UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ALEXANDER JACKMAN, JR,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
CH-0432-22-0119-I-1

DATE: April 15, 2022

Matthew F. Mihalich, Esquire, Washington, D.C., for the appellant.

Katherine E. Griffis, Esquire, Fort Campbell, Kentucky, for the agency.

BEFORE
Martha L. Russo
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 30, 2021, the appellant timely filed an appeal of his removal for unacceptable performance. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over the appeal under 5 U.S.C. §§ 4303(e) and 7701(a). A hearing was held. Hearing Recording (HR), IAF, Tab 31.

For the reasons explained below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

Background

Prior to the removal action, the agency employed the appellant as a Health System Specialist (Physical Evaluation Board Liaison Officer (PEBLO)) at the

Blanchfield Army Community Hospital (BACH) at Fort Campbell, Kentucky. *See* IAF, Tab 19 at 4. The appellant's first-level supervisor was Supervisory PEBLO Debbie Kendrick. HR (appellant, Kendrick). His second-level supervisor was Adrienne Thomas, Chief of the Integrated Disability Evaluation System (IDES) at BACH. *Id.* (appellant, A. Thomas).

PEBLOs counsel service members whose medical conditions may render them unfit for duty and guide them through the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) process. HR (appellant, Kendrick). The PEBLO ensures service members' medical records are uploaded into the appropriate databases, and keeps the service members and command updated on the process. *Id.*

On June 7, 2021, Kendrick placed the appellant on a Performance Improvement Plan (PIP) due to his unacceptable performance in Data Management, Critical Element 3 of his performance plan. *See* IAF, Tab 12 at 23-25. On August 2, 2021, she notified him he did not reach an acceptable level of competence on the PIP. *Id.* at 45-46. Kendrick then notified the appellant on September 27, 2021, that she proposed his removal from Federal service. *Id.* at 47-53. On November 30, 2021, Chief Thomas issued a decision sustaining the appellant's removal. *Id.* at 55-61. The removal action was effective December 7, 2021. IAF, Tab 19 at 4.

This appeal followed. A hearing was held on April 7 and April 8, 2022. HR. The record is closed. *Id.*

Burden of Proof and Applicable Law

An agency may reduce in grade or remove an employee for unacceptable performance under 5 U.S.C. § 4303 when it proves by substantial evidence:[1] (1)

[1] Substantial evidence is the "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. § 1201.4(p). In other words, the agency is not required to provide evidence regarding the appellant's

the Office of Personnel Management (OPM) approved the agency's performance appraisal system; (2) the agency communicated to the appellant the performance standards and critical elements of his position; (3) the appellant's performance standards were valid under 5 U.S.C. § 4302(c)(1); (4) the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him a reasonable opportunity to demonstrate acceptable performance; and (5) the appellant's performance remained unacceptable in one or more of the critical elements for which he was provided an opportunity to demonstrate acceptable performance. *White v. Department of Veterans Affairs*, 120 M.S.P.R. 405, ¶ 5 (2013); *Lee v. Environmental Protection Agency*, 115 M.S.P.R. 533, ¶ 5 (2010).

Failure to demonstrate acceptable performance under a single critical element will support an action under 5 U.S.C. § 4303. *Towne v. Department of the Air Force*, 120 M.S.P.R. 239, ¶ 29 n.12 (2013); *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 627 (1984).

The agency has shown by substantial evidence that OPM approved its performance appraisal system.

An OPM-approved performance appraisal system is the fundamental basis of a chapter 43 action. *See Griffin v. Department of the Army*, 23 M.S.P.R. 657, 662 (1984), *recons. denied sub nom. Nothman v. Department of the Army*, 29 M.S.P.R. 190 (1985). As a general rule, however, agencies are no longer required to submit evidence proving OPM approved their performance appraisal system, unless the appellant alleges there is reason to believe OPM has not done so. *See Adamsen v. Department of Agriculture*, 563 F.3d 1326, 1330-31 (Fed. Cir. 2009), *modified*, 571 F.3d 1363 (Fed. Cir. 2009); *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶ 12 (1999).

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performance that is more persuasive than that presented by the appellant. *See Leonard v. Department of Defense*, 82 M.S.P.R. 597, ¶ 5 (1999).

Department of Defense Instruction 1400.25, Volume 430, entitled "DoD Civilian Personnel Management System: Performance Management," includes a January 31, 1996, letter from OPM advising the agency that OPM approved the agency's non-Senior Executive Service performance appraisal system. IAF, Tab 29 at 4, 10; *see also* HR (Rivera). The appellant did not challenge this evidence or argue OPM did not approve the agency's performance appraisal system.

