

Mary L. Martino v. U.S. General Accounting Office

Docket No. 76-100-17-86

Date of Decision: July 23, 1987

Cite as: Martino v. GAO (7/23/87)

Before: Kaplan, Member

Discipline

Termination

Authority of PAB

Removal

REPORT OF FINDINGS OF FACT AND RECOMMENDATIONS

BACKGROUND

On November 3, 1986, Mary L. Martino (Petitioner) filed an appeal with the General Accounting Office Personnel Appeals Board (Board) contesting her removal from the U.S. General Accounting Office (GAO). On November 7, 1986, the Board accepted her appeal as a Petition for Review.

A hearing was held in Washington, D.C. on March 26, 1987. Both parties were represented by counsel and had the opportunity to present evidence in support of their respective positions. A verbatim transcript was made of the hearing. Post-hearing briefs were received by the undersigned on or about April 27, 1987.

ISSUES

Was Mary L. Martino removed from her position at the GAO for such cause as will promote the efficiency of the service? If not, what is the appropriate remedy?

FACTS

Mary Martino was a Mail and File Clerk, employed by the Office of General Counsel of the GAO. She had been an employee of the GAO for approximately 14 years. In January 1977, Martino was informed that improvement was needed in the manner of her requesting leave and leave use itself. On April 1, 1977, Paul Kut yana, her immediate supervisor, warned Martino about her unacceptable leave usage. For the period from April 1, 1977 through March 17, 1978, Martino was credited with using 126 hours of annual leave, 80 hours of sick leave and 271 hours of leave without pay (LWOP). On April 14, 1978, Felix R. Brandon, II, Director of Personnel for the GAO, informed Martino that she would be subject to leave restrictions. On April 25, 1979, Martino was informed that she would be required to conform to further leave restrictions, based upon her absences since April 14, 1978. On September 9, 1979, Martino was admonished for time spent at the Public Health Service outpatient clinic.

In 1983, Martino's leave use and her manner of applying for leave became more troublesome to her superiors. On April 21, 1983, Kutyana issued a letter of warning for her application of leave and her use of leave. On June 23, 1983, Martino received an advance of 240 hours of sick leave. This advance was necessitated because of an operation Martino had for thyroid tumors. On August 9, 1983, Martino was informed that, based upon her past leave record, leave restrictions would be imposed when she returned from her operation on or about August 17, 1983. In a letter dated December 16, 1983, Martino was advised that her leave restrictions would be carried through March 31, 1984, at which time consideration would be given to removing those restrictions. On June 11, 1984, Kutyana informed Martino that no improvement had been shown in her application for leave and use of leave.

On October 2, 1984, Martino was suspended for three days for violation of leave restrictions. This suspension was based upon Martino being charged with Absence Without Leave (AWOL) for 112 hours, during the period from July 2, 1984 to August 17, 1984. Martino was suspended again in June 1985 for violating her leave restrictions. This suspension was based upon Martino being absent from work for a total of 335 hours, from October 13, 1984 through May 11, 1985. This included 145 hours of LWOP, 115 hours of AWOL and 75 hours of annual leave. Martino did not grieve either of the two suspensions issued by GAO.

On April 7, 1986, Harry VanCleve, General Counsel of the GAO, proposed Martino's removal. The proposed removal was based upon three reasons. They were (1) violation of leave restrictions, (2) failure to comply with GAO leave policies and procedures, and (3) unauthorized absences. On April 10, 1986, Martino met with Dick Smith for the purpose of submitting her oral response to the proposed removal. Documentation regarding her absences were submitted by Martino. Smith prepared a summary of the oral response.

