UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 49

Docket No. DE-0432-07-0345-M-1

Floyd J. Adamsen,

Appellant,

v.

Department of Agriculture,

Agency.

April 5, 2011

Thomas F. Muther, Jr., Esquire, Denver, Colorado, for the appellant.

Alan B. Robinson, Beltsville, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision issued on remand from the United States Court of Appeals for the Federal Circuit that affirmed his removal for unacceptable performance under chapter 43. For the reasons set forth below, we GRANT the appellant's petition and REVERSE the initial decision. The removal action is NOT SUSTAINED.

BACKGROUND

¶2 Effective April 27, 2007, the agency removed the appellant from the position of Research Soil Scientist, GS-0470-13, for unacceptable performance.

In his appeal to the Board the appellant alleged, among other things, that the agency failed to establish that the Office of Personnel Management (OPM) approved the performance appraisal system under which he was removed. The administrative judge then assigned to the case found that, under *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶ 12 (1999), the appellant's challenge placed the burden on the agency to prove by substantial evidence that it had obtained the necessary approval. She found that the agency had met its burden by producing a September 10, 1986 letter from OPM approving its performance appraisal system, even though the agency had since made changes to that system. The administrative judge affirmed the action, finding that the agency had also established the remaining elements of its case. *Adamsen v. Department of Agriculture*, MSPB Docket No. DE-0432-07-0345-I-1 (Initial Decision, Nov. 8, 2007). The decision became final when the full Board denied the appellant's petition for review. *Adamsen*, 108 M.S.P.R. 575 (2008) (Table).

¶3 The appellant then petitioned the Federal Circuit for review of the Board's decision. *Adamsen v. Department of Agriculture*, 563 F.3d 1326 (Fed. Cir. 2009), *modified by* 571 F.3d 1363 (Fed. Cir. 2009). The Federal Circuit affirmed the Board's decision in part, but vacated the portion of the decision that found OPM had approved the performance appraisal system under which the appellant had been removed. *Id*. at 1334. The court reasoned that "[i]f an agency significantly alters a previously-OPM-approved performance appraisal system, OPM review of the agency's modifications is necessary to achieve compliance with the basic purpose underlying the OPM-approval requirement." *Adamsen*, 571 F.3d at 1364. The court found, however, that it could not determine from the record what changes the agency made to its approved performance appraisal plan, whether the agency was required to submit those changes to OPM for approval, whether it did submit those changes, whether OPM approved the changes, or whether the appellant had satisfied the *Daigle* standard by alleging that there was "reason to believe" that the agency was not in compliance with law. *Adamsen*, 563 F.3d at

1332. Accordingly, the court remanded the case for further adjudication on these issues. *Id*.

¶4 On remand, the administrative judge determined that: (1) the appellant met the *Daigle* standard by alleging there was reason to believe the agency had not obtained the required OPM approval; (2) the agency made significant changes to its approved performance appraisal system on November 16, 1995, when it issued Personnel Bulletin No. 430-1; and (3) the agency established by substantial evidence that OPM had approved those changes. Remand Appeal File (RAF), Tab 23 (Initial Decision, Apr. 15, 2010). Accordingly, the administrative judge sustained the action. *Id*. On petition for review, the appellant contends the administrative judge erred in finding that the agency established by substantial evidence that OPM had approved the changes. Petition for Review File (PFR File), Tab 1. The agency has responded. PFR File, Tab 3.

ANALYSIS

¶5 The appellant, a General Schedule (GS) employee, is among the employees covered under 5 U.S.C. chapter 43 subchapter I. *See* 5 U.S.C. § 4301(2); *see also* 5 C.F.R. § 430.202(a)(2). Under that subchapter, agencies are required, under regulations prescribed by OPM, to create performance appraisal systems that provide for periodic appraisals of job performance for covered employees and also permit their removal for unacceptable performance. 5 U.S.C. § 4302(a)(1), (b)(6); *see also* 5 C.F.R. § 430.204. OPM is required to review all such performance appraisal systems to determine whether they meet the requirements of the subchapter. 5 U.S.C. § 4304(b)(1); *see also* 5 C.F.R. § 430.210. If OPM determines that the system does not meet statutory and regulatory requirements, OPM is to "direct the agency to implement an appropriate system or to correct operations under the system, and any such agency shall take any action so required." 5 U.S.C. § 4304(b)(1), (3); *see also* 5 C.F.R. § 430.210(c). Pursuant to its statutory rule-making authority under 5 U.S.C. § 4305, OPM has

