

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

THOMAS W. WELLS, *et al.*,

v.

PATRICIA R. HARRIS, *et al.*

} Order No. RR-80-3.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

A. Background of the case

This matter comes before the Merit Systems Protection Board ("the Board") pursuant to its authority under 5 U.S.C. § 1205(e)(1)(B).¹ In pertinent part that provision states:

At any time after the effective date of any rule or regulation issued by the Director [of OPM] in carrying out functions under section 1103 of this title, the Board shall review any provision of such rule or regulation. . .

(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board. . . .

On May 17, 1979, the American Federation of Government Employees, AFL-CIO(AFGE) petitioned the Board to review (1) certain regulations issued by the Director of the Office of Personnel Management (OPM) relating to the demotion or removal of Federal employees and (2) the implementation of those regulations by the Social Security Administration (SSA) of the Department of Health, Education and Welfare. AFGE alleged that the interim regulations published by OPM implementing Chapter 43² of title 5 of the United States Code as amended, were invalid on their face because they required the commission of prohibited personnel practices, and that the implementation of the regulations by SSA was also invalid.

¹ Unless otherwise indicated, all references to sections of the United States Code are to those within Title 5.

² See, 5 C.F.R. §§ 430 and 432 (January 16, 1979). Chapter 43, specifically §§ 4302 and 4303, of Title 5 governs the establishment of performance appraisal systems for most Federal employees and reductions in grade or removals of such employees based on unacceptable performance.

After providing OPM and SSA an opportunity to respond to the petition, the Board granted the request for review.³ Additionally, it specified that Board review would focus on whether OPM interim regulation § 432.206 "on its face or as implemented by the Department of Health, Education and Welfare would require, or has required, any employee to violate 5 U.S.C. § 2302(b)(11)." Finally, the order provided for the submission of comments by other interested parties and set the proceeding for oral argument.⁴

The Board subsequently ordered the scope of the review in the proceeding to be expanded to include consideration of OPM's final regulations implementing Chapter 43. The order also requested the parties to file briefs addressing the issue of whether OPM's final regulation on its face would require any employee to violate § 2302(b)(11) and whether the Board's review of the interim regulation had been rendered moot by OPM's issuance of its final regulation.⁵ Oral argument before the Board took place on September 27, 1979.⁶

B. Issues Presented

The central issue presented here is whether, and if so under what limitations, removal or demotion actions based on "unacceptable performance" may be taken under § 4303 against employees for whom a performance appraisal system has not yet been established under § 4302. AFGE argues that to take an action under § 4303 without such a system in place is a violation of § 4302. It further submits that such action constitutes a prohibited personnel practice in that it is a violation of a law which implements or directly concerns a merit principle. In response, OPM and SSA counter that there is no violation of § 4302 in that Congress provided that § 4302 systems did not have to be in place until October 1, 1981. Accordingly, they submit that until that time, adverse actions of this

³ While this matter was being considered the Special Counsel, in a parallel action on different grounds, pursuant to 5 U.S.C. § 1208 filed a request with the Board to stay further action against its employees by SSA under OPM's regulations. The stay was approved by the Board and later extended. Further action in that matter has been delayed by agreement between SSA and the Special Counsel, pending a determination in this case.

⁴ 44 Fed. Reg. 44857 (July 31, 1979). Comments received and considered by the Board in this proceeding included those of the Departments of Agriculture, Defense and Navy, the SEC, IRS, FCC, NLRB, EEOC, the National Federation of Federal Employees (NFFE), the National Treasury Employees Union (NTEU) and the Special Counsel.

⁵ 44 Fed. Reg. 45587 (to be codified at 5 C.F.R. § 432.205) (August 3, 1979).

⁶ The Board requested that all interested parties file notices of intent to participate in oral argument. All requests were granted. Participants included AFGE, OPM, SSA, the Departments of Agriculture, Army, Navy and Transportation, the IRS, VA, NFFE, NTEU and the Special Counsel.

nature can be taken against employees if the requirements of § 4303 alone are met by the acting agency.

Resolution of the issue is significant throughout the Federal service for two reasons: the basis for the action and the standard of proof necessary to sustain the action. Demotions or removals under § 4303 are based on "unacceptable performance" by the individual employee and are to be sustained on appeal if supported by "substantial" evidence. Adverse actions under Chapter 75 of title 5 must be based on the "efficiency of the service" and must be supported by the more stringent "preponderance of the evidence" standard.⁷

Because the term "unacceptable performance" as used in § 4303 is precisely defined as failure to meet established performance standards in even a single "critical element" of the employee's position,⁸ it is a narrower justification for removal than the Chapter 75 requirement of "such cause as will promote the efficiency of the service."⁹ Consequently, performance-related removals and demotions are more easily sustained under § 4303 than under Chapter 75, thus accomplishing a primary purpose of the Act.

Once a performance appraisal system covering any particular employee is in place, the Act provides clear guidance for relating that employee's performance appraisal to the requirements of § 4303. However, the Act does not specifically address the procedures to govern during the interim period. Therefore, the Board has analyzed the structure of the statute and its legislative history to determine the meaning of the Act, the validity of OPM's regulations, and the validity of SSA's implementation of those regulations.

C. Summary of the Board's Conclusions

The Board is satisfied that the dominant legislative objective of the Act was to create a single interrelated framework in which the results of performance appraisal systems established under § 4302 are to be used, among other things, as a basis for taking actions under § 4303. The streamlined procedures of § 4303 were not intended to be applied to employees whose performance has not been evaluated under a § 4302 appraisal system. Considering the provisions of Chapter 43 as a whole, we conclude, therefore, that the regulations under consideration and the actions taken by SSA are invalid.

⁷ 5 U.S.C. § 7701(c)(1).

⁸ 5 U.S.C. § 4301(3).

⁹ 5 U.S.C. § 7513(a).

We do not, however, find that performance standards and critical elements need be identical for all employees having common position descriptions, nor do we discern in the Act or its legislative history any requirement that standards and elements be developed by each agency on a centralized basis. It is clear that Congress, to permit agencies to have maximum flexibility in these respects, required only that performance standards be based on objective criteria "related to the job in question for each employee or position" under the particular appraisal system, and that the other requirements of § 4302 be met.

The Board's conclusions do not prevent agencies from removing employees for performance-related reasons until October of 1981. The agencies control their own timetables in establishing the performance appraisal systems required by § 4302. Nothing in the Act prevents them from doing so earlier than 1981; indeed, § 4302(b)(2) expressly requires that the systems be established and communicated to employees "as soon as practicable." Moreover, Chapter 75 remains available for adverse actions that are performance related. Section 7512(D) excludes from Chapter 75 only § 4303 actions for "unacceptable performance" as defined in § 4301(3). Nothing in § 7512 prevents action under the provisions of Chapter 75 merely because the action is performance-based. As previously noted, the higher "preponderance of the evidence" standard and the "efficiency of the service" requirement would apply to such actions, but we have found nothing to indicate that Congress intended to prevent agencies from meeting those requirements where they are able to do so. In this respect the agencies carry no greater burden during the interim period than they did prior to the Act, and they have it within their own hands to hasten the availability of the more lenient § 4303 standards by establishing their § 4302 appraisal systems sooner rather than later.

The issues posed in this case provide the first occasion for construing some of the Act's more significant provisions. We commence our consideration of these issues with a survey of the pertinent statutory framework. Thereafter the analysis of the substantive issues relating to §§ 4302, 4303, and 2302(b)(11) is presented, followed by a discussion of the Board's authority under § 1205(e) and the relationship between § 4303 and Chapter 75.

II. STATUTORY AND ADMINISTRATIVE BACKGROUND

A. *The Statutory Framework*

The Civil Service Reform Act of 1978, the most comprehensive reform of the Federal Civil Service system since passage of the

Pendleton Act in 1883,¹⁰ is a complex piece of legislation comprising nine separate titles, preceded by Congressional findings and a statement of purpose. We are concerned in this proceeding with Titles I and II of the Act, both of which amend title 5, United States Code.

Title I adds a new Chapter 23 to title 5, including two sections pertinent to this proceeding. The first of these is § 2301, which sets forth "merit system principles" with which Federal personnel management "should be" consistent. As indicated by the Act's findings and statement of purpose, these principles are "expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business." The principles, stated in hortatory terms, are not self-executing.¹¹

The other pertinent provision of the new Chapter 23 is § 2302(b) which makes it a "prohibited personnel practice" for any employee to take, direct, recommend or approve a personnel action under any of eleven specified circumstances. These prohibited practices are defined by statute "to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system," as stated in § 3(2) of the Act. Most of the prohibited personnel practices are defined by § 2302(b) with a degree of specificity and are derived from previously existing law or regulation. An exception is § 2302(b)(11), invoked by AFGI in this proceeding. That subsection makes it a prohibited personnel practice to

¹⁰ S. Rep. No. 95-969, 95th Cong., 2d Sess. 1 (1978), reprinted in House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 1465 (Comm. Print No. 96-2, 1979) [hereinafter referred to as *Legislative History*]. In addition to these materials, the legislative history includes extensive hearings in both houses of Congress. See Civil Service Reform: Hearings on H.R. 11280 Before the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. (1978) [hereinafter referred to as *House Hearings*]; Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (1978) [hereinafter referred to as *Senate Hearings*]. The Markup Sessions of the House Committee on Post Office and Civil Service, to be published as Committee Markup of Civil Service Reform Legislation (Comm. Print No. 33-782, 1978), are available in page proof at the present time [hereinafter referred to as *House Markup*]. The Markup Sessions of the Senate Committee on Governmental Affairs, and of the House-Senate Conference, both invaluable as documents of legislative history, have not yet been published but are available in stenographic transcript form [hereinafter referred to as *Senate Markup* and *Conference Markup* respectively].

¹¹ The Conference Report states: "Unless a law, rule or regulation implementing or directly concerning the principles is violated (as under section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency." *Legislative History*, at 1970. However, OPM is required by § 1104(b)(2), as amended, to establish and maintain an oversight program to "ensure" that activities under any personnel management authority that is delegated to agencies by the Director of OPM are "in accordance with the merit system principles."

(11) take or fail to take any . . . 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 this title.

Thus a prohibited personnel practice is not established under § 2302(b)(11) merely by showing that an action violates the merit system principles. It must be shown by a two-step analysis that the action (i) violates a law, rule, or regulation, and (ii) that the violated law, rule or regulation is one which "implements" or which "directly concerns" the merit system principles.

Title II of the Act relates to civil service functions, performance appraisal, and adverse actions. First, it provides for the statutory establishment, powers and functions of OPM, the Board, and the Special Counsel of the Board. Pertinent to this inquiry is § 1205(e) which authorizes the Board to review regulations issued by OPM upon petition or upon the Board's own motion.

