

Patricia Donahue v. U.S. Government Accountability Office

Docket No. 08-05

Date of Decision: August 11, 2009

Cite as: Donahue v. GAO, No. 08-05 (8/11/09)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Merit Pay System

Pay Bands

Performance Appraisal System and Procedures

Performance Ratings

Prohibited Personnel Practice

Summary Judgment

DECISION ON PETITIONER'S AND RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Patricia Donahue, the Petitioner, filed a Petition containing seven Counts on July 9, 2008. On March 30, 2009, Petitioner filed a Motion for Partial Summary Judgment on Counts II and VII of the Petition, and the Government Accountability Office (GAO or the Agency or Respondent) filed a Motion for Partial Summary Judgment on Counts I, II, VI, and VII of the Petition.¹

¹ Count I alleges that GAO's "flat-lining of Petitioner's performance upon her placement into a higher pay band to 'meets expectations' in all her job competencies, without regard to her actual performance and without regard to the appropriate performance standards, injured Petitioner and constituted a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12)." Petition ¶18. Count II alleges that GAO's "consideration of only Petitioner's three-month post-promotion performance when appraising her work for the FY 2006 annual appraisal cycle, rather than considering her work for the entire appraisal cycle, injured Petitioner and constituted a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12)." Petition ¶20. Counts VI and VII essentially restate these allegations, respectively, as to other banded employees who were competitively placed into a higher pay band.

Also on March 30, 2009, Petitioner timely filed a Motion for Class Certification. In that Motion, Petitioner requested class certification only as to Count VII of the Petition, and not Count VI of the Petition. On April 7, 2009, the parties filed a Joint Motion to Stay Briefing on Class Certification pending disposition of the parties' pending cross motions for partial summary judgment. In the Joint Motion, Petitioner stated that she "hereby withdraws Count VI of her Petition as she is no longer seeking to represent a class as to the 'flat-lining' claim, and will only pursue such a claim (Count I) on an individual basis." Joint Motion at 2. On April 8, 2009, the Joint Motion was granted and further briefing on class certification was stayed pending resolution of the parties' cross motions for partial summary judgment.

GAO timely filed an Opposition to Petitioner's Motion for Partial Summary Judgment on April 29, 2009. No opposition to GAO's motion was filed.²

II. BACKGROUND

The Government Accountability Office Personnel Act of 1980 (GAOPA) established an independent personnel system for GAO and its employees. Pub. L. No. 96-191 §3(c)(1)(2), 94 Stat. 27 (1980).³ The GAOPA provided GAO with greater flexibility in matters of pay and classification than the General Schedule system that prevails in the Executive Branch.⁴

² On June 12, 2009, Petitioner filed a Notice of New Authority. *See* n.23, *infra*.

³ Pursuant to that authority, in 1989 GAO abandoned the General Schedule and established a system which grouped its evaluators, evaluator-related staff, and specialists into three broad pay bands. In early 2006, the middle band was subdivided into Band IIA and Band IIB.

⁴ The GAOPA has been substantively amended several times. The GAO Personnel Flexibilities Act of 2000 (Human Capital I), Pub. L. No. 106-303, was enacted to provide the Comptroller General (CG) with increased authority in areas not here relevant. Prior to 2004, the GAOPA had provided that with certain exceptions, "basic pay rates of officers and employees of the Office shall be adjusted at the same time and to the same extent as basic pay rates of the General Schedule are adjusted." In 2004, the GAO Human Capital Reform Act of 2004 (Human Capital II), Pub. L. No. 108-271, was enacted. This amended the GAOPA to provide, *inter alia*, greater authority in the areas of annual pay adjustments, pay retention and annual leave for certain employees. Specifically, the 2004 amendments required that GAO adjust "basic rates" of employees annually "to such extent as determined by the Comptroller General." 31 U.S.C. §732(c)(3). Under the amended version, in making that determination, the CG was to consider six enumerated factors, including that "equal pay should be provided for work of equal value within each local pay area," and "such other criteria as the Comptroller General considers appropriate, including, but not limited to, the funding level for the Office, amounts allocated for performance-based compensation, and the extent to which the Office is succeeding in fulfilling its mission and accomplishing its strategic plan..." 31 U.S.C. §§732(c)(3)(A), (F). The provision also required the CG to consider "the appropriate distribution of agency funds between annual adjustments under this section and performance-based compensation." 31 U.S.C. §732(c)(3)(E).

Congress amended the GAOPA again in 2008, in part to provide a legislative remedy for individuals who effectively were denied cost of living increases in 2006 and 2007 because of the Comptroller General's interpretation of flexibility provided by the 2004 amendments. The GAO Act of 2008, Pub. L. No. 110-323, provided retroactive relief for qualifying individuals for 2006 and 2007. GAO is now expressly required to make future annual increases in base salary at the same time as the GS adjustment

However, the independent and more flexible system was still tied to basic principles that underlay the merit system from which it developed. In this regard, in enacting the GAOPA, Congress stated that GAO must provide for a system to appraise the performance of GAO employees that meets the requirements of section 4302 of title 5. 31 U.S.C. §732(d)(1).⁵ One of those requirements is set forth in section 4302(a)(1) of title 5: an agency's performance appraisal system must "provide for periodic appraisals of job performance of employees." GAO's regulation implementing this requirement, 4 C.F.R. §4.2(b)(3), states in relevant part that any performance appraisal system used by GAO shall provide for "[a]nnually evaluating each employee during the appraisal period[.]" In addition, 5 U.S.C. §4302(a)(3) requires agencies to "use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees" (emphases added).

