

Janice M. Turner v. U.S. General Accounting Office

Docket No. 94-07

Date of Decision: July 3, 1995

Cite as: Turner v. GAO (7/3/95)

Before: Leroy D. Clark, Chair

Prohibited Personnel Practice

Merit pay system

Performance appraisals

INTRODUCTION

Petitioner filed a Petition for Review with the General Accounting Office, Personnel Appeals Board in July 1994. By leave of the Administrative Judge, Petitioner filed an amended petition in October 1994, alleging that she was subjected to a prohibited personnel practice because the Respondent had implemented a merit pay system based upon a forced distribution of pay categories unrelated to actual performance. Respondent's answer denied that the agency had committed a prohibited personnel practice. Motions for summary judgment submitted by both parties were denied. The evidentiary hearing was held on January 3, 1995, January 4, 1995, January 18, 1995 and March 22, 1995.

FACTUAL BACKGROUND

Introduction

Petitioner, Janice M. Turner, served an internship in a cooperative program with the General Accounting Office (GAO) from August 1987 to December 1987, and began full-time employment as an evaluator in August 1988. (Tr. 3-6). In June 1989, GAO replaced the General Schedule (GS) system of promotion and pay increases and adopted the Pay-For-Performance (PFP) system in which evaluators were placed in broad bands depending on the GS grade level they occupied. (Tr. 228). The Petitioner, after rotation through various GAO offices, was promoted from a developmental to a full performance level as a Band I evaluator in 1991. (Tr. 11-13).

The evaluation year at issue in this case ran from June 1991 to June 1992. The Petitioner worked in the General Government Division (GGD), and was assigned, within that division, to the Office of the Assistant Comptroller General from June 1991 to November 1991, and to the Administration of Justice issue area from November 1991 to June 1992. (Tr. 13-15).

GAO's Pay-For-Performance System

Under the GAO's Pay-For-Performance system, merit pay and bonuses are meted out to employees annually. The PFP system is administered initially through an issue area-level panel called the Management Review Group (MRG). The operative instructions for the MRG are included in the PFP/APSS Assessment Handbook (hereinafter referred to as "handbook"), which is given to each member at the start of the process. (Tr. 46). The handbook directs that members of the MRG should be senior to the Band I and Band II employees that they evaluate and should include some persons who have had some contact with each employee to be evaluated. (Pet. Ex. 3, at 2). The MRG in this case included Harold A. Valentine, then the Associate Director of the Justice issue area, who functioned as chairperson (Tr. 97-98), and James A. Blume, Daniel C. Harris, Lynda D. Willis, Richard M. Stana, Weldon McPhail, and Edward H. Stephenson, Jr. (Tr. 25).

The handbook enjoined the MRG to seek to make a relative assessment or ranking of all employees in the issue area into four categories: Exceptional, Meritorious, Commendable, and Acceptable. A fifth category, Unacceptable, was not filled by the MRG, for it included only employees who were automatically assigned to the category when they received an unacceptable checkmark on some dimension of performance on their year-end appraisal. (Pet. Ex. 3 at 1-2). Employees assigned to the Exceptional category received the highest bonus and merit pay. Those assigned to the Meritorious category received the next highest bonus and merit pay. Employees assigned to the Commendable and Acceptable categories received no bonus monies, and the Commendable group received a higher merit pay increase than those in the Acceptable group. (Pet. Ex. 3 at 1). The MRG was to make its ranking based on three sources of information: (1) the performance appraisal prepared by the employee's supervisor; (2) a statement by the employee describing the contribution which he or she made to the unit; and (3) the exchange of knowledge which any MRG member had of the employee's contribution to the issue area and the group's work as a whole. (Pet. Ex. 3 at 8-9).

The unit as a whole (in this case, the General Government Division) was required to limit the number of persons assigned to each category in the following percentages: a maximum of 20% of the employees to the Exceptional group; a maximum of 66.6% to the Exceptional and Meritorious group (and thus entitled to receive a bonus); and a minimum of 10% of the group had to be assigned to the Acceptable group. (Pet. Ex. 3 at 1). To assure that the unit held to these precise group percentages, the Deputy Assistant Comptroller General for Human Resources, Ms. Joan Dodaro, gave, as the handbook states, "specific numerical guidance to each MRG":

Before the panels meet, the ACG will give each chair the "control numbers"--the maximum number the MRG may place in the Exceptional category, the maximum number of staff overall who can receive a bonus, and the minimum number who must be placed in the Acceptable category.

(Pet. Ex. 3 at 11).

