

# Hector Rojas v. U.S. General Accounting Office

Docket No. 96-08

Date of Decision: March 6, 1998

Cite as: *Rojas v. GAO* (3/6/98)

Before: Leroy D. Clark, Chair, for the Board *en banc*; Harriet Davidson, Vice Chair; Michael Wolf, Member, concurring

Reduction-in-Force

Position classification

RIF procedures

## DECISION

### Introduction

This matter is before the Personnel Appeals Board (PAB) of the U.S. General Accounting Office (GAO) on the Petition for Review filed by Petitioner, Hector Rojas, pursuant to the Board's authority to review separations resulting from a Reduction-in-Force (RIF). 31 U.S.C. §753(a); GAO Order 2351.1, ch. 6 (February 28, 1996); *see Cosella v. GAO*, 2 PAB 383, 393 (1994).

An evidentiary hearing in this matter was held on March 17 and 18, 1997 by then Board Member Nancy A. McBride, serving as Administrative Judge. Because the judge's term as a Member of the PAB expired while the matter was pending, Judge McBride issued a Recommended Decision on June 6, 1997.<sup>1</sup> Accordingly, as required by the applicable regulations, the full Board has considered the exceptions to the Recommended Decision filed by Petitioner and reviewed the record as if it were making the initial decision. *See* 4 C.F.R. §28.86. For the reasons set forth below, the Board reverses the Recommended Decision and concludes that the Agency action in this matter cannot be sustained.

### Background

Petitioner retired from employment with Respondent, the U.S. General Accounting Office, as a result of a Reduction-in-Force, effective October 27, 1996. The RIF notice which the Agency provided Petitioner stated that the RIF was instituted because of the lack of work for a mining engineer. Petitioner thereafter filed his Petition for Review of the RIF action directly with the PAB, challenging the *bona fides* of the purported basis for the RIF and contending that the action

---

<sup>1</sup>The Recommended Decision concluded that the Agency invoked RIF procedures for legitimate management reasons and that Petitioner's separation by RIF was not personally motivated.

was targeted at him personally. He also alleges that the RIF action was undertaken in retaliation for whistleblowing and for filing equal employment opportunity (EEO) complaints.

The matter initially was assigned to Administrative Judge Elliott Bunce, who resigned from the Board while this case was pending. Effective February 19, 1997, the case was transferred to Board Member Nancy A. McBride. Prehearing briefs were filed by both parties. Petitioner's prehearing brief included a motion for summary judgment. Following the hearing and the parties' submission of posthearing briefs, on June 6, 1997 Judge McBride issued the Recommended Decision and an order denying Petitioner's motion for summary judgment.

Pursuant to 4 C.F.R. §28.86, Petitioner filed exceptions to the Recommended Decision on July 7, 1997. The Agency filed a response on August 7, 1997. Petitioner thereafter submitted a reply to GAO's response on August 20, 1997. By order of September 5, 1997, the Board notified the parties of its conclusion that the record did not support Petitioner's retaliation claims and invited further submissions from the parties.<sup>2</sup> Accordingly, Petitioner and GAO both filed supplemental briefs on September 26, 1997.

## **Contentions of the Parties**

### Petitioner

Petitioner contends that the RIF was improper because it was targeted at him personally. He raises two major claims: (1) The RIF was an unlawful disguised adverse action, a means of getting rid of a problem performer; and (2) the RIF constituted unlawful retaliation for Petitioner's exercise of two forms of protected activity--filing EEO complaints and whistleblowing. Petitioner charges that the Agency's asserted justification for the RIF--lack of work for a mining engineer--was a pretext for other, unlawful motives.

In support of his position, Petitioner argues that the Agency should not have treated him as a mining engineer for RIF purposes, because he had been performing evaluator duties as assigned by management for nearly two years immediately prior to receiving his RIF notice. In Petitioner's view, he had been functioning as a *de facto* generalist evaluator and, therefore, could not be separated by RIF due to lack of work for a mining engineer. He contends that his October 1994

---

<sup>2</sup>In the September 5, 1997 order, the Board also notified the parties that it was "considering application of a dual motive analysis to determine the lawfulness of the RIF action here at issue." Order at 2. The Board order provided the parties an opportunity to present additional evidence to meet their respective burdens under the proposed standard and to submit briefs addressing the appropriateness of the standard. Both parties declined to submit additional evidence, but chose to submit briefs arguing against application of the dual motive standard. Upon consideration of all the submissions and evidence of record, the Board has concluded that it need not apply the dual motive analysis to resolve this matter. Rather, the actions of the Agency in applying RIF procedures to Petitioner can be properly analyzed within the traditional framework for reviewing a RIF.

assignment to the Food and Agriculture issue area, where no mining engineering work could be expected, as well as numerous warnings from supervisors regarding his need to perform evaluator duties, demonstrate that he was, in fact, no longer a mining engineer. Moreover, he also points to the Agency's failure to check the accuracy of his position description prior to the RIF, as had been done in the very recent wide-scale RIF of Administrative, Professional and Support Staff (APSS) employees.

Petitioner challenges the Agency's asserted justification for the RIF, claiming that there is in fact work for a mining engineer. He also claims that his documented performance problems, within a few months of the decision to abolish the position of mining engineer through RIF procedures, provided motivation for the RIF. In addition, he details his equal employment opportunity complaint activity--past and ongoing at the time of the RIF--to support his theory that the RIF action was retaliatory. In particular, Petitioner contends that the nexus in timing between the Agency's knowledge of his EEO activity and the RIF action evidences retaliation.

### Respondent

The Agency counters that the RIF was undertaken for legitimate management considerations of the type appropriately committed to its discretion and that all applicable regulations were followed. Specifically, Respondent contends that the RIF was lawfully undertaken for the stated reason, *i.e.*, lack of work for a mining engineer. In the Agency's view, because there was a genuine lack of mining engineer work, the RIF action should be sustained despite the existence of performance problems which might suggest unlawful, personal reasons for the RIF. Respondent further contends that Petitioner has failed to show that the Agency's legitimate, nonretaliatory reason was a pretext for retaliation for EEO activity. The Agency asserts that Petitioner's claim of retaliation for whistleblowing should be dismissed as abandoned, or denied for lack of basis in the record.

### **Findings of Fact**

#### GAO Organization and Work Structure

1. GAO work assignments are responsive to needs expressed by Congress. The major work planning involves a three-year strategic plan, developed through consultation with congressional committee staffs and revised annually. Each year, GAO asks for identification of major agenda items for the next one to three years. This forms the basis for allocating the Agency's financial and human resources. TR 78-80, 125-28.
2. The bulk of GAO's work involves review of matters regarding organization, planning, and management of the program or activity at issue. TR 132.
3. Because of the nature of the work, the vast majority of GAO professional staff members are generalist evaluators. TR 130-32.
4. Within GAO, the Resources, Community, and Economic Development Division (RCED) has

subject matter responsibility for the following five issue areas: 1) Energy, Resources, and Science; 2) Transportation; 3) Housing; 4) Environment; and 5) Food and Agriculture. TR 75.

5. Michael Gryzkowiec has been RCED Director for Planning and Reporting since approximately 1993. He oversees strategic planning for all five issue areas within the Division. He has seen no need for a mining engineer in any RCED issue area since 1993, nor does he foresee such a need in the future. TR 38, 70-74, 82-83, 89-90.