GAO Order 2430.1, "Performance Appraisal" (Mar. 20, 2006) (Pet. Exh. 11), established GAO's performance appraisal program for most GAO employees, including Petitioner and similarly situated employees.⁶ Under Order 2430.1, each appraisal system must provide for, among other things, "evaluating each ratee, at least annually[.]" GAO Order, ch. 1, §4b(2). The Order lists seven exceptions to the annual appraisal cycle, including the following:

An appraisal is required when an employee is promoted during the annual performance appraisal cycle. One appraisal period will end with the promotion, and a new period will begin on the employee's promotion date. (In this instance, the employee is appraised at the end of one period against the standards for the lower band, new expectations are set after promotion using the competencies and standards for the higher band.)

GAO Order, ch. 1, §6b(4).⁷

and to provide each employee who is meeting expectations at least what he or she would get if under the GS system. *See* 31 U.S.C. §732(j).

⁵ Section 732(d)(2) provides that the Comptroller General has the same responsibility for performance appraisals under this subsection as the Director of the Office of Personnel Management has under 5 U.S.C. §4302.

⁶ The Order does not apply to individuals in the Senior Executive Service (SES), Senior Level (SL) employees, student interns and experts and consultants. Order 2430.1, ch. 1, §1.

⁷ The other exceptions to the annual appraisal cycle concern appraisals for developmental staff, appraisals when there is a change in the designated performance manager during the annual appraisal cycle, appraisals for employees officially detailed or temporarily assigned to a different position for more than 90 days, appraisals for employees whose performance is deemed to be below expectations in any competency before the end of the annual appraisal cycle, appraisals at the conclusion of an opportunity period, and appraisals when the Agency changes the starting and/or ending date of the performance appraisal cycle. Order 2430.1, §6b.

The GAOPA also requires that the Agency's merit pay system be "consistent with section 5401 of title 5, as in effect on October 31, 1993." 31 U.S.C. §731(b). Section 5401 provided,⁸ in relevant part, that agencies: 1) use performance appraisals as the basis for determining adjustments in basic pay by general pay increases and merit increases and making performance award determinations; and 2) within available funds, recognize and award quality performance by varying amounts of performance and cash awards. The corresponding GAO regulation provides, in relevant part, that "[p]ay distinctions be maintained in keeping with work and performance distinctions." 4 C.F.R. §5(a)(2); *see* 4 C.F.R. §5.3.

At all times relevant to this case, analysts' performance appraisals were prepared in accordance with GAO's "Competency-Based Performance System" (CBPS). Under CBPS, most analysts received one appraisal that evaluated their performance over a full year, corresponding generally to the fiscal year. However, in accordance with the provision of the Order 2430.1 set forth above, analysts who were competitively placed or promoted⁹ before the end of an appraisal year received two appraisals, each covering a different part of the appraisal year--one for the period of time before they were promoted or competitively placed (a so-called closeout or non-cycle appraisal), and one for the period of time after promotion or competitive placement.

Also, at all times relevant to this case, GAO used a Performance Based Compensation (PBC) system to determine analysts' pay. Under the PBC system, GAO analysts are grouped into pay bands. From lowest pay ranges to highest pay ranges, the bands are Band I, Band IIA, Band IIB, and Band III.¹⁰ For each annual performance appraisal cycle, which corresponds generally to the fiscal year, analysts' pay is based on their individual performance appraisal scores relative to the average appraisal scores of a comparison group of employees during that same performance appraisal cycle.

GAO uses a Standardized Rating Score (SRS) for making such comparisons. To determine an analyst's SRS, GAO first calculates the analyst's annual performance appraisal average. This average is obtained by assigning a numeric point value to each rating on every job competency (0 for "Below Expectations," 1.5 for "Meets Expectations," 3 for "Exceeds Expectations," and 5

⁸ 5 U.S.C. §5401 was repealed when the Executive Branch pay-for-performance system ended, effective November 1, 1993.

⁹ GAO makes a distinction between a competitive placement and a promotion. A competitive placement is the movement of an analyst from Band IIA to Band IIB and does not result in an automatic salary increase. All other movements of analysts from one band level to a higher band level are called promotions and do result in an automatic salary increase. *See* Order 2540.3, ch. 3, ¶¶4-5 (2006) (Pet. Exh.8); ch. 3, ¶¶4, 5 (2008) (Pet. Exh. 6).

