

# **Charles W. Malphurs v. U.S. General Accounting Office**

**Docket No. 91-04**

**Date of Decision: December 10, 1991**

**Cite as: Malphurs v. GAO (12/10/91)**

**Before: Alan S. Rosenthal, Member**

**Performance Appraisal Systems**

**Evaluation of Employee**

**Performance Ratings**

**Reprisal/Retaliation Standard of Proof**

**Reprisal/Retaliation**

## **INITIAL DECISION**

Charles W. Malphurs is employed by the United States General Accounting Office (hereinafter "GAO" or "agency") as an evaluator in the Research, Development, Acquisition, and Procurement Group (RDAP) of its National Security and International Affairs Division (NSIAD).<sup>1</sup> He instituted this proceeding by the filing of a petition for review on April 3, 1991. The gravamen of the petition is that, in 1990, petitioner unjustifiably was both denied a bonus and placed in the lowest permanent pay increase category provided by the agency's prevailing employee compensation system for evaluators and certain other job classifications. More specifically, according to the petition, these adverse actions were taken as a retaliatory measure prompted by a grievance that petitioner had filed the previous year against his then supervisor in a different Group within NSIAD.<sup>2</sup> By way of relief, petitioner seeks a higher performance rating, a bonus, and an "appropriate" permanent pay increase.

In its April 29 answer, the agency denied the pivotal allegations of the petition and also asserted, by way of affirmative defenses, (1) that the Board lacked subject matter jurisdiction; and (2) that petitioner had failed to state a claim upon which relief could be granted. Following a May 23 status conference with counsel for the respective parties, by a June 4 letter the agency withdrew its jurisdictional defense.<sup>3</sup>

An evidentiary hearing was conducted on July 24-26 and the record was thereafter supplemented with the transcript of the August 22 deposition of Patricia D. Slocum, a witness for petitioner who had been unavailable to testify at the time of the hearing because of illness in her immediate family.<sup>4</sup> The post-hearing opening and reply briefs of the parties are now on file and, consequently, the case is ready for determination.

For the reasons that follow, the Board is convinced that, viewing the record as a whole in the light most favorable to petitioner, there remains no basis upon which a reasonable inference might be drawn that petitioner's prior grievance played a role in the administrative actions of which petitioner complains. Accordingly, the petition must be denied for the failure of petitioner to fulfill his burden of persuasion on

the retaliation claim.

I.

A. An appraisal of the claim before the Board in this proceeding requires an understanding of the basic elements of the GAO's personnel compensation system for evaluators that was in place in 1990. At the hearing, the mechanics of that system--which bears the title Pay for Performance (PFP)--were described without contradiction by Joan M. Dodaro, the Deputy Assistant Comptroller General for Operations. Her testimony<sup>5</sup> and other similarly uncontroverted evidence of record<sup>6</sup> reveal the following: Prior to 1989, the GAO compensation scheme for evaluators was akin to that still prevailing today in most of the executive branch of the federal government. In a word, assuming performance at an acceptable level of competence, the evaluator's compensation hinged entirely upon his or her time in the assigned grade. As a consequence, for example, every GS-13 evaluator within the same longevity step of that grade received the same compensation notwithstanding a possible significant differential in quality of performance.

In 1989, the PFP system was inaugurated. The employees to be included within it--among them evaluators--were placed in one of three "Bands" (apparently depending upon their grade at the time of the conversion). Band II was the essential equivalent of grades GS-13 and 14. Consequently, petitioner, a GS-13 at the time, found himself in that Band.

At the root of the PFP scheme is the concept that compensation received by an employee within a particular Band should be based upon an assessment of the employee's performance and contributions relative to those of other employees, rather than simply upon considerations of longevity. To this end, a relatively complex process was established for the carrying out of the assessment through, in the first instance, the compilation of rank lists. These lists are then used by the Assistant Comptroller General in charge of each Division in making his or her determination respecting the award of bonuses and permanent merit pay increases to evaluators and other employees within the PFP ambit.<sup>7</sup> According to Ms. Dodaro, in 1990, the year in question here, up to 50% of those employees could be given bonuses in amounts ranging from 2% to 7% of the individual's salary. In addition, permanent pay increases were actually received by approximately 95% of them, in amounts ranging from 0.5% to 6% of their salary.<sup>8</sup>

1. The rank lists for evaluators contain two components and are computed on an aggregate 60-point scale. The first component is the performance appraisal score. Every employee receives annually such an appraisal from his or her immediate superior, which includes the providing of one of five performance level ratings (ranging from "exceptional" to "unacceptable") for each of several task elements (or job dimensions) such as data gathering, data analysis, written communication and oral communication. By assigning a specified numerical value to the received rating for each element (e.g., an "exceptional" rating for a particular element would be accorded five points and an "unacceptable" rating for that element but one point), a total score for this component (up to a maximum of 40 points) is obtained.

While the performance appraisal score is thus arrived at arithmetically on the basis of the performance level ratings on the employee's appraisal for the rating period in question, the other rank list component has a quite different foundation. That component represents an assessment on a 20-point scale of the contributions made by the employee during the year to the furtherance of, e.g., GAO products and testimonies; agency, unit, or team functioning within GAO; the agency's standing with non-government entities; and GAO's relationship with other agencies and the Congress. The assessment is made by a Management Review Group (hereinafter "ranking panel") consisting of three or more management officials who must be in at least one Band higher than that of the individuals being rated. Each panel

evaluates the contributions of employees in a particular unit and its members are designated by the head of that unit. Accordingly, for example, the RDAP Director designates the members of the ranking panel called upon to appraise the contributions of RDAP evaluators.

