

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

2007MSPB 93

Docket No. SF-0432-04-0668-I-2

**Craig Mahaffey,
Appellant,**

v.

**Department of Agriculture,
Agency.**

March 30, 2007

Craig Mahaffey, Santa Clara, California, pro se.

Debra J. Gilmore, Vallejo, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that affirmed the agency's action removing him from his position for unsatisfactory performance. For the reasons discussed below, we GRANT the petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, STILL SUSTAINING the agency's removal action.

BACKGROUND

¶2 Effective September 30, 2003, the agency placed the appellant, a GS-12 Resource Information Specialist, on a 90-day performance improvement plan

(PIP) based on its determination that his performance in a critical element of his performance standards, Managing Work Assignments, was unacceptable. Initial Appeal File (IAF), Tab 3, Subtab 4aaa. In the PIP, the appellant's immediate supervisor, Jayne Handley, noted that, despite her efforts to work with the appellant to improve his performance deficiencies, the appellant had been unable and unwilling to demonstrate his ability to perform at an acceptable level. *Id.* at 1. The PIP listed 15 assignments, dated from July 2002 to May 2003, that the appellant either failed to accomplish or performed inadequately. *Id.* at 3. The PIP further informed the appellant that he needed to complete seven specific and detailed tasks during the PIP period to bring his performance up to an acceptable level. *Id.* at 5-7. During the initial 90-day period, Ms. Handley held weekly progress meetings with the appellant. *Id.*, Subtabs 4m, 4t, 4cc-4ee, 4ii, 4nn, 4pp, 4rr, 4uu, 4yy-4zz. Further, at the appellant's request, the agency agreed to have a "third-party" management official, who was knowledgeable in the appellant's area of work but was not in his supervisory chain, participate in the weekly meetings to facilitate communication between the appellant and his supervisor. IAF, Tab 38, Subtab 1 at 3-4.

¶3 The agency determined that the appellant had not timely accomplished the work required of him by the PIP within the initial 90-day period and provided him an additional 20 days to complete the required assignments. IAF, Tab 3, Subtab 4u. Upon the expiration of the 110-day PIP period, the agency determined that the appellant's performance remained unacceptable and proposed his removal. *Id.*, Subtab 4f. After the appellant's oral response to the proposed removal, *id.*, Subtabs 4d-4e, the deciding official, Bernie Weingardt, issued a letter of decision removing the appellant, effective June 22, 2004. *Id.*, Subtab 4b. The removal action was never effected, however, because the appellant retired, effective June 22, 2004. *Id.*, Subtab 4a.

¶4 The appellant filed a Board appeal challenging the merits of the agency's decision. IAF, Tab 1 at 5;¹ *see Richards v. Department of Veterans Affairs*, 74 M.S.P.R. 17, 19 (1997) (under 5 U.S.C. § 7701(j), an individual retains the right to appeal a decision to remove him even if he retires in lieu of being removed). He also asserted various affirmative defenses, including that the agency subjected him to a hostile work environment, discriminated against him based on his age (over 40), sex (male), religion (Episcopalian), disability (acute stress disorder), and sexual orientation, denied him a reasonable accommodation, and retaliated against him for his prior equal employment opportunity (EEO) activity. IAF, Tab 1 at 5; Redocketed Appeal File (RAF), Tab 6 (Appellant's Submission of Additional Evidence and Arguments at 9).² The appellant requested a hearing, but later withdrew his request, asking that the administrative judge adjudicate the appeal based on the written record. IAF, Tab 1 at 2; Tab 21.³

¶5 After receiving closing briefs from the parties, IAF, Tab 38; RAF, Tabs 6, 9, the administrative judge issued an initial decision affirming the removal action, RAF, Tab 16 (Initial Decision (ID)) at 1-8. He found that the agency met its burden of proving, by substantial evidence, that the performance standards were valid, that those standards were communicated to the appellant, that the appellant

¹ The appellant also raised a forced retirement claim which he later withdrew. IAF, Tab 1 at 5; Tab 14 at 2.

² According to a letter submitted with the agency's response to the appellant's petition for review, the appellant withdrew his claim of disability discrimination during the proceedings below. Petition for Review File (PFRF), Tab 4 at 19. The record below, however, does not contain any documentation confirming this fact. In any event, we find that the appellant abandoned this claim, Redocketed Appeal File (RAF), Tab 6, and note that he makes no attempt to resurrect it on review, PFRF, Tab 1.