Based on the record, I find the agency met its burden on this element.

The agency communicated to the appellant the performance standards and critical elements of his position.

The appraisal period for the 2021 appraisal year (AY 2021) began on April 1, 2020, and ended on March 31, 2021. *See* IAF, Tab 12 at 13. The appellant met with Kendrick on or around May 6, 2020, to discuss his performance plan for that appraisal year and, during that meeting, she reviewed the critical elements of his position with him. HR (appellant, Kendrick); *see also* IAF, Tab 12 at 13, 12-22.

The appellant's performance plan for AY 2021 was comprised of seven elements. IAF, Tab 12 at 12-22. The appellant's performance in each of these areas was rated on a three-tier scale, ranging from unacceptable to fully successful to outstanding. *Id.* The plan included the performance standard for each element, including Critical Element 3. *Id.* at 14-20.

It is undisputed the agency did not issue the appellant a performance plan for AY 2022, which began on April 1, 2021. HR (appellant, Rivera). Human Resources Specialist Pedro Rivera testified that an employee, like the appellant, who receives an "Unacceptable" rating must be placed on a PIP and is not issued a new performance plan until he has completed the PIP. *Id.* (Rivera). The appellant testified he knew after the conclusion of AY 2021 that he was being held to the same standards as in his AY 2021 performance plan. *Id.* (appellant).

I find the agency has shown by substantial evidence it communicated the critical elements and standards of a Health System Specialist (PEBLO) to the appellant.

The appellant's performance standards were valid under 5 U.S.C. § 4302(c)(1).

Performance standards must, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria. 5 U.S.C. § 4302(c)(1); *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1335-36 (Fed. Cir. 2004). Standards must be reasonable, realistic, attainable, and clearly stated in writing. *Towne*, 120 M.S.P.R. 239, ¶ 21 (citations omitted). Performance standards should be specific enough to provide an employee with a firm benchmark toward which to aim his performance and must be sufficiently precise so as to invoke general consensus as to their meaning and content. *Id*. Performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid an action for unacceptable performance under chapter 43. *Id*.

The element and standards for Critical Element 3, Data Management, as set forth in the appellant's AY 2021 performance plan, are:

> Makes entries and updates the appropriate databases as cases progress through the DES. Tracks all assigned cases according to established timelines. Provides complete and accurate case files to various agencies and stakeholders, allowing for continued processing.
>
> Fully Successful = 80-89%, ALL CASES MUST MEET THIS STANDARD.
>
> *****DELAYS OUTSIDE OF THE PEBLOs ABILITY TO CONTROL WILL BE DEDUCTED PRIOR TO DETERMINING MEETING STANDARDS*****

Standards:

a. VTA, eMEB[2] and local tracking databases updated on a bi-weekly basis or real time.

b. Within 5 calendar days after completion of the final DA Form 199, create Medical Board Documents merge file (.pdf), IAW Frago 13 OPORD 12 -43, and upload into HAIMS through AHLTA.[3]

c. MEBs: PEBLO has 5 calendar days from date of separation on DD214 or orders to closeout case in eMEB.

d. TDRLs: PEBLO has 10 calendar days from USAPDA final determination date to closeout case in eMEB and local tracker.[4]

Id. at 16.

In the PIP, Kendrick advised the appellant that to succeed he must meet the Fully Successful standards "with the following modifications":

a. Create the Medical Board Documents merge file and upload into HAIMS through AHLTA within 5 calendar days after completion of the DA 199.

b. Make entries in VTA and eMEB on a bi-weekly basis or real time utilizing a calendar suspense reminder notification.

c. Meet deadlines at a minimum and one day extension decided by Supervisor on a case by case basis to be allowed twice a month if applicable.

IAF, Tab 12 at 23. Thus, on its face, the PIP "modified" the standards set out in the appellant's performance plan only by indicating the appellant would use a calendar reminder notification for entries in VTA and eMEB and by allowing for

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[2] The Veterans Tracking Application (VTA) is a database used by PEBLOs to record information regarding service members, including the rating of members' disabilities by the Department of Veterans Affairs. HR (Kendrick). eMEB is the electronic Medical Evaluation Board system used by PEBLOs to transmit a service member's packet for adjudication of fitness. *Id.*

[3] HAIMS is an electronic medical records system used when service members receive medical treatment from outside entities. HR (Kendrick). AHLTA is the interface or application used to upload records into HAIMS. *Id.*

[4] TRDL cases relate to service members with temporary disabilities. HR (Kendrick, appellant).

exceptions as decided by Kendrick. The appellant testified he understood the performance standards from his AY 2021 plan applied during his PIP, including that 80-89% of his cases had to meet the standard in order for him to be fully successful. HR (appellant).

