

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2011 MSPB 94**

Docket No. SF-0432-10-0852-I-1

**Larry Van Prichard,
Appellant,**

v.

**Department of Defense,
Agency.**

November 9, 2011

Larry Van Prichard, Glendale, California, pro se.

Roland D. Meisner, Quantico, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has petitioned for review and the appellant has cross-petitioned for review of the initial decision that reversed the appellant's removal for unacceptable performance under 5 U.S.C. chapter 43. For the reasons set forth below, we DENY the agency's petition for review and the appellant's cross-petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant worked as an Industrial Security Specialist (ISS), GG-11,¹ for the agency. Initial Appeal File (IAF), Tab 7 at 126. For the rating period from April 1, 2009, to September 30, 2009, the agency rated the appellant Unacceptable under the Defense Security Service (DSS) Performance Plan and Appraisal (Performance Plan). IAF, Tab 4 at 89. Specifically, the appellant was rated Unacceptable in the following three elements:²

Element #1 – Contributing to the Achievement of Organizational Goals. Accomplishes performance requirements which contribute to the achievement of local and agencywide [sic] goals in terms of quantity and quality. Work products and services are usually accurate, timely, and complete, while appropriately prioritized to ensure mission accomplishment.

. . .

Element #2 – Technical Knowledge and its Application. Displays and applies appropriate knowledge and understanding of the technical requirements of the job (to include applicable policies, procedures, and automation [sic] requirements) in order to effectively support DSS missions and goals. Demonstrates ability to analyze and solve problems as appropriate.

. . .

Element #5 – Communications. Work products are generally well written, clear, concise, logically organized and technically accurate. Orally articulates operational [sic] related matters to customers, general public, co-workers, and supervisors with tact and diplomacy. Keeps supervisor, team leader and/or team members informed of issues and problems.

Id. at 90-91.

¶3 Under Element #1, the Performance Plan further states:

¹ On October 11, 2009, the appellant’s position was reclassified from a GG-11 level to an IA-03 level, but there is no evidence that the appellant was provided with a new set of performance standards at that point. *See* Initial Appeal File, Tab 7 at 124.

² The DSS Performance Plan does not distinguish between critical and noncritical elements, but the appellant’s supervisor referred to the three elements at issue in the instant appeal as “critical” elements. *See* IAF, Tab 4 at 82.

The rating official and the employee/team are expected to jointly discuss and develop the standards for this element. The standards should take into account not only accuracy, timeliness, and quality, but also customer needs and requirements. While DSS has made agencywide [sic] commitments for its product lines, each team, operating location, center and directorate should establish commitments that support the achievement of the overall agency goals. Any revisions made to this element during the appraisal cycle need to be initialed by both the employee and the rating official.

Id. at 90. The Performance Plan also includes the following three additional sections under Element #1:

IDENTIFY PRODUCT LINE(S)

Implement management initiatives goals and direction. Improve communications, incorporate counterintelligence in the program, implement the career path, improve automation efforts, improve industry relations and use risk management (identification and implementation of process improvements). NOTE: Employee should identify specific goal(s) for the rating period.

Performs core industrial security taskings following the priorities as outlined in the ISOM and as directed/communicated by ISP management. NOTE: Supervisor may provide specific goals for the rating period.

PRODUCTS COMPLETED WITHIN COMMITMENTS

(A percentage, range, or number is to be reflected here)

Employee consistently meets suspenses for assigned tasks and manages resources effectively. (See attached Supplemental to Product Line, Products Completed Within Commitments, and Quality Standard)

NOTE: With the Regional Director's concurrence, the production percentages identified under the Field Industrial Security Program Management section can be adjusted to offset vacancies in a given office over a sustained period. Adjustments will be documented in the Performance Plan & Appraisal document.

QUALITY STANDARD

(The percentage of products meeting customer expectations and requirements)

Work is consistently of good quality and content and is rarely turned back for rework.

(See Supplemental to Quality Standard Below)[.]

Id. (italicized and bold fonts omitted). The referenced Supplemental provided additional standards related to, inter alia, timeliness and quality. *See* IAF, Tab 7 at 4-6.

