UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 12

Docket No. AT-0432-08-0792-I-1

Arthur J. Henderson,

Appellant,

v.

National Aeronautics and Space Administration,

Agency.

February 2, 2011

Clement J. Cartron, Esquire, Huntsville, Alabama, for the appellant.

Patricia A. Watson, Esquire, Marshall Space Flight Center, Alabama, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the appellant's removal for unacceptable performance under 5 U.S.C. chapter 43. For the reasons set forth below, we find that the petition does not meet the criteria for review under 5 C.F.R. § 1201.115, and we therefore DENY it. However, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118 to consider the agency's arguments on review, and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant began his employment in 1982 at the agency's Marshall Space Flight Center, in Huntsville, Alabama, and continued to work for the agency for the next twenty-five years in a variety of positions, most of which fell under the Materials Engineer and Aerospace Engineer position descriptions. Initial Appeal File (IAF), Tab 4, Subtab 1 at 1-5, Subtabs 4u, 4v. On September 2, 2007, the appellant was formally reassigned to the position of GS-0861-13 Aerospace Engineer in the Test Laboratory, Engineering Directorate, and the appellant signed a performance plan for this position on August 22, 2007. *Id*., Subtab 1 at 5-6, Subtabs 4w, 4u at 1. On November 26, 2007, John Hammond, Deputy of the Test Laboratory in the Engineering Directorate and the then acting Branch Chief of the Propulsion Test Branch, met with the appellant to conduct a "mid-year performance review," and found his performance unsuccessful. *Id*., Subtab 1 at 6, Subtab 4t. Specifically, Mr. Hammond found that the appellant failed to demonstrate acceptable performance in the critical elements of "Mechanical Systems Engineer" and "Communications." *Id*., Subtab 4t. On January 22, 2008, the agency placed the appellant on a 90-day Performance Improvement Plan (PIP) as a result of his unsatisfactory performance. *Id*., Subtab 1 at 7, Subtab 4p.

¶3 On May 16, 2008, Mr. Hammond issued the appellant a notice proposing to remove him for unsatisfactory performance during the PIP. *Id*., Subtab 1 at 9, Subtab 4h. The appellant and his attorney responded orally and in writing to the notice of proposed removal, and the agency issued a July 18, 2008 decision informing the appellant that he would be removed, effective July 23, 2008. *Id*., Subtab 1 at 9-10, Subtabs 4e-4g.

¶4 The appellant, through his designated counsel, appealed his removal to the Board. IAF, Tab 1 at 1-2. He requested a hearing and he asserted that the removal action was: not in accordance with law; the result of harmful error; and the result of marital status and age discrimination. *Id*. at 2, 4-5, 8-10.

¶5 After holding a telephonic prehearing conference, the administrative judge issued a summary of the conference setting forth the only issues for adjudication, unless the parties requested in writing to modify the issues. IAF, Tab 23 at 1-2. The administrative judge found that the appellant was not disputing that the agency has an Office of Personnel Management (OPM) approved performance appraisal system or challenging the validity of his performance standards.[1] *Id*. at 1-2.

¶6 Following a hearing, the administrative judge issued an initial decision that reversed the agency's removal action. IAF, Tab 55, Initial Decision (ID) at 1, 13. In the initial decision, the administrative judge addressed the validity of the performance standards at issue in this appeal and found that, with respect to the critical elements of "Mechanical Systems Engineer" and "Communications," the standards are, on their face, invalid. ID at 3-12. The administrative judge further found that, although an agency may cure facially invalid standards by informing the appellant through subsequent oral or written communications as to what level of performance is required to retain his position, ID at 5, the agency's communications to the appellant did not cure this deficiency. ID at 8-12. The administrative judge found that, absent valid performance standards, the appellant's performance cannot be measured, and, therefore, she did not need to address the appellant's allegation of harmful error because there was no further remedy she could grant on his claim. ID at 11-13 & n.8.