The Board will defer to managerial discretion in determining what employees must do in order to perform acceptably in their positions. *See Lee*, 115 M.S.P.R. 533, ¶ 29. Thus, an agency is free to set its performance standards as high as it thinks appropriate, provided those standards are objective and meet the other express requirements of 5 U.S.C. § 4302(c)(1). *See Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 14 (2004). Managers of federal agencies, moreover, have the authority to decide what agency employees must do in order to perform acceptably in their particular positions. *Id*. Accordingly, the focus of the Board's inquiry in a chapter 43 appeal is whether the standards set by the agency "measure the performance of the job in question on the basis of the objective criteria set forth by the agency[.]" *Id*. Provided this standard it met, the Board will defer to the agency's structuring of an employee's performance standards. *Id*.

The appellant objected that the performance standards articulated in his performance plan and the PIP were subjective and unattainable. He contended virtually all cases include data entry errors that a supervisor could identify if she chose to do so. HR (appellant). He also testified timeliness issues are sometimes outside a PEBLO's control in that other entities, or even the service member, may cause delays in a case. *Id.* Finally, he testified that supervisors rate PEBLOs based on only a sample of cases, and a supervisor could thus skew an employee's rating by sampling a greater number of problematic cases. *Id.*

Kendrick testified the data entered by PEBLOs must be both timely and "accurate," in that PEBLOs must ensure the required documents are part of the file and their notes are factually correct. HR (Kendrick). The type of errors described by Kendrick are not minor errors, but relatively significant ones that

could cause a case to be rejected by the Physical Evaluation Board (PEB) or that convey wrong information about the current status of a service member's case. Kendrick's testimony was direct, and consistent with that of Chief Thomas, who corroborated that "typos" are not considered errors with regard to Critical Element 3. *See id.* (A. Thomas); *see also Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (demeanor and consistency with other evidence are factors in assessing credibility). Substantial record evidence supports that the performance standard for Critical Element 3 did not require perfection or an inordinately high accuracy rate.

Further, Chief Thomas testified that only 2 of the 16 PEBLOs employed at the end of AY 2021 were not at least fully successful on Critical Element 3. *Id.* (A. Thomas). Her testimony that the standard was attainable was corroborated by that of PEBLO Eric Thomas who testified he is able to meet the standard, though he acknowledged it was sometimes difficult. *Id.* (E. Thomas). PEBLO LeVon Ozier similarly attested he meets the 80-89% standard for fully successful. *Id.* (Ozier). The record supports that the appellant also met the standard at times. Specifically, Kendrick issued the appellant a Letter of Performance Counseling (LOPC) on August 4, 2020, advising him his performance was unacceptable in Critical Elements 1 and 3. IAF, Tab 14 at 4-5; HR (Kendrick, appellant). Following that counseling, Kendrick noted in a November 5, 2020, progress review that the appellant had "done an overall vast improvement in Data Management" and was at that time meeting the standard. IAF, Tab 14 at 17. The appellant testified he agreed with Kendrick's assessment that his performance met the standard at the time of that progress review. HR (appellant). Substantial record evidence supports that the performance standard for Critical Element 3 was realistic and attainable.

Substantial record evidence also supports that the standard was reasonably objective. As the appellant acknowledged under cross examination, the calendar deadlines laid out in the performance plan are objective requirements. HR

(appellant). Further, the standards of Critical Element 3 measure the regularity of a PEBLO's updates and the promptness of the PEBLO's entry of information following certain key events in a case's progression. Those actions are within the PEBLO's control. Thus, while it may be true that a case could be delayed by, for example, a service member's cancellation of a medical appointment, the standards of Critical Element 3 do not assess the timeliness of the cases themselves, but rather the timeliness of the PEBLO's data entry activities. Finally, Kendrick's testimony is undisputed that, on the occasions she evaluated the appellant based only on a sample of his cases, she selected those cases randomly.[5] Her testimony was direct and unwavering on that point. *Hillen*, 35 M.S.P.R. at 458 (demeanor is a factor in assessing credibility).