³ After the appellant filed his Board appeal, he filed an EEO complaint, alleging that the agency discriminated against him based on his age, sex, religion, and reprisal for prior EEO activity when his supervisor allegedly caused him to be removed from the Gay and Lesbian Employee Advisory Council (GLEAC), on which he served as a representative from the Department of Agriculture. RAF, Tab 6 at 50-81.

failed to meet one critical element of his position, and that he was given a reasonable opportunity to improve his performance. ID at 3-6. The administrative judge further found that the appellant had not shown that the agency denied him due process or committed harmful procedural error. ID at 6-7. With respect to the appellant's allegations of hostile work environment, the administrative judge found that the appellant "did not connect his broad workplace complaints to his performance and, therefore, those matters are deemed irrelevant to this appeal." ID at 7. The initial decision did not directly reference the appellant's discrimination or retaliation claims nor did it provide the appellant with mixed-case appeal rights.⁴

¶6 In his petition for review, the appellant argues that the administrative judge failed to adjudicate his allegations of discrimination, including his allegation of discrimination on the basis of sexual orientation, political beliefs, and participation in an organization known as USDA GLOBE (Gay, Lesbian or Bisexual Employees), and retaliation. PFRF, Tab 1 at 2-6. Additionally, he submits new documentation, including the agency's April 15, 2005 Response to the Appellant's First Set of Interrogatories from the Equal Employment

⁴ During the proceedings below, the appellant filed a motion to "replace" the agency's representative. IAF, Tab 17. The appellant based his argument on the fact that the agency's representative played an active role in the issuance of the PIP by drafting the initial and final versions of the PIP. *Id.* at 6. The appellant further alleged that the agency's representative may have counseled agency officials with respect to their options upon completion of the PIP period and could be called as a witness at a hearing due to her role in the agency's decision-making process. *Id.* at 2-3, 16. The agency argued, inter alia, that the motion should be denied as untimely filed. IAF, Tab 19.

The administrative judge did not rule on the appellant's motion below. Notwithstanding the administrative judge's failure to adjudicate the appellant's motion, we find that the motion was untimely filed because his challenge to the representative's participation in the appeal was filed more than fifteen days after the date of service of the agency's designation, despite the fact that the appellant knew, upon the agency's selection of a representative, of her prior involvement in the PIP. *See* 5 C.F.R. § 1201.31(b); IAF, Tab 3 at 2; Tab 17 at 9-12.

Opportunity Commission (EEOC) proceeding, and the appellant's Response to the Agency's First Set of Interrogatories from the Board proceedings below. PFRF, Tab 1 at 24-42. The appellant has not shown, however, that the information contained in the new documents or the documents themselves were unavailable despite his due diligence before the record closed. Therefore, we need not consider them. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989). The remaining documents are already a part of the record below and, on that basis, do not constitute "new" evidence. PFRF, Tab 1 at 43-44; RAF, Tab 9 at 71-72; *see Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980).⁵ The agency has responded in opposition to the appellant's petition. PFRF, Tab 4.

ANALYSIS

The administrative judge did not err in finding that the agency proved that the appellant's performance was unsatisfactory in a critical element of his performance standards.

¶7 An agency may rely on either Chapter 75 or Chapter 43 of Title 5 of the United States Code to take a performance-based action. *Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (en banc). For the Board to sustain the agency's action in a Chapter 43 case, the agency must show by substantial

⁵ The appellant also alleges that several of the administrative judge's rulings constituted harmful error. PFRF, Tab 1 at 8-12. In this connection, the appellant contends, inter alia, that the administrative judge: (1) "denied [him] access to formerly cooperative witnesses and allow[ed] the agency representative to intimidate them into silence[;]" (2) ruled on the agency's motion for sanctions without allowing ten days for him to respond and failing to subsequently consider his response; and (3) ruled on the agency's motion for sanctions after the appeal had been dismissed without prejudice and before it had been refiled. *Id.* We need not further consider these arguments because the appellant does not allege, and our review of the record does not show, that he preserved these matters for review by timely objecting below. *See Burge v. Department of the Air Force*, 82 M.S.P.R. 75, ¶30 (1999). In any event, the appellant has not shown that any procedural error adversely affected his substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

evidence that the appellant's performance fails to meet the established performance standards in one or more of the critical elements of his position. *Harvey v. Department of the Navy*, 65 M.S.P.R. 120, 124 (1994). It must also show that: (1) The agency established performance standards and critical elements and communicated them to the appellant at the beginning of the performance appraisal period; (2) the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him an adequate opportunity to improve; and (3) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element. *Lovshin*, 767 F.2d at 834.⁶ Substantial evidence is the degree of relevant evidence that 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). Substantial evidence is a lesser standard of proof than preponderance of the evidence and, to meet this standard, the agency's evidence need not be more persuasive than that of the appellant. *Lovshin*, 767 F.2d at 834.

