UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BOBBY C. CLIFFORD, Appellant, v. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER SL04329110084 DATE: SEP 13 1991

Robert S. Olive, Esquire, Knoxville, Tennessee, for the appellant.

Lawrence S. Cavallaro, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency petitions for review, and the appellant cross petitions for review, of the initial decision, issued April 19, 1991, that reversed the appellant's removal. For the reasons set forth below, the Board GRANTS both the agency's petition and the appellant's cross petition, REVERSES the initial decision, and REMANDS the case for further adjudication.

BACKGROUND

The agency removed the appellant from the position of District Conservationist based upon the charge of unacceptable performance. The agency specified that the appellant's performance for 1 of the critical elements of his position was unacceptable.

The appellant filed an appeal of this action with the Board's St. Louis Regional Office. Following a hearing, the administrative judge reversed the appellant's removal, finding that the appellant did not receive a bona fide opportunity to improve his performance because the performance standards lacked objective criteria for measuring performance. The administrative judge also found the following: (1) The agency proved that its performance appraisal system was approved by the Office of Personnel Management; (2) the agency communicated the critical elements and performance standards to the appellant at the beginning of the performance appraisal period; (3) the agency warned the appellant of his alleged performance deficiencies under the critical element at issue during the appraisal period; and (4) the appellant did not prove the affirmative defenses of handicap, race, or age discrimination, or reprisal.

In its petition for review, the agency asserts that the administrative judge erred in interpreting the performance standard. In its cross petition, the appellant contends that he did not receive a reasonable opportunity to improve and that the administrative judge erred in concluding that the

agency did not discriminate against him on the basis of his handicapping condition.[1]

ANALYSIS

The performance standard at issue is valid.

The agency charged the appellant with failing to satisfy the critical element of "Food Security Act." This critical element only specifies 1 level of performance. Agency File, Tab 4dd. Relying upon the Board's decision in *Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 296-98 (1985), the administrative judge found that this standard is invalid because the agency improperly used a 5-tier appraisal system based upon the single performance standard.

We find, however, that the present case is similar to *Seplavy v. Veterans Administration*, 41 M.S.P.R. 251, 252-54

[1] The appellant also argues that the administrative judge's credibility determinations and findings with respect to reprisal and age discrimination are erroneous, and references an alleged off-the-record comment by the administrative judge indicating that she believed that the agency had treated the appellant unfairly. We find that these assertions constitute mere disagreement and, therefore, do not provide a basis for granting review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Further, the administrative judge's alleged comment does not support the appellant's argument that her credibility determinations were erroneous because the administrative judge's reversal of the removal action was consistent with her statement that she believed the appellant was treated unfairly. In addition, the appellant asserts that the agency erred in placing him on a performance improvement period (PIP) because he was performing acceptably. An agency, however, is not required to prove that an appellant was performing unacceptably prior to a PIP. *Brown v. Veterans Administration*, 44 M.S.P.R. 635, 640 (1990) (citing *Wilson v. Department of the Navy*, 24 M.S.P.R. 583, 586-87 (1984)). This matter, however, may still apply to the appellant's allegation of discrimination, and the administrative judge should, therefore, consider it on remand in that regard.

(1989), where the Board distinguished cases such as this one from *Donaldson*. In *Seplavy*, the Board found that *Donaldson's* holding, that a performance appraisal plan requiring the rating on an individual critical element to be extrapolated more than 1 level above and below the written standard may violate the objectivity requirement of 5 U.S.C. § 4302(b)(1), only applies to the rating assigned to individual critical elements and does not pertain to summary ratings of an employee's overall performance.

As in *Seplavy*, there is no evidence in the present case supporting the administrative judge's finding that the agency established a system that requires extrapolation more than 1 level above or below the written standard of the critical element at issue. The appellant's performance appraisal indicates that the written performance standard describes the "Fully Successful" level of achievement. Agency File, Tab 4dd. The appraisal also establishes that the appellant is rated on each critical element as "exceeds," "fully successful," or "does not meet." *Id.* Thus, the performance plan does communicate the "minimally acceptable" level for the employee's retention in his position, performance at the level described in the standard itself. Although the appraisal does have a 5-level evaluation system to determine the appellant's overall rating, *id.*, this 5-level system was not used to evaluate the appellant's performance on the individual critical elements.

We, therefore, conclude that the administrative judge erred in finding that the performance standard at issue was invalid, and find that remand of this appeal to the regional office to be appropriate for a determination of whether the agency proved its charge that the appellant was performing unacceptably, as well as any other pertinent issues remaining in this case. *See Seplavy* at 254.

Additional findings pertaining to the opportunity to improve and the appellant's allegation of handicap discrimination are also necessary on remand.

In *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980), the Board held that an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. The initial decision in the present case does not meet this requirement with respect to the issues of whether the agency provided the appellant with a reasonable opportunity to improve, and whether it discriminated against the appellant with respect to his handicapping condition.

In his petition for review, the appellant contends that he did not receive a reasonable opportunity to improve because he was detailed out of his office to Decatur County and that this detail adversely affected his ability to fulfill his work requirements during the PIP. We also note that the appellant raised this argument below. Appeal File, Tab 1.

In *Brown v. Veterans Administration*, 44 M.S.P.R. at 643, the Board held that an employee's performance pursuant to a PIP must always be reviewed in the context of the employee's performance plan, and that agencies may not use a PIP either to reduce or to increase the standards of performance established at the beginning of the appraisal period. In the present case, the initial decision's discussion of the PIP focused on whether the appellant's technical advisor's counseling sessions impeded his progress in completing his assignments, and the bona fides of the PIP in light of the conclusion that the performance standard were invalid. It did not address the appellant's contention that his detail resulted in additional duties that prevented him from successfully completing his PIP. Initial Decision at 6-16. The initial decision should, therefore, discuss this matter on remand.

The initial decision also lacks findings and conclusions with respect to all of the appellant's proposed accommodations for his handicapping condition. The appellant alleged that the agency could reasonably accommodate his handicapping condition by reassigning him to another position or by delaying implementation of the PIP until he received additional counseling that would enable him to perform his duties successfully. Appeal File, 26. Although the initial decision recognized that medical evidence supported the proposition that the appellant could be reasonably accommodated by a reassignment to less stressful duties,

including a change to a lower grade, it only discussed the agency's offer of a demotion without including findings on either of the other suggested accommodations. The initial decision on remand, therefore, should also discuss these matters.

ORDER

Accordingly, we REMAND this appeal to the St. Louis Regional Office to issue a new initial decision consistent with this Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.