In discharging their assessment function, the ranking panel members are to have available to them the employee's performance appraisal for the prior year, as well as any contributions and accomplishments statement (hereinafter "contributions statement") that the employee might have submitted.<sup>9</sup> These statements, the submission of which is optional, set forth the employee's own view of the nature and extent of the contributions he or she made during the rating period to the accomplishment of the agency's mission.<sup>10</sup> Once the panel is convened, the panel members employ the fruits of their review of those documents, as well as any personal work-related knowledge they might possess, to make an initial assessment of each employee's contributions and to assign a tentative score based upon that assessment. Thereafter, a collegial discussion of each employee takes place, following which the panel members may (and sometimes do) change their tentative scores. The ultimate scores of the members are then averaged to reach a composite contributions score for the employee.

As thus ascertained, the composite contributions score is added to the performance appraisal score (for which, as seen, the ranking panel is not responsible). The employees being assessed by the panel are thereupon ranked among themselves on the basis of the combined scores. For example, an employee with a combined score of 45 would be placed on his or her rank list ahead of an employee whose combined score was 40 but behind an employee with a combined score of 50.

2. In each GAO Division, there are a number of units (i.e., groups such as RDAP) and, consequently, a number of ranking panels and rank lists. All of the lists compiled within a particular Division ultimately find their way into the hands of the Assistant Comptroller General in charge of the Division.<sup>11</sup> That official determines, among other things, which employees in his or her Division should receive bonuses.<sup>12</sup> In exercising that authority, he or she may not award a bonus to, e.g., a person ranked 10th on a particular list while denying one to a person ranked higher (e.g., 4th) on the same list. Although not likely to occur, he or she is free, however, to elect to award bonuses to every person on one rank list while denying a bonus even to the person at the top of a different list. In short, occupying a high position on a particular rank list provides no absolute assurance that an evaluator will actually receive a bonus.

## B.

1. Turning to the relevant facts of this case,<sup>13</sup> petitioner has been employed by the GAO since 1978.<sup>14</sup> Following several years in another Division, he joined NSIAD in or about 1982 and, as previously noted, continues to serve as an evaluator in that Division. Until 1989, he was assigned to the Division's Manpower Group. In June of that year, he transferred to RDAP. While still in the Manpower Group, petitioner filed a grievance directed to the performance appraisal that he had received for the rating period ending June 1989 from his then supervisor in that Group, John Harper.<sup>15</sup> By way of relief, he sought an upgrading of the appraisal to an "exceptional" rating in each job dimension category. When this relief was not forthcoming administratively, petitioner filed a petition for review with this Board, asserting his failure to have received formal performance expectations from his supervisor.<sup>16</sup> In March 1990, the parties reached a settlement and, as a result, no Board decision on the petition was forthcoming.

Upon his transfer to RDAP in June 1989, petitioner worked under the supervision of one of that Group's several Assistant Directors, James F. Wiggins. In June 1990, Mr. Wiggins provided petitioner with his performance appraisal for the rating period ending in that month.<sup>17</sup> In all but one of the seven job dimension categories, the petitioner received the second highest rating--"superior." With respect to "written communication," the next lower rating--"fully satisfactory"--was assigned. For each rating, the appraisal supplied an explanation as to the underlying basis.<sup>18</sup> As was his right, petitioner elected to comment on the appraisal. In a June 8, 1990, memorandum to the RDAP Associate Director, Michael E. Motley, he expressed the view that the "quantity and quality of my work justifies a higher rating."<sup>19</sup> In an accompanying five-page statement, petitioner set forth the foundation for his belief that, in four of the job dimension categories, the rating should be raised. Mr. Motley did not agree; consequently, the challenged ratings were not changed.<sup>20</sup> On July 13, 1990, a ranking panel met for the purpose of determining the contributions component of the assessment for PFP purposes of the performance of 19 RDAP Band II evaluators, including petitioner, who were in what was identified as Group K.<sup>21</sup> The members of the panel, in addition to Messrs. Wiggins and Motley, were the RDAP Director, Paul F. Math (who served as chairman), and five other RDAP Assistant Directors: Clark G. Adams, David E. Cooper, Lester C. Farrington, Jr., John A. Rinko, and Kevin M. Tansey. In passing upon the contributions of petitioner, the panel had available to it his June 15, 1990 contributions statement.<sup>22</sup> The contributions scores (on the 20-point scale) provided to petitioner by the eight panel members ranged from a low of five (the rating of two panel members) to a high of ten (supplied by Mr. Wiggins, his immediate superior). In between those extremes were three sevens and two eights. The result was a composite contributions score of 7.13, which, when added to petitioner's arithmetically-computed performance appraisal score of 30.86, produced a total score of 37.99.<sup>23</sup> This total score compared unfavorably with the total scores of all but one of the other 18 employees in Group K being evaluated by the panel. In this connection, the composite contributions scores given those employees ranged from a low of eight to a high of 17.38, with most of the scores between 11 and 15.<sup>24</sup>

2. Each ranking panel member was included on the witness lists of both petitioner and the agency. In the circumstances, it was agreed that those individuals would make a single appearance at the hearing. After interrogation by petitioner's counsel with the benefit of the greater latitude accorded in the instance of an adverse witness, the panel members would then be examined by agency counsel. This procedure was uniformly followed.

Given the substance of petitioner's claim, the questioning of the panel members understandably addressed, *inter alia*, (1) whether, at the time of their July 13, 1990, meeting to determine the contributions scores, those members were aware of petitioner's prior grievance while employed in the Manpower Group; and (2) if so aware, whether the fact of that grievance played any part in the deliberations that led to the contributions scores assigned to petitioner by each panel member. In response, five of the witnesses--Messrs. Adams, Cooper, Farrington, Rinko, and Tansey--testified that they had not been personally aware of the grievance when they went into the meeting.<sup>25</sup> Moreover, none of them had any recollection of the grievance being mentioned during the collegial panel discussion pertaining to petitioner.<sup>26</sup>

The other three witnesses--Messrs. Math (RDAP Director), Motley (RDAP Associate Director), and Wiggins (petitioner's immediate supervisor)--acknowledged that they had been aware of the earlier grievance in advance of the panel meeting. Mr. Math had been told of it by Arthur R. Goldbeck, the NSIAD Director of Operations, and had discussed it with Mr. Motley (albeit, insofar as he could recall, with no other person in RDAP).<sup>27</sup> Mr. Motley testified that he first learned of the grievance in a

conversation with petitioner himself that preceded the panel meeting.<sup>28</sup> For his part, Mr. Wiggins similarly recalled a discussion with petitioner prior to the panel meeting during which the subject of the grievance was raised.<sup>29</sup> In addition, he alluded to a luncheon conversation with two other staff members in which, after one of them referred to petitioner's difficulties with his Manpower Group supervisor, he (Wiggins) noted his understanding that a grievance had been filed.<sup>30</sup> Neither of those staff members served on the ranking panel.

In common with the other panel members, all three of these witnesses disclaimed any recollection that the prior grievance was discussed at the panel meeting.<sup>31</sup> Further, each maintained that the grievance played no part in the contributions score he assigned to petitioner.<sup>32</sup> In this connection, to repeat, Mr. Wiggins gave petitioner his highest score--a ten. The scores petitioner received from the other two members with acknowledged advance knowledge of the grievance were an eight and seven, respectively. At the same time, only one of the five panel members assertedly unaware of the prior grievance provided a score as high as eight--two of the other four assigning scores of seven and the remaining two scores of five.<sup>33</sup> Thus, as it turned out, petitioner fared better in the rating process at the hands of those panel members who concededly had entered the meeting with knowledge of the earlier grievance.

Despite the latitude provided to his counsel in the examination of persons called as adverse witnesses, petitioner's interrogation of the eight panel members failed to reveal anything to counter either the disavowal by a panel majority of any prior knowledge of the earlier grievance or the insistence of each witness that the grievance was not discussed at the meeting. Nor is there other evidence of record that would supply a sufficient basis for an inference that the earlier grievance was, in fact, known to the panel as a whole and, as such, might have played some part in the composite contributions score ultimately given to petitioner.

To be sure, petitioner recalled discussing the grievance with Mr. Rinko before the date of the panel meeting.<sup>34</sup> According to Mr. Rinko, however, he initially became aware of it on July 16, 1990--i.e., three days after the meeting--in a discussion with petitioner incident to the latter's transfer to his supervision on or about that date.<sup>35</sup> Although there is nothing in the record to corroborate conclusively either version of events, it seems more likely that the Rinko recollection is accurate. There is no apparent reason why petitioner would have informed Mr. Rinko of the earlier grievance in advance of being placed under his supervision. In this regard, the record does not suggest that petitioner was inclined to make the fact that he had filed a grievance while employed in the Manpower Group known broadly to supervisory personnel in his new Group.<sup>36</sup>

A still thinner reed supports petitioner's further endeavors at the hearing to undermine the unequivocal testimony of five panel members that they were unaware of the earlier grievance at the time of their meeting. Petitioner pointed out that, in the justification he submitted to Mr. Motley in support of his claim of entitlement to higher performance appraisal ratings for the rating period ending in June 1990, he had observed that he had used his "knowledge of EEO and labor relations to help an RDAP senior evaluator who is facing potential grievances from her staff member."<sup>37</sup> Even indulging in petitioner's tacit assumption that, perusing the full text of the three-page, single-spaced justification, a panel member would have focused particularly on that sentence, it is much too great a leap then to draw his further suggested inference that the sentence would have telegraphed the certain message that that "knowledge" had been obtained through the filing of a grievance.<sup>38</sup>

Similarly, petitioner is not aided by his stress at the hearing upon the fact that the performance appraisal previously received (for the 1988-89 rating period) from his superior in the Manpower Group was missing from the material provided to the panel members.<sup>39</sup> For one thing, petitioner's past performance appraisals had relevance solely on the matter of permanent pay increases and that matter would have been considered only after the contributions scores had been determined for bonus allocation purposes. More important, had a panel member nevertheless taken note of the absent appraisal before determining his contributions score for petitioner, the high probability is that he would not have jumped to any conclusion as to the underlying reason without first raising the question in the panel discussion. Once again, however, the uncontroverted testimony of all concerned is that the subject of an earlier grievance simply never came up at any point during the deliberations.

Finally, petitioner referred to a conversation he had with a co-worker, Patricia D. Slocum, who assertedly told him that, during a training session devoted to the setting of performance expectations, Mr. Goldbeck, the NSIAD Director of Operations, commented that one employee had not had his expectations set the prior year.<sup>40</sup> Ms. Slocum is said to have added that "[w]e all knew" it was petitioner to whom Mr. Goldbeck was referring.<sup>41</sup> Noting his belief that all members of the ranking panel were required to attend the course, petitioner would have it that they necessarily likewise were aware that petitioner was the subject of the Goldbeck remark. Even were one to accept that most dubious inference, it would scarcely follow that the panel members likely would have proceeded to the additional conclusion that a grievance was associated with the failure to have provided petitioner with performance expectations.

