

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2006 MSPB 255**

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Docket No. DC-0432-05-0526-I-1

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**Winifred Jackson-Francis,  
Appellant,**

**v.**

**Office of Government Ethics,  
Agency.**

August 16, 2006

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Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

Walter M. Shaub, Jr., Esquire, and Diana J. Veilleux, Esquire, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

Chairman McPhie dissents without opinion.

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that sustained her removal, and the agency has filed a cross PFR. For the reasons discussed below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115, DENY the agency's cross PFR for failure to meet the criteria for review, and REVERSE the ID. The appellant's removal is NOT SUSTAINED.

## BACKGROUND

¶2 On October 28, 2004, the agency informed the appellant, a GS-13 Instructional Systems Specialist, that her performance was unacceptable and placed her on a ninety-day performance improvement plan (PIP). Initial Appeal File (IAF), Tab 4, Subtab 4f. The PIP notice identified two critical elements in which the appellant's performance was unacceptable and informed her that, if her performance did not reach at least a fully successful level of performance in these elements by the end of the PIP period, the agency could reduce her grade or remove her. *Id.* The agency thereafter determined that the appellant did not attain a fully successful level of performance in one of the critical elements listed in the PIP, "Develops Courses for Ethics Officials and Government Employees," and removed her for unacceptable performance under 5 U.S.C. chapter 43 effective May 20, 2005. IAF, Tab 4, Subtabs 4a, 4d, Tab 24.

¶3 The appellant filed an appeal with the Board arguing that the agency should not have removed her because: She should only have been required to reach a minimally successful level of performance and not a fully successful level; the agency's performance standards are invalid because the minimally successful performance standard is "backwards" and the standards are not objective; the agency did not afford her a fair opportunity to improve during the PIP period; the agency improperly based its decision to remove her on draft work product rather than final work product; and her performance during the PIP was successful. IAF, Tabs 1, 17. The appellant also argued that in removing her the agency discriminated against her on the basis of her age and reprised against her for engaging in whistleblowing activity. IAF, Tab 1 at 3, Tab 17 at 3-4, 15. She requested a hearing. IAF, Tab 1 at 2. The AJ informed the appellant of the burden of proof on her affirmative defenses. IAF, Tab 20.

¶4 After a hearing, the AJ issued an ID affirming the appellant's removal upon finding that the agency proved by substantial evidence that: The appellant's performance standards were valid for the critical element at issue; the appellant

was aware of her performance standards; the agency afforded the appellant a reasonable opportunity to improve her performance; and the appellant failed to meet the “fully successful” level of performance for the critical element during the PIP. IAF, Tab 25, ID at 1-21. The AJ also found that the appellant had not proven that the agency either discriminated against her on the basis of her age or removed her in reprisal for whistleblowing. ID at 22-25.

¶5 The appellant has filed a PFR arguing, inter alia, that the AJ erred by finding that: The agency could require her to meet the “fully successful” performance level under the PIP; and the “minimally successful” performance standard for the critical element at issue in this case is valid. Petition for Review File (PFRF), Tab 3. The agency has responded in opposition to the appellant’s PFR and has filed a cross PFR arguing that the AJ erred in making a procedural ruling below. PFRF, Tab 4. The appellant has responded in opposition to the agency’s cross PFR. PFRF, Tabs 8-9.

### ANALYSIS

The agency cannot require the appellant to reach a fully successful level of performance to avoid removal under chapter 43.

¶6 Agency performance appraisal systems may include between two and five summary rating levels. 5 C.F.R. § 430.208(d). Under any performance appraisal system, the lowest rating level is “unacceptable,” which is the only rating that will support removal under chapter 43. *Stenmark v. Department of Transportation*, 59 M.S.P.R. 462, 468 (1993); see 5 U.S.C. § 4302(b)(6); 5 C.F.R. §§ 430.206(b)(8), 430.207(c), 430.208(d). Under certain performance appraisal systems, performance of a critical element may fall between “fully successful” and “unacceptable.” 5 C.F.R. §§ 430.207(c), 430.208(d); *Stenmark*, 59 M.S.P.R. at 468. If an agency adopts such a performance appraisal system, an appellant’s performance could be “not satisfactory” without falling to the level that would

support removal. 5 C.F.R. §§ 430.207(c)-(d), 430.208(d); *Stenmark*, 59 M.S.P.R. at 468.

¶7 Here, the agency rated the appellant under a five-tiered performance appraisal system, including a rating level of “minimally successful” that fell between “fully successful” and “unacceptable.” IAF, Tab 23 at 4. Therefore, under the agency’s performance appraisal system, if the appellant’s performance was “minimally successful” it would be “not satisfactory” without falling to the level of “unacceptable.” *Id.*; see 5 C.F.R. §§ 430.207(c), 430.208(d); *Stenmark*, 59 M.S.P.R. at 468. Thus, under the agency’s performance appraisal system, the appellant could reach a “minimally successful” level of performance without falling to the level that would support removal under chapter 43. IAF, Tab 23 at 4; see 5 U.S.C. § 4302(b)(6); 5 C.F.R. §§ 430.207(c)-(d), 430.208(d); *Stenmark*, 59 M.S.P.R. at 468. Consequently, the agency erred by requiring the appellant to reach a “fully successful” level of performance during the PIP to avoid removal under chapter 43. IAF, Tab 4, Subtab 4f; see *Goodale v. Department of Labor*, 28 M.S.P.R. 158, 159 n.4 (1985).

