UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 5

Docket No. DE-0432-11-0095-I-1

Mary Ann Muff,

Appellant,

v.

Department of Commerce,

Agency.

January 19, 2012

Mary Ann Muff, Prescott Valley, Arizona, pro se.

Kardesha N. Bradley, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the appellant's removal for failure to maintain acceptable performance after she successfully completed a performance improvement period (PIP). For the reasons set forth below, we DENY the petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still reversing the agency's action.

BACKGROUND

¶2 The agency removed the appellant from the GS-4 position of Field Representative under chapter 43 procedures for failing to maintain acceptable performance in a critical element of her position. Initial Appeal File (IAF), Tab 9. The agency's charge relied on instances of unacceptable performance in critical element 1 (CE 1), Interviewing/Response Rate/Listing/Sampling, that occurred during a 1-month period in May 2010 after her earlier successful completion of the PIP and within a year of the advance notice that the agency was placing her on a PIP. IAF, Tab 18. The appellant had served the PIP from July 1 through October 31, 2009, for the same critical element, CE 1. *Id*. The critical element provides that the appellant "[c]ollects data for current surveys and/or other one-time surveys by contacting respondents by a designated personal visit or telephone call." IAF, Tab 18 at 61. The purpose of the surveys is to provide information on labor force characteristics of the U.S. population to obtain estimates regarding employment, unemployment, earnings, hours of work and other indicators. IAF, Tab 19 (Initial Decision) at 2. As a Field Representative, the appellant was charged with obtaining responses from the households by gaining their cooperation. *Id*. at 8. To perform at the minimally successful level in CE 1, the appellant's survey response rate had to be at an annual rate of 90%. IAF, Tab 18 at 28. The appellant's response rate for May 2010 was 87.50%. *Id*. The agency based the removal action on this 1 month of unacceptable performance in CE 1.

¶3 The appellant appealed the agency's action. IAF, Tab 1. She claimed that the agency's action was the result of harmful procedural error. *Id*. Based on the record developed by the parties, including hearing testimony, the administrative judge reversed the agency's action. Initial Decision (ID) at 11. He found the agency failed to prove by substantial evidence that the appellant's performance of the critical element in question was unacceptable. Specifically, he found the agency established by substantial evidence that the appellant's performance of

CE 1 in May 2010 was at the unacceptable level. ID at 9. He found further, however, that under the circumstances of this case, the appellant's performance for only 1 month was an insufficient basis on which to remove her under 5 U.S.C. § 4303(d) because the agency failed to consider her performance for any other month after her successful completion of the PIP. *Id*. He noted that the agency cited no authority for its contention that it could base a removal action on 1 month of performance without considering other post-PIP performance. *Id*. He also found that the "overwhelming" evidence of record shows that the appellant's cumulative performance for the 1-year period preceding the proposal to remove her was at the acceptable level. *Id*. at 11. With regard to the appellant's harmful error claim, he found she failed to prove it. He ordered the agency to afford the appellant interim relief if any party filed a petition for review of the initial decision. *Id*. at 14.

¶4 The agency has filed a petition for review. Petition for Review File (PFR File), Tab 1. It has attached to the petition evidence demonstrating its compliance with the interim relief order. *Id*. The appellant has filed a response in opposition to the petition. PFR File, Tab 5.

ANALYSIS

¶5 An agency may reduce in grade or remove an employee for unacceptable performance under 5 U.S.C. § 4303 when the agency proves by substantial evidence that: (1) The agency had performance standards that were approved by the Office of Personnel Management (OPM); (2) the appellant's performance fails to meet the established performance standards in one or more critical elements of her position; (3) the agency established performance standards and critical elements and communicated them to the appellant at the beginning of the performance appraisal period; (4) the agency warned the appellant of the inadequacies of her performance during the appraisal period and gave her an adequate opportunity to improve; and (5) after an adequate PIP, the appellant's

performance remained unacceptable in at least one critical element. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 6 (2008). The agency may remove an employee for unsuccessful performance under chapter 43 after the successful completion of a PIP if: (1) the instances of unacceptable performance are in the same critical elements involved in the PIP and (2) the agency's reliance for its action is limited to those instances of performance that occur within 1 year of the advance notice of the PIP. *Sullivan v. Department of the Navy*, 44 M.S.P.R. 646, 656-61 (1990).

¶6 Here, the appellant stipulated that OPM had approved the agency's performance appraisal system, her performance standards were communicated to her and were valid, and she was given a reasonable opportunity to improve her performance. ID at 7. Thus, there is only one issue still in dispute: whether, when the appellant's performance was acceptable at the end of the PIP, the agency may take an action within 1 year of the advance notice of the PIP based on 1 month of unacceptable performance in the same critical element without consideration of other months of successful performance during and after the successful PIP.

¶7 In *Sullivan*, 44 M.S.P.R. at 656, the Board held that, within certain important limitations, post-PIP performance may be relied on to sustain a chapter 43 action. The Board found that Congress did not intend that all performance after the close of the PIP should be disregarded for every purpose and indicated that both acceptable and unacceptable performance after the PIP could be considered by the agency. *Id*. at 657-58. The Board held that an agency may rely on instances of unacceptable performance in the same critical element or elements that occur within a year of the advance notice that an agency was placing an employee on a PIP, even after the successful completion of a PIP, to take an action against an employee under chapter 43 without affording the employee another opportunity to improve. *Id*. at 659.

¶8 Finally, the Board found that, although it had determined that post-PIP performance may be considered under some circumstances, no overall formula for application in such cases would be appropriate. *Id*. at 660-61. The Board found instead that it would determine on a case-by-case basis what constitutes substantial evidence of genuinely unacceptable performance in the context of the employee's annual performance plan. *Id*. The Board stated that a realistic application of the performance standards would govern any such inquiry. *Id*.

