

**Sixty Employees of the Philadelphia Regional Office v.
U.S. General Accounting Office**

Docket No. 94-02

Date of Decision: May 17, 1994

Cite as: Philadelphia Regional Office v. GAO, Docket No. 94-02 (5/17/94)

Before: Alan S. Rosenthal, Chair, for the Board; Nancy A. McBride, Vice-Chair; Paul A. Weinstein, Member; Leroy D. Clark, Member; and Harriet Davidson, Member

Headnotes:

Jurisdiction

Statements of Policy and Guidance

Workforce Restructuring Actions/Reduction in Force

ORDER

At this juncture, because filing could be accomplished by mail, it is not known to the Board whether any of the seven employees availed themselves of the right to file a petition for review. It is possible, however, that one or more of those employees chose not to do so in reliance on the pendency of the section 28.155 petition for a statement of policy or guidance.

For the reasons set forth below, however, the Board's preliminary view is that the current case is not well-suited to proceedings under Subpart J or the issuance of a statement of policy or guidance. It appears that proceedings under Subpart B of the Board's regulations on a petition for review filed by specific aggrieved individuals may be a better vehicle for the resolution of those matters presented which fall within the Board's jurisdiction.¹ The Board therefore has decided to hold this petition in abeyance and, at the same time, to extend, sua sponte the time for the filing of a petition for review to and including May 23, 1994. Following that date, the Board will determine how it should proceed in dealing with this controversy.

BACKGROUND

The Philadelphia employees raise a number of issues stemming from GAO's decision to close the Philadelphia Regional Office.

¹ In its answer, GAO questioned whether some of the issues raised in the petition for a statement of policy fell within the Board's subject matter jurisdiction. The Board will not rule on this objection at this time.

Petitioners group these issues into five general areas as follows:

1. Whether the administrative grievance procedure adopted by the GAO in Order 2771.1 is unlawful because it fails to comport with the standards applicable to such grievance procedures in the executive branch? Whether the GAO failed to provide a fair and equitable forum for the petitioners' group grievance, concerning the decision to close the Philadelphia office, as required by GAO's own order on administrative grievances?

2. Whether GAO's decision to downsize by closing offices rather than by an agency-wide reduction-in-force constituted unlawful discrimination because it was based in part on a desire to preserve the diversity of GAO's work force? Whether the GAO articulated a legitimate basis for conducting a reduction-in-force in the offices selected for closure?

3. Whether GAO has unlawfully limited the reassignment and reemployment rights of Philadelphia employees by adopting a narrow definition of "competitive area"? Whether this action by GAO constitutes a prohibited personnel practice?

4. Whether GAO retaliated against the Philadelphia employees who filed the group grievance by adopting a requirement that each employee who transfers to Washington and receives the special \$8,000 relocation payment must first sign a statement certifying that the transfer was made for the employee's convenience? Whether the agency's determination that it will not pay any relocation expenses beyond the \$8,000 is lawful?

5. Whether the GAO's closure of the Philadelphia office constitutes a "transfer of function" , thus entitling affected GAO employees to transfer with the function and receive full relocation expenses?

The petitioners ask the Board to stay the implementation of the closure decision. They also seek "appropriate corrective action as to any findings of Prohibited Personnel Practices." They request that the Board order the GAO to adopt a program similar to the Interagency Placement Program operated by the Office of Personnel Management. In addition, they seek declarations concerning: (1) the lawfulness of basing the decision to close offices rather than conduct an agency-wide reduction-in-force on a desire to protect the diversity of the work force; (2) whether the closure of the Philadelphia office constitutes a transfer of function; and (3) the reassignment rights to which employees are entitled as a result of the closure of the Philadelphia office. Finally they ask the Board to strike certain provisions of the GAO's grievance procedure and remand the petitioners' grievance to the agency for further processing.

DISCUSSION

Subpart J of the Board's regulations gives the Board authority to issue statements of policy or guidance when the Board, in its discretion, determines that it is appropriate. The Board has

issued one prior statement of policy or guidance. See, GS-13/14 Management & Policy Advisory Council and Career Level Council v. GAO, Docket No. 116-600-GC-89 (1991). That case sheds some light on the kinds of situations in which a statement of policy may be appropriate. In that case, two GAO employee councils challenged a provision of a GAO Order on labor-management relations that prohibited GAO evaluators from being represented by a labor organization that represented other federal, state or local employees. No individual employee was claiming to have been affected or harmed by the rule and no labor organization was planning an organizing campaign. What was presented was a single, clear issue of law: whether the provision of the GAO Order was lawful under the terms of the General Accounting Office Personnel Act. As relief, the petitioners in the GS-13/14 case asked that the Board strike the offending provision from the GAO Order.

