

**CAROLANN COSELLA et al. v. U.S. General Accounting Office**

**Docket Nos. 94-03; 94-04; 94-05**

**Date of Decision: June 29, 1994**

**Cite as: Cosella et al. v. GAO, Docket No. 94-03 (6/29/94)**

**Before: Alan S. Rosenthal, Administrative Judge**

**Headnotes:**

**Discovery**

**Prohibited Personnel Practice**

**Protective Order**

**Workforce Restructuring Action/Reduction in Force**

**ORDER**

PERSONNEL APPEALS BOARD  
UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C.

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| CAROLANN COSELLA, ET AL.<br>Petitioners,                   | ) | Docket No. 94-03 |
| v.   | ) |                  |
| UNITED STATES GENERAL<br>ACCOUNTING OFFICE,<br>Respondent. | ) |                  |
| JOSEPH MARGALLIS, ET AL.<br>Petitioners,                   | ) | Docket No. 94-04 |
| v.   | ) |                  |
| UNITED STATES GENERAL<br>ACCOUNTING OFFICE,<br>Respondent. | ) |                  |
| STEPHEN L. BALLARD<br>Petitioner,                          | ) | Docket No. 94-05 |
| v.   | ) |                  |
| UNITED STATES GENERAL<br>ACCOUNTING OFFICE,<br>Respondent. | ) |                  |

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ORDER

This proceeding is before the Board on three consolidated petitions for review challenging various aspects of the decision of the agency to close, effective no later than August 31, 1994, its Philadelphia Regional Office (PRO). The petitioners are present or former agency employees assigned to PRO. To date, the proceeding has generated considerable filings and one oral argument on legal issues, most forthcoming on an expedited schedule provided in our

June 1, 1994 order in recognition of the imminence of the proposed PRO closure. Specifically, the Board now has in hand the following in addition to the petitions for review and the answer thereto:

a. The memoranda of the parties on certain legal issues identified in the June 1 order, as well as the transcript of the oral argument on those issues that took place on June 13.

b. The agency's motions for partial dismissal and partial summary judgment, filed on June 10, and the petitioners' response thereto.

c. The petitioners' motion for a stay of the proposed PRO closure, filed on June 13, and the agency's response thereto.

d. The petitioners' June 22 motion to compel the agency to respond to certain discovery requests objected to on grounds of lack of relevance as well as undue burden, and the agency's response thereto.<sup>1</sup>

Upon its full consideration of all the foregoing material (including any surreply that may have been filed in connection with a particular submission), the Board has reached certain conclusions respecting which issues presented by the petitions appear to

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<sup>1</sup> A second motion to compel was received late yesterday afternoon and, as the parties have been advised, has not as yet been considered by the full Board. At the telephone conference held today, the undersigned informed the parties of his belief that the discovery request to which that motion related was untimely in that it was made one day before discovery had to be completed under the terms of the Board's June 1 order. The parties' oral response to that expressed belief will be made available to the full Board for whatever action it deems appropriate. It should be noted that, while opposing the motion to compel, agency counsel voluntarily agreed to supply a portion of the sought information as soon as possible.

warrant additional exploration at an evidentiary hearing. Such a hearing will now be held before any further action by the Board with regard to the ultimate disposition of the merits of the controversy, either on the agency's dismissal and summary judgment motions or otherwise.

Beyond its determinations respecting the scope of the evidentiary hearing, the Board has acted upon both of the petitioners' motions that are now ripe for decision.

As provided in the Board's June 13 and 20 orders, a telephone conference was held with the parties today for the purpose of discussing the Board's determinations and the forthcoming evidentiary hearing. This order is a memorialization of the content of the conference.

1. The evidentiary hearing. The hearing will take place on July 14 and 15, 1994 and will commence each of those days at 9:30 a.m. in the Board's hearing room, Suite 830, Union Center Plaza II, 820 First Street, N.E., Washington, D.C. The petitioners will present their evidence first and, if so inclined, may present rebuttal evidence following the conclusion of the agency's presentation.