promulgated regulations that specify the requirements for performance appraisal systems, 5 C.F.R. § 430.204, and require it to review and approve such systems. 5 C.F.R. § 430.210. OPM's implementing regulations further require an agency to "[s]ubmit for approval a description of its appraisal system(s) as specified in § 430.204(b) of this subpart, and any subsequent changes that modify any element of the agency's system(s) that is subject to a regulatory requirement in this part." 5 C.F.R. § 430.209.

¶6 Consequently, in order to take a removal action under 5 U.S.C. chapter 43 subchapter I, the agency must first obtain OPM approval of the applicable performance appraisal system, including any significant changes made to a previously approved system. *See Adamsen*, 571 F.3d at 1364; *Griffin v. Department of the Army*, 23 M.S.P.R. 657, 661-62 (1984).[1] Ordinarily, the Board will presume that the agency is in compliance with this requirement, but where, as here, an appellant alleges that there is reason to believe the agency has not received OPM approval for its performance appraisal system or any significant changes to an approved system, it is the agency's burden to demonstrate that it has received the necessary approval. *Adamsen*, 563 F.3d at 1330-31; *Lee v. Environmental Protection Agency*, 115 M.S.P.R. 533, ¶ 5 (2010); *Daigle*, 84 M.S.P.R. at 630-31.[2]

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[1] The *Griffin* decision notes that the appeal was resolving "significant issues common to a large number of appeals [then] before the Board under 5 U.S.C. Chapter 43 with regard to removals or demotions for unacceptable performance," including "proof of a performance appraisal plan reviewed and approved by . . . [OPM]." *Griffin*, 23 M.S.P.R. at 659.

[2] The dissent states the appellant "has not identified any specific reason to believe the agency did not obtain approval for bulletin 430-1," suggesting that he failed to meet the *Daigle* standard: "the appellant merely insists on holding the agency to its burden of proof." Dissenting Opinion, ¶¶ 4, 8. As thoroughly explained by the administrative judge, however, including the agency's failure to produce in response to discovery any evidence that OPM had approved the applicable appraisal system, the appellant plainly met the *Daigle* standard as explained in *Mahaffey v. Department of Veterans Affairs*, 105 M.S.P.R. 347, ¶ 7 n.6 (2007) and *Gonzalez v. Department of Transportation*, 109

¶7 The agency must show OPM approval by substantial evidence. 5 U.S.C. § 7701(c)(1)(A); *Lee*, 115 M.S.P.R. 533, ¶ 5; *Griffin*, 23 M.S.P.R. at 663. The Board's regulations define substantial evidence as "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). Our reviewing court has described substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1300 (Fed. Cir. 2008). In *Bradley v. Veterans Administration*, 900 F.2d 233, 234 (Fed. Cir 1990), cited with approval in *Leatherbury*, the Federal Circuit explained substantial evidence as follows:

> Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 [. . .] (1938). Accordingly, it "*must do more than create a suspicion of the fact to be established ….*" *Labor Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 [. . .] (1939)[, *quoting*] *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951).[3]

M.S.P.R. 250, ¶ 6 (2008). RAF, Tab 23 at 5-8; *see Sanders v. Social Security Administration*, 114 M.S.P.R. 487, ¶ 11 n.2 (2010). The agency thus was required by law to meet "its burden of proof" and establish by substantial evidence that its performance-based removal was based on a performance appraisal plan reviewed and approved by OPM. The appellant cannot be required to prove that the appraisal system was not approved. *See Griffin*, 23 M.S.P.R. at 662 n.4, 663. The failure to have an approved appraisal system is not a trivial matter, as the failure to base unacceptable performance decisions upon standards established as part of an OPM-approved appraisal system could result in a prohibited personnel practice. *See Wells v. Harris*, 1 M.S.P.R. 208, 229-230, 243 (1979).