I find the standards in the appellant's Performance Plan informed the appellant of what was necessary to achieve an acceptable rating in the Data Management element and permit the accurate evaluation of the appellant's job performance based on objective criteria. Thus, the agency has met its burden of proving by substantial evidence that the appellant's performance standards are valid.

<u>The agency failed to prove by substantial evidence the appellant's performance was unacceptable in a critical element before the PIP period.</u>

As discussed above, the agency also must show be substantial evidence it warned the appellant of the inadequacies of his performance, it gave him a reasonable opportunity to demonstrate acceptable performance, and his performance remained unacceptable in one or more of the critical elements for which he was provided an opportunity to demonstrate acceptable performance. *White*, 120 M.S.P.R. 405, ¶ 5; *Sanders v. Social Security Administration*, 114 M.S.P.R. 487, ¶ 11 (2010). In order to show the appellant's performance

[5] The appellant acknowledged he did not know how Kendrick selected cases to review. HR (appellant).

"remained unacceptable," the agency must prove by substantial evidence his performance was unacceptable before the opportunity to demonstrate acceptable performance period and that it remained so during the opportunity to demonstrate acceptable performance period. *See Santos v. National Aeronautics & Space Administration*, 990 F.3d 1355, 1360-63 (Fed. Cir. 2021). The agency's burden of providing evidence of the appellant's unacceptable performance can be met largely by submissions of documentation, such as the appellant's working papers. *See Fernand v. Department of the Treasury*, 100 M.S.P.R. 259, ¶ 10 (2005), *aff'd*, 210 F. App'x 992 (Fed. Cir. 2006). The proposal notice, moreover, can constitute valid proof of an agency's charges, where the notice is not merely conclusory, but sets forth in detail an employee's errors and deficiencies, and where the notice is corroborated by other evidence. *Id.*; *Gill v. Department of the Navy*, 34 M.S.P.R. 308, 311 (1987).

I find the agency failed to show by substantial evidence the appellant's performance was unacceptable on Critical Element 3 before the PIP began on June 7, 2021. While the record reflects Kendrick's generalized conclusions that his performance was inadequate before the PIP, the agency failed to support those conclusions with specific information or documentation. For instance, Kendrick issued the appellant a Letter of Performance Counseling (LOPC) on February 9, 2021, stating his performance was unacceptable Data Management. IAF, Tab 14 at 22-23. She broadly stated in the LOPC that the appellant did not upload Medical Board documents within given timelines and did not make VTA entries in real time or on a bi-weekly basis. *Id.* However, the LOPC provided no specifics regarding these documents or entries, and the record does not contain this information. On or around February 10, 2021, Kendrick rated the appellant as "Needs Improvement" in Critical Element 3 in his third quarter progress review. *Id.* at 27. In the narrative, she stated he did not meet the standard with regard to updating VTA, eMEB, and local database entries or uploading Medical Board documents in HAIMS. *Id.* She wrote, "MEBs 1 out of 12 cases reviewed –

Does Not Meet Standards" and also "Data MGMNT_HAIMS (6 out [of] 7 cases reviewed – Does Not Meet Standards." *Id.* In order to conclude the appellant failed the standards, she presumably meant that only 1 of the 12 cases complied with the eMEB timeframe and 6 of the 7 cases did not comply with the HAIMS timeframe. However, she provided no explanation of that information at the hearing. The record does not include any details or documentation regarding the specific cases in which the appellant's work was purportedly deficient or clarification as to how his performance fell short.

Kendrick also rated the appellant's performance as "Unacceptable" on Critical Element 3 for AY 2021, which ended on March 31, 2021, prior to the PIP. *See* IAF, Tab 12 at 16. In the supporting narrative, she wrote, in relevant part,

> VTA, eMEB (MEBs 10 out of the 32 cases reviewed) - Does Not Meet Standards;
>
> Data MGMNT HAIMS (11 out of the 17 cases reviewed) - Does Not Meet Standards
>
> Data MGMNT_ Close Outs - (l out of the l case reviewed) Meets Standards
>
> Data MGMNT_TDRLs (2 out of the 2 cases reviewed) Meets Standards
>
> TDRLs (Regular Cases) - (l out of the l case reviewed) Meets Standards
>
> Overall with the above discrepancies this has resulted in 76% below standards.

Id. at 16 (punctuation as in original). At the hearing, Kendrick did not explain how she calculated the 76% figure and provided only conclusory testimony that the appellant failed to meet the performance standard with regard to VTA and eMEB entries and HAIMS uploads. HR (Kendrick). Again, the record contains no information regarding the cases Kendrick relied upon in reaching her conclusion or any details at all about the appellant's errors or deficiencies.