Application of PFP to Petitioner

Pursuant to its authority, the MRG in this case assessed a total of 30 employees in the Justice issue area to which the petitioner was assigned, and was required to place no more than 6 employees in the Exceptional category, no more than 20 employees in the Exceptional and Meritorious categories combined, and at least 3 employees in the Acceptable category. (Tr. 49-51). Ms. Dodaro testified, that since only the assignments of employees to the Exceptional and Meritorious categories involved the payment of bonuses, the requirement that a specific percentage of employees be assigned to the Acceptable category below Commendable was not "driven" by budgetary considerations. (Tr. 232-234). If a unit as a whole could not adhere strictly to the assigned percentages, the head of the unit could seek a waiver from Ms. Dodaro. (Tr. 244). Nothing in the handbook specifies the basis upon which a unit head could request such a waiver.

Mr. Harold A. Valentine, chairperson of the MRG, testified that he had been given instructions by the GGD Human Relations Manager, Ms. Jacquelyn I. McDaniel, that allowed the MRG to request a waiver if they could not comply with the control numbers. (Tr. 120). However, Ms. McDaniel testified that she had no knowledge of the basis for requesting a waiver from meeting the control numbers and that she had not given the MRG which assessed the Petitioner any instructions on a waiver. (Tr. 83, 96). Ms. Dodaro confirmed that the waiver was only available by request of the unit head, and not the MRG. She testified, however, that members of the MRG should have been aware that the unit head could request a waiver and that there was some "flexibility" in the process. She testified, however, that she had not authorized any instructions to be given to the MRG panels indicating that they could start the process of a request for a waiver, and said that she would have had a "problem" if any such instruction had been given to any MRG. (Tr. 246).

The MRG which assessed Petitioner met in June 1992 to begin their deliberations. The handbook required the MRG to assess Band I employees separately from Band II employees. (Pet. Ex. 3 at 10). At the end of their first session, the MRG placed six (20% of total) of the Band I and II employees in the Exceptional category, an additional 13 employees (46% of total) in the Meritorious category, and the remaining employees, including the Petitioner, in the Commendable category. No employees from either Band I or II were placed in the Acceptable category. (Tr. 111-113). The Chairperson of the MRG testified that the group did not want to assign any employees to the Acceptable category because in the previous year that category was filled with persons who had some "unacceptable" ratings in their performance appraisals and none of the employees placed by the MRG in this year's Commendable category had such a low rating. (Tr. 112). There was nothing, he testified, which indicated that "their performance wasn't adequate." (Tr. 113).

The Chairperson of the MRG transmitted these results to Mr. Ray Rist, through Ms. McDaniel,

the Human Relations Manager. Mr. Rist, after consulting with Richard Fogel, the Assistant Comptroller General in charge of the GGD, sent an order to the MRG to reconvene and make another assessment which would comply with the directive to assign at least three employees to the Acceptable category. (Tr. 114, 209-211). Mr. Fogel testified that he gave no consideration to a waiver of non-compliance to the MRG because he did not have any knowledge of the particular employees they were evaluating and because he considered their refusal to assign 10% of the employees to the acceptable category to be a breach of policy. (Tr. 178).

The MRG reconvened and resubmitted a list in which the Petitioner and two other employees had been placed in the Acceptable category. (Tr. 120-121). The Chairperson of the MRG testified that there was unanimous agreement that Mr. Howard Kreitzman and Mr. Edward Luna be moved from Commendable to the Acceptable category. (Tr. 117). The assignment of the Petitioner to the Acceptable category was, however, "a very close call" because they decided that a decision had to be made between the Petitioner and Ms. Lou Smith and their performance evaluations "were relatively equal". (Tr. 116, 118).¹ The vote of the MRG was 4-3 to place the

¹ The relevant performance appraisals of Petitioner and Ms. Smith contained the following ratings:

Lou V.B. Smith - Rating Period 6/16/91-6/15/92

Job Dimensions

Planning	-	Exceeds Fully Successful
Data Gathering and Documentation	-	Exceeds Fully Successful
Data Analysis	-	Fully Successful
Written Communication	-	Fully Successful
Oral Communication	-	Fully Successful
Working Relationships, Teamwork, and Equal Opportunity	-	Outstanding
Supervision, Appraisal, and Counseling	-	No Basis for Evaluation

[Petitioner received two separate performance appraisals for the rating year as she worked in two different offices within GGD.]