[3] In *Universal Camera*, the Supreme Court considered the standard for judicial review of factual findings under the federal Administrative Procedure and Taft-Hartley Acts. In noting that both statutes contained similar language requiring a reviewing court to find "substantial evidence" based on review of the "whole record," the Court concluded that Congress's inclusion of the direction to "consider the whole record" was a strong

Bradley, 900 F.2d at 234 (emphasis added).[4]

¶8 The record shows that by letter dated September 10, 1986, OPM approved the agency's plan for a performance appraisal system required under 5 U.S.C. § 4302. RAF, Tab 16, Agency Exhibit 1. OPM also approved the agency's plan for the performance appraisal system for Senior Executive Service (SES) employees required under 5 U.S.C. § 4312. *Id*. The September 1986 letter further stated that "[a]ny proposed changes to the . . . plans must be submitted to this office for prior approval if the change would affect a provision of the plan covered by regulation or law." *Id*. In another letter, also dated September 10, 1986, OPM approved the agency's plan for a third performance appraisal system, then required under 5 U.S.C. § 4302a, for employees under the now-obsolete

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signal that the courts must do more than rubber stamp an agency's factual findings. *Universal Camera*, 340 U.S. at 487-90. The Court also pointed to the committee reports of both houses that suggest courts should not rely on "suspicion, surmise, implications, or plainly incredible evidence" and indicated that "courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of the 'whole record.'" *Id*. at 484 n.17. Given the similarity in the definition of "substantial evidence" discussed *in Universal* Camera and that applicable to Board appeals of performance-based removals, this discussion in *Universal Camera* suggests the proper scope of the Board's review for "substantial evidence."

[4] The dissent criticizes our discussion of *Universal Camera* in part because it quotes the legislative history from the Taft-Hartley Act of "some sixty-five years" ago. As we noted, *Universal Camera* has been relied on by our reviewing court to explain that substantial evidence requires more than a "suspicion of the fact to be established." We believe the citation to *Universal Camera* by the Federal Circuit further suggests that our substantial evidence review should result in more than a rubber stamp for suspicion and speculation. The dissent has failed to provide any authority for the more deferential standard of "substantial evidence" review it suggests, other than general references to *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985) (en banc) and *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984), and the vague notion that Congress intended to "streamline chapter 43 cases" from the system that existed prior to the Civil Service Reform Act (CSRA) of 1978. As *Lovshin* explains, before the CSRA agencies essentially had to take the equivalent of chapter 75 adverse actions for performance, but in two separate time-consuming stages. Simplifying the process and lowering the burden of proof to "substantial evidence" for performance-based actions does not suggest that Congress intended "substantial evidence" to be a meaningless standard.

Performance Management and Recognition System (PMRS).[5] RAF, Tab 17, Appellant's Exhibit 2. On July 31, 1987, the agency issued Personnel Letter No. 430-15, which set out all three performance appraisal systems in a single document. RAF, Tab 17, Appellant's Exhibit 3. It is undisputed that the appellant, then a GS-11, was covered by the provisions of Personnel Letter No. 430-15 that applied to non-SES, non-PMRS employees. *See id*., § 1-2.

¶9 On September 30, 1993, Congress passed the Performance Management and Recognition System Termination Act, Pub. L. 103-89 (Sept. 30, 1993), abolishing the PMRS effective November 1, 1993, including its performance appraisal provisions. *See id*., § 3(b)(1)(B) (striking 5 U.S.C. § 4302a). As a consequence, employees formerly covered under PMRS became subject to the statutory requirements for performance appraisal under 5 U.S.C. § 4302. OPM in turn eliminated the PMRS performance appraisal regulations formerly codified at 5 C.F.R. part 430 subpart D. 58 Fed. Reg. 65531 (Dec. 15, 1993). In doing so, OPM stated that agencies could choose to keep their PMRS performance management plans for supervisors and management officials in grades 13-15, with certain preapproved technical revisions. *Id*. Otherwise, OPM indicated, "agencies should inform OPM and former PMRS employees if they would be covered by the components of their Performance Management Plans used for other General Schedule Employees." *Id*.