¶4 On November 17, 2009, Clarence Hollingsworth, Field Office Chief and the appellant's supervisor, issued the appellant a Notification of Unacceptable Performance and Opportunity to Improve, hereinafter known as a Performance Improvement Plan (PIP). IAF, Tab 4 at 82. The memorandum stated that the appellant's performance was Unacceptable in Critical Elements #1, #2, and #5, described how the appellant failed to meet the Fully Successful level for his position, and set forth the improvements needed to meet that standard. *Id.* at 82-88. In a May 4, 2010 letter, La Shawn Samuel, Director of Human Resources, proposed the appellant's removal based on the appellant's inability to perform at a Fully Successful level during the PIP. IAF, Tab 4 at 23-30. The letter set forth one charge of Unacceptable Performance in Critical Elements #1, #2, and #5, noted that the appellant's supervisor determined that the appellant's performance had not improved to the Fully Successful level at the conclusion of his PIP on February 17, 2010, and provided a number of examples of the appellant's performance deficiencies under each Critical Element. *Id.*

¶5 After considering the appellant's written and oral replies, which disputed some of the alleged errors, alleged that someone had tampered with his computer, and asserted that Mr. Hollingsworth was biased against him, *see* IAF, Tab 4 at 110, 112-14, 118-25, Richard Lawhorn, Director of Industrial Security Operations, upheld the charge of Unacceptable Performance, *id.* at 93-95. Mr.

Lawhorn found that the appellant's work products were full of grammatical errors and technical inconsistencies that required his supervisor to review his work in detail and return it to the appellant for corrections and found that many of the appellant's inspection reports were untimely. *Id.* The appellant filed a timely Board appeal, raising claims of discrimination, harmful procedural error, and prohibited personnel practices. IAF, Tab 1 at 4. The appellant did not request a hearing.

¶6 The administrative judge did not sustain the agency's charge of Unacceptable Performance. IAF, Tab 29, Initial Decision at 19, 23. The administrative judge first recognized that, under the agency's five-tiered performance appraisal system, the appellant could reach a Marginally Successful level of performance without falling to the level that would support removal under 5 U.S.C. chapter 43. *Id.* at 15. The administrative judge found that the agency failed to show that its performance standards are valid, finding that the Performance Plan provided definitions for each of the five possible ratings but did not describe with any clarity how an employee may attain a particular rating in any given element aside from the Fully Successful level. *Id.* at 15-16. The administrative judge found that the Supplemental and the PIP provided the appellant with information regarding the agency's expectations of timeliness, quality, and quantity at the Fully Successful level. *Id.* at 16-17. The administrative judge found, however, that neither the Performance Plan, nor the Supplemental, defined the Marginally Successful standard so as to set forth the minimal performance necessary for the appellant to remain employed in his position. *Id.* at 17. The administrative judge therefore found that the agency failed to distinguish between Marginally Successful and Unacceptable performance. *Id.* at 17-18. She further found that the Marginally Successful standard was an invalid negative standard as it described only what the appellant should not do and not what the appellant was required to do. *Id.* at 18. The administrative judge also found that the Marginally Successful standard did not

permit the accurate evaluation of job performance on the basis of objective criteria, was not sufficiently precise, and was not rendered less vague when read in conjunction with the appellant's critical elements. *Id.* at 18-19. The administrative judge found that, because the Marginally Successful standard was unclear and vague, she could not consider the appellant's charged performance deficiencies. *Id.* at 19. She thus ordered the agency to cancel the appellant's removal and retroactively restore the appellant effective July 12, 2010. *Id.* at 23.

