

**GAO EMPLOYEES ORGANIZATION, IFPTE LOCAL 1921 v.
U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Docket No. LMR 2011-02

Date of Decision: August 24, 2011

Cite as: GAO Employees Organization, IFPTE Local 1921 v. GAO, Docket

No. LMR 2011-02 (8/24/11)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Collective Bargaining – Agency Head Review

Jurisdiction

Labor Relations

PAB Regulations

DECISION AND ORDER

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

**GAO EMPLOYEES ORGANIZATION,
IFPTE LOCAL 1921,
Petitioner**

v.

**UNITED STATES GOVERNMENT
ACCOUNTABILITY OFFICE,
Respondent**

Docket No. LMR 2011-02

August 24, 2011

DECISION

I. INTRODUCTION

GAO Employees Organization, IFPTE Local 1921 (Petitioner or the Union) filed a Petition alleging that the Government Accountability Office (Respondent or GAO) acted improperly in alleging that a Memorandum of Agreement entered into by the parties should not be given effect because it is inconsistent with a Board regulation. For the reasons stated below, I find that GAO did not act improperly. However, I further find that the Board regulation is contrary to law and cannot be enforced as written, and that therefore the MOA shall be given full effect.

II. BACKGROUND

On April 27, 2011, representatives of the Union and GAO signed a Memorandum of Agreement (MOA) that stated in pertinent part:

Employees have the right to file prohibited personnel practice complaints with the GAO Personnel Appeals Board, and Article 29 - Grievance Procedure of the CBA [collective bargaining agreement] is not intended to interfere with that right.

Petition, Attachment A.

On May 19, 2011, pursuant to his Agency-head review authority under 5 U.S.C. §7114(c), the Comptroller General issued a memorandum disapproving the MOA on the ground that the MOA "does not conform to law, rule and/or regulation." Petition, Attachment B. Specifically, the Comptroller General stated:

The [MOA] states that employees have a right to file any prohibited personnel practice charge with the Personnel Appeals Board (PAB). This conflicts with the PAB regulation that would prohibit charges where the subject matter is grievable under a negotiated grievance procedure. See 4 C.F.R. §28.2(c)(2). Based on the above, the MOA with this sentence in it is disapproved because it conflicts with PAB regulations concerning its jurisdiction.

Id.

On June 7, 2011, Petitioner filed a Petition for Review along with Petitioner's Argument (Pet. Arg.) asserting that the regulation relied upon by the Agency head to disapprove the MOA is contrary to the PAB's enabling statute, and therefore the regulation "is not enforceable and the disapproved provision is negotiable." Pet. Arg. at 1.

On June 29, 2011, the Respondent filed a Response to the Petition and accompanying Respondent's Argument (Resp. Arg.) contending that the MOA should not be enforced because "the Comptroller General acted appropriately" and the MOA "was

non-negotiable as written." Resp. Arg. at 2. However, GAO further stated that it "support[s] revision of section 28.2(c)(2) to allow GAO bargaining unit employees the option of pursuing all PPP [prohibited personnel practice] claims either at the Board or through the negotiated grievance procedure." *Id.* at 3.

III. POSITIONS OF THE PARTIES

A. Petitioner

Petitioner asserts that under the GAO Personnel Act, 31 U.S.C. §732(e), organizational and bargaining rights of GAO employees must be "consistent with chapter 71 of title 5[,]" which establishes labor organization rights for most Federal government employees. Pet. Arg. at 4. Petitioner further asserts that: (1) the "statute creating the PAB expressly gives the PAB the authority to hear prohibited personnel practice complaints. 31 U.S.C. §753(a)(2)"; and (2) "the statute allows the PAB to prescribe regulations 'providing for officer and employee appeals consistent with sections 7701 and 7702 of title 5.' 31 U.S.C. §753(e)(2)."¹ *Id.* at 5.

