UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LOUISA A. CORBETT, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER PH0432930201-I-1 DATE: OCT 25 1993

Vincent R. Castellano, Sr., American Federation of Government Employees, Local 1778, Wrightstown, New Jersey, for the appellant.

Francine I. Swan, McGuire Air Force Base, New Jersey, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The agency petitions for review of the initial decision, issued May 27, 1993, that reversed the appellant's removal. For the reasons set forth below, the Board GRANTS the agency's petition, REVERSES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

The agency removed the appellant from her position as Contract Specialist, GS-5, based upon the charge of

unacceptable performance. The agency specified that the appellant failed to satisfy the performance standards for two critical elements of her position.

The appellant filed an appeal of this action with the Board's Philadelphia Regional Office. Following a hearing, the administrative judge reversed the appellant's removal, finding as follows: (1) The agency established that its performance appraisal plan was approved by the Office of Personnel Management; (2) the appellant's performance standards were valid and were communicated to her; and (3) the agency did not provide the appellant with a meaningful opportunity to improve because it did not meet its training obligations. With respect to this last issue, the administrative judge first recognized that an agency does not have a generalized obligation to provide formal training as part of a performance improvement plan (PIP). She found, however, that the agency here committed itself to providing training for the appellant but then made only a "veiled effort to do so."

In its petition for review, the agency asserts that it did not promise the appellant formal training during her PIP, and that, to the extent that it promised her assistance, it complied with this requirement. Thus, the agency asserts that it provided the appellant with a reasonable opportunity to improve.[1]

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[1] The appellant responded to the petition by requesting that it be denied because neither she nor her representative

ANALYSIS

In a performance-based action taken under 5 U.S.C. § 4303, the agency must prove by substantial evidence that it afforded the appellant the opportunity to demonstrate acceptable performance. *See Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587 (1984). The Board has held, however, that an agency is not required to provide an employee with any formal training as part of this opportunity. *See Macijauskas v. Department of the Army*, 34 M.S.P.R. 564, 569 (1987), *aff'd* 847 F.2d 841 (Fed. Cir. 1988)(Table). The Board has also found that an agency does not meet its burden of proving that it afforded an appellant an opportunity to improve, where it promises an appellant assistance during a PIP, and then both fails to provide such assistance and otherwise prejudges the appellant or hinders the appellant's chances to succeed. *See Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 579 (1991); *Adorador v. Department of the Air Force*, 38 M.S.P.R. 461, 466 (1988); *Zang v. Defense Investigative Service*, 26 M.S.P.R. 155, 157 (1985). *See also Woytak v. Department of the Army*, 49 M.S.P.R. 687,

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received a copy of it. The agency, however, timely filed its petition for review with the Office of the Clerk of the Board. Petition for Review File, Tabs 1, 2. Further the agency replied to the appellant's request by submitting evidence and argument showing that it placed copies of its petition, addressed to both the appellant and her representative, in the postal mail stream prior to the filing deadline. The appellant's representative has also admitted that he did receive a copy of the petition. Petition for Review File, Tab 5. We, therefore, deny the appellant's request. *See Johnston v. Office of Personnel Management*, MSPB Docket No. NY844E920468-I-1, slip op. at 4 n.2 (June 7, 1993).

690-95 (1991) (remand to determine whether agency's alleged failure to provide promised monitoring and assistance deprived the appellant of a reasonable opportunity to improve).

In placing the appellant on her PIP in the present case, the appellant's supervisor, Ms. Lidija Erazo, both recounted the agency's past training efforts and offered the appellant additional assistance during her PIP. She noted that, since March 15, 1991, the appellant had four different trainers, including her current one, Ms. Sheryl Carrington. She stated that these trainers had been instructed to provide the appellant with day-to-day training and assistance, and that, even though the appellant had also been provided divisional, branch, and individualized training, she was unable to understand and put to use the fundamental elements of the small purchase acquisitions she was required to make in her position. Thus, she stated that the agency was delaying training the appellant regarding more complex large purchases. Agency File, Tab 4g. She further stated that, once the appellant reached a fully successful level in small purchases, she would be provided training for the more complex area of sealed bid acquisitions. Finally, Ms. Erazo informed the appellant as follows:

> During this period I will afford you four (4) hours to read FAR, Federal Acquisition Register, Part 13 and MAC Reg 70-3 in order to familiarize yourself with requirements. You will report directly to me when you have questions concerning your work assignment. You and I will meet on a weekly basis to review work and progress, clarify issues and correct misunderstandings. At any time that you need assistance do not hesitate to ask questions.