The short of the matter is that there is a total lack of evidence, direct or circumstantial, that might cast reasonable doubt on the truthfulness of the testimony of the eight panel members with respect to either (1) their knowledge of petitioner's earlier grievance at the time of the July 13, 1990, panel meeting; or (2) the absence of any discussion during that meeting of the grievance. This Board therefore accepts that testimony and, based upon it, finds as a fact that a majority of the members of the panel (Messrs. Adams, Cooper, Farrington, Rinko and Tansey) were unaware of the grievance when they provided their contributions scores for petitioner and the other rated RDAP employees at the panel meeting.

## II.

The criteria governing the adjudication of retaliation claims are well-established and not in serious dispute here. Suffice it to say that it was incumbent upon petitioner to make out a prima facie case of retaliation by demonstrating that (1) he had engaged in protected activity; (2) thereafter, he was subjected to some adverse personnel action; (3) the official or officials taking that action had knowledge of the protected activity; and (4) a causal relationship existed between the protected activity and the adverse action.<sup>42</sup> If the petitioner fulfilled that obligation, the burden of going forward shifted to the agency which had to establish the existence of a genuine non-retaliatory reason for the adverse action.<sup>43</sup>

Accordingly, the first inquiry must be into whether the sum total of petitioner's evidence provides the requisite prima facie case in support of his retaliation claim. If not, the matter is at an end. If so, the question then becomes whether the agency supplied an explanation for the challenged actions that convincingly demonstrated that, nonetheless, those actions did not have a retaliatory foundation.

As the agency readily concedes, petitioner did engage in a protected activity (the submission of his grievance in June 1989 and the filing of a complaint with this Board two months later). It also acknowledges that, thereafter, petitioner was subjected to adverse personnel action in the sense that he received in June and July 1990, respectively, a performance appraisal from his immediate superior and

contributions scores from the ranking panel that did not accord with his own evaluation of the quality and extent of his performance and contributions during the rating period in question (and had unfavorable consequences from a monetary standpoint). With respect to the third prong of the test for ascertaining the presence of a prima facie case of retaliation, the agency officials responsible for the preparation and review of petitioner's performance appraisal (Messrs. Wiggins and Motley) concededly were aware of the protected activity but, as has been found, a majority of the ranking panel did not possess similar knowledge. As to the fourth prong, there is sharp disagreement between the parties as to the existence of any causal relationship between the grievance and Board petition that petitioner filed in 1989 and the ratings that he received the following year.

A few preliminary observations are in order. To begin with, there obviously is little likelihood that any employee will be able to demonstrate the requisite causal relationship through direct evidence. It would be a rare case indeed in which the employee might be able to point to a candid acknowledgment by the deciding official(s) that the adverse action was taken in retaliation for some prior protected activity--or to some "smoking gun" of equally persuasive force.

By the same token, in relatively few cases is the circumstantial evidence of a causal relationship likely to be equivalent to that in Chen, note 2 supra. That case involved an individual who, in February 1983, obtained a ruling from this Board that the GAO's refusal to hire him was a discriminatory violation of Title VII of the Civil Rights Act of 1964. In accordance with the Board's directive that he be hired in one of two positions, Chen started to work for the agency in July 1983. Six months later, he was denied a within-grade salary increase and, in June 1984, he was notified that he was being fired. As the Court of Appeals for the District of Columbia Circuit noted when Chen's challenge to those actions reached it on a rejection of the challenge by the full Board, "[t]here appears to be no dispute that Chen has made out a prima facie case of retaliation," requiring the agency to meet "its burden of coming forward with a legitimate non-retaliatory reason" for the denial of the within-grade salary increase and the subsequent termination of employment.<sup>44</sup>

Thus, even if meritorious, by their very nature claims of retaliation are often not easily supported. That consideration manifestly must be taken into account by the trier of fact in the assessment of such a claim. Giving the claimant the benefit of any reasonable doubt that might arise in ambiguous circumstances does not mean, however, that a prima facie case can be founded on nothing more than suspicion or pure conjecture. Stated otherwise, the fact that an employee engaged in a protected activity and later received a disappointing evaluation of the quality and/or significance of his or her performance does not, of itself, establish the likelihood of a link between the two. There must be present other factors that allow a reasonable inference--even if not a compelled conclusion--that such a link exists.

A. Although both Mr. Wiggins (the preparer of the 1989-90 performance appraisal) and Mr. Motley (the reviewer of the appraisal) were aware of petitioner's prior grievance, there is no basis in this record for an inference that a link existed between the appraisal and the grievance. To begin with, notwithstanding that petitioner was dissatisfied with the ratings he received on the various job dimensions involved in the appraisal, it cannot be said that they were unfavorable on their face. To the contrary, as earlier noted, in all but one category petitioner was rated "superior"--the second highest of the five possible ratings--and in the remaining category he was deemed "fully satisfactory,"--the next highest rating. In addition, the narrative justifications for the ratings that were offered by Mr. Wiggins, and thereafter reviewed by Mr. Motley, were highly complimentary for the most part.<sup>45</sup>

It might well be that a case could also be made for the equally subjective judgment of petitioner that the "quantity and quality" of his work warranted still higher ratings in several categories. (Indeed, a substantial portion of the evidence adduced by petitioner was directed to that issue.) This Board does not sit, however, for the purpose of resolving the differences of opinion that often, and understandably, arise between employee and supervisor with regard to the precise level of the former's performance. In fact, in the absence of first-hand knowledge of the details of that performance, any such undertaking obviously would be impossible.<sup>46</sup> The most that the Board can determine is whether the appraisal is at such odds with the totality of the record evidence bearing upon petitioner's job performance during the rating period that it is reasonable to infer that some improper consideration or motivation --e.g., retaliation--might well have played a role in the formulation of the appraisal. The required disparity is not present here. Even giving petitioner the benefit of every reasonable doubt, and making every possible allowance for the appreciable rating inflation that seemingly prevailed at the time in RDAP (if not in the agency in general),<sup>47</sup> an inference of retaliation would necessarily rest--and impermissibly so--on nothing but unfounded speculation and conjecture.