¹⁰ For 2006, the pay ranges for employees working in Washington, D.C. and several other cities were as follows:

Band I	\$41,600 - \$75,900
Band IIA	\$69,800 - \$101,600
Band IIB	\$82,100 - \$118,000
Band III	\$104,000 - \$129,800

for "Role Model") and dividing the total points accumulated by the number of job competencies. GAO then calculates each employee's annual SRS by subtracting the average performance appraisal average for the comparison group from the individual analyst's performance appraisal average, dividing the result by the standard deviation for the comparison group, rounding the result to two decimal places, and adding 5.00 to the resulting number. *See* Resp. Exh. 10 at 6. For most analysts, the comparison group for determining the SRS is all employees in the same pay plan, pay band, and employing unit. The SRS is then used to calculate each analyst's PBC. *See* Resp. Memorandum of Law at 6-7; Pet. Memorandum of Points and Authorities at 3.

Generally, the SRS formula provided more PBC to employees who received higher performance appraisal scores than other employees in their peer group. However, for purposes of PBC, GAO treated employees who were promoted during the year differently from employees who were competitively placed during the year. Employees who were promoted (either from Band I to Band IIA or from Band IIB to Band III) during the year received only a portion of their calculated PBC amount, depending on when in the year they were promoted. Employees who were promoted during the second quarter of the fiscal year received 66% of the calculated PBC amount; employees who were promoted during the third quarter of the fiscal year received 33% of the calculated PBC amount. Resp. Exh. 10 at 3; 2 ¶7. On the other hand, employees who were competitively placed during the year into Band IIB from Band IIA received 100% of the calculated PBC amount based on the Band IIB competitive pay rate, without regard to when during the year they were competitively placed. Resp. Exh. 2 ¶7.

III. FACTS

Based on the record, I find the following material facts as to which there is no dispute:

1. Patricia Donahue, the Petitioner, began fiscal year 2006 as a Band IIA analyst. In or around May 2006, Ms. Donahue applied for competitive placement into Band IIB. Answer to Petition ¶7.

2. Ms. Donahue received a non-cycle performance appraisal covering her performance as a Band IIA analyst from October 1, 2005 to May 30, 2006. Resp. Exh. 4. She received ratings of "Exceeds Expectations" in all seven competencies in the non-cycle performance appraisal.¹¹ *See* Resp. Exh 2 ¶5. All other applicants for competitive placement also received a non-cycle performance appraisal.

3. On July 9, 2006, approximately 9 months into the FY2006 appraisal cycle, Ms. Donahue was competitively selected and placed in Band IIB. Answer to Petition ¶8.

4. In November 2006, Petitioner received a performance appraisal for the period from July 9, 2006, to October 14, 2006, which evaluated her performance during that period as a Band

¹¹ Because the non-cycle appraisal was prepared solely for the application process, GAO did not calculate an SRS score for that appraisal.

IIB analyst.¹² In this appraisal, she received "Exceeds Expectations" ratings in two competencies and "Meets Expectations" ratings in the remaining six competencies.¹³ Resp. Exh. 6.

5. In calculating Petitioner's SRS and PBC for the FY2006 annual appraisal cycle, GAO considered only her performance appraisal for the period from July 9, 2006 to October 14, 2006, when she was appraised as a Band IIB analyst. *See* Resp. Exh. 2 ¶7.

6. As with other employees who were competitively placed into Band IIB from Band IIA, Petitioner received 100% of her calculated PBC amount. *Id.*

7. In calculating the SRS and PBC for employees like Petitioner, who are competitively placed into Band IIB, GAO does not consider the employee's performance appraisal for the period when he/she was appraised as a Band IIA analyst.¹⁴ Resp. Exh. 2 at ¶4.

IV. POSITIONS OF THE PARTIES

Petitioner asserts that GAO's consideration of only her post-competitive placement performance when appraising her work for the FY2006 annual appraisal cycle and calculating her SRS and attendant PBC, and the exclusion from consideration of her performance for the earlier part of the annual appraisal cycle, injured her and constitutes a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12). Petitioner also asserts that this practice extends to other banded employees, injuring them and constituting a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12).

In support of these assertions, Petitioner contends that GAO's practice of truncating the period of performance considered in issuing the annual performance appraisal violates 4 C.F.R. §§4.2 and 5.1 and GAO Orders 2550 and 2430.1, which implement or directly concern the merit system principles set forth in 5 U.S.C. §2301, and that GAO's practice is, therefore, a prohibited personnel practice proscribed by 5 U.S.C. §2302(b)(12). Pet. Memorandum of Points & Authorities at 7. In addition, relying on a regulation issued by the Office of Personnel Management, 5 C.F.R. §430.206(a)(2), which provides that appraisal periods will generally be 12 months but may be longer in some circumstances, Petitioner asserts that reading GAO's regulation as defining an appraisal period as comprising one year is consistent with OPM's comparable regulation. *Id.* at 9.

¹² Other analysts who were competitively placed into Band IIB also received appraisals for their performance during the period that they served as Band IIB analysts. *See* Resp. Exh. 2.