6. If GAO had work for a mining engineer, it most likely would come under the Energy, Resources, and Science issue area of RCED. TR 98. Because RCED generally assigns specialists to an issue area, if the division had a mining engineer, he or she would be "part of the normal staffing" for natural resources within the Energy, Resources, and Science issue area. TR 71. Since at least 1993, this issue area has had no planned projects relating to minerals or mining engineering or requiring the services of a mining engineer. TR 84-88, 127-28. Virtually all the work in Energy, Resources, and Science was performed by generalist evaluators from 1993 to 1996. TR 138.

7. At the time of the hearing, GAO did not have any work for a mining engineer, nor did it foresee any such work. TR 134-36.

#### Petitioner's Background and Personal History

8. Petitioner began work for GAO in 1979. At that time he was classified as a General Engineer, GS-14. He worked in the Resources, Community, and Economic Division (and its organizational predecessor, the Energy and Minerals Division) throughout his career at GAO. Until 1993, he was assigned to work in the Natural Resources issue area. TR 214-15, 220.

9. As of March 21, 1982, Petitioner was reassigned from the position title "General Engineer" to "GAO Evaluator" (occupation code series 347). The Notification of Personnel Action form for this reassignment indicates that it resulted from a position review and that the position carried an "organizational title" of "GAO Evaluator-Mining Engineer." Pet. Exhib. 27.

10. Petitioner's official position description for the "GAO Evaluator-Mining Engineer" position in 1982 stated the duties as:

Plans, organizes, conducts, and reports on comprehensive review of major Government programs or functions, groups of such functions, or issues of national or international impact, high public congressional interest or oriented to future long-term problems (e.g., minerals deposits and systems utilizing new techniques, acquisition of major data processing systems in a large agency, administration of Federal retirement systems, major pollution, energy and materials, or international relations issues or policies, or planning for weapons systems research and development). Findings and recommendations are aimed at substantive improvements, alternatives or

redirection to operations, program objectives, or Federal policy. Provides direction to other evaluators on the team, assigns work, coordinates efforts, and manages assigned resources.

Due to a condition such as the urgency of the project, in combination with the incumbent's exceptional proficiency in evaluation work, assignments typically are made in very broad terms with an unusual delegation of responsibility in planning and carrying out the work.

Pet. Exhib. 1.

11. Effective May 11, 1986, Petitioner was reassigned from "GAO Evaluator" (series 347) to "Mining Engineer" (series 880). Pet. Exhib. 29; TR 215-17.

12. While the "Major Duties" of this official position description for "Mining Engineer" all refer to minerals or mining expertise, the "Factoral Knowledge Required" for the position includes the requirements for generalist evaluators, such as written and oral skill in organizing and presenting complex analyses and research projects, "[i]ndepth knowledge of the evaluation process, including the application of advanced operational auditing and analysis techniques to problem identification and solution, and the ability to determine how guidelines or plans for an audit/review may be devised to approach new or previously unencountered conditions, when original criteria must be formulated and to determine when evaluation objectives have been met." Pet. Exhib. 2 at 2-3.

13. As the position descriptions stood in 1996, all elements of the GAO Evaluator position were included in the Mining Engineer position, with the addition of special knowledge, skills and ability requirements for the specialist position. See Pet. Exhibs. 18, 19; Resp. Exhib. 20.

14. During Petitioner's employment with GAO there has been a longstanding problem of insufficient work for a mining engineer. See FOF ##5-7.

15. Efforts were made to find mining engineer work for Petitioner. During 1992 and 1993, Mr. James Wells, who then worked in the energy issue area, was asked to notify RCED Director of Operations Harry Finley if there was any work for a mining engineer. There was none during that time. TR 34-35.

16. On September 28, 1993, John Anderson, Jr., then Associate Director of RCED's Natural Resources Management issue area, met with Petitioner and Petitioner's supervisor at that time, Robert Wilson, Assistant Director, Natural Resources Management issue area. At the meeting Mr. Anderson noted that there was a "lack of need" for Petitioner's mining expertise "on any current or foreseeable assignments." Mr. Anderson further advised Petitioner that, in view of Agency downsizing plans, a number of specialist positions--including mining engineer--likely would be eliminated. Resp. Exhib. 2. Mr. Anderson also informed Petitioner that because of Agency needs and the lack of mining engineer work, he was being assigned to work on planning under the

supervision of Charles Cotton, an RCED Assistant Director for Energy, Resources and Science. He told Petitioner that "the opportunity to work in the planning area with Charlie [Cotton] would help [him] . . . make the transition into more of a generalist evaluator role." Resp. Exhib. 2; TR Pt. II, 4-5, 8-9.

17. During 1993 and 1994, the Agency assigned Petitioner to help develop minerals-related issues as part of the ongoing strategic planning process. TR Pt. II, 10. In the winter of 1993-94, Petitioner worked full-time on planning under Mr. Cotton, and he was given the opportunity to identify work related to minerals or to mining engineering. TR 245-47; TR Pt. II, 10.

18. As a result of further GAO consultation with Congress, none of the minerals-related jobs identified by Petitioner were pursued. TR Pt. II, 15-16, 18. They were displaced by matters that ranked higher among congressional priorities. TR Pt. II, 16-19. Therefore, the lack of work for a mining engineer continued. TR Pt. II, 20-22.

#### Petitioner's Food and Agriculture Assignments

19. In October 1994, Harry Finley, then RCED Director of Operations, transferred Petitioner to the Food and Agriculture issue area because of the continued lack of mining engineering work. Petitioner was told that from that point on he would be doing evaluator work. TR 222.

20. Robert A. Robinson, Director of RCED's Food and Agriculture issue area, was responsible for assigning Petitioner within that issue area. Mr. Robinson agreed to Petitioner's assignment into the issue area, although he told Mr. Finley that Food and Agriculture "almost by definition, doesn't have a lot of work for a mining engineer." TR 105. Mr. Robinson told Mr. Finley: "I don't have a requirement for mining engineer, but I will try to use him [Petitioner] as best we can as an evaluator. So that was always the condition." TR 116.

21. Mr. Robinson "had been aware" "of some sort of personality clashes or something going on" with respect to Petitioner. TR 105.

22. During the period of Petitioner's assignment to Food/Agriculture, he was expected to perform as an evaluator. TR 116; see Pet. Exhib. 9 (Memo of James Wells, October 26, 1995); Pet. Exhib. 10 (Memo of Pat Gleason, March 19, 1996). Petitioner's performance ratings for 1994-95 were based on his performance of tasks done by generalist evaluators and on the expectations and standards set for generalist evaluators at GAO. TR 116-18. He received evaluator training to meet the continuing professional education requirements. Pet. Exhib. 10 (Gleason Memo). He did not perform any work as a mining engineer during this period.

23. Mr. Robinson considered Petitioner to be a generalist evaluator during his period in Food/Agriculture. TR 116-17.

24. Mr. Robinson told one of Petitioner's supervisors, Tom Kwai, to treat Petitioner as an evaluator and to evaluate him on the basis of standards applicable to evaluators. TR 118.