If upon review the Board finds an OPM rule or regulation to be invalid on its face or as implemented, the Board must direct agencies to cease compliance with the invalid provisions or to correct any invalid implementation.¹² The criteria for the Board's determination are whether the regulation would require, or as implemented has required, the commission of a prohibited personnel practice.

Second, Title II sets forth a new Chapter 43 headed "Performance Appraisal." Section 4301 contains definitions of terms used in that subchapter. One of those terms is "unacceptable performance," defined by § 4301(3) to mean "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position."

Section 4302 requires the establishment of performance appraisal systems. Subsection (a) requires each agency to develop such systems; subsection (b) specifies the criteria to be satisfied and the purposes to be served by each such system.

Section 4303 authorizes agencies to reduce in grade or remove an employee for "unacceptable performance," and provides the procedures for such actions. Those procedures include 30 days' notice of the proposed action which identifies "specific instances of unacceptable performance . . . on which the proposed action is based" and "the critical elements of the employee's position involved in each instance of unacceptable performance."¹³ Section 4304 requires OPM to review each appraisal system for compliance with the subchapter, and to "direct" agencies to "implement an appropriate system or to correct" any non-complying "operations

¹² 5 U.S.C. § 1205(e)(3)(C).

¹³ 5 U.S.C. § 4303(b)(1)(A).

under the system."¹⁴ Section 4305 authorizes OPM to prescribe regulations to carry out the purpose of the subchapter.

The balance of Title II of the Act concerns adverse actions and appeals. Chapter 75 of title 5 is amended to provide statutory procedural rights in adverse action cases for all non-probationary employees in the competitive service. In all such cases, as under prior law and regulation, the action taken—whether removal, suspension, reduction in grade or pay, or furlough—must be “for such cause as will promote the efficiency of the service.”¹⁵ However, Chapter 75 is made expressly inapplicable to “a reduction in grade or removal under § 4303 of this title.”¹⁶

In addition to being exempted from the “efficiency of the service” requirement applicable to Chapter 75 adverse actions, unacceptable performance actions under § 4303 are also treated differently in the Act’s provision concerning the standard of proof required to sustain the agency action on appeal.

Section 7701 in Chapter 77, governing appeals to the Board, provides in subsection (c)(1) that:

... the decision of the agency shall be sustained only if the agency’s decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

This distinction was intended to provide a “lower standard of proof” in § 4303 performance cases “because of the difficulty of proving that an employee’s performance is unacceptable.”¹⁷ The preponderance of the evidence standard, specified by § 7701(c)(1)(B) for all other cases, was regarded as reflecting the law previously applicable to all adverse action cases.¹⁸

¹⁴ Agencies are obliged to act upon OPM’s directions. 5 U.S.C. § 4304(b)(3).

¹⁵ 5 U.S.C. §§ 7503(a), 7513(a). The prior requirements appeared in 5 U.S.C. § 7512(a) (1977) and 5 C.F.R. § 752.104(a) (1978).

¹⁶ 5 U.S.C. § 7512(D).

¹⁷ *Legislative History*, at 1981 (Conference Report). See also *id.*, at 1473-1474 (Senate Report).

¹⁸ *Id.*, at 1518 (Senate Report). In other respects, the amended § 7701 expands employees’ statutory rights in adverse action appeals by providing for a right to a hearing with a transcript in all cases; placing the burden of proof on the agency in all cases; requiring that removal cases be heard only by the Board itself, an administrative law judge, or an experienced hearing officer; and authorizing attorneys’ fees to be awarded to employees who prevail on the merits if payment by the agency is found to be “warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency’s action was clearly without merit.” 5 U.S.C. § 7701(a)(1), (b), (c), (g). Other changes in prior law include the requirement that notwithstanding the agency’s

B. The OPM Regulations

OPM's interim and final regulations implementing § 4303, issued respectively on January 16 and August 3, 1979, included the following provisions under challenge here:

Interim Part 432

§ 432.206 Interim procedures

Until the date, but no later than October 1, 1981, that an agency has established its performance appraisal system(s) and communicated to each employee the performance standards and critical elements of the employee's position, an action under this part may only be initiated 30 days after:

(a) the critical elements of the employee's position and

(b) the performance standards for the one or more critical elements for which the employee's performance is unacceptable have been communicated to the employee against whom an action is contemplated.

Final Part 432

§ 432.205 Interim procedures

Until the date, but no later than October 1, 1981, that an agency has established a performance appraisal system under Part 430 of this title which covers an employee against whom an action is contemplated:

(a) A notice of action under this part may be proposed only after:

(1) The agency has discussed with and communicated to the employee the critical elements of the employee's job and the performance standards for the one or more critical elements for which the employee's performance is unacceptable and

(2) The employee has been given a reasonable time and opportunity to demonstrate acceptable performance.

(b) An action may be affected under this part only in accordance with all other requirements of this part.

The opening clauses of these regulations both provide for § 4303 removal and demotion actions to be instituted *before* an agency has established a "performance appraisal system" covering the affected employee. It is in this respect that the provisions set forth "interim procedures," as reflected by the subsection titles.

Both provide that before a notice of § 4303 action may be proposed, the agency must previously have communicated to the employee (i) the "critical elements" of the employee's position or job but only (ii) those "performance standards" which are "for the one or more critical elements for which the employee's performance is unacceptable." In the interim regulation such communication was required to precede the notice of proposed action by at least 30 days.

OPM explained the requirements of the interim regulation in the following guidance issued to all departments and agencies in FPM Bulletin 432.1 (Attachment 2, Question 23, February 15, 1979):

meeting its burden of proof, the agency action may not be sustained if the employee shows harmful procedural error by the agency in arriving at its adverse decision or that the decision was based on any prohibited personnel practice. 5 U.S.C. § 7701(c)(2).

Q. Our new agency performance appraisal system is not yet in place. However, we have an employee whose performance is completely unacceptable to us.

A. OPM realizes that many agencies may not have their performance appraisal systems finally approved and in place for some time after January 11, 1979, the effective date for the general provisions of subchapter I of chapter 43. In its interim Part 432, OPM has established interim procedures for situations like yours. These require that the agency communicate to an employee against whom it contemplates an action the critical elements of the employee's position and the performance standards for each critical element for which the employee's performance is unacceptable. These must be communicated to the employee 30 days before any actions is proposed. [Original emphasis]

The final regulation replaces the 30-day requirement with the more general provision that the employee must have been given "reasonable time and opportunity to demonstrate acceptable performance" before the action is proposed.¹⁹ The other changes made by the final regulation are the added requirements that the critical elements and the standards in which performance was deficient must have been "discussed with" as well as communicated to the employee, and that § 4303 actions may be effected "only in accordance with all other requirements" of the final Part 432. Those other requirements, which generally track § 4303,²⁰ include the provision that a § 4303 action may be initiated at any time the employee's performance becomes unacceptable during the "performance appraisal cycle," a term not defined.

Both interim and final Part 430 require agencies to submit "proposed appraisal systems" to OPM for review no later than July 31, 1981, to "implement an approved system or systems" on or before October 1, 1981, and to "inform all employees . . . of the performance standards and critical elements of their positions" no later than October 1, 1981. The final Part 430 adds that employees must be so informed "as soon as the system is approved."²¹ But neither interim § 432.206 nor final § 432.205 states any criteria for ascertaining when an agency has "established" its relevant ap-

¹⁹ This is defined in final § 432.202 as "an amount of time commensurate with the duties and responsibilities of the employee's job which is sufficient to allow the employee to show whether he or she can meet minimum performance standards." 5 C.F.R. § 432.202, 44 Fed. Reg. 45594 (1979).

²⁰ The entire text of § 4303 is set forth as Subpart A of both interim and final Part 432, preceding Subpart B which specifies OPM's "Regulatory Requirements." 5 C.F.R. § 432.101 (1979); *id.*, 44 Fed. Reg. 45593 (1979).

²¹ 5 C.F.R. § 430.301 (1979); *Id.*, 44 Fed. Reg. 45591 (1979).

praisal system for purposes of terminating the availability of "interim procedures" for § 4303 actions.²²

Both interim and final Part 430 require that performance appraisals under established systems "shall" be used, *inter alia*, "As a basis for decisions to grant awards; grant or withhold pay increases, i.e., within-grade increases, step increases, and quality step increases; grant merit pay; reassign; promote; train; retain in reduction in force; and reduce in grade or remove."²³

C. SSA Implementation

It is undisputed on the record that SSA has failed to establish performance appraisal systems under § 4302 and Part 430 covering any of its employees. Following the issuance of OPM's interim regulations and FPM Bulletin 432-1, Herbert T. Doggette, Jr., SSA's Acting Associate Commissioner for Management, Budget, and Personnel, issued a memorandum dated March 15, 1979, to all SSA Regional Commissioners and certain other officials entitled "Implementation of the Unacceptable Performance Provisions of the Civil Service Reform Act—INFORMATION."²⁴ SSA agrees that this memorandum set forth SSA policy "implementing" the OPM interim regulations.²⁵

The March 15 memorandum referred to inquiries received from SSA field personnel as to whether SSA intended to develop performance standards and critical elements "centrally" or whether this should be done at "a regional or component" level. Doggette stated that SSA planned to develop such elements and standards "centrally for all jobs which have standard position descriptions" and that field officials would be kept advised of progress. The memorandum then stated:

In the meantime, in order to take action based on new regulations, *supervisors should develop interim critical elements on an as-needed basis to implement the unacceptable performance provision of the law.* Once these critical elements have been established (and reviewed by a higher level of management) the employee

²² In a more recent memorandum to Agency Personnel Directors, dated November 26, 1979, OPM has advised:

The interim period ends when an agency has implemented an approved performance appraisal system or systems. Implementation of such systems must include informing employees of the performance standards and critical elements of their positions. Thus, the issuance of an agency regulation does not, in and of itself, terminate the interim period. The period terminates when an approved system has been fully implemented.

²³ 5 C.F.R. § 430.203(i), 44 Fed. Reg. 45591 (1979); see also 5 C.F.R. § 430.204(h) (1979).

²⁴ Record, pp. 39, 100.