¹³ The competencies for Band IIB analysts are the same seven as for Band IIA analysts – Achieving Results, Maintaining Client and Customer Focus, Thinking Critically, Collaborating with Others, Presenting Information Orally, Presenting Information in Writing, Leading Others – as well as an additional competency called "Developing People." Resp. Exhs. 4, 6.

¹⁴ The record contains no evidence that Ms. Donahue's performance between June 1, 2006, and July 8, 2006 as a Band IIA analyst was ever appraised. In any event, GAO did not consider her performance during this period in calculating her SRS and PBC for the FY2006 annual appraisal cycle.

GAO contends that it complied with applicable laws, rules, and regulations by separately assessing Petitioner's performance during the period of the fiscal year that she was a Band IIB analyst. Resp. Memorandum of Law at 9, 13. In addition, GAO asserts that it has broad discretion to determine how, when, whether, and to what extent it wants to compensate its employees, and that it acted in full compliance with applicable laws, rules, and regulations in compensating Petitioner. *Id.* at 15-16.

In this regard, GAO argues that there is no legal requirement that GAO base PBC only on a full year of performance. GAO contends that "[e]ssentially, the pay claims boil down to Petitioner's belief that it would have been more 'fair' if GAO had elected to compensate her and other employees placed into Band IIB differently from how it actually did." GAO's Memorandum of Law in Support of Motion for Summary Judgment at 18. According to GAO, 5 U.S.C. §2302(b)(12) "does not exist to remedy an individual employee's perception that he or she is being treated 'unfairly[,]'" and Petitioner cannot establish that GAO's actions violated any law, rule, or regulation that implements or directly concerns a merit system principle. *Id.* at 19.

GAO also contends that there is no regulatory requirement that employees receive performance appraisals "that cover a full year—and only a full year—of performance." Opposition to Petitioner's Motion for Partial Summary Judgment at 2. Rather, GAO asserts that the applicable regulation requires only that employees be appraised at least once per year, and that it complied with this requirement with respect to its appraisal of Petitioner. Citing the development of the regulation as well as GAO Order 2430.1, GAO asserts that the regulation means that employees must "receive at least one appraisal per year," not that "appraisal periods [must] cover a full year of performance." *Id.* at 4.

V. ANALYSIS

As stated in *Tekeley v. GAO*, PAB Docket No. 06-16 (Aug. 9, 2007):

Summary judgment is appropriate under the guidelines of the Federal Rules of Civil Procedure 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 judgment as a matter of law. Fed. R. Civ. P. 56(c). Although the moving party bears the burden of demonstrating the absence of genuine issues of material fact, it can discharge this burden by showing an absence of evidence to support the nonmoving party's case. *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994). *See also, Madson v. GAO*, PAB Docket No. 96-07 (Apr. 23, 1997), *aff'd en banc*, Dec. 2, 1997. Thus, a party opposing summary judgment must do more than show "some metaphysical doubt" as to the material facts to create a triable issue. *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 1000 (Fed. Cir. 1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial'"));

Gatlin-Brown v. GAO, PAB Docket No. 00-02 (Mar. 23, 2001), *aff'd en banc*, Nov. 9, 2001.

Tekeley v. GAO at 22. *See also* 4 C.F.R. §28.21(c)(3).

A. Counts At Issue

As noted at the outset of this decision, Petitioner is seeking summary judgment as to Counts II and VII of the Petition, and GAO is seeking summary judgment as to Counts I, II, VI, and VII of the Petition.¹⁵

Count I alleges that GAO's "flat-lining of Petitioner's performance upon her placement into a higher pay band to 'meets expectations' in all her job competencies, without regard to her actual performance and without regard to the appropriate performance standards, injured Petitioner and constituted a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12)." Petition ¶18. According to GAO, "Petitioner has articulated her flat-lining claims under section 2302(b)(12) in slightly different ways during this case." GAO Memorandum at 11. After reviewing the Petition and Petitioner's deposition taken during discovery GAO asserts that

[t]he crux of Petitioner's flat-lining complaint does not appear to be that she and other employees ultimately received all "Meets Expectations" ratings following promotion/placement, but that GAO did not include her performance prior to her placement into Band IIB when it prepared the November 2006 appraisal. Further, Petitioner complains that she was performing at the "Exceeds Expectations" level prior to her placement, but had to "start over" and be measured again against the baseline "Meets Expectations" standards for Band IIB.

Id. at 13. Petitioner did not file a response to GAO's Motion for Partial Summary Judgment, and thus did not challenge GAO's description of the essence of Count I.

Based on my review of the record, I construe Count I as an assertion that GAO committed a prohibited personnel practice in the manner in which it appraised Petitioner's performance during FY2006--specifically, that it did not take into account Petitioner's higher-rated performance as a Band IIA analyst from October 1, 2005 to May 30, 2006 in giving her an appraisal in November 2006 when she was a Band IIB analyst.¹⁶

¹⁵ GAO's motion with respect to Count VI is moot because, as noted above, Petitioner subsequently withdrew Count VI in the Joint Motion to Stay Briefing on Class Certification. Accordingly, Count VI will not be discussed further.