25. Despite the nature of Petitioner's work, the Agency did not formally reclassify him as an evaluator; GAO did not process the paperwork to reassign him to the position of generalist evaluator. TR 188.
26. The Agency did not formally "detail" Petitioner to Food/Agriculture. TR 154, 196-97.
27. According to Patricia Gleason, Human Resources Manager for RCED, Petitioner had been transferred to the Food/Agriculture group. TR 196-97.
28. From October 1994 to June 1996, Petitioner worked on four projects in the Food and Agriculture issue area.
29. Petitioner's performance in the Food and Agriculture issue area was less than fully satisfactory.
30. Petitioner's first project in the Food/Agriculture issue area involved review of the formulas used for allocating water and waste disposal grants among states. TR 107-08. Petitioner worked on this project for about eight months. TR 223.
31. Petitioner's second assignment in Food/Agriculture was a fraud, waste and abuse plan. During this period he received an unsatisfactory rating and was placed in a performance improvement opportunity period. TR 108-09, 224-25.
32. For his third assignment, Petitioner was asked to identify some work that he believed would use his background. From a list compiled by Petitioner, Mr. Robinson selected and assigned Petitioner a project involving animal waste lagoon management. TR 108-10. While working on the lagoon project, Petitioner improved his performance enough to complete his opportunity period satisfactorily. TR 23.
33. Petitioner's fourth assignment in the Food and Agriculture issue area was an inventory of rural credit programs. TR 112.
34. James Wells, Jr. replaced Harry Finley as RCED Director of Operations on October 1, 1995. At that time, Petitioner had been in Food and Agriculture for one year and was about to receive a performance rating that was unsatisfactory in certain dimensions. Mr. Wells was briefed on this situation shortly after he became Director of Operations, because he was responsible for reviewing and delivering Petitioner's rating and for explaining the terms of the performance improvement opportunity period and supervising its progress. TR 15-16.
35. In October 1995, Petitioner's performance was rated as unsatisfactory. Consequently, he was placed in a 90-day opportunity period during which he was to improve his performance or, if unsuccessful, face further action. Pet. Exhib. 9.

36. Notes taken on Petitioner's performance during the opportunity period indicated continuing performance and attitude difficulties. Pet. Exhib. 13.

37. The opportunity period was extended, approved by Mr. Wells, and Petitioner was successful in improving his performance to above unsatisfactory. However, the performance was not fully satisfactory; several ratings remained in the "needs improvement" range. The rating was sufficient to avoid removal, but nevertheless indicated performance problems. TR 21, 23.

38. At the end of the opportunity period, Mr. Wells told Petitioner that because of the budget situation, he was expected to perform as an evaluator. TR 22-23.

39. Petitioner had been converted to an evaluator in October 1994 upon his transfer to the Food/Agriculture issue area to perform generalist duties. TR 71, 106, 116-18, 222; Pet. Exhibs. 9, 10.

#### Petitioner's Complaint History

40. Petitioner had a history of filing complaints with the Agency. A complaint filed in April 1991, involving charges about assignments dating as far back as 1986, had progressed to a final decision from the Personnel Appeals Board in *Rojas v. GAO*, 2 PAB 193 (1993). The Board concluded that Petitioner's lack of assignments resulted from lack of work for a mining engineer, not from discrimination by the Agency. 2 PAB at 219.

41. Mr. Wells learned that Petitioner had a history of filing complaints on the day he first met him. TR 40.

42. In the period relevant to the instant case, Petitioner filed several complaints with GAO's Office of Civil Rights. Pet. Exhib. 31. On November 26, 1995, Petitioner filed a complaint after being placed in a 90-day opportunity period and after talking to Mr. Wells. On January 3, 1996, Petitioner lodged a written complaint challenging the conclusion that his performance on the lagoon job was still unacceptable. Petitioner filed a complaint on March 3, 1996, charging the Agency with acts of discrimination on the basis of race, religion, national origin, age, and retaliation. In connection with this complaint, he cited his assignment to duties designed for a generalist evaluator rather than for a specialist mining engineer. The March 3 complaint listed December 18, 1995, and November 26, 1995, as the most recent dates on which the acts of discrimination and retaliation occurred. Resp. Exhib. 22. Petitioner filed an additional complaint on May 23, 1996, after being criticized by his supervisor for using GAO time to work on his complaints. On August 10, 1996, Petitioner filed a complaint challenging his unsatisfactory rating on the loans job. Pet. Exhib. 31. Petitioner also wrote letters to RCED human resources manager Patricia Gleason, dated April 5, 1996 and August 14, 1996, stating his intent to grieve his 1995 and 1996 performance appraisals respectively. Pet. Exhib. 11, 14; TR 198-99. Further complaints

followed his receipt of the RIF notice. Pet. Exhib. 31.<sup>3</sup>

43. Petitioner's supervisors and GAO officials who took part in the RIF action were generally aware of Petitioner's complaint activity. Mr. Wells testified that Petitioner talked about having filed complaints at their first meeting. TR 40. He further stated that Petitioner "many times commented . . . that he was thinking about filing" and that this complaint history made Mr. Wells extremely careful to seek advice and follow procedures and rules. TR 40-41.

#### Agency Downsizing and the "APSS" RIF

44. In August 1996, GAO had just completed a major downsizing effort directed toward achieving a 25 percent budget cut, as directed by Congress. TR 27-30, 149-50; see Comptroller General Memorandum, "Impact of Budget Reductions on GAO" (August 7, 1995), Resp. Exhib. 9 at 1.

45. In its Plan to Implement Budget Reductions, dated July 31, 1995 and adopted by the Comptroller General, senior level managers involved in the downsizing plans concluded: "As we continue to downsize, it is critical that evaluators either be performing (1) audit and evaluation functions or (2) work that can only be performed by an evaluator. Therefore, we recommend an intensive agency-wide effort to reassign as many evaluators as possible, including those in staff offices, to audit and evaluation work as soon as possible, but not later than March 31, 1996." Resp. Exhib. 9 at 8.

46. The downsizing effort announced in August 1995 was accomplished in three phases: (1) the separation of approximately 400 employees through voluntary separation incentive programs, such as buy-outs and early retirement offers; (2) the closing of three field offices, with a resulting release of approximately 143 employees; and (3) the RIF of Administrative, Professional and Support Staff employees, known as the "APSS RIF." TR 28-29; Resp. Exhib. 10 at 2-3. During the downsizing period, a freeze on hiring was in effect at GAO. TR 31, 135-36; Resp. Exhib. 11 at 5.

47. In the course of phase three, which occurred from April to June 1996, 154 APSS employees were given RIF notices. Resp. Exhib. 10 at 3-4 (143 separations; 11 downgrades or reassignments).

48. As a result of the voluntary separation incentive programs, RCED lost 60 generalist evaluators who were needed by the division. TR 135.

49. Prior to the APSS RIF, RCED managers were given a number of positions to eliminate, from

---

<sup>3</sup>Except for the March 3, 1996, complaint, Petitioner's characterizations of the complaints filed, as set forth in Petitioner's Exhibit 31, are accepted for the limited purpose of generally identifying and dating the complaints. The great variance between Petitioner's characterization of his March 3, 1996, complaint (Pet. Exhib. 31) and the actual complaint (Resp. Exhib. 22) suggests that his synopses are not reliable as to actual content.

which they reviewed division needs and made decisions as to which positions could be spared. TR 15, 44; see Resp. Exhib. 9 at 4, 7.

50. Prior to the APSS RIF, the RCED Division was instructed by the Office of Personnel to review position descriptions for all APSS employees within the Division to make sure that they accurately reflected their duties. This review was done by Patricia Gleason (RCED human resources manager), who spoke to each RCED support staff member or his or her supervisor. TR 44-45, 194-95. When there were major differences between job duties and position descriptions, changes were made in the position descriptions and, in some cases, the job title was changed. TR 195, 200.

