

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD A. WOYTAK,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF04328810928

DATE: AUG 28 1991

Victor C. Thuesen, Esquire, Petaluma, California, for
the appellant.

Richard J. Brennan, Esquire, Fort Ord, California, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

Chairman Levinson concurs in the result.

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of an initial decision issued January 20, 1989, that sustained his removal for unacceptable performance. For the reasons discussed below, the petition for review is GRANTED under 5 U.S.C. § 7701(e)(1), the initial decision is VACATED, and the case is REMANDED to the San Francisco Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant was first appointed to the position of Historian for the agency in November 1985, and about two months later was assigned to Fort Ord. See Hearing Transcript (HT) at 435-36. About mid-1986, he was reassigned to serve as command historian for the Army Combat Developments Experimentation Center (CDEC). CDEC was under the command of the TRADOC Experimentation Center (TEXCOM), a component of the United States Army Training and Doctrine Command (TRADOC). See HT at 19.

About August 1986, while on a visit to CDEC, Major General Robert L. Drudik, the TEXCOM commander, assigned the appellant the task of preparing a monograph for publication, entitled, "Validating the Light Division Concept: TRADOC and the Certification of the 7th Infantry Division (Light) 1984-1985" (the monograph). The general assigned the task to the CDEC Historian, rather than to his own TEXCOM Historian, because, at the time, there was no Historian assigned to TEXCOM. See HT at 223 and 226. Based on the appellant's asserted lack of progress on the monograph, on January 4, 1988, Col. Alvin B. Johnson placed the appellant on a 90-day performance improvement plan (PIP) for failure to meet the performance standards of Critical Element Two of his position. See Initial Appeal File (IAF), Tab 4f. The PIP was subsequently extended until April 16, 1988.

Critical Element Two of the appellant's performance standards provides:

Based on guidance from the Director, CDEC, prepares annually at least two major articles/monographs or other written documents describing contributions of CDEC and their impact on specific Army programs (materiel/doctrine/training). Articles will be prepared in accordance with accepted research and documentation standards. Articles will be submitted for publication to appropriate defense oriented newspapers, magazines, and journals. Fifty percent of articles submitted will be accepted for publication.

See IAF, Tab 4f.

On July 1, 1988, Col. Johnson proposed the appellant's removal based upon his failure to improve his performance under Critical Element Two sufficiently to meet the minimum standards for this element. See *id.*, Tab 4e. In a decision dated August 29, 1988, Dr. Marion R. Bryson, Director of CDEC, determined that the appellant's removal was warranted. See *id.*, Tab 4b. The appellant appealed his removal to the Board's San Francisco Regional Office. Following a 3-day hearing, the administrative judge sustained the agency's action.

The administrative judge found that the appellant was evaluated under a performance appraisal system approved by the Office of Personnel Management. See Initial Decision at 2; Agency File, Tab 4g. She also found that the appellant was aware of the performance standards and

critical elements of his position, see *id.* at 3, that he was notified of his unsatisfactory performance in Critical Element Two, see *id.*, and, based upon her credibility determinations, that his performance was unacceptable during his improvement period. See *id.* at 3-6.

The administrative judge rejected the appellant's arguments that the guidance and assistance he received during the PIP were inadequate. See *id.* at 4-5. Crediting agency witnesses over the appellant and his witnesses, the administrative judge found that the appellant's performance during the PIP was unacceptable. See *id.* at 6-9. She also found that the appellant failed to prove his affirmative defense of national origin discrimination.¹ See *id.* at 9-10.

In his petition for review, the appellant challenges the administrative judge's finding that the removal action was supported by substantial evidence. He makes the following arguments: (1) Critical Element Two fails to meet the objectivity requirement of Chapter 43; (2) the monograph that the appellant was assigned exceeded the scope of the standards in Critical Element Two; (3) the record does not support the administrative judge's finding that the appellant was notified that his performance in the critical element was unacceptable; (4) the record does not support

¹ In his petition for review, the appellant does not specifically challenge the administrative judge's finding that he did not prove his affirmative defense of national origin discrimination.

the administrative judge's finding that the appellant was afforded a reasonable opportunity to improve his performance; (5) the record does not support the administrative judge's finding that the appellant's performance on the monograph was unacceptable; and (6) there is no record support for certain of the administrative judge's credibility and fact findings.

ANALYSIS

The finding that the appellant was afforded a bona fide opportunity to improve his performance under Critical Element Two failed to resolve material issues and was based upon credibility determinations that were not made in accordance with a Hillen analysis.²

We reopen this case to address the appellant's contention that he was not afforded a reasonable opportunity to improve his performance. Assuming, arguendo, that the appellant failed to meet the minimum requirements for acceptable performance under Critical Element Two during the PIP, the agency's action, nevertheless, cannot stand if the agency failed to provide him with a reasonable opportunity to improve his performance.