Janice M. Turner - Rating Period 11/12/91-6/15/92

Job Dimensions

Planning	-	Exceeds Fully Successful
Data Gathering and Documentation	-	Exceeds Fully Successful
Data Analysis	-	No Basis For Evaluation
Written Communication	-	Fully Successful
Oral Communication	-	Exceeds Fully Successful
Working Relationships, Teamwork, and Equal Opportunity	-	Exceeds Full Successful
Supervision, Appraisal, and Counseling	-	No Basis for Evaluation

Janice M. Turner - Rating Period 6/16/91 to 11/91

Job Dimensions

Planning	-	No Basis for Evaluation
Data Gathering and Documentation	-	No Basis for Evaluation
Data Analysis	-	Exceeds Fully Successful
Written Communication	-	Exceeds Fully Successful
Oral Communication	-	Outstanding
Working Relationships, Teamwork, and Equal Opportunity	-	Outstanding
Supervision, Appraisal, and Counseling	-	No Basis for Evaluation

Petitioner in the Acceptable category. (Tr. 121).

Mr. Weldon McPhail, a member of the MRG, testified that he had voted for Ms. Smith because he supervised her and thought she had done an "outstanding" job in data collection--and "I thought that relatively speaking she had simply done more [than the petitioner]". (Tr. 223). Mr. McPhail had not supervised the Petitioner at any time during her work in the Justice issue area; he had only worked with the Petitioner years earlier when she was assigned to a unit called Civilian Personnel. (Tr. 226). Mr. Dan Harris, a member of the MRG, reported on the work of the Petitioner (Tr. 118), but Petitioner had done no data collection work while in the Justice issue area. (Pet. Ex. 3). While in the office of the Assistant Comptroller General during the 6 month period prior to being assigned to the Justice issue area, the Petitioner received an "exceeds fully successful" evaluation on her performance appraisal for data collection, equivalent to that received by Ms. Smith in the Justice issue area. (Pet. Ex. 1 and Resp. Ex. 2). Mr. McPhail testified that he had also voted for Ms. Smith because she had engaged in volunteer activities as a member of the African-American Council and the Toastmasters. On cross-examination, he conceded that the Petitioner had also participated in these two activities. (Tr. 224-225).

Ms. Linda Willis, another member of the MRG, testified that one factor that influenced her vote to place the Petitioner instead of Ms. Smith in the Acceptable category was that the Petitioner had a dimension in her performance appraisal which indicated "no basis to judge" whereas Ms. Smith had received a rating on that dimension (data collection, noted above). (Tr. 140, 142-144). Ms. Willis also testified that while she was not aware of any process for the MRG to "formally" request a waiver, she thought that was "in essence" what they were trying to effect by not putting any employee in the bottom 10% category. (Tr. 141).

Mr. James M. Blume, also a member of the MRG, stated that he thought that having to assign employees in the group they evaluated to the Acceptable category was "arbitrarily making a cut at some level." (Tr. 151). He also testified that he had no knowledge of the MRG having an option of requesting a waiver if they determined that no employees should be assigned to the Acceptable category. (Tr. 152-53). Upon receiving instructions to reconvene and assign 10% of the employees to the Acceptable category, he stated that the fact that the Petitioner had a "no basis to evaluate" on the dimension of data analysis "was a factor that probably swayed my vote." (Tr. 163).

Petitioner received a letter informing her of the final MRG decision. (Pet. Ex. 2). The letter indicated that she would receive no bonus, but a pay raise of \$390. The record indicates that Petitioner would have received a merit pay increase of \$1,363 if she had been left in the Commendable category. (Tr. 51). The letter informed her that "it was difficult to weigh the contributions and experiences of our newer staff with that of staff who have been in the Justice issue area for the entire assessment year." (Pet. Ex. 2). The Chair of the MRG also told the Petitioner that when one is "new to an area, you have to work harder to make sure that their performance and contributions are considered on par with everybody else". (Tr. 123-124).

Expert Opinions

Dr. William Belmont, an economic consultant, was called by the Petitioner to give an expert opinion on the Respondent's evaluation process. He reviewed the hearing transcripts, exhibits and depositions of witnesses who appeared in the hearing. (Tr. 264-265). Dr. Belmont testified that based on statements made by Ms. Joan Dodaro, the Respondent had developed the percentages that would govern each category in the rating system based on a "bell curve" form of frequency distribution.² Dr. Belmont testified that a bell curve might be a proper predictor for the performance of a large group, such as all employees in the General Accounting Office, but that it was not appropriate to use such a prediction of future performance for every issue area where, as in Petitioner's case, the group was as small as 30 employees. (Tr. 273).