¶8 On review, the appellant raises several challenges to the administrative judge's decision to affirm the removal action. PFRF, Tab 1. Specifically, he claims that the administrative judge failed to consider his argument that the agency changed the subjective performance requirements during the PIP; erred by considering the finding of the third-party observer that he did not complete the assignments required by the PIP, which, he argues, was based on misinformation given to the third-party observer by his supervisor; and misinterpreted certain evidence and disregarded other evidence. *Id.* at 12-22. These arguments, however, are nothing more than mere disagreement with the administrative

⁶ An agency must also show that its performance management system has been approved by the Office of Personnel Management when such approval is specifically challenged by the appellant, but here the appellant does not raise such a challenge. *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶¶ 11-12 (1999).

judge's factual findings on the merits of the removal action and, therefore, do not warrant full review by the Board. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Moreover, the administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). In sum, the appellant has failed to show that the administrative judge made a prejudicial error in finding that the agency submitted substantial evidence that the appellant's performance was unacceptable in at least one critical element of his performance standards. Accordingly, we affirm the initial decision in that regard.

The administrative judge erred in failing to address the appellant's affirmative defenses.

¶9 An administrative judge must make findings of fact and conclusions of law on all material issues of fact and law presented in the record. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). Affirmative defenses are material issues of fact and law that the administrative judge must address when an appellant timely raises them. *See Jones v. Department of the Army*, 68 M.S.P.R. 398, 402 (1995). Additionally, the Board has held that an appellant is entitled to a Board decision on the merits of his discrimination claims in accordance with the procedures set forth at 5 U.S.C. § 7702(a)(1). *Currier v. U.S. Postal Service*, 79 M.S.P.R. 177, 182 (1998), *overruled on other grounds by Redd v. U.S. Postal Service*, 101 M.S.P.R. 182, ¶ 5 (2006).

¶10 During the proceedings below, the appellant claimed that the agency discriminated against him in violation of 5 U.S.C. § 2302(b)(1) (on the bases of his age, religion, and retaliation for prior EEO activity) in connection with the removal action, thus alleging a causal connection between the alleged discriminatory actions and the removal. IAF, Tabs 1, 14; RAF, Tab 4, Deposition

Transcript at 35-38; Tab 6 at 9-11.⁷ He further alleged that “the agency discriminated against him on the basis of . . . conduct outside working hours that was unrelated to performance or merit (sexual orientation, political beliefs, and his participation in USDA GLOBE . . .) which is a prohibited personnel practice, and contends that the [a]gency therefore intentionally created a hostile work environment in an effort to force him to retire. . . .” RAF, Tab 6 at 9. He claimed that, when he tried to “defend his rights,” the agency “intentionally concocted documentation of unsuccessful performance as pretext to justify removing him from his position. . . .” *Id.*

¶11 Although the parties briefed these issues below, the administrative judge erred when he did not address them in his initial decision. Given the appellant’s waiver of a hearing, the record consists of the appellant’s deposition testimony (which was made a part of the record by the agency), affidavits of several agency employees, and voluminous documents related to the appellant’s various EEO complaints. IAF, Tab 38, Subtabs 1-6; RAF, Tabs 4, 6, 9. In addition, the appellant was placed on notice by various agency submissions regarding the correct burden and elements of proof required to establish his claims. IAF, Tab 3, Subtab 1, Response at 19-21; Tab 38 at 25-27; RAF, Tab 9 at 35-36. Documentation submitted by the appellant shows that he understood that he was raising a claim under 5 U.S.C. § 2302(b)(10) and that he bore the burden of proof on that claim. *E.g.*, RAF, Tab 6, Attach. 6c at 6, 14, 51, 67-68; *see Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ¶¶ 14-16 (2006) (declining to remand where the appellant knew the correct burden of proof and did not claim on review confusion regarding his burden of proof). Because the record is fully developed and the Board is not basing its findings on witnesses’ demeanor, remand is not necessary, and the appellant’s discrimination and retaliation claims

⁷ The appellant presented no argument or evidence below, or on review, regarding his claim of sex discrimination. IAF, Tabs 1, 14; RAF, Tab 6; Deposition Transcript.

can be adjudicated at this level. *See, e.g., Gregory v. Federal Communications Commission*, 84 M.S.P.R. 22, 25-26 (1999), *aff'd*, 232 F.3d 912 (Fed. Cir. 2000) (Table).

