

Carolann Cosella et al v. U.S. General Accounting Office
Joseph Margallis et al v. U.S. General Accounting Office
Stephen L. Ballard v. U.S. General Accounting Office

Docket No. 94-03

Docket No. 94-04

Docket No. 94-05

Date of Decision: August 10, 1994

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Margallis v. GAO

Ballard v. GAO (8/10/94)

Before: Personnel Appeals Board, en banc (Alan S. Rosenthal, Chair; Nancy A. McBride, Vice Chair; Leroy D. Clark, Harriet Davidson and Paul A. Weinstein, Members)

Discrimination in Reorganization

Transfer of Function in Reorganization

Transfer of Function in Reduction-in-Force

Relocation Expenses

Consideration of Alternatives in Reduction-in-Force

Reprisal/Retaliation

Violation of Merit System Principles

Management Rights in Reorganization

Authority of PAB in Reduction-in-Force

Competitive Area in Reduction-in-Force

DECISION

These consolidated cases were filed by a total of seven present and former employees of the Philadelphia Regional Office (PRO).¹ The petitioners challenge the decision of the agency to close PRO, effective August 31, 1994. They also challenge a number of decisions of the agency concerning the implementation of the office closure. Because of the importance of the case to both the petitioners and the agency, and because of the need to reach a final decision with great expedition, the case was heard in the first instance by the full five-member Board.

The petitioners raised numerous claims in each of the three petitions for review filed with the Board. The agency raised legal objections to many of these claims, arguing as to some that the claim was not within the subject matter jurisdiction of the Board and as to others that the petitioners had failed to state a claim upon which relief can be granted. The Board received briefs and held a lengthy oral argument as to these legal issues. As a result of these proceedings, the Board determined that five issues merited factual development:

- A. Whether the agency's decision to close PRO was based upon unlawful discrimination on account of race, gender or national origin.
- B. Whether the PRO closure constitutes a "transfer of function," thereby entitling the employees of that office to transfer with the function and to be reimbursed for relocation expenses.
- C. Whether the transfer of the PRO employees to headquarters is "in the interest of the government," thus requiring the agency to pay their relocation expenses as mandated in 5 U.S.C. §5724.
- D. Whether the agency fulfilled any obligation it had under GAO Order 2351.1, Chapter 1, to consider alternatives to conducting a reduction-in-force (RIF).
- E. Whether the agency committed a prohibited personnel practice by retaliating against employees who filed an administrative grievance or engaged in any whistleblowing activities concerning the PRO closure.

See, Order dated June 29, 1994, p. 4-5. A two-day evidentiary hearing was held on the above issues on July 14 and 15, 1994.

As to issues A, B, D and E listed above, the Board concludes that petitioners failed to establish that the agency violated any applicable legal requirements. The petitioners are, therefore, not entitled to relief for any of those claims. As to issue C, the Board was unable to reach a majority position. Two Board members voted to affirm the agency's decision to deny relocation expenses, two Board members concluded that the PRO employees were entitled to receive reimbursement for their relocation expenses and one Board member concluded that the issue was not within the subject matter jurisdiction of the Board. The effect of this divided vote is to leave the agency's decision as to relocation expenses in place.

In the following sections of the opinion, the Board will first present the reasons for its decision on the five issues addressed at the evidentiary hearing. The Board will then discuss the remaining issues raised by petitioners which the Board had declined to include within the scope of the evidentiary hearing. The Board will explain its reasons for concluding that these allegations by the petitioners did not state valid legal claims.

I. ISSUES ADDRESSED AT THE EVIDENTIARY HEARING

A. Discrimination

The petitioners allege that the decision to close the Philadelphia Regional Office was due, at least in part, to an unlawful desire to grant a preference to women and minority employees. Specifically, petitioners assert that:

. . . this decision to close offices, as opposed to an agency wide RIF, was the selected approach to downsizing in order to retain the "diversity" gained in the past 10 to 12 years.

Cosella petition at p. 5. See also Ballard petition at p. 2 ("GAO's decision to downsize by closing offices rather than by an agency-wide reduction-in-force (RIF) constituted unlawful discrimination because it was based in part on a desire to preserve the diversity of GAO's work force.")²

In order to prevail on a claim of unlawful discrimination, a petitioner must prove that consideration of race or gender was a motivating or contributing factor in the employer's decision. Congress reaffirmed this requirement in a recent amendment to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. Revised section 703(m) of the statute reads:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. §2000e-2(m), as added by the Civil Rights Act of 1991, Pub.L. No. 102-166, Title I, §107(a), 105 Stat. 1071, 1075 (1991) (emphasis added).³ As explained in the House Report accompanying the legislation:

Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue . . . the complaining party must demonstrate that discrimination actually contributed or was a factor in the employment decision or action. Thus, in providing liability for discrimination that is a "contributing factor," the Committee intends to restore the rule applied in many federal circuits prior to the Price Waterhouse decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.

H. R. Rep. No. 102-40(I), 102d Cong., 1st Sess., 48, reprinted in 1991 U.S. Code Cong. & Admin. News 549, 586 (emphasis in original).

In this case, the Board concludes that a desire to protect female or minority employees was not a motivating or contributing factor in the decision to close the Philadelphia Regional Office. To be sure, there was clear testimony that the Comptroller General has long been concerned with improving the representation of women and minorities within the GAO work force. (Tr. 15, 124, 333). The agency has also taken the public position that one undesirable consequence of a reduction-in-force is that it disproportionately affects women and minorities and wipes out past affirmative action gains. (Tr. 11-12). The testimony established, however, that quite apart from any considerations of diversity, the agency never viewed an agency-wide reduction-in-force as a serious option. Joan M. Dodaro, the Deputy Assistant Comptroller General for Human Resources, testified that she knew of no instance of a geographically dispersed federal agency conducting an agency-wide reduction-in-force and described the results of such a process as "sheer chaos:"

You would have people in Chicago bumping people in Boston, bumping people in Dallas, bumping people on the third floor of the GAO building. We would shut the place down for months doing the bumping and retreat rights across the Nation.

