

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TIMOTHY D. DODSON,
Appellant,

v.

FEDERAL EMERGENCY MANAGEMENT
AGENCY,
Agency.

DOCKET NUMBERS
DC04328710381
DC531D8710382

DATE: AUG 23 1988

Peter B. Broida, Esquire, Passman and Broida,
Washington, D.C., for the appellant.

Lorri L. Jean, Esquire, Washington, D.C., for the
Agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the initial decision issued on September 29, 1987. For the reasons stated below, the Board GRANTS the petition for review and AFFIRMS the initial decision as MODIFIED.

BACKGROUND

The appellant appealed to the Washington, D.C. Regional Office of the Board from the agency actions denying his

within-grade salary increase and removing him from his position as Program Analyst for unacceptable performance. The appellant raised several procedural and substantive issues in regard to the propriety of the agency actions. The administrative judge found that the actions were taken pursuant to law. She found that, while the appellant performed unacceptably as to only two¹ standards under critical element A, he performed unacceptably under all of the standards of critical element B. She therefore sustained both agency actions, finding them supported by substantial evidence.

In his petition for review, the appellant does not assert that his performance was acceptable. However, he does assert, inter alia, that the administrative judge did not properly address his contentions that: (1) His performance standards were not objective because they did not relate to one another at different levels in a clearly meaningful manner; and (2) the agency failed to allow him an opportunity to perform during the performance improvement period (PIP) by refusing to allow him assignments at the "meets" and "exceeds" levels of performance.

¹ While the administrative judge stated that the appellant performed unacceptably under only one of the standards under critical element A, her analysis and discussion clearly showed that the appellant failed to perform acceptably under two of those standards.

ANALYSIS

1. The appellant's performance standards were sufficiently objective.

In support of his contention that the standards were unobjective and unrelated, the appellant contends that an employee might not meet the minimal standard (C)1 under critical element B, requiring that a project reflect independent judgment, but satisfy the "meets" standard C by supplying material suitable after a second draft.

Under 5 U.S.C. § 4302(b)(1), performance standards must permit accurate evaluation of job performance on the basis of objective criteria. Further, the "standards should be objective, realistic, reasonable, and clearly stated in writing." *Williams v. Department of Health and Human Services*, 30 M.S.P.R. 217, 219 (1986), citing to *Callaway v. Department of the Army*, 23 M.S.P.R. 592, 599 (1984). A level one performance standard which bears no relationship to a level two performance standard, or which requires a higher level of performance than the level two standard, is invalid. *Williams*, 30 M.S.P.R. at 219.

The administrative judge found no conflict in the standards. In this regard, she found that the "independent judgment" requirement for the "minimal" standard merely meant that the work initially submitted was presumed to be the employee's own independent work product, whereas the "meets" standard required that a second draft of the

material be suitable for use after review by the branch chief.

While we find no error in those determinations, we note that the administrative judge did not specifically address the appellant's contention that, if he had been given the opportunity, he could have satisfied the "meets" and "exceeds" standard under critical element B without satisfying the "minimal" standard. The appellant asserts that, under critical element B, he was required to produce computer data for his supervisor under the "minimal" standard but that the "meets" and "exceeds" level required preparation and presentation of briefings or staff papers. He argues that he could have met or exceeded the standard without doing any work on the computer projects. The administrative judge merely found no evidence of conflict in the standards or that the "meets" level was easier to satisfy, noting that "[if] the ['meets' requirement of] research on the prosecution of the program effect had been done and put into a graph-type format, appellant would probably have satisfied the ['minimal'] requirement for a system." Initial Decision at 10.

Nevertheless, the appellant has not shown reversible error by the administrative judge here. See *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights). The development of

the computer system was only one of five of the "minimal" standards for critical element B. See the appellant's performance standards, Agency File, Tab B.² That standard, as well as the "meets" standard, which required the preparation and presentation of briefings and staff papers, and the "exceeds" standard, which required that the briefing outlines and staff papers be of a quality acceptable to the branch chief on the second draft, related to the stated reason for the criticality of element B, i.e., to provide "technical support through the establishment of policies and

² The "minimal" standard in question required as follows: "Develops a system for processing and presenting MICA/MYDP data relating to DC&W, in matrix form. Matrix must be able to display selected localities vs. selected criteria, each of which will be determined by management at the time of need. System must allow actual transfer of data from the MITRE output listings to a final matrix presentation in less than an hour."

The "meets" standard required:

A. Identifies short- & long-range needs for guidance in support of the DC&W program.

B. Prepares and presents, as required, briefings/staff papers to management, staff, and other interested parties on the prosecution of the program effort.

The "exceeds" standard in question required:

A. Formalizes the approach to the presentation of such guidance and either implements it or sets a schedule, suitable for inclusion in the MIS, for its implementation.

B. Briefing outlines/Staff papers are of such a quality that they are acceptable to the branch chief in second draft.

criteria and the development of appropriate guidance." *Id.* The "minimal" standard requiring the development of a computer system for processing and presenting the necessary data interrelated with the "meets" and "exceeds" requirements in presenting the information on this program effort. Thus, the standards were sufficiently interrelated.

Further, we find no merit to the appellant's contention that the higher standards were easier to attain than the minimal standard inasmuch as the data gathered from the computer system developed was necessary for the briefing outlines and staff papers to be presented under the higher standards. Thus, the requirements of the "minimal" standard had to be satisfied before the appellant could demonstrate performance at the higher standards.

2. The agency did not deny the appellant the opportunity to perform during the PIP.

The appellant contends that, if the agency had allowed him to perform his full range of responsibilities, including assignments at the "meets" and "exceeds" levels of performance, he might have satisfied the "meets" or "exceeds" standards, and that the "minimal" standards evaluation would have been moot. He alleges that the administrative judge ignored this issue.

The administrative judge did not specifically address this issue. Nevertheless, the administrative judge found that the appellant failed to complete two of his five

assignments under the standards of critical element A, and all five of his assignments under the standards of critical element B. The appellant was entitled to, and did receive, an opportunity to improve his performance. See *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 586-87 (1984). The appellant was entitled only to an opportunity to perform at the minimally successful level. See *Grant v. Department of Transportation*, 24 M.S.P.R. 663, 667 (1984). The appellant does not deny that he failed to complete his assignments under the minimal performance standards for his position. We find no merit to his contention that he should have been permitted an opportunity to perform at the higher levels of his performance standard. Thus, he has not shown reversible error by the administrative judge in this regard. See *Karapinka*, 6 M.S.P.R. at 127.

Finally, we have considered the remaining issues raised by the appellant³ and find that they establish neither error in the administrative judge's determinations on those issues nor a need to further discuss such issues in this Opinion

³ Those additional arguments are that: (1) The agency was required to allow him to perform under his revised performance appraisal standards before it placed him on the PIP; (2) the performance action was void because the agency failed to advise him of the relative weight of his performance standards; (3) the agency hindered or failed to assist him during the PIP; (4) the agency failed to communicate to him the content of his performance standards; (5) his performance standards were not objective because there were no objective criteria for determining whether assignments he completed met or failed to meet a particular standard; and (6) the agency standard requiring independent judgment was unobjective and unreasonable.

and Order. Therefore, we find no basis for disturbing those findings.

ORDER


This is the Board's final order in this appeal.
5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board