In performance-based actions taken under 5 U.S.C. Chapter 43, the agency must prove by substantial

² See *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (to resolve credibility issues, an administrative judge must: (1) Identify the factual issues in dispute; (2) summarize all of the evidence on each disputed question of fact; (3) state which version is believed; and (4) explain in detail why the chosen version was more credible than the other version or versions of the event).

evidence that the appellant was afforded a meaningful opportunity to improve his performance. See *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587 (1984) (in performance-based actions taken under 5 U.S.C. § 4303, the opportunity to demonstrate acceptable performance is an element of the agency's case that must be proven by substantial evidence). The agency's submission of documents or testimony may be sufficient to establish that it offered the appellant an opportunity to improve. See *id.* However, where, as here, the appellant challenges the reasonableness of the improvement period, the agency must then rebut this challenge and demonstrate that it has complied with the requirement of Section 4302(b)(6) by substantial evidence. See *id.*

In the PIP letter of January 4, 1988, Col. Johnson informed the appellant that he was required to submit, prior to the end of the PIP, three copies of his final draft of the monograph, prepared in accordance with accepted research and documentation standards, completed and ready for publication, and in conformity with the guidance previously provided to him in a memorandum dated October 27, 1987, prepared by Col. Johnson, and in four earlier memoranda provided by Dr. Malone, TRADOC Command Historian. The letter further stated that Col. Johnson would "closely monitor" the appellant's performance during the PIP, and that guidance provided to him by Dr. Malone and Mr. Romjue in his visit to TRADOC headquarters in Virginia "should

suffice to assist you in accomplishing a monograph worthy of acceptance and publication." He also advised that the final draft of the monograph would be submitted to Dr. Alfred E. Mierzejewski, the TEXCOM Command Historian for technical compliance with the standard. See Agency File, Tab 4f.

Because we find the record is insufficient to resolve the critical issues necessary to determine whether the appellant was afforded a meaningful opportunity to improve his performance, we remand this case to the Regional Office for a determination of the questions discussed below and for a new adjudication.

The appellant complains that Col. Johnson failed to provide the monitoring promised in the PIP letter. See Petition for Review at 95. Col. Johnson testified that he "monitored" the appellant's performance by moving him into his own building, so that the appellant would have access to secretarial assistance and Col. Johnson could "look to see if he was working." See Hearing Transcript (HT) at 133-35. What did the offer of "monitoring" include? Did it include active or merely passive assistance?

Col. Johnson testified that the appellant spoke to him only once during the PIP, and that he did not know why the appellant did not come to him for assistance other than that one time. See HT at 134. Was the appellant aware that he was expected or required to seek out Col. Johnson for assistance?

General Drudik, for whom the monograph was being prepared, testified that he suggested to the appellant that he use a monograph prepared by John Ronjue, a TRADOC Historian, as "a reasonable model." See HT at 235, 238, 250. In light of Lt. Col. Hahn's criticism of John Ronjue's writing, see Deposition, Tab 16, at 60-62; IAF, Tab L, was the Ronjue monograph a help or a hindrance? Did the appellant follow the Ronjue model, and, if so, was he faulted for following the advice given to him by General Drudik?

General Drudik testified that he was concerned that the appellant was not getting, and could not get, proper guidance from Dr. Bryson, Col. Johnson, or Lt. Col. Hahn because they did not have professional training as historians. See HT at 258, 359. Dr. Mierzejewski testified that Col. Johnson and Dr. Bryson were similarly not capable of providing proper guidance to the appellant on the monograph. See HT at 359. What effect did the concerns by General Drudik and Dr. Mierzejewski have on the agency's obligation to provide the appellant with a reasonable opportunity to improve his performance?

General Drudik testified that he instructed Dr. Mierzejewski to provide assistance and peer review to the appellant. See HT at 237. According to Dr. Mierzejewski, the basic conception of what he was supposed to do had not been adequately communicated to him by General Drudik. See HT at 379-380. He testified that he viewed his role only to

check to see if the appellant had adequate support, such as office facilities, typewriter, word-processor, note cards, etc., and guidance, but not to provide them. See HT at 373. He also testified that the appellant received adequate guidance from Dr. Malone, General Drudik, and himself. See HT at 375. In light of his testimony, what, if any, help did he provide to the appellant during the PIP?

