
Roberts, Paul E. v. General Accounting Office

Docket No. 112-211-17-89

Date of Decision: July 26, 1990

Cite as: Roberts v. GAO

Before: Roger P. Kaplan, Member

Performance Appraisal Systems – Evaluation of Employees

Performance Appraisal Systems – Procedures for Appraisals

Performance Appraisal Systems – Performance Ratings

Prohibited Personnel Practice – Violation of Merit System Principles

Definitions – Prohibited Personnel Practice

DECISION

INTRODUCTION

On June 2, 1989, Paul E. Roberts (Petitioner) filed a Petition for Review with the General Accounting Office Personnel Appeals Board alleging that prohibited personnel practices were committed by the U.S. General Accounting Office (GAO) in conjunction with a performance appraisal Petitioner received in February, 1989. A hearing was held in Washington, D.C., on December 12-13, 1989. Both parties were represented by counsel and had the opportunity to present evidence in support of their respective positions. A verbatim transcript was made of the hearing. Post-hearing briefs were received by the undersigned on or about January 23, 1990.

ISSUES

Did the GAO commit a prohibited personnel practice in violation of 5 U.S.C. Sections 2302 and 4302 by failing to communicate performance standards and critical elements to Petitioner Paul E. Roberts at the beginning of the performance appraisal period? If so, what is the appropriate remedy?

FACTS

This action protests the alleged failure of the GAO to comply with communicating critical elements and performance standards to Petitioner at the beginning of the performance appraisal period in June 1988. Petitioner alleged that the GAO committed a prohibited personnel practice by failing to communicate critical elements and performance standards to him at the beginning of the performance appraisal period. Petitioner requested that his performance appraisal period from June 15, 1988 to January 24, 1989 be set aside. The GAO argued that the Petitioner knew what his performance standards and critical elements were and understood them at the beginning of the appraisal period. The GAO requested that the action be dismissed.

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Petitioner started working at GAO in December 1979 as a GS-14 Economist. From October 2, 1983, to the present, Petitioner worked in the Human Resources Division. During the period from July 1982 to June 1988, Petitioner received eight performance appraisals under the Behaviorally Anchored Rating Scales (BARS) system. In all of these performance appraisals, Petitioner was rated on all the critical elements except supervision. From approximately January to March 1985, Petitioner was an evaluator in charge of a project to investigate the Social Security Trust Fund. Petitioner was solely responsible for this assignment, which included planning the job, conducting interviews, analyzing data and submitting a written report.

Petitioner started working for Mr. Jay Eglin in the summer of 1986. Petitioner continuously worked for Eglin up until January 1989. From June 1986 to June 1987, Petitioner worked as a senior economist and technical advisor to Eglin on issues pertaining to the financing of higher education. Petitioner reviewed written material and provided technical advice on the following issues:

1. alternative funding for higher education;
2. returning federal advances from guaranty agencies participating in the Guaranteed Student Loan Program; and
3. comparing proposals for student aid programs.

On June 23, 1988, Eglin gave Petitioner a performance appraisal for the period from June 1987 to June 1988.¹ Petitioner served as advisor on several assignments dealing with guaranteed student issues. These included default costs, returning federal advances and lender billings. Petitioner received a fully successful rating on this performance appraisal.

The performance appraisal at issue in the present case covered the period from June 15, 1988, to January 24, 1989. Petitioner received a fully successful rating on the job dimensions of planning, oral communication, administrative duties, and working relationships and equal opportunity. Petitioner received a borderline rating on the job dimension of data analysis. Petitioner received an unacceptable rating in the job dimensions of data gathering and documentation and written communication.

The only assignment that Petitioner had during the rating period was to determine the feasibility and efficiency of permitting students at institutions of higher learning to establish multiple lines of credit for their student loans. Although the rating period commenced on June 15, 1988, Petitioner started working on this project in February 1988. At that time, Eglin told Petitioner that he would be the Project Manager of a legislatively-mandated study to establish lines of credit with eligible

¹Petitioner received a fully successful rating in all critical elements on this performance appraisal.