¹⁶ To the extent that Petitioner is asserting in Count I that, as phrased by GAO, she "had to 'start over' and be measured again against the baseline 'Meets Expectations' standards for Band IIB" once she was competitively placed in Band IIB in July 2006, such an assertion fails to demonstrate that GAO committed any legal error. GAO Memorandum at 13. When an employee is placed in a new position (here, a Band IIB position) and is assigned competencies for that position, the employee's performance in that new position during an appraisal period is properly measured only with reference to how well the employee performed those competencies while in that new position during that appraisal period. *See*

Count II alleges that GAO's "consideration of only Petitioner's three-month post-promotion performance when appraising her work for the FY 2006 annual appraisal cycle, rather than considering her work for the entire appraisal cycle, injured Petitioner and constituted a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12)." Petition ¶20.¹⁷ According to Petitioner's Memorandum of Points and Authorities, GAO's practice of considering "only post-competitive promotion or placement work when evaluating an employee's performance and calculating SRS and PBC" injures those employees because

employees promoted or competitively placed into a higher pay band after the beginning of the annual performance appraisal cycle have their annual performance assessed for a period that is less than one year, and have their attendant SRS and PBC calculated by comparing their less than full-year performance appraisal average to the full-year performance appraisal average of employees in their comparison group.

Petitioner's Memorandum at 4-5. In this regard, Petitioner further asserts that the "practical result" of GAO's practice "is that an employee's pre-promotion/competitive placement job performance is disregarded and ignored when calculating his/her PBC." *Id.* at 10.

In essence, Petitioner is contending that GAO was required to give her one "annual" performance appraisal covering a 12-month period for FY2006 that took into account both her work as a Band IIA analyst and her work as a Band IIB analyst, and that GAO's failure to do so "injured [her] and constituted a prohibited personnel practice."¹⁸ Petition at ¶20.

Accordingly, based on my review of the record, I construe Count II as asserting that GAO committed a prohibited personnel practice when it calculated Petitioner's PBC without taking into account her performance as a Band IIA analyst from October 1, 2005 to May 30, 2006.¹⁹

The performance appraisal and pay allegations are addressed below.

Resp. Exh. 2 at ¶3; *see also* Pet. Exhibits in Support of Motion for Class Certification and Motion for Partial Summary Judgment, Exh. 1 at 66. Petitioner cites no authority to support a contention that GAO was required to have taken into account its assessment of her prior performance as a Band IIA employee when it was assessing her performance as a Band IIB employee. The fact that there is considerable overlap in the competencies in the two positions provides no warrant for carrying over one appraisal period's conclusions into the determination of performance during a new appraisal period.

¹⁷ Count VII essentially restates this allegation as to other banded employees who are competitively placed into a higher pay band.

¹⁸ While Petitioner alleges that the Agency's actions "injured" her, she does not specify what harm she actually suffered.

¹⁹ I construe Count VII in the same manner with respect to other banded employees who are competitively placed into a higher pay band.

B. Performance Appraisals

As noted above, the statutory authority for GAO's personnel management system is contained in 31 U.S.C. §732. Section 732(d)(1) states that GAO's personnel management system shall provide for a system to appraise the performance of GAO employees that meets the requirements of section 4302 of title 5. One of those requirements is set forth in section 4302(a)(1): an agency's performance appraisal system must "provide for periodic appraisals of job performance of employees."

GAO's regulation implementing this requirement, 4 C.F.R. §4.2(b)(3), states in relevant part that any performance appraisal system used by GAO shall provide for "annually evaluating each employee during the appraisal period[.]" The history of this provision demonstrates that it was intended to ensure that GAO would appraise employees' performance at least annually.

When GAO published proposed performance appraisal regulations, section 4.2 directed GAO to develop one or more performance appraisal systems "which provide for periodic appraisals of job performance of employees[.]" 45 Fed. Reg. 44956 (July 2, 1980) (Resp. Opposition, Attachment B).²⁰ In this regard, proposed section 4.2(b)(3) stated that each performance appraisal system developed by GAO shall provide for "evaluating each employee during the appraisal period[.]" *Id.*

In its final form, section 4.2(b)(3) added the word "annually," so that the regulation provided that each performance appraisal system developed by GAO shall provide for "annually evaluating each employee during the appraisal period[.]" 45 Fed. Reg. 68377 (Oct. 15, 1980) (Resp. Opposition, Attachment C). The Supplementary Information accompanying the issuance of the final regulations specifically addressed the reason for the addition of the word "annually":

An organization suggested that a requirement be added to require evaluation of employees' *performance at least annually*. *GAO agrees that performance should be evaluated at least annually and has added this requirement.*

45 Fed. Reg. 68373 (Oct. 15, 1980) (emphasis added) (Resp. Opposition, Attachment C). This explanation makes it clear that the revision in section 4.2(b)(3) was designed to ensure that employees receive evaluations at least annually. In addition, this explanation, combined with the fact that there was no change between the proposed and final section 4.2 in the requirement that any GAO performance appraisal system provide for "periodic appraisals" of job performance of employees, demonstrates that the addition of the word "annually" addressed how often employees were to be evaluated and was not intended to mandate that all performance appraisal periods be a year in length.

