

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

**Docket No. 96-07**

**Date of Decision: April 23, 1997**

**Cite as: Madson v. GAO (4/23/97)**

**Before: Harriet Davidson, Vice-Chair**

**Reduction-in-Force**

**Transfers**

**Retirement**

**Voluntariness**

## **DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

### **INTRODUCTION**

This matter is before the Personnel Appeals Board (PAB) on a petition for review, filed on September 3, 1996 by Richard L. Madson, a retired employee of the respondent Agency, the U.S. General Accounting Office (GAO). Proceeding *pro se*, petitioner alleges that GAO's actions in separating him through the use of accrued annual leave to reach early retirement were in violation of the Agency's rules and regulations governing Reduction-in-Force (RIF). Petitioner also asserts that because GAO failed to reassign him to the Dallas Regional Office upon his request and in accordance with his individual RIF notice, his retirement was coerced. Petitioner seeks reinstatement, backpay and the ability to retire upon reinstatement retroactive to September 30, 1996.

On October 1, 1996 the respondent Agency filed an answer denying petitioner's allegations. Respondent claims that it complied with all applicable statutes, regulations and orders and that petitioner had no legal entitlement to transfer to Dallas.

At petitioner's request, all proceedings in this matter were stayed for approximately one month. Subsequently, the parties engaged in discovery, which was completed in January 1997.

On January 10, 1997 the Agency filed a motion for summary judgment. On January 27, 1997, petitioner filed his response in opposition to respondent's motion and his cross motion for summary judgment. The Administrative Judge heard oral arguments on February 10, 1997. The parties thereafter submitted additional documents at the request of the Administrative Judge. For the reasons set forth more fully below, the Board concludes that the Agency is entitled to

summary judgment, and that petitioner's cross motion for summary judgment should be denied.

## **UNCONTROVERTED FACTS**

Petitioner, Richard L. Madson, began his employment with the respondent, U.S. General Accounting Office, on August 13, 1978. After working at several different field locations, in July 1984 petitioner transferred to the San Antonio field office, where he served as an evaluator. (Transcript of Deposition of Richard L. Madson (Dep. Tr.) at 6-8.)

In the Senate Report accompanying the 1994 Legislative Branch Appropriations Bill, GAO was directed to evaluate its regional facilities and to study alternatives for streamlining its field office structure. In response to this congressional directive, on November 9, 1993, the Comptroller General issued a memorandum to all GAO employees announcing the closure of several field offices, including San Antonio where petitioner worked. (Respondent's Motion for Summary Judgment (Resp. Motion), Attach. 2.) Employees were advised that the San Antonio office would close by July 31, 1995. (*Id.*; and GAO Management News (November 15, 1993) (Resp. Motion, Attach. 3).)

The Comptroller General established a policy which provided that all employees in the offices scheduled for closure would be "given the opportunity to relocate to another GAO location," and that assistance would be available to those employees who did not want to relocate. (Comptroller General Memorandum (November 9, 1993) (Resp. Motion, Attach. 2); and GAO Management News (November 15, 1993) (Resp. Motion, Attach. 3).) Petitioner was informed that he could either transfer to Dallas or to headquarters in Washington, D.C. (Dep. Tr. at 25.)

In December 1993, GAO made certain policy changes to the Agency's RIF regulations, including a specific new temporary exception to the order of release of employees from a competitive level during a RIF. Under the new provision, GAO had discretion to retain an employee on annual leave past the effective date of the RIF, if the employee would have sufficient accrued annual leave "to attain first eligibility for an immediate retirement benefit."<sup>1</sup> (Interim Notice 2351.1, ¶3 (December 23, 1993)(A-94) (Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment (Pet. Response), Attach. 5).)