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lenders for student loans. Petitioner was responsible for planning the assignment, conducting the work, and preparing the final report that would be submitted.

Eglin testified that the first meeting he had with Petitioner to discuss this assignment was on February 24, 1988. Eglin stated that they talked in general terms about the assignment and agreed to meet again to discuss the specifics of the assignment. Eglin and Petitioner met again on February 28, 1988 to discuss the assignment.

At this February 29th meeting, Eglin stated that he identified the performance standards to Petitioner that he intended to use at the end of rating period. Eglin testified that he discussed with Roberts the necessary documentation to get the assignment approved in the GAO. Eglin told Petitioner that he would not be supervising any other persons on this assignment. Eglin stated that he told Petitioner that he would need to gather information from several sources, including, the Department of Education, the National Association of Student Finance and a few other groups. Eglin indicated that he communicated job dimensions by discussing the task of creating a planning document.

Eglin stated that he did not open the BARS Manual during his meeting with Petitioner. However, he testified that prior to his meeting with Petitioner, he reviewed the BARS Manual to review the different types of standards used in expectation setting. During this meeting, Eglin stated that he communicated the task of preparing a planning document for this project. Although Eglin told Petitioner about the task of creating a planning document or developing an audit plan, Eglin testified that he did not list the critical elements that were involved in these tasks.

Eglin took notes during the February 29th meeting, which reflected some of the items that were discussed between Petitioner and himself. The notes reflected that Eglin discussed with Petitioner the following:

- a. the background surrounding the students applying for loans and the eligibility determination;
- b. the objective of determining what this study would entail, including resources, issues and reporting;
- c. developing an audit plan for implementation;
- d. discussing the scope and the method of this assignment, which included reviewing the legislative history, contacting the main players, looking at others using lines of credit in consumer area and examining the accountability and trade offs that would need to be considered.

At the February 29th meeting, Eglin told Petitioner that a document called an Assignment Authorization Form 100 would have to be completed. This internal

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document was for outlining several of the steps that Petitioner would have to take during the course of his work on this study.

After their February 29th meeting, Petitioner started developing the assignment plan. Petitioner did some data gathering and identified people and conducted some interviews to gather information regarding the project. On March 1, 1988, Petitioner talked with individuals of the Department of Education. Eglin was present at this meeting. Petitioner spoke to other persons who had knowledge about the guaranteed student loans and financial institutions in the educational sector to get an idea on how to proceed with the project.

On March 24, 1988, Eglin told Petitioner that he wanted him to develop an outline for discussion of the lines of credit assignment. He told Petitioner that the outline need not be formal, but he wanted this outline so the matter could be discussed with him towards the end of the week of March 28th, prior to the preparation of an assignment plan.

On April 20, 1988, Eglin had a meeting with Petitioner and Bill Schmidt. Prior to that meeting, Eglin prepared notes on items that needed to be discussed. Some of the factors that were discussed at the April 20th meeting were the costs involved if the lines of credit were introduced, and the accountability by the Department of Education if the banks allowed the lines of credit. Numerous other items were discussed relating to the parties, the past experience and the effect if the project was implemented.

On May 16, 1988, Petitioner submitted a position paper to Eglin on the feasibility of using lines of credit in the guaranteed student loan program. Petitioner testified that he did not receive any feedback from Eglin after submitting the position paper. However, Eglin prepared certain notes in which he told Petitioner that the position paper lacked depth, had no sense of significance, and did not have any conclusions or recommendations. Petitioner stated that Eglin criticized the format of his position paper submitted on May 16th. After being told by Eglin that the information needed to be put in a different form, Petitioner prepared a work plan which was much more specific than the position paper.

On June 7, 1988, Petitioner submitted a draft of a work plan for the assignment. Eglin told Petitioner that it was an unacceptable work plan. He suggested that Petitioner discuss with Bill Schmidt another way of presenting the work plan. On July 8, 1988, Petitioner submitted a revised draft work plan. Eglin found this draft audit plan acceptable and advised Petitioner of this fact. Eglin testified that he gave Petitioner instructions to proceed with the assignment based upon the work plan. Petitioner stated the Eglin did not give him any instructions regarding the implementation of the work plan.

On June 23, 1988, Eglin gave Petitioner his performance appraisal for the period from June 16, 1987, through June 15, 1988. As stated previously, Petitioner received fully successful ratings on all job dimensions in which he was rated. In

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this evaluation, the critical elements of technical planning, data analysis and written communication were referenced.

Petitioner testified that at the meetings between himself and Eglin in the early months of 1988, Eglin did not identify the critical elements, job dimensions or performance standards to him. Petitioner stated that Eglin did not use the task inventory in describing the tasks for which Petitioner was responsible.

When Eglin asked Petitioner to prepare a position paper, Petitioner stated that Eglin did not identify the critical elements or performance standards that were involved. Petitioner testified that Eglin's only feedback on this position paper dealt with the need for it to be put into a different format. Petitioner stated that prior to putting the material contained in the position paper into a work plan, Eglin did not describe any critical elements or performance standards. Petitioner further testified that Eglin gave him no feedback on the draft work plan. Petitioner also testified that Eglin did not give him any instructions regarding the implementation of the draft work plan.

In a Capitol Hill meeting on September 15, 1988, it was decided that other work had a higher priority and the lines of credit assignment in the guaranteed student loan program was terminated. Although Eglin knew that the assignment was terminated on September 15, 1988, he did not inform Petitioner of this fact until September 22, 1988.

On September 22nd, Eglin told Petitioner that the job had been terminated. Eglin testified that he asked Petitioner to prepare a work paper summary and the appropriate work papers to complete the assignment. Eglin stated that this would involve a certain amount of data analysis and written communications. Eglin stated that he did not assign Petitioner any other tasks after the September 22nd meeting. During this meeting, Eglin referred to the HRD Expectation Setting Checklist. In this discussion, Eglin told Petitioner that he would be rated under the BARS performance appraisal standards. According to Eglin, Petitioner was unhappy about being rated under the BARS Manual. Eglin stated that Petitioner made this concern known to him several times during the rating period. Eglin testified that Petitioner told him that he was not an evaluator, but rather an economist and therefore, should be appraised on other things. The meeting ended because Petitioner did not think that it was worth going any further.

Petitioner submitted the Summary Report and workpapers to Eglin on January 19, 1989. Eglin met with Petitioner on January 24, 1989, and told him that the workpaper summary and workpapers did not present any in-depth analysis of the work that had been done, in addition to having no conclusion and recommendations. Eglin also told Petitioner that the workpapers should include the summaries of the interviews that he conducted.

Eglin told Petitioner that he would have to make the necessary changes and submit another report. However, Petitioner told Eglin that he was not interested in making

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any of the changes suggested by Eglin. Petitioner stated that his objective was to leave the Human Resources Division and he was in the process of doing so. Subsequently, Eglin then met with his supervisor, Mr. Gainer. They agreed that they would complete a performance appraisal for Petitioner. Eglin issued Petitioner a performance appraisal on February 16, 1989. The appraisal documents the fact that Petitioner refused to make the necessary changes in the workpaper summary and workpapers. This resulted in Eglin giving Petitioner the unacceptable and borderline ratings in several areas. Petitioner objected to his performance appraisal dated February 16, 1989, which led to the initiation of the instant case.