(Tr. 142). Similarly, James F. Hinchman, Special Assistant to the Comptroller General, testified that little serious consideration was given to an agency-wide reduction-in-force because it would be "enormously disruptive." (Tr. 335-336).

The petitioners' theory for their discrimination claim is that the agency was faced with a choice of downsizing by agency-wide reduction-in-force or downsizing by closing offices, and that the agency chose the latter course due to concerns about diversity. The record indicates that the agency never viewed its options in those terms. Various downsizing techniques were considered by the agency and a program of separation incentives or "buy outs" was chosen as the primary means of reducing staffing levels agency-wide. (Tr. 12). The decision to close field offices, however, proceeded on a different course. The Senate directed GAO to reexamine the need for its regional offices and suboffices in light of budget constraints. (Resp. Exh. 5, p. 1). GAO had concurrently determined that it would review its field structure to determine whether its resources were properly situated to perform anticipated audits through the year 2000. (*Id.*) To accomplish these tasks, the agency established a committee, headed by John Luke,⁴ to determine where GAO needed to be located to accomplish its work efficiently and effectively. (Tr. 170-71; Resp. Exh. 5). The result of this study was a recommendation to close several field offices, including the Philadelphia Regional Office.

The testimony at the hearing established that considerations of diversity played no part in the decision to initiate a review of GAO's field structure or in the decision as to which field offices to close. Mr. Luke stated that he was not told to consider the composition of the work force in carrying out his task, that the Committee collected no data on diversity, and that the Committee gave no consideration to race, sex or national origin in making its recommendations. (Tr. 239, 245-46, 252-53). The testimony of the other participants in the decision to close offices was to the same effect. (Tr. 21-23, 170-75, 332-34).⁵ The petitioners presented no evidence to show that a desire to protect diversity in any way contributed to the decision to close field offices or in the selection of particular offices to close.⁶

Based on this record, the Board concludes that the petitioners failed to show that the decision to close PRO was motivated by a preference for women and minorities or a desire to protect the diversity of the GAO work force.⁷

B. Transfer of Function

Petitioners allege that the closure of the Philadelphia Regional Office should have been classified as a "transfer of function" in which the functions currently performed by the Philadelphia office will be transferred to agency headquarters in Washington, D.C. Margallis petition at p. 18-22. Where a transfer of function takes place, the employees who performed the function in the prior location are entitled to transfer with the function to the new location. GAO Order 2351.1, Chap. 7, par. 2(b). The agency apparently does not dispute that, in the case of a transfer of function, transferring employees would receive full reimbursement for their relocation expenses. Compare Margallis petition at p. 21 with Agency Answer at p. 19-20.

"Transfer of function" is a term with a technical meaning under the applicable regulations. GAO Order 2351.1 on reduction-in-force, defines a transfer of function as:

the removal of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas, except when the function involved is virtually identical to functions already being performed in the other competitive area(s) affected.

GAO Order 2351.1, Chap. 1, par. 7(l), p. 4. A "function" is in turn defined as:

all or a clearly identifiable segment of a mission (including all integral parts of that mission), regardless of how it is performed.

Id. at par. 7(f), p. 3. In interpreting an almost identical provision applicable to executive branch agencies, the Merit Systems Protection Board (MSPB) has stated that:

a function has to be a clearly identifiable activity of the agency's mission which consists of substantial authorities, powers, and duties authorized by law which combine to form a segment of the agency's mission . . . Therefore, it is the functional activities that are described in an agency's enabling legislation, organization manuals, and delegations of authority that are clearly of most significance in determining whether a function has been transferred.

Former Comm. Serv. Admin. Employees v. Department of Health and Human Services, 21 M.S.P.R. 379, 383 (1984). Thus, a function cannot merely be a specific task or activity performed by the Philadelphia office; it must be a basic class of activities or a category of work. The focus of the Board's analysis must be on whether, as a result of the reorganization, headquarters or another regional office gained a "class of activity it did not have before." Neilson v. Federal Highway Administration, 21 M.S.P.R. 178, 180 (1984).⁸

Applying these standards, the Board concludes that no transfer of function took place in the present case. The agency contended that the "function" performed by the Philadelphia office was to perform audits and evaluations, and that this is the same mission work that is performed by headquarters and the other regional offices. Ms. Dodaro, the Deputy Assistant Comptroller General for Human Resources, testified that evaluators in headquarters and the regions do the same basic work: planning assignments, collecting data, analyzing data, writing up their conclusions and presenting their reports. (Tr. 180-81). She further testified that one could not distinguish between the work of the regions and the work of headquarters on the grounds that the former involved the gathering and analysis of raw data whereas the latter involved policy development. Id. Rather, she stated that, depending on the particular assignment, evaluators in both headquarters and the field could be called upon to do data gathering and analysis or policy work. Id. The evidence presented by the petitioners did not refute that the basic type of work performed in Philadelphia and headquarters was the same.

Instead, petitioners presented evidence concerning two specific activities in Philadelphia which they felt qualified as unique functions. The first was the audit of certain Navy and Defense Department supply facilities. The testimony did establish that these were unique facilities located near Philadelphia and not duplicated elsewhere in the country. (Tr. 58-59). It was also clear that auditing of these facilities required a detailed knowledge of the very complex data bases maintained by these facilities, and that developing such knowledge could take a considerable period of time. Id. Nonetheless, the evidence did not reveal that the type of work done to audit these facilities was different in any significant way from the type of auditing work done elsewhere in GAO. (Tr. 74-75, 183). Rather, the testimony confirmed that there are many complex and sophisticated government data bases throughout the nation that are audited by GAO, and that the process that auditors would have to go through to conduct an audit involving any such data

base would basically be the same. Id. Thus, the Board concludes that auditing these Naval and Defense Department facilities did not constitute a separate, identifiable function performed in Philadelphia but not in headquarters.

The second activity identified by petitioners as a unique function of Philadelphia was PRO's participation in the Mid-Atlantic Intergovernmental Audit Forum. The Forum is an organization that promotes cooperation among all the governmental agencies engaged in auditing work in the Mid-Atlantic region. (Tr. 221-23). While the record indicates a substantial commitment by PRO to making the Forum a success, the record also clearly establishes that other regional offices and headquarters participated in similar audit forums around the country. (Tr. 227-28). Thus, this clearly cannot qualify as a unique class of work performed by Philadelphia and not the offices that will inherit its work.

For the reasons stated above, the Board concludes that no transfer of function was involved in the closure of the Philadelphia office.

C. Payment of Relocation Expenses

GAO has declined to reimburse PRO employees who choose to transfer to Washington for their full relocation expenses. Instead, the agency has offered an \$8,000 "special relocation payment" to each employee who accepts a transfer.⁹ The petitioners challenge this decision, alleging that:

. . . GAO's decision not to pay relocation costs for PRO employees transferring to Washington as a result of office closures is not in accord with past practice or prior [Comptroller General] decisions interpreting travel regulations, and the decision violates merit system principles.

Margallis petition at p.16. In analyzing this issue, the Board faced difficult issues both as to its jurisdiction to entertain the claim and as to the merits.

Jurisdiction: The payment of relocation expenses for government employees is governed by 5 U.S.C. §5724 which states:

Under such regulations as the President may prescribe and when the head of the agency concerned or his designee authorizes or approves, the agency shall pay from government funds . . . the travel expenses of an employee transferred in the interest of the Government from one official station or agency to another for permanent duty . . .¹⁰

The General Services Administration, under authority delegated by the President, has published regulations to implement this section. See, 41 C.F.R. Part 302-1.

The jurisdiction of the Board is set forth at 31 U.S.C. §753(a). Under that section, the Board has the authority to consider and order relief in cases arising from:

- (1) an officer or employee appeal about a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;
- (2) a prohibited personnel practice under section 732(b)(2) of this title;

- (3) a prohibited political activity under section 732(b)(3) of this title;
- (4) a decision of an appropriate unit of employees for collective bargaining;
- (5) an election or certification of a collective bargaining representative;
- (6) a matter appealable to the Board under the labor-management relations program . . .;
- (7) an action involving discrimination prohibited under section 732(f)(1) of this title; and
- (8) an issue about Office personnel the Comptroller General by regulation decides the Board shall resolve.

The Board may only hear cases that fall in one of these categories. There is nothing in the above-quoted language which expressly gives the Board jurisdiction over an agency decision to pay or to decline to pay relocation expenses. Nor is there anything in 5 U.S.C. §5724, the statute concerning the payment of relocation expenses, which gives the Board a role in reviewing such determinations.

The Board does, however, have clear authority to review separations resulting from a reduction-in-force. This authority is delegated to the Board by GAO Order 2351.1, Chapter 9, §1.¹¹ GAO has unequivocally announced that it will use the reduction-in-force regulations to separate any Philadelphia employee who declines to transfer to Washington. At least three of the petitioners have alleged that they cannot afford to relocate to Washington at their own expense and that they will thus be separated from GAO as part of the reduction-in-force. See, Cosella petition at 9.

Four of the Board members (hereinafter "the majority") have concluded that this allegation is sufficient to give the Board authority to review the agency's decision to deny relocation expenses. To the majority, the Board has jurisdiction to review the lawfulness of the denial of relocation expenses because that decision is the direct cause of the employees' separation from the agency. Such review by the Board is necessary to ensure that employees are not being separated from the agency improperly and that the reduction-in-force procedures are not being abused. Cf., Haataja v. Department of Labor, 25 M.S.P.R. 594, 601 (1985) (MSPB's authority to review a reduction-in-force action includes not only the authority to ensure that the RIF regulations were properly followed but also "such review of any other relevant provision of law, regulations or negotiated procedures as circumstances warrant").

The dissenting Board member concluded that the Board has been given no direct authority to review decisions concerning the payment of relocation expenses and has no clear standards for decisionmaking in this area. Because the reduction-in-force order does not create any entitlement to relocation expenses, the dissenting member concluded that review of the agency's decision is not encompassed under the Board's authority for enforcing that order. In the view of the dissenting member, the resolution of the issue of entitlement to relocation expenses has been assigned to the United States Court of Federal Claims pursuant to 28 U.S.C. §1491. The dissenting member also believes that the agency confronted a new problem that is unsatisfactorily decided by the present all-or-nothing legislative stricture of either having no formal obligation to pay any relocation expenses to transferring employees or, conversely, having the burden of paying full relocation expenses. The agency should, in the dissenting member's view, seek a legislative amendment that would allow it to engage in a major reorganization and transfer of employees, with payment of limited relocation expenses.

Because a majority of the Board members concluded that the Board had jurisdiction over this issue, the Board proceeded to consider the merits of the agency's decision to deny relocation expenses to PRO employees who transfer to Washington.¹²

Merits: Considerable time at the hearing was devoted to addressing the merits of the agency's decision to deny relocation costs. The position of each party is briefly summarized below:

Agency position: The agency contended that it had declined to pay relocation expenses for transferring PRO employees because such transfers were "not in the interest of the government." The agency argued that, under applicable law, it had considerable discretion in determining what was in the agency's interest and that its decision should only be overturned if arbitrary, capricious or clearly erroneous on the facts.

The agency acknowledged that it had paid relocation expenses in the past when offices closed, but argued that those past closures took place in the 1970's and 1980's when the agency was hiring nationwide. By contrast, the agency asserted that it is currently operating under a hiring freeze and engaging in other downsizing activities. In this environment, the agency claimed that it was not in its interest to retain the Philadelphia employees. The agency argued that the Comptroller General had only offered PRO employees the opportunity to transfer out of compassion because he recognized that some employees would have few other viable options. The agency therefore concluded that those transfers were primarily for the convenience of the employees.

Petitioners' position: The petitioners contended that the transfer of the PRO employees did not qualify as being primarily for the convenience or benefit of the employees because the employees had not sought or requested such transfers. Rather, it was the agency that had initiated the transfers by deciding that it was most efficient to close PRO and perform its work elsewhere within GAO. It was also the agency that had determined that PRO employees could only transfer to Washington.

Petitioners argued that GAO would still need to perform the work of PRO following its closure and that PRO employees would thus be needed in Washington or other offices. They contended that GAO was already below its personnel ceiling and that there was thus no need to downsize beyond what had already been achieved by the use of separation incentives in 1993. Petitioners thus concluded that their transfer to Washington was "in the interest of the government" and their relocation expenses should have been paid. They argued that payment had only been withheld because it would be very expensive for the agency, an impermissible consideration under 5 U.S.C. §5724.

Board's decision: The Board considered all the evidence adduced at the hearing and engaged in extensive deliberations on this issue. Nonetheless, the Board was unable to reach a majority decision on the merits of the relocation payment question. Two Board members voted to uphold the agency's decision not to pay the relocation expenses of the PRO employees. They concluded that the agency's determination that the transfers were not in the interest of the government was not arbitrary, capricious or clearly erroneous on the facts. Two other Board members voted for the petitioners, concluding that the record established that the transfers were in the interest of the government. The fifth Board member concluded (as noted above) that this entire matter was not within the Board's jurisdiction and thus it would be inappropriate to express an opinion on the merits of the claim.

As a result, there is no majority decision or opinion on the issue of the payment of relocation expenses. Consequently, the petitioners cannot be awarded the sought relief and the agency's decision is left standing.

D. Consideration of Alternatives to the RIF

Petitioners allege that GAO failed to follow its own order on reductions-in-force because it did not consider alternatives that would have lessened or avoided the need for a RIF. Margallis petition at p. 6. The introduction to GAO Order 2351.1 states:

Several important considerations should be emphasized where reductions in force are concerned. GAO will take every appropriate measure before conducting a reduction in force including, utilizing attrition, furlough, early retirement authorities, and other actions that would limit the number of involuntary actions.

GAO Order 2351.1, Chap. 1, par. 1(b), p. 1. The petitioners allege that GAO did not consider all of these alternatives before deciding to close the Philadelphia office. Specifically, the petitioners complain of the agency's failure to consider a furlough.

At the outset, the Board observes that, to the extent that this order imposes a legal obligation on the agency, it would be an obligation to consider ways to reduce the number of involuntary actions against employees. Thus, once an agency decides that it needs to reduce the size of an office, the order would dictate that the agency consider alternatives (such as attrition or retirement incentives) that would accomplish that objective with the minimum number of involuntary separations. The order does not appear to impose any obligation on the agency to consider alternatives to the underlying management decision, i.e., the decision that the agency needed to reduce the size of an office.

In this case, petitioners are seeking alternatives to the decision to close the Philadelphia office. This decision resulted from an agency conclusion that it no longer needed a presence in Philadelphia. The order does not require the agency to consider alternatives to this kind of management decision about the agency's structure. Rather, it directs the agency to seek ways to reduce the number of involuntary separations that flow from the decision.

The record establishes that the agency considered appropriate measures to reduce the number of people separated. The agency sought and obtained authority to offer a "buy out" to encourage individuals to leave the agency voluntarily. (Tr. 164). The agency also offered every Philadelphia employee an opportunity to transfer to Washington, even though the transfer was not on as favorable terms as the employees would have liked. (Id.).

The only other alternative suggested by the petitioners was to conduct a furlough. This essentially seems to be offered as an alternative to the management decision to close the office. As such, it is beyond the scope of the order. Moreover, the agency's objective in closing offices was to achieve a more effective structure for the agency and to eliminate offices that were no longer needed. (Tr. 164, 335, 346). This objective could not have been achieved by furloughing every employee in the agency for a few days during the year. Furloughs were not, therefore, an appropriate alternative in the circumstances of this case.

The Board therefore concludes that the agency fulfilled any obligation it had, under this provision of GAO Order 2351.1, to consider alternatives to lessen the impact of the RIF.

E. Retaliation

Petitioners allege that GAO retaliated against them for filing an administrative grievance concerning the closure of PRO and for writing letters to various members of Congress.¹³ Two specific instances of retaliation are alleged: (1) the agency's requirement that employees transferring to Washington sign a statement agreeing that the transfer was for their convenience; and (2) statements made to PRO employee Marilyn Wasleski by Derek Stewart, the Executive Assistant to the Assistant Comptroller General for Operations, which statements allegedly threatened negative consequences for employees who wrote to their representatives in Congress. Each of these allegations will be addressed in turn.

Relocation Agreement: According to the Margallis petition, 44 PRO employees, including one of the named petitioners, filed an administrative grievance with the agency on November 24, 1993. Margallis petition at p. 16. The grievance complained about various aspects of the implementation of the office closure. It asserted that the transfers to Washington were not voluntary and that the agency was therefore liable to pay full relocation expenses. Id.; see also Exh. 18 attached to the Margallis petition. The grievance was denied by the agency on December 17, 1993. Id.

On January 4, 1994, GAO adopted a "Notice" concerning the field location closures. Pet. Hearing Exh. 143.¹⁴ This notice stated that employees transferring from one of the closed offices to another GAO office would be eligible to receive a special relocation payment of \$8,000. However, in order to receive the payment, a transferring employee had to sign a "special relocation payment agreement" which stated "I agree that my reassignment is for my own convenience." Id. Petitioners assert that the requirement to sign the agreement was adopted to retaliate against employees who had filed the administrative grievance.

Petitioners presented no evidence that demonstrated a connection between the filing of the administrative grievance and the agency's decision to require the signing of the relocation agreement. To be sure, the notice containing the agreement was adopted soon after the filing and the dismissal of the grievance. But it was also adopted within a few months after the decision to close the Philadelphia office. Management officials testified that the notice was drafted as part of the implementation of the decision to close offices and that the agreement was included to make clear the terms on which GAO was agreeing to transfer employees. (Tr. 189-90). Ms. Dodaro, the Deputy Assistant Comptroller General for Human Resources, denied that the decision to adopt the notice and the agreement was in any way connected to the grievance. (Tr. 189). The petitioners presented nothing to refute this assertion, either through cross-examination or through the testimony of other witnesses. Moreover, the relocation agreement imposed no penalty on persons based on the filing of an administrative grievance. All transferring employees, from any of the offices to be closed, were confronted with having to sign the agreement whether they had filed an administrative grievance or not. On this record, the Board concludes that petitioners failed to prove that retaliation played any part in the adoption of the notice or the relocation agreement.¹⁵

Statements made by Derek Stewart: Ms. Marilyn Wasleski, a Senior Evaluator with PRO, testified that she had a telephone conversation on February 23, 1994, with Mr. Derek Stewart, the Executive Assistant to the Assistant Comptroller General for Operations. Mr. Stewart had been asked to prepare a response to congressional inquiries concerning the PRO closure which stemmed from letters written by PRO employees to their representatives. The congressional inquiries made reference to a study performed by PRO employees which concluded that it would cost \$10 million dollars to close PRO in 1994 as opposed

to 1996, the date scheduled for other office closures. Mr. Stewart called Ms. Wasleski seeking a copy of this study.

Ms. Wasleski testified that, in the course of the conversation, Mr. Stewart stated: "[I]f I was planning to continue my career with an organization, I would not be doing some of the things that [PRO employees] were doing . . . writing letters to Congressmen is not a good move career-wise." (Tr. 259). Ms. Wasleski testified that she felt threatened by this remark and believed that she "would not be getting any more promotions, bonuses, merit pay, that . . . they would get me one way or the other." (Tr. 262). Mr. Stewart denied having made these remarks and denied any intent to threaten Ms. Wasleski or other PRO employees.

The Board accepts Ms. Wasleski's version of the conversation. Her testimony at the hearing was credible and it was corroborated by a memorandum that she recorded on the same day as the telephone call. By contrast, Mr. Stewart's summary of the conversation was not written until more than 10 days later, after Ms. Wasleski had complained to Mr. Stewart's supervisor about his comments.

Nonetheless, the Board finds that Mr. Stewart did not intend to threaten Ms. Wasleski and that he has taken and intends to take no action to harm her career. Based on Mr. Stewart's testimony and demeanor at the hearing, the Board concludes that his remarks were an ill-advised attempt to offer advice to the PRO employees. He was genuinely surprised, and frightened, when his comments were taken as a threat, and he immediately tried to make amends. As the petitioners presented no evidence of other threats or retaliatory conduct, the Board cannot conclude that the agency has engaged in or intends to engage in retaliation against PRO employees who filed grievances or wrote to members of Congress.

The Board, however, does not wish to have its findings on this issue misconstrued. Mr. Stewart's remarks must be deemed inappropriate. As an assistant to one of the highest management officials in the agency, his words and intonation carry unusual weight. In the circumstances, it was understandable for Ms. Wasleski to assume that he expressed a management viewpoint and to be apprehensive about her future. While the Board concludes that she was mistaken about Mr. Stewart's intentions,¹⁶ the incident may highlight a need for greater sensitivity on the part of management officials. In order to ensure that employees feel free to exercise their rights to file grievances and to petition Congress, the agency may need to stress to its managers that nothing in their statements should suggest an attitude of intolerance to such activities or that negative consequences might result therefrom.

II. ISSUES AS TO WHICH NO EVIDENTIARY HEARING WAS NECESSARY

A. Agency Compliance with Requirements in Senate Report:

GAO's review of its field structure was triggered, at least in part, by the Senate Report accompanying the legislative branch appropriations for 1994. That report required GAO to "critically examine the need for its remaining regional offices and suboffices in light of current budget constraints." Senate Report 103-103, 103d Cong., 1st Sess. at 35, attached to Cosella petition as Exh. 3. The report further required GAO to prepare a report for the Senate Committee on Appropriations that included "alternatives for elimination and/or consolidation of regional facilities including an analysis of short-term costs as well as long-term savings associated with such actions." *Id.* Petitioners allege that GAO did not fulfill the requirements contained in the Senate Report before deciding to close PRO because it did not perform the cost-benefit analysis required by the Committee. Petitioners ask the Board to invalidate GAO's decision to close PRO because of the agency's failure to fulfill the requirements imposed by the Senate Committee.

Cosella petition at p. 2.

The Board concludes that it has no authority to review GAO's compliance with the terms of the Senate Report. The report required GAO to report back to the Senate Committee on Appropriations. It is for that Committee to determine whether its mandate was fulfilled. Nothing in the Board's statutory grant of jurisdiction (31 U.S.C. §753) gives it any role in reviewing this matter.

B. Failure to Follow Merit Principle Requiring Efficient and Effective Use of Federal Work Force:

Petitioners allege that the closure of PRO was not in accord with the merit system principle contained in 5 U.S.C. §2301(b)(5) stating that "the Federal work force should be used efficiently and effectively." The merit system principles are broad policy statements that are intended to guide an agency's conduct. The Board, however, has jurisdiction only over "prohibited personnel practices." See, 31 U.S.C. §753. An allegation that a merit system principle has not been fulfilled does not, by itself, constitute an allegation of a prohibited personnel practice. Phillips v. General Services Administration, 917 F. 2d 1297, 1298 (Fed. Cir. 1990). The prohibited personnel practices are set forth in 5 U.S.C. §2302(b). The only one relevant to petitioners' allegation states that it is a prohibited personnel practice for a management official to:

take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

5 U.S.C. §2302(b)(11). Thus, petitioners must allege the violation of some law or regulation that implements a merit system principle; they cannot merely allege the failure to comply with a merit principle itself. Because the petitioners have not alleged the violation of a specific law or regulation, their claim that the PRO closure was not an efficient or effective use of the work force cannot be entertained.

C. Challenges to the Wisdom of the Management Decision to Close PRO: Many of the allegations in the petitioners' complaints essentially challenge the wisdom of the agency's decision to close PRO. Petitioners, for example, challenge the methodology and the conclusions of the "Luke Study" which recommended the closure of PRO and other offices. Review of the management considerations which undergird an agency action is, however, beyond the authority of the Board.

The Board does have authority to review separations which occur as a result of a reduction-in-force. See, GAO Order 2351.1, Chap. 9. The Board's authority includes a review to ensure that the RIF was initiated for one of the lawful reasons listed in the RIF order: lack of work, shortage of funds, reorganization or the exercise of reemployment or restoration rights. GAO Order 2351.1, Chap. 1; see also executive branch RIF regulations, 5 C.F.R. §351.201(a)(2). The Board may overturn a reduction-in-force if it finds that there was, in fact, no genuine reorganization and that the claim of a reorganization was merely a subterfuge to terminate a particular employee. Losure v. I.C.C., 2 M.S.P.R. 195 (1980). However, if the Board concludes that a bona fide reorganization took place, then it is not authorized to review the wisdom of the management determination that the reorganization was justified. Holmes v. Dept. of Army, 41 M.S.P.R. 612 (1989); Taylor v. Coast Guard, 20 M.S.P.R. 457 (1984).

In this case, there is no dispute that the agency conducted a genuine reorganization of its field structure. It may have been a wise or foolish decision to close the Philadelphia Regional Office. The Board, however, does not have authority to perform the review sought by petitioners of the management considerations underlying that decision.

D. Petitioner Ballard’s Claim as to a Reduction in the Number of Promotions Accorded to PRO:

Petitioner Ballard claims that he was forced to resign from the agency as a result of several unlawful decisions that the agency made in connection with the decision to close PRO. In particular, he alleges that the agency refused to accord PRO its rightful share of promotions to Band II positions in retaliation for an administrative grievance filed by 44 PRO employees. He seeks compensation for the difference between the Band II salary he would have received at GAO and the lower rate of pay he is receiving in his new job outside the agency. His claim necessarily rests on an assertion that he was unlawfully denied a promotion. The parties agreed, however, that Mr. Ballard resigned from GAO before any selections were made for Band II positions at PRO. Ballard petition at p. 3; Resp. Motion for Partial Dismissal and Motion for Partial Summary Judgment, p. 11, 16; Pet. Response to foregoing motion, p. 16. He, therefore, took himself out of competition for those positions and it cannot be known whether he might have received one of the available promotions. As a result, any claim he makes for loss of a promotion must be denied.

E. Whether the Closure of PRO was Intended to Enhance Employment Opportunities at Headquarters:

Petitioners allege that one of the motivating factors behind the closure of the Philadelphia office was a desire to open up new slots for personnel so that the agency could engage in additional hiring at its headquarters in Washington, D.C. Cosella petition at 6-7. Petitioners assert that this constitutes a prohibited personnel practice under 5 U.S.C. §§2302(b)(5) and (6) which make it unlawful for a management official to:

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

The Board finds that these sections have no applicability to the allegations raised by petitioners. They are aimed at prohibiting manipulations of the selection process for a particular job so as to give an unfair advantage to a particular applicant. The petitioners’ claim is entirely different. In essence, it is that the agency has made a decision to increase the size of its headquarters office while reducing the size of its field component.¹⁷ While such a decision may be either a wise or misguided choice, it is a matter within the agency’s discretion and not, by itself, reviewable by the Board.

F. Whether the Competitive Area was Unlawfully Limited to the Philadelphia Region: Petitioners allege that the agency unlawfully defined Philadelphia as a separate "competitive area" and thereby prevented PRO employees from competing to be retained in other jobs within the agency. See, Margallis petition at p. 6; Ballard petition at p. 3; Pet. Brief on Legal Issues at 29. The Board concludes, however, that the agency did not violate applicable regulations by defining the competitive areas as it did.

Employee rights during a reduction-in-force are defined in GAO Order 2351.1. Under this order, employees have the right to compete for any jobs that remain within their "competitive area" following a RIF. Chapter 2, §1. They may not compete with employees in another competitive area. *Id.* The order in which employees are retained, within a competitive area, is determined by tenure of employment, veterans’ preference and length of federal service. Chap. 3, §2. As to the definition of a competitive area, Order 2351.1 states:

GAO will define competitive areas in terms of organizational units and geographical locations.
EXAMPLE: All GAO employees in the Chicago Regional Office's Duluth, MN sublocation.

Chap. 2, §1. The order further specifies that the Office of Personnel will maintain a list of all GAO competitive areas. Id. Patricia Rodgers, Director of Personnel, testified that such a list was maintained and that PRO was listed as a separate competitive area. (Tr. 112). It thus appears that GAO fulfilled its obligations under its own order.

Although GAO may not be legally required to follow executive branch RIF regulations, the Board notes that GAO's definition of the competitive area was also consistent with those regulations. The regulations issued by the Office of Personnel Management state:

A competitive area may consist of all or part of an agency. . . .In the field, the minimum competitive area is an activity under separate administration within the local commuting area.

5 C.F.R. §351.402(b). In interpreting this requirement, the Federal Circuit has stated that no competitive area need be larger than the local commuting area. Grier v. Department of Health and Human Services, 750 F. 2d 944 (Fed. Cir. 1984). GAO's definition of PRO as a separate competitive area satisfies this obligation.¹⁸

G. Claims Concerning the Processing of Petitioners' Administrative Grievance: Petitioner Ballard claims that: 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. The GAO failed to provide a fair and equitable forum for appellants' group grievance concerning the decision to close the Philadelphia office as required by GAO's own order on administrative grievances. Ballard petition at 3. In the section of his petition marked "remedies sought," he mentions no specific relief that he is seeking concerning the administrative grievance. GAO has argued that the Board lacks jurisdiction to review the processing of the administrative grievance.

In general, the Board's jurisdiction does not extend to reviewing administrative grievances. The Board might have jurisdiction to review whether a prohibited personnel practice had been committed during the processing of an administrative grievance, but in the present case the Board can discern no prohibited personnel practice that has been alleged. The allegation that GAO's procedures failed to comport with those applicable to the executive branch does not by itself allege a prohibited personnel practice as defined by 5 U.S.C. §2302(b).¹⁹ The only other bases for a prohibited personnel practice cited by petitioners are: (1) the alleged retaliation engaged in by agency officials against PRO employees; and (2) asserted violations of GAO's own order on administrative grievances. See, Pet. Response in Opposition to Resp. Motion For Partial Dismissal and Motion for Partial Summary Judgment, at pp. 12-14; Pet. Brief on Legal Issues, at p. 37.

As to the first basis, the Board does have jurisdiction over claims of retaliation and addresses that issue elsewhere in this decision. As to the second basis, the Board has recognized that violations of a requirement in an agency order may sometimes constitute a prohibited personnel practice if the specific requirement in issue directly concerns or implements a merit system principle. See, Dowd v. GAO, PAB Docket No. 91-03, Decision En Banc on Motion and Cross-Motion for Summary Judgment (Feb. 24, 1992). Here, however, the petitioners have made no specific allegations of violations of the GAO Order. Their chief complaint is that the agency did not appoint an independent fact-finder to hear their grievance. As they concede, this is not required by the GAO Order. See GAO Order 2771.1, at p. 12. In these

circumstances, the Board perceives no basis for asserting jurisdiction here.²⁰

CONCLUSION

For the foregoing reasons, the Board concludes that the petitioners have failed to establish their entitlement to relief on any of their claims. With respect to their claim of entitlement to reimbursement of relocation expenses pursuant to 5 U.S.C. §5724, the Board was unable to reach a majority position and thus issues no opinion. The effect of the Board's action is to leave standing the agency's determination not to pay relocation expenses.

SO ORDERED.

Notes

1. In each of the three petitions for review filed in this case, the petitioners sought to represent a class made up of all employees of PRO as of November 10, 1993. In a separate order issued today, the Board denies petitioners' motion for class certification. The Board concludes that it would be inappropriate to permit class members to be bound by the outcome of a case such as the present one, which involves complex legal issues, when the petitioners are not represented by an attorney.
2. The Board has jurisdiction to hear claims of unlawful discrimination based on race, gender or national origin pursuant to 31 U.S.C. §753(a)(2) and (7).
3. This provision was added to overturn the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which had held that, when a plaintiff proves that her gender played a motivating part in an employment decision, the employer may still avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Under the amended provision, proof that an unlawful consideration was a motivating factor establishes liability and may justify an injunction to cease the unlawful behavior and attorney's fees. 42 U.S.C. §2000e-5(g)(2)(B), as added by P.L. No. 102-166, Title I, §107(b), 105 Stat. 1071, 1075 (1991). Proof by the employer that it would have made the same decision anyway only affects entitlement to individual relief such as reinstatement and back pay. Id.
4. Mr. Luke is the manager of the agency's Chicago and Detroit offices. (Tr. 234).
5. James Howard, the Assistant Comptroller General for Operations, gave some confusing testimony on this point. He was asked by the petitioners: "[D]id the desire to protect hiring gains over the past 10 or 12 years play any part whatsoever in the decision to limit the RIF to PRO?" He first stated:

I have to give you a two-step answer to that. The RIF issue only followed my field office study, which looked at where do I need to place my resources in the next three to seven years to meet my future work. Once that study was completed, as you well know, now, and there were recommendations to close and consolidate about eight offices, that's when the options began to be discussed as to what do we do with our people.

(Tr. 18-19). This was followed by some debate between the parties over whether a responsive answer had been given. When instructed by Judge Rosenthal to give a yes or no answer to the question, Mr. Howard stated: "The answer, of course, is yes." (Tr. 20.) A few minutes later, when asked by his own counsel

whether "the decision to close the Philadelphia Regional Office [was] based on any . . . desire to protect diversity?", he responded, "No, it was not." (Tr. 21). He went on to say:

The basis of the decision, again, was that we looked at our field structure to determine where did we need a future present [sic] to do our work.

(Tr. 22). When viewed in light of his entire testimony, it appears to the Board that Mr. Howard was saying the following: that the desire to protect diversity was one factor that would have made an agency-wide RIF an unacceptable option, but that the decision to close PRO was a separate decision based on the agency's review of its field structure.

6. William Schmanke, the manager of the PRO Technical Assistance Group, testified that he had reviewed work force data on PRO and GAO as a whole and had concluded that the closure of PRO would have no significant impact on the agency's EEO profile. (Tr. 52-53). He admitted, however, that he had no knowledge of whether such data was reviewed by the Luke Committee. (Tr. 72). His testimony did not establish that any GAO official involved in the decision to close field offices had ever reviewed or considered EEO profiles.

7. Because of the Board's determination on the facts of this case, the Board has no occasion now to consider whether it is ever lawful for an agency, in choosing between two otherwise race and gender neutral downsizing techniques, to consider the impact of those techniques on past affirmative action hiring gains. See, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), and other cases governing affirmative action by governmental units.

8. The Neilson case makes clear that, if the gaining office merely expands the geographical region in which it performs a particular class of activity, no transfer of function has occurred. Neilson, supra at 180.

9. No party has raised an issue as to the legality of the \$8,000 payment.

10. Where the transfer is "in the interest of the government," the statute also authorizes the payment of other expenses such as the travel expenses of the employee's family and the cost of moving household goods. 5 U.S.C. 5724(a). Additional relocation expenses are authorized by 5 U.S.C. §5724a. Payment of relocation expenses is prohibited "[w]hen a transfer is made primarily for the convenience or benefit of an employee . . . or at his request . . ." 5 U.S.C. §5724(h).

11. The Board may also have authority to review separations resulting from a reduction-in-force pursuant to its authority, under 31 U.S.C. §753(a)(1), to review "removals."

12. Petitioners also asserted that the failure to pay relocation expenses violated the merit principles. Such an allegation by itself does not give rise to a claim actionable before the Board. The Board's jurisdiction is limited to "prohibited personnel practices." To constitute a prohibited personnel practice, a petitioner must allege the violation of a law, rule or regulation that implements or directly concerns a merit principle. See, 5 U.S.C. §2302(b)(11). While petitioners are alleging a violation of 5 U.S.C. §5724, that statute is not a statute that implements a merit principle.

13. It is a prohibited personnel practice for a management official to take or to threaten to take a personnel action against any employee because that employee has filed an administrative grievance. 5 U.S.C. §2302(b)(9). It is also a prohibited personnel practice to take or to threaten to take action against an

employee because that employee discloses information that he or she reasonably believes to evidence a violation of a law, rule or regulation, gross mismanagement or a gross waste of funds. 5 U.S.C. §2302(b)(8). These provisions of the Civil Service Reform Act are made applicable to the GAO by 31 U.S.C. §732(b)(2).

14. The date listed on Petitioners' Exhibit 143 is "January 4, 1993." Patricia Rodgers, the GAO Director of Personnel, testified that the date was incorrect. It was actually issued on January 4, 1994. (Tr. at 103).

15. The Board notes that the agency has now agreed to delete from the agreement the language that required the employee to affirm that the transfer was for the employee's convenience, and to permit employees who have already transferred to execute a new agreement without this language. Thus, employees should not now be in the position of having to choose between signing the agreement (and fearing that they will thereby waive their claim to additional reimbursement for relocation expenses) and refusing to sign the agreement (in which case they lose the \$8,000 payment).

16. Mr. Stewart was new to his job and may not have appreciated how his remarks would be perceived.

17. The Board makes no finding as to whether the agency did, in fact, plan to increase the size of its headquarters staff following the closure of PRO. Petitioners asserted such an intention; agency officials claimed that little if any hiring would take place at headquarters.

18. The Board also notes that the agency has defined competitive areas along geographical lines, and listed PRO as a separate competitive area, since at least 1986. (Tr. 112). Thus, there does not appear to be any basis for alleging that the agency manipulated the definition of the competitive area at the time it decided to close PRO so as to disadvantage or discriminate against PRO employees.

19. The Board also notes that there is no express requirement in the General Accounting Office Personnel Act, 31 U.S.C. §732(d)(5), that the GAO's administrative grievance procedure follow the requirements applicable to the executive branch.

20. It is also unclear that there is any relief concerning the administrative grievance that would be of practical significance to petitioners. Petitioners are seeking to stop the closure of PRO or to obtain full relocation expenses for employees transferring to Washington. These issues have been fully aired during the proceedings before the Board. The positions of the parties have been made clear. Ordering further grievance proceedings at this point would not seem to serve any useful purpose. The agency makes the final decision in the grievance process. If the agency did not choose to rescind its decisions based on what it learned of the petitioners' arguments in the present proceedings, it is difficult to imagine that a different outcome would have been accomplished through the grievance process.