

# **Thomas Taydus v. U.S. Government Accountability Office**

**Docket No. 07-03**

**Date of Decision: May 4, 2010**

**Cite as: Taydus v. GAO, Docket No. 07-03 (5/4/10)**

**Before: Mary E. Leary, Chair, for the Board;<sup>1</sup> Paul M. Coran, Member**

## **Headnotes:**

**Class Actions**

**Evidence**

**Motions Practice**

**Performance Ratings**

**Prohibited Personnel Practice**

**Standard of Review**

**Summary Judgment**

## **DECISION ON PETITIONER'S APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE**

### **I. INTRODUCTION**

This matter is before the Personnel Appeals Board (PAB or the Board) on Petitioner's appeal from the January 13, 2009 Initial Decision (ID) of the Administrative Judge (AJ). The ID found in favor of the U.S. Government Accountability Office (GAO or the Agency or Respondent) and granted GAO's Motion for Summary Judgment. The ID further found that Petitioner's Motion for Certification of an Interlocutory Ruling for Appeal to the Full Board regarding the AJ's Decision on Petitioner's Motion for Class Certification was moot in light of the Decision granting summary judgment to the Agency. Petitioner also appeals from the December 3, 2008 Decision denying his Motion for Class Certification on the basis that he had failed to support his claim that the commonality and typicality requirements had been satisfied.

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<sup>1</sup> \* Administrative Judge Steven H. Svartz, who wrote the Initial Decision and the Decision on Petitioner's Motion for Class Certification, did not participate in the appeal herein.

Petitioner alleged that GAO gave him a lower performance rating for Fiscal Year (FY) 2002 than he would have otherwise received because he had more than five years of GAO service as a Band I Analyst. He claimed that this action constituted a prohibited personnel practice under 5 U.S.C. §2302(b)(12).<sup>2</sup> The GAO Personnel Act specifically incorporates the prohibited personnel practices enumerated in 5 U.S.C. §2302(b), making them clearly applicable to GAO. *See* 31 U.S.C. §§732(b)(2), 753.

The AJ found that the essence of Petitioner's five-year claim was his contention that his supervisors did not rate him solely on their application of the performance standards, but rather improperly took into account his years of GAO service and gave him a lower rating as a result of considering his length of GAO service at the Band I level. ID at 5-6. The AJ concluded that the only evidence submitted by either party that addressed Petitioner's FY 2002 performance appraisal showed that the appraisal did not take into account his length of GAO service, and therefore, the AJ held that GAO was entitled to summary judgment. ID at 6.

Petitioner filed his Appellate Brief on March 9, 2009. GAO's Response to Petitioner's Appeal to the Full Board was filed on April 3, 2009. Two weeks later, on April 17, 2009, Petitioner sought leave to file a reply brief. The undersigned denied that request by Order of June 18, 2009.

Upon review of the submissions of the parties and the record herein, the Board affirms the Initial Decision and finds that Petitioner failed to demonstrate that there were any genuine issues of material fact that could be determined at a hearing, and that the Agency was entitled to summary judgment on Petitioner's claim. The Board also affirms the December 3, 2008 Decision denying Petitioner's Motion for Class Certification.

## **A. Factual Background**

The facts in this case are summarized below:

Thomas Taydus had been employed by GAO as a Band I Analyst for over five years by the end of Fiscal Year 2002, at the time when his FY 2002 performance appraisal was prepared. Petitioner's Appellate Brief (Pet. Brief) at 7; Respondent's Memorandum of Law in Support of Motion for Summary Judgment (GAO Mem.) at 3; *see* ID at 4-5 & n.2.