The Respondent called Dr. Erich P. Prien, an industrial psychologist, as an expert witness. Dr. Prien testified that he had assisted the Respondent in constructing the Pay-For-Performance system, but that he had not suggested the percentage breakdown that the Respondent used for the various categories, and no management official had informed him that they would be operating from a bell curve system. (Tr. 324-327). Dr. Prien testified that the percentage breakdowns would have been legitimate if they were based on management's experience as to the distribution of high and low performers. (Tr. 327-330). Dr. Prien also testified that he saw the percentages for categories as "guidelines", and that in his understanding of how the PFP system operated "there are opportunities for exceptions" (Tr. 330), and that if assignment to a category working with 30 employees was "absolutely mandatory", he would "have a hard time saying that was completely acceptable". (Tr. 353). Dr. Prien also testified that if a group was small (10 employees) and they were all high level performers that he would have "some difficulty" with a relative ranking system that did not allow "an MRG" to seek a "waiver". (Tr. 372).

APPLICABLE STATUTES

Pursuant to 31 U.S.C. §§732(a) and (b)(1) and (2), GAO is required to maintain a personnel

² Dr. Belmont also submitted a written report (Pet. Ex. 8) which buttressed his claim that the Respondent was relying on the bell-curve form of frequency distribution: "it is useful to begin by recognizing that the bell curve distribution is a theoretical concept. It technically represents the limit of binomial expansion as "n" (the number of tries or observations in an experiment) approaches infinity." (at p.6). "...the theoretical bell shaped or normal curve is unimodal, is symmetrical around the peak value (the simple mean of the distribution) with calculable measure of variance. Thus it is known that in a bell curve or normal frequency distribution, the area bounded by plus and minus one standard deviation from the mean is equal to approximately 68 percent of the area or cases under the entire curve." (at p. 7) Dr. Belmont noted that the Respondent had prescribed a total of 70 percent of employees to the middle range:

Meritorious = 47 percent
Commendable = 23 percent
Total = 70 percent (at p. 3)

management system which incorporates the merit system principles of 5 U.S.C. §2301(b) and prohibits personnel practices prohibited under 5 U.S.C. §2302(b). 31 U.S.C. §§732(d)(1) and 731(b) require that GAO be governed by 5 U.S.C. §§4302 and 5401. Section 5401, in pertinent part, states that the agency must:

- (1) use performance appraisals as the basis for (a) determining adjustments in basic pay by general pay increases and merit increases, and (b) making performance award determinations;
- (2) within available funds, recognize and award quality performance by varying amounts of performance and cash awards.³

Section 4302 requires the maintenance of a performance appraisal system and that performance appraisals be used as a basis for rewarding and promoting employees.

CONTENTIONS OF THE PARTIES

Petitioner

Petitioner argues that the Respondent imposed a mandatory distribution system, which allowed for no exceptions generated by the MRG which administered its Pay-For-Performance plan, and that implementation of such a system constituted a prohibited personnel practice. The first submission of the MRG in which Petitioner was assigned to the Commendable category was an evaluation based on the Petitioner's actual performance on the job. Petitioner's subsequent relegation to the lower Acceptable category was driven by the mandatory distribution system and thus was not related to job performance.

Petitioner takes the position that 5 U.S.C. §2302(b)(11) prohibits the Respondent from taking any personnel action which violates a law, rule or regulation which implements or directly concerns a merit system principle contained in 5 U.S.C. §2301. The two merit system principles under 5 U.S.C. §2301(b) which were violated by Respondent's actions, are those which state:

...advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity. [Subsec. 1].

...appropriate incentives and recognition should be provided for excellence in performance. [Subsec. 3].

³ 5 U.S.C. 5401 has been repealed, but 31 U.S.C. Section 731 (b) now states that the Comptroller General may establish a merit pay system consistent with section 5401 of title 5, as in effect on October 31, 1993. The repeal of 5 U.S.C. Section 5401 took effect on November 1, 1993.

The merit system principle in §2.4 of 4 C.F.R. which requires that employees, "in a merit system", should be "rewarded"..."on the basis of individual ability", and not on the basis of "personal favoritism", was also violated.

The laws implementing these merit system principles which petitioner allege were violated are 5 U.S.C. §5401(1) and (2), concerning the use of performance appraisals as the basis for determining merit pay increases and performance award determinations, and 5 U.S.C. §4302a, which prohibited prescribing "a distribution of levels of performance ratings for employees".

Respondent

Respondent takes the position that the merit system principles relied on by the Petitioner do not support her allegations. It argues that 5 U.S.C. §2301(b)(1) does not address pay-systems, but is concerned solely with recruitment, selection and advancement. Moreover, even if "advancement" were affected by the evaluations made in Petitioner's case, §2301(b)(1) expressly recognizes that advancement may be determined by "relative ability". The GAO Pay-For-Performance system was designed to measure relative ability.