While the appellant did not specifically refute any of Kendrick's statements, he generally testified he worked diligently after the February 9, 2021, LOPC to timely update his cases and, to his knowledge, his performance was acceptable under Critical Element 3 by the end of AY 2021. HR (appellant).

Substantial evidence is a lesser standard of proof than preponderance of the evidence. *Towne*, 120 M.S.P.R. 239, ¶ 6. Yet, substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Leatherbury v. Department of the Army*, 524 f.3d 1293, 1300 (Fed. Cir. 2008). The agency presented nothing other than conclusory assertions the appellant's performance was unacceptable before the PIP period. While Kendrick indicated her typical practice was to create spreadsheets of PEBLOs' cases and then summarize that information in LOPCs and performance appraisals, *see* HR (Kendrick), the agency did not provide any such spreadsheets regarding the appellant's cases before the PIP. The agency did not identify the cases for which the appellant's data entries were untimely or inaccurate, nor did it provide any working papers or other evidence supporting the general assertions that the appellant's pre-PIP performance in Critical Element 3 was unsatisfactory. Instead, the agency provided supporting documentation, in the form of Kendrick's spreadsheets, only with regard to the appellant's performance *during* the PIP period. *See* IAF, Tab 12 at 26-39; HR (Kendrick). Further, the record contains some degree of evidence, in the form of the appellant's general testimony, contradicting the agency's claims that the appellant's pre-PIP performance was unacceptable.

Accordingly, I find the agency failed to submit sufficient evidence to meet its burden of proving the appellant's performance under Critical Element 3 was unacceptable prior to the PIP. Because the agency failed to prove the elements of its performance case, the removal action must be reversed. *See Santos*, 990 F.3d at 1360 ("[A]n agency must justify institution of a PIP when an employee challenges a PIP-based removal."). I therefore do not decide whether the agency

warned the appellant of the inadequacies of his performance and gave him a reasonable opportunity to demonstrate acceptable performance, or whether the agency showed the appellant's performance was unacceptable during the PIP period.

The appellant asserted affirmative defenses.

The appellant alleged the agency's action was the result of discrimination based on sex and/or reprisal for a protected union activity. Discrimination and retaliation on those bases are prohibited personnel practices under 5 U.S.C. § 2302(b). Because the appellant may be entitled to additional relief if he proves his claims of discrimination and/or reprisal, these affirmative defenses are not rendered moot by the determination that the agency failed to prove the elements of its performance case. *Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶¶ 13, 14 (2012).

The appellant also contended the agency violated his right to procedural due process and committed harmful procedural error. Any such relief associated with such claims is limited to reversing the agency's action. Because the agency's action is reversed on the merits, I find the appellant's due process and harmful procedural error claims are moot. *See Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 197 (1996) (holding that affirmative defenses that do not support compensatory damages or relief other than reversal may be moot). Therefore, I do not consider those claims further.

The appellant failed to prove the agency's action was the result of discrimination based on sex.

When an appellant asserts an affirmative defense of discrimination based on sex, the Board first will inquire whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor

in the contested personnel action.[6] *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, ¶ 28 (2016). Evidence to establish the appellant's burden of showing motivating factor may be either direct or circumstantial. *Id.*; *see also Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 51 (2015).

The appellant argued there were female PEBLOs who failed to meet the performance standards of Critical Element 3. IAF, Tab 25 at 6 (appellant's prehearing submissions). At the hearing, he testified male and female PEBLOs were treated differently, and only the appellant and another male PEBLO were placed on PIPs. HR (appellant). He testified that at least four female PEBLOs received performance counseling, and a number of PEBLOs, both male and female, resigned or retired due to "harassment" related to meeting performance standards. *Id.* Aside from these generalized statements, the appellant did not offer any evidence of suspicious statements or behavior from which an inference of discriminatory intent might be drawn.

The appellant's allegations of sex discrimination have little support in the record. Contact Representative Stacy Grudinski testified she pulls reports showing when PEBLOs have most recently entered comments in their cases. HR (Grudinski). She testified that, to her knowledge, Kendrick has not noted the errors of male PEBLOs more than those of female PEBLOs. *Id.* PEBLO Thomas testified he "feels" Kendrick treats males differently than females based on how she talks to him, but he has not seen her apply standards differently. *Id.* (E. Thomas). PEBLO Ozier testified he has not heard Kendrick make any statement denigrating anyone based on gender and has not observed Kendrick treating men less favorably or noting their errors more often. *Id.* (Ozier).