Consequently, the Board must find as a fact that petitioner failed to establish a possible causal relationship between his prior grievance and the performance appraisal he received for the 1989-90 rating period. In the circumstances, the agency had no burden of defending the appraisal. Nonetheless, the Board further finds that the justification supplied in the appraisal for the assigned ratings, taken in conjunction with all other evidence of record, would have fulfilled any obligation that the agency might have had to provide a non-retaliatory reason for the ratings.<sup>48</sup>

B. Moving on to the contributions scores that the ranking panel provided petitioner, there is no question, of course, that those scores were relatively low. Here too, however, it is not this Board's function to decide whether petitioner's more generous assessment of the worth of his contributions to the agency's mission during the rating period is closer to the mark than that of the panel members individually or collectively. Nor can this Board sit in judgment on whether, to the extent revealed in the testimony of the panel members, each employee being rated (and particularly petitioner) was evaluated in precisely the same fashion as every other employee. The Board has not been clothed with the mantle of general overseer of the operation of PFP to ensure that it produces total equity in the case of all employees covered by that program. Rather, in the context of the present case, its role is confined to exploring whether a sufficient foundation exists for petitioner's insistence that his contributions scores were not merely wide of the mark but the result of a desire to make him pay a substantial price for his prior engagement in protected activity.

In light of the fact that a majority of the panel members--including the two members assigning him the lowest contributions scores--were unaware of the prior grievance at the time of (or during) the panel meeting, petitioner's endeavor to establish the requisite causal relationship was confronted at the outset with a hurdle of major proportions. Of necessity, his case came down to the proposition that, although the grievance had not implicated any RDAP official, but rather was directed at a supervisor in an entirely different group within NSIAD, Messrs. Math, Motley and/or Wiggins nonetheless undertook at the panel meeting to wreak vengeance against petitioner by falsely representing to their panel colleagues that petitioner's contributions were of relatively little worth. Such a scenario is most assuredly not lightly to be presumed--on the face of it, at least, it seems highly improbable that any or all of those individuals would embark upon such a machiavellian course simply to redress a perceived insult of which none of them (or anyone else in RDAP for that matter) was the target.<sup>49</sup> In the case of Mr. Wiggins, petitioner's immediate superior, the thesis seems yet more improbable. It would have it that, while himself giving petitioner a contributions score of ten, during the panel discussion Mr. Wiggins maliciously undertook to downgrade

petitioner's contributions to such an extent that two of the panel members personally unfamiliar with those contributions (as well as with the prior grievance) saw fit to assign the much lower score of five.

A close examination of the testimony of the panel members pertaining to their deliberations and the basis for their contributions scores has not supplied the slightest warrant for being any less skeptical respecting the validity of petitioner's required chain of reasoning. In a nutshell, there is a lack of anything remotely approaching sufficient probative evidence to undergird a finding that, although personally unaware of the prior grievance, some panel members based their low contributions scores on false representations made by other panel members, which representations were induced by those members' personal knowledge of the grievance and their desire to punish petitioner for it.<sup>50</sup> Instead, the most that can be said for petitioner's claim is that Mr. Wiggins might not have pressed his case for a higher contributions score with as much vigor as petitioner thought warranted and that, in some limited respects, the various contributions statements under scrutiny might not have received uniform treatment.<sup>51</sup> But even were one to agree with petitioner that his contributions statement deserved a better reception, standing alone those considerations will not support the theory of a possible and invidious causal relationship between petitioner's earlier protected activity and the necessarily subjective determinations reached by a collegial body, the majority of the members of which had no knowledge of that activity.<sup>52</sup>

In sum, it must be concluded that petitioner also failed to make a prima facie case of retaliation with regard to the ranking panel's action. Insofar as the evidence discloses, petitioner's contributions scores were founded on an honest (whether or not entirely accurate) assessment of his contributions (and contributions statement), free of any element of retaliation for past protected activity.<sup>53</sup>

On the basis of its examination of the record as a whole and for the reasons stated above, the Board makes these ultimate findings:

1. There is insufficient evidence to allow an inference that prior protected activity on petitioner's part might have played some role in the performance appraisal given to him for the rating period 1989-90. Accordingly, petitioner failed to sustain his burden of presenting a prima facie case on the claim that the ratings given to him in that appraisal represented retaliation for prior protected activity.
2. In any event, the narrative justifications accompanying each rating contained in the 1989-90 performance appraisal provided a satisfactory non-retaliatory foundation for the assigned ratings.
3. Five of the eight members of the ranking panel that assessed petitioner's contributions to the accomplishment of the agency's mission during the 1989-90 rating period were personally unaware of the prior protected activity at the time they supplied petitioner with his contributions scores for that period. There is insufficient evidence, either direct or circumstantial, on which to rest an inference that the contributions scores of some or all of those five members (two of whom provided petitioner with his lowest scores) might have been influenced by statements of the remaining three panel members that, in turn, were prompted by a desire to retaliate against petitioner because of his prior protected activity in a different Group within NSIAD. Nor is there room for an inference that the contributions scores supplied by those panel members aware of petitioner's prior protected activity might have been, in whole or in part, the product of that knowledge. Rather, from all that appears in the record, the contributions score given to petitioner by each of the eight panel members was founded on a genuine, even if arguably inaccurate, assessment of petitioner's contributions (and contributions statement), following a collegial discussion that was itself free of the taint of retaliation. Accordingly, petitioner failed to sustain his burden of putting forward a prima facie case on his claim that the contributions scores he received from the ranking panel

represented retaliation for prior protected activity.