According to Petitioner, under chapter 77 of title 5 and regulations of the Merit Systems Protection Board (MSPB) implemented pursuant to that chapter, "employees may pursue complaints regarding prohibited personnel practices with the MSPB or through the negotiated grievance procedure." *Id.* at 6. Petitioner states that the PAB regulation relied on by the Comptroller General "strips GAO employees of the right to have prohibited personnel practices heard by the PAB simply if they have the option of pursuing the matter through the negotiated grievance procedure[,] 4 C.F.R. §28.2(c)(2)." *Id.* at 6. In Petitioner's view, therefore, this

¹ Petitioner cites 31 U.S.C. §753(e)(2); the quoted provision is 31 U.S.C. §753(e)(1).

result is clearly at odds with the PAB statute, which grants the Board jurisdiction to hear such claims, and the requirement that the PAB promulgate regulations consistent with MSPB's jurisdiction, which explicitly allows prohibited personnel practices to be brought under either the negotiated grievance procedure or to the MSPB. Because the regulation, relied upon to disapprove the MOA, is at odds with the statute, the disapproval must be reversed and the MOA must be declared negotiable.

Id. at 7.

B. Respondent

GAO contends that "Petitioner's request that the Board order the MOA to be negotiable and enforceable is misplaced. The Comptroller General properly disallowed the MOA because it was in direct conflict with section 28.2(c)(2)." Resp. Arg. at 2. In this regard, GAO notes that under the labor-management relations program in the Executive Branch, the Federal Labor Relations Authority "may not order enforcement of an MOA that is in conflict with another agency's regulation, even if the regulation itself is arguably in conflict with governing law." *Id.* (footnote and citations omitted).

Nonetheless, GAO acknowledges that section 28.2(c)(2) is inconsistent with chapter 71 of title 5, specifically with 5 U.S.C. §7121, which "provides executive branch bargaining unit employees with the right to pursue PPP claims either at the MSPB or under a negotiated grievance procedure, but not both." *Id.* at 4. Noting that the Board has held that GAO is "required to give its employees the same substantive rights and benefits under its labor-management relations program as those of executive branch employees under chapter 71[.]" GAO requests that the Board revise section 28.2(c)(2) to conform with the labor-management relations program in the Executive Branch, so that GAO bargaining unit employees have the option of pursuing all PPP claims either at the Board or through the negotiated grievance procedure. *Id.* at 4 (citing *GS-13/14 Mgmt. & Policy Advisory Council and Career Level*

Council v. GAO, PAB Docket No. 116-600-GC-89 (Sept. 20, 1991)). GAO notes that if the Board revises its regulation in this manner, the resulting regulation would mirror the current MSPB regulation. *Id.* at 5.

IV. DISCUSSION

The parties agree on the essential substantive point in this case: section 28.2(c)(2) of the Board's regulations is inconsistent with existing law. A brief historical discussion, as provided by GAO at pp. 5-6 of its brief, is helpful in understanding why the regulation is inconsistent with current law. The Board published section 28.2(c)(2) on November 23, 1993, effective January 1, 1994. 58 Fed. Reg. 61998 (Nov. 23, 1993). At that time, the Board's regulation mirrored that of the MSPB. Specifically, both regulations provided that bargaining unit employees could pursue prohibited personnel practice (PPP) claims at the Board or the MSPB, respectively, only if those claims involved discrimination, performance-based reduction in grade or removal, or an adverse action as defined in 5 U.S.C. §7512²; such employees could choose either the administrative appeal route or the negotiated grievance procedure but not both. *Compare* section 28.2(c)(2) with 5 C.F.R. 1201.3(c) (1994). An individual with PPP claims beyond those specified in the PAB regulation or the earlier MSPB regulation did not have a choice of forum.