PETITIONER'S CONTENTIONS

The gravamen of Petitioner's argument is that the BARS Manual is a rule and regulation, and therefore, its provisions are mandatory. Petitioner contends that his supervisor failed to follow the provisions in the BARS Manual for establishing performance standards, and therefore, Petitioner's rights under 5 U.S.C. Sec. 4302 have been violated. Thus, Petitioner reasons, a prohibited personnel practice within the meaning of 5 U.S.C. Sec. 2302 has been committed by the issuance of a performance appraisal in violation of the BARS Manual's requirements. In support of his argument, Petitioner specifically states the following:

1. The Personnel Appeals Board has jurisdiction over allegations of the prohibited personnel practice found at 5 U.S.C. Sec. 2302.
2. The prohibited personnel practices are made applicable to GAO through the GAO Personnel Act, 31 U.S.C. Sec. 732(b)(2), and by the PAB Rules and Regulations, 4 CFR 2.5(a) through (k).
3. The specific prohibited personnel practice applicable to this appeal is 5 U.S.C. Sec. 2302(b)(11), which makes it unlawful to "take or fail to take any... personnel action if the taking or failure to take such action violates any law, rule or regulation implementing, or directly concerning, the merit system principles..."
4. The performance appraisal statute, 5 U.S.C. Sec. 4302, implements or directly concerns the merit system principles found at 5 U.S.C. Secs. 2301(b)(3) and (6), concerning performance standards.
5. Violation of 5 U.S.C. Sec. 4302 by any employee would constitute a prohibited personnel practice under 5 U.S.C. Sec. 2302(b)(11).
6. The GAO Order 2430.1 is a rule and regulation promulgated by Respondent under 5 U.S.C. Sec. 4302.
7. The BARS Manual is that part of the GAO Order 2430.1 which relates to evaluator and evaluator-related positions.

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8. Therefore, the GAO Order 2430.1 and the BARS Manual constitute rules or regulations which implement, or directly concern, merit system principles.
9. The provisions of GAO Order 2430.1 and the BARS Manual are mandatory, and violation of the provisions in dispute here is a prohibited personnel practice within the meaning of 5 U.S.C. Sec. 2302(b)(11).
10. Petitioner's supervisor did not follow the provisions of the BARS Manual in setting expectations for Petitioner's assignment on the Guaranteed Student Loan lines of credit project, and therefore, the performance appraisal issued on the assignment constitutes a prohibited personnel practice.

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RESPONDENT'S CONTENTIONS

Respondent argues that the GAO Order 2430.1 and the BARS Manual are not rules and regulations, but that, even if they are found to be rules and regulations within the meaning of 5 U.S.C. Sec. 4302, their provisions are not mandatory. Respondent further argues that Petitioner's supervisor did communicate critical elements and performance standards to Petitioner at the beginning of the appraisal period. The GAO contends that Petitioner knew and understood the tasks he was assigned to perform, as well as the performance standards and critical elements on which his performance of those tasks would be appraised.

Respondent contends that the language in the GAO Order and the BARS Manual clearly indicates that the documents merely set forth guidelines for the supervisor to follow in setting expectations, and that the manner of communicating critical elements and performance standards to the employee is left to the discretion of the supervisor. Respondent argues that, even if I should find that the BARS Manual contains some mandatory provisions with respect to expectation setting, any failure of Petitioner's supervisor to comply with those provisions would be harmless error, because there is no evidence that Petitioner was harmed in any way by the asserted noncompliance with the BARS Manual's requirements.

DISCUSSION AND ANALYSIS

Roberts alleges that Respondent's use of the subject performance appraisal has violated substantive rights accorded to him under Federal law, specifically 5 U.S.C. Sec. 4302 and 5 U.S.C. Sec. 2302. The provisions of 5 U.S.C. 4302 require each agency to establish a performance appraisal system which provides, to the maximum extent feasible, for the accurate evaluation of each agency employee's job performance "on the basis of objective criteria." Also known as the performance appraisal statute, 5 U.S.C. Sec. 4302 requires that performance standards and critical elements upon which each employee is to be evaluated are to be communicated to the employee at the beginning of the appraisal period.

The Federal performance appraisal statute, 5 U.S.C. Sec. 4302, covers only agencies in the Executive Branch of the government. However, the provisions of 5 U.S.C. Sec. 4302 are made applicable to GAO by the GAO Personnel Act of 1980, as amended, 31 U.S.C. Sec. 732(d), which incorporates the performance appraisal statute. In compliance with 5 U.S.C. Sec. 4302, GAO has developed the performance appraisal program set forth in GAO Order 2430.1 Order 2430.1 applies to all GAO employees except GS-15s and members of the Senior Executive Service. There are performance appraisal systems incorporated into GAO Order 2430.1 for approximately fifteen groups, or categories, of employees. As a matter of statute and policy, GAO Order 2430.1 requires that each of its component appraisal systems must:

- a. Establish performance standards which accurately measure performance on the basis of job-related criteria.

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- b. Communicate to each GAO employee the performance standards and the critical elements for each employee at the beginning of the rating period.
- c. Provide for evaluating each employee according to established performance standards at least annually.
- d. Recognize and reward employees according to performance.
- e. Help employees improve unacceptable performance.
- f. Provide for reassignment, reduction in grade, or removal of employees who, after having been given a chance to demonstrate acceptable performance, continue to perform unacceptably. GAO Order 2430.1, Para.3.

GAO Order 2430.1 defines the term appraisal system as a “performance appraisal process,” established pursuant to GAO’s statutory performance appraisal/standards mandate, which provides for:

- (1) The establishment of written performance standards (2) the identifications of critical elements, (3) the communication of standards and critical elements to employees, (4) the means to explain the standards and critical elements and (5) the appropriate use of appraisal information in evaluating employees, rewarding employees, assisting employees with unacceptable performance and initiating performance-based actions when necessary. GAO Order 2430.1, Para 6(a).

One of the performance appraisal systems created for GAO employees under the law, and the appraisal system at issue here, is the BARS system. The BARS system is used to appraise the performance of GAO employees in evaluator or evaluator-related positions. The BARS system is set forth – document known as the BARS Manual, which contains detailed instructions for performing the various functional tasks incident to the performance appraisal process, as well as discursive narratives interpreting the document. The BARS Manual contains three primary chapters, plus five appendices, and is a total of approximately 130 pages.

The first chapter in the BARS Manual relates to “The Performance Appraisal Cycle,” which contains three discrete phases: setting expectations, monitoring performance, and the actual conduct of the performance appraisal. The initial phase, that of setting expectations, is the crucial phase of the performance appraisal cycle, for both the purposes of complying with 5 U.S.C. Sec. 4302, and for the purposes of this action. The purpose of the expectation setting process is to establish the performance standards and critical elements by which the employee’s performance will be appraised.

The BARS Manual clearly states that the purpose of the expectation setting is to achieve a clear understanding at the beginning of the rating period about what performance will be expected of the employee for the balance of the rating period.

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The BARS Manual does not require that expectations be reduced to writing, but stresses that it is important that both the supervisor and the employee clearly understand:

- What specific tasks or responsibilities are being assigned?
- What outputs are expected to be produced?
- What the outputs are expected to contain or cover.
- The time frames in which the outputs are expected to be delivered.
- The standards against which the outputs and the individual's performance will be judged. BARS Manual, Chapter 1, page 1.

In deciding whether the Respondent violated 5 U.S.C. 4302 and 5 U.S.C. 2302, it is not essential to determine whether the BARS Manual is a rule or regulation. A determination that the BARS Manual is a rule or regulation does not reach the questions of whether the provisions of the BARS Manual are mandatory. The United States Court of Appeals for the Federal Circuit had occasion to give its opinion as to the mandatory status of provisions of the Federal Personnel Manual. In *Horner v. Jeffrey*, 823 F.2d 1521 (1987), the court held the Federal Personnel Manual provision in question was invalid because it was contrary to the statute. The court added:

In *Horner v. Acosta*, 803 F.2d 687, 695 (Fed. Cir. 1986), this court rejected the argument that FPM provisions should be accorded the status of regulations. We reject such a position as well. (Footnote omitted.)

