

John H.M. Chen v. U.S. General Accounting Office

Docket No. 50-200-GC-84

Date of Decision: June 19, 1986

Cite as: Chen v. GAO (6/19/86)

Before: Jaffe, Chair; Feigenbaum, James and Kaufmann, Brown (Dissenting), Members

Negative Acceptable Level of Competence - Within-Grade Increase

Credibility

Quality of Work Product

Termination

Standard of Proof

Reprisal

Hearing Procedures

DECISION OF THE PAB

This matter is before the Board pursuant to the motion of the General Accounting Office (the Agency or GAO) to reopen and reconsider the decision of the Presiding Member finding that Petitioner was denied a within-grade increase and subsequently terminated from his position as a Training Evaluation Specialist, GS-1701-12, as a result of retaliation. The Presiding Member ruled that Petitioner had shown, by a preponderance of the evidence, that the Agency's articulated reasons for denying the within-grade increase (WIG) and terminating Petitioner were a pretext for discrimination. In its motion for reconsideration, the Agency argues that the Presiding Member's finding on the issue of retaliation is arbitrary, capricious, and is not supported by substantial evidence.

FACTUAL BACKGROUND

On July 24, 1983, Petitioner was appointed to a position as a GS-12 Training Evaluation Specialist in the Organizational Analysis and Planning Branch (OAPB) of the Office of Organizational and Human Development (OOHD) of the Agency. Petitioner had been placed in this position by order of this Board after we found that Petitioner had been denied employment by the Agency because of his national origin in violation of Title VII of the Civil Rights Act of 1964.

On January 20, 1984, Petitioner was denied a within-grade salary increase (WIG) for failing to satisfy three critical job elements of his position. On February 1, 1984, Petitioner filed a complaint of discrimination alleging that the denial of the WIG increase was harassment and retaliation because he filed the initial complaint against OOHD officials when they refused to hire him. On March 20, 1984, Petitioner's performance was reevaluated and he was again denied his WIG increase.

On May 24, 1984, Petitioner's supervisor informed him that he was recommending his termination. The following day, Petitioner filed another complaint of discrimination. On June 8, 1984, Petitioner received a formal letter proposing his termination, effective June 22, 1984, thirty days before the completion of his probationary period. On June 11, 1984, Petitioner amended his second discrimination complaint to include his proposed termination.

On June 22, 1984, Petitioner was terminated, and petitioned this Board to review the termination and the denial of the WIG. Following a hearing, the Presiding Member issued a decision on December 23, 1985 which ordered Petitioner reinstated with all appropriate make-whole relief, including retroactive restoration of the WIG increase. On January 30, 1986, the Agency petitioned for review.

The Agency argued that it denied Petitioner's WIG increase and terminated him because Petitioner's work product was not acceptable. The Agency based its assessment of Petitioner's work on his failure to satisfactorily complete three major writing assignments that were critical elements of his performance appraisal standards. The Agency presented specific examples of Petitioner's allegedly deficient work product as part of their evidentiary submissions at the hearing. The Agency also presented testimony from several of Petitioner's co-workers in OOHD as well as his supervisor to show that Petitioner was not treated any differently than anyone else in OOHD as to the type, quality and quantity of direction, supervision and assistance he was given in his assignments. The Agency further asserted that Petitioner was given more guidance, assistance, training and counseling by his supervisor than was normally given to other employees.

OPINION

The Agency has asked for reconsideration of the decision of the Presiding Member finding that the Agency's denial of Petitioner's within-grade increase and the subsequent termination of Petitioner was reprisal and retaliation in violation of Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e3(a). The Presiding Member found that the Agency had not carried its burden of showing that its adverse actions directed at Petitioner were supported by substantial evidence.

In reviewing a decision by a Presiding Member, the Board will uphold that decision unless there is clear error or unless the decision is not supported by substantial evidence on the record viewed as a whole. Similarly, performance-based actions such as Agency determinations regarding the denial of an employee's within-grade increase must be supported by substantial evidence on the record as a whole. Kienzle v. GAO, 1 PAB 28, 31 (1981). We recognize that the Court of Appeals for the District of Columbia Circuit has overturned this precedent. White v. Department of the Army, 720 F.2d 209 (1983). However, the Court of Appeals for the Federal Circuit and the Merit System Protection Board still adhere to the standard which we enunciated in Kienzle. Cf., Ommaya v. National Institutes of Health, 84 FMSR 5420 (1984). We remain convinced of the correctness of our rationale in Kienzle, and choose to continue to follow the reasoning of the Court of Appeals for the Federal Circuit and the MSPB.¹

With respect to the denial of Petitioner's WIG, the record evidence reflects that Petitioner received notice that his performance was unacceptable on three separate assignments: 1) the Learning Center Evaluation Plan, 2) the Chapter on Special Issue Area courses, and 3) the Literature Search. The first two projects were listed as critical elements on Petitioner's performance appraisal.

Petitioner's supervisor testified that he did not become aware that Petitioner was eligible for a WIG increase until January of 1984. Thus, the supervisor explained, he had to base his decision on whether to deny or grant the WIG on the above three projects, which represented the bulk of Petitioner's work during the relevant time period. The supervisor further testified that he first began to realize that there were problems with Petitioner's work when Petitioner turned in his first written work products, the outline for the Learning Center evaluation (submitted in November 1983) and the first draft of the chapter on Special Issue Area Courses.

Even if the standard applied to this case is the preponderance of the evidence standard, it is equally clear that the record herein does not support a finding that the Agency's actions were pretextual.

With respect to the Learning Center assignment, the record before us indicates that Petitioner was the branch representative on a committee which had responsibility for planning and developing a multi-media training center where GAO employees could utilize various instructional tools to improve their knowledge and work skills. Petitioner attended meetings of this committee (called the Learning Center Resource Group) in order to remain knowledgeable of the committee's plans, including the materials and methodology of the various training modes and the types of employees that would be serviced by each mode. According to his supervisor, Petitioner was directed to prepare an evaluation for the Learning Center that would test the effectiveness of the center. Testimony was also heard from another employee witness who was Petitioner's predecessor on this project. That employee testified that the evaluation of the Learning Center was to be prepared as the Learning Center was being planned and developed and, as such, it was not necessary for the Learning Center to be completed before the evaluation could be completed. We are persuaded that the evidence on the record supports a finding that the assignment could be completed in the manner outlined by the Petitioner's supervisor.

Petitioner's supervisor testified that Petitioner's first draft of the Learning Center Evaluation Plan was an outline submitted in November 1983. However, Petitioner's supervisor testified that he found the outline unacceptable because it was too general. According to the supervisor, he explained to Petitioner that the draft was inadequate because it failed to include the following: 1) which groups of GAO employees would be using the center, 2) which instructional packages would be used by each group, 3) how the various instructional packages would be selected, 4) the length of time the packages would be used, 5) how supervisors would view employee participation, and 6) how to measure an employee's improvement on the job after the employee had received the instruction. The supervisor testified that he spent a great deal of time trying to explain the above points to Petitioner--much more time than he spent counseling any of his other employees on their assignments. Nevertheless, the supervisor testified that Petitioner was unresponsive to his directives, and instead continuously argued that his method was the proper method. The supervisor testified that at the height of his frustration with Petitioner, he sat down with Petitioner and attempted to list every possible item that could be included in the Learning Center Evaluation Plan, but to no avail. The testimony of Petitioner's supervisor in this regard is supported by the testimony of other witnesses, who stated that they overheard a number of discussions between Petitioner and his supervisor. Petitioner did not contest these points in his own testimony. Instead, Petitioner argued that his supervisor and his colleagues in the Learning Center Resource Group did not really understand what learning centers were all about.

Petitioner's supervisor testified that because of the inadequacies in the outline of the evaluation plan, and the continuing problems in communicating its deficiencies to Petitioner, the supervisor requested that Petitioner submit a draft of the evaluation plan by January 9, 1984. Even with the extension, Petitioner did not submit the draft until January 24, 1984, four days after the decision to deny his WIG increase was made.

Petitioner's supervisor testified that he encountered similar problems with Petitioner's assignment on the Special Issue Area Course chapter. According to the supervisor, the draft chapter submitted by Petitioner on December 15, 1983 was completely unacceptable. This testimony is supported by the extensive comments that the supervisor wrote on the draft. Petitioner produced a second draft on January 4, 1984. Despite the lengthy written comments made regarding the first draft, the second draft was also deemed

unacceptable by Petitioner's supervisor, as well as by a senior reviewer who also reviewed the draft. The record shows that this second draft of the chapter on Special Issue Area Courses was also substantially rewritten by the supervisor. Based on Petitioner's efforts on these two assignments, the supervisor determined that Petitioner's performance with respect to the January 20, 1984 WIG increase was not acceptable. Once again, Petitioner offered no evidence to refute this testimony.

With respect to the third assignment, that of the literature search, Petitioner's supervisor testified that he directed Petitioner to conduct a literature search on the evaluation of learning centers and to summarize selected articles. Instead of completing the assignment as directed, the supervisor testified that Petitioner merely provided photocopies of the abstracts of the articles as they appeared in the computer. According to the supervisor, since library personnel actually performed the tasks of locating and copying the abstracts, Petitioner performed very little work on the project. While this project was not found to be a critical element in Petitioner's performance standards, Petitioner's supervisor could nevertheless consider Petitioner's work on this assignment in evaluating Petitioner's performance. Petitioner's only attempt to rebut this point is testimony that the supervisor had not directed him to actually summarize the articles.

Thus, a review of the evidence on the record shows that there was substantial evidence to support the Agency's denial of Petitioner's WIG salary increase. It was this denial of the WIG that formed the basis for the subsequent termination of Petitioner. In this regard, the supervisor testified that there was no improvement in Petitioner's performance after the January 20, 1984 denial of WIG. Petitioner submitted his draft of the Learning Center Evaluation Plan on January 24, 1984 and the supervisor found it to be unacceptable because it was too "general." Petitioner's supervisor noted on the face of the draft that it was a "good summary" of what general evaluations should include, but the document did not "tell us what we need to do and are doing for the learning center." The supervisor further stated that Petitioner needed to "... lay out step-by-step plans for this particular project." This was consistent with the supervisor's previous testimony. The supervisor testified that he held subsequent meetings with Petitioner on February 2, 17, 21, 22, 23, 27, and 29 and March 1, 2, and 12, and despite these discussions, Petitioner could not prepare an acceptable final work product. The completed report on the evaluation plan was due on February 9, 1984 but the record contains no evidence of any subsequent drafts, nor a final draft of the evaluation plan as submitted by Petitioner.

With respect to the report on Special Issue Area Courses, the record shows that Petitioner submitted a third draft on January 27, 1984. Petitioner's supervisor testified that it was because of his own previous efforts, and not Petitioner's, that the third draft was more acceptable. In this regard the supervisor stated that because Petitioner had been so unresponsive, he had to make the corrections himself. The supervisor testified that his corrections of this draft were more than editorial changes, which he defined as correcting spelling, punctuation, and grammar. An examination of the document in question reveals that the supervisor made substantial changes in the draft document. Once again, the Petitioner did not rebut this testimony.

A third critical element of Petitioner's performance appraisal was an assignment requiring the preparation of a report on computer-assisted instruction. Petitioner testified that he asked his supervisor to eliminate this assignment. During his testimony, Petitioner's supervisor denied that he agreed to Petitioner's request. There is no evidence in the record to support Petitioner's contention that the Agency eliminated this assignment and that the Agency's reliance on his failure to satisfactorily perform that assignment was proof of pretext. In fact, Petitioner submitted some summaries of articles, which were again deemed unacceptable by the supervisor. Despite the supervisor's stated criticisms, there is no evidence to show

that Petitioner ever made any further effort to complete the project. The supervisor testified that as best he could determine, Petitioner spent his last months at GAO working on his discrimination complaints. Once again, Petitioner did not rebut this testimony, and provided little, if any, substantive evidence to show that he actually produced the assigned work.

Once the Agency has produced evidence that the adverse actions taken against Petitioner were based on unacceptable performance, the burden falls on Petitioner to prove by the preponderance of evidence that management's justification for the denial of his within-grade and his subsequent firing was pretextual. As our earlier discussion indicated, Petitioner offered virtually no testimony to rebut the evidence presented by the Agency. In fact, much of Petitioner's testimony is confusing at times and otherwise non-responsive to the issues of the case. Furthermore, the documentary evidence submitted by Petitioner does not support his position. As a result, the record offers no basis for finding that Petitioner has met his burden of proving reprisal by the preponderance of the evidence.

In his decision, the Presiding Member made a finding of pretext and cited five factors to support this finding, including:

- (1) The Presiding Member inferred a retaliatory motive to the OOHD Division Director. The Division Director denied Petitioner's transfer request on the reason that to transfer Petitioner would violate the order of the Board to place Petitioner in a specific position. The Presiding Member did not credit this testimony, reasoning that a person of the Division Director's grade and experience should have known that he had the latitude to grant Petitioner's transfer.
- (2) Another individual had been selected to fill Petitioner's position before Petitioner had been notified that he was being terminated.
- (3) After Petitioner was denied the WIG increase, Petitioner's supervisor maintained a diary detailing Petitioner's performance.
- (4) Petitioner was given inadequate guidance and assistance on his assignments by his supervisors.
- (5) Different standards of performance were applied to Petitioner than were applied to other employees.

Since Petitioner offered little evidence, if any, to support his claim, the Presiding Member relied largely on inferences he drew from evidence presented by the Agency.

With respect to the first basis, we find no evidence on the record to support the Presiding Member's determination that the Division Director's decision not to transfer Petitioner was pretextual. The Director's grade and experience do not, in our view, offer sufficient basis for inferring an improper intent. The director's comments concerning his approval of transfer requests from other employees did not establish any policy of granting transfer requests by probationary employees, especially probationary employees who the Agency has identified as having performance problems.

With regard to the second point, Petitioner, through his counsel, acknowledged that the hearing transcript incorrectly reported that an individual had been selected for Petitioner's position. There is no basis, then, for a finding of pretext in this regard.

With respect to the third factor, the record reveals that the rating official only began keeping a diary of his contacts with Petitioner after the decision to deny Petitioner's within-grade increase, and only on the advice of the Agency personnel office. These factors support a finding that the diary was not being used for retaliatory or other improper purposes. There is insufficient evidence on the record to support a determination to the contrary.

With regard to the fourth finding of the Presiding Member, several witnesses, including the rating official, testified that Petitioner received more guidance and assistance than the other employees commonly supervised. The witnesses also stated that it was the practice of Petitioner's supervisor to give little or no written assignments to his employees, preferring oral discussion to written memoranda. We find insufficient evidence to support the Presiding member's finding that Petitioner received less favorable treatment in the areas of guidance and assistance than other employees under the same supervision as Petitioner.

We make a similar finding with respect to the fifth basis for the Presiding Member's decision. The record is bereft of any substantial evidence concerning the performance of other employees. What evidence there is indicates that the performance appraisals for other employees were prepared in the same manner as the performance appraisals for Petitioner were prepared. Nor is there any record evidence of disparate treatment between the way Petitioner was treated and the way other probationary employees were treated. Therefore, we find no basis in the record to support a finding of disparate treatment of Petitioner by his supervisors. Taken as a whole, we do not find any substantial evidence to support the Presiding Member's determination that the Agency's proffered reasons for denying Petitioner a WIG increase and terminating his employment were a pretext for reprisal.

One final comment needs to be made regarding this decision. The Dissenting Opinion criticizes the Board Majority for failing to provide attentive consideration to the decision below. This review is the first pursuant to the Board's revised regulations which require the Board to review the decisions of Presiding Members with regard to whether the record, viewed as a whole, supports the decision. The rationale in adopting that change in regulations was to provide the Board the first opportunity to correct any decision which was contrary to the overall weight of the record evidence. In fulfilling this responsibility, each Board member read the entire record in this matter and many hours of deliberation were devoted to the careful consideration of the decision below.

No point would be served by stating in even greater detail the areas of our disagreement with the Decision below. It is sufficient to observe that, when that record review was completed, the majority was persuaded that the record simply did not support the conclusions of the Decision below to the effect that the Agency's determination to withhold a within-grade increase and to terminate the employment of Petitioner, a probationary employee, was due to improper motive (*i.e.*, due to reprisal or retaliation for previously pursuing EEO charges). Nor was the Board persuaded that the record supports the determination below that the discharge of Petitioner shortly prior to the end of his probationary period was due to any unlawful discrimination. The federal government is provided with great discretion in evaluating the performance of probationary employees so as to determine whether or not to grant to those employees the substantial benefits and protections of career employment status. The evidence of poor work performance by Petitioner was such that the Board Majority was not persuaded that the claim of poor work performance was pretextual and a cover for some ulterior unlawful motivation.

Accordingly, the Petition for Reconsideration is granted and the Decision of the Presiding Member is reversed. Member Brown dissents from this decision and states his reasons for doing so in a separate Opinion.

DISSENTING OPINION

In overturning the Presiding Member's decision, the Majority Opinion errs in four important respects. First, it applies an incorrect burden of proof on the agency in reviewing the denial of petitioner's within-grade salary increase. See section I. below. The correct burden of proof in this circuit is "preponderance of the evidence." Second, the Majority Opinion should have determined that the Agency did not provide proper justification for reopening this decision. See section II. below. Third, the Majority Opinion improperly overturns credibility determinations. See section III. A. below. The Board must exercise more care in overturning a Presiding Member's credibility determinations. Fourth, the Majority Opinion improperly overturns findings of fact. See section III. B. below. As a result of these last two errors, it is necessary to review the record as it relates to petitioner's performance and as it relates to the findings of retaliation. See sections IV. and V. respectively. This dissent deals with each of these issues.

I. Preponderance of the Evidence is the Proper Burden of Proof

We first consider the appropriate burden of proof in this case as it relates to the within-grade increase denial.¹ As the majority opinion acknowledges, this Board had followed the precedent of the Merit Systems Protection Board (MSPB) to the effect that the agency in a salary increase denial action has to support its action substantial evidence. Kienzle v. GAO, 1 PAB 28 (1981). Since that decision, however, the court of appeals for the D.C. Circuit has rejected the reasoning of the MSPB and held that the agency's burden of proof is not substantial, but rather preponderant evidence. White v. Department of the Army, 720 F.2d 209 (D.C. Cir. 1983) and Ommaya v. National Institutes of Health, 726 F.2d 827 (D.C. Cir. 1984). Most cases from the MSPB are appealed to the Federal Circuit and that court agrees with the substantial evidence standard for salary increase denial actions. Nevertheless, the MSPB acknowledges that other circuits do not agree with that burden of proof. Thus, when it is apparent that a case is subject to review in one of those circuits, the MSPB applies the preponderance of the evidence standard. Williams v. Department of Education, 11 MSPB 569 (MSPB 1982) ("mixed case" subject to appeal to Third Circuit); Wade v. Department of Health and Human Services, 84 FMSR 5388 (MSPB 1984) (acknowledging that the Fifth and the D.C. Circuits follow the preponderance of the evidence rule and so will the MSPB in cases within those Circuits). This Board is faced with the identical situation in this case as was the MSPB in Williams and Wade. It should, therefore, do as the MSPB has done -- that is, follow the precedent of the controlling circuit.