The Board held that the issuance of a statement of policy was the best way to resolve the issue in the GS-13/14 case because the very existence of the GAO Order could have a chilling effect on GAO employees who wished to exercise their right to unionize and on government-wide unions that might want to mount an organizing campaign within GAO. Because no employees had yet sought to test the rule, there were no current proceedings between the parties that could be disrupted by the issuance of a policy statement. The Board stated that it would not require the parties to wait until there was an actual controversy between the agency and an employee or union before ruling on the validity of the rule. To do so, the

Board concluded, would be unreasonable as it would require an employee to violate the rule, or a union to go to the expense of a possibly futile organizing campaign, before getting a determination of the validity of the rule.

By contrast, the Philadelphia employees seek a policy statement about a current controversy that they are having with the agency. GAO has already announced the closing of the Philadelphia office and notified employees that those not transferring to Washington, D. C., will be terminated through reduction-in-force processes. Several employees from the Philadelphia office have filed charges with the PAB General Counsel and have a present right to proceed before the Board and have the Board decide those issues that are within its jurisdiction.

Rather than raising a single, discrete legal issue as in the GS-13/14 case, the Philadelphia employees raise numerous issues concerning the office closure, several of which are mixed questions of law and fact. Fact-finding may well be necessary to resolve some of the issues raised, particularly the charges of discrimination and retaliation, and the question concerning whether the office closure constitutes a transfer of function. Unlike the GS-13/14 case, petitioners do not seek a simple declaration of the validity of a GAO Order, but rather seek numerous items of relief including corrective action for alleged prohibited personnel practices.

Where, as here, there is a live controversy between the parties involving both legal and factual disputes, and the

petitioners seek detailed items of relief beyond a mere declaratory judgment, the Board will generally regard the matter as best suited to adjudication under Subpart B of the Board's regulations. This is particularly true where, as here, charges have already been filed with the Board's General Counsel and right to appeal letters have been issued. It was not the Board's intent that petitions for statements of policy would become a vehicle for preempting an ongoing case within the Board's adjudicatory authority.²

Nonetheless, the Board is not dismissing the petition for a statement of policy or guidance at this time. Before foreclosing the relief sought by petitioners, the Board would first like to see what petitions for review, if any, are filed in response to the pending right to appeal letters, and what issues are raised in any such petitions. This will give the Board a more informed basis on which to determine whether indeed there are more appropriate means available for resolving the matters raised.

Accordingly, the Board hereby extends sua sponte the time for filing petitions for review under 4 C.F.R. § 28.18 to and including Monday, May 23, 1994. Any person taking advantage of this extension shall submit his or her petition by hand delivery or facsimile transmission to the Clerk of the Board [(202) 512-7525] no later than 3:00 p.m. on that date. An additional original and

² One of the key factors to be considered under Subpart J in determining whether to issue a statement of policy or guidance is "whether the question presented can more appropriately be resolved by other means." 4 C.F.R. § 28.155(a).

seven copies must be simultaneously hand delivered or mailed to the Clerk in accordance with 4 C.F.R. § 28.20(a).³

SO ORDERED.

Alan S. Rosenthal / *BL*
Alan S. Rosenthal
Chair

For the Board, en banc:

Nancy A. McBride
Paul A. Weinstein
Leroy D. Clark
Harriet Davidson

DATE: 5/17/94

³ The Board is sensitive to the fact that the petition for a statement of policy or guidance was filed so as to obtain a timely resolution of the issues concerning the office closure, which will become effective in August. The Board will take steps to expedite the proceedings on any petitions for review concerning the closure of the Philadelphia office that may be filed.

CERTIFICATE OF SERVICE

This is to certify that on May 17, 1994, the Order issued by the Board in the case of Sixty Employees of the Philadelphia Regional Office v. GAO, Docket No. 94-02, was sent to the parties listed below in the manner indicated.

Petitioner

Keith Steck
Representative for the
Sixty Philadelphia employees
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

Attorney for Respondent

Joan M. Hollenbach
Associate General Counsel
General Accounting Office
441 G Street, N.W.
Room 7862
Washington, D.C. 20548
(FAX & mail)

Ms. Carolann Cosella
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

Mr. Dirk Schumacher
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

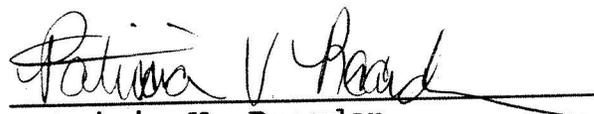
Mr. Joseph A. Margallis
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

Mr. Glenn Knopfle
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

Mr. Stephen L. Ballard
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

Martin L. Ward
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)

Ann Marie Henry
Philadelphia Regional Office
General Accounting Office Office
841 Chestnut Street, Suite 760
Philadelphia, PA 19107
(FAX & mail)



Patricia V. Reardon
Clerk of the Board