Alleged discrimination on the basis of age and religion and alleged reprisal for EEO activity in violation of 5 U.S.C. § 2302(b)(1).

¶12 An appellant must prove his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(iii). Discrimination in violation of section 2302(b)(1) on the bases of age and religion may be established by direct or circumstantial evidence. Direct evidence may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude; and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). An appellant with direct evidence of discrimination will prevail on his discrimination claim if he establishes that improper motivating factors played a part in the agency decision. *Id.* In a “mixed motive” case, i.e., a case in which the agency responds to an employee’s direct evidence of discrimination with a legitimate reason for its action, *see Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601, 604 (1994), even after unlawful discrimination is found, an agency may limit relief by proving by preponderant evidence that it would have taken the same action in the absence of the proven discrimination. *Arredondo*, 85 M.S.P.R. 113, ¶ 13.

¶13 In the absence of direct evidence, the Board typically uses the “pretext standard” of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). To establish a claim of prohibited employment discrimination, the employee first must establish a prima facie case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency’s stated reason is merely a pretext for prohibited discrimination. *Id.* However, where, as here, the record is fully developed on the issue of discrimination, the inquiry shifts from whether the appellant made a prima facie

case of discrimination to whether he met his ultimate burden of proving his affirmative defense, i.e., whether the agency's reasons for its actions were pretextual and motivated by unlawful discrimination. *See U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983); *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 51 (1998) (when a case involving a discrimination claim is past that stage of the proceedings where the parties have presented their evidence on the discrimination issue, the rebuttable presumption created by the establishment of a prima facie case drops from the case). Thus, the Board must review all of the evidence to determine whether the agency intentionally discriminated against the appellant. *See Aikens*, 460 U.S. at 714-15; *Jackson*, 79 M.S.P.R. at 51-52.

¶14 In support of his allegation of age discrimination, the appellant relied primarily on the affidavit of Mildred Otwell, an agency Information Resources Management Director, who stated that “[s]omeone on the [Resource Information Board of Customers] may have referenced wanting ‘new blood’ for [the Geographic Information System] because [the appellant] had issues.” IAF, Tab 3, Subtab 4c at 3; Tab 14 at 4. The appellant argued that, because Ms. Handley, his supervisor, and Mr. Weingardt, the deciding official, are members of the Resource Information Board referred to by the affiant, the at-issue statement is somehow attributable to them. IAF, Tab 14 at 4. Ms. Otwell's affidavit also indicated, however, that she never heard Ms. Handley say that the appellant was “too old” or make any type of reference to his age. The appellant's additional evidence of age discrimination includes his assertion he was perceived as having “baggage” and “issues.” *Id.*

¶15 In support of his allegation of religious discrimination, the appellant presented no evidence that his supervisor or the deciding official had knowledge of his religious affiliations, other than his bare assertion that they knew he was Episcopalian because he had an Episcopalian flag on his desk. IAF, Tab 14 at 4. During his deposition, he reasserted his claim that Ms. Handley considered his

religion in proposing his removal. RAF, Tab 4, Transcript at 34-35. He explained that “[t]here are many people in the Forest Service who do not share the tolerant views of the progressive Episcopalians” and “who are religiously conservative and do not appreciate having gays and lesbians openly serving in the Forest Service.” *Id.* at 35. He further testified that “[Ms. Handley] may have shared those views or she may have been following orders from another manager higher up.” *Id.* However, he later conceded that he had “no written facts” to support his allegation, and, when asked whether he knew that Ms. Handley shared the allegedly intolerant views, he responded, “It’s a possibility that I have considered.” *Id.*

¶16 In response to questions concerning the basis for his allegation that Mr. Weingardt took his religion into account during the removal process, the appellant testified, “To the extent that he’s worked in Region 4, Salt Lake City, Utah, . . . I believe he may share some of the same views that other conservative managers in the Forest Service share.” RAF, Tab 4, Transcript at 35-36. When asked whether he had any information regarding whether Mr. Weingardt used those views in making his decision to remove him, the appellant replied, “I don’t have any information that he didn’t.” *Id.* at 36.