There are a variety of reasons why this Board should overrule Kienzle. Unlike the MSPB, none of our decisions are reviewable by the Federal Circuit, the primary court supporting the substantial evidence test. Also unlike the MSPB, most of our decisions that are appealed will probably be reviewed by the D.C. Circuit. To date, the only decisions of this Board that have been appealed to one of the federal courts have gone to the D.C. Circuit. It is possible under our statutory scheme for one of the other circuits to properly review a Board decision, but most such reviews will be conducted by the D.C. Circuit. Absent action by Congress to amend our statute, decisions of this Board will never be reviewed by the Federal Circuit. For all of these reasons, the Board should, in salary increase denial cases, require the agency to support its action by a preponderance of the evidence.

Had the majority opinion adopted the preponderance of the evidence standard, it could not have reached the same result.² The evidence demonstrates that Petitioner substantially met the performance criteria and performed in accordance with established performance standards.³

II. Due Deference Must Be Paid To The Credibility Determinations Of The Presiding Member Unless The Moving Party Raises Serious Evidentiary Questions Based On Specific Supporting References To The Record.

In its Motion to Reopen, the Agency does not claim that the Presiding Member improperly articulated the legal standards to be applied in a retaliation case or a performance-based action; nor does it designate a specific statute or regulation that the Presiding Member failed to interpret properly. Rather, its disagreement pertains to the conclusions of fact and the credibility determinations made by the Presiding Member from the evidence in the record presented to him. The Majority Opinion reflects agreement with the Agency in this regard, and this agreement is in error.

The Majority Opinion fails to acknowledge that the basis for review of credibility determinations is somewhat different from that for review of other factual findings. The MSPB, for example, requires that the moving party (in this case, the agency)

- *identify internal inconsistencies or inherent improbabilities or*
- *identify a contradiction by independent witnesses or independently corroborated evidence or*
- *identify any reliance by the hearing officer on hearsay lacking in probative value, unsubstantiated rumor, surmise, conjecture or speculation or*
- *identify any error in the reasoning on which the hearing officer predicated his credibility finding or*
- *identify something in the record that suggests the hearing officer's credibility assessment was erroneous.*

Weaver v. Department of the Navy, *supra*, at 299. Agency allegations presented to the Board in regard to these requirements fail to reflect the full scope of the evidence, including the credibility determinations of the Presiding Member. The Majority Opinion, by not addressing this failure, has not justified its decision to reopen and reconsider the credibility determinations in the initial decision. See also Neal v. T.V.A., 85 FMSR 5320 (MSPB 1985)(the Board accords due deference to the credibility determinations of its presiding officials, who are present at the hearings and observe the demeanor of the witnesses, in the absence of serious evidentiary questions based on specific supporting references to the record). In short, the Agency failed to provide the Board with adequate reasons to justify reopening this case.

III. In Reversing Credibility Determinations And Other Findings Of Fact In The Presiding Member's Decision, The Majority Opinion Must Demonstrate "Awareness" of the Presiding Member's Findings of Fact and State "Sound Reason" For Taking A Different Course.

Having decided to reopen this case, the Majority errs in its decision by failing to "reflect attentive consideration to the [Presiding Member's] decision." Since the MSPB and the courts have acknowledged that there is some distinction in the burden of a board such as the PAB when it overturns credibility determinations versus when it overturns findings of fact, we will first consider the law as it relates to the

review of credibility determinations. Next, we will consider the law as it relates to the review of findings of fact. Finally, in sections IV. and V., we will examine the specific findings of the Majority Opinion in order to relate this legal analysis to the record in this case.

A. Legal Basis for Review of Credibility Determinations.

The MSPB has recognized that it can substitute its credibility determinations for that of a presiding official. In doing so, however, the MSPB has held that it must articulate "sound reason, based on the record, for its contrary evaluation of testimonial evidence." Wyman v. U. S. Marine Corps, 85 FMSR 5512 (MSPB 1985). The Majority Opinion in this case does not even acknowledge that substantial portions of the findings of fact in the initial decision are based upon credibility determinations.⁴ In such circumstances, the courts have noted that "evidence in the record which, when taken alone, may amount to 'substantial evidence' and therefore support the Board's decision, will often be insufficient when the trial examiner has, on the basis of the witnesses' demeanor, made credibility determinations contrary to the Board's position." Penasquitos Village v. N.L.R.B., 565 F.2d 1074, 1078 (9th Cir. 1977); Jackson v. Veterans Administration, 85 FMSR 7049 at 126 (Fed. Cir. 1985). In this case, for example, the majority opinion refers to statements by agency witnesses regarding Petitioner's performance and then makes its own credibility determination without any references to the findings of the Presiding Member or any stated justification for its departure from the findings of the initial decision. Majority Opinion at pages 5-10. In National Association of Recycling Industries the court described a similar decision of another body as follows:

"The Commission appeared entirely to discount the hearing evidence on which the ALJ relied. The Commission simply asserted that this was hearsay testimony with 'little probative value,' ignored the evidence, and declined to reflect on the implications. The Commission stubbornly insisted on wearing blinders to judge the available evidence in this case.

National Ass'n of Recycling Industries v. F.M.C., 658 F.2d 816, 825 (D.C.Cir. 1980). In many instances, which are described in more detail under sections IV. and V. of this dissent, the Majority Opinion does not identify the specific evidence nor provide analysis that justifies its reversal of the Presiding Member's credibility determinations.

B. Legal Basis for Review of Findings of Fact

Although the courts seem to require somewhat more from administrative boards when they overturn credibility findings of their hearing officers, the rule is essentially the same as when such a board overturns any findings of fact made by a hearing officer. For example, the court of appeals for the District of Columbia defined the proper role for a review of findings of fact by an administrative adjudicatory body as follows:

"Here, the Commission accepted the Examiner's findings and conclusions to a substantial degree; and when it did not, the Commission **made clear not only its awareness of what the Examiner had concluded, but also its reasons for taking a different course.**

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 853 (D.C. Cir. 1970) (emphasis supplied). Still another court stated the proposition as follows:

““While the reviewing courts generally accord much deference to an agency’s expertise and discretion if the agency adopts the findings of the ALJ, a slightly different rule applies when the administrative agency rejects the findings of the ALJ. **The Board’s departure from the ALJ’s findings is vulnerable if it fails to reflect attentive consideration to the ALJ’s decision.**”

Citizens State Bank of Marshfield, Mo. v. F.D.I.C., 718 F.2d 1440, 1444 (8th Cir. 1983) (emphasis supplied and citations omitted). Thus, the authority of the Board to substitute its own findings of fact is not unfettered. The Board must demonstrate an "awareness" of what the Presiding Member concluded and it must state "its reasons for taking a different course of action." In this Majority Opinion, however, there is often little, if any, reference to the findings and the conclusions of the Presiding Member. These shortcomings are explored in more detail in the following section.

IV. The Majority Opinion Fails To Reflect Attentive Consideration To The Initial Decision’s Evaluation Of Petitioner’s Performance

Two factors demonstrate the failure of the majority opinion "to reflect attentive consideration to the [initial] decision" in this case. First, and most obvious, the majority opinion does not acknowledge the existence of numerous findings that were significant to the decision. Second, even the findings that the majority opinion addresses are dealt with in a summary fashion.

As an example of the omission of numerous significant findings, the majority opinion states, "The Presiding Member made a finding of pretext and cited five factors to support this finding, including...." Majority Opinion at page 11. The majority opinion then briefly discusses these five factors as if they provided the entire basis for the initial decision’s finding of pretext. In fact, the initial decision makes it very clear that these five points represent only a partial listing of the findings that support its conclusion. The initial decision reads, in pertinent part, as follows:

“Considering the evidence presented in this case, both actual and circumstantial, I am persuaded that Petitioner has proven the reasons articulated by management to be pretextual and I am not persuaded that the Agency has demonstrated clearly and convincingly that the Petitioner would have been terminated anyway absent a retaliatory motive. The evidence presented by the Agency does not substantially support its allegations of poor performance against the Petitioner; but even if this evidence were substantial to the degree necessary to support the poor performance charges, the preponderance of the evidence, **including but not limited to the following examples**, also provides reasonable basis to support inferences of retaliatory motives.

Presiding Member’s decision at page 61 (emphasis supplied).

Many other findings throughout the prior 60 pages of the decision support the finding of retaliation and the initial decision so states quite clearly.⁵ This example, which deals with the retaliation issue, is repeated in this discussion of the Majority Opinion’s handling of the petitioner’s performance, because it demonstrates so well the failure of the Majority Opinion to even acknowledge the existence of numerous findings and credibility determinations of the Presiding Member. At other times, the Majority Opinion avoids discussing findings of fact and credibility determinations by simply stating that there is not substantial evidence to support the finding. In either case, the Majority Opinion does not meet the first criterion for substituting its own findings of fact for those of the initial decision -- demonstrating an "awareness of what the [initial decision] had concluded."

In addition to failing to acknowledge numerous significant findings of fact, the findings that the Majority Opinion does address are usually dealt with in a summary fashion. The most common pattern here is that of incompletely stating the findings of fact. As a result, the Majority Opinion usually fails to give "reasons for taking a different course" of action regarding both the Petitioner's performance and the retaliatory or "pretextual" factors referenced above. These failings are examined in reference to the performance issue in this section and to the "pretextual" or retaliation issue in section V.

We turn first to the performance issue. The Majority Opinion finds that there was substantial evidence to conclude that Petitioner's performance was deficient on four assignments (pages 5-10). They are as follows: the literature search; the chapter on Special Issue Area Courses; the Learning Center Evaluation Plan; and the Report on Computer Assisted Instruction. As discussed in detail in the Decision of the Presiding Member, and summarily reviewed in this dissent, there are numerous and substantial deficiencies with this finding of the Majority Opinion. Actually the evidence demonstrates just the opposite -- that the Petitioner performed assigned tasks in accordance with the requirements of written performance standards and the guidance received. A summary of the evidence presented in the initial decision to support this conclusion follows.

A. Literature Search

The Literature Search assignment is discussed in detail on pages 31 and 32 of the Presiding Member's decision. With regard to this assignment, the Majority Opinion (page 8) states that the Petitioner's supervisor testified that he "directed the Petitioner to conduct a literature search on the evaluation of learning centers and to summarize selected articles." The Petitioner is pictured as not having done the work on this project and merely providing "photocopies of the abstracts of the articles as they appeared in the computer." Majority Opinion at page 8. The testimony of the supervisor to the effect that Petitioner was "to conduct a literature search" and "to summarize selected articles," is offered by the Majority Opinion as evidence that the Petitioner failed to perform this task in an acceptable manner and that there is no evidence to the contrary. The discussion is literally void of much of the evidence presented by the Presiding Member in his decision and the credibility determinations he was required to make in regard to this assignment. A summary of this evidence follows.

The performance standard for this project required that literature related to the Learning Center be searched and completed by October 15, 1983. The handwritten note upon which the assignment was based, as discussed in the Presiding Member's decision, does not contain a requirement for management summaries. Nevertheless, the absence of "management summaries" is the primary criticism leveled against petitioner's work product by the Agency.

The literature search, as reflected in the documents submitted by the Petitioner, is comprised of abstracts from books, documents, periodicals, etc. which give specific information about a particular operational element of a learning center. The abstracts themselves are, in fact, summaries.

The literature search was completed on October 3, 1983, almost two weeks before it was due. The record does not reflect any mention of this project by the supervisor in any manner until January, 1984--approximately three months after it was submitted and only approximately two weeks before the petitioner's salary increase was due. The petitioner's supervisor stated that he discussed with the petitioner the matter of management summaries on January 6, 1984--three months after the project had been submitted. The Petitioner contended that the matter of summaries was not discussed with him until the January 20 meeting at which the denial of his within-grade was discussed. These two differing statements

represented conflicting testimony for which the Presiding Member was required to determine credibility. To resolve the credibility problem, the Presiding Member reviewed the evidence, including the supervisor's diary, which was submitted as evidence for the record. The diary indicates that on January 6, the supervisor conducted the mid-year performance appraisal with the Petitioner. He stated in the diary that he discussed with the Petitioner the shortcomings of his Evaluation Chapter and his dissatisfaction with his progress on the Learning Center Evaluation Plan. In the supervisor's own account of what was discussed on that day, there is no mention of the literature search assignment or of a requirement for a management summary. This is consistent with the Petitioner's testimony that the subject was not discussed until the January 20 meeting when his salary increase was denied. The Presiding Member, being present to observe the demeanor of the witnesses, concluded that the documentary evidence in the supervisor's own exhibit outweighed his testimonial evidence. Thus, the Presiding Member concluded that the testimony of the Petitioner was most credible and that (1) based upon the facts and the evidence presented, more likely than not the Petitioner had not been asked to "provide management summaries to branch managers" and, therefore, could not be held responsible for not having done so; and (2) the Agency had not proved even by substantial evidence its allegation of poor performance relative to this assignment, for the absence of a management summary was the only alleged deficiency articulated for that assignment in the memorandum which denied his within-grade salary increase.

The Majority Opinion disregards the evidence and determinations of the Presiding Member and offers no rationale for its conclusion that "management summaries" was part of the original assignment. By so doing, it fails to demonstrate "awareness" of what the Presiding Member had concluded and it fails to articulate "reasons for taking a different course" of action as required by the D.C. Circuit in Greater Boston Television Corporation.

B. Report on the Evaluation of Special and Issue-Area Courses

This assignment is discussed in detail on pages 33-37 of the Decision of the Presiding Member. In discussing this assignment, the Majority Opinion, at pages 7 and 8, relies on the testimony of the Petitioner's supervisor regarding the drafts submitted by the Petitioner. The Majority Opinion finds that Petitioner submitted a draft that was "completely unacceptable;" that the supervisor provided "extensive comments...on the draft;" that the second draft was "unacceptable" and had to be "substantially rewritten by the supervisor;" and that these efforts by petitioner supported the salary increase denial. The Majority Opinion then concludes that there was "no evidence to refute this testimony." The Majority Opinion does not reflect in any manner the findings of the Presiding Member.

The written performance standards for this assignment allowed the Petitioner two major revisions and two minor editorial rewrites to attain an acceptable level of performance. Presiding Member's decision at page 33. This standard indicates that problems were expected and that two major revisions were anticipated. The Petitioner submitted his first draft on December 14, 1983. The supervisor stated that this draft needed practically a complete rewrite. The suspense date for the Petitioner to submit the first rewrite or major revision was established by the supervisor as January 4, 1984.

On January 4, 1984, the Petitioner submitted his first major revision or rewrite as required. The supervisor testified that this revision contained grammatical mistakes such as mixed tenses, problems in the analysis and discussion of data, and improper stylistic choices. Presiding Member's decision at page 35.

As noted in the Majority Opinion at page 8, it was at this time that Petitioner's salary increase was denied. What the Majority Opinion ignores, however, is that the performance standard allowed Petitioner two major rewrites; that this represented one of those two major rewrites; and that Petitioner incorporated every change noted by the supervisor from the original draft in this first major rewrite. Having heard the testimony, observed the demeanor of the witness and closely reviewed the documentary evidence, the Presiding Member found the supervisor's testimony regarding unacceptable products on this assignment was lacking in credibility. Thus, the Presiding Member concluded that, at the time of the salary increase denial, Petitioner "had generally met the performance standards--at least at the generally acceptable level." Presiding Member's decision at page 37. The Majority Opinion is able to reach a contrary conclusion by ignoring the performance standard and other critical facts in the case. Thus, the Majority Opinion fails to demonstrate an "awareness" of what the Presiding Member had concluded and it fails to articulate "reasons for taking a different course."

The Majority Opinion also viewed the Petitioner's subsequent performance on this report on Special Issue Area Courses as a factor in Petitioner's termination. Petitioner submitted a third draft, which was his second major revision under the performance standard. The Majority Opinion concludes that the product was deficient because the supervisor had to make "more than editorial changes..." he had to make "several substantial changes in the document." Majority Opinion at page 10. The Presiding Member found and the Majority Opinion did not dispute, that Petitioner made all the changes suggested by the supervisor in each revision. To attain acceptable performance, Petitioner was to be allowed two major revisions and two editorial rewrites. After Petitioner completed two major rewrites and incorporated all of the supervisor's comments, the supervisor accepted the product as being "good enough" and did not, on his own accord, require the petitioner to perform the two editorial rewrites.

The Majority Opinion accepts uncritically the conclusion of the supervisor that rewrites by Petitioner were unresponsive and inadequate without considering that Petitioner did exactly what the supervisor suggested with each rewrite. The Majority Opinion accepts uncritically the fact that the supervisor made some substantive changes in the final document as evidence that more than editorial changes were necessary without noting that even the supervisor failed to note these substantive changes in earlier versions submitted by Petitioner. The Majority Opinion, thus, faults Petitioner for limiting his earlier corrections very specifically to the supervisor's criticisms and then faults his final submission for containing an alleged substantive error that his supervisor had missed in three earlier drafts.

After hearing the testimony and reviewing the documentary evidence, the Presiding Member concluded that the supervisor's description of Petitioner's performance was not consistent with his own actions and with the evidence in the record. The Majority Opinion again fails to demonstrate an "awareness" of what the Presiding Member had concluded and it again fails to articulate "reasons for taking a different course."

C. Learning Center Evaluation Plan

The third major project which was assigned to the Petitioner and for which the Majority Opinion finds evidence to support a finding of unsatisfactory performance by the Petitioner was the development of a Learning Center Evaluation Plan. The conclusion of the Majority Opinion is based upon four factors:

- (1) The testimony of another employee that indicated that the project "could be completed in the manner outlined by the Petitioner's supervisor." Majority Opinion at page 6.

(2) The testimony of the supervisor that Petitioner's draft for this project omitted six necessary requirements. Majority Opinion at page 6.

(3) The testimony of the supervisor, corroborated by the testimony of "other witnesses," that he finally sat down with Petitioner and "attempted to list every possible item that could be included in the Learning Center Evaluation Plan. Majority Opinion at page 7.

(4) The supervisor testified that he realized there were problems with petitioner's work when he turned in an outline for the Learning Center evaluation plan in November 1983 and that, because this outline was inadequate, he moved, petitioner's due date for the draft evaluation plan to January 9, 1984. Majority Opinion at pages 5 and 7.

The discussion by the Majority Opinion of each of these factors is literally void of any references to the findings and the conclusions of the Presiding Member and the credibility determinations he was required to make in regard to each of these four issues. This subject is discussed at pages 37-42 of the Presiding Member's decision. A summary of this evidence regarding each of these four factors follows.

(1) Whether the assignment could be completed in the manner outlined by the supervisor.

In its decision, the Majority cited the testimony of another employee-witness, who was the Petitioner's predecessor on this project, as a reason for its conclusion that the petitioner performed poorly on this assignment. According to the Majority Opinion,

That employee testified that the evaluation of the Learning Center was to be prepared as the Learning Center was being planned and developed and, as such, it was not necessary for the Learning Center to be completed before the evaluation could be completed. Therefore, ...the assignment could be completed in the manner outlined by the petitioner's supervisor.

Majority Opinion at page 6.

This statement, however, does not reflect the full scope of this employee's testimony. Additionally, a portion of this statement appears to conflict with other prior statements made by the witness, and must be evaluated in relationship to these prior statements and to the rest of the testimony given by the employee.

The employee-witness was assigned this project for approximately ten months prior to the petitioner's appointment (Tr. page 368 and Presiding Member's decision at pages 39-40). In January 1983, he prepared a memorandum informing the Deputy Director of the division that an actual program of evaluation was not feasible at that time because the project did not have components to piece together. Presiding Member's decision at pages 39-40. This statement appears to be in some conflict with the employee's testimony, upon which the Majority Opinion relies. However, closer examination demonstrates that there is no conflict and that there is no support for the interpretation of the Majority Opinion.

In August 1983, just eight months after his memorandum to the Division Director and at the time when the petitioner was being assigned to the project, the evidence shows that the employee-witness (the Petitioner's predecessor) stated that the Learning Center was still in a formative stage and "really didn't exist. It was a concept being developed. The project" he continued, "was dormant. I mean there was really nothing anymore." (Tr. at page 354). On a related matter, this employee testified that the role of the

Evaluation Representative (originally himself and now the Petitioner) on the Learning Center Resource Group (LCRG) was not to tell the Training people what to put in the Learning Center, but "to tell them how we thought would be a good way to evaluate their activities" (Tr. at pages 352-353). This is more than an inference; it is, rather, a clear statement of what the employee-witness meant when he said that the project "could be completed." He says, in essence, that it is not the job of evaluation personnel, such as himself and petitioner, to tell the training personnel what to put in the Learning Center; that is, to identify its components or to formulate its goals and objectives. That responsibility, he states, is the function of the training personnel. Once the training people decide what is to be put into the Learning Center, however, the assignment to develop the Learning Center Evaluation Plan then becomes possible. The evidence indicates that this employee-witness was not in possession of this information (i.e., what was to go into the Learning Center) at the time the Petitioner was hired and, therefore, could not pass it on to the Petitioner. Presiding Member's decision at page 40. Furthermore, no evidence was offered to indicate that this information (what was to go into the Learning Center) was ever given to the Petitioner. Presiding Member's decision at page 40. In fact, in a memorandum dated January 20, 1984, the supervisor acknowledged that even the "objectives and goals" of the Learning Center had not yet been developed and he shifted responsibility for developing them from the training personnel to petitioner. Presiding Member's decision at page 46.⁶ In short, there was still no evidence of the existence of components for the Learning Center. Presiding Member's decision at page 40. Development of the Learning Center was still in a formative stage just as it had been a year earlier when the employee-witness advised the Deputy Director that an evaluation plan "was not feasible." As a matter of fact, ten months after he had been assigned to the project, the employee-witness, upon whose testimony the majority opinion relies, had not developed a Learning Center evaluation plan. If the assessment reflected in the Majority Opinion is true, why did the employee-witness not complete the development of the evaluation plan when it was his assignment?

Therefore, the statement relied upon by the Majority Opinion (that the assignment could be completed in the manner outlined by the supervisor) is accurate, but is out of context and as such is incomplete. Development of an evaluation plan for the Learning Center could "be prepared as the Learning Center was being planned and developed." However, there was no evidence that the planning or development had progressed in terms of providing the petitioner with needed information. The evidence was to the contrary. In January 1983, there were "no components to piece together." In August 1983, when petitioner was assigned to it, the project was "dormant." Even objectives and goals for the Learning Center had not been developed by the training people by January 1984. As a result, the Majority Opinion's conclusion ("the assignment could be completed in the manner outlined by the petitioner's supervisor") is based upon an unstated assumption (that some identifiable components of the Learning Center had been developed) for which there is no supporting evidence.

(2) Whether petitioner omitted six necessary requirements.

The second factor relied upon by the Majority Opinion for its conclusion that petitioner's work on the Learning Center Evaluation Plan was unacceptable involves petitioner's failure to include six necessary requirements in the Plan. The Majority Opinion asserts that the supervisor told petitioner that these six requirements were necessary and that the testimony of "other witnesses" supported the supervisor's testimony. Majority Opinion at pages 6 and 7. There are two possible witnesses to whom the majority may be referring. We now turn to consideration of these six requirements and the testimony of these two witnesses.

The nature of these six requirements⁷ indicates a need for the components, objectives, and other operational information to be available - otherwise, the questions cannot be addressed. As discussed under subsection C. (1) above, there is no evidence that this information was ever made available to the Petitioner. Based upon this assessment, the Presiding Member found credible the statement by the Petitioner and the other employee-witness (who is referred to in the discussion under section C. (1) above) that the plan could not be developed until the training personnel had made some progress in developing the components and other operational data.

Another employee-witness also testified with regard to guidance on or "requirements" of the Learning Center Evaluation Plan. The supervisor gave petitioner models developed by this other employee to be used as guides in the development of the Evaluation Plan. This second employee-witness, however, testified that he had no experience, per se, in the design or the management of Learning Centers; that he was not involved in that area of training; and that the documents given the petitioner could not be used as content guides. The Presiding Member reviewed these models. Both models, unlike the Learning Center, pertained to programs or items already in place or in use and functioning. Thus, the goals, objectives, and other components necessary to develop a specific evaluation plan for those programs were in place for those models. As already discussed in detail, there is no evidence that similar pertinent information and data relative to the Learning Center were provided to the petitioner at any time. Also, this employee-witness stated that the petitioner "was beginning a project which was a new type of venture in the Evaluation Branch and, I presumed, for (the petitioner) himself." The employee-witness testified that he gave the petitioner the models discussed, but admitted his lack of experience as discussed before (Tr. at pages 83, 85, and 86). This testimony certainly does not support the contentions expressed in the Majority Opinion.

Based upon this assessment of the evidence and the facts, the Presiding Member concluded that the agency's allegations relative to these drafts were not supported by the evidence, and that the Petitioner's claims were credible--that considering the status of the development of the Learning Center at that time, the guides given petitioner could not be used as content guides in the development of the Learning Center Evaluation Plan.

In conclusion, the reliance by the Majority Opinion on the guidance given petitioner, including listing six necessary requirements, is again misplaced. The Majority Opinion assumes that development of the Learning Center had progressed to a point at which evaluation of those six requirements was possible. However, that assumption is not supported by any evidence in the record. Once again, the Majority Opinion fails to demonstrate "awareness" of what the Presiding Member had concluded and it fails to articulate "reasons for taking a different course" as required by the D.C. Circuit in Greater Boston Television Corporation.

(3) Corroboration by other witnesses of specific counseling by supervisor.

The third factor relied upon by the Majority Opinion to find the performance on the Learning Center Evaluation Plan to be unacceptable was certain testimony of the supervisor, which was, according to the Majority Opinion, corroborated by "other witnesses."

The Majority Opinion states, The supervisor testified that at the height of his frustration with petitioner, he sat down with the petitioner and attempted to list every possible item that could be included in the Learning Center Evaluation Plan, but to no avail. The testimony of the Petitioner's supervisor in this regard is supported by the testimony of other witnesses who stated that they

overheard a number of discussions between the Petitioner and his supervisor. The Petitioner did not contest these points in his own testimony.

Majority Opinion at page 7.

The specific discussion between the supervisor and the petitioner on this matter is discussed on page 57 of the decision of the Presiding Member. The petitioner, however, had no knowledge as to what witnesses overheard and there was no basis for his "contesting these points" when specifics as to what witnesses allegedly heard were not given. For example, as recorded on pages 362-364 of the transcript, one of the witnesses, who stated that he heard many discussions, was asked whether he had heard conversations between the Petitioner and the supervisor. He testified that he and the supervisor "shared a very large area, about a hundred square feet and it was divided by a partition about eight feet high." In answer to a question, "Do you remember anything about these conversations," the witness responded:

The earlier conversations, no, but later on...from time to time there would be some heated exchanges."

Q.And why would they become heated?

A.Well, from what I could gather, it was a disagreement on the nature of the assignment and what the expectations were and what the product was to be delivered.

Q.To what extent did you hear (the supervisor) counseling or giving feedback to (the Petitioner)?

A.Well, I can remember a few specific instances, probably more, but none that I could speak clearly of - one involved the Learning Center itself and the actual evaluation plan. Apparently it had gone around the route two or three times and just wasn't satisfactory.

In much of this testimony, the witness used terms, such as "apparently," "I suppose he was explaining-," "from what I could hear," "none that I could speak clearly of" or "from what I could gather," to explain what he is supposed to have heard relative to conversations between the supervisor and the Petitioner. The Presiding Member, in determining the credibility of this testimony, considered these statements to be more in the nature of speculation or supposition rather than factual conclusions that may or may not be true as to the scope and the intent of what he had heard. The plausibility of this determination is buttressed by the comments of the witness under cross examination as follows:

Q.Your testimony concerning the relationship between (the supervisor and the petitioner), is that based entirely on your overhearing conversations between the two of them?

A.The only time I was--yes, except there was one instance, and this was after things had moved to the point where it was a business of having to have witnesses whenever one said something to the other, and I was called in at one point as a witness when (the supervisor and the Petitioner) were talking about something. **I don't even remember what it was.** That was the only time I was actually there with them face to face.

Transcript at pages 371-372 (emphasis supplied).

The Presiding Member concluded that if the witness could not remember what he was called in to witness, he (the Presiding Member) could not consider credible the evidence which the witness stated that he heard in "a very large area, about a hundred square feet and...divided by a partition about eight feet high." Most importantly, the witness never provided specific details as to what he had heard. Here, again, is an example in which the decision of the Majority Opinion does not consider the full range of the evidence presented in the record.

The only other evidence regarding the testimony of "other witnesses" relates to models and plans given to the Petitioner as guides in the development of the Evaluation Plan. This testimony is discussed in detail on pages 41 and 42 of the decision of the Presiding Member and is discussed briefly in this dissent under subsection C. (2) above.

None of this evidence supports the contentions of the Majority Opinion. Nothing in the testimony of these two principal employee-witnesses supports the Agency's denial of the Petitioner's salary increase nor does the testimony support the Majority Opinion.

(4) Testimony of supervisor regarding receipt of outline and reason for moving up due date for draft.

Finally, the Majority Opinion reflects a number of findings of fact that simply are not supported by any construction of the evidence. The Majority Opinion states that "he (the supervisor) first began to realize that there were problems with Petitioner's work when petitioner turned in his first written work products, the outline for the Learning Center evaluation (submitted in November 1983) and the first draft of the chapter on Special Issue Area Courses." Majority Opinion at page 5. At best this statement is misleading and does not accurately reflect the evidence in the record (Tr. page 37), the information presented in the decision of the Presiding Member (pages 15 and 16), and the information reflected in the supervisor's diary on the date of January 20, 1984.

To begin with, the statement quoted above suggests that the supervisor first realized that there were problems with petitioner's work when petitioner turned in the outline for the Learning Center Evaluation Plan in November, 1983. This is erroneous. The record does not indicate that the supervisor ever made any such statement on that date concerning the outline. To the contrary, the petitioner stated that he submitted this three page outline of the Learning Center Evaluation Plan to the supervisor in November, 1983 and received no feedback. The supervisor's diary states that he did not receive this outline until January 20, the date petitioner was advised of the decision to deny his salary increase. Testimony by the supervisor indicates the same (Tr. at pages 26-27).

In a later sentence, the Majority Opinion states that the outline of the Learning Center Evaluation Plan "was unacceptable because it was too general"-- citing the six requirements that have already been discussed in this dissent. Majority Opinion at page 6. This was part of the evidence used by the Majority Opinion to "support the Agency's denial" of petitioner's salary increase on January 20. As stated earlier, the evidence indicates that the outline was reviewed in January, after the decision to withhold the salary increase had been made, not in November as stated in the Majority Opinion.

The statement attributed to the supervisor that "because of the petitioner's inadequate outline of the evaluation plan...he requested that the petitioner submit a draft of the evaluation plan by January 9, 1984," is in error in that the supervisor testified and his diary corroborated that he did not receive the draft outline until January 20, 1984. In fact, except for the statement that the supervisor wanted the draft for another meeting (transcript at page 59), the record is silent as to why the supervisor moved the deadline forward. Here, again, is an indication of the failure of the Majority Opinion to reflect accurately the evidence presented in the record and in the decision of the Presiding Member.

D. Computer Assisted Instruction

The Majority Decision cites the Computer Assisted Instruction assignment as another assignment for which the Petitioner's performance was considered unsatisfactory. The Decision of the Presiding Member discusses this project in detail on pages 42 and 43.

The Majority Opinion states that the petitioner testified that the computer-assisted instruction assignment was dropped, and that there is no evidence to support the petitioner's contention on this point. Majority Opinion at page 10. A review of the evidence on this discussion, however, indicates that the Majority Opinion is in error relative to the contentions of the petitioner. Tr. at pages 145-147. The evidence shows that the petitioner initially requested that the assignment be dropped, but the discussion in the transcript establishes that the supervisor and the petitioner eventually agreed to delay the submission of the assignment, as stated by the petitioner, after the petitioner had agreed to submit an article on the advantages and disadvantages of CAI.

The Majority Opinion also states that "there is no evidence to show that the Petitioner ever made any further effort to complete the project." Again, the Majority Opinion has failed to consider the evidence described in the Presiding Member's decision. The decision of the Presiding Member states that the CAI assignment was due on May 30, 1984. The evidence indicates that the supervisor stated that by approximately May 15, he had made up his mind to terminate the petitioner. Also, neither the memorandum denying the petitioner's salary increase nor the letter of termination cite unsatisfactory performance of this assignment as a reason for actions taken. Presiding Member's decision at pages 42-43. For these reasons, the Presiding Member concluded that a detailed discussion of this project was inappropriate. Thus, the Majority Opinion uses an issue that was not relied upon by the Agency in order to supply support for the Agency's action. Again, the Majority Opinion makes no reference to the determinations and the conclusions of the Presiding Member or to the evidence upon which his determinations were based. Likewise, the Majority Opinion fails to articulate reasons for taking a different course.

We have now considered the findings and conclusions of the Majority Opinion as they relate to petitioner's performance on his assigned tasks. This review establishes that there is not substantial, much less preponderant evidence to support the agency's denial of petitioner's salary increase denial. It also makes clear that considering all the evidence presented, petitioner did establish that he met the requirements for his assignments to the extent possible and to the extent those assignments could be reasonably defined.

The case Degani v. Dept. of the Air Force, 2 MSPB 81 (1980), states that the Petitioner will prevail in a salary increase denial case if the Agency does not demonstrate the failure of the employee to perform at an acceptable level of competence. It is not necessary, it continues, for the employee to prove that he/she was performing at the acceptable level to win the appeal. The Agency must demonstrate that he was not. This the Agency did not do. On its way to finding to the contrary, the Majority Opinion does not reflect an "awareness" of the analyses and conclusions of the Presiding Member and it fails to articulate "reasons for taking a different course" of action as required by the D.C. Circuit Court of Appeals in Greater Boston Television Corporation, *supra*. Having concluded with this review of the portion of the Majority Opinion dealing with petitioner's alleged performance deficiencies, we turn now to the evidence of retaliation or "pretextual" evidence.

V. The Majority Opinion Fails to Reflect Attentive Consideration To The Initial Decision's Evaluation Of Findings of Fact Relating to Retaliation

As noted at the beginning of section IV. in this dissent, the Majority Opinion states that the Presiding Member based his finding of retaliation on five factors. Majority Opinion at page 11. The Majority Opinion then briefly discusses and dismisses each finding. It is first important to note that the Presiding Member did not base his finding of retaliation on these five factors alone and the initial decision clearly states that fact. See footnote 5 and the accompanying text. This omission alone emphasizes the failure of the Majority Opinion to demonstrate an "awareness" of what the Presiding Member had concluded and the failure to articulate "reasons for taking a different course."

However, even to the extent that the Majority Opinion addresses these five factors, a review of the record reveals that their conclusions are again based upon fragments of the record, rather than upon the record as a whole. With this in mind, we turn to four of the five cited factors.⁸

A. Denial of Petitioner's Transfer Request

The initial decision concluded that the Division Director's proffered reason for not granting Petitioner's transfer request was evidence of pretext. Presiding Member's decision at pages 50-53. The Majority Opinion found "no evidence on the record to support the Presiding Member's determination...." Following is a brief restatement of the findings of fact from the initial decision that the Majority Opinion omits from its consideration. The Petitioner requested a transfer and the Division Director denied the request. It was established that ordinarily all requests for transfers had been approved in the past by this Director. The initial decision also acknowledges that the employee had no right to a transfer and that the agency could deny the transfer. However, the decision also found that the Division Director's articulated reason for the denial was not reasonable or credible under the circumstances. The Division Director testified that an earlier Board decision had placed Petitioner in a position in his Division and that to place Petitioner in a different position, even at Petitioner's own request, would violate the Board's order. The initial decision noted that the Division Director did not even attempt to get advice from agency legal counsel or personnel specialists on this matter. Based upon all of these factors, the initial decision concluded that the Division Director's testimony was not credible. It was unreasonable for a senior executive with twenty-two years experience in the government to decide not to follow his normal practice based upon what is at best a dubious interpretation of a Board order and to do so without consulting legal or personnel staff. Presiding Member's decision at pages 50-53.

The Majority Opinion, in effect, holds that it is not suspicious for a senior government manager to reverse his normal practice based upon his own dubious legal theory which was arrived at without requesting any expert advice. The analysis offered by the Majority Opinion in support of its conclusion is as follows: "[The Division Director's] grade and experience do not, in our view, offer sufficient basis for inferring an improper intent." Majority Opinion at page 11. This, of course, ignores the other factors present in the initial decision:

1. Departure from his normal practice of granting transfers. "In most cases these requests [for transfer] were honored." Presiding Member's decision at page 51.

2. Dubious legal theory to support the exception in this case. Presiding Member's decision at pages 52-53.

3. Failure to seek expert advice. Presiding Member's decision at pages 51 and 53.

In addition to these specific reasons stated in the decision of the Presiding Member, the record provides the following direct and circumstantial evidence of a retaliatory motive on the part of this executive which supports the decision of the Presiding Member and which the Majority Opinion ignores.

1. Only six months had elapsed between the PAB's favorable ruling for the petitioner in his original complaint of discrimination against the Agency and the denial of the transfer. Presiding Member's decision at pages 1-2.

2. The executive who denied the request for transfer testified in the original case against the petitioner. In that hearing he stated that the communication skills of the petitioner were not adequate to perform the tasks associated with the position. (Tr. page 215).

3. A lack of communication skills was cited by this executive as a factor in the termination of the Petitioner-even though the PAB, in the original case, had found this argument unworkable (Petitioner's Exhibit 16) and even though this executive testified that he had never personally reviewed the petitioner's work products. Tr. pages 216, 217, 219, 220. By contrast, the immediate supervisor testified that the petitioner had adequate command of the English language (Tr. at page 55).

4. The executive who denied the transfer testified, contrary to the statement in the Majority Opinion (at page 12), that he was sure that there were other individuals assigned the same kind of work as petitioner, in the same environment, and in the same type of situation. (Tr. page 231). The petitioner, however, is the only employee to have ever been denied a transfer where it was requested.

5. The executive stated that there was another individual who worked under him in the Training Branch and who, though not doing similar work, was similarly situated and who took considerable adjustment. (Tr. page 230). There was no performance based action taken against this or any other person in the Division.

The Majority Opinion does not reflect consideration of this evidence as presented in the record and in the decision of the Presiding Member.

Also, the ruling of the Presiding Member is in keeping with established law and the regulatory provisions cited. For example, Gonzales v. Bolger, 486 F. Supp. 595, 601 (D.D.C. 1980) states that where adverse actions followed protected activity within a short period of time, it is proper for the Board to infer retaliatory motives for actions. The initial request for transfer by the petitioner, as shown in the decision of the Presiding Member, was made in February, 1984-shortly after the denial of the salary increase. The transfer request was denied at that time, even though all other requests by other employees had been granted. Also, Brown v. Rollins, Inc., 397 F. Supp. 571, 577, 16 FEP 271, 275 (W.D.N.C. 1974) states that a complainant's need to rely on circumstantial evidence in a retaliation case (as was done, and shown in this case) is well recognized since "direct evidence of discrimination is virtually impossible to produce" in the ordinary case. Also, the provisions of Greater Boston Television Corporation v. F.C.C., cited earlier, apply in terms of a requirement to reflect awareness of the conclusions of the Presiding Member. In

Teamster v. United States, 431 U.S. 324, 335-336 (1977) the court stated that a claim of disparate treatment simply means that the employer has treated one employee less favorable than others because of that employee's race, color, religion, sex, or national origin.

The evidence indicates that the petitioner was treated less favorably than other employees similarly situated in the granting of transfers--establishing a causal connection between the denial and a retaliatory motive. Additionally, the Presiding Member, based upon the evidence, agreed with the Petitioner that the reasons cited by the Agency for denying the request for a transfer support an inference of retaliation and pretext.

B. Maintenance of Diary On Petitioner Evidenced Pretext

The initial decision concluded that the diary kept by the supervisor regarding petitioner's performance strongly suggests the possibility of a search for a pretextual basis for a disciplinary action. Presiding Member's decision at page 55. The majority opinion dismisses this conclusion in the following language:

[T]he record reveals that the rating official only began keeping a diary of his contacts with the petitioner after the decision to deny the within-grade increase, and only on the advice of the Agency personnel office. These factors support a finding that the diary was not being used for retaliatory or other improper purposes. There is insufficient evidence on the record to support a determination to the contrary.

Here the Majority Opinion fails to cite the controlling factor in the initial decision. The Presiding Member took judicial notice of the Agency's Performance Appraisal Manual. That Manual provides as follows:

- (1) that anecdotal records or supervisor's notes are legal providing they are not shown to anyone except the subordinate whose performance it describes;
- (2) that they are destroyed after the written appraisal has been completed and placed on file;
- (3) that for the sake of equity, notes should be kept on all persons supervised;
- (4) that notes should be discussed with the person to whom they pertain when each notation is made; and
- (5) that there are three specific occasions when notes are to be kept by supervisors.

Presiding Member's decision at pages 53-54.

The initial decision concluded that every single one of the above provisions was violated in this circumstance. In other words, the initial decision concluded that this violation by the agency of its own regulations reasonably evidenced disparate treatment. Thus, it constituted additional circumstantial evidence in support of Petitioner's pretext burden of proof.

Also, the evidence on the record indicates that the statement by the Majority Opinion as to the reason why the supervisor stated that he maintained the diary is incomplete and omits pertinent testimony relative to the charge of pretext. His stated purpose for the diary (Tr. page 281 and page 54 of the Presiding Member's decision) was that the people in Personnel and the Labor Management and Employee Relations Office told him "to start taking notes on what John was doing, what John was not doing, and the substance

of our meetings so that if the need should arise, I would be able to document what happened...." The evidence also reflects that the Petitioner was not informed of the diary and that the supervisor did not maintain diaries for all other employees. Too, the evidence shows that prior to these circumstances, the supervisor had never maintained a diary on any other employee. As shown in the evidence, the purpose of these notes was not to improve performance, as specified in the GAO Personnel Appraisal Manual and discussed in the Opinion of the Presiding Member at page 54, but was to document what the Petitioner "was doing" and "was not doing...so that if the need should arise I would be able to document what happened...." The evidence and the facts show that within a period of five to six months after the Petitioner had successfully prosecuted a complaint of discrimination against the Agency, the Petitioner's within-grade was denied based upon an Agency allegation of poor performance. On the same day the salary increase was denied (January 20, 1984), the evidence reflects that the supervisor began maintaining the diary. Gonzales v. Bolger, 486 F. Supp. 595, 601 (D.D.C. 1980), states that when adverse actions follow protected activity within a short period of time, it is proper for the Board to infer retaliatory motives for actions. The decision of the Majority Opinion does not reflect a consideration of these critical findings and, thereby, does not adequately support either its "reasons for taking a different course" or its failure "to reflect attentive consideration of the (initial) decision."

The facts and circumstantial evidence presented to the Presiding Member leave no doubt but that the Petitioner was treated differently from similarly situated non-protesting employees. The Court has stated in Francis v. American Tel. & Tel. Co., 55 F.R.D. 202, 4 FEP 777 (D.D.C. 1972), that circumstantial evidence of this nature can support an inference that a retaliatory motive played some part in the adverse treatment of the petitioner. Also, the fact that the employer began surveillance at this time (documenting what the petitioner was doing and was not doing immediately following the adverse action) is very important evidence--not so much as proof of adverse treatment in and of itself, but because, as stated in Francis v. American Tel. & Tel. Co., its presence strongly suggests the possibility of a search for a pretextual basis for discipline, which, in turn, suggests that subsequent discipline was for the purpose of retaliation. Also, both the fact that the diary was not made known to the petitioner, and the supervisor's stated reason for maintaining the diary are circumstances that indicate that the purpose of the diary was to build and to document a case against the Petitioner, rather than to assist petitioner to improve his performance.

The courts have found that building a file is an indication of retaliatory conduct. Brunetti v. Wal-Mart Stores, Inc., 525 F. Supp. 1363 (E.D. Ark., 1981). In Williams v. Boorstin, 663 F.2d 109 at 117 (D.C. Cir. 1980), the court of appeals ruled that "the mere presence of a legitimate purpose underlying the discharge, will not sterilize unlawful retaliation when the latter is in fact the dispositive cause." In United States v. Hayes Int'l Corp., 6 FEP 1328, 1330 (N.D. Ala. 1973), aff'd mem., 507 F.2d 1279, 10 FEP 1481 (5th Cir. 1975), the Court stated that it is a violation if retaliation played any part in a challenged action, no matter how remote, or slight, or tangential. In Kornbluh v. Stearns and Foster Co., 73 F.R.D. 307, 312, 14 FEP 847, 851 (S.D. Ohio 1976), the Court stated that it is sufficient that the retaliation played any part in the plaintiff's dismissal; or stated otherwise, the showing of another sufficient cause does not remove the issue. The decision of the Presiding Member, contrary to the Majority Opinion, is in keeping with these rulings.

C. Guidance and Assistance Provided to Petitioner was Inappropriate.

The initial decision found that the guidance and assistance provided to Petitioner on two assigned tasks was "inappropriate" and provided further evidence for a finding of pretext. The Majority Opinion finds "insufficient evidence to support the Presiding Member's finding that Petitioner received less favorable treatment in the areas of guidance and assistance than other employees in petitioner's department." Majority Opinion at page 12 (emphasis supplied). To support this conclusion, the Majority Opinion offers the following analysis:

[S]everal witnesses, including the rating official, testified that the Petitioner received more guidance and assistance than the other employees in the department. The witnesses also stated that it was the practice of Petitioner's supervisor to give little or no written assignments to his employees, preferring oral discussion to written memoranda.

Majority Opinion at page 12 (emphasis supplied).

Once again, the majority opinion disregards the findings of the initial decision and fails to even discuss the principle bases for the initial decision. The majority focuses on the "quantity" of guidance and assistance given petitioner and on the supervisor's practice of not providing written guidance to any of his staff. The finding of the initial decision, on the other hand, dealt not with the "quantity," but rather with the "quality" of the assistance and guidance provided to petitioner as already discussed in various sections of this dissent. Furthermore, although the initial decision dealt with the supervisor's refusal to provide written guidance to petitioner, that fact was not the primary element of this particular finding. Also, as shown and discussed earlier, the circumstances relating to the evidence presented by the two principal witnesses in this regard casts doubt upon the credibility of their testimony.

Therefore, in order to intelligently discuss this issue, we must first restate briefly what the initial decision found. In regard to the guidance issue, the initial decision focused on two assignments for which Petitioner was alleged to have performed unsatisfactorily. On one, the literature search assignment, the Agency claimed that petitioner was given guidance concerning the need to submit a management summary, but failed to do so. This was the only assignment given to Petitioner in writing and it contained no requirement for a "management summary." Presiding Member's decision at page 63. The initial decision also concluded that this requirement for a management summary was not discussed with petitioner until the denial of his salary increase--almost three months after the assignment was submitted. Presiding Member's decision at page 63. It was upon these findings that the initial decision relied as further support for the conclusion that the guidance and direction received for this project was not as described by the supervisor and that retaliation motivated the action against Petitioner. The Majority Opinion ignores these findings and the conclusions of the Presiding Member in this regard. See also discussion at section IV. A. in this dissent. The second assignment considered in the initial decision on this point was the plan for evaluating a Learning Center. The initial decision concluded that the guidance and assistance given to Petitioner on this assignment was "inappropriate." The facts supporting this conclusion were that Petitioner was sent to a staff member for guidance and that staff member testified he had no experience in either the design or the management of learning centers and that aside from reading some literature, he had no expertise in learning centers.