John Finedore, then a Band III Assistant Director on GAO's Physical Infrastructure (PI) team, was responsible for the supervision and performance assessment of assigned employees in addition to his management of a portfolio of GAO engagements. Respondent's Exhibits to Opposition to Motion for Class Certification and Motion for Summary Judgment (GAO Ex.), Ex. A, Declaration of John Finedore, ¶1-2. He served as the Designated Performance Manager (DPM) for Mr. Taydus. *Id.* ¶2. In FY 2002, Mr. Taydus was a Band IF (Full Performance) Analyst in the Agency's Boston Field Office, assigned to the PI team. GAO Ex. G, Petitioner's FY 2002 Performance Appraisal. As DPM, Mr. Finedore was the rater and responsible for preparing Petitioner's FY 2002 performance appraisal. GAO Ex. A ¶3. As such, Mr. Finedore prepared the initial draft of Petitioner's appraisal and proposed specific checkmarks determining

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<sup>2</sup> As noted in the ID, Petitioner initially also raised age discrimination claims, which the AJ dismissed at Petitioner's request. *See* ID at n.1.

what ratings he should receive based solely on Mr. Finedore's evaluation of how Petitioner performed in light of the rating standards then in effect. *Id.* ¶¶3, 4.

In his declaration, Mr. Finedore stated that in preparing Mr. Taydus' 2002 appraisal, he "evaluated his performance against the established rating standards and placed checkmarks in the appropriate ratings categories based solely on my evaluation of how Mr. Taydus performed in light of those standards during the rating period." *Id.* ¶4. Further, he specifically denied having given Mr. Taydus a lower appraisal than his performance merited "due to his years of GAO experience as a Band I." *Id.* Mr. Finedore also said that he was not aware of any GAO policy or practice, whether formally established or informally applied, that called for employees with more than five years of experience to be rated lower than employees with fewer than five years of experience. *Id.* He was never informed of such a policy or practice nor has he ever heard of any other individual considering such a factor. *Id.* The record contains no evidence to the contrary.

Peter Guerrero, then a Director in PI, performed the role of reviewer for Petitioner and therefore reviewed the drafts of proposed ratings to determine whether he agreed with the ratings and whether Mr. Finedore had properly applied the performance standards. GAO Ex. A ¶3. Raters and reviewers generally meet and discuss proposed performance appraisals, and if there are differences of opinion as to a specific rating, discuss where the checkmark should ultimately be placed. *Id.* In determining the ratings to give Petitioner, Mr. Finedore as rater and Mr. Guerrero as reviewer applied the established job competencies, work activities, and performance standards that were applicable to all Band I Analysts at that time. *Id.* Messrs. Finedore and Guerrero reached agreement as to Petitioner's final performance appraisal for 2002. *Id.* Thereafter, Appellant's ratings were reviewed, along with other PI staff ratings, by the PI Managing Director and the other PI Directors. *Id.*

Linda Garcia, then Director of Performance and Compensation Management in the Agency's Human Capital Office, assisted with the implementation and oversight of GAO's performance appraisal system, known as Competency Based Performance System (CBPS), which was implemented for Band I Analysts in 2002. GAO Ex. B, Declaration of Linda Garcia, ¶¶1-2. Under CBPS, Band I Analysts were assessed with respect to how they performed in the job competencies of: 1) Achieving Results; 2) Maintaining Client and Customer Focus; 3) Thinking Critically; 4) Improving Professional Competence; 5) Collaborating with Others; 6) Presenting Information Orally; 7) Presenting Information in Writing; 8) Facilitating and Implementing Change; and 9) Representing GAO. Analysts could receive a checkmark rating in each competency in one of the performance categories: "meets expectations," "exceeds expectations," "role model," or "below expectations." *Id.* ¶2; GAO Ex. C, GAO Analyst and Specialist Performance Standards and Rating Categories (Jan. 2002).

Supervisors evaluated each employee's individual performance of the specified work activities and measured the performance against the established CBPS performance standards. The same competencies were used across GAO for Band I Analysts. GAO Ex. B ¶¶2, 3. However, there was no single central group or organization charged with evaluating and issuing performance appraisals; rather, the responsibility for preparing an individual's performance appraisal rested with the assigned team or unit. Even within the team or unit, different supervisors were

responsible for preparing or reviewing the performance appraisals of different employees within the team. *Id.* ¶3.

Petitioner received five “meets expectations” checkmarks and four “exceeds expectations” checkmarks in FY 2002. GAO Ex. G. The “meets expectations” assessment applied to Achieving Results, Maintaining Client and Customer Focus, Presenting Information Orally, Presenting Information in Writing, and Facilitating and Implementing Change. The “exceeds expectations” designation was given for Petitioner’s performance in the competencies of Thinking Critically, Improving Professional Competence, Collaborating with Others, and Representing GAO.

As with Petitioner, each Band I Analyst had an assigned DPM—often the Analyst’s day-to-day supervisor—who served as rater. GAO Ex. B ¶4. The raters were to evaluate the employee’s performance under the appropriate standards and propose the specific checkmark rating for each job competency. *Id.* The reviewers, in turn, were responsible for: 1) determining whether the DPM/rater had properly applied the performance standards; and 2) evaluating whether he or she agreed with the rater’s assessment and, if not, resolving any differences of opinion. *Id.* ¶5.

GAO had no policy or practice in FY 2002, whether formally established or informally applied, that called for lowering of performance appraisals for Band I employees with greater than five years experience at GAO. To the knowledge of Ms. Garcia, Director of Performance and Compensation Management at that time, there was never any such policy, and “all GAO employees received performance appraisals based on the established standards.” GAO Ex. B ¶6.

During FY 2002, there were fifty-two Band IF Analysts who received cycle performance appraisals on the PI team. GAO Ex. D, Declaration of William Mowbray (GAO Mathematical Statistician), ¶3. Twenty-four different individuals rated these employees. Eleven of the twenty-four raters prepared appraisals for only one Band IF Analyst and two of the twenty-four raters prepared appraisals for as many as five Band I Analysts. Mr. Finedore, who rated Petitioner’s performance, did not serve as the rater on any other Band I performance appraisal for that cycle. *Id.*

For Band I employees in the PI team during FY 2002, six different individuals served as reviewers on performance appraisals. They reviewed from one to fifteen appraisals each. Peter Guerrero served as the reviewer in 2002 on Petitioner’s appraisal and on six other performance appraisals. *Id.*

Prior to 2002, employees were rated on a Behaviorally Anchored Rating Scale (BARS)<sup>3</sup>

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<sup>3</sup> BARS focused on what activities were performed rather than on what activities were appropriate for each Band level. CBPS established broadly defined job categories for each Band. Under each competency are listed work activities, which are utilized to further define a job competency. *Kelly v. GAO*, PAB Docket No. 08-03, slip op. at 5 (2/3/10). As the AJ noted in his Decision on Summary Judgment, under CBPS “Analysts were to be given ratings in specified competencies based on supervisors’ evaluations of each employee’s individual performance of specified work activities measured against the established performance standards.” ID at 5.

system. Beginning in 2002, the CBPS system was implemented. GAO Ex. E, Deposition of Thomas Taydus (Taydus Dep.) at 63. When Petitioner crossed the five-year mark for service at GAO, he was rated under the BARS scale. He stated that when he exceeded five years of employment with GAO in 1997, his appraisals either stayed the same or got better after he crossed the five-year threshold until the new performance appraisal system was implemented in 2002. Taydus Dep. at 64.<sup>4</sup>

The record contains no evidence that Petitioner's 2002 appraisal was based on his length of service at the Band I level.

## **B. Motion for Class Certification**

Petitioner filed a Motion for Class Certification on August 8, 2008. GAO filed an Opposition to the Motion for Class Certification on October 3, 2008. On October 23, 2008 Petitioner filed his Reply to Respondent's Opposition; the Agency submitted a Sur-reply in Opposition to Motion for Class Certification on November 12, 2008.

The AJ issued a Decision on Petitioner's Motion for Class Certification on December 3, 2008. In that Decision, he found that Petitioner had not supported his claim that the commonality and typicality requirements of class certification were satisfied. Specifically, the AJ concluded that the Motion for Class Certification contained only unsupported allegations with respect to these requirements that do not withstand the "rigorous analysis" required by Federal Rules of Civil Procedure (F.R.C.P.) Rule 23(a).

On December 15, 2008, Petitioner filed a Motion for Certification of an Interlocutory Ruling for Appeal to the Board pursuant to 4 C.F.R. §28.80. In reaching his January 13, 2009 Decision on Summary Judgment, the AJ determined that the Motion for Certification of an Interlocutory Ruling was moot since Respondent's Motion for Summary Judgment was granted. ID at 10. Petitioner now appeals the denial of his Motion for Class Certification under 4 C.F.R. §28.81(g), which allows him to challenge the interlocutory rulings in the course of the review by the Board of the Initial Decision.

## II. DISCUSSION

### **A. Standard of Review**

The Board's regulations provide that on appeal the full Board may review the record *de novo*. 4 C.F.R. §28.87(g). This standard is particularly appropriate in cases involving the award of summary judgment. *See Gatlin-Brown v. GAO*, PAB Docket No. 00-02 at 4 (11/9/01) (*en banc*).

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<sup>4</sup> The statistical evidence provided by the Mathematical Statistician at GAO demonstrated that Petitioner's percentile ranking ebbed and flowed from 1993-2001 with no discernable pattern either before or after his five-year mark in service. *See* GAO Ex. D ¶4, Declaration of William Mowbray.

## **B. Motion for Summary Judgment**

The AJ issued his Decision on Respondent's Motion for Summary Judgment on January 13, 2009. He noted therein that initially Petitioner had raised both age discrimination claims and the five-year claims set forth above. Subsequently, at the unopposed request of Petitioner, his age discrimination claims were dismissed. ID at n.1. While initially the five-year claims included both Petitioner's and putative class claims, based on the denial of the class certification motion, which has been affirmed herein, the five-year claim at issue is limited to Petitioner's individual claim.

In support of his five-year claim, Petitioner asserted that GAO violated its own Order 2430.1, Performance Appraisal [no date cited], which requires the Agency to rate employees according to performance standards that accurately measure performance based on job related criteria, and violated GAO Order 2540.3, Pay Administration in the Analyst Performance Based Compensation System (Nov. 14, 2002), which sets requirements for determining an employee's rate of basic pay.<sup>5</sup> The evidence established that Petitioner's performance ebbed and flowed throughout his years at GAO; however, the only year at issue herein is FY 2002, following the implementation of the CBPS for assessing performance, when he was rated lower than some employees who had fewer than five years of GAO experience. Petitioner's Opposition to the Motion for Summary Judgment (Pet. Opposition) at 2-3. The undisputed evidence submitted by GAO, which is set forth above, demonstrates that the FY 2002 performance appraisal of Petitioner was based on the evaluation of his performance measured by clearly established rating standards without regard to his years of service.

In support of his case, Petitioner submitted an expert report, which found that "there is a statistically significant difference in the average performance ratings between those employees with more than five years at GAO and those with less than five years, with the more senior employees receiving lower ratings." Petitioner's Exhibit (Pet. Ex.) 1 at 1.<sup>6</sup> The report, however, did not specifically address Petitioner's appraisal for that year or make any findings concerning that appraisal. Further, as the AJ noted, the report "made no findings or conclusions as to any possible reasons for the difference in the average performance ratings." ID at 8. Nothing in the report constituted evidence that Petitioner's appraisal was lowered because of his length of service as a Band I Analyst at GAO.

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<sup>5</sup> The Amended Petition did not specify what law, rule, or regulation assertedly had been violated, but merely referenced 5 U.S.C. §2302(b)(12), which makes it a prohibited personnel practice to take or fail to take a personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of Title 5 U.S.C. The Orders underlying Petitioner's (b)(12) claim were not identified in pleadings until Petitioner's September 15, 2008 Response Submitted in Compliance with the Board's September 4, 2008 Decision on Petitioner's Motion for Leave to Amend Petition and Related Matters (at 4).

<sup>6</sup> The expert's report was admitted into the record by Decision of Nov. 25, 2008, subject to certain conditions. The AJ considered it part of the record for purposes of the summary judgment determination; the Board is following suit on this appeal. See ID at 7 n.4.

Petitioner also submitted the Agency’s “Summary of CBPS Appraisal and Merit Pay Category Results, Analyst & Specialist Staff—Fall 2002 Cycle” in support of his claim. Pet. Ex. 2. This also contains statistics relating to the Band I group, but makes no findings about Petitioner’s appraisal nor does it review possible reasons for any differences in average ratings based on length of service. We agree with the AJ that this Summary does not create a disputed factual issue as to the circumstances underlying Petitioner’s appraisal.

Finally, Petitioner submitted the April 9, 2008 Memorandum from the Acting Comptroller General, “Upcoming Project to Engage You in Reviewing GAO’s Performance Appraisal System.” Pet. Ex. 4.<sup>7</sup> This two-page document, addressed to all GAO employees, merely reflects the Agency’s intention to begin an inclusive process of analyzing future changes to the performance appraisal system, which had then been in place for more than five years: “It is now time to begin planning for a systematic and inclusive review of our performance appraisal system in order to comprehensively re-examine what works, what does not, and what could be done better.” *Id.* at 1. This Memorandum fails to create a triable issue of fact in support of Petitioner’s claim.

The burden of proof in a summary judgment case requires that the moving party, GAO herein, successfully demonstrate the absence of genuine issues of material fact. In this case, the Agency must show that it properly evaluated Petitioner’s performance under Order 2430.1 (Performance Appraisal) by rating him according to performance standards that measure performance based on job related criteria. The party opposing summary judgment must provide “specific facts showing there is a genuine issue for trial’.” *Id.* at 4 (quoting *Tekeley v. GAO*, PAB Docket No. 06-16 at 22 (8/9/07) (citing *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)).

Petitioner alleged that GAO lowered his rating based on his length of service as a Band I Analyst at GAO. He presented not one iota of evidence in support of that allegation. Petitioner submitted no evidence to dispute his supervisor’s Declaration as to the methods used to rate him. Although he had the opportunity to identify any persons or information supporting his theory that his appraisal scores were lowered because of his length of service, he failed to identify any such person or practice in his deposition nor did he supplement his discovery. *Id.* at 7. Petitioner also failed to provide evidence in support of his theory that GAO had a policy or practice, whether formal or informal, of lowering the appraisal scores of Band I Analysts with greater than five years of experience. He presented no evidence to counter the Declaration of Ms. Garcia, then the Agency’s Director of Performance and Compensation Management, in this respect.

The expert’s report concluded, “there is a statistically significant difference in the average performance ratings between those Band I employees with more than five years at GAO and those with less than five years, with the more senior employees receiving lower ratings.” Pet. Ex. 1; *see* *Id.* at n.4. However, the report lacked any findings or conclusions as to the reasons for

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<sup>7</sup> Petitioner also submitted the April 25, 2008 Final Report of the Ivy Planning Group entitled “Government Accountability Office African American Performance Assessment Study.” Pet. Ex. 3. As noted by the AJ, Petitioner cited this report only in connection with his age discrimination claims, which he subsequently withdrew. *Id.* at 7 n.3; *see* Pet. Opposition at 3-4.

the differences in average performance ratings. Accordingly, the AJ correctly concluded that Petitioner failed to provide evidence that his performance appraisal was lowered as a result of his length of service at GAO. ID at 8.

As set forth in the ID, the proof required in this matter based on an alleged violation of 5 U.S.C. §2302(b)(12) is different from that in employment discrimination cases alleging disparate impact. Herein, Petitioner's age discrimination claims were dismissed at his own request. In a discrimination case, if certain conditions are met, a member of a "protected class" is entitled to a rebuttable inference of discrimination upon proof of a *prima facie* case. ID at 9; *see McDonnell Douglas v. Green*, 411 U.S. 792, 801-02 (1973). The AJ correctly concluded that employees with more than five years of GAO service do not constitute a protected class. ID at 9; *see Stern v. FTC*, 46 M.S.P.R. 328, 338-39 (1990). Accordingly, there is no entitlement to an inference that the unexplained statistical disparity implied an intentional plan to treat employees with greater than five years of Band I service differently than those with fewer years of service.

Petitioner failed to submit any evidence to support his claim that GAO took or failed to take a personnel action in violation of a law, rule, or regulation implementing or directly concerning the merit system principles. In the absence of such evidence, the AJ correctly found no genuine issue of material fact. GAO is entitled to the granting of its Motion for Summary Judgment as a matter of law.

The Initial Decision is hereby affirmed in its entirety.

### **C. Motion for Class Certification**

We agree with the determination of the Administrative Judge that the conclusion he reached, and affirmed herein, that summary judgment in favor of the Agency was appropriate on the five year claim mooted out the request for interlocutory review of the denial of the request for class certification. *See Lisanti v. OPM*, 573 F.3d 1334, 1342 (Fed. Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 2253 (Mar. 8, 2010). Nevertheless, in the interest of judicial economy, a brief review of the applicable principles supporting that denial is in order.

In deciding on a request that a matter be treated as a class action, the PAB is guided—but not controlled—by Rule 23 of the Federal Rules of Civil Procedure. *Dowd v. GAO*, PAB Docket No. 91-03 at 2-3(12/18/92) (*en banc*); *see* 4 C.F.R. §28.18(f).

The question of class certification is a procedural one distinct from the merits of the action. *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 at n.2 (11th Cir. 2000). The certification of a class action requires that the action meet the requirements of a two-step test. *In re A.H. Robbins Co.*, 880 F.2d 709, 727-28 (4th Cir.), *cert denied*, 493 U.S. 959 (1989). First, the action must satisfy all four of the prerequisites mandated by Rule 23(a) of the Federal Rules of Civil Procedure. *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006). Assuming these four prerequisites to Rule 23(a) are met, the second step demands that the action fit within one or more subsections of Rule 23(b). *Eisen v. Carlisle & Jaccquelin*, 417 U.S. 156, 162 (1974); *Garcia*, 444 F.3d at 631 n.6; *Malone v. Microdyne Corp.*, 148 F.R.D. 153, 156 (E.D. Va. 1993). The four threshold requirements of Rule 23(a) are: 1) numerosity of the parties; 2) commonality

of legal and factual issues; 3) typicality of the claims and defenses of the class representative; and 4) adequacy of representation.<sup>8</sup> See also *Eisen*, 417 U.S. at 162; *Dowd v. GAO*, at 3; *Chennareddy v. GAO*, PAB Docket No. 85-704-CA-86 at 2 (11/23/87) (*en banc*).

The critical inquiry is whether the requirements of Rule 23 are met, not whether Petitioner's case will succeed on the merits. *Chennareddy v. GAO*, at 2. This inquiry requires a "rigorous analysis," which "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *General Telephone Co. v. Falcon*, 457 U.S. 147, 160-61 (1982). This does not mean a full trial on the merits, but often requires looking behind the pleadings, "even to issues overlapping with the underlying claims." *Dukes v. Wal-Mart Stores*, 2010 U.S. App. LEXIS 8576 at 16 (9<sup>th</sup> Cir. Apr. 26, 2010) (*en banc*) (*citing Falcon*, 457 U.S. at 160-61). As the Ninth Circuit recently summarized, "*Falcon's* central command requires [the AJ] to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings." *Id.* at 17. This Board noted in *Chennareddy* that, in conducting the Rule 23 inquiry, "[t]he commonality and typicality requirements tend to merge, and they may be satisfied by demonstrating that there are other members of the class who have the same or similar grievances as the named plaintiff." *Chennareddy v. GAO*, at 3.

In his Decision on Petitioner's Motion for Class Certification, the AJ concluded that Petitioner had not supported his claim that the commonality and typicality requirements had been met; he further found that the Motion contained only unsupported allegations with respect to these requirements that do not withstand the "rigorous analysis" required by Rule 23(a).

Petitioner asserts that his Motion for Class Certification met the applicable standards followed by the Board, and therefore, should have been granted. In particular, he asserts that the AJ "incorrectly conflated the commonality and typicality requirements . . . into a requirement that Appellant prove at the class certification stage of his non-discrimination action that the alleged specific policy was actually employed by GAO and the reason(s) why GAO employed such a policy." Pet. Brief at 11. He further contends that the AJ erred by following the practice "arguably" applied in disparate impact discrimination cases, requiring that the existence of a practice be established at the class certification stage. *Id.* at 11-12.

### Commonality

Petitioner asserts that the request for class certification rests on questions of law or fact common to the class (the commonality test). On appeal, he argues that "[t]he commonality test is met when there is at least one issue . . . the resolution of which will affect all or a significant number of the putative class members'." Pet. Brief at 9 (*quoting Lindsay v. GEICO*, 251 F.R.D. 51, 55

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<sup>8</sup> The Agency challenged Petitioner's showing on the commonality and typicality requirements and, accordingly, the AJ addressed only those two prongs of the Rule 23(a) proof. We note that the number of potential class members appears to fall within the acceptable range to constitute a class. See Petitioner's Motion for Class Certification Ex. 2 (listing approximately ninety Band IF employees with more than five years of GAO experience). See also *Markham v. White*, 171 F.R.D. 217, 221 (N.D. Ill. 1997); *CONRAIL v. Town of Hyde Park*, 47 F.3d 475, 483 (2d Cir.), *cert denied*, 515 U.S. 1122 (1995); *Jordan v. Lyng*, 659 F.Supp. 1403, 1410 (E.D. Va. 1987). We also note that the class would have been represented by PAB/OGC.

(D.D.C. 2008) (*quoting Coleman v. PBGC*, 196 F.R.D. 193, 198 (D.D.C. 2000)). He further argues that there is ample support for certification in cases that allow for factual variations among class members and varying legal theories of putative class members so long as a single aspect or feature of the claim is common to all proposed class members. Pet. Brief at 10; *see Bynum v. District of Columbia*, 214 F.R.D. 27, 33-34 (D.D.C. 2003). As set forth by the AJ, the essence of Petitioner’s commonality claim is that GAO rated employees with greater than five years of Band I experience lower than employees with fewer than five years of experience at that level because of their length of GAO service at the Band I level, rather than rating them based solely on the application of their performance standards. *Id.* at 2.

GAO opposed the Motion for Class Certification, contending that Petitioner failed to establish that there are questions of law or fact common to the class. Specifically, GAO argues that Petitioner cannot satisfy Rule 23(a)’s commonality requirements and asserts that there is no evidence of a GAO-wide policy or practice in which employees with more than five years of GAO experience were to be rated lower than employees with fewer than five years of GAO experience. GAO’s Response to Petitioner’s Appeal to the Full Board (GAO Response) at 25.

The evidence demonstrates that GAO implemented the CBPS performance appraisal system and performance-based pay for Band I Analysts in 2002. There were fifty-two Band I Analysts who received cycle performance reviews in 2002. Twenty-four raters and six reviewers throughout GAO, including both field offices and Headquarters, rated employees under the CBPS in 2002. The Agency provided undisputed evidence that the Band I Analysts were rated based on the factors set forth in the CBPS without regard to years of service. Further, the Agency provided uncontroverted evidence that there was no formal policy or informal practice that called for lowering of performance appraisals for Band I employees with greater than five years of experience at GAO. GAO Ex. A ¶4; GAO Ex. B ¶6.

Accordingly, we agree that Petitioner has failed to satisfy the commonality requirement for class certification.

### Typicality

GAO asserts that Petitioner’s “individualized experience with respect to his own performance appraisal cannot stand as a proxy for how any other Band I employee was treated. Moreover, even if there were evidence of a common practice, Petitioner’s claims are not typical because his performance actually improved once he had been at GAO for more than five years.” Respondent’s Opposition to Motion for Class Certification (Opposition to Certification) at 2; GAO Response at 27. GAO also points out that “Petitioner received two of his best four performance appraisals after crossing the five-year mark.” Opposition to Certification at 27. The statistical evidence demonstrated that Petitioner’s performance ratings ebbed and flowed throughout his career at GAO with no discernible pattern either before or after he had served five years at GAO. GAO Ex. D, Declaration of William Mowbray. As such, Petitioner’s experience is not typical of the class he seeks to represent.

The party seeking certification bears the burden of establishing that all prerequisites are met. *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1267

(4th Cir. 1981). Class certification is proper only “after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied.” *Falcon*, 457 U.S. at 161. In order to engage in the requisite rigorous analysis, the trier of fact may “consider the substantive elements of the plaintiffs’ case....” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch*, 259 F.3d 154, 166 (3d Cir. 2001)).

Under F.R.C.P. 23(a)(2), a class can only be maintained if “there are questions of law or fact common to the class.” To meet this requirement, the evidence must establish that members of a putative class “possess the same interest and suffer the same injury.” *Falcon*, 457 U.S. at 156. Petitioner has failed to submit any evidence in support of his assertion that the Agency maintained a policy or practice that resulted in a lowering of scores for employees with greater than five years of GAO experience; rather, the evidence established that Band I Analysts were rated consistent with the job related performance criteria set forth in the CBPS. Contrary to the Petitioner’s assertions, the mere allegation alone is not sufficient to satisfy the commonality and typicality requirements; the rigorous analysis must go beyond the recitation of the law applied in previous cases.

The AJ correctly found that in his Reply to Respondent’s Opposition to Motion for Class Certification, Petitioner did not assert that the cited expert’s report established the reasons for any disparity between the ratings of employees with greater than five years of GAO experience and those with fewer than five years experience.<sup>9</sup> Decision on Class Certification at 6. Petitioner asserts on appeal that while a plaintiff alleging disparate impact discrimination may have to establish at the class certification stage the existence of a practice because of the problems associated with such claims, such proof is not required at that stage outside the discrimination context.<sup>10</sup> Pet. Brief at 11-12. The weight of authority, however, is to the contrary. Thus, for example, in *Szabo v. Bridgeport Machines*, 249 F.3d 672 (7th Cir. 2001) (a breach of warranty case), the Seventh Circuit Court of Appeals remanded the case to the district court to allow it “to pierce the allegations of the complaint.” *Id.* at 678. In doing so, the court in *Szabo* observed that “sometimes it may be necessary . . . to probe beyond the pleadings before coming to rest on the certification question. . . . [A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable.” *Id.* at 677 (quoting *Falcon*, 457 U.S. at 160).

What is necessary to establish class certification in this case involving whether GAO acted pursuant to an illegal policy, practice, or procedure is to provide some evidence to substantiate the theory of an unlawful Agency-wide practice. Petitioner has failed to submit any evidence

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<sup>9</sup> Petitioner misconstrues this finding to require proof of the Agency’s reasons for engaging in such a practice. Pet. Brief at 7-9. The AJ referenced reasons for the disparity in ratings and did not assume the existence of a practice.

<sup>10</sup> We agree with the Agency that the underlying implication of Petitioner’s theory defies logic—and thus we concur that “Petitioner’s section 2302(b)(12) claim is clearly not subject to a lower bar on class certification than a discrimination claim. . . . It makes little sense to require Title VII plaintiffs to make [a significant showing that they suffered from a common policy of discrimination] but then not require at least an equal showing from Petitioner, who has grasped upon an essentially random attribute (five plus years of GAO service) of a group with no known history of victimization.” GAO Response at 24 n.8 (emphasis in original).

that would help to establish this critical fact. Petitioner has failed to demonstrate any causal basis for the underlying charges. Accordingly, the AJ correctly concluded that Petitioner has not supported his claim that the commonality and typicality requirements have been satisfied.

Having found that Petitioner failed to establish the commonality and typicality requirements for class certification, the Board concurs with the AJ that it is unnecessary to reach the issue of adequacy of representation.

The AJ's Decision denying Petitioner's Motion for Class Certification is hereby affirmed.

### **CONCLUSION**

The Decision of the Administrative Judge awarding summary judgment to the Agency is hereby affirmed. In addition, the December 3, 2008 Decision denying Petitioner's Motion for Class Certification is also affirmed.

**SO ORDERED.**