¶7 On petition for review, the agency asserts that the administrative judge erred in addressing the validity of the appellant's performance standards without providing it an opportunity below to address the issue. Petition for Review (PFR) File, Tab 1 at 22-24. The agency further argues that, even if the administrative judge did not err in raising this issue, she erred in finding that the agency failed

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[1] In addition, the administrative judge indicated that the appellant's representative stated that he "is not pursuing any discrimination claims." IAF, Tab 23 at 1.

to show that the appellant's performance standards are valid. *Id.* at 24-33. The appellant has responded in opposition to the agency's petition. PFR File, Tab 5.

ANALYSIS

The agency's petition for review was timely filed.

¶8 The appellant asserts that the agency's petition for review should be denied because it was untimely filed and the agency has not shown good cause for the delay in filing. PFR File, Tab 5 at 5-11. The initial decision informed the parties that a petition for review must be filed on or before December 30, 2009. ID at 15. Because the agency's petition was electronically submitted from the agency's Huntsville, Alabama office at 11:56 p.m. Central Standard Time on December 30, 2009, the last day of the filing period, PFR File, Tabs 1-2, we find that the agency's petition was timely filed. *See* 5 C.F.R. § 1201.14(m)(1) (all pleadings filed via the Board's e-Appeal Online system are stamped with Eastern Standard Time, but the timeliness of a pleading is assessed based on the time zone where the pleading is being filed).

The agency has not shown that the administrative judge erred by addressing the validity of the appellant's performance standards.

¶9 Before initiating an action for unacceptable performance under 5 U.S.C. § 4303, an agency must give the employee a reasonable opportunity to demonstrate acceptable performance and must show by substantial evidence that: its action was taken under a performance appraisal system approved by OPM; the appellant's performance standards are valid; and the appellant's performance was unacceptable in at least one of his critical elements. *Diprizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 7 (2001); 5 C.F.R. § 432.104. Performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid removal for unacceptable performance under chapter 43. *Jackson-Francis v. Office of Government Ethics*, 103 M.S.P.R. 183, ¶ 8 (2006); *see Eibel v. Department of the Navy*, 857 F.2d 1439, 1441-44

(Fed. Cir. 1988). Absent valid performance standards, the Board cannot evaluate whether an agency properly took action against an employee for unacceptable performance. *Neal v. Defense Logistics Agency*, 72 M.S.P.R. 158, 161 (1996). The Board has held, therefore, that it is obliged to consider the validity of an appellant's performance standards, regardless of whether it has been raised by the parties. *Id.*; *Smith v. Department of Veterans Affairs*, 59 M.S.P.R. 340, 347 (1993).

¶10 In the summary of the prehearing conference, the administrative judge indicated that the appellant was not contesting the validity of the performance standards. IAF, Tab 23 at 1-2. In his post-hearing brief, however, the appellant argued that his performance standards were not valid. IAF, Tab 53 at 16-18. In the initial decision, the administrative judge considered this issue and found the appellant's performance standards invalid. ID at 3. Because the Board is obliged to consider the validity of an appellant's performance standards, regardless of whether it has been raised by the parties, the administrative judge properly raised the validity of the appellant's performance standards and the agency cannot claim prejudice because the validity issue was not a "new" issue. *See Neal*, 72 M.S.P.R. at 161; *Smith*, 59 M.S.P.R. at 347-48.

¶11 The agency argues on petition for review that the administrative judge erred by citing *Smith*, 59 M.S.P.R. 340, and *Ortiz v. Department of Justice*, 46 M.S.P.R. 692 (1991), in the initial decision to support her reasoning that an agency cannot claim surprise when the validity of an employee's performance standards were not previously identified as an issue. PFR File, Tab 1 at 23-24; *see* ID at 3. The agency asserts that, while the performance standards were deemed facially invalid in *Smith* and *Ortiz*, in this case the administrative judge looked "well beyond the four corners of the performance standards" and relied on the record evidence to determine that the standards were invalid. PFR File, Tab 1 at 23-24. Thus, the agency argues that even if the administrative judge did not commit error, per se, by considering the validity issue, the administrative judge

did commit prejudicial error when she looked to the record evidence before finding that the performance standards are invalid because she did not provide the agency with an opportunity to submit evidence or argument in support of this issue. *Id.*

¶12 We find the agency's arguments unpersuasive. In *Smith*, the Board found the performance standard at issue invalid as an absolute standard.[2] *Smith*, 59 M.S.P.R. at 348-49. In *Ortiz*, the Board affirmed the administrative judge's finding that the performance standard was invalid as a "backward" standard because such standards "would have to be entirely rewritten, not just fleshed out and clarified during counseling."[3] *Ortiz*, 46 M.S.P.R. at 695. Thus, it was presumably not necessary in *Smith* and *Ortiz* to look beyond the four corners of the written performance standards because it would have been impossible for the agencies in those cases to cure an absolute or inherently backwards standard through subsequent oral or written communications. *See Eibel*, 857 F.2d at 1443 (backwards standards have to be entirely rewritten, not just fleshed out and clarified during counseling, to inform an appellant of what he needs to do to achieve an acceptable rating); *Jackson-Francis*, 103 M.S.P.R. 183, ¶ 10 (same).

¶13 In contrast, the administrative judge in this case found the performance standards facially invalid because they consisted of a single written standard of satisfactory performance despite the fact that the agency has a five-tier

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[2] An "absolute standard" is a standard under which a single incident of poor performance will result in an unsatisfactory rating on a critical element. *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 9 (2004). Although not at issue here, we note that the Federal Circuit has held, subsequent to the Board's decision in *Smith*, that absolute standards are not invalid per se. *See Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1334-37 (Fed. Cir. 2004); *see also Jackson*, 97 M.S.P.R. 13, ¶ 15.

[3] "Backwards standards" are standards that identify unacceptable performance rather than acceptable performance. *See, e.g., Eibel*, 857 F.2d at 1441, 1443; *Jackson-Francis*, 103 M.S.P.R. 183, ¶ 10.

performance appraisal plan. ID at 4-5. As explained herein, the Board has held that a single standard in a five-tier performance plan violates the statutory requirement of objectivity because it requires extrapolation more than one level above and below the written standard. *See Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 295-98 (1985). Although the appellant's performance standards were facially invalid, the administrative judge properly found that this deficiency could be cured through subsequent written and oral communications to the appellant. ID at 5; *see Thompson v. Department of the Navy*, 89 M.S.P.R. 188, ¶ 18 (2001). Thus, unlike the performance standards at issue in *Smith* and *Ortiz*, where clarification of the standards was not a possibility, the administrative judge properly looked to the written and hearing testimony to determine whether the agency sufficiently clarified the appellant's performance standards.

¶14 We further find that the agency has not shown on review that it was prejudiced by the administrative judge's failure to provide specific notice and opportunity below to develop the validity issue once the administrative judge looked beyond the "four corners" of the performance standards. Although the appellant's post-hearing brief and the initial decision properly informed the agency of its burden and the elements to prove the validity of the appellant's performance standards, the agency has not identified on review what evidence it would have submitted below to show that the appellant's performance standards are valid if the administrative judge had provided it with a specific opportunity to address this issue. *See* PFR File, Tab 1 at 22-24; *cf. Harris v. U.S. Postal Service*, 112 M.S.P.R. 186, ¶ 9 (2009) (where an administrative judge failed to properly apprise an appellant prior to the initial decision of her burden and the elements to establish jurisdiction over her appeal, if the agency's pleadings contained the notice that was otherwise lacking, or if the initial decision put the appellant on notice of what she had to do to establish jurisdiction, then the appellant had the opportunity to meet her burden on review); *Scott v. Department of Justice*, 105 M.S.P.R. 482, ¶ 6 (2007) (same).

¶15 Thus, we find that the administrative judge did not commit prejudicial error by failing to apprise the parties prior to the initial decision that she would adjudicate the validity of the appellant's performance standards.

The administrative judge's finding that the agency failed to prove that the appellant's performance standards are valid is supported by the record.