In these circumstances, petitioner is not entitled to any of the relief sought in the petition for review and the petition therefore must be, and hereby is, denied.<sup>54</sup>

Alan S. Rosenthal  
Administrative Judge

Date: December 10, 1991

## Notes

1. As the term is used by GAO, evaluators are professional employees (in many cases possessing graduate degrees) who plan and conduct reviews of programs and internal agency operations within the federal government.

2. The General Accounting Office Personnel Act of 1980, as amended, requires the Comptroller General to maintain a personnel management system that, inter alia, prohibits "personnel practices prohibited under section 2302(b) of title 5 [of the United States Code]." 31 U.S.C. §732(b)(2). One of the section 2302(b) prohibited personnel practices is the taking of any personnel action against an employee because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." See section 2302(b)(9)(A). As mandated, the Comptroller General has carried over this proscription in the GAO regulations. See 4 C.F.R. §2.5(i). See also Chen v. General Accounting Office, 821 F.2d 732, 738 (D.C. Cir. 1987).

3. At the status conference, the Board brought to GAO counsel's attention an order that it had entered the prior day in Burns v. GAO, Docket No. 91-02 (a proceeding later dismissed on July 8 because of an intervening settlement of the controversy). In that order, the Board struck sua sponte as patently without substance a like jurisdictional defense interposed in GAO's answer in Burns. The order added (at p. 6) that the agency is "not to assert a lack of subject matter jurisdiction in future proceedings before [this administrative judge] unless it is able to offer a colorable foundation for the assertion at the first status conference."

4. The Board had agreed to this procedure prior to the conclusion of the hearing and had memorialized that agreement in a July 29 order. The addition of the Slocum deposition to the record was recognized in a September 10 order. The deposition will be cited hereinafter as "Slocum Dep."

5. Tr. 423-61. As she stated, her official responsibilities include the oversight of all human resource activities in the agency. The discussion of the functioning of the PFP system contained in the text is largely derived from her testimony.

6. See, e.g., Resp. Exhs. 3 (Performance Appraisal System Manual for Band I and Band II Employees) and 5(Guide for Assessing Contributions (June 1989)), received in evidence at T. 364 and 185, respectively.

7. Although Ms. Dodaro's testimony focused upon the role of that official in making bonus awards, the memorandum received by petitioner in August 1990 from the NSIAD Assistant Comptroller General covered both the bonus and the permanent pay increase decisions made in his case. See n.24, infra.

8. Tr. 424-25.

9. As will be seen (n.52, infra), however, not every member of the ranking panel that assessed petitioner's contributions had in hand the statements prepared by petitioner and the other employees being rated.

10. Apparently, some employees subject to PFP choose not to submit contributions statements. It is reasonable to suppose that, in most instances at least, that choice reflects the employee's confidence (whether justified or not) that his or her contributions are so well known throughout the unit that their memorialization would be superfluous.

11. The number of employees on a specific rank list obviously will vary from unit to unit; an Assistant Comptroller General for a particular Division might be dealing with lists encompassing in total as many as 400 employees.

12. In addition, as earlier noted, it appears that the Assistant Comptroller General is also involved in the decision regarding the allocation and amount of permanent pay increases.

13. Much of the testimony and exhibits offered at the hearing turned out to have no bearing upon the limited issue before the Board for decision--whether petitioner's performance appraisal ratings and low contributions scores were given him in retaliation for prior protected activity. The rehearsal of evidence lacking true probative value would, of course, serve no useful purpose.

14. Tr. 16. Prior to that time, petitioner was employed in the Department of Defense, where he worked principally in the area of military compensation (Tr. 13-15).

15. Pet. Exh. 28, received in evidence at Tr. 25.

16. Malphurs v. GAO, Docket No. 119-211-17-18, petition for review filed on August 18, 1989.

17. Pet. Exh. 9, received in evidence at Tr. 78.

18. Ibid.

19. Ibid. Mr. Motley was the official who reviewed Mr. Wiggins' appraisal of petitioner's performance. The June 8 memorandum was preceded by a June 5 memorandum to Mr. Wiggins in which petitioner questioned the ratings assigned in the appraisal. Pet. Exh. 11, received in evidence at Tr. 83. In addition petitioner met with both Mr. Motley and Mr. Wiggins to discuss his performance appraisal orally. See Pet. Exhs. 12 and 13, received in evidence at Tr. 84-85.

20. Tr. 206-14.

21. See Resp. Exh. 20, received in evidence at Tr. 182, containing the names of the panel members and the total scores (appraisal, contributions, and combined) received by each of the 19 employees in Group K. The same panel members rated the contributions of four evaluators in Group Y. See Resp. Exh. 21, received in evidence at Tr. 182.

22. Resp. Exh. 2, received in evidence at Tr. 214. The panel also had available to it, of course, the contributions statements of other employees being rated.

23. Resp. Exh. 22, received in evidence at Tr. 184.

24. Resp. Exh. 20. The employee whose overall ranking was below that of petitioner had the composite contributions score of eight. Because he had a performance appraisal score of 29.33, his total score was 37.33.

