UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEONARD N. BOGGESS, appellant, v. DEPARTMENT OF THE AIR FORCE, agency.	DOCKET NUMBER DA04328610089 Date: AUG 19 1986

BEFORE

Maria L. Johnson, Acting Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The agency timely petitioned for review of the March 7, 1986, initial decision which reversed the agency's action removing appellant from his position. For the reasons discussed below, the Board DENIES the petition for failure to meet the criteria for granting review set forth at 51 Fed. Reg. 25,158 (1986) (to be codified in 5 C.F.R. § 1201.115).[1/]

BACKGROUND

Appellant was removed from his position as Housing Manager at Brooks Air Force Base, Texas, based on his alleged unacceptable performance of one of the critical elements of his revised performance plan. Appellant appealed his removal to the Board's Dallas Regional Office. After a hearing, the

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1/ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-25,172 (1986) for the text of all references to this part.

administrative judge[2] reversed the agency's action.[3] Citing *Sandland v. General Services Administration*, 23 M.S.P.R. 583 (1984), the administrative judge found that the agency, by simultaneously presenting appellant with revised performance standards (substantially different from the prior standards) and notifying him that his performance was unacceptable and that he had thirty days to improve, failed to fulfill the substantive requirement of 5 U.S.C. § 4303 to provide appellant with a reasonable opportunity to improve. I.D. at 4. The administrative judge concluded that the agency was required to evaluate appellant's performance under the revised standards before it could give him a reasonable opportunity period (ROP) in which to improve his performance under those new standards. *Id.*

ISSUE

Did the administrative judge correctly find that appellant had been denied a reasonable opportunity to improve under the revised standards?

ANALYSIS

The administrative judge correctly determined that appellant had been denied a reasonable opportunity to improve under the revised standards because he did not receive a reasonable evaluation period before being required to improve his performance.

2/ Effective May 8, 1986, the working title for the Board's Regional Office attorney-examiners has been changed from "presiding official" to "administrative judge."

3/ Appellant alleged that his removal was the result of age discrimination and reprisal. However, appellant's allegations of discrimination, standing alone, were found insufficient to support a showing of discrimination. Initial Decision (I.D.) at 4-5 (citing *Simmons v. Social Security Administration*, 10 M.S.P.R. 295 (1982)). Since she did not sustain the agency's action, the administrative judge did not consider appellant's additional allegation of reprisal by the agency. I.D. at 5 n.3.

An employee's right to a reasonable opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework. *Sandland, supra*, at 590. In its petition for review, the agency contends that the administrative judge erred in reversing the agency action, arguing that the revised standards were not substantially different from the original standards and that the administrative judge therefore erred in finding that appellant was entitled to an evaluation of his performance under the revised standards before it could impose a performance improvement period upon him. The agency has not shown, however, that the administrative judge erred in finding that the revised standards were substantially different from the original standards. The administrative judge was correct in finding that appellant was entitled to an appraisal period under the revised standards and to a reasonable opportunity to improve after his performance was rated as deficient under those standards before the agency could properly initiate an action based on his unacceptable performance.[4/] *See Sandland, supra*, at 587; *Weaver v. Department of the Navy*, 2 M.S.P.R. 129 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982).

4/ The administrative judge found that appellant was meeting the requirements of his original performance plan at the time that he was given the revised performance standards, since the new plan eliminated the specific performance standard that appellant had previously failed to meet. I.D. at 4. Without making any determination with regard to the accuracy of this particular finding, the Board notes that the agency's failure to evaluate appellant's performance under the revised standards requires reversal of its action, even if the agency could have properly removed appellant for unacceptable performance under his original performance plan. *Cf. James v. Veterans Administration*, 27 M.S.P.R. 124, 127 (1985) (even if the agency was not required to give employee a ROP to improve his deficient performance before initiating action against him, it was precluded from taking the action after he had demonstrated acceptable performance during the improvement period).

The revised performance standards were substantially different from the original standards.