²⁵ Record, p. 388.

must receive the required 30-day notice to improve before taking adverse action. You should consult with your servicing personnel office to assure that normal proper documentation is achieved in these actions. [Emphasis supplied]

The March 15 memorandum made no explicit reference to interim development of performance standards, as distinct from critical elements. However, it is not disputed that the memorandum was both understood and intended as directing that performance standards, like critical elements, be developed by supervisors on an "as-needed basis."²⁶ The March 15 memorandum was so treated in Mr. Doggette's subsequent memorandum to the same SSA officials dated May 30, 1979, which reaffirmed the March 15 procedures and added the requirement that such "interim critical elements and performance standards" (emphasis supplied) be reviewed at the Deputy Regional Commissioner level before "the elements and standards" are communicated to employees.²⁷

It is undisputed that under this procedure SSA has communicated "critical elements" and "performance standards" to selected employees only—employees whom SSA management had *already* identified, *prior* to communication of such elements and standards, as deficient performers.²⁸ SSA acknowledges that the purpose of communicating critical elements to such employees was not to conduct a performance appraisal but to take removal or demotion action.²⁹

Among 86,000 employees of SSA, only 41 had received notice of "critical elements" under SSA's implementation of the OPM regulation. In each instance, communication of critical elements was regarded by SSA management as a step in taking action against the employee. SSA had formally proposed or effected the removal or demotion of 24 of those 41 employees under § 4303 and interim § 432.206 by August 9, 1979, when SSA entered into an

²⁶ AFGE has so alleged (Record p. 73), and SSA has not denied it. See also Transcript of Oral Argument, Sept. 27, 1979, at 96-97 (oral argument of SSA) [hereinafter referred to as Transcript].

²⁷ Record, p. 98. The May 30 memorandum also required that an "informational copy" of such "interim elements and standards" be sent to the SSA central personnel office where it would be available to all other SSA components having similar positions "for their information."

²⁸ Record, pp. 2, 27, 72-73.

²⁹ SSA states, "When taking action against an employee for unacceptable performance, as opposed to appraising his/her performance under 5 U.S.C. 4302, there is no need, and nothing that requires a supervisor, to notify an employee of those elements in which he/she is performing acceptably." Record, p. 378 (emphasis supplied). SSA's acknowledgment that no "appraisal" is involved in these cases accords with OPM's interim regulations which defined "appraisal" as a comparison of an employee's performance with standards "under an appraisal system," 5 C.F.R. § 430.203(c) (1979). Since SSA had no "appraisal system," it could not conduct such an "appraisal" in any of these cases.

agreement with the Special Counsel halting such actions. The 24 employees include 12 claims representatives in Nebraska, Missouri, California, Pennsylvania, Wisconsin, the District of Columbia, Maryland and Virginia, and 12 other employees scattered in four job classification series and six states. No two of those 24 employees at the same series and grade are in the same state. The remaining 17 employees to whom "critical elements" had been communicated are similarly scattered in four job series.³⁰

Both AFGE and SSA agree that the merits of any individual adverse action are not at issue in this proceeding.³¹

As OPM construes its regulations, SSA's implementation did not violate those regulations.³²

III. MOOTNESS

OPM contends that Board review of the interim regulations for facial validity has been rendered moot by issuance of the final regulations, because all future actions by agencies may be taken only pursuant to the final regulations. By this view, the only question remaining before the Board as to the interim regulations is whether they were invalidly implemented by SSA. We disagree. Certainly, issues under the interim regulations remain alive as to actions merely held in abeyance by agreement between the Special Counsel and SSA, and agencies other than SSA have apparently initiated actions under those regulations.³³ Resolution of the issues raised by the interim regulations will avoid the repetition of like controversies. In any event, the Board is not strictly bound by the mootness doctrine.

The Board as an administrative agency with quasi-judicial functions has powers and limitations distinct from those of an Article III court. The Constitutional restriction imposed by Article III limiting courts to "cases" or "controversies" would therefore not necessarily bind the Board. Moreover, Congress has conferred specific powers on the Board to review an OPM regulation on the Board's own motion, pursuant to § 1205(e)(1)(A). Congress thus contemplated the exercise of the Board's review function without the

³⁰ Transcript at 95 (oral argument of SSA); Record, pp. 208, 201. SSA expressly admits that "notification of performance standards and critical elements" constitutes for SSA employees one of the four "stages" in which "actions [are] pending," the other such stages being warning that performance is lacking, proposal to take personnel action, decision to take personnel action, and personnel action effected. Record, p. 108. The Board expresses no opinion as to the appropriateness of the "critical elements" and "performance standards" assigned by SSA to these employees.

³¹ Record, pp. 54, 105, 386.

³² Transcript at 81-82 (oral argument of OPM).

³³ The Special Counsel has advised that he has entered into agreements with the FTC and IRS similar to his agreement with SSA. Record, pp. 318, 337.

action of a complaining party. In addition, however, the proceeding before the Board was initiated under § 1205(e)(1)(B) on behalf of all employees affected by the interim regulations.

Moreover, in administrative law cases the courts have recognized that the mootness doctrine should not be so applied that resolution of continuing issues is "defeated by short-term orders, capable of repetition, yet evading review, and at one time the Government, and at another time the [affected persons] . . . have their rights determined by the Commission without a chance of redress." *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). In such cases, "[i]t is sufficient . . . that the litigant show . . . an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 127 (1974). The key elements to consider are the likelihood of repetition of the controversy and the public interest in assuring appellate review. *Alton & Southern Railway Co. v. Int'l Ass'n of Machinists*, 463 F.2d 872, 878-880 (D.C. Cir. 1972).

That is the situation here. Both the interim and the final Part 432 provide for unacceptable performance actions to be instituted under § 4303 before any "performance appraisal system" covering the affected employee has been established by the agency. In this respect the final regulation is the same as the interim and the changes which have been made have not erased this controversy.³⁴

Under these circumstances no consideration of judicial efficiency or economy of the Board's resources, or of potential impact upon parties not before the Board, is served by eschewing consideration of the interim regulation. On the contrary, if the Board now considers only the validity of the regulation as implemented by SSA, there would remain for review in numerous other Board proceedings the implementation of that same regulation by dozens of other departments and agencies between January 11 and August 3, 1979. This would entail a burdensome drain upon the Board's resources (and upon those of the agencies) that should be unnecessary to impose if the underlying OPM regulation is itself invalid.

OPM's mere substitution of a "final" for an "interim" regulation, with no substantive alteration in the matters at issue, does not place the facial validity of the interim regulation beyond the Board's reach. See *Southern Pacific Terminal Co.*, *supra*. Since one of the purposes of the Board's § 1205(e) authority is to facilitate striking at the source of a government-wide prohibited personnel practice without being obliged to consume resources in attacking each

³⁴ See, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 414 (1935); *Rodway v. United States Dep't of Agriculture*, 482 F.2d 722, 726 (D.C. Cir. 1973); *Abbotts Dairy Div. of Fairmont Foods, Inc. v. Butz*, 389 F. Supp. 12 (E.D. Pa. 1975).

instance of such a practice through multiple proceedings, we reject the contention that the mootness doctrine prevents the Board from considering the facial validity of OPM's interim regulation.

IV. RELATIONSHIP OF SECTION 4303 TO SECTION 4302

The attack upon the OPM regulations is grounded on the claim that an unacceptable performance action under § 4303 may be instituted only after a performance appraisal system satisfying § 4302 covers the affected employee. In providing otherwise, AFGE argues, OPM's regulations require the commission of § 2302(b)(11) prohibited personnel practices, because § 4302 implements or directly concerns the merit system principles and its violation is therefore contrary to § 2302(b)(11).

Since under § 2302(b)(11) we do not reach the question of how a particular law relates to the merit system principles unless we first determine that such law has been violated, we start by considering whether the regulations under review are in violation of any of the requirements of Chapter 43, subchapter I. This determination turns essentially on the relationship between § 4303 and § 4302.

A. Statutory Analysis

According to AFGE, the "integrated nature" of the provisions of Chapter 43, subchapter I, mandates the conclusion that no § 4303 action may be taken against an employee as to whom a § 4302 appraisal system is not fully in place. AFGE claims that such appraisal systems must include all elements of § 4302, not merely those which happen to be mentioned also in § 4303.

OPM relies heavily upon § 4303(a) which states:

Subject to the provision of this section, an agency may reduce in grade or remove an employee for unacceptable performance.
[Emphasis supplied.]

The opening clause of § 4303(a) does support OPM's view that there are no requirements applicable to performance removal and demotion actions other than those found in § 4303 itself. Granting that much, however, this construction is insufficient to carry OPM as far as OPM contends, for by its own terms § 4303(a) authorizes actions only for "unacceptable performance." The term "unacceptable performance" thus limits the application of § 4303 no less than does the opening clause.³⁵

³⁵ Congress more than likely intended by this opening clause simply to make plain that no additional procedural standards, such as those imposed by prior law, regulation or judicial interpretation, would be required of agencies in § 4303 actions. In discussing this section the Senate Committee stated:

One of the chief differences between the procedures currently applicable at the agency level and the proposed procedures concerns the standard governing the agency's action. Under current law, an employee may be dismissed for

"Unacceptable performance" as used in the Reform Act is not a generic term. It is a term of art whose meaning is expressly defined in § 4301(3) "for the purpose of this subchapter." In that subchapter the term is then used only in § 4302(b)(5), § 4302(b)(6), and seven times in the title and text of § 4303. The only permissible conclusion is that the term has the same meaning in § 4303 as in § 4302, i.e., the meaning specified by § 4301(3).

Unacceptable performance as defined by § 4301(3) means "performance . . . which fails to meet *established performance standards* in one or more *critical elements of such employee's position*" (emphasis supplied). OPM concedes that the word "established" in this definition means established pursuant to § 4302, but contends that only the portion of § 4302 relating to performance standards and critical elements is thereby implicated in the meaning of "unacceptable performance," not all of the elements of § 4302.³⁶

Textual analysis as well as the structure of Chapter 43, subchapter I, taken as a whole³⁷ demonstrates that "established" as used in § 4301(3) refers to performance standards and critical elements which are established *as part of an appraisal system* under § 4302. Indeed, OPM came close to saying as much when it explained, in issuing final § 430.202(a), that pre-Reform Act performance standards are not to be carried automatically into § 4302 appraisal systems but that ". . . standards will be established *as part of new performance appraisal systems.*"³⁸

The performance appraisal systems required to be established by § 4302 must not only meet certain criteria but must also be used to serve a number of specified purposes. Subsection (a) of § 4302 re-

unacceptable performance only if dismissal would improve the efficiency of the service. As a practical matter, agencies have found it very difficult to prove this to the degree required by courts through a series of judicial decisions. Section 4303(a) imposes a new standard. It is "performance which fails to meet established requirements in one or more critical elements of the job." The Committee intends that this new standard should not be governed by the existing case law defining the present standard, "such cause as will promote the efficiency of the service."

Legislative History, at 1507 (Senate Report).

³⁶ Transcript at 80 (oral argument of OPM).

³⁷ As stated by the Supreme Court in *Richards v. United States*, 369 U.S. 1, 11 (1962):

We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation 'we must not be guided by a single sentence or member of a sentence but [should] look to the provisions of the whole law and its policy.' [Citations omitted.]

See also, *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 386 (1964); *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282 (1957); *Thompson v. Clifford*, 408 F.2d 154 (D.C. Cir. 1968); and *United States v. St. Regis Paper Co.*, 355 F.2d 688 (2nd Cir. 1966).

