SANDRA J. PRUNEDA
v.
INTERNAL REVENUE SERVICE

Docket No.
DA531D8010034

OPINION AND ORDER

The Internal Revenue Service, agency, has petitioned the Board to review the initial decision in which the presiding official reversed the agency action. The agency had denied Sandra J. Pruneda, employee, a within-grade increase because it had determined that her performance was not at an acceptable level of competence. The presiding official found that the employee's performance was not at the required level but reversed the denial because the agency mistakenly informed her that her error rate was acceptable when in fact it exceeded the established requirement. The presiding official found that the employee interpreted this notice as waiving the established error rate and concluded that the agency could not later rely on the "waived" requirement to deny the within-grade increase. We do not find this conclusion to be supported by the record, and the petition is therefore GRANTED.

By written notice of January 7, 1980, the employee's supervisor advised her that her performance was not at an acceptable level to warrant award of a within-grade increase. The specific deficiency cited was failure to meet the production standard. Although the same notice advised the employee that she "must . . . maintain [her] acceptable quality rate . . .," the employee's error rate was actually in excess of the established standard. The work report analysis attached to the January 7, 1980, letter set forth the employee's production rate for the period from October 6, 1979 to December 22, 1979 but did not include error rate data.

The record shows that although the acceptable error rate was 6.5%, the employee's error rate was 7.5% for the period ending December 22, 1979, 9.4% for the week of January 5, 1980, and 8.7% during the notice period.

We do not find that the employee had any reasonable basis to believe that the acceptable error rate had been "waived" by the agency, by virtue of the mistake in the January 7, 1980 notice. There is no evidence that (during the 90-day notice period) the employee was aware of her error rate for either December 22, 1979, or January 5, 1980, but the record does clearly reflect that she had been notified of the 6.5% standard in writing as recently as November 15, 1979, and that during the 90-day period she was counseled concerning her high error rate. The January 7, 1979, letter did not in any way indicate that the quality standard had been changed, nor that the supervisor would accept performance in excess of the error rate. Moreover, even if the employee were aware of her error rate as of December 22, 1979, which was the

last week considered in the January 7 letter, and believed that such rate was acceptable, that rate was substantially exceeded during the notice period.

We thus find the employee was aware of the established 6.5% error rate, and that she exceeded this rate during the notice period. Further, the error in the January 7 letter regarding her quality performance could, at most, have been interpreted as approval of the 7.5% rate of December 22, 1979, and this, too, was exceeded. We therefore conclude that the denial of the within-grade increase is supported by substantial evidence in the record, and that the employee did not demonstrate harmful error.

Accordingly, the initial decision is reversed and the denial of the within-grade increase is sustained. This is a final decision of the Merit Systems Protection Board.

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:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *May 21, 1981*