On January 4, 1994, Joan Dodaro, then Deputy Assistant Comptroller General for Human Resources, circulated a notice to GAO employees. The notice set forth GAO policy pertaining to the field office closures announced by the Comptroller General on November 9, 1993. The policy applied to petitioner as an employee assigned to the San Antonio office. It specified various options available to employees in lieu of separation by RIF, including resignation with severance pay, placement in another position at GAO with receipt of a special relocation

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<sup>1</sup>The RIF order then in effect contained a provision for "permissive temporary exceptions" to the order of release, but it did not specifically list qualification to reach retirement eligibility as a reason for an exception. See Order 2351.1 (July 28, 1986), ch. 4, ¶7 (Resp. Motion, Attach. 17).

allowance, and discontinued service retirement. (Notice 2351.2, Field Location Closures (A-94) (January 4, 1994).)

Shortly thereafter, petitioner called Ms. Dodaro to obtain information about possible assistance to enable him to qualify for early retirement as an alternative to transferring. Ms. Dodaro informed petitioner that GAO might be able to help him; however, she had to check with the Personnel Office to determine what was permissible. (Dep. Tr. at 16-17, 19.)

In a June 1994 meeting, Dan Garcia, Ms. Dodaro's assistant for matters relating to office closures, advised petitioner that GAO was attempting to accommodate people who wanted to reach eligibility for early retirement. To be eligible to retire, petitioner needed to have completed a minimum of twenty years of creditable service and be at least fifty years of age. Since petitioner already had the requisite years of service,<sup>2</sup> he calculated that he could qualify for retirement on January 13, 1996, the date on which he would turn fifty. This was approximately five and one-half months past the projected date for the closing of the San Antonio office. (Dep. Tr. at 20-21, 27.)

Petitioner informed Mr. Garcia that he preferred to retire rather than to transfer to Dallas. Mr. Garcia advised petitioner to ascertain the amount of annual leave he had accrued because petitioner might be able to use the annual leave to help him reach eligibility for retirement. (Dep. Tr. at 24-28, 49.) Petitioner calculated the number of days of accrued annual leave he would have by January 13, 1996. By counting backward, petitioner determined that he could begin using his annual leave on September 13, 1995 in order to reach eligibility for retirement. (Dep. Tr. at 47.)

In making these calculations, petitioner included 208 hours of annual leave for the 1994 calendar year above the ceiling or maximum number of hours of accrued leave he could carry over into 1995 without approval from the Agency. Ordinarily, petitioner would have been required to either use or forfeit the 208 hours of leave before the end of the year. Annual leave in excess of the maximum permissible carryover (thirty days or 240 hours) generally is forfeited unless the Agency restores it under limited circumstances. GAO Order 2630.1, ch. 5, ¶4. The Agency approved petitioner's request to carry over the excess leave into 1995. In accordance with Agency procedures, the leave was administratively forfeited and subsequently restored. (Pet. Supp. Filing (leave restoration).)

Petitioner received a RIF notice, dated May 23, 1995, which reflected respondent's efforts to achieve petitioner's objectives. The RIF notice stated that petitioner's position would be abolished at the end of the business day on September 13, 1995, unless by that time, he was reassigned to Dallas or headquarters or had applied to retire, effective January 13, 1996, through

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<sup>2</sup>Petitioner's service computation date for purposes of determining eligibility for discontinued service retirement pursuant to 5 U.S.C. §8336 was November 28, 1971. (RIF Notice at 3 (Resp. Motion, Attach. 5).)

the use of annual leave to reach retirement eligibility.<sup>3</sup> (Resp. Motion, Attach. 4.)

In response to congressional authorization, on July 27, 1995, GAO established a policy governing separation incentive payments of up to \$25,000 for eligible employees who voluntarily separated between July 27, 1995 and September 30, 1995. (Interim Notice 2551.1, Separation Pay & Voluntary Early Retirement (July 27, 1995) (A-95) (Resp. Motion, Attach. 8); see Pub. L. No. 104-19, §702 (July 22, 1995) (Resp. Motion, Attach. 7).) Five classes of employees were excluded from eligibility for the separation incentive payment (buyout).<sup>4</sup> The Assistant Comptroller General for Operations had discretion to approve exceptions to the policies on inclusions or exclusions in cases of severe personal hardship or persuasive management reasons, but could not extend the statutory deadline for qualifying. See Interim Notice 2551.1, ¶2.d.

On July 31, 1995, the San Antonio office was officially closed. At that time, all of the San Antonio employees, except petitioner, had been reassigned to other offices and, accordingly, no San Antonio employee was separated by means of a RIF. (Status of Staff in San Antonio (Resp. Motion, Attach. 6).)

At the time of the office closure, petitioner had not requested a transfer and still intended to retire, effective January 13, 1996. In furtherance of petitioner's retirement plans, GAO allowed him to continue working in San Antonio at Kelly Air Force Base through September 13, 1995. (Transcript of Oral Argument (February 10, 1997) (Arg. Tr.) at 12.)

During the Summer of 1995, the Comptroller General learned that Congress intended to substantially reduce GAO's funding levels for fiscal years 1996 and 1997. As part of its response to the anticipated budget cuts, on August 1, 1995, GAO management imposed an Agency-wide freeze on all inter-office transfers that had not previously been approved by the Assistant Comptroller General for Operations. (Declaration of Joan M. Dodaro (Resp. Motion, Attach. 12); and Staff Transfers Memorandum (August 1, 1995) (Resp. Motion, Attach. 13).) In addition, on August 7, 1995, the Comptroller General announced the decision to stop authorizing employee moves to other GAO locations. (Comptroller General Memorandum (August 7, 1995) (Resp. Motion, Attach. 11).) On August 8, 1995, petitioner learned about the transfer freeze. (Dep. Tr. at 82.) Although he initially believed that there was some question about the applicability of the freeze to his situation, petitioner's main objective at the time was to retire and receive a separation incentive payment. (Dep. Tr. at 82-96.)

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<sup>3</sup>The original RIF notice incorrectly listed January 12, 1996 as the date on which petitioner would qualify for retirement. GAO sent petitioner an amended RIF notice indicating January 13, 1996 as the effective date of his retirement. (Resp. Motion, Attach. 5; Dep. Tr. at 49-50, 52.)

<sup>4</sup>These exclusions did not pertain to petitioner. See Interim Notice 2551.1, ¶2.b.

Petitioner wrote to the Assistant Comptroller General for Operations on August 24, 1995, requesting an exception to the September 30, 1995 cut-off for buyout eligibility because he would not qualify for retirement until January 1996. In support of his request, petitioner argued that it would be in GAO's best interests to give him the buyout payment along with his January 1996 retirement rather than "compel" him to transfer to Dallas and continue to pay his salary. In the letter, petitioner acknowledged the steps which GAO had taken to assist him in reaching early retirement. He also admitted that he "originally chose to take this RIF option of early retirement, even without expectation of any buy-out/separation pay," because his personal circumstances prior to the office closure were such that it was in his best interests to remain in San Antonio. Citing his RIF notice, he stated that, until the close of business on September 13, 1995, he retained the options of either being reassigned or applying for retirement effective January 13, 1996. (Request for Exception at 2 (Resp. Motion, Attach. 9).)

In response to his request, petitioner received a telephone call from Dan Garcia on August 29, 1995.<sup>5</sup> (Dep. Tr. at 73.) Mr. Garcia advised petitioner that he could not obtain the buyout payment if he was on GAO's payroll past September 30, 1995, and that he could no longer transfer to Dallas because of the transfer freeze. This was confirmed the following day by Steve Schmal, chief of GAO's Employee Relations Branch, and subsequently by an attorney in GAO's Office of General Counsel. (Dep. Tr. at 72-73, 90-92.)

Approximately two weeks later, on September 12, 1995, petitioner submitted an application for retirement, effective January 13, 1996. (Resp. Motion, Attach. 15.) On September 13, 1995 at 4:15 p.m.,<sup>6</sup> petitioner left a message on Mr. Garcia's voice mail confirming respondent'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 (September 13, 1995). Petitioner explained that if the Assistant Comptroller General for Operations would approve his request for an exception to the buyout eligibility rules and authorize a \$25,000 separation incentive payment, "then I again request this separation pay instead of any transfers." (Transcript of Call (Resp. Motion, Attach. 16).)