³⁸ 44 Fed. Reg. 45588 (1979). [Emphasis supplied.]

quires each agency to "develop one or more" performance appraisal systems which provide for periodic appraisals of employees' job performance, "encourage" employee participation in establishing performance standards, and "use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees."³⁹ In contrast, the only personnel action for which the former Chapter 43 provided that performance ratings were to be a basis was removal.⁴⁰

Subsection (b) specifies requirements to be met and purposes to be served which "each performance appraisal system shall provide for" under regulations to be prescribed by OPM. Among those requirements is "*establishing performance standards which will . . . permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system.*"⁴¹ This is the sole reference in § 4302(b) to establishment of performance standards; it provides for such establishment only with respect to employees or positions "under the system," a clear indication that § 4302 does not contemplate establishment of such standards on an isolated basis extrinsic to or independent of an appraisal system.

The only reference in § 4302 to the timing with which its requirements must be met is in subsection (b)(2), which specifies that each appraisal system provide for—

as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position.

As the only other portion of § 4302(b) mentioning performance standards and the only portion of § 4302 to use the term "critical elements," this provision likewise alludes to such standards and elements only in the context of a system, as indicated by the references to "initial appraisal periods" and "each following appraisal period." Such references to successive and continuing appraisals could have no meaning except in the context of the rest of

³⁹ Because § 4302 appraisal systems provide the basis for these actions, agencies are expected to start using § 4302 appraisals for these purposes as soon as their system is in place, upon OPM review and approval. This does not mean that an agency is required to demonstrate that it has used the results of appraisals under the § 4302 system for decisions concerning training, rewarding, reassigning, or promoting before it can take an action under § 4303. It is sufficient that it demonstrate its system provides the basis for making these decisions.

⁴⁰ See 5 U.S.C. § 4304(b) (1977). By separate provision, performance ratings were also required to be considered in determining the order of retention of employees in a reduction in force, 5 U.S.C. § 3502 (1977).

⁴¹ 5 U.S.C. § 4302(b)(1). [Emphasis supplied.]

§ 4302, including subsection (b)(3) which requires each appraisal system to provide for periodic evaluations of each employee "on such standards" and subsection (a)(1) requiring agencies to develop systems that "provide for periodic appraisals of job performance of employees."

Subsections (b)(4), (5), and (6) require that each appraisal system provide for use of its results for the several purposes referred to in subsection (a)(3). Only the last of those uses is adverse to employees, requiring systems to provide for "reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance."⁴²

Analysis of § 4303 demonstrates that it is premised on the operation of a performance appraisal system meeting all the requirements of § 4302. OPM agrees that prior communication to the employee of performance standards and critical elements established under § 4302 is a necessary condition of the notice required by § 4303(b)(1)(A). OPM also agrees that a prior opportunity to demonstrate acceptable performance as required by § 4302(b)(6) is a necessary condition of such § 4303(b)(1)(A) notice.⁴³ But § 4303(b)(1)(A) also requires that the notice identify "specific instances of unacceptable performance," which necessarily posits some process by which the agency has evaluated the employee's performance against the established performance standards and found that the performance "fails to meet [those] . . . standards in one or more critical elements." Such an evaluation process is similarly implicit in § 4303(d), which provides for consideration of improved performance during the notice period. The evaluation process posited by § 4303 can only be the appraisal process called for by §§ 4302(a)(1), (3) and (b)(1), (2), and (3). Any different conclusion would be inconsistent with the requirement of §§ 4302(a)(3) and (b)(6) that appraisals under § 4302 systems be used "as a basis" for "reducing in grade, or removing employees who continue to have unacceptable performance. . . ."

The only elements of § 4302 not expressly or implicitly referenced in § 4303 are the requirement that appraisal systems "encourage" employee participation in establishing performance standards,⁴⁴ and the requirements for use of appraisals for purposes other than demoting or removing unacceptable performers.⁴⁵ However, given the fact that § 4303 addresses only demotions and removals for failure to meet performance standards once they have been established, no occasion for referring to those other § 4302

⁴² 5 U.S.C. § 4302(b)(6).

⁴³ Transcript at 82 (oral argument of OPM).

⁴⁴ 5 U.S.C. § 4302(a)(2).

⁴⁵ 5 U.S.C. § 4303(b)(4), (5), and the reassignment provision of (6).

elements is provided by the context of § 4303. Consequently, no significance can reasonably be attached to the omission of such references in § 4303.

OPM's further argument that § 4302 has a "delayed effective date" by reason of the 1981 deadline in § 4302(b)(2) is wide of the mark. All provisions of the Act became effective on January 11, 1979, except "as otherwise expressly provided in" the Act.⁴⁶ No such express provision appears in connection with § 4302, and we decline to infer such an intention from § 4302(b)(2) in view of Congress' plain demonstration in this same Act that it knew how to provide expressly for a delayed effective date when it intended to do so.⁴⁷ Furthermore, the plain meaning of § 4302 is contrary to OPM's argument, since § 4302(b)(2) requires that appraisal systems provide for communication of performance standards and critical elements to each employee "as soon as practicable." The October 1981 deadline for completing such communication to every employee covered by subchapter I of Chapter 43 obviously could not be met if the agencies were free to delay until October 1981 in commencing to develop the systems and establish the standards required by § 4302.

This reading of §§ 4302 and 4303 does not lead to the conclusion that OPM's regulations require agencies to violate § 4302, as claimed by AFGE. The requirements of § 4302 are that agencies "develop" certain "systems" and that those systems shall each "provide for" meeting certain criteria and serving certain purposes. No party has identified, and we have not found, any provision of the regulations under review that calls for agencies to violate those requirements. On the contrary. Part 430 of OPM's regulations obliges agencies affirmatively to develop such systems and to submit them to OPM for review no later than July 1, 1981.

Rather, the conclusion to which our analysis points is that OPM interim procedures result in violation of § 4303, by providing for resort to that section's removal and demotion procedures in cases not authorized by § 4303(a). Our analysis of the language and structure of §§ 4302 and 4303, together with the definition of "unacceptable performance" in § 4301(3), demonstrates that § 4303(a)

⁴⁶ Section 907 of the Act, 92 Stat. 127, 5 U.S.C. § 1101 note.

⁴⁷ The Act's exceptions to the general effective date are stated unambiguously in such explicit phrases as, "Effective beginning October 1980, . . ." section 307, 92 Stat. 1147, amending 5 U.S.C. § 2108 (relating to veterans and preference eligibles); "The provisions of this title . . . shall take effect 9 months after the date of enactment of this Act," section 415(a)(1), 92 Stat. 1179, 5 U.S.C. § 3131 note (Senior Executive Service); "Effective one year after the date of enactment of the Civil Service Reform Act of 1978 . . ." section 602(a)(3), 92 Stat. 1189, 42 U.S.C. § 4728(h) (amending Intergovernmental Personnel Act); and "The amendments made by this subsection shall take effect on the first day of the first applicable pay period beginning on or after the 90th day after the date of enactment of this Act," section 801(a)(4)(A), 92 Stat. 1222, 5 U.S.C. § 5361 note (Grade and Pay Retention).

authorizes actions under that section only against employees for failure to meet performance standards which have been established as part of § 4302 performance appraisal systems. This would mean that a removal or demotion for failure to meet standards not so established cannot be an action for "unacceptable performance" as defined in § 4301(3) and, therefore, is not an action authorized by § 4303(a).

Such a reading of § 4303 is consistent also with the position derived from § 4301(3) that a removal or demotion action may be taken under § 4303 for an employee's failure to meet established standards in even a single "critical element" of the employee's position. Since "efficiency of the service" need not be shown under § 4303, the agency's authority to establish an employee's performance standards and critical elements is tantamount to authority to shape the criteria by which the employee may be removed. When the lesser evidentiary burden of "substantial evidence" for § 4303 actions is also considered, in lieu of the "preponderance" standard applicable under Chapter 75, it is manifest that performance standards and critical elements should be established under circumstances providing adequate safeguards for employees. Concern for such safeguards is apparent in the requirement of § 4302(b)(1) that performance standards "will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria."

This concern is also apparent in the requirements of § 4304 that OPM make technical assistance available to agencies in the development of performance appraisal systems and that OPM review such systems for compliance with subchapter I, including compliance with the accuracy and objective criteria requirements of § 4302(b)(1), with authority in OPM to direct agencies to make corrections. By assuring that § 4303 actions are based only on performance standards established under an appraisal system which has been reviewed for compliance with those requirements, this reading of § 4303 gives effect to the concerns for safeguards reflected in §§ 4302(b)(1) and 4304.

B. Legislative History

The legislative history shows that Congress intended to provide in § 4302 a more meaningful replacement for the former performance rating systems which were regarded as useless or ineffective; to require a single interrelated framework for performance appraisals under § 4302 systems in which those appraisals would be the basis for multiple personnel actions including promotions, pay increases and awards as well as adverse actions; and to require that § 4303 actions be based on the results of such appraisal systems. It

also shows that Congress was aware of inadequacies in the state-of-the-art for appraising employee performance and the consequent potential for arbitrariness, and sought to protect against those risks by requiring objective performance criteria and careful review by OPM of each appraisal system.

The Senate Report discussed at length the purposes of § 4302 performance appraisals and the relationship of such appraisals to § 4303 performance actions. The Senate bill did not include any delayed deadline for establishing § 4302 systems. Nonetheless, the Report reflected expectation that § 4303 actions would be integrated with § 4302 systems. In summarizing the major provisions of S. 2640, that Report stated:⁴⁸

S. 2640 will accelerate the personnel action process while protecting employees' rights to fair treatment. *The bill will simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level within a comprehensive framework for performance evaluation. The bill requires that performance evaluation be used as a basis for all decisions about rewarding, promoting, and retaining Federal employees.*

The Report describes "the purpose of section 203," enacting all of subchapter 1 of Chapter 43 including both §§ 4302 and 4303, as "to provide for new systems of appraising employee work performance."⁴⁹ It then states:⁵⁰

The bill provides that appraisals of performance for all purposes *shall be made within a single, interrelated system.*

Finally, *the bill makes the performance ratings given under the system more meaningful than in the past. The rating an employee receives should be a consideration in rewarding or promoting an employee and in decisions about demotion or removal from the Federal service.* Salary increases under the merit pay system proposed by title V of the bill will be based on the performance ratings system provided by this section.

The Report then provides a detailed discussion of § 4302 and the nexus between that section and personnel actions based on performance. Because of their importance, pertinent excerpts are set forth here:⁵¹

Section 4302(a) details the objectives of the performance appraisal systems, and requires agencies to develop and establish one or more performance appraisal systems which will encourage superior performance. *Any system established by an agency must meet the criteria established by this section. The*

⁴⁸ *Legislative History*, at 1474 (Senate Report). [Emphasis supplied.]

