

Richard L. Madson v. U.S. General Accounting Office

Docket No. 96-07

Date of Decision: December 2, 1997

Cite as: Madson v. GAO (dissent) (12/2/97)

Before: Michael Wolf, Member (dissenting)

Reconsideration

Reduction-in-Force

Transfers

Administrative Judge Michael Wolf, dissenting:

I respectfully dissent from the opinion of my two colleagues.

To put my objections to the majority's decision in proper context, it is necessary to highlight a few critical facts: The Petitioner's specific RIF notice was issued on May 23, 1995. It advised Petitioner that his position was being abolished effective September 13, 1995 and that he had the option of choosing one of the following Agency actions:

1. Separation;
2. Reassignment to Dallas, Texas;
3. Reassignment to Washington, DC.

In addition, Petitioner was informed that he could avoid the above actions altogether if he opted to retire effective January 13, 1996. The Petitioner's deadline for choosing one of these options was September 13, 1995.

Throughout the ensuing communications between Petitioner and GAO, he made it clear that he preferred to retire. However, he also did nothing to suggest that he was abandoning his right to select one of the other options, including a reassignment.

On August 7, 1995, the Comptroller General issued his Memorandum to "All GAO Employees," which adopted the following recommendations set forth in the accompanying July 31, 1995, memorandum from senior staff:

[W]e decided that the New York and Detroit offices should be closed on November 10, 1995. Likewise, HEHS's social security site should be closed at that time. We also concluded that today's budget climate requires that Cincinnati's already scheduled closure

should be moved up to November 10, 1995.

One of the more difficult issues we addressed as a team involved the question of allowing staff in these locations to transfer to other GAO offices. We reluctantly concluded that the agency should not authorize affected staff to move to other GAO offices. If moves were allowed, our history indicates that as many as 50 percent of the staff would relocate. Thus, to achieve the same downsizing target for field offices, we would be required to close twice as many offices. In our judgement, doing so would cause excessive disruption and too severely weaken our essential field structure.

Resp. Exhib. 11 (emphasis added). By its own terms, this memorandum did not address the San Antonio office or Petitioner.

The majority opinion glosses over the fact that Petitioner testified in deposition that he had a conversation with Management official Dan Garcia on August 8, 1995 to ascertain whether the August 7, 1995 memorandum would affect his RIF rights. Petitioner recalled that Garcia told him that the Comptroller General's memorandum would not apply to him. For purposes of deciding a summary judgment motion, we must accept Petitioner's sworn deposition testimony as true, especially since the Agency presented no evidence (documentary or testimonial) to dispute it. The majority simply ignores this testimony.

On August 24, 1995, Petitioner submitted a memorandum seeking eligibility for a buy-out offer that had been circulated throughout the Agency. Petitioner stated in the memorandum that he did not wish to transfer, but he also did not abandon or waive his right to exercise this option. In response to this request, Dan Garcia informed Petitioner by telephone on August 29, 1995 that he would not be eligible for the buy-out offer unless he agreed to terminate his employment by October 1, 1995 (as opposed to January 13, 1996) and that he no longer had the option to transfer to Dallas or Headquarters. This verbal communication, only two weeks before the September 13, 1995 RIF deadline, was the first time that Petitioner had been informed of the rescission of his right to select reassignment as the RIF action. The Agency's position was reiterated in another telephone conversation, this one with Steve Schmal, Chief of GAO's Employee Relations Branch, on August 30, 1995.

On August 25, 1995, the Special Assistant to the Comptroller General issued a memorandum to the "Managers of Cincinnati, Detroit and New York Regional Offices." Pet. Exhib. 3. That memorandum rejected a proposal to "review the decision to set November 10 as the date for closing the Cincinnati, Detroit and New York field offices, and the decision not to permit staff in those offices to relocate to Washington, D.C." (emphasis added). As with the July 31, 1995 memorandum, this document did not address the rights of the one employee who was nominally still assigned to the San Antonio office.

On September 12, 1995, Petitioner submitted a written request for retirement, to become

effective January 13, 1996. However, on the following day, Petitioner left the voice-mail message for Dan Garcia that is quoted at footnote 6 of the majority opinion. The voice-mail request to transfer to Dallas was denied by letter dated September 20, 1995 from Joan Dodaro (then Deputy Assistant Comptroller General for Human Resources). This last correspondence was the first time since the RIF notice of May 23, 1995 that GAO sent a written communication to Petitioner advising him that the reassignment option in that RIF notice was rescinded.