In a letter dated May 20, 1986, Brandon, Director of Personnel, sustained the removal of Martino. He indicated that careful consideration was given to Martino's oral response. He further stated that he had reviewed all the material which formed the basis for removal. After such review, Brandon determined that several of the charges in support of the reasons for Martino's removal were not sustainable. However, Brandon determined that the charges that were sustained warranted the removal of Martino.¹

Martino had several medical problems, which resulted in her spending various amounts of time out of the office. Other than the thyroid tumor operation in 1983, Martino started experiencing dizziness and headaches in 1982. This occurred after her father died. These problems were diagnosed as hypertension, which included high blood pressure. Martino had two operations on her left hand, which stemmed from an injury on a Xerox machine at the office. Martino received Workers' Compensation for this injury. In addition to her own medical problems, Martino had to spend time out of the office taking care of her mother who was quite ill.

During the majority of her time away from the office, Martino was treated by Dr. Juan Calatayud. Martino went to see Dr. Calatayud on numerous occasions for her high blood pressure, dizziness and severe headaches. On January 27, 1986, Dr. Calatayud informed Martino that he would be retiring from the practice of medicine on February 14, 1986. Realizing that Dr. Calatayud was retiring, Martino secured the services of Dr. Charles F. Adams. She started seeing Dr. Adams in January 1986.

There is no dispute that the work performance of Martino was satisfactory while she was employed by the GAO. This is substantiated by Brandon in the removal letter. He stated that Martino received a within-grade increase on February 2, 1986. He added that her removal was based upon deficiencies in conduct and not in performance. Brandon also indicated that he took into consideration Martino's past disciplinary record. This included a three-day suspension from October 15 through 17, 1984, and a 14-day suspension from June 10 through 23, 1985. In addition, Brandon indicated that Martino had been counseled numerous times regarding her leave problem and that she had been under formal leave restrictions since August 9, 1983.

DISCUSSION AND ANALYSIS

This Petition for Review protests the dismissal of Mary L. Martino from the employment of the GAO. Petitioner Martino was fired for (1) violation of leave restrictions, (2) failure to comply with GAO leave policies and procedures and (3) unauthorized absences. Petitioner asked that the removal should be reversed, with the maximum penalty reduced to a suspension and reinstatement to her former position with back pay and benefits.

In the instant case, Petitioner does not allege that the GAO violated any procedural requirements accorded to her under law and regulation. Petitioner does not allege that her removal was based upon any allegation of discrimination. She does allege that the GAO's actions in terminating her were unreasonable, arbitrary and capricious.

In reviewing the merits of the dismissal action, the undersigned will review the reasons and specifications that were sustained by Brandon in his decision letter dated May 20, 1986.

Violation of Leave Restrictions

The only charge sustained under this reason related to the absence of Martino during the period of January 13 through 17, 1986. Martino allegedly did not report her absence on January 16, 1986, as required by the leave restrictions.

On August 9, 1983, Martino was placed under leave restrictions. These restrictions remained in effect during the period in question. In pertinent part, Martino was required to:

1. Request all annual leave 24 working hours in advance. In an emergency situation justify absences in writing.
2. Report any absence as soon as possible on the first day of such absence.

In his decision, Brandon stated as follows:

However, during your oral response, you failed to address the charge of failing to report your absence for January 16, 1986. Absent any persuasive evidence or explanation from you to the contrary, I find the charge of violation of leave restrictions owing to your unauthorized and unexcused absence on January 16, 1986, to be sustained.

The evidence does not support the charge that Martino's absence on January 16, 1986, was either unauthorized or unexcused. On February 3, 1986, Terry Yancy, Management and Employee Relations Specialist, requested Dr. Murray Grant of the GAO to review the medical evidence concerning Martino's condition on January 16, 1986. Dr. Grant responded to Yancy's request in a memorandum dated February 14, 1986. He stated:

I have reviewed the material that you transmitted concerning the above-mentioned subject and specifically examined the emergency room record resulting from her visit to the Capitol Hill Hospital emergency room on January 16.