Furthermore, the initial decision noted that the supervisor testified that he too had no experience in learning centers and that the materials he gave Petitioner as guides could not in fact be used as content guidelines in preparation of a learning center evaluation plan. Presiding Member's decision at page 63. See also the discussions of this assignment at Presiding Member's decision at pages 7-8, 20-23, 37-42 and

the discussion in this dissent concerning the supervisor's statement of the content of the Learning Center Plan at section IV. C.

All these findings regarding the "quality" of the guidance provided are even more critical in light of another finding, which the majority opinion fails to mention. This assignment was given to another more senior staff member approximately 10 months earlier. Approximately six months before the project was given to the Petitioner, this senior staff member reported that

it was not feasible to consider an actual evaluation [plan] at this point because we didn't have a program that really had components to piece together, but that in a year we ought to take a look at that and put something together.

Presiding Member decision at pages 39-40.

Additional evidence regarding the quality and the nature of the guidance given the Petitioner on these projects are analyzed at section IV. C. of this dissent. Generally, this evidence, as reflected in the record and the findings and conclusions of the Presiding Member, is not acknowledged in the Majority Opinion. In summary, the initial decision established the following:

despite the fact that only months earlier a senior staff member was relieved of developing an evaluation plan, at which time, according to his report to Division management, the components of the Learning Center were not in place; despite the fact that there was no evidence showing that components of the Learning Center had been established in 1983 and 1984 during Petitioner's assignment period; despite the fact that this senior staff member had stated that the components of the Learning Center would have to be identified and put in place before the Learning Center evaluation plan could be effected; and despite the fact that Petitioner told his supervisor that a specific plan could not be developed before the Learning Center had been established, the Agency took its actions, based in large part upon Petitioner's failure to prepare such a specific evaluation plan. Presiding Member's decision at 40.

The Majority Opinion omits all these factors in concluding that the guidance given to Petitioner was no less favorable than that given other staff. By focusing on the wrong issue, "quantity" of guidance rather than "quality" of guidance, and by once again ignoring critical findings of fact, the Majority Opinion does not reflect the full range of the evidence pertinent to this issue and reflected in the record. In short, the majority opinion again lacks "reasons for taking a different course" and "fails to reflect attentive consideration to the [initial] decision."

D. Disparate Treatment of Petitioner.

The final finding that the Majority Opinion addresses is that the Petitioner was treated differently by his supervisors compared to other employees. The point that the Majority Opinion targets is the last summary statement of pretextual findings at the close of the initial decision. Presiding Member's decision at pages 63-65. The majority opinion offers no more than the conclusory statement that the "record is bereft of any substantial evidence concerning the performance of other employees." Majority Opinion at page 12.

The dissent will not burden the record here with a detailed discussion of the numerous findings made in the initial decision. We offer the following incomplete list to demonstrate again the failure by the majority opinion "to reflect attentive consideration to the [initial] decision:"

The assessment of another employee that development of a Learning Center evaluation plan was not feasible until components of the Learning Center were identified and developed was accepted, while Petitioner's assessment to the same effect was rejected. Presiding Member's decision at 39-40 and 44-45.

Another employee was rated satisfactory for having completed the Learning Center evaluation plan when the employee had not in fact attempted to develop a plan, while Petitioner was rated unacceptable when, in similar conditions, he at least submitted a general evaluation plan. Presiding Member's decision at 45.

The assignment to develop objectives for the Learning Center was given to Petitioner and he was later faulted for not performing satisfactorily, while a higher graded employee had earlier developed objectives for the Learning Center that, obviously, were not found to be acceptable because the assignment was later given to the Petitioner. Presiding Member's decision at page 46.

Petitioner's suspense dates on one project were more compressed than they were for another employee on the same project. Presiding Member's decision at pages 48-51.

Allowance was made for another employee's performance deficiencies due to his short period in the unit but not for Petitioner. Presiding Member's decision at pages 49-51.

The failure to properly consider Petitioner for transfer as others had been. Presiding Member's decision at pages 50-53.

This partial listing demonstrates that there is no foundation for the assertion that the record is "bereft of any substantial evidence concerning the performance of others."

Again, this discussion establishes that the Majority Opinion fails to demonstrate "awareness" of what the Presiding Member had concluded with regard to the finding of retaliation and pretext and that the Majority Opinion fails to articulate "reasons for taking a different course" of action.

VI. CONCLUSION

It must be said that this dissenting opinion does not attempt to refer to or to summarize all the evidence that the initial decision relied upon to conclude that Petitioner's performance satisfied performance standards and that retaliation was the dominant motive in these personnel actions. This dissenting opinion has restricted itself to the limited matters upon which the Majority Opinion bases its conclusions.

The Majority Opinion, by not dealing with the findings and the conclusions of the Presiding Member, has not reflected the full range of the evidence upon which the initial decision is based—thereby failing to reflect contradictory evidence or evidence from which conflicting inferences can be drawn. The law requires not only that we consider all the evidence, but that, when reviewing another Member's decision, we must do more. First, we must leave in place that Member's credibility determinations unless the Board can "articulate sound reasons based on the record for its contrary evaluation of the testimony." Second, in overturning the other findings of fact of another Member, we must present "reasons for taking a different course" and "reflect attentive consideration to the [initial] decision." All this the Majority Opinion does not do.

The evidence presented in the decision of the Presiding Member and summarized in this dissent indicates that the decision of the Presiding Member is not arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law as stated by the Agency and as supported by the Majority Opinion by its decision to reverse. The decision of the Presiding Member is amply supported by evidence, facts, and legal statutes and case law; therefore, the decision of the Board to reverse is improper.

Notes

1. The Presiding Member's decision did not reach this issue due to the finding of discrimination. The majority opinion requires that the issue not be addressed.
2. This member does not believe that the agency proved by substantial evidence that its denial of the salary increase was warranted. The agency certainly did not produce preponderant evidence in support of its action.
3. These matters are discussed at length in the initial decision at pages 9-18 and 30-42. After reviewing the three assignments in detail, the initial decision concludes that Petitioner "performed satisfactorily under the circumstances on all three of the assignments..." See also footnotes 4 and 5 and the accompanying text of this dissenting opinion and section IV of this dissenting opinion.
4. Conflicts in testimony existed in a number of crucial matters and credibility determinations were necessary. For example, since only one assignment was given to Petitioner in writing, there was conflicting testimony as to the exact nature of the assignments. Even in the one assignment that was in writing, there was substantial dispute as to the details of the assignment. The most significant credibility determinations included the following:
 - a. determining the nature of the literature search assignment.
 - b. determining when Petitioner and the supervisor first discussed the need for a management summary with the literature search.
 - c. determining the nature of the Learning Center (LC) assignment
 - d. determining that the components of the LC had to be in place before the evaluation plan could be attempted.
 - e. determining why the supervisor retained the Special Issues Chapter after two major rewrites.
 - f. determining whether the supervisor concluded that the Special Issues Chapter was unsatisfactory without consideration for the fact that Petitioner had two editorial rewrites still available.
 - g. determining whether the Division Director's reason for denying the transfer request was credible.
 - h. determining whether the supervisor's reason for maintaining a diary on Petitioner was credible.
5. Credibility determinations regarding Petitioner's performance that the majority opinion either ignores or did not fully assess are recited at footnote 4. Some specific findings dealing with retaliation, which the majority opinion does not reflect, are discussed in the body of the text above and in section V of this dissent. The following is a summary of still other significant findings of fact that the majority opinion does not acknowledge.
 - a. Mistakes that were identified in two rewrites were expected in that performance standards allowed two major revisions. PM decision at page 37.
 - b. Another senior staff member had been relieved of the task of completing the evaluation plan for the Learning Center (LC) and he reported at that time that the components of the LC were not in place. PM decision at pages 40, 44-46.
 - c. Components for the LC had to be in place before a specific evaluation plan could be developed. PM

decision at 40.

d. There was no evidence that the components for the LC were in place during Petitioner's period of employment. PM decision at page 40.

e. The guides provided to Petitioner for development of an evaluation plan for the LC could not be used as content guides; neither the supervisor nor the staff member assigned to offer assistance had any experience or expertise in Learning Centers. PM decision at pages 40-41.

f. Treatment accorded Dr. Holley on his performance of LC tasks was very different from Petitioner's treatment. PM decision at pages 44-45.

g. Assigning Petitioner to develop objectives for the LC when it had been clear to Dr. Holley that that responsibility belonged to the LC Resource Group (LCRG) and not to the evaluation staff; development of the objectives was assigned to Petitioner only after LCRG Chairman did not accomplish the task acceptably. PM decision at pages 46.

h. The differences in treatment and allowances made for Petitioner versus Dr. Groves on similar assignments. PM decision at pages 47-50.

i. Failure of Division Director to seek legal or personnel advice on dubious legal theory for denying transfer request.

j. Statement by Division Director in termination letter that Petitioner's inability to communicate contributed to his termination -- a viewpoint he expressed in the original hearing and which the Board rejected. PM decision at page 55.

k. Analysis of the specific nature of the instructions given Petitioner as "assistance" in the development of the LC evaluation plan. PM decision at page 57.

6. The assignment to develop goals and objectives for the Learning Center is referenced in section V. D. of this dissenting opinion.

7. Evidence reflected in the transcript at pages 63 & 64 elaborates on these requirements by the supervisor and includes the following: Who is coming in? Who is using the facilities? Who is using the packages? What packages they are using? How long are they spending on them? What are they doing on them? Are they there with supervisory approval or because they are doing some kind of training? Are they there because they are just developing themselves? What did the supervisor think - did the participants perform any better or any worse when they got back to the job?

8. As noted in the Majority Opinion, one of the five factors recited in the Presiding Official's decision was based upon an error in the transcript. There is no dispute over that issue now. This discussion is limited to the other four factors raised in the Presiding Member's decision.