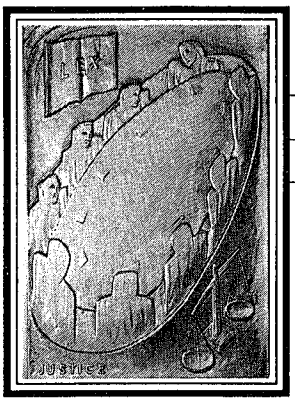
Report on Personnel Appeals Board

Hearing on Age Issues in Employment



Personnel
Appeals
Board

March 29, 1996

The Honorable Charles A. Bowsher
Comptroller General
United States General Accounting Office
Room 7000
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Bowsher:

Pursuant to the authority granted to it under the General Accounting Office Personnel Act of 1980, the Personnel Appeals Board has statutory responsibility to oversee equal employment opportunity at GAO. On February 10, 1995, in exercise of that authority, the Board held a hearing to examine issues that affect older workers, generally, and those employed by GAO, specifically.

Participants at the hearing addressed the role that age might play in personnel decisions particularly in the areas of recruiting, training, advancement opportunities, retention efforts, and downsizing. The attached report summarizes the participants' remarks at the hearing and also references supplemental materials provided by GAO's Personnel Office subsequent to the hearing.

Sincerely,

Nancy A. McBride

Nancy A. McBride
Chair

attachment

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Summary of Proceedings

Introduction

On February 10, 1995, pursuant to its EEO oversight authority,[1] the Personnel Appeals Board of the U.S. General Accounting Office held a hearing to examine issues that affect older workers, generally, and those employed by GAO, specifically. The hearing participants addressed the role that age might play in personnel decisions particularly in the areas of recruiting, training, advancement opportunities, retention efforts, and downsizing.

A representative of the American Association of Retired Persons (AARP), staff from the Equal Employment Opportunity Commission (EEOC) and the Office of Personnel Management (OPM), GAO management, and representatives of GAO employees spoke to the Board about age issues in employment.

The participants at the hearing were asked to address specific issues that affect older workers and to identify barriers that may operate to deny them access to the full range of employment opportunities. In addition, the Director of GAO's Personnel Office later submitted data requested by Board members during the course of the hearing.[2] This report is based on the participants' remarks at the hearing and the supplemental materials subsequently provided by GAO's Personnel Office.

[1] 31 U.S.C §732(f)(2)(A); 4 C.F.R. §§28.91 and 28.92.

[2] The Board requested a profile of all GAO employees who were promoted, as well as those who received pay increases or bonuses during the past five years, broken down by age in five year increments. In addition, the Board also requested information about GAO's recruitment practices.

Legal Background

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA), the purpose of which was

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[3]

The ADEA, which has been amended several times, applies to private sector employers with 20 or more employees, states, employment agencies, and labor organizations and pertains to employees who are 40 years old or older.[4] In addition to proscribing the failure to hire or the discharge of a covered employee on account of age, the Act prohibits the limiting, segregating, and/or classifying of employees in any way that would adversely affect employment status because of age.

In 1974, the ADEA was amended to prohibit age discrimination in Federal sector employment.[5] A single amendment to the Act provides simply that all personnel actions affecting Federal employees who are at least 40 years old "shall be made free from any discrimination based on age."[6] No other provisions of the ADEA apply to the Federal government. Among the most notable differences are that double damages for wilful violations of the Act and jury trials are not available in Federal sector cases.

Underlying the Act is the premise that those covered should be assessed on their ability, not their age. Age issues in employment can and do affect workers nearing the end of their careers as well as those seeking to reenter the job market, advancing or changing direction in their careers, or contemplating full or early retirement. Rapid technological advances may also present age issues where older workers may not have obtained training necessary to remain competitive.

[3] 29 U.S.C. §621

[4] Originally the Act covered employees between the ages of 40 and 70. A 1986 amendment to the Act deleted the upper age limitation.

[5] Id. §633a.

[6] Id. §633a(a). Federal agencies covered by the Act are defined as certain military departments, executive agencies, the Postal Service, units of the legislative and judicial branches having positions in the Federal service, and the Library of Congress. GAO is one of the legislative branch agencies covered by the ADEA.

Issues Addressed

Downsizing

Nearly every participant at the hearing addressed age issues related to the reduction of an agency's workforce. Edward McHugh, Director of the Federal Workforce Restructuring Office at OPM,[7] described ways to reduce a workforce without resorting to a reduction-in-force (RIF). Mr. McHugh's experience includes the implementation of the Federal Workforce Restructuring Act of 1994,[8] which mandates targets for reducing the Federal government over the next seven years.

According to Mr. McHugh, the traditional method for reducing the size of the government workforce over the past fifty years has been the use of RIFs, which he defined as a legal system to retain people in a certain order prescribed by law. Experience has taught, he said, that this method is disruptive because of the multiple bumping and moving involved;[9] it has a negative impact on employee morale due to the involuntariness of the separations; it creates skill imbalances in the workforce as newer employees who often have current expertise in emerging areas or technological proficiency are lost; and it is expensive because people who are downgraded or moved retain their pay levels.

In recent years, according to Mr. McHugh, the most popular technique, government-wide, has been the "buyout," a voluntary separation incentive that involves a lump sum cash payment. He noted that buyouts typically do not disrupt the work of an agency because certain positions or units can be targeted, the buyouts occur quickly, and at $25,000 or less per person, buyouts are more cost efficient than RIFs which usually cost between $35,000-40,000 per employee. About half of all employees taking advantage of buyouts have been eligible for optional full retirement, about forty percent have been eligible for early retirement,[10] and the remainder have taken the amount of cash to which they were entitled by virtue of age and/or length of service but did not qualify for any retirement benefits.

Mr. McHugh also said that all of the congressional policies, as well as OPM's downsizing instructions, discourage agencies from using RIFs unless absolutely necessary. He noted, however, that voluntary incentives, such as buyouts, appeal to senior, experienced employees and agencies run the risk of losing institutional memory and expertise.

Both Paul Brenner, an attorney with the Office of General Counsel at the EEOC,[11] and Michele Pollak, an attorney with the AARP,[12] discussed some age issues that may arise in the use of voluntary retirement incentives and also addressed the legal ramifications of such incentives. Both agreed that complaints most frequently are lodged when buyouts or incentives are limited to those employees eligible for early retirement, thereby depriving the older, retirement-eligible employee of the benefit. According to Mr. Brenner, the courts have generally agreed that this constitutes age discrimination.

While limited buyouts have not been the norm in the Federal government before the past few years, Ms. Pollak pointed out that her organization receives complaints from older employees not yet at full retirement eligibility calculated by age and length of service who feel compelled to take advantage of a buyout and leave their employment prematurely because the buyout is only offered for a finite time. She also noted that

[7] As Director of the Federal Workforce Restructuring Office, Mr. McHugh is resonsible for supporting the workforce restructuring initiatives of the National Performance Review. His Office is also the source of guidance and assistance for Federal agencies on all aspects of government streamlining. Mr. McHugh has held a variety of Federal positions over the past 30 years, including serving as Director of OPM's Staffing Policy Division and heading the United States delegation to the Joint Committee on the Public Service of the International Labor Organization in 1994. Mr. McHugh's remarks begin at page 79 of the age hearing transcript.

[8] Pub. L. No. 103-226, 108 Stat. 111 (March 30, 1994). Codified in scattered sections of 5 U.S.C. beginning with §2101 (1995).

[9] "Bumping" and "moving" are terms used to describe what happens when employees who lose their jobs through a RIF assert their rights, through seniority or tenure, to other positions. A "riffed" employee may, in fact, displace a less senior employee in another section or office of the agency.

[10] Early retirement means that employees need to meet certain age and service requirements below what is mandatory for "full" retirement. For example, an employee may be entitled to receive all retirement benefits offered by the employer upon attaining the age of 55 and accruing 25 years of service. In order to reduce the size of the workforce, an employer may offer the option of retiring to employees who are 50 years of age with 20 years of service with little or no reduction in benefits. The former would be considered full retirement; the latter early retirement.

[11] Paul Brenner began his government career as an attorney with the Justice Department and then went to the Department of Labor where he specialized in cases under the ADEA. When jurisdiction for the Act was transferred to the EEOC, Mr. Brenner moved to that agency where he has been litigating cases under the ADEA ever since. Mr. Brenner's remarks begin on page 99 of the hearing transcript.

[12] Michele Pollak is the Legislative Labor counsel in the Federal Affairs Department of the AARP. The AARP, a nonprofit organization, is the nation's oldest and largest organization of older Americans with a membership of more than 30 million. Ms. Pollak's office develops legislative policy recommendations and monitors Federal initiatives and programs affecting older people. Ms. Pollak's comments begin on page 16 of the hearing transcript.

early retirement incentives may reinforce stereotypes of older workers as the most dispensable in the workforce. According to Mr. McHugh, buyouts cannot be offered indefinitely. They do not present a long term solution to downsizing and only work when offered for a short time period. He noted further that buyouts that extend over a period of time halt normal attrition, because if people know that they are going to be paid to leave at some point, they will not leave without the payment.

Accentuating the differences between the private and public sectors, Mr. Brenner and Mr. McHugh agreed that the fact that the Federal government offers buyouts to everyone and does not target employees contributes to the small number of complaints by Federal employees alleging age discrimination in this area. Ms. Pollak also noted that the issue of voluntariness is always fundamental; couching a buyout in terms that include a threat of involuntary separations if enough employees do not take advantage of the buyout is coercive and may be perceived as discriminatory by older workers who believe that the threat is aimed at them.

Joe Cleary, Director of the ADEA Division at EEOC,[13] agreed that coercion to accept "voluntary" separation incentives could spell trouble under the law, but noted his belief that employees usually want to know that layoffs are likely to occur if the incentive program is not successful. There was consensus among the participants that if decisions about layoffs are based on objective criteria, then age discrimination issues may be avoided. Mr. Cleary also stated that it is unlawful to differentiate among employees based on the average cost of employing them because of the correlation between higher pay and age.

Finally, Mr. Cleary introduced the issue of reassignment in the context of downsizing. He spoke specifically of cases in which older employees facing a downsizing situation have applied for reassignment to other divisions where vacancies existed, only to be rejected. According to Mr. Cleary, complaints of age discrimination arise when only younger applicants are selected for the vacancies and the older employees are told that they are not as qualified or over-qualified. He said that the EEOC scrutinizes these cases carefully to determine whether the assertions are lacking in objective content and are pretexts for age discrimination. He also described cases in which investigations revealed that management had a policy or practice of not permitting the reassignment of any employee who was within five years of retirement age, situations that present *prima facie* cases of age discrimination.

Promotions

Mr. Cleary was the first participant to address the issue of promotions. He shared EEOC statistics that show that promotion issues constitute a smaller percentage of complaints under the ADEA than under other anti-discrimination statutes that EEOC enforces.[14] Charles Woodward, Chair of the Mid-Level Employees' Council, speaking on behalf of his and other GAO councils, stated a belief that age is an important factor in promotion decisions at GAO. Relying on anecdotal information, Mr. Woodward said that his constituency believes that age plays a significant role in GAO's personnel decision-making and that a "steady stream" of younger staff has been promoted more quickly than and instead of older, more experienced staff.

[13] Mr. Cleary joined the EEOC as a regional trial attorney for enforcement upon his graduation from law school. He later transferred to Headquarters where he was litigator in the Office of Legal Counsel. He was appointed Director of the Age Discrimination in Employment Act Division at the EEOC in 1987. Mr. Cleary's remarks begin on page 10 of the hearing transcript.

[14] In 1993, promotion issues comprised 6.8 percent of EEOC's charges of age discrimination; in 1994, the figure was 7.6 percent; in the first quarter of 1995, the figure was 7.9 percent. By contrast, the area of layoff/discharge comprised 62.2 percent of EEOC's age discrimination charges in 1993; 59.7 percent in 1994; and 57.7 percent in the first quarter of 1995.

Subsequent to the hearing, at the request of the Board, Patricia Rodgers, the Director of the Personnel Office,[15] provided data on promotions by age (FY 90-94); Pay for Performance results by age (FY 90-94); and an age profile for those receiving bonuses (FY 90-92). The statistics provided show that there were 3,121 promotions at GAO from 1990 to 1994; 2,368 of promotions were to employees under the age of 40 and 753 were to employees 40 or over, 160 of which were to employees over the age of 50.[16] In 1994, 61 percent of GAO's employees were 40 years old or older;[17] 32 percent of the promotions went to these employees. Diana Eisenstat, Special Assistant to the Deputy Assistant Comptroller General for Human Resources,[18] stated at the hearing that positions in GAO that are advertised for promotional opportunity are becoming increasingly specialized, calling for discrete expertise that senior employees with more general auditing or accounting backgrounds may not have. Mr. Woodward asserted that the speed with which newer, younger employees are promoted is the reason that promotions are scarce for the older mid-level employees and, absent that factor, a funnelling of a certain number of the older mid-level employees to higher level jobs would occur.

Also speaking at the hearing was Walter Charlton, a private attorney representing thirteen employees who have filed an age discrimination suit against GAO in Federal District Court. The focus of the suit originally was promotions at GAO. According to Mr. Charlton, the probability of promotion at GAO declines at 43; by 55, that probability is virtually non-existent. He echoed Mr. Woodward's claim that at GAO young, newly-hired employees are being promoted faster than older employees were and that they are being promoted over more senior employees. The suit has been expanded to include lack of visibility of assignments given to older workers and the denial of certain other benefits based on age. The plaintiffs are awaiting a decision from the judge on whether he will certify them to proceed as a class.

Another concern raised by Mr. Woodward was the agency's use of core group leaders. They are used in a new agency system of "core groups" or "issue areas" which are replacing GAO's traditional organizational units. Ms. Eisenstat explained to the Board that GAO has identified 35 distinct issues or topics that GAO staff is studying and evaluating and, within those areas, the agency has assembled more than 50 teams, each of which has a leader. Mr. Woodward's constituency believes that these group leader assignments are used to identify employees with management or supervisory potential and that younger, newer employees are being given the assignments.

Recruitment and Hiring

Several participants addressed recruitment, although GAO has not engaged in meaningful recruiting activities for several years due to a hiring freeze expected to continue for some time to come. The issue arose in the context of a question posed by one of the Board members who recently had had before him a case in which an applicant for employment at GAO charged that the agency's recruiting practices, which he described as heavily oriented toward college campuses, discriminated against older applicants.[19] Mr. Cleary indicated that, in his opinion, a practice of recruiting targeted at college campuses was not impermissible, particularly if the employer were also considering other qualified applicants from other pools. He noted that the practice may spring from certain stereotypes that are not

[15] Patricia Rodgers has been with GAO since 1978, as Deputy Director of Personnel and, currently, as Director of the Personnel Office. Prior to joining GAO, she had been with the General Services Administration and the Departments of Commerce and Labor. Ms. Rodgers' remarks begin at page 118 of the hearing transcript.

[16] In FY 90, 685 employees under the age of 40 were promoted and 197 employees who were 40 or over were promoted. The corresponding figures for the next fiscal years are: FY 91 -- 529 under 40, 151 who were 40 or over; FY 92 -- 446 under 40, 138 who were 40 or over; FY 93 -- 412 under 40, 130 who were 40 or over; FY 94 -- 296 under 40, 137 who were 40 or over. Employees who were 50 or over received 160 of the 3,121 promotions between FY 90 and FY 94.

[17] The median age of GAO's workforce at the time of the hearing was 44.1, comparable to the Federal workforce, according to Ms. Rodgers.

[18] Diana Eisenstat joined GAO's Washington Regional Office in 1981 and transferred to the General Government Division several years later. In 1988, she was selected to serve as Assistant to the Deputy Assistant Comptroller General for Human Resources. Shortly after the hearing, she was chosen to participate in the Executive Candidate Development Program and has been re-assigned. Ms. Eisenstat's remarks begin at page 128 of the hearing transcript.

[19] The Board has twice had before it appeals alleging discrimination in GAO's recruitment, specifically challenging the practice of recruiting on college campuses. The case referenced in text settled prior to the issuance of a decision. The petitioner in an earlier case (*Bell v. GAO*, 1 PAB 386 (1986)) argued that the GAO practice of granting first interviews to those recruited at colleges had an "adverse impact" on himself and others in the protected age group of 40-70 years of age. The administrative judge rejected that argument, finding that petitioner failed to show that college campus recruitment played any significant role in the selection for a second interview.

supported by the data. Specifically, he rejected beliefs that younger workers are easier to train because they have not been schooled in another employer's system and that they have greater longevity prospects with their employers. In fact, continued Mr. Cleary, older workers are receptive to training, have good work ethics, and perhaps exhibit greater loyalty to their employers than younger workers.

Patricia Rodgers, Director of GAO's Personnel Office, explained that the agency had traditionally hired evaluator staff at the entry levels. Just before the hiring freeze in 1991 and 1992, however, agency needs had necessitated the hiring of more mid and upper level staff. The median age of those hires was 28 years old, with 15 percent age 40 or older. Although few employees were hired in 1993 and 1994, their median ages were 44 and 42, respectively, with 50 percent of those hired being 40 or older.

Subsequent to the hearing, Associate General Counsel Joan Hollenbach elaborated on a Board member's question about recruitment on college campuses. She wrote that GAO has not recruited for entry-level positions solely on college campuses but seeks qualified applicants from a number of sources. Among those, in addition to colleges and universities, are Federal personnel offices and job information centers; the media; special emphasis organizations; and state employment commissions.

Training

The issue of training at the hearing was addressed primarily by the Director of GAO's Training Institute, Anne Kalvin Klein,[20] and the Director of GAO's Accounting and Information Management Division (AIMD), William Oelkers.[21] Ms. Klein described GAO's curriculum plan, designed to emphasize the development of technical skills integral to GAO's ever-changing work. This plan includes course offerings in study methods, oral and written communications, computers, and management. Mr. Oelkers acknowledged that his division has hired people with recently acquired technical information management skills and accounting experience, but has also worked to upgrade the skills of his onboard employees. He added that he has developed three new career tracks in his division and, in conjunction with the Training Institute, will be creating curricula associated with each track for current employees. According to Ms. Klein and Mr. Oelkers, training courses are being designed around issue areas and this will allow more senior employees to "get up to speed" in rapidly changing areas.

Ms. Klein also described external training opportunities which include OPM seminars, technical and professional conferences. Mr. Oelkers noted that the training budget for graduate courses has been virtually eliminated, but Ms. Klein said that the agency has experimented successfully with bringing selected graduate courses to employees on-site at GAO.

[20] Anne Kalvin Klein joined GAO in 1980 to evaluate training programs and later served as the Training Institute's Deputy for Curriculum. Ms. Klein previously worked at the Bureau of Labor Statistics and in the Baltimore County public school system. Ms. Klein's remarks begin at page 128 of the hearing transcript.

[21] Prior to appointment to his current position as Director of Operations in AIMD, William Oelkers served as Associate Director of the Human Resources Information Systems (AIMD). Mr. Oelkers has held a wide variety of positions at GAO since his arrival in 1961 and has received numerous awards. His remarks begin on page 131 of the hearing transcript.

Current and Future Studies

Participants at the hearing raised three issues that are appropriate for future Board GAO oversight studies: recruitment and hiring, downsizing, and promotions. Because recruitment and hiring are frozen, and most likely will be for the foreseeable future, the Board will be directing its attention to the other two areas of oversight: (1) monitoring the separations that will be occurring as 850 or more employees leave the agency in present and near future downsizing efforts; and (2) the feasibility of conducting a review of promotion and pay for the past five years.

With respect to monitoring the downsizing, the Board has asked the agency to provide data on separations quarterly, aggregated by race, national origin, gender,[22] age in five year increments, and disability. This data will be obtained by organizational unit, as well as for the total workforce. The Board will monitor the effects of the downsizing that will occur between July 31, 1995, and October 1, 1996, undertaken pursuant to FY 1996 budget reductions. The agency plans to accomplish much of the reduction by closing certain field offices, reducing support staff and management positions,[23] and offering buyouts and early retirements. After review and analysis of the data, the Board will prepare a detailed report about the overall effects of the reduction on the GAO workforce as a whole. Because the agency is using different methods to reduce the number of employees in different categories of employees, the Board will have the opportunity to study the eeo impact of each of the techniques used by GAO.

The Board is also exploring the feasibility of studying study promotions at GAO during the past five years. Such a study would entail a comparison of time-in-grade for all promotions for each career ladder within specific units by age in five year increments. The Board would then compare the rates of promotion for employees under the age of 40 with those who are 40 years old or over to determine whether older employees spent significantly longer in grade than younger employees. For competitive promotions, the Board would study comparative data such as inclusion on the best-qualified list.

[22] Race, national origin, age, and disability data will also be broken down by gender in each of those categories.
[23] It is proposed that support staff reductions will be accomplished by contracting out functions and eliminating others. Identifying opportunities to reduce the executive and managerial ranks is the subject of a current agency study.