Ms. Martino was obviously suffering from an upper respiratory infection for at least part of the time covering the period January 13-17, 1986 and at the time she visited the emergency room Ms. Martino was found to have a temperature of a little over 100 degrees. In addition, she has a history of high blood pressure and her reading at the time of her emergency room visit would indicate that this was not, at that time, under proper control and may have accounted for the headache which was the reason for her emergency room visit. As a result of that visit, she was placed on some additional medication in an effort to control her high blood pressure. Accordingly, it is my judgment that Ms. Martino was probably justified in being absent for the period January 13-17 on the basis of a combination of upper respiratory infection and uncontrolled high blood pressure.

Based upon Dr. Grant's memorandum of February 14, 1986, it is clear that Martino submitted the emergency records of Capitol Hill Hospital to her supervisor. These records, as reviewed by GAO's own doctor, found Martino to be justified in being absent. Obviously, her documentation from Capitol Hill Hospital provided a justifiable written submission as required by the leave restrictions outlined in the August 9, 1983 correspondence. The GAO maintains that Martino did not call in on January 16, 1986, which was a requirement of the leave restrictions. However, evidence was submitted showing Kutyana's notes during this period. These handwritten notes reflected, in pertinent part, as follows:

1-16-86 Did not call.

1-17-86 Called 8:45. Said her mother found her passed out. Called ambulance and took her to emergency room. Blood pressure still up.

The GAO offered no evidence to refute Martino's contention that she passed out on January 16, 1986, and was taken to the emergency room at Capitol Hill Hospital. In addition, the documentation reviewed by Dr. Grant found Martino's absence on January 16, 1986 to be justified. Even if Martino did not call in on January 16, 1986, her reason for failing to do so has merit. When an individual is taken to an emergency room at a local hospital, it is understandable that they would not be functioning in a normal manner. The records of Kutyana show conclusively that Martino called in at 8:45 a.m. the next day, after being taken to the emergency room on January 16, 1986. Given the circumstances of January 16, 1986, Martino's conduct was reasonable.

The GAO argues that the testimony of Martino is conflicting with her previously-answered interrogatories. At the hearing, Martino stated that she could not remember whether she called in on January 16, 1986. She did add that she blacked out that day and was taken to the hospital. In her answer to interrogatories, Martino stated that she called in on January 16, 1986 and spoke to either Margaret Taylor, James Hill or Rueben Thomas. Margaret Taylor submitted a statement that said she had taken telephone calls when Kutyana was out of the office regarding leave being requested by Martino.

I do not find that these apparent inconsistencies are sufficient to sustain this reason. It is possible that Martino could be confused as to when she called in because of the substantial number of times she was out of the office. There is a possibility that she did call in on January 16, 1986 and spoke to one of her co-employees. The most likely scenario is that Martino passed out and was taken to the emergency room at Capitol Hill Hospital without calling in to the office. In any event, Martino's telephone call to Kut yana on January 17, 1986 satisfied the leave restrictions imposed on August 9, 1983. I am also not persuaded that the failure of Martino to raise this matter in her oral response on April 10, 1986 should be held against her. Management had in their possession (1) Kut yana's notes showing that Martino called in on January 17, 1986 and (2) documentation from the emergency room at Capitol Hill Hospital verifying Petitioner's contention. In light of these pieces of evidence, the GAO had no valid reason to charge Martino. The violation of leave restrictions on January 16, 1986 is not supportable by a preponderance of the evidence.

Failure to Comply with GAO Leave Policies and Procedures

GAO Order 2630.1 sets forth the leave policies and procedures. Chapter 6, Paragraph 4e, states, in pertinent part, as follows:

...for an absence of more than three consecutive workdays, application for sick leave must be supported by a certificate of incapacity from the attending physician or practitioner. The application should be made immediately to return to duty, or not later than the end of the pay period in which the return to duty occurs. The physician/practitioner's medical certification of incapacity must be submitted to the supervisor within 15 days after return to duty.

In addition, Martino was informed in her leave restriction letter of August 9, 1983 that failure to provide the required documentation would result in her being placed in an AWOL status.

