

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

**Docket No. 96-07**

**Date of Decision: December 2, 1997**

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

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

**Reconsideration**

**Reduction-in-Force**

**Transfers**

## **DECISION**

This matter is before the full Personnel Appeals Board (PAB) on appeal from the decision of the administrative judge granting summary judgment in favor of the Respondent U.S. General Accounting Office (GAO) and dismissing the petition for review filed by Richard L. Madson, a retired GAO employee. See 4 C.F.R. §28.87. Petitioner challenges the Agency's actions in separating him through the use of accrued annual leave to reach early retirement, claiming that the actions violated GAO's rules and regulations governing Reductions-in-Force (RIFs). In particular, Petitioner alleges that GAO unlawfully denied his request to transfer to the Dallas Regional Office as provided for in his individual RIF notice.

The administrative judge upheld the Agency action, concluding that Respondent followed applicable rules and regulations in notifying Petitioner of his impending RIF, in changing its policy regarding office transfers, and in notifying Petitioner of that change prior to his request to transfer. The presiding member concluded that the option to transfer was revocable, and that it had been effectively revoked prior to the September 13, 1995 communication in which Petitioner attempted to exercise that option. With respect to Petitioner's allegation that the Agency acted unlawfully in establishing a later RIF date for him than for other employees in San Antonio, the administrative judge concluded that the decision to set Petitioner's RIF date to allow him to qualify for retirement was within the Agency's circumscribed authority to determine the date when positions will be abolished during a RIF. The initial decision also rejected Petitioner's claim that his request for discontinued service retirement was involuntary. The administrative judge concluded that as of September 12, 1995, when Petitioner submitted his written retirement request, he "could not reasonably have relied upon any alleged misinformation from the Agency in making his choice." Initial Decision at 26.

On appeal, Petitioner challenges the award of summary judgment in the Agency's favor, claiming

that he, rather than the Agency, was entitled to judgment as a matter of law.<sup>1</sup> He asserts that the Agency violated his rights when it denied his September 13, 1995 request to transfer, arguing that the right to transfer up until his separation date was embodied in his individual RIF notice and had been verified by Agency officials after he received the RIF notice. Petitioner also contends that GAO acted unlawfully by extending the effective date of the RIF in his case beyond July 31, 1995--the date the San Antonio office ceased operations--and allowing him to remain on Agency rolls after the closing so that he would qualify for retirement. Petitioner has proceeded *pro se* throughout the course of his petition before the Board.

Petitioner filed a brief in support of his appeal, the Agency filed a brief in response, and Petitioner filed a reply brief. Subsequently, by order of July 23, 1997, this Board asked the parties, and the Board's Office of General Counsel (PAB/OGC), as *amicus curiae*, to address several specific questions pertaining to review of the initial decision. The *amicus* filing submitted by the PAB/OGC in response to the July order resulted in a further order, dated August 26, 1997, requesting the parties to address specifically whether GAO Order 2351.1 required that the Agency provide Petitioner with an amended RIF notice after the decision was made to revoke the option to transfer. This issue had not been raised before the administrative judge.

The Board majority affirms the conclusion of the administrative judge that material facts are not in dispute and that summary judgment is appropriate to dispose of this case. Upon consideration of the submissions of record, the majority concludes that the Agency acted lawfully in revoking Petitioner's option to transfer and in communicating that change to Petitioner prior to his request to transfer. For the reasons set forth below, the majority concludes that GAO was not required to issue an amended RIF notice to Petitioner, but met its obligation to notify Petitioner that his transfer option was revoked by providing actual notice to him prior to his request to exercise the option. The full Board affirms the conclusion in the initial decision that the Agency acted lawfully in allowing Petitioner to remain on Agency rolls past the date the San Antonio office was closed, in order to qualify for retirement. Accordingly, the decision of the administrative judge awarding summary judgment in favor of the Agency is affirmed.

## I. Factual Background

Petitioner, Richard L. Madson, began his employment with GAO in 1978, serving as an evaluator in the San Antonio office since July 1984. Transcript of Deposition of Richard L. Madson (Dep. Tr.) at 6-8 (Respondent's Motion for Summary Judgment, Attach. 1). On November 9, 1993, the Comptroller General advised all GAO employees that eight field offices, including San Antonio, would be closed in response to a congressional directive to streamline field operations. The San Antonio office was scheduled to cease operations by July 31, 1995. Resp. Motion, Attach. 2 and 3.

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<sup>1</sup>Before the administrative judge as well as on appeal, Petitioner has argued ambiguously that he did not ask for summary judgment but that he--not the Agency--was entitled to judgment as a matter of law. His statements were understood as a cross motion for summary judgment, in light of his *pro se* appearance.

Prior to the closings, GAO issued Notice 2351.2, Field Location Closures (A-94) (January 4, 1994), which set forth various options available to employees in offices scheduled for closing.<sup>2</sup> The options in lieu of separation by RIF included resignation with severance pay, placement in another position at GAO with receipt of a special relocation allowance, and discontinued service retirement. The affected employees were notified as follows:

Employees may resign and receive severance pay or be placed in another position in GAO for their own convenience. . . . GAO will make positions available at appropriate locations. . . .

As an evaluator employed in the San Antonio office, Petitioner was given the option of transferring either to Dallas or headquarters.

Petitioner made clear to his superiors that he was interested in taking early retirement,<sup>3</sup> rather than transferring to another GAO office. In furtherance of this preference, he initiated discussions with GAO management in which he proposed that he be permitted to carry over unused annual leave (above the maximum normally allowed) from 1994 into 1995 and that he be permitted to use this leave to reach his early retirement date of January 13, 1996. Dep. Tr. 16-21, 27, 32-33, 42-44. Because of the "use-or-lose" requirements for annual leave, GAO's consent to this plan was necessary for Petitioner to have sufficient annual leave to qualify for retirement. See Order 2630.1, ch. 5, ¶4.

Petitioner had more than 200 hours of accumulated annual leave above the maximum number of accrued leave hours he could carry over into 1995 without Agency approval. Even with the restored excess hours from 1994, Petitioner's annual leave hours were not sufficient to bridge the time between July 31, 1995 (the scheduled date of the office closure) and January 13, 1996. His early retirement proposal therefore still required him to work until September 13, 1995. Dep. Tr. 47-48.

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<sup>2</sup>Notice 2351.2 was issued on January 4, 1994 to establish GAO policy related to the eight field locations slated for closure in the November 9, 1993 Comptroller General memorandum. Notice 2351.2 (A-94). It was revised on April 13, 1994 (Notice 2351.2 (B-94)) and again on August 3, 1994 (Notice 2351.2 (C-94)). On September 5, 1995, the Notice was superseded by a substantially changed Notice, Field Location and Other Office Closures. In that revision, the "Special Entitlements and Provisions" section had been replaced by the following section on "Entitlements." That section provides: "Employees may resign and, if eligible, receive severance pay or discontinued service retirement at any time after receipt of their specific notice of reduction-in-force (RIF)." Notice 2351.2 (A-95).

<sup>3</sup>The technical term for the type of retirement taken by the Petitioner is "discontinued service retirement." References in this decision to early retirement should be understood to mean discontinued service retirement.

As required by GAO Order 2351.1 (July 25, 1986), Petitioner received his individual RIF notice on May 23, 1995. This RIF notice stated, in pertinent part, as follows:

On November 9, 1993, the Comptroller General announced that the San Antonio office will close. As of the close of business on September 13, 1995, your position in the San Antonio office will be abolished. Because of this, we are required under GAO RIF regulations (GAO Order 2351.1, Reduction-in-Force) to issue you a RIF notice. This memorandum serves as that notice.

This memorandum will not affect you if you are reassigned to the Dallas Regional Office or to headquarters by September 13, or by that date have applied to retire effective January 13, 1996<sup>4</sup> (through use of annual leave to reach retirement eligibility). But it is your official notice that if you choose not to exercise one of these options by September 13, 1995, we will have no choice but to separate you by RIF procedures, effective on that date.

Resp. Motion, Attach. 5. Other employees in the San Antonio office were given RIF notices with a separation date of July 31, 1995. Dep. Tr. 53.

Petitioner understood that the Agency had made special arrangements to permit him to obtain early retirement. He testified in his deposition that the change in his RIF date to September 13, 1995 was intended to benefit him and that, as of May 23, 1995, he had no intention of transferring to Dallas. Dep. Tr. 32-49.

Just prior to the office closing, the Agency issued Interim Notice 2551.1 (July 27, 1995), offering a lump-sum payment to any employee who elected to retire or resign prior to October 1, 1995.<sup>5</sup> The Notice authorized GAO to make exceptions to this policy "if there are severe personal hardships or there are persuasive management reasons." Interim Notice 2551.1, ¶2.d. The Agency's discretion, however, did not include extending the statutory deadline for qualifying for the buy-out. See *ibid.*

Before Petitioner submitted his written request attempting to take advantage of the new buy-out offer, the Agency imposed a freeze on transfers, ultimately deciding to no longer authorize employees affected by office closings to move to other locations. The freeze on transfers was reflected in a file memorandum written by Carolyn Taylor, Assistant to the Deputy Assistant

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<sup>4</sup>GAO originally sent a RIF notice that erroneously identified January 12, 1996 as Petitioner's retirement date. Resp. Motion, Attach. 4. A corrected notice was immediately provided to Petitioner.

<sup>5</sup>The payment was "the lesser of \$25,000 or the amount of severance pay the employee would be entitled to if eligible for severance pay." Interim Notice 2551.1, ¶2.

Comptroller General for Human Resources, on August 1, 1995. The memorandum indicated that twenty-one GAO officials/office heads had been notified as follows:

[E]ffective immediately, as of August 1, 1995, all staff transfers between units, that were not previously approved by ACG-Ops, have been frozen until further notice.

An annotation on the memorandum indicated that similar voicemail messages had been left for regional managers. Resp. Motion, Attach. 13.

On August 7, 1995, the Comptroller General announced the decision to stop authorizing employee moves to other GAO locations. In a Memorandum to all GAO employees, he adopted the recommendations of a senior-level management team as to the most efficient means of implementing severe budget cuts imposed by Congress. Those recommendations (contained in an accompanying July 31, 1995 memorandum) included the following:

2. Close the New York and Detroit offices on November 10, 1995. At the same time, close the HEHS site in Baltimore. Do not authorize any moves to other GAO offices.
3. Accelerate the previously announced closure of the Cincinnati office from July 31, 1996 to November 10, 1995. No longer authorize moves to other GAO offices.

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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. Motion, Attach. 11 at 3, 5. Petitioner learned about the transfer freeze on August 8, 1995. In a conversation that day with Dan Garcia, an assistant to the Deputy Comptroller General for Human Resources, he questioned the applicability of the freeze to his situation, but told Mr. Garcia that his main objective was to retire and receive a buy-out. Dep. Tr. 82-97.

In furtherance of that objective, Petitioner submitted a memorandum dated August 24, 1995 to the Agency requesting an exception to the terms of Interim Notice 2551.1. The requested exception would permit him to obtain both his early retirement and the \$25,000 lump-sum

payment. Petitioner explained that the exception was necessary because the buy-out offer explicitly required termination of employment prior to October 1, 1995 and he would not qualify for retirement until January 13, 1996. He therefore sought a waiver of the termination date in the Interim Notice. Resp. Motion, Attach. 9.

In making this request for an exception, Petitioner noted the steps which GAO had taken in furtherance of his reaching retirement eligibility, and acknowledged that he "originally chose to take this RIF option of early retirement, even without expectation of any buy-out/separation pay," based on his personal circumstances. Finally, Petitioner noted that he still preferred not to transfer, but that according to his May 23, 1995 RIF notice, he did "retain until the close of business on September 13, 1995, the options to be reassigned to the Dallas Regional Office or to headquarters, or to have applied to retire effective January 13, 1996." Resp. Motion, Attach. 9.

On August 29, 1995, Dan Garcia advised Petitioner by telephone that his request for an exception would not be granted unless he agreed to terminate his employment prior to October 1, 1995. The Agency's position was reiterated in another telephone conversation with Steve Schmal, then Chief of GAO's Employee Relations Branch, on August 30, 1995. Both Mr. Garcia and Mr. Schmal told Petitioner that he could not transfer to Dallas, because of the transfer freeze announced in August 1995. He continued to challenge the denial of his request for an exception to the buy-out rules through discussions with an attorney in GAO's Office of General Counsel. Dep. Tr. 72-73, 77, 90-92.

After Garcia and Schmal advised Petitioner that the policy change precluded his transfer to Dallas, he took no action for approximately two weeks. On September 12, 1995, he submitted a written request for retirement, to become effective January 13, 1996. Resp. Motion, Attach. 15. However, on the following day, at 5:15 p.m. EST, Petitioner left a voicemail message for Dan Garcia confirming the Agency's approval of his carryover annual leave, relating the Agency's receipt of his application for retirement and, at the same time, making a qualified request for a transfer to Dallas effective that day. He explained that if his request for an exception to the buy-out eligibility rules would be approved, making him eligible for a \$25,000 separation incentive payment, "then I again request this separation pay instead of any transfers." Transcript of Call (Resp. Motion, Attach. 16).<sup>6</sup>

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<sup>6</sup>"Hi Dan, this is Rich Madson in San Antonio its 4:15 roughly on my 9:15 to 6:00 work day here in San Antonio on September 13, 1995. I got my annual leave approved by the Dallas Regional Office for 9/14/95 thru 1/12/96 and Tina Clark is in receipt of my application for retirement effective 1/13/96. She said everything seemed to be in order for that. However, I'm calling because I've been troubled ever since you called to tell me the results of my letter to Mr. Howard regarding my request for exception to separation pay rules. Due to information its kind of recently been given to me, I feel compelled to reiterate my request in that letter, therefore I do hereby, here now formally and officially request that I be transferred to the Dallas Regional Office effective 9/13/95 in accordance with my option to do so as stated in my RIF notice. However, again if an exception is to be approved by ACG/Ops or whoever to provide me with the \$25,000 separation pay as I requested in my letter then I again request this separation pay

In response to Petitioner's September 13, 1995 message to Mr. Garcia, Joan Dodaro, as Deputy Assistant Comptroller General for Human Resources, wrote to Petitioner on September 20, 1995, reiterating the information previously conveyed by Dan Garcia and Steve Schmal. Petitioner was told that he could either take early retirement as of January 13, 1996 or separate from GAO prior to October 1, 1995 and obtain the \$25,000 payment; he could not, however, obtain both benefits. Petitioner's request to transfer to Dallas was also rejected. Resp. Motion, Attach. 10.

On September 14, 1995, Petitioner commenced using his accrued annual leave. The Agency processed Petitioner's request for retirement, and he was placed in retirement status effective January 13, 1996.

## **II. Analysis**

### A. Introduction

The major argument in this case is that Petitioner retained the option to transfer through his scheduled RIF date, and that his telephonic request to transfer to Dallas, communicated by voicemail on September 13, 1995, should have been granted. In the majority view, the option to transfer was not a right irrevocable through Petitioner's RIF date, but a gratuitous benefit established by Agency policy. GAO could and did cancel that policy in August 1995 to implement changes resulting from serious budget cuts. The change in Agency policy was implemented by GAO and communicated to Petitioner prior to his attempt to exercise the transfer option. Accordingly, Petitioner's request to transfer was properly denied.

GAO is required by statute to prescribe and follow regulations for the orderly release of individuals in a RIF.<sup>7</sup> The governing regulatory provisions are found in Order 2351.1, Reduction

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instead of any transfers. I am reiterating this in part because a discussion with the Office of General Council [sic] hasn't convinced me and I haven't had any documentation presented to me that unequivocally shows that an exception to give me the \$25,000 separation pay would be contrary to law and I think my interpretation of what's written in the statutes is valid and I would be entitled if an exception would be granted. Anyway, I appreciate some sort of written response to my request in the mean time you can call me at (210) 691-8841, thank you."

<sup>7</sup>Until November 1995 and thus, for the period relevant to this case, GAO was governed by the same statutory requirements for conducting RIFs that apply to the executive branch. See 5 U.S.C. §3502; 31 U.S.C. §731 *et seq.*; GAO Order 2351.1. The 1995 amendments to the General Accounting Office Personnel Act (GAOPA) added a new section (h) to 31 U.S.C. §732, which requires that GAO's RIF regulations "shall, to the extent deemed feasible by the Comptroller General, be designed to minimize disruption to the Office and to assist in promoting the efficiency of the Office."

in Force (July 28, 1986).<sup>8</sup> These provisions are intended 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. The RIF regulations contain specific notice requirements, designed to ensure that individuals subject to RIF procedures are accorded a minimum period of time in which to plan and to assure that individuals are notified of their rights in the process. At the time of Petitioner's RIF, GAO's governing regulation stated that "each employee identified for release from a competitive level is entitled to a specific written notice at least 60 days before the effective date of release." Interim Notice 2351.1, ¶4.a (December 23, 1993) (Petitioner's Response to Motion for Summary Judgment, Attach. 5).

The RIF Order also required, in pertinent part, that an individual RIF notice state specifically "the action to be taken and its effective date." GAO Order 2351.1, ch. 6, ¶2.a(1) (July 25, 1986).<sup>9</sup> As in the executive branch, a RIF notice at GAO is therefore designed to provide the affected employee with notice of the personnel action which would be taken at the end of the notice period, and the effective date for that action. *See Note, Reduction in Force: A Guide for the Uninitiated*, 44 Geo. Wash. L.Rev. 642, 664-67 (1976). The actions requiring the Agency to follow RIF procedures are the following specific circumstances: "when . . . [GAO] releases employees from competitive levels by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement." Order 2351.1, ch. 1, ¶4 (July 25, 1986). The notice provision of the RIF Order also addressed the need to amend a RIF notice under certain circumstances: "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." Order 2351.1, ch. 6, ¶5.<sup>10</sup>

The case at hand presents two related questions: Could GAO revoke the option to transfer; and if

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<sup>8</sup>The RIF order was substantially revised subsequent to the matters here at issue. *See* GAO Order 2351.1 (February 28, 1996).

<sup>9</sup>The Order required that a RIF notice state specifically:

- (1) the action to be taken and its effective date;
- (2) the employee's competitive area;
- (3) competitive level;
- (4) subgroup;
- (5) service computation date;
- (6) the location where the employee may inspect the regulations and records pertinent to the case;
- (7) the reasons for retaining lower-standing employees, if any, in the same competitive level;
- (8) information on reemployment rights; and
- (9) the employee's right to appeal to the GAO Personnel Appeals Board where applicable.

Order 2351.1, ch. 6, ¶2.a (July 25, 1986) (Resp. Motion, Attach. 17).

<sup>10</sup>Similarly, new written notice is required in the executive branch "if the agency decides to take an action more severe than first specified." 5 C.F.R. §351.805.

so, did the revocation trigger an obligation to issue an amended RIF notice, or merely a duty to notify Petitioner of the change in his options?

### B. The Transfer Option

We begin our analysis by reviewing the nature of the transfer option. It originated in the policy announced by the Comptroller General in November 1993, committing the Agency to provide employees assigned to offices slated for closing "the opportunity to relocate to another GAO location." (Resp. Motion, Attach. 2 at 2). The Notice formalizing the policy, applicable to employees at eight locations including San Antonio, provided in pertinent part as follows:

Employees may resign and receive severance pay or be placed in another position in GAO for their own convenience and receive a special relocation payment within 18 months of the closure date announced for their office. GAO will make positions available at appropriate locations, however, requests for placement assistance may be made prior to receipt of the official notice. Any individual who wishes to file for discontinued service retirement should notify Personnel . . . "

Notice 2351.2, ¶2, Field Location Closures (January 4, 1994) (A-94). The Comptroller General memorandum and the related Notice both evidence an Agency policy to accommodate transfer requests in lieu of separating personnel. However, the Notice did contain its own internal limitation, specifically providing that the Assistant Comptroller General for Operations (ACG/Ops) could make exceptions to the policies concerning office closures for "severe personal hardships" or "persuasive management reasons." Notice 2351.2, ¶6 (January 4, 1994).<sup>11</sup>

Inherent in the policy concerning transfers, as stated in the applicable Notice, therefore, is the notion that the policy was subject to change or exception for the type of management concerns that govern RIF situations, *i.e.*, persuasive management reasons such as, in this case, further budget cuts. The susceptibility to change is also evidenced by the inclusion of the policy in the Notice format, which by definition is a temporary entry in the GAO Order system. See GAO Order 0010.1, GAO Operations Manual System, ¶9.b(3) (January 5, 1981). The Notice stated that it would expire "after the closing of all of the offices discussed in the Comptroller General's memorandum of November 9, 1993." Notice 2351.2, ¶7 (January 4, 1994), ¶8 (April 13, 1994 and August 3, 1994). In fact, the Notice was superseded by a revised version issued on September 5, 1995. The revised Notice reflected the policy change which took place in August 1995, when the Agency placed a freeze on transfers. The revision extinguished any reference to transfer options. Instead, it provided: "Employees may resign and, if eligible, receive severance pay or discontinued service retirement at any time after receipt of their specific notice of

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<sup>11</sup>The exceptions provision is found in ¶7 of the revisions to this Notice dated April 13, 1994 and August 3, 1994. In the final revision of September 5, 1995, it is found in ¶6.

reduction-in-force (RIF)." Notice 2351.2, ¶3 (A-95).

In this case, on May 23, 1995 Petitioner received a specific RIF Notice, tailored to his date for qualifying for retirement. As required by GAO Order 2351.1, the notice alerted Petitioner to his possible impending separation by RIF. Petitioner's RIF notice stated in pertinent part as follows:

As of the close of business on September 13, 1995, your position in the San Antonio office will be abolished. Because of this, we are required under GAO RIF regulations . . . to issue you a RIF notice. This memorandum serves as that notice.

**This memorandum will not affect you if you are reassigned to the Dallas Regional Office or to headquarters by September 13, or by that date have applied to retire effective January 13, 1996 (through use of annual leave to reach retirement eligibility). But it is your official notice that if you choose not to exercise one of these options by September 13, 1995, we will have no choice but to separate you by RIF procedures, effective on that date.**

Notification of Reduction-in-Force, ¶¶2 and 3 (May 23, 1995) (Resp. Motion, Attach. 5) (emphasis added).

In Petitioner's view, the RIF statement conferred an irrevocable option to transfer, which could be exercised at any time up to and including September 13, 1995, the date his job was slated to be abolished. On the other hand, Respondent argues that the RIF notice is merely a statement that at the time of its drafting--May 23, 1995--Petitioner had several options to choose as alternatives to the scheduled RIF, but if none of those options had been elected by September 13, 1995, the RIF action of separation would take place as scheduled. The Agency does not view this statement as creating or recognizing an irrevocable right to choose to transfer up until the RIF date, but as a notice that if none of the options had been chosen by that date, the RIF would occur. By the Agency's admission, the option to relocate was available to Petitioner until the freeze on transfers was effectuated in August 1995. Resp. Motion at 7.

In providing alternatives to RIF separation, the Agency was engaging in a voluntary policy to ameliorate some of the effects of downsizing. Nothing in the RIF regulations required that the Agency provide the option to transfer, or compelled that the policy could not be modified when circumstances dictated that the Agency, in the exercise of its discretion, determined that transfers could no longer be allowed. Indeed, a RIF scenario by nature often involves continuing changes in an agency's "organization and, thus, in the kind and number of available positions." *Petraneck v. Dept. of Army*, 4 MSPR 419, 421 (1980) (upholding an agency's amending an offer of reassignment even after the offer had been accepted).

### C. No Duty to Amend RIF Notice

As noted above, the Order governing RIFs at GAO stated that under certain circumstances the Agency is required to issue an amended RIF notice: "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.**" Order 2351.1, ch. 6, ¶5 (July 25, 1986) (emphasis added). The question of the import of this provision was crystallized by the *amicus* filing on appeal and had not been developed previously in this case. See *Brief Amicus Curiae* at 18. If withdrawal of the option to transfer constituted "an action more severe than that first specified" in Petitioner's RIF notice, within the meaning of the RIF regulations, then the Agency would have been required to issue Petitioner a new or amended RIF notice. If withdrawal of the option was not a more severe action within the meaning of the RIF regulations, then no amended notice was required.

The growing body of RIF caselaw does not address this question. Definition of the meaning of "more severe action" therefore entails an examination of the language of the RIF Order in light of the Agency's RIF authority and obligations and its ordinary mission to function efficiently and effectively. As explained below, we do not agree with the position taken by the *amicus* in this case that removal of the option to transfer meant that the noticed RIF action was made more severe.

The purpose of a RIF notice is to allow an individual a minimum period of time before the ultimate consequence of the RIF notice is imposed. For that reason, when the ultimate RIF action is made more severe, a new notice to the individual is required. The regulations of GAO and of the executive branch list the four possible RIF actions as 1) involuntary separation; 2) demotion; 3) furlough for more than 30 days; and 4) reassignment requiring displacement of another employee. GAO Order 2351.1, ch. 1, ¶4; 5 C.F.R. §351.201(a)(2). See also MSPB, *Reduction in Force: The Evolving Ground Rules* at 1 ("RIF can affect employees in any of four ways") (1987). It is when one of these four specified RIF actions is changed to a more severe one that an amended RIF notice is required.

The regulatory purpose of a RIF notice is to alert an employee to possible specified action. In this case, Petitioner's RIF notice alerted him that, if he had not retired or transferred to Dallas or headquarters by his RIF date of September 13, 1995, he would in fact be separated by RIF. From the beginning of his notice period Petitioner knew that the most severe possible RIF action--separation--loomed at the end of that period. That potential separation was not made more severe when the option to transfer was withdrawn. See *Metzger v. HUD*, 6 MSPR 434, 436 (1981) (requirement for new notice did not apply to individual where no new more severe RIF action involved). Petitioner remained on notice of possible separation by RIF on a certain date.

The RIF guidance provided in the now-obsolete Federal Personnel Manual (FPM)<sup>12</sup> to explain the executive branch RIF regulations supports our interpretation of "more severe action." For

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<sup>12</sup>The FPM was abolished as of December 31, 1993. See GAO Order 0020.1 Appendix at 5 (December 11, 1995); *Clarke v. OPM*, 73 MSPR 435 (1997); *New v. Dept. of Veterans Affairs*, 72 MSPR 574, 588 n.5 (1996).

example, the FPM states that the RIF notice must include "**the specific reduction-in-force action** to be taken." FPM Inst. 263 (July 7, 1981, subch. 6-2, ¶d (emphasis added). This language suggests that the duty to amend a RIF notice is triggered only when one of the four "actions" enumerated in the RIF regulations is made more severe. In describing a change of action, the FPM guidance states: "An employee is entitled to a new specific notice of at least 30 days if the agency decides to take a more severe reduction-in-force action than it first specified. A change from furlough to separation and extension of a furlough both fall into this category. *Id.*, ¶e. Similar guidance was offered in FPM Letters 351-20 (March 4, 1986) and 351-22 (September 17, 1987), subch. 7-3, ¶e: "An employee is entitled to a new notice and notice period of at least 30 days if the agency decides to take a more severe RIF action than it first specified. A change from one-grade demotion to separation is an example of a more severe RIF action."

From a literal viewpoint, since the Agency had already informed Petitioner of his release date for separation by RIF, nothing short of separation could be more "severe." Petitioner's option to transfer to another job did not provide him with extra security from the ultimate consequence of a RIF, for the Agency could and did in this instance conclude that it could not absorb more employees in the remaining regional offices or in headquarters, *i.e.*, that allowing transfers after the time when the Agency learned about the 25% budget reduction would ultimately result in another round of RIFs. From this perspective, therefore, when the Agency withdrew the option to transfer, it did not materially diminish Petitioner's job security. He was already on notice that he would be separated. When the Agency made a judgment that it could not absorb more employees in the Dallas office, the resulting cancellation of the transfer option accordingly was not a "more severe action" for purposes of providing the requisite RIF notice.

The possibility of transfer was an option; it did not rise to the level of an entitlement that could not be withdrawn. It was a gratuitous gesture by the Agency to ameliorate some of the effects of downsizing. As such, the option had to be revocable immediately for the Agency to be able to achieve its goal of attaining a proper staff level. If the Agency were required to give 30 days' notice prior to effectuating withdrawal of the transfer option, its purpose would be undercut. Such a 30-day period would afford employees a last chance opportunity to transfer, thus diverting the Agency's downsizing goals and ultimately resulting in a further round of RIF actions. The logical consequence of viewing removal of a transfer option as a more severe RIF action therefore points to the conclusion that such an interpretation does not fit within the regulatory framework applicable to RIFs.

The conclusion that no amended RIF notice was required does not imply that Petitioner had no rights with respect to the transfer option. That option had been included in Petitioner's RIF notice, listed as an alternative to separation. Its inclusion in the RIF notice as an alternative to the ultimate consequence of separation gave rise to a duty on the Agency's part to inform Petitioner promptly after the decision was made to revoke the option. *See Reed v. Dept. of Commerce*, 18 MSPR 697, 699 (1984) (recognizing a duty to give employee actual timely notice of change in RIF information). Clearly, Petitioner's oral communications with Mr. Schmal and Mr. Garcia at the end of August 1995 could leave no doubt in Petitioner's mind that the Agency

viewed the written notice of the freeze on transfers as applying to his situation. These conversations effectively notified Petitioner that his circumstances had changed, that his alternatives to separation by RIF had been reduced to retiring or resigning and taking the desired cash buy-out.

In this case, Petitioner was notified orally by Agency officials of the change in policy which effectively revoked his option to transfer to Dallas in the face of the pending RIF action. The actual notice to Petitioner was designed to implement an action which the Agency should be entitled to implement immediately. To require the formality of an amended written notice directed specifically to Petitioner in these circumstances does not comport with the purpose of such a change.

Petitioner had the kind of notice which is appropriate for the circumstance. He knew the option to transfer was just that--an option and not a right. He was informed in a written announcement of the policy that it could be withdrawn for pressing Agency needs. He was informed orally, with reference to the August documents imposing the freeze, that the transfer option was in fact withdrawn. This communication of the change in his options was sufficient, since it took place prior to Petitioner's attempt to exercise the option.<sup>13</sup> The Agency therefore discharged its obligation to Petitioner by communicating the change in options in a timely manner.

Even assuming that written notification of the change in policy was required, GAO did accomplish such written notification when it issued Notice 2351.2 (A-95), Field Location and Other Office Closures, on September 5, 1995. That change, which was distributed to all Field Office employees,<sup>14</sup> eliminated the reference to transfer options for employees affected by the office closings. The revised Notice specifically stated that it established Agency "policy related to field location and other office closures. This notice applies to employees who are assigned, other than on a rotational or detail basis, at locations **such as those discussed** in the attachment to the Comptroller General's memorandum on the impact of budget reductions." *Id.*, ¶1 (emphasis added). This language cannot be read restrictively to include only those offices named in the attachment to the Comptroller General's August 1995 memorandum. Rather, its broadly inclusive language would encompass employees at any of the various sites involved in office closings and consolidations. The Notice clearly states that it "supersedes GAO Notice 2351.2 (C-94), 'Field Location Closures,' dated August 3, 1994." *Id.*, ¶2. Accordingly, that change in policy would have included Petitioner, as a field office employee assigned to an office closed during the particular downsizing period.

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<sup>13</sup>No doubt a written confirmation in such circumstances may be preferable from a management viewpoint, as it may help avoid unnecessary litigation. From an employee perspective, it would help concretize the message that an important option had been removed.

<sup>14</sup>The Notice indicates that it was distributed to persons in Codes "C, R, and Employee Councils." Distribution Code "R" includes all employees in Field Offices. GAO Order 0030.1, ¶5, GAO Internal Distribution Codes (August 9, 1995).

Petitioner makes much of the fact that the Comptroller General's memorandum and attachment, issued on August 7, 1995, did not specifically mention San Antonio as an office affected by the freeze on transfers. The short explanation for this omission is that the San Antonio office was already closed, as of July 31, 1995, and that Petitioner alone continued on the rolls of that office, for the purpose of qualifying for retirement. In this circumstance, it is not surprising that the announced policy change omitted specific reference to an office already closed. The Agency had every reason to think that Petitioner's situation was taken care of, that he was carrying out the steps necessary to qualify for retirement. It is not clear why Petitioner alone should have been exempted from an Agency-wide freeze on transfers at that point. That Petitioner's situation was not specifically mentioned in this written announcement is of no consequence, however, in light of our conclusion above that actual notice of the policy change was effective and that the written form of policy change was promulgated prior to Petitioner's attempt to exercise the transfer option on September 13, 1995.

Because the Agency communicated the change in Petitioner's options prior to his request to transfer, the option to transfer as reflected in his RIF notice was effectively revoked. Review of the papers submitted by the parties, the applicable regulations and caselaw, leads the Board majority to conclude that the Agency acted lawfully in denying Petitioner's request to transfer after the option had been withdrawn.

The view of the dissenting member would require that an Agency cannot make the kind of managerial judgments in the midst of downsizing decisions that ultimately reduce the need for further downsizing activity. By suspending the policy of allowing transfers, GAO avoided a subsequent round of further RIFs, because its experience had shown that approximately 50% of employees transfer when allowed to do so. To allow transfers during a new 30-day RIF notice period would wholly subvert the intention of a freeze on transfers, perhaps resulting in even more transfers than the usual experience indicated. In a RIF situation, an agency must be able to accomplish such changes on an immediate basis. RIF regulations prohibit the Agency from conducting the actual RIF action--the demotion, reassignment involving displacement, furlough for more than 30 days, or separation--immediately. These actions require the Agency to follow RIF procedures and to provide the notice period before the action becomes effective.

In light of our decision, the Board majority need not address the question of remedy and specifically, the import of settlement offers made in 1996. These issues were briefed by the parties in response to a Board order during the pendency of this appeal, but they have no bearing on the decision because of the conclusion reached here that the Agency acted lawfully with respect to the revocation of Petitioner's option to transfer. The Board has considered all the submissions in arriving at its decision.

#### D. Petitioner's RIF Date

On appeal, Petitioner renews his argument that the Agency acted unlawfully in extending his RIF date beyond the date established for the office closing. As the administrative judge concluded,

the Agency was acting within its authority to accommodate an individual's effort to meet first eligibility for retirement as an alternative to separation by RIF. See Interim Notice 2351.1, ¶3 (December 23, 1993) (A-94) (Pet. Response, Attach. 5). Petitioner was not unlawfully retained in preference over other individuals with higher retention standing, because all other San Antonio employees had been reassigned to other GAO offices by July 31, 1995. See Resp. Motion, Attach. 6. Moreover, the RIF Order does authorize exceptions to the order of release in certain circumstances.

The governing GAO Interim Notice specifically authorized the Agency to "make a temporary exception to retain on annual leave, past the effective date of the RIF, any GAO employee . . . who will have sufficient accrued annual leave to attain first eligibility for an immediate retirement benefit. . . ." Interim Notice 2351.1, ¶3 (December 23, 1993). The sole purpose for Petitioner's later RIF date was to meet his need for time in service to qualify for retirement. Petitioner requested and received the benefit of the option that he was most aggressively pursuing at the time the San Antonio office closed.

## **CONCLUSION**

For the reasons set forth above, we conclude that the Agency acted properly in cancelling Petitioner's option to transfer and in communicating that change to him prior to his attempt to exercise that option. We also conclude that the Agency acted lawfully in allowing Petitioner to remain for a brief period after the office closing to achieve retirement eligibility. Accordingly, we affirm the decision of the administrative judge awarding summary judgment in Respondent's favor and denying petitioner's cross motion for summary judgment. The petition for review of the Agency action is dismissed with prejudice.

## **SO ORDERED.**

Member Wolf dissents from the decision and states his reasons for so doing in a separate opinion.