In *Doe v. Hampton*, 566 F.2d 265 (1977), the United States Court of Appeals for the District of Columbia Circuit considered whether a provision of the Federal Personnel Manual was binding upon a government agency. The court stated:

We begin our analysis with the rather obvious proposition that not "every piece of paper emanating from a Department or Independent Agency is a regulation." ...It is less clear however, to what extent provisions of the Manual not also published in the Federal Register or Code of Federal Regulations of the Manual is not mandatory, but some unpublished provisions may be binding if so intended by the Commission. Thus, to determine the effect of a Manual provision, a court must determine the Commission's intent in authoring it, as ascertained by an examination of the provision's language, its context, and any available extrinsic evidence.

566 F.2d at 280. See also *New England Tank Inc. of New Hampshire v. United States*, 861 F.2d 685 (Fed. Cir. 1988).

Although Petitioner argues that the BARS Manual should be considered a rule or regulation, the main thrust behind his argument is the contention that the

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provisions of the BARS Manual are mandatory. In attempting to determine whether the Respondent committed a prohibited personnel practice, it is necessary to look at whether the provisions of the BARS Manual created a mandatory requirement for GAO. As stated in Doe v. Hampton, supra, it is important to ascertain the intent of the authors of the BARS Manual.

In examining the language of the BARS Manual, the intent of its authors and the testimony of various witnesses, I conclude that the BARS Manual, in general, is not to be considered mandatory, but its provisions should be considered permissive to permit the utmost flexibility in enabling supervisors to perform their required functions.

When the revised BARS Manual was distributed in July 1984 to the heads of the divisions, regions and offices, the Assistant Comptroller General for Human Resources, Gregory J. Ahart, in a cover memorandum, set forth the GAO policy regarding its provisions. He stated:

One of the primary objectives of the 1984 update was to make the manual as useful as possible for evaluators and specialists at all grades. The manual represents GAO-wide guidance which should be susceptible to use without supplement for most positions. The manual, however, is not prescriptive. (Emphasis supplied).

There are several other indications that the BARS Manual was intended to be used as a guide rather than a mandatory requirement. In Chapter 1, Setting Expectations, the BARS Manual states:

As a matter of policy, GAO has not prescribed the exact manner for communicating expectations, that is, whether expectations should be in writing or verbally communicated. Instead, the specific method used to communicate expectations is left to the discretion of the supervisor and the subordinate... Regardless of how it is achieved, it is important that at the start of an appraisal period, both parties clearly understand:

- What specific tasks or responsibilities are being assigned.
- What outputs are expected to be produced.
- What the outputs are expected to contain or cover.
- The time frames in which the outputs are expected to be delivered.
- The standards against which the outputs and the individual's performance will be judged.

This language leaves the clear impression that the supervisor has wide latitude in communicating the expectations to the employee. There is no requirement that the supervisor must refer to the BARS Manual in communicating these

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expectations. The supervisor has discretion in how to communicate the expectations to an employee.

Robert Farabaugh, Human Resources Manager for the Human Resources Division, testified that his division uses the BARS Manual as an overall guide in the appraisal system. He further stated that the HRD Expectation Setting Checklist was intended to be used as a guide. His testimony is supported by the language set forth at the beginning of the HRD Expectation Setting Checklist. It states that, "The rater and the ratee may use this list as a guide during the expectation setting session."

Having found that the provisions of the BARS Manual were not mandatory, it is necessary to determine whether Eglin informed Petitioner of his expectations at the beginning of the appraisal period. The appraisal period for Petitioner's performance appraisal did not commence until June 15, 1988.

Prior to the beginning of the June 15th appraisal period, Eglin met with Petitioner several times to discuss his expectations. Eglin first met with Petitioner on February 24, 1988, to outline the requirements of his assignment. At the next meeting on February 29, 1988, Eglin gave Petitioner a detailed understanding of his tasks during the appraisal period. Eglin's testimony and notes reflected that during this meeting Eglin communicated to Petitioner the background of the assignment, the objectives and tasks of the assignment, and the method and scope of the implementation of the assignment. Eglin had further meetings with Petitioner to discuss the assignment during the months of March, April, May and June.

Although Petitioner disputes the assertion that his expectations were set prior to the beginning of his appraisal period, the substantial weight of evidence suggests otherwise. There can be no doubt that Petitioner understood the nature of his assignment prior to June 15, 1988.

Eglin's meetings with Petitioner met the statutory requirements of law in setting his expectations. It is undisputed that Petitioner had been rated under the BARS system for at least seven years prior to this appraisal period. In addition, he had received at least three prior performance appraisals under the BARS system for Eglin. Petitioner's critical elements and performance standards under his three previous performances appraisals were almost identical to his present performance appraisal. Furthermore, there is not evidence that Petitioner gave any indication to Eglin that he failed to understand his assignment. One could easily surmise that if an employee did not understand his expectations on an assignment, he would make it known to his immediate supervisor. Petitioner was also rated fully successful in all job dimensions on his June 1988 performance appraisal. This 1988 performance appraisal included his past and current work on the student loan assignments. The fact that Petitioner had been working on student loan matters for at least two years meant that he was collecting and analyzing data that was, at least, not foreign to him.

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The performance appraisal at issue here could not have been defective because of any lack of communication of the performance standards and critical elements to Petitioner. The clear weight of the evidence shows that Petitioner received the unacceptable rating after the January meeting in which Eglin told him that the “summary report” was not acceptable as it was written. Petitioner admitted that he understood that the report was not acceptable because it was not in the proper form, but that he was not interested in making the required changes. Thus, the performance appraisal that Petitioner received in February 1989 was not the result of Eglin’s failing to adequately communicate expectations, but Petitioner’s own willful failure to follow the instructions of his supervisor.

Prior to the beginning of the performance appraisal period, Eglin communicated to Petitioner his tasks and responsibilities on this assignment. Between February and June 1988, Eglin held several meetings with Petitioner to explain what work products he was expected to produce. There was not evidence presented that Petitioner failed to understand the time requirements for his work product submissions. I find that Petitioner understood how his performance would be judged. Eglin’s instructions prior to June 15, 1988, met the regulatory requirement of the BARS Manual and the statutory requirements of the law.

The United States Court of Appeals for the Federal Circuit looked at the question of communicating critical elements and performance standards at the beginning of the appraisal period. *In Cross v. Department of Air Force*, 785 F.2d 320 (Fed. Cir. 1985), the court affirmed the previous decision of the Merit Systems Protection Board (MSPB), 25 M.S.P.B. 353 (1984). In this case, the MSPB found that even though the agency handed the employee her performance plan without discussing the performance standards and critical elements, the employee understood the critical elements and performance standards of her position. In upholding the MSPB decision, the court held that 5 U.S.C. Sec. 4302 (b)(2) constitutes a substantive right which requires an agency to ensure that employees are aware in advance of the critical elements and performance standards of their position. In reaching its decision that the statutory right does not require communication of critical elements and performance standards per se, the court stated that employees must be made aware of the standards against which their performance is to be measured. In deciding that the agency had met its requirement, the court noted that:

- (1) the employee knew and understood the performance standards and critical elements of her position for this evaluation period;
- (2) the standards were clear;
- (3) the employee did not request any explanation or indicate that she did not understand the requirements of her position.

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In the instant case, there is no allegation that the critical elements and performance standards were unclear. Neither did Petitioner contend that he did not understand the requirements of his position. This is evidenced by the fact that Petitioner never requested guidance from Eglin as to the requirements of his assignment.

The agency is given wide discretion in communicating critical elements and performance standards to employees prior to the beginning of the appraisal period. In reviewing all the evidence submitted, I find that the GAO met its statutory obligations. Petitioner, prior to the commencement of the appraisal period, knew or should have known what was expected of him and how to achieve those expectations.²

² See Papritz v. Department of Justice, 31 M.S.P.R. 495, 498 (1986) and Hawkins v. Department of Commerce, 27 M.S.P.R. 430, 431-32 (1985).

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CONCLUSION

For the above reasons, I find that Petitioner has failed to establish that Respondent committed a prohibited personnel practice by failing to communicate performance standards and critical elements at the beginning of the performance appraisal period. Accordingly, the Petition for Review is dismissed.