Unauthorized Absences

Martino was charged with being AWOL from November 18 through 22, 1985. The GAO alleged that she failed to provide acceptable medical documentation for that period of time. Martino was also charged with being AWOL on December 31, 1985 and January 2 and 3, 1986. The GAO alleged that she failed to provide medical documentation to justify these absences.

The reasons concerning failure to comply with GAO leave policies and procedures and unauthorized absences concern the identical periods of time and will be considered together.

The GAO contends that on November 21, 1985 Martino was advised that medical documentation was needed to substantiate this absence. After returning to duty, Martino provided a medical certificate, which was determined to be unacceptable because it did not establish that she was totally incapacitated during this period. The GAO contends that although Martino was instructed to obtain and submit additional medical documentation, she failed to do so. The GAO alleges that Martino failed to present any medical evidence to support her absence of December 31, 1985 and January 2 and 3, 1986.

The Petitioner claims that the decision by management to decline to accept the medical documentation submitted by her for November 18 through 22, 1985 was arbitrary and capricious. Evidence was introduced to show that Martino had brought in identical medical documentation in the past from Dr. Calatayud, which had been accepted by management officials. Randy Byle, Manager of the Legal Services Section of the Office of General Counsel testified that the GAO wanted a certificate from Martino's doctor

indicating that she was totally incapacitated and when she could return to work. The certificate submitted by Dr. Calatayud indicated that Martino would return to work on November 25, 1985. Therefore, one of management's concerns was answered by the medical certificate.

Management argues that it had a right to know whether Martino was totally incapacitated. It is my judgment that such a determination is within management's discretion. The Petitioner argues that she was never requested in writing to provide this type of further medical documentation. Reference is made to the Agency manual, which allegedly requires that leave restrictions be made in writing. Notwithstanding Petitioner's argument, there was no requirement for management to notify Martino in writing that additional medical certification was needed. (Emphasis added.) Kutyna testified that he orally notified Martino that further medical documentation was needed. Under GAO Order 2630.1, Chapter 6, Paragraph 4c, provides that the head of a division or office may request an employee to furnish a certificate from the physician or other acceptable written evidence of incapacity. Martino was informed that the medical documentation submitted by Dr. Calatayud was insufficient.

The GAO raises a significant point in arguing that employees under leave restrictions should be held to a higher standard. In this case, it is obvious that management officials were not happy with the manner in which Martino complied with the Agency's leave requirements. The leave restrictions that Martino was put under were not applicable to most employees. When an employee has failed to adhere to policies and practices, management has every right to hold that employee to a stricter standard. In addition, Martino had been counseled numerous times about her documentation of leave requests and had been disciplined on two separate occasions. In this particular case, management had the discretion to require further documentation from Martino, in light of the fact that the initial documentation did not indicate whether she was totally incapacitated. In fact, the initial documentation did not mention any reason for her being out of work, but just stated that Martino had been under the care of Dr. Calatayud.

The incident surrounding December 31, 1985 and January 2 and 3, 1986 is clear. Martino submitted no documentation of her absence during this period of time and was charged with AWOL. Although it is true that Martino was in the midst of changing doctors, this does not excuse her from complying with the policies and procedures of the GAO. Having been warned and counseled on many occasions, Martino knew, or should have known, what would occur if medical documentation was not forthcoming. By not submitting any medical documentation for December 31, 1985 and January 2 and 3, 1986, Martino was in clear violation of her leave restrictions and GAO policies and procedures.

Based upon the above, I find that Martino failed to comply with GAO leave policies and practices, which warranted her being placed in an AWOL status from November 18 through 22, 1985 and December 31, 1985 and January 2 and 3, 1986. These reasons are sustained and supported by a preponderance of the evidence.

PENALTY

Having found that Martino failed to comply with GAO leave policies and practices and was properly charged with unauthorized absences, the penalty must be considered. The GAO argues that even if some of the charges are not sustained, the Agency has discretion in setting forth the penalty. It maintains that the penalty of removal is an appropriate action for the third offense of unauthorized absence.