> You will be responsible for researching appropriate directives and completing work assignment.

Id.

The record supports the conclusion that the agency provided this promised assistance. Although the appellant testified that Ms. Erazo did not counsel her during the PIP, Ms. Erazo testified that she spoke to the appellant on a weekly basis to give her feedback on her performance. Hearing Transcript (Tr. at 38, 58-59, 96-98, 129, 133, 312). The documentary record supports Ms. Erazo's feedback claim. Ms. Erazo documented approximately 14 meetings with the appellant during the PIP. Ms. Erazo's notes establish that she was available to the appellant for questions, identified the appellant's errors, instructed the appellant about how to correct them, and gave her general feedback about how her work was progressing. Agency File, Tab 4e.

It is also undisputed that, in addition to access to Ms. Erazo, the agency continued to provide the appellant with Ms. Carrington as a trainer during the PIP. Ms. Carrington testified that she trained the appellant on two days for approximately 1/2 day on each occasion during the PIP. Tr. at 231. Although, as the administrative judge found, Ms. Carrington testified that the appellant's PIP was unusual because the appellant was not allowed to direct questions to other employees, and because she was not given a plan to follow in training the appellant, her testimony also supports the conclusion that the agency met its offer of training and assistance. Initial Decision at 7; Tr. at 223, 227. In this

regard, she testified that she was instructed to train the appellant on new items that arose, that the appellant was free to come to her with questions, that there were no prohibitions or limitations on training, that she never refused a request for training, and that the appellant never expressed dissatisfaction with her. Tr. at 213, 228, 229.

Both Ms. Erazo and the appellant corroborated Ms. Carrington's testimony regarding her availability to help the appellant, and the appellant's satisfaction with her efforts. Ms. Erazo testified that Ms. Carrington was instructed to help the appellant learn about new documents, and to be available to answer questions. Tr. at 37. She further testified that the appellant had previously expressed dissatisfaction with the three trainers assigned to her prior to Ms. Carrington, that she changed the appellant's trainers upon receiving complaints, and that the appellant never complained about Ms. Carrington's training efforts. Tr. at 60-62. The appellant also admitted that Ms. Carrington was available "most" of the time, that Ms. Carrington trained her on new items, and that she never asked Ms. Carrington for help in problem areas.[2] Tr. at 308, 317, 322-23.

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[2] We note that the administrative judge found that Ms. Carrington did not train the appellant on two aspects of one of the charged critical elements. Initial Decision at 7. This finding, however, would not be relevant to an action based upon the other charged critical element alone; further, even with respect to the element referenced in the initial decision, the administrative judge has not explained the significance of the training omission.

We find that the above evidence establishes that the agency satisfied the general regulatory requirements governing PIPs and opportunities to demonstrate acceptable performance, as well as any specific obligation it may have incurred in offering the appellant training and assistance during the PIP. *Compare* 5 C.F.R. § 432.103(e) (defining an opportunity to demonstrate acceptable performance as "a reasonable chance for the employee ... to demonstrate acceptable performance in the critical element(s) and/or critical work objectives at issue"); *with* 5 C.F.R. § 432.103(f) (setting forth the requirements for a PIP for a supervisory or managerial employee and specifically requiring an "offer [of] assistance to the employee"). We, therefore, conclude that the agency provided the appellant with a reasonable opportunity to improve. *See Johnson v. Department of the Army*, 44 M.S.P.R. 464, 468-69 (1990); *Macijauskas*, 34 M.S.P.R. at 567-69.

In light of this conclusion, a determination must be made regarding whether the agency proved its charges of unacceptable performance against the appellant. The initial decision does not discuss this issue. Because such findings will require credibility assessments of the various witnesses testifying to this matter, as well as an evaluation of the evidentiary weight warranted by the hearsay documentary evidence presented below, we find it appropriate to remand this appeal for further findings and conclusions.[3] *See e.g.*,

[3] We note that the administrative judge limited the agency's hearing presentation to testimony regarding one of

Cohen v. General Services Administration, 48 M.S.P.R. 451, 456-59, 462 (1991).

ORDER

Accordingly, we REMAND this appeal to the Philadelphia Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

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the two critical elements contained in the appellant's removal notice. Appeal File, Tab 14 at 4. If, on remand, the administrative judge finds that the agency did not prove the appellant's unsatisfactory performance under that one critical element, she should reconvene the hearing to allow the agency to present testimonial evidence concerning the appellant's performance under the other charged critical element.