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[5] Title II of the Civil Service Retirement Spouse Equity Act of 1984, Pub. L. 98-615 (Nov. 8, 1984), established the PMRS as a distinct performance management system covering supervisors and management officials within grade GS-13, GS-14, or GS-15. *Id*., § 201(a), *codified at* 5 U.S.C. §§ 5401-10 (1985). Under the Act, agencies were required to create performance appraisal systems for PMRS employees, and to establish performance standards review boards charged with, among other things, assessing the appropriateness of PMRS performance standards. *Id*, § 202(a); *codified at* 5 U.S.C. § 4302a (1985). Notably, PMRS performance appraisal systems provided for a fixed appraisal period and an opportunity to respond in writing to an initial rating and obtain review of the rating by an employee at a higher executive level than the supervisor who issued the rating. *Id*.

¶10 On November 16, 1995, the agency issued Personnel Bulletin No. 430-1, updating the performance appraisal system for non-SES employees required under 5 U.S.C. § 4302 and 5 C.F.R. part 430 subpart A. *See* RAF, Tab 16, Agency Exhibit 2.[6] All employees formerly covered by the PMRS were now covered under the updated performance appraisal system, which deleted all references to PMRS and made no special provisions for employees who were or would have been covered under PMRS. *Id.* Thus, the agency elected not to preserve a distinct PMRS performance management plan. In addition to expanding the class of employees covered by the non-SES performance appraisal system, the agency made another significant change by permitting sub-agencies to establish a three or four-tiered summary rating system instead of the five-tiered system mandated by Performance Letter No. 430-15. *Compare id.*, § 2-7(a)(3) ("performance may be rated using either three, four, or five summary rating levels") *with* RAF, Tab 17, Appellant's Exhibit 3, § 2-7(a)(3) (defining "five required summary rating levels"). The performance appraisal system was also updated to incorporate revisions to Personnel Letter No. 430-15 published in Personnel Letters No. 430-16 and No. 430-17, but, as the latter two documents are not in the record, we cannot ascertain the nature of those revisions. *See* RAF, Tab 16, Agency Exhibit 2.

¶11 The cover page to Personnel Bulletin No. 430-1 issued on November 16, 1995, states that "[on] September 10, 1986, the Office of Personnel Management (OPM) approved the U.S. Department of Agriculture's (USDA) Performance Management Plan" and that "[a] committee to draft a USDA Performance Management System has been formed, and upon Office of Personnel Management approval, mission areas will be able to design their own Performance

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[6] We note there is no agency letter, memo or other written document in the record forwarding to OPM for approval Personnel Bulletin No. 430-1 or the agency's performance appraisal system contained in the bulletin.

Management programs within the parameters of the Departmental System."[7] *Id*. The record shows that the agency periodically reviewed Personnel Bulletin 430-1 for currency but made no further changes to its non-SES performance management system until October 1, 2007, after the appellant's removal. RAF, Tab 16, Agency Exhibits 3-5; RAF, Tab 21, Agency Exhibit 5.

¶12 The question before us then is whether the agency established by substantial evidence that it obtained OPM approval for the significant changes it made to its non-SES performance appraisal system in Personnel Bulletin No. 430-1. *See Adamsen*, 571 F.3d at 1364. Substantial evidence of an agency's performance appraisal system may consist of documentary and/or testimonial

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[7] The Board has held that an agency regulation stating its performance appraisal system was approved by OPM, in the absence of rebuttal by an appellant, is sufficient to find that an agency has met its burden of showing that it took its action under an OPM-approved system. *Campbell v. Department of Veterans Affairs*, 25 M.S.P.R. 556 n.* (1985); *see Chennault v. Department of the Navy*, 796 F.2d 465 (Fed. Cir. 1986) (same). As just explained, Personnel Bulletin No. 430-1 noted that the agency's "Performance Management Plan" was approved on September 10, 1986. Section 1-1a of Personnel Bulletin 430-1 also states that the regulations in Chapter 430 "constitute the Department's Performance Appraisal Plan" and "[t]his Plan has been approved by OPM . . . ." RAF, Tab 16, Agency Exhibit 2. As Personnel Bulletin 430-1 was issued in November 1995, the OPM approval mentioned in section 1-1a could not be in reference to an alleged OPM approval letter later issued in January 1996. The overall language of the Bulletin suggests that the agency did not believe it needed any approval of Personnel Bulletin 430-1 apart from the September 10, 1986 OPM approval of its earlier performance appraisal system. In spite of this language in Personnel Bulletin 430-1, the dissent repeats the unsubstantiated finding of the administrative judge that the Bulletin itself "contains a statement that the agency intended to submit the bulletin for OPM approval." We find no such statement. The Bulletin describes itself as "the Performance Appraisal component of the USDA Performance Management Plan" that "the [OPM] approved" "[o]n September 10, 1986." The Bulletin's vague reference to seeking "Office of Personnel Management approval" of a future "Performance Management System" to be drafted by a "committee" that had been "formed" does not suggest that the agency intended to seek OPM approval for the Performance Appraisal Plan that OPM had, according to the same Bulletin, already approved in September 1986. *Id*. The cover page to the Bulletin also plainly states that employees will be "covered by the provisions of this plan until a new program is approved" and contained an "EXPIRATION DATE [of] January 31, 1998," also suggesting an agency belief that OPM approval was not needed before implementation of the plan.