On September 14, 1995, petitioner commenced using his accrued annual leave. Ms. Dodaro, as Deputy Assistant Comptroller General for Human Resources, wrote to petitioner on September 20, 1995, and reiterated the Agency's previous position concerning his ineligibility for a separation incentive payment while remaining on the rolls of GAO. She also denied his request for a transfer, based on the previously announced freeze. Resp. Motion, Attach. 10. Petitioner

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<sup>5</sup>Petitioner's handwritten note on the call indicated the date to be August 28, 1995 (Resp. Motion, Attach. 14), while his deposition testimony stated that the call took place on August 29, 1995. The discrepancy is of no consequence to the outcome in this matter.

<sup>6</sup>This message was left shortly before his separation by Reduction-in-Force would have been effective as set forth in his RIF notice, if he had not applied to use annual leave to reach retirement eligibility.

continued to use his annual leave until January 13, 1996, when he retired.

## **SUMMARY OF THE CONTENTIONS OF THE PARTIES**

### **Respondent**

The respondent has filed a motion for summary judgment, claiming that the material facts are not in dispute, and that it had and properly exercised the authority to change its policy so as to preclude employees, whose offices were closing, from transferring to another office within GAO. Respondent argues that petitioner did not have an irrevocable right to transfer. It maintains that it acted lawfully when it informed petitioner that the option to transfer had been withdrawn several weeks prior to September 13, 1995, the date on which petitioner left a voice mail message requesting a transfer. Respondent further claims that its denial of petitioner's transfer request was based on a transfer freeze legitimately imposed in response to upcoming budgetary reductions.

Respondent asserts that, contrary to petitioner's contention, there was no legal impediment to the Agency's allowing petitioner to remain employed in San Antonio after the other San Antonio employees had transferred and the office was officially closed. It takes the position that the Agency was exercising its ordinary management discretion regarding work assignments, and did not abuse that discretion by keeping petitioner on the rolls to enable him to qualify for retirement.

### **Petitioner**

Petitioner also asserts that summary judgment is in order, arguing that the Agency violated his rights when it used RIF procedures to separate him involuntarily by means of discontinued service retirement. Petitioner claims that GAO acted improperly when it allowed him to remain in San Antonio after the office was closed, so that he might utilize accrued and restored annual leave to qualify for retirement. This contention appears to be based on the theory that the respondent's allegedly unlawful action in not scheduling petitioner's potential RIF for July 31, 1995--the date of the office closure--denied him the option to transfer to Dallas.

Petitioner also claims that the freeze on transfers which was imposed after the office closure did not apply to him. He contends that his RIF notice as well as the Agency policy developed when the office closures were announced made his option to transfer irrevocable through his scheduled potential RIF date. Accordingly, the transfer offer was still open on September 13, 1995, when he made his qualified request to transfer.

## **ANALYSIS**

This matter is now before the Board on the parties' cross motions for summary judgment. Rule

56 of the Federal Rules of Civil Procedure governs the standards for summary judgment.<sup>7</sup> Under Rule 56(c), summary judgment "is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because summary judgment deprives the nonmoving party of the opportunity to present evidence at a trial, the party seeking judgment has the burden of proving the absence of any dispute as to material facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Alamilla v. GAO*, PAB Docket No. 94-01 at 8 (Mar. 17, 1995); *Rosenbaum v. GAO*, 2 PAB 257, 261-62 (1993) (affirmed *en banc*, 2 PAB 368 (1994)). Material facts are those facts which might affect the outcome of the litigation. Factual disputes which are irrelevant or unnecessary will not be considered. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

In determining whether there are any disputed issues of material fact, the nonmoving party's version of the facts material to the decision must be accepted; all genuine issues of fact must be resolved in favor of the party opposing summary judgment. *Bishop v. Wood*, 426 U.S. 341, 347 n.11 (1976). To prevail on summary judgment, therefore, the moving party must present undisputed evidence in support of factual allegations which, standing alone, would permit judgment in his favor. *Liberty Lobby*, 477 U.S. at 248; *Malphurs v. GAO*, 2 PAB 1, 5 (1990). Applying these legal principles, the Board concludes that there are no material facts in dispute and, therefore, a hearing is not warranted.