Respondent recognizes that 5 U.S.C. §2301(b)(3) addresses equal pay for equal work, but asserts that this principle provides that incentives should be granted for excellence in performance. Respondent argues that the GAO PFP system provided appropriate incentives because it rewarded employees according to levels of excellence of performance. Respondent contends that the merit system principle noted in 4 C.F.R. §2.4(a) was not violated because it requires awards to be based on individual abilities without discrimination or personal favoritism and the PFP incorporates those principles. 4 C.F.R. §3.1 recognizes merit as the guiding factor in appointing, promoting and assigning employees. Respondent takes the position that this provision was not violated, first, because a merit pay decision under the PFP system is not an "appointment, promotion or assignment," and second, because merit was involved in the personnel action regarding the Petitioner. Respondent contends that 5 U.S.C. §4302a which prohibited forced distributions is not applicable to GAO.

Respondent argues that the MRG, in its initial evaluation and assignment of Petitioner to the Commendable category, was involved in a repudiation of their instructions to relatively rank employees and, in doing so, to assign a specific number of employees to the Acceptable category. The MRG thereafter properly followed instructions to rank employees relatively and to comply with the percentage guidelines. The MRG should have been aware that the head of a unit could request a waiver of compliance with the requirement that 10% of employees be assigned to the Acceptable category because it was recorded in the handbook they received. If the first submission of the MRG was a request for a waiver, it was denied because the Assistant Comptroller General, GGD, Richard Fogel, "had determined that the overall quality of employees' performance and contributions was fairly comparable across all the issue areas". (Resp. Post-Hearing Brief at 7).

ANALYSIS

Having carefully considered all the evidence of record, as well as the arguments of the parties, the Board finds, for the reasons stated below, that Respondent committed a prohibited personnel practice when its system of performance rankings and forced distribution into one of four categories resulted in Petitioner being placed in the Acceptable category during the 1992 Pay-For-Performance merit pay/bonus determinations.

I. Was There a "Forced Distribution" Of PFP Categories?

The first issue to be confronted in this case concerns the facts. Was there a "forced distribution" of employees into PFP categories, or was there flexibility? If there was some flexibility and relief from a mandatory assignment of employees to specific categories of contribution, where was the authority or discretion lodged to bring it into play--with the MRG or higher management? If such flexibility existed, what criteria were operative to guide the discretion? How, precisely did the evaluation of the Petitioner go forward?

Based on the evidence of record in this case, the Board finds that the Respondent operated a Pay-for-Performance system that required the MRG to assign no more than 20 percent of employees to the top category of performance--Exceptional, and required the assignment of no less than 10 percent of employees to the bottom category--Acceptable. The requirement for the MRG was absolute--they had no discretion to do otherwise, and there was no rule or practice which permitted them to request a waiver from that requirement.

Mr. Harold A. Valentine, the Chairperson of the MRG, was the only witness who claimed that the MRG itself had discretion not to meet its control numbers, by requesting a waiver. He testified that he was given instructions to that effect by the Human Relations Manager, Ms. McDaniel. The problem with Mr. Valentine's testimony is that it was contradicted by the handbook of instructions under which the MRG operated and by every other witness, including his superiors who testified. Ms. McDaniel denied that she had given the MRG members any instructions on the possibility of a waiver. Indeed, Ms. McDaniel testified that she was unaware of the basis upon which waivers were granted, when they were recognized. (Tr. 83, 96). Mr. Richard Fogel, Assistant Comptroller General in charge of GGD, testified that the handbook contemplated that only "Unit heads may request a waiver from ACG OPS if they are unable to meet the 10 percent requirement". (Tr. 175). He further stated that "we never envisioned that we would quite frankly give a specific waiver to a particular panel within the division." (Tr. 176). Mr. Ray Rist, the Director of Operations for the GGD stated: "The agency nor the division had set up a mechanism whereby a single issue area had the opportunity to create a waiver". (Tr. 207).

Ms. Joan Dodaro, the Deputy Assistant Comptroller General for Human Resources, made a somewhat internally contradictory claim: She testified that the option for a waiver existed only at

the unit level, and not the issue area level, but that the "panel members know that there is some flexibility". (Tr. 248). She then claimed, however, that if the MRG panel members were given direct instructions on the grounds for requesting a waiver "In fact, I probably would have had some problem if there was a lot of discussion about that kind of thing." (Tr. 245-246).

The bases for entertaining a waiver, even by the unit head, do not appear in the handbook. Ms. Dodaro testified that one of the bases upon which she would have entertained a waiver from a unit head is where "individuals were so close that you couldn't possibly make distinctions". (Tr. 245).