¶17 Upon review of the appellant’s evidence and the agency’s evidence supporting the reasons for its action, we find that the appellant failed to prove discrimination on the basis of age or religion. In her sworn affidavit, Ms. Handley stated that, before the PIP was instituted, the appellant “routinely did not complete work that [she] assigned him[,]” “disregarded [her] authority[,]” chose to work on items he thought were important, leaving work she assigned unfinished, and became “abusive and insulting” when she tried to discuss his work plan with him. IAF, Tab 38, Subtab 2 at 3-4. Ms. Handley further attested that, despite the appellant’s inappropriate behavior, she afforded him several opportunities to improve before placing him on the PIP. *Id.* at 4-5. During the PIP period, Ms. Handley and other agency officials asserted that they exerted

significant effort working with the appellant to improve his performance, including weekly meetings, the involvement of a neutral third-party, and regular communications to the appellant regarding the expectations listed in the PIP. IAF, Tab 3, Subtabs 4g-4h, 4j-4n, 4t-4u, 4w-4x, 4cc-4ee, 4ii, 4nn, 4pp, 4rr, 4uu, 4yy-4zz. Ms. Handley prepared memoranda stating that these efforts were met with contention, lack of cooperation from the appellant, and his continued failure to complete work assignments. *Id.*, Subtabs 4pp, 4ss, 4uu, 4yy-4zz; Tab 38, Subtabs 1-3, 6. The agency's reasons for proposing the appellant's removal included written assessments of the appellant's performance submitted by Ms. Handley and the third-party observer. IAF, Tab 3, Subtab 4j; Tab 38, Subtab 3.

¶18 Additionally, Mr. Weingardt's affidavit states that his decision to remove the appellant was based on the appellant's documented unacceptable performance. IAF, Tab 38, Subtab 1. Specifically, Mr. Weingardt found that the work the appellant was required to complete during the PIP was reasonable and consistent with the type of work a GS-12 would be expected to complete. *Id.* at 5. He further stated that the appellant was given a full and fair opportunity to succeed and was repeatedly advised of what was required to succeed. *Id.* at 5-6. In making the decision to remove the appellant, Mr. Weingardt found that the appellant did not submit acceptable, quality work within the deadlines established by the PIP and, further, failed to complete two of the assigned projects. *Id.* at 6. Both Ms. Handley and Mr. Weingardt's assessments of the appellant's performance were shared by the neutral third-party. *See* IAF, Tab 3, Subtab 4h.

¶19 We have carefully considered the appellant's evidence in support of his claims that the agency discriminated against him on the basis of age and religion and the agency's reasons for its action. We find that the appellant's evidence of age discrimination, the possibility that an agency official may have mentioned wanting "new blood" and that the appellant had "issues," falls short of proving that the agency's stated reason for its removal action was merely a pretext for prohibited age discrimination. We also find that the appellant's bare assertion

that the agency officials knew that he was Episcopalian because he had an Episcopalian flag on his desk also falls short of proving that the agency's stated reason for removing him was a pretext for discrimination on the basis of religion. We therefore find that the appellant failed to show that the agency intentionally discriminated against him on the basis of age and religion.

¶20 To prove retaliation for engaging in EEO activity, an appellant must show by preponderant evidence that he engaged in protected activity, the accused official knew of such activity, the adverse action could, under the circumstances, have been retaliation, and after carefully balancing the intensity of the motive to retaliate against the gravity of the misconduct, or inadequacy of the performance of duties, a genuine nexus is established between the protected activity and the subsequent action. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Williams v. Social Security Administration*, 101 M.S.P.R. 587, ¶¶ 11-12 (2006). Where, as here, however, the record is complete on the issue of retaliation, the Board's inquiry proceeds to the ultimate question of whether, upon weighing the evidence presented by both parties, the appellant has met his overall burden of proving retaliation. *See Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005).⁸

¶21 The appellant argued below that the agency "planned and executed" the PIP and his removal "in reprisal for [his] prior EEO activity." RAF, Tab 6 at 9. According to the appellant, his prior EEO activity included the filing of an EEO complaint in 2003.⁹ *Id.* at 10-11; RAF, Tab 4, Transcript at 36-39. At his

⁸ To the extent that *Simien*, 99 M.S.P.R. 237, ¶ 28, suggests that the Board recognizes a claim of retaliation for filing an EEO complaint only under 5 U.S.C. § 2302(b)(9), we hereby clarify our holding in that case, and find that a claim of retaliation for filing an EEO complaint is cognizable under both §§ 2302(b)(1) and 2302(b)(9). *See Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 12 (2005); *Parnell v. Department of the Army*, 58 M.S.P.R. 128, 130-31 (1993).