¶16 As set forth in the initial decision, the agency alleged that the appellant's performance was unsatisfactory in the critical elements of "Mechanical Systems Engineer" and "Communications." ID at 4, 11; IAF, Tab 4, Subtab 4w at 4, 6. The administrative judge correctly found that each element of the performance plan has five possible ratings, i.e., "fails to meet expectation[s]," "needs improvement," "meets expectations," "exceeds expectations," and "significantly exceeds expectations." ID at 5; IAF, Tab 4, Subtab 4w at 3. The performance standard for the appellant's position, however, only sets forth one level of performance, i.e., what one must do to "meet" the standard. ID at 5, 12; IAF, Tab 4, Subtab 4w at 4-6. Where an appellant is rated on a five-tier system for his critical elements, the agency must inform him, at a minimum, of what he must to do to perform at the "needs improvement" level to avoid a performance-based action. *See, e.g.*, *Jackson-Francis*, 103 M.S.P.R. 183, ¶¶ 6-7, 10 (the agency erred by requiring the appellant to reach a "fully successful" level of performance during the PIP to avoid removal under chapter 43 because under a five-tier system, an employee's performance can be "not satisfactory" without falling to a level that requires removal). Therefore, because the agency's five-tier performance appraisal plan is based on a single written standard of satisfactory performance, the administrative judge correctly found that it violates the statutory requirement of objectivity because it requires extrapolation more than one level above and below the written standard. ID at 5, 12; *see Donaldson*, 27 M.S.P.R. at 295-98.

¶17 Moreover, Mr. Hammond conceded that the written performance standards did not inform the appellant of the factors on which he would be judged in his

performance appraisal. Hearing Transcript (HT) 12/03/08 at 246-51. Thus, because the performance standard for the appellant's position did not inform him of what he needed to do to achieve the various levels of performance under the agency's five-tier system, the administrative judge correctly found that the standards are invalid. ID at 5; *see Nalls v. Department of the Air Force*, 46 M.S.P.R. 603, 608 (1991).

The agency's communications with the appellant during the initial performance period did not cure the invalid written performance standards.

¶18 An agency may cure otherwise fatal defects in the development and communication of performance standards by communicating sufficient information regarding performance requirements at the beginning of, and even during, the PIP. *Thompson*, 89 M.S.P.R. 188, ¶ 18; *Donaldson*, 27 M.S.P.R. at 297-98; ID at 5. On September 21, 2007, Timothy Gautney, the Mechanical Team Lead for the West Area who mentored and trained the appellant, provided the appellant with a written list of Test Preparation Sheets (TPSs)[4] to complete, along with "target" completion dates. IAF, Tab 11, Ex. 12 at 40-41 (e-mail from Gautney to the appellant), Tab 25, Ex. 64 (Excel spreadsheet attached to the e-mail); HT 04/02/09 at 18; HT 05/20/09 at 56; ID at 6. The appellant testified that there were inconsistencies between his supervisor, Mr. Hammond, and Mr. Gautney on whether the target suspense dates were "guidelines" or "deadlines," because Mr. Gautney presented the target dates as "guidelines" and informed him that there is "no such thing as deadlines" in the West Test Area. HT 07/07/09 at 26-28; HT 07/08/09 at 280-81. The appellant also testified that he was not informed by Mr. Hammond that he was expected to comprehend the knowledge requirements by a specific date. HT 07/08/09 at 370.

[4] TPSs essentially are work orders instructing technicians in the Test Lab how to perform various tasks. ID at 6; HT 12/3/08 at 30-32.

¶19 The appellant's "mid-year performance review" on November 26, 2007, occurred less than three months after the appellant was formally assigned to the position and only two months after the appellant was given the September 21, 2007 list of tasks to complete. IAF, Tab 4, Subtab 4t; IAF, Tab 25, Ex. 64. During that review, Mr. Hammond informed the appellant that his performance in the critical element of "Mechanical Systems Engineer" was unacceptable because he was unable to "manage his time efficiently to meet his deadlines," he "communicates poorly with other members of his team," and he did not show the "initiative that would be expected of an employee of his grade and experience level." IAF, Tab 4, Subtab 4t at 1. Mr. Hammond also found that the appellant: completed less than half the tasks from the original assignment list and wrote fewer than ten TPSs after 90 days on the job. *Id*. He further found that the appellant failed to meet expectations in his critical element of "Communications" because he routinely failed to communicate verbally or by e-mail in a "clear, concise, and well-organized manner." IAF, Tab 4, Subtab 4t at 1-2.