51. In May 1996, John Luke, Deputy Assistant Comptroller General for Human Resources, testified on the downsizing before a congressional subcommittee. His testimony disclosed no plan to eliminate specialist positions or to review specialist or evaluator-related positions as part of a systematic look at the GAO structure for planned streamlining. Resp. Exhib. 10 at 3-4. The testimony noted the three phases of Agency downsizing (voluntary separation incentive program; field office closures; and RIF of support staff). Mr. Luke further stated: "In addition, we anticipate that 171 staff will be off our rolls by October 1, 1996. This includes staff to be transferred with GAO's claims function to other agencies and normal attrition. . . . At this level of operation, we believe we will be able to maintain productivity while avoiding major disruptions and imbalances in our staff mix." *Id.* at 4. The chart accompanying this testimony indicated the following categories of "Staff Leaving GAO July 31, 1995 - October 1, 1996: Sept. 1995 Buyout, Nov. 1995 Buyout; June 1996 RIF; Other Attrition."

#### Petitioner's Separation By RIF

52. In June 1996, Petitioner had completed his most recent assignment and was scheduled for reassignment. Mr. Wells called a meeting to discuss Petitioner's future assignments, in light of his continuing performance problems. TR 25-26, 58. This meeting was attended by: the Food and Agriculture management team; Patricia Gleason, RCED's human resources manager; representatives from the Office of Personnel; and Barry Shillito, an attorney from the Office of General Counsel. The attorney was present because it was generally Mr. Wells' "practice when we are dealing with performance issues to have people like that advise me." TR 25-26.

53. At the June meeting, Mr. Wells learned that "lack of work" was a permissible reason to conduct a RIF. TR 26. He stated that Petitioner "was up for reassignment again and it was during that meeting that I heard the option of a possible RIF." TR 25-26. Mr. Wells "decided to explore it further." TR 33.

54. Mr. Wells asked Mr. Shillito to look into the "authority to conduct a RIF for lack of work." TR 68. He asked Ms. Gleason to verify that there was no work for a mining engineer within RCED. TR 33.

55. Following the June 1996 meeting, Mr. Shillito asked Margaret Braley, a Personnel

Management Specialist, to review whether Petitioner would have any assignment rights if RIF procedures were invoked to eliminate his position. TR 203-04. She reviewed records of Petitioner's employment history and concluded that he would not have any assignment rights. TR 205.

56. Ms. Braley had been involved in reviewing reassignment rights for employees affected by the APSS RIF in 1996. During that RIF, Ms. Braley did not conduct any preliminary reviews of assignment rights. The reviews were conducted after positions were abolished. TR 202, 206.

57. Because it was unusual to conduct this review of assignment rights prior to commencement of the RIF action, Ms. Braley was curious about Petitioner's situation. She therefore made inquiries and learned that Personnel operations staff member Kyle Adams knew nothing about any planned RIF of Petitioner's position. She learned from Lisa Hobbs of the Employee Relations Branch of the Office of Personnel that Petitioner had ongoing employee relations issues and some performance problems. TR 206-08.

58. After receiving this information, Ms. Braley submitted a written report to Mr. Shillito. TR 207.

59. Sometime after the June meeting, Mr. Wells met with John Luke, Deputy Assistant Comptroller General for Human Resources, to get approval to consider a RIF of the mining engineer position. TR 36-37. Mr. Wells "wanted to talk about the fact that we were considering a RIF action of an employee or a position in RCED for a lack of work and I wanted him to be aware of what we were doing and what reaction he had in terms of whether I had the authority to continue this, to pursue it." TR 36-37.

60. Mr. Luke approved Mr. Wells' plan and Mr. Wells proceeded to recommend the RIF action. TR 37-38.

61. Mr. Wells consulted with RCED's senior management team--Keith Fultz, RCED Assistant Comptroller General for Operations, and Mike Gryszkowiec, RCED Director of Planning and Reporting. They reiterated the lack of need for a mining engineer. TR 38.

62. On August 20, 1996, Mr. Wells signed the Reduction-in-Force results summary for Petitioner's position, prepared by the Office of Personnel, and marked it as approved. The summary contained the typed notation that approval was "received 8/16/96 from ACG/OPS [Assistant Comptroller General for Operations] to abolish this position per Jim Wells, Director of Operations, RCED." Resp. Exhib. 12; TR 39-40.

63. After Mr. Wells approved the RIF, Mr. John McGrath of the Office of Personnel conducted a customary review of Petitioner's record to determine if he had any assignment rights. This was the same procedure that had been followed during the wide-scale APSS RIF. In conducting this review, Mr. McGrath looked first at Petitioner's most recent performance appraisal average. At

2.5, the average was below the 3.0 minimum required for eligibility for assignment rights. Mr. McGrath therefore determined that Petitioner had no assignment rights. He next looked at whether Petitioner would have had such rights if his latest appraisal average were higher, and he concluded, as had Ms. Braley, that Petitioner would not have been able to bump or retreat into another position. He could not bump because there was no employee in a lower tenure group than his; he could not retreat because there were no jobs essentially identical to those which he had held previously. TR 159-61; Resp. Exhib. 15.

64. The "Absolute Retention List" for the RIF, a 44-page document listing RCED Professional/Evaluator (P/E) Staff, isolated Hector Rojas' position to be abolished. The "remarks" section contained the note: "position abolished - no available offer - separation." Pet. Exhib. 15 at 19.

65. The RIF notice was delivered to Petitioner on August 28, 1996. TR 40; Resp. Exhib. 21. The notice stated that Petitioner would be released from his position of mining engineer effective October 27, 1996, because the "position is being abolished due to a lack of work." It also stated that Petitioner was eligible to retire. Pet. Exhib. 21. The RIF Results Summary noted that Petitioner was "the only employee in the job group, Mining Engineer, PE-880-II, in the RCED Pay Plan PE zone of consideration." Pet. Exhib. 16.

66. At the time of his RIF notice, Petitioner's position of record was "Mining Engineer." By then he had been performing the duties of a generalist evaluator for 22 months. In October 1994, he had been assigned to an issue area in which mining-related assignments could not reasonably have been expected to occur and, since that time, he had been treated and evaluated as a generalist evaluator. TR 46, 105.

67. GAO's governing RIF order requires current records for retention standing determination. TR 148-49; see Order 2351.1, ch. 2, ¶7. Ms. Gleason had not assessed the accuracy of Petitioner's position description prior to his RIF because she had not been asked to do so. TR 196. According to Mr. Wells, Petitioner's position description was not reviewed for accuracy prior to his RIF because "Mr. Rojas was a mining engineer, self-professed to be a mining engineer and that's how he passionately described his duties to me since the first day I met him." TR 45.

68. On October 27, 1996, Petitioner retired pursuant to the terms of his RIF notice.

69. By late 1996 into 1997, GAO had commenced hiring evaluators. TR 150-53.

### **Analysis**

The question before the Board is whether GAO acted lawfully in implementing Reduction-in-Force procedures to separate Petitioner from his employment with the Agency. After careful and considered review of the facts of this particular situation, and in light of the law governing RIFs, we conclude that the Agency has not met its burden of proving that this RIF action was lawful.

Our analysis rests on two prongs, explained more fully below: (1) Petitioner was illegally targeted for removal by RIF; and (2) Petitioner was converted from serving in a mining engineer position to serving in an evaluator position two years prior to the RIF action; therefore, he could not be separated by means of RIF from the mining engineer position, which by August 1996 had long been vacant.