⁹ The appellant also alleged that his participation in USDA GLOBE and GLEAC constituted EEO activity. *See* RAF, Tab 4, Transcript at 37; Tab 6 at 9-10. Although

deposition, the appellant testified that he “strongly believe[d] that [his] EEO activity was causing difficulty for managers in the Forest Service by having to respond to backlash from the conservative Christian element in the Forest Service.” RAF, Tab 4, Transcript at 37. However, he admitted that the sole basis for his allegation that Mr. Weingardt considered his EEO activity in making the decision to remove him was his mere “belief.” *Id.* at 39.

¶22 Based on the evidence, we find that the appellant did not establish that either Ms. Handley or Mr. Weingardt had any motive, no less a significant motive, to retaliate against him based on his prior EEO activity. While he asserted, and Ms. Handley admitted, that during the PIP period she questioned him about the amount of time he was spending on EEO complaints, RAF, Tab 6 at 49, we do not regard such an inquiry as necessarily indicative of retaliatory animus, especially as it was raised in the midst of a PIP imposed as a result of the appellant’s documented performance deficiencies in the “managing workload” element of his job. *Id.*, Tab 9 at 45-46. Our review of the record indicates that these concerns were a reasonable response to the appellant’s work issues. *Id.*

Alleged discrimination involving sexual orientation in violation of 5 U.S.C. § 2302(b)(10).

¶23 The appellant alleges that agency officials Ms. Handley and Mr. Weingardt discriminated against him “on the basis of conduct outside working hours that was unrelated to performance or merit (sexual orientation, political beliefs, and his participation in USDA GLOBE, a DPM 252 employee organization)....” IAF,

many federal agencies incorporate their implementation of the government’s stated policies with regard to the prohibition against discrimination on the basis of sexual orientation into existing EEO frameworks, implementing the policy against sexual orientation discrimination is not EEO activity. *Cf. Gonzales v. Department of Housing & Urban Development*, 64 M.S.P.R. 314, 317-18 (1994) (EEO activities include filing an EEO complaint, testifying at another employee’s EEO hearing, and assisting an individual in pursuing an EEO complaint). We have therefore not considered these allegations as retaliation for EEO activity.

Tab 6. Such discrimination, he alleges is “(prohibited by Title 5, Section 2302(b)(10) as based on private conduct or imputed conduct which does not adversely affect his performance)....” PFRF, Tab 1¹⁰.

¶24 Because the appellant submits evidence based on speculation that provides neither direct nor indirect support for his allegation, his claim must fail. Title 5 U.S.C. § 2302(b)(10) provides that it is a prohibited personnel practice to: “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.” There is no Board precedent covering allegations of discrimination involving sexual orientation under this section. Nor do we find it necessary to establish such precedent in this case, where there is insufficient evidence to support a violation under any view of the statute.

¶25 Namely, the appellant testified that managers in the Forest Service did not appreciate having gays and lesbians openly serving in the Forest Service and that Ms. Handley “may have shared” intolerant views about gays and lesbians in the workplace. *Id.* at 35-36. The appellant also speculated that Mr. Weingardt shared the intolerant views of “other conservative managers in the Forest Service” by virtue of his working in the agency’s Salt Lake City office, and that those views influenced his decision to remove the appellant. *Id.* He further noted that members of CROSS [Christians Reaching Out in Service and Support] distributed “numerous communications” to Forest Service employees, including Forest Service managers, that were “disrespectful of gay and lesbian employees.” *Id.* at 38. He could only surmise, however, that Mr. Weingardt had actually seen these communications and, ultimately, agreed that his contention that Mr.

¹⁰ Discrimination on the basis of sexual orientation is not prohibited by Title VII of the Civil Rights Act, as incorporated into the Civil Service Reform Act at 5 U.S.C. § 2302(b)(1). *Morales v. Department of Justice*, 77 M.S.P.R. 482, 484 (1998).

Weingardt considered the CROSS communications in deciding to remove him was based, again, only on his mere “belief.” *Id.* at 38-39.

¶26 Given, as discussed at length above, the fact that Ms. Handley had ample reason to propose the appellant’s removal, and the further fact that Mr. Weingardt had ample reason to effect his removal based on his performance, we find that the appellant has not shown that the gravity of his performance deficiencies was outweighed by any motive to discriminate against him. *See Simien*, 99 M.S.P.R. 237, ¶ 40. Therefore, he has not proven his affirmative defense.

ORDER

¶27 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 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 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:

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