¶20 Performance standards should be specific enough to provide an employee with a "firm benchmark" toward which to aim his performance, *Greer v. Department of the Army*, 79 M.S.P.R. 477, 483 (1998), and must be sufficiently precise so as to invoke general consensus as to their meaning and content. *Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 534-35 (1992), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994) (Table). Here, the record supports the administrative judge's finding that the agency failed to put the appellant on notice of what he needed to do to be at an acceptable level of performance on the critical elements of "Communications" and "Mechanical Systems Engineer." ID at 6-9, 11-13; IAF, Tab 4, Subtab 4w. In this regard, the appellant testified that he learned for the first time in his November 26, 2007 "mid-year performance review" that he was not communicating at a level or in the manner deemed acceptable by agency. IAF, Tab 4, Subtab 4t; HT 07/07/09 at 39-40. The

appellant also testified that, prior to the November 26, 2007 review, he was not informed by Mr. Hammond until halfway into the performance period that he was expected to produce TPSs at a higher rate and in a timelier manner. HT 7/8/09 at 306-07. While the agency may have had an expectation that the appellant would produce the TPS reports within a certain time, the record shows that the agency did not initially inform the appellant that he was expected to strictly adhere to "target dates," and, in fact, Mr. Gautney testified that he conveyed to the appellant that the timelines he provided were not deadlines, per se, but were goals for completing these assignments. HT 04/02/09 at 27-29.

¶21 Thus, the record supports the administrative judge's finding that the agency failed to cure its invalid written performance standards during the appellant's initial performance period. ID at 7-8, 11-12.

The agency's communications with the appellant during the PIP did not cure the invalid written performance standards.

¶22 The record also supports the administrative judge's findings that the agency did not cure its deficient performance standards through written and/or oral communications during the 90-day PIP period. ID at 8-12. Because the appellant was rated on a five-tier system for his critical elements, IAF, Tab 4, Subtab 4w at 3, the agency was required to inform him, at a minimum, of what he needed to do to perform at the "needs improvement" level to avoid a performance-based action. *See Jackson-Francis*, 103 M.S.P.R. 183, ¶¶ 6-7. Although the agency communicated to the appellant the tasks he needed to complete on the PIP and provided him with feedback on his completion of tasks, the agency failed to inform the appellant of the minimum level of performance he needed to demonstrate to avoid a performance-based action. ID at 9-10; *Donaldson*, 27 M.S.P.R. at 298-300 (the appellant's demotion for unacceptable performance could not be sustained where the agency, despite having a five-tier performance system, consistently told the appellant what was required for a "satisfactory" rating only, and not for the "minimally satisfactory"

or "needs improvement" level which she had to reach in order to avoid demotion).

¶23 The record supports the administrative judge's finding that, although Mr. Hammond informed the appellant, through the PIP, of his work duties and expected completion dates, he did not sufficiently communicate to the appellant how his efforts would be evaluated to determine a level of performance. ID at 8-9; IAF, Tab 4, Subtab 4p. The Board has held that an agency is not required to include in each performance standard specific indicators of quantity, quality, and timeliness that are used to evaluate work. *Coleman v. Department of the Army*, 27 M.S.P.R. 305, 309 (1985). Further, the fact that the performance standard may call for a certain amount of subjective judgment on the part of the employee's supervisor does not automatically invalidate it. *Melnick v. Department of Housing and Urban Development*, 42 M.S.P.R. 93, 99 (1989), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990) (Table). However, as set forth above, the Board has repeatedly held that performance standards must be "sufficiently precise and specific as to invoke a general consensus as to its meaning and content and provide a firm benchmark toward which the employee may aim [his] performance." *Johnson v. Department of the Interior*, 87 M.S.P.R. 359, ¶ 6 (2000); *see, e.g.*, *Greer*, 79 M.S.P.R. at 484 (finding that the agency cured any lack of specificity in the appellant's performance standards when it informed the appellant of specific work requirements through written instructions, information concerning deficiencies and methods of improving performance, and memoranda describing unacceptable performance); *see also Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985).

