

Sandra Hill v. U.S. General Accounting Office

Docket No. 96-06

Date of Decision: April 30, 1998

Cite as: Hill v. GAO (4/30/98)

Before: Leroy Clark, Chair; Harriet Davidson, Vice-Chair, *en banc*; Michael Wolf, Member, dissenting.

Settlement agreement

Reduction-in-Force

Contract law

DECISION ON PETITIONER'S REQUEST FOR REVIEW OF THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

We have fully considered Petitioner's appeal from the September 30, 1997 initial decision of the Administrative Judge. That decision denied the Petition for Enforcement of the settlement agreement entered into between the parties in April 1992, concluding that the terms of the agreement did not bar the Agency from applying its Reduction-in-Force (RIF) procedures to separate Petitioner in the context of a wide-scale RIF of support personnel.

In this opinion we reaffirm the conclusion that Petitioner's challenge must fail and determine that the initial decision addressed and correctly resolved each issue presented by the Petition. Nevertheless, we reiterate and clarify several matters in view of the position expressed by our colleague in his dissent to this decision. The initial decision found no reason to reach certain points raised by Petitioner, because of the conclusion that Petitioner had not established that the settlement agreement covered the circumstance of an Agency-wide RIF. However, the dissenting opinion is written from the premise that an Agency-wide RIF, not contemplated by either party, was covered by the settlement agreement. Further, our colleague takes issue with the consideration of extrinsic evidence to determine the intended meaning of the settlement agreement. He also holds the view that the burden is on the Respondent to show that a discharge of its duty under the agreement was "impossible."

The underlying factual background is amply set out in the initial decision. For present purposes, we only summarize that background to set the stage for this discussion. Petitioner Sandra V. Hill filed a Petition for Enforcement of a settlement agreement, challenging the action of the U.S. General Accounting Office (GAO) in applying Reduction-in-Force procedures to separate her from employment. She claimed that the terms of a settlement agreement reached on April 28, 1992 precluded the Agency from separating her as part of the Agency-wide RIF of support staff which took place in 1996. GAO contended that the settlement agreement did not bar Petitioner's

separation by means of RIF. Following an evidentiary hearing, the initial decision concluded that the Agency did not violate the settlement agreement in separating Petitioner by RIF.

The settlement agreement here at issue required that GAO assign Petitioner tasks, in a newly created position as issue area librarian, with opportunities "to demonstrate her ability to take on assignments of increasing complexity and greater responsibility." Settlement Agreement, ¶2. Under the agreement, the Agency also was to provide training in furtherance of Petitioner's library duties:

In conjunction with the assignments described . . . and in order to assist employee in developing the skills, knowledge and abilities that will qualify her to perform official duties and for upward mobility, GAO shall undertake its best efforts within twelve (12) months of the date of this Agreement to make training available to employee.

Settlement Agreement, ¶3.

While the settlement did not specify an ending date, it did include in ¶4 a termination clause which is central to this case. That clause stated that the agreement would expire under any of the following three circumstances:

- (a) Employee terminates her employment with GAO or GAO lawfully removes employee from employment;
- (b) GAO determines in good faith to discontinue the Issue Area Library, in which case GAO will reassign employee to duties that it determines in good faith will continue to provide employee with opportunities to develop skills, knowledge and capability to qualify her for upward mobility; or
- (c) The parties agree to terminate this Agreement for any reason.

The agreement's termination clause did provide in ¶4(b) for the possibility of the Agency's determination to discontinue the issue area librarian position which had been created for Petitioner in settlement of her earlier dispute. On its face, however, that provision of the agreement speaks only to a determination focused solely on the new position; it is silent as to its applicability or nonapplicability in the context of an Agency-wide downsizing effort.

The Administrative Judge, in assessing the contractual obligations of ¶4(b), interpreted the settlement agreement in light of the parties' collective intent at the time of the agreement's drafting. *See Greco v. Department of Army*, 852 F.2d 558, 561 (Fed. Cir. 1988); 4 Williston on Contracts 3d Ed. §601 at 305. The inquiry into intent starts with a review of the terms of the settlement agreement itself. *See Dati v. Department of Navy*, 41 MSPR 397, 400 (1989). As part of this inquiry, we look to the reasonable use of words and how each party would reasonably

have understood them; the circumstances under which words are used are always relevant to discerning the parties' intent. 4 Williston on Contracts §607 at 378-80.

While the words of ¶4(b) may appear to be clear in and of themselves, their applicability to the broad-scale RIF context is not. The dissent fails to see that the ambiguity in this matter lies in the provisions's applicability or nonapplicability to the RIF context. A provision in a contract or settlement agreement is ambiguous, and therefore warrants consideration of extrinsic evidence, "if it is susceptible of differing, reasonable interpretations." *Gullette v. U.S. Postal Service*, 70 MSPR 569, 573 (1996); see *Thomas v. HUD*, 71 MSPR 181, 187 (1996), *aff'd in pertinent part, rev'd on other grounds*, 124 F.3d 1439, 1442 (Fed. Cir. 1997) (ambiguity exists "if the terms of the agreement are reasonably susceptible of more than one interpretation"). See also *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) ("[i]t is a generally accepted rule, which requires no citation of authority, that if a contract is reasonably susceptible of more than one interpretation, it is ambiguous"). Extrinsic evidence in that circumstance enlightens the court as to the parties' intent at the time the contract was entered. See Zamir, The Inverted Hierarchy of Contract Interpretation and Supplementation, 97 Colum. L. Rev. 1710, 1728-31 (1997). See also *King v. Department of Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) ("[i]f ambiguity is found, or if ambiguity has arisen during performance of the agreement, the judicial role is to implement the intent of the parties at the time the agreement was made").

Because the agreement's terms neither specifically refer to a RIF as a triggering event for the termination provision nor exclude that possibility, resolution of this matter necessarily involves probing the intent of the parties at the time the settlement agreement was drafted as well as the actions surrounding the decision concerning the library and the RIF here at issue--the events which caused Petitioner's separation from employment. Therefore, the Administrative Judge considered testimony from the drafting parties on the meaning of §4(b) of the agreement and whether they intended a broad-scale RIF to be encompassed within its terms. We agree with the conclusion of the initial decision that the terms of the settlement agreement did not encompass protection against an Agency-wide RIF of the type which precipitated Petitioner's separation in 1996.

Our colleague expresses in the dissent a very different view of ¶4(b) of the agreement. Stating that the contract language is not lacking in clarity, he concludes that "there is no reason to consider extrinsic evidence to interpret language that is patently unambiguous." Dissent at 2. He reads the pertinent provision as creating by its terms a binding duty on the Agency's part to reassign Petitioner even in the context of an Agency-wide RIF.

We cannot agree with such a reading of the provision regarding reassignment. In our view, to conclude that the agreement clearly on its face applied to this situation, the provision by its terms would have to expressly refer to "Agency-wide RIFs"¹ and further, it would have to expressly

¹A conclusion that the agreement's language clearly embraced this situation would not alleviate concerns about legal questions on the impact on third party rights of such an attempted contract for RIF immunity.

exempt from its coverage a second "Agency-wide RIF" (the latter being the reading that the Petitioner proposed). Short of such clarity by express reference to the circumstances surrounding the 1996 RIF of support staff, one cannot read into the agreement a duty to reassign Petitioner in this context merely from the literal terms of the agreement.

In fact, we read the ¶4(b) provision as drafted to cover two possible scenarios, neither of which is present here: (1) a subsequent isolated decision by the Agency, focused narrowly on the newly created issue area librarian function, that the function was unnecessary or superfluous; and (2) a bad faith targeted elimination of the position.² See Transcript of Hearing at 13, 15-16, 19-21, 23, 27, 72 (March 4, 1997). In either event, the provision assured that Petitioner would be reassigned to a comparable position in terms of upward mobility and responsibility. The parties thus bargained for the contingency of the Agency making a decision focused solely on Petitioner's position and outside the context of an Agency-wide RIF. In contrast, the RIF action here at issue was not at all focused on the position or individual in question. Rather, the decision to abolish the issue area librarian position took place as part of a mandatory division-wide review to assess the relative importance of each of the support positions in light of the Agency's mission and the targeted number of positions required to be eliminated to achieve the Congressionally mandated budget cuts.

To have focused on the individual position or employee in the Spring of 1996 would have jeopardized the requirement for consistent and uniform application of RIF procedures. By statute, GAO's rules governing the release of employees in a RIF are required to "give due effect to tenure of employment, military preference, performance and/or contributions to the agency's goals and objectives, and length of service."³ 31 U.S.C. §732(h). The statute does not allow room, in prescribing the order of release of employees in a RIF, for consideration of a pre-existing settlement agreement favoring one individual employee. The RIF here at issue was undertaken pursuant to detailed RIF rules found in GAO Order 2351.1 (February 28, 1996), designed to assure that individuals subject to RIF procedures are treated fairly and in accord with merit principles as applicable to the circumstances of agency downsizing. See generally MSPB, Reduction in Force: The Evolving Ground Rules (1987).⁴ These rules require that the Agency first identify positions to be eliminated and then identify the individuals affected by the decision

²In contrast, the dissent views the ¶4(a) provision as addressing Agency action "directed personally against Petitioner," and ¶4(b) as covering "a different circumstance." Dissent at 1 (emphasis in original).

³This provision varies slightly from the requirement applicable in the executive branch, which includes the same requirements, except that consideration of "efficiency or performance ratings" is mandated rather than consideration of "performance and/or contributions to the agency's goals and objectives." 5 U.S.C. §3502(a).

⁴The executive branch RIF regulations, which are closely paralleled by GAO's RIF Order, are found in 5 C.F.R. Part 351.

to eliminate particular positions. *Grier v. Department of Health & Human Services*, 750 F.2d 944, 945-46 (Fed. Cir. 1984). The latter step is based upon retention standing, determined according to rules developed for the conduct of the RIF. *Gandola v. FTC*, 773 F.2d 308, 310 (Fed. Cir. 1985). See also *Horne v. MSPB*, 684 F.2d 155, 156-57 n.2 (D.C. Cir. 1982).

GAO's RIF Order specifies rules governing employee competition for remaining positions when a determination is made to eliminate positions. See Order 2351.1, ch. 2-4. In this case, when Petitioner was identified as an individual subject to RIF, the Agency determined that she did not have assignment rights. Petitioner has never challenged the Agency's reasons for the RIF nor its procedural application of the RIF rules to her. Rather, Petitioner has only taken issue with whether the settlement agreement barred the Agency from invoking RIF procedures to separate her.

In fact, the very existence of detailed RIF rules--designed to assure that merit principles are applied when agencies must downsize⁵--highlights the difficulty with reading broad-scale RIF immunity into the provision here at issue. While we need not resolve this issue here, it is potentially beyond the legal capacity of the Agency to enter into an agreement with one individual which would detrimentally affect the rights of other employees in a GAO-wide RIF. The merit system underpinnings of the RIF Order are called into question by the suggestion of RIF immunity which necessarily imperils the RIF status of another individual. Exceptions to the regulatory order of retention in RIFs are not to be implied. See *Antoine v. Department of Interior*, 63 MSPR 185 (1994) (RIF statute directs Office of Personnel Management to prescribe regulations for the release of competing employees in a RIF, giving due effect to an employee's tenure of employment, military preference, length of service and efficiency or performance ratings; the statute makes no mention of preference of any kind other than that based on military service).⁶

In reaching his conclusion, the dissent assumes that the §4(b) provision necessarily involved contemplation of a RIF and that, therefore, it also involved broad-scale RIF applicability. He expresses the view that the elimination of Petitioner's position while she occupied it likely would have resulted in a RIF. Dissent at 3. Nothing in the agreement language or in the record of this matter supports this conclusion. On the contrary, in the GAO employment environment of 1992, Petitioner could have been moved to a different position within the Agency without any person being released from a job group and, thus, without any individual being subjected to RIF procedures. This would simply involve creating a new slot or position for her in a related area.

⁵See generally, *Rojas v. GAO*, PAB Docket No. 96-08 at 23-25.

⁶In *Antoine*, the MSPB rejected an effort to apply RIF retention preference to Indians employed on reservations entitled to employment preference; only very limited RIF preference, expressly provided for by federal statute, was recognized for Indians employed by the Bureau of Indian Affairs and the Indian Health Service. The Board concluded that "employment preference" did not encompass "RIF retention preference" without express Congressional authorization.

The record amply supports the conclusion that ¶4(b) was drafted to protect Petitioner from a subsequent Agency determination that her newly created function was ill-advised or from a bad faith effort to eliminate her position as a means of getting rid of her. Testimony adduced at the evidentiary hearing shows that the parties who negotiated the agreement envisioned Petitioner being moved to another position without any employee necessarily being displaced. TR at 13-20, 22-28.

One further discussion in the dissent warrants comment here. Because of the dissent's premise that a contractual duty to reassign Petitioner existed even in the Agency-wide RIF context, our colleague moves on to a discussion of the doctrine of impossibility as an excuse for nonperformance of a contract. We do not agree that the question of impossibility arises, in view of our holding that there was no duty in this RIF context.

The dissent points to *W.R. Grace & Co. v. Local 759, International Union of Rubber Workers*, 461 U.S. 757 (1983), in support of the proposition that "a settlement agreement cannot be unilaterally obviated by an employer merely because enforcement of the agreement would directly conflict with another legal obligation (in that case, a lawful seniority system)." Dissent at 12. The *Grace* case did not hold (as opposed to stating in dictum) that the employer had to fulfill both obligations.⁷ The only issue before the Court, and the only issue decided, was whether the male employees who had been laid off in violation of the collective bargaining agreement were entitled to backpay. In fact, *Grace* held what we state here, namely that the employer could not enter into a conciliation or agreement with female employees, to which the male employees were not parties, and denigrate the rights of male employees under a pre-existing, valid collective bargaining agreement (or, as here, the valid RIF regulations).

Thus the *Grace* decision's relevance for present purposes lies not in any application to concerns of impossibility of performance, but in its implications for Petitioner's attempt to claim RIF immunity through her individual settlement agreement, to the detriment of other employees subject to the RIF and to the detriment of the merit system itself. There is nothing to support a claim of Agency authority to sacrifice the rights of another employee in a job elimination in order to retain Petitioner, and in contravention of the established, fully detailed RIF regulations prescribing the order of release.

CONCLUSION

In this action to enforce a settlement agreement, Petitioner bears the burden to establish that a

⁷It should be noted that Petitioner's only requested relief here was for specific performance--retention in employment. Implicit in this request, in the RIF context, is the conclusion that someone else would have to be separated in her stead. This implication for the RIF retention rights of another employee, inherent in Petitioner's argument, raises questions about Agency authority to contract in the manner which the Petitioner contends it did. Agency action to separate a different employee, higher on the retention register than Petitioner, would have collided with the requirements of the RIF regulations.

contractual duty existed and was breached by the Agency. In our view, Petitioner has failed to meet that burden in light of the contract's provisions, which do not specifically address broad-scale RIFs. Consideration of the full record, including testimony of both parties' attorneys who negotiated the settlement, supports the conclusion that no broad-scale RIF immunity should be read into the agreement here in question. This conclusion is fully consistent with principles of public policy as well. The RIF regulations reflect a finely tuned mechanism based upon a Congressional mandate that merit system principles must govern in downsizing efforts. As explained above, no broad RIF protection was provided for in the settlement agreement; certainly none should be implied. See *Kellihan v. Department of Navy*, 72 MSPR 47 (1996).

Finding no merit in Petitioner's challenge and being persuaded that the initial decision addressed and correctly determined each issue presented by the Petition, we **affirm** the conclusion of the initial decision that the settlement agreement entered into between Petitioner and the Agency in April 1992 did not bar the action taken in this circumstance. Accordingly, the Petition for Enforcement is **denied** and the RIF action resulting in Petitioner's retirement is **sustained**.

SO ORDERED.

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