Petitioner's attempt to show that section 4.2(b)(3) permits only one evaluation of an employee's entire 12-month performance in all circumstances is unpersuasive. As shown above, such an

²⁰ This requirement remained unchanged in the final regulations. 45 Fed. Reg. 68376 (Oct. 15, 1980) (Resp. Opposition, Attachment C).

interpretation is unsupported by the stated explanation for the addition of the word "annually" in the regulation. Additionally, as Petitioner correctly concedes, "GAO's regulation does not otherwise specifically define an 'appraisal period' as comprising one year[.]" Petitioner's Memorandum at 9. Moreover, construing all appraisal periods as being one year in length would render invalid the other exceptions to the general annual appraisal period set forth in §6b(4) of the GAO Order. Petitioner has advanced no persuasive contention as to why those exceptions should be invalidated. Thus, nothing in GAO's regulations or the GAO Order specifies that GAO must appraise an employee only once on the basis of the employee's 12-month performance.

Finally, Petitioner's reliance on a regulation issued by the Office of Personnel Management (OPM), 5 C.F.R. §430.206(a)(2), is misplaced. That regulation provides in part that an agency's appraisal program

shall specify a single length of time as its appraisal period . . . [which] generally shall be 12 months so that employees are provided a rating of record on an annual basis . . . [but] may be longer when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.

5 C.F.R. §430.206(a)(2). Petitioner contends that "[a]lthough GAO's regulation does not otherwise specifically define an 'appraisal period' as comprising one year, such an interpretation comports with OPM's comparable regulation implementing 5 U.S.C. §4302." Pet. Memorandum of Points & Authorities at 9.

This argument is flawed for several reasons. Even assuming for the sake of argument that a desired interpretation of a GAO regulation would comport with a comparable OPM regulation, this by itself would be insufficient to show that the GAO regulation would have to be construed in this manner. The appropriate inquiry is not whether a GAO regulation would "comport" with an OPM regulation; it is whether GAO would be required to comply with the OPM regulation as construed by Petitioner.

Petitioner makes no claim and presents no arguments that GAO is required to comply with 5 C.F.R. §430.206(a)(2). That regulation applies to agencies covered by OPM's performance management regulations, and GAO is excluded from coverage. *See* 5 C.F.R. 430.202; 5 U.S.C. 4301(1). However, the statutory provision addressing GAO's performance management system, 31 U.S.C. §732(d), does require GAO's compliance with 5 U.S.C. §4302. As noted above, section 4302(a)(1) states that an agency's performance appraisal system must "provide for periodic appraisals of job performance of employees."

Neither party specifically addresses whether the requirement that GAO comply with 5 U.S.C. §4302 also means that GAO is bound by OPM's regulations implementing that section, including 5 C.F.R. §430.206(a)(2). Even assuming that GAO is so bound, I find that 5 C.F.R. §430.206(a)(2) does not require a 1-year appraisal period in all instances, but rather leaves discretion to agencies to have appraisal periods of differing lengths in certain circumstances.

Section 430.206(a)(2) states that an agency's appraisal period

shall specify a single length of time as its appraisal period . . . [which] generally shall be 12 months so that employees are provided a rating of record on an annual basis . . . [but] may be longer when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.

5 C.F.R. §430.206(a)(2). By its terms, the regulation seems to support Petitioner's view that appraisal periods shall generally be 12 months and any exceptions to the general rule would be permitted only for lengthening that period. However, the regulation must be read in context with other related OPM regulations, and an examination of these related regulations demonstrates that agencies have flexibility in certain circumstances to issue appraisals covering periods of fewer than 12 months.

For example, OPM regulations state that while employees shall be given a rating of record "after the end of the appraisal period[,]" "[a] performance rating may be prepared at such other times as an appraisal program may specify for special circumstances including, but not limited to, transfers and performance on details." 5 C.F.R. §§430.208(a), (j). In addition, another OPM regulation states that agencies are to establish the "minimum period of performance that must be completed before a performance rating may be prepared." 5 C.F.R. §430.207(a). Notably, that regulation does not specify a precise period of time, but rather leaves the determination of the length of the period to the particular agency.

In sum, these OPM regulations demonstrate that although performance appraisals generally are intended to cover a 12-month period, appraisals may cover either longer or shorter periods in certain circumstances. Nothing in law or in GAO's or OPM's regulations demonstrates that GAO's actions in this case in providing Petitioner with two appraisals covering a 12-month period violated applicable law or regulation.

C. Pay

Petitioner contends that GAO committed a prohibited personnel practice when it "disregarded and ignored" her "pre-promotion/competitive placement job performance" when calculating her PBC. Pet. Memorandum at 10. According to Petitioner, "[b]y ignoring an employee's pre-promotion/competitive placement work when calculating PBC and by comparing a less-than-full-appraisal cycle performance to the full-cycle performance of other employees, the Agency is patently failing to provide equal pay for work of equal value or to make pay distinctions based on work and performance as required by 4 CFR §5.1." *Id.*²¹

²¹ 4 C.F.R. §5.1(a) states:

Pay principles. Pay of the employees of GAO shall be fixed by the Comptroller General consistent with the principles that--

- (1) There be equal pay for work of substantially equal value.
- (2) Pay distinctions be maintained in keeping with work and performance distinctions.
- (3) Pay rates be comparable with private enterprise pay rates for the same levels of work.
- (4) Pay levels be interrelated to the General Schedule.

GAO contends that "Petitioner cannot establish that GAO's policies regarding PBC violate the principles contained in 4 C.F.R. §5.1(a) because the regulation pertains to the setting of basic pay rates of GAO employees and does not govern PBC." Resp. Opposition at 11. Additionally, GAO contends that, even assuming that the regulation does apply to merit pay, GAO's practices with regard to PBC for recently promoted or competitively placed employees are consistent with the principles contained in the regulation. According to GAO, nothing in the regulation requires GAO to base PBC only on a full year of performance, and to impose such a requirement would be inconsistent with the broad discretion vested in the Comptroller General regarding the setting of merit pay. *Id.* at 14-16.

The regulation at issue, 4 C.F.R. §5.1, is entitled "Pay." Subsection (a) states that the pay of GAO employees "shall be fixed by the Comptroller General" consistent with certain principles; subsection (b) states that the Comptroller General shall publish a schedule of pay rates for GAO employees and refers to "basic pay . . . under the General Schedule;" and subsection (c) states that "[e]xcept as provided in regulations for the GAO Senior Executive Service and the Merit Pay System, the pay of GAO employees shall be adjusted at the same time and to the same extent as rates of basic pay are adjusted for the General Schedule." 4 C.F.R. §5.1.

Thus, the terms of the regulation explicitly address the fixing and adjustment of pay and the publication of a schedule of pay rates, and refer to basic pay under the General Schedule. These terms strongly suggest that the regulation applies to basic pay.

Moreover, a different regulation, 4 C.F.R. §5.3, is entitled "Merit Pay."²² That regulation states that the Comptroller General may prescribe regulations establishing a merit pay system that, among other things, "use[s] performance appraisals as the basis for determining merit pay adjustments." 4 C.F.R. §5.3 (quoting 5 U.S.C. §5401(a)(1)(B)). The fact that a different

²² 4 C.F.R. §5.3 states:

Merit pay. The Comptroller General may promulgate regulations establishing a merit pay system for such employees of the Government Accountability Office as the Comptroller General considers appropriate. The merit pay system shall be designed to carry out purposes consistent with those set forth in section 5401(a) of title 5, United States Code, which provides--

5401. Purpose

(a) It is the purpose of this chapter to provide for—

(1) A merit pay system which shall

(A) Within available funds, recognize and reward quality performance by varying merit pay adjustments;

(B) Use performance appraisals as the basis for determining merit pay adjustments;

(C) Within available funds, provide for training to improve objectivity and fairness in the evaluation of performance; and

(D) Regulate the costs of merit pay by establishing appropriate control techniques; and

(2) A cash award program which shall provide cash awards for superior accomplishment and special service.

Petitioner does not allege that GAO's practices at issue in this case violate 4 C.F.R. §5.3.

regulation addresses merit pay supports the conclusion that 4 C.F.R. §5.1 was intended to address basic pay, not merit pay.²³

In these circumstances, I conclude that 4 C.F.R. §5.1 addresses basic pay and that 4 C.F.R. §5.3 addresses merit pay.

However, even assuming that the principles in 4 C.F.R. §5.1 apply to the determination of merit pay, I find that GAO's system for calculating PBC for Petitioner and similarly situated employees is consistent with those principles. Specifically, I find that, contrary to Petitioner's contention, GAO's system is consistent with the principles that there should be equal pay for work of substantially equal value and that pay distinctions should be maintained in keeping with work and performance distinctions.

Under GAO's pay banding system, each successive band (Band I, Band IIA, Band IIB, and Band III) has separate performance standards, different pay ranges, and different competitive salary rates. Thus, this system evaluates and pays employees in the bands differently based on the perceived value of the work at each level. Similarly, PBC determinations are based on employees' performance relative to other employees who are on their team and are at the same band level. *See* Resp. Exh. 8, ch. 7 and Resp. Exh. 2 at 4. When GAO calculates PBC for employees who, like Petitioner, were competitively placed during an appraisal year, it takes into account only the rating under the new band and uses the higher competitive rate of the new band.

Under the GAOPA, GAO is required to be consistent with 5 U.S.C. §5401 as in effect on October 31, 1993, if it has a merit pay system; there is no requirement that it be identical in the specifics of its plan. 31 U.S.C. §731(b). Section 5401 previously²⁴ provided for merit pay in the Executive Branch and required that merit pay system to:

- (1) use performance appraisals as the basis for (a) determining adjustments in basic pay by general pay increases and merit increases, and (b) making performance award determinations.

The Executive Branch implementing regulations provided that each agency under the Performance Management and Recognition System (PMRS) “establish procedures to manage the performance appraisal process . . . such as reviews of standards and ratings for difficulty and strictness of application, to obtain performance pay amounts that are equitable both in the value of the award to the employee and in the relationship of award between levels.” 5 C.F.R. §540.105(c) (1993). Those regulations further provided that “[a]n employee who moves into the PMRS within 90 days of the effective date of the [annual] merit increase and who receives an increase to base pay (promotion, within-grade increase, quality step increase) within 90 days of

²³ Petitioner asserts that “GAO variously states that non-bonus PBC is not part of basic pay, and is part of basic pay.” Petitioner's Notice of New Authority (June 12, 2009) at 1, n.2. PBC is performance-based compensation that can take the form of a one-time lump-sum bonus and/or the form of an increase to basic pay. Resp. Exh. 10. Regardless of which form it takes and, therefore, whether or not it results in a change to basic pay, there is no dispute that PBC is merit pay that is calculated based on performance.

²⁴ Section 5401 was repealed effective Nov. 1, 1993. See footnote 8, *supra*.

the effective date of the merit increase, will not receive a merit increase for that fiscal year.” 5 C.F.R. §540.107(e). Moreover, §540.107(d) stated that an employee “newly appointed to the Government within 90 days of the effective date . . . of the [annual] merit increase . . . [would] not be eligible for a merit increase.” Thus, when the Executive Branch had a generally-applicable merit pay system, the implementing regulations limited annual merit increases available for new hires or newly promoted individuals.

Since Petitioner was in the new placement for at least 90 days, she was eligible for the end of appraisal year merit pay consideration. *See* GAO Order 2540.3, ch. 6 ¶3.a [Pet. Exh. 8] (requiring at least 90 days for performance based compensation). As GAO has configured its system, the appraisal following competitive placement reflects the higher value that GAO places on work as a Band IIB rather than a IIA, since the Agency uses a higher PBC factor in computing merit pay for Band IIB employees. *See* GAO’s Opposition at 14. GAO also does not pro-rate the PBC for employees competitively placed during the middle of the year, although it does pro-rate for employees promoted from Band I to Band II and from Band IIB to Band III. *See* GAO Memorandum at 7. In this way GAO accounts for the performance that took place prior to the competitive placement—*i.e.*, by providing a full rather than pro-rated PBC to individuals who have been competitively placed mid-cycle.

This practice is consistent with the principle of equal pay for work of substantially equal value because it compares employees who are working at the same band level and who are being evaluated under the same performance standards. In addition, the practice is consistent with the principle that pay distinctions should be maintained in keeping with work and performance distinctions, since the competitive rate that is used to calculate PBC is higher in each successive band and employees within each band who have higher performance appraisal ratings in that band will receive higher PBC.

Petitioner asserts that GAO's practice is not consistent with these principles essentially because GAO's practice does not take into account her performance earlier during the fiscal year while she was in Band IIA. However, GAO did take Petitioner's performance into account in several ways. Her performance as a Band IIA during the earlier part of the fiscal year, as reflected in her close-out rating, served as a significant factor for her competitive placement into Band IIB. Resp. Exh. 2 at ¶5. That placement gave her the opportunity to receive a considerably higher amount of pay, since the upper limit pay range for a Band IIB in FY2006 was \$118,000, as opposed to the upper limit of \$101,600 that year for a Band IIA analyst. It also entitled her to PBC for 100 percent of the year based on the higher Band IIB competitive pay rate, even though she was in Band IIB for only the latter part of the year. By providing a full 100% PBC based on the higher competitive pay rate for Petitioner and other employees who are competitively placed in Band IIB during the middle of the fiscal year, the GAO system effectively captures and rewards the Band IIA performance. Finally, her competitive placement also gave her the opportunity to apply for promotion to the next band, Band III.

It appears that GAO could have designed a system that, rather than giving Petitioner (and similarly situated employees) 100 percent of PBC for the year based on her appraisal as a Band IIB, would have given her PBC based on a formula that calculated a portion of her PBC for the time that she was evaluated as a Band IIA (comparing her performance to that of other Band IIA

employees) and a portion of her PBC for the time that she was evaluated as a Band IIB (comparing her performance to that of other Band IIB employees). However, the desirability of such a system or any other possible system is not the issue in this case. The issue is whether the current system developed and used by GAO is consistent with applicable legal requirements. For the reasons stated above, I find that it is.

CONCLUSION

Accordingly, GAO's Motion for Partial Summary Judgment is granted and Petitioner's Motion for Partial Summary Judgment is denied.

Counts I, II, and VII are dismissed. Count VI was previously withdrawn by Petitioner.

Petitioner's Motion for Class Certification is dismissed as moot.

An order regarding the processing of the remaining Counts of the Petition (Counts III, IV, and V) will follow.

SO ORDERED.