¶9 The agency agrees it was required to comply with *Sullivan*. It asserts, however, that the administrative judge improperly relied on *Brown v. Veterans Administration*, 44 M.S.P.R. 635, 642-43 (1990), to adjudicate the appeal. The agency's assertion is without merit. The administrative judge relied on the finding in *Brown* that explains the Board's holding in *Sullivan*. Specifically, the administrative judge relied on the holding in *Brown* that, if the administrative judge determines that the appellant performed the critical element acceptably during the PIP, he should then determine whether the appellant continued to perform that element acceptably thereafter and, if he finds that performance failures occurred after the PIP, he must determine whether those failures, in light of the appellant's performance during the year preceding the notice of proposed removal, amount to unacceptable performance. *Id*. at 644; ID at 9. In *Brown*, the Board noted that this holding was consistent with its decision in *Sullivan*. Thus, the administrative judge properly relied on *Brown* to the extent that it clarified the Board's decision in *Sullivan*. Consistent with the guidance in *Brown* and *Sullivan*, the administrative judge properly considered the appellant's performance during the 1 year preceding the notice of proposed removal. IAF, Tab 18 at 25; ID at 10-11. He correctly found that the appellant's survey response rate during that interval, including the response rate for May 2010, was better than the 90% required for a minimally successful rating. ID at 11.

¶10 Moreover, the administrative judge relied on the fact that the performance standard under which the appellant performed refers to a cumulative response rate

and found that assessing the appellant's performance based on a single month ignored the performance standard's requirement that performance be assessed based on the appellant's cumulative performance. This is consistent with the guidance in *Brown* and relevant to this case. If the appellant demonstrated acceptable performance during her PIP but failed to sustain it thereafter, the appellant's overall performance during the year then must be evaluated under the annual standard. The Board held that the agency's action can be sustained only if the evidence shows her performance was unacceptable under the annual standard for this critical element. Here, the appellant's performance was measured monthly, but it was evaluated on an annual basis. IAF, Tab 18 at 60. Under *Brown* and *Sullivan*, the administrative judge properly found that the agency's action based on a single month measure of performance applied the annual performance standard in an unreasonably strict manner. ID at 10. The administrative judge properly determined, consistent with *Sullivan*, that the agency's showing did not constitute substantial evidence of genuinely unacceptable performance in the context of the employee's annual performance plan. *Sullivan*, 44 M.S.P.R. at 656.

¶11 The agency asserts that this case is similar to *Thomas v. Department of Defense*, 95 M.S.P.R. 123 (2003), *aff'd*, 117 F. App'x 722 (Fed. Cir. 2004), and that the administrative judge erred in not finding that *Thomas* controlled. Critical Element 4 (CE 4) of the performance standards for Thomas's position as a Sales Store Checker required that she ensure that the amount of money in her till at the end of the day was accurate. *Id*. at 126. The agency placed Thomas on a PIP for unsuccessful performance in CE 4 and she successfully completed the PIP in August 2001. *Id*. at 125. Two months later, in November 2001, she failed in the same critical element as had triggered the PIP by having more than 8 days when her till had variances. *Id*. at 126-27. The following month, December 2001, Thomas again failed in CE 4, this time by a variance which exceeded $50 in that month. *Id*.

¶12 The Board found that the agency warned Thomas after she completed the PIP in August 2001 that if her performance in CE 4 again fell below the acceptable level before August 2002, it could propose her removal. *Id*. The Board noted the evidence that Thomas's performance in CE 4 fell below an acceptable level only about 2 months after she completed the PIP and that she continued to fail in CE 4 for 2 months in a row. Additionally, the Board relied on testimonial evidence that checkers were not subjected to action for failing the standard in only 1 month. Under these circumstances, the Board found that the agency provided the appellant with a reasonable opportunity to demonstrate acceptable performance before it removed her and that the agency proffered substantial evidence to show that this performance standard was not applied in an unreasonably strict manner. The Board found that this post-PIP evidence of failing to meet performance standards for 2 successive months shortly after successful completion of a PIP constituted substantial evidence that Thomas's performance within the year of her successful completion of the PIP fell short of her standard. *Thomas*, 95 M.S.P.R. at 130. The Board sustained the agency's removal action. *Id*.

¶13 We find that this case is distinguishable from *Thomas*. In *Thomas*, the appellant performed unacceptably within just 2 months after she successfully completed the PIP and the agency did not propose Thomas's removal until she had performed unsuccessfully for 2 successive months after the PIP. Here, the appellant performed acceptably during the 4-month PIP and for 6 months thereafter. Further, the appellant's performance was unacceptable for only 1 month, May 2010, not 2 months in succession, and she consistently performed acceptably after May 2010. As the administrative judge noted, the appellant received an annual performance rating of Level 3, the fully successful level, for the appraisal year that included the PIP and May 2010, the month that the appellant's performance was measured as unacceptable. Further, she received a performance award for her performance that included the PIP and May 2010. As

noted above, the Board stated in *Sullivan*, 44 M.S.P.R. at 656, that it necessarily will have to determine on a case-by-case basis whether an agency's evidence of post-successful PIP performance constitutes substantial evidence of genuinely unacceptable performance. *Id*. Comparing the circumstances in *Thomas* with those here, we find that *Thomas* presents a different set of facts and that, while the agency's factual showing in *Thomas* constituted substantial evidence of unacceptable performance under the particular facts of that case, the agency's factual showing in this case failed to show unacceptable performance by substantial evidence.

ORDER

¶14 We ORDER the agency to cancel the removal and to restore the appellant effective November 15, 2010. *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.

¶15 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, 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.

¶16 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).

¶17 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).

¶18 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.

¶19 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**

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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