

in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., March 9, 1983

with no greater appeal rights than he would have had if he had been terminated during his probationary period. *Link v. Department of Navy*, 3 MSPB 287, 288 (1980).

JEWEL MORTENSEN
v.
DEPARTMENT OF THE ARMY

DOCKET NO.
DE531D8110140

OPINION AND ORDER

Appellant Jewel Mortensen, a chemist for the Department of the Army at the Dugway Proving Ground, Utah, was denied her within-grade salary increase as a result of the determination that she was not performing at an acceptable level of competence. Since she had not been issued the denial notice 60 days prior to the end of the waiting period, she was afforded the 60-day evaluation period provided for in 5 C.F.R. § 531.407(c)(5)¹ and then was notified again that she was not performing at an acceptable level of competence and would be denied her within-grade salary increase.

The agency failed to advise appellant of her right to have the denial reconsidered, or to appeal the matter to the Board, but she was advised that she could grieve it under the negotiated grievance procedure. When the agency discovered its error, it advised appellant of her right to appeal the matter to the Board.

On appeal to the Board's Denver Regional Office, the presiding official held that while the Board usually would not have jurisdiction over

¹ Because the action denying appellant's within-grade increase occurred in January 1980, references in this decision to applicable regulations in 5 C.F.R. Part 531 are to those regulations prior to their 1981 amendment.

this matter without reconsideration at the agency level in accord with the Board's holding in *Bueschel v. Department of Health and Human Services*, 6 MSPB 633 (1981), it is apparent in this case that the agency improperly denied appellant an opportunity for reconsideration, and that such denial is sufficient to allow the Board to assume jurisdiction and adjudicate the matter on the merits. See *Gerard v. Department of Transportation*, 6 MSPB 648 (1981). The presiding official accepted the matter for adjudication and found that by substantial evidence, the agency showed that appellant was experiencing problems in her performance throughout the entire waiting period and that the record supports the agency's decision that she was not performing at an acceptable level of competence. The presiding official further found that the agency's failure to advise the appellant of her right to request reconsideration did not constitute harmful error under the Board's holding in *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). The presiding official also concluded that appellant's allegations of reprisal and/or discrimination because of previously filed EEO complaints were unsupported by the evidence. Accordingly, the agency action withholding the appellant's within-grade salary increase was affirmed.

In her petition for review, appellant argues that the initial decision should be reversed because it is based on an erroneous interpretation of certain provisions of 5 C.F.R. § 531.407, and specifically section 531.407(c)(2)(iii), which requires that an agency head or his designee base his determination concerning acceptable level of competence on the employee's performance during the waiting period. Appellant asserts that while the presiding official found that the record indicates appellant was experiencing problems throughout the waiting period, the record does not indicate that, and that a negative ALOC determination based on a small portion of the waiting period is improper. As she argued below, appellant also asserts that the agency denial of reconsideration may have brought a different decision since another supervisor would have reassessed the matter.

While appellant correctly asserts that performance during her entire waiting period must be considered, great weight should be placed on the employee's performance during the 60 day redetermination period. *Zaph v. Federal Maritime Commission*, 6 MSPB 522 (1981). It is clear from the initial decision that the presiding official did review the entire record and found evidence of counselling as early as 1978, contrary to appellant's allegations. The Board finds that appellant's assertions, without reference to previously unavailable material evidence, fail to satisfy the criteria for review at 5 C.F.R. § 1201.115. Rather, her allegations constitute simple disagreements with the presiding official's conclusions but are insufficient to show error in those conclusions. See *Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

With regard to appellant's assertion that "it is well within the range of appreciable probability that another agency official on reconsideration

might have reached another decision," the Board's regulations at 5 C.F.R. § 1201.56 (c)(3) provide that the burden is upon the appellant to show that based upon the record as a whole, the error caused substantial harm or prejudice to her rights. A simple theoretical possibility of prejudice is an insufficient basis for inferring actual prejudice. "Unless it is likely that the alleged error affected the result, its occurrence cannot have been prejudicial." *Parker v. Defense Logistics Agency*, *supra* at 493. Also See *Blake v. Department of Health & Human Services*, 7 MSPB 439 (1981). For the reasons relied on by the presiding official, we agree that appellant has failed to show that the agency's error in this case was harmful.

The Board, having fully considered appellant's petition for review and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *March 11, 1983*