However, structurally, only the MRG panel, and not the unit head, could identify when it was impossible to make such distinctions. As Mr. Fogel testified when explaining why he did not consider a waiver of the 10 percent requirement for the Justice issue panel: "I didn't know who was on the list...The people that really knew the staff and had to make the decision was the panel itself." (Tr. 178-179). Mr. Fogel, however, also testified that he made no inquiry of the MRG panel members or the Chairperson as to the basis for their decision not to assign any employee to the Acceptable category--he simply treated it as a breach of the policy of mandatory assignment. (Tr. 181-182). Therefore the circumstance identified by Ms. Dodaro as warranting a waiver could not functionally occur because the MRG had no power to request a waiver and the unit heads were not authorized to inform them of the very basis for a waiver identified by Ms. Dodaro.

The evidence reveals that Respondent imposed a a priori percentage categories on performance evaluations in a layperson's attempt, as Dr. Belmont testified, to mimic the bell curve form of frequency distribution. The problem, as Dr. Belmont noted, was that the statistical theory of the bell curve operates only to predict performance when the sample is sufficiently large, and that a group of 30 employees does not meet this criterion. (Tr. 273). The Respondent seeks to overcome or circumvent the damaging testimony of Dr. Belmont by advancing a statement of fact in their brief (without record citation) that Mr. Fogel had "determined that the overall quality of employees' performance and contributions in GGD was fairly comparable across all the issue areas and that management could relatively rank employees, including identifying the bottom 10 percent employees, even where there were high performers in an issue area". (Resp. Post-Hearing Brief at 7). There is nothing in Mr. Fogel's testimony, or indeed in the record as a whole, which supports the claim that management made a determination that employees in every issue area were identical or even "comparable" as to abilities and performance.

The vice in the forced distribution which the Respondent imposed on the evaluation of employees by the MRG is that it did not accommodate, in fact, the possibility that some employees could be so close in performance that making a distinction in terms of who was superior could not be done with any reasonable degree of certainty. That appears to have been precisely the case with the distinction which the MRG was required to make between the Petitioner, whom they assigned to the Acceptable category, and Ms. Lou Smith, who they left in the Commendable category. The performance appraisals of the two employees were virtually identical. No member of the MRG testified that there was a significant difference between the

two employees in terms of their respective contribution statements. One member of the MRG was candid enough to admit that he felt he was being forced into "arbitrarily making a cut at some level" (James M. Blume, Tr. 151). Other members of the MRG were thus forced into one of three postures: vague conclusory statements about the differences between the two employees [Linda Willis, (Tr. 139), Harold Valentine, (Tr. 118)]; statements about superior contributions by Ms. Smith which were immediately refuted on cross-examination (e.g. volunteer work in the African American Council and the Toastmasters [Weldon McPhail (Tr. 224-225)] or reliance on the fact that the Petitioner had a "no basis to evaluate" on one dimension on which Ms. Smith had been rated [James A. Blume, Tr. 163; Linda Willis, Tr. 140, 142-44]). On this last issue, the key agency official, Ms. Dodaro, confirmed that it was inappropriate for panel members to have down-graded the Petitioner's competitive stance vis-a-vis another employee because she had been assigned work which did not entail a possibility of a rating on one or another dimension. (Tr. 243). Respondent, in its brief, recognized that panel members used the "no-basis" factor improperly, but there was an effort to argue that panel members McPhail and Willis offered additional reasons for voting for Ms. Smith over the Petitioner. However, panel member Blume testified that the "no-basis" factor "probably swayed my vote" (Tr. 163), and he can be viewed as the deciding vote in a 4-3 decision.

II. Was GAO Prohibited From Using A Forced Distribution System?

Had this case arisen in an executive branch agency, there would undoubtedly be a finding that the Respondent committed a prohibited personnel practice. Prior to 1984, the Office of Personnel Management (OPM) had regulations which prohibited the forced distribution of performance levels. In 1983, as the Congress began considering the passage of 5 U.S.C. §4302a, as part of merit pay reform in the Civil Service Amendments of 1984, the OPM proposed revised regulations that would eliminate the strict bar against forced distribution. OPM tried to explain that it was not asking for authority to "require 65% of employees receive Fully Successful ratings nor require fixed percentages for other rating levels"--it only wanted to avoid managers being "reluctant to require that inaccurate appraisals be revised for fear of being accused of forcing the distribution of ratings".⁴ OPM gave assurances that, even if the revised regulations were permitted, "OPM has and will continue to encourage accurate appraisals of performance." (See, footnote 4). The hearings clearly indicate that Congress was aware of the modest proposals of the OPM for modification of the prohibition on forced distribution,⁵ but passed Section 4302a, which contained an express provision prohibiting forced distribution of performance levels, suggesting that Congress believed the provision was essential to the integrity of the merit pay system.⁶

⁴ See Merit Pay & Proposed Pay-for-Performance Regulations: Hearings Before the Subcomm. on Civil Service, Post Office, & General Services of the Sen. Comm. on Governmental Affairs, Pt. 1, 98th Cong., 1st Sess. 40 (1983).