⁴⁹ *Id.*, at 1503.

⁵⁰ *Id.*, at 1504. [Emphasis supplied.]

⁵¹ *Id.*, at 1505-1506. [Emphasis supplied.]

provision requires "periodic appraisals" of job performance. Under current regulations, ratings are required at least annually. The Civil Service Commission has informed the Committee that it anticipates that a similar requirement will be established under this provision.

The section specifically encourages employee participation in establishing performance objectives. Experience has shown that doing so motivates employees to accomplish the objectives. Management will have the ultimate responsibility under this section, however, to establish the performance standards.

Section 4302(a) specifically provides that the ratings derived from the performance appraisal system will be used as a basis for a wide variety of personnel actions.

...
... Performance appraisal is an integral part of management ... and any time which may be required to implement the system should be more than fully justified by improved employee performance.

Agencies are required to establish performance requirements and standards of performance at the beginning of the rating period and to communicate them—though not necessarily in written form—to employees. *Employees' performance appraisals must be based on these previously established performance standards.*

Agencies are required to take action, based on performance appraisals, to:

- (1) recognize and reward employees whose performance warrants it;
- (2) assist employees whose performance is unacceptable to improve; and
- (3) reassign, demote, or separate employees whose performance continues to be unacceptable.

Section 4302(b)(4) specifies that an adverse action should be taken against an employee with an unacceptable performance rating only after the employee has had an adequate opportunity to improve his job performance.

In its discussion of § 4303, the Report notes that an employee may be removed or demoted at any time that performance becomes unacceptable "during the performance appraisal cycle,"⁵² again demonstrating the expectation that § 4303 actions are to be based on appraisals under § 4302 systems.

Both the Senate and the House bills were based on proposals of the Administration, whose chief spokesman on the legislation was

⁵² *Id.*, at 1506.

Alan K. Campbell, then Chairman of the Civil Service Commission. Chairman Campbell's testimony before both bodies addressed the failures of the previous appraisal requirements, which the new system was expected to remedy:⁵³

The present performance appraisal requirements are based on the Performance Rating Act of 1950. The purposes of that Act were to recognize the merits of employees and their contributions to efficiency and economy, *to provide fair appraisals of employee performance*, to improve employee performance, to strengthen supervisor-employee relationships, *and to remove employees whose performance is unsatisfactory from their positions. These purposes have not been achieved. In part, this failure is attributable to inadequacies in the state-of-the-art for appraising employee performance.* In other respects, the constraints and complexities of the present statutory provisions have made it impossible to administer a workable program that provides managers and employees the information they both need about employee performance.

Of the existing statutory provisions, one of the weakest is the requirement to assign summary *adjective performance ratings*. Such ratings *are useless* as a basis for rewarding superior performance, encouraging improved performance, withholding pay step increases of employees whose performance is marginal or substandard, or removing employees for unsatisfactory performance *because they do not provide enough information to make any of these decisions.* The inadequacy of summary adjective ratings as a management tool stems from the excessively restrictive statutory criterion for assigning an "outstanding" rating, from subsequent changes in the General Schedule pay statutes governing the determination of entitlement to within-grade pay increases, and from the requirement to use adverse action procedures to demote or remove an employee for "unsatisfactory" performance.

He then explained how the new system would be expected to link appraisal with a subsequent adverse action based on unacceptable performance:⁵⁴

A single integrated framework for giving performance appraisals for all performance related purposes is needed to better interrelate the various decisions that are made on the basis of work performance Agencies will be required to take action, based on performance appraisals, to: (1) recognize employees whose performance significantly exceeds requirements; (2) help employees whose

⁵³ House Hearings at 31; Senate Hearings at 102. [Emphasis supplied in both.]

⁵⁴ House Hearings at 32; Senate Hearings at 102-103. [Emphasis supplied.]

performance is unacceptable to improve; and (3) remove employees from their positions when their performance becomes unacceptable, after warning and an opportunity for improvement.

The new performance appraisal systems envisioned by this title will contribute to the goal of improving the quality of employee performance by establishing that *certain personnel actions must be based on performance appraisals assigned under appraisal systems tailored to the work force and mission of an agency . . .* The increased emphasis on meaningful appraisals will impose additional responsibilities on managers, but it will also provide them with a more effective and equitable means of managing their employees.

Further, in response to a written question from the Senate Committee on Governmental Affairs, inquiring how an individual employee's performance will be rated under the performance appraisal system, Chairman Campbell again expressed the interrelationship of appraisal systems and performance-based personnel actions:⁵⁵

This question appears to assume that a single system will be utilized Government-wide. It is our intention, however, that agencies make the determination of what type of performance appraisal methods best suited their needs. This may range from a traditional system to a management by objectives type of system, with more than one system used for different groups of employees. For example, within the same agency, a management-by-objectives system might be used for professional and managerial employees and a traditional system might be used for clerical or wage employees. *Regardless of the method used, the bill requires that performance appraisal systems meet certain criteria. Among these are that: (1) performance standards must be established in advance; (2) the employee must be informed of these criteria; (3) his or her performance will be a basis for promotions, pay increases, awards, retention in reduction in force, etc.*

S. 2640 was amended on the Senate floor in two respects pertinent here. Both amendments were offered by Senator Stevens and accepted by the Committee. One added the provision enacted as § 4304(b)(1) requiring OPM to review each § 4302 appraisal system for compliance with the requirements of subchapter I. Senator Stevens explained:⁵⁶

The provision will insure compliance with merit principles and appropriate personnel standards.

⁵⁵ *Senate Hearings* at 154. [Emphasis supplied.]

⁵⁶ *Legislative History*, at 1664-1665 (Senate debate). [Emphasis supplied.]

Existing performance ratings in the Civil Service fail to measure the relative merits of employees. The rating system is a burden that withdraws more in effort than its returns in efficiency or morale. *Performance appraisals must be conducted uniformly, efficiently, and objectively.* They should tell the employee what management thinks of his present contribution and his future prospects.

They should help management to utilize its employees more fully.

My amendment will insure central approval of all new appraisal systems.

The bill already permits the development of new performance appraisal systems. *We would like to have those systems approved by OPM so that one agency is not developing a step backward while another one is developing a step forward.*

We are trying to develop, and the bill instructs the agency to develop, new performance appraisal systems. *But we think they ought to be coordinated.* That is what this amendment will do.

The second pertinent Stevens amendment added to § 4302(b)(1) the requirement that performance standards "permit the accurate evaluation of job performance on the basis of [objective] criteria . . ." Senator Stevens explained.⁵⁷

Mr. STEVENS. Mr. President, I wish to submit an amendment to establish objective criteria in the development of performance appraisal systems. Senate Bill 2640 requires agencies to develop new appraisal systems to evaluate the performance of all employees affected by the legislation. *These systems for employee evaluation will be even more significant than current applications. Personnel actions including removal have been strengthened by a streamlining of the appeals process. The basis for adverse action will be even more clearly centered on the employees' performance appraisal.*

The appraisal systems currently used in civil service have been widely criticized. The fact that practically all evaluations result in a satisfactory rating is a symptom of the problem. The current system lacks some specific standards to meet the goals of personnel evaluation required in the civil service reform bill.

The reform bill requires agencies to develop new performance appraisal systems consistent with criteria to be established by the Office of Personnel Management. Yet the bill is silent on establishing one criterion of the greatest importance. Critical

⁵⁷ *Id.*, at 1666-1667 (Senate debate). [Emphasis supplied.]

elements of the position must be clearly stated as basis for performance evaluation. Critical elements should be defined as those specific skill levels, responsibilities, or individual actions which will be evaluated in performance appraisal.

My amendment requires performance appraisal systems to identify the critical elements of a position. The employee must know the specific criteria which will be used in his evaluation. This amendment clearly states that intention.

A similar provision calling for performance standards that permit accurate evaluation on the basis of objective criteria had already been adopted by the House Committee on Post Office and Civil Service. That provision was offered during the Committee markup of H.R. 11280 and agreed to with this explanation by Representative Clay.⁵⁸

Mr. Chairman, *this amendment insures that, to the extent possible, employees' performance appraisals shall be based upon objective criteria.* Experience with equal employment opportunity cases has demonstrated that the use of subjective criteria in promotions has been challenged in the courts on the grounds that women and minorities have been treated less fairly than white males.

In sum, *the use of objective criteria in performance appraisals, consistently applied, will benefit Federal employees by providing them with protection against arbitrariness and discrimination.* It will also benefit management by removing a potential basis for legal attacks.

The Stevens and Clay amendments demonstrate the intention of Congress that employees not be subject to the streamlined procedures of § 4303 on the basis of subjective performance standards established at the unreviewed discretion of agencies. The method chosen to avoid such potential for inconsistency, arbitrariness or discrimination was to require OPM review of each appraisal system for compliance with requirements of § 4302, including accuracy and objective criteria requirements for performance standards. An interpretation of § 4303 that allowed agencies to bypass such review, on the theory that performance standards and elements need not be established as part of a § 4302 appraisal system, would seem plainly contrary to that legislative intent.

The portion of the legislative history on which OPM most relies is a statement in the House Report concerning the interim period until the October 1, 1981, date specified in § 4302(b)(2). That passage states:⁵⁹

⁵⁸ *House Markup*, at 58. [Emphasis supplied.]

⁵⁹ *Legislative History*, at 657-658 (House Report).

The new section 4301(3) defines "unacceptable performance" to mean performance which fails to meet established performance standards in one or more "critical elements" of an employee's position. The committee recognizes that performance standards are not adequately described under the present civil service system. For that reason, the committee, in section 4302(b)(2) authorizes a 3-year delay in the establishment of performance standards and the description of critical elements of a job. Between now and October 1, 1981, the Office of Personnel Management must ensure that disciplinary actions against employees based on a failure to meet acceptable performance standards in one or more critical elements of the job are very carefully administered so that no employee will be disciplined when performance standards and critical elements have not been adequately defined by an agency.

Reference to the 1981 deadline does not appear elsewhere in either the House or Senate Reports. The provision as adopted by the House was agreed to in Conference without comment in either the markup session or Report of the Conference Committee. However, the record of the House Committee markup session shows that the provision was adopted on the basis of the following discussion.⁶⁰

MR. UDALL. . . . We provided . . . that the agency should communicate such standard to such employee at the beginning of an appraisal period, indicating to the employee at such time which of such standards are for critical elements of the employee's position.

The Administration pointed out that, while they have in some situations, they have performance standards, they don't in most agencies and for most positions. This is a basic change in the way they function, and would require them to gear up to do this for hundreds of thousands of individual positions.

So they suggested that an effective date for this requirement would be October 1983, to give them that much time to put this system fully into operation.