evidence. *Griffin*, 23 M.S.P.R. at 663. "Such evidence may be presented . . . in various forms, such as a letter from OPM stating its approval or an affidavit to that effect by an agency official with knowledge of the approval."[8] *Id.* n.5. After considering the record as a whole, we agree with the appellant that the agency did not make the required showing.

¶13 For reasons unexplained in the record, the agency failed to produce a letter from OPM approving the changes set forth in Personnel Bulletin No. 430-1 or any other direct evidence that the agency obtained the requisite approval.[9] The agency instead relies on the December 16, 1996 letter from an OPM official, Doris Hausser, which states, in relevant part:

> This is in response to your letter of December 5, 1996, submitting technical revisions to the attachment of the United States Department of Agriculture appraisal system approved on January 31, 1996. The revised attachment is accepted and has been appended to the original OPM Form 1631, replacing the attachment originally submitted with the OPM Form 1631.

RAF, Tab 21, Agency Exhibit 2. It may be possible to infer from Ms. Hausser's letter that OPM approved a performance appraisal system of some kind on January 31, 1996. However, we conclude that this letter creates nothing more than a suspicion that OPM approved the November 1995 appraisal system applicable to the appellant. As the appellant observes, there is nothing in Ms. Hausser's letter to indicate that the appraisal system "approved on January 31,

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[8] OPM approval also could be established by the direct hearing testimony of an agency official with knowledge of the approval. *Griffin*, 23 M.S.P.R. at 663 n.5. Although a hearing was held on the appellant's initial appeal below, the remanded appeal was decided on the written record without a hearing.

[9] This is especially troubling in light of the issues identified in the Federal Circuit's decision, the agency's clear burden to establish approval of its performance appraisal system and any significant changes, and considering that such evidence would likely be in the agency's control or within its ability to obtain from OPM. *See Griffin*, 23 M.S.P.R. at 662 (an agency is required to affirmatively prove OPM approval because "[i]nformation regarding such approval is peculiarly within the knowledge of the agency.").

1996" was the one described in Personnel Bulletin No. 430-1. The letter does not cite Personnel Bulletin No. 430-1 by name or make any reference to non-SES employees. *Cf. Alexander v. Department of Commerce*, 30 M.S.P.R. 243, 245 (1986), *overruled in part on other grounds by Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13 (2004) (inferring OPM approval of performance appraisal system based on OPM's reference to an agency letter requesting approval of "appraisal documents covering Senior Executive Service employees and general workforce employees"). Nor does the letter cite any statutes or regulations - e.g., 5 U.S.C. § 4302 or 5 C.F.R. part 430 subpart B - that would indicate the appraisal system in question was the one for non-SES employees, such as the appellant, as opposed to the performance appraisal system for SES employees which the agency issued separately on August 4, 1994. *See* RAF, Tab 16, Agency Exhibit 2. In short, it is impossible to ascertain from Ms. Hausser's letter itself what appraisal system OPM may have approved on January 31, 1996. This lack of clarity perhaps could be resolved by examination of the OPM Form 1631 or the December 5, 1996 letter to which Ms. Hausser refers, but the agency did not provide either these documents. *Cf. Lee*, 115 M.S.P.R. 533, ¶ 25 (the agency submitted evidence of OPM approval in the form of a copy of the agency's approval request, the OPM letter granting that request, and the OPM Form 1631).

