

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

2007 MSPB 278

Docket No. SF-0432-06-0735-I-2

**Robbie D. McGowan-Butler,
Appellant,**

v.

**Department of Justice,
Agency.**

November 30, 2007

David S. Handscher, Esquire, San Francisco, California, for the appellant.

Rachel A. Bouman, Esquire, Washington, D.C., for the agency.

BEFORE

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

Chairman McPhie issues a separate dissenting opinion.

FINAL ORDER

The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

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

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

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

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

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

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Robbie D. McGowan-Butler v. Department of Justice

MSPB Docket No. SF-0432-06-0735-I-2

For the reasons given below, I do not agree with the majority's decision to deny the agency's petition for review.

BACKGROUND

The agency removed the appellant from her GS-9 Industry Operations Investigator position for unacceptable performance in two critical elements: (1) Plans and Manages an Inventory of Assignments; and (2) Develops Cases Using Current Inspection/Investigative Techniques or Procedures. On appeal, the administrative judge (AJ) reversed the action. Specifically, the AJ held that Critical Element (1) is invalid because it does not define the Minimally Successful level of performance that is required to avoid removal. The AJ further found that the appellant was performing at the Fully Successful level on Critical Element (2) before the agency put her on a performance improvement plan, so the agency's charge as to that critical element also could not be sustained. I-2 File, Tab 8.

The agency argues in its petition for review that the Minimally Successful level of performance for Critical Element (1) can be inferred because the agency defined the Fully Successful and Unacceptable levels.* The majority denies the agency's petition for review, thereby allowing the initial decision to become final.

* The agency does not challenge the AJ's finding with respect to Critical Element (2), which is supported by Board law. *Powell v. Department of the Treasury*, 37 M.S.P.R. 78 (1988).

DISCUSSION

Performance standards must allow “accurate” measurement of employee performance based on “objective” standards that are communicated to the employee. 5 U.S.C. § 4302(b)(2). An agency may remove or demote an employee only for “unacceptable” performance. 5 U.S.C. § 4303(a).

An agency may choose to have from two to five levels in an employee’s performance standards. 5 C.F.R. §§ 403.206, 430.208(d). The Board has held that under a five-level system, an agency must define the Minimally Successful level of performance, because an employee cannot be removed or demoted for performance meeting that threshold; again, only “unacceptable” performance can form the basis for an action. *Donaldson v. Department of Labor*, 27 M.S.P.R. 293 (1985); *see also Jackson-Francis v. Office of Government Ethics*, 103 M.S.P.R. 183 (2006) (an employee working under a five-level system cannot be removed or demoted for failing to meet the Fully Successful level of performance).

In the present case, the AJ reversed the appellant’s removal on the ground that the agency never defined Minimally Successful performance in Critical Element (1). The performance standards for Critical Element (1) provide as follows:

FULLY SUCCESSFUL

Prepares for assignments by researching files and referencing materials.

Prepares required work plans, manages a varied inventory of assignments, and plans itineraries.

Responsibilities are executed in an efficient manner. Fails to meet assignment or progress report deadlines on no more than ten percent of assignments in a rating period.

Plans and responsibilities are executed without repeated guidelines.

UNACCEPTABLE

Fails to prepare for assignments by researching files or reference material.

Fails to prepare required work plans on more than ten percent of inspections in any rating period

Misses more than ten percent of assignment or progress report deadlines in a rating period due to poor planning or management of assignments or itineraries.

Failure to properly plan results in repeated unnecessary expenditure of resources. Repeated guidance is needed in order to finalize plans or complete responsibilities.

I-1 File, Tab 10, Ex. B at 3.

The AJ was not persuaded by the agency's argument that the Minimally Successful level could be inferred, or as the agency put it, "extrapolated," from its descriptions of the Fully Successful and Unacceptable levels. According to the AJ, there is no range of performance that could fall in between those two levels. I-2 File, Tab 8 at 9-10. The AJ was correct in this observation, and the appellant, who is represented by an attorney, does not challenge it on review. PFR File, Tab 5 at 3. Simply put, for the tasks described in Critical Element (1), performing below the level defined as Fully Successful equates to being Unacceptable. For example, missing assignment and progress report deadlines more than 10% of the time is Unacceptable, while missing them no more than (or "up to") 10% of the time is Fully Successful. Nothing falls between those two ranges.

Based on the foregoing, it is confusing to say that the agency failed to "define" the Minimally Successful level for Critical Element (1). In fact, there *was no* Minimally Successful level. As a practical matter Critical Element (1) did not actually have five levels, because there was just one level of performance below Fully Successful. The appellant's argument that Critical Element (1) is invalid thus elevates form over substance. The appellant had a right to notice of the minimum level of performance expected of her, 5 U.S.C. § 4302(b), and Critical Element (1) provided her with such notice. The appellant could not have reasonably believed that she would be safe from a performance-based action if she failed to meet the Fully Successful level. Accordingly, Critical Element (1)

is valid. Finally, *Donaldson* and *Jackson-Francis* do not control, because those decisions dealt with five-level rating systems.

CONCLUSION

I would grant the agency's petition for review, reverse the AJ's finding that Critical Element (1) is invalid, affirm the AJ's unchallenged determination not to sustain the agency's charge under Critical Element (2), and remand the appeal for findings and conclusions on whether the appellant's performance under Critical Element (1) was Unacceptable.

Neil A. G. McPhie
Chairman