### Introduction

A Reduction-in-Force in the federal government is a planned agency action to achieve streamlined operations analogous to a layoff in the private sector. By its terms, a RIF involves the "administrative process through which the government eliminates jobs and deals with the employees who formerly occupied the abolished positions." *Grier v. Department of Health & Human Services*, 750 F.2d 944, 945 (Fed. Cir. 1984). A RIF action therefore entails release of one or more individuals from their jobs. An action to eliminate a vacant position, entailing no such release of an employee, does not constitute a Reduction-in-Force. RIF actions are governed by regulations designed to assure that individuals subject to RIF procedures are treated fairly and in accord with merit principles as applicable to the circumstances of agency downsizing. See generally MSPB, Reduction in Force: The Evolving Ground Rules (1987). Because "the linchpin of federal personnel management is fairness," fairness also is "implicit in the reduction-in-force regulations." *Wilburn v. Department of Transportation*, 757 F.2d 260, 262 (Fed. Cir. 1985).<sup>4</sup>

A RIF is accomplished in two steps: identification of the position or positions to be eliminated; and identification of the individuals affected by the decision to eliminate particular positions.<sup>5</sup> *Grier*, 750 F.2d at 945-46. The latter step is determined by retention standing, based upon rules

---

<sup>4</sup>GAO's RIF Order, as relevant to this matter, closely parallels executive branch regulations pertaining to RIFs. Therefore, it is appropriate to consider precedent concerning the review of executive branch RIF actions. See *GAO v. GAO PAB*, 698 F.2d 516, 535 (D.C. Cir. 1983); *Cosella v. GAO*, 2 PAB 383, 404 (1994); *Turner v. GAO*, PAB Docket No. 94-07 at 25 (1995).

<sup>5</sup>As the D.C. Circuit explained, when the release of personnel is warranted by reorganization, lack of work, budget constraints, or the like, an agency must provide for a RIF plan:

Pursuant to the plan, an administrative area must be designated from which a certain number of employees will be released and within which the employees will compete to be retained. Retention is determined according to a variety of factors including veteran's preference and seniority. The "competition" is conducted through a "retention register" on which employees are listed according to their "competitive level" (which defines comparability), seniority, and so forth. Once the individuals who are to be released are identified, "reassignment" rights come into play. These rights permit certain individuals under certain circumstances to "bump" (displace) others or to "retreat" to previous jobs.

*Horne v. MSPB*, 684 F.2d 155, 156-57 n.2 (D.C. Cir. 1982). These intricacies of the RIF process at GAO are detailed in chapters 2-4 of Order 2351.1.

developed for the conduct of the RIF. *Gandola v. FTC*, 773 F.2d 308, 310 (Fed. Cir. 1985).

The law governing Reductions-in-Force is quite clear that a RIF may only be conducted for one of the following stated purposes: (1) lack of work; (2) shortage of funds; (3) insufficient personnel ceiling; (4) reorganization; or (5) an individual's exercise of reemployment or restoration rights. GAO Order 2351.1, ch. 1, ¶6.b (February 28, 1996). See also 5 C.F.R. §351.201(a)(2) (executive branch). The RIF regulations apply when one of the enumerated permissible reasons is the cause for invoking the RIF procedures, and the action to be taken is one of the four specified RIF actions: (1) separation; (2) demotion; (3) reassignment caused by a RIF action; or (4) furlough for more than 30 days. Order 2351.1, ch. 1, ¶6.a.

In this case, the action taken with respect to Petitioner--separation--clearly falls within the category of RIF actions. The issue to be addressed is whether that separation was occasioned by the Agency's stated reason for conducting a RIF, *i.e.*, lack of work. The burden of establishing that the RIF was conducted for lack of work rests with the Agency. *Losure v. ICC*, 2 MSPR 195 (1980); see *Metger v. Department of Navy*, 68 MSPR 225 (1995); *Schroeder v. Department of Transportation*, 60 MSPR 566 (1994). For the reasons set forth below, we conclude that GAO has failed to meet that burden.

#### I. Petitioner Was Targeted for Separation by RIF

A RIF action must be directed solely at eliminating a position--not aimed at removing a particular individual. *Carter v. Department of Army*, 62 MSPR 393, 398 (1994), *aff'd mem.*, 45 F.3d 444 (Fed. Cir. 1995); *Gandola*, 773 F.2d at 312. See also *Cobb v. Department of Labor*, 774 F.2d 475, 477 (Fed. Cir. 1985); *Grier*, 750 F.2d at 945. The rule of law precludes an agency from using RIF action to circumvent an employee's procedural rights that attach in the event of an adverse action. *Losure*, 2 MSPR at 199. Therefore, if an individual is selected for RIF action as a target for removal, the action cannot be sustained.

The agency bears the burden to support its decision to invoke RIF procedures by a preponderance of the evidence. The agency establishes a *prima facie* case of the legitimacy of a RIF by showing that the action was taken for one of the permissible reasons as outlined in the RIF order. *Rosen v. ICC*, 20 MSPR 574, 577 (1984). The agency burden "includes proof that the RIF regulations were properly invoked **due to** management considerations of the character appropriately committed to agency discretion." *Losure*, 2 MSPR at 201 (emphasis added). Once the employee has introduced rebuttal evidence challenging the *bona fides* of the agency's stated reason for the RIF, the agency must prove by a preponderance of the evidence that the RIF regulations "were **in fact invoked for one of the legitimate management reasons.**" *Id.* at 202 (emphasis added); see *Metger*, 68 MSPR 225. Finding that the stated reason is a pretext for an unlawful purpose does not require finding that officials were acting with subjective bad faith. *Losure*, 2 MSPR at 200. The pivotal question is whether the stated reason for conducting the RIF was, in fact, the reason undergirding the RIF. *Schroeder*, 60 MSPR at 571.

It is not sufficient that GAO establish that a lack of mining engineer work existed in the Agency at

the time of this particular RIF action; the Agency must establish by preponderant evidence that the lack of such work was the reason for the RIF of Petitioner. *Losure*, 2 MSPR at 202; *see Drake v. Department of Commerce*, 18 MSPR 475, 476 (1983) (despite *prima facie* case that RIF was undertaken for lack of work/shortage of funds, "preponderance of the evidence showed that the RIF was tainted by improper motivations"); *Peters v. Department of Energy*, 29 MSPR 253, 255 (1985) (although agency articulated legitimate management reasons for RIF, preponderant evidence showed reorganization action was tainted to avoid RIF running its natural course). The Board examines all the circumstances in weighing the evidence to determine whether the RIF action resulted from legitimate management considerations or actually constituted an adverse action taken for reasons personal to the employee. *See Bonn v. Department of Navy*, 49 MSPR 667, 670-73 (1991), *aff'd mem.*, 960 F.2d 155 (Fed. Cir. 1992).

Our review of the record in this matter makes clear that the Agency addressed the lack of work for a mining engineer through various efforts to utilize Petitioner's talents in light of the absence of work calling for his special expertise. By 1993, Agency officials foresaw the long term need to transition Petitioner from his specialist role into that of a generalist. At that time he was given a planning assignment in the RCED division, notified that the mining engineer position likely would be abolished, and told that the planning opportunity would help him make the transition into more of a generalist role. GAO provided this planning opportunity at a time when it likely could have abolished the mining engineer position and conducted a RIF for lack of work.

At the end of Petitioner's planning assignment, rather than conducting a RIF to address the continued lack of mining engineer work, the Agency chose to reassign Petitioner to perform evaluator work in the Food and Agriculture issue area of RCED, where no mining engineer work could reasonably be expected. *See* FOF #20. During his tenure in the Food/Agriculture group, Petitioner's performance was reviewed using the criteria for evaluator work. FOF #22. Based on the position descriptions of the mining engineer and evaluator positions, Petitioner should have possessed all the skills and background necessary for an evaluator (as well as the special education and background required for mining engineer expertise). *See* FOF ##12-13. Nevertheless, the record reveals that Petitioner experienced less than fully satisfactory performance reviews during this time, beginning with his second of four assignments in the Food/Agriculture group. As a result of an unsatisfactory rating in October 1995, Petitioner was placed in a 90-day opportunity or performance improvement period. Mr. Wells, as RCED Director of Operations, reviewed that performance appraisal rating and, as supervisor of the opportunity period, notified Petitioner that he was being placed in the performance improvement period. TR 16. In January 1996, Mr. Wells approved the recommendation of Petitioner's supervisors that the opportunity period be extended to allow more time for Petitioner to improve his performance. TR 21. Petitioner's supervisor noted continuing performance and attitude problems during the opportunity period. FOF #36; Pet. Exhib. 13. As of March 1996, Petitioner had raised his performance above "unsatisfactory" to the "needs improvement" level. This was sufficient to avoid removal through adverse action proceedings and to end the formal opportunity period, but still indicated performance difficulties. FOF #37.