The record reveals that the revised performance plan developed by appellant's new supervisor, Capt. McAdams,[5/] was in fact substantially different from the plan which it replaced. In addition to eliminating the specific performance standard that appellant had allegedly failed to meet by the end of his first performance improvement period[6/] and substantially altering most of the remaining standards, the revised plan added one new critical element and three noncritical elements that were not present in the original

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5/ Appellant had a change of supervisors approximately two months before his removal was proposed by the agency. Shortly after commencing her duties as Chief of Services at appellant's installation, appellant's new supervisor, Capt. McAdams, learned that appellant had been given a notice of unacceptable performance by his previous supervisor (Capt. McAdams' immediate predecessor) for allegedly unacceptable performance of one critical element of his original performance plan (in this regard, the agency properly afforded appellant a thirty-day ROP before finding his performance unacceptable). Although appellant's allegedly unacceptable performance under his original performance plan could have been used to support an agency proposal to remove him at that time, the agency, nevertheless, chose not to take any action against him.

After reviewing appellant's existing performance standards, Capt. McAdams developed revised standards which both expanded upon appellant's previous performance plan and eliminated the specific performance standard that appellant allegedly had been unable to acceptably perform. Upon receipt of the new performance plan, appellant was told that he was being given an additional thirty-day period to bring his performance up to an acceptable level. At the conclusion of that period, the agency proposed appellant's removal, alleging his failure to meet one of the critical elements of the new performance plan.

6/ At the conclusion of his first ROP, appellant was given a notice entitled "Closeout of Opportunity Period to Demonstrate Acceptable Performance." Appeal File (A.F.), tab 4, subtab 10. That notice stated that appellant had brought all of the elements of his performance plan up to an acceptable level of performance "with the exception of element 3E, specifically standard 3Sc (insures that furniture assigned to quarters is properly marked)." *Id.*

plan. A. F., tab 4, subtabs 9 and 10. Moreover, the only critical element[7/] that appellant failed to meet under the revised performance plan, although arguably derived in part from standards present in the original performance plan, also included a new performance standard (limiting the number of valid complaints that appellant could receive each month) that had no counterpart in the original performance plan. *Id.*; P.F.R. at 14.

The evidence of record does not support the agency's contention that the performance standard that appellant had allegedly failed to meet under his original performance plan was "carried over" to the revised performance plan. P.F.R. at 12-16. The agency's assertion that the revised plan is "essentially the same" as the original plan and that appellant was therefore on notice as to the fact of his allegedly unacceptable performance with regard to the new plan is similarly without merit. *Id.* The original and revised performance plans were materially different.

7/ Appellant failed to meet critical element 1E under his new performance plan: "[r]esponsible for efficient management of all transient airmen quarters, temporary lodging facilities for military families, and Unaccompanied Personnel Housing. Responsibility includes supervision of all related subordinate activities." A.F., tab 4, subtab 9. The agency asserts that new critical element 1E replaced former critical element 3E which provided: "[i]nspects transient and permanent party quarters." A.F., tab 4, subtab 10. Appellant's performance had been deemed deficient under his original performance plan as to former critical element 3E based on his failure to meet performance standard 3Sc. However, the agency also asserts that performance standard 3Sc was carried over to the revised plan as part of critical element 8E. Petition for Review (P.F.R.) at 13-14. Thus, even based on the agency's representations, we must find that appellant was not made aware of his specific performance deficiencies until the conclusion of the ROP, since the agency did not rely on any portion of element 8E as a basis for finding appellant's performance unacceptable under the new plan.

The agency failed to provide appellant with a reasonable opportunity to demonstrate acceptable performance.

At the onset of the second thirty-day performance improvement period, appellant's performance had not yet been deemed unacceptable by Capt. McAdams with regard to any of the critical elements of the new performance plan.[8/] Although appellant was informed by the agency in its "Notice of Unacceptable Performance and Commencement of Opportunity Period to Demonstrate Acceptable Performance" that his performance of critical element 3E of the old performance plan (and specifically performance standard 3Sc dealing with furniture inventory) "was then and is now considered unacceptable," he did not learn of his alleged performance deficiencies relative to his new performance plan until he received his notice of proposed removal after the conclusion of the second thirty-day improvement period. A.F., tab 4, subtabs 5 and 8. Since that new performance plan did not include the one specific performance standard that appellant knew he was performing unacceptably, he could not possibly have had adequate notice of his other alleged performance deficiencies under the new plan at the beginning of the second thirty-day period.

