UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CALVIN L. KOPP, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER AT04328210971-1 DATE: MAY 18 1987

Calvin L. Kopp, pro se, Avon Park, Florida.

David Nathan Cooper, Captain, Langley AFB, Virginia for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The agency has petitioned for review of an April 11, 1985 remand decision in which an administrative judge[1] of the Board's Atlanta Regional Office did not sustain the agency's action removing the appellant.

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[1] The title of "presiding official" has been changed to "administrative judge."

The appellant was a Heavy Mobile Equipment Mechanic Foreman with the United States Air Force (agency) at the Avon Park Air Force Range. On March 11, 1982, the agency proposed to remove the appellant for unsatisfactory performance of his duties as supervisor of the Transportation Section. On April 29, 1982, the agency removed the appellant. The administrative judge issued an initial decision on September 20, 1983, in which she affirmed the removal and found that the appellant had failed to show that the agency action was based on handicap discrimination. The appellant petitioned for review of the initial decision.

On October 22, 1984, the Board issued its decision in *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984), in which the Board held that, with certain limited exceptions, performance-based actions taken after October 1, 1981, had to be effected under 5 U.S.C. Chapter 43. *Id.* at 614.

Because it could not be determined whether the adverse action in this case was taken under Chapter 43 or Chapter 75 and the action was effected April 29, 1982, the Board vacated the initial decision that was issued on September 20, 1983. The case was remanded to the regional office for the administrative judge to determine whether the performance-based action had been taken under the provisions of Chapter 43 or Chapter 75 and, if the action had been taken under Chapter 75, whether the action fell within one of the *Gende* exceptions.

In response to the remand, the agency argued that the action had been taken pursuant to Chapter 43. The SF-50 effecting the agency action cited Chapter 43 and the agency had argued to the administrative judge who had issued the first initial decision that the action had been taken under Chapter 43. This administrative judge agreed and found that since the inception of the removal, the agency had processed the action under Chapter 43. He found that the agency had not identified the critical elements or the performance standards of the appellant's position, had not provided evidence that the appellant was advised at the beginning of the appraisal period of his critical elements and performance standards and had not submitted evidence of a performance appraisal plan or performance evaluation for the appellant. The administrative judge concluded that the appellant's substantive rights under Chapter 43 had been violated and reversed the agency decision removing the appellant. The administrative judge adopted the findings on discrimination that were made in the September 20, 1983, initial decision.

The agency filed a petition for review[2] contending that the appellant had been advised of his performance standards and critical elements and that he had received a performance appraisal advising him that his performance was

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[2] While the agency characterized the document as a request for reconsideration, it was accepted by the Board as a petition for review. See 5 C.F.R. § 1201.4(h).

unacceptable.[3] While the petition was pending before the Board, the United States Court of Appeals for the Federal Circuit issued its decision in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 1523 (1986). The court held that agencies may use Chapter 75 for performance-based actions and that the procedural requirements of Chapter 43 were not applicable to performance-based actions taken under Chapter 75. In response to *Lovshin*, the agency contended that its performance-based action satisfied both the requirements of Chapter 43 and Chapter 75.

We DENY the agency's petition for review for the reasons stated below because it does not meet the criteria for review set out in 5 C.F.R. § 1201.115.[4] However, we REOPEN the remand decision on our own motion and AFFIRM the remand decision.

ANALYSIS

1. The agency removed the appellant under Chapter 43.

When the agency removed the appellant, supporting documentation indicated that he had been removed under

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[3] The performance appraisal was signed by one of the appellant's supervisors on April 29, 1982, the date on which the removal notice was issued, and signed by the other on May 2, 1982, twelve days before the effective date of the removal.

[4] 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. 25,146-72 (1986) for the text of all references to this part.

Chapter 43. The administrative judge who issued the September 20, 1983, initial decision found that the action had been taken under Chapter 43. When the agency was given the opportunity to show whether the action was taken under Chapter 43 or Chapter 75, the agency responded that the action was taken under Chapter 43. The administrative judge who issued the April 11, 1985, remand decision found that the agency action was taken under Chapter 43. In its petition for review of the remand decision, the agency contended that the action had been taken under Chapter 43. Based on the agency's consistent assertions, we find that this action was taken under Chapter 43.