When all the pleadings and supporting documents filed in this matter are considered, it is clear that the respondent is entitled to summary judgment as a matter of law. As explained more fully below, 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 for a transfer. Petitioner has failed to establish any entitlement to relief and, accordingly, his cross motion for summary judgment must be denied.

## **I. The Transfer Option**

Both parties focus on the issue of the revocation of petitioner's option to transfer to Dallas as an alternative to separation by RIF. Accordingly, the Board must decide whether the transfer option was irrevocable up until petitioner's potential RIF date. Petitioner argues that it was. Respondent claims that the transfer option could be withdrawn for legally permissible reasons if the revocation was communicated to petitioner before he requested the transfer.

The analysis of whether the Agency had the authority to revoke petitioner's option to relocate to Dallas must begin with the source of that option. Federal employees generally derive the benefits

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<sup>7</sup>The Board's regulations provide that in procedural matters not specifically addressed in its regulations, the Board will be guided by the Federal Rules of Civil Procedure. See 4 C.F.R. §28.1(d).

and emoluments of their positions not from any contractual relationship with the government, but from their appointments, which are governed by civil service laws and regulations. *See Matos v. Hove*, 940 F.Supp. 67 (S.D.N.Y. 1996). *See generally Frazier v. MSPB*, 672 F.2d 150 (D.C. Cir. 1982). Accordingly, an employee's purported transfer rights in the context of an office closure generally are governed not by common law contract principles, but rather, by the body of law and regulations applicable to RIFs in the federal government. The statutes and regulations governing RIFs impose no obligation on an agency to give an employee, whose office is scheduled to close, the option to transfer to another position within the agency.<sup>8</sup> GAO's decision to allow such transfers, therefore, was based on a voluntary policy adopted by the Comptroller General to ameliorate some of the effects of downsizing.

The policy, as initially communicated to GAO employees in the Comptroller General's November 9, 1993 memorandum, was to provide that "[a]ll staff in units which will be closing will be given the opportunity to relocate to another GAO location." (Resp. Motion, Attach. 2.) Shortly thereafter, the policy was described as including assistance for those who did not want to relocate. (*GAO Management News* (November 15, 1993) (Resp. Motion, Attach 3).) The policy, as further developed, was set forth in GAO Notice 2351.2, concerning Field Location Closures. The Notice expressly covered employees at eight locations, including the office at which petitioner worked. The following pertinent provisions of the policy were listed under the heading "Special Entitlements and Provisions:"

Employees may resign and receive severance pay or be placed in another position in GAO for their own convenience or benefit 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 . . .<sup>9</sup>

Petitioner argues that this provision of Notice 2351.2 and its applicability to employees in eight specifically enumerated offices made the transfer policy irrevocable until the closure of the last

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<sup>8</sup>See 5 U.S.C. §3502; 31 U.S.C. §731 *et seq.*; 5 C.F.R. Part 351; GAO Order 2351.1.

<sup>9</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 substantially changed. The "Special Entitlements and Provisions" section had been replaced by the following section on "Entitlements:" "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).)

office, which would have been Cincinnati.<sup>10</sup> (Arg. Tr. at 53-54.) The policy, read in its entirety, does not support that conclusion. Furthermore, the policy had been changed by the time that petitioner requested his transfer.

The exception clause of Notice 2351.2 specifically gave the Assistant Comptroller General for Operations discretion to make exceptions to the office closure policies (other than for matters related to eligibility for severance pay), for severe personal hardship or persuasive management reasons. (Notice 2351.2, ¶¶ 6 and 7.) Persuasive management reasons existed when Congress announced significant reductions in funding for GAO. The Agency could no longer afford to transfer employees and keep them on the rolls. The anticipated reduction in budget and staffing levels precipitated the change in Agency policy.

Respondent claims that the transfer option was not based on any legal obligation but on a voluntary Agency policy. Consequently, the Agency had the right to change the policy by placing a freeze on transfers, unless there was a legal impediment to doing so. Petitioner has not demonstrated the existence of any prohibition against the policy change.

Petitioner also contends that the new Agency policy imposing a freeze on transfers did not apply to him and that, therefore, GAO improperly denied his request to transfer. The uncontroverted affidavit of Joan M. Dodaro and the Staff Transfer Memorandum dated August 1, 1995 indicate that on August 1, 1995, GAO imposed an Agency-wide freeze on all transfers between offices that had not already been approved by the Assistant Comptroller General for Operations. (Declaration of Joan M. Dodaro (Resp. Motion, Attach 12); Staff Transfers Memorandum (August 1, 1995) (Attach. 13).) Because petitioner had not requested a transfer by the time that the freeze was imposed, petitioner was clearly subject to the freeze.

Furthermore, the Comptroller General's memorandum dated August 7, 1995, formally announced a new policy precluding all transfers between offices. Petitioner relies on the fact that the San Antonio office was not specifically mentioned in the Comptroller General's memorandum to argue that the Agency was precluded from denying his transfer. Because the San Antonio office had already been closed by the date of the Comptroller General's memorandum, there was no reason for the memorandum to mention San Antonio. Furthermore, as soon as the respondent learned that petitioner had not abandoned the option to transfer, four Agency managers indicated to petitioner on four separate occasions that the transfer freeze applied to him. See

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<sup>10</sup>The Cincinnati office initially was scheduled to close on July 31, 1996. However, in announcing the policy changes in August 1995, the Comptroller General advanced that office closure to November 10, 1995 in response to funding cutbacks. In doing so, he adopted the following recommendation of the budget review team:

"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." (Resp. Motion, Attach. 11.)

Uncontroverted Facts, *supra*. There is no reason to reject the Agency interpretation of its own policies. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Accordingly, the Agency properly revoked petitioner's option to transfer.

Petitioner also bases his entitlement to a transfer on the language in his RIF notice, which states 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 (May 23, 1995), ¶¶ 2 and 3 (Resp. Motion, Attach. 5).) Petitioner claims that the RIF notice 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 contained a statement that at the time of its drafting, May 23, 1995, petitioner had several options to choose from as alternatives to the scheduled RIF, but if none of those options had been elected by September 13, 1995, the separation by RIF would take place as scheduled. The Agency asserts that this language in the RIF notice does not create or recognize an irrevocable right to choose to transfer up until the RIF date.

GAO's RIF regulations provided that under circumstances involving a reasonably foreseeable RIF, "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. There is no maximum reduction in force period." Interim Notice 2351.1, ¶4.a (December 23, 1993) (Pet. Response, Attach. 5). Each individual RIF notice must include:

- (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 (July 25, 1986) (Resp. Motion, Attach. 17).<sup>11</sup> GAO's provision is fully consistent with the underlying statutory requirement for notice. See 5 U.S.C. §3502.<sup>12</sup>

By regulatory design, therefore, a RIF notice is intended to provide the affected employee with specific notice of the action to be taken at the end of the notice period, and the effective date for that action. See also *Note, Reduction in Force: A Guide for the Uninitiated*, 44 Geo. Wash. L. Rev. 642, 666 (1976). In this case, the action which loomed at the end of the notice period was termination of employment, because of the office closing. In accordance with Agency regulations, petitioner's notice stated that if he was still on the rolls of the San Antonio office beyond September 13, 1995, his job would be abolished and he would be separated from employment. Petitioner's RIF notice also included several other options which could occur to prevent the actual separation by RIF: reassignment to Dallas or headquarters or application for retirement, effective January 13, 1996. (Resp. Motion, Attach. 5.)

Petitioner was, in fact, given an opportunity to relocate and, by the respondent's admission, had that option available until the Agency changed its policy and placed the freeze on transfers in August 1995. By that time, all other employees had been reassigned from San Antonio (having done so on or before the official office closing on July 31, 1995), and petitioner had not exercised the option to transfer.<sup>13</sup> See Status of Staff in San Antonio (Resp. Motion, Attach. 6). The

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<sup>11</sup>GAO Order 2351.1, Reduction in Force, was substantially revised on February 28, 1996. The earlier version, as modified on December 23, 1993, applies to the instant case because the RIF notice in question was issued in May 1995.

<sup>12</sup>Pursuant to 5 U.S.C. §3502(d)(1)(A), the statute requires a minimum notice period of 60 days. In addition, the notice must include:

- (A) the personnel action to be taken with respect to the employee involved;
- (B) the effective date of the action;
- (C) a description of the procedures applicable in identifying employees for release;
- (D) the employee's ranking relative to other competing employees, and how that ranking was determined; and
- (E) a description of any appeal or other rights which may be available.

5 U.S.C. §3502(d)(2).

<sup>13</sup>As referenced throughout this decision, the submissions of the parties reveal that throughout the process--from the initial conversations with Mr. Garcia in 1994 through the office closing and the freeze on transfers--petitioner fully intended to retire rather than transfer or be RIFed.

Agency determined that September 13, 1995 would be petitioner's last day of duty. The primary purpose of selecting that date was to facilitate petitioner's retirement, not to extend his option to transfer.

Nothing in petitioner's RIF notice precluded the respondent from withdrawing the option to transfer, which was not a mandatory requirement but based on a voluntary Agency policy. The Merit Systems Protection Board (MSPB) has recognized that "a RIF action may often involve continuing changes in the agency's organization and, thus, in the kind and number of available positions." *Petranek v. Dept. of Army*, 4 MSPR 419, 421 (1980). For that reason, the MSPB upheld an agency's amendment of its offer of reassignment even after it had been accepted. *Ibid.*

In this case, the offer of transfer had been withdrawn prior to petitioner's acceptance. Petitioner acknowledges that he only requested a transfer after Mr. Garcia informed him that the freeze on transfers precluded him from securing that option as set forth in his RIF notice. (Arg. Tr. at 38-39.) Based on the foregoing, the Board determines that neither Agency policy nor petitioner's RIF notice gave petitioner an irrevocable right to transfer to Dallas. Consequently, the respondent's revocation of petitioner's transfer option and its subsequent denial of his transfer request were lawful.

## **II. The Effective Date of the RIF**

In his cross motion for summary judgment, petitioner also claims that the Agency committed harmful error by giving him a potential RIF separation date which extended beyond the closure of the San Antonio office. The next issue to be decided, therefore, is whether the Agency violated any RIF regulations in determining the effective date of petitioner's RIF. Petitioner argues that the Agency was required to use the date on which the San Antonio office closed as the effective date of his RIF. He relies on the following language of GAO Interim Notice 2351.1 to support his position:

GAO may 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 . . . and/or establish eligibility . . . to carry health benefits coverage into retirement.

(Interim Notice 2351.1, ¶3 (December 23, 1993) (A-94) (Pet. Response, Attach. 5).)

Contrary to Petitioner's contention, the only clear meaning of this provision is that an individual could be retained on annual leave beyond his or her RIF date to qualify for retirement. There is nothing in the provision to support petitioner's reading that the phrase "effective date of the RIF" refers to the office closing date. There is no language tying the provision to a general RIF date applicable to all or even most employees. Indeed, the RIF regulations require individual RIF notices to assure that individuals subject to a possible RIF are given specific notice applicable to

their situations. Petitioner's May 23, 1995 RIF notice clearly states that his RIF date was September 13, 1995.

Furthermore, there is no statute or regulation which precludes management from exercising its discretion in determining the date on which positions will be abolished in a Reduction-in-Force. See Order 2351.1 (July 25, 1986) (Resp. Motion, Attach. 17). Consistent with Agency policy and its understanding of petitioner's intentions, respondent made a management decision to abolish petitioner's position on September 13, 1995, if he had not elected to transfer or retire by that date. Respondent did not abuse its discretion in selecting September 13, 1995 as the effective date of petitioner's potential separation by RIF. It was chosen for the mutually beneficial purpose of enabling petitioner to use his accrued annual leave to qualify for retirement.

Accordingly, petitioner has not demonstrated any violation of RIF regulations in the Agency's determination of the effective date of his RIF.

### **III. The Decision to Retire**

Petitioner claims that he was coerced into requesting "terminal" annual leave and applying for discontinued service retirement to avoid being RIFed, because he was not allowed to transfer to Dallas or to receive the buyout and retire effective January 13, 1996. Accordingly, the last issue to resolve is whether the petitioner's decision to retire from GAO in lieu of separation by RIF was made voluntarily.

Retirement generally is presumed to be a voluntary act. *Covington v. United States*, 750 F.2d 937, 941 (Fed. Cir. 1984); *Lawson v. U.S. Postal Service*, 68 MSPR 345, 349 (1995). To prevail on a claim that retirement was involuntary, an individual must show that the decision to retire was either the product of misinformation or deception or was the result of coercion by the agency. *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1124 (Fed. Cir. 1996).

Petitioner contends that his decision to retire was involuntary because the Agency gave him misinformation about the deadline for exercising the option to retire or transfer. Through July 31, 1995, petitioner did have the option of relocating to the Dallas office. Because of a lawful policy change, petitioner lost that option. Petitioner was made aware of the freeze on transfers, through both oral and written communications, but he questioned whether it applied to his situation. As soon as the Agency realized that petitioner still believed that he retained the right to transfer, as indicated in his August 24, 1995 letter, respondent promptly disabused petitioner of this erroneous notion.<sup>14</sup> Agency officials notified petitioner that the freeze on transfers precluded

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<sup>14</sup>Petitioner's situation is entirely different from that in *Reed v. Dept. of Commerce*, 18 MSPR 697, 699 (1984), in which the MSPB found that the agency's "error in the original severance pay determination and its failure to correct such error prior to appellant's separation substantially prejudiced appellant's rights because he was effectively misled into allowing himself to be separated." In that case, the agency's misadvice about the individual's severance pay rights had

him from transferring to Dallas. This did not constitute misinformation but reflected the actual change in Agency policy.

Petitioner further asserts that the decision to retire was coerced because the Agency prevented him from retiring with a buyout or, in the alternative, transferring to Dallas. To establish coercion, the employee must show that the Agency imposed the terms of the retirement, the employee had no realistic alternative, and that the retirement "was the result of improper acts by the agency." *Staats*, 99 F.3d at 1124.

From his initial conversations with Mr. Garcia in 1994 to the effective date of petitioner's potential RIF, petitioner's primary intention was to retire. In fact, it was petitioner who first broached the subject with management officials. When the buyout was announced, petitioner endeavored to obtain the benefits of both the cash buyout and the ability to remain on GAO's payroll, using annual leave to qualify for retirement. See Request for Exception (August 24, 1995) (Resp. Motion, Attach. 9). Petitioner, rather than the Agency, was attempting to dictate the terms of his retirement.

The authorizing statute for the buyout limited the payment to persons who voluntarily separated before October 1, 1995. See Pub L. No. 104-19, §702 (July 27, 1995) (Resp. Motion, Attach. 7). The deadline for separation was a statutory requirement. Respondent did not have authority to waive this requirement and extend the deadline an additional three and one-half months to enable petitioner to retire with a cash separation incentive. Agency officials, therefore, acted lawfully when they appraised petitioner that legally he could not obtain both the buyout and retirement. Transferring was no longer an option at the time that the denial of the buyout was communicated to petitioner. This fact, however, does not mean that petitioner's decision to choose retirement was coerced.

The fact that petitioner was faced with an unpleasant situation or that his choice was limited to two unattractive options--retirement without the buyout or separation by RIF--does not make petitioner's decision any less voluntary. See *Staats*, 99 F.3d at 1124 (citing *Covington*, 750 F.2d at 942). At the time he retired, petitioner could not reasonably have relied upon any alleged misinformation from the Agency in making his choice. See *Covington*, 750 F.2d at 942. Nor could he claim that his retirement was coerced, because it was not the result of improper acts by GAO. See *Staats*, 99 F.3d at 1124. Accordingly, the Board finds that petitioner's retirement was voluntary.

## CONCLUSION

For the foregoing reasons, the Board finds that there is no genuine issue as to any material fact, and that respondent is entitled to judgment as a matter of law. Therefore, respondent's motion for summary judgment is hereby **GRANTED**, petitioner's cross motion for summary judgment is

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resulted in a reduction of severance benefits by almost fifty percent. *Ibid*.

hereby **DENIED**, and the petition for review is **DISMISSED** with prejudice.

**SO ORDERED.**