Shortly after the PAB provision was adopted, Congress amended 5 U.S.C. §7121 by providing that bargaining unit employees could elect to raise any PPP claim within the MSPB's jurisdiction either to the MSPB or through the parties' negotiated grievance procedure. Pub. L. No. 103-424, section 9(b), 108 Stat. 4361, 4365 (Oct. 29, 1994). In effect, this statutory

² 5 U.S.C. §7512 defines "adverse action" to include: a removal; suspension for more than 14 days; reduction in grade or pay; and furlough of 30 days or less.

amendment broadened the category of cases in which individuals could choose which procedure to pursue. Subsequently, the MSPB revised its regulation to reflect this statutory change. 62 Fed. Reg. 17041 (Apr. 9, 1997); 5 C.F.R. §1201.3(c)(1)(ii).³

The Personnel Appeals Board, however, did not revise its regulation to require a choice of procedure in all PPP cases within its jurisdiction after 5 U.S.C. §7121 was amended. Therefore, section 28.2(c)(2), albeit consistent with law at the time of its 1993 promulgation, was not revised to be consistent with the applicable statutory revision that was enacted in 1994.

Because the regulation is inconsistent with existing law, it is null and void. *See NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (vacating EPA guidance inconsistent with law); *Killeen v. OPM*, 558 F.3d 1318 (Fed. Cir. 2009) (repeating earlier conclusion that found OPM regulation inconsistent with statute); *Skinner v. Brown*, 27 F.3d 1571 (Fed. Cir. 1994) (finding VA regulation inconsistent with law). Accordingly, this regulatory provision cannot serve as a bar to the legality of the MOA.⁴ The MOA is consistent with existing law, *i.e.*, with 5 U.S.C. §7121, and is to be given full effect.

³ The MSPB's revised regulation states:

An appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) may be raised under not more than one of the following procedures:

- (A) The Board's appellate procedures;
- (B) The negotiated grievance procedures; or
- (C) The procedures for seeking corrective action from the Special Counsel. . . .

⁴ In so finding, I note that the Comptroller General did not act improperly when he disapproved the MOA on the basis of the regulation as worded. However, for the reasons stated herein, the regulation is inconsistent with law. As a result of this determination, it can no longer serve as a bar to the legality of the MOA.

It is recommended that the Board take appropriate action to revise the regulation consistent with this decision as soon as practicable. Accordingly, this matter is being forwarded to the Board for its consideration.

SO ORDERED.

Date: 8/24/11

/s/
Steven H. Svartz
Administrative Judge

NOTICE—BOARD REVIEW

This Decision will become final on September 23, 2011 unless a request for review by the full Board is filed by one of the parties within fifteen (15) days of service of this Decision [by September 8, 2011], or unless the full Board, prior to September 23, 2011, decides to review the Decision on its own motion. *See* 4 C.F.R. §§28.87, 28.4.

In the alternative, either party may, within ten (10) days of service of this Decision [by September 6, 2011], file and serve a request for reconsideration with the Administrative Judge who rendered this Decision. The filing of such a request will toll the commencement of the fifteen-day period for filing a notice of appeal with the full Board, pending a decision by the Administrative Judge on the request for reconsideration.

The original and five copies of a notice of appeal requesting review by the full Board shall be filed with the Board in person or by commercial carrier at the office of the Board, or by mail (addresses listed below). When filed by mail, the postmark shall be deemed to reflect the date of filing. The party filing the request shall serve a copy of the notice of appeal on all other parties. Within twenty-five (25) days following the filing of a notice of appeal requesting review by the full Board, the appellant shall file and serve a supporting brief. The brief shall identify with particularity those findings or conclusions in the Initial Decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error. The responding party shall have twenty-five (25) days, following service of appellant's brief, to file and serve a responsive brief. Within ten (10) days of service of appellee's responsive brief, appellant may file and serve a reply brief.

The Board may grant a request for review when it finds that:

1. The findings in the Decision are unsupported by substantial evidence in the record viewed as a whole; or

2. New and material evidence is available that, despite due diligence, was not available when the record was closed; or
3. The Decision is based on an erroneous interpretation of statute or regulation; or
4. The Decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or
5. The Decision is not made consistent with required procedures and results in harmful error.

See 4 C.F.R. §28.87.

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