After Petitioner's performance improved sufficiently for him to emerge from the opportunity period his supervisor, Mr. Wells, called a meeting in June 1996 to discuss Petitioner's continuing performance problems and future assignments. See FOF #52. Because of the performance issues, a number of managers, as well as an attorney from the Office of General Counsel, Mr. Shillito, were present. In the course of the discussion about Petitioner's ongoing performance difficulties and future assignment, Mr. Wells learned that lack of work was a permissible reason for conducting a RIF. This is the context in which the plan to conduct a RIF of the mining engineer position first arose.

When the RIF for lack of work was raised, GAO changed course and latched onto that option as a ready solution for Petitioner's ongoing performance difficulties. The evidence of record indicates that Mr. Wells was primarily interested in dealing with Petitioner as a problem performer. When the idea of a RIF for lack of work surfaced at that meeting, he sought input on whether the option was viable. Mr. Wells followed up on the RIF suggestion by asking the attorney, Mr. Shillito, to verify that a RIF could be premised on a lack of work, and by asking the human resources manager, Ms. Gleason, to confirm that there was a lack of mining engineer work. See FOF #54.

Mr. Shillito thereafter asked Margaret Braley, a personnel management specialist, to conduct a preliminary review to determine if Petitioner would have any assignment rights if RIF procedures were invoked to eliminate the mining engineer position. If so, then Petitioner would be able to survive a RIF action by being placed in a different position at GAO. Ms. Braley had conducted such analyses during the recent RIF of Administrative, Professional and Support Staff, but not on a preliminary basis before the decisions to abolish specific positions were made. FOF ##55-57. This preliminary review and determination that Petitioner had no assignment rights sets Petitioner's RIF action apart from the APSS RIF procedure followed just two months earlier and points to a decision to target Petitioner for separation through RIF.

Petitioner, in his particular RIF action, was treated differently from the APSS employees in another important respect. Prior to the APSS RIF, the human resources manager for Petitioner's division reviewed individuals' position descriptions and classifications for accuracy and made changes as necessary. See FOF #50. GAO did not conduct this pre-RIF review of position description and classification for Petitioner. At the evidentiary hearing, the human resources manager explained that she was not asked to do so. Petitioner's supervisor stated that the review was not conducted for Petitioner because he "was a mining engineer, self-professed to be a mining engineer and that's how he passionately described his duties to me since the first day I met him." See FOF #67; TR 45. Petitioner's unrealistic view of his professional position, against his own employment interest, does not excuse the omission of this step of checking the accuracy of his position description prior to the determination that he would be separated as a result of elimination of the mining engineer position. Employees in the recent APSS RIF had been afforded the measure of accuracy of a position review; principles of fairness dictate that Petitioner was entitled to comparable treatment. The Agency's failure to undertake this check for accuracy of the position description provides further support for the conclusion that Petitioner was targeted for separation by RIF. Indeed, such a review would have revealed that Petitioner was, in fact, no longer a mining

engineer and could not be subject to a RIF for lack of work.

The RIF of Petitioner is further distinguished from the wide-scale recent APSS RIF by the dearth of evidence that the RIF resulted from any Agency planning process. GAO presented no evidence of a planned review of evaluator-related specialist positions to determine which ones could be spared in favor of a streamlined Agency. Nor did Agency officials reference such a review of the evaluator-related community in reporting to Congress on GAO's downsizing progress. See FOF #51. While the GAO Order on position classification provides for an annual review of organizational structure for the purpose of planning additions and eliminations of positions, the Agency introduced no evidence to show that the formal elimination of the mining engineer position resulted from the requisite review of organizational structure pursuant to Agency regulation.<sup>6</sup> See Order 2511.1, ch. 5, ¶5 (March 23, 1994).

After considered review of all the evidence of record, we cannot escape the conclusion that this single-person RIF was tainted. The clear nexus between the formal discussion of Petitioner's performance problems and the search to determine whether the RIF option could be pursued, the Agency's preview of Petitioner's bump and retreat rights to determine if he would be separated by a RIF for lack of work, the Agency's failure to adhere to its own policy--followed in the APSS RIF--of reviewing functions performed and position descriptions to assure accuracy prior to the RIF, all point to a targeted RIF.

Indeed, the Agency clearly lacked work for a mining engineer for years,<sup>7</sup> but it did not conduct a RIF of the sole incumbent of that official position until two things happened: GAO had reached a point of frustration with Petitioner's performance, which continued to be less than fully satisfactory, and the opportunity to hire evaluators was on the horizon and thus, the need for even a minimally satisfactory evaluator no longer existed. The Agency thus took advantage of the RIF provisions to remove a persistent problem performer. In doing so, it relied on the lack of work for a mining engineer as justification for the action. In light of all the evidence, GAO has failed to meet its burden of establishing that the lack of work for a mining engineer was the reason underlying Petitioner's removal by RIF. Rather, the action constituted a targeted RIF and cannot be sustained.

## II. Petitioner Had Been Reassigned to the Evaluator Position

Our review of the facts in this matter also leads to the conclusion that Petitioner could not be removed by RIF from the mining engineer position because he had become a generalist evaluator two years prior to the action in question. Because the mining engineer position was essentially

---

<sup>6</sup>Prior to the APSS RIF, RCED managers were given a number of positions to eliminate, from which they reviewed division needs and made decisions as to which positions could be spared. See FOF #49.

<sup>7</sup>Our decision in no way reflects a criticism of the Agency's efforts to utilize Petitioner's skills when the conclusion was reached that the lack of work for a mining engineer was permanent.

vacant, the lack of work for that position could not support a RIF action.

Recognizing the lack of work for a mining engineer, GAO in September 1993 assigned Petitioner to work on planning for the RCED division. That point marked the beginning of the Agency's shifting of Petitioner from a position as an evaluator with a specialty in mining engineering to a position as a generalist evaluator. In fact, Petitioner was advised at that time that a number of specialist positions, including mining engineer, likely would be eliminated in the face of Agency downsizing. Petitioner was told that "the opportunity to work in the planning area . . . would help [him] . . . make the transition into more of a generalist evaluator role." FOF #16. This was a clear signal that Petitioner's transition to generalist evaluator was undertaken in response to the lack of mining engineer work. Pursuant to that plan, in the winter of 1993-94 Petitioner worked full time on planning and was encouraged to explore mining-related possibilities for future assignments. FOF #17. Because of Agency work priorities, none of the minerals-related jobs identified by Petitioner was pursued. FOF #18.

By October 1994, GAO had concluded that in fact no mining engineer work existed then, in the planning cycle to come, or in the foreseeable future. At that time, the plan to "re-tool" Petitioner took firm shape, as the Agency decided to transfer him from his evaluator-related specialty into generalist evaluator work. This was accomplished when Petitioner was reassigned in October 1994 from the Energy, Resources, and Science issue area to work in the Food/Agriculture issue area as a generalist evaluator. The transfer from Energy, Resources, and Science was occasioned by the continued lack of work for a mining engineer. In fact, the director of the Food/Agriculture issue area admitted that his issue area, "almost by definition, doesn't have a lot of work for a mining engineer." Accordingly, Petitioner reasonably could only expect to encounter assignments appropriate for a generalist evaluator. FOF #20.