I don't know that they need all of that time, but they've convinced me that they need a substantial amount of time to make this kind of a change, and that's the purpose of the amendment.

MR. NIX. Any further discussion on the amendment?

MR. HARRIS. Yes, Mr. Chairman, I think this does present a very difficult problem, in that we tell a person, first, what his or her job is, what performance requirements there are, but

⁶⁰ House Markup, at 54.

then we can discipline or discharge him or her without them knowing what the critical elements were.

I can understand that it takes time, maybe, to identify the critical elements of the job. Obviously, they're identified well enough to discharge the person. And I just wonder how much time you want to leave it in this sort of limbo.

It seems to me that 5 years is an inordinate amount of time, and I'd move an amendment, Mr. Chairman, to change the year to 1981 instead of 1983.

MR. UDALL. I'll accept the gentleman's suggestions and ask for unanimous consent to insert "1981" instead of "1983", and we can argue about it in conference, or later on, if that's an unreasonable accommodation.

MR. NIX. Without objection, it is so ordered. The question arises on the adoption of the amendment as offered. Those in favor of the adoption of the amendment will say aye. Those opposed, no. It is the opinion of the Chair the ayes have it, and the amendment is agreed to.

The quoted passage from the House Report and the House Committee markup discussion set forth above comprise the entire legislative history of the 1981 deadline provision in § 4302(b)(2). OPM contends that the House Report passage constitutes a clear statement that Congress expected that performance-based actions would be taken prior to the establishment of completed performance appraisal systems. AFGE, on the other hand, reads the same passage as an expression of concern that employee due process rights not be diluted.

The statutory language in § 4302(b)(2), both as enacted and in H.R. 11280 as reported by the House Committee,⁶¹ requires that performance standards and critical elements be communicated to all employees "as soon as practicable, but not later than October 1, 1981." The second and third sentences of the House Report passage, explaining the provision for this "3-year delay," must be read in context with the statutory language that was being explained, i.e., as referring to the deadline by which every single employee throughout the Federal government must have been advised of his or her performance standards and critical elements. The Committee recognized that this would entail a major effort by the executive branch, since "performance standards are not adequately described under the present civil service systems" and, as Representative Udall had explained at the markup session on this provision, performance standards did not yet exist "in most agencies and for most positions."⁶²

⁶¹ See *Legislative History*, at 525 (H.R. 11280).

⁶² The same information had been reported to Congress by the General Accounting Office in the Comptroller General's Report, *Federal Employee Performance Rating*

But clearly the Committee expected some employees to be informed of their performance standards and critical elements sooner than October 1, 1981, in accordance with the requirement in the Committee bill for such communication "as soon as practicable." The final sentence of the Report passage, concerning the period "[b]etween now and October 1, 1981," can only refer to such employees, or more particularly to those among them who might become subject to § 4303 actions. However, nothing in the Report suggests that the critical elements and standards of such employees were not to be established and communicated as part of § 4302 appraisal systems. In the Committee bill as in the Act, § 4302(a) called for *each* agency to develop "one or more" performance appraisal systems,, which might be implemented at different times so long as all were implemented no later than October 1, 1981. It was, therefore, entirely reasonable for the Committee to foresee § 4303 actions involving standards and elements under § 4302 appraisal systems fully established for some agency units, components, or appropriate categories of employees sooner than October of 1981,⁶³ without any implication that actions could proceed against individually-targeted employees outside of any § 4302 appraisal system. Consequently, the House Report does not support the interpretation OPM attributes to it.

This view of the House Report gains corroboration from the fact that the House Bill did not include any provision such as that added to the Senate Bill by the Stevens amendment, requiring OPM to review each appraisal system for compliance with the requirements of § 4302. Under that circumstance the last sentence of the House Report's passage concerning the interim period until October 1, 1981, in which the Committee expressed its desire that OPM "ensure" that no § 4303 actions are based on inadequately defined performance standards and critical elements, may be seen as a reflection of concerns paralleling those of Senator Stevens which led to enactment of § 4304(b)(1). When the Conference Report including that provision was presented for final approval in the

Systems Need Fundamental Change, at 18 (March 3, 1978). The Civil Service Commission, commenting on the draft of that report, had advised:

The problem is that it takes time, effort and good procedures to do it well. For jobs predominantly involving qualitative duties such as analysis, decision-making, research and management, the results may not be completely satisfactory regardless of the time and effort spent. Likewise, everyone agrees that employees should be fairly appraised in relation to the requirements. The problem is how to do it validly and reliably. [at 131]

⁶³ For example, if SSA chose to implement in 1980 an appraisal system for all of its claims representatives, more than 13,000 employees would be covered by such a system. See Transcript at 95 (oral argument of SSA). This example is illustrative only; we express no opinion concerning the size of an appropriate category of employees.

Senate, Senator Stevens closed the debate on the Report by referring again to that provision, stating:⁶⁴

The Office of Personnel Management will be required to approve all performance appraisal systems developed by agencies. *The approval must consider each system's effectiveness, objectivity, and compliance with merit principles.* All performance appraisal systems will be required to identify the specific skill levels, responsibilities, and individual actions that will be considered in performance evaluation.

The OPM review mandated by § 4304(b)(1) appears intended to preclude use of just such procedures as here adopted by SSA pursuant to OPM's regulations. The admitted absence of any SSA performance appraisal system enables SSA to identify first the employees against whom the agency wishes to act and then to establish critical elements and performance standards on an individual basis—what SSA calls an “as-needed basis”—solely for those employees.

Rather than ascertaining adequacy of performance on the basis of performance standards and critical elements previously established under a system that has been reviewed by OPM for “effectiveness, objectivity, and compliance with merit principles,” a procedure such as SSA's enables an agency to stand on its head the appraisal process required by the Act—identifying “unacceptable performance” on an unspecified *ad hoc* basis and afterwards writing elements and performance standards to facilitate the desired adverse action. Without suggestion that SSA did that in any of the individual actions taken under its implementing procedure,⁶⁵ the Board concludes that the inherent dangers of any such individually-targeted procedure were precisely what Congress sought to avoid in requiring “unacceptable performance” to be determined under a §4302 appraisal system that has been reviewed and approved by OPM pursuant to § 4304(b).

Based upon the foregoing analysis of the Act and its legislative history, the Board determines that both interim § 432.206 and final § 432.205 of OPM's regulations, in providing for § 4303 actions against employees for failure to meet performance standards which have not been established as part of § 4302 performance appraisal systems,⁶⁶ violate the requirement of § 4303(a) that such actions may be taken only for “unacceptable performance” as defined in § 4301(3).

⁶⁴ *Legislative History*, at 1728 (Senate debate on Conference Report). [Emphasis supplied.]

⁶⁵ As previously stated, the merits of any individual case are not before the Board in this proceeding.

⁶⁶ OPM, while contending that § 4303 may be applied without regard to establishment of § 4302 appraisal systems—a contention which the Board here expressly re-

V. RELATIONSHIP OF SECTION 4303(a) TO MERIT SYSTEM PRINCIPLES

Having established that the OPM regulations under review prescribe or authorize actions in violation of § 4303(a), the two-step analysis required by § 2302(b)(11) obliges the Board next to consider whether § 4303(a) is a

... law ... implementing, or directly concerning, the merit system principles contained in section 2301 ...

In this case, arguments have been made that the law violated relates to several merit principles.⁶⁷ Most of those arguments have been addressed to the premise that § 4302 is the law that has been violated, but on the analysis set forth in Part IV of this Opinion the Board has found the violated law to be § 4303(a). That conclusion simplifies identification here of the most pertinent merit system principle, which plainly is § 2301(b)(6), providing that ... employees should be separated who cannot or will not improve their performance to meet required standards."

It need not be assumed, however, that (b)(6) is the only relevant principle. Like many provisions of the Act, § 4303 and its interrelationship with § 4302 by way of § 4301(3) reflects a carefully fashioned balance among considerations expressed in several of the merit system principles. The Board's task is not to create that

jects—argues in the alternative that "the combination of the interim regulations in Part 432 and interim procedures for appraisals provided for by Part 430 would constitute an appropriate interim performance system." Record, p. 115. However, an OPM regulation or procedure cannot constitute an agency's appraisal system. Moreover, OPM does not claim to have reviewed and approved SSA's procedures under § 4304(b), nor do OPM's Part 432 "interim procedures" provide for such review and approval of so-called "interim performance systems" adopted thereunder.

⁶⁷ The merit principles variously claimed to be violated are set forth in § 2301(b) as follows:

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origins, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes ...

balance but to recognize where it was struck by the Congress and give effect to it. In ascertaining where Congress struck that balance on the question under consideration here, we receive guidance from this statement in the Senate Report:⁶⁸

One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons. This balanced bill should help to accomplish that objective.

This statement, capsulizing reams of legislative history, expresses the "central" importance attached by Congress to section 203 of the Act, enacting §§ 4301 to 4305. Also of general guidance is the statement in section 3(2) of the Act that the purpose of defining prohibited personnel practices in § 2301(b) is to prevent "conduct which undermines the merit system principles and the integrity of the merit system."⁶⁹

Such general guidance must be given all the more consideration because the terms "implementing" and "directly concerning" in §§ 2302(b)(11), unlike some others, have not been defined in Chapter 23 or elsewhere in the Act.⁷⁰ Since we conclude that § 4303(a) is a law "implementing" the merit system principles, we need not consider here what the term "directly concerning" encompasses.

Section 2302(b)(11) is the only provision of the Act referring to a "law, rule, or regulation" implementing the merit system principles of § 2301.⁷¹ Nothing in the Act excludes relevant portions of the Act itself from the category of "laws" implementing those principles, and logic suggests the contrary. If "laws" in § 2302(b)(11) were limited to those subsequently enacted, the provision would be deprived of all current effect. If the term were limited to laws previously enacted, the protections afforded by § 2302(b)(11) would be unduly confined to those found warranted in the past. If the term were meant to include all laws except those enacted by "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883,"⁷² surely Congress would have said so.

⁶⁸ *Legislative History*, at 1468 (Senate Report).

⁶⁹ 5 U.S.C. § 1101 note.

⁷⁰ E.g., "Personnel action" is defined in 5 U.S.C. § 2302(a)(2)(A). Similarly, "covered position" is defined at 5 U.S.C. § 2302(a)(2)(B).

⁷¹ Those principles are not self-executing, as previously noted. Section 2301(c) directs the President or agency heads to take action, including issuance of rules, regulations, or directives, "necessary to ensure that personnel management is based on and embodies the merit system principles," but only "pursuant to authority otherwise available." Compare § 2302(c) and 5 U.S.C. § 7116(a)(7) relating to implementation of § 2302, discussed in *Legislative History*, at 1997 (Conference Report).

⁷² *Legislative History*, at 1465 (Senate Report).

Absent any such limitation expressed or suggested in the statute or its history, we read the term "law" in § 2302(b)(11) to include relevant portions of the Act itself.

The Act provides no special definition of "implementing." Nor does anything we have discovered in the legislative history amplify the intended meaning of that term. We therefore look to its connotation in normal usage, guided by the declared purpose of the Act. We take the term in its ordinary meaning, i.e., to carry out, accomplish, fulfill or give practical effect to,⁷³ in the context of a manifest purpose or design to prevent conduct which directly and substantially "undermines" the merit system principles and the "integrity" of the merit system.⁷⁴

It would be difficult to find a law which is more clearly designed to give practical effect to merit system principle (b)(6) than § 4303(a), and which more clearly is intended to correct conditions found to have "undermined confidence in the merit system."⁷⁵ The § 4302 appraisal process by which "unacceptable performance" is to be identified under § 4303(a) was expressly designed to remedy the existing "[p]erformance evaluation procedures [which] do not work well enough to distinguish employees whose performance is below an unacceptable level to make the changes stick."⁷⁶ That new appraisal process, and the "streamlined" appeals procedure authorized for cases to which § 4303 applies,⁷⁷ were deliberately designed to accomplish separation of employees "who cannot or will not improve their performance to meet required standards."⁷⁸

Having determined that § 4303(a) implements § 2301(b)(6), we conclude that violation of § 4303(a) through failure to base unacceptable performance decisions upon standards established as part of a § 4302 appraisal system constitutes a prohibited personnel practice under § 2302(b)(11).⁷⁹

⁷³ See Webster's Third New International Dictionary (unabr. ed. 1968).

⁷⁴ See section 3(2) of the Act, 5 U.S.C. § 1101 note.

⁷⁵ *Legislative History*, at 1467 ((Senate Report).

⁷⁶ *Id.*, at 1473 (Senate Report).

⁷⁷ *Id.*, at 1474 (Senate Report).

⁷⁸ 5 U.S.C. § 2301(b)(6). Compare the closely parallel language of §§ 4301(3) and 4302(b)(6). Of course, in finding that § 4303(a) implements the merit systems principles, we do not imply that all other provisions of the Act do also, nor do we now consider any other particular provision.

⁷⁹ Our holding addresses only the application of § 4303 to employees for whom no performance appraisal system has been established pursuant to § 4302. We do not intimate that procedural or operation defects in appraisal systems established by an agency give rise to § 2302(b)(11) prohibited personnel practices whenever § 4303 actions under such appraisal systems are initiated. In any such case, to establish a § 7701(c)(2)(B) defense an employee must show that the decision was "based on" a prohibited personnel practice in the particular case, i.e., that the procedural or operational defect in the appraisal system amounted to a prohibited personnel practice affecting the particular decision in a way that was harmful to the employee.

VI. ESTABLISHMENT OF PERFORMANCE STANDARDS AND ELEMENTS

During the course of this proceeding two related questions were raised which the Board considers significant as the agencies undertake to establish their performance appraisal systems. These issues are:

(i) whether critical elements and performance standards must be based on employee position descriptions and be the same for all employees who have the same position description; and

(ii) whether critical elements and performance standards must first be uniformly established by the agency headquarters and only then modified for application in the field.

In considering these issues the Board finds that an examination of the pertinent statutory language and the legislative history reveals Congress placed very few restrictions on the establishment of performance standards and critical elements and in fact made it clear that the agencies were expected to have substantial flexibility in this area.

The Act requires only that performance standards permit the accurate evaluation of job performance based on objective criteria and be related to job in question for each employee or position under the system. Moreover, the language of the Act specifically permits performance standards to be related to the job in question "for each employee or position under the systems." Thus, it is clear that Congress intended for the agencies to consider *either* the specific employee or the position in establishing performance standards rather than just the latter.⁸⁰

The legislative history of the Act reflects that Congress purposefully did not specify how these standards and elements should be developed by the agencies because it had determined that within the statutory restrictions, this was a matter that should be left to agency discretion. As stated in the Senate Report:

The Office of Personnel Management will issue guidelines and make technical assistance available for performance appraisal, *but agencies will have great flexibility to choose or develop their own systems. Agencies should determine what type of performance appraisal methods best suit their needs. This may range from a traditional system to a management by objectives type*

⁸⁰ 5 U.S.C. § 4302(b)(1) (emphasis supplied). Both of the versions of this provision as reported out of the House and Senate Committees provided for performance standards for each employee. The Conference added the language "or position," without explanation. Thus, it is clear that each alternative was considered separately. Additionally, it should be noted that the suggestions that performance standards be linked to an employee's official position description was specifically made at the House Hearings but not adopted. See, *House Hearing*, at 207.

of system, with more than one system used for different groups of employees.

. . . Any performance appraisal system should put primary emphasis on the quality of the employee's work. Moreover, a performance evaluation of a supervisor or manager should consider the performance of that employee's subordinates. *These tailored systems should not be more complex than necessary to meet an agency's particular needs.*⁸¹

Given this background, the Board cannot conclude that performance standards and critical elements must be based on position descriptions. Nor can it conclude that agencies must centralize establishment of these criteria. Rather, the agencies should have flexibility in relating performance standards and critical elements to position descriptions and in centralizing or decentralizing this function in accordance with their own needs.

VII. APPLICATION OF SECTION 1205(e) TO REGULATIONS UNDER REVIEW

This being the first review proceeding conducted by the Board under 5 U.S.C. § 1205(e), it is appropriate to examine the scope of the authority. The specific application of that authority to the regulations in question, on their face and as implemented by SSA, is then considered.

A. Scope of Review

Section 1205(e)(2) directs the Board to declare an OPM regulation or rule:

(A) invalid on its face, if the Board determines that such provision *would, if implemented* by any agency, on its face, *require* any employee to violate section 2302(b) of this title; or

(B) invalidly implemented by any agency, if the Board determines that such provision, *as it has been implemented* by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, *has required* any employee to violate section 2302(b) of this title. [Emphasis supplied.]

The essential distinction between facial invalidity and invalid implementation is that the former relates to prospective application of regulations, whereas the latter relates to implementation

⁸¹ *Legislative History*, at 1506 (Senate Report). [Emphasis supplied.]

which has already taken place in some particular agency resulting in commission of a prohibited personnel practice at that agency. This distinction corresponds with the remedies available to the Board, which are an order to agencies not to comply with facially invalid regulations, and an order requiring agencies to correct any invalid implementation that has already occurred.⁸²

Recognition of this distinction between §§ 1205(e)(2)(A) and (B) is significant, because it demonstrates that the difference between facial and applied invalidity is not a matter of whether the regulation in question "requires" or merely "permits" agencies to commit prohibited personnel practices. Under both subsections (A) and (B) a determination of invalidity must be based on a finding that such practices would be or have been "required" within the meaning of § 1205(e); the difference is only between prospective and past implementation of the rule or regulation.

The statute does not define the terms "require" or "required." However, both the purpose of § 1205(e) and its legislative history demonstrate that a narrow interpretation in the sense of a literally imperative or mandatory command should not be ascribed to these terms. Rather, a rule or regulation "would require" a prohibited personnel practice if it is reasonably foreseeable that it will result in such a practice, and it "has required" such a practice if its application has actually had that result. A more restrictive interpretation would subvert the purpose of § 1205(e) and be inconsistent with the legislative intention.

If the use by an OPM regulation of the precatory "may" were to put the regulation beyond the reach of § 1205(e), OPM by the skillful use of language could avoid entirely the Board's § 1205(e) authority. Moreover, OPM does not have the authority to command agencies to take personnel actions under § 4303, but may only prescribe the conditions under which such actions may be taken. A regulation providing that action may be taken if certain conditions are met is equivalent to a direction that no further conditions are necessary, even if the regulation does not expressly so state.

The legislative history supports this interpretation. Board authority to review OPM regulations was not included in the Administration's bills or in the House or Senate bills reported from Committee. Senator Mathias first introduced the proposal on the Senate floor,⁸³ with the agreement of Senators Ribicoff, Percy and Stevens, as well as the Administration. Referring to the minority views of himself and Senator Stevens in the Senate Committee

⁸² 5 U.S.C. § 1205(e)(1)(C).

⁸³ The Mathias amendment was essentially identical to § 1205(e).

Report,⁸⁴ Senator Mathias explained⁸⁵ that the Board's proposed authority to invalidate a rule

... prior to implementation reflects our concern that hundreds of civil servants and many agencies should not be placed in the unseemly position of acting upon a regulation or being affected thereby *when it is obvious that implementation would amount to illegality.*

The Mathias amendment as adopted, as was a similar amendment to H.R. 11280 thereafter offered on the House Floor by Representative Fisher.⁸⁶ In commenting on the Conference Report when final approval was considered in the Senate, Senator Stevens, who had co-sponsored the Mathias amendment, stated that he read § 1205(e) as authorizing the Board to eliminate any rule or regulation "which would . . . result in prohibited personnel practices upon agency implementation."⁸⁷

Given the purpose of § 1205(e) to enable the Board to reach OPM rules directly if they would result in widespread abuses, thereby avoiding the necessity for multiple proceedings to correct abuses that have a common source, it would be inconsistent for the Board's authority to be so narrowly construed that the Board could not prevent reasonably foreseeable illegal action from occurring. We therefore find that a broad interpretation of § 1205(e) is appropriate. *Train v. Colorado Public Interest Research Group*. 425 U.S. 1 (1976).

B. Facial Validity of the Regulations

Applying the standard of §1205(e)(2) to the OPM regulations in issue, the Board determines that those regulations are invalid on their face. By their own terms, both interim § 432.206 and final § 432.205 provide for the taking of removal and demotion actions under § 4303 prior to the establishment of a performance appraisal system under § 4302. This is a clear violation of § 4303(a), as con-

⁸⁴ In that report, Senators Mathias and Stevens had expressed concern that "merit would be seriously endangered" by the unchecked authority of the OPM Director to make "personnel policy for the entire Federal civil service work force," noting that:

The power to make personnel policy includes the power to interpret the laws; to decide the policies for authorizing exceptions to certain laws; to make the policies which determine how job applicants shall be ranked for employment consideration; to take positions out of the competitive service so they can be filled politically; and to set aside almost all civil service laws in Demonstration Projects that would affect many thousands of individuals. *Legislative History*, at 1598 (Senate Report).

⁸⁵ *Id.*, at 1658 (Senate Debate). [Emphasis supplied.]

⁸⁶ *Id.*, at 855 (House Debate).

⁸⁷ *Id.*, at 1728 (Senate Debate). [Emphasis supplied.]

cluded in Part IV of this Opinion. Employing OPM's "interim procedures" under both interim and final Part 432 would require an employee to commit a § 2302(b)(11) prohibited personnel practice. The OPM regulations are thus facially invalid.

C. Validity of SSA Implementation

SSA has admittedly taken personnel actions and adopted an implementing policy in conformity with interim § 432.206 which have resulted in § 4303 actions against employees based on standards not established by any § 4302 performance appraisal system. Those SSA actions have, therefore, required the commission of § 2302(b)(11) prohibited personnel practices for the reasons hereinabove stated, and such implementation of the OPM regulations is hereby declared invalid.

VIII. APPLICATION OF CHAPTER 75 TO PERFORMANCE-BASED ACTIONS

In support of its argument that § 4303 actions should be permitted prior to the establishment of a § 4302 system, OPM urges that Congress did not intend that the Reform Act would result in a moratorium on performance-based actions until 1981. OPM asserts that Chapter 75 is by its own terms inapplicable to performance-based actions. We do not agree.

We agree that Congress did not intend to make it any more difficult to remove employees under the Reform Act. We also believe Congress intended no moratorium on removal or demotion arising from inadequate performance. For that very reason, we find OPM's position untenable. OPM overlooks the fact that there will be a substantial period of time before agencies could take § 4303 actions even applying the regulations under review. No one disputes the fact that performance standards simply cannot be developed overnight. Under OPM's own interpretation, no performance-related actions could be taken during that period.

Section 7512(2)(D) states that Chapter 75 is inapplicable to a "reduction in grade or removal under § 4303 of this title," and § 7701 provides that the substantial evidence test applies to "an action based on unacceptable performance described in section 4303." Reading these two sections together, it is apparent that as used in both sections the term "unacceptable performance" is the term of art which is defined at § 4301. It is not a general term covering all types of poor performance. As we have ruled, if the process of Chapter 43 is not followed, "unacceptable performance" cannot be demonstrated. However if a determination of inadequate performance is not made under a performance appraisal system provided

for in Chapter 43, then it may be processed as a Chapter 75 action.⁸⁸

The legislative history of the new Chapter 75 is sparse. Nonetheless, to the extent that it deals with the questions of when an action must be taken under Chapter 43, it frequently refers to the term "unacceptable performance" and the requirements which flow therefrom under this Chapter. For example, the Senate Report states that subchapter II of Chapter 75 governs adverse actions "where the basis of the agency action is misconduct or any other cause besides *unacceptable performance*. Actions based on *unacceptable performance* are governed by Chapter 43"⁸⁹ After referring to the exception of "employees who are subject to adverse actions on the basis of *unacceptable performance*," the Report states "Section 4303 of title V, as amended by this bill, covers employees demoted or removed for *unacceptable performance*."⁹⁰ [Emphasis added throughout.]

Whichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter. If an agency sees some advantage in pursuing performance-based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof—and the more difficult standard of demonstrating that the action will promote "efficiency of the service." There is not the slightest evidence in the legislative history to suggest that Chapter 43 was ever to be a refuge for employees to escape Chapter 75. Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose.

Pursuant to its authority under 5 U.S.C. § 1205(e) the Board has determined that 5 C.F.R. § 432.205 (final) (1979) and § 432.206 (interim) (1979), hereafter "the Regulations," are invalid on their face and have been invalidly implemented by the Social Security Administration (SSA) of the Department of Health, Education and Welfare.

⁸⁸ The Civil Service Commission consistently maintained that the greatest defects in the pre-existing law under Chapter 75 were: (1) the multi-level appeals process, and (2) reversal of agency action on appeal for minor procedural error. Reorganization Plan No. 2 of 1978 eliminated the first problem. The harmful error requirement of § 7701 now minimizes the second.

⁸⁹ *Legislative History*, at 1510 (Senate Report).

⁹⁰ *Id.*, at 1514. Thus, the Senate Report equates Chapter 43 actions with "unacceptable performance" actions under § 4303, and recognizes that Chapter 75 can apply to any cause "besides unacceptable performance." Therefore, guidance offered in the Senate Report would not seem to exclude performance-based actions that did not fit the definition of "unacceptable performance." Until Chapter 43 is implemented, therefore, an employee's performance could not be measured against the standards and critical elements that are the basis for determining unacceptability. The Senate Report by inference can be read to mean that Chapter 75 is available for any action not brought under § 4303, and the option remains for the agency to choose whether to proceed under Chapter 43 or Chapter 75.

Accordingly it is ordered that all agencies⁹¹ shall forthwith cease taking personnel actions under the Regulations.

It is further ordered that SSA shall within 20 days from the date of this order submit to the Board and serve on AFGE, OPM, and the Special Counsel a complete status report with respect to each personnel action that SSA has taken under the Regulations since January 11, 1979.

It is further ordered that within 40 days from the date of this order SSA, OPM, AFGE, and the Special Counsel shall each submit a proposed order from appropriate SSA corrective action consistent with this Opinion.

For the Board:

RUTH T. PROKOP,
Chairwoman.

RONALD P. WERTHEIM,
Member.

ERSA H. POSTON,
Vice Chair.
Dissenting in part, con-
curring in part, with
separate opinion.

DATE: *December 17, 1979*

OPINION OF VICE CHAIR POSTON

[Concurring in Part and Dissenting in Part]

While I am in full agreement with the decision of the Board that the Social Security Administration's implementation of the OPM regulations providing for interim performance based adverse actions resulted in the commission of prohibited personnel practices, I cannot concur in the Board's determination that both OPM's interim and final regulations are invalid on their face. Therefore, I dissent with respect to this latter conclusion.

My dissent is based in large measure on my active participation in the drafting and legislative passage of the Civil Service Reform Act.⁹² While civil service reform sought increased protection of employee rights, another impetus for the reform movement from the Administration's standpoint was the failure of the civil service

⁹¹ As defined in 5 U.S.C. § 4301(1).

⁹² From June 16, 1977, until December 31, 1978, I was a Member of the Civil Service Commission. During this period, all Members of the Commission were extensively involved in the President's Civil Service Reform proposals.

system to provide a fair and effective method for disciplining poorly performing Federal employees. The legislative history of the CSRA is replete with demonstrations that Federal employees who are unable or unwilling to perform their jobs have continued on the rolls. There are many factors which contributed to this state of affairs. Included predominantly were poor supervision by Federal managers and the fact that the civil service appeal system had become so encrusted with procedural nuance that it was nearly impossible to remove a poorly performing employee. Appeals from performance-related actions required the difficult "preponderance of the evidence" standard which often turned these proceedings into a trial of the supervisor rather than an inquiry into the state of the employee's performance. The person best able to judge an employee's performance obviously is the employee's supervisor who observes him daily, not a hearing examiner substituting his judgement after the fact.

For these reasons, the Administration strongly supported changing the standard of evidence in performance cases to "substantial evidence." Secondly, the legally imprecise and over-burdened "efficiency of the service" standard was rejected in favor of a test which questioned whether the employee was performing up to standard in critical areas of his job.

As the reform legislation progressed through Congress, it became apparent to a number of us that it would be impossible for the snail-like Federal bureaucracy to change overnight from the adjective performance rating system then in place, to the new performance standard/critical element system. Therefore, Congress provided that the requirement for a full performance appraisal system of proposed 5 U.S.C. § 4302 be postponed until 1981. In retrospect, the amendment designed to adopt this postponement was inadequately drawn and, on its face, is susceptible to the interpretation placed on it by the majority of the Board. However, I believe that the legislative history clearly supports a contrary conclusion. It was the intention of all concerned that unacceptable performance-based actions be allowed prior to the effectuation of a full § 4302 system. The language of the legislative history clearly recognizes this and imposes on an agency deciding to undertake an interim performance action the burden to ensure that performance standards and critical elements

... are very carefully administered so that no employee will be disciplined when performance standards are critical elements have not been adequately defined and communicated by an agency.⁹³

⁹³ *Legislative History*, at 658 (House Report).

As I interpret this burden, it means that an agency may not simply pick out employees who it subjectively believes are poor performers and remove them, as the Social Security Administration did. Rather, the agency must have some sort of clearly-defined performance standards and critical elements applicable to an administratively appropriate, identifiable group of employees. But what this does *not* mean is that the agency must have a full § 4303 system which uses periodic appraisals to provide the basis for training, promoting, reducing-in-grade, and the like, *during this interim period*.

While OPM regulations recognize this fact, the Board's majority seems to interpret these regulations as providing for performance removal prior to the establishment of *any* system. I interpret the OPM regulation as providing for performance removals prior to the implementation of a full § 4302 system. In other words, a rudimentary procedure for employee evaluation under performance standards and critical elements is necessary if an employee within an administrative group is to be disciplined. During the interim period a full performance appraisal system need not be in effect simply to remove an employee. If an employee in a group is to be disciplined, it is sufficient to evaluate that employee by performance standards and critical elements which are reasonably related to those assigned to other employees in the same group. That is all.

The majority's interpretation that §4303 reads into law prior to 1981 the entirety of § 4302 is unwarranted. The majority argues that in determining unacceptable performance under § 4303, the § 4301 definition of unacceptable performance applies. With this I agree. But the § 4301 definition of unacceptable performance does not lead inexorably to the conclusion that the unacceptable performance can only be established pursuant to a full § 4302 system. Unacceptable performance is defined in § 4301(3) as: "performance of an employee which fails to meet established standards none or more critical elements of such employee's positions." Nowhere in the definition of unacceptable performance does this term, "system" appear. One could, therefore, argue that the definition of unacceptable performance in § 4301 provides for unacceptable performance established pursuant to a performance appraisal system or established otherwise. There simply is no tie between the term, "unacceptable performance" and a performance appraisal system under § 4302.⁹⁴

⁹⁴ As I read the majority opinion, however, this does not mean that those Chapter 43 performance based actions taken by the Federal agencies (other than SSA) must necessarily be overturned on appeal to the Board. The majority has ruled that an employee may not raise as a defense to his or her performance removal the fact that there was some supposed deficiency in the agency's performance appraisal system unless the employee was somehow injured by that deficiency. See footnote 79 of the

Accordingly, since it is my view that until 1981, agencies, prior to the adoption of a full § 4302 system, may discipline poorly performing employees, it is also my conclusion that neither the interim nor the final OPM regulations compel the commission of a prohibited practice. Rather these regulations permit what was intended all along by the legislative draftsmen.

ERSA H. POSTON,
Vice-Chair.

December 17, 1979.

Board's opinion on page 230. Therefore, except upon establishment of harmful error by an employee, our presiding officials will not be required to review performance appraisal systems adopted under § 4302. Moreover, during the interim period, prior to the establishment of a full § 4302 performance appraisal system, as I read the majority's opinion, those actions initiated under Chapter 43 which meet the requirements of Chapter 75 may still be valid and may still result in the disciplining of poorly performing employees if it is established by a preponderance of the evidence that the disciplinary action will promote the efficiency of the service. See Part VIII of the Board's opinion.