¶14 It would be proper for the agency to support its contention that OPM approved its November 1995 performance appraisal system with an affidavit or declaration from a credible witness with actual knowledge of the approval. Indeed, probative hearsay evidence may meet the substantial evidence standard. *Griffin*, 23 M.S.P.R. at 663 n.5, *citing Borninkhof v. Department of Justice*, 5 M.S.P.R. 77 (1981). The agency provided an "affidavit" by Anita Adkins, senior policy Human Resources Specialist, who states that "[b]y letter dated January 31, 1996, Doris Hausser, Chief Performance Manager and Incentive Awards Division, OPM acknowledged approval of USDA's system." RAF, Tab 21, Agency Ex. 6. However, Ms. Adkins did not become responsible for the

agency's non-SES performance management policy until April 2006, and she plainly was not personally involved in the relevant events of 1995 and 1996. *See id*. Although Ms. Adkins states she reviewed "available files," she does not identify what files were or were *not* available, she does not assert that she personally saw or examined the alleged January 1996 OPM approval letter, nor does she otherwise explain the factual basis for asserting that OPM approved "USDA's [performance management] system" in a letter dated January 31, 1996.

¶15 We are cognizant that, in appropriate circumstances, an unrebutted affidavit or declaration under penalty of perjury may prove the facts it asserts. *See Schaefer v. U.S. Postal Service*, 42 M.S.P.R. 592, 595 (1989) (affidavit); *Woodall v. Federal Energy Regulatory Commission*, 30 M.S.P.R. 271, 273 (1986) (declaration under penalty of perjury). However, Ms. Adkins's alleged "affidavit" woefully fails to meet the requirements of an affidavit because it was not sworn before a notary public or other person authorized to administer oaths. The statement also fails to meet the requirements of a declaration pursuant to 28 U.S.C. § 1746, as it was not signed "under penalty of perjury"; Ms. Adkins's statement merely states: "I hereby declare that the information contained in the above Affidavit is true to the best of my knowledge, information and belief." 28 U.S.C. § 1746(2); *see e.g., Caretolive v. Food & Drug Administration*, 2011 WL 43646 (6th Cir., January 6, 2011), slip op. at 7. It is therefore nothing more that an unsworn statement, which we find entitled to little weight for the reasons we explain below.

¶16 Although hearsay evidence such as Ms. Adkins's statement may be admissible in Board proceedings, assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case. *Borninkhof*, 5 M.S.P.R. at 83-87. The Board generally evaluates the probative value of hearsay by considering various factors that include the availability of persons with firsthand knowledge to testify at the hearing, whether the out-of-court statements were sworn, whether the declarants were disinterested witnesses to the

events and whether their statements were routinely made, the consistency of the out-of-court statements with other statements and evidence, whether there is corroboration or contradiction in the record, and the credibility of the out-of-court declarant. *Vojas v. Office of Personnel Management*, 115 M.S.P.R. 502, ¶ 13 (2011); *see Social Security Administration v. Long*, 113 M.S.P.R. 190, ¶¶ 26-27 (2010) (citing *Borninkhof*, 5 M.S.P.R. at 87).

¶17 Ms. Adkins's unsworn statement, identifying no firsthand knowledge of the relevant events and no factual basis to support a claim that OPM had issued a letter in January 1996 approving the agency's November 1995 performance appraisal system, is on its face unreliable hearsay. We have considered the statement in light of the agency's significant, unexplained failure to produce any letter from OPM approving the updated performance appraisal system described in Personnel Bulletin 430-1. Especially also considering that the agency was able to produce OPM approval letters for both the appraisal system that originally covered the appellant and the system in effect after the appellant's removal, we do not find Ms. Adkins's unsworn, unsupported statement to be probative in establishing the requisite OPM approval for the agency's November 1995 appraisal system. Therefore, we give little weight to Ms. Adkins's statement.[10]

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[10] Ms. Adkins has identified no personal knowledge of the critical fact she asserts, i.e., OPM approval of the agency's performance appraisal system. She admittedly was not present during the relevant time period, she does not state she has personally seen the January 1996 letter, she does not identify any other basis for her to have personal knowledge of this crucial fact, and her statement was not given under oath or in the proper form for a declaration under penalty of perjury. Federal Rules of Evidence 602, providing guidance to the Board, states, in part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." We therefore give little weight to Ms. Adkins's similarly weak unsworn statement, lacking an adequate description of her personal knowledge. We further note that we have considered Ms. Adkins's unsworn, unsubstantiated assertion that OPM had approved the agency's performance appraisal plan in light of the agency's failure to produce the alleged January 31, 1996 OPM letter of approval, even though the administrative judge below granted the appellant's motion to compel the agency to produce such documentation. RAF, Tabs 10, 11.