Moreover, the agency failed to meet the requirements under 5 C.F.R. §§ 430.204(a),(b), and (m) that it afford appellant a minimum appraisal period of not less than 90 calendar days in which to demonstrate the quality of his work (as measured by the revised performance standards and critical elements of his new performance plan) before rating him on his

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8/ Capt. McAdams testified that, at the beginning of the new ROP under the revised plan, she did not consider appellant to be unacceptable in any of the critical elements of the new plan. Hearing Tape (H.T.) at tape counter 90-100. Capt. McAdams further testified that she intended appellant to perform his duties as set forth in the revised plan as if he was starting off with a "clean slate." *Id.* Characterizing the revised standards as "new standards," Capt. McAdams stated that she did not "prejudge" appellant with regard to his performance relative to the standards set forth in the new plan. *Id.*

performance during that period. Accordingly, we must concur with the administrative judge's finding -- *i.e.*, the agency failed to provide appellant with a reasonable opportunity to improve.[9/] *See Colgan v. Department of the Navy*, 28 M.S.P.R. 116 (1985) (Board held that agency had failed to prove by substantial evidence that it complied with 5 U.S.C. § 4302(b)(6), since it removed employee based on unacceptable performance without allowing the employee a reasonable opportunity to demonstrate acceptable performance); *Grant v. Department of Transportation, U.S. Coast Guard*, 24 M.S.P.R. 563 (1984) (pursuant to 5 C.F.R. § 432.203(b), an agency is required to identify for the employee the critical element(s) for which performance is unacceptable and give the employee a reasonable time to demonstrate acceptable performance before proposing removal of employee).

The decision in this case is consistent with Board precedent.

The agency argues that the administrative judge's decision in this case runs contrary to the Board's holding in *Wilson v. Department of the Navy*, 24 M.S.P.R. 583 (1984) (Board held that the agency need not establish that an employee is performing unsatisfactorily prior to issuing its notice of unacceptable performance in order to take a performance-based adverse action against that employee). The agency further contends that our holding in *Wilson* supports its position with regard to the propriety of its action in finding appellant's performance to be unacceptable during the ROP under the revised performance plan. We disagree. This argument ignores the fact that where the employee in *Wilson*

9/ *Cf. Anthony v. Department of the Army*, 27 M.S.P.R. 271 (1985) (where Board found that employee was not denied an opportunity to demonstrate acceptable performance, notwithstanding that performance standards were changed at the same time she was placed on a performance improvement plan, since employee was given a *bona fide* opportunity to demonstrate acceptable performance -- *i.e.*, the changed standards neither materially changed the performance expected nor posed any additional burdens on the employee).

had adequate notice of his performance deficiencies at the onset of the ROP, appellant in the instant case did not learn of his performance deficiencies until after the close of his opportunity period. In *Wilson* the employee's performance standards remained the same before, during, and after the ROP. Appellant's performance during the ROP in the instant case, however, was measured against the new performance standards of the revised performance plan. Since appellant was not informed of his deficiencies under the revised plan at the onset of the ROP, the agency's actions were clearly contrary to the notice requirements set forth in *Colgan*, *supra*, and *Grant*, *supra*.

ORDER

The agency is ORDERED to cancel appellant's removal and to retroactively restore appellant effective November 1, 1985. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to award appellant back pay and benefits in accordance with 5 C.F.R. § 550.805. *See Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25 (1984); *Robinson v. Department of the Army*, 21 M.S.P.R. 270 (1984).

The agency is ORDERED to complete all computations and issue a check to appellant for the appropriate amount of back pay within sixty days of the date of this decision. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay due.

If there is a dispute as to the amount of back pay due, the agency shall issue a check to appellant for the amount not in dispute within the above time frame. Appellant may then file a petition for enforcement concerning the disputed amount.

The agency is hereby ORDERED to inform appellant of all actions being taken to comply with the Board's order and the

date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). Appellant is ORDERED to provide all necessary information requested by the agency in furtherance of compliance and should, if not notified, inquire as to the agency's progress from time to time. *See id.*

Appellant is hereby notified that if, after being informed by the agency that it has complied with the Board's order, he believes that there has not been full compliance, he may file a petition for enforcement with the Dallas Regional Office within 30 days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to review this decision on your claims of prohibited discrimination. 5 U.S.C. § 7702(b)(1). The address of the EEOC is 2401 E Street, N.W., Washington, D.C. 20506. You must file your petition with the EEOC no later than 30 days after you receive this order. 5 U.S.C. § 7702(b)(1).

If you elect not to petition the EEOC for further review, you may file a civil action on your discrimination claims in an appropriate United States District Court. 5 U.S.C. § 7703(b)(2). You must file it no later than 30 days after you receive this order. 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed

lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims

If you choose not to pursue the discrimination claim before the EEOC or a United States District Court, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than 30 days after you or your representative receive this order. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C