

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

JORGE L. GARZA,  
Appellant,

DOCKET NUMBER(S)  
DA-0432-12-0007-I-1  
DA-531D-11-0596-I-2

v.

DEPARTMENT OF AGRICULTURE,  
Agency.

DATE: November 20, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Bobby Devadoss, Esquire, Dallas, Texas, for the appellant.

Bradly Siskind, Esquire, Riverdale, Maryland, for the agency.

Davina Minnix, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

---

<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).<sup>2</sup> After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

During the proceeding below, the appellant challenged the agency actions denying his within grade increase and removing him from his position for unacceptable performance. The administrative judge affirmed both actions.

The appellant argues on review that his performance was not unacceptable so as to justify denial of his within-grade increase (WIGI). It is true, as he alleges, that his supervisor Jacqueline Freeman rated his performance as fully successful during his mid-year review. However, as she subsequently explained to him, the reason she did not rate his performance as marginal at that time was so that he would not be denied a step increase for FY-09, but that almost immediately his performance deteriorated, compelling her to place him on 100% review because of the need to improve the quality of his reports of investigation.

---

<sup>2</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

Initial Appeal File (IAF) 432, Tab 15 at 2-6, Appellant's Exhibit A. Thereafter, Freeman reviewed all of the appellant's reports according to the Investigative and Enforcement Services (IES) Case Report Review Worksheet, providing for each a numerical score that represented its quality, measured against the requirements of the IES Manual, and including specific comments addressing specific deficiencies. *Id.*, Tab 6, Exhibit 47; *see* Tab 12, Exhibits 16-20, 23, 30-37, 40-41. Freeman discussed the appellant's performance with him at the end of the FY-10 rating period and informed him of the basis for his unacceptable rating.

The record supports the administrative judge's finding that the agency showed by substantial evidence that the appellant's rating of "Does not Meet" in critical element 1 was correct and that his failure to meet the standard in that element meant that his summary rating was therefore not "Fully Successful." [5 C.F.R. § 430.208](#)(b)(1). The administrative judge properly found that, because the appellant's performance rating for FY-10 was not "Fully Successful," his performance was not at an acceptable level of competence and the agency properly denied his WIGI. [5 C.F.R. § 531.404](#)(a); Initial Decision (ID) at 11-14. This is so despite the fact that the appellant's mid-year rating was "Fully Successful." *Cf. Lee v. Department of Labor*, [110 M.S.P.R. 355](#), ¶ 11 (2008) (an agency is not estopped by a prior satisfactory appraisal from taking a performance-based action against an employee at any time during the appraisal cycle, where his performance in a critical element becomes unacceptable).

The appellant also argues that the instances of unacceptable performance referenced in the notice of proposed removal that the administrative judge upheld all occurred prior to the performance improvement plan (PIP) and that they therefore could not have been relied upon to support the agency's case. The notice of proposed removal states that it is based on the appellant's performance during and following the PIP (December 6, 2010 to April 5, 2011, and after). IAF 432, Tab 6, Subtab 4d. The administrative judge correctly found that the first instance of unacceptable performance occurred before the PIP and that the

second occurred during the PIP and was based on corrections to an earlier-submitted unacceptable report that were ultimately deemed acceptable. She therefore correctly concluded that they did not support a finding that the appellant's performance during the PIP was unacceptable. ID at 15-16.

The appellant argues that the remaining three instances upheld by the administrative judge similarly should not be considered. We disagree. While Instance 3 referred to report TX-10363 that the appellant submitted just prior to the PIP, the agency focused on the revised version that the appellant submitted during the PIP, which contained additional errors that required correction. IAF 432, Tab 6, Subtab 4d. Freeman testified to these errors, to the corrections she required, and to the appellant's further failure to make the necessary revisions. Compact Disc (CD) 1; IAF 432, Tab 6, Subtab 4e; Tab 12, Exhibit 29. After careful consideration, the administrative judge found that Freeman's credible testimony established that she found the appellant's work on TX-10363 during the PIP to be unacceptable and that the appellant's contrary testimony was contradictory and not consistent with the record. ID at 16-21. His mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133-34 (1980).

Instance 4 addressed the appellant's work on report TX-10362. IAF 432, Tab 6, Subtab 4d. The proposal noted specific errors in the report, *id.*, and Freeman testified to these errors, which she discovered upon receiving the report during the PIP, stating she demonstrated to the appellant that they all required correction, CD 1; IAF 432, Tab 6, Subtab 4d. Although the appellant disputed that the errors made the report unacceptable, the documentary and testimonial evidence supports the administrative judge's finding that the agency established that TX-10362 was deficient as set out in the proposal notice. ID at 21-26.

Instance 5 alleged that, during the PIP, the appellant submitted a form to request additional information in connection with his work on report TX-10362

but that the request itself contained errors. IAF 432, Tab 6, Subtab 4d. The record contains evidence of these errors, *id.*, Subtab 4e, Exhibits 23, 24, and Freeman testified to them and how they reflected the appellant's refusal to follow her directions and the requirements of the IES manual. CD 1. Although the appellant disputes the errors, the documentary and testimonial evidence supports the administrative judge's finding that the agency established that the appellant made the errors cited in instance 5. ID at 26-27. As with the findings in all three instances of unacceptable performance, the agency is only required to prove them by substantial evidence, a lower standard of proof than preponderant evidence. *Belcher v. Department of the Air Force*, [82 M.S.P.R. 230](#), ¶ 4 (1999).

The appellant only vaguely challenges the sufficiency of the opportunity to improve afforded him by the agency. The record reflects that, during the 120-day PIP, Freeman had weekly teleconferences with the appellant about his work and provided him written feedback. *See, e.g.*, IAF 432, Tab 6, Subtab 4e, Exhibits 3, 11-12, 21, 24-25, 30-32, 36-38, 41, 43. The appellant also received additional training courses. *Id.*, Exhibits 13-16, 32. Although he questions the extent of the feedback he received, the evidence of record supports the administrative judge's finding that the agency established by preponderant evidence that it provided the appellant a reasonable opportunity to improve his performance during the PIP. *See Lee v. Department of Labor*, [110 M.S.P.R. 355](#), ¶ 7 (2008); ID at 28-29.

### **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 Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, NE  
Suite 5SW12G  
Washington, D.C. 20507

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. § 2000e-5\(f\)](#) and [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, [www.cafc.uscourts.gov](http://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.