¶7 With respect to the appellant's affirmative defenses of harmful procedural error and violations of 5 U.S.C. §§ 2302(b)(4) and (b)(6),³ the administrative judge found that, because she reversed the agency's removal action, the appellant's claims were immaterial as they could not provide any additional relief for the appellant. Initial Decision at 20. The administrative judge rejected the appellant's claim of sex discrimination, finding that the appellant failed to meet his prima facie burden of proof because he provided no evidence that Mr. Hollingsworth or the Regional Director favored female employees and no evidence that the alleged activities of his female coworkers that allegedly created a hostile environment actually occurred. *Id.* at 22. The administrative judge further found that, even if the appellant's allegations were true, he failed to show that a reasonable person would consider the workplace an abusive working environment and he did not raise any inference that sex was a factor in the decision to remove him. *Id.*

¶8 The agency filed a timely petition for review, submitting evidence that it complied with the administrative judge's order to provide the appellant with interim relief, to which the appellant filed a response. Petition for Review (PFR)

³ Under 5 U.S.C. § 2302(b)(4), the appellant alleged that the agency prevented him from doing his job by inserting an illegal modem in his laptop allowing the agency to interfere and tamper with his work product. Under 5 U.S.C. § 2302(b)(6), the appellant alleged that his supervisor allowed female employees to "run the office" when the appellant's duty hours changed. IAF, Tab 14 at 5; *id.*, Tab 22 at 6.

File, Tabs 1, 6; *see* Initial Decision at 24. The appellant also filed a timely cross-petition for review, to which the agency filed a timely response.⁴ *Id.*, Tabs 3, 5.

ANALYSIS

The agency's performance appraisal system was approved by the Office of Personnel Management (OPM).

¶9 Before initiating an action for unacceptable performance under 5 U.S.C. § 4303, an agency must give the employee a reasonable opportunity to demonstrate acceptable performance and must show by substantial evidence that: its action was taken under a performance appraisal system approved by OPM; the appellant's performance standards are valid; and the appellant's performance was unacceptable in at least one of his critical elements. *Diprizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 7 (2001); 5 C.F.R. § 432.104. Substantial evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1).

¶10 While the agency has the burden of proving it, ordinarily the Board will presume that OPM has approved the agency's performance appraisal system; however, if an appellant has alleged that there is reason to believe that OPM did not approve the agency's performance appraisal system or significant changes to a previously approved system, the Board may require the agency to submit evidence of such approval. *Adamsen v. Department of Agriculture*, 563 F.3d 1326, 1330–31 (Fed. Cir.), *modified by* 571 F.3d 1363 (Fed. Cir. 2009); *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶ 12 (1999). In its petition for

⁴ The appellant also filed a reply to the agency's response to his petition for review on March 29, 2011. PFR File, Tab 8. Because the Board's regulations do not provide for a reply to a response to a petition for review and because the record on review closed on March 18, 2011, we have not considered the appellant's March 29, 2011 submission. *See id.*, Tab 4; *see also* 5 C.F.R. § 1201.114(i) (once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that it was not readily available before the record closed).

review, the agency asserts that the administrative judge failed to determine whether the agency's performance appraisal system had been approved by OPM even though the appellant challenged it. PFR File, Tab 1 at 6; *see* IAF, Volume 3, Tab 25 at 16. The agency is correct that the administrative judge did not make an explicit finding that OPM approved the agency's performance appraisal system. Evidence submitted by the agency before the administrative judge indicates that OPM approved the performance appraisal system in 1996. *See* IAF, Tab 7 at 26. However, given that OPM approval of the performance appraisal system is an element separate and apart from the element requiring the agency to prove the validity of its performance standards, the agency's assertion that its performance standards are valid merely because OPM approved its performance appraisal system is without merit. *See* PFR File, Tab 1 at 6.

The appellant is not barred by collateral estoppel from challenging the validity of his performance standards.

¶11 In its petition for review, the agency asserts that the issue of whether the agency's performance standards are valid is precluded by administrative collateral estoppel. PFR File, Tab 1 at 13. It asserts that the issue of the validity of the agency's performance standards is identical in the instant case as in *DeShields v. Department of Defense*, MSPB Docket No. DA-0432-06-0559-I-1, Initial Decision (Nov. 28, 2006), *aff'd*, 105 M.S.P.R. 557 (2007) (Table), that the issue was actually litigated in *DeShields*, that the determination on the issue in *DeShields* was necessary to the resulting judgment, and that the appellant here has not "raised any performance standards legal issues that had not been finally decided by the Board in *DeShields* in 2007." PFR File, Tab 1 at 13-14.

