

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD DOWD)	
)	
v.)	DOCKET NUMBER
)	BN531D8210125
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES)	
)	
)	

OPINION AND ORDER

The Department of Health and Human Services (agency) petitions for review of an initial decision (I.D.) issued June 28, 1983, which did not sustain the agency's denial of appellant's within grade increase.

The petition for review is hereby GRANTED pursuant to 5 U.S.C. § 7701(e)(1).

BACKGROUND

Appellant's position as a Professional Standards Review Organization (PSRO) Program Specialist, GS-12, requires that he monitor, evaluate, and respond to written requests for policy clarification from PSROs.^{1/} The agency's determination that appellant's work performance was not of

^{1/} A PSRO is a group of physicians who have assumed responsibility on behalf of the federal government to review the quality and necessity of care given to medicare and medicaid patients.

an acceptable level of competence was based on 1) failure to identify and sufficiently address the full scope of issues necessary to complete an assignment; 2) frequent calls to the Central Office for assistance before doing research in the Regional office; 3) failure to write memoranda completely addressing issues in response to correspondence; 4) failure to prepare complete responses to incoming inquiries; 5) lack of clarity and continuity in written work; 6) untimely completion of work. The denial was sustained by the agency upon reconsideration.

Specific examples of appellant's deficiencies were included in the agency's evidentiary submissions to the Board's Boston Regional Office on appeal, although the agency stated that not every draft that required revision was documented. The presiding official found that the agency had failed to show that its decision to withhold the within grade increase was supported by substantial evidence. The presiding official stated that: "I am not persuaded that the appellant was not performing at an acceptable level of competence. I find that the changes in wording and phrases [appellant's supervisor] insisted upon are essentially stylistic changes." I.D. at 3-4. The presiding official dismissed the issue of timeliness, stating that "... the agency did not make a big issue out of the timeliness aspect of appellant's performance and there were only six such examples submitted by the agency over a two-year period".

In its petition for review the agency argues that the presiding official failed to properly evaluate the evidence of record, and that she misapplied the requisite standard of proof justifying a within grade denial.

ANALYSIS

An agency action pursuant to 5 U.S.C. § 5335 must be supported by substantial evidence. Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). The Board's regulations at 5 C.F.R. § 1201.56 define substantial evidence as:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

In reviewing an initial decision, while we afford due deference to the presiding official's credibility assessments, the Board is free to substitute its own determinations of fact, giving the presiding official's findings only so much weight as warranted by the record and the strength of his reasoning. Weaver v. Department of the Navy, 2 MSPB 297, 298-299 (1980). Review of the presiding official's fact finding will not be undertaken in the absence of explanation of why the challenged factual determination is incorrect and identification of specific record evidence which demonstrates the error. Here, the agency has provided sufficient detailed reasoning to warrant full review.

The presiding official's holding with regard to the agency's denial of the step increase rested on findings made with regard to documentary and testimonial evidence submitted by the agency. The agency's evidence consisted of proposed letters appellant had written for his supervisor's signature and her written criticisms of them. Appellant's supervisor testified concerning all of them.

The agency also introduced a copy of an incomplete telephone message taken by appellant, a memorandum to appellant concerning his untimely submission of draft letters, and a memorandum from appellant's supervisor questioning items in a draft he had written.

The testimony of appellant's supervisor with regard to appellant's deficient performance covered several areas. On two occasions appellant's supervisor changed the wording of appellant's drafts to offer further explanation so as to avoid confusion, and to make the response more complete or accurate. Agency File, Tab 3, pp. 50-52, 59, 61, 69, 70, 72, and 75. The supervisor also testified that one of appellant's drafts contained information that was inconsistent with agency policy and that he should have researched the issue on his own initiative. Agency File, Tab 3, pp. 37-42. Appellant's supervisor stated that it took three or four times longer for her to review appellant's letters and to get them into a final draft than it did for the other staff members, and that one-third to one-half of appellant's time was spent in writing responses to PSROs. Although policy dictated that responses were due within 30 days, five examples of appellant's drafts showed delays of two to five months in responding. Finally, appellant's supervisor stated that the central office had informed her that appellant often called for answers to questions which he should have been able to find by researching materials available in the regional office.

Although the presiding official was "not persuaded that appellant was not performing at an acceptable level of competence", and characterized changes made in appellant's drafts as "stylistic", and "embellishments", we disagree with her conclusion.^{2/}

^{2/} We agree, however, with the presiding official's conclusion that appellant's claim of discrimination on the basis of mental handicap lacks merit. I.D. at 4.

We find that the problems appellant's supervisor encountered with appellant's work were repeated and significant in light of the need for precision and care required in appellant's position.

Based on the totality of the evidence^{3/} regarding appellant's performance, we hold that the agency proved by substantial evidence that such performance was not at an acceptable level of competence.

CONCLUSION

The initial decision is hereby REVERSED and the agency action SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such petition be filed with the EEOC within thirty (30) days after notice of this decision.

If appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition,

^{3/} Although the presiding official relied heavily on the testimony of an expert witness who testified that, in his opinion, appellant's writing style was clear and pointed, the expert admitted that he was unfamiliar with agency policy concerns and that his review of appellant's work was restricted to matters of style.

the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

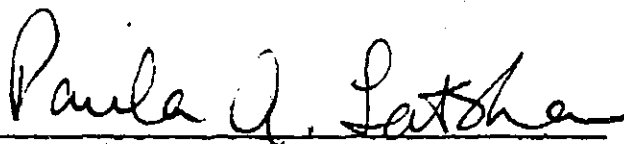
If the appellant chooses not to pursue the discrimination issue before the EEOC or United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUN 18 1984

(Date)

Washington, D.C.



PAULA A. LATSHAW
ACTING SECRETARY