GAO's Table of Disciplinary Offenses and Penalties, Order 2751.2, provides that for a third offense of unauthorized absence on any scheduled day of work the penalties can range from a 10-day suspension to removal. The GAO contends that, under its table of penalties, the decision to remove Martino was reasonable.

The Petitioner claims that the GAO did not offer any evidence to show that Martino's unauthorized absences impaired the efficiency of the service. It contends that approved leave cannot be considered as a basis for a removal action. The Merit Systems Protection Board (MSPB) in Webb v. U.S. Postal Service, 9 MSPB 749, 752-3 (1982) found that an adverse action cannot normally be sustained based upon a record of approved leave. The undersigned concurs that only unauthorized absences can be used to support the adverse action taken in the instant case. However, the Petitioner's argument that the GAO is under a requirement to show how specific absence impairs the efficiency of the service is not persuasive.

Unauthorized absences, by their very nature, are proper grounds for removal, since they impair the efficiency of the service. See Chiaverini v. U.S., 157 Ct. Cl. 371 (1982), Desiderio v. Dept. of the Navy, 4 MSPB 171 (1980). Evidence showed that Martino's conduct of unauthorized absences affected the efficiency of the service in the scheduling of work within the office.

It is a function of the Board to determine whether the penalty imposed was excessive given all of the circumstances of the instant case. Although the penalty of removal was within the range of penalties under the GAO's Table of Disciplinary Offenses and Penalties, it is not dispositive of the instant factual situation.

The Petitioner claims that because some of the charges should not be sustained, the penalty of removal should be reduced. In addition, Martino contends that since several of the initial charges in the notice of proposed removal were not sustained, the penalty should be reduced. When Deciding Official Brandon did not sustain some of the initial charges, in the notice of proposed removal he found the remaining charges to support a decision of removal. That decision must be reviewed in light of the requirements of law.

The MSPB in Douglas v. Veterans Administration, 81 FMSR 7037, 5 MSPB 313 (1981) set forth factors governing the consideration by management officials in determining the appropriateness of penalties. One conclusion reached by the MSPB was that a hearing examiner has the authority to review and modify or reduce discipline when some of the charges are not sustained. In the instant case, I did not sustain the charge proffered against Martino for violation of leave restrictions. Notwithstanding that determination, I find that the penalty of removal is reasonable under the instant circumstances.

Brandon considered the fact that Martino had two previous suspensions for violation of leave restrictions. These suspensions show that the GAO used progressive discipline in an attempt to rehabilitate Martino. Obviously, these suspensions were not successful in accomplishing their desire. In both disciplinary actions, Martino was warned that she was in violation of GAO's regulations regarding leave restrictions. In addition, in the proposed notice to suspend on May 14, 1985, Martino was informed:

...Accordingly, so that it may be impressed upon you that such misconduct will not be tolerated, this suspension of 14 days is proposed in the interest of promoting the efficiency of the service, the expectation being that, through this action, you will be motivated to comply with the established standards of employee conduct concerning leave, attendance, and adherence to supervisory instructions. You are reminded that any recurrence of such actions may result in more severe disciplinary action being proposed against you which may include proposing your removal from the

agency. (Emphasis added.)

It is clear to the undersigned that the GAO has given Martino sufficient warnings of her violation of management regulations. Within eight months after receiving this letter, Martino violated policies and procedures of the GAO. Having failed to heed the warning by management officials of the GAO, the decision to remove Martino was not arbitrary or capricious. Brandon's decision to remove Martino was reasonable and supported by a preponderance of the evidence. That decision must be sustained.

ORDER

It is my conclusion that, based upon a preponderance of the evidence submitted, the GAO proved that Mary L. Martino was removed from her position for reasons which will promote the efficiency of the service. I, therefore, order that the Petition for Review be denied.

Notes

1. The substance of the charges that were sustained will be discussed in the Discussion and Analysis portion of this decision.