According to Dr. Mierzejewski, he reviewed a draft of the monograph in October 1987, prior to the PIP. He did not read any drafts after that until the end of the PIP, when he reviewed the final draft. See HT at 357. However, he testified that, in February 1988, he wrote a memorandum to General Drudik stating that the appellant "will not pass muster with the Light Division Certification monograph and is unable to do a command history. I also think that he will hang tough in trying to keep his job. He will use every administrative and legal means at his disposal to keep his position or delay his dismissal." See IAF, Tab 8, Exhibit 9; HT at 360. He stated that he based his opinion that there was no way that the appellant could successfully complete the PIP on his observations in October and a memorandum dated December 23, 1987, by Dr. Malone and Mr. Ronjue, even though he did not check to see whether any of the appellant's drafts followed the guidance given by Malone and Ronjue. See HT at 360-61. He testified:

Based on the information that I saw, as I just described in my previous comment, and based on my experience as a

professor for two years at Norwich University, you can tell when a student isn't going to make it and in this case it was my feeling that Dr. Woytak wasn't going to make it.

See HT at 361. Dr. Bryson, the deciding official, relied on Dr. Mierzejewski's critique of the final draft of the monograph in reaching his decision to remove the appellant for unacceptable performance under Critical Element Two. See HT at 204. What effect did Dr. Mierzejewski's apparent predisposition have on whether the appellant was afforded a reasonable opportunity to improve his performance?

According to Lt. Col. Hahn, the appellant, without sufficient experience in military writing and testing, was assigned an "impossible task." See IAF, Deposition, Tab 16, at 58-59. However, he also testified that, while he considered the monograph task very difficult for any historian, it was not impossible, but just required greater documentation efforts.³ See *id.* at 75. In light of Lt. Col. Hahn's testimony, what was the effect of the appellant's lack of experience in military writing and testing?

General Drudik had four meetings with the appellant on the monograph and never told him that he was displeased with any part of the drafts submitted. See HT at 253-54. Considering that General Drudik met with the appellant four

³ General Drudik testified that the appellant's position was being relocated from Fort Ord to Fort Hood, so that the position could become part of a team together with Dr. Mierzejewski. See HT at 270-71.

times, what effect did his failure to inform the appellant that he was displeased with his drafts have on whether the appellant was afforded a reasonable opportunity to improve?

In considering the above questions, the administrative judge should address the applicability of the cases discussed below to this case:

In *Zera v. Defense Investigative Service*, 26 M.S.P.R. 151, 157 (1985), the Board deferred to the administrative judge's credibility determinations to find that an agency's demotion action based upon unacceptable performance could not be sustained because the agency failed to give the employee a sufficient opportunity to improve. The Board found that counselling sessions given the employee by her supervisor were often disparaging in nature, did not produce guidance or advice on how to improve, and were not used to warn her of the possibility of impending action.

In *Adorador v. Department of the Air Force*, 38 M.S.P.R. 461, 466 (1988), the Board found that an agency demotion action based upon unacceptable performance could not be sustained because the agency failed to meet the statutory requirements for providing a meaningful opportunity to improve. The Board found that, contrary to the PIP notice, the appellant's supervisor did not assist the appellant during the early weeks of the PIP, that she considered the appellant to be incompetent prior to the PIP, and that assistance that the appellant did receive came too late to enable her to meet the requirements of the PIP. See

id. See also *Beasley v. Department of the Air Force*, 25 M.S.P.R. 213, 215 (1984) (the agency denied the appellant a reasonable opportunity to improve where it determined that the appellant was going to fail and she could have done nothing to correct the performance her supervisors continually criticized).

In *Macijauskas v. Department of the Army*, 34 M.S.P.R. 564, 567-69 (1987), *aff'd*, 847 F.2d 841 (Fed. Cir. 1988) (Table), the Board found that the agency provided the employee with a bona fide opportunity to demonstrate acceptable performance where: (1) The employee was an experienced computer operator who had over five years experience in his position with the agency; (2) the employee's supervisor counseled him about once a week during the PIP period and discussed with him specific problems and errors; (3) his supervisor provided him with specific recommendations for improvement; (4) his supervisor asked him how he was doing with his duties; and (5) his supervisor instructed another computer operator to demonstrate to the employee how to perform certain computer functions.

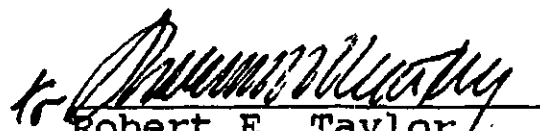
In *Bare v. Department of Health and Human Services*, 30 M.S.P.R. 684, 689 (1986), the agency did not deny the employee, a biological laboratory technician, a reasonable opportunity to improve where the employee was an experienced biological laboratory technician before he was assigned to the position from which he was removed, and he did not request assistance concerning matters in which he was

admittedly deficient or other related matters agency's.
See 30 M.S.P.R. at 689.

ORDER

Accordingly, this case is remanded to the Regional Office for further analysis and adjudication with respect to whether the appellant was afforded a reasonable opportunity to improve his performance. See *Hillen v. Department of the Army*, 35 M.S.P.R. at 458; *Sandland v. General Services Administration*, 23 M.S.P.R. at 587.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.