¶24 Here, the administrative judge correctly found that the agency did not adequately communicate to the appellant the standard of measure for evaluating his assignments and whether difficulty in one particular area or task would preclude a finding that he had successfully completed the PIP. ID at 10-11. In other words, in looking at the record as a whole, it is not possible to invoke a

"general consensus" as to what level of performance the agency expected of the appellant to successfully pass his PIP. *See Johnson*, 87 M.S.P.R. 359, ¶ 6. The appellant's lack of clarity of what he needed to do to succeed on the PIP is illustrated in a February 13, 2008 e-mail wherein Mr. Hammond addressed the appellant's concerns that if he failed one element of the PIP, he would fail the entire PIP by assuring him that "this was not the case" and that "all knowledge factors and tasks will be evaluated as a whole at the end of [the] PIP." IAF, Tab 25, Ex. 27. Mr. Hammond reiterated in a March 14, 2008 e-mail to the appellant that: his "overall performance will be determined at the end of the PIP and the PIP will be graded on its entirety"; the key to succeeding on the PIP is the ability to "demonstrate initiative and the ability to work at the GS13 level"; and the appellant's "first priority is to meet the suspense dates of [his] PIP." IAF, Tab 25, Ex. 35.

¶25 Mr. Hammond's March 11, 2008 e-mail to the appellant, halfway through the PIP period, further shows the agency's deficiency in properly informing the appellant of what level of performance he needed to achieve to pass the PIP:

> You have increased your efforts significantly since your midterm review in November. At your PIP status meeting on February 27th you had completed you[r] knowledge requirements and were slightly behind in your work products. Today you were more behind on your work requirements and unsatisfactory on your knowledge requirements. The things that concern me most are not your technical expertise or learning capability, but your time management, initiative, and your communication with us.

IAF, Tab 4, Subtab 4o at 1. He then set forth several examples of the appellant's deficiencies in time management and communication. *Id.* Mr. Hammond also provided the appellant with more specific information about what he considered constitutes acceptable performance in the tasks of knowledge requirements. IAF, Tab 4, Subtab 4o at 2. The administrative judge found that, while this information provided the appellant with more specific information regarding the level of performance the agency expected of him on the knowledge requirement

tasks, the agency did not provide the appellant with this information until two-thirds of the way into the PIP period. ID at 10; *see* 5 U.S.C. § 4302(b)(2) (an agency is required to inform an employee of the expected performance standards at the beginning of a performance "appraisal period"); 5 C.F.R. §§ 430.203 (defining "appraisal period" as "the established period of time for which performance will be reviewed and a rating of record will be prepared"), 430.204(b)(1)(ii). In any event, even if the agency had provided the appellant with this information earlier in the PIP, the agency's failure to inform the appellant of how it would evaluate his performance on individual tasks and on the PIP as a whole precludes a finding that the appellant's performance standards were valid as supplemented by the agency's oral and written communications. *See Donaldson*, 27 M.S.P.R. at 298-300.

¶26 The totality of the evidence shows that, although the agency informed the appellant of the individual tasks he needed to accomplish during the PIP, it failed to adequately explain to the appellant a sufficiently "firm benchmark" for which he should aim his performance. This is especially true given Mr. Hammond's statement to the appellant that his performance on the PIP would be graded in its entirety, without any further explanation as to how the agency intended to evaluate the appellant's performance as a whole.

¶27 Accordingly, because the agency has not shown that the administrative judge erred in finding that the written performance standards were invalid and were not subsequently cured by the agency's oral and written communications to the appellant, we AFFIRM the initial decision that reversed this 5 U.S.C. chapter 43 performance-based removal action.

ORDER

¶28 We ORDER the agency to cancel the removal action and to restore the appellant effective July 23, 2008. *See Kerr v. National Endowment for the Arts*,

726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶29 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶30 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶31 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶32 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the

Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶33 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does

not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.