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[6] Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

I find the appellant has not shown by preponderant evidence sex was a motivating factor in the agency's action. While he generally asserted females were treated more favorably, he did not present evidence of any similarly situated comparator, that is, an individual whose performance was similar to his without differentiating or mitigating circumstances. *See Ly v. Department of the* Treasury, 118 M.S.P.R. 481, ¶ 10 (2012). An appellant's bare allegation of discrimination, unsupported by probative and credible evidence, does not prove an affirmative defense. *See Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 539 (1992), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994) (Table); *Wingate v. U.S. Postal Service*, 118 M.S.P.R. 566, ¶ 5 (2012). Accordingly, I find this affirmative defense fails.

The appellant failed to prove the agency's action was reprisal for engaging in protected union activity.

The appellant argued his removal was reprisal for protected union activity. The appellant attempted to invoke *Weingarten* rights during the initial PIP meeting on June 7, 2021, and Kendrick denied his request because the meeting was not disciplinary.[7] HR (Kendrick). In addition, the appellant contacted the union on or around July 28, 2021, when Kendrick advised him he had not successfully performed under the PIP. *Id.* (appellant). He told the union he disagreed with the outcome of the PIP and believed male PEBLOs were treated less favorably than females.[8] *Id.*

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[7] *Weingarten* rights involve an employee's right to request union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action. *See National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251, 260-62 (1975). These rights are comparable to the provisions found at 5 U.S.C. § 7114(a)(2)-(3). *See also Howard v. Office of Personnel Management*, 31 M.S.P.R. 617, 621 (1986), *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table).

[8] The appellant has not shown by preponderant notice he in fact filed a grievance. Rather, he testified only that he spoke with the union on or around July 28, 2021, and

To prevail on an affirmative defense of retaliation for protected union activity protected, the appellant must show by a preponderance of the evidence: (a) he engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the alleged retaliation and the adverse employment action. *See Mattison v. Department of Veterans Affairs*, 123 M.S.P.R. 492, ¶ 8 (2016); *see also Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986). To establish a genuine nexus between the protected activity and the adverse personnel action, the appellant must prove that the action was taken because of the protected activity. *Mattison*, 123 M.S.P.R. 492, ¶ 8. If the appellant meets this burden, the agency must show, also by preponderant evidence, it would have taken the same action even absent the protected activity. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1989).

The appellant initially testified he told both Kendrick and Chief Thomas he was going to the union on July 28, 2021, because he was going during duty time. HR (appellant). He later said he told only Kendrick. *Id.* He stated he did not tell her the reason he was going, but believes she would have known it was due to the "counselings" and the PIP because there was no other reason he would have needed to consult with the union. *Id.*

Kendrick testified she was not aware the appellant ever filed a grievance or engaged the union regarding the PIP, and she credibly denied any irritation or animosity toward the appellant for his attempt to invoke *Weingarten* rights. HR (Kendrick). Chief Thomas testified she was aware only that the appellant contacted the union to assist him with his reply to the proposal notice. *Id.* (A. Thomas). I observed the witnesses' demeanor at the hearing. Kendrick's and

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the union subsequently assisted him in replying to the notice of proposed removal. HR (appellant).

Thomas' testimony regarding the appellant's union activity was direct and unrehearsed. In contrast, the appellant's testimony that he told one or both of Kendrick and Thomas that he was going to the union was vague and inconsistent. Further, it is undisputed Kendrick counseled the appellant regarding his performance and decided to initiate the PIP *before* the appellant either attempted to invoke *Weingarten* rights or contacted the union. There also is little reason to believe Kendrick or Chief Thomas had an intense motive to retaliate for the appellant's relatively minimal union activity.[9]

Again, the appellant presented little more than bare allegations to support his affirmative defense, and I find he failed to establish a prima face case of retaliation for union activity.

Conclusion

As discussed above, the agency failed to support its action by substantial evidence. Accordingly, the agency's action must be reversed.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **December 7, 2021**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of

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[9] Chief Thomas testified the union official at the appellant's oral reply was rude, and it is clear that meeting was somewhat contentious. HR (A. Thomas). Thomas was candid in her description of that meeting, and, looking at the totality of the circumstances, I am persuaded she did not harbor any animus toward the appellant based on his contacts with the union.

Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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. I **ORDER** the agency 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.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: /S/
Martha L. Russo
Administrative Judge

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **May 20, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the

earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By

statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). 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. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's

Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx