

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL J. THOMPSON,
Appellant,

v.

FARM CREDIT ADMINISTRATION,
Agency.

DOCKET NUMBER
DC04328810407

DATE: DEC - 3 1991

Douglas B. Huron, Esquire, Kator, Scott, & Heller,
Washington, D.C., for the appellant.

Elizabeth M. Dean, Esquire, and Gary K. VanMeter,
Esquire, McLean, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

Chairman Levinson issues a concurring opinion.

OPINION AND ORDER

The agency petitions for review and the appellant cross petitions for review of the initial decision, issued on October 11, 1988, that reversed the agency's removal action. The Board GRANTS both the petition and the cross petition. 5 U.S.C. § 7701(e). The initial decision is AFFIRMED as MODIFIED. The agency's action is NOT SUSTAINED.

BACKGROUND**1. Unacceptable Performance**

The agency removed the appellant from the position of Financial Analyst, GS-14, based on charges of unacceptable performance in two critical elements of his position, Data Bases and Financial Projections (Data Bases) and Special Studies. The administrative judge found that the agency did not inform the appellant that his performance was unsatisfactory in the critical element Special Studies until it proposed his removal. Therefore, the administrative judge found that the appellant was not given an opportunity to demonstrate acceptable performance in that critical element as required by 5 U.S.C. § 4302(b)(6) and did not sustain the agency's charge of unsatisfactory performance in that critical element. The administrative judge found, however, that the appellant was given an opportunity to improve with respect to the critical element Data Bases¹

¹The critical element Data Bases and Financial Projections has 9 standards. Generally, an employee working under this element:

Participates in the development of data bases and financial projections relating to the Farm Credit System. This includes work on special projects, funding issues, and the System financial projection study. Develops a base of data either as an ongoing activity or to support special studies which enables adequate analysis of projects.

Specifically, an employee working under this standard:

because the agency had outlined the appellant's deficiencies

- A. Completes an annual financial projection of the System with appropriate updates within the Year.
- B. Maintains unit data bases to adequately support analytical projects assigned to the unit and identifies the need for data base development, keeping in mind fiscal discipline.
- C. Prepares a complete and adequately supported work product which:
 - 1. requires no major changes because it is clear, concise, understandable, and targeted for the appropriate audience.
 - 2. addresses and appropriately resolves all pertinent issues; establishes processes to verify the accuracy of final data in most critical projects;
 - 3. contains sound, reasonable, and logical conclusions and recommendations.
- D. Applies appropriate theory and methods consistent with relevant procedures, policy, law, regulations, and state-of-the-art techniques.
- E. Completes work assignments within deadlines, allowing sufficient time for review and conveyance of work product to recipient.
- F. Works independently with minimum supervision and assistance.
- G. Works closely and coordinates efforts with other divisions, offices, and teams, where appropriate.
- H. Works effectively under pressure.
- I. Demonstrates innovative and creative thinking.

in this element in its notice of unacceptable performance and the appellant was afforded an 80-day performance improvement period.²

The administrative judge found that the appellant's performance was unsatisfactory on one of three³ assignments under the critical element Data Bases, calculation of bond premiums for certain Farm Credit banks, because the appellant made errors on his first draft of the project and these errors were similar to errors that the appellant had been warned of in the notice of unacceptable performance.

The administrative judge found further that failure in this project established that the appellant's performance was unsatisfactory in two performance standards of the element Data Bases, Standard C which requires the preparation of a complete and adequately supported work

²The agency placed the appellant on a performance improvement plan because of his alleged unacceptable performance in two critical elements: (1) Data Bases; and (2) Communication and Interpersonal Relationships. Appeal File, Tab 5, Subtab 4(III). The Communications element was critical for the appellant but not for other employees working under the same standards. In the notice of proposed removal, the agency informed the appellant that his performance in the Communications element had improved to an acceptable level. Appeal File, Tab 5, Subtab 4(C).

³The appellant received three assignments under this critical element during the performance improvement period. His supervisor found that he performed unsatisfactorily on two of them. The administrative judge found that the appellant's performance could not be found unsatisfactory on one of those two, the Funding Database assessment, because his supervisor admitted that she did not counsel and direct the appellant with respect to it.

product and Standard F which requires independent work with minimal supervision. He found also that failure in these two standards constituted failure in the element as a whole.

Additionally, the administrative judge found that the appellant's supervisor did not err in not considering an interim review by his former supervisor assessing his performance as outstanding.⁴ He found that, although agency regulations required that a rating official consider an interim rating, the review was not an interim appraisal but a general statement concerning the appellant's performance without relating the performance to the standards.

2. Affirmative Defenses

The administrative judge reversed the agency action, however, finding that it was taken in retaliation for the appellant's protected activity, opposing the decision of the chairman of the FCA that certain information about the financial condition of the Farm Credit System not be revealed to Congress. Specifically, the appellant told the Chairman that it was "irresponsible" not to reveal to Congress that the System needed financial assistance of \$5.8 billion because, in 1985, Congress reorganized FCA when its officials failed to keep Congress fully informed. The

⁴Until June 30, 1987, the appellant worked for Gregory Yowell. After that time he worked for Ann Grochala under a new set of performance standards. The interim review covered the six-month period prior to June 30.

administrative judge found that the appellant reasonably believed that the withholding of the information -- generated by a task force, of which the appellant was a member, that prepared financial projections for the System -- from Congress was mismanagement or an abuse of authority. Thus, he found that a protected disclosure was made.

The administrative judge also found that the Chairman, believing that the appellant had attempted to release his financial projections within the agency, told the appellant's third level supervisor that the appellant should be fired. He found further that the third-level supervisor reprimanded the appellant and told the appellant's immediate supervisor what the Chairman had said.

The administrative judge found that retaliation resulted because the appellant's supervisor's knowledge of the Chairman's statement eliminated the facial separation between the Chairman and the officials engaged in the removal.

Additionally, the administrative judge found that the Chairman's statement indicates a motive to remove the appellant, and that this statement, viewed in the light of the circumstances that followed it, establishes that reprisal was a substantial factor in the appellant's removal. Accordingly, the administrative judge found that

the appellant established a violation of 5 U.S.C. § 2302(b)(8).

Finally, the administrative judge found that because reprisal was a substantial basis for the appellant's removal, the agency failed to establish the requisite nexus between his removal and the efficiency of the service. Thus, he found that the appellant established a violation of 5 U.S.C. § 2302(b)(10).

PETITION AND CROSS PETITION FOR REVIEW

In its petition for review, the agency asserts generally that the administrative judge improperly applied the test announced by the court in *Hagmeyer v. Department of Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985). The agency argues that: (1) The administrative judge erred in finding that the appellant's alleged protected activities fell within the definition of a "disclosure of information" under 5 U.S.C. § 2302(b)(8) because there was no protected disclosure in the case, i.e., the appellant's urging the chairman to disclose information was not protected, and the objective evidence shows that it was not reasonable for the appellant to believe that the failure of the agency to adopt his alleged protected disclosure was evidence of mismanagement or abuse of authority; (2) the administrative judge erroneously determined that the accused official participated in the appellant's removal and that the

proposing and deciding officials were aware of the appellant's alleged protected disclosure; (3) the administrative judge erroneously found that the appellant's removal was the result of retaliation; (4) assuming, arguendo, that the appellant's activities were protected, the administrative judge erroneously determined that the appellant proved that a genuine nexus existed between his protected activity and his removal; (5) the administrative judge erred in finding that a prohibited personnel practice, violation of 5 U.S.C. § 2302(b)(8), was the motivating factor for the action; and (6) the administrative judge erred in determining that the agency's removal was in violation of 5 U.S.C. § 2302(b)(10).

In his cross petition for review,⁵ the appellant asserts that the administrative judge erred in finding that the agency proved by substantial evidence that the appellant's performance was unacceptable. The appellant argues that the evidence of poor performance, the appellant's errors in a draft of one assignment in which the final product was timely, acceptable, and innovative, is insufficient to be called substantial evidence of poor

⁵The agency asserts that the appellant's cross petition for review is untimely. The Board granted the appellant an extension of time until December 19, 1988, to file his cross petition. The cross petition is postage metered December 19. It is, however, also stamped "December 20, Washington, D.C." It is unclear what the December 20 stamp represents but it does not appear to be a postmark as does the December 19 stamp. We therefore find that the cross petition is timely filed.

performance, especially in light of the ease with which the appellant corrected the errors once they were noted by his supervisor and the general expectation in the office that complex assignments would go through a number of drafts.⁶

ANALYSIS

1. The agency improperly applied Chapter 43.

A. The agency improperly applied the Data Bases standard to the appellant's work.

In *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985), the court held that a performance standard should be sufficiently precise and specific as to invoke a general consensus as to its meaning and content. The court found further, however, that the need for precision does not mean that standards must be quantitative and recognized that some tasks may be rated only with "a certain modicum of subjective judgment." *Id.* at 1055. Thus, the court held that a standard may be fleshed out and implemented in detail in a performance improvement plan.

⁶The appellant also filed a motion to strike exhibits A-N filed by the agency with its petition for review. The appellant asserts that all of these exhibits were available to the agency prior to the close of the record. We grant the appellant's motion. The agency did not show that its submissions were unavailable prior to the closing of the record by the administrative judge. Attachments A, C, and G-N are records of Congressional hearings occurring before this appeal. Attachments D-F are copies of reports prepared by the appellant before the appeal. Attachment B is the affidavit of the Chairman of the Farm Credit Administration, who, without explanation, did not testify at the hearing in the appeal.

In *Eibel v. Department of the Navy*, 857 F.2d 1439, 1443 (Fed. Cir. 1988), the court emphasized that a performance standard must inform the employee of what is acceptable performance and that the fleshing out of a standard in a performance improvement plan may not amount to rewriting the standard. In *Stone v. Department of Health and Human Services*, 38 M.S.P.R. 634, 639 (1988), the Board stated that an agency's attempt to clarify a standard through written and oral instructions may not impose a higher level of performance than was previously required or called for by the critical element.

In this case, Standard C of the element refers to a "complete" work product and "the accuracy of final data." The language of the standard does not imply that it applies to drafts. Further, the agency did not introduce evidence to indicate that it applied the standard to the drafts of other employees. In fact, the record shows that it was not normal to require error-free first drafts, Hearing Transcript (HT) at 372-73, and it was not unusual for first drafts of employees comparably situated to the appellant to be incomplete in some ways or to have errors in some respect, HT at 318 and 361. For these reasons and, as explained below, in light of the retaliatory motive that infused the appellant's removal, the Board finds that the agency, by imposing the standard applied to final work

products on the appellant's drafts, improperly imposed a higher level of performance than was required by the Data Bases element.⁷

B. The agency did not afford the appellant a meaningful opportunity to improve.

In performance-based actions taken under 5 U.S.C. § 4303, the opportunity to demonstrate acceptable performance is an element of the agency's case that must be proven by substantial evidence.⁸ Further, the right to an opportunity to demonstrate acceptable performance is a substantive right, not just a procedural one. *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587 (1984). In *Zang v. Defense Investigative Service*, 26 M.S.P.R. 155 (1985), the Board noted that an employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework.

In *Beasley v. Department of the Air Force*, 25 M.S.P.R. 213, 215 (1984), the Board held that the agency did not meet its burden to prove that an employee was afforded a

⁷The performance standard in this appeal applies only to final work products and not to draft work products. An agency could take a performance-based action under a performance standard that pertains to unsatisfactory draft work products.

⁸Substantial evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole might accept as adequate to support a conclusion even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1).

reasonable opportunity to improve before her removal for unsatisfactory performance, where the agency determined that the employee was going to fail and the employee could have done nothing to correct the performance that her supervisors criticized. In *Adorador v. Department of the Air Force*, 38 M.S.P.R. 461 (1988), the Board held that the employee did not receive a meaningful opportunity to improve because he did not receive the promised assistance of his supervisor during the early weeks of the performance improvement period.

In this case, although the agency afforded the appellant a procedural opportunity to improve, the Board finds that the opportunity was not substantive. On one of the two Data Base element projects that the agency found unacceptable during the performance improvement period, the appellant did not receive the promised supervisory assistance. Further, the record as a whole establishes that the appellant's supervisors, by their actions before, during, and after the performance improvement period, revealed their predetermination that he was going to fail.

Before the improvement period, when the new standards were implemented, the appellant's supervisors made the element Communication and Interpersonal Relationships critical for the appellant although it was not critical for others working under the same standards. Subsequently, the

appellant's supervisors found his performance under that element unsatisfactory and placed him on a performance improvement plan with respect to it.⁹ During the improvement period, they defined the critical element Data Bases to apply to the appellant's drafts when there is no inference from the wording of the standard itself that it applied to drafts and there is no evidence that it was applied to the drafts of others working under the same standards. See Appeal File, Tab 5, Subtab 4D; HT at 361, 364, and 370. After the improvement period, when the appellant was partially successful, performing acceptably with respect to the Communication element, they attempted to charge him with unacceptable performance of the element Special Studies based on his performance of that element during the opportunity period and did not afford him even a procedural opportunity to improve with respect to it. Finally, they did not recognize, as they could have under Standard I of the element Data Bases, the appellant's innovative use of new software to accomplish assignments, opting instead to denigrate his drafts. HT at 126 and 371-72.

⁹Because, during the performance improvement period, the agency found the appellant's performance under the element Communications and Interpersonal Relationships satisfactory, the Board need not reach the question of whether the agency properly made the element critical for the appellant based on his prior performance. We note, however, that it is the importance of the element, and not the employee's performance under it, that determines if an element is critical.

2. The appellant proved that the agency action was taken in reprisal for protected activity and in violation of 5 U.S.C. § 2302(b)(8).¹⁰

In *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986), the court held that in order for an appellant to establish reprisal, he has the burden of showing by the preponderance of the evidence that: (A) A protected disclosure was made; (B) the accused official knew of the disclosure; (C) the adverse action under review could, under the circumstances, have been retaliation; and (D) there was a genuine nexus between the retaliation and

¹⁰§ 2302(b)(8) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as reprisal for --

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs

the removal.¹¹ See also *Hagmeyer v. Department of Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985).

A. A protected disclosure was made.

In *Oliver v. Department of Health and Human Services*, 34 M.S.P.R. 465, 470 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table), the Board held that memoranda to two deputy directors of the agency expressing concern over continuing low minority and female participation in a grants program and the employee's belief that her performance evaluation would be unjustly downgraded were entitled to the protection of the law because they addressed situations which the employee believed evidenced mismanagement. In *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 280 (1990), the Board held that the protections provided in 5 U.S.C. § 2302(b)(8) apply where a retaliatory personnel action is taken against an employee believed to have engaged in protected activity even though the employee may not have actually done so.

The appellant made clear to top agency officials, including the Chairman, his position that the financial data

¹¹This case arose before Congress passed the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221 (WPA), which proscribed the use of the test announced in *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986) to determine whether an action is taken in retaliation for protected activity under 5 U.S.C. § 2302(b)(8). The WPA therefore is inapplicable in this situation and the appellant must establish retaliation under the Warren standard.

upon which he relied, which was developed by a committee of experts, depicted a truer picture of the financial situation of the agency than the picture painted by the Chairman. The appellant's position, although contrary to that of the Chairman, was reasonable. Based on his expertise and that of others who generated the financial information, he had reason to believe that the numbers were accurate. Further, the appellant's expressions of disagreement with the Chairman's view consistently were based on the appellant's understanding of congressional desire to be kept fully advised of the financial status of the Farm Credit System.

Although the appellant's expression of his view may not of itself have been intended as a disclosure of waste, fraud or abuse, the Board finds that the record as a whole establishes that, based on that statement regarding his view of the appropriate financial model to report to Congress, and the appellant's later actions, the Chairman perceived the appellant as a whistleblower.

The Chairman made his statement that the appellant should be fired shortly after learning of the appellant's distribution to other agency managers of a 1986 liquidation study drawing conclusions about the financial need of the FCS that differed from the Chairman's public position.¹²

¹²The Board rejects the agency's position that no retaliation resulted from that statement because the appellant's removal was not effected until 1988. Both

The appellant testified that, although he believed that the distribution was authorized, an agency manager indicated that the Chairman was extremely nervous that, if a copy of that report were to be made public outside of the agency it would be a potential embarrassment, because it was contrary to the Chairman's statements that the system did not require financial assistance. See HT at 174. The agency also viewed the appellant's distribution, in 1987, to persons outside of the agency, of background material for the 1987 financial projection model, as unauthorized, despite the appellant's belief that he acted appropriately. See Appeal File, Tab 5, Subtab 4NNN (Official Reprimand of Daniel Thompson); Appeal File, Tab 11 (Agency Exhibit 2).

Based on the agency's careful scrutiny of the distribution of financial data both within and without the agency and the open disagreement between the appellant and the Chairman with regard to the financial situation of the system, the Board finds that the agency perceived the appellant as a whistleblower. The appellant's admission that the Farm Credit Administration Chairman has the discretion to decide whether the numerical data should be made available to Congress, HT at 282-85, and his deference

before and after the 1986 liquidation study, into the spring of 1987, the appellant produced reports that painted a gloomier picture of the financial condition of the FCS than that painted by the Chairman. Further, the process of the appellant's removal began in June 1987, close in time to the appellant's Spring 1987 briefing to the Chairman about the financial status of the FCS.

to the Chairman's clear wish that those numbers not be used as part of FCA's official position on the financial status of the Farm Credit System, did not alter the Chairman's perception of him as a dangerous proponent of a view that could prove embarrassing -- possibly evidencing mismanagement and abuse of discretion. Thus, the Board finds that the appellant's disclosures inside and outside the agency about the financial condition of the Farm Credit System are protected under 5 U.S.C. § 2302(b)(8).

B. The accused official knew of the disclosure.

The administrative judge correctly determined that the accused official, the Chairman, knew of the appellant's protected activity. It is undisputed that the appellant argued his position about the financial plight of the Farm Credit System directly to the Chairman. Appeal File, Tab 11 (Appellant's Exhibit A); HT at 171-73, 181-83, and 387. Thus, the administrative judge correctly found that the second prong of the Warren test had been met.

C. The adverse action could, under the circumstances, have been retaliation.

The proposing and deciding officials were aware of the appellant's protected disclosure. The appellant's third-line supervisor informed his first line supervisor, the proposing official, of the protected activity and of the Chairman's reaction to it. HT at 403-05. The deciding official was also aware of the protected activity and that

the appellant's position with respect to the extent of the financial need of the Farm Credit System was not accepted. See Appeal File, Tab 11 (Deposition of William Dunn at 26). Under these circumstances, it is immaterial that the Chairman, who supplied the only direct evidence of retaliation by stating that the appellant should be fired for his protected activity, did not play a formal role in the appellant's removal. Where the head of the agency has expressed a desire to have an employee fired, one may assume that officials serving him, knowing his view, could have retaliated in deference to his authority. See HT at 405.

D. There was a genuine nexus between the retaliation and the removal.

The administrative judge correctly found that the appellant proved by the preponderance of the evidence that a genuine nexus existed between his protected activity and his removal. As in almost all situations where an appellant is attempting to prove retaliation, the nexus between the protected activity and the retaliation must be inferred from circumstantial evidence. *Ireland v. Department of Health and Human Services*, 34 M.S.P.R. 614, 618 (1987). In this case, there is a great deal of circumstantial evidence of retaliation.

The circumstantial evidence of retaliation by officials who were not the direct targets of the appellant's protected disclosures outweighs the presumption of their obligation

to act in good faith to uphold the law. Agency officials who were unaware of the Chairman's feelings about the appellant uniformly respected the appellant's work. The appellant's supervisor, the proposing official, testified that another supervisor was "very willing to take [the appellant], anxious to take him" into his unit. HT at 24. Even the deciding official relied on the appellant's work, including the work that he did during the interval of the notice period of his removal.

Additionally, the appellant's supervisor consistently exercised her discretion against the appellant. She ignored the appellant's outstanding interim review in her performance rating. Also, she maintained her harsh judgment of the appellant's first draft of the calculation of bond premiums assignment despite circumstances around the drafting of that assignment weighing in the appellant's favor. To complete the draft, the appellant perfected a computer program that enabled him to quickly generate the information that his supervisor requested. Further, that program enabled the appellant to easily make the changes in the draft requested by his supervisor and to easily complete the assignment. Finally, the appellant's supervisor did not allow her unacceptable rating to be tempered by an acknowledgment that the program developed by the appellant allowed others to follow similar supervisory directions more

quickly than any other program available in the agency. See Appellant's Exhibit I; HT at 126 and 371-72.

Also, although the first draft of the calculation of bond premiums assignment was hastily given to the supervisor and was not checked to assure that it complied with the instruction given, the effect of the error resulting from this inadequacy was isolated. Once the error in the draft was pointed out to the appellant, he timely produced a fully successful final product. Indeed, his supervisor admitted that the second draft of the project was very close to what she had requested and that the project was placed into final form after the second draft. HT at 94.

Despite evidence that the appellant's unacceptable performance was limited by the appellant's immediate correction of his error and the fact that the error did not affect the work of any other employee, the deciding official meted out the harshest possible penalty, that suggested by the Chairman. Additionally, as noted above, the appellant's supervisor made critical for the appellant an element that was not critical for others working under the same performance standards, and she stated that she took this action because of the reprimand given the appellant in direct response to the Chairman's statement that he should be fired. HT at 62. Thus, the administrative judge properly found that the intensity of the motive to retaliate

outweighed the inadequacy of the performance of the appellant's duties. Hence, the administrative judge made an informed and reasoned determination that a nexus existed between the retaliation and the adverse action.

In *Oliver*, the Board also held that the Warren test encompasses the settled rule that an appellant will prevail if retaliation was shown to have been a significant factor in the action, unless the agency proves by preponderant evidence that it would have taken the action absent the protected conduct. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268 (1981).

In this case, the Board finds that not only does the record show nexus between the retaliatory motive and the appellant's removal, but the retaliatory motive was the genesis of the charge of unsatisfactory performance. The appellant's third line supervisor told his first line supervisor of the Chairman's statement immediately after she assumed supervisory responsibilities, and the first line supervisor immediately acted to make the performance element "Communications and Interpersonal" Relationships critical for the appellant when it was not so for others working under the same standards. Further, within three months, the first line supervisor found the appellant's performance

unacceptable under the newly established elements and standards.¹³

In addition, the appellant's second line supervisor and the deciding official invoked the most severe action available and testified that reassignment was precluded despite undisputed record evidence that other offices sought the appellant.¹⁴ The deciding official also ignored the evidence of the appellant's superior and outstanding performance in the 18 months prior to his removal.

Thus, the Board finds that the agency did not show by preponderant evidence that it would have removed the appellant absent the retaliatory motive.

3. The administrative judge erred in finding that the appellant proved that the agency violated 5 U.S.C. § 2302(b)(10).

In *Merritt v. Department of Justice*, 6 M.S.P.R. 585 (1981), the Board examined the legislative history of § 2302(b)(10). During a mark-up session, Representative

¹³The appellant began to work for Ms. Grochala under a new set of performance standards. His first rating from her, after ninety days, was unacceptable. The appellant's immediate prior rating of record, under a different standard and a different supervisor, was highly successful, and his prior interim rating was outstanding.

¹⁴The agency's argument that the vacancy for which the appellant was sought was a higher graded position misses the point. The fact that the supervisor who sought the appellant had only one vacancy which was a higher graded position, does not show the agency's good faith in this matter.

Harris, who moved for the adoption of § 2302(b)(10),¹⁵ explained:

The amendment adds to the prohibited practices this provision which would bar an official from taking action against any employee or applicant for employment as a reprisal for non-job related conduct. I think it is clear to prohibit discrimination against activities that have no bearing on one's job. Psychiatry, outside interests, a member of "NOW" or "Taxpayers Alliance" or what have you

Merritt at 602. Emphasis added.

Additionally, in *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cir. 1988), the court emphasized that § 2302(b)(10) is designed to prohibit personnel practices that are taken in response to an employee's off-duty conduct or interests that are unrelated to job performance.

¹⁵ U.S.C. § 2302(b)(10) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States

The Board is persuaded by the legislative history of § 2302(b)(10) and by judicial interpretation of that provision that it is intended to apply to off-duty non-job related conduct. Thus, we find that the administrative judge erred in finding a violation of § 2302(b)(10) in this case. The conduct for which the agency retaliated against the appellant occurred during the performance of his duties.¹⁶

CONCLUSION

Because the agency failed to show that the appellant's performance was unacceptable under Chapter 43 and because the appellant proved that the agency action was taken in reprisal for protected activities in violation of 5 U.S.C. § 2302(b)(8), the agency action cannot be sustained.

¹⁶In *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cir. 1988), the court stated "Chapter 23 . . . is designed to prohibit prohibited personnel practices that are taken in response to an employee's off-duty conduct or interests that are unrelated to job performance." This statement is overbroad and in conflict with Board precedent that Chapter 23 prohibits prohibited personnel practices in response to on-duty conduct. See, e.g., *Oliver v. Department of Health and Human Services*, 34 M.S.P.R. 465 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988). The District Court decision in *Garrow*, however, makes it clear that petitioner was alleging a violation of § 2302(b)(10). See *Garrow v. Phillips*, 664 F. Supp. 2, 3 (D.D.C. 1987). Thus, to the extent that the appellate court's finding in *Garrow*, quoted above, was addressing petitioner's allegation that the agency engaged in a prohibited personnel practice in violation of § 2302(b)(10), the Board agrees with the court.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The agency is ORDERED to cancel the appellant's removal and to retroactively restore the appellant effective May 23, 1988. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date this decision.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's notification of compliance to resolve the disputed amount. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you

personally, whichever receipt occurs first. See 5 U.S.C.
§ 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board

CONCURRING OPINION OF
CHAIRMAN DANIEL R. LEVINSON

In
Thompson v. Farm Credit Administration
DC043288910407

I join the majority's opinion, except to the extent that it suggests that a violation of section 2302(b)(8) may be found absent a protected disclosure. In my view, *Special Counsel v. Navy*, 46 M.S.P.R. 274 (1990), does not require this conclusion. In that case, the record showed that a disclosure was made, and the Special Counsel alleged that the agency retaliated against an individual whom it mistakenly perceived to be the source of the disclosure. Our conclusion that the employee was protected in those circumstances rested primarily on the plain words of section (b)(8), which prohibits disciplining "any" employee for a disclosure by "an" employee.

Moreover, I note that the issue of whether section 2302(b)(8) requires a disclosure before an employee may be protected from reprisal was left open in *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 604 n.16, rev'd on other grounds, *Harvey v. Merit Systems Protection Board*, 802 F.2d 537 (D.C.Cir. 1986). While the Board's rationale for finding a violation of (b)(9) in *Harvey* may lead to the conclusion that proof of an actual disclosure is unnecessary to finding reprisal under (b)(8), we need

not reach that issue in this case because an actual disclosure was made.

Daniel R. Levinson
Daniel R. Levinson
Chairman

DEC - 3 1991

Date