¶18 A reasonable person might conclude that the mere temporal proximity between the November 15, 1995 issuance of Personnel Bulletin No. 430-1 and the January 31, 1996 date mentioned in Ms. Hausser's December 1996 letter provides some evidence that OPM approved the non-SES appraisal system that covered the appellant. This timing alone, however, creates no more than a suspicion that OPM approved the performance appraisal system issued in November 1995. We therefore find, considering the record as a whole, that a reasonable person could not reach the conclusion that OPM had, in fact, approved the agency's November 1995 performance appraisal system contained in Performance Bulletin 430-1. The agency thus has failed to meet its burden of proving by substantial evidence that OPM had approved the performance appraisal system applicable to the appellant at the time it took its removal action.[11]

¶19 Because the agency failed to establish by substantial evidence that it had obtained OPM approval for the significant changes it made to its performance appraisal system under 5 U.S.C. § 4302, its removal action must be reversed. *See Adamsen*, 571 F.3d at 1364; *Lee*, 115 M.S.P.R. 533, ¶ 24 (citing *Cole v. Internal*

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[11] The dissent asserts that "the Board has previously accepted *similar evidence* as substantial evidence that OPM had approved an agency's performance management system," citing *Ebron v. Department of the Army*, 29 M.S.P.R. 126, 128 (1985) (emphasis added). We disagree. Close examination of *Ebron* and an earlier case it relied on, *Wapinski v. Department of the Army*, 28 M.S.P.R. 616, 619-20 (1985), shows that the meager evidence submitted by the agency here is not similar to what the Department of the Army submitted in those two cases. In *Ebron*, the Board noted it had previously held in *Wapinski* that the same evidence later presented in *Ebron* was sufficient to establish proof of OPM approval. *Ebron*, 29 M.S.P.R. at 128. *Ebron* explained that the record contained the following evidence: (1) A September 5, 1980 letter from OPM stating that the agency's performance system was approved if certain revisions were made; (2) a March 23, 1984 letter from OPM indicating that *the* plan was approved; (3) an *affidavit* by the agency's Employee Relations Specialist stating that she had personally revised the appraisal plan, forwarded the amended plan to OPM on September 24, 1980, and that OPM had informed her the plan was approved. *Id.* We would have little difficulty finding the agency here has met its burden to establish OPM approval of its performance appraisal system if it had presented similar evidence to what the Army provided in *Ebron* and *Wapinski*.

Revenue Service, 25 M.S.P.R. 564, 565 n.* (1985)) (the harmful error doctrine does not apply to the issue of OPM approval of an agency's performance appraisal system).

ORDER

¶20 We ORDER the agency to cancel the appellant's removal and restore him to his former position effective April 27, 2007. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶21 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.

¶22 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).

¶23 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 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).

¶24 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.

¶25 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 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, www.cafc.uscourts.gov. 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.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.

DISSENTING OPINION OF MARY M. ROSE

in

Floyd J. Adamsen v. Department of Agriculture

MSPB Docket No. DE-0432-07-0345-M-1

¶1 At bottom, this case involves a disagreement about the meaning of the term "substantial evidence." The Board's regulations state that substantial evidence is "[t]he 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). In other words, when *no* reasonable person, considering the record as a whole, could find the evidence adequate to support the conclusion, the substantial evidence standard is not met. Thus, when the majority finds that the agency has not shown by substantial evidence that its performance system was approved by Office of Personnel Management (OPM), by implication it finds that no reasonable person could find on this record that OPM approved the agency's system. I believe that the majority misunderstands the substantial evidence standard. I also believe that the majority's decision ignores the clear intent of Congress to make performance-based actions under chapter 43 easier for agencies to prove than misconduct cases under chapter 75.