The issue area director for Food/Agriculture viewed Petitioner's assignment to his area as that of a generalist. He testified that he informed the RCED Director of Operations that he did not need a mining engineer, but would "try to use him [Ppetitioner] as best we can as an evaluator." TR 116. Petitioner himself was told that from October 1994 forward he would be doing evaluator work. FOF #19; TR 222. His supervisors considered him an evaluator and treated him as such. FOF ##22-24. From October 1994 until his separation, Petitioner's performance was reviewed on that basis. His ratings during this period were based on tasks performed by generalist evaluators and on the expectations and standards set for generalist evaluators. FOF #22. These include the ratings for which he was placed in an opportunity period. See FOF ##31-38. Petitioner also received training appropriate for a generalist evaluator during his assignment to Food/Agriculture. FOF #22. Therefore, as of October 1994, the lack of work for a mining engineer had already caused Petitioner's functional reassignment to generalist evaluator.

GAO had a number of options available when it determined that the lack of work for a mining engineer was permanent. The Agency could have assigned Petitioner to perform generalist functions by "detail," pursuant to Order 2300.1. See Order 2300.1, ch. 4, ¶4-1 (October 8, 1993) ("A detail is the temporary assignment of an employee to a different position or set of duties for a

specified period of time"). The Agency has never characterized its placement of Petitioner as a "detail," nor did it place any evidence in the record to support such a characterization. Indeed, GAO's Director of Personnel, Patricia Rodgers, testified that a detail of Petitioner "would have been one possibility so that he could have had work to do of a temporary nature, . . . and that would have given them time to see if the situation was going to change and if they then wanted . . . to return him to mining engineering work" (emphasis added). TR 154. In Petitioner's case, the choice not to use the detail mechanism likely was based on its temporary nature, appropriate for circumstances where the individual is expected to return to the original position. Indeed, the governing Order specifies the following time limits for details: "Employees may be detailed, in 1-year increments or less, to the same or lower grade/band positions for up to 2 years. Extensions beyond 2 years require Personnel approval." Order 2300.1, ch. 4, ¶4-3. Clearly there was no intent to return Petitioner to his mining engineer role.

The Personnel Director also noted another option available to temporarily address the lack of work for a specialist: "if there were special projects of a temporary nature, he could certainly have had such assignments." TR 154. Petitioner's assignment to do planning work under Mr. Cotton in the year before his transfer to Food/Agriculture appears to be such a special temporary project. See FOF ##16-17. In contrast, his transfer to Food/Agriculture constituted a permanent assignment.

To address the lack of work permanently, the Agency also could have conducted a RIF action when the decision was made to vacate the mining engineer position in 1994. This would have entailed abolishing the position at that time for lack of work, and separating the incumbent mining engineer. TR 155. No such action was taken then.

Another option available to management in 1994 was to eliminate the mining engineer position and reassign Petitioner. TR 154. Although the Agency never processed the paperwork normally associated with that personnel action, the Board finds that Petitioner's reassignment to the position of evaluator was complete and effective in October 1994. The evidence is clear that beginning at least in the Fall of 1994, GAO functionally converted Petitioner to a generalist evaluator, advising him of the change, assigning him to an issue area with projects suitable exclusively for a generalist, and evaluating his performance on that basis. From that point forward, the Agency ceased utilizing Petitioner as a mining engineer. Thus, when Petitioner began working in Food/Agriculture, the mining engineer position became vacant. After that occurred, the Agency still could have abolished the position of mining engineer. However, GAO no longer had authority to separate Petitioner from that position by RIF, because he no longer occupied the mining engineer position. At that point, Petitioner could only be subject to RIF action involving the generalist evaluator community at GAO.

The Agency's most recent brief characterizes Petitioner's status in the Food/Agriculture issue area as being "informally reassigned to do evaluator work." Resp. Supp. Brief at 5. In fact, no such "informal reassignment" action exists in the body of GAO regulations. Moreover, none of the GAO managers or personnel specialists who testified at the hearing mentioned the term "informal reassignment." An "informal reassignment" to a new issue area removed from Petitioner's area of

expertise, for a period of two years, was not one of the options available to GAO when it determined to cease utilizing the mining engineer position in 1994.

The Agency's failure to fully formalize its reassignment of Petitioner to generalist evaluator cannot obscure what actually happened. GAO focused on the mining engineer position and the unlikelihood of mining-related work for an extended period in 1993-94, before reassigning Petitioner to the generalist evaluator position in 1994 because it did not envision any further work for a mining engineer and evaluators were needed. Clearly the determination to vacate the mining engineer position as well as the conversion of Petitioner to generalist evaluator took place by October 1994.

Moreover, the Agency's argument that it can implement an extended informal reassignment leads to an illogical conclusion. While a formal "detail" is limited in time, the Agency's vehicle of "informal reassignment" could, theoretically, go on forever. Under GAO's theory, there is no limit as to how long it could functionally reassign Petitioner to a generalist evaluator position, while never processing the formal paperwork for such a reassignment. The Agency in theory could maintain the "informal reassignment" for years on end and still remove Petitioner under the pretense that his position of record remained that of mining engineer. We cannot sanction such a misinterpretation of the RIF rules.

It is also worth noting that GAO's own governing RIF regulation requires that current records be maintained for RIF purposes. See Order 2351.1, ch. 2, ¶7.<sup>8</sup> Moreover, the GAO Order and Supplement on position classification also establishes that good management practice entails making sure that accurate and current personnel records are maintained.<sup>9</sup> See 2511.1 Supp., ch. 6, ¶4 (March 23, 1994). This guidance on maintaining accurate records, coupled with the fact that the Agency did review position descriptions for accuracy prior to the wide-scale RIF of APSS employees, suggests an omission of consequence here. Certainly, under the circumstances of this case, the Agency cannot now rely on its own failure to ascertain that Petitioner's position description no longer comported with his actual duties to then justify his separation resulting from a formal elimination of a position which, it had determined two years earlier, was not needed.

GAO's actions, which effectively converted Petitioner to an evaluator, coincided with an Agency-wide hiring freeze and the voluntary separation of numerous evaluators pursuant to buy-out and early retirement authority. The Agency acknowledged having a shortage of generalist evaluators during this period, but could not replace evaluators who elected to take advantage of voluntary

---

<sup>8</sup>The provision states that "GAO will maintain current correct records needed to determine the retention standing of its competing employees. . . ."

<sup>9</sup>Supplemental information in the Order on position classification contains the following specific guidance on the subject of accuracy of personnel records: "Supervisors and managers are responsible for maintaining current and accurate position descriptions and revising them when necessary. They shall initiate this process by preparing draft position descriptions containing the new or revised duties." Order 2511.1 Supp., ch. 6, ¶4 (March 23, 1994).

separation incentives and who left the RCED division well below optimal staff levels for the generalist position. Moreover, in planning for the RIF of support staff, GAO set out to retain as many individuals as possible who could do evaluator work, by returning to evaluator duties those evaluators who were performing staff rather than evaluator functions. See Comptroller General Memorandum and Attachment, Impact of Budget Reductions on GAO at 4, ¶7 (August 7, 1995) (Resp. Exhib. 9); FOF #45.

Petitioner's reassignment to generalist work in October 1994 falls into this same scheme of maximizing the potential number of functioning evaluators in the face of downsizing. The Agency accomplished a *de facto* reassignment of Petitioner to the generalist position. This was a position for which he was fully qualified as a matter of essential elements of the position. From this perspective, GAO was willing to utilize Petitioner to serve its need for evaluator work while the Agency was unable to fill evaluator vacancies. As the end of the hiring freeze drew near, the Agency rediscovered Petitioner's classification as a mining engineer--solely for the purpose of implementing the "RIF."

In reaching our determination, we are not unmindful of the line of cases decided by the Merit Systems Protection Board (MSPB) holding that RIF actions are based on an individual's position of record.<sup>10</sup> Underlying these cases is the availability of a mechanism within the executive branch, by which an employee may challenge his or her position classification outside the employing agency through appeal to the Office of Personnel Management. 5 C.F.R. Part 511, Subpart F; see Note, *Reduction in Force: A Guide for the Uninitiated*, 44 Geo. Wash. L. Rev. 642, 652 & n.65 (1976). No comparable mechanism for challenging a position classification beyond the employing agency is available to GAO employees.<sup>11</sup> Thus, the rationale for disregarding the actual duties performed by a position's incumbent--to encourage use of the OPM appeal process--is wholly inapplicable to a RIF at GAO. Moreover, the executive branch cases speak to the administrative convenience in determining employees' competing rights during a RIF; they do not address the type of factual situation involved in the present case, where Petitioner alone was the subject of this

---

<sup>10</sup>See, e.g., *Apodaca v. Department of Education*, 19 MSPR 540, 544-45 (1984) (rejecting challenge to competitive level; retention standing determined by position of record); *Caracciolo v. Department of Education*, 20 MSPR 211, 212 (1984) (retention rights determined by position of record when competing employees involved); *Bjerke v. Department of Education*, 25 MSPR 310, 313 (1984) (competitive level of competing employees determined by position of record); *Frankel v. Department of Education*, 17 MSPR 453, 456 (1983) (employees on detail returned to official positions for RIF purposes). The MSPB has indicated that other evidence in addition to official position descriptions may be relevant to the determination of the propriety of competitive level. *Bateman v. Department of Navy*, 64 MSPR 464, 468 (1994).

<sup>11</sup>The governing GAO Order provides for an appeal to the Agency's Director of Personnel. If an employee is dissatisfied with the Director's appeal decision, he or she may request reconsideration by the Deputy Assistant Comptroller General for Human Resources, whose decision is final. Order 2511.1, ch.2, ¶¶2, 8.

RIF action and no other employee's rights were adversely affected.<sup>12</sup>

Where, as here, a substantial question is raised with respect to the accuracy of the official position description, the better policy is to consider the actual duties of a position prior to RIF action. See Note, *Reduction in Force*, supra at 652 & n.65. This was the procedure followed by GAO prior to the wide-scale APSS RIF, when position descriptions were reviewed for accuracy and changes to position descriptions and job classifications were made as necessary in advance of the actual RIF determinations. See FOF #50. The Agency's practice of reviewing the underlying documents prior to the APSS RIF reflects the need for fairness implicit in the merit system.<sup>13</sup> We therefore conclude that prior to conducting a RIF, GAO must engage in a good faith review of position descriptions to ascertain that they are accurate.<sup>14</sup>

The Agency's attempt to characterize Petitioner's separation as a RIF was premised on its failure to have an accurate position description reflecting the clear and unequivocal reassignment of Petitioner to the generalist evaluator position two years earlier. Petitioner was fully entrenched in the Food/Agriculture issue area in June 1996, and had been assigned to evaluator duties in that group for nearly two years. Having thus worked Petitioner and reviewed him as a generalist

---

<sup>12</sup>Having undertaken an accuracy review prior to the wide-scale APSS RIF, GAO certainly could not raise administrative burden as an explanation for not having taken this step with respect to Petitioner.

<sup>13</sup>See *Wilburn*, 757 F.2d at 262.

<sup>14</sup>The concurring judge agrees that GAO should not be able to "informally reassign" an employee to a position for a potentially unlimited number of years and then RIF that person from the "formal" position of record. However, the concurring judge would take into account merely as "evidence" the fact that GAO did not do an accurate position description before conducting a RIF. That approach does not fully address the inequities inherent in the Agency's position. The only straightforward way to avoid such an unseemly result is if GAO is required to do an accurate position description before a RIF is conducted.

Moreover, the concurring judge concludes that, on the record before us, the mining engineer position was "vacant" at the time the Agency sought to conduct a RIF from the position. If the formal, unreviewed position description attached to Petitioner can be relied upon to describe his job, then the RIF was not conducted against a "vacant" position. Therefore, from one perspective, the concurring judge implicitly accepts our analysis that a *bona fide* effort at constructing a current position description before a RIF is necessary.

The concurring judge expresses concern about the lack of authority to support the conclusion that GAO must make a good faith effort to ascertain that position descriptions are accurate prior to a RIF action. Under the circumstances, we have found nothing which precludes us from requiring the Agency to engage in a good faith effort to align an employee's position description with his current job assignment before a RIF. Such an obligation imposes a duty on the Agency, but it does not, as implied by the concurring opinion, ripen into a right for any employee to challenge, before this Board, the particulars of the results of such a good faith review.

evaluator, the Agency could not then pretend he was still a mining engineer for the purpose of conducting a RIF.<sup>15</sup>

### III. Retaliation Claims

The Board agrees with the conclusion reached in the Recommended Decision that Petitioner cannot prevail on his claim that his separation by RIF was retaliatory. *See Malphurs v. GAO*, 2 PAB 147, 150 (1992) (citing *Webster v. Department of Army*, 911 F.2d 679 (Fed. Cir. 1990), *cert. denied*, 502 U.S. 861 (1991); *Warren v. Department of Army*, 804 F.2d 654 (Fed. Cir. 1986); *Oliver v. Department of Health & Human Services*, 34 MSPR 465 (1987), *aff'd mem.*, 847 F.2d 842 (Fed. Cir. 1988)). Petitioner produced no evidence to support the allegation that the RIF action was undertaken to retaliate for whistleblowing. On the theory that the RIF action was retaliatory for Petitioner's EEO complaint activity, Petitioner failed to meet his burden of establishing a genuine nexus between the protected activity and the RIF action.

### **CONCLUSION**

The Agency's decision to separate Petitioner was not authorized by the RIF Order. Petitioner is therefore entitled to cancellation of his separation. Accordingly, GAO is directed to reinstate Petitioner as a generalist evaluator, with appropriate back pay. The reinstatement shall be effective as of the date of his retirement pursuant to RIF procedures.

### **SO ORDERED.**

Member Wolf concurs in the result. His reasons are stated in a separate concurrence.

---

<sup>15</sup>The Board is not asserting jurisdiction to resolve classification issues *per se*. The Board does, however, have authority to review these matters insofar as the *bona fides* of a RIF is at issue. *See Lewis v. Department of Army*, 4 MSPR 278, 280 (1980); *Lester v. Department of Education*, 18 MSPR 63, 65 n.3 (1983). The MSPB also looks beyond official position descriptions where necessary to resolve such questions as the propriety of competitive level and the underlying reason for a RIF. *See, e.g., Bateman*, 64 MSPR at 468; *Drake*, 18 MSPR at 476.

This Board generally will not assume full-scale *de novo* review of objections to classifications; however, GAO must, minimally, have made a good faith attempt to review the accuracy of a position description prior to conducting the RIF. No claim of any kind of review of Petitioner's position description was made in this case.