GAO's own regulations require specific RIF notices to be in writing. It is a rule that ensures that both the Agency and the affected employees are able to make informed judgments about their future courses of action. When confronting the difficult choices that a RIF presents, employees are entitled to a clearly enunciated statement from the Agency of their rights and options. In this respect, GAO needs to be mindful of the enormous burdens that a RIF can impose on a work force, including, at its most extreme, the termination of employees' careers. The Agency's strict adherence to proper procedures is crucial to preserving employees' rights. GAO itself seems to recognize this fact:

This is a highly sensitive area of employee-management relations and should be viewed as part of the overall management concern of GAO. Mere literal adherence to the regulatory and procedural requirements of reduction in force alone does not make for a sound program. It is important to remember that in reduction in force some employees will be hurt. This factor automatically increases the degree of emotional involvement, anxiety, and potential for adverse effects on morale.

Order 2351.1 (July 25, 1986).

In the case of Petitioner Madson, I do not believe that the Agency complied with either the letter or spirit of its own regulations governing RIFs. In particular, the Agency failed to comply with the following requirement in Chapter 6 of Order 2351.1:

Employees are entitled to new written notice of at least 30 days if GAO decides to take an action more severe than that first specified.

In view of the fact that the no-transfer rule for employees in newly closed offices was promulgated on August 7, 1995 and in view of Petitioner's inquiry about that rule on August 8, 1995, the Agency had time to provide Petitioner with written notice 30 days prior to his September 13, 1995 deadline if it wished to extend the no-transfer rule to him. Instead, the Agency gave conflicting verbal advice to Petitioner with regard to his reassignment rights. The only written rescission of those transfer rights came after the September 13, 1995 deadline for his early retirement decision, when Ms. Dodaro wrote a letter to Petitioner on September 20, 1995. The confusion engendered by GAO's inconsistent verbal communications to Petitioner and its untimely submission of a written rescission of Petitioner's reassignment rights compels me to

dissent. Although GAO's failure to comply with all of the requirements of that Order appears not to have been the product of malice or bad faith, it nevertheless is a defect that should be fatal to its actions in this case.

An ordinary reassignment of an employee is not appealable if it does not involve a reduction in pay or grade or some other adverse consequence. However, if a reassignment to another job is effectuated through RIF procedures and for reasons relating to a RIF, the employee does have a right of appeal. *Marcinkiewicz v. FAA*, 10 MSPR 631 (1982); *Mantick v. HUD*, 6 MSPR 358 (1981).

If a reassignment is effectuated through a RIF, then the agency is obligated to provide the employee all of the procedural rights applicable to a RIF; this is so even when the reassignment does not involve the displacement of another employee (e.g., in a bumping situation). *Payne v. Department of Interior*, 26 MSPR 159 (1985); *Mantick. Accord, Patton v. Smithsonian Institution*, 26 MSPR 609 (1985). In *Payne*, the MSPB held that an agency is not required to follow RIF procedures when it reassigns an employee outside the context of a RIF and without causing a displacement of another employee. However, the Board further observed that when an agency chooses

to effect a release and reassignment under RIF procedures, appellant is entitled to all the procedures and protections afforded by the RIF regulations.

Payne, 26 MSPR at 160.

Moreover, the fact that an agency extends gratuitous rights or benefits in a RIF action does not relieve it of the obligation to apply all RIF rules to those rights and benefits. For example, in *Reed v. Department of Commerce*, 18 MSPR 697 (1984), the employee received a RIF notice which informed him that he could receive a specified amount of severance pay as an alternative to a reassignment. The amount of the severance pay was set forth in the specific RIF notice. After the employee's separation, the agency determined that the amount of the severance pay was incorrect and lowered the amount to conform with what it should have been. When the employee contested the agency's right retroactively to lower his severance amount, the MSPB concluded the following:

The entitlement to severance pay in the amount of \$2,039.40 was specifically set forth in the specific RIF notice for appellant's consideration in making his decision regarding acceptance of reassignment rights. Although the agency was not required to set forth such information in the specific RIF notice, we find that its inclusion made it a specific portion of the RIF procedures applied to this appellant.

Reed, 18 MSPR at 698-99. The MSPB rejected the agency's RIF action because the employee's agreement to be separated was procured by misinformation.

I would apply the foregoing principles to the instant case. GAO was not obligated to offer Petitioner a right to select reassignment as an alternative to early retirement or termination, but it nevertheless extended that right to him and made that option a part of his RIF notice. The reassignment rights enumerated in the May 23, 1995 RIF notice became part of the proposed RIF action. All of the procedural rights attendant upon a RIF therefore became applicable to the reassignment rights offered in the RIF notice. Those procedural rights included the 30-day written notice provision in Chapter 6 of Order 2351.1.

As previously explained, the agency's "action" for purposes of Order 2351.1 was the following:

1. Involuntary Separation;
2. Reassignment to Dallas;
3. Reassignment to Washington, D.C.

The agency told Petitioner that it was his option to choose one of those actions or, alternatively, to take early retirement. The fact that the reassignment option was a gratuitous inclusion in the RIF notice is completely irrelevant under the foregoing precedent. Similarly, the fact that Petitioner was given the option to choose among the several "actions" does not alter the fact that they are all part of the RIF "action" for purposes of Order 2351.1. I therefore cannot accept the argument that, because the reassignment rights extended to Petitioner in his specific RIF notice were gratuitous, they are somehow entitled to less procedural protection than other parts of the RIF notice.

Nor can I accept the argument that the rescission of Petitioner's reassignment rights was not a "more severe" action than the one originally proposed on May 23, 1995. The original RIF notice offered Petitioner several options short of involuntary separation, including reassignment to other locations. The Agency also gave Petitioner sole control over which of the options would be implemented. When GAO withdrew Petitioner's right to select the reassignment options, it certainly was imposing a more severe action within the meaning of Order 2351.1. A RIF action which limits an employee to only one alternative to separation is clearly and logically "more severe" than a RIF action that affords an employee three alternatives to separation.

Employees in a RIF are often forced to make decisions affecting their careers; those decisions may have long-range consequences that require careful consideration and planning. This need for careful decision-making is reflected in the requirement that certain changes to a RIF be put in writing 30 days before the implementation of those changes. Employees should not be surprised by the Agency's change in direction; they should not be forced to make snap decisions on issues of such great moment. Yet, that is precisely what occurred in this case. Having led Petitioner to believe on August 8, 1995 that all of his RIF options were still available, the Agency reversed direction on August 29, 1995 and told him (again verbally) that two of his options no longer existed. This reversal took place only two weeks before his deadline for making a decision on early retirement.

I do not doubt that Petitioner's own equivocation caused some confusion for GAO officials. One might even say that Petitioner was "playing all the angles." However, that was his right and did not excuse the Agency's own deviation from its regulations. In fact, uncertainty surrounding Petitioner's intentions made the preparation of a written record all the more important. Order 2351.1 wisely requires that certain changes in a RIF action be put in writing. This case, to my mind, clearly called for written, rather than verbal, changes to the May 23, 1995 RIF notice.

My colleagues seem to be concerned about the practical consequence of holding the Agency to its own 30-day notice rule. The concern is that a 30 days' notice in this case would have resulted in Petitioner opting for reassignment, thereby vitiating the policy of non-transfer that had been implemented on August 7, 1995. There are two answers to this concern. First, Petitioner was the only employee left from the closure of the San Antonio office; continuing his right of transfer would not have seriously undermined the policies in the July 31 and August 7, 1995 memoranda; those memoranda were not even contemplating San Antonio or Petitioner. His transfer would have had a *de minimis* effect on the Agency's plans. Second, the problem posed by the majority is one of GAO's own making. It did not have to extend so many options to Petitioner. It would not have had to comply with Chapter 6 of Order 2351.1 if it had left those options out of the RIF notice. However, having made reassignment one of the RIF options, the Agency should be bound to its own RIF procedures, including the 30-day notice requirement.

In the end, my disagreement with my colleagues is not over the Agency's authority to effect a rescission of the Petitioner's reassignment rights. Instead, I believe that the GAO failed to follow its own procedures when it denied Petitioner's request for a transfer to Dallas. In my view, the Agency never effectively rescinded Petitioner's transfer rights. It therefore acted improperly when it denied Petitioner's request for reassignment to Dallas.¹

Finally, because the majority affirmed the Agency's actions, it did not need to address the appropriateness of a remedy. However, in view of my belief that GAO did violate one of its own regulations, I think it useful to inform the parties that I believe Petitioner's entitlement to a remedy in this case would be severely constricted because of his rejection of an offer of re-employment extended to Petitioner by the Agency.

¹The Agency suggests that the reassignment request was ineffective because it was submitted the day after Petitioner submitted the paperwork for his early retirement. However, a retirement which has been procured by "misinformation" is deemed involuntary and therefore may be withdrawn. *Covington v. Dept. of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Staats v. U.S. Postal Service*, 99 F.3d 1120 (Fed. Cir. 1996). The misinformation need not be the product of intentional deception: "[t]he misleading information can be negligently or even innocently provided." *Covington*, 750 F.2d at 942. The information provided to Petitioner on August 29, 1995 by Dan Garcia (*i.e.*, that his reassignment rights had already been terminated) was incorrect, since the necessary 30-day written notice had not been provided. Accordingly, Petitioner's early retirement decision was the product of Agency misinformation. Petitioner had the right to rescind that decision and proceed instead with a transfer to Dallas, as he requested on September 13, 1995.

Prior to the filing of the Petition for Review in this case, GAO notified Petitioner that it was offering to re-employ him in the Dallas office. This offer of re-employment, dated July 22, 1996, was unconditional. However, the Agency declined to pay Petitioner back pay for the period between January 13, 1996 and the date of re-employment; instead, it offered to permit him to keep the retirement pay that he had received in that time period.

On July 26, 1996, Petitioner conditionally accepted the offer; he identified three conditions that he wanted met before he would fully accept the offer. On August 1, 1996, GAO accepted the three conditions requested by Petitioner and directed him to report to Dallas by August 5, 1996. On August 2, 1996, Petitioner telefaxed to GAO a statement that he would not accept the offer of reinstatement and would not report to work in Dallas. A follow-up letter from Petitioner on August 8, 1996 explained that he did not believe that the offer letter from the Deputy Assistant Comptroller General for Human Resources would be legally binding on the Agency, especially with regard to Petitioner's future eligibility to retire. Petitioner then invited a new offer of re-employment from GAO, but GAO declined to continue the dialogue with Petitioner, noting that his concerns had already been addressed and resolved.

In his Petition for Review, Petitioner requested that he be put in the same position he would have been in if he had been reassigned to Dallas on either July 31, 1995 or September 13, 1995. That remedy might have been within Petitioner's reach, but for his rejection of GAO's offer of reinstatement. When an employee asserts employment claims (e.g., an illegal discharge) and seeks reinstatement and back pay against the former employer, the employer may toll the potential back pay liability by offering unconditional reinstatement to the claimant. *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008 (5th Cir. 1989); *Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986); *Figgs v. Quick Fill Corp.*, 766 F.2d 901 (5th Cir. 1985).² However, if the claimant refuses an unconditional offer of reinstatement, s/he will forfeit the right to reinstatement and all back pay that would have accrued after the offer. *Id.* The forfeiture of these remedies will occur unless the plaintiff can establish special circumstances for rejecting the offer. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 238 (1982). The fact that the offer does not include all of the back pay being sought or does not restore lost seniority does not constitute a special circumstance or justify the rejection of a reinstatement offer, as long as the claimant still has the opportunity to litigate his or her entitlement to those remedies. *Ford*, 458 U.S. at 224, 232 n.18. The fact that there are some uncertainties inherent in the offer does not constitute a special circumstance. *Giandonato*, 804 F.2d at 125.

In this case, GAO's offer of reinstatement to Petitioner was unconditional. It offered him re-employment at his same position in Dallas--the very relief he sought in this litigation. The offer did not insist that Petitioner abandon any legal rights he might have had. Petitioner rejected the offer, not because it failed to meet his conditions, but because it purported to contain uncertainties as to the legal authority of the Deputy Assistant Comptroller General for Human Resources to grant some of those conditions. I have reviewed the correspondence leading up to

²An offer that requires the claimant to forego litigation of other remedies is not unconditional. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232-33 (1982).

the offer (about which there is no dispute) and would conclude that GAO did indeed offer unconditional reinstatement, including the three conditions demanded by Petitioner, and that the offer would have been legally binding if it had been accepted by Petitioner. He presented no special circumstances to justify his rejection of that offer. For this reason, even if Petitioner had prevailed on the merits, I believe his remedy should have been severely limited. Specifically, I would have concluded that Petitioner is not entitled to reinstatement and could receive as a backpay remedy no more than the amount of salary he would have received between January 13, 1996 and August 5, 1996, the date when Petitioner was to report back to work under GAO's re-employment offer. That amount of backpay would then be offset by the amount of retirement income received by Petitioner during that same time period.