No later than noon on July 12, the parties shall file and serve, by either facsimile transmission or hand delivery if necessary to ensure receipt by that hour, lists identifying with particularity the witnesses who will be presented and exhibits that will be offered at the hearing. In the case of each witness, a brief summary of the substance of the proposed testimony of that

witness shall be included.

The hearing shall be confined to the following issues:

a. Whether the agency's decision to close PRO was based upon unlawful discrimination on account of race, gender or national origin.

b. Whether the PRO closure constitutes a transfer of function, thereby entitling the employees of that office to transfer with the function and to be reimbursed for relocation expenses. In this connection, the Board is withholding final judgment on the agency's offered interpretation of the term "function" pending receipt of any evidence proffered with regard to the existence of an identifiable class of activities that is now performed in PRO but not at headquarters. Further, the Board will expect the agency to provide any available evidence in its possession with regard to how it has applied the concept of transfer of function in past practice.

c. Whether the transfer of the PRO employees to headquarters is "in the interest of the government", thus requiring the agency to pay their moving expenses. The Board recognizes that there is a jurisdictional question respecting its ability to consider this issue. Nevertheless, it desires to receive evidence on such matters as how the work now being performed in the PRO will be handled in headquarters, including who will be performing it. In addition, the evidence should cover the extent, if any, to which the decision not to treat the transfer as in the government's interest was influenced by monetary considerations. On this score,

the facts surrounding the assertedly different decision reached in the case of the closure of agency offices in Harrisburg and Pittsburgh might well be developed.

d. Whether the agency fulfilled any obligation it had under GAO Order 2351.1, Chapt. 1, to consider alternatives to conducting a reduction-in-force.

e. Whether the agency committed a prohibited personnel practice by retaliating against employees who filed an administrative grievance or engaged in any whistleblowing activity concerning the PRO closure. In this connection, the agency will be expected to substantiate its claim that the issue as to the relocation agreement is moot.<sup>2</sup>

2. Motion to Compel. The Board has determined that, in large measure, the information sought by the interrogatories to which the

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<sup>2</sup> During the conference, the parties were informed of the issues that the Board has concluded do not warrant evidentiary exploration. Those issues are:

1. Whether GAO failed to fulfill the requirements contained in the Senate Report accompanying the 1994 Legislative Branch Appropriations Bill.

2. Whether the closure of the Philadelphia Regional Office violated the merit principle, contained in 5 U.S.C. § 2301(b)(5), that "the Federal work force should be used efficiently and effectively."

3. Whether the decision to close the Philadelphia Regional Office constituted a wise or well-founded management decision.

4. Whether the agency retaliated against Mr. Ballard by reducing the number of promotions in PRO.

5. Whether the office closure was intended to enhance employment opportunities in Washington and thus violated 5 U.S.C. § 2302(b)(5) or (6).

agency objected is not relevant to the issues that warrant evidentiary exploration. In addition, many of the interrogatories are so broad in scope that to require a response would impose an undue burden on the agency. The Board nonetheless is requiring a response, by 4:00 p.m. on July 5, to the following questions in the interrogatories, which the Board deems both relevant to the issues to be explored at the evidentiary hearing and capable of response without undue burden:

a. Dodaro - Question 1, subparts 3 and 7; question 3 in its entirety.

b. Howard - Questions 1 and 2 but not confirmation sought in a paragraph marked "x" following question 2.

c. Field Office Study Team members - For each team member, questions 1, 2, 15 and 16.

3. Motion for a Stay. Without reaching the question of its authority to issue an order staying the PRO closure at the request of petitioners, the Board denies the motion without prejudice to its renewal following the evidentiary hearing if petitioners are so inclined. The Board cannot conclude at this juncture that there is a substantial likelihood that petitioners will succeed on so much of their claim as seeks to preclude PRO closure, as distinguished from their endeavor to obtain full relocation expense reimbursement for transferring employees. Moreover, a stay would likely occasion substantial injury to the agency. In this regard, because the Board will make every effort to decide the controversy prior to August 31, 1994, such injury to petitioners in the absence of a

stay is much less apparent.

SO ORDERED.

For the Board

DATED:

6/29/94

          /S/            
Alan S. Rosenthal  
Chairman