It was not until the agency submitted its brief in response to *Lovshin*, that the agency indicated that it had complied with both Chapter 43 and Chapter 75 requirements for removing an employee for unacceptable performance. Having lost on the issue of its Chapter 43 compliance, the agency is now attempting to rely upon another statute in order to obtain a favorable decision. The time for making an argument that the action had been taken under Chapter 75, however, has long passed. An agency cannot, when the case is before the Board, change its performance-based action from a Chapter 43 action to a Chapter 75 action. *Callaway v. Department of the Army*, 23 M.S.P.R. 592 (1984). The Federal Circuit has recently held that, notwithstanding *Lovshin*, the Board's denial of such a requested change is proper. *Wilson v. Department of Health and Human Services*,

770 F.2d 1048, 1055 (Fed. Cir. 1985). Nor can the Board, on its own initiative, substitute Chapter 75 for Chapter 43 as the basis for the agency action. *Hanratty v. Federal Aviation Administration*, 780 F.2d 33, 35 (Fed. Cir. 1985). Therefore, the finding of the administrative judge that the agency was taken under Chapter 43 is correct.

2. The agency did not afford the appellant the Chapter 43 procedures to which he was entitled.

The administrative judge found that the agency had offered no evidence of the critical elements or the performance standards for the appellant's position. He also found that there was no evidence that the appellant was advised, at the beginning of the appraisal period of his performance standards and critical elements or that the appellant had received a performance appraisal. Accordingly, the administrative judge correctly found that the appellant did not receive these procedural rights to which he was entitled under Chapter 43. *See Salonga v. Department of Army*, 28 M.S.P.R. 628, 632 (1985); *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 590 (1984).

3. The agency has shown no basis for the Board to grant a petition for review.

In the petition for review, the agency contends that the deficiencies found by the administrative judge did not, in fact, exist. The agency stated that it did not submit the appellant's performance appraisal plan because its

action had been affirmed in the September 20, 1983, initial decision and because it had interpreted the Board's remand order as precluding it from offering further evidence in support of its action. While the Board's order advised the agency that it could not introduce further proof regarding the merits of the charge, it also advised the agency that the "parties may introduce ... evidence regarding compliance with Chapter 43 procedures ...." *Kopp v. Department of the Air Force*, Docket No. AT04328210971 (November 30, 1984), slip op. at 2. If the agency believed that there was a question as to whether it could introduce evidence of such compliance, it was under an obligation to offer that evidence and to a seek ruling on its admissibility from the administrative judge. Having elected to proceed without attempting to introduce that evidence, the agency may not at this stage seek to supplement the record with evidence that was available to it at the time of the hearing. *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite a party's due diligence). The representative's mistaken litigative strategy does not provide an adequate basis for reopening the record. *See Massingale v. Merit Systems Protection Board*, 736 F.2d 1521 (Fed. Cir. 1984); *Dillard v. U.S. Postal Service*, 27 M.S.P.R. 189 (1985); *Perez v. Department of Army*, 26 M.S.P.R. 161 (1985). Accordingly,

the agency has made no showing that the petition for review meets the Board's standards for review that are set forth in 5 C.F.R. § 1201.115.

After full consideration, the Board DENIES the agency's petition for review of the remand decision that was issued on April 11, 1985, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115.

The agency is ORDERED to cancel the appellant's removal and to retroactively restore the appellant effective April 29, 1982. *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 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 the appellant for the appropriate amount of back pay within sixty days of the date of this decision. The 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 the back pay due, the agency shall issue a check to the appellant for the

amount not in dispute within the above time frame. The appellant may then file a petition for enforcement concerning the disputed amount.

The agency is ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes that it has fully complied. *See* 5 C.F.R. § 1201.181(b). The 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.*

If, after being informed by the agency that it has complied with the Board's order, the appellant believes that there has not been full compliance, he may file a petition for enforcement with the Chicago Regional Office within thirty 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 the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

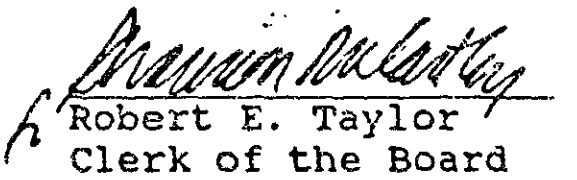
This is the Board's final order in this appeal. The initial decision in this appeal in now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

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



Robert E. Taylor
Clerk of the Board

Washington, D.C.