⁵ See Hearings, *supra* note 3, at Pt. 2, at 270, 274.

⁶ 5 U.S.C. §4302a subsec. (e): In carrying out this section, neither the Office nor any other

Indeed the Respondent, speaking through its then Director of the General Government Division, submitted a report in 1983 to the Senate Subcommittee which was considering the bill which expressly disapproved of the forced distribution of ratings. The GAO report said:

Another desirable feature of the bill is the continued prohibition against OPM or the agencies prescribing any preestablished distribution of ratings. As discussed earlier, good practice dictates that employees be evaluated against established performance standards. To apply pre-established ratings distributions would be contrary to this sound principle.⁷

Respondent correctly argues that 5 U.S.C. §4302a did not expressly apply to GAO. The section applied only to agencies within the meaning of 5 U.S.C. §4301, and GAO was specifically excluded. However, the principle barring forced distributions in evaluation of work performance is so central to merit determinations, that OPM has retained the prohibition on forced distribution in performance ratings [5 C.F.R. §430.206(d)],⁸ and merit pay [5 C.F.R. §540.104(d)]⁹ even after 5 U.S.C. §4302a was repealed.¹⁰

In line with the retention of these regulations, the Merit Systems Protection Board (MSPB) has considered an executive branch challenge involving a "bell curve" distribution for performance evaluations and merit pay awards, such as that involved in this case. In *McDiarmid v. U.S. Fish*

agency may prescribe a distribution of levels of performance ratings for employees covered by chapter 54 of this title.

⁷ See Hearings, *supra* note 3, Pt. 2 at 149 (July 14, 1983).

⁸ Forced distribution. An agency may not prescribe a distribution of levels of ratings for employees covered by this subpart.

⁹ [n]o merit pay determination may take into consideration any pre-established or forced distribution of levels of performance among Merit Pay System employees.

¹⁰ The repeal of section 4302a had nothing to do with dissatisfaction with the prohibition on forced distribution. The Civil Service Amendments of 1984 had provided that merit pay in the executive branch would be implemented on an experimental basis, for a fixed term. 5 U.S.C. §5410. The termination date was extended several times until the Performance Management and Recognition System Termination Act was enacted in 1993 which provided for orderly termination of the merit pay system and authorized merit increases and performance awards for the Fiscal Year 1993 performance cycle.

& Wildlife Service, 23 M.S.P.R. 420 (1984), the MSPB noted that the agency issued new instructions to be used "strictly as a guideline," for the purposes of achieving a more unified application of the rating system. The challenge had involved allegations that the petitioners' ratings were "arbitrarily lowered by their fund supervisors who were imposing a percentage limitation on the number of level I and level II ratings." *Id.* at 421. The MSPB granted a motion to dismiss the case as moot after the agency revised its instructions and voluntarily agreed to adjust the challenged ratings. The new instructions provided that managers were not allowed "'to define or engage in any effort to pre-establish rating distribution patterns'," and that managers would "'be held accountable for ensuring that all employees under their directions are evaluated only by the application of performance standards to their actual performance'." *Id.* See also, *McDiarmid v. U.S. Fish & Wildlife Service*, 19 M.S.P.R. 347 (1984) (decision granting petition for review of implementation of regulations governing performance appraisals).

Respondent argues that this Board recognized that "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". *Cosella, et al. v. GAO*, 2 PAB 383, 405 (1994). It may be true that there is no warrant for an automatic assumption that there must be a strict identity between GAO personnel practices and those in executive branch agencies, but it is also true, that when fundamental employment rights are implicated, "Congress desired for employees of the GAO the same degree of legal protection accorded executive branch employees." *G.A.O. v. G.A.O. Personnel App. Bd.*, 698 F.2d 516, 523 (D.C. Cir. 1983). GAO was given a separate personnel and enforcement system to "remove the appearance of conflict between the GAO and the executive personnel agencies" that it had a mandate to monitor and assess. *G.A.O. v. G.A.O. Personnel App. Bd.*, *supra*, at 523. There is nothing in GAO's need for autonomy and separation of its personnel system which suggests that it must have access to an arbitrary, rigid process for the distribution of bonuses and merit pay.

