavit), requested PAB review. He participated in conversations with one or more of the petitioners, together with members of the PAB General Counsel's staff, in June or July 1984 and April 1, 1985 (Trahan affidavit). In March 1985 he told petitioners that he would like to represent them on the reprisal issue after they had learned that the General Counsel would not. He told petitioners he would speak to the General Counsel about the feasibility of doing so (Rasberry). The record does not indicate if such a conversation took place and what its result was.³ Further, he attempted to negotiate a settlement with the Agency but was unsuccessful because the GAO would not grant three promotions (all affidavits.)

There is nothing here to indicate Mr. Scanlon, in effect, lost interest in petitioners' individual cases once he became counsel to the Mason class agent. Rather, the fact is that the cases were being investigated by GAO or the PAB General Counsel from March 1984 until March 1985, when the latter issued his Reports and Recommendations. Once that happened, Mr. Scanlon talked to petitioners about whether he could continue to represent them and what to do about the reprisal issue (all affidavits).

The last matter to be discussed in this respect is Mr. Scanlon's alleged comment to Ms. Fauntleroy in mid-March 1985 "... that he had forgotten about these three cases." If that is what was said, it could mean anything from he had forgotten some of the details and wanted to refresh his memory by reading the Reports and Recommendations before discussing the case with Ms. Fauntleroy, to having literally forgotten about the cases. I view the former interpretation to be more likely in view "of the fact that a few days after Ms. Fauntleroy called him about the General Counsel's Report and Recommendations he initiated a call to her to ask why he had not yet received them.

The record does not support the allegation that Mr. Scanlon failed to properly advise the petitioners on the opt out issue. Ms. Rasberry indicates that in mid-April 1984, because the reprisal issue was still alive, he indicated that he wasn't certain whether petitioners had to opt out or not. (Also according to Ms. Rasberry, she received approximately the same advice from Deputy General Counsel Willis. Ms. Willis told her in February 1985 that the General Counsel's investigation was not complete and reprisal was still an issue. "On this basis [petitioners' cases were] considered distinct from Mason and opting out would be premature.") In contrast, Ms. Trahan's affidavit asserts that Mr. Scanlon told her in April 1984 that she could not both continue her individual claim and stay in Mason.

In mid-March 1985, Mr. Scanlon told Ms. Rasberry and Ms. Trahan that it might be to their advantage, particularly that of Ms. Trahan, to opt out of Mason but he was not sure if GAO would permit it at that late date. He told them they could not remain in Mason and pursue their individual cases (Rasberry and Trahan). On March 26, 1985, Mr. Scanlon called Ms. Fautleroy and told her that their individual cases were now similar to Mason (the reprisal issue had been dropped) and that they might have to drop out of the Fogle/Mason settlement if they chose to pursue their individual cases (Fautleroy).

In a March 29 conference call with petitioners, Mr. Scanlon told them they needed to meet because a decision on opting out had to be made. A meeting was held on April 1, 1985, which Ms. Willis attended. Mr. Scanlon said that Fogle and Mason were merged and that they could not opt out of only one, that it now might be too late to opt out, and that they should try to get the PAB to decide on the commonality of petitioners' cases and Mason (Rasberry and Trahan).

It is clear from a careful reading of all these affidavits that petitioners realized from the class notice that they were being asked to either remain in Mason or opt out to pursue their individual claims. They felt confused about how and to what extent this applied to them. However, I do not regard this as proof of inadequate representation on Mr. Scanlon's part. It was not until March 1985 that the reprisal issue was dropped. Also, I believe that the confusion was caused in part by the fact that opting out was counter to petitioners' desires and their view of their cases. They viewed their cases and Mason as different and did not see why they had to drop out of one or the other.

By March 1985, Mr. Scanlon made it clear to petitioners that they had to choose between Mason and their individual claims, although he was not certain if GAO would permit opting out at that point. What GAO would have done and what this Board might have done under those circumstances cannot be known, because, for whatever reason, petitioners did not seek to opt out.

4. The clearly expressed intention of the petitioners has been to pursue their individual claims and the Agency's willingness to process their claims should permit petitioners to continue their individual claims. I find no basis for accepting this argument. The record indicates that the clearly expressed intention of the petitioners has been to pursue both their individual claims and the Mason class action. As long as the reprisal issue was included in their complaints it could be argued that there was no need to make an opt out decision. That situation changed in March 1985 and Mr. Scanlon so advised them.

The agency continued to process petitioners' claims in May 1984 by requesting additional investigation to correct an error. This was proper on the part of the Agency and cannot be used as a basis for asserting that petitioners were misled into thinking the Agency was acquiescing in both the pursuit of their Mason and individual claims.

ORDER

The Agency motion to dismiss is granted.

Notes

1. However, in a conference call between representatives of the parties and myself on July 8, 1985, it was established that had petitioners made their division BQLs they would have been able to apply for promotions in other divisions.

2. CRO stands for the Agency's Civil Rights Office.

3. It should be noted that, pursuant to the Board's directive, if the General Counsel accepts a case he has full control of it and will not permit private counsel to pursue an issue which the General Counsel believes to be without merit.