The agency’s “minimally successful” performance standard for the critical element at issue in this case is not valid.

¶8 To remove an employee for unacceptable performance under 5 U.S.C. chapter 43, the agency must prove, inter alia, that the appellant’s performance standards are valid. *Diprizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 7 (2001). Absent valid performance standards, the Board cannot consider charged performance deficiencies. *Ortiz v. Department of Justice*, 46 M.S.P.R. 692, 695 (1991). Performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid removal for unacceptable performance under chapter 43. *Eibel v. Department of the Navy*, 857 F.2d 1439, 1441-44 (Fed. Cir. 1988).

¶9 Here, because the agency could not remove the appellant under chapter 43 if she reached a “minimally successful” level of performance, we must examine

whether that performance standard is valid. The “minimally successful” performance standard for the critical element “Develops Courses for Ethics Officials and Government Employees” states as follows:

Does not identify training needs of the targeted audiences. Fails to use principles of course design to develop performance-based training. Fails to develop training designed to enable ethics officials to determine whether ethics violations occurred and employees to determine if they violated any of the ethics prohibitions. Does not develop a project plan to monitor and track course development to ensure that projects are completed on time.

IAF, Tab 23 at 5.

¶10 We find that this performance standard is an invalid “backwards” standard because, although it is written at the “minimally successful” level, it fails to inform the appellant of what is necessary to obtain an acceptable level of performance, and instead describes what she should not do. *See Eibel*, 857 F.2d at 1443-44; *Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 534 n.5 (1992), *aff’d*, 22 F.3d 1104 (Fed. Cir. 1994) (Table). Because the “minimally successful” standard does not define the minimal performance necessary for the appellant to remain employed in her position, the agency failed to distinguish between minimally acceptable and unacceptable performance as a practical matter. *See Burroughs v. Department of Health & Human Services*, 49 M.S.P.R. 644, 650-51 (1991). The “minimally successful” performance standard would have to be entirely rewritten, not just fleshed out and clarified during counseling, to inform the appellant of what she needed to do to avoid removal under chapter 43. *See Burnett v. Department of Health & Human Services*, 51 M.S.P.R. 615, 617-18 (1991) (citing *Eibel*, 857 F.2d at 1443).

¶11 Thus, because the agency’s “minimally successful” performance standard for the one critical element at issue in this case is not valid, the Board cannot

consider the charged performance deficiencies. *See Burnett*, 51 M.S.P.R. at 618. Accordingly, the agency's removal action must be reversed.<sup>1</sup> *See id.*

### ORDER

¶12 We ORDER the agency to cancel the appellant's removal and restore the appellant effective May 20, 2005. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action with 20 days of the date of this decision. The agency must complete this action no later than 20 days after the date of this decision.

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

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

¶15 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement

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<sup>1</sup> Because we reverse the appellant's removal for the reasons set forth above, we need not address the appellant's remaining arguments on the merits of the agency's action that she raises on review. *See Burroughs*, 49 M.S.P.R. at 651. However, we note that the appellant on PFR does not challenge the ID's findings that she did not prove her affirmative defenses of age discrimination and reprisal for whistleblowing, and we discern no basis to disturb those findings. *See* PFRF, Tab 3; ID at 22-25.

with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶16 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

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

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

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

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 19848  
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

#### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

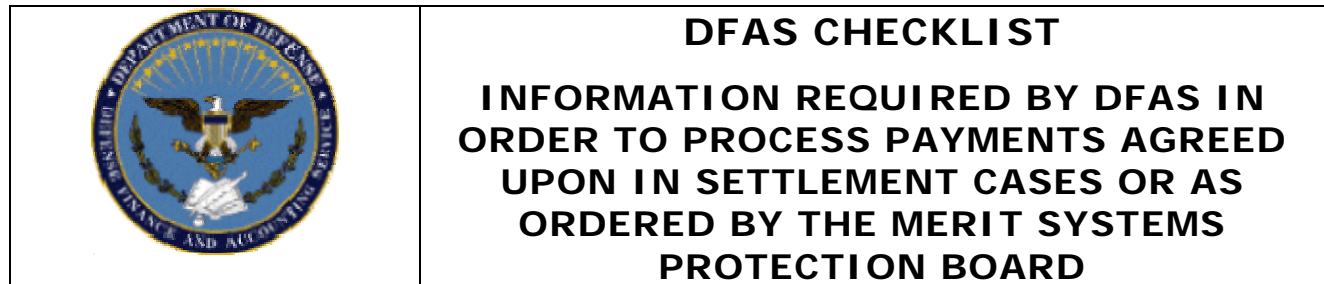
If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Bentley M. Roberts, Jr.  
Clerk of the Board  
Washington, D.C.



AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT  
CASES

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

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

**ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:**

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

type of leave to be charged and number of hours.



## **NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES**

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
  - a. Employee name and social security number.
  - b. Detailed explanation of request.
  - c. Valid agency accounting.
  - d. Authorized signature (Table 63)
  - e. If interest is to be included.
  - f. Check mailing address.
  - g. Indicate if case is prior to conversion. Computations must be attached.
  - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

### **Attachments to AD-343**

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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