DIXIE L. HOLLAND
v.
U.S. DEPARTMENT OF AGRICULTURE

DOCKET NO.
SF531D8110545

OPINION AND ORDER

The Board, having fully considered appellant's petition for review of the initial decision and finding that is does not meet the criteria for review set forth in 5 C.F.R. 1201.115, hereby DENIES the petition.

However, the Board under the authority granted in 5 C.F.R. Section 1201.117, is REOPENING the decision on the Board's own motion to correct the presiding official's classification of one of appellant's arguments as substantive rather than procedural.

Appellant, in contesting the denial of her yearly within-grade increase, argued that the agency did not consider her performance over the full 60-day reconsideration period because she was absent during approximately twenty days of this period. The agency contended that these absences did not affect their decision as appellant's performance problems related to quality, nor quantity. The presiding official determined that this 60-day period set out in 5 C.F.R. Section 531.407(b) was a substantive right rather than a procedural right, but nonetheless found that appellant, even with absences, had ample time to improve the quality of her work and dismissed the argument.

The Board has considered this 60-day period to be a procedural right rather than a substantive right. See *Tolton v. Department of the Army*, 5 MSPB 306 (1981); *Bergman v. Department of Health and Human Services*, 4 MSPB 452 (1980); *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). Thus, the presiding official erred in his classification of this regulatory requirement as a substantive right. However, a reading of the presiding official's discussion of this issue shows that he found appellant had not been harmed by her absences during this period. Thus, even if there was procedural error by the agency, it was not harmful procedural error. Furthermore, the Board has held that an employee's absence during the 60-day period does not obviate the regulatory obligation to give timely notice and that the agency has no authority to extend the waiting period. *See Chiodo v. U.S. Department of Treasury*, 6 MSPB 139 (1981). Therefore, even though the presiding official erred, we do not find his error to constitute reversible error. *See Karapinka v. Department of Energy*, 6 MSPB 114 (1981); *Ragland v. Internal Revenue Service*, 6 MSPB 565 (1981).

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 120.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *May 6, 1982*