¶12 Collateral estoppel, or "issue preclusion," is appropriate when: (1) An issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the

prior action, either as a party or as one whose interests were otherwise fully represented in that action. *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988); *Encarnado v. Office of Personnel Management*, 116 M.S.P.R. 301, ¶ 13 (2011).

¶13 We have reviewed Critical Element #1 of the performance standard at issue in *DeShields*, which involved the removal of an Industrial Security Representative by the agency, as set forth in the Initial Decision in that matter. *See DeShields*, MSPB Docket No. DA-0432-06-0559-I-1, Initial Decision at 2, 4-5. While the first paragraph of Critical Element #1 in *DeShields* appears to be identical to the Performance Plan at issue here, the performance plan in *DeShields* also included four sub elements to Critical Element #1 that do not appear in the Performance Plan submitted by the agency in the instant appeal. *See DeShields*, MSPB Docket No. DA-0432-06-0559-I-1, Initial Decision at 4-5; IAF, Tab 4 at 90. Thus, it is far from clear that the performance standards are identical in every respect. Further, there is nothing in *DeShields* that indicates whether the performance plan contained the same negative definition of the Marginal level of performance on which the administrative judge based her decision that the standards at issue here are invalid. *See* Initial Decision at 17-19. Moreover, there is nothing in the initial decision in *DeShields* that suggests that Mr. DeShields challenged the validity of the performance standards applied to him, or, if he did so challenge the validity of the standards, the extent or the details of his challenge. Thus, even if the performance standards at issue were identical, the validity was actually litigated in *DeShields*, and the determination was necessary to the resulting judgment in *DeShields*, we cannot say that the appellant's interests were fully represented in that action with respect to challenging the validity of the performance standards. *See Encarnado*, 116 M.S.P.R. 301, ¶ 13. Accordingly, the agency's assertion that the appellant is barred from relitigating the validity of the performance standards at issue here by collateral estoppel is without merit.

The agency failed to prove that its Marginal performance standard is valid or that it otherwise advised the appellant of what he needed to do to reach the Marginal level of performance in order to retain his position.

¶14 Agency performance appraisal systems may include between two and five summary rating levels. 5 C.F.R. § 430.208(d). Under any performance appraisal system, the lowest rating level is “unacceptable,” which is the only rating that will support removal under chapter 43. *Jackson-Francis v. Office of Government Ethics*, 103 M.S.P.R. 183, ¶ 6 (2006); *Stenmark v. Department of Transportation*, 59 M.S.P.R. 462, 468 (1993); see 5 U.S.C. § 4302(b)(6); 5 C.F.R. §§ 430.206(b)(8), 430.207(c), 430.208(d). Under certain performance appraisal systems, performance of a critical element may fall between “fully successful” and “unacceptable.” 5 C.F.R. §§ 430.207(c), 430.208(d); see *Jackson-Francis*, 103 M.S.P.R. 183, ¶ 6. If an agency adopts such a performance appraisal system, an appellant’s performance could be “not satisfactory” without falling to the level that would support removal. 5 C.F.R. §§ 430.207(c)-(d), 430.208(d); see *Jackson-Francis*, 103 M.S.P.R. 183, ¶ 6.

¶15 Here, as the administrative judge acknowledged, the agency rated the appellant under a five-tiered performance appraisal system, including a rating level of Marginal that fell between Fully Successful and Unacceptable. IAF, Tab 4 at 89; Initial Decision at 14. Under the agency’s performance appraisal system, if the appellant’s performance was Marginal it would be “not satisfactory” without falling to the level of Unacceptable. IAF, Tab 4 at 89; see *Jackson-Francis*, 103 M.S.P.R. 183, ¶ 7; 5 C.F.R. §§ 430.207(c), 430.208(d). Thus, under the agency’s performance appraisal system, the appellant could reach a Marginal level of performance without falling to the level that would support removal under chapter 43. IAF, Tab 4 at 89; see 5 U.S.C. § 4302(b)(6); *Jackson-Francis*, 103 M.S.P.R. 183, ¶ 7; 5 C.F.R. §§ 430.207(c)-(d), 430.208(d). Consequently, to the extent the agency required the appellant to reach the Fully Successful level during his PIP to avoid removal under chapter 43, the agency erred. IAF, Tab 4

at 30, 87-88; *see Goodale v. Department of Labor*, 28 M.S.P.R. 158, 159 n.4 (1985); Initial Decision at 14-15.