The Respondent's only authority for the distribution of merit pay requires that it establish a system consistent with 5 U.S.C. §5401. That statute requires that pay and merit increases be based on performance appraisals. The quintessence of a performance appraisal is that it be grounded solely in the performance of the employee. The forced, inflexible distribution system which the Respondent relied upon to determine pay and merit increases could, and did in this case, become unmoored from the actual performance of the Petitioner, and thus was violative of §5401. The forced distribution system also violated 4 C.F.R. §2.4 in that it was not a "merit system" which "rewarded...on the basis of individual ability." These provisions implement the merit system principles that "advancement should be determined solely on the basis of relative ability, knowledge, and skills" and that "[e]mployees should be protected against arbitrary action". 5 U.S.C. §2301(b)(1) and (8).

While this opinion is primarily concerned with the lawfulness of the Respondent's forced distribution system, the Board is also troubled by the Respondent's relative ranking system utilized in this case. The Board questions whether the Respondent needed additional statutory authority in order to adopt a system for distributing pay and merit increases which does not rely

exclusively on the performance appraisal system. The sole statutory authority for the Comptroller General to establish a "merit pay system" is 31 U.S.C. §731. That statute requires that the merit pay system be consistent with §5401 of title 5. Section 5401 requires to agency to:

(1) use performance appraisals as the basis for (a) determining adjustments in basic pay by general pay increases and merit increases, and (b) making performance award determinations.

In conjunction with the §5401 requirement for a merit pay system, GAO is also statutorily required to provide its employees with a performance appraisal system meeting the requirements of 5 U.S.C. §4302. Like §5401, §4302(a)(3) also contains a requirement that "the results of performance appraisals [be used] as a basis for...rewarding ...employees". In *Wells v. Harris*, 1 M.S.P.R. 208, 230 (1979), the Merit Systems Protection Board discussed the legislative history of §4302:

The Legislative history shows that Congress intended to...require a single interrelated framework for performance appraisals under §4302 systems in which those appraisals would be the basis for multiple personnel actions including promotions, pay increases and awards as well as adverse actions.

In sum, it is arguable that §§5401 and 4302 are inextricably intertwined--and that both require that performance appraisals serve as the exclusive or primary basis for all merit pay/bonus award decisions. It is clear from Respondent's brief, and from testimony in the hearing, that although the performance appraisal was to be one of the inputs to decision making by the MRG, it played a minimal role. Ms. Dodaro testified:

The [performance] rating is a marginal input to this whole panel process. It is a piece of paper. The primary thing on a relative comparison that we're looking for is the panel's view of what people did.

(Tr. 256).

The handbook reinforces this position by describing the panelist's knowledge of each individual's and the group's work as "the key element in making relative distinctions." (Pet. Ex. 3, at p. 9).

It is possible that the Respondent could take the position that based on research done by their expert witness, Dr. Prien, that there were aspects of performance that were not adequately captured by the performance appraisal. (Tr. 336-338). The question which would then remain,

is, can the Respondent lawfully adopt a performance assessment process which is structured to subordinate the performance appraisal, if that assessment process lacks many of the procedural safeguards which attach to the performance appraisal process? Unlike the performance appraisal process, in the Respondent's relative ranking, an employee is not told in advance what elements of performance will be evaluated. There is no mid-term feedback to the employee, so that the employee may gauge his or her progress. An MRG panel may (as in this case) have only one member who has actively worked with an employee during the evaluation year. The MRG, however, makes decisions by majority vote--therefore a majority of panelists can determine an employee's rank although they have no working knowledge of that employee's performance. The handbook urges MRG panelists to take notes during the deliberative process, but "these notes are not part of the official record, and need not be retained." (Pet. Ex. 3, at p.10). Since no record of these deliberations is required, is the feedback process deficient to that which an employee would receive in a performance appraisal? Is accurate feedback possible if each panelist has made a judgment on a different basis (again, as appeared in this case)? Are the instructions as to the meaning of the various categories of ranking sufficiently clear?

In this case it appeared that the MRG may have refused initially to put any employee in the Acceptable category because they thought it signalled not only that some employees ranked below others, but that "Acceptable" meant substantively marginal or barely adequate performance. This understanding may have fostered by the handbook because, while it describes the Acceptable category as appropriate for those "performing less well", it also states: "This category is appropriate for staff who meet job expectations, but rarely exceed any--and for those who do their job, but little more." (Pet. Ex. 3, at p. 10).

CONCLUSION AND ORDER

For the reasons stated above, the Board finds that Petitioner has prevailed and satisfactorily proven that she was subjected to a prohibited personnel practice by Respondent. As relief, the Respondent is hereby **ORDERED** to retroactively place Petitioner to the Commendable category for the 1992 Pay-For-Performance merit pay/bonus determinations, with appropriate adjustments in back pay and in her official personnel records.