¶2 The agency has submitted three pieces of evidence in support of its contention that OPM approved Personnel Bulletin No. 430-1 by letter dated January 31, 1996. The first is Personnel Bulletin No. 430-1 itself, which contains a statement that the agency intended to submit the bulletin for OPM approval. Remand File (RF), Tab 21, Agency Exhibit 2 at 2-3. The second document is a December 16, 1996 letter from Doris Hausser, Chief of the Performance Management and Incentive Awards Division, Office of Employee Relations and Workforce Performance at OPM. That letter states that it is in response to the agency's December 5, 1996 request for approval of technical changes to the

performance appraisal system that OPM approved on January 31, 1996. RF, Tab 21, Agency Exhibit 2 at 1.

¶3 The third document is a February 1, 2010 unsworn declaration from Anita Adkins, a human resources specialist who has been responsible for non-SES performance management policy at the agency since April 2006. Ms. Adkins states that she "reviewed available files" and saw "no evidence of any period of time where [the agency] has operated under a performance management system that has not been approved by OPM." RF, Tab 21, Agency Exhibit 6. Ms. Adkins further states that OPM approved the 1995 revisions to the agency's system by letter dated January 31, 1996, and signed by Ms. Hausser. *Id.*

¶4 In *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶ 12 (1999), the Board held that agencies no longer need to submit proof that their performance management systems have been approved by OPM unless "an appellant alleges that there is reason to believe that an agency is not in compliance with the law." *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶ 12 (1999). The court in the instant case cited *Daigle* with approval. *Adamsen v. Department of Agriculture*, 563 F.3d 1326, 1330-31 (Fed. Cir. 2009). The appellant here has not identified any specific reason to believe that the agency did not obtain approval for bulletin 430-1; the appellant merely insists on holding the agency to its burden of proof.

¶5 Considering the record as a whole, the agency made changes to its performance management system on November 16, 1995; OPM approved a performance management system on January 31, 1996; the responsible human resources specialist reviewed the files and declared that the performance management system that OPM approved on January 31, 1996 was bulletin 430-1. The administrative judge found that the temporal proximity between the November 16, 1995 issuance of the bulletin and the January 31, 1996 approval of a performance management system was substantial evidence that OPM approved the bulletin on January 31, 1996. I would find that the temporal proximity

between the two events, as bolstered by the Adkins statement, constitutes substantial evidence that OPM approved the agency's performance management system. I believe that a reasonable person could reach this conclusion even though another reasonable person might not, and that the administrative judge correctly found that the agency met its burden of proof by substantial evidence.

¶6 The majority opinion identifies reasons why another reasonable person might find that the record is not sufficient. The Adkins statement is not sworn and does not contain all of the details that counsel might have elicited had Ms. Adkins been subject to cross examination. It would have been better if the agency had simply submitted the approval letter, and its failure to do so might cause a reasonable person to question the agency's tactics. However, the Board has previously accepted similar evidence as substantial evidence that OPM had approved an agency's performance management system. *Ebron v. Department of the Army*, 29 M.S.P.R. 126, 128 (1985) (absent rebuttal, a letter from OPM approving the agency's performance management system provided certain revisions were made, coupled with an affidavit from an employee relations specialist stating that she made those changes, submitted them to OPM, and OPM approved them, and a non-contemporaneous letter from OPM four years later stating that the system was approved, constituted substantial evidence that OPM approved the agency's performance management system). While the majority's view is reasonable, I believe that a reasonable person could also conclude on this record, despite its weaknesses, that the agency's evidence is sufficient.

¶7 I am also troubled by the broader implications of the majority's decision. Today's decision renders the substantial evidence test much more difficult to meet. This is contrary to the intent of Congress, which, as we know from the court's extensive discussion in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985) (en banc), and from our own discussion in *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984), was to streamline chapter 43 cases and make them easier for agencies to prove in exchange for affording employees additional

procedural rights. The majority's imposition of a more stringent standard of proof is inconsistent with Congressional intent.

¶8 In sum, I believe that a reasonable person could find, considering this record as a whole, that the evidence is sufficient to show that OPM approved the agency's performance management plan. I disagree with the majority's finding that the evidence is not sufficient, but I believe the majority's reasons are well-articulated and its position is reasonable. The substantial evidence standard by definition permits disagreement among reasonable persons. By elevating the substantial evidence test such that it does not allow for the reasonable views of others, I believe that the majority is acting contrary to statute. For that reason, I respectfully dissent.

_____
Mary M. Rose
Member