¶16 To remove an employee for unacceptable performance under 5 U.S.C. chapter 43, the agency must prove, inter alia, that the appellant's performance standards are valid. *Diprizio*, 88 M.S.P.R. 73, ¶ 7. To prove that it has valid performance standards, an agency must show that the standards meet the statutory requirements of 5 U.S.C. § 4302(b)(1) and do not constitute an abuse of discretion. *Johnson v. Department of the Interior*, 87 M.S.P.R. 359, ¶ 6 (2000). Thus, to the maximum extent feasible, an agency is required to establish standards which permit the accurate appraisal of performance, based on objective criteria. *Neal v. Defense Logistics Agency*, 72 M.S.P.R. 158, 161 (1996). Performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid removal for unacceptable performance under chapter 43. *Eibel v. Department of the Navy*, 857 F.2d 1439, 1441-44 (Fed. Cir. 1988). Absent valid performance standards, the Board cannot consider charged performance deficiencies. *Ortiz v. Department of Justice*, 46 M.S.P.R. 692, 695 (1991).

¶17 As the Board similarly recognized in *Jackson-Francis*, because the agency here could not remove the appellant under chapter 43 if he reached a Marginal level of performance, the question is whether that performance standard is valid. *See Jackson-Francis*, 103 M.S.P.R. 183, ¶ 9; IAF, Tab 4 at 89. Unlike the standards in *Jackson-Francis*, in which apparently each level of performance was defined for each critical element, here the agency's Performance Plan simply sets forth each critical element but does not define the level of performance for each element as part of the Plan. *See Jackson-Francis*, 103 M.S.P.R. 183, ¶ 9; IAF, Tab 4 at 90-92; *id.*, Tab 7 at 4-6; Initial Decision at 15-16. Instead, as the administrative judge noted, the only mention of the requirements of meeting the Marginal level of performance are stated generally for the Performance Plan as a whole in the "Definitions" section. IAF, Tab 4 at 89; Initial Decision at 15-17.

The Marginal rating is defined as performance that is “less than Fully Successful and supervisory guidance and assistance is more than normally required. To be rated Marginal, any of the Critical Elements are rated ‘Marginal’ and no elements are rated ‘Unacceptable.’” IAF, Tab 4 at 89.

¶18 We agree with the administrative judge that the Marginal performance standard is an invalid backwards standard because, although it is written at the “minimally successful” level, it fails to inform the appellant of what is necessary to obtain an acceptable level of performance, and instead describes what he should not do. Initial Decision at 17-18; *see Eibel*, 857 F.2d. at 1443-44; *Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 534 n. 5 (1992), *aff’d*, 22 F.3d 1104 (Fed. Cir. 1994) (Table). Because the Marginal standard does not define the minimal performance necessary for the appellant to remain employed in his position, the agency failed to distinguish between Marginal and Unacceptable performance as a practical matter. *See Burroughs v. Department of Health & Human Services*, 49 M.S.P.R. 644, 650-51 (1991); IAF, Tab 4 at 89. In its petition for review, the agency has failed to point to anything in the record that cures this deficiency by advising the appellant of what is necessary to obtain an acceptable level of performance, i.e., a Marginal level of performance rather than a Fully Successful level. *Cf. Diprizio*, 88 M.S.P.R. 73, ¶¶ 10-11 (finding that, while the agency’s performance standards were not sufficiently precise, the applicable critical elements identified specific tasks with such details that, when read in conjunction with the performance standards, the appellant was apprised of the tasks he was required to perform to meet the minimally successful level of performance); *see* Initial Decision at 18-19.