Petitioner was advised, by August 21, 1990, memorandum signed by the NSIAD Assistant Comptroller General, that, as a consequence of his PFP assessment, he would not receive a bonus in 1990 and was being given the lowest permanent pay increase allowed by that compensation system. Pet. Exh. 8, received in evidence at Tr. 78.

25. Tr. 234-35 (Adams); Tr. 257 (Cooper); Tr. 246 (Farrington); Tr. 401 (Rinko); Tr. 287 (Tansey).

26. Tr. 235 (Adams); Tr. 257 (Cooper); Tr. 243 (Farrington); Tr. 421-22 (Rinko); Tr. 287 (Tansey).

27. Tr. 139.

28. Tr. 194.

29. Tr. 343.

30. Tr. 344-45.

31. Tr. 152 (Math); Tr. 219-20 (Motley); Tr. 345, 384 (Wiggins).

32. Tr. 147-48 (Math); Tr. 220 (Motley); Tr. 384 (Wiggins).

33. Resp. Exh. 22.

34. Tr. 91

35. Tr. 401-02

36. Although it is unnecessary to resolve the matter here, it is possible that the discrepancy in the testimony was occasioned by petitioner's inaccurate recollection that he had started to work under Mr. Rinko's direction in May 1990, rather than after the panel meeting in July (as reflected not merely impliedly by Mr. Rinko's notes but, as well, by the express recollection of Mr. Wiggins). See Tr. 93, 355, 402. This is seen from the fact that petitioner testified that the discussion respecting his earlier grievance had occurred when he was assigned to work for Mr. Rinko (Tr. 91).

Petitioner expressly acknowledged that he had not discussed the grievance in advance of the panel meeting with Messrs. Adams, Cooper, and Farrington (Tr. 91). He was not asked explicitly about such a discussion with Mr. Tansey, although he did state that he had never worked under that supervisor's direction (Tr. 93).

37. See p. 4 of petitioner's June 8, 1990 memorandum to Mr. Motley, received in evidence as part of Pet. Exh. 9, alluded to at Tr. 101-02.

38. Moreover, at least two of the panel members claiming an unawareness of the prior grievance apparently had not yet looked at petitioner's 1990 performance appraisal (and therefore at anything associated with it) at the time of the determination of contributions scores. See n.52, infra.

39. Tr. 93.

40. Tr. 96-97.

41. Tr. 97. For present purposes it may be assumed that petitioner's account of his conversation with Ms. Slocum is accurate. In her testimony, however, Ms. Slocum stated that she could not recall any such comment by Mr. Goldbeck (Slocum Dep. 6). It is also noteworthy that Ms. Slocum was the sole peer of petitioner who testified on his behalf. Her testimony does not bear out any suggestion that the fact that petitioner had filed a grievance while employed in the Manpower Group was so well-known throughout RDAP that it must be presumed that all of the ranking panel members became aware of it. Insofar as of possible present relevance, she stated simply that petitioner himself had told her of his earlier grievance. She had not thereafter discussed it with anyone else in RDAP, including Mr. Tansey (her own supervisor) (Slocum Dep. 7-8).

42. See, e.g., Chen v. GAO, n.2, supra, 821 F.2d at 739. Petitioner and the agency do disagree respecting the precise formalization of the fourth criteria. Petitioner would have it that he need show only the existence of "some connection" between the protected activity and the adverse action. For its part, the agency maintains that more than "some connection" is required; that the petitioner must prove a "genuine nexus" by a preponderance of the evidence. As will be seen, it is not necessary in this case to decide whether more than an issue of semantics is involved.

43. Ibid.

44. 821 F.2d at 739. In this regard, the court observed that a causal relationship "may be inferred from adverse action that closely follows protected activity." Ibid., citing Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 325 (D. Mass), aff'd, 545 F.2d 222 (1st Cir. 1976). That observation is not relied upon by petitioner here and, in any event, does not measurably assist his cause. Even assuming its applicability to a situation where, unlike that in Chen and Hochstadt, subjective performance and contributions appraisals (rather than objective actions such as removal) are under attack, in this instance approximately a year elapsed between the protected activity and the disputed ratings. Even more important, no one associated with his grievance had any part in the assertedly retaliatory conduct. This being so, petitioner cannot (as he seemingly does not) base his claim of a causal relationship on the time element.

45. It is worthy of passing note that, in her opening statement, petitioner's counsel herself observed that, although "not the highest in the group," petitioner's performance appraisal "was a good appraisal" ( Tr. 4). It also is of interest that, in his June 5, 1990 memorandum to Mr. Wiggins (Pet. Exh. 11), petitioner expressed disappointment that he was being transferred to the supervision of another RDAP Assistant Director (Mr. Rinko). As he stated, he considered Mr. Wiggins "one of the best managers I have worked for."

46. Nor is the Board equipped to judge the merits of any disagreements that might have existed between petitioner and his superiors with respect to particular job assignments or the exercise of other aspects of managerial discretion--another subject to which petitioner devoted considerable attention in his testimony.

Absent manifestations of such gross disparity of treatment between petitioner and other similarly situated employees as to suggest animus toward petitioner on the part of superiors (and thus the possibility of retaliatory measures), there can be no cause for the Board's intercession. In this instance, while petitioner might have reason to be displeased with some managerial decisions affecting him, it simply cannot be said that he was treated so unfairly vis a vis his peers that an inference of animus might be appropriate.

47. Of the 18 other Group K RDAP evaluators rated by the ranking panel in question, only four received performance appraisals that produced a lower arithmetically-computed score for that component of the overall ranking. See Resp. Exh. 20. That fact strongly suggests that most of the evaluators were given the highest ("exceptional") rating in many (if not most) of the job dimension categories.

In this connection, Ms. Dodaro observed herself that petitioner's 30.86 performance appraisal score would be deemed a comparatively low score for the agency as a whole, NSIAD, and this particular rating group (Tr. 449-50). She added that, for 1990, it would have been in the bottom 25% for the entire NSIAD (Tr. 450). Thus, in practice, the PFP appraisal system would have it that 75% of NSIAD evaluators are doing "exceptional" work on the whole and that those evaluators whose work is simply "superior" are among the lowest performers in that Division. It is difficult to square that outcome with the commonly understood meaning of the terms "exceptional" and "superior."

48. Petitioner testified that, when in June 1989 he met with Mr. Harper, his then supervisor in the Manpower Group, to fulfill the first step of the grievance procedure, Mr. Harper told him that, if he went ahead with the grievance, his career at GAO would be at an end because the management always would hold the grievance against him (Tr. 26-27). Mr. Harper denied that any such meeting took place (Tr. 118). It is unnecessary to resolve the resultant credibility issue because, in any event, there is no evidence to suggest that anyone in RDAP management was aware of, let alone subscribed to, the view attributed to Mr. Harper by petitioner. Similarly, there is a lack of present relevance to the episode involving Mr. Harper's resort to a locksmith to obtain papers contained in petitioner's locked desk (Tr. 120). Whether that conduct was appropriate or not, it permits no inference respecting the foundation of any action taken by Mr. Wiggins, Mr. Motley, or other RDAP officials. In this regard, between September 1989 and October 1990, Mr. Harper was a participant in an executive exchange program, which placed him in the headquarters of a private corporation in New York State (Tr. 117). He thus was not physically present in the agency at the time of, or for nine months before, the RDAP panel meeting. In that circumstance, it seems even more improbable that he had any influence upon ratings given petitioner in June-July 1990.

49. Nor does the record allow an inference that any of them might have been giving effect to some institutional bias against employees who have challenged agency action in the past.

50. It does appear that, following the collegial discussion, three panel members (Messrs. Adams, Rinko, and Tansey) reduced the contributions scores they had tentatively given to petitioner at an earlier point. See Pet. Exh. 2 (under seal), received in evidence at Tr. 295. It scarcely perforce follows, however, that this action was the result of improperly motivated conduct on the part of other panel members. The expectation was that, on the basis of what was said by panel members especially familiar with the work of a particular employee (in the case of petitioner, Messrs. Wiggins and Motley), the tentative contributions scores given to that employee by other panel members might change. And the same exhibit discloses that one other employee (who, insofar as the record shows, had not engaged in prior protected activity) had the tentative scores given him by two panel members reduced by those members after a full discussion. In the absence of some indication to the contrary, it must be presumed that, as Mr. Tansey testified was the case

with regard to his changed score (Tr. 280-86), the ultimate scores received by petitioner from each panel member was the product of the appropriate collegial consideration of the extent of his contributions. See also Tr. 409-11 (Rinko).

51. On the latter front, in his post-hearing brief (at 14-15) petitioner complains, inter alia, that Mr. Motley denigrated one of the claims in petitioner's contributions statement while, at the same time, the panel "overlooked puffery" in the statements of other employees being rated. Suffice it to say, reasonable minds might well differ on the validity of that complaint. The line between fair and exaggerated representations of one's own worth is frequently not at all bright and to be found only in the eye of the beholder.

Indeed, a possible generic disadvantage of the contributions statement aspect of the PFP process is that employees filing such statements walk a very narrow tightrope. On the one hand, they have an obvious incentive not to undervalue their contributions lest the panel members take them at their word. On the other, if they throw modesty to the wind, they run the risk of being thought lacking in credibility (with equally unfortunate potential consequences in terms of the received contributions scores).

52. Nor is it of particular significance here that, as petitioner correctly notes in his post-hearing brief, the panel members were not of one mind as to what was to be examined in connection with the assessment of an employee's contributions. For example, Mr. Farrington testified that he did not have the recent performance appraisals of the employees in hand and was under the impression that those appraisals were not to be considered at all in determining contributions scores (Tr. 241-42). Mr. Cooper was of the same view (Tr. 252). Yet, Mr. Tansey expressed the contrary understanding that, in assessing contributions for bonus purposes, he was expected to take into account the employee's latest performance appraisal as well as the contributions statement (Tr. 278). On this understanding, he had examined the performance appraisals furnished to him (ibid).

Although these differences, as well as certain other variations in approach illumined by the panel members' testimony, do not reflect possible retaliation against petitioner, they are nonetheless most troublesome. Given the importance of the PFP assessment process to the pocketbook interests of the rated employees, as well as to the efficiency of agency operations, there would appear to be considerable room for improvement in the instruction provided those chosen to serve on ranking panels.

53. During the panel discussion, a question had arisen as to why petitioner had stressed his military compensation expertise in his contributions statement given the fact that, unlike the Manpower Group, RDAP does little, if any, work in that sphere (Tr. 117, 209, 229-30, 282). Although that was a fair question, one might also ask whether, in light of petitioner's apparent extensive experience in military compensation matters (dating back to his Department of Defense employment), the transfer from the Manpower Group to RDAP was in the best interests of both petitioner and the agency. Be that as it may, however, there is no indication in the record that the transfer might have been improperly motivated.

54. In view of this result, it is not necessary to reach the question, raised for the first time in the agency's post-hearing brief (at 26), whether petitioner's claims respecting the performance appraisal were timely asserted.

Further, all findings proposed by the parties in their post-hearing briefs that are not incorporated in this decision should be deemed rejected as either unsupported by substantial evidence or irrelevant to the disposition of the presented issues.