¶19 While the agency asserts that, even if the performance standards lacked specificity, the agency provided the appellant with clear guidance of what was expected of him during the PIP, *see* PFR File, Tab 1 at 15, we agree with the administrative judge that the information provided to the appellant for his PIP was limited to what was required for the appellant to achieve a Fully Successful

rating. *See* Initial Decision at 17. The issue here turns on not only whether the agency informed the appellant of what duties he was required to perform in his position and/or during the PIP, but also the *level of performance* he was expected to achieve to retain his position. Indeed, as discussed above, the PIP refers on several instances to the improvements needed by the appellant to meet the Fully Successful level. *See* IAF, Tab 4 at 82, 87-88 (stating that the appellant would be given 90 days to “achieve a Fully Successful level of performance,” that the appellant “must raise [his] performance to the Fully Successful level,” and that “[f]ailure to achieve a Fully Successful level of performance . . . may result in a performance-based action.”). The agency has identified nothing in the PIP that placed the appellant on notice of what was required to reach the Marginal performance level, at which he could retain his position and could not be removed for unacceptable performance under chapter 43. *See Jackson-Francis*, 103 M.S.P.R. 183, ¶ 7; *Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 298-300 (1985) (the appellant’s demotion for unacceptable performance could not be sustained where the agency, despite having a five-tier performance system, consistently told the appellant what was required for a “satisfactory” rating only, and not for the “minimally satisfactory” or “needs improvement” level which she had to reach in order to avoid demotion).

¶20 The agency asserts in its petition for review that the administrative judge’s “factual finding that the Agency used a summary performance rating of ‘Marginally Successful’ is not supported by any record evidence” and thus her finding that the Marginally Successful performance rating is invalid was erroneous. PFR File, Tab 1 at 10. The agency maintains that “Marginally Successful” is not defined anywhere in the record, that the administrative judge “coined” the phrase, and that “the phrase does not in anyway [sic] describe or illustrate any of the Agency’s critical elements and their respective performance standards.” *Id.* at 11. It further asserts that the administrative judge’s coined phrase represents the agency’s summary level 2 performance rating based on its

five-tiered scale and that the agency's definition of level 2 "fully complies with the OPM prescribed definition found at 5 C.F.R. § 430.207(c)." *Id.*

¶21 The agency's assertions on this issue are without merit. While the agency's Performance Plan clearly refers to "Marginal" performance rather than "Marginally Successful" performance as referenced by the administrative judge throughout the initial decision, the deficiency in the Performance Plan's definition of the Marginal level remains, as fully discussed above, regardless of the administrative judge's minor misstatement in referring to the standard. *See Jackson-Francis*, 103 M.S.P.R. 183, ¶¶ 8-10. Further, 5 C.F.R. § 430.207(c) provides nothing more than that "[a]ppraisal programs should provide assistance whenever performance is determined to be below 'Fully Successful' or equivalent but above 'Unacceptable.'" Assuming that the agency met that requirement, it still failed to define the minimal performance necessary for the appellant to remain employed in his position. *See Eibel*, 857 F.2d at 1441-44; *Burroughs*, 49 M.S.P.R. at 650-51.

¶22 The agency asserts in its petition for review that the administrative judge failed to issue an order indicating any potential legal problem with the standards or to otherwise place the agency on notice that there were problems with the OPM-approved performance standards. PFR File, Tab 1 at 6-7. The agency has failed to cite legal authority supporting its implicit assertion that the administrative judge may not find the performance standards invalid without providing the agency an opportunity to supplement the record. The Board has held that, absent valid performance standards, it cannot evaluate whether an agency properly took action against an employee for unacceptable performance. *Neal*, 72 M.S.P.R. at 161; *Smith v. Department of Veterans Affairs*, 59 M.S.P.R. 340, 347 (1993). Thus, because an agency must prove its action was based on valid performance standards in cases involving a performance-based action under 5 U.S.C. chapter 43, the Board has held that it is "obliged to consider this issue, regardless of whether it has been raised by the parties." *Neal*,

72 M.S.P.R. at 161. The administrative judge properly advised the agency of its burden in proving the appellant's unacceptable performance under chapter 43, which includes proving by substantial evidence that the relevant performance standards are valid. *See* IAF, Tab 14 at 1-3; *see also Diprizio*, 88 M.S.P.R. 73, ¶ 7; 5 C.F.R. § 432.104. Accordingly, the agency's assertions on this issue are meritless. *See, e.g., Johnson*, 87 M.S.P.R. 359, ¶¶ 3, 17 (finding no error by the administrative judge where he considered, *sua sponte*, the validity of the appellant's performance standards because although the administrative judge cancelled the appellant's requested hearing and issued a decision reversing the appellant's removal, he provided the agency with an opportunity to present evidence and argument to show that its standards were valid), *rev'd in part on other grounds in Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1337 (Fed. Cir. 2004).

¶23 The agency maintains in its petition for review that the appellant was removed in accordance with 5 U.S.C. § 4303(c)(2) because his performance at the end of his PIP remained unacceptable. PFR File, Tab 1 at 11-12. The agency asserts that the appellant's performance was rated Marginal in his previous final full year appraisal for the period ending on March 31, 2009, and that the appellant did not appeal or grieve his rating, indicating that he understood and accepted the rating. *Id.* at 12. It further asserts that the appellant failed to claim that his performance during his PIP was Marginal and that he thus could not be terminated for unacceptable performance. *Id.* at 12-13. The agency further asserts that, even if neither issue preclusion nor collateral estoppel apply, the appellant admitted before the administrative judge that his performance was not satisfactory and that he "quintessentially admitted under oath that the performance standards did 'permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question.'" *Id.* at 14-15 (citing *Neal*, 72 M.S.P.R. at 163).

¶24 Regardless of whether the appellant asserted that his performance was Marginal and thus he could not be removed, the Board is obligated to consider and the agency is obligated to prove by substantial evidence that the performance standards under which the appellant was rated were valid before sustaining a removal under chapter 43. *See Neal*, 72 M.S.P.R. at 161. Accordingly, the appellant's failure to object to his previous Marginal performance rating or his failure to assert that his performance was Marginal during his PIP does not excuse the agency from meeting its burden on this issue. Further, under the agency's five-tiered performance appraisal system, the agency is required to prove that the appellant's performance is worse than "not satisfactory," i.e., Marginal; it is required to prove that his performance is Unacceptable. *See Jackson-Francis*, 103 M.S.P.R. 183, ¶ 7; IAF, Tab 4 at 89; PFR File, Tab 1 at 14-15. Therefore, the appellant's admission during his deposition that some of his work products were unsatisfactory does not equate to an admission that his performance was unacceptable. *See IAF*, Tab 7 at 94, 99. Further, we note that the appellant's statements regarding the unsatisfactory nature of some of his work products were elicited during a series of questions related to his assertions that someone was tampering with his work products after they were submitted, i.e., he stated that he submitted his work products "in a satisfactory manner" and that the only reason they were unsatisfactory was because someone changed them. *See id.* Moreover, as also noted above, absent valid performance standards, the Board cannot consider charged performance deficiencies. *See Ortiz*, 46 M.S.P.R. at 695. Thus, as the administrative judge properly found, the Board cannot consider the appellant's performance deficiencies, or lack thereof, in light of the agency's invalid performance standards. *See Initial Decision* at 19.

The appellant fails to identify any error by the administrative judge in his cross petition for review.

¶25 In his cross petition for review, the appellant asserts that the administrative judge erroneously declined to address his claims of harmful procedural error and

prohibited personnel practices. PFR File, Tab 3 at 4. However, the appellant has pointed to no error by the administrative judge in the treatment of these issues. *Cf. Hejka v. U.S. Marine Corps*, 9 M.S.P.R. 137, 140 (1981) (finding that, where an action for removal based on misconduct was not sustained, the remaining issue of possible harmful error was rendered moot). Furthermore, the appellant does not dispute, and we find no reason to disturb, the administrative judge's findings with respect to his sex discrimination claim. *See* Initial Decision at 20-22.

ORDER

¶26 We ORDER the agency to cancel the removal and to restore the appellant